THE TRANSNATIONAL MINING JUSTICE SOCIAL MOVEMENT: INDIGENOUS RIGHT TO CONSULTATION & RIGHT TO REMEDY LAW REFORM ACTIVISM IN CANADA AND LATIN AMERICA FROM 1999-2019.

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ABSTRACT

This portfolio dissertation studies the activism of the transnational mining justice social movement in Canada and Latin America from the late 1990s to 2019. It focuses on two of the movement's most significant human rights projects in that period: Indigenous right to consultation in Latin American (company host states), and the right to remedy in Canada (company home state). Chapter One undertakes an in-depth study of the Peruvian Campesino Community San Andres de Negritos' long battle in search of a legal remedy for its dispossession in favor of Yanacocha Mine in the early 1990s. The Community's "turn to the law" reveals a disjuncture between the expansion of Indigenous rights recognition at one level, and the absence of appropriate causes of action and procedures for operationalizing these rights on the ground. Widespread experiences of similar injustices and impunity have led to endemic social conflict across the region in opposition to neoliberal resource extraction. Chapter two analyzes a key state response, Indigenous right to consultation legislation enacted in a number of Latin American countries. Drawing insights from the relevant literature, alongside the experience of the Negritos Community, this chapter identifies reforms that could facilitate access to the courts in the face of dispossession. Chapters three and four shift the focus to activism in Canada since the late 1990s, calling for the creation of non-judicial grievance mechanism to address human rights complaints against Canadian resource companies abroad. These chapters document the relevant advocacy strategies and critically analyze activists' reform proposals as well as responses from the Canadian state. Chapter five brings both case studies together to identify common patterns in the inadequate state responses to the movement's activism over the last 20 years. It argues that these shortcomings are due in part to the persistence of three liberal/neo-liberal ideologies in the reforms in question: formalism, voluntarism and privatism. To help explain these findings, it turns to three theories of human rights activism: pragmatism, left critique/critical legal liberalism and counter-hegemony. Each chapter endeavors to offer insights that may be instructive to those who pursue law reform agendas capable of addressing pressing global environmental and social justice issues.

DEDICATION

To all social justice activists, land and human rights defenders, past and present, who have had the courage to speak truth to power and to seek accountability for harm, sometimes at great personal risk and sacrifice. I am honored to have studied their work and learned from their creative efforts to engage with law, in the hope that it might be a tool of justice.

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Much of this dissertation was drafted after 2014 and while I taught law as an Assistant and then Associate Professor at the Faculty of Law at Thompson Rivers University (TRU). In that period, many TRU law students helped compile portions of the research cited here: Richard Wong, Cody Kessler, Jeanine Ball, Stephanie Head, Judith Acevedo Paz, Lavinia Floarea and Heather Hall. Parts of this dissertation also benefited from the work of law students in Peru, Ivar Calixto and Carlos Alberto Quispe Davila, at Osgoode Hall Law School, Margarita Malkina, and at the University of Saskatchewan, Nnaemeka Ezeani (thanks to funds provided by Professor Dwight Newman). Grants and scholarships provided by TRU's Research Office, the TRU Faculty of Law, Osgoode Hall Law School, York University and the Social Sciences & Humanities Research Council (SSHRC) have all helped in many ways.

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Community's continued existence and activism is a testament to human resilience and the lasting importance of land and community in spite of all the forces that work to destroy it. Acknowledgment is also due to the Peruvian advocates that helped to make the Negritos Community's legal case possible. This includes the NGO GRUFIDES in Cajamarca, and the Legal Clinic at San Marcos National University in Lima, Peru. Lawyer Jesica Karina Chuquilin Figueroa has had a critical role, acting as a faithful and diligent liaison between Community leaders in Cajamarca and their lawyers and supporters in Lima and Canada. She also represented the Community *pro bono* at the courts of first and second instance, before Juan Carlos Ruiz Molleda took the case to Peru's Constitutional Court. Carlos Quispe has also faithfully supported the Community for many years.

There is no single person whose support was more essential to the completion of this dissertation than Professor Shin Imai. Shin has shown the most extraordinary commitment to me and to my research. Everything I have written since 2009 has benefited from countless conversations with, and comments from, Shin. Much of the research in this dissertation draws on our shared work and experiences as co-founders of the Justice & Corporate Accountability Project (JCAP) in 2011. I am deeply grateful for Shin's wisdom and guidance, first as my LLM (2010) and then as my PhD supervisor, and I have enormous respect for him as a person, as a professor/mentor and as an advocate. Thanks to his influence, my research and activism are forever changed for the better. I will never be able to return this generosity, but I hope to pay it forward.

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TABLE OF CONTENTS

INTRODUCTION

This short introduction begins by situating this dissertation's five portfolio articles/chapters within a broader frame of law and legal processes. In then outlines the common approach, activist-engaged legal scholarship, that unites each of the chapters. Next it summarizes each portfolio article's topic and main contents before identifying three themes that connect the dissertation's portfolio articles.

1 Framing the Dissertation Context and Focus

Economic globalization is fundamentally characterized by the expansion of transnational corporations, primarily headquartered in developed (home) countries, pursing foreign direct investment activities in developing (host) countries through a complex network of corporate subsidiaries. This economic activity is enabled, facilitated and protected by law: corporate law in developed countries, investment-oriented laws in developing countries (for example mining laws), a web of bilateral and multilateral free trade and foreign investment agreements between developed and developing countries, together with a multitude of foreign investment contracts between companies and states. At the same time, the activities of the transnational corporation in developing countries are, at least in theory, directly or indirectly constrained by public norms, including the rights and obligations embedded in developing country constitutions and legislation, reporting or other obligations enacted by developed country governments, and the obligations of state signatories to international human rights treaties. Private law norms can also be invoked to establish corporate liability, commonly the law of tort, contract or "extra-contractual obligations".

This complex matrix of domestic and transnational law creates the rules that enable and govern the terms and conditions of foreign investment and related areas of economic and political decision-making. The term transnational law is used here to captures the full range of law that "regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit such standard categories." [1]

Civil society actors with justice concerns and contestations related to economic globalization often engage in trans-border advocacy through networks of organizations that are

[1] Philip Jessup, *Transnational Law* (Yale University Press, 1956) at 2. In recent years, this reference to "other rules" is commonly understood to include corporate social responsibility norms, voluntary or self-regulation regimes and state-based extraterritorial regulation.

similarly trans-border in nature.[2] In this context, local actors may join with these networks to pursue norm development that is responsive to their concerns, and/or to search for legal recourse and remedies, domestically or internationally. In addition to the public and private, domestic and transnational law regimes, actors may also choose to navigate a plethora of voluntary corporate social responsibility mechanisms of various sorts: some are internal to the corporation, some are created by associations of corporations, others by financial lenders and still others by multi-stakeholder coalitions of states, international organizations, and corporations. Concerns over law's limited ability to govern the social and environmental impacts of transnational corporate activity, particularly in developing countries, are often described as a global "governance gap". Chapters 1 and 4 in particular significantly frame their discussion in relation to this concept and describe it in greater detail.

This dense array of actors, regimes and processes form the backdrop for the relatively circumscribed focus of this dissertation. It investigates some of the legal strategies taken up by the transnational mining justice social movement in response to the operations of large transnational mining companies. Economic globalization and its legal instruments, mentioned above, have significantly intensified global resource extraction and imbued it with particular geographic patterns. The majority of mining companies operating globally are headquartered in Canada, and almost half of their activities take place in the resource rich countries of Latin America. Moreover, most of these operations take place on land owned, claimed and/or occupied by Indigenous peoples and Campesino communities. These patterns inform the jurisdictional focus of this dissertation. Chapters 3 and 4 examine law reform advocacy in Canada with respect to the Canadian government's legal, political and economic relationship with Canadian mining companies' operations abroad. Chapters 1 and 2 examine litigation and law reform in Latin America in response to social conflicts that have arisen following transnational corporate resource extraction on Indigenous and/or Campesino communally-held land. Finally, Chapter 5 considers these case studies as a whole, in order to identify commonalities between these distinct yet related experiments with law as a potential tool for justice in these contexts.

The social conflicts that industrial mining often generates between communities in developing countries and foreign companies are increasingly trans-border in that they may implicate states, NGOs, lawyers, journalists and researchers in multiple jurisdictions. In addition

[2] Trans-border in this context simply refers to scope of activity of the civil society actors referred to.

to other advocacy strategies, activists and communities within the mining justice movement have at times turned to domestic and international litigation to seek remedies for the harms caused by particular mining projects and in the hope of establishing jurisprudence that is favorable to their social justice goals. They have also advocated in favor of domestic law reform, usually in the realm of new legislation but in some cases also constitutional reforms. At the international level, advocates have invoked existing human rights treaty obligation while also advocating for more progressive interpretations and even new treaties to address the global problem of corporate impunity. Some civil society actors have participated, alongside governments, companies and other stakeholders in the creation of transnational voluntary regimes to address specific issues such as security, environmental standards, and corruption.

The movement's approach to norm development is an important focus of study because it constitutes a significant mode of political engagement with foreign resource extraction and economic globalization more generally. Within this broader realm of advocacy, this study focuses on certain arenas of norm development unfolding over a period of approximately twenty years, and taking place concurrently in two related areas. The first area pertains to Indigenous peoples' rights in relation to foreign resource extraction in Latin American "host states". This part of the dissertation (primarily Chapters 1 and 2) analyzes Indigenous rights recognition among international human rights bodies, in Latin American constitutions, jurisprudence, and in the form of legislation. The rights to communal property, and to free prior and informed consent and consultation are the main focus. While these chapters draw on the development of these norms at the international level, they specifically concentrate on how they are operationalized in domestic litigation and in domestic legislation. This study presents empirical research from Peru, while also consulting literature that examines how these same issues are unfolding in other countries in the region.

The second area of norm development studied here (primarily in Chapters 3 and 4) is in Canada in relation to "home state" obligations to ensure that communities adversely impacted by the operations of Canadian mining companies have access to a remedy and/or that Canadian companies are held accountable in some way for harms. Here this study analyzes the advocacy strategies and law reform efforts of the mining justice movement in Canada, along with the grievance mechanisms that Canada has created in response. This part of the dissertation captures a wide variety of proposed and adopted norms, from federal voluntary grievance mechanisms, to

proposed legislation, to adopted legislation (including Orders in Council). The nature of these regimes has varied from voluntary, to administrative, to legislative, and the proposals have entered the realms of both public law regulation and private law causes of action. Finally, this portion of the dissertation recognizes the role of international human rights institutions and norms in this ongoing conversation about domestic law and policy in Canada.

This dissertation's study of the transnational mining justice social movement's engagement with law is inevitably selective and does not capture many pieces of a much larger picture. For example, it is not a comparative study of the rights of Indigenous peoples recognized in Canada and Latin America. Nor is it a study of the regulation of the transnational corporation as between Canada and the United States (the home state for Newmont, the mining company that appears in Chapter 1). Rather it is a study of a social movement and some of its legal strategies and engagements with law in the pursuit of justice. Its chosen case studies reflect particularly intense, sustained and innovative arenas of engagement which, as described above, also track the dominant geographical patterns of transnational mining activity on the globe and in the Americas in the last twenty years. In this regard, its primarily focus is on the development of state-based public law and public law litigation (as in the case of Chapter 1). However, not all forms of public law advocacy and norm development are captured, such as for example efforts to infuse international trade instruments and agendas with human rights and environmental provisions.

2 Activist-Engaged Legal Scholarship

As stated in the previous section, this dissertation focuses on the work of a network of organizations, activists, communities, journalist, lawyers and academics that it describes as forming part of a discernible transnational mining justice social movement. All of the chapters describe this movement and/or its participants in varying degrees of detail and Chapter 5 also explores literature on social movement lawyering. In Chapters 1 and 5 in particular, I explicitly situate myself in relation to the social movement and the subject matter of these chapters and I disclosure my own role in relation to the advocacy and legal strategies under study.

However, my role and relationship with the subject matter is not the same in all cases. For example, in Chapter 1, I was part of the legal team that systematized the facts of the case and developed and pursued the legal arguments in question. On the other hand, my relationship with the law reform efforts that I study in Chapters 3 and 4 is far less central, I contributed as a legal

researcher (including as a supervisor of law students' research) and as an advocate in public policy debates (for example by writing op eds.). In some respects, the focus of all of the chapters are a function of my own biography as, on one hand, a person who has lived in Latin America and has had the opportunity to work with civil society groups in Peru in a sustained way, and on the other hand, as a Canadian legal academic who has collaborated and built strong relationships with Canadian civil society groups working on the issues in question.

My personal relationships and commitments also help explain and inform my particular approach to scholarship which I refer to here as activist-engaged legal scholarship.[3] In Chapter 5 of this dissertation, I survey an array of related literature that describes and theorizes social movement lawyering, and presents theories of progressive engagement with liberal law from a left, counter-hegemony or subaltern perspective. These literatures are certainly relevant to this dissertation and provide insight into its findings. Social movement lawyering literature examines the ethical, cultural, practical and political dimensions that social movement lawyers navigate in their efforts to use their legal knowledge to support a movement. In this work, the focus is on the methods and tactics of those who are directly engaged in the advocacy work, as well as the perspectives of those who are impacted by it, such as clients, affected groups and social movement actors. Literatures on critical legal engagement with liberal law theorize how legal activism succeeds in changing law and the wider society, and how progressive activism and justice claims may in turn be reshaped in the process. This theoretical work is concerned with the larger structural, ideological or rhetorical impact of the work done on specific cases of injustice, and in particular it examines the possibility that certain justice claims or reforms may fail to address, or even reinforce, the conditions or root causes of injustice. In chapter 5, I engage in detail with these ideas, and I identify their contributions and insights, rather than seeking a conclusion about which approach is more favorable. While these ideas and theories do not appear explicitly in chapters 1 to 4, they influence the arc of my scholarship throughout this dissertation.

These approaches are related to, but distinct from, the activist-engaged scholarship approach I set out here, which refers to a method of scholarship where the academic/scholar attempts to use the research process to contribute intellectually and practically to the justice cause

[3] I would like to thank Ruth Buchanan for first supplying a version of this term to describe my approach.

under study.[4] At the same time, in this approach, the scholar builds insights based on active engagement in the subject matter as an advocate. The following four features of my approach to activist-engaged scholarship are present in all of the dissertation's chapters. First, I am interested in the question of how positive law is, or can become, meaningful (or not) from the perspective of mine-affected communities claiming harms. This informs my exploration of procedural issues in Chapter 1, referring to how public law norms might be invoked in a specific case. This further informs my inquiry in Chapter 2 into the social, economic, political and cultural context within which legislated consultations take place with Indigenous communities in Latin America. In Chapters 3 and 4, I critically examine the Canadian context to identify how specific proposals, policies or laws may provide meaningful human rights protection or access to remedies for mine-affected communities. In my approach, a community-based lens often becomes pluralist as it attempts to identify all of the legal instruments that come to bear on a particular community's experience, including those that structure political and economic exercises of power that affect a community. Taking a community-based lens to law has the potential to offer insight and reveal blind spots or gaps that may otherwise be hidden. In my conclusions to Chapters 1 and 4, I elaborate on the benefits of this approach in considerable detail.

A second important feature of this approach is its commitment to tracking and recording the movement's history, with a special focus on advocacy and legal strategies. In my view, academic publishing is an important and privileged opportunity to record this knowledge and history in a rigorous, credible way that is educative, not only for myself as a researcher, but also for other researchers and advocates. In Chapter 1, one of my goals was to create a comprehensive record of events, arguments and strategies for the Negritos Community members, their children and grandchildren. It is for this reason that I have more recently dedicated the time and resources required to translate Chapters 1 and 2 into Spanish and publish them in Peru and Colombia (respectively) with the help of a co-author. In the case of Chapters 3 and 4, my work to map the movement's advocacy strategies in Canada over twenty years was also inspired by an interest in recording, and better understanding, this important history.

[4] For an example of efforts to approach research in a similar way in the discipline of anthropology, see: Michael Ash, "Indigenous Self-Determination and Applied Anthropology in Canada: Finding a Place to Stand" (2001) 43:2 *Anthropologica* 201-07; Emma Feltes, "Research as Guesthood: The Memorial to Sir Wilfrid Laurier and Resolving Indigenous-Settler Relations in British Columbia" (2015) 57:2 *Anthropologica* 469-80.

A third feature of my approach, which once again unites this dissertation's portfolio articles, is the commitment to using scholarship as a venue for the generation of ideas and insights of value for the objectives of the movement or specific communities. In Chapter 1, the focus is on the Negritos case but considerable discussion is dedicated to potential applications of the knowledge acquired, and strategies explored in that case for similarly situated communities. In Chapter 2, the focus is on practical reforms or institutional features that might attenuate some of the problems associated with right to consultation legislation in Latin America. In Chapter 3 and especially in Chapter 5, this dissertation attempts to critically and theoretically interrogate, from the standpoint of human rights protection and the right to remedy, the content of proposed law reforms and actual policies adopted in Canada. For its part, Chapter 4 examines the efficacy of a variety of strategies in achieving better policy and law reform content. Finally, Chapter 5 examines various theories in an effort to draw insights of interest and utility for the social movement. (In order words, it does not set out, at least not as a primary objective, to draw insight from practice that might be informative for theory, although this could be in indirect consequence of the research, or an approach that one could pursue in subsequent work.) Thus, all chapters try, in different ways, to produce knowledge of value to members of the transnational mining justice movement.

The final feature of my approach to activist-engaged legal scholarship is its commitment to reflexivity and (self-)consciousness, both in my own research and analytical process but also within the movement itself. All chapters treat the process whereby advocates endeavor to problematize complex social reality in the frame of particular legal categories, claims and regimes, as a deeply political and epistemological act that necessarily involves a variety of strategic decisions. At the same time, not all parts of this process are necessarily conscious, and the process of problematization is limited by a variety of factors, including our own imagination, our awareness of and access to alternative frames and venues, our biases and predispositions, and other limitations like political opportunity and resources. Similarly, advocates and scholars alike are not fully in control of the outcomes of their activism and research and as such reflexive analysis after the fact can be helpful to identify limitations, breakthroughs and blind spots not previously observed. Finally, one's perspective on a particular strategy or outcome is not only inflected by one's position in and experience with the movement, but also by the particular moment in time that an assessment is made. This final point is referred to in Chapter 5.

3 Summary of the Chapters (Portfolio Articles)

The discussion above described some of the unities between this dissertation's portfolio articles. However, as standalone articles, they each contain their own distinct framing/introduction, research questions and methodology, findings and conclusion. The fifth article synthesizes the findings of the previous four articles and analyzes them as a whole by drawing on the work of scholars concerned with social movements, law and social change. Chapters 1-5 are all published or forthcoming and Chapter 1 and 2 have been translated into Spanish and submitted for publication. Chapters 3, 4 and 5 update each other with respect to the Canadian case study as they were published in 2012, 2018 and 2020 respectively. What follows is a brief summary of the topics addressed in each chapter.

Chapter 1: Litigating Indigenous Dispossession in the Global Economy

This dissertation's *first portfolio article* is entitled "Litigating Indigenous Dispossession in the Global Economy: Law's Promise and Pitfalls" published in 2017 in the Brazilian Journal of International Law (pp 165-225) and is approximately 35,000 words.

Based on documents collected with local community members and advocates over the course of more than a decade, this chapter begins by describing the legal processes whereby the Campesino Community San Andres de Negritos allegedly "consented" to its own dispossession in favor of the large foreign-owned Yanacocha Mine located in Northern Peru. This chapter frames this story within the larger unfolding story of Agrarian Reform, neoliberal globalization, transnational resource extraction, the rise of community-based activism, and the emergence of Indigenous rights in international law and domestic constitutions in Latin America.

In this highly-textured context, this chapter describes how advocates developed an innovative rights framework for problematizing the Negritos Community's dispossession and challenging the legality of Yanacocha's operations. This unprecedented turn to the law ultimately reveals a disjuncture between the expansion of Indigenous rights recognition at one level, and the absence of appropriate causes of action and procedures for operationalizing these rights on the ground. As the Negritos Community litigates its case against one of the most powerful mining companies in the world, it has faced numerous challenges inside and outside of the courtroom.

This chapter critically analyzes the response of the state, the company and the domestic legal system to the Negritos Community's claims and litigation. It focuses in particular on the

limitation period procedural rule and the formalist and ultimately discriminatory view of consent that has permeated the courts' decisions to date. In formulating this critique, the chapter theorizes "the dynamics of dispossession" and reflects on human rights law's promise and pitfalls as an instrument of global economic justice. The conclusion articulates this chapter's findings and consequences for future research and law reform in this area.

Chapter 2: Contesting Indigenous-Industry Agreements in Latin America

This dissertation's *second portfolio article* is entitled "Contesting Indigenous-Industry Agreements in Latin America" forthcoming in *Indigenous-Industry Agreements, Natural Resources, and the Law*, edited by Ibironke Odumosu-Ayanu & Dwight Newman (Routledge). It is approximately 12,400 words and is a longer and updated version of the shorter chapter which will appear in the book. A further updated Spanish translation of this second portfolio chapter is forthcoming in the *Latin American Law Review* based at Los Andes University in Colombia.

This chapter reviews the contributions of scholars and activists who share my concern that the legal and social contexts that typically inform the formation of Indigenous-industry agreements in Latin America are marked by enormous power disparities and stark epistemological differences. This literature review supports the proposition that it is likely that many Indigenous-industry agreements in Latin America lack legitimacy and perhaps legality. This in turn raises serious questions about whether or not Indigenous-industry "agreements" formed in these conditions could possibly rest on any meaningful notion of consent.

This chapter make this important point in order to focus on a narrower question, one of the present but also very much one of the future, as we face the aftermath, in the years and decades to come, of the proliferation of agreements under present circumstances. What happens when a community mobilizes in order to challenge the legality of a past agreement with industry, such as for example by contesting the idea that it actually consented? What if the company and/or the state holds up a document with signatures from past community leaders that allegedly represent consent? If the company and the state are unresponsive to a community's concerns about an agreement, can it resort to the courts? This chapter explores some of these questions by referring to Peru as a case study. In conclusion, it explores the significance of this study for ongoing normative developments in relation to Indigenous peoples' right to consultation, consent and the formation of Indigenous-industry agreements.

Chapter 3: Canadian Mining Companies and Domestic Law Reform

This dissertation's *third portfolio article*, entitled "Canadian Mining Companies and Domestic Law Reform: A Critical Legal Account" (pp 1456-1486) was published in 2012 in the German Law Journal (2012) and is approximately 10,400 words.

This chapter offers a critical legal account of transnational corporate accountability law reform efforts undertaken by Canadian advocacy groups between 2005 and 2012, together with the government's first corporate social responsibility (CSR) response, introduced in 2009. It begins by introducing the social and economic context that forms the backdrop of these efforts. In particular it describes Canadian foreign investment in mining globally, and particularly in Latin America. It also surveys existing research on the nature of the human rights concerns and harm associated with Canadian mining companies' overseas operations. It summarizes these in terms of three main areas: the problem of criminalization of dissent, the problem of environmental harm, and the problem of inadequate consultation and/or land acquisition. This final area (form of harm) connects back to the theme of contract, consultation and consent in Chapters 1 and 2.

The relevant proposals for legal reform in Canada are then reviewed in three periods within the time frame captured in the chapter. In the first, federal advisors made proposals that attempted to blend private and public approaches to regulation. In the second, the federal government introduced its 2009 CSR policy predicated on volunteerism. And in the third period, three individual Members of Parliament tabled private members' bills, each representing very different private and public approaches to regulation.

Following this empirical description, each reform project is critically analyzed in terms of the regulatory vision it presents and the concept of the state, the corporation, and civil society that it advances. This paper represents a first step toward exploring how activists' legal strategies and reform proposals embed different articulations of the relationship between the corporation, the state and civil society.

Chapter 4: Building the Case for a Home-State Grievance Mechanism

This dissertation's *fourth portfolio article*, entitled "Building the Case for a Home-State Grievance Mechanism: Law Reform Strategies in the Canadian Resource Justice Movement" was published in 2019 in *Human Rights in the Extractive Industries: Transparency, Participation,*

Resistance, edited by Isabel Feichtner and Markus Krajewski (Springer). It is approximately 14,600 words.

This chapter begins with a detailed review of the work of social justice advocates to systematically document the concerns of mine-affected communities in relation to Canadian operations in developing countries. It captures a significant body of empirical work that described not only the nature of the social conflicts associated with Canadian companies but also the mechanisms whereby the Canadian government provides companies with political, economic and legal support. Beginning in 2005, activists, policy makers, industry leaders and international human rights bodies participated in a sustained debate over the appropriate Canadian regulatory responses to these issues.

This chapter analyses the strategies of law reform advocates between 2000 and 2017 in favor of a non-judicial grievance and remedy mechanisms in Canada. This chapter summarizes the statements of international bodies to Canada on this issue. It then gives special attention to the 2016 law reform proposal from Canadian civil society, the draft *Business & Human Rights Act*, and the strategic trade-offs that advocates adopted when fashioning and proposing reform in this area. The strategies profiled here are of special interest because they resulted in a significant, and perhaps unexpected, breakthrough in early 2018 when the Canadian government announced its intention to create a globally unprecedented new grievance mechanism: the Canadian Ombudsperson for Responsible Enterprise. In conclusion, this chapter catalogues the movement's strategies into four areas: (1) documentation of harm that provides an account of the nature of the problem; (2) engagement with existing CSR mechanisms to demonstrate their inadequacy; (3) appeal to international human rights bodies; and (4) development of concrete reform proposals that reflect strategic/pragmatic trade-offs.

Chapter 5: The Transnational Mining Justice Social Movement

This dissertation's *fifth portfolio article*, entitled "The Transnational Mining Justice Social Movement: Reflecting on Two Decades of Law Reform Activism" is approximately 26,000 words and has been submitted for publication.

In this article, I consolidate my research in the four previous dissertation chapters that track the activism of the mining justice social movement in Canada and Latin America from the late 1990s to present. As a starting point, I conceptualize this movement as a transnational political

project that seeks to transform the terms of corporate resource extraction pursuant to the political and legal arrangements of neo-liberal economic globalization. In this context, I critically analyze the movement's most significant human rights-oriented law reform projects in the Americas: Indigenous right to consultation legislation in several Latin American countries, and a series of non-judicial grievance mechanisms in Canada, in response to the right to remedy norm in international law.

Drawing on existing research, I conclude that in both cases the state has responded with law and policy reforms that fall far short of achieving the movement's objectives. I argue that these shortcomings are due in part to the persistence of three liberal/neo-liberal ideologies in the reforms in question: formalism, voluntarism and privatism. To better understand and explain these findings, I turn to three critical theories of human rights legal activism: pragmatism, left critique/critical legal liberalism and counter-hegemony. I examine the work of a wide range of scholars writing under the banner of each theory in order to identify key debates and insights that may be instructive as the mining justice movement, and related social and environmental justice movements, continue to aspire toward a law reform agenda capable of addressing pressing global environmental and social justice issues.

4 Overarching Themes in the Dissertation

This section reviews three main themes that connect this dissertation's portfolio chapters: (1) consultation, consent and dispossession; (2) regulation and privatization; (3) the potential and limitation of legal strategies. The unifying themes that connect Chapters 1 thru 4 are further developed and analyzed this portfolio's fifth and concluding chapter. The objective here is not to fully reproduce all of the ways in which these themes are developed and discussed in this dissertation's substantive chapters. Rather it is to merely to introduce and foreground the themes so that the reader is alert to them at the outset.

4.1 Consultation, Consent & Dispossession

As described above, this dissertation focuses on community-based legal strategies to address the adverse impacts of mineral extraction in developing countries. In the Negritos case study in Chapter 1, it uncovered the legal genesis of the Campesino Community's as well as of Yanacocha's property rights (mineral and surface) and the terms of the easement and expropriation

"contract" between the company and the community. In applying an Indigenous and human rights analysis to this property and contract arrangement, the chapter interrogates the meaning of consultation and consent in this specific case study.

These themes extend from the Negritos case study into the analysis in Chapter 2 of right to consultation legislation in Latin America. This genre of legislation was first enacted in Peru in 2011 as the Peruvian state's primarily response to massive and violent conflict in 2009 between police and Indigenous protestors in the Peruvian Amazon following the imposition of land and resource laws favorable to foreign investors and in response to newly signed free trade agreements at the time. A number of other Latin America countries then created their own Indigenous consultation legislation in the years following. Thus, the question of how agreements/contracts with respect to land and resources are made resonates from the Negritos case study through to the emergence of domestic consultation legislation.

Certainly, all of these domestic developments were preceded by momentum in international human rights law, including in the OAS beginning in the early 2000s, further entrenching the recognition of Indigenous peoples right to free, prior and informed consultation and in some cases consent. In that period, many corporate actors similarly began to endorse Indigenous peoples' right to consultation and the device of benefit agreement-making between companies and communities has proliferated. In sum, property transfer by contract, which by definition entails consent, are together the bedrock legal institutions of resource extraction under liberal law. For Indigenous peoples disproportionately affected by resource extraction, the right to consultation has become a primary devise for those seeking to challenge the property/contract resource extraction framework.

This dissertation examines this state of affairs in various ways, consistent with the activist-engaged scholarship approach described above. Chapter 1 reports on one attempt to operationalize the complete arsenal of recognized Indigenous and Campesino rights in support of the Negritos Community's legal challenge to allegedly illegal property transfers (dispossession). This exercise reveals the many practical challenges to assembling legal cases and accessing justice using this particular rights frame in Latin American countries. It also reveals the difficulty of translating complex historically rooted social processes of dispossession into the available (and justiciable) Indigenous rights frameworks. Chapter 2 continues with this theme, revealing the gross deficiencies of consultations laws across the region when evaluated in light of the extraordinary disparities and inequities between companies and states on one hand, and communities on the other.

These inequities are further reflected in the fact that these purported human rights laws contain many features that were ultimately imposed by the state in question.

On the surface, the focus in Chapters 3 and 4 on home-state law and policy responses in Canada appear removed from this detailed discussion of consultation and consent. However, the evaluation in these chapters of the efficacy of home state responses, that aim to protect human rights and strengthen access to remedy, is necessarily informed by the problems "on the ground", and especially the dynamics of dispossession and deficiencies in the available consultation and consent human rights frames. In the end a troubling state of affairs emerges. In one respect consultation and consent are the most widely recognized and accepted legal tools for Indigenous communities concerned with harmful and imposed resource extraction, and they represent a dramatic change, over the last twenty years, in the law.

On the other hand, these legal devices appear to suffer from serious inadequacies, perhaps most profoundly, in their ability to properly account for the complexity of what free and informed (meaningful) consultation and consent could possibly mean in the contexts studied here, where radically socially and economically unequal actors encounter each other in the context of broader legal frameworks that largely reinforces these power differences. Added to this, this dissertation argues that there are serious practical difficulties, at least in Latin America, with translating these human rights norms into legally enforceable standards that are helpful to affected communities in their own domestic legal systems. Hence, social conflicts have continued in lockstep with the intensification of resource extraction on the continent, and apparently unattenuated by the added layers of consultation laws, as well as environmental assessment laws for that matter.

In the end, I have no comprehensive answers to this conundrum. However, several things seem important. First, the significance of relatively new human rights frames like consultation and consent should be fully recognized and appreciated. However, at the same time this study suggests, and cites others who appear to agree, that these rights, at least on their own, are inadequate and, even worse, can be status quo reinforcing. At least in the timeframe and in the context under study, they have failed to produce notable results for affected communities and serious social conflicts continue. It may be time to focus our energy on the development of approaches that change the fundamentally colonial legal arrangements of extraction, and that go beyond simply adding a layer of human rights or environmental law to them. The daunting task is to develop legal concepts and regimes that are better able to account for historically informed inequities and power disparities,

better able to contribute to environmental sustainability and social justice, while also being workable, practical and enforceable.

4.2 Privatisim & State Regulation

Another theme that runs through this dissertation is that of privatism, which is closely connected to voluntarism, referring to obligations that are not legally enforceable. This theme is discussed most directly in Chapter 5, but it also appears in a number of ways throughout the other chapters. As described above, this dissertation is concerned with the legal regimes and processes that encourage and enable the privatization of communally held land via the transfer of title and rights to transnational mining corporations. Related to this, it is attendant to the treatment of agreements between companies and communities as private (confidential) matters, subject to the assumptions of formal equality and classical liberal contract law. Chapter 2 describes how Indigenous consultation laws in Latin America are so restrictive that they exclude many communities from this public form of regulation, creating large zones of private/unregulated space where excluded Indigenous and Campesino communities are left to negotiate private benefit agreements directly with companies, which are not necessarily enforceable, especially once land is transferred and company operations begin. Protests due to perceived company failures to fulfill (unenforceable) agreements are common place.

The theme of privatism is also present in this dissertation's analysis of law reform proposals and outcomes in response to the assertion that Canada, as a home state, has obligations to promote human rights protection and facilitate access to remedy for those harmed by Canadian mining companies operating abroad. In this portion of the dissertation, the analysis focuses on how conceptualizations of the state's role in this realm have been deeply influenced by a particular logic of privatism, where the state's scope of authority and concern is tantamount to that of a commercial actor or of a neutral third party, and/or where the state's substantive objectives are partially or totally conflated with those of the private sector. This is manifest in the kinds of state-imposed sanctions envisioned (withdrawal of state financing and services as seen in several civil society proposals) and in the role of the state as a neutral mediator of "private" company-community disputes (as in the Canadian state's CSR policies to date). While some proposals have had some public features (public reporting following independent fact finding), ultimately substantive

remedies for affected communities have remained outside of the reach of the home state public regulation and thereby voluntary or available only through private causes of action.

Referring back to the activist-engaged scholarship approach described above, this critical interrogation of privatism's influence in the public regulation studied here raises questions about how it limits the state's capacity to fulfill its public interest function in ensuring corporate accountability for harm and protecting human rights. This inquiry is also rooted in a commitment to critical reflection on how pragmatic trade-off may involve accepting concepts of the state that produce certain unintended consequences. As discussed in Chapter 5, this reflection is not an attempt to second guess strategic choices or to suggest that there is only one method or avenue for achieving justice. For example, this dissertation does not engage with private law's potential as a tool of social change (for example via litigation), including as a potential complement or instigator of public law reform. Rather, the discussion here of privatism is informed, first by a commitment to critically interrogating the concept of the state that is inevitably embedded in any public regulation proposal, and second, by the hope that law reform activism in the area of corporate accountability might better incorporate and insist on the state's obligations to the public interest, and its active role in constituting the market and establishing its enabling institutions.

4.3 The Potential & Limitations of Legal Strategies

A third theme that weaves through this dissertation's chapters is a concern with the potential and limits of legal strategies. This mode of inquiry is once again informed by this dissertation's approach to scholarship and is necessarily grounded in the specific subject matter of the dissertation and the political moment: neo-liberalism economic globalization is entrenched and human rights has obtained near hegemonic status as the language of justice. In one sense, the approach here to law and legal strategies is profoundly optimistic. My chosen approach of activist-engaged legal scholarship and my inquiry in Chapter 5 into theories of social movement lawyering entails a belief that engagement with law has the potential to produce positive results from a social justice perspective. Or at the very least a belief that law is a site of power that must therefore be struggled over, lest it be used only by the powerful.

At the same time there is something profoundly dissatisfying with the whole exercise; the scale of community resistance, protest and sacrifice, the volume of research and advocacy establishing "the problem" seem, at least intuitively, to be out of proportion with the results, defined

by the efficacy of resulting law reforms and the instances of meaningful results for affected communities, at least in developing countries. And then there are those moments where human rights activism has inadvertently produced perverse results, such as in the case of Canadian regimes that allow companies to complain about activists, or in Latin America, those consultations that are a farce and become tools for the legitimation of imposed results. Of course, these statements instantly raise the obvious "but for" question – but for the efforts made, perhaps things would be worse still, along with the equally obvious question of time scale – in what timeframe can and should one measure the impact of the work done.

Once again, there are no obvious answers to these questions, but as before some things seems relatively clear. Human rights frames can be powerful tools for problematizing the injustices of economic globalization and for making those affected, exploited and dispossessed more visible and less dispensable. At the same time, human and environmental laws are less effective when they are simply layered on top of existing political, economic and legal systems. Moreover, perhaps unsurprisingly given its colonial origins, the state has, more often than not, emerged as a cynical entity, at times almost entirely impermeable to moral and/or evidence-based arguments. Time and time again, at least in the domain studied here, the state has revealed itself to be deeply vulnerable to capture by corporate interests such that a sophisticated analysis of the public interest, or a serious consideration of the state's powers to regulate, seem nearly unattainable. While the state is captured, meaningful and structural law reform may well be out of reach when it comes to corporate accountability.

Yet inspite of this, activists and activist-engaged scholars continue to engage law and reinvent and rethink their approach. Committed, creative, reflexive and courageous experimentation with law as a tool of social justice in response to economic globalization appears to be a constant, and this itself is rather hopeful, and certainly interesting.

CHAPTER ONE: Litigating Indigenous Dispossession in the Global Economy: Law's Promises and Pitfalls

- Charis Kamphuis*

Abstract

Based on documents collected with local community members and advocates over the course of more than a decade, this paper begins by describing the legal processes whereby the Campesino Community San Andres de Negritos allegedly "consented" to its own dispossession in favor of the large foreign-owned Yanacocha Mine located in Northern Peru. It frames this story within the larger unfolding story of Agrarian Reform, neoliberal globalization, transnational resource extraction, the rise of community-based activism, and the emergence of Indigenous rights in international law and domestic constitutions in Latin America. In this highly-textured context, this paper describes how advocates developed an innovative rights framework for problematizing the Negritos Community's dispossession and challenging the legality of Yanacocha's operations. This unprecedented turn to the law ultimately reveals a disjuncture between the expansion of Indigenous rights recognition at one level, and the absence of appropriate causes of action and procedures for operationalizing these rights on the ground. As the Negritos Community litigates its case against one of the most powerful mining companies in the world, it has faced numerous challenges inside and outside of the courtroom. This paper critically analyzes the response of the state, the company and the domestic legal system. It focuses in particular on the limitation period procedural rule and the formalist and discriminatory view of consent that has permeated the courts' decisions to date. In formulating this critique, the paper theorizes "the dynamics of dispossession" and reflects on human rights law's promise and pitfalls as an instrument of global economic justice. The conclusion articulates this study's findings and consequences for future research and law reform.

1 Introduction & Context: Global Resource Conflicts and the Governance Gap

In the last two decades, foreign investment in the extraction of natural resources has expanded dramatically around the world.[1] Latin America in particular has become a region plagued by social conflicts between communities, resource extraction companies and the states that support them.[2] These conflicts often originate in community concerns related to control over the use of land, environmental protection and the equitable distribution of benefits.[3] Social conflicts

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[1] Todd Gordon & Jeffery R Webber, *Blood of Extraction: Canadian Imperialism in Latin America* (Fernwood Publishing, 2016).

[2] OAS, Inter-American Commission on Human Rights, *Criminalization of the Work of Human Rights Defenders*, OROEA/Ser.L/II.Doc.49/15 (2015) at paras 48-50. Also see Observatorio de Conflictos Mineros de América Latina, "Mapa de Conflictos Mineros en América Latina", online: http://www.conflictosmineros.net/; mcgill Research Group Investigating Canadian Mining in Latin America, "Canadian Mining in Ecologically Vulnerable Areas: South America", online: Http://micla.ca/wpcontent/uploads/2012/05/canadianmining_ecologically_vulnerable_areas.png; Environmental Justice Organization, Liabilities and Trade, "Environmental Justice Atlas", online: http://ejatlas.org/.

[3] Most resource extraction is an industrial for-profit activity that fundamentally involves permanently transforming the surface and/or subsurface of significant tracts of land with which communities have a mix of historical, cultural, economic and social relationships, along with asserted or recognized legal rights: Special Rapporteur on the Rights of

are intense, involving everything from peaceful protests, civil disobedience and sit-ins or occupations. These actions are often met with the exercise of force by public and private security forces. Activists and community members are too often defamed, threatened, surveilled, incarcerated, injured and in some instances even murdered due to their criticism of resource extraction projects.[4] In Latin America as a whole, the proponents of resource extraction activities are typically foreign companies headquarter in wealthy developed countries. As of 2016, mining companies headquartered in Canada, the United States and the United Kingdom had the greatest presence in the region.[5]

The proliferation of these kind of social conflicts, not only in Latin America but also elsewhere in the world, has led to an extensive global debate regarding the governance of transnational resource extracting companies and their impacts on local communities in developing countries.[6] As a whole, this debate tends to center on the efficacy (or not) of corporate social

Indigenous Peoples, James Anaya, *Extractive industries and indigenous peoples*, GA, 24th Sess, UN Doc A/HRC/24/41 (2013) [Anaya]; OAS, Inter-American Commission on Human Rights, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*, OROEA/Ser.L/VII.Doc.47/15 (2015) [OAS, *Human Rights Protection*].

[4] See generally *supra* notes 1 and 2. Also see: Justice & Corporate Accountability Project, *The "Canada Brand": Violence and Canadian Mining Companies in Latin America* (JCAP, 2016); Jen Moore, *In the National Interest?: Criminalization of Land and Environment Defenders in the Americas* (MiningWatch Canada, 2015); Charis Kamphuis, "Foreign Investment and the Privatization of Coercion: A Case Study of the Forza Security Company in Peru" (2012) 37(2) Brooklyn Journal of International Law 529 [Kamphuis, "Privatization of Coercion"]; Global Witness, *On Dangerous Ground: The Killing and Criminalization of Land and Environmental Defenders Worldwide* (London: Global Witness, 2016).

[5] Half of announced investment in metal mining between 2003 and 2015 in Latin America originated in Canadian firms (50.6%), which also accounted for 83.0% of total investment in gold and silver mining. United Kingdom-based companies made up the next largest source, representing 52.2% of investment in iron ore mining and 21.3% of investment in copper, nickel, lead and zinc mining. The United States was the main source of investment in aluminum and the second-largest investor in iron ore extraction: Economic Commission for Latin America and the Caribbean (ECLAC), *Foreign Direct Investment in Latin America and the Caribbean, 2016*, LC/G.2680-P (Santiago, 2016) at 107.

[6] John Ruggie, Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, OHCHR, UN Doc A/HRC/17/31 (2011); Penelope Simons & Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage* (New York: Routledge, 2014).

responsibility mechanisms[7], the existence (or not) of a home state responsibility to regulate[8] and the viability (or not) of a binding international treaty instrument to address these matters.[9] While these conversations are prolific, they overwhelmingly focus on jurisdictions and instruments outside of the developing countries where ground-level social conflicts around resource extraction are taking place. There is relatively little debate in the global governance literature over the emerging efforts of mine-affected communities in developing countries to engage with their own domestic public law regimes in order to address their justice concerns.[10] There are relatively even fewer in-depth, extended studies of this form of legal activism and its implications.[11]

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[7] Hevina S. Dashwood, *The Rise of Global Corporate Social Responsibility: Mining and the Spread of Global Norms* (Cambridge University Press, 2012); Cynthia A. Williams, "Civil Society Initiatives and 'Soft Law' in the Oil and Gas Industry" (2003-2004) 36 NYU Journal of International Law and Politics 457; Luis Eslava, "Corporate Social Responsibility & Development: A Knot of Disempowerment" (2008) 2 (2) Oñati Journal of Emergent Socio-Legal Studies 43; Ronen Shamir, "Corporate Social Responsibility: A Case of Hegemony and Counter-Hegemony" in Boaventura de Sousa Santos & Cesar A. Rodriguez-Garavito, eds, *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge University Press, 2005); Penelope Simons, "Corporate Voluntarism and Human Rights: The Adequacy and Effectiveness of Voluntary Self-Regulation Regimes" (2004) 59 Relations industrielles/ Industrial Relations 101.

[8] Sara L. Seek, "Home State Responsibility and Local Communities: The Case of Global Mining" (2008) Yale Human Rights & Development Law Journal 177-206; ETOS for Human Rights beyond Borders, *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights* (February 2012); Robert McCorquodale & Penelope Simons "Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law" (2007) 70 *Modern Law Review* 598.

[9] Jens Martens, *Corporate Influence on the Business and Human Rights Agenda of the United Nations* (Germany: Global Policy Forum, June 2014); Penelope Simons, "International law's invisible hand and the future of corporate accountability for violations of human rights" (2012) 3:1 Journal of Human Rights and the Environment; Claire A Cutler, "Private transnational governance and the crisis of global leadership" in Stephan Gill, ed, *Global Crises and the Crisis of Global Leadership* (Cambridge University Press, 2011); *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, HRC Res, UNGAOR, 26th Sess, UN Doc A/HRC/26/L.22/Rev.1 (2014).

[10] References to these efforts are beginning to appear in some places, although most are cursory. For a reference to a court case in Chile, see: James S Phillips, "The rights of indigenous peoples under international law" (2015) 26(2) Global Bioethics 120; Michelle Richard, "Conflict in Latin America over Natural Resource Exploitation" (2013) 19 L & Bus Rev Am 561. For discussions of a court case in Argentina, see Brant McGee, "The Community Referendum: Participatory Democracy and the Right to Free, Prior and Informed Consent to Development" (2009) 27 Berkeley J Intl L 570. For references to court cases in Columbia see: Viviane Weitzner, *Holding Extractive Companies to Account in Columbia: An evaluation of CSR instruments through the lens of Indigenous and Afro-Descendent Rights* (The North-South Institute, Proceso de Comunidades Negras, Resguardo Indígena Cañamomo Lomaprieta, 2016); Europe-Third World Centre & International Association of Democratic Lawyers, *Mining and Human Rights Violations in Colombia: The Case of Anglo Gold Ashanti vs the Afro-descendant community of La Toma*, UNGA, 26th Sess, Annex, Agenda Item 3, UN Doc A/HRC/26/NGO/38 (2014). For references to court cases in Guatemala, see: Rachel Sieder, "'Emancipation' or 'regulation'? Law, globalization and indigenous peoples' rights in post-war Guatemala" (2011) 40(2) Economy and Society 239; Shin Imai et al, "Breaching Indigenous Law: Canadian Mining in Guatemala" (2007) 6(1) Indigenous L J 101. For references to court cases in Ecuador, Bolivia and Costa Rica, see Begüm Özkaynak et al, *Mining conflicts around the world: Common grounds from an Environmental Justice perspective*, EJOLT Report No 7 (Environmental Justice Organisations, Liabilities and Trade, 2012).

[11] For some recent examples of case studies of the genius, litigation and consequences of particular Indigenous rights cases see: Cesar Rodríguez-Garavito & Diana Rodríguez-Franco, *Radical Deprivation on Trial: The Impact of Judicial Activism on Socioeconomic Rights in the Global South* (Cambridge University Press, 2015); Pooja Parmar, *Indigeneity*

This absence likely has more than one reasonable explanation. Developing country legal systems are routinely viewed as either incapable or unwilling to rein in transnational resource companies and subject them to the rule of law generally, much less to human rights standards more specifically. Some point to the presence of endemic inefficiencies, corruption and inadequacies in developing country legal systems, the product of some combination of a chronic lack of resources, colonial histories, foreign influences, and imperial impositions.[12] Other scholars point to the ways in which international trade agreements and foreign investment protection agreements circumscribe the range of public policy options available to decision makers in developing countries in relation to foreign resource companies.[13] The applicable instruments of public international law are often similarly viewed as inadequate, for the reason that, even when binding, they represent a system of law that is non-enforceable vis-à-vis a developing country state that, once again, is beholden to the powerful companies that it hosts.[14] Finally, logistically and conceptually, it may be difficult for the transnational solidarity networks that support mine-affected communities to engage with developing country legal systems, causing them to favor other more familiar legal options and strategies.

These explanations and characterizations are well known. They form part of the context for an important global conversation about how to address the "governance gap", a term used to

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and Legal Pluralism in India: Claims, Histories, Meanings (Cambridge University Press, 2015); Judith Kimerling, "Habitat as Human Rights: Indigenous Huaorani in the Amazon Rainforest, Oil and Ome Yasuni" (2016) 40 Vermont Law Review 445. For a series of studies of domestic human rights litigation in the African context in an effort to challenge global poverty, see: Lucie E. White & Jeremy Perelman, *Stones of Hope: How African activists reclaim human rights to challenge global poverty* (Stanford University Press, 2011).

[12] See Simons & Macklin, *supra* note 6 at 16-17, citing the OECD definition of weak governance zones. In a transnational tort action against a Canadian mining company, the British Columbia Court of Appeal recently decided that the risk of an unfair trial in the Guatemalan courts was a factor that weighed in favor of its determination that the province of British Columbia is the most appropriate jurisdiction to hear the Guatemalan plaintiffs' claim: *Garcia v Tahoe Resources Inc*, 2017 BCCA 39. For critique of Canadian foreign policy in relation to resource extraction in developing countries, see generally: Stephen Brown, ed, *Struggling for Effectiveness: CIDA and Canadian Foreign Aid* (McGill-Queen's University Press, 2012); Yves Engler, *The Black Book of Canadian Foreign Policy* (Fernwood Publishing & RED Publishing, 2009).

[13] Hadrian Mertins-Kirkwood, *A Losing Proposition: the Failure of Canadian ISDS Policy at Home and Abroad* (Ottawa: Canadian Centre for Policy Alternatives, 2015); Gus Van Harten, "Investment Treaty Arbitration and the Policy Implications for Capital-Importing States" in Diego Sánchez-Ancochea & Kenneth C Shadlen, eds, *The Political Economy of Hemispheric Integration* (New York: Palgrave Macmillan, 2008) 83; Gus Van Harten, "Investment treaties as a constraining framework" in Shahrukh R Khan & Jens Christiansen, eds, *Towards New Developmentalism: Market as means rather than master* (New York: Routledge, 2011) 154; Lorenzo Cotula, *Foreign investment, law and sustainable development: A handbook on agriculture and extractive industries*, 2nd ed, IIED Natural Resources Issues Series 31 (International Institute for Environment and Development, 2016).

[14] Claes Cronstedt & Robert C Thompson, "A Proposal for an International Arbitration Tribunal on Business and Human Rights" (2016) 57 Online Symposium, Harv Intl LJ 66, online: http://www.harvardilj.org/wp-content/uploads/Cronstedt-and-Thompson_0615.pdf.

refer to the systemic impunity that transnational corporations, operating in developing countries, appear to enjoy.[15] This article in no way aims to detract from this extremely important conversation. Law reform and new enforceable mechanisms that aim to address problematic corporate conduct are pressing.[16] However, while the larger political struggle over the terms of effective transnational regulation and extra-territorial jurisdiction continues, mine-affected communities, local activists and lawyers in the Global South are deeply involved in the daily, ground-level work of attempting to engage with existing, ostensibly enforceable, domestic public law to address their ongoing social injustice concerns.[17]

In spite of many pitfalls, the public law regimes currently in force in developing countries maintain a certain appeal for activists and their lawyers. They offer an enforceable rights framework, which, in the Latin American context and perhaps elsewhere, increasingly incorporates international human rights law. Moreover, domestic public law represents the system of law with the closest proximity to the historical context, democratic life and political struggles of mine-affected communities. This paper departs from the assertion that the task of recognizing, tracking and analyzing mine-affected communities' engagement with applicable public law regimes in the Global South is incredibly important. To the extent that these efforts are successful (by some measure), they represent an important advance toward the aspiration that law might be an instrument of social justice in the hands of poor and marginalized communities in developing countries.[18] To the extent that they are unsuccessful (by some measure), their pitfalls offer important insight into public law's shortcomings in the context of the foreign resource extraction, with the potential to feed local law reform efforts as well as the broader global conversation on the transnational regulation of the multinational corporation.

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[15] Simons & Macklin, *supra* note 6, Catherine Coumans, "Alternative Accountability Mechanisms and Mining: The Problems of Effective Impunity, Human Rights, and Agency" (2010) 30 CJDS 27; Ruggie, *supra* note 6.

[16] Sara L. Seck, "Canadian Mining Internationally and the UN Guiding Principles on Business and Human Rights" (2011) 49 Can YB Int'l Law 51; Charis Kamphuis, "Canadian Mining Companies and Domestic Law Reform: A Critical Legal Account" (2012) German Law Journal 1456; Penelope Simons, "Canada's Enhanced CSR Strategy: Human Rights Due Diligence and Access to Justice for Victims of Extraterritorial Corporate Human Rights Abuses" (2015) 56 Canadian Business Law Journal 167.

[17] See references in *supra* note 10. Also see Rachel Sieder, "The judiciary and indigenous rights in Guatemala" (2007) 5(2) Int J Const L 211.

[18] See María Galvis & Ángela Ramirez, *Digesto de jurisprudencia latinoamericana sobre los derechos de los pueblos indígenas a la participación, la consulta previa y la propiedad comunitaria* (Washington: Fundación del Debido Proceso, 2013); Boaventura de Sousa Santos & César Rodríguez-Garavito, eds, *Law and Globalization from Below. Towards a Cosmopolitan Legality* (Cambridge: Cambridge University Press, 2005).

Using the case study method, this article will focus on one Campesino Community's engagement with the matrix of public laws enforceable in its jurisdiction of Peru. It traces this community's attempts to translate its justice concerns with respect to the actions of a large multinational mining company into terms that have traction with applicable domestic and international law regimes. This case study is particularly interesting because its substantive issues are at the heart of the contemporary resource extraction model, namely it examines the nature of communities' ownership and control over land and access to equitable compensation and benefits when resources are developed. In this connection, this study profiles another important legal issue that challenges many resource extraction projects around the world, namely the matter of how courts should respond to past injustice claims, advanced now in the language and in accordance with the procedures of constitutional rights and international human rights law. This case study reveals some of the promises and pitfalls that may emerge when Indigenous communities in Latin America attempt to bring their claims of dispossession in the global economy to their own domestic legal systems. This test of one domestic legal system's capacity as a potential instrument of justice in this context has implications for substantive and procedural law at international human rights bodies like the Inter-American Commission and Court of Human Rights, some of which I explore in this paper's conclusion. At both the domestic and the international level, what is at stake is the ability of Indigenous communities to bring claims that might benefit from, and further advance, these bodies' promising statements of collective rights.

Part 2 of this paper reviews, by way of background, the first leg of the unfolding story of the Peruvian Campesino Community San Andres de Negritos. Elsewhere, I have provided an account of the legal processes whereby Yanacocha Mine, majority owned by American gold mining giant Newmont, came to occupy the Negritos Community's communally titled land in the northern Andes of Peru.[19] In this previous work, I argue that these processes were a product of the convergence of Yanacocha's corporate power with the Peruvian state's public power. I described a central feature of this convergence in terms of the production of the Community's "consent" to its own dispossession and ultimately its own legal annihilation or "annulment". The present paper

[19] Charis Kamphuis, "Foreign Mining, Law and the Privatization of Property: A case study from Peru" (2012) 3:2 Journal of Human Rights and the Environment 217 [Kamphuis, "Foreign mining"]; Charis Kamphuis, "Derecho y la Convergencia del Poder Público y el Poder Empresarial: La Desposesión Campesina y La Coerción Privatizada en el Perú" (2012) 15 Revista Latinoamericana de Derecho Social: Universidad Nacional Autónoma de México Instituto de Investigaciones Jurídicas 57 [*Translation*].

adds to the story by fully assessing the complex dynamics of dispossession and describing some of the Negritos Community's responses and forms of resistance to the circumstances of its dispossession, setting the context for its ultimate turn toward the Peruvian courts. Further, it situates these local forms of resistance in a national and international context of Indigenous activism that has simultaneously spurred the emergence of Indigenous rights regimes while reacting to ongoing neoliberal reforms of investment and resource laws.

Whereas Part 2 of this paper recounts the Negritos Community's story of dispossession and resistance, Part 3 tells the story of the case itself; focusing on how the Community has endeavored to pursue justice through law. In 2011, the Negritos Community initiated a constitutional *amparo* action in local courts in an effort to seek a remedy for its dispossession. Its action challenges the legality of Yanacocha's operations on its land, attempts to compel the state and the company to respect and protect its constitutionally recognized communal property rights, and seeks to remedy the alleged violations. Part 3 describes the Community's legal strategies in the domestic scene, in particular that of putting the full matrix of applicable public law before the court. Importantly, in Peru, like in other Latin American countries, the constitutional rights regime applicable to Indigenous and Campesino Communities incorporates certain international Indigenous rights principles, ratcheting up the domestic legal standard and creating a matrix of rights enforceable against both public and private actors. This makes the Negritos Community's efforts to actualize these rights provisions and principles all the more interesting, especially from the perspective of the "governance gap" referenced above.

The section also analyzes the challenges that the Negritos Community has faced, both inside and outside of the courtroom. Significantly, the actualization of rights principles through local courts involves finding a suitable domestic cause of action. The Negritos case study reveals that procedural matters can become front and center in communities' struggles to frame their stories of injustice in ways that are intelligible to public law rights protecting regimes. Legal claims are successful not only with good facts and robust substantive rights frameworks. Crucially, they must also package themselves into a recognizable cause of action and navigate the associated procedural requirements. The Negritos case study reveals how the complexity of these matters is augmented in the context of resource extraction, where the lived reality of dispossession's legal and social processes may be difficult to reconcile with procedural rules. It depicts how procedural rules

become a site of struggle over the meaning of consent, the subjectivity of the rights holder, and how to come to terms with past and ongoing injustice.

This overview requires a comment on the research methods that inform this paper. The story that the Negritos case tells about dispossession and resistance (Part 2), as well as the story of the Negritos Community's engagement with public law (Part 3), are based on hundreds of pages of primary documents collected and organized over more than a decade by Negritos community members and *pro bono* local lawyers and law students based in Peru, with the support of volunteer lawyers and law students in Canada. I was an active participant in this transnational team since its inception. The documents referred to in Part 2 were collected beginning in 2006 and up until 2011 when the Negritos community filed its *amparo* claim before local courts. The documents described in Part 3 were collected between 2011 and 2016 as the court case wound its way toward Peru's Constitutional Court, where, at the time of publication, it awaits a final decision. All of these documents were produced either by Peruvian courts, government institutions, the company in question, or the Community's own governance bodies. These materials are complemented by information published in secondary sources as well as through many conversations between myself, members of the Negritos legal team and Community leaders over the course of multiple visits to the Community and countless virtual conversations.

The strength of this method is derived from the opportunity it provides to critique the formal legal justification for Yanacocha's presence on the Negritos Community's land. The documentary record constitutes the formal legal underpinnings for Yanacocha's operations, primarily rooted in property and contract law. The review of this record offers an important and potentially powerful opportunity to challenge the very legality of the company's presence, using normative frameworks embedded in constitutional and international law. In order words, the Negritos case scrutinizes Yanacocha Mine's claim to legality and advances a critique that brings the dynamics of dispossession into a legal forum. However, there is no doubt that this reliance on documents, including the Community's own written records, has limitations. While myself and other members of the Negritos legal team have spent time in the Negritos Community, our work did not include ethnographic methods. As a result, the story told here can only very partially and tangentially capture the lived experiences of Community members with respect to the events surrounding the official documents and the litigation itself. It does not endeavor to account for the meanings that Community members assign to the many legal and political moments in their journey, from the

hacienda system, to Agrarian Reform, through to the arrival of Yanacocha, the Community's dispossession, and its ultimate decision to pursue justice in local courts.[20]

In telling this story, and notwithstanding the limitations of the documentary method, my approach to law in this article resonates with the tenants of critical legal pluralism.[21] I attempt to capture the multiple scales of law at play (local, national, regional and international), the interrelationship between multiple areas of law (private and public), the slippage between substantive claims and procedural requirements, and the interaction between law, politics/ideology and corruption. In this vein, this paper consciously employs the term "story" in order to make explicit the techniques used to package complex social relationships into legal frameworks that serve to justify or problematize those relationships. This reflects the socio-legal insight that, in their efforts to pursue justice through law, social justice lawyers do not just find cases. Rather, they act to convert complex social realities into terms that have currency with applicable systems of law. In this article, I examine the techniques employed in a multidimensional, shifting and sometimes contradictory legal landscape in order first, to articulate the Negritos story as one of dispossession and second, to fashion a pathway for resistance using law.

This introduction reveals the fact that this article is fundamentally a product of advocacy and activism, including my own. It is also written as part of an explicit effort to support the Negritos Community's case going forward. In other words, it takes the opportunity, in an academic venue, to explore and develop the approaches to law that might enable the Negritos Community, and communities like it, to pursue justice in domestic and international courts. Beyond its practical value to communities, this advocacy-oriented approach, supported by an extensive documentary record, has the potential to ground and inform a range of analytical and theoretical work going forward. The thick description of context, practices, law and legal argument in the pages that follow offers important data that is not easily or readily available to those who have not had the opportunity to work intensively and continuously with mine-affected communities in the Global South. This material has value to efforts to theorize the concepts of consent and knowledge, as

[20] For one relatively rare example of a rich ethnographic study of one community's historic and contemporary dispossession story, see Parmar, *supra* note 11. Writing about a "Scheduled Tribe" in India, Parmar's captures the differing interpretations among activists, lawyers and community members with respect to the nature of the injustice at issue and the significance of the domestic litigation that emerged in response.

[21] See Martha-Marie Kleinhans & Roderick A. Macdonald, "What is Critical Legal Pluralism?" (1997) 12(2) Canadian Journal of Law & Society 25. Kleinhans and Macdonald define critical legal pluralism as an approach that sees legal subjects as "law inventing". Also see: Roderick A Macdonald, "Custom Made: For a Non-chirographic Critical Legal Pluralism" (2011) 26 Canadian Journal of Law & Society 301.

well as the procedural and remedial legal forms the might govern encounters between Indigenous communities and multinational companies operating in developing countries. As such, this paper recounts an unfinished story in more than one sense. Not only does the Negritos Community's advocacy journey continue as it awaits a decision from Peru's highest court, likewise, the concepts and legal forms profiled here similarly await further in-depth analytical reflection and research.

This article's conclusion in Part 4 takes some early steps toward this larger goal. It begins by articulating the international and comparative research and potential law reform agendas that flow from this work. Reflecting on the Negritos Community's pursuit of justice, it offers insight into law, lawyering and access to justice in the context of Campesino and Indigenous legal challenges to resource extraction practices in Latin America. This includes an incipient reflection on the transformative potential and pitfalls of collective property rights claims as a mode for articulating the justice concerns of Indigenous communities adversely affected by the global system of resource extraction.

2 The Negritos Story: An account of dispossession (the case tells a story about life)

In many Latin American countries, struggles over land, resources and rights often occur in the context of rural property regimes characterized by a mix of communal and individual tenures. Today's legal framework is a product of a complex history of ideologically-driven land reform initiatives that stretch from protectionist/nationalist policies enacted between the 1960s and the 1980s,[22] through to on-going neo-liberal reforms begun in the 1990s that aim to foster private investment including on Campesino land,[23] and now, in some countries, with relatively new layers of community consultation laws and an emerging Indigenous and Campesino constitutional rights jurisprudence.[24]

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[22] Tom Griffiths, "Indigenous Peoples, Land Tenure, and Land Policy in Latin America" in P. Groppo, ed, *Land Reform: Land Settlement and Cooperatives* (FAO, 2004) 49; Miguel Alteri & Andrés Yurjevic, *La agroecología y el desarrollo rural, sostenible en América Latina* (Santiago de Chile: Economic Commission for Latin America and the Caribbean, 1992) online:
Http://repositorio.cepal.org/bitstream/handle/11362/33761/S9200648_es.pdf?Sequence=1

[23] See *infra* Section B.5 for discussion of the more recent laws that critics argue infringe Campesino and Indigenous rights.

[24] See Roger Merino Acuña, "Prior Consultation: Law and the Challenges of the New Legal Indigenism in Peru" (2014) 4(1) Hendu 19; Fundación del Debido Proceso, "El derecho a la consulta de los pueblos indígenas en Perú" (Washington, DC: 2010); Raquel Yrigoyen, "El horizonte del constitucionalismo pluralista: del multiculturalismo a la decolonización" in César Rodríguez, ed, *El Derecho en América Latina: Un mapa para el pensamiento jurídico del siglo XXI* (Buenos Aires: Siglo XXI Editores, 2011) 139; César Rodríguez-Garavito, "Ethnicity.gov: Global

Each of these waves are of course the product of a complex interplay between transnational and domestic trends and influences. As a practical matter though, mine-affected communities who seek to challenge the legality of a company's concession and surface property rights must navigate this complex and even contradictory domestic legal matrix. The Negritos case study provides a highly-textured example of how these trends have unfolded in Peru with consequences for present day legal struggles between mine-affected communities and foreign mining companies.

2.1 Dispossession Story: Agrarian Reform, neoliberalism, transnational mining & corruption

Agrarian Reform is an important historical point of departure for the Negritos Community in that for the first time it became an entity with significance in Peruvian law. Agrarian Reform came to Peru in 1969 with an agenda to transform the agrarian system by replacing the *haciendas*, inherited from colonial times, with a fair system of property and a legal regime that would guarantee social justice in rural areas.[25] The *Agrarian Reform Law* also declared that "Indigenous Communities" would thereafter be called "Campesino Communities".[26] The key provisions of Agrarian Reform were later constitutionalized in the 1979 *Political Constitution of Peru*. The program was also implemented in part through a series of statutes that purported to define Campesino Communities, their political and economic institutions, and their legal relationship with their communal lands. Most prominent among these were the 1970 *Campesino Communities Special Statute*,[27] the 1987 *Campesino Communities General Law* [28] and the 1987 *Law for the Demarcation and Titling of the Communal Territories of Campesino Communities*.[29] The

Governance, Indigenous Peoples, and the Right to Prior Consultation in Social Minefields" (2010) 18 Indiana Journal of Global Legal Studies 1; Emiliano López & Francisco Vértiz, "Extractivism, Transnational Capital, and Subaltern Struggles in Latin America" (2015) 42(5) Latin American Perspectives 152.

[25] Law No 17716, *Agrarian Reform Law* (1969), art 1. When comparing Agrarian Reform in Peru to other processes of the same name across Latin America, some authors have characterized Peru's Agrarian Reforms as "revolutionary", "massive" and "structural": see Raúl Alegrett, "Past and present land reform in Latin America" in P. Groppo, ed, *Land Reform: Land Settlement and Cooperatives* (FAO, 2003/2) 112 online: http://www.fao.org/docrep/006/J0415T/j0415t0b.htm.

[26] *Agrarian Reform Law*, *ibid*, art 115.

[27] Supreme Decree No 37-70-AG, *Campesino Communities Special Statute* (1970).

[28] Law No 24656, *Campesino Communities General Law* (1987). Also see: Supreme Decree No 008-91-TR, *Regulation of the Campesino Communities General Law* (1991).

[29] Law No 24657, *Law for the Demarcation and Titling of the Communal Territories of the Campesino Communities* (1987).

significance of this domestic legal regime for the Negritos case will be described more fully in the next section.

In 1971 the Peruvian state designated the inhabitants of an area of land called "Negritos" as beneficiaries of Agrarian Reform and in 1974 the country's President decreed that 14,375 hectares of land would be communally titled in the Community's name. The Negritos Community is located in the northern Andes of Peru in the Department of Cajamarca, relatively close to the regional capital city, also called Cajamarca. It is one of approximately 118 Campesino Communities in the entire Department. Cajamarca is a predominately rural region and has consistently ranked among the poorest in the country. In 2015 about half of the population continued to live in poverty and another one quarter struggling in extreme poverty.[30] In La Encañada, the district where the Negritos Community is located, poverty levels in recent years have fluctuated between 70 and 80%.[31] The Negritos Community is located in the highlands, accessible only by a simple road. Most households do not have electricity or running water.

The practical implementation of Agrarian Reform was a complex affair, under-resourced and suffering from serious deficiencies, delays and in some cases, acts of corruption.[32] The Negritos Community was not immune to these issues. For example, in 1975, in a patently illegal move, state officials purported to sell the Negritos Community's land to representatives of the neighboring Campesino Community of Tual. In 1980, the payment requirement was removed but title remained with the neighboring Community. When Negritos community members became aware of these events in 1986, they called a General Assembly and agreed to pressure Peruvian government bodies to recognize their Community and its property rights. This agreement was recorded in a handwritten resolution entitled "Act of the General Assembly of the Negritos Community":

> By majority we request the separation of Negritos land from the Campesino Community of Tual and the [legal] formation of an independent community that will be called Negritos, given that among other things we are an independent socio-economic territorial unit, which is why it is absurd to consider that we might be part of the Campesino Community of Tual,

[30] Cajamarca is one of three regions of Peru with the highest incidence of poverty, generally fluctuating between 44.7 and 51.7 %. As of 2015 Cajamarca had the highest incidence of extreme poverty in Peru, with peak levels reaching 26.97% of the total population in 2013: see Instituto Nacional de Estadística e Informativa, *Evolución de la Pobreza Monetaria: 2009-2015* (Lima: INEI, 2015) at 46, 50.
[31] *Ibid*, at 61, 107.
[32] Alfonso Quiroz, *Historia de la corrupción en el Perú*, translated by Javier Flores, Popular Collection Series No 5 (Lima: Institute for Peruvian Studies, 2014) at 320-9. Also see: Alfonso Quiroz, *Corrupt Circles: A History of Unbound graft in Peru* (Washington: Woodrow Wilson Center Press, 2008).

given that the two communities have always lived independently without any links between us. [translation]

There is a paper trail, beginning in the 1980s, of handwritten records (Acts) of decisions made at Negritos Community General Assembly meetings. To date, Community members maintain original copies of the documents produced at these meetings. In these Acts, Community members describe their communal decision-making processes regarding many practical matters of interest to their Community as a whole. They make reference to their collective political and legal institutions, elections of leaders, decisions related to communal justice, agreements regarding communal planting and harvesting of crops, and the collective management of communal property and finances.

Between 1987 and 1989, officials from the Ministry of Agriculture responded to the Negritos Community's requests for recognition in a series of field studies and meetings with community members. Based on these visits, Ministry officials wrote in their technical reports that the Negritos Community members are "natural-born" Campesinos, with their own unique characteristics and institutions, "who have been working on the communal lands in question since the time of their ancestors". Finally, in 1990, the Ministry officially recognized the Campesino Community San Andres de Negritos as a legal entity consisting of 140 families. Community members then took steps to debate their Community Statute and Internal Regulations, "article by article", which they ultimately adopted with a signature from the head of each family. Among other things, these rules allowed Negritos families to obtain "certificates of possession" of parcels of Negritos communal land. Between 1990 and 1991, Community members worked with Ministry staff to demarcate the boundaries of its territory. The agreed upon demarcations establishing a total surface area of 13,609 hectares of Community land and this was incorporated into the Community's Internal Statute. Negritos' communal title was registered in the local Public Registrar in October of 1991.

Following these events, this story of recognition and communal titling abruptly reversed itself over just a few short years. By 1995 Yanacocha Mine had established itself squarely within the boundaries of the Negritos Community's land. Moreover, according to the State and company, the Negritos Community no longer existed in law and was not longer a property titleholder. The remainder of this section will describe the documentary record of how this came to be.

As the first large-scale foreign investment project of its kind in the country and perhaps even the entire region, Yanacocha was truly emblematic of the new face of neoliberal globalization in Peru, in the region and the entire world. It consisted of a joint venture between its majority shareholder, the American company Newmont Mining, and its minority shareholders, the International Finance Corporation (IFC), an arm of the World Bank, and Buenaventura, a Peruvian company owned by one of the most powerful families in Peru.[33] With significant start-up financing from the IFC, Yanacocha quickly grew to be the largest gold mine in Latin America and one of the largest in the world.[34] Its extraordinary profitability, due in part to extremely low production costs, has also been the subject of significant study, with some authors concluding that it quickly became the most profitable mine in the world.[35] Yanacocha's size and profitability have arguably made a significant contribution to the success of its majority shareholder. In 2015 Newmont Mining was the second largest gold producer globally.[36] These figures starkly contrast those that depict persistent extreme poverty in the region of Cajamarca, which marked 2015 with the highest levels of extreme poverty in Peru.[37]

Yanacocha established itself in Peru at a time of radical neo-liberal restructuring of the Peruvian legal and economic system, and just as neo-liberal globalization began to take a stronger hold in many countries around the world.[38] Elected president of Peru in 1990, Alberto Fujimori became a champion of neo-liberal policies, immediately implementing a wide-ranging program to reduce restrictions on international trade and investment while also cutting government funding of social services, health and education.[39] Fujimori immediately began to pursue policies specifically aimed at weakening Agrarian Reform and opening Campesino communal land up to foreign

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[33] Newmont Mining Company, online: http://www.newmont.com/operations-and-projects/south-america/yanacocha-peru/overview/default.aspx.

[34] Some researchers report that Yanacocha is the second largest gold mine in the world: Fabiana Li, "Contested Equivalences: Controversies over water and mining in Peru and Chile" in John Wagner, ed, *The Social Life of Water* (Berghahn Books, 2013) at 18 [Li, "Contested Equivalences"].

[35] Raul Wiener & Juan Torres, *Large scale mining: Do they pay the taxes they should? The Yanacocha case* (Latin American Network on Debt, Development and Rights, 2014) at 23, 29. These researchers allege that Yanacocha has consistently inflated its expenses to reduce its taxes owing: *ibid* at 73.

[36] "10 Top Gold-producing Companies", *Investing News Network* (20 April 2016) online: http://investingnews.com/daily/resource-investing/precious-metals-investing/gold-investing/barrick-newmont-anglogold-goldcorp-kinross-newcrest/.

[37] *Supra* note 30.

[38] David Harvey, "The 'New' Imperialism: Accumulation by Dispossession" (2004) 40 Socialist Register 63.

[39] See: Legislative Decree No 662, *Granting a Legally Stable Regime to Foreign Investors through the Recognition of Certain Guarantees* (1991); Legislative Decree No 757, *Legal Framework for the Growth of Private Investment* (1991); Legislative Decree No 674, *Law for the Promotion of Private Investment in State Enterprises* (1991); Legislative Decree No 708, *Law for the Promotion of Investments in the Mining Sector* (1991).

investment.[40] In addition to this very favorable legal framework, Yanacocha's investors further benefited from a foreign investment agreement with the Peruvian government, guaranteeing it a low rate of income tax, tax-stability, and a complete exemption from royalty payments.[41]

The comfortable relationship between Yanacocha Mine, its majority shareholder Newmont, and the Peruvian government has, at a minimum, crossed ethical boundaries. In the mid-1990s, Newmont became embroiled in a legal dispute in Peruvian courts with a French company over the right to shares in Yanacocha.[42] In the early 2000s, video evidence leaked as part of a *New York Times* investigation revealed that, in the midst of the court case, in two separate meetings, a representative of the American Central Intelligence Agency (CIA) and a Newmont executive personally requested help from Vladimiro Montesinos, the head of Peru's secret intelligence agency and the most powerful official in the country at the time.[43] In response, Monestinos met with one of the seven justices of Peru's Supreme Court who were presiding over the case.

Leaked videos depict Montesinos explaining to the judge that he must decide in Newmont's favor in order to improve Peru's diplomatic position in negotiations with the United States on other matters.[44] Days later, the Supreme Court handed down its decision, with the judge in question making the difference in a 4-3 vote in Newmont's favor. The Yanacocha scandal was only the beginning of Fujimori and Monestinos' downfall. Beginning in 2007, and unrelated to Yanacocha, Peruvian courts found Fujimori guilty of a long list of crimes, including crimes against humanity

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[40] In 1991, Fujimori repealed the *Agrarian Reform Law*, replacing it with Legislative Decree No 653, *Law for the Promotion of Investment in the Agrarian Sector* (1991). He followed this with an agrarian land titling program that only contemplated individual title and a controversial law dubbed the "Land Law": Law No 26505, *Law for the Promotion of Private Investment in the Development of Economic Activities on the National Territory and on Campesino and Native Community Land* (1995). Fujimori's attack on Campesino land and institutions has continued with subsequent governments: see *infra* Part 3.5.

[41] Christian Aid, *Undermining the Poor: Mineral Taxation Reforms in Latin America* (September 2009) at 9, 16; Wiener & Torres, *supra* note 35 at 42. For a general description of the tax agreements available to the mining sector in Peru, see Wiener & Torres, *ibid* at 65-6.

[42] Wiener & Torres, *ibid* at 11.

[43] *Ibid* at 12. J Perlez & L Bergman, "Tangled Strands in Fight Over Peru Gold Mine" (Series: The Cost of Gold: Treasure of Yanacocha), *New York Times* (25 October 2005).

[44] Some of the leaked videos are available online. For a video of the meeting between Montesinos and a representative of the Central Intelligence Agency (CIA), see: "Vladimiro Montesinos ofreciendo mina Yanacocha a través de la CIA a cambio de millones", youtube, online: https://www.youtube.com/watch?V=15k3ghwhhvw. For a transcript of the meeting between Montesinos and Justice of the Supreme Court of Peru, see: Segunda Legislatura Ordinaria de 2000, Transcripción del Vídeo No 892 (19 May 1998), online: http://www2.congreso.gob.pe/sicr/diariodebates/audiovideos.nsf/indice/CD180DDE013DE79805256A8E006F659A. There are a number of documentary videos about these events, including one by a *New York Times* journalist: Lowell Bergman, *La maldición del oro inca* (FRONTLINE/World, 2005), youtube, online: Https://www.youtube.com/watch?V=5odj9erv_LY.

and corruption.[45] Montesinos was similarly found guilty, beginning in 2002, of numerous crimes related to corruption and abuse of public office.[46] Thus, while the careers of these political leaders ended, Yanacocha's career, as a profitable mine surrounded by impoverished communities, remained in full swing.

This broad strokes description of these macro processes paints a backdrop for the micro-level legal and social processes that opened doors for Yanacocha on the ground, or more specifically, on the Negritos Community's communally titled land.[47] Generally speaking, the mineral tenure system in Peru is similar to that of many other countries in that a company can begin extraction only after the state has granted it a mineral concession, referring to a kind of property right to the subsurface minerals beneath a tract of land.[48] As stated above, Newmont's acquisition of the concession rights to Yanacocha Mine are a point of controversy. However, with these rights in hand, the company faced the task of securing access to the surface land above the subsurface minerals, which of course happened to be the recently communally titled property of the Negritos Community.

In Latin America more generally, the legal processes whereby companies acquire surface property rights and access can be highly controversial for the reason that, in many cases, projects proceed without the free, prior and informed consultation or consent of Indigenous communities who either hold title, or claim title, to the surface area and perhaps even the subsurface minerals.[49] Thus, for legal and practical reasons, the issue of access to surface land is often at the heart of conflicts between communities and resource companies. The Negritos case study offers a particularly stark depiction of the extraordinary difficulty of informed consultation and consent where a community is left to negotiate directly with a company in the context of immense power

[45] Supreme Court of Justice of the Republic, Criminal Investigations Section, Exp No 13-03 (11 December 2007); Supreme Court of Justice of the Republic, Special Criminal Appeals Section, Exp No 10–2001 / Acumulado No 45–2003 AV (7 April 2009); Supreme Court of Justice of the Republic, Special Criminal Appeals Section, Exp No AV–33–2003 (30 September 2009); Supreme Court of Justice of the Republic, Special Criminal Appeals Section, Exp. No AV 19-2001 (7 April 2009); Supreme Court of Justice of the Republic, Special Criminal Appeals Section, No AV-23-2001 (20 July 2009).

[46] Roberto Barandiaran Dempwolf & José Antonio Nolasco Valenzuela, *Jurisprudencia penal generada en el subsistema anticorrupción. Corrupción gubernamental*, Vol 2 (Lima, Palestra: 2006) at 691-704, 991-1011, 712-779.

[47] Some parts of this story are recounted in Kamphuis, "Foreign mining", *supra* note 19 at 224-31.

[48] In Peru, like in many other countries, renewable and non-renewable natural resources, including subsurface minerals, are the property of the State and concession rights are real property rights, see: the *Political Constitution of Peru, 1993*, art 66; the *General Law on Mining* (1992) and the *Organic Law for the Sustainable Use of Natural Resources* (1997), art 23.

[49] See generally, Anaya, *supra* note 3.

inequalities, which create serious risks of, among other things, the abuse of power, the breakdown of community cohesion, and the corruption of community leaders.[50]

According to documents, in 1992 Yanacocha submitted a request to the Ministry of Mining for the expropriation of 609 hectares of Negritos communal land (in an area known as Pampa Larga). In 1993, the Ministry granted this request and title to this portion of land passed from the Community to the company. Official documents indicate that Yanacocha and the Community "directly agreed" to compensation in the amount of approximately $US 30,000, or just under $50 per hectare.[51] These funds were transferred directly to only three community members, including the then President, over 800 kilometers away in the national capital city of Lima. By 1995, Yanacocha had obtained two mortgages over the expropriated property in exchange for loans from the IFC and a German bank totaling US$ 85,000,000.[52]

The expropriation and the transfer of all of the compensation directly to the then Negritos President in Lima was purportedly authorized by several Acts of the Community's General Assembly. In one Act, dated just months before Yanacocha solicited the expropriation, the Community purportedly agreed to grant the President a certificate of possession to Pampa Larga, coincidently the area that would shortly become the object of expropriation. The timing and contents of this Act suggest that the President took steps to position himself to benefit from the expropriation before it was even officially requested.

Then, a few months after Yanacocha requested the expropriation, in another Act, the Community purportedly made a number of important decisions: agreeing to the expropriation; agreeing that 95% of the total compensation would be designated for the holder of the certificate of possession to the expropriated area (the then President); and granting the then President and two other community leaders the authority to act on behalf of the entire Community in all matters related to the expropriation and the transfer of funds. On the basis of these "authorizations", the President then proceeded to unilaterally agree to, and personally accept, a compensation amount. Notably, the Community's alleged agreement in this Act to the expropriation and compensation occurred before the compensation amount had been proposed, at least in writing.

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[50] For critiques of power relationships under contemporary consultation laws in Peru and Bolivia see: Flemmer & Schilling-Vacaflor, *infra* note 125.

[51] Also see Wierner & Torres, *supra* note 35 at 36. In their study Wierner & Torres record that on average Yanacocha paid US$ 52 per hectare to Campesinos in exchange for land.

[52] In its 2011 submissions to the First Civil Court of Cajamarca, Yanacocha claimed that the mortgage was not of the expropriated property alone, but also of other properties and all of the machinery and structures located on its property.

This expropriation is only one of a number of allegedly unconstitutional and illegal transfers of Negritos' communal property to Yanacocha.[53] In 1995, in exchange for approximately US$18,000, Yanacocha obtained a mining easement in relation to 810 hectares of Negritos communal land. The easement was tantamount to an expropriation given that its terms permitted the full range of mineral extraction activities. The easement was also established under the same provisions of Peruvian mining law and followed a very similar procedure to that of the expropriation.

Not surprisingly, the Negritos Community asserts that its alleged consent to the expropriation and easement was totally fraudulent. Between 1995 and 1996, the Community passed at least two General Assembly Acts condemning the Community leaders who had signed onto the expropriation and easement documents. Community members sent these Acts, along with numerous letters, to local authorities. They alleged that the Community's then President and his small group of supporters had pressured fellow Community members off of their land in anticipation of transfers of land to Yanacocha, had sold land to Yanacocha that did not belong to them, had participated in fraud and extortion in relation to the procurement of signatures on Community Acts and in the creation of certificates of possession, and had not shared any of the expropriation compensation with the rest of the Community. There is no record that state officials did anything to respond to these concerns, sent in writing. Rather, Yanacocha's operations continued to benefit from state support.

Finally, between 1992 and 1995, the Ministry of Agriculture designated the Community's communally titled land as eligible for individual title, leaving only a small portion known as the "reserve area", considered in Peruvian law to be property of the state (although this is not the Community's view). This process of individual titling culminated in an administrative act executed by the Ministry in 1995 that purported to strip the community of its legal status (legal personality) as a Campesino Community. The actions of the Ministry to convert communally titled land to individual titles and to annul the Community's legal personality were highly problematic and appear to have violated, not only the Community's constitutional rights, but also basic administrative law principles.[54] The documents suggest that Ministry officials actively

[53] See Part 3.5.b of this paper for the argument that the law of mining expropriations and easements in Peru is unconstitutional and contravenes international law with respect to Campesino and Indigenous Communities.
[54] See Part 3.5.b of this paper for the argument that the individual titling and annulment of the Negritos Community violated the constitution and international law.

misinformed Negritos Community members by advising them, among other things, that their Campesino Community did not have communal property rights and that they had no other choice but to accept individual title. This approach to the Community starkly contrasts the Ministry' actions, just a short few years prior, to recognize and communally title the Negritos Community.

The introduction of individual title and the purported annulment of the Negritos Community was perfectly timed with Yanacocha's arrival and occurred at a time of crisis in the Community due to the apparent betrayal of its leaders to Yanacocha. Individual title made it even easier for the company to acquire land through direct dealings with individual Campesinos. Community members recount that transfers of property to Yanacocha were often induced by a combination of misinformation, threats, extortion and unfulfilled promises.[55] Researchers have reported that Yanacocha workers drove poor and illiterate community members to the land titles office in company vehicles in order to sign the necessary paper work.[56] By 2009, Yanacocha Mine occupied approximately one third of the Negritos Community's original communally title property area. Part 3.2 of this paper analyzes these events by conceptualizing the knowledge and power dynamics of dispossession in the Negritos case. Part 3.5 describes the substantive rights violations that the Negritos Community attributes to these events.

As Yanacocha consolidated the surface rights necessary to initiate and quickly expand its operations, social conflict began to brew. As early as 1993, Campesinos from numerous Communities in the area had begun to complain about land usurpation, extortion, environmental impacts on animals and water and excessive use of force on the part of Yanacocha's security forces.[57] These early years of protest against Yanacocha were also witness to the birth of a growing

[55] A number of empirical studies have documented the tactics adopted by Yanacocha in purchasing land from local Campesinos: S Langdon, 'Peru's Yanacocha Gold Mine: The IFC's Midas Touch?' in Profiling Problem Projects (Project Underground, Berkeley CA 2003); Anthony Bebbington et al, "Mining and Social Movements: Struggles over Livelihood and Rural Territorial Development in the Andes" (2008) 36 World Development 2888. Wierner & Torres accuse the company of tactics to pressure Campesinos to "sell" their land for unbelievably low prices. This includes threatening Campesinos with expropriation if they refuse to sell and hiding information about the gold deposits in order to induce them to accept lower prices for their land. These authors characterize the processes whereby Yanacocha acquired land as a "brutal fraud and pillage" of land: *supra* note 35 at 14-15.

[56] J Bury, "Neoliberalismo, minería y cambios rurales en Cajamarca" in A Bebbington, ed, *Minería, Movimientos Sociales y Respuestas Campesinos* (CEPES & IEP, Lima 2007) 49 at 76–7.

[57] Marco Arana, "El Cerro Quilish y la Mineria del Oro en Cajamarca", online: http://cajamarca.de/mine/quilish.htm; Fabiana Li, "Relating Divergent Worlds: Mines, Aquifers and Sacred Mountains in Peru" (2013) 55 Anthropologica 399 at 401 [Li, "Divergent Worlds"]; Wierner & Torres state that the first legal complaints about water contamination occurred in 1999: *supra* note 35 at 18.

class of local NGOs in the Cajamarca region.[58] In 2000, Yanacocha's subcontracted trucking company was responsible for a serious mercury spill along a local road.[59] The subsequent handling of the spill and the alleged cover up did not help the deteriorating relationship between the mine and surrounding communities.[60] The community living alongside the road suffered extensive mercury poisoning and there are widespread allegations that compensation agreements between the company and victims were inadequate with many victims receiving no compensation at all.[61]

2.2 The Turn to Law: An unresponsive state and the emergence of local activism

Beginning in 2004 with a long general strike, social unrest linked to Yanacocha culminated over the years in more than one period of social crisis, widespread blockades and general strikes.[62] Of course the Negritos Community, living with Yanacocha literally in its backyard, was involved in many of these protest events, which have at times implicated multiple Campesino Communities and sometimes spread to the nearby regional capital city of Cajamarca. Especially in the first decade following Yanacocha's arrival in the area, communities, including the Negritos Community, typically expressed their opposition with social protest, civil disobedience and road blockades.[63] In recent years, these tactics have been increasingly accompanied by resort to local courts.[64]

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[58] For the influence of local NGOs, formed in the early 2000s, on social protest and concern about mining, see: Li, "Divergent Worlds", *ibid* at 402.

[59] Allan Ingelson, Arturo Urzúa & William Holden, "Mine Operator Liability for the Spill of an Independent Contractor in Peru" (2006) 24(1) J Energy Nat Resources L 53.

[60] The Peruvian Ombudsman reported that Yanacocha workers told community members to collect the mercury themselves and offered money rewards in proportion to the amount collected. Children and adults alike proceeded to collect the liquid mercury with their bare hands. They were not told that it was a toxic substance: Defensoría del Pueblo, *El Caso del Derrame de Mercurio que afectó a las localidades de San Sebastián de Choropampa, Magdalena y San Juan, en la Provincia de Cajamarca*, Informe Defensorial No 62 (2001) at 18-79.

[61] Comisión de Pueblos Andinos, Amazónicos, Afroperuanos, Ambiente y Ecología, *Informe del Grupo de trabajo encargado de levantar información sobre la situación ambiental y estado de salud de los afectados por el derrame de mercurio en las localidades de San Juan, Choropampa y Magdalena, Departamento de Cajamarca en junio del año 2000* (Lima: Congreso de la República del Perú, 2008). Also see documentary film: Ernesto Cabellos & Stephanie Boyd, *Choropampa: The Price of Gold* (Guarango Association, 2002).

[62] In 2004 protests erupted against a proposed expansion of Yanacocha Mine to a neighboring mountain called Quilish. Over a period of 15 days protestors called for a general strike, demanding that Yanacocha halt exploration activities on the mountain. At times, the protestors ranked more than 10,000 strong, uniting sections of urban and rural civil society. At the time, these protests were unprecedented in the country's history: Li, "Divergent Worlds", *supra* note 57. Also see: Fabiana Li, "In Defense of Water: Modern Mining, Grassroots Movements, and Corporate Strategies in Peru" (2016) 21(1) The Journal of Latin American and Caribbean Anthropology 109 (referring to protests in Combayo).

[63] Arana, *supra* note 57.

[64] In 2012 local activists decided to bring a legal case against a proposed expansion of Yanacocha Mine known as the Conga Project, see: STC No 03673-2013-PA/TC (11 December 2014). Also see: Natalia Guzmán Salano, "Struggle

This section describes the Negritos Community's trajectory from participation in broad-based grassroots community activism and protest to political advocacy with local officials to the articulation of collective rights claims with the support of a transnational legal team. Attention to the multiple scales of law that surround the Negritos case reveals that, at the turn of the century, growing social discontent with Yanacocha specifically, and large scale mining in Peru and the Americas more generally, occurred in conjunction with significant shifts in the international and domestic legal landscape of Indigenous rights.

Nearly two and a half decades after Agrarian Reform had declared that Peru's Indigenous peoples would thereafter be called "Campesinos", the term "Indigenous" began to reappear in Peruvian law along with a series of legal and institutional innovations with respect to *peoples* more generally in Peru, including Indigenous, Campesino and Afrodescendant communities. In 1993, Peru passed 1989 ILO *Convention concerning Indigenous and Tribal Peoples in Independent Countries*[65] ("*Convention No 169*") into domestic law, ratifying it the following year.[66] Then in 1995, the National Institute for the Development of Andean, Amazonian and Afro-Peruvian Peoples was created.[67] These developments continued between 2003 and 2011 as the Peruvian government passed a series of laws protecting and recognizing Campesino and Indigenous peoples' rights, including in relation to Campesino traditional institutions of communal justice (2003), Indigenous groups in voluntary isolation in the Amazon (2006), Campesino and Native Communities' right to water (2009), and Indigenous Peoples' right to prior consultation (2011).[68] With respect to the 2003 law on Campesino communal justice, it explicitly extended the protections of *Convention No 169* to traditional justice institutions, called *Rondas Campesinas.*[69] Between

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from the margins: Juridical processes and entanglements with the Peruvian state in the era of mega-mining" (2016) 3 The Extractive Industries and Society 416; Maiah Jaskoski, "Environmental Licensing and Conflict in Peru's Mining Sector: A Path-Dependent Analysis" (2014) 64 World Development 873 (referring to protests over the proposed Conga Mine).

[65] *Convention concerning Indigenous and Tribal Peoples in Independent Countries*, International Labour Organization, Convention No. 169, (1989) [*Convention No 169*].

[66] Legislative Resolution No 26253, *For the approval of "Convention 169 of the ILO on Indigenous and Tribal Peoples in Independent Countries"* (1993).

[67] Law No 28495, *Law for the National Institute for the Development of Andean, Amazonian and Afro Peruvian Peoples* (1995).

[68] See respectively: Law No 27908, *Rondas Campesinas Law* (2003); Law No 28736, *Law for the protection of Indigenous and original peoples in a situation of isolation or initial contact* (2006); Law No 29338, *Hydro Resources Law* (2009), arts 3, 64; Law No 29785, *Law for the right of Indigenous and original peoples to prior consultation, recognized in Convention 169 of the International Labour Organization* (2011) [Right to Consultation Law].

[69] *Rondas Campesinas Law*, *ibid*: article 1 states that the recognized rights of Indigenous and Campesino Communities apply to the *Rondas.*

2002 and 2005 Peru's environmental laws also added special recognition for Indigenous peoples, Campesino and Native communities, including references to rights protection, knowledge recognition, equitable compensation and consultation.[70]

At the same time, at the international level, and especially in the Americas, the Indigenous rights movement was making gains, catalyzed by the 2001 landmark *Awas Tingni* ruling where the Inter-American Court of Human Rights found that the property rights protected by the 1969 *American Convention on Human Rights* encompass an Indigenous right to collective property.[71] Since then, the Inter-American Court has produced a notable body of jurisprudence on Indigenous property and cultural rights, often in response to cases brought by communities affected by resource extraction.[72] These claims often echo many of the issues raised by the Negritos Community, namely that extraction activities are occurring without the consent and to the detriment of affected communities.[73] This inter-American jurisprudence is important because it has the potential to influence and even direct the development of constitutional law in many Latin American countries with monist legal systems.[74]

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[70] Law No 28611, *General Law on the Environment* (13 October 2005), arts 70-2; Law No 27446, *National System of Environmental Impact Assessment Law* (2009), art 71.

[71] See *Mayagna (Sumo) Awas Tingni Cmty v Nicaragua*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug 31, 2001) at para 148 [*Awas Tingni*]. *Awas Tingni* was the first indigenous rights claim brought to the Inter-American Commission. The petition was filed in 1995 and the Court issued a final judgment in 2001. See Galvis & Ramírez, *supra* note 18, for specific references to subsequent Indigenous rights jurisprudence in Latin American courts more generally. For a description of the emergence of the Indigenous rights movement as an international human rights movement, see Karen Engle, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* (Duke University Press, 2010).

[72] See generally: *Maya Indigenous Communities of the Toledo District v Belize*, Merits Report, Case 12.053, Inter-Am Comm'n HR, Report No 40/04 (2004) [*Maya Communities*]; *Moiwana Cmty v Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am Ct HR (ser C) No 124 (June 15, 2005); *Yakye Axa Indigenous Cmty v Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am Ct HR (ser C) No 125 (17 June 2005); *Sawhoyamaxa Indigenous Cmty v Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am Ct HR (ser C) No 146 (29 March 2006) [*Sawhoyamaxa*]; *Saramaka People v Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am Ct HR (ser C) No 172 (28 November 2007) [*Saramaka*]; *Saramaka People v Suriname*, Interpretation of the Judgement on Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am Ct HR (ser C) No 185 (12 August 2008); *Xákmok Kásek Indigenous Cmty v Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am Ct HR (ser C) No 214 (24 August 2010); *Pueblo Indígena Kichwa de Sarayaku v Ecuador*, Merits and Reparations, Judgment, Inter-Am Ct HR (ser C) No 245 (27 June 2012); *Communities of the Sipakepense and Mam Mayan People of the Municipalities of Sipacapa and San Miguel Ixtahuacan v Guatemala*, Report on Admissibility, Inter-Am Comm'n HR, Report No. 20/14 Petition 1566-07 (3 April 2014); *Comunidad Garifuna de Punta Piedra v Honduras*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am Ct HR (ser C) No 304 (8 October 2015); *Comunidad Garifuna de Triunfo de la Cruz v Honduras*, Merits, Reparations, and Costs, Judgment, Inter-Am Ct HR (ser C) No 305 (8 October 2015); *Kaliña and Lokono Peoples v Suriname*, Merits, Reparations, and Costs, Judgment, Inter-Am Ct HR (ser C) No 309 (25 November 2015).

[73] OAS, *Human Rights Protection*, *supra* note 3.

[74] Galvis & Ramírez, *supra* note 18 at 256-7.

It is fascinating that these national and international shifts in law and political consciousness occurred roughly in parallel to a renewal of activism and hope for justice within the Negritos Community. In 2005, following the massive 2004 regional general strike against Yanacocha (mentioned above), the Negritos Community elected a new leadership with a mandate and the capabilities to begin to investigate the past wrongs that had led to Yanacocha's entry into its territory. The Community had not forgotten about the expropriation of Pampa Larga. However, while Community members carried a strong sense of betrayal and injustice, they knew very little about how their dispossession had actually been achieved in law, just over 10 years prior.

In this context, Negritos Community leaders began to collect volumes of official documents pertaining to the legal status of their Community and its property rights. These documents, spanning from the 1970s to the mid-1990s, were primarily collected from government entities such as the Public Registrar and government ministries, but they also included the handwritten record of communal decisions (Acts) made at countless community General Assemblies. These documents ultimately formed the basis of the Community's legal case and the allegations described throughout this paper. The Community's internal decision to investigate its own case in order to understand it and pursue some form of justice underscores the assertion that the elimination of the Community's property rights and its very existence, as described in the previous section, occurred without the informed consent or even knowledge of the Community. While in the eyes of the company and the Peruvian state the Community no longer existed in law, it certainly existed as a sociological fact.

Bolstered by what they saw in these documents, Community leaders initiated a series of formal and informal appeals with a wide range of administrative and political decision makers, as well as Yanacocha itself. In 2006, the Community found a local lawyer who helped them file civil law proceedings against a group of third parties (non-community member), who were apparently attempting to occupy and illegally obtain title to a portion of the Community's land, known to the Peruvian state as the "Reserve Area" and to the Community as "Llagaden". Community members believed that these "invaders" were receiving informal support from Yanacocha. In order to better investigate and document the situation, the Community resolved to undertake a traditional communal inspection of the area. However, it feared that these third parties were armed and violent and made numerous requests for protection from local authorities, including to the regional Governor, the prosecutions office and the police. After these requests went unanswered, the

Community resolved to undertake the inspection anyway with over 250 community members in attendance. Unfortunately, during the inspection unknown assailants shot at the Community members and one person was injured.

This new threat to communal property appears to have catalyzed yet another series of appeals to state and company officials. It also starkly revealed that without state recognition, the Negritos Community's capacity to protect its communal property interests would be limited. Between 2006 and 2009 the Community sent at least eight letters to the regional office of the Ministry of Agriculture requesting official recognition as a Campesino Community and title to Llagaden (the Reserve Area). In response, the Ministry consistently took a number of problematic positions in its communications to the Community, from claiming that the Reserve Area is state-owned property, to stating that the Community does not exist, to denying that the matter is in its jurisdiction, to proposing that the area could only be demarcated and titled in exchange for thousands of dollars. The Ministry's responses to the Community's letters were less than timely, often delayed by months, and sometimes up to a year at a time. Community leaders' frequent requests to meet with officials in person yielded similarly sparse results.

In the same time period, the Negritos Community sent complaints to the Ministry of Energy and Mining and at least thirty letters to Yanacocha. In these letters, the Community advised that a recent expansion of the Mine had occurred without consulting the Community and it detailed the impact of mining activities on ongoing traditional communal uses of land and livelihood. The Community requested that Yanacocha negotiate matters related to the acquisition of communal property with the recognized and elected leaders of the Community and that the company cease to use and occupy communal property without permission. In written responses Yanacocha consistently denied the Community's existence and stated that it had fulfilled all of its commitments. Yanacocha refused to meet with Community leaders, stating that its operations take place exclusively on property owned by the company and threatened to initiate legal action against anyone who failed to respect its property rights.

2.3 Developing a Legal Strategy: Putting dispossession into a rights framework

In 2007 the Community solicited the support and legal representation of a local NGO who in turn sought support from international partners. Beginning in 2008, a transnational team of *pro bono* Canadian and Peruvian lawyers and academics began to organize and analyze the documents

collected by Community members. Working with hundreds of pages of documents, these lawyers reconstructed the historical record of the Negritos Community's land title and status as a Campesino Community. The documents detailed the story recounted in the previous section, of how, after granting Yanacocha the concession rights to the minerals beneath the Negritos Community's land, the Peruvian state had proceeded to expropriate a portion of the Community's communal land, designate its communally titled land as eligible for individual titling, and strip the Community of its legal status.

The Negritos legal team undertook to analyze these documents in light of applicable domestic, constitutional and public international laws. Their starting point was the status of Campesino Communities in Peruvian law. As referenced above, the first mention of Campesino Communities in Peruvian law occurred in 1969 with the promulgation of the *Agrarian Reform Law*, which declared that Indigenous Communities were to be denominated Campesino Communities from that point forward. Previously, Indigenous Communities were recognized in the 1920 Constitution, which specified that the State had a duty to protect the "indigenous race" and to pass special laws to support its development in harmony with its needs.[75] This now historic Constitution also afforded Indigenous communal property special protections, stating that Indigenous property interests may not be diminished by prescription, that Indigenous property can only be transferred to the state and that such transfers may occur only as prescribed by law.

Following Agrarian Reform, Campesino Communities were recognized in the 1979 Constitution. This legal text is relevant to the Negritos Community's case because it applies to those events that took place prior to the introduction of the subsequent 1993 Constitution. This includes for example the expropriation of the Community's land and the conversion of a portion of its communal property interest into individual interests. The 1976 Constitution states that Campesino Communities have legal existence and legal personhood, that they are autonomous in their communal organizations, work, land uses, economy and administration, and that the State must respect and protect their traditions.[76] It also creates a state duty to promote Campesino Communities' development and communal enterprises.[77] Finally, it provides special protections for communal property, stating that Campesino land is unalienable except in one of two

[75] *Agrarian Reform Law*, *supra* note 25, art 58.
[76] *Political Constitution of Peru, 1979*, art 161.
[77] *Ibid*, art 162.

circumstances: either by a law based in the Community's interest and approved by two-thirds of community members; or in the case of an expropriation, by a law based on public need and utility.[78] These 1970s Campesino rights and protections are relatively progressive for their time, especially due to their recognition of political and economic autonomy and rights. However, it should be noted that these Campesino property rights recognitions are surface rights, they do not include ownership of the subsurface minerals.

Fujimori's 1993 Constitution, which remains in place today, significantly weakened these constitutional recognitions and protections for Campesino Communities. It recognizes the right to communal property but controversially allows the state to claim rights over "abandoned" lands.[79] In a context where so many communities remain unable to acquire communal title due to deficiencies in domestic land laws, this provision puts untitled communities at risk. Like its predecessor, the 1993 Constitution recognizes the legal existence of Campesino Communities, their autonomy, and some property protections. However, it very significantly removed the requirement that communal property might only be alienated on the basis of a two-thirds majority vote of Community members.[80]

The 1993 constitutional changes were consistent with Fujimori's wide-sweeping program of law reform that aimed to weaken communal property rights and facilitate private foreign investment in natural resource extraction. Of interest though, is the fact that Fujimori's reforms left the most important Agrarian Reform statutes in place, including the 1987 *Campesino Communities General Law* and the 1987 *Law for the Demarcation and Titling of Communal Territories of Campesino Communities*. Importantly, these statutes, which remain in place to date, maintain the property protections that Fujimori eliminated from the Constitution, including the requirement for a two-thirds majority vote.[81]

Taken together, these Constitutional and statutory laws referring to Campesino Communities formed the basic starting point for the Negritos legal team's in-depth analysis of the documents that the Community had been collecting. However, key features of the Peruvian

[78] *Ibid*, art 163.
[79] *Political Constitution of Peru, 1993*, art 88.
[80] *Ibid*, art 89.
[81] See *Campesino Communities General Law*, *supra* note 28 at art 7. These Agrarian Reform statutes remain in place today, even in the midst of the ongoing roll out of neo-liberal reforms that aim to further facilitate foreign investors' access to land and resources. Many of these laws arguably violate different aspects of Indigenous peoples' rights as recognized in international law and the Peruvian Constitution. See Part 3.5.b for more detail on some of these contemporary reforms and their relevance to the Negritos case.

constitutional system allowed the Negritos legal team to complement these domestic rights provisions by drawing upon international legal principles on the rights of Indigenous peoples.[82] Doctrinally, this was possible due to the combined operation of two rules, one domestic and the other international.

Beginning with the domestic rule, Peru, like many Latin American countries, is a monist legal system in that article 55 of its 1993 Constitution explicitly incorporates international treaties into national law upon ratification by the Peruvian state. In 2005 Peru's Constitutional Court interpreted this provision to include international human rights treaties such as the 1969 *American Convention*.[83] In 2009 the Court acknowledged that ILO *Convention No 169* and the jurisprudence of the Inter-American Court also have the status of enforceable law in Peru.[84]

This recognition of the constitutional status of international human rights treaties and jurisprudence in Peru requires some clarification regarding the applicability of these sources of law to past events. In international law, the rights recognized in any given treaty become binding on a state after it ratifies the treaty. In Peru, these rights become binding domestically once the treaty is specifically incorporated into Peruvian law by legislation. For example, ILO *Convention No 169*, first available for ratification in 1989, was not incorporated into Peruvian law until November 1993, just months after the expropriation of Negritos land but nearly two years before the mining easement was established. As such, its provisions would apply to the latter but not the former.

The temporal applicability of the relevant jurisprudence of the Inter-American Court in Peru also merits comment. When the Inter-American Court considers provisions of the 1969 *American Convention* in any given case, its interpretation of the content and meaning of specific rights are available to analyze facts that pre-date the case at hand. This is due to the nature of rights jurisprudence in international as well as domestic public law. Part of a court's judicial function is to interpret the rights statements contained in the constitution or treaty within its jurisdiction. In other words, public law rights jurisprudence interprets and applies existing rights, it does not create new rights. This is precisely what makes it such an important and powerful tool for analyzing the present-day legal significance of past injustice. On this basis, the Negritos legal team invoked the

[82] The Negritos legal claim asserted that Campesino Communities in Peru are analogous to Indigenous Communities for the purposes of the application of international human rights law protections. The details of this argument are described in Part 3.5.a of this paper.
[83] STC No 4587-2004-AA/TC (29 November 2005) at para 44. STC No 0025-2005-PI/TC (25 April 2006) at para 30.
[84] STC No 00007-2007-PI/TC (19 June 2007) at para 36.

Indigenous rights jurisprudence of the Inter-American Court to analyze the earlier facts of the Community's case.

With this framework, the Negritos team advanced the proposition that the above-named sources of international law (*Convention No 169*, the *American Convention* and decisions of the Inter-American Court) should be relied on, together with the constitutional and legislative provisions pertaining to Campesino Communities in Peru, to analyze the facts of the Negritos case. Indeed, there are remarkable parallels between Peru's 1970s and 80s Campesino Community laws, and the Indigenous rights principles developed in international law beginning with ILO *Convention 169* in 1989 and continuing with the Inter-American Indigenous rights jurisprudence beginning in 2001. These parallels allowed the Negritos legal team to create a robust and coherent substantive rights framework by effectively weaving these international sources of Indigenous rights law together with the Campesino rights provisions already present in the Peruvian Constitution and domestic law.

The impact of this approach was further complimented by the operation of another rule, this time emanating from an international source. Article 29(b) of the *American Convention* establishes that its provisions cannot be interpreted to limit the enjoyment and exercise of any right or freedom recognized under the domestic law of the state in question or recognized by an international treaty ratified by that state. In the context of the Negritos case, this principle infuses the Indigenous property rights jurisprudence of the Inter-American Court with the rule from the *Campesino Communities General Law* that Campesino land cannot be alienated without a two-thirds majority vote. Given that this jurisprudence has constitutional status in Peru (as described above), the operation of article 29(b) in the context of Peru's Constitutional framework creates a kind of feedback loop, elevating the property rights-related provisions of the *Campesino Communities General Law* to constitutional status on their own terms. This also accords with the principle that rights recognized in domestic statutes should be considered when interpreting related constitutional rights.

As a result, the two-thirds majority vote rule should retain significant legal weight in Peru, even after Fujimori's 1993 Constitution removed it. This is relevant to the conversion of the Negritos Community's communally titled land into individually titled land (one form of alienation), which occurred both before and after this constitutional amendment. It is also helpful due to the fact that the sources of international law applicable to the Negritos facts have only

recognized a limited Indigenous right to free, prior and informed *consent* to the alienation of communally-held land.[85] As a result, the two-third majority rule arguably has the potentially to create a higher standard than international sources, at least in the context of the potential alienation of communally titled land.

In sum, article 55 of the Peruvian Constitution and article 29(c) of the *American Convention* allow for the integration of the rights protection offered by applicable international human rights treaties and Peruvian domestic law in order to assemble a rights framework that contains the most robust and comprehensive level of protection available. Consequently, the sources of law relevant to the Negritos case are: the *American Convention*, *Convention No 169*, the Peruvian Constitution, Peruvian domestic law, the jurisprudence of the Inter-American Court on Human Rights, and the jurisprudence of the Peruvian Constitutional Court. The Negritos legal team considered these sources holistically to identify the substantive rights available to the Negritos community. In other words, the focus of the rights analysis was not on each relevant article and statements of law, which taken together are numerous. Rather, the Negritos legal team synthesized the relevant articles and their interpretations to identify the substantive rights that these provisions, taken together as a whole, recognize in relation to the facts of the Negritos case. In one sense, the articulation of this framework was ambitious in that it required significant effort to integrate all of the multiple sources of applicable law in a rigorous and coherent way. However, in another sense the approach reflected merely the routine methods of lawyering in that the framework was constructed following well-established rules for identifying applicable sources of law, and it incorporated rights already recognized by domestic and international laws and tribunals.

Applying this holistic method, Community's legal team ultimately concluded that there was strong documentary evidence that the actions of the Peruvian state and Yanacocha Mine had violated the Negritos Community's rights, as protected by Peruvian constitutional and international laws applicable at the time of the acts in question. It identified violations of the following substantive rights: (1) the right to collective property; (2) the right to free, prior and informed

[85] The Inter-American Court has recognized that the state must obtain the free, prior, and informed consent of affected communities before proceeding with certain types of projects such as where the project may endanger the physical or cultural survival of a community: Saramaka, *supra* note 72. See: Forest Peoples Programme, *Indigenous Peoples' Rights and Reduced Emissions from Reduced Deforestation and Forest Degradation: The Case of the Saramaka People v. Suriname* (UK: Forest Peoples Programme, 2009). The *UN Declaration* is not directly applicable to the Negritos facts since it came into being much later: *United Nations Declaration on the Rights of Indigenous Peoples*, UNGAOR, 62 Sess., Annex, Agenda Item 68 UN Doc. A/61/L.67 (2007).

consent prior to a change in the status of the Community's property title from communal to individual; (3) the right to the recognition of the Community and its legal personhood; (4) the right to free, prior and informed consent prior to a change in the Community's legal status or personhood; (5) the right to free, prior and informed consultation prior to the expropriation of the Community's land; (6) the right to equitable indemnification in exchange for the expropriation of the Community's land; (7) the right to benefit equitably from the benefits generated by mining activity on the Community's land; and (8) the State's obligation to take special measures to protect the aforementioned rights. The alleged violation of these rights stems primarily from the State's actions, detailed in the previous section, to expropriate communal land and strip the community of communal title and legal status, concurrently with the establishment of Yanacocha Mine squarely within the boundaries of the Negritos Community's communally titled property.[86]

The articulation of these rights arguments was a watershed moment for Negritos community members because it represented a significant reframing of their concerns into a legal framework that they had been largely unaware of. Community members previously had very limited knowledge of their legal rights as a Campesino Community and even less information about how the state and the company had purported to diminish or eliminate those rights in law. As such, they had expressed their sense of injustice primarily in the language of a general demand for recognition as a Campesino Community and in reference to a raft of specific practical grievances with the Yanacocha and the impact of its operations on daily subsistence life. Community members welcomed and celebrated the proposition that international law and Peruvian constitutional law recognize that their Community has special status, including special property rights, that should command the attention and respect of company and state alike. However, given that the state and company were certainly not listening, the Community's last resort was to approach a court of law that could recognize and enforce its rights claims. Crucially, this was contingent on the identification of an appropriate legal forum and a cause of action. The next part of this paper turns to this issue.

[86] A full and methodical analysis of each state and company impugned action in the Negritos case and the complete argumentation with respect to these alleged violations is beyond the scope of this paper. However, for more discussion on the alleged violations mentioned here, see Part 3.5 of this paper.

3 The Negritos Case: Litigating a dispossession claim (the story of the case itself)

This part begins with the practical question of what would be required to operationalize the statements of international and constitutional Campesino rights described above. The Inter-American Commission for Human Rights can admit a petition only when claimants have complied with a number of procedural requirements, including the "exhaustion of domestic remedies" rule.[87] The Negritos volunteer legal team ultimately determined that a domestic constitutional cause of action called *amparo* was in principle available in Peru to protect the Community's constitutionally enshrined rights, as set out in the previous section. If the *amparo* action were to fail, the Negritos Community would be in a position to present a petition to the Inter-American Commission alleging violations of the *American Convention* on the part of the Peruvian State.

In general, once the Commission deems a petition admissible, it evaluates the claim on the merits. If it finds one or more human rights violations, the Commission can refer the case to the Inter-American Court where claimants can seek a binding judgment against their home state.[88] As such, if the Negritos Community were to have any chance of pursuing justice with either international or domestic public law, it would have to navigate its own domestic regimes by fitting the particularities of its Campesino rights claim into the parameters and logic of Peru's *amparo* domestic cause of action. The following section describes the Negritos *amparo* action and touches on its significance in terms of the global debate on the regulation of the transnational corporation, referred to in this paper's introduction.

3.1 The *Amparo*: A cause of action for dispossession in Peru?

Peru's *Constitutional Procedural Code* establishes three potential causes of action for rights protection. The *habeas corpus* action is linked to the protection of individual freedoms, typically in the realm of criminal law, and the *habeas data* action typically relates to the right to receive information from any public office.[89] The *amparo* action is available to protect all other

[87] *Rules of Procedure of the Inter-American Commission on Human Rights*, art 31(1).
[88] *Ibid*, art 45.
[89] Allan R Brewer-Carías, *Constitutional Protection of Human Rights in Latin America: A Comparative Study of Amparo Proceedings* (Cambridge University Press, 2008) at 159.

constitutional rights not covered by these first two, including presumably Campesino rights. In this sense, it is considered a "residual" cause of action.[90]

The Peruvian *amparo* shares common features with the cause of action by the same name in a number of other countries in the region.[91] It is a civil law procedure that enables a plaintiff to request a court order requiring the defendant to cease any actions or omissions that the court finds responsible for violating the plaintiff's constitutional rights.[92] An *amparo* action can be brought against a private party and/or a state defendant. In the sense that it offers judicial protection of constitutional rights, the *amparo* resembles the procedure known as judicial review in common law countries, with one significant difference being that the Peruvian *amparo* is not available to challenge the constitutionality of statutes or legislation.[93]

An *amparo* claim in Peru must allege violations of the constitutionally protected aspects of the rights claimed.[94] In this regard, the *Code* specifies twenty-four different constitutional rights that the *amparo* protects.[95] Campesino and/or Indigenous rights are not mentioned anywhere in this long list. As such, they necessarily fall under the twenty-fifth and final item listed, namely "other rights that the constitution recognizes."[96] Notably then, while Peru's 1979 and 1993 Constitutions both set out Campesino rights in some detail, the accompanying *Constitutional Procedural Code* does not provide for a cause of action specifically tailored to these rights, nor does it even mention them explicitly.[97] This general absence of Campesino Communities from Peru's procedural code led the Negritos legal team to undertake intensive consultations with Peruvian constitutional experts before determining that the *amparo* cause of action was in principle available to the Negritos Community.

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[90] See Omar Cairo Roldán, "El panorama general del proceso de amparo en el Perú" 3(8) (2008) Palestra Tribunal Constitucional: Revista de doctrina y jurisprudencia 153 at 157.
[91] Peru's *amparo* is similar to that in Brazil, Colombia, the Dominican Republic, Ecuador, Guatemala and Nicaragua: see Brewer-Carías, *supra* note 89 at 139.
[92] Law No 28237, *Constitutional Procedural Code*, art 2.
[93] In Peru, judicial oversight of legislation for constitutional compliance is triggered by a distinct cause of action known as the action of unconstitutionality: at Brewer-Carías, *supra* note 89 at 161, 175.
[94] *Constitutional Procedural Code*, art 5(1).
[95] *Ibid*, art 37.
[96] *Ibid*, art 37(25).
[97] The Constitutional Court has stated that the *amparo* is not the appropriate proceeding for determining whether or not claimant is a rights-holder. Rather, it is available solely for the purpose of alleging a rights violation: STC No 4762-2007-PA/TC (22 September 2008) at para 10-11. As such, it appears that the Peruvian legal system lacks a constitutional process whereby an Indigenous community can bring a claim seeking constitutional rights recognition.

The Negritos Community began the process of assembling its legal claim in 2008 and in 2011 it filed its *amparo* action before a local court of first instance in the city of Cajamarca, Peru. Interestingly, this period of time coincided with an unprecedented series of decisions from Peru's Constitutional Court. Between 2008 and 2012, the Constitutional Court issued eight decisions that addressed the issue of Indigenous peoples' constitutional rights in Peru for the first time.[98] Seven of the eight cases were initiated between 2008 and 2009 and as of the date of publication, there have been no further decisions on Indigenous constitutional issues at the Constitutional Court level since 2012.[99] In only three of these eight decided cases did the Court find in favor of the claimant.[100] Nonetheless, as a group, these cases are important because they pushed the Constitutional Court to recognize, as mentioned earlier, that both ILO *Convention No 169* and the Inter-American Court's jurisprudence on Indigenous peoples rights have constitutional force in Peru.[101]

Notwithstanding their achievements, the substantive rights claims advanced in these cases have limited precedential value for the purposes of the Negritos claim. For the most part, these cases have focused on asserting an Indigenous right to consultation prior to enacting national legislation that impacts Indigenous communities.[102] In this sense these cases can be understood as an attempt to address some of the neo-liberal investment oriented reforms referred to earlier. A smaller subsection of these eight cases focused on rights related to a healthy environment.[103] Only one case advanced a claim to an Indigenous right to communal property. However, the allegations in that case related to trespass and hold little resemblance to those of the Negritos case in that they do not involve allegations of elimination of title and illegal property transfers to a foreign mining company.[104] As a result, to date, there is not a single case on record in Peru's highest court whereby

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[98] STC No 03343-2007-PA/TA (19 February 2009); STC No 06316-2008-PA/TC (11 November 2009 and clarification decision 24 August 2010); STC No 00027-2009-PI/TC (5 January 2010); STC No 0022-2009-PI/TC (9 June 2010); STC No 05427-2009-PC/TC (30 June 2010); STC No 00025-2009-PI/TC (17 March 2011); STC No 00024-2009-PI/TC (26 July 2011); STC No 01126-2011-HC/TC (11 September 2012).

[99] The only Constitutional Court decision after 2012 is STC No 01931-2013-HC (30 July 2015). However, this decision relates to a Native Community's request for clarification of a judgement previously obtained. As such, it is linked with one of the eight cases already mentioned.

[100] STC No 03343, *supra* note 98; STC No 05427, *supra* note 98; STC No 01126, *supra* note 98.

[101] See *supra* note 98 and accompanying text. See specifically STC No 00024, *supra* note 98 at para 12.

[102] STC No 00027, *supra* note 98; STC No 0022, *supra* note 98; STC No 05427, *supra* note 98; STC No 00025, *supra* note 98; STC No 00024, *supra* note 98.

[103] STC No 03343, *supra* note 98; STC No 06316, *supra* note 98. In this second case, the right to property was raised among a long list of environmental rights but it was not considered because the court concluded that there was insufficient evidence that the communities in voluntary isolation in fact existed.

[104] STC No 01126, *supra* note 98.

a Campesino Community has initiated a constitutional rights claim that resembles that of the Negritos Community, claiming violations of communal property title, recognition, consent and compensation for violations.

The total absence of a Campesino or Indigenous rights jurisprudence in Peru until 2009 is striking in light of the fact that the contemporary recognition and protection of Campesino and Native communal property, social, economic and cultural institutions first occurred in the 1979 Constitution. Indeed, even among the Indigenous rights cases decided since 2009, five of the eight to date were brought by civil society groups impugning national legislation on behalf of Indigenous communities generally.[105] In only two cases were the claims on behalf of a named community or group of communities and in only one case (the trespass case) was the community itself the claimant.[106]

Notwithstanding the constitutionalization of Campesino rights since 1979 in Peru, this overview points to three absences. First, Campesino rights are absent from Peru's *Constitutional Procedural Code*. Second, Campesino and Indigenous rights are absent from the Constitutional Court's jurisprudence before 2009. And finally, at least to date, Campesino and Indigenous communities *as claimants* are almost totally absent from the Court's jurisprudence on their rights. Arguably, these absences suggest that there are barriers that prevent these communities from accessing Peruvian courts to advance their interests though constitutional rights protection claims. This highlights the importance of tracking the barriers that arose in the Negritos case as well as the strategies employed over the course of the case's journey in the Peruvian court system.

While the shortage of comparable precedents on point certainly presents a challenge for the Negritos claim, it is not fatal to its pursuit of justice. As lawyers well know, an absence of comparable case law does not necessarily mean that innovative claims are not legitimate, viable and even a necessary part of broader efforts to push the law to respond to social realities. Moreover, in spite of the absences described above, the Peruvian *amparo* has two feature that are particularly promising for a community like Negritos, seeking to advance a legal claim against a foreign resource company for violations of its Campesino rights, including communal property rights.

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[105] STC No 00027, *supra* note 98; STC No 0022, *supra* note 98; STC No 00025, *supra* note 98; STC No 00024, *supra* note 98; STC No 03343, *supra* note 98.

[106] STC No 05427, *supra* note 98; STC No 06316, *supra* note 98; STC No 01126, *supra* note 98. There are a handful of examples where a single Campesino Community has brought a claim to the Constitutional Court for protection of constitutional right *other than* Campesino constitutional rights. See for example: STC No 04611-2007-PA/TC (9 April 2010); STC No 09874-2006-PA/TC (20 December 2007); STC No 03215-2008-PA/TC (19 August 2009).

First, the Peruvian *amparo* permits a plaintiff to bring a constitutional rights action against a public authority, functionary and/or a private person, which includes a corporation.[107] As such, in the Negritos *amparo* action, the Community named Yanacocha as a co-defendant alongside the Peruvian Ministry of Energy and Mining. The Community was able to allege that the actions and omissions of state authorities and the mining company, often in combination, had violated the Community's collective rights.

Second, a successful *amparo* claimant obtains an enforceable remedy from the Peruvian courts. The available remedy aligns with the purpose of the *amparo* as a cause of action, namely to protect constitutional rights.[108] As such, the court will attempt to return the plaintiff to the state in which they were before the violation occurred. To this end, the judge may order a defendant to fulfil its legal obligations or, in the case of a public authority, to perform an administrative act.[109] The court may issue a declaration requiring the defendant(s) to cease rights violating actions, or in the case of omissions, requiring the defendant(s) to undertake some form of positive action in order to respect the claimant's rights.[110] The court has the power to impose fines or other penalties on a defendant who refuses to comply with court orders.[111]

These two features are significant especially when considered together with the incorporation of international human rights law into the Peruvian constitutional framework, as described in the previous section. In summary, the *amparo* creates a domestic cause of action, with an enforceable remedy, against a public or private actor who violates constitutionally protected Campesino rights, which includes certain Indigenous rights recognized in international human rights law. Within this framework, the Negritos Community's *amparo* claim is fundamentally about the pursuit of an enforceable remedy via a domestic cause of action in Peru directly against a foreign resource company for the violation of its constitutional and international human rights as a Campesino Community.

As such, the Negritos claim brings together a constellation of rights, remedies and actors that is of particular interest in the context of the global conversation, referred to in this paper's

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[107] *Constitutional Procedural Code*, art 2. The *amparo* action against individuals is expressly referred to in the constitutions of Argentina, Bolivia, Paraguay and Peru: see Brewer-Carías, *supra* note 89 at 174.
[108] *Constitutional Procedural Code*, art 1.
[109] *Ibid.*
[110] Part 3.5.c provides a detailed description of the specific remedies requested in the Negritos action.
[111] *Constitutional Procedural Code*, art 22. The defendant may be obligated to pay fixed or accumulative fines. The judge may also order the dismissal of a responsible public authority.

introduction, regarding the problem of the "governance gap" in the effective regulation of the human rights impacts of transnational corporations operating in developing countries. The techniques described here are fascinating in light of the widely-observed fact that communities in developing countries often lack a forum and an enforceable cause of action when seeking to mount rights claims, and in particular international human rights claims, against foreign resource companies. While this paper undoubtedly explores the problems that the Negritos Community has faced in the course of its efforts to access this regime in practice, the mere fact of its existence is significant. In light of the governance gap, the Negritos *amparo* action appears to represent a relatively unusual opportunity, at least to date. Human rights lawyers in Peru report that there is now a handful of Indigenous property claims of various kinds against foreign resource companies in progress in the lower courts in Peru. However, the Negritos claim remains the only one of its kind now before Peru's Constitutional Court.[112]

3.2 Dispossession as Knowledge and Power: An equitable approach to the limitation period

The previous section described how the *amparo* offers the Negritos Community an avenue for constitutional rights protection and remedy in that it applies to the substance of its case, framed in terms of violations of its Campesino constitutional rights. However, like most civil causes of action, the *amparo* imposes various procedural rules on claimants. While several of these requirements presented challenges to the Negritos Community, the limitation period rule ultimately became its biggest obstacle. The Peruvian *Constitutional Procedural Code* requires that an *amparo* claim be filed before a court of first instance within sixty days of the time that the claimant's rights were first violated.[113] The rationale for this rule appears to be rooted in the *amparo*'s conception as a simple and prompt remedy for the urgent protection of rights.[114]

The limitation period rule as set out in the *Code* includes two important qualifiers, first the claimant must have knowledge of the violating act, and second, the claimant must have the ability to present the claim to the courts. The rule states that if either of these obstacles exist, the limitation period will be calculated from the moment that the impediment is removed.[115] Thus the limitation

[112] Instituto de Defensa Legal, "Listado de casos patrocinados por el Área de Litigio Constitucional" (July 1, 2016), document on file with the author.
[113] *Constitutional Procedural Code*, art 44.
[114] Brewer-Carías, *supra* note 89 at 165; Cairo Roldán, *supra* note 90 at 179, 230.
[115] *Supra* note 111.

period rule as it appears in the *Code* exists in the form of a strict rule (60 days) accompanied by a kind of equitable exception, internal to the rule itself, that gives the court the discretion to account for the claimant's knowledge and ability in relation to the alleged violation and, arguably, the legal system itself. This general statement of the limitation rule in the *Code* precedes a list of numbered exceptions to the rule, to be considered in the next section of this paper.

The Inter-American Court has indirectly addressed procedural questions in relation to Indigenous peoples' rights claims with an important statement regarding the right to remedy. The Court has stated that Indigenous peoples who have *unwillingly* lost their lands are entitled to a legal remedy and that *the right to a remedy persists* so long as their relationship with the land exists, or where there are impediments to the maintenance of this relationship, so long as those impediments exist.[116] Notably, this statement regarding the right to a remedy is qualified with the requirement that the loss of land must have occurred "unwillingly", in other words, without their consent.

These statements from the Inter-American Court can be read together with the statement of the limitation period rule in Peru's *Constitutional Code* to identify at least some of the general principles that might apply to the question of the admissibility of the Negritos Community's claim. First, the Negritos Community's right to a legal remedy persists so long as the loss of its legal interests occurred unwillingly, meaning without its consent; and second, the limitation period for seeking a legal remedy will be triggered at the point in time when the Community has knowledge of the violating acts *and* the ability to bring its claim forward. In this light, consent, knowledge and ability all emerge as central concepts in the admissibility and right to remedy analysis. At the same time, Parts 2.3 and 3.5.b of this paper both describe how the concept of consent, which is of course inextricably linked with knowledge, is also at the core of the alleged rights violations in the Negritos case. Taking all this together, an interesting situation comes into sharper focus, with potential implications for the litigation of other Indigenous dispossession claims. In the Negritos *amparo* claim, the concepts of knowledge and ability/power are engaged in the analysis of procedural questions related to admissibility, as well as in the analysis of the Community's substantive right to consultation and consent.

[116] *Sawhoyamaxa*, *supra* note 71, at paras 128, 131-132 [emphasis added].

Arguably, at both the procedural and substantive phases, these concepts must be considered in context.[117] Given that the *amparo* is in place to protect constitutional rights, including Campesino rights, it is critical that its procedural requirements, including the limitation period requirement, be interpreted in context. This refers to the lived reality of those rights and by extension, rights violations. In the Negritos case, searching for the lived reality of rights violations requires a brief review of the factual story, told in Part 2 of this paper, of the social and legal processes that led to the elimination of the Community's Campesino property title and legal status, as well as the processes whereby the Community came to assert rights and claim rights violations.

The Negritos legal claim arises from contemporary processes of dispossession and lack of recognition that are rooted in a history of colonial relations and the subsequent inadequacies of Agrarian Reform. Part 2 of this paper described how in the early 1990s, newer legal and economic forms of globalization mapped onto a preexisting context of disadvantage and social exclusion that was only partially addressed by Agrarian Reform. As a result, the processes of dispossession in the Negritos case unfolded in the context of fundamentally unequal power relationships, between the Campesino Community on one side and the state and the foreign company on the other. Indeed, the interests and actions of the state and the corporation (Yanacocha) were at times so highly coordinated that the exercise of public and private power seemed to converge. The Peruvian state and the company often appeared to operate in a complementary fashion toward achieving a common objective. This occurred in part through the exchange of roles, responsibility, resources and information and through the mutual facilitation of the social and legal processes necessary to ostensibly eliminate the Negritos Community's legal interests.[118]

When the state and company's interests prevailed, this occurred formally through processes that engaged the legal constructs of property, contract and consent. For example, the name of the titleholder in the state registry changed from that of the Community to the mining corporation, purportedly on the basis of an expropriation "agreement" between Yanacocha and the Community. Other pivotal moments involved the elimination of the Community's legal personhood and its communal property title in favor of the opportunity to obtain individual titles. Legal title to many individually titled properties was also transferred to the Mine. Critically, these changes to the

[117] See for example: Jeremy Webber, "The Meanings of Consent" in Jeremy Webber and Colin Macleod, eds, *Between Consenting Peoples: Political Community and the Meaning of Consent* (Vancouver: UBC Press, 2010) 3-41.
[118] For a detailed description of the convergence of private and public power in the Negritos case and the links with the exercise of coercive force, see: Kamphuis, "Foreign mining", *supra* note 19 at 239-242.

Community's status and property interests in law all occurred with the signatures of some (but not all) Community members, procured at different intervals between 1991 and 1995, and just as Yanacocha began to produce its first bars of gold. Part 2 of this paper described how in 1995 and 1996 the Community publicly denounced, including in letters to state officials, the legitimacy of these legal processes along with the allegedly corrupt leaders that facilitated them. However, and of particular importance for the limitation period discussion, the Community did not respond to these events with an immediate and coordinated turn to the law, much less with a formulated constitutional claim. Indeed, the Negrito *amparo* action was only filed much later, in 2011 with the support of a transnational team of lawyers and law students.

On a socio-historical level, the Negritos Community's delayed turn to the law might be understood in light of the long history of indifference (or even animosity) on the part of Peru's Campesino Communities toward laws emanating from the Peruvian state.[119] This may explain in part the many absences, described previously, of Campesino and Indigenous communities from Peruvian constitutional jurisprudence. However, turning to the specific facts at issue in the Negritos case, the *amparo* action alleges that unequal power relations enabled illegal practices such as fraud, corruption, extortion and misrepresentation, which in turn reinforced or deepened these power relations. Although the state and the company purported to procure signatures from Community members, there are many unresolved questions surrounding the validity of these signatures. Community members allege that signatures were falsified, extorted or otherwise uninformed. Moreover, even the number of (contested) signatures was insufficient to comply with the constitutional requirement in Peruvian law that the agreement of two-thirds of the Community is required before communal land can be alienated.

Nonetheless, the signatures of some Community members on the documents that purported to transfer title and eliminate rights in the Negritos case raise the obvious possibility that an outside observer may presume that the signatories had knowledge of the contents of the documents signed, understanding of their meaning, and the capacity to act, thereby triggering the sixty-day limitation

[119] For example, Campesino Communities in Peru have long standing communal institutions of justice called "*Rondas*" that applied communal laws. The *Rondas* historically operated with disregard for state-based law in part because it was either unknown, inappropriate or unenforced: see Antonio Peña Jumpa, *Justicia comunal en los Andes del Perú: El caso de Calahuyo* (Lima: Pontificia Universidad Católica del Perú, Fondo Editorial, 1998). In 2003, legislation was enacted to protect the *Rondas* as Campesino institutions and give them special status as indigenous rights holders: Alejandro Laos Fernández et al, *Rondando por Nuestra Ley* (Lima: Asociación Servicios Educativos Rurales, Red Interamericana para la Democracia, 2003).

period. This reveals that the concept of knowledge and capacity employed in the limitation period analysis is a crucial matter and requires critical interrogation. Beyond the allegations of dubious dealings described above, the Negritos *amparo* action alleges that, even if these signatures are taken at face value, the facts reveal that Community members did not know what they were signing due to lack of adequate information and inappropriate procedures. At this juncture, an important argument emerges with respect to how the court should approach the limitation period. The assertion here is that where the substantive rights issues in *amparo* proceedings raise questions of consent, the court cannot avoid a careful consideration of the plaintiff's knowledge and capacity for the purposes of the limitation period analysis. Moreover, in order to properly interpret the legal standards of knowledge applicable to an Indigenous community, the courts must consult with the case law on point.

As stated previously, the Negritos *amparo* action asserts that the Community has a right to free, prior and informed consent prior to the alienation of its communal property, and in the case of expropriation, a right to free, prior and informed consultation.[120] The Inter-American Commission has stated that consent requires, at a minimum, that all members of the Community be fully and precisely *informed* of the nature and consequences of the proposed project and of the decision-making process; and that they be afforded the opportunity to effectively participate individually and collectively.[121] For its part, Peru's Constitutional Court has stated that access to "true information" is not only a fundamental human right, but also an essential condition for free choice.[122] Drawing on Inter-American jurisprudence, the Constitutional Court has recognized that the appropriate methodology for consultation is case specific, considering the needs and circumstances of each community. However, at a basic level, the information required in relation to a proposed resource project would include information about the company proposing the project, the kind of resource, the exploitation area and the potential environmental and health impact.[123] Moreover, communities should have adequate time to digest this information during the

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[120] This assertion is grounded in the following legal instruments and jurisprudence: *Political Constitution of Peru, 1979*, art 163; *Campesino Communities General Law*, art 7, *supra* note 28; *American Convention*, art 2(2), 2(14), 21; *Convention No 169*, arts 6(1), 6(2), 17(2); *Awas Tingni*, *supra* note 71; *Yake Axa*, *supra* note 72; *Saramaka*, *supra* note 72. It is supported by the following legal instruments: *Political Constitution of Peru, 1979*, art 161; *Political Constitution of Peru, 1993*, art 89.

[121] *Maya Communities*, *supra* note 72 at para 142.

[122] STC No 1776-200-AA/TC (26 January 2007) at paras 39-40.

[123] STC No 0022, *supra* note 98 at paras 26-8, 32, 34, 35, 51; STC No 03343, *supra* note 98 at para 35. Also see *Saramaka*, *supra* note 72 at para 134.

consultation process and the process itself should aim to achieve an agreement that protects the legitimate interests of the community, including the preservation of its economic and cultural activities and the environmental integrity of its territory.[124]

The work of legal anthropologists in the Peruvian context offers critical insights that help illuminate the complexity of the concepts of adequate information and appropriate procedures as described in the case law above. They have accumulated a rich body of research that reveals that consultation and consent processes with Indigenous peoples will only be effective if they are designed to account for information and knowledge differences and power disparities.[125] Anthropological work with Campesino Communities in Peru suggests that these inequities are exacerbated by deeper epistemological differences between the parties regarding the meaning of community, property, livelihood, development, and the environment.[126] A number of studies have observed that Communities have complex, mixed and multilayered conceptions of property that blend communal and familiar rights into different and variable arrangements that do not coincide with state-based legislation or legal concepts.[127] One researcher who did ethnographic work with Negritos Community members reports that when Yanacocha arrived in the early 1990s most of the adults in the Community were illiterate and did not understand exactly what a "mine" was.[128]

As stated, the Negritos *amparo* action alleges that for most Negritos Community members the legal processes that lead to their dispossession in law (on the books) were initially either entirely unknown or, if known, their significance was not understood. Moreover, there is continuity between the formal legal processes of dispossession and the material outcomes of the mining

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[124] STC No 0022, *supra* note 98 at paras 30, 33, 39.

[125] See for example: David Szablowski, "Operationalizing Free, Prior and Informed Consent in the Extractive Industry Sector? Examining the Challenges of a Negotiated Model of Justice" (2010) 30:1-2 Canadian Journal of Development Studies 111; Riccarda Flemmer & Almut Schilling-Vacaflor, "Unfulfilled promises of the consultation approach: the limits to effective indigenous participation in Bolivia's and Peru's extractive industries" (2015) Third World Quarterly.

[126] One researcher working with Campesino Communities in Cajamarca has observed the impact of divergent epistemologies on conflicts related to the management of water resources impacted by Yanacocha Mine: Li, "Contested Equivalences", *supra* note 34.

[127] See Alejandro Diez, "Interculturalidad y Comunidades: Propiedad Colectiva y Propiedad Individual" (2003) 36 Debate Agrario 71; Laureano del Castillo, "Titulación de las Comunidades Campesinas: CEPES, ALLPA y la Problemática Comunal" (2003) 36 Debate Agrario 89; Cletus Gregor Barié, *Pueblos Indígenas y derechos constitucionales en América Latina: un panorama,* 2d ed (La Paz, Bolivia: Génesis, 2003) at 492-3; R Plant & S Havlkof, *Land Titling and Indigenous Peoples in Latin America* (Inter-American Development Bank, Washington DC, 2001) at 15.

[128] Richard André O'Diana Rocca, *Las limitaciones del sistema de dominio minero vigente en el Perú y las consecuencias negativas que genera a las comunidades campesinas: un estudio a partir del caso de la Comunidad Campesina San Adres de Negritos de Cajamarca*, Thesis for the degree of Bachelor of Law, Faculty of Law, Pontifical Catholic University of Peru (Lima, 2014) at 120, 144.

project that these processes purport to legalize. The adverse material impact of the project on the Negritos Community embodies the fundamentally different understandings and worldviews (at best), and fraud, extortion and misrepresentation (at worst), that characterized the initial legal processes that presumed to eliminate the Community's property title and status with its "consent".

The Negritos Community's dispossession was consolidated by the subsequent deepening of its relative marginalization as Yanacocha's operations picked up speed and it became grossly unable to equitably benefit from the mining project. This occurred as a result of a two-fold process. First, the Community was substantively excluded from the model of mining "development" initiated by the changes to its property title. Community members did not obtain meaningful employment and otherwise meaningfully share in Yanacocha's wealth production. Second, Yanacocha's operations diminished Community members' capacity to engage in their land-based livelihoods. They allege that their natural sources of water have been contaminated, that their traditional pathways for moving animals have been destroyed and that their homes have suffered the consequences of blasting. In the Negritos case the subsequent wealth disparities are stark: Part 2 referred to the fact that after more than twenty years of Yanacocha's operations, members of the Negritos Community remain among the poorest inhabitants of one of the poorest regions of Peru while Yanacocha's wealth has consistently topped the charts globally. Its success is arguably due in part to the way that it originally leveraged its title to Negritos' land to obtain start-up financing loans in the amount of US$ 85,000,000.

This account of the Negritos Community's knowledge and ability for the purposes of the limitation period analysis must also account for its processes of resistance and its ultimate turn to law. Gradually Community members became aware of the stark material consequences of their dispossession, the grossly unequal and disadvantageous conditions in their midst, and the adverse impact of the mine's operations on their livelihood. As mentioned earlier, explicit or open conflict between Yanacocha, the Negritos Community and other neighboring communities emerged toward the end of the 1990s, once the mine was well into the operations phase and the reality of its potential and actual environmental, social and economic consequences were felt. Part 2 of this paper described how these initial conflicts occurred primarily in the form of social protests as opposed to claims brought to the courts.

As the Negritos Community came together in the years that followed to seek solutions for a variety of problems, it encountered the consistent message from state and company officials that

it lacked the status to make demands as a Community, in other words, that it did not exist. All of this served as a catalyst for renewed Community mobilization and search for justice. However, it took a period of years for the Community to explore its options. The previous section described how following several episodes of protest in the region, in 2005 the Negritos Community began to intensify its pursuit of potential avenues of recourse, directly appealing to political actors, administrative decision makers and the corporation itself.

When these avenues consistently failed, the Community ultimately turned to the law, searching for legal mechanisms that might govern the public and private actions and inactions in question. In the process, it faced serious hurdles as it sought to collect hundreds of pages of documentation from state authorities in order to understand what had happened to its legal interests. Finally, it turned to the only legal counsel willing to assist, a team of volunteer lawyers, law students and local NGO workers, who in turn received support from a small group of national and international allies. This team was ultimately able to file the Community's claim in local courts in early 2011. This brief recap of the Community's pursuit of justice signals that a final condition of inequity has reinforced its dispossession, namely its lack of access to legal counsel and the resources necessary to efficiently bring its claims to local courts.

In sum, the Negritos Community's dispossession fundamentally involved the non-consensual loss of land and status, resulting in the enrichment of Yanacocha, growing economic disparity and the deprivation of the Community. The processes that purported to imbue dispossession with a veneer of legality and consent were underpinned by vast inequalities in economic and political power. The impossibility of meaningful consent in this context is a consequence of at least four conditions of inequity or what I refer to as the "dynamics of dispossession": (1) lack of meaningful access to information about material fact and law, (2) inaccessible, inappropriate, inefficient or unfair administrative procedures, (3) epistemological differences with respect to the meaning of legal categories and events, and (4) lack of access to appropriate legal support.

This account emphasizes the temporal aspect of these legal and social process in order to explain why the Negritos Community's turn to the courts took place gradually, over a period of years, and far beyond the 60-day limitation period required by statute. The dynamics of dispossession help explain why the Negritos Community did not have the knowledge or ability to mount a legal challenge to the alleged rights violations, which began between 1991 and 1995, until

it finally presented its case to local courts in 2011, a decade and a half later. As I have noted, this examination of the specific features of knowledge, ability and consent in the Negritos case raises important questions regarding how the courts should interpret and apply limitations period rules in the context of Indigenous rights claims like that of the Negritos Community.

Importantly, the above account signals that the inequities that enable the legal processes of dispossession can be the same factors that prevent the community from promptly understanding the full significance of these processes and bringing legal action. For example, not only does a lack of access to information and fair process make meaningful consent impossible, it can also prevent a timely response from the Community. The Negritos story reveals that, due to the dynamics of the unequal power relationships that inform the processes of dispossession, the legal underpinning of the impugned act or omission is often consolidated without the full knowledge or participation of the Community and according to the terms of a system of law that the Community is not familiar with. As a result, it may take a period of years or even decades for a Community to become aware of the loss of its rights in the eyes of state-based law, as well as the possibility, and potentially the necessity, of seeking redress through the state's legal system.

The Negritos Community's experience in this regard supports a more general argument, namely, that where an Indigenous community's constitutional claim alleges the nonconsensual loss of property and rights, for the purposes of the limitation period rule the claimant's knowledge and ability must be considered in the full context of each case and on the basis of relevant principles in the applicable Indigenous rights jurisprudence. Strict adherence to the sixty-day limitation period requirement on the basis of formal signatures would put the law dramatically out of touch with the ways in which Indigenous property rights are often lived and lost on the ground. To demand by way of a generic procedural requirement that the Negritos Community, and communities like it, should mobilize within sixty days of the impugned act or omission would be to perpetuate the very dynamics of dispossession that form the basis of the claim. Especially where questions of dispossession and consent are at issue, to assume at the admissibility stage that the Community's knowledge and ability was sufficient to launch a legal challenge within sixty days of the alleged violations would amount to a premature and formalistic determination of the substantive issues. Indeed, issues such as what the Community *knew* are central to the allegations of rights violations. Thus, a strict application of the limitation period criterion in the context of Negritos case, and cases

of a similar nature, would risk creating a *de facto* bar in Peru to Indigenous communities seeking constitutional redress for constitutional wrongs that fall outside of a 60-day period.

3.3 Dispossession as Ongoing Actions and Omissions: A doctrinal approach to the limitation period

The previous section set out the *amparo*'s limitation period rule as stated in the *Constitutional Procedural Code*. It observed that the 60-day limitation rule contains a qualification, internal to the rule itself, that references a claimants' knowledge and capacity. This grounded the argument that the rights violations alleged in the Negritos case, rooted in the dynamics of dispossession, are a direct result of inequities related to knowledge and capacity, thereby explaining the fact that the Community did not turn to the law for several years. While this equitable argument makes an important contribution to a critical analysis of the limitation period, it also faces important evidentiary obstacles. The substantive arguments in the Negritos action rely on the available documentary record to argue that the Community's loss of title and status was non-consensual. However, further evidence would be required to prove that the Community lacked sufficient knowledge and capacity to bring its claim in the years between the initial loss of its rights (1992-1995) and the moment when it filed its claim (2011). This would likely be difficult to prove in light of the strict evidentiary requirements of the *amparo* action. The *amparo* procedures do not typically allow forms of evidence that would need to be tested and weighed by the court, such as witness testimony in the form of affidavit evidence.[129]

In this context, the Negritos legal team sought an alternative approach to overcoming the limitation period hurdle, one that would not raise complex evidentiary questions and equitable arguments. It turned to a list of specified exceptions that appear in the *Constitutional Procedural Code* immediately following the statement of the rule. In this regard, articles 44(3) and 44(5) were particularly promising. These two provisions permit exceptions to the *amparo*'s sixty-day limitation period rule in circumstances where the alleged violations are generated by omissions and/or ongoing actions. Relying on these provisions, the Negritos *amparo* asserted that the courts should admit the claim and exempt the Community from the application of the 60-day limitation

[129] *Constitutional Procedural Code*, art 9. This evidentiary rule is a result of the *amparo*'s intended status as a rapid constitutional procedure designated for urgent rights issues. However, judges have the discretion to accept other forms of evidence if it will not compromise the expediency of the process: Cairo Roldán, *supra* note 92 at 161.

period requirement on the basis that the alleged rights violations are the result of continuous actions or omissions. Continuous actions are actions that have been occurring, that continue to occur, and that will certainly continue to occur.[130] Another way to identify continuous actions is by their effects. Decisions of Peru's Constitutional Court state that the effects of a continuous action are periodically produced and reproduced, leaving the rights holder constantly unable to exercise the right.[131]

On the basis of these provisions and their interpretation, the Community argued that the rights violations it attributes to the mining company and the state did not end with the initial changes in law to the Community's status and its property title, such as for example through the expropriation of Pampa Larga. Rather, the Community asserted that the violations of the rights in question, the right to property, the right to recognition, the right to consultation and consent, and the right to equitable compensation and an equitable share of the benefits of resource development, should all be characterized as the product of continuous actions and omissions. However, given the absence already noted of decided constitutional cases in Peru with facts comparable to those of the Negritos case, it is not surprising that there is a similar absence of guidance in the case law with regard to how limitation period exceptions should be interpreted in the context of Campesino constitutional rights claims. As a result, in order to support the argument that the rights violations in the Negritos claim are continuous, the Community's legal team sought analogies with continuous actions and omission in other contexts already recognized by Peru's Constitutional Court.

The Negritos submissions developed two main analogies with established case law interpreting the meaning of continuous actions and omissions. The first related to the allegations in the Negritos claim that the state and company had violated the Community's right to equitable compensation for the loss of its property interest and the right to benefit equitably from mining activity on its land. The *amparo* claim argued that these violations were generated by the company's continual failure to transfer compensation and benefits and by the state's failure to ensure that these rights are respected. In developing this argument, the Negritos action put forward the view that the deprivation of one's right to a constitutionally protected economic entitlement is an ongoing violation of that right. To support this assertion, it drew upon the fact that Peru's Constitutional Court had upheld this principle in a series of pension benefits cases, where the court

[130] Samuel Abad Yupanqui, *El Proceso Constitucional de Amparo* (Gaceta Jurídica: Lima, 2008) at 127.
[131] STC No 3283-2003-AA/TC (15 June 2004) at para 4.

found that the failure to provide these benefits constituted an ongoing violation of the claimants' rights.[132]

The second analogy drew on the allegations in the Negritos case that any purported consent or consultation was invalid because the Community lacked the information necessary to make a free and informed decision with regard to changes made to its status and property title. The Community's *amparo* action argued that this deficiency constituted a failure (omission) on the part of the state and the company to provide appropriate information. In making this argument, it drew on Peruvian jurisprudence that accepts that a lack of access to adequate information is an ongoing omission that exempts a claimant from the limitation period requirement.[133]

Moving beyond these doctrinal analogies, the Negritos *amparo* claim extended the concept of ongoing violations and omissions to the case's core rights issues of Campesino communal property title and status. Referring to Yanacocha's alleged illegal acquisitions of the Community's property for its mining operations, the Negritos claim asserted that the physical act of Yanacocha's occupation is an ongoing action, thereby constituting a continuing violation of the Community's communal property rights. With regard to the state's purported elimination of the Negritos Community's legal status, the *amparo* claim asserted that the failure of the state to fulfill its duty to recognize the Negritos Campesino Community as such is an ongoing omission. On the facts of the Negritos case, this omission has become an active violation of the Community's right to recognition due to the state's consistent rejection of the Community's requests for recognition.[134] Moreover, this sustained refusal to recognize the Community has made it vulnerable to new and ongoing impacts on its rights. Part 2 of this paper described how Yanacocha and other third parties have taken advantage of the Community's uncertain legal status. It recounted how in one instance, when non-community members invaded tracts of land which were formally communally titled, the Community's efforts to confront these invaders and obtain protection from the police were frustrated in part by the state's continued denial of the Community's very existence.

The Negritos legal team ultimately made a strategic decision to invoke the "ongoing actions" and "omissions" exceptions to the limitation period, rather than focusing its limitations

[132] STC No 2574-2005-AA/TC (27 May 2005) at para 1. This case relates to article 11 of the 1993 Constitution which guarantees access to pension and health services.
[133] STC No 00014-2007-PI/TC (4 May 2009) at para 16. This case relates to the fundamental right to information, established in article 5 of the 1993 Constitution.
[134] See Part 2.2 of this paper.

argument on the conditions of knowledge and capacity referred to within the rule itself. In doing so, it appealed to doctrine, as described in this section, rather than the equitable arguments put forward in the previous section. There were two reasons for this. First, the team calculated that the courts would be more likely to accept arguments based on analogies with established doctrine than arguments rooted in a social analysis of the inequities that inform the dynamics of dispossession. Second, even if successful in the Negritos case, going forward, arguments regarding any given community's knowledge and ability at the time of dispossession would need to be proven on a case by case basis, thereby maintaining procedural and evidentiary obstacles for other communities in a similar situation. In contrast, if the Negritos Community were successful with a doctrinal argument that constructs relations of dispossession in terms of ongoing actions and omissions, this could potentially be useful to communities facing similar hurdles at the limitation period stage.

The viability of any doctrinal argument depends considerably on the willingness of the Court to accept the proposed construction of law. At the admissibility stage of the Negritos case, this refers to the proposed construction of the alleged rights violations as ongoing actions and omissions. Arguably, the distinction between rights violating actions that have ceased, are continuous or qualify as omissions, is not self-evident, but rather can only be resolved by making analytical choices. As with any application of law to fact, and particularly when adjudicating rights claims, there is often more than one reasonable construction and the ultimate path chosen will be informed by the courts' underlying political and social values.[135]

Ultimately then, the outcome in the Negritos case would depend on the importance, in the eyes of Peruvian courts, of making the *amparo* cause of action accessible to Communities whose dispossession has occurred over time and under conditions of gross inequality. Absent such a willingness, the limitation period requirement stands to perpetuate the factors of inequity and risks creating an absolute bar to any Campesino justice claim that is not brought within sixty days of the first occurrence of rights violating acts. As argued above, the very circumstances that inform rights violations in contexts like the Negritos case often serve to prevent Communities from presenting their claims to the courts within such a narrow timeframe. With all of this in the background, the

[135] See for example Allan Hutchinson, "Looking for the Good Judge: Merit and Ideology" in Nadia Verrelli, ed, *The Democratic Dilemma: Reforming Canada's Supreme Court* (McGill-Queen's University Press, 2013) 99.

next section will critically examine the Peruvian courts' responses to the Negritos *amparo* to date, with particular attention to their treatment of the limitation period issue.

3.4. San Andres de Negritos Campesino Community v Yanacocha Mine

This section is divided into three parts. The first recounts the Negritos Community's experience in the courtroom to date litigating its constitutional claim against Yanacocha Mine and the Peruvian State. The second offers a critical analysis of this experience. The third describes some of the challenges that the Community has faced outside of the courtroom.

a. The Litigation

The Negritos legal team filed the Community's *amparo* claim in civil court in the regional capital city of Cajamarca, Peru in March 2011. In its response submissions, Yanacocha made four objections to the admissibility of the claim. It argued that the Community did not have the legal capacity to present an *amparo* claim because it did not have legal personhood, meaning it did not exist in law. Adding to this, the company argued that the Community could not claim property rights violations because it was not a property titleholder. It further asserted that the Community had failed to exhaust administrative remedies and that the claim was outside the limitation period.[136]

Yanacocha and the Community's lawyers made a series of written and oral submissions with regard to these objections over the course of nearly six months before the proceedings ran into procedural delays. Three distinct procedural disputes emerged and each was only resolved on appeal, leading to considerable delays as the case was transferred back and forth between two levels of court each time. Confusion over the proper service of documents and the timeliness of the Ministry of Energy and Mining's written submissions caused the first procedural delay. This issue arose in part because the Ministry's response to the Negritos claim was filed outside of the timeframe required in the Procedural Code. The Ministry had also failed to specify an address in the regional capital city of Cajamarca for the service of documents, instead insisting on service at its headquarters in the national capital city of Lima. The service issue was significant for the

[136] On matters of substance, Yanacocha took the position that the Community had freely consented its own elimination and to the transfers of its property to the company. It also argued that, in any case, the Negritos Community could not avail itself of rights regimes applicable to Campesino and Indigenous Communities because it does not fulfill the definition in Peruvian law of a Campesino Community.

Community given that its *pro bono* lawyer at the time was located in the city of Cajamarca and without a budget for executing service in the nation's capital, hundreds of kilometers away.

In the final weeks of 2012, an appeal court resolved the matter, ordering the Ministry to accept service at its regional office.[137] Although the Ministry remains a named defendant and continues to be served with documents in the proceedings, it has declined to make a single submission to the courts on any of the substantive or admissibility issues raised by the other two parties. In light of all this, it seems fair to describe the Ministry's role in the proceedings as one of indifference, at the very least, and less charitably, perhaps even incompetence. Without a doubt, the Ministry's errors added to the delays in the process and created further challenges for the Community.

The second procedural issue arose when Yanacocha challenged a resolution of the court of first instance allowing the Community to make audio recordings of oral submissions at hearings. Yanacocha argued that such recordings would violate its lawyers' rights to free expression and to preserve their "image and good reputations". The finagling over this issue continued (in parallel to other issues) for nearly two years until an appeal court sided with the Community in 2013 and awarded it the right to make the recordings requested.[138] In spite of this win, on the day of the hearing, the presiding judge nonetheless failed to ensure that the courtroom was furnished with the necessary audio video equipment. Community members were forced to record what they could with their cellular phones.

The third issue arose in 2013 when a Canadian NGO, the Justice and Corporate Accountability Project (JCAP), sought permission to participate in the Negritos *amparo* proceedings as an intervenor in order to make written submissions to the court on points of law (known in Peru as an *amicus curiae*). Yanacocha argued that the court should refuse to grant JCAP *amicus* status. The company asserted that JCAP was not objective or impartial and that, in any case, in the company's view the subject matter of the litigation did not raise any public interest issues that would merit intervener participation. This issue was temporarily addressed on appeal, when the court decided that JCAP's *amicus* request would be determined together with the issue of the admissibility of the *amparo* action itself. This resolution of the issue meant that JCAP's

[137] Specialized Civil Appeal Court of Cajamarca, Exp No 00315-2011-1-0601-JR-CI-01, Resolution No 2 (14 December 2012).
[138] Specialized Civil Appeal Court of Cajamarca, Exp No 00315-2011-1-0601-JR-CI-01, Resolution No 1 (19 March 2013).

amicus, which included substantial analysis of admissibility-related issues, was not part of the record before the court when it determined the admissibility of the *amparo*.

These three procedural disputes created additional obstacles and distractions from the threshold issue of the Negritos *amparo*'s admissibility in light of Yanacocha's objections. In June 2014, more than three years after the *amparo* claim was first filed, the local court of first instance finally issued a decision, declaring the Community's claim inadmissible. It reached this conclusion by finding in favor of two of Yanacocha's four objections.[139] It agreed with Yanacocha that the Community did not have the legal status to present its claim (it did not exist in law) and that its claim was beyond the limitation period. In coming to this latter conclusion, the court relied on the principle that, absent evidence to the contrary, there is a presumption that both natural and legal persons have *knowledge* of the records contained in the Public Registry.[140] This refers to the official repository of documentation where the changes to the Negritos Community's property title and legal status were registered. In its judgement, the lower court failed to address the Community's doctrinal arguments that the codified exception to the limitation period should apply on the basis that the alleged violations are ongoing actions and omissions.

The Negritos Community appealed this lower court decision to Cajamarca's regional appeal court for civil matters and the appeal court issued its decision in May 2015.[141] It rejected three of Yanacocha's four objections, overturning the lower court's conclusion that the Community did not have the legal status to present its claim. However, it agreed with the lower court's conclusion that the claim was outside of the limitation period. On this basis, the appeal court upheld the lower court decision to rule the Negritos *amparo* claim inadmissible. At the same time, it denied JCAP's request to act as an *amicus curiae* in the proceedings. The Community sought and received leave to challenge the appeal court's decision before Peru's Constitutional Court. The Community continues to wait for a hearing date, knowing that delays are notorious due to a heavy backlog of cases at the highest Court. The legal questions that frame the Negritos Community's appeal to the Constitutional Court will be addressed in the final section of this paper.

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[139] First Specialized Civil Court of Cajamarca, Exp No 00315-2011-1-0601-JR-CI-01, Resolution No 25 (16 June 2014).
[140] Legislative Decree No 295, *Civil Code* (2015), art 2012 [emphasis added].
[141] Superior Court of Justice of Cajamarca, Permanent Civil Appeal Court, Exp 00315-2011-0-0601-JR-CI-01, Resolution No 33 (5 May 2014).

a. Critical Analysis of the Appeal Court Decision

There are at least two important observations to make of the Negritos Community's experience in the courtroom to date litigating against Yanacocha and the Peruvian state. The first, and most obvious, relates to process, and the second, and more complex, addresses the appeal court's admissibility analysis of the Negritos claim. A final point of analysis focuses on the appeal court's treatment of JCAP's *amicus curiae* request.

Turning to issues of process, the proceedings notably suffered from significant procedural delays. This is evident from the fact that it took more than four years for the Community to receive an admissibility decision from Cajamarca's appeal court and the Community continues to wait for a hearing before the Constitutional Court. Much of this delay was caused by procedural issues triggered by either the company or the Ministry of Energy and Mining. This ranged from the Ministry's failure to properly participate in the proceedings to Yanacocha's objections to increased transparency and public participation in connection to the Community's attempt to film the proceedings and JCAP's request to submit an *amicus*. Undoubtedly, a four-year court battle on the threshold issue of admissibility took a toll on the Negritos Community, especially where it spent much of that time fighting to make the proceedings more transparent and open to public participation.

A second observation arises from a concerning set of developments at the core of the court's treatment of the limitation period issue. Yanacocha has challenged the claim's admissibility by adopting a strategy of conflating the substantive legal issues in the case with admissibility questions. Critical analysis of this strategy reveals that it is predicated on a formalistic concept of consent and an abstract universalizing construction of the legal subject. These two approaches to consent and subjectivity have infiltrated the court's admissibility analysis in the form of formalist assumptions that have the effect of decontextualizing the Community's dispossession claim, rending its experience invisible or irrelevant, and ultimately excluding its justice claims from the courts. This section will examine how this has occurred.

As stated, in its objections to the Negritos claim's admissibility, Yanacocha took the position that the Community does not exist and does not have a property right to defend. Both assertions rely on a common sense formal notion of consent to the legal events that lead to the elimination of the community's legal status and property title. They ask the court to presume that the signature of some community members on the relevant documents is a full and sufficient

answer to the Negritos claim. This ignores the fact that the question of free and informed consent to these legal events is precisely at the heart of the case. It is problematic to implicitly presume informed consent at a preliminary stage when the alleged absence of informed consent is central to the substantive issues in the case.

Although the appeal court's admissibility decision rejected these two objections, it accepted another of Yanacocha's objections, namely that the Community's claim is barred because it is outside of the limitation period. Crucially, the limitation period objection depends on the same problematic formalist notion of consent and knowledge. The reasoning of the appeal court on this point is revealing. The court began its discussion of the limitation period objection by emphasizing that constitutional rights are not absolute and must be balanced with other objectives, presumably referring to the objective of legal certainty generally associated with limitation period rules.[142] It rejected the theory of continuous rights violations and omissions, instead taking the position that any alleged rights violations would have concluded with the finalization of the legal transactions in question, referring to the transfer of property interests from the Community to the company. The court seems to have relied on "common sense" reasoning to support this conclusion, as it did not point to any supporting case law, nor did it directly address the Community's submissions on point.

In reaching these conclusions, the appeal court explicitly assumed that these legal processes occurred with the consent of the Community. The court stated that as soon as these property transfers occurred, the Community is presumed to have had the *ability* to act in defense of its own rights.[143] It reasoned that the Community cannot argue that it did not have the technical or economic *capacity* to do so given that it had previously registered itself as a Campesino Community, therefore interacting with the Public Registry. The court concluded that any argument that the Community leaders who signed the property transfer documents were corrupt is unsupported and merely serves as a convenient reason for bringing a claim after the expiry of the limitation period. The court further observed that it would be impossible for the Community not to know that there was a mine operating in its midst on the basis of these property transfers.

The appeal court's reasoning on the limitation period issue made dramatic presumptions about the Negritos Community's knowledge and consent, without acknowledging that these issues

[142] *Ibid* at para 8.
[143] *Ibid* at paras 10-11 [emphasis added].

are directly related to the Community's substantive arguments on the merits of the case. In doing so, the court avoided the need to consider documentation suggesting misrepresentation, corruption, fraud and extortion. It failed to consider alternative approaches to the limitation period and Peruvian and international jurisprudence elaborating on the right to remedy and the meaning of informed consent and consultation. Further, it ignored the social context of the Negritos Community, its poverty, isolation, limited literacy, lack of legal knowledge, and lack of access to competent lawyers capable of taking on a case against the most powerful foreign company in Peru.

Rather, the appeal court implicitly held the Negritos Community to a standard that would require it to engage with Yanacocha as though it were also a legally sophisticated, knowledgeable and resourced actor. The court conflated the obvious fact of the Community's knowledge of the physical existence of the Mine, with knowledge of its legal rights, alleged violations and available causes of action. It presumed that since the Mine's presence is based on official documents and publically registered title, then the Community should have had knowledge of these documents and of its legal rights and remedies in this respect. In this way, the court measured the Community's conduct against the standard of an ideal subject, with qualities that do not reflect the Community's actual social experience. To the extent that the Community cannot meet this standard due to its social disadvantage, the appeal court's approach is exclusionary and discriminatory. This reasoning effectively transforms the limitation period rule into an absolute bar to the pursuit of justice through law for the Negritos Community and communities like it.

The appeal court's reasoning leaves unanswered the question of what kind of information and consultative community processes would be required for the Negritos Community to make a free and informed collective choice, in the early 1990s, to transfer large portions of its communal land to one of the largest and most powerful mining companies in the world, in order to build one of the largest and most profitable gold mines in the world, such that its members would live with this mammoth open pit mine as their neighbor for decades and generations to come. In this context, and putting aside questions of allegedly illegal acts in procuring signatures, it does not seem reasonable to presume that the Community made a free and informed choice to extinguish all of its rights and its very existence in law in exchange for a few thousand dollars. This is highlighted by the apparent contradiction between the Community purported agreement to annul its legal existence and the fact that it continued with its communal economic, cultural and governance practices as before. Given the high indicators of poverty among Campesino Communities in the region,

combined with limited to no access to basic education, much less legal advice, it seems unlikely that the Community had meaningful knowledge in the early 1990s that it had collective rights protected in Peruvian constitutional and international law. This all casts in serious doubt the appeal court's conclusion that the Community had the capacity to marshal the knowledge and the resources necessary to bring its case to court within sixty days (the limitation period) following the events in question.

When the appeal court rejected the community's doctrinal arguments with respect to the application of the codified exceptions of continuous actions and omissions, it appeared to do so offhandedly, and not on the basis of doctrinal reasoning. Rather, it chose to rest its decision on presumptions about the Community's consent and knowledge. In choosing to go down this path, it was incumbent on the court to consider a contextualized equitable approach to the limitation period as well as the case law on Indigenous knowledge and consent in an effort. These sources would have certainly complicated the formalist notion of consent and knowledge that the appeal court ultimately adopted. It is discriminatory for the court to adopt an interpretation of the limitation period rule and presumptions about the Community's consent and knowledge that do not take the Negritos Community social context of historical disadvantage into account.

In the final portion of its decision, the appeal court rejected JCAP's *amicus curiae*, presented earlier in the proceedings. The controversy regarding the admission of the JCAP *amicus* arose due to some uncertainty in the law on this area. As a starting point, the regulations of the Constitutional Court give it the discretion to directly invite a third-party to act as an *amicus curiae*.[144] However, according to some legal experts, the right to proactively request *amicus curiae* status (without an invitation from the court) is rooted in Peru's constitutional provisions establishing the right to make legal submission to public authorities, the right to publicize legal proceedings and the right to participate in the political life of the nation.[145] In practice, it has become increasingly common practice for Peru's Constitutional Court, as well as lower courts, to accept *amici curiae* from third parties without previous invitation from the court, although there are some notable (and arguably politicized) exceptions.[146] Nonetheless, the increasing

[144] Administrative Resolution No 095-2004-P-TC, *Normative Regulation of the Constitutional Court* (14 September 2004) art 13-A.
[145] *Political Constitution of Peru, 1993*, arts 2.17, 2.20, 31, 139.4. See: Juan Carlos Ruiz Molleda, "Para que sirven los *amicus curiae*?: TC rechaza el amicus del IDL sobre el derecho a la consulta de pueblos indígenas" (Instituto de Defensa Legal, 2010) online: http://www.justiciaviva.org.pe/notihome/notihome01.php?Noti=221.
[146] Ruiz Molleda, *ibid.*

participation of *amici curiae* in public interest cases in Latin America is widely seen as part of a trend toward greater democratization and transparency in legal debate and judicial decision making that takes into account the broader public and social impacts of individual cases.[147] The Inter-American Court has emphasized the importance of *amici curiae* because of their capacity to represent relevant public interests and contribute to debate in cases with broad social consequences that require greater public and democratic deliberation.[148] Peru's Constitutional Court has reiterated this perspective in a number of cases.[149]

The court of appeal in the Negritos case ultimately concluded that the JCAP *amicus* was inadmissible because the court had not directly requested it from the NGO. As such, it adopted a conservative interpretation of the law on point, converting the court's discretion to solicit an *amicus* into a strict rule that an *amicus* is only admissible if it is solicited. In doing so, the appeal court ignored the public interest purposes of the *amicus*. However, the court went further, reasoning that the fact that the *amicus*' authors had presented it on their own initiative made it evident that they were not impartial and objective. The court then went on to say that JCAP's interest in the case reveals that the case itself is a product of third-party NGO interests, aimed at generating instability in the country by taking advantage of a difficult social context on mining issues.[150]

As such, the appeal court's reasoning and conclusion in relation to the *amicus* appears to be based on ideological rather than legal considerations. It does not offer any support for its statement that JCAP aims to cause social instability in the country. This conclusion appears to be based on unfounded assumptions and a suspicious view of the Negritos Community's decision to resort to the courts with the help of civil society actors. The court's comments with respect to JCAP's *amicus* are consistent with a conservative strand of thinking in some circles in Peru that delegitimizes, and in some cases, even dehumanizes and criminalizes, Campesino Communities and NGOs for their concerns and critiques of resource extraction in the country.[151] In doing so, the

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[147] Martín Abregu & Christian Courtis, "Perspectivas y posibilidades del *amicus curiae* en el derecho argentino" in *La aplicación de los tratados sobre derechos humanos por los tribunales locales* (CELS, Editores del Puerto, 1997) at 388, cited in Ruiz Molleda, *supra* note 145; Peter Haberle, *El Estado Constitucional* (Autonomous University of Mexico, 2003) at 149, cited in Ruiz Molleda, *ibid*.

[148] *Castañeda Gutman v Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am Ct HR (ser C) No 184 (August 6, 2008).

[149] Some examples are: STC No 3081-2007-PA/TC (9 November 2007); STC No 0017-2003-AI/TC (16 March 2004); STC No 7435-2006-PC/TC (13 November 2006); STC No 00027-2006-PI/TC (21 November 2007).

[150] *Ibid* at para 14.

[151] This ideology is best described by the concept of "*perro de hortelano*" or "the dog in the manger". In 2007, then President of Peru Alan Garcia published an editorial in a major Peruvian newspaper where he described the "syndrome"

appeal court ignored accepted practice and relevant jurisprudence with regard to the public policy and democratic function of an *amicus curiae* in human rights cases.

The forgoing analysis of the appeal court's comments on the JCAP *amicus*, taken together with the reasoning in its admissibility decision and the procedural delays in the Negritos legal proceedings to date, paint a bleak access to justice scenario for Campesino Communities in Peru. First, the appeal court was willing to ignore evidence, jurisprudence and social context in order to rule the Negritos claim inadmissible on the basis of a formalist and exclusionary notion of consent and knowledge. It implicitly evaluated the Community's conduct against the standard of a legally sophisticated and resourced subject, thereby turning the limitation period rule into an absolute bar to justice for Campesino Communities in a position similar to that of the Negritos Community. This obstacle was augmented in the proceedings themselves when both the company and the Ministry generated delays on procedural matters. Ultimately, this has forced the Community to somehow marshal the resilience and the resources to advocate in a process that has continued for nearly six years and counting.

Finally, the appeal court's reasoning on the admissibility of the *amicus* seals the Community's fate. To the extent that the Community receives support from civil society actors, include foreign lawyers, the court presumes that the claim is illegitimate and animated by nefarious goals, as opposed to a *bona fide* concern to defend the rights in question. Following the logic of the appeal court, not only must the Community have the ability to mount its legal case extremely quickly, with full knowledge of the law, it must do so without the support of civil society organizations, lest its intentions be called into question. This paper's conclusion will explore the wider implications of the Peruvian courts' treatment to date of the Negritos claim.

b. Challenges outside the Courtroom

The previous sections recounted the challenges that the Negritos Community faced inside of the courtroom over the course of its litigation journey. This captures only one dimension of the

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of "the dog in the manger", to refer to Indigenous and Campesino communities who oppose resource extraction on their land, thereby creating obstacles to national prosperity for all. He accused them of being irrationally attached to a way of life that only traps them in poverty and prevents progress. This discourse is used to justify militarized responses to opposition and protest. For commentary see: Moore, *supra* note 4 at 12-3; Roger Merino Acuna, "The politics of extractive governance: Indigenous peoples and socio-environmental conflicts" (2015) 2 The Extractive Industries and Society 85; Kamphuis, "Foreign mining", *supra* note 19 at 135; Anthony Bebbington & Denise Humphreys Bebbington, "Actores y ambientalismos: Continuidades y cambios en los conflictos socio-ambientales en el Perú" (2009) 35 Iconos 117.

complex set of economic, political, cultural and social challenges that Campesino and Indigenous communities face when they choose to engage with state law against a powerful foreign company. This section will profile some of the additional challenges that the Community faced in relation to its litigation efforts. Just as Part 2 of this paper contextualized the Negritos Community's dispossession story, this section sketches some of the social context details that have characterized the Community's litigation experience to date.

The Negritos Community litigated its case in a broader social context where the corruption of public officials in Peru is an ongoing concern. Unfortunately, it seems that corruption concerns and allegations continue to maintain close proximity to both Yanacocha and the Negritos case. The lower court decision in the Negritos *amparo* action in favor of Yanacocha's admissibility objections was issued by a judge of the Superior Court of Cajamarca by the name of Guhtember Pacherres Pérez. This is the same judge who neglected to duly organize audio recordings of certain hearings. Throughout the proceedings, the Negritos Community members and their local lawyer strongly suspected that Justice Pacherres Pérez was not an ethical judge and they believed that he was intentionally delaying the proceedings. It appears that they may have had good reason to suspect as much. Coincidentally, the day after Justice Parcherres Perez issued his decision dismissing the Negritos' *amparo* claim, he was filmed accepting a bribe in another case and was subsequently arrested, tried, and sentenced to a nine-month prison term.[152] He admitted his guilt, and the evidence revealed that he had solicited the bribe on July 11, 2014, just days before he issued his admissibility decision in the Negritos case.

The Negritos Community has no direct evidence that Justice Pacherres Perez accepted bribes from Yanacocha in relation to the Negritos *amparo* proceedings. There is no doubt though that this lower court judge was engaged in acts of corruption while he presided over the Negritos proceedings. The uncertainty about whether or not corruption has influenced outcomes to date in the Negritos case is heightened by the grim reminder of the high-profile corruption allegations that plagued the decision of the Supreme Court of Peru in favor of Newmont in Yanacocha's early

[152] "La intervención a Juez Titular Gutenberg Pacherres Pérez por coima" (21 July 2014) online: https://www.youtube.com/watch?V=pcotbybthzu; "Juez Titular Guhtember Pacheres Pérez al penal de Huacariz en Cajamarca" (19 July 2014), online: https://www.youtube.com/watch?V=-w9hkrf__C8 ; "Si, soy corrupto: El reo Pacherres aceptó recibir coima, ahora sufridos litigantes piden revisión de casos", *El Mercurio* (21 July 2014) 2, online: https://issuu.com/elmercurio/docs/21-07-2014; "Cajamarca: encarcelan a juez acusado de recibir coima de 4 mil dólares", *Canal N* (18 July 2014), online: http://canaln.pe/peru/cajamarca-encarcelan-juez-acusado-recibir-coima-4-mil-dolares-n145767.

days.[153] Moreover, just a few months before the Pacherres Pérez corruption scandal broke, Yanacocha was implicated in yet another high-profile corruption story. In May 2014, Peruvian journalists reported on a leaked audio recording of conversations that took place in 2012 between Yanacocha's governmental affairs manager and three elected public officials in Cajamarca. In the recordings, the public officials requested a financial contribution from the company in return for their support of its controversial mine expansion project, known as Minas Conga. In response, Yanacocha's manger promised to raise the issue of "economic support" with senior management. Following the publication of these recordings, Yanacocha promised to investigate and reiterated its commitment to transparency.[154]

There can be little doubt that the challenges associated with litigating a case like that of the Negritos Community's has taken a personal toll on the Community and its allies. In 2014, the local NGO that had been providing legal representation for the Negritos Community since 2007 withdrew from the case without an official explanation. As a result, for much of the litigation process, the Community was represented by a young local lawyer, working *pro bono*, with the distant help of a volunteer group of students and lawyers in Lima, Peru and in Canada. Just like the mine that sits on its land, the Negritos Community's case is mammoth, involving hundreds of pages of documents and complex arguments of fact and law. Dispossession cases are often complicated by nature, making them difficult to for NGO workers and *pro bono* lawyers to sustain.

The logistical, social and human conditions of the Negritos Community itself has added to these challenges. This paper has already referred to the Community's relatively low levels of education and continued high levels of poverty and exclusion from basic services. Community members live high up in the mountains, making communication very difficult with limited telephone access or electricity. In order to meet with Community members, lawyers must wait for regularly scheduled monthly General Assembly meetings. Community members walk long distances to attend meetings and it is often difficult for lawyers to find and pay for transportation for the trip up into the mountains. Meetings take place in the open air, sitting under the hot Andean sun. Community leaders and members come to nearby Cajamarca only periodically and can

[153] See *supra* Part 2.1.
[154] "Peru: Miners in bribery risks, Yanacocha probes case", *Latin IQ* (21 May 2014), online: http://latin-iq.com/blog/peru-miners-in-bribery-risks-yanacocha-probes-case/; "Consejeros de Cajamarca pidieron plata a Yanacocha para apoyar proyecto Conga", *La Republica* (21 May 2014), online: http://www.larepublica.pe/21-05-2014/consejeros-de-cajamarca-pidieron-plata-a-yanacocha-para-apoyar-proyecto-conga.

sometimes be hard to locate with inconsistent access to a telephone. The Community's isolation, lack of resources and logistical challenges are just some of the obstacles that have made it difficult for Community members and *pro bono* lawyers alike to engage in a court process against a powerful company over a period of years.

These observations offer only a very partial picture of the social context that framed the Negritos Community members' experiences of the legal arguments, procedures and decisions taking place in the courtroom. Importantly, the documentary record does not capture the social and cultural impact of the case on the Negritos Community itself. Whenever a community decides to bring its justice concerns to the dominant legal system, it will undoubtedly face stresses and strains on community relationships and political leadership.[155] Litigation inevitably triggers a complex array of internal and external pressures that may create or exacerbate divisions within the Community. Community members and leaders may come under enormous pressure to drop or settle the case, sometimes they are offered bribes, sometimes they are threatened and sometimes they are actually harmed.[156] It is well documented that Yanacocha's operations are increasingly militarized with may reported incidences of its security services threatening, harming or surveilling the company's critics.[157] Further in-depth fieldwork is required to fully document the Negritos Community's social experience with respect to the litigation to date and as it continues to unfold.

In sum, the Negritos Community has faced multiple challenges in its efforts to use the domestic Peruvian legal system to advance communal property claims grounded in international human rights law and the Constitution. Outside of the courtroom, these challenges have included the risk of corruption and bias in the local judiciary and a lack of access to trained and funded legal counsel. Inside the courtroom, the Community faces the formalist application of procedural rules

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[155] For one example of a detailed account of the negative impact of litigation on community relationships, see Parmar, *supra* note 11.

[156] See generally commentary on criminalization of environmental and human rights defenders in Latin America: *supra* notes 2 and 4.

[157] Kamphuis, "Privatization of Coercion", *supra* note 4; Guzmán Salano, *supra* note 64; Tim Martin et al, "Tragadero Grande: Land, Human Rights, and International Standards in the Conflict Between the Chaupe Family and Minera Yanacocha", *Report of the Independent Fact Finding Mission* (Washington, DC: Resolve, 2016); Inter-American Commission on Human Rights, Resolution, Resolución 9/2014, *Lideres y Lideresas de Comunidades Campesinas y Rondas Campesinas de Cajamarca Respecto de la República de Perú*, Precautionary Measure No 452-11 (2014), online: http://www.oas.org/es/cidh/decisiones/pdf/2014/MC452-11-ES.pdf; Roxana Olivera, "'I Will Never Give Up My Land'", *New Internationalist* (July 2016), online: https://newint.org/features/2016/07/01/interview-maxima-acuna/; earthrights International, Media Release, "Factsheet: Campos-Alvarez v Newmont Mining Corp", online: https://www.earthrights.org/sites/default/files/documents/Factsheet-Campos-Alvarez-v-Newmont.pdf; "Máxima Acuña: 2016 Goldman Prize Recipient" (2016) *The Goldman Environmental Prize*, online: http://www.goldmanprize.org/recipient/maxima-acuna/.

to justify the dismissal of its case on the basis of a concept of consent and subjectivity that is arguably discriminatory. This live legal issue is the focus of the Negritos Community's current appeal to Peru's highest court.

3.5 Negritos Case Next Steps: Precedents & Remedies

As stated, the Negritos Community has appealed the dismissal of its *amparo* action to Peru's Constitutional Court. In Peruvian constitutional law, this type of appeal is called a *recurso de agravio*. The *Constitutional Procedural Code* grants an *amparo* claimant a general procedural right to appeal a negative decision of a court of second instance to Peru's highest court.[158] Thus, according to the *Code*, the Peruvian Constitutional Court is required to consider all *recurso de agravio* petitions if they are presented according to the specified rules.

However, recent developments in Peruvian constitutional jurisprudence have expanded the grounds upon which the Constitutional Court may refuse to grant a full hearing to such an applicant. In 2014, the Court issued the *Vásquez Romero* precedent, which established a special expedited procedure for dismissing *recurso de agravio* claims in certain situations.[159] The decision identifies a list of deficiencies that could, alone or in combination, form the basis for the Court's decision to summarily dismiss the case: the alleged violations are manifestly unsubstantiated; the question of law at issue does not have "special constitutional importance"; the claim relies on law that clearly contradicts an established precedent of the Court; and finally, cases with substantially similar legal issues have been unsuccessful.[160] Referring to the criterion of "special constitutional importance", the *Vásquez Romero* decision states that this threshold is met when a case requires the court to consider the content or scope of a fundamental right, when the alleged violations affect the constitutionally protected aspects of the rights in question, or when the issues at stake require especially urgent rights protection.[161] Commentators have observed that the *Vásquez Romero*

[158] *Constitutional Procedural Code*, art 18.
[159] STC No 00987-2014-PA/TC (6 August 2014) at para 49. This decision attempted to refine earlier decisions with a similar orientation: César Landa Arroyo, "Límites y alcances de la 'especial transcendencia constitucional'" (2015) 8 Revista Peruana de Derecho Constitucional 89 at 91-96.
[160] STC No 00987, *ibid*.
[161] *Ibid* at para 50. Also see: Eloy Espinosa-Saldaña Barrera, "La "especial trascendencia constitucional" como causal para el rechazo liminar de recursos de agravio en el Perú" (2015) 8 Revista Peruana de Derecho Constitucional 41 at 48-49, 52.

criteria are highly subjective and they speculate that the Constitutional Court will likely be forced to provide further precision on their meaning in subsequent decisions.[162]

Importantly, the Court's inquiry into the "constitutional importance" of the case is expeditious, in that the Court makes this assessment without an in-depth review of the proceedings. Rather, the claimant must make a written submission to the court addressing the issue of constitutional importance. This is a function of the fact that the *Vásquez Romero* criteria were introduced, at least in part, to help reduce the unmanageable case load that the Constitutional Court faces. In 2013, the Court had an accumulated load of over six thousand and six hundred cases pending.[163] This situation obviously impedes the Court's ability to attend to urgent and important cases in a timely manner.

Given the centrality of the "constitutional importance" criteria, the remainder of this section will describe the legal significance of the Negritos case in the context of the ongoing tension in Peru between neoliberal reforms and Indigenous rights. If the Constitutional Court agrees to consider the case on the merits, it would have the opportunity to develop jurisprudence in three distinct aspects of Indigenous and Campesino rights law with respect to resource extraction. First, admitting the case would give the Court the opportunity to clarify the status of Peru's Campesino Communities vis-à-vis the incorporation of international Indigenous rights norms into Peru's constitutional order. Second, the substantive arguments in the case address matters relating to the nature of Campesino constitutional rights, including norms governing: the conversion of communal property into individual property; the legal recognition of Campesino communities; the expropriation of Campesino communal property, and meaning of fair and equitable compensation. Finally, if successful on the merits, the case would give the Constitutional Court the opportunity to explore law's capacity to remedy dispossession claims.

Due to its focus on the ongoing Negritos *amparo* litigation, this section of the paper frames the important questions and arguments advanced in the case in terms of their potential contribution to Peruvian law. However, many of the issues in the Negritos case are arguably a microcosm of the tensions between Indigenous communities around the world and the globalized model of foreign resource extraction. As such, the discussion in this section, while situated in the Peruvian context, arguably transcend the Negritos case. Controversy over the foreign resource extraction

[162] Landa Arroyo, *supra* note 159 at 101.
[163] *Ibid.*

model are very often about the legal status of rights holders, the meaning of consent, the terms of property ownership, transfer and compensation, the tension between private and public law, as well as the nature of available legal remedies. At the same time, exploring these themes in a discrete case study is helpful because it illuminates law's potential and limitations as a tool for responding to the underlying justice concerns that the Negritos case represents. I will take this topic up again in this paper's conclusion.

a. The Indigenous Status of Campesino Communities in International Law

Part 2 of this paper described briefly how in the 1920 and 1933 Peruvian Constitutions, "Indigenous Communities" were given special status and rights. The 1969 *Agrarian Reform Law* changed this terminology when it declared that from that moment forward, the Indigenous Communities of Peru would be denominated "Campesino Communities".[164] The Peruvian state subsequently developed an elaborate statutory regime pertaining to Campesino Communities and in the 1979 and 1993 Constitutions they were granted special status and rights. In each of these Constitutions, the term "Campesino Community" was used together with "Native Community" in reference to the same set of cultural, political, and property rights. Specific legislation clarifies that Campesino Communities are those located in the Andes while Native Communities are found in the Amazon region of Peru.

Part 2 also referred to the fact that at the international level, Indigenous peoples began to make significant gains beginning in the early 1990s. In 1989 the ILO revised its earlier 1957 Convention[165] to approve *Convention No 169*, which remains the only binding international treaty on the subject of Indigenous peoples' rights. In 2001 the Inter-American Court pronounced in its first Indigenous land rights case, interpreting existing provisions of the 1969 *American Convention* to include an Indigenous right to communal property.[166] Finally, in 2007, the *United Nations Declaration on the Rights of Indigenous Peoples* was broadly endorsed by the international community. Part 3 of this paper described the legal significance of these international law developments in Peru. Peru's Constitutional Court has held that it is bound by the jurisprudence of the Inter-American Court, including its interpretations of Indigenous rights, while *Convention*

[164] *Agrarian Reform Law*, *supra* note 25 at art 115.
[165] *Indigenous and Tribal Populations Convention*, International Labour Organization, Convention No 169, (1957).
[166] *Awas Tingni*, *supra* note 71.

No 169 is similarly part of Peruvian Constitutional law, acquiring constitutional status after it was approved by Peru's Congress in 1993.

This brief recap reveals that a curious situation has arisen in Peruvian law. While relatively recent international statements of Indigenous rights have been incorporated into Peruvian Constitutional law, the category of "Indigenous Communities" disappeared from the 1979 Constitution in favour of the terms Campesino and Native Communities. Thus, while international and domestic law have converged in Peruvian constitutional law, the legal categories employed in these two spheres have diverged. In this context, the status of Peru's Campesino Communities vis-à-vis international law has become an important question. In other words, do the rights of Indigenous peoples, as incorporated into the Peruvian Constitution through various international instruments, apply to Campesino Communities? This question is pressing. There are over 5000 Campesino Communities in Peru and a significant portion of mining activity affects land belonging to these Communities.[167]

Human rights institutions, both inside of Peru and internationally, have consistently treated Campesino Communities, either implicitly or explicitly, as Indigenous for the purposes of the application of the Peruvian Constitution and international law.[168] Certain domestic statutes have also treated Campesino Communities and Indigenous peoples as a single grouping for the purposes of describing their rights.[169] However, the Peruvian State's official position on this issue is inconsistent at best and it has tended to deny that Campesino Communities have Indigenous rights. In 2009 the Peruvian State informed the ILO Expert Committee that it intended to treat Campesino Communities as collectivities similar to Indigenous Peoples in the recognition of their ethnic and

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[167] See Laureano del Castillo, "Propiedad Rural, Titulación de Tierras y Propiedad Comunal" (1997) 26 Debate Agrario 59.

[168] For domestic examples, see: the Peruvian Commission for the Environment, Ecology and Andean, Amazonian and Afro-Peruvian Peoples: Acuerdo de la Comisión de Amazonia, Asuntos Indígenas y Afroperuanos, en Relación al Capítulo VII del Título II del Dictamen de Reforma Constitucional, *Título II del Estado y la Nación (…) Capitulo VII Derechos de los Pueblos Indígenas Artículo 96*, 2003, online: <http://www4.congreso.gob.pe/comisiones/2002/debate_constitucional/aportes/aporte_comision_agraria.htm>. Also see the National Institute for the Development of Andean, Amazonian and Afro-Peruvian Peoples: Supreme Decree No 065-2005-PCM, *Regulation of the National Institute for the Development of Andean, Amazonean and afroperuvian Peoples* (2005), art 2. For international examples, see: OAS, Inter-American Commission on Human Rights, *Second Report on the Situation of Human Rights in Peru*, OR OEA/Ser.L/V/II.106/Doc 59, rev (2000) at Chapter X, "Indigenous Communities' Rights". Also see: ILO, Committee of Experts on the Application of Conventions and Recommendations, *Indigenous and tribal peoples: Observations of Peru, Indigenous and Tribal Peoples Convention, 1989 (No 169),* ILC.98/III/1A (ILO: 2009), 686-687 at paras 3, 4 [CEACR 2009].

[169] See *Rondas Campesinas Law, supra* note 69; See environmental laws (Law No 28611 and Law No 27446), *supra* note 70.

cultural rights.[170] Yet in a 2011 decision, the Constitutional Court took note of the Peruvian government's submissions that *Convention No 169* does not apply because Peru has very few Indigenous peoples and Campesino and Native Communities are fundamentally *mestizo* or 'mixed'.[171]

Also in 2011, the Peruvian state legislated a controversial set of objective and subjective criteria for the recognition of Indigenous peoples, including that they must be "direct descendants" of the country's "original inhabitants" and that they must self-identify as Indigenous.[172] This definition directly contradicts statements of the ILO Expert Committee on the application of *Convention No 169* in Peru.[173] The Committee has clearly stated that if Campesino Communities fulfill the requirements of the *Convention*, they should receive the full protection of its provisions. Notably the language of the *Convention* is significantly broader than the concepts of "direct descendant" of "original inhabitants".[174] Moreover, the ILO has stated that the use of the term "Indigenous" by a community in the Peruvian context is not a requirement and its absence should not be used to preclude the application of the *Convention*.[175] In spite of this, in 2012, Peru's Ministry of Culture adopted an even more restrictive definition to the effect that, in order to be registered in the Official Indigenous Peoples' Database, communities must speak an Indigenous language and remain in their ancestral territory.[176] Local lawyers have documented instances

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[170] CEACR 2009, *supra* note 168.
[171] STC No 00024, *supra* note 98.
[172] *Right to Consultation Law*, *supra* note 69 at art 7.
[173] The ILO Expert Committee expressed disapproval of Peru's definition of Indigenous peoples in its *Law for the Right to Consultation*: see ILO, Committee of Experts on the Application of Conventions and Recommendations, *Indigenous and tribal peoples: Observations of Peru, Indigenous and Tribal Peoples Convention, 1989 (No. 169),* ILC.100/III/1A (ILO: 2011), at 794-795 [CEACR 2011].
[174] The Expert Committee stated that if Campesino Communities comply with either (a) or (b) of article 1, *Convention No 169* will apply: CEACR 2009, *supra* note 168. The text of article 1 is as follows: 1. This Convention applies to: (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations; (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions: *Convention No 169*, art 1.
[175] CEACR 2009, *supra* note 168; CEACR 2011, *supra* note 173 at 872.
[176] Directive No 03-2012/MC at arts 7.1, adopted by Ministry of Culture, Ministerial Resolution No 202-2012-MC (2012).

where the Ministry of Energy and Mining has used this restrictive definition to avoid consulting with Campesino Communities impacted by proposed mining projects.[177]

In spite of the controversy and importance of this issue, Peru's Constitutional Court has declined to offer any meaningful guidance in its decisions to date. It has referenced the issue only once by way of comments that were tangential to its ultimate decision. On this occasion, the Court stated that the Indigenous status of Campesino Communities for the purposes of the application of *Convention No 169* in Peru must be considered on a case-by-case basis.[178] Unfortunately, the Court refrained from offering any additional guidance regarding this form of individualized consideration.

Taken together, the legislation described above and the Court's decision ostensibly create a situation where, prior to invoking the rights and protection of *Convention No 169*, each individual Campesino Community must somehow prove its status as an Indigenous community. As a result, Campesino Communities in Peru exist in a legal context where there is a presumption that they are *not* Indigenous and where the onus is on them to prove their indigeneity. When making a legal claim in a court, this amounts to an additional threshold evidentiary burden on Campesino Communities who claim Indigenous rights as recognized in international law. Given that the 1969 Agrarian Reform in Peru declared that Indigenous Communities would thereafter be dominated Campesino Communities, the Peruvian State's contemporary approach to the legal category of Indigenous converts this change in terminology into a presumption in favor of Campesino Communities' loss of Indigenous status and the concomitant reduction of their rights in international law. Not only does this contradict the professed social justice purpose and spirit of the *Agrarian Reform Law* and its implementing legislation, it converts Agrarian Reform into a fundamentally assimilationist rights-reducing project.

In the context of the ongoing controversy in Peru over the legal definition of Indigenous communities, the Negritos *amparo* claim takes the position that Campesino Communities *as such* have the legal status of Indigenous communities under international law. This argument is legalistic as opposed to anthropological. It begins with the historical progression in Peru's *Agrarian Reform Law* from the term Indigenous to Campesino. It further points to the significant

[177] Juan Carlos Ruiz Molleda, "Ministerio de Cultura bloquea la consulta previa de las concesiones mineras e invisibiliza a los PPII en Espinar", *Instituto de Defensa Legal: Justicia Viva*, (16 April 2015), online: http://www.justiciaviva.org.pe/notihome/notihome01.php?Noti=1597.
[178] STC No 0022, *supra* note 98 at para 10.

conceptual similarities between international Indigenous rights regimes and the Peruvian domestic legal regime with respect to Campesino Communities. Peruvian laws recognize Campesino Communities' legal personhood, their culturally specific characteristics as a group, their communal political and economic institutions and their special relationship to a specific area of land or territory. On this basis, the Negritos *amparo* claim argues that to identify oneself as part of a Campesino Community in Peru is the equivalent, for the purposes of the application of international law, to identifying oneself as a member of an Indigenous group.

This argument attempts to counteract the State's assimilationist approaches by intentionally relying on legal histories and facts available to all Campesino Communities in order to construct a broad claim for their international status as Indigenous people. The value of this approach is that Campesino Communities are not required to marshal complex historical anthropological evidence before invoking international Indigenous rights statements to support their claims. This avoids the imposition of a heavy evidentiary burden on Campesino Communities, which in practical terms may be insurmountable. In the context of litigation, such a burden would only exacerbate the existing procedural and practical obstacles described in the previous sections of this paper. In this way, the Negritos *amparo* action has the potential to set an important precedent by advancing an approach that would clarify some of the legal uncertainties and alleviate some of the evidentiary burdens that presently plague Peru's Campesino Communities who assert Indigenous rights in local courts.

b. Substantive Rights Precedents

Previous sections of this paper described how the Negritos *amparo* action draws on domestic and international law and jurisprudence to advance four substantive rights claims of precedent setting value. Each claim speaks to an unresolved point of law in the Peruvian context and, if accepted, would make an important contribution to the advancement of Campesino and Indigenous rights in Peru. Beyond their legal significance, these claims have political significance in that they confront a suite of neoliberal state policies and company practices that continue to pose a threat to Campesino Communities' land and legal status. While certain events in the Negritos case occurred decades ago, they remain emblematic of the vulnerabilities and pressures that Campesino Communities in Peru continue to face vis-à-vis legal regimes designed to promote foreign investment at the expense of rights protection. This highlights the need for strategic

Campesino rights litigation like the Negritos case to push the political debate and legislative agenda.

The *first* significant substantive rights claim in the Negritos action is that the communal property of a Campesino Community cannot be alienated or converted into individual property without the free, prior and informed consent of the majority of the Community.[179] This assertion is grounded in the 1979 Constitution and 1987 *Campesino Communities General Law* which require a vote of two-thirds of the community in these circumstances.[180] Part 3 of this paper described how international and domestic law principles imbue this provision of the *Campesino Communities General Law* with constitutional significance even after it was dropped from the 1993 Constitution. International sources of law support the proposition that this vote should be free, prior and informed, emphasizing (among other things) that information should be meaningful, appropriate and allow for effective decision-making.[181]

This argument is important because of consistent efforts of the Peruvian State since the early 1990s to introduce policies that attempt to facilitate and expedite the conversion of communally titled property into individual property.[182] The expressed goal of these policies has often been to facilitate the disposition of (formerly) communal property to private, often foreign, investment. While the state has repealed some of these policies due to their controversial and allegedly unconstitutional status, this has only occurred after significant social conflict.[183] As recently as 2015, the Peruvian government passed laws purporting to allow a small number of Campesino Community leaders to approve mining projects without bringing the proposal to a General Assembly,[184] thereby expediting the sale of communally owned Campesino and

[179] This right is part of a suite of interrelated Indigenous property rights, including the right to collective property, the right to state recognition of collective property and the state's duty to take special measures to protect communal property related rights. The conversion of Negritos communal land into individually titled land occurred between 1991 and 1995. As such, both the 1979 and 1993 Political Constitutions of Peru apply, as well as *Convention No 169* and the *American Convention*.

[180] In domestic law, this right is based on articles 163 and 161 of the *Political Constitution of Peru, 1979*, article 7 of the *Campesino Communities General Law*, and article 89 of the *Political Constitution of Peru, 1993*.

[181] See *American Convention*, art 21 and relevant jurisprudence of the Inter-American Court: *Awas Tingni*, *supra* note 71 at para 149; *Yakye Axa*, *supra* note 72; *Saramaka*, *supra* note 72. Also see: *Convention No 169*, arts 6(1), 6(2), 17(2).

[182] Part 2 above referred to the Fujimori era laws associated with this tendency.

[183] In 2007, the Executive Branch, endowed with special new powers, introduced new laws to facilitate Peru's Free Trade Agreement with the United States. Five decrees in particular endeavored to reduce the property rights of Campesino and Native Communities. After one year of widespread protest against the new laws, four of the five decrees were repealed: see Pedro Castillo Castañeda, *El Derecho a la Tierra y los Acuerdos Internacionales: el Caso de Perú* (Lima, CEPES & International Land Coalition: 2009) at 74-75.

[184] Supreme Decree No 001-2015-EM, *Provisions for mining procedures that encourage investment projects* (2015).

Indigenous property to private investors.[185] Notably, these laws presume to legalize the very type of process that was actually followed in the Negritos case in the early 1990s. Commentators have denounced these 2015 laws for contravening provisions of the *Campesino Communities General Law* and international law regarding consultation and consent and for interfering with Communities' political autonomy and rights under national and international law to establish their own governance structures and decision-making procedures.[186]

In sum, the Peruvian state and the private sector have consistently pursued legal frameworks that help expedite the commodification of communal land. This has led to policies and practices on the ground that generate significant pressure on Campesino Communities to individually parcel and/or sell their land to companies. In this context, the facts of the Negritos case remain extremely relevant. Their judicial treatment would give the courts an opportunity to make a clear statement that informed consent with the meaningful participation of the majority of Community members is the standard in relation to the alienation of communal land.

The *second* substantive claim of constitutional significance in the Negritos action arises from the state's administrative action purporting to eliminate the Community's legal existence.[187] As a result, the Negritos *amparo* action offers the courts the opportunity to pronounce on Indigenous and Campesino rights to political and legal recognition. This directly relates to the first legal claim in the Negritos case in that the state's efforts to eliminate communal land rights were directly linked with its efforts to eliminate the legal personhood of the Community itself. Domestic and international tribunals are clear that state recognition of Campesino and Indigenous communities is declaratory and not constitutive.[188] The Negritos case builds on this to argue that,

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[185] Legislative Decree No 1192, *Law for the acquisition and expropriation of real property, transfer Of state real property, removal of interferences and other measures for the execution of infrastructure projects* (2015).
[186] Álvaro Másquez Salvador & Juan Carlos Ruiz Molleda, "Gobierno aprueba norma que consagra intromisión en autonomía de Comunidades Campesinas", *Instituto de Defensa Legal: Justicia Viva* (15 January 2015), online: http://www.justiciaviva.org.pe/notihome/notihome01.php?Noti=1526; Juan Carlos Ruiz Molleda, "¿El sexto paquetazo normativo? La aprobación de los DL N° 1192 y N° 1210" *Instituto de Defensa Legal: Justicia Viva* (1 October 2015), online: http://www.justiciaviva.org.pe/blog/el-sexto-paquetazo-normativo-la-aprobacion-de-los-dl-n-1191-y-n-1210/ [Ruiz Molleda, "Sexto paquetazo"].
[187] A regional branch of the Ministry of Agriculture issued a resolution purporting to annul the legal personhood of the Negritos Community in 1995. As a result, the *Political Constitution of Peru, 1993*, *Convention No 169* and the *American Convention* all apply to this event.
[188] In domestic law, the Constitutional Court has interpreted article 89 of the *Political Constitution of Peru, 1993* to conclude that Campesino Communities have exceptional and privileged legal existence and legal personhood, that state recognition is declaratory and not constitutive of their existence, and that their existence should not depend on formalities: see STC No 02939-2008-PA/TC (13 May 2009) at para 9; STC No 04611, *supra* note 106 at para 22; STC No 00042-2004-AI/TC (13 April 2005) at para 1. In international law, the Inter-American Court has held that the legal

following recognition, any change in the legal status of a Campesino Community may only take place with the free, prior and informed consent of the majority of the Community. Given that the recognition of the Community as such strengthens its capacity to assert rights claims in legal and political arenas, establishing a standard of informed consent prior to any changes to the Community's legal personhood is a fundamental first step toward securing robust rights protection for Campesino Communities.[189]

The *third* claim of constitutional importance in the Negritos *amparo* action relates to the domestic regulatory regime that governs the expropriation of Campesino communally owned land in favour of private mining interests. The Peruvian Constitution allows the state to expropriate both communal and individually titled land in situations of public necessity and utility or for a social interest, in accordance with law and with fair monetary compensation.[190] Peru's 1992 *Mining Law* gives mineral concession owners the right to submit a request to the Ministry of Mining to expropriate property for the purposes of mining activities.[191] This law does not distinguish between individually titled and Campesino communally titled property.

The *Mining Law* also specifies the resulting procedures, which apply equally to all property titleholders.[192] It requires that, within fifteen days of receiving notice from the Ministry of Mining, the titleholder must attend a "negotiation meeting" with the mineral concession holder in order to reach an agreement regarding the expropriation. If the property owner fails to attend, the process will continue in its absence. If the owner does attend but an agreement cannot be reached at the meeting, the Ministry will designate an expert official to impose a final decision regarding the process and the compensation.[193] In all cases, whether the property owner agrees or not to the expropriation, a visual inspection of the property must occur within sixty days of the meeting and a report must be issued in the thirty days following. Upon receiving the report, the Ministry must,

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personhood of Indigenous Peoples makes existing rights operational and that Indigenous rights do not originate in the act of State recognition: *Yakye Axa*, *supra* note 72 at para 82.

[189] The Inter-American Court has stated that Indigenous peoples' right to the recognition and legal personhood is connected to communal property rights, the right to legal protection and the state's duty to take measures to effectively protect Indigenous rights: *Saramaka*, *supra* note 72 at paras 174-5.

[190] *Political Constitution of Peru, 1979*, art 125; *Political Constitution of Peru, 1993*, art 70. While, international law principles tend to support the existence of this power, it is controversial. *Convention No. 169* recognizes the state's right to expropriate Indigenous land upon realizing a consultation process with the Indigenous community (art 6) while the *UN Declaration* states that Indigenous peoples cannot be forcefully displaced from their land and that any relocation must occur after the consent of the community (art 10).

[191] Supreme Decree No 014-92-EM, *General Mining Law* (1992), art 37.

[192] *Ibid*, arts 130-1.

[193] *Ibid.*

within thirty days, issue a final resolution approving or not the expropriation request.[194] Thus the entire expropriation process is designed to wrap up in approximately four and half months and property owners, including Campesino Communities, are legally entitled to only fifteen days at the outset to participate in the process and negotiate an agreement. If they are unable to agree in this period, the Ministry has the power to impose an agreement upon them.

The *Mining Law* contemplates an identical process in order to establish an easement in favor of a concession holder over privately owned property, including Campesino property.[195] The substantive effect of the mining easement on Campesino communal land interests is tantamount to that of an expropriation. In other words, just like the expropriation, the easement allows for the involuntary and potentially permanent transfer of the right to use the surface of a particular piece of land. Although an easement does not transfer title, mining easements in Peru allow for activities that permanently and radically alter the land. For example, in the Negritos case the easement afforded Yanacocha the open-ended right to undertake work related to mining exploration and exploitation, broadly defined.

The expropriation of a portion of Negitos communal land known as Pampa Larga was executed in 1993 and the establishment of a mining easement in favor of Yanacocha over another portion of Negritos land occurred in 1995. Both processes occurred in accordance with the procedures dictated by the *Mining Law*, as outlined above. The now discredited Community leaders agreed to the expropriation and the easement at a negotiation meeting with Yanacocha, with no further consultation with the rest of the Negritos Community and even before many key details of the transaction were specified, including the compensation amount. As stated earlier, there is no evidence that the Community received any information about its legal rights and the anticipated consequences and impacts of the mining activities contemplated. Part 2 outlined the dubious dealings that occurred in relation to both transactions and the grossly inequitable final arrangement.

The Negritos *amparo* action claims that, while the expropriation and easement procedures with respect to the Negritos Community's land may have followed the provisions of the *Mining Law*, they did not conform to the constitutional standard of free, prior and informed consultation

[194] *Ibid.*
[195] *Ibid.*

with at least two thirds of Community members.[196] It is inconceivable that a Campesino Community could participate in meaningful consultation with respect to the expropriation of its land for the purposes of a large mining project within fifteen days and in the absence of basic information regarding the expropriation and the project. The imposition of such a severe timeframe effectively subverts Communities' right to engage in decision making in accordance with their customs and traditions and in light of their social and economic constraints.[197] The Negritos action argues that respect for the Campesino right to meaningful consultation is part of the constitutional framework of due process and legality that constrains the state's power to expropriate communally-held land.[198] In this respect, Peru's Constitutional Court has stated that the right to consultation is engaged by the expropriation of Indigenous land and that the content of that right is elevated where the impact of the expropriation will be significant.[199] For its part, the Inter-American Court has stated that in the case of large scale projects with a significant impact on an Indigenous group's territory, the state must obtain their consent.[200]

Within the scope of the Negritos *amparo* action, the assertion that the expropriation and easement in the Negritos case was unconstitutional has only indirect implications for the relevant provisions of the *Mining Law*. It is not open to a court in *amparo* proceedings to find that the *Mining Law*'s expropriation provisions are themselves unconstitutional as they apply to Campesino land. This is due to the fact that the *amparo* is a cause of action against public and/or private actions/omissions, and not legislation.[201] However, in spite of these constraints, the Negritos action marshals a claim with considerable impact. It argues that while the conduct of the state and the company may have formally occurred in conformity with the *Mining Law*, this conduct is

[196] The Negritos Community's communal property was expropriated and title was transferred to Yanacocha in April of 1993. As a result, the *Political Constitution of Peru, 1979* and the *American Convention* both apply to this event. An easement was established in favor of Yanacocha over Negritos communal land in 1995. As a result, the *Political Constitution of Peru, 1993*, the *American Convention* and *Convention No 169* all apply to this event.
[197] See STC No 0022, *supra* note 98 at paras 26, 28, 34, 39, 51; STC No 003343, *supra* note 98 at para 97; *Saramaka*, *supra* note 72 at paras 129, 134. Also see: *Campesino Communities General Law*, *supra* note 28, art 15.
[198] In Peru's constitutional framework, the state's power to expropriate occurs by definition against a property owner's will and as such is an exception to the constitutionally recognized right to property. As such, an expropriation must comply with certain conditions, including it may only be done: in accordance with law, when necessary, proportional, and in order to pursue a legitimate objective in a democratic society: STC No 05614-2007-PA/TC (20 March 2009) at paras 8-9.
[199] STC No 0022, *supra* note 98 at paras 32, 51.
[200] *Saramaka*, *supra* note 72 at paras 134, 137. The Inter-American Court has also added that any restriction on Indigenous peoples' property cannot put their subsistence into jeopardy: *Yake Axa*, *supra* note 72 at paras 145-8.
[201] See discussion in Part 3.1.

nevertheless unconstitutional (and therefore illegal) because did not comply with the constitutional requirement of free, prior and informed consultation.[202]

Judicial treatment of the Negritos claim in this regard is pressing since the status quo in Peru on this issue remains deeply problematic. The 1992 expropriation provisions of the *Mining Law* were not modified following the 2011 *Right to Consultation Law*, thereby contributing to a situation of regulatory incoherence that puts Campesino Communities' rights at risk.[203] Moreover, recent expropriation laws that aim to support large development projects have failed to include provisions that would protect Indigenous and Campesino land.[204] In 2015 a law regulating expropriation more generally was modified so that it could be read to apply to Campesino and Native Communities' lands.[205] Like the 1992 *Mining Law*, the 2015 general expropriation law fails to stipulate appropriate conditions and procedures for meaningful consultation with Campesino Communities. It also implements nearly identical expedited procedures, including the extraordinarily limited fifteen-day window for negotiating compensation followed, failing this, by the imposition of an agreement.[206] In this context, Indigenous and Campesino communities in Peru continue to demand that the state must, at a minimum, undertake free, prior and informed consultation with them prior to transferring their land interests over to resource companies.[207]

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[202] The Constitutional Court has stated that where there are gaps in the law with respect to the regulation of consultation with Indigenous peoples, the state must proceed in accordance with constitutional standards lest its actions be deemed unconstitutional even if it has complied with applicable statutes: STC No 0022, *supra* note 98 at para 26. Also see *infra* note 213.

[203] This situation is described in greater detail in Part 2.1.

[204] See: Law No 30025, *Law that facilitates the acquisition, expropriation and possession of real property for infrastructure works and declares the public need for the acquisition or expropriation of real property affected by the execution of diverse infrastructure works* (2013). This law allows private investors to acquire land for infrastructure projects and permits special procedures for expropriation. Also see: Law No 30327, *Law for the promotion of investment for economic growth and sustainable development* (2015). This law simplifies the procedures for obtaining easements and expropriations of "unoccupied" land, which could include the untitled land of Campesino Communities.

[205] Legislative Decree No 1192, *supra* note 185 as modified by Legislative Decree No 1210, *Modification of the Tenth Final Complementary Disposition of Legislative Decree No 1192* (2015). The modification retains an exemption for Indigenous peoples from the law's expropriation provisions but changes the earlier version by removing Campesino Communities from this exemption, presumably in accordance with the state's position that Campesino Communities are not Indigenous: see Ruiz Molleda, "Sexto paquetazo", *supra* note 186.

[206] Decreto Legislativo No 1192, *supra* note 185, art 20.

[207] See for example: "Reconocen que servidumbres petroleras están sobre territorios indígenas", *Servicios de Comunicación Intercultural*, (28 November 2016), online: https://www.servindi.org/actualidad-opinion/28/11/2016/reconocen-que-servidumbres-petroleras-se-encuentran-sobre-territorios. Communities are also demanding that consultation occur prior to granting mineral concessions: "Todas las concesiones mineras deberán ser consultadas a las comunidades" *Servicios de Comunicación Intercultural* (24 November 2016), online: https://www.servindi.org/actualidad-noticias/24/11/2016/todas-las-concesiones-mineras-deberan-ser-consultadas-las-comunidades.

In sum, the legal status quo in Peru continues to be one where Campesino and Native land are subject to expropriation laws that do not account in any way for their right to meaningful free prior and informed consultation. In light of this reality, the questions raised in the Negritos action are certainly constitutionally significant and require urgent judicial consideration.

The *fourth* contribution of the Negritos *amparo* action to substantive law in Peru moves beyond the process required before expropriating Campesino Community land (consultation and in some cases consent) to address the matter of Campesino Communities' rights to equitable compensation. Part 2.1 told the story of how, using the legal instruments of expropriation and easement, Yanacocha received title and/or full access rights to a combined total of just over 1200 hectares of Negritos communally titled land in exchange for a total payment of approximately US$ 48,000. The company subsequently mortgaged the expropriated property for financing loans totaling US$ 85 million.

At a minimum, Peruvian and international law requires fair compensation where Campesino communal land is expropriated.[208] As such, the meaning of fair compensation in this context must be explored. Clearly a meaningful process of free and informed consultation prior to a proposed expropriation is essential to determining the terms of fair compensation. According to the Inter-American Court, fair compensation for any limitation on Indigenous property rights in favor of private investment includes the right to participate in the creation of a "development plan".[209] Moreover, the state must *guarantee* that Indigenous communities' reasonably benefit from the plan.[210] Peru's Constitutional Court has similarly stated that where expropriation occurs to facilitate resource extraction, Indigenous peoples' right to compensation includes the right to an equitable share in the profits and benefits[211] and that a failure to ensure equitable compensation is

[208] See *Constitution Political del Peru, 1979*, arts 2(2), 2(15), 125, 163; Supreme Decree No 004-92-TR, *Regulation of Chapter VII – Economic Regime for the Campesino Communities General Law* (1992), art 167; *American Convention*, art 21(2).
[209] *Saramaka*, *supra* note 72 at para 129, interpreting article 21(2) of the *American Convention*.
[210] *Ibid* [emphasis added]. This fits with a line of jurisprudence at Peru's Constitutional Court to the effect that the state has an obligation to correct inequalities generated by the free market, while private parties have an obligation to exercise their freedoms with social responsibility: STN No 03343, *supra* note 98 at para 22; STC No 00020-2005-PI/TC and 00021-2005-PI/TC (27 September 2005) at para 17; STC No 0008-2003-AI/TC (11 November 2003) at para 4.
[211] STC No 03343, *supra* note 98 at para 34. Equitable benefit includes participation in the extractive activities and sharing of profits: *ibid* at para 39; STC No 0022, *supra* note 98 at para 33.

actionable.[212] These standards are rooted in the recognition that land has a special spiritual and cultural significance for Campesino Communities and its loss can put their very existence as such into jeopardy.[213]

Drawing on this international and domestic jurisprudence, the Negritos *amparo* action argues that the expropriation and easement in favor of Yanacocha violated, not only the Community's right to consultation, but also its right to fair and equitable compensation. Part 2.1 of this paper recounted the Negritos Community's continued social and economic deprivation in the face of Yanacocha's extraordinary profitability over more than two decades. Moreover, the meaning of fair and equitable compensation remains pertinent in Peru. While the mining laws, consultation law, and expropriation laws referenced throughout this section all regulate in some regard the potential transfer of communal land interests to private companies, none of these laws have addressed Indigenous and Campesino rights to equitable compensation.

Unfortunately, the legislative trend in Peru is to specifically curtail the concept of equitable compensation. The most explicit example of this is the recent 2015 expropriation law. It expressly states that property, including Campesino and Indigenous property, can only be valued in terms of its commercial value, fixed by the value, present and future, of any existing improvements and crops being cultivated *at the time* that the acquisition or the expropriation is solicited.[214] This provision has the effect of precluding any consideration of the post-expropriation profitability of the property. Moreover, this same law specifically prohibits calculating compensation by taking into account "non-economic" valuations, such a property's cultural, social and spiritual significance to its owner.[215]

Undoubtedly, this economic approach is a disadvantage for Peru's Indigenous and Campesino Communities who generally do not have large amounts of capital and who mostly use their land for subsistence purposes. It also directly disadvantages Communities if they chose not to cultivate certain tracts of land for conservation or other reasons. Most importantly, the preclusion of equitable compensation and non-economic valuations flies in the face of the jurisprudence of Peru's Constitutional Court and the Inter-American Court, which have both

[212] STC No 0022, *ibid* at para 52. A 2005 environmental law also provides that Indigenous peoples, Campesino and Native Communities have the right to equitable compensation when the state grants third parties the right to exploit resources on their land: Law No 28611, *supra* note 70, art 72.3.
[213] *Ibid.*
[214] Decreto Legislativo No 1192, *supra* note 185, art 13.1.
[215] *Ibid.*

directly prohibited a purely economic approach to compensating Indigenous peoples for limitations or losses of property interests.[216] In this context, the Negritos case stands to make an important contribution by presenting the court with the opportunity to analyze the right to equitable benefit in a well-documented factual matrix.

c. Legal Remedies for Dispossession

The claims made in the Negritos action ultimately require inquiry into the nature of the remedies available in an *amparo* proceeding in response to a dispossession claim such as that of the Negritos Community. The question of remedy is of major constitutional significance given the lack of jurisprudence in this area in Peru. It critically goes to the heart of law's potential as an instrument of justice in these circumstances. Especially given the significance of the procedural, substantive and practical obstacles to the Negritos claim, it is important to be clear about what is at stake and what might be accomplished by the Community's decision to resort to domestic courts against the odds. In this light, questions of remedies in the context of the Negritos claim allow for an important reflection on the possibilities and limitations that shape law's ability to redress Indigenous dispossession in the global economy.

In its written submissions, the Negritos Community must request action from the court (*petitorio*) on the basis of the facts and allegations presented in its case. Section B.1 of this paper explained that the remedial focus of Peru's *amparo* cause of action is on the protection and restoration of constitutional rights. As such, the *Procedural Code* neither mandates nor prohibits a monetary damages award to the claimant as compensation for violations. Rather, it empowers the Court to issue a declaration ordering the cessation of the offending action and the restoration of the claimant to its original position prior to the violation. The *amparo* process is restorative in that the objective is "to restore the enjoyment of the plaintiff's injured right, reestablishing the situation existing when the right was harmed, by eliminating or suspending, if necessary, the detrimental act or fact."[217] To this end, the Court may also order the defendant to perform a positive action in the case of proven omissions.

These are the statutory parameters that shape the nature of the remedies that the Negritos Community may request if the Constitutional Court finds in its favor on the merits of its case.

[216] See *supra* notes 208 through 213.
[217] Brewer-Carías, *supra* note 89 at 279.

Within this framework, the Negritos legal team fashioned four specific remedies that attempt to redress the injustice of the Community's dispossession in terms that fit the scope of the court's remedial power in an *amparo* action. These proposed remedies reflect a preliminary effort to explore the question of what might be required, practically speaking, in order to take the Negritos Community's justice claims and its right to remedy seriously. Given the Peruvian courts' limited consideration of Indigenous property rights to date, there does not appear to be any domestic case law directly on point. As such, this discussion of remedies refers to relevant Peruvian commentary as well as statements of international human rights bodies.

The *first* available remedy would be a declaration that the Ministry of Energy and Mining and Yanacocha Mine violated the Negrtios Community's rights (as described above) and failed to fulfil their obligations to the Community under the Peruvian Constitution and international law. This first step would form the basis for the *second* remedy, namely a declaration that the administrative decisions that purported to eliminate or diminish the Community's communal property rights and legal existence are null and void. This includes the Ministry's approval of the expropriation and mining easement.

Building on these first two remedies, as a *third* step, the court could restore the Negritos Community to its original position before the violations by declaring that it remains a legal person and rightful property owner of the Reserve Area (Llagaden), the expropriated area (Pampa Larga) and the area subjected to a mining easement in favor of Yanacocha. This third order could include recognition of the Community's right to participate in the benefits of the mining activity taking place on its land and to be equitably indemnified for the damage it has suffered due to past violations of it property rights and the illegal occupation of its property since the early 1990s for the purposes of mining activity.[218]

Finally, to secure the ongoing protection of the Negritos Community's rights in light of Yanacocha's occupation of its land, the court could add a *fourth* order requiring the company to negotiate an agreement with the Community. Such an agreement would govern the terms of the co-existence of the mining company and the Community in light of the Community's rightful

[218] Citing a report of the Peruvian national Ombudsmen, Sulca Huamaní also concludes that mining operations, even when authorized by the Ministry of Mining, are illegal if they have not met the constitutional standard of free, prior and informed consent or consultation, as the case may be: Daniyar Sulca Huamaní, "Acceso a las tierras comunales y le conflicto sociambiental: el Caso Majaz" (2008) Palestra del Tribunal Constitucional: Revista de Doctrina y Jurisprudencia 3(9) 135 at 145. Also see *supra* note 202.

ownership of the land upon which the company conducts some of its key operations.[219] The court should specify that the negotiation of this agreement must be conducted in accordance with the principles of constitutional and international law that define the Community's right to equitable compensation and equitable benefit in return for the loss of its land to mining activity.

To ensure that the company commits to such negotiations, the court could impose a fine or penalty if the company refuses to comply.[220] However, it could also take a more proactive approach, by ordering the suspension of all mining activities that impact the Community's property interests until such an agreement is reached.[221] A proactive approach may be important in light of the severe nature of the rights violations and the extraordinary power imbalance between the parties. It would incentivize Yanacocha to take its negotiations with the Community seriously and reach an agreement, thereby protecting the Community's right to property and equitable compensation. Of course, if it is difficult to reach an agreement expeditiously, at the Community's discretion the suspension of mining operations could be lifted by way of an interim agreement predicated on the consolidation of a longer-term agreement.

These proposed remedies are structured to acknowledge that, while the *amparo* is a public law rights-protecting cause of action, some of the Negritos Community's specific rights claims have distributive consequences. In particular, this refers to the right to equitable compensation for damage to its property and to an equitably share of the profits generated by resource extraction. The legal remedies described above address this through a combination of orders that recognize rights, restore rights and require the company to do the same, including by applying economic pressure on the company through a suspension order.

This discussion of remedies makes apparent the fact that, in problematizing the Negritos story of dispossession by raising rights claims rooted in constitutional and international human

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[219] The Community may decide to negotiate an agreement to govern present day operations given that the mine is already established and its impacts can only be mitigated. The Peruvian State could of course elect to re-expropriate the Community's property but this would require conformity with the general rules that govern expropriation in addition to due regard for the Community's status as a Campesino property holder under Peruvian Constitutional and international law.

[220] *Constitutional Procedural Code*, art 22.

[221] There is at least one example of an international human rights body ordering the temporary suspension of a foreign-owned mine in response to a petition brought by Indigenous communities in Guatemala alleging rights violations, including property rights violations: Inter-American Commission on Human Rights, PM 260-07 "Communities of the Maya People (Sipakepense and Mam) of the Sipacapa and San Miguel Ixtahuacan Municipalities in the Department of San Marcos, Guatemala" (May 20, 2010 revised December 7, 2011), online: http://www.oas.org/en/iachr/decisions/precautionary.asp under 2010, PM 260-07.

rights law, the Negritos case taps into deeper questions regarding judicial remedies for past wrongs. More specifically, in fashioning a remedy for dispossession, courts are often forced to address a material conflict between rights rooted in public law, due in this case to the claimant's special status as a Campesino Community, and rights rooted in private law, acquired here by the mining company through the law of contract and property.[222] In this context, Peruvian constitutional experts have advocated for the principle that private law rights must give way to constitutional rights where there is a conflict.[223] Statements from international human rights bodies have similarly concluded that the state should suspend a company's private rights to exploit a natural resource where its operations have been approved and undertaken without fully respecting the rights of affected Indigenous communities.[224] Even those who argue that private rights should be insulated from public law remedies for historic injustice nonetheless qualify their argument to those cases where the private rights-holders are "morally innocent", having acquired their rights many years after the original violations.[225] Undoubtedly where the private rights-holder is also the original rights violator, as alleged in the Negritos Community's action against Yanacocha, this reasoning should not apply.

4 Conclusion: Dispossession Research and Law Reform Agenda

This case study told the story of how one domestic legal system in Latin America responded to an Indigenous dispossession claim that fundamentally challenges the legal arrangements underpinning the operations of a large and profitable foreign-owned gold mine. In conclusion, I will summarize the practical consequences of this study for those who seek to continue the work

[222] While contract and property rights enjoy constitutional protection in Peru, they nonetheless originate in private law: see *Political Constitution of Peru*, 1993, arts 62, 70. The constitutional right to property in Peru is limited by the state's power to expropriate property for reasons of national security or public necessity.

[223] Roger Arturo Merino Acuña, "La Tutela Constitucional de la Autonomía Contractual. El Contracto Entre Poder Público y Poder Privado" in *El Derecho Civil Patrimonial y Derecho Constitucional* (Gaceta Jurídica, 2009) 43; Roger Arturo Merino Acuña, "Legitimando el Abuso en el Contrato: El Pleno Casatorio Sobre Transacción Extrajudicial y los Contratos Contaminados" (2010) Actualidad Civil y Procesal Civil, Normas Legales 221.

[224] In 2010, the Committee of Experts on the Application of Conventions and Recommendations (CEACR) of the International Labour Organization (ILO) recommended that the Peruvian State "suspend the exploration and exploitation of natural resources which are affecting peoples covered by the Convention until such time as the participation and consultation of the peoples concerned is ensured through their representative institutions in a climate of full respect and trust, in accordance with Articles 6, 7 and 15 of the Convention", see: ILO, Committee of Experts on the Application of Conventions and Recommendations, *Report of the Committee of Experts on the Application of Conventions and Recommendations* (Report III, Part 1A), International Labour Conference, 99th Session, 2010 (ILO: 2010) at 784.

[225] One example is Jeremy Waldron concept of supersession: Burke A. Hendrix, "Historical Injustice, Rawlsian Egalitarianism, and Political Contestation" (2014) 27 Canadian Journal of Law & Jurisprudence 73 at 74.

of studying and problematizing Indigenous dispossession in the global economy. This includes by advancing rights claims in domestic and international legal fora in order to support Indigenous communities confronted with unwanted models of resource extraction. In this section, I outline this study's two most significant findings, along with their potential consequences for national and international law reform and future comparative research. The first set of findings relate to the study and problematization of dispossession using human rights law. The second set speak to the litigation of dispossession in domestic and international courts. I will describe each area in turn.

First, this paper demonstrates the strategic value of accumulating a critical mass of empirically informed systematic studies of the legal processes of Indigenous dispossession in the global economy. In the preceding pages, I relayed the story of the Negritos Community's dispossession and resistance, making an effort to tell this story in its larger social, legal, economic and political context. I also analyzed this story systematically in order to describe the "dynamics of dispossession". While this description is rooted in the Negritos Community's experience, it has the potential to contribute to further comparative study and theorizing of dispossession in the global economy. Although every Indigenous community's dispossession story has its own specificities, systematic and comparative studies may reveal patterns. More studies are needed of the mechanics of how legal processes facilitate, maintain and enforce the dispossession of local communities in the global economy and a comparative review of existing studies may be in order.[226]

Not only can this mode of inquiry be useful for specific communities, studies of this kind can present a powerful challenge to the contemporary model of global resource extraction, revealing the extent to which it is predicated on relations of dispossession. The strength of communities' efforts to challenge the ethics and legality of the relations that underlie global resource extraction will depend in part on the quality of the evidence behind each dispossession story. Uncovering (and interrogating) a company's official claim to legality is a critical starting point.

This paper also described how the Negritos legal team drew on constitutional and international human rights law to develop a legal framework for problematizing the Negritos Community's dispossession. It depicts how the expansion of Indigenous rights principles in international law complements existing constitutional frameworks and jurisprudence in Peru to

[226] See Anaya, *supra* note 3; Engle, *supra* note 71; Rodríguez-Garavito & Rodríguez-Franco, *supra* note 11; Parmar, *supra* note 11.

create a relatively robust, and generally applicable, set of standards and rights for problematizing dispossession and making a claim for remedy. These principles, enforceable in the jurisdiction, include the right to communal property, the right to free, prior and informed consultation and in some cases consent, the right to legal personhood, and the right to benefit equitably from resource extraction activities. Most importantly from the perspective of Negritos Community members, these principles speak to their lived experience of dispossession and they offer a language for challenging their material loss of property and legal personhood, as well as their alleged consent to these processes. Thus, at least at the level of principle or the rights framework itself, the Negritos experience suggests that human rights law can be a useful frame for translating dispossession concerns into legal and political claims.

Despite this, the state has failed to respond to the Negritos Community's claims and the domestic courts have become the Community's last resort. This paper tells the story of how the Negritos Community has attempted to give practical effect to its Campesino Community rights. This provides an important opportunity to examine the available causes of action that might channel dispossession claims to local (and international) courts. While much is known about the expansion of Indigenous peoples' substantive rights internationally, much less is known about how these rights are operationalized in domestic legal systems. As the Negritos Community discovered, Peru's domestic legal system offers a single cause of action, the *amparo* action, for presenting a claim to local courts alleging violations of constitutional Campesino rights and international human rights law.

Rights are only meaningful if processes and mechanisms exist whereby communities can advance their substantive claims before legal decision makers. In the process of litigating its case, the Negritos Community encountered multiple hurdles in the courtroom. Among these, the limitation period has emerged as the most significant procedural obstacle. To date, domestic courts in the Negritos case have ignored other possible approaches to the limitation period requirement, opting for an interpretation that would have required the Community to bring its legal claim within sixty days of purportedly signing the documents that transferred its land to the company. I have argued that the courts' interpretation of the limitation period requirement in the Negritos case is doctrinally unnecessary in that it was open to the court to conceptualize the impugned rights violations as ongoing actions or omissions. Perhaps more importantly, I have argued that if the court decides to draw conclusions with respect to an Indigenous claimant's knowledge and capacity

at the admissibility phase of a dispossession claim, it must consider these concepts in context and in light of Indigenous rights case law. To do otherwise is problematic from an equitable perspective because it ignores the power dynamics that characterized the processes that lead to the Community's dispossession. To date, the courts in the Negritos case have been unwilling to substantively consider the factors that impacted the Community's knowledge and capacity to bring its claim in a timely fashion.

Rather, the courts in the Negritos case have ultimately relied (at least to date) on the same formalist, superficial view of consent that Yanacocha put forward in its submissions. Thus, a certain irony emerges. The Community is attempting to access the court in order to assert a rights framework that includes the right to *free and informed* consultation, and in some cases, consent. The facts of the case provide strong evidence suggesting that the signatures procured on the documents in question fall far short of meeting the free and informed standard being developed in international law and in Peruvian domestic law. The Community is precluded from a substantive consideration of its consent-related allegations due to the operation of a formalist notion of consent in the limitation period analysis at the admissibility stage.

This observation lays the groundwork for this paper's second major finding. The expansion of Indigenous rights frameworks in both domestic and international law is undoubtedly important and, as described above, these statements of principle seem capable of effectively problematizing relations of dispossession. However, this expansion of substantive rights recognition has not been accompanied by a parallel concern for the development of appropriate and accessible judicial procedures and legal remedies. Communities' legal claims are successful not only because they have good facts and are decided with robust substantive rights frameworks. Crucially, they must also be able to package themselves into a recognizable domestic cause of action and navigate the associated procedural requirements. Access to justice is of course as contingent on appropriate procedures as it is on rights statements and enforcement. Arguably international and domestic lawmakers have been insufficiently attentive to the procedural aspects of the assertion of Indigenous and Campesino rights, and particularly property rights, in domestic courts. This observation applies in particular to contexts where the claims relate to past violations associated with established projects.

In Peru, despite the existence of promising statements of law, there is no specific constitutional procedure for the litigation of Campesino and Indigenous rights claims. When the

Negritos Community attempted to bring its rights claim using the only cause of action that ostensibly applied, the associated procedural rules proved susceptible to the re-introduction of formalist concepts of consent. Thus, the rules of procedure themselves have become a new site of political and legal struggle. This suggests that appropriate public law mechanisms, procedures and principles must be developed to prevent courts from dismissing Indigenous rights claims at the procedural phase of legal proceedings on the basis of formalistic notions of consent. More research is needed to identify whether or not substantive Indigenous rights frameworks and remedies are similarly inaccessible in other domestic legal systems in the Americas. There may be good reason to believe that this issue is systemic given that the Peruvian *amparo* as a cause of action is similar to *amparo* proceedings in other countries across Latin America.[227] Law reform may be needed to design new mechanisms, or to make available mechanisms more accessible and responsive to the reality of Indigenous claims, especially claims of past rights violations. If this does not happen, the Negritos experience teaches that existing domestic rights protection mechanisms will work to simply reinforce the dynamics of power and exclusion that give rise to rights violations.

Importantly, this Indigenous rights-based critique of domestic procedure and access to justice in Peru has its international counterpart with international consequences. This paper has described how the Negritos case unfolded in parallel with the emergence, at the turn of the millennium, of a body of inter-American jurisprudence that acknowledges Indigenous rights. However, these rights might only be claimed before the Inter-American Commission or Court in accordance with certain procedural requirements. Perhaps most significant is the long-standing exhaustion of remedies requirement: all claimants must exhaust available remedies in their domestic legal system, albeit with some exceptions.[228] Thus, the expansion of Indigenous rights recognition in the inter-American system has not been accompanied by, at least on its face, any changes to the procedural requirements that Indigenous groups must meet in order to operationalize these rights.

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[227] See generally Brewer-Carías' comparative study of the *amparo* proceedings across numerous Latin American countries: *supra* note 89.

[228] *Rules of Procedure of the Inter-American Commission on Human Rights*, art 31(1). The exceptions to the exhaustion of remedy requirement are: (i) the domestic legislation does not afford due process of law [art 31(2)(a)]; (ii) the party alleging violation has been denied access to the remedies under domestic law or has been prevented from exhausting them [art 31(2)(b)]; (iii) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies [art 31(2)(c)].

Yet the Negritos case study reveals that an ostensible domestic cause of action may in practice include procedural requirements that are interpreted to create an insurmountable obstacle for Indigenous dispossession claims. The Negritos example is important because it documents how a community can become caught in a web of procedural requirements that threaten to effectively frustrate its capacity to assert its substantive rights claims before any court of law, either domestically or internationally. There is potentially a kind of misalignment between inter-American procedures and statements of Indigenous rights on one hand, and on the other, the complex domestic legal and political terrain that Campesino and Indigenous communities must navigate in an effort to simply identify a cause of action and convince a court to admit their claim and consider it on the merits. Due to the exhaustion of remedies requirement, where an ostensible cause of action exits these domestic efforts are a necessary prerequisite, even if they are ultimately fruitless, before a community may appeal to an international human rights body, like the Inter-American Commission.

This points to a potential area of future public international law research focused on the admissibility decisions of the Inter-American Commission in response to Indigenous rights related petitions. If the domestic mechanisms available for actualizing Indigenous rights in the region are systematically and seriously deficient, more research is needed to identify how this reality is informing, or should inform, admissibility rules at the inter-American level. For example, how has the Inter-American Commission applied the exhaustion of remedies requirement (and its exceptions) to petitions presented by Indigenous communities in the Americas? Can a systematic pattern of deficient local remedies be observed across the petitions presented to date? If so, how should the Commission respond in its admissibility determinations? Are specialized admissibility considerations or rules warranted for Indigenous rights petitions? Should the Commission develop substantive principles to inform debate over the domestic causes of action and procedural rules that would ensure Indigenous communities' meaningful access to their local courts?

As a stand-alone case study, the Negritos case cannot answer these questions; rather it can only help to pose them. While a single case study will always have inherent limitations, one of the strengths of the Negritos study is the depth and detail of information compiled over more than a decade. As such, it offers a unique window into the interaction between the domestic legal system, a Campesino Community, and a transnational mining company, where enforceable Constitutional rights and international human rights are at stake. It tells us that the incorporation of international

public law, and specifically rights related to Indigenous communal property, into the domestic sphere, can trigger important access to justice problems due to the absence of appropriate procedural rules. More detailed empirical and longitudinal studies of other cases and contexts are needed to identify the extent to which these problems extend beyond Peru.[229] In this work, it would be important to distinguish between the proactive use of the courts to resist the imposition of a project, and recourse to the courts in order to remedy past violations and dispossession.

The Negritos case study depicts a particular form of legal practice in contemporary conditions of economic globalization. At the broadest level, it represents an attempt by activists to use international human rights concepts to address issues of global economic justice. This activism must be informed by a conception of the nature of the problem it seeks to address and of course such an exercise is always contentious and complex.[230] In the *amparo* action, the Negritos Community's concerns were primarily framed as violations of communal property rights. This was in part due to the nature of the available documentary evidence. Perhaps with other forms of evidence, other legal frames could have been adopted, such as cultural rights or environmental rights. However, as stated above, the Negritos experience suggests that there is significant value in framing cases of this kind as struggles over property in particular. The property lens reveals the material, corporeal, aspect of foreign mining activities, where land is taken, transferred, occupied and exploited in the midst of people, communities and livelihoods. In the Negritos case, the property lens was powerful because it allowed the Community to challenge the very legality and the legitimacy of Yanacocha's mining operations, and arguably by extension, the global status quo of transnational resource extraction as described in this paper's introduction.

In the first paragraphs of this conclusion I referred to the importance of studying dispossession in the global economy and the promise that human rights law seems to hold as one problematizing frame for this endeavor. However, at the same time, the procedural obstacles in the Negritos case point to a potential weakness or irony of property claims as a human rights claims.

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[229] Although there are a number of studies of Indigenous and other communities in Latin American using domestic courts to address concerns related to resource extraction, none of these offer the detail and depth described here. Moreover, many of these depict examples of communities resorting to the courts in order to proactively prevent a proposed mining project, rather than examples of efforts to remedy past violations: see generally *supra* note 10.

[230] Karen Engle published an extensive study of the struggle within the Indigenous rights movement over international law strategies for addressing "the problem". She sees the history of the movement primarily in terms of a struggle between framing the problem as the right to self-determination and the right to culture. While she understands the right to property as a derivative of the right to culture, she also observes how the property frame has the potential to advance certain elements of the self-determination agenda, namely control over land and resources: see Engle, *supra* note 71.

In a market economy, property is traded through contracts, usually in exchange for money. This exchange of course is predicated on some notion of consent. Legitimate property transfers must be consensual. Where they are not consensual, they must be justified in the national public interest, as in the case of expropriation.[231] The Negritos study reveals how slippery the notion of consent can be, not only in relation to substantive rights matters, but also at the procedural stage of legal proceedings. The case law and literature cited in Part 3.3 of this paper emphasize that for Indigenous communities the question of consent is never merely a matter of formal information transfer, but can only be understood in a cultural, social, historical context and with attention to different ways of knowing. In the Negritos case, to date the courts, the state and the company have all accepted the idea that, in exchange for practically nothing, the Community consented to the elimination of all of its communal land interests, any other community right or interest, and its very existence in law.

In one view, the Negritos case study is perhaps an extreme example due to the time period of the property acquisitions in question. In today's Latin America, arguably few communities occupy a position comparable to that of the Negritos Community in the early 90s: most have at least heard about the pitfalls of large-scale foreign mining and many have relatively greater access to information and supportive civil society actors. However, these changes are a matter of degree. Communities in Latin America and foreign resource companies continue to encounter each other in the context of vastly unequal power relations. The widespread resource related social conflicts described in this paper's introduction reveal that, politically speaking, the terms and meaning of consent remain very much unsettled, notwithstanding the growing international Indigenous rights case law.

In this light, many of the deeper questions in the Negritos case maintain their relevance. Of particular importance is the question of just how free consent can be under current conditions, not only of unequal power relations, but where the rules of property and contract that ultimately govern these relations remain squarely in the political economy of neoliberal capitalism. Even where Communities are relatively better resourced and equipped to negotiate with companies, it can be difficult to escape a model that pushes toward the commodification of rights, exchanging monetary

[231] *Political Constitution of Peru, 1993*, art 70; *American Convention*, art 21(2).

compensation in return for permission to exploit resources.[232] One important commonality between the Negritos case and the circumstances of present day resource conflicts is that few communities have real choices and control over outcomes when it comes to proposed resource projects and the legal frameworks that determine who has ultimate decision making power.[233]

Property has come to occupy this ambivalent space, as a foundational right in Indigenous rights frameworks as well as in the neoliberal economic system. This paper previously described how, in Peru and in many other countries in the region and around the world, Indigenous rights and neoliberal legal (foreign investment) projects have unfolded almost in parallel. The Negritos case study reveals that the slippage between these two worlds often occurs in the context of the struggle over the meaning of consent, crystalized in this study in arguments over how to apply the limitation period. While this paper has advocated for progressive interpretations of limitation period laws, or other Indigenous appropriate procedural reforms, in the background we are always confronted with the possibility that in order to approximate global social justice, we must address and transform the system of property that generates the very injustices we seek to redress.[234] This raises questions about whether or not, or under what conditions, human rights, and Indigenous property rights more specifically, can be liberating, or conversely, whether or not even the most robust procedural reforms will nonetheless somehow fail to convert law into an instrument of justice for the dispossessed.

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[232] See for example: Ibironke Odumosu-Ayanu, "Foreign Direct Investment Catalysts in West Africa: Interactions with Local Content Law and Industry-Community Agreements" (2012) 35 North Carolina Central Law Review 65; Colin Samson, "Canada's Strategy of Dispossession: Aboriginal Land and Rights Cessions in Comprehensive Land Claims" (2016) 31(1) Canadian Journal of Law and Society 87.

[233] For an Indigenous rights critique of the dominant global resource extraction model, see Anaya, *supra* note 3. Popular referenda in Latin America represent one attempt to establish and advocate for another source of law and decision-making power. For just two of many examples see: McGee, *supra* note 10; Shin Imai et al, *supra* note 10. This is not just a developing country issue. Indigenous controlled project assessments and decision-making processes that situate themselves outside of the state's jurisdiction are also growing in Canada. For two examples see: Stk'emlupsemc te Secwepemc Nation, Media Release, "Stk'emlupsemc te Secwepemc Nation (SSN) says No to KGHM Ajax Mine and Yes to Healthy People and Environment" (4 March 2017), online: http://MiningWatch.ca/sites/default/files/2017-03-ssnajaxdecisionrelease_0.pdf; Tsleil-Waututh Nation, Media Legal Backgrounder, "Tsleil-Waututh Nation (TWN) Legal Challenge to the National Energy Board's (NEB) review of Kinder Morgan Trans Mountain Pipeline and Tanker Project" (2 May 2014), online: http://www.twnation.ca/en/~/media/Files/Press%20Releases/TWN%20-%20NEB%20-%20Legal%20Backgrounder%20-%20CLEAN_VAN_LAW-1461360-v4.ashx.

[234] Engle, *supra* note 71 at 274-8; David Kennedy, "The international human rights movement: part of the problem?" European Human Rights Law Review 3 (2001) 245; David Kennedy, "The International Human Rights Regime: Still Part of the Problem?" in Ole Windahl Pedersen, ed, *Examining Critical Perspectives on Human Rights* (Cambridge University Press, 2013) 19.

In the meantime, while we contemplate how we might change the legal structures of the global economic system, or while we strategize legal responses to the global governance gap described in this paper's introduction, we must bear in mind one final lesson from this study. As we reach to global debates and work toward structural changes, we must nonetheless remain grounded in the struggles of the dispossessed. This involves thinking critically, conscientiously and consulting as we craft legal frames for problematizing relations of dispossession. It requires using law to fight practices and ideologies that would treat the dispossessed as inevitable, irrelevant, nonexistent, invisible, or deserving of their fate. At the same time, we must be realistic that even the most committed communities may become weak and divided after decades (or centuries) confronting relations of power and exploitation. And even when our efforts feel futile in the face of what we confront (delays, corruption, formalism), we must continue to support communities' demands that their local legal systems be efficient, fair, equitable and accessible. May we be creative and courageous in our pursuit of remedies, reparations and a new order of legal relations.

CHAPTER TWO: Contesting Indigenous-Industry Agreements in Latin America

- Charis Kamphuis[1]

Abstract
In this chapter, I review the contributions of scholars and activists who share my concern that the legal and social contexts that typically inform the formation of Indigenous-industry agreements in Latin America are marked by enormous power disparities and stark epistemological differences. This literature review supports the proposition that it is likely that many Indigenous-industry agreements in Latin America lack legitimacy and perhaps legality. This in turn raises serious questions about whether or not Indigenous-industry "agreements" formed in these conditions could possibly rest on any meaningful notion of consent. I make this important point in order to focus on a narrower question, one of the present but also very much one of the future, as we face the aftermath, in the years and decades to come, of the proliferation of agreements under present circumstances. What happens when a community mobilizes in order to challenge the legality of a past agreement with industry, such as for example by contesting the idea that it actually consented? What if the company and/or the state holds up a document with signatures from past community leaders that allegedly represent consent? If the company and the state are unresponsive to a community's concerns about an agreement, can it resort to the courts? In this chapter, I explore some of these questions by referring to Peru as a case study. In my conclusion, I explore the significance of this study for ongoing normative developments in relation to Indigenous peoples' right to consultation, consent and the formation of Indigenous-industry agreements.

1 The Context for Indigenous-Industry Agreements in Latin America

The principle that resource extraction should only occur on Indigenous land (owned or claimed) after a process of free, prior and informed consultation with affected communities first made its appearance on the international legal stage in the 1989 *International Labour Organization (ILO) Convention concerning Indigenous and Tribal Peoples in Independent Countries* (*Convention 169)*.[2] Since then, this principle has become ubiquitous, endorsed in many statements of international law, in some countries' constitutions and/or constitutional jurisprudence around the world and in the policies of international financial investors and corporations. The related principle that consultation must occur "in order to obtain the free, prior and informed consent" of affected Indigenous peoples has continued to gain acceptance since its articulation in the 2007 UN *Declaration on the Rights of Indigenous Peoples* (UNDRIP).[3] In his 2013 final report to the UN

[1] Chapter in *The Law & Politics of Indigenous-Industry Agreements*, edited by Dwight Newman & Ibironke Odumosu-Ayanu (Routledge, 2020).
[2] *International Labour Organization (ILO) Convention concerning Indigenous and Tribal Peoples in Independent Countries,* 27 June 1989, C169 art 15(2) (entered into force 5 September 1991) [*Convention* 169].
[3] *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, A/RES/61/295 art 32(2) [UNDRIP].

Human Rights Council, Special Rapporteur for the Rights of Indigenous Peoples, James Anaya argued that there is a general rule in international law that extractive activities should not take place on the territories of Indigenous peoples without their free prior and informed consent.[4] Notably though, the precise meaning of the right to consent remains controversial.[5]

Latin American countries have been at the forefront of these global legal developments. Of the countries that have ratified *Convention 169* worldwide, approximately two-thirds (15) are Latin American.[6] After UNDRIP was adopted, a number of Latin American countries developed legislation to regulate Indigenous peoples' right to free, prior and informed consultation and by 2015, four countries, Bolivia, Ecuador, Colombia and Peru, had passed legislation in this area.[7] Attention to these rights instruments in the region is not surprising given that many Latin American states claim sovereignty over a land base that is also inhabited and claimed by Indigenous peoples. In particular, countries located in the Andean and Central American regions have large Indigenous populations.

Not only are many Latin America countries the site of some of the richest mineral and petroleum deposits in the world, most have adopted a common political economy of extraction consistent with neoliberal economic globalization.[8] This refers to, *inter alia*, the use of domestic law to attract and facilitate foreign investment in large scale resource projects, the use of

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[4] James Anaya, *Report of the Special Rapporteur on the rights of indigenous peoples, Extractive industries and indigenous peoples*, UNGAOR, 24th Sess, UN Doc A/HRC/24/41 (2013) at para 27 [Anaya, *Extractive Industries*]. Anaya emphasized that this rule applies in "the standard scenario", where states or third-party business enterprises promote the extraction of natural resources within Indigenous territories. However, he also identified a preferred political economic model of resource development, which is not the prevailing business model (see *ibid* at paras 8–17).

[5] See e.g. David Szablowski, "Operationalizing Free, Prior, and Informed Consent in the Extractive Industry Sector? Examining the Challenges of a Negotiated Model of Justice" (2010) 1:2 Can J Development Studies 111 at 116 [Szablowski]. Especially controversial is the possibility of a substantive Indigenous right to consent (or to withhold consent), grounded in an Indigenous right to self-determination and to exercise jurisdiction over resources. However, there appears to be a consensus among international human rights bodies that at a minimum consent is required where a proposed project will significantly and adversely impact a community, such as through displacement: *Saramaka People v Suriname* (2007) Inter-Am Ct HR (Ser C) No 172 at para 134. See also James Anaya, *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, UNGAOR, 21st Sess, UN Doc. A/HRC/21/47 (2012) at para 65 [Anaya, *Report*].

[6] These countries are: Argentina, Bolivia, Brazil, Chile Columbia, Costa Rica, Dominica, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru and Venezuela: see International Labour Organization, "Ratifications of C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169)", online: <http://www.ilo.org/dyn/normlex/en/f?P=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314>.

[7] Patricia Urteaga-Crovetto, "Implementation of the Right to Prior Consultation in the Andean Countries: A Comparative Perspective" (2018) 50:1 J Leg Pluralism & Unofficial L 7 at 8 [Urteaga-Crovetto].

[8] Fábio De Castro, Pitou Van Dijck & Barbara Hogenboom, *The Extraction and Conservation of Natural Resources in South America: Recent Trends and Challenges* (Amsterdam: CEDLA, 2014) at 6-7 [De Castro et al].

international economic law to protect foreign investors from certain kinds of state decisions, and the use of corporate law and tax law to enhance foreign companies' profits and locate them outside of the countries where they operate.[9] In this framework, foreign mineral extraction has intensified in Latin America over the last twenty years.[10]

In a context of strong and continued resource extraction, and in light of the widespread diffusion of the principles of consultation and consent, it stands to reason that resource companies operating in Latin America are increasingly pursing benefit agreements with affected communities. Many have espoused the "business case" for respecting human rights and securing community agreement.[11] The idea here is that agreements improve profitability by securing greater social stability for specific projects and positively impacting a company's reputation. Notably, Industry-community agreements are primarily formed outside of formal state-led consultation processes. This is due to the fact that consultation-related legislation in Latin America to date has focused exclusively on regulating the state's consultation process and agreement making with affected Indigenous communities. The relationship between these state-led processes and Industry-community agreements in Latin America is further explored throughout this chapter.

Alongside these normative developments, neo-liberal resource development also coincides with serious and endemic social conflicts in Latin America.[12] In a 2016 report, the organization Global Witness found that in 2015 alone, 185 environmental defenders had been assassinated across 16 countries around the world.[13] In this study, mining was the industry most linked to violence and four of the top five countries with the worst incidence of violence were Latin

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[9] *Ibid*. See also Anaya, *Report*, *supra* note 5 at para 74.

[10] Economic Commission for Latin America and the Caribbean (ECLAC), *Foreign Direct Investment in Latin America and the Caribbean, 2016*, LC/G.2680-P (Santiago: 2016) at 107; OAS, Inter-American Commission on Human Rights, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*, OROEA/Ser.L/V/II.Doc.47/15 (2015) at 15 [OAS, *Human Rights Protection*].

[11] Global Affairs Canada, "Canada's Enhanced Corporate Social Responsibility Strategy to Strengthen Canada's Extractive Sector Abroad – Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad", online: (2014), at 8 <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Enhanced_CS_Strategy_ENG.pdf>; Anaya, *Extractive Industries*, *supra* note 4 at para 29; OECD, *OECD Guidelines for Multinational Enterprises*, 2011 ed (OECD Publishing, 2011) at para 40 <http://www.oecd.org/daf/inv/mne/48004323.pdf>; John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UNGAOR, 17th Sess, UN Doc A/HRC/17/31 (2011) at 8, 14.

[12] OAS, Inter-American Commission on Human Rights, *Criminalization of the Work of Human Rights Defenders*, OROEA/Ser.L/V/II.Doc.49/15 (2015) at paras 48-50.

[13] Global Witness, *On Dangerous Ground: The Killing and Criminalization of Land and Environmental Defenders Worldwide* (London: Global Witness, 2016) at 5.

American: Peru, Brazil, Nicaragua and Colombia.[14] In 2016, the Justice and Corporate Accountability Project (JCAP) published a study of reported incidents of violence and criminalization in Latin America in relation to Canadian mining operations. It found that between 2000-2015 there were 44 deaths and 403 injuries across 13 Latin American countries in incidents involving 28 different companies.[15] In sum, land and environment related conflicts in the region are often violent and in far too many cases community leaders who oppose or criticize projects are murdered, harmed, threatened, surveilled and criminalized.

This background reveals that over the last twenty years, a curious state of affairs has emerged. The Indigenous right to consultation has been widely endorsed by Latin American governments and courts *in tandem* with the intensification of proposed resource extraction on Indigenous land and the proliferation of violent conflicts over specific projects as well as over pro-extraction laws and policies more generally.[16] In making this observation, my intent is not to undertake a full examination of this phenomena and potential explanations.[17] Rather, it is to frame a more narrow set of arguments and inquiries in relation to the formation of Indigenous-industry benefit agreements in this context.

In Part 2 of this chapter, I refer to the contributions of scholars and activists who share my concern that the legal and social contexts that typically inform the formation of Indigenous-industry agreements in Latin America are marked by enormous power disparities and stark epistemological differences. Their findings raise serious questions about whether or not Indigenous-industry "agreements" formed in these conditions could possibly rest on any meaningful notion of consent. This literature review supports the proposition that it is likely that many Indigenous-industry agreements in Latin America lack legitimacy and perhaps legality.

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[14] *Ibid* at 8.

[15] Justice and Corporate Accountability Project, *The "Canada Brand": Violence and Canadian Mining Companies in Latin America* (JCAP, 2016).

[16] In a study of Colombia, César Rodríguez Garavito makes a similar observation, asking the question: "How is this coexistence of order and chaos (this coexistence of the utmost legal formalism and the most extreme violence) possible?": César Rodríguez-Garavito, "Ethnicity.gov: Global Governance, Indigenous Peoples, and the Right to Prior Consultation in Social Minefields" (2011) 18:1 Ind J Global Leg Stud 263 at 4-5 [Rodríguez Garavito]. See also De Castro et al, *supra* note 8; Roger Merino Acuña, "The politics of extractive governance: Indigenous peoples and socio-environmental conflicts" (2015) 2:1 Extractive Industries & Society 85 [Merino Acuña, "Extractive Governance"].

[17] Several authors have undertaken inquiries into the conceptual and political compatibility of international human rights law and neo-liberal globalization: Roger Merino Acuña, "Critical Human Rights and Liberal Legality: Struggling for 'The Right to Have Communal Rights'" (2013) 3:3 Philosophy Study 246; Umut Özsu, "Neoliberalism and Human Rights: The Brandt Commission and the Struggle for New World" (2018) 81 Law & Contemp Probs; David Kennedy, "The International Human Rights Regime: Still Part of the Problem?" In Rob Dickinson et al, eds, *Examining Critical Perspectives on Human Rights* (Cambridge University Press 2012) 19.

I make this important point in order to focus on a narrower question, one of the present but also very much one of the future, as we face the aftermath, in the years and decades to come, of the proliferation of agreements under present circumstances. What happens when a community mobilizes in order to challenge the legality of a past agreement with industry, such as for example by contesting the idea that it actually consented? What if the company and/or the state holds up a document with signatures from past community leaders that allegedly represent consent? If the company and the state are unresponsive to a community's concerns about an agreement, can it resort to the courts?

In Part 3 of this chapter, I respond to some of these questions by referring to Peru as a case study. I begin by summarizing the main features of the constitutional and regulatory frameworks that inform the formation of Indigenous-industry agreements in that country. I complete this section by sharing the experience of San Andres de Negritos, a community that has sought to challenge the constitutionality of two agreements/contracts with Yanacocha Mine in Peruvian courts. This experience illuminates both interesting opportunities, as well as procedural obstacles when it comes to challenging illegitimate agreements in Latin America. The judicial response to date in the Negritos case study underscores the need for adequate and accessible oversight of Indigenous-industry agreements in these circumstances, a topic that I return to in this chapter's conclusion.

While this study is framed in relation to relevant literature on Latin America as a region, it adopts Peru as a useful case study for two reasons. First, Peru shares many familiar challenges with other Latin American countries, and likely with many developing countries in other regions of the world. Its history and democratic present are marked by deep problems with the rule of law, extreme social inequality, entrenched economic dependency on foreign resource extraction, and endemic and violent social conflicts rooted in social inequality. At the same time, Peru has a relatively strong history of recognition, regulation, litigation, law reform and political mobilization in relation to Indigenous issues. It also has a one of the largest Indigenous populations in Latin America and in 2011 was the first country in the region to regulate the right to consultation.[18] Finally, many key features of Peru's constitutional tradition and procedures are commonly shared by other Latin American countries.

[18] Notably, this occurred in response to an exceptionally violent conflict between Peruvian security forces and a broad coalition of Indigenous communities protesting laws promoting investment and extraction in their territories.

All of this makes Peru a useful site of study for examining the possibilities and pitfalls of the implementation of the right to consent and consultation in the region and the theoretical and practical concerns with the formation of Indigenous-industry agreements in these contexts. While every country has unique features, the dynamics captured in this chapter's case study will undoubtedly resonate with other countries in Latin America and potentially countries in other regions of the world. In my conclusion, I explore the significance of this study for ongoing normative developments in relation to Indigenous peoples' right to consultation, consent and the formation of Indigenous-industry agreements, either independently or in conjunction with broader state-led processes.

2 Critical Research on Consultation, Consent and Indigenous-Industry Agreements in Latin America

Writing in 2010, David Szablowski observed a dearth of knowledge about the effective implementation of Indigenous peoples' right to consent in practice, and in particular, about the actual institutional arrangements required to give this principle concrete meaning in different contexts.[19] In Szablowski's view, where Indigenous communities lack legal rights to resources and are obligated to settle "for what they think they can get in the circumstances", this falls short of consent.[20] After referring to developments in public international law, private transnational regimes and corporate policy, he concluded that "FPIC is everywhere discussed, but it is not much of an exaggeration to say that it is practised virtually nowhere."[21] Moreover, Szablowski expressed concern that if power imbalances remain unaddressed, consent could become a double-edged sword for Indigenous peoples. As a partial remedy to this, Szablowski argued that the concept of "informed" consent must infuse the contractual relationship between industry and communities with fiduciary obligations (the duty to inform), thereby requiring a departure from the classical liberal approach to consent common in contract law.[22]

These relatively early assertions raise questions about Indigenous-industry agreements. In his 2013 report, Anaya articulated a normative standard for evaluating the legitimacy of these

[19] Szablowski, *supra* note 5 at 116. In one study, Indigenous representatives could not point to a single example of the effective implementation of this right.
[20] *Ibid* at 120.
[21] *Ibid* at 127.
[22] *Ibid* at 124-125.

agreements. Specifically, he endeavoured to describe the legal conditions that enable consent to a proposed project "on equitable and just terms".[23] Anaya proposed a human rights approach that characterizes consent as a safeguard for Indigenous peoples' rights more generally. Importantly, his framework captures two issues, first the wider legal and negotiating context within which the agreement is formed, and second, the substance of the agreement itself.

With respect to the first issue, Anaya argued that the protection of basic civil and political rights (free expression, including the right to oppose projects without repression and criminalization) is a pre-condition for the formation of legitimate agreements. However, the wider context must also include regulatory regimes that recognize and protect the full range of Indigenous peoples' rights and apply sanctions for violations.[24] Anaya also addressed the negotiation dynamic itself, stating that consultation procedures should ameliorate power imbalances between companies and Indigenous peoples. To this end, he asserted that States should establish mechanisms for sharing information and ensuring that Indigenous peoples have adequate negotiation capacity.[25]

Having established these contextual conditions, Anaya identified the fundamental characteristics of "rights-centered equitable agreements". In his view, these agreements must safeguard rights and/or mitigate the impact of resource development on rights.[26] As a preferred model, agreements should also ensure genuine long-term partnership such that Indigenous peoples participate in project decision-making and benefits as well as regulatory control.[27] According to Anaya, this substantive standard for agreements is required by international human rights law.

Furthering Anaya's framework, Elisa Morgera has argued that his principle of fair and equitable benefits-sharing has received insufficient attention among international human rights bodies and experts in the area.[28] Morgera advocates for an expansion of Anaya's argument through

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[23] Anaya, *Extractive Industries*, *supra* note 4 at para 41.

[24] *Ibid* at paras 41-46. Anaya mentions three other important pre-conditions: (1) mechanisms that enable Indigenous peoples' participation in state-driven strategic planning with respect to resource uses and land designations (paras 49-51); (2) companies' due diligence responsibilities, which includes respect for international human rights law and fair and adequate consultation and negotiation (para 52-57); and (3) the extraterritorial regulation of companies' activities by their home states (paras 47-48).

[25] Anaya, *Report*, *supra* note 5 at para 67.

[26] Anaya, *Extractive Industries*, *supra* note 4 at paras 73-77.

[27] Anaya stated that benefits should include direct financial benefits and compensation for adverse effects and should be determined in proportion to what Indigenous peoples provide to the company in return, including access to land and resources, as well as what Indigenous peoples may give up, including alternatives for future development.

[28] Elisa Morgera, "Under the Radar: Fair and Equitable Benefit-Sharing and the Human Rights of Indigenous Peoples and Local Communities Connected to Natural Resources" (2017) BENELEX Working Paper No 10 at 2-3. The only treaty-based reference in relation to Indigenous peoples in international human rights law occurs in article 15 of *ILO Convention No 169*. However, this provision refers only to Indigenous peoples' "right to participate" in the benefits

cross-fertilization between international human rights law and international environmental law. She argues that a combined doctrinal reading of these two areas supports a positive concept in international law of equitable benefit-sharing. Morgera argues that this principle is not only a procedural safeguard, but also as a substantive right that is integral to Indigenous peoples' rights connected to natural resources.[29]

In pursuing this line of doctrinal development, Morgera and Anaya explicitly cast their approach as a remedy to the potential pitfalls of consultation, consent and benefits-sharing. Morgera refers to the risk that benefits-sharing will convert complex issues into mere financial transactions, reinforcing advantages of the powerful and legitimizing loss of resources by the vulnerable.[30] Anaya similarly specified that agreements should not result from "undue pressure" and that access to basic services should not be conditioned upon acceptance of extractive projects. Anaya also indicated that the State and company should guard against the manipulation or intimidation of Indigenous leaders by public or private officials.[31] He cautioned that "consent is not a free-standing device of legitimation".[32] Notably, Szablowski, Morgera and Anaya all see a connection between the developments in human rights law in relation to Indigenous consultation and consent, and the formation of Indigenous-industry agreements. They all elaborate on the fundamental proposition that human rights law should come to bear in some way on these private agreements.

However, and of considerable importance given this chapter's focus, these authors provide very little guidance with respect to how questionable agreements might be reviewed on substantive or procedural grounds if disputes arise.[33] Lack of attention to this issue is of concern in light of the fact that, at least in Latin America, many of consent's pitfalls are indeed materializing in practice.[34]

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arising from the use, management and conservation of their natural resources, "wherever possible". The concept of benefits-sharing is absent entirely from UNDRIP. It made its first explicit appearance in the jurisprudence of the Inter-American Court of Human Rights in the 2007 *Saramaka* case which cast it as a "safe-guard" for Indigenous peoples' right to freely dispose of their natural resources. Following *Saramaka*, the right to benefits-sharing has been adopted in subsequent Inter-American Court cases and by other international bodies (*ibid* at 9-10).

[29] *Ibid* at 8.

[30] *Ibid* at 6.

[31] Anaya, *Extractive Industries*, *supra* note 4 at paras 24-25.

[32] *Ibid* at para 31.

[33] *Ibid* at para 78.

[34] In addition to the studies discussed here see also Due Process of Law Foundation, *El derecho a la consulta previa, libre e informada de los pueblos indígenas. La situación de Bolivia, Colombia, Ecuador y Perú* (Washington: DPLF/OXFAM, 2011); Amanda M. Fulmer, Angelina Snodgrass Godoy & Philip Neff, "Indigenous Rights, Resistance and the Law: Lessons from a Guatemalan Mine" (2008) 50:4 Latin American Politics and Society 91.

Anthropologists Riccarda Flemmer and Almut Schilling-Vacaflor studied forty state-led consultation processes in Bolivia and five in Peru, all undertaken in accordance with recent legislation in each country regulating the Indigenous right to free, prior and informed consultation with respect to proposed resource projects. In a 2015 publication of their results, they concluded that the implementation of this right is abysmally distant from the ideals of human rights advocates working on norm development at the international level.[35]

Flemmer and Schilling-Vacaflor found that the terms of consultations, including procedures, timelines, scope/issues and information, were largely imposed by the State. Moreover, consultations suffered from serious power asymmetries, enormous information and knowledge deficiencies, and intercultural inadequacies.[36] All of this limited the legitimacy of the process and the effective participation of Indigenous groups involved. Notably, consultations were often overloaded with a wide range of community concerns not directly related to the extractive project in question. Finally, these researchers observed that agreements reached between government authorities and Indigenous communities were weak, lacked follow up mechanisms and key provisions were subsequently disregarded.[37]

Drawing on these findings, Flemmer and Schilling-Vacaflor argue that, while Bolivia and Peru may be at the forefront of regulating state-led consultations with Indigenous peoples in Latin America, both countries lack the preconditions necessary to ensure that these processes fulfil their rights protecting promise. In both countries, the State has endeavoured to implement consultations without changing the status quo: Indigenous communities do not have a decisive say in extraction activities; they lack continuous channels for political participation; their basic social and economic needs are not met; and broader Indigenous rights to land, territory, autonomy and political power are ignored. Moreover, these authors observed that without addressing these pre-conditions, consultation processes can have disempowering or exacerbating effects.[38] A 2017 unpublished study of numerous compensation agreements between Indigenous communities in Peru's Amazon

[35] Riccarda Flemmer & Almut Schilling-Vacaflor, "Unfulfilled Promises of the Consultation Approach: The Limits to Effective Indigenous Participation in Bolivia's and Peru's Extractive Industries" (2016) 37:1 Third World Q 172. See also Deborah Delgado-Pugley, "Contesting the Limits of Consultation in the Amazon Region: On Indigenous Peoples' Demands for Free Prior and Unformed Consent in Bolivia and Peru" (2013) 43 RGD 151 [Delgado-Pugley].
[36] *Ibid* at 7, 8.
[37] *Ibid* at 10-11.
[38] *Ibid* at 12.

region and large oil and gas companies dramatically supports the conclusion that poorly conceived agreements can leave communities worse off.[39]

In 2018, Oxfam and CooperAcción jointly published a comprehensive study, authored by lawyer and researcher Ana Leyva, of the 38 consultation processes that the Peruvian state had undertaken in the context of proposed mining and hydrocarbon projects in the six years following the implementation of Peru's consultation regulations.[40] The study found numerous serious deficiencies with these processes, mirroring many of the findings in the Flemmer and Schilling-Vacaflor study. Leyva similarly observed that Indigenous participants in the consultations had a profound lack of knowledge about the basic functions of the state, the legal obligations of companies, and their own rights.[41] Perhaps one of Leyva's most important additional findings is that consultations took place *after* the state had already made all, or nearly all, key decisions about the project.[42] As a result of these deficiencies, Leyva observed that the resulting state-community agreements had extremely little, if any, relevance to protecting the rights of the communities involved in relation to the proposed extractive project.[43] Rather, agreements duplicated the existing legal obligations of both the state and the company, rather than improving the conditions for the project in relation to communities' rights. Agreements often simply recorded the communities demands for public services or to resolve historic grievances, with the state authority merely committing to pass these concerns along to other competent authorities.[44] In only one case, with independent legal support, were communities able to secure direct economic benefits, but even then they failed to obtain additional environmental protection clauses.[45]

Colombian legal scholar César Rodríguez Garavito has also undertaken detailed fieldwork, mostly in Colombia but also in Ecuador, Chile and Peru, on the implementation of consultations

[39] This study analyzed agreements formed beginning in 2002: Glenn H. Shepard Jr., "Compensation to Native Communities of the Lower Urubamba by the Camisea Consortium: Impacts, Benefits and Failures", online: (2017) <https://www.academia.edu/36453472/Compensation_to_Native_Communities_of_the_Lower_Urubamba_by_the_Camisea_Consortium_Impacts_Benefits_and_Failures?Auto=download>.
[40] Ana Leyva, *Consúltame de Verdad: Aproximación a un balance sobre consulta previa en el Perú en los sectores minero e hidrocarbonífero* (cooperacción, Oxfam, June 2018).
[41] *Ibid* at 53.
[42] *Ibid* at 65-6, 68.
[43] *Ibid* at 21, 55-6.
[44] *Ibid* at 21, 55, 67, 69-70. The cooperacción/Oxfam study also cites similar findings made by Peru's Ombudsperson in 2016: *ibid* footnote 19 at 53.
[45] *Ibid* at 24.

with Indigenous peoples.[46] He found that consultations are highly procedural/technical (rather than addressing substantive issues), are primarily focused on monetizing anticipated harms, and are plagued by endemic miscommunications (which are sometimes intentionally produced by company and State officials). Perhaps most significantly, Rodríguez Garavito found that the conditions of negotiation are often so coercive (physically and economically) and asymmetrical that, in his view, free participation and consent are not possible in practice.[47] He argues that even where agreements are formed, communities' substantive claims are diluted and the terms of agreements create new dependencies (on experts and companies), internal divisions and conflicts.[48]

On the basis of these findings, Rodríguez Garavito concluded that consultation is the new devise for the assimilation of Indigenous peoples and the legitimation of a global economy predicated on "accumulation by dispossession".[49] He argues that that, in practice, consultation is being reduced to a formal procedural right (due process and free contract), based on the "liberal fiction" of formal equality ("a level playing field"), leaving questions of power, the right to self-government, and the material conditions necessary for genuine deliberations unaddressed.[50]

These observations from the field are further supported by the work of Peruvian academic Patricia Urteaga-Crovetto, who undertook a comparative textual study of state-led consultation laws in Bolivia, Peru, Colombia and Ecuador. Urteaga-Crovetto tracked how technicalities and procedures in each country's law work to diminish the political significance of the rights in question. She also recorded reports of manipulation to obtain agreements with communities in Colombia and Peru.[51]

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[46] Rodríguez Garavito, *supra* note 16. This research included eighty-eight interviews with leaders, officials and experts, along with participant observation of communities and grassroots organizations.

[47] *Ibid* at 37.

[48] *Ibid* at 39. Notwithstanding this profound critique, Rodríguez Garavito believes that the right to consultation can have an emancipatory effect when its procedures are used strategically to challenge or postpone resource extractive projects or introduce legal innovations that help address communities' substantive concerns: *ibid* at 12, 40-42.

[49] *Ibid* at 6, 22-23, 26. Rodríguez Garavito argues that the right to Indigenous consultation has become part and parcel of the constitution of "social minefields" in Latin America, a term he uses to describe the highly violent contexts within which Indigenous peoples are dispossessed from their territories in favor of resource extraction (*ibid* at 5). Both Rodríguez Garavito and Merino Acuña (*infra* note 46) build on the concept of dispossession developed in: David Harvey, "The 'New' Imperialism: Accumulation by Dispossession" (2004) 40 Socialist Register 63.

[50] *Ibid* at 16, 22-23. This research included eighty-eight interviews with leaders, officials and experts, along with participant observation of communities and grassroots organizations.

[51] Urteaga-Crovetto identifies four groupings of technicalities: (1) the definition of the right to consultation; (2) the subjects of the right to consultation; (3) the subject matters to be consulted; (4) timelines (*supra* note 7 at 18-20). See also Elizabeth Salmon who finds that recognition of rights in Peru has generated undesirable effects, including restrictive interpretations: Elizabeth G. Salmon, "The Struggle for Laws of Free, Prior, and Informed Consultation in Peru: Lessons and Ambiguities in the Recognition of Indigenous Peoples" (2013) 22:2 Pac. Rim L. & Pol'y J 353 at 356 [Salmon].

Urteaga-Crovetto's textual analysis of consultation laws, in combination with the observations from the field described above, support Peruvian legal theorist Roger Merino Acuña's theoretical critique of consultation regimes in Latin America. He argues that the mainstream rationale for the Indigenous right to consultation, as a mechanism to reduce the barriers to investment created by social conflicts (ie "the business case"), reveals its roots in the colonial legality and capitalist political economy of classical liberalism.[52] In opposition to this, he calls for recognition of the right to territory and to self-determination as foundational rights, beyond liberal colonial legality.[53] He further argues that negotiations must not be limited to the benefits of extractive activities, but rather must be permitted to fundamentally question the "extractivism model" itself.[54]

Robert Coulter extends Merino Acuña's critique of consultation rights to address the related right to free prior and informed consent.[55] He argues that the current conception of Indigenous consent in international law is fatally flawed in that it fundamentally presumes agreement to an act that would otherwise violate Indigenous rights. Referring to specific provisions of UNDRIP, Coulter argues that consent has been reduced to at best a procedural right that, rather than safeguarding substantive rights, simply permits Indigenous peoples to negotiate the financial terms of rights violations. In Coulter's view, the right to consent has diverted attention from Indigenous peoples' most fundamental substantive right "the right to own, use, control, benefit from, and dispose of lands and natural resources and the right of self-determination, the right to control or govern activities that seriously and directly affect indigenous peoples, communities and resources."[56] He asserts that the concept of consent is so poorly defined that is it practically useless

[52] Roger Merino Acuña, "Prior Consultation: Law and the Challenges of the New Legal Indigenism in Peru" (2014) 5:1 Hendu 19 at 22 [Merino Acuña, "Legal Indigenism"]. One feature of this legality is its insistence that certain people must be sacrificed in favor of the national interest and the alleged economic benefits for all (*ibid* at 26). See also Salmon for reference to business rationale and objectives underlying Peru's consultation law (*supra* note 51 at 354).
[53] Merino Acuña, "Legal Indigenism", *supra* note 52 at 23-24.
[54] Merino Acuña, "Extractive Governance", *supra* note 16 at 90. Extractivism is defined as "all economic activities that remove huge amounts of natural resources…from 'developing countries', usually in areas inhabited by poor or indigenous communities, and in general for their exportation as raw materials" (*ibid* at 85).
[55] Robert T. Coulter, "Free, Prior, and Informed Consent: Not the Right it is Made Out to Be" (Paper delivered at the conference on "*Free, Prior and Informed Consent: Pathways for a New Millennium"* at the University of Colorado Law School, 31 October 2013) [unpublished]. See also Robert T. Coulter, "The Law of Self-Determination and the United Nations Declaration on the Rights of Indigenous Peoples" (2010) 15:1 UCLA J Intl L & Foreign Aff.
[56] *Ibid* at 3.

and that, due to these limitations, "in practice, some form of monitoring is needed to guard against abuse, fraud, corruption and dishonourable dealings."[57]

Like Coulter, Nathan Yaffe advocates for some form of independent third-party monitoring of Indigenous-industry agreements.[58] Yaffe bases this recommendation in part on his analysis of the Indigenous consent policies of various international private sectors actors, including individual companies, the International Council on Mining and Metals (ICMM) and the International Finance Corporation. His analysis in this regard includes a case study featured in the ICMM's Guide on the topic, of an agreement between American mining company Newmont and a community in Suriname.[59] Yaffe concluded that the private sector's approach to Indigenous consent is often purely or predominately commercial and presumes a "thin, liberal, individualistic lens".[60] He argues that the private sector's dominate role in implementing the right to consent through benefit agreements is thus "radically altering" consent's normative foundations in the right to Indigenous self-determination.[61] He cautions that this should raise alarms about the "experiment of corporate-controlled" Indigenous consent processes.[62]

The research reviewed above uses five different methods to approach the topic of Indigenous consultation and agreement-making with industry and/or the state: international law normative interpretation, empirical/fieldwork data collection, regulatory analysis, corporate policy analysis, and theoretical critique. These scholars share specific expertise in Latin America and/or broader international perspectives. Those who have conducted fieldwork in the region all point to profound power disparities and information gaps. They argue that present institutional conditions exacerbate or fail to ameliorate these issues: poorly designed processes; profound lack of accessible information; lack of recognition and enforcement of substantive Indigenous rights, including self-determination; and lack of safeguards and oversight of agreements with private or public-sector representatives. In general, these researchers' findings apply equally to consultations/negotiations and agreements undertaken by either private or public officials. Finally, these conclusions are

[57] *Ibid* at 2 (emphasis in original).
[58] Nathan Yaffe, "Indigenous Consent: A Self-Determination Perspective", online: (2018) SSRN <https://papers.ssrn.com/sol3/papers.cfm?Abstract_id=3153945> at 39-45.
[59] *Ibid* at 27.
[60] *Ibid* at 4-5.
[61] *Ibid* at 37. Yafee argues that the private sector approach exemplifies free, prior and informed consent's "normative drift", defined as the gap between consent, as part of a broader normative agenda that flows from self-determination, and the practical pursuit of Indigenous consent in the absence of a self-determination framework (*ibid* at 1-2).
[62] *Ibid* at 4-5.

bolstered by the findings of researchers focused on law and policy textual analysis, including corporate policies.

Notably, all of these researchers share Szablowski's early observation that there are few examples *in practice* of agreements that meet human rights standards. They also commonly assert that classical liberal contractual approaches to consent risk legitimatizing inequitable agreements, perpetuating inequalities and perhaps even leaving communities worse off. Several conclude that the Indigenous right to consent must be rooted in the right to self-determination *in practice*, and that more radical transformations of the legal and political context are necessary to address the historical, economic and political roots of Indigenous peoples' dispossession and ongoing marginalization.

3 Legal Challenge to Illegitimate Indigenous-Industry Agreements in Peru

The body of research reviewed in the previous section supports the conclusion that, under present conditions, agreements between Indigenous peoples in Latin American and industry actors are rarely, if ever, a product of meaningful, legitimate and emancipatory free, prior and informed consultation and consent. This section conveys the experience to date of the Peruvian Campesino Community San Andres de Negritos and its attempts to challenge the legality of a so-called agreement with Yanacocha Mine. It begins with an overview of the complex legal framework in Peru in relation to state-led consultation and Indigenous-industry agreements. It then presents the Negritos Community's experience as a case study of the dynamics of illegitimate agreements. Finally, this section will describe the pathway to challenging such agreements in Peruvian courts, as well as the obstacles and opportunities that the Negritos Community has encountered to date.

3.1 Legal Framework

There are approximately 7,267 Campesino and Native Communities in Peru.[63] Campesino Communities generally inhabit the mineral rich Andean mountains and Native Communities inhabit the oil and gas rich Amazon region of the country. Many (but not all) of these communities

[63] Instituto del Bien Común, Centro Peruano de Estudios Sociales, *Directorio 2016 Comunidades Campesinas del Perú: Sistema de Información sobre Comunidades Campesinas del Perú* (Lima, 2016) 10 <http://www.ibcperu.org/wp-content/uploads/2017/06/DIRECTORIO-DE-COMUNIDADES-CAMPESINAS-DEL-PERU-2016.pdf>. This includes 6,138 Communities in the costal and Andean regions, and 1,129 in the Amazonian region. Of these, a total of 5,137 have official recognition and communal title.

acquired communal title during the agrarian reform years. Thus, the governance of Indigenous-Industry agreement in Peru is often intertwined with two main issues: (1) the status of Campesino and Native Communities vis-a-vis international and national laws recognizing Indigenous rights,[64] and (2) the legal terms that govern the acquisition of surface and resource rights to communally titled property by investors. An array of constitutional provisions, statutes and case law constitute the matrix of positive State law that governs struggles over the answers to these questions. This includes: 1970s and 80s agrarian reform laws and related constitutional provisions, neo-liberal foreign investment laws beginning in the 1990s and continuing to date; and a handful of Indigenous rights statutes and case law, emerging just after the turn of the millennium.[65]

Agrarian reform laws declared in 1969 and 1974 that Peru's Indigenous peoples would thereafter be called Campesino and Native Communities.[66] Subsequent laws recognized these communities as legal persons, with special cultural characteristics, self-governing political institutions, communal property and various other communal institutions, including political and economic autonomy. This included a statutory rule, constitutionalized in 1979, that communal property can only be alienated with a vote of 2/3 of the community. However, Alberto Fujimori's government halted communal titling programs and rewrote the Constitution in 1993, removing the 2/3 vote rule. Fujimori also introduced laws to facilitate foreign investment in resources, particularly on communally held land, and subsequent governments have continued on this path. This includes laws facilitating the conversion of communal title to individual title and expediting agreements between companies and communities, for example by requiring only a bare majority vote of the community members in attendance at any given meeting.[67]

Following unprecedented violent conflicts in 2009 between police and Indigenous protesters opposed to pro-foreign investment legal reforms in relation to land and resources, the Peruvian government passed Indigenous consultation legislation in 2011.[68] This statute, along with its 2012 regulations, imposes an obligation on state entities to consult Indigenous communities

[64] See for example reference to many statements to Peru from the ILO Committee: Salmon, *supra* note 51 at 366, 373.
[65] For a full description of the relationship between these legal frameworks: Charis Kamphuis, "Litigating Indigenous Dispossession in the Global Economy: Law's Promises and Pitfalls" (2017)14:1 Brazilian J Intl L 165 [Kamphuis, "Litigating Indigenous Dispossession"].
[66] For a summary of these events, see Salmon, *supra* note 51 at 372.
[67] This could of course be just a small fraction of the community. For a detailed account of the transition from agrarian reform laws to pro-investment laws, see Kamphuis, "Litigating Indigenous Dispossession", *supra* note 65.
[68] Law No 29785, *Law for the right of Indigenous and original peoples to prior consultation, recognized in Convention 169 of the International Labour Organization* (2011) [Right to Consultation Law].

before undertaking legislative or administrative acts that may directly affect their rights. Notably, this regime explicitly excludes consultations led by private companies and does not mention Indigenous-industry agreements. Critically then, proponent-led negotiations and agreements with communities in Peru remain essentially unregulated.

Peru's consultation legislation is controversial for many reasons, not least due to the fact that many provisions demanded by Indigenous organizations were omitted from the final version.[69] One of its most controversial aspects is its narrow definition of Indigenous peoples. The onus is on communities to "objectively" prove their Indigeneity by, *inter alia*, showing that they are the direct descendants of populations that inhabited the country at the time of colonialism *and* that they have maintained some or all of their social, economic, cultural and political institutions. In 2012 the Ministry of Culture added two more requirements, that communities must have maintained an Indigenous language and must reside in their ancestral territory.[70] These criteria are far more restrictive than the terms set out in *Convention 169* and UNDRIP and are widely criticized.[71] Peru's restrictive definition of Indigeneity for the purposes of national consultation laws works to exclude many Campesino and Native Communities in Peru who cannot meet these strict criteria.[72] It is widely believed that the state's intention was to exclude Campesino Communities' land where the majority of mining projects are located.[73] There are multiple reports of government efforts to exclude certain communities from the consultation law, including by paying private consultants to "scientifically prove" the inexistence of Indigenous peoples in certain areas.[74]

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[69] See Delgado-Pugley, *supra* note 35; Salmon, *supra* note 51 at 385-7; Claire Wright, "Indigenous Mobilisation and the Law of Consultation in Peru: A Boomerang Pattern?" (2014) 5:4 Intl Indigenous Policy J 1 at 8; Almut Schilling-Vacaflor & Riccarda Flemmer, "Conflict Transformation through Prior Consultation? Lessons from Peru" (2015) 47:4 J Latin American Studies 811 [Schilling-Vacaflor & Flemmer]. Many Indigenous organizations subsequently denounced the law, among other things, on the basis of the restrictive definition of Indigenous peoples.

[70] Directive No 03-2012/MC at arts 7.1, adopted by Ministry of Culture, Ministerial Resolution No 202-2012-MC (2012).

[71] The ILO Committee of Experts has regularly criticized the Peruvian state's approach to defining Indigenous peoples. See e.g. ILO, Committee of Experts on the Application of Conventions and Recommendations, *Indigenous and tribal peoples: Observations of Peru, Indigenous and Tribal Peoples Convention, 1989 (No 169),* ILC.98/III/1A (2009) 686-687 at paras 3, 4; ILO, Committee of Experts on the Application of Conventions and Recommendations, *Indigenous and tribal peoples: Observations of Peru, Indigenous and Tribal Peoples Convention, 1989 (No. 169),* ILC.100/III/1A (2011) at 794-795.

[72] See e.g. Delgado-Pugley, *supra* note 35 at 169.

[73] Leyva, *supra* note 40 at 38-39. Campesino Communities were not included in the registry at all until 2015.

[74] Urteaga-Crovetto, *supra* note 7 at 18. See also see Leyva, *ibid* at 39-40; Juan Carlos Ruiz Molleda, "Ministerio de Cultura bloquea la consulta previa de las concesiones mineras e invisibiliza a los PPII en Espinar" (16 April 2015), *Instituto de Defensa Legal: Justicia Viva*, online: <http://www.justiciaviva.org.pe/notihome/notihome01.php?Noti=1597>.

For those Campesino and Native communities who hold communal title but do not enjoy a state-recognized right to consultation, the applicable land and resource laws create enormous pressure to agree to resource development in ways that are likely inconsistent with agrarian reform laws and the Peruvian constitution.[75] For example, as recently as 2015, Peru passed legislation permitting the sale of land or other private agreements between communal property holders and private actors with only a bare majority of votes of the communities' executive leadership in attendance at any given meeting.[76] Peru has also strengthened expropriation laws in favour of private investors and mineral tenure holders.[77] For example, after a resource company solicits the expropriation of communal land, Campesino or Native Communities have only 15 days to meet directly with the company and come to an agreement. If this does not happen, the relevant ministry has full power and discretion to approve the expropriation.[78] Notably, Peruvian law severely constrains the available compensation amount, including for communally held land.[79] These coercive legal conditions form the statutory context within which Campesino and Native

[75] For a full analysis of this issue, see Kamphuis, "Litigating Indigenous Dispossession", *supra* note 65.

[76] Legislative Decree No 1192, *Law for the acquisition and expropriation of real property, transfer Of state real property, removal of interferences and other measures for the execution of infrastructure projects* (2015); Supreme Decree No 001-2015-EM, *Provisions for mining procedures that encourage investment projects* (2015). Commentators have denounced these 2015 laws for contravening provisions of the *Campesino Communities General Law* and international law regarding consultation and consent and for interfering with Communities' political autonomy and rights under national and international law to establish their own governance structures and decision-making procedures: Álvaro Másquez Salvador & Juan Carlos Ruiz Molleda, "Gobierno aprueba norma que consagra intromisión en autonomía de Comunidades Campesinas", (15 January 2015), *Instituto de Defensa Legal: Justicia Viva*, online: <http://www.justiciaviva.org.pe/notihome/notihome01.php?Noti=1526>; *Juan Carlos Ruiz Molleda,* "¿El sexto paquetazo normativo? La aprobación de los DL N° 1192 y N° 1210" (1 October 2015), *Instituto de Defensa Legal: Justicia Viva*, online: <http://www.justiciaviva.org.pe/blog/el-sexto-paquetazo-normativo-la-aprobacion-de-los-dl-n-1191-y-n-1210/>.

[77] Legislative Decree No 1192, as modified by Legislative Decree No 1210, *Modification of the Tenth Final Complementary Disposition of Legislative Decree No 1192* (2015). The modification retains an exemption for Indigenous peoples from the law's expropriation provisions but changes the earlier version by removing Campesino Communities from this exemption, presumably in accordance with the state's position that Campesino Communities are not Indigenous. See also Law No 30025, *Law that facilitates the acquisition, expropriation and possession of real property for infrastructure works and declares the public need for the acquisition or expropriation of real property affected by the execution of diverse infrastructure works* (2013). This law allows private investors to acquire land for infrastructure projects and permits special procedures for expropriation. See also Law No 30327, *Law for the promotion of investment for economic growth and sustainable development* (2015). This law simplifies the procedures for obtaining easements and expropriations of "unoccupied" land, which could include the untitled land of Campesino Communities.

[78] Supreme Decree No 014-92-EM, *General Mining Law* (1992), art 37. The relevant legislation lacks any criteria to constrain or guide the exercise of the state's discretion to approve a company's request to expropriate communal land. The only constraint appears in the Constitution, which refers to "public need" or the "national interest".

[79] Compensation for expropriation, including of communal land, can only be valued in terms of its commercial value, fixed by the value, present and future, of any existing improvements and crops being cultivated *at the time* that the acquisition or the expropriation is solicited: Legislative Decree No 1192, *supra* note 76 art 13.1.

communal titleholders, not recognized as Indigenous by the Peruvian state, are left to negotiate land-related agreements with the private sector.

The situation is only marginally better for Indigenous peoples in Peru who have gained state recognition under the 2011 consultation law.[80] Among other limitations, Peru's consultation laws impose short and strict timeframes, including a maximum of 120 days for the formal consultation process.[81] The consultation process first begins informally when state authorities proposing a legislative or administrative measure believe that it may directly affect an identified Indigenous community.[82] The state authority may then undertake preparation meetings with identified communities "to inform them of the proposed Consultation Plan".[83] Once the Consultation Plan and the proposed state measure to be consulted about are published, the process formally begins. Communities then have 30 days to designate their representatives and between 30 and 60 days to review information about the proposed decision.[84] This is followed by the internal evaluation phase, where communities have 30 days to make an internal decision, either to enter into an agreement with the state authority, or to oppose the proposed measure.[85] If the community disagrees, the maximum time allotted for "intercultural dialogue" is 30 days[86] before the responsible state entity must make a decision.[87]

In Leyva's 2018 study of all consultations undertaken pursuant to this regime between 2012 and 2018, she found that the majority were completed between 49 and 90 days, a much shorter timeframe than the maximum allowed.[88] Furthermore, the majority of this time transpired between the publication of the prospective decision and the information meeting. Incredibly, Leyva reported that the time between the information meeting and the internal decision meeting was often

[80] Ministry of Culture, Base de Datos de Pueblos Indígenas u Originarios, Lista de pueblos indígenas u originarios https://bdpi.cultura.gob.pe/pueblos-indigenas. In 2018, Leyva observed that a little more than half of all Indigenous communities in Peru have been registered in the government database of Indigenous Peoples: *supra* note 40 at 67.
[81] Supreme Decree No 001-2012-MC, Regulation of Law No 29785, *Law for the right of Indigenous and original peoples to prior consultation, recognized in Convention 169 of the International Labour Organization* (2012), art 24.
[82] *Ibid*, art 14.
[83] *Ibid*, art 15.
[84] *Ibid*, arts 10, 18.1. For any community not initially included, or for a state decision for which consultation was not planned, communities have only 15 days after the publication of a consultation plan and/or administrative decision to request that they be included in the consultation process: ibid, art 9. However, in her research, Leyva noted that consultation processes are typically proposed by the state, and Indigenous peoples have rarely sought to trigger the process independently.
[85] *Ibid*, art 19.7.
[86] *Ibid*, art 20.6. This period can be extended if the parties agree.
[87] *Ibid*, art 23. Also see: Right to Consultation Law, *supra* note 68 at articles 11-15.
[88] Leyva, *supra* note 40 at 57-58.

extremely short. Sometimes these two events were separated by only a few days or even occurred on the same day.[89] In other words, in practice, communities have had very little time to evaluate the proposed measures, their impacts, and make proposals.

Where an agreement is reached between the Peruvian government and an Indigenous community, the regulations make it enforceable against both parties. Of interest is the recognition in the regulations that Indigenous peoples have a right to participate in the benefits of resource extraction and a right to equitable compensation for any harm suffered. In spite of this, in Leyva's study, state agreements with Indigenous communities contained no such provisions and were largely lacking in any rights-protecting provisions. Also of note, the regulations make no reference to remedies for a possible failure on the part of the state to appropriately consult or fulfil the terms of an agreement. Interestingly, in 2013 a Permanent Multisectoral Commission was created with a broad mandate to follow up on the implementation of the consultation law. However, in 2016 the Commission's mandate was limited to following up exclusively on agreements reached in consultation processes. Notably, the Commission is not independent; rather its membership consists entirely of state representatives, and primarily members of the Executive.[90]

In terms of jurisprudence, since 2008, the Constitutional Court of Peru has decided eight cases on the subject of Indigenous rights, with most of the decisions issued between 2008 and 2010. Early cases confirmed that in Peru's monist system, certain Indigenous rights recognized in international law are incorporated directly into Peru's Constitution.[91] In this framework, Peru's constitutional case law has recognized that Indigenous communities have the constitutional right to communal property, the right to free, prior and informed consultation and in some cases consent, and finally the right to equitably benefit from resource extraction that impacts their land and livelihood.[92]

While notable, these jurisprudential advances have their limitations.[93] For example, the Constitutional Court has declined to provide guidance with respect to the definition of Indigenous

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[89] *Ibid* at 57-58, 68.
[90] *Ibid* at 15.
[91] STC No 00007-2007-PI/TC, (19 June 2007) at para 36. Mainly this refers to the jurisprudence of the Inter-American Court of Human Rights and the entire text of ILO *Convention 169*.
[92] Pedro P. Grández Castro, "Sobre el Emergente Derecho Constitucional Indígena en el Espacio Interamericano: Notas Sobre el Derecho a la Consulta Desde la Experiencia Peruana" in XII Congreso Iberoamericano de Derecho Constitucional, Bogotá, Universidad Externado de Colombia, 2015), 373 [Grández Castro]. See also Kamphuis, "Litigating Indigenous Dispossession", *supra* note 65.
[93] Some Peruvian legal scholars further argue that Peru's constitutional jurisprudence in the area of consultation falls short of the standards established by the Inter-American Court of Human Rights: Grández Castro, *ibid*.

peoples in Peru. Moreover, in the cases to date the litigants have primarily been NGOs seeking constitutional review of foreign investment laws on behalf of all Indigenous peoples in Peru. At present, the Negritos case (described below) is the only case to come before the Constitutional Court that raises the substantive rights of a specific community in relation to a proposed resource project and further seeks to challenge the constitutionality of a so-called agreement. The decided cases have also not touched on other key issues like remedy for failure to consult appropriately or for deficient or fraudulently obtained consent.[94] The relatively sparse constitutional case law on Campesino and Indigenous rights in Peru is notable given that Campesino and Native Communities' rights were first constitutionally recognized in 1979 and noting that international Indigenous rights norms were first incorporated into Peru's constitution in the early 1990s. Clearly there is a significant gap between the articulation of norms/rights on one hand, and access to the courts on the other.[95]

This description of Indigenous peoples' consultation rights in Peru would not be complete without a reference to civil rights issues. Recall that in Anaya's framework, respect for civil and political rights is a basic pre-condition for right-centred agreements. In other words, the legitimacy of industry-Indigenous agreements cannot be analysed in isolation from the circumstances that communities will face if they oppose a project. The history of numerous environmental conflicts in Peru indicates that when communities oppose projects, companies and state officials alike are often unable or unwilling to effectively manage the situation.[96] Like elsewhere in Latin America, Community leaders who are critical of proposed projects are often intimidated, defamed, harassed, threatened, or even subjected to bodily harm. When communities in Peru resort to protest or civil disobedience they are often met with the exercise of force by police operatives in the employ of the company.[97]

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[94] Kamphuis, "Litigating Indigenous Dispossession", *supra* note 65.

[95] For references to literature referring to the implementation gap between domestic legislation on Indigenous rights and the reality on the ground, see: Salmon, *supra* note 51 at 373. Salmon also argues that there are barriers to accessing justice in Peru which have contributed to a situation of few Indigenous rights cases being brought against Peru on the inter-American human rights system (*ibid* at 367).

[96] See e.g. Anthony Bebbington et al, "Anatomies of Conflict: Social Mobilization and New Political Ecologies of the Andes" in Anthony Bebbington & Jeffery Buries, eds, *Subterranean Struggles: New Dynamics of Mining, Oil and Gas in Latin America* (Austin: University of Texas Press, 2013). See also Embajada de Suiza en el Perú, *Diagnóstico Nacional sobre la Situación de la Seguridad y el Respeto a los Derechos Humanos: Referencia Particular al sector extractivo en el Perú* (Lima: Centro de Colaboración Cívica, 2013).

[97] Charis Kamphuis, "Foreign Investment and the Privatization of Coercion: A Case Study of the Forza Security Company in Peru" (2011) 37:2 Brook J Intl L 529 at 548; Earthrights International et al, *Convenios*

The criminalization of dissent in Peru has extended to international advocates who work with mine affected communities. In a very troubling 2017 case, Jen Moore, a Canadian NGO worker, was detained and permanently banned from returning to Peru after she showed a documentary film about Canadian company Hudbay, in the very communities where the company is developing a large copper mine.[98] Peruvian authorities defended their decision by arguing that Moore is a threat to public order.[99] This echoes the long standing view among certain public officials that those who oppose the dominant resource extraction model are standing in the way of the nation's progress. Significantly, some Campesino communities in the area of Hudbay's operations have signed land transfer and benefit agreements with the company and others are under pressure to do so. At the same time, public security forces, employed by Hudbay, have responded violently to community members protesting the proposed mine.[100] The Peruvian government's actions to ban Moore ensure that agreements between Hudbay and local communities will be signed without the presence of international human rights advocates.

This brief review of key laws that apply to communally held (or claimed) land in Peru helps to flesh out and highlight many of the critiques described in the previous section. While Peru's consultation regime has many deficiencies,[101] many Campesino and Native communities are excluded entirely from its application, including those who obtained communal property titles following agrarian reform. Regardless of a community's legal status, there is no specific regulation of agreements negotiated between industry and Indigenous communities, including Campesino and

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entre la Policía Nacional y las empresas extractivas en el Perú (Peru, 2019) <https://drive.google.com/file/d/1tntep6avg-sz_X__l39mnqwsipvqt7ig/view>.

[98] John Dougherty, "Investigativemedia releases online version of Hudbay Minerals documentary "Flin Flon Flim Flam"" (31 December 2015) Investigativemedia (website), online <http://www.investigativemedia.com/investigativemedia-releases-online-version-of-hudbay-minerals-documentary/>.

[99] Minister of the Interior, COMUNICADO MININTER N° 008 – 2017, (22 April 2017), online: <https://www.mininter.gob.pe/content/sobre-la-situaci%C3%b3n-migratoria-irregular-de-una-ciudadana-canadiense-y-un-norteamericano>. This decision is now being challenged by human rights organizations in Peruvian courts.

[100] These events were captured by the same documentary film that Moore was screening in Peru: see Dougherty, *supra* note 98.

[101] The researchers cited throughout this section agree that the legislation lacks basic pre-conditions for the effective implementation of consultation: (1) state institutions able to justly balance the interests of diverse groups; (2) measures to reduce power imbalances within consultations; (3) joint decision-making processes with binding agreements; and (4) recognition of self-determination and autonomy: Schilling-Vacaflor & Flemmer *supra* note 63 at 813-4. See also Urteaga-Crovetto, *supra* note 7. Merino Acuña argues that Peru's consultation laws were designed as a mechanism to inform and convince Indigenous peoples of a decision already made by the state: Merino Acuña, "Legal Indigenism", *supra* note 53 at 22.

Native communities. General resource and land laws apply to the many Campesino or Native communities that the Peruvian state does not recognize as Indigenous. As such, these groups must deal directly with private companies, under aggressive timelines and extra-ordinary power asymmetries. Moreover, opposition to proposed projects often faces criminalization by state authorities and recent state actions have served to isolate communities from international observers and human rights experts. This detailed description of Peru's domestic context confirms that, under current conditions, there are serious risks that agreements between industry actors and Indigenous communities will fail to meet basic criteria for legitimacy or even legality.

3.2 The Dynamics of Illegitimate Agreements

The experience of the Campesino Community San Andres de Negritos, whose members reside in the Andean region of Peru, offers some insight into how illegitimate agreements with industry may form and come to be subsequently challenged. Although the story of the Negritos Community's contemporary dispossession began decades ago, its struggle to challenge an illegitimate agreement with Yanacocha Mine (majority owned by American mining company Newmont), is very much a story of the present. Moreover, the Negritos Community's experience reveals some of the legal barriers that may arise when a Community mobilizes to challenge an illegitimate agreement. Given the contexts and dynamics of consultations now taking place in Latin America and the concomitant risk of illegitimate agreements between industry actors and Indigenous groups, the Negritos Community's experience remains highly relevant.

The Negritos Community acquired legal title to its land pursuant to agrarian reform legislation and a declaration by Peru's President at the time, granting the Community communal title to 14,375 hectares in 1974. However, shortly after the arrival of Yanacocha Mine to the area, in 1993 and 1995 the Community allegedly consented to transfer title to approximately 1400 hectares of its land to the company in exchange for approximately $US 48,000. This arrangement was reflected in two different contracts signed by company and community representatives after the company had officially requested the expropriation of the Community's land.[102] Yanacocha quickly mortgaged a portion of the transferred property (609 hectares) to international banks, for

[102] One agreement was an "expropriation agreement" and the other was an "easement agreement". However, it is widely recognized that under Peru's mining laws, a mining easement is tantamount to an expropriation: see Kamphuis, "Litigating Indigenous Dispossession", *supra* note 65.

loans totalling $85 million. At the same time, between 1991 and 1994, state authorities initiated measures to convert Negritos' communal land title into individual/family-based land titles, followed by a state decision in 1995 to annul the Community's legal personality. This allowed Yanacocha to subsequently pursue private land sales with individual community members. The Negritos Community alleges that the documents that underlie these transfers were signed by a handful of corrupt community leaders, that community members were misinformed, bribed or extorted into signing certain ancillary documents, and that the Community as a whole was never properly consulted or even informed of these dealings, much less its rights in Peruvian constitutional law and international law applicable at the time.[103]

The Negritos Community's gradual turn to the law began a decade after these events, in tandem with a general rise in Indigenous and Campesino protest, rights consciousness and growth in civil society organizations in Peru and across Latin America. Campesino protests against Yanacocha began in 2004 and in 2006, a Negritos community leader opposed to the mine was assassinated and a protestor was killed by security forces in the employ of Yanacocha.[104] In spite of this, Negritos community members persisted and raised the money necessary to collect documents from various government ministries. They then handed these large piles of paper over to *pro bono* lawyers for legal analysis. Emboldened by what they saw in the documents, community members appealed to the company, various public officials and administrative decision makers for recognition of their rights and responses to their grievances, but to no avail. Finally, in 2011, the Negritos Community presented its claim before a court of first instance, alleging that its communal property had been transferred without proper consultation, without free and informed consent and that the payment made in return was grossly unfair and inequitable.[105]

While the underlying facts of the Negritos case took place in the early to mid 1990s, the literature reviewed in the previous sections demonstrates that many communities in Peru continue to face similar power asymmetries. Like the Negritos Community, they are isolated and lack: awareness of their rights; independent advice; access to credible and accessible information about the impact of proposed projects; previous experience negotiating with companies; and experience

[103] For a full description of the complex series of events that took place in relation to these agreements and land transfers, see Kamphuis, *ibid*.
[104] See Charis Kamphuis, "Foreign Mining, Law and the Privatization of Property: A Case Study from Peru" (2012) 3:2 J Human Rights & Environment 217 at 239.
[105] For a full description of the Negritos Community's turn to the law and its legal arguments, see Kamphuis, "Litigating Indigenous Dispossession", *supra* note 65.

resorting to the courts. Communities also often face coercive conditions, including poverty, social exclusion and threats of violence if they oppose proposed projects. Like the Negritos case, at present agreements and access to land are still often procured by: dividing and misleading community members; disregarding or actively subverting broad consultation; and/or choosing to negotiate secretly with leaders that already support the company, often in exchange for personal gain.

As in the Negritos case, there continues to be significant risk that industry-Indigenous agreements will, at worst, be improperly obtained through corruption, extortion or dishonesty, and at best, that communities will negotiate agreements without fully understanding applicable laws, as well as social, environmental and economic consequences. All of this makes the Negritos Community's litigation instructive, as it explores the question of how a potentially unconstitutional or otherwise illegally obtained agreement between a foreign company and an Indigenous community (communal titleholder) might be challenged in court on the basis of constitutional and international Indigenous rights principles.

3.3 Challenging Illegitimate Agreements in the Courts

As indicated, in 2011 the Negritos Community launched a constitutional challenge to agreements with Yanacocha Mine, signed in the early to mid 1990s. Under Peru's Constitutional Procedural Code, an *amparo* action is the single cause of action available to defend Campesino and Native constitutional rights in these circumstances.[106] In principle, it could allow for a kind of judicial review of Indigenous-industry agreements. This is possible due to three important features of Peruvian constitutional law. First, the *amparo* allows communities to request a remedy for alleged violations of Campesino and Native rights already explicitly recognized in the constitution and domestic legislation. Second, communities can bolster their claims by referring to certain international Indigenous and human rights principles that are directly incorporated into Peru's constitution and are therefore legally binding. Third, the *amparo* allows communities to bring their claim directly against a private party's acts or omissions, such as for example those of a resource company. Of further interest is the fact that these features of Peruvian constitutional law are similar

[106] See Omar Cairo Roldán, "El panorama general del proceso de amparo en el Perú" (2008) 3:8 Palestra Tribunal Constitucional: Revista de doctrina y jurisprudencia 153 at 157.

in a number of other countries in Latin America.[107] While the Negritos Community brought its *amparo* action against the specific transfer of its property interests executed in contracts signed with Yanacocha, given that the Procedural Code refers to any act or omission by a private or public actor that violates a constitutional right, it appears that the *amparo* cause of action could capture Indigenous-industry agreements more broadly.

Since presenting its *amparo* action, the Negritos community has faced many delays and obstacles both inside and outside of the courtroom.[108] Unsurprisingly, defendant Yanacocha Mine responded by immediately objecting to the admissibility of the Community's claim.[109] However, only one objection has prevailed at both first and second instance, namely that the claim is outside of the required limitation period. This refers to the provisions of Peru's Constitutional Procedural Code that require a claimant to bring an *amparo* claim within 60 days from the time that the claimant: (1) became aware of the rights violation, and (2) is able to bring the claim. The Code also recognizes exceptions to this general rule, including where the alleged rights violating actions are ongoing, or where the alleged violations are the result of omissions. [110]

In 2015, an appeal court held that the 60-day limitation period began on the precise date in the mid-1990s when a handful of Community leaders signed the agreement with Yanacocha to transfer the company title and interests in communally owned land. The court reasoned that the Negritos Community must have known about the land transfer due to the fact that the change in title was filed in the public registrar and given that community members could plainly observe the mine's subsequent operations on formerly communal land. It characterized the Community's constitutional concerns about the agreement as a convenient excuse. The court also refused to consider the argument that the limitation period rule should be interpreted equitably, taking into account community members' lack of knowledge of their substantive and procedural rights, and of the nature and consequences of the agreement with Yanacocha. The court also declined to consider the argument that the impugned agreement represents ongoing violations and/or omissions with

[107] Peru's *amparo* is similar to the *amparo* available in Brazil, Colombia, the Dominican Republic, Ecuador, Guatemala and Nicaragua: see Allan R Brewer-Carías, *Constitutional Protection of Human Rights in Latin America: A Comparative Study of Amparo Proceedings* (New York: Cambridge University Press, 2008) at 139.
[108] See Kamphuis, "Litigating Indigenous Dispossession", *supra* note 65.
[109] First Specialized Civil Court of Cajamarca, Exp No 00315-2011-1-0601-JR-CI-01, Resolution No 25 (16 June 2014).
[110] Law No 28237, *Constitutional Procedural Code*, arts 2, 44.

respect to the Community's rights, thereby triggering an exception to the 60-day limitation period. On this basis, the court refused to consider the Community's claim on the merits.[111]

In doing so, the appeal court presiding over the Negritos Community's *amparo* action adopted a formalistic view of consent whereby the signatures on an agreement document were sufficient to trigger a very short limitation period of 60 days. This reasoning ignored the fact that the Community's central substantive allegations in the case are precisely that its land titles were transferred to the company without its informed consent, on the basis of misinformation, falsehoods or extortion, and in some cases without its knowledge. In other words, the appeal court's approach to consent in the limitation period context ignored the social and cultural reality of these early interactions between Negritos Community members and representatives of Yanacocha Mine. Rather, the court expected the Community to interact with Yanacocha like a sophisticated legal actor, fully aware of and able to act on all of its procedural and substantive rights. The Negritos Community is challenging the appeal court's decision on these points in Peru's highest constitutional court.

4 Conclusion: Equitable Rights-Centred Oversight Mechanisms

This chapter reviewed literature evaluating the regulation of the Indigenous right to consultation in various Latin American countries, as well as the implementation of this right on the ground (Part 2), including through industry's efforts to negotiate agreements with affected communities. Building on this, it offered an account of the Peruvian legal context in order to establish the relationship between state-led consultations under statute, and unregulated Indigenous-industry agreements (Part 3). On this basis, I have argued that the legal and political conditions in many Latin American countries generate a serious risk that Indigenous communities will enter into benefit agreements with resource companies in the absence of full information and knowledge of the meaning and significance of the agreement, without a variety of human rights safeguards, and sometimes as a result of inappropriate or illegal tactics.

The Negritos Community's efforts to challenge agreements with Yanacocha Mine related to the transfer of property interests have uncovered an avenue for judicial scrutiny of allegedly unconstitutional agreements. Peru's constitutional order contains three key features that make this

[111] Superior Court of Justice of Cajamarca, Permanent Civil Appeal Court, Exp 00315-2011-0-0601-JR-CI-01, Resolution No 33 (5 May 2014).

possible: it recognizes Campesino and Native Communities' communal rights; it incorporates certain internationally recognized Indigenous rights; and it allows rights violations claims to be brought directly against a company. These features are also part of the legal systems of a number of other Latin American countries. This framework is interesting in that it subjects private contracts to constitutional scrutiny and the standards vested in constitutionalized Campesino, Native and Indigenous rights.[112]

However, the social and legal dynamics of the Negritos case underscore that it can take a great deal of time for communities to realize that they have a legal basis for challenging an unfair agreement, find capable legal support and marshal all that is required to bring a case forward. While the applicable limitation period in Peru's Procedural Code is short, the rule is articulated with important references to a claimant's knowledge and capacity to bring a claim. Moreover, the Code provides for certain exceptions to the rule. In principle this would give the courts discretion to take a claimant's social circumstances into account. However, in the Negritos case the courts to date have chosen to ignore this in favour of a narrow interpretation of the limitation period rule. This could convert the Community's delay into an absolute bar to a substantive constitutional consideration of its case.

The observations and findings in the Negritos case study merit analysis in relation to the research reviewed in Part 2 of this chapter. This includes the work of authors who have attempted to address, at a normative and theoretical level, the relationship between the Indigenous right to consultation/consent and the right to self-determination, the problem of power, law's colonial legacies, and the meaning of consent and knowledge in the context of Indigenous-industry agreements. This also includes widespread critiques of Indigenous consultation laws in Latin America and the strong consensus that in principle and in practice these laws have failed to address these normative and theoretical issues. Rather, they have tended toward the formalistic, liberal concept of consent associated with classical contract law.

The Negritos Community's experience reveals that the very same inequities, power asymmetries and improprieties that lead communities into illegitimate agreements also prevent

[112] One Peruvian constitutional law scholar has dedicated considerable attention to the relationship between public law/judicial review and the private law of contracts: Roger Arturo Merino Acuña, "La Tutela Constitucional de la Autonomía Contractual. El Contracto Entre Poder Público y Poder Privado" in *El Derecho Civil Patrimonial y Derecho Constitucional* (Gaceta Jurídica, 2009) 43; Roger Arturo Merino Acuña, "Legitimando el Abuso en el Contrato: El Pleno Casatorio Sobre Transacción Extrajudicial y los Contratos Contaminados" (2010) Actualidad Civil y Procesal Civil, Normas Legales 221.

them from launching legal challenges in a timely fashion. Thus, notwithstanding the existence in principle of potential legal avenues for judicial scrutiny of Indigenous-industry agreements, in practice the formal equality logic of liberal contract law may work to bar Indigenous challenges to past agreements with industry. In other words, there is an important continuity between the failure to address questions of social context and power in the conceptualization and implementation of the rights to consultation and consent/agreement, and the failure to address these same issues in the procedural rules that function as gatekeepers to substantive judicial scrutiny of Indigenous-industry agreements.

This observation should be important to those seeking to develop emancipatory normative and practical approaches to Indigenous consultation and consent. As stated, the literature reviewed in this chapter has critiqued the ways in which these rights are being articulated and implemented in Latin America. The Negritos case study adds to this critique, revealing that normative developments in this area have also failed to consider the procedural obstacles to defending these rights, including in the courts. In particular, they have failed to articulate the rules that should govern how communities might challenge the legitimacy of past agreements with industry on substantive or procedural grounds.

Current social and legal dynamics in Latin America indicate that this is not a small oversight. There is a clear need for mechanisms capable of independently scrutinizing the validity of Indigenous-Industry benefits agreements against the normative criteria of substantive Indigenous rights. Such mechanisms must safeguard against formalistic and exclusionary approaches to consent, as exemplified by the Peruvian courts to date in the Negritos case. These mechanisms must adopt equitable and contextual approaches to substantive *and* procedural questions. In short, Anaya's concept of equitable rights-centered agreements must be accompanied by the development of equitable rights-centered causes of action, limitation period rules, and normative standards for scrutinizing Indigenous-industry agreements after the fact.

As companies continue under present conditions to pursue benefits agreements with Indigenous peoples in Latin America, there are problems and there will be more problems with these agreements. In the absence of specialized oversight mechanisms, courts will often be the only forum for resolving rights and distribution claims and ensuring the legitimacy and legality of past agreements. However, judicial oversight will only be possible if civil procedures enable communities to access the courts in practice. At stake is communities' ability to operationalize

substantive Indigenous rights principles to remedy past and ongoing violations that have been enshrined in so-called “agreements”.

CHAPTER THREE: Canadian Mining Companies and Domestic Law Reform: A Critical Legal Account

By Charis Kamphuis*

Abstract

This article offers a critical legal account of law reform efforts undertaken by Canadian activist groups between 2005 and 2012, together with the government's response, introduced in 2009. It begins by introducing the social and economic context that forms the backdrop of these efforts. The relevant proposals for legal reform in Canada are then reviewed in terms of three periods. In the first, federal advisors made proposals that attempted to reconcile private and public approaches to regulation. In the second, the federal government introduced a corporate social responsibility (CSR) policy predicated on volunteerism. And in the third period, three individual Members of Parliament have tabled private members' bills, each representing very different private and public approaches to regulation. Following this, each reform project is analyzed in terms of the regulatory vision it presents and the conception of the state, the corporation, and civil society that it advances. This paper represents a preliminary step toward considering how the private or public nature of the legal forum might shape activists' legal strategies and articulations of the corporation, the state and the problem.

1 Introduction & Research Context

In the last decade, Canada has become the most important home jurisdiction for mining companies operating globally. Certain Canadian NGOs, faith groups and labor unions[1] argue that these activities systematically give rise to conflicts between companies and local communities in circumstances where companies frequently enjoy effective impunity for the human rights violations they may commit. This assessment has prompted these groups and other likeminded actors to advocate for a series of law reform proposals.

This article offers a critical legal account of these law reform efforts, undertaken between 2005 and 2012, together with the government's response, introduced in 2009. It begins in Part 2 by introducing the social and economic context that forms the backdrop of these efforts. This consists of a description of the Canadian foreign mining sector and some of the associated social conflicts. Extractive activities and conflicts in Latin American are profiled in particular given the significance of that region for Canadian mining companies. The relevant proposals for legal reform in Canada are then reviewed in Part 3 in terms of three periods. In the first, federal advisors made

* This chapter is published in (2012) 13:9 German Law Journal 1456.

[1] CANADIAN NETWORK ON CORPORATE ACCOUNTABILITY, *Our Members*, available online at: http://cnca-rcrce.ca/about-us/members/.

proposals that attempted to reconcile private and public approaches to regulation. In the second, the federal government introduced a corporate social responsibility (CSR) policy predicated on volunteerism. And in the third period, three individual Members of Parliament have tabled private members' bills, each representing very different private and public approaches to regulation.

Following this review, each reform project is analyzed in Part 4 in terms of the regulatory vision it presents and the conception of the state, the corporation, and civil society that it advances. In conclusion, this article's place within its broader research context is explored. To date, the Federal government has declined to enact legislation that would specifically regulate the activities of Canadian mining companies operating abroad. In the absence of such a regime, advocates interested in pursuing legal recourse in Canada are presently engaging with an ad hoc mix of private and public legal mechanisms to pursue corporate accountability on behalf of affected communities. The present article is part of a larger project that examines this engagement and inquires into the theoretical, political and strategic considerations that might guide this activism. Among the broader questions at stake is that of the nature of the relationship between legal form and substance in the context of private or public law activism. This may be particularly of interest to those concerned with the question of how the private or public nature of the legal forum might shape the substance of activists' legal and political struggles.

2 Canadian Mining Abroad: Social & Economic Context

2.1 The Canadian Mining Sector: Global and National Economic Significance

Canadian mining companies have historically had a strong global presence and until very recently, their outward investment has consistently exceeded inward investment levels.[2] In the last two decades, Canadian stock exchanges have come to dominate the global mining industry. As of 2012, Canadian stock exchanges listed more mining companies than the exchanges of any other country in the world and Canadian-listed companies conducted about 40% of all mineral exploration globally.[3] This market activity is concentrated on the Toronto Stock Exchange (TSX)

[2] Paul Stothart, *F & F 2011: Facts & Figures of the Canadian Mining Industry*, THE MINING ASSOCIATION OF CANADA, 82, available online at: http://www.mining.ca/www/media_lib/MAC_Documents/F&F2011-English.pdf.
[3] As of December 2011, there were 1646 mining companies listed on the TSX/V. The majority of these were exploration companies: TMX, A CAPITAL OPPORTUNITY: MINING (2012), 11, 17, 24, available online at: http://www.tmx.com/en/pdf/Mining_Presentation.pdf [TMX, "Mining"]. However, 16 of the "top 100" mining companies in the world are Canadian, which is second only to China's 18 companies in this same category, see Stothart, *supra* note 2, at 81.

and the TSX Venture Exchange (TSXV), currently home to 58% of the world's publicly traded mining companies.[4] These two exchanges are also the largest source of equity capital for global mining exploration and production. From 1999-2011, on average they facilitated over 80% of all global mining equity financings, and in 2011 and 2012 that number rose to 90%.[5]

Just as the activities of these companies are significant globally, they are also important for Canadian capital markets generally. Among Canada's goods-producing sectors, mining companies listed on Canadian stock exchanges are the largest single group of outward investors. This has grown from $13.5 billion in investments in 1990 to $58 billion in 2010, with a historic high of $66.2 billion in 2008.[6] This sector accounts for a sizable portion of all Canadian direct investment abroad, at over 12% in 2005 and 9.4% in 2010.[7]

Almost half of all mineral exploration projects held by TSX/V companies are outside of Canada[8] and Latin America is one of the most significant regional destinations for this investment. According to statistics from 2009 and 2010, approximately 50% of all Canadian mining assets abroad are invested in Latin America and the Caribbean[9] and there are 286 TSX/V listed mining companies operating in South America alone.[10] Moreover, Canadian mining investment in this region appears to be growing. In 2010, companies on the TSX/V raised a record amount of capital for projects in Latin America[11] and in 2011 projects in South America received the largest share of the total amount of mining equity capital raised.[12]

In sum, Canadian mining companies are major global players and Canadian capital markets play a crucial role in facilitating the investment activity that drives the global mining industry. In this context, Latin America is one of the most important regional destinations for Canadian mining investment. Taken together, these activities are also significant for Canada in that they form an important part of Canada's overall foreign investment activity.

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[4] TMX, "Mining", *supra* note 3, at 13.
[5] *Id.* At 19, 21.
[6] Stothart, *supra* note 2, at 91.
[7] The relative decline in recent years, namely, from 15% in the 1990s to about 10% in the last decade, is due to the increased outward investment in the energy and financial sectors, see Stothart, *supra* note 2, at 82.
[8] TMX, "Mining", *supra* note 3, at 23.
[9] Natural Resources Canada, *The Geographical Distribution of Canada's Mining Assets*, available online at: http://www.nrcan.gc.ca/minerals-metals/publications-reports/4425.
[10] TMX, *supra* note 3, at 32.
[11] TMX, *supra* note 3, at 16.
[12] TMX, *supra* note 3, at 29. The region of Asia tied with South America for this top position.

2.2 Canadian Mining & Social Conflict in Latin America

Any review of law reform efforts must begin by describing "the problem" that such reforms seek to address. In many policy matters this can be controversial and the activities of Canadian mining companies abroad is no exception. In this context, it is useful to begin with sources that share a relatively high degree of consensus. The activities of Canadian mining companies were intensively studied by the Advisory Group of the Canadian National Roundtables on Corporate Social Responsibility and the Extractive Industry in Developing Countries, a group of experts representing industry, NGOs and academia. In its consensus report, this group summarized the concerns at issue in terms of: "environmental concerns; community relations; human rights; security and armed conflict; labor relations; indigenous peoples' rights; compatibility of resource development with national and local economic priorities; benefit sharing with local communities; ineffective legal systems and the potential for corruption."[13]

The Advisory Group developed this list in part on the basis of information provided by a large number of civil society organizations in Canada and internationally[14] that are dedicated to documenting the concerns expressed by numerous communities located in countries where Canadian mining companies operate. This grassroots work is prolific and in many cases it involves allegations that are highly contentious. At the same time, it has given rise to a handful of legal proceedings in Canada, together with a small concentration of academic writing and empirical research. Of course even these accounts, presented in the formal settings of law and academia, are also contested. To date no court has considered a case based on its substantive merits for the reason that mining company defendants have successfully raised preliminary objections that prevented these cases from moving forward.

This review draws on this relatively small body of published academic writing and legal claims to provide some specific examples of "the problem" associated with the activities of Canadian mining companies abroad. It maintains a focus on Latin America, partly because of the economic importance of this region, evidenced above, but also due to the fact that the public record,

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[13] Advisory Group Report, *National Roundtables on Corporate Social Responsibility (CSR) and the Canadian Extractive Industry in Developing Countries*, PROSPECTORS AND DEVELOPERS ASSOCIATION OF CANADA (PDAC), 4-5 (Mar. 29, 2007), available online at: http://www.pdac.ca/pdac/misc/pdf/070329-advisory-group-report-eng.pdf.

[14] The Advisory Group's Report was based on submissions made during the National Roundtables. In total, the Advisory Group heard 156 oral presentations and received 104 written submissions. Of these oral presentations, 61 were from civil society, 33 from industry, 15 from labor organizations, 31from academics and research institutes, and 16 from members of the public without a stated affiliation, see Advisory Group Report, *supra* note 13, at *i*.

as generated by legal activism and academic writing, is arguably greater in relation to Canadian mining in Latin America than in any other regions. While this review is brief and non-exhaustive, it nonetheless offers a preliminary sketch of the nature of the social conflicts at issue.

Perhaps not surprisingly, concerns regarding current or potential environmental damage are a significant underlying factor in many of the conflicts attributed to Canadian mining. The most famous case in this category arose from an environmental catastrophe caused by the collapse of a tailings dam in 1995 at the Omai Gold Mine in Guyana, owned by Cambior.[15] While this is the only case brought in Canada to date on the basis of actual environmental damage, there is documentation of growing concern for potential environmental damage. This is expressed through the emerging practice of the local community referendum, which generally consists of a formal opportunity, organized by and for community members, to vote either for or against a proposed project. With regard to Canadian mining companies, there are three well-documented examples to date in Latin America (in Peru, Guatemala and Argentina), all resulting in the popular rejection of the proposed project.[16] While these votes have occurred in the context of varying domestic legal frameworks and their legal implications are contested,[17] they have had important political consequences.

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[15] For detailed discussions of this case, *see* Kernaghan Webb, *CSR and the Law: Learning from the Experience of Canadian Mining Companies in Latin America*, *in* GOVERNANCE ECOSYSTEMS: CSR IN THE LATIN AMERICAN MINING SECTOR 47, 48-9 (Julia Sagebien & Nicole Marie Lindsay eds., 2011); Craig Scott & Robert Wai, *Transnational Governance of Corporate Conduct through the Migration of Human Rights Norms: The Potential Contribution of Transnational Private Litigation*, *in* TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM 287, 297-303 (Christian Joerges, Inger-Johanne Sand & Gunther Teubner eds., 2004).

[16] Brant McGee, *The Community Referendum: Participatory Democracy and the Right to Free, Prior and Informed Consent to Development*, 27 BERKELEY J. INT'L L. 570 (2009). In 2002 the community of Tambogrande, Peru voted against a gold mining project proposed by Manhattan Minerals. It is reported that 98% of the 73% of eligible voters who participated voted against the project, see mcgee, *The Community Referendum* at 604. In 2005 the community of Esquel, Argentina voted against a project proposed by Meridian Gold. It is reported that 81% of 75% of eligible voters who participated voted against the project, *see* McGeeee, *The Community Referendum* at 615; Mariana Walter & Joan Martinez-Alier, *How to be Heard When Nobody Wants to Listen: Community Action against Mining in Argentina* 30 CAN. J. OF DEV. STU. 281 (2010). In 2005 indigenous communities in Sipacapa, Guatemala voted against the activities of Marlin Mine owned by Goldcorp. It is reported that 11 of 13 villages voted against mining, casting 2486 votes against the mine with only 35 votes in favour, see mcgee, *The Community Referendum* at 619.

[17] To date the primary impact of these referenda have been political. However, several authors have argued that these referenda, particularly when undertaken by indigenous communities, have legal weight in international law. One argument is that these referenda carry legal weight in international law under the rubric of the right to free, prior and informed consent, see mcgee, *The Community Referendum* at 635. Another argument is that the Guatemala referendum was an expression of Indigenous law, made with the authority that arises from the inherent rights that come with being an indigenous people, *see* Shin Imai, Ladan Mehranvar & Jennifer Sanders, *Breaking Indigenous Law: Canadian Mining in Guatemala*, 6 INDIGENOUS L.J. 1, 17 (2007). For an argument that links the Guatemala referenda to the right to self-determination, *see* Tara Ward, *The Right To Free, Prior, And Informed Consent: Indigenous Peoples' Participation Rights Within International Law*, 10 NW. J. INT'L H.R. 54 (2011).

The phenomenon of community referenda raises the issue of the meaningful participation and consent of local communities to mining projects. This in turn feeds into another significant underlying factor in Canadian mining conflicts in Latin America, namely the failure to respect communal and individual land and property rights. While allegations of this nature are numerous, there are several cases where it has been possible to collect extensive supporting documentation. The Marlin Mine in Guatemala, owned by Goldcorp, is accused of failing to properly consult with local communities prior to mine development and of coercing landowners into selling their property to the company.[18] Also in Guatemala, the Canadian owners of the El Estor Mine have been accused of ignoring the land claims of indigenous communities and of participating in the violent eviction of community members.[19] Finally, the La Platosa Mine in Mexico, owned by Excellon Resources, is accused of failing to respect its land rental agreement with local communal landowners.[20]

These bases for community opposition to Canadian mining frequently result in conflicts that include acts of violence against community members, and particularly against prominent leaders. It is alleged that in 2006 the employees of a private security company, contracted by Copper Mesa, attacked unarmed members of a community in Junin, Ecuador who opposed the company's proposed project.[21] The community referenda in Peru and Guatemala, referenced

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[18] Irene Sosa, *Responsible Investment Case Studies: Newmont and Goldcorp*, *in* 201, 207 GOVERNANCE ECOSYSTEMS: CSR IN THE LATIN AMERICAN MINING SECTOR (Julia Sagebien & Nicole Marie Lindsay eds., 2011); Imai, Mehranvar & Sanders, *Breaking Indigenous Law*, *supra* note 17; Ward, *The Right To Free, Prior, And Informed Consent*, *supra* note 17 at 75. These allegations were the subject of a petition to the Inter-American Commission for Human Rights, see Communities of the Maya People (Sipakepense and Mam) of the Sipacapa and San Miguel Ixtahuacán Municipalities in the Department of San Marcos, Guatemala, PM 260-07, Inter-Am. Comm'n H.R., (20 May 2010), available at: http://www.cidh.oas.org/medidas/2010.eng.htm.

[19] Ownership of the El Estor Mine changed hands between three Canadian companies between the early 1960s and 2008 before being sold to a private company headquartered in Cyprus in 2011. For instance, *see* Shin Imai, Bernadette Maheandiran & Valerie Crystal, *Accountability Across Borders: Mining in Guatemala and the Canadian Justice System*, *in* TRANSNATIONAL CORPORATIONS, HUMAN RIGHTS AND ENVIRONMENTAL JUSTICE IN LATIN AMERICA (Obi Aginam, ed., forthcoming).

[20] Complaint Submitted to the Canadian National Contact Point Pursuant to the OECD Guidelines for Multinational Enterprises Concerning: The Operations of Excellon Resources Inc. At the La Platosa Mine in the Ejido "La Sierrita", Durango State, México (29 May 2012). Excellon is also accused of systematically undermining the efforts of its employees to organize a democratically elected labour union through acts of union intimidation and violations of workers' rights to freedom of association. *See* press release and accompanying documents at: Mining Watch Canada, "Mexican Workers, Landowners File Second Complaint Against Canadian Mining Company Excellon Resources" Press Release (29 May 2012), available online at: http://www.MiningWatch.ca/news/mexican-workers-landowners-file-second-complaint-against-canadian-mining-company-excellon.

[21] Some of these violent confrontations were caught on film: *see* Malcolm Rogge, *Under Rich Earth*, see documentary website at <http://underrichearth.ryecinema.com/?Page_id=114>. They were also the subject of an unsuccessful lawsuit in Canada: *Piedra v. Copper Mesa Mining Corporation*: Statement of Claim, (3 March 2009), available at: http://www.ramirezversuscoppermesa.com/; *Piedra v. Copper Mesa Mining Corporation*, 2011 ONCA 191.

above, were both accompanied by violence. Community leaders were assassinated in the context of both referenda, and in Guatemala police and army officers killed an individual at a public protest.[22] In relation to the El Estor Mine in Guatemala, since 1969 there have been numerous assassinations of community leaders, most recently in 2009.[23] The El Estor Mine is also the focus of one of the most disturbing allegations of violence against a Canadian mining company to date. It is alleged that in 2007, police, military, and the mine's security personnel raped ten Mayan women while undertaking land evictions in favor of the company.[24]

These micro-level accounts of the use of violence in order to protect the interests of Canadian mining companies resonate with the general observations of international human rights bodies. In 2010, the United Nations Special Rapporteur on the Situation of Human Rights Defenders reported that private corporations are allegedly impeding the activities of human rights defenders working on issues related to the exploitation of natural resources. The Rapporteur noted instances where security guards employed by mining companies allegedly committed acts of violence against human rights defenders concerned with the negative impacts of these activities.[25] Similarly, in 2011 the Inter-American Commission on Human Rights observed that violence against defenders of the environment has become more pronounced where there are serious tensions between the supporters of extractive industries, and those sectors that resist the implementation of projects in order to prevent environmental harm.[26]

In sum, the legal and academic accounts touched upon in the above review can by synthesized in terms of three key potential sources of social conflict between Canadian mining companies and communities in Latin America. First, conflicts can arise were communities suspect actual or potential environmental damage. Second, conflicts can originate in a lack of consent and inadequate community participation in project development. Finally, violations of communal or

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[22] McGee, *The Community Referendum*, *supra* note 16, at 574.
[23] For an overview of these assassinations, see Imai, Maheandiran & Crystal, *Accountability Across Borders*, *supra* note 19. The 2009 assassination is the basis of a civil lawsuit currently underway in Canada, see Choc v. Hudbay Minerals Inc., CV-10-411159 (Ont. Sup. Ct. J. Filed Sept. 24, 2010), available online at: <http://www.chocversushudbay.com/wp-content/uploads/2010/11/Choc-v-Hudbay-Statement-of-Claim-updated-Oct-2013.pdf>.
[24] These alleged rapes are the basis of a civil lawsuit currently underway in Canada, see *Caal Caal v. Hudbay Minerals Inc.*, 2020 ONSC 415, available online at: http://www.chocversushudbay.com/wp-content/uploads/2020/02/2020-01-22-Decision-re-motion-to-amend-pleadings.pdf.
[25] Special Rapporteur on the Situation of Human Rights Defenders, *Human rights defenders*, ¶ 9-10, U.N. Doc. A/65/223 (Aug. 4, 2010).
[26] Second Report on the Situation of Human Rights Defenders in the Americas, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II, doc. 66, ¶ 312 (Dec. 31, 2011).

individual property rights and/or disregard for land claims may lead to conflict. When these three concerns remain unaddressed and conflicts occur, there is a risk that community opposition to mining will be met with significant violence and repression.

3 Resource Extraction & Law Reform Efforts in Canada

Communities' concerns and the associated risks of violence form the social context that has compelled civil society actors to advocate in favor of law reform in Canada. While these law reform efforts are multifaceted, they have nonetheless been dominated by a fundamental struggle between two models. Certain civil society actors have advocated for Canadian government regulation and enforceable laws, while certain industry representatives have taken the position that voluntary mechanisms represent the best governance model.

The struggle in Canada between these two approaches, which has largely taken place since the early 2000s, can be understood in terms of three main, yet somewhat overlapping, periods. In the first period, federal government advisors proposed regulatory models that attempted to reconcile public regulation and private voluntary governance models. Following this, the federal government introduced its CSR policy in the form of a private voluntary model that is facilitated by designated government actors. In the third period, federal Members of Parliament introduced three different private members bills, respectively representing public law, private law and voluntary approaches to regulation. The proposals developed in each of these periods are reviewed below with a focus on their regulatory features.

3.1 Federal Advisors: Reconciling Private Volunteerism and Public Regulation?

After civil society activists succeeded in bringing concerns regarding the conduct of Canadian mining companies abroad to the attention of federal lawmakers, the Parliamentary Sub-committee on Human Rights and International Development held periodic hearings into the matter. In 2005, the Sub-committee drafted a report entitled *Mining in Developing Countries: Corporate Social Responsibility*,[27] which was subsequently adopted by the Standing Committee on Foreign Affairs and International Trade (SCFAIT) and submitted to Parliament.

[27] HOUSE OF COMMONS STANDING COMMITTEE ON FOREIGN AFFAIRS AND INTERNATIONAL TRADE, *Mining in Developing Countries: Corporate Social Responsibility*, Parl. 38th Sess. 1, Rep. 14th (June 2005), available online at: http://www.resourceconflict.org/Foreign%20Affairs%20Committee%20&%20Mining.pdf. This report was

The SCFAIT Report called on the Government of Canada to "put in place stronger incentives to encourage Canadian mining companies to conduct their activities outside of Canada in a socially and environmentally responsible manner and in conformity with international human rights standards."[28] The Committee urged that such measures "must include" conditioning federal government financial and political support[29] for companies on their adherence to "clearly defined corporate social responsibility and human rights standards".[30] Further, the Committee urged the government to "establish clear legal norms in Canada to ensure that Canadian companies and residents are held accountable when there is evidence of environmental and/or human rights violations".[31]

These core recommendations are notable for the particular approach to public regulation that they promote. The SCFAIT Report envisions a role for the federal government that evaluates mining companies' compliance with a set of normative standards, *prior* to extending political or financial support. In this regard, it defines "financial support" as project loans made with public funds, primarily through Export Development Canada. Further, the Committee proposes that this preliminary conditionality be accompanied by a complaint or investigation mechanism with the enforcement power to ensure accountability, in the form of the withdrawal of government support, for violations of these standards. Finally, while the Report references CSR standards, its overall language appears to propose public international human rights law, such as international human rights treaties, as the basis for developing the enforceable standards it calls for.

In addition to proposing a public regulation approach, the SCFAIT Report calls on the federal government to actively promote the enforcement capacity of certain private transnational mechanisms. Specifically, the Report calls upon the government to advocate for a model of mandatory compliance with regard to the, at-present voluntary, OECD Guidelines for Multinational Enterprises. It also calls on the Government of Canada to advocate for a model

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compiled on the basis of the committee's recent round of hearings in continuation of the committee's compilation of evidence over several years related to the activities of Canadian mining companies in developing countries, *id.* At 1.

[28] *Id.* At 2.

[29] The Report defined this as including export and project financing together with services offered by Canadian missions abroad, see *id.* At 2.

[30] *Id.* The Report suggested that compliance could be demonstrated through the mechanism of human rights impact assessments.

[31] *Id.* At 3.

among international financial institutions (IFIs) where project financing is made contingent on adherence to international human rights standards.[32]

In response to the 2005 SCFAIT report, in 2006 the Department of Foreign Affairs and International Trade (DFAIT) established the National Roundtables on Corporate Social Responsibility (CSR) and the Extractive Industry in Developing Countries. To support the Roundtables, DFAIT convened an Advisory Group of experts from academia, labor, civil society, the socially responsible investment community, and industry. After participating in roundtables in four Canadian cities, the Advisory Group drafted a final report with consensus recommendations for the creation of a CSR Framework by the Government of Canada.[33] According to one Advisory Group member, achieving a consensus regarding the regulatory component of this Framework required the negotiation of an accountability mechanism that struck a middle ground between the position of government and industry in favour of "pure volunteerism", and the push from civil society members for mandatory standards and law reform to make sanctions and remedies available in Canadian courts.[34]

The model of regulation ultimately proposed by the Advisory Group contained two key components of interest.[35] First, it involved the development of a set of Canadian CSR standards of conduct and reporting obligations. However, it circumscribed the sources of these norms to include only those international frameworks that result from "multi-stakeholder and multilateral dialogue". This caveat refers to private transnational norms designed with the joint participation of civil society actors, states, and industry. Concretely, the Advisory Group sanctioned the International Finance Corporation (IFC) Performance Standards and the Voluntary Principles on Security and Human Rights as the only appropriate sources of standards, in addition to the OECD Guidelines, already endorsed by the Government of Canada.[36] As such, the use of public international human rights law and treaties as a *source* of standards was effectively precluded from the proposed Canadian CSR Framework. Rather, the Report states that the application of the private

[32] Certain ifis, such as the World Bank and those banks that have signed onto the Equator Principles, have CSR policies. However, as of 2010, there was no known example of a case where an IFI had withdrawn project financing on the basis of a violation of these policies: Catherine Coumans, *Alternative Accountability Mechanisms and Mining: The Problems of Effective Impunity, Human Rights, and Agency* 30 C.J.D.S. 27, 36, (2010).
[33] ADVISORY GROUP REPORT, *supra* note 13.
[34] Coumans, *supra* note 32, at 40-41.
[35] A third component, albeit less salient from a regulatory perspective, related to the formation of a multi-stakeholder Canadian Extractive Sector Advisory Group to advise government on the implementation and further development of the Canadian CSR Framework, see ADVISORY GROUP REPORT, *supra* note 13, at iii.
[36] *Id.* at iv-v.

transnational standards named above must "observe and enhance respect for" the principles of public international human rights law "that are within the sphere of control of companies".[37]

Second, the Advisory Group's proposed model included a fact-finding and accountability component with two key features: an ombudsman and a review committee. In this concept, the independent ombudsman office would be empowered to investigate and report on complaints with respect to Canadian extractive companies operating in developing countries.[38] This role would feed into the mandate of a tripartite Compliance Review Committee with the power to consider the ombudsman's investigations in order to make determinations and recommendations regarding the nature and degree of company non-compliance with Canadian CSR Standards. In cases of serious failure to comply, and when steps to bring the company into compliance had failed, the CSR framework contemplated that the Government of Canada should sanction the company by withdrawing financial and/or non-financial support.[39] Like the SCFAIT Report, the Advisory Group defined these forms of support in terms of financial support from Export Development Canada (EDC) and political support from diplomatic trade missions, defined as support that goes beyond ordinary consular services by promoting a Canadian company or its interests in a foreign country.

3.2 The Federal CSR Policy: The Advantage of Canadian Volunteerism

The Government of Canada waited two years to respond to the Advisory Group Report. Then, in 2009, it announced its policy "Building the Canadian Advantage: A Corporate Social Responsibility Strategy for the Canadian International Extractive Sector". This policy represents a radical embrace of volunteerism that sharply contrasts with the proposals tabled in the SCFAIT and the Advisory Group Reports.

The overall objective of the federal policy is to "improve the competitiveness" of the sector by enhancing companies' abilities to manage social and environmental risks.[40] To this end the policy operates on the basis of four pillars. First, it supports initiatives to enhance the capacities of

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[37] *Id.* at v. In its Report, the Advisory Group acknowledges that the initial recommended framework falls short of addressing the full range of issues of concern regarding extractive industry, particularly with regard to human rights, see *id.* at iv.
[38] *Id.* at vi-vii.
[39] *Id.* at xii-xiii.
[40] DEPARTMENT OF FOREIGN AFFAIRS AND INTERNATIONAL TRADE CANADA, *The Government of Canada's CSR Strategy* (Mar. 2009), available online at: http://www.international.gc.ca/csr_counsellor-conseiller_rse/About_us-A_propos_du_bureau.aspx?View=d.

developing countries to manage the development of extractive activities and improve opportunities for economic development. Second, it endorses four voluntary transnational performance guidelines: the IFC Performance Standards, the Voluntary Principles, the Global Reporting Initiative (GRI), and the OECD Guidelines. Third, it creates a Centre for Excellence in CSR, and finally, it creates the Office of the Extractive Sector Corporate Social Responsibility Counselor, who is a special advisor to the Minister for International Trade. This Office has the mandate to administer the policy's regulatory component.

The Office of the CSR Counselor is mandated to review the CSR practices of Canadian companies operating outside of Canada according to a five-step process that, upon the submission of a request for review, offers eligible parties informal mediation, followed by the option of formal mediation.[41] It states that an "individual, group or community" who "reasonably believes" that they have been adversely affected by the activities of a Canadian extractive sector company, for the reason that they are inconsistent with the endorsed guidelines, is eligible to request a review. At the same time, a Canadian company can submit a request for review to the Office if it "believes" that "an identifiable party" has made unfounded allegations against it. In both cases the process is voluntary and the participants can withdraw at any time. The Office states that its process is not adjudicative or investigative, rather it aims to promote dialogue, problem solving and conflict resolution.

The Office opened in March 2010 and began receiving requests for review in October of that year. To date, the Office has received only three requests for review in two years.[42] A Mexican NGO and labor union jointly requested the first review in relation to Excellon Resources. This review failed to yield results because Excellon abruptly withdrew from the process before proceeding to the dialogue stage.[43] The Office received its second request for review from

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[41] DEPARTMENT OF FOREIGN AFFAIRS AND INTERNATIONAL TRADE CANADA, *Review Process of the Office of the Extractive Sector Corporate Social Responsibility (CSR) Counsellor*, available online at: http://www.international.gc.ca/csr_counsellor-conseiller_rse/assets/pdfs/info%20brochure%20Nov1.pdf.

[42] OFFICE OF THE EXTRACTIVE SECTOR CORPORATE SOCIAL RESPONSIBILITY (CSR) COUNSELOR, *2011 Annual Report to Parliament* (Nov. 2011), available online at: http://www.international.gc.ca/csr_counsellor-conseiller_rse/assets/pdfs/2011_report_to_parliament-eng.pdf.

[43] *Id.* At 22. OFFICE OF THE EXTRACTIVE SECTOR CORPORATE SOCIAL RESPONSIBILITY (CSR) COUNSELOR, *Closing report – Request for review file #2011-01-MEX* (Oct. 2011), available online at: http://www.international.gc.ca/csr_counsellor-conseiller_rse/assets/pdfs/Closing_report_MEX.pdf. The Counselor stated that in her opinion Excellon's decision to withdraw represented a significant missed opportunity and that the request for review had every reason to move fruitfully to a structured dialogue were it not for Excellon's withdrawal, see *id.* At 2-4.

organizations in Mauritania concerned about First Quantum Minerals' mine, but it closed this review shortly thereafter at the "informal mediation" phase for the reason that the requesters had not pursued the available "site level grievance mechanism".[44] Two Argentinean NGOs submitted a third request for review in relation to a project owned by McEwen Mining. Like Excellon, McEwen Mining withdrew from the process before it could proceed from the "information mediation" phase to a "facilitated dialogue".[45]

3.3 Private Member Bills: An Eclectic Mix of Legal Mechanisms

In the wake of the voluntary federal CSR policy and the public regulation proposals put forward in the SCFAIT and Advisory Reports, individual Members of Parliament became engaged, introducing three different private members bills between 2009 and 2010. While each of these intended to impact the accountability of Canadian mining companies operating abroad, the bills represent very different approaches to the regulation of the transnational corporation.

Liberal Member John McKay introduced the first of these in 2009 under the banner of Bill C-300, *An Act Respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries*.[46] This Bill passed through its first and second reading at the House of Commons before it was narrowly defeated at its third and final reading in October of 2010.[47] Many of the civil society organizations behind the Bill[48] had also participated in the National Roundtables, either as Advisory Committee members or by making submissions. These groups made enormous efforts to garner political support for the Bill and they attributed its failure to heavy lobbying and misinformation on the part of the Canadian mining industry.[49]

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[44] OFFICE OF THE EXTRACTIVE SECTOR CORPORATE SOCIAL RESPONSIBILITY (CSR) COUNSELOR, *Closing report – Request for review file #2011-02-MAU*, 4 (Feb. 2012), available online at: http://www.international.gc.ca/csr_counsellor-conseiller_rse/assets/pdfs/2011-02-MAU_closing_report-rapport_final-eng.pdf.

[45] OFFICE OF THE EXTRACTIVE SECTOR CORPORATE SOCIAL RESPONSIBILITY (CSR) COUNSELOR, *Request for review file #2012-03-ARG – Closing Report* (Oct. 2012), available online at: http://www.international.gc.ca/csr_counsellor-conseiller_rse/assets/pdfs/closing_report-2012-03-ARG-rapport_fermeture-eng.pdf.

[46] *An Act respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries*, Bill C-300, first reading Feb. 9, 2009, available online at: http://www.parl.gc.ca/content/hoc/Bills/402/Private/C-300/C-300_1/C-300_1.PDF.

[47] CANADIAN NETWORK ON CORPORATE ACCOUNTABILITY, *Bill C-300: Narrow Defeat despite Widespread Support for Mining Accountability and Human Rights* (Oct. 28, 2010), available online at: http://cnca-rcrce.ca/bill-c-300-narrow-defeat-despite-widespread-support-for-mining-accountability-and-human-rights/.

[48] CANADIAN NETWORK ON CORPORATE ACCOUNTABILITY, *supra* note 1.

[49] CANADIAN NETWORK ON CORPORATE ACCOUNTABILITY, *supra* note 47.

Bill C-300 would have applied to any company incorporated under federal or provincial law that engaged in mining, oil or gas activities with support from the Government of Canada. Its stated intention was to ensure that the conduct of these companies is consistent with international environmental best practices and Canada's commitments to international human rights standards, defined as standards based on international customary law and on the international human rights conventions to which Canada is party. Concretely, the Bill required the creation of corporate accountability standards that incorporated the IFC Performance Standards, the Voluntary Principles, and human rights provisions consistent with international human rights standards.

Moreover, Bill-C 300 proposed a complaint mechanism administered by the Minister of Foreign Affairs and the Minister of International Trade. It would have obligated both Ministers to receive complaints from Canadian citizens, permanent residents, or residents and citizens from a developing country, regarding Canadian companies engaged in mining, oil or gas activities. Where either Minister determined that a corporation had not met the standard of conduct established pursuant to the Bill, they were to notify Export Development Canada (EDC) and the Canada Pension Plan (CPP) Investment Board.

Through a consequential amendment to the *Export Development Act,*[50] Bill C-300 required EDC to make its contracts and transactions conditional on companies' compliance with the Bill's standards. Similarly, the Bill proposed an amendment to the *Canada Pension Plan Investment Board Act*[51] requiring the Board to take the standards into consideration when investing CPP assets, and to refrain from investing in any corporation whose activities have been found by the Ministers to be inconsistent with the standards. Finally, through an amendment to the *Department of Foreign Affairs and International Trade Act*,[52] the Bill further required DFAIT to undertake its duty to coordinate Canada's international economic relations and its efforts to expand Canada's international trade and commerce in a manner consistent with the standards. It also required DFAIT to refrain from promoting or supporting, beyond the provision of ordinary consular services, mining, oil or gas activities that are inconsistent with the standards set out by the Bill. Based on the foregoing, it is clear that Bill C-300 was modeled after the proposals in the SCFAIT and the

[50] *Export Development Act*, R.S.C. 1985, s. 2 (f), available online at: http://laws.justice.gc.ca/eng/acts/E-20/.
[51] *Canada Pension Plan Investment Board Act*, S.C. 1997, available online at: http://laws-lois.justice.gc.ca/eng/acts/C-8.3/.
[52] *Department of Foreign Affairs and International Trade Act*, R.S.C. 1985, s. 2, available online at: http://laws-lois.justice.gc.ca/eng/acts/E-22/index.html.

Advisory Group Reports, while at the same time expanding their regulatory scope to include CPP investments and human rights standards.

The second private member's Bill in the realm of CSR in Canada is Bill C-323, *An Act to amend the Federal Courts Act (international promotion and protection of human rights)*.[53] New Democratic Party (NDP) Member Peter Julian first tabled this bill in 2009, but after the defeat of Bill C-300, he re-introduced it to Parliament again in 2011.[54] The Bill would extend the jurisdiction of the Federal Court and Federal Court of Appeal to include civil claims brought by non-citizens who allege a violation, committed in a foreign state or territory, of international law or of a treaty to which Canada is a party. The Bill would then place the burden on the defendant to prove that the Courts should not take jurisdiction over the claim. Mr. Julian describes his Bill as a Canadian version of the U.S. *Alien Torts Claims Act*.[55]

The third private member's bill to date is Bill C-571, *An Act respecting corporate practices relating to the purchase of minerals from the Great Lakes Region of Africa*,[56] tabled in 2010 by NDP Member Paul Dewar.[57] It would apply to any corporation incorporated in Canada that endeavors to purchase minerals that originate in a designated group of African countries. The Bill would require companies to undertake certain due diligence practices to ensure that the purchase of these minerals does not directly or indirectly provide monetary gain to illegal armed groups. Finally, the Bill requires the CSR Counselor to report on those companies that she believes are not following appropriate CSR practices in the Great Lakes Region of Africa. In essence, Bill C-571 would expand the mandate of the CSR Office to include reporting on a specific issue and region.

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[53] *An Act to amend the Federal Courts Act (international promotion and protection of human rights*, Bill C-354, first reading Apr. 1, 2009, s. 14, available online at: http://www.parl.gc.ca/content/hoc/Bills/403/Private/C-354/C-354_1/C-354_1.PDF.

[54] PARLIAMENT OF CANADA, *Legisinfo – Private Member's Bill C-323*, available online at: http://www.parl.gc.ca/legisinfo/billdetails.aspx?Language=E&Mode=1&billid=5138027.

[55] PETER JULIAN, *Bill C-323, The International Protection & Promotion of Human Rights Act / Projet de loi C-323, Loi de promotion et de protection des droits de la personne à l'échelle internationale* (Oct. 5, 2011), available online at: http://peterjulian.ndp.ca/post/c-323-the-intl-protection-promotion-of-human-rights-act-loi-de-promotion-et-de-protection-des-droits-de-la-personn.

[56] *Trade in Conflict Minerals Act*, Bill C-571, first reading Sept. 30, 2010, available online at: http://parl.gc.ca/content/hoc/Bills/403/Private/C-571/C-571_1/C-571_1.PDF.

[57] Since that time, this bill has not moved beyond the phase of introduction and first reading, see PARLIAMENT OF CANADA, *Legisinfo – Private Member's Bill C-571*, available online at: http://www.parl.gc.ca/legisinfo/billdetails.aspx?Language=E&Mode=1&billid=4663285.

4 Analysis

John Ruggie, the United Nations Special Representative on the issue of human rights and transnational corporations and other business enterprises, describes the "business and human rights predicament" in terms of a "governance gap".[58] His usage of this term refers to the distance between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. On the other hand, Catherine Coumans, the Research Coordinator of the NGO MiningWatch Canada,[59] describes the same set of concerns in terms of the "effective impunity" of the transnational corporation.[60] Coumans' concept is defined as those circumstances where the governments of the jurisdictions where companies operate (host states) do not hold them to account for their human rights violations, and the governments of the countries where companies are headquartered (home states) lack the political will to regulate them or provide the conditions for legal accountability for these violations. Interestingly, the term "impunity" does not appear in Ruggie's report, though Coumans does note that the "governance gaps" highlighted by Ruggie are one way of framing the causes of "effective impunity".[61]

The above examples are only two of many that underscore the fact that there is no consensus on how to describe the legal and regulatory problematic generated by transnational corporate activity, with the Canadian mining industry's foreign operations given as one example. Indeed, how one frames the problem involves making choices that lead to different political, policy and legal proposals. Thus, there are at least two interrelated arenas for debate on the subject. The first is a conceptual, or even epistemic, debate about how to define the problem, while the second is a regulatory debate about how to address the problem, once defined.

The following analysis examines the regulatory and policy proposals advanced in Canada to date in order to identify the conceptual assumptions they embody regarding the state, the corporation, and civil society. This is an early stage attempt to interrogate the terms of the debate in Canada and the manner in which this debate has manifested in the particular legal terrain of law

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[58] Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, ¶ 3, 104, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (by John Ruggie).

[59] Catherine Coumans testified before the SCFAIT and was also a member of the National Roundtables Advisory Group, see HOUSE OF COMMONS STANDING COMMITTEE ON FOREIGN AFFAIRS AND INTERNATIONAL TRADE, *supra* note 27. MiningWatch Canada was a key supporter of Bill C-300, *see* CANADIAN NETWORK ON CORPORATE ACCOUNTABILITY, *supra* note 1.

[60] Coumans, *supra* note 32, at 32-33.

[61] Coumans, *supra* note 32, at 33, 36.

reform. To do so, this analysis gives special attention to the private and/or public features of each proposal, the specific way it purports to use law to structure the relationship between the state and the corporation, and the conception of the private and public spheres that underlie the regulatory dimensions of each proposal.

This method of inquiry illuminates the fact that, while on a political level it appears that the regulatory struggle in Canada has taken place between those who advocate enforceable standards and those who support exclusively voluntary commitments; there are also important conceptual differences and assumptions in the use of private and public law among the proposals for enforceable standards. As such, the proposals described in the previous section are analyzed in terms of three main categories: (1) public law regulatory approaches, (2) voluntary approaches, and (3) private law litigation approaches.

4.1 Public Regulation Models: What is the Scope of the Public?

The SCFAIT Report, the National Roundtables Advisory Group Report, and Bill C-300 are all "public regulation" proposals for the reason that they envision either the creation of a new regulatory body, or the creation of new regulatory duties within an existing federal body. In either case, the designated body is charged with a regulatory mandate to investigate and evaluate the conduct of Canadian mining companies according to a set of standards, and to impose a certain range of sanctions where appropriate. Beyond sharing these public regulation features, these proposals are also unified by certain fundamental assumptions, which will be interrogated here in the context of two key regulatory features: standards and sanctions. At the same time, variations between proposals will be considered.

On the issue of standards, all three proposals aim to create a hybrid standard based on a blend of voluntary multi-stakeholder CSR standards and international public human rights law standards. However, the method for constructing this blended standard is contentious. One key issue that emerges from these three proposals revolves around the relative weight or prioritization that should be afforded to public sources of standards verses their private counterparts.

Of the three public regulation proposals, the Advisory Group Report is the most explicit and descriptive on the standards issue. The previous section described how this Report explicitly excluded public international human rights law as a source of standards in favor of transnational

norms that originate from multi-stakeholder international processes.[62] The Report confirms that this recommendation was a difficult concession for the civil society members of the Advisory Group. These members criticized standards originating from investment institutions, such as the IFC Performance Standards, as "risk-based principles developed by a financial institution and accepted by corporations".[63] Civil society members would have preferred standards derived from human rights-based principles reflected in globally endorsed United Nations treaties.[64]

In response to these concerns, the Advisory Group Report stated that the application of transnational standards must "observe and enhance respect for" the principles of public international human rights law "that are within the sphere of control of companies".[65] In other words, the standards contemplated by the Advisory Group must be consistent with *only* those human rights principles that are in Canadian mining companies' sphere of control. Conversely then, one might logically reason that, at least in some cases, these standards may in fact be inconsistent with human rights concerns that are outside of the sphere of control of companies. The Report seems to acknowledge this possibility when it concedes that its proposal does not cover the full range of human rights concerns raised by the extractive industry in developing countries.[66] Unfortunately, the Report does not provide concrete examples that might better explain how its proposed blend of standards might work in practice.

At first brush, it would seem obvious that companies should not be held accountable for issues that are outside of their "sphere of control". Yet this simple proposition obscures the fact that the question of the scope of the human rights obligations of transnational companies under international law is extraordinarily complex and contentious. This precise issue has polarized several decades of efforts at the United Nations to create a code of conduct on the subject.[67] By

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[62] The Advisory Group sanctioned the International Finance Corporation (IFC) Performance Standards and the Voluntary Principles on Security and Human Rights as the only appropriate sources of standards, in addition to the OECD Guidelines, already endorsed by the Government of Canada, see ADVISORY GROUP REPORT, *supra* note 13.
[63] ADVISORY GROUP REPORT, *supra* note 13, at 12.
[64] *Id*. See also Coumans, *supra* note 32, at 41-42.
[65] ADVISORY GROUP REPORT, *supra* note 13, at v. In its Report, the Advisory Group acknowledges that the initial recommended framework falls short of addressing the full range of issues of concern regarding extractive industry, particularly with regard to human rights, see *id.* at iv.
[66] *Id.* at iv.
[67] Alejandro Teitelbaum, *Observations on the Final Report of the Special Representative of the UN Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie*, *in* HUMAN RIGHTS AND SUSTAINABLE HUMAN DEVELOPMENT, The Jus Semper Global Alliance (May 2011), available online at:
http://www.jussemper.org/Resources/Corporate%20Activity/Resources/Observations_to%20Ruggies_final-2011.pdf.

adopting the caveat "sphere of control", the language of the Advisory Group Report lends itself at best to a contractual conception of companies' human rights responsibilities. Legally speaking, the company might only be found to "control" those actions that are directly attributable to its employees or other agents with whom it enters into a contractual relationship of some kind.

The SCFAIT Report and Bill C-300 propose a method for blending international standards to create a Canadian CSR standard that stands in contradistinction to the Advisory Group Report's circumscription of the role of international human rights norms. However, on this subject, the SCFAIT Report makes only general recommendations. It simply states that company conduct should conform to clearly defined international human rights principles *and* corporate social responsibility standards.[68] Bill C-300 provides some additional detail as to how such a combined standard might be constructed. Its declared objective is to ensure that Canadian mining companies operate in a manner that is consistent with Canada's obligations under international human rights law. However, in creating a human rights standard to meet this objective, Bill C-300 aims to incorporate the same set of multisectoral transnational standards that were given priority in the Advisory Group Report, namely, the IFC Performance Standards and the Voluntary Principles. As mentioned earlier, the IFC Standards are designed to govern the terms of the loans that the IFC provides to private enterprises investing in developing countries.

The prospect of melding this set of private transnational standards with international public law human rights principles is an interesting endeavor. Unfortunately, like the Advisory group Report recommendations, Bill C-300 was not implemented, making it difficult to conceptualize how this might occur in practice. Thus, these unfulfilled law reform projects leave a number of unanswered questions, which are briefly articulated here. First, it is unclear what an integrated private/public standard might achieve, beyond what is already accomplished by international public law norms. This question arises given that public law principles are generally far more expansive than private transnational norms. Moreover, to the extent that there are differences between the two, it may be the case that risk-based standards and human rights-based norms contain certain fundamental contradictions. This seemed to be the concern of the civil society members of the Advisory Group. CSR standards are designed to be compatible with protecting and advancing the interests of investors, while international human rights standards were created to grant protections to all individuals. This raises the question of how standards rooted in different

[68] SCFAIT, *supra* note 26, at 2.

normative logics might be combined, and what logic might orient the resulting blended standard. For example, how would the interests of communities affected by mining operations be reconciled with those of the investors in the design of this blended standard?

This question leads to another important, and related, area of analysis, namely the relationship between the standards and objectives articulated in these regulatory proposals. Both the SCFAIT Report and Bill C-300 shared a common objective: to ensure that the conduct of Canadian companies' is consistent with Canada's international human rights standards. Thus, both proposals would impose a duty on the Canadian government to regulate the activities of its mining companies abroad to meet this objective. In such a regime, the Canadian state would impose its obligations under international human rights law onto these companies. Further, the regulation contemplated would extend the scope of these obligations to include communities adversely affected by Canadian mining companies operating abroad. In sum, the Canadian state would have an obligation, created by the regulation, to ensure that its companies do not violate the rights of communities abroad, as articulated by the international treaties that Canada is signatory to.[69]

This careful (if not laborious) articulation reveals the close relationship between standards and objectives in regulatory design. For example, in both Bill C-300 and the SCFAIT Report, the standards also constitute the objectives of the proposed regulation: the objective is to ensure that companies respect human rights, and the standards imposed on companies are human rights standards. Thus, standards and objectives are crucial to the design of these public regulatory regimes and they must inform this article's analysis of their proposed sanctions. This is the case because the sanction components of these regulatory regimes constitute the means for achieving their objectives, which are in turn contingent on the standards they apply.

Turning then to the issue of sanctions, the SCFAIT, Advisory Group and Bill C-300 all concentrate on the withdrawal of federal government financial and political support. As the first proposal, the SCFAIT Report set a template in this regard that was subsequently followed by the other two proposals. While the SCFAIT Report puts forward a model that targets the institutional financing of Canadian mining companies, it refers to only two sources of financing: private sources originating from international financial institutions (IFIs), and public financing from funds

[69] For an argument that the Canadian state has a duty in international law to regulate in this regard, see Sara Seck, *Home State Responsibility and Local Communities: The Case of Global Mining* 11 YALE HUM. RTS. & DEV. L.J. 177 (2008).

managed by the Canadian government, primarily through Export Development Canada (EDC). Thus, it locates the enforceable standards it proposes in two spheres, namely transnational private law and domestic public law. Since the Canadian government lacks the power to unilaterally make changes in IFI financing, its proposal regarding public financing is of greater interest for the purpose of this analysis.

What is notable about SCFAIT's adoption of financing as a method of sanction is the narrowness of its focus, as in fact the most significant areas of company financing are absent from the Report. There is no question that the accumulation of capital through financial markets in Canada is the largest source of financing for Canadian mining companies, as outlined above. At $58 billion in 2010,[70] the outward investments of Canadian mining companies dwarfs the total investments of EDC in the entire commercial extractive sector, at $14.6 million in the same year.[71] Yet the SCFAIT Report does not consider Canadian capital markets whatsoever.

Ostensibly, this is because the Report is concerned only with the federal government's "political and financial support" for Canadian mining companies. If so, the Report's rationale is predicated on the assumption that government political and financial support does not occur in and through the private sphere, or in other words, that financial markets exist autonomously of state decisions, actions, and interventions.[72] By rending invisible the multidimensional role of government in the creation, maintenance and promotion of capital markets,[73] the SCFAIT Report precludes the market, as an area of possible intervention and sanction, from the scope of the state's regulatory authority.

This assumption that the market exists autonomously from the state fits with the SCFAIT Report's related conception of the public sphere and the scope of moral responsibility attributable to the state. As described above, the Report focuses almost exclusively on the financing provided by EDC, a corporation created and owned by the Government of Canada. The Minister for

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[70] Stothart, *supra* note 2, at 82.
[71] EXPORT DEVELOPMENT CANADA, *Annual Report 2011*, Supplemental Information – Table 6: Concentration of Exposure by Industry, available online at: http://www19.edc.ca/publications/2012/2011ar/english/11-1-6.shtml.
[72] For some examples of contributions that attempt to reveal the political/policy decisions involved in creating different aspects of the market, see David Kennedy, *Some Caution About Property Rights as a Recipe for Economic Development* 1 ACC., ECON., & L. 1 (2011); ANNELISE RILES, COLLATERAL KNOWLEDGE: LEGAL REASONING IN THE GLOBAL FINANCIAL MARKETS (2011); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State* 38 POL. SCI. Q. 470 (1923); Morris R. Cohen, *Property and Sovereignty* 13 CORNELL LAW Q. 8 (1927).
[73] Of course the constitutional division of powers between the federal and provincial governments in Canada determines to some extent which level of government performs what role in the creation and maintenance of Canadian financial markets.

International Trade appoints EDC's board members, who must report to Parliament annually on the fulfillment of EDC's primary objective, which is to develop Canadian capacity to engage in trade, partly through the provision of credit, insurance and investments to Canadian businesses.[74]

By focusing exclusively on EDC, the SCFAIT Report circumscribes the role of the Canadian State in the regulation of Canadian mining companies operating abroad to circumstances where it has entered into a direct contractual relationship with a company in the form of a financing agreement. Seen as such, the role of the state as a regulator is reduced to that of a private market actor in that the scope of its regulatory authority is dictated by its commercial relationships, in this case as an issuer of loans. Given that human rights and other normative concerns form the objectives of SCFAIT's proposed regulatory approach (as discussed above), this method of sanction serves to equate the state's sphere of moral responsibility with the circumstances of its direct financial interests. Thus, this public regulation approach emerges as a kind of "privatism" in the sense that the state, while apparently acting as a public regulator, would regulate only its own private commercial relationship with certain corporate actors. The fact that EDC's decision making and compliance with social and environmental policies is itself covered by almost total confidentiality adds to the private nature of this form of regulation.

The Advisory Group Report maintained the SCFAIT Report's underlying assumptions regarding the nature of the private and public sphere and their relationship. Like the SCFAIT Report, it focuses on conditioning the federal government's project financing, primarily through EDC. However, it somewhat minimizes the regulatory role proposed in the SCFAIT Report in that it does not contemplate a requirement that projects be screened prior to financing.[75] Rather, it specifies that financing may only be withdrawn after a complaint process is completed, and compliance efforts are exhausted. Further, the Advisory Group does not take up the SCFAIT recommendation to pressure international financial institutions to enhance the enforcement of CSR standards.

On the other hand, the Advisory Group shares the SCFAIT recommendation to use the withdrawal of political support as a potential sanction. It elaborates on the meaning of political support, which was not expounded on in the SCFAIT Report, and defines it as support from trade

[74] *Export Development Act*, *supra* note 50, at ss. 3-5, 10, 11.
[75] In spite of this, the Advisory Group Report does contain recommendations that call on Export Development Canada to improve its disclosure policy, *see* ADVISORY GROUP REPORT, *supra* note 13, at vi, 19.

missions that goes beyond ordinary consular services by promoting a Canadian company or its interests in a foreign country. In sum, the strength of the public regulatory role in the Advisory Group Report is somewhat weaker than in the SCFAIT proposal, support for the enforcement of transnational norms is removed, and the meaning of political support is defined.

On the subject of sanction and financing, the regulatory vision of Bill C-300 most closely resembles that of the SCFAIT Report. It contemplates imposing a proactive obligation on EDC to screen projects, together with the withdrawal of access to EDC financial services. It further adds specific provisions for the withdrawal of Canadian political support, building on the definition set out in the Advisory Group Report. However, Bill C-300 moved significantly beyond both Reports in that it introduces an additional form of sanction through the requirement that investments be screened, and that CPP funds be withdrawn from Canadian mining companies found responsible for human rights violations abroad. This step is momentous in terms of its potential economic ramifications. The CPP is unquestionably the largest institutional investor in Canada.[76] As of June 2012, the CPP Fund was valued at $165.8 billion,[77] affording it a level of investment power that dwarfs that of EDC, with a cap of authorized capital set at $3 billion.[78]

Normatively, Bill C-300's proposal would have transformed the CPP Board's current framework for investment decision-making. At present the Board, like all other public sector pension fund investment boards in Canada, operates in a legal framework that allows it to take social and environmental considerations into account in its investment decisions only to the extent that they threaten to negatively impact a company's profitability.[79] The Board explicitly states that

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[76] In fact, large institutional investors such as pension funds account for over one-third of the world's invested assets, see FOREIGN AFFAIRS AND INTERNATIONAL TRADE CANADA, *Corporate Social Responsibility*, Financial Incentives (Mar. 2009), available online at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/ds/csr-strategy-rse-stategie.aspx?View=d.

[77] CPP INVESTMENT BOARD, available online at: http://www.cppib.ca.

[78] *Export Development Act*, *supra* note 50, at s. 11.

[79] For the statutory description of the CPP Board's duties, see *Canada Pension Plan Investment Board Act*, S.C. 1997, s. 14, available online at: http://laws-lois.justice.gc.ca/eng/acts/C-8.3/. For the common law definition of fiduciary relationship, see *Hodgkins v Simms*, 117 D.L.R. (4th) 161 (1994). The CPP Board is generally understood to have a fiduciary relationship in law with CPP beneficiaries that prevents it from taking human rights concerns into account that might negatively affect financial returns, see Benjamin J. Richardson, *From Fiduciary Duties to Fiduciary Relationships for Socially Responsible Investing: Responding to the Will of Beneficiaries*, 1 J. OF SUST. FIN. & INV'NT. 5, (2010). The CPP is a signatory to the United Nations-backed voluntary Principles for Responsible Investment. The Principles declare that, "as institutional investors, we have a duty to act in the best long-term interests of our beneficiaries. In this fiduciary role, we believe that environmental, social, and corporate governance (ESG) issues can affect the performance of investment portfolios". Signatories of the Principles "publicly commit to adopt and implement them, where consistent with our fiduciary responsibilities." See PRI SECRETARIAT, *The Principles of Responsible Investment*, available online at: http://www.unpri.org/principles/.

it does not screen its investments based on these concerns alone for the reason that doing so would either increase risks or reduce returns. Rather, the Board evaluates these concerns only to the extent they affect long-term risk and financial returns to beneficiaries.[80]

The Board's statements in this regard make it clear that Bill C-300's proposal represents a significant incursion of human rights concerns into the market place. While legislative measures of this nature are not unprecedented globally, they would have been the first of their kind in Canada.[81] Albeit only in the realm of CPP investments, Bill C-300 advances the proposition that the state may impose human rights (moral) parameters onto private investment decision-making processes that are not necessarily compatible with optimizing investors' returns. In what sense are these decisions private? Of course the CPP is a public pension fund, and like the EDC, the CPP Board is a Crown corporation, accountable to Parliament, though in this case it's members are appointed by the federal Minister of Finance.[82] However, there is a significant conceptual difference between the proposal to withdrawal EDC loan support and the idea of constraining CPP investments. The latter of these expands the scope of the state's moral and regulatory concern to include the decisions made by the investment administrators of Canada's national pension fund on behalf of pension plan beneficiaries. Whereas in the case of EDC the state's financial interests are at stake in its capacity as a lender and owner of EDC, in the case of the CPP, the state is intervening in reference to the private financial interests of 18 million Canadian CPP beneficiaries.

While Bill C-300 significantly expands the economic scope of regulatory intervention, it maintains a certain conceptual consistency with the SCFAIT and Advisory Group Reports. All three proposals share a common focus on withdrawing financial support in the form of commercial investments or loans as their chosen method of regulatory sanction. However, it is unclear how these sanctions, on their own, will meet the express objectives embodied in the standards discussed above. More specifically, it is not obvious that the withdrawal of access to EDC loans and CPP

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[80] CANADIAN PENSION PLAN INVESTMENT BOARD, *2011 Report on Responsible Investing*, at 23, available online at: http://www.cppib.ca/files/PDF/CPPIB_RI_Report.PDF.

[81] For example, the Swedish, Norwegian, New Zealand and French national pension schemes are statutorily required to invest responsibly, see Benjamin J. Richardson, *Protecting Indigenous Peoples through Socially Responsible Investment* 6 I.L.J. 1, 29 (2007). An example of divestment based on a country's human rights record occurred in 2006/2007 in California when the state government introduced the *California Public Divest from Sudan Act,* Cal. Gov. Code § 7513.6 (2012), available at: http://law.onecle.com/california/government/7513.6.html, and the *California Public Divest from Iran Act*, Cal. Gov. Code § 7513.7 (2012), available at: http://law.onecle.com/california/government/7513.7.html.

[82] *Canada Pension Plan Investment Act*, *supra* note 78, at ss. 2, 3, 10. The Board is also accountable to provincial Ministers, see s. 50.

investments alone has the potential to meet the objectives of the proposed regulation, namely to ensure that the conduct of Canadian mining companies is consistent with Canada's human rights obligations in international law.

Moreover, where problematic mining operations have occurred or continue, the withdrawal of these forms of financial support provides no apparent remedy to affected communities, who are nonetheless the presumed rights-holders in the regimes proposed by the SCFAIT Report and Bill C-300. Given the robust standards and objectives created by these two proposals in particular, it is conceptually unclear why the scope of the federal government's regulatory authority and moral concern should be limited to its role as a lender through EDC, or as the facilitator of pension investments through the CPP. While these roles are no doubt important and carry economic and moral weight, they do not subsume the extent of the government's role in the formation and maintenance of Canadian markets and, as a corollary, in the operation of Canadian mining companies.

4.2 The Federal CSR Policy: Civil Society as a Source of Risk?

As indicated above in Part 2, the federal government's CSR policy represents a total about-face from the public regulation proposals recommended in the Advisory Group and SCFAIT Reports, toward an approach based entirely on multisectoral norms and voluntary commitments. First, while the CSR policy adopts the private transnational standards recommended in the Advisory Group Report, it omits any reference to public international human rights law. Second, it disregards both Reports' recommendations to create an investigative regulatory mechanism, linked with a possible sanction in the form of the withdrawal of federal financing. Instead, it creates a voluntary mediation service.

In light of these two features, the federal CSR policy communicates a particular view of the Canadian State that is distinct from that of the public regulation proposals. It frames the state, not as a regulator of the human rights impacts of market activities, but rather as a mediator of conflicts between private parties. Concomitantly, it presumes that the state's commercial relationships with the private sector in the form of financing are immune from moral or human rights concerns. Moreover, to govern mediation between companies and civil society actors, it predominantly selects norms that originate from private sources, developed in a risk-based investor-oriented

framework.[83] The dominance of such norms in the federal CSR review process would seem to be at odds with the fact that the civil society actors who are intended to use the process are generally not in an investor relationship with the company. This returns us to some of the concerns and unanswered questions raised in the previous section with regard to blending private and public norms.

Also notable is the apparent incoherence of the state's mediator role envisioned in the CSR policy. The policy declares that the Office of the CSR Counselor is an "impartial advisor and facilitator" and "an honest broker".[84] Yet at the same time the stated purpose of the policy is to "improve the competitiveness of Canadian international extractive sector companies by enhancing their ability to manage social and environmental risks."[85] It is difficult to comprehend how the Office of the Counselor might be impartial when it also forms part of an overarching policy with the primary objective of improving the situation of Canadian companies. The policy contains no counter-balancing objective oriented toward improving the situation of those actors who might be adversely affected by companies.[86] Rather, the language employed to articulate the policy's purpose suggests that it considers that the concerns of communities and individuals that might be raised in the review process are "risks" that must be "managed" for the benefit of the company. Thus, although at a technical or procedural level the review process may appear to be "fair" or "impartial", when placed in the context of its overall policy objectives, this become debatable.

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[83] These are the IFC's Performance Standards, which govern the terms of loans made by the IFC, and the Global Reporting Initiative (GRI), with an original target audience of investors, *see* GLOBAL REPORTING INITIATIVE, *What is GRI?*, available online at: https://www.globalreporting.org/information/about-gri/what-is-GRI/Pages/default.aspx (last accessed: 1 December 2012). The Voluntary Principles are based on human rights principles but only apply to the area of security. The OECD Guidelines were not developed in a risk-based framework, however prior to the introduction of its CSR policy, the Canadian government had already adopted these voluntary guidelines as an OECD member and through the Canadian National Contact Point.

[84] FOREIGN AFFAIRS AND INTERNATIONAL TRADE CANADA, *The Review Process*, available online at: http://www.international.gc.ca/csr_counsellor-conseiller_rse/review_process-processus_examen.aspx?View=d.

[85] FOREIGN AFFAIRS AND INTERNATIONAL TRADE CANADA, *About Us*, available online at: http://www.international.gc.ca/csr_counsellor-conseiller_rse/About_us-A_propos_du_bureau.aspx?View=d.

[86] The policy's first pillar involves supporting initiatives to enhance the capacity of developing countries to manage the development of extractive activities and improve economic development. However, there is no clear link made between this objective and the concerns of communities and individuals adversely affected by a Canadian company. The fact that economic development in the form of resource extraction does not necessarily translate into an improved situation for mining-affected communities is well documented in the resource curse literature. *See* for instance, Paul Collier, *Laws and Codes for the "Resource Curse"* 11 YALE HUM. RTS. & DEV. L.J. 9, (2008); Matthew Genasci & Sarah Pray, *Extracting Accountability: The Implications of the Resource Curse for CSR Theory and Practice* 11 YALE HUM. RTS. & DEV. L.J. 37, (2008); Jeffery D. Sachs & Andrew M. Warner, *Natural Resources and Economic Development: The Curse of Natural Resources* 45 EUR. ECON. R., 827 (2001); Michael L. Ross, *The Political Economy of the Resource Curse* 51 WORLD POLITICS 297, (1999).

The claim to fairness and impartiality is further called into question by the terms of the mediation services offered. The CSR policy allows a company to request a review of civil society actors who it "believes" have raised unfounded allegations. To date this form of review is unprecedented in a CSR mechanism. On its face, it appears to be based on a formal proceduralist concept of fairness in the sense that it allows either opposing party to complain about the other. However, this gesture toward equal treatment is immediately complicated by the policy's language describing parties' eligibility for the review process. It requires that civil society actors hold a "reasonable belief" in the substance of their concern, while the company is only required to "believe" that a party has made unfounded allegations.[87]

Most significantly, the federal CSR approach diverges dramatically from the definition of "the problem" put forward in the SCFAIT and Advisory Group Reports' recommendations to Parliament, namely law reform in Canada to address the concern that the activities of Canadian mining companies in developing countries conform to human rights standards.[88] In contrast, the federal CSR policy adopts a very different conception of the fundamental nature of the problem. Namely, it seems to view civil society actors as the problem. These actors are understood as a source of risk to companies to the extent that they express either good faith concerns or unfounded allegations regarding company behavior. Notably, in the view of the federal government, this latter source of risk is such a significant problem that it merits state intervention in the form of the review process and mediation service offered by the Office of the CSR Counselor. This is surprising, not only because this issue is not mentioned in either the SCFAIT or the Advisory Report, but also because it presumes that companies lack other adequate avenues for raising concerns of this nature.[89]

In sum, the federal CSR policy appears to completely invert the orientation of the public regulation proposals. Rather than reflecting a concern for the human rights consequences of Canadian mining activities for local communities, it conceives of these communities and other civil

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[87] The Office of the Extractive Sector Corporate Social Responsibility Counsellor, Government of Canada, *Rules of Procedure for the Review Mechanism of the Office of the Extractive Sector Corporate Social Responsibility (CSR) Counsellor* (October 2012), at 4, available online at: http://www.international.gc.ca/csr_counsellor-conseiller_rse/assets/pdfs/rules_procedure-regles_procedure-eng.pdf.

[88] ADVISORY GROUP REPORT, *supra* note 13, at 2.

[89] For example, two defamation suits were recently brought in Canada by Canadian mining companies against journalists and academics who published research critical of these companies, *see* CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS (CAUT) BULLETIN, *Noir Canada Defamation Lawsuit Settled, Publication of Book Stopped* (Nov. 2011), available online at: http://www.cautbulletin.ca/en_article.asp?Articleid=3342.

society actors as a potential source of risk to Canadian mining companies' success and profitability. This view might explain why the Office of the CSR Counselor has garnered such little interest from civil society actors, having registered only three complaints against mining companies in two years. On the other hand, its services have yet to be used by mining companies to express concerns of unfounded allegations. Whatever the reasons for this lack of interest in both sides, what is certain is that its relevancy as a mediation service has yet to be demonstrated.

It should be noted that the federal CSR policy is also the subject of Bill C-571. This Bill intends to create a special focus within the mandate of the CSR Counselor on the specific issue of companies' possible complicity with illegal armed groups in certain African countries. However, it does not modify the review process and simply requires that the CSR Counselor report on this specialized subject matter. As such, the provisions of Bill C-571 do not contain material that might modify or enrich the above analysis.

4.3 Private Law Cause of Action: A Loss of Faith in the State as a Regulator?

The provisions of Bill C-323 are simple but with potentially far-reaching consequences. It gives the Federal Court and Federal Court of Appeal jurisdiction over a violation of international law committed in a foreign state against someone who is not a citizen of Canada. While the scope of this Bill clearly goes beyond this paper's focus, for the purposes of the subject matter at hand, it would entail that a community or individual in a foreign state could bring a private action in Canada against a Canadian mining company for the violation of its rights, as recognized by the international human rights treaties to which Canada is party. In fact, based on the political support being marshaled for Bill C-323, the application of the Bill to the Canadian mining sector is actually one of its primary objectives.[90]

Like Bill C-300 and the SCFAIT Report, Bill C-323 intends to impose international human rights law obligations directly onto Canadian companies. However, unlike these public regulation proposals, Bill C-323 does not try to create a blended standard; instead it would simply apply public international law. Moreover, the Bill does not concern itself with company financing. Rather, in

[90] The Bill's sponsor, Member of Parliament Peter Julian, organized a conference in support of the Bill, held on 16 March 2012 in Ottawa. The subject matter of this conference focused exclusively on Canadian companies' operations abroad, particularly in the area of mining, and the impacts on communities. *See* Peter Julian, *Walking the Talk: Human Rights Abroad, Take II* (Mar., 16, 2012), available online at: http://peterjulian.ndp.ca/conference-agenda-programme.

the framework of a civil claim, it contemplates a monetary sanction that would also serve as a remedy for victims, assuming that they are able to effectively enforce such an order.

Although Bill C-323's proponents compare it to the *Alien Tort Claims Act* (ATCA)[91] in the United States, it contains at least one significant difference, namely it would create a presumption in favor of extra-territorial jurisdiction. Often, in international tort actions, claimants must convince the court considering the claim that it should exercise jurisdiction. This burden has created a significant barrier to claims brought in the United States[92] under the ATCA, as well as in Canada[93] under existing common law tort causes of action. Having created a presumption of jurisdiction, Bill C-323 would presumably make it relatively easier for claimants to access Canadian courts.

On its face, Bill C-323 appears to resolve many of the concerns raised by the foreign operations of Canadian mining companies. It would theoretically include every violation conceivably captured by the full range of Canada's international human rights obligations. Further, it would hold Canadian companies to account in a proceeding with the potential to provide a remedy to the victims. Of course, on the other hand there are potential practical disadvantages to addressing these issues through private civil claims. These claims, even when successful, do not necessarily prevent or halt human rights violations; rather the "injuries" incurred are simply quantified in monetary terms and, as with any civil claim, there is a danger that the cost of litigation simply becomes part of the "cost of doing business" for the corporation.

Perhaps Bill C-323 appears to be so effective in resolving some of the issues raised in this paper because it entirely avoids the question of regulation. It does not create a regulatory duty of any kind for the Canadian state with regard to either the corporation or civil society. Rather, it constructs a direct relationship of human rights obligations between these latter two entities. The problem at hand becomes an issue between two private parties, the corporation and the community,

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[91] Alien Tort Claims Act, 28 U.S.C. § 1350 (2006).

[92] In the United States, as of 2004 there were approximately twelve active cases against corporate defendants under the ATCA, only three or four of which had survived a motion to dismiss on the basis of jurisdiction. Most of the ATCA cases against private corporations have been dismissed for lack of jurisdiction and none have resulted in a final judgment against a U.S. corporation: Harold Hongju Koh, *Separating Myth from Reality about Corporate Responsibility Litigation*, 7 J. OF INT'L ECON. L. 263, 269-70, 298 (2004).

[93] In Canada the courts have adopted such a narrow approach to the doctrine of *forum non-conveniens* that most litigants have been unable to convince the courts to take jurisdiction over the harm allegedly caused by a Canadian mining companies abroad. *Recherches Internationales Quebec v. Cambior Inc.*, [1998] Q.J. no 2554 (Can. Que. Sup. Ct. J.); *Anvil Mining Limited v. Association canadienne contre l'impunité*, [2012] J.Q. no 368, 2012 QCCA 117 (Can. Que. Ct. A.). For a review of these cases, see Webb, *supra* note 15, at 48-52; Imai, Maheandiran & Crystal, *supra* note 19.

yet ironically this conflict is governed by the state's international human rights commitments. The state is not present, while its commitments are.

By eliminating the state from the equation, in a certain sense Bill C-323 represents a kind of privatization of the problematic discussed in the opening of this paper. As such, a question lingers in the face of the Bill's aspiration for legal accountability. If the state's commitments in international human rights law are to govern, why not require it to act or regulate in order to ensure that these commitments are fulfilled? Perhaps the question of the relationship between the state and the market has become too complex to tackle, and the issues are better resolved by court-awarded damages in private actions. Or perhaps civil society proponents have calculated that the political conditions necessary to support a program of effective regulation are simply absent. In either case, it may be that Bill C-323 signals a certain loss of faith in the possibility that the Canadian state might act to regulate the activities of Canadian mining companies operating abroad.

5 Conclusion

The above analysis of the public regulation proposals reviewed raises two key themes that provide fodder for further research and reflection. The first relates to these proposals' aspiration to blend private risk-based CSR norms with international public law human rights principles. While this paper raised several questions in response to this possibility in the abstract, it also observed that in the concrete example provided by the Advisory Group Report, the use of the term "sphere of control" seems to reduce the application of public international human rights law to the sphere of companies' contractual relationships.

The second key theme relates to the view taken in these proposals of the Canadian state and its relationship with the market. The common vision of public regulation that emerges focuses on federal government contracts with companies through EDC. By reducing the discussion of "government support" to a question of loan financing, these proposals take a market-based or commercial view of the state (also described above as a form of privatism) that casts its potential regulatory and moral responsibilities as coterminous with its commercial relationships. Even where "government support" is expanded to include CPP investments as in the case of Bill C-300, the assumptions that the market is autonomous of the state, and that the state's regulatory obligations are dictated by commercial relationships, remain intact.

The dominance of contractual and investment rationales in the public regulation proposals reviewed here is ironic given the political perspectives and aspirations of their civil society proponents and activists. These groups passionately seek to prevent and remedy human rights violations committed against communities in developing countries and to hold Canadian mining companies to account in this regard. Yet each of the proposals contains a certain disjunction between its broadly stated human rights standards and objectives, and the market-based sanction or method chosen as a means for achieving this objective. Given the economic and social context described in this paper's introduction, it remains doubtful whether or not the financing and investment sanctions proposed would be capable of "holding companies to account" and "ensuring that their conduct is consistent with human rights obligations", to use some of the language of the SCFAIT Report and Bill C-300.[94]

In the midst of what may be a highly conceptual and abstract analysis, I realize that the people behind these public regulation proposals operate within the constraints of what is politically possible. Faced with a particular political scenario and propelled forward by their conviction to act, they are not bound simply by conceptual issues. This paper is after all, a "critical legal account" of the law reform events it depicts. There is no doubt that a "critical social account" would reveal the fascinating and sophisticated political calculations and trade-offs that activists' undertook to advance each of these law reform proposals the great distances that they ultimately achieved.

As stated at the outset, this paper springs from a broader research project concerned with the dynamics of law and social change in general, and in particular with the use of law as a method of resistance "from below" to dominate models of economic globalization. The question that drives this research is how the law might be of use to those who do not benefit, or who do not benefit equitably, from the activities associated with economic globalization. The law reform proposals reviewed here indicate that this line of questioning necessarily requires an examination of activists' engagement with private and public law mechanisms. This paper represents a preliminary step toward considering how the private or public nature of the legal forum might shape activists' legal strategies and articulations of the corporation, the state and the problem.

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[94] HOUSE OF COMMONS STANDING COMMITTEE ON FOREIGN AFFAIRS AND INTERNATIONAL TRADE, *supra* note 27 at 2-3; *An Act respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries*, *supra* note 45, s. 3.

To explore this question more fully, the theories of action, resistance and social change that animate these strategies must be clearly identified. These theories must be built on a conception of the relationship between legal activism and the social change it pursues. Further, the concepts of the state and the corporation that are implicit or explicitly present in the arguments and legal frameworks employed by these strategies must be uncovered. Perhaps the tentative lesson learned from this case study is that in order to approximate human rights aspirations through the regulation of Canadian mining companies operating abroad, critical research and thinking is required to elucidate the full extent of the relationship between the Canadian state, the market, and Canadian mining companies. Indeed, the aspiration of any activist-oriented conceptual reflection, such as the one pursued here, is to make a contribution capable of informing political strategy and innovation.

Looming in the background of this discussion is the specter of the Canadian CSR Policy, which sends the disconcerting signal that the federal government of the day views civil society as the problem or, stated in market terms, as the source of risk. The present challenge to this policy is the total pragmatism represented by Bill C-323, where the state, and any concomitant regulatory question, is eliminated in favor of the effective privatization of the issues in the form of a legislated civil law cause of action. We can only hope that this (mis)alignment of visions does not allude to a loss of faith in the possibility of engaging productively with the regulatory questions that are crystallized by the contemporary foreign operations of Canadian mining companies.

CHAPTER FOUR: Building the Case for a Home-State Grievance Mechanism: Law Reform Strategies in the Canadian Resource Justice Movement

- Charis Kamphuis*

Abstract

The vast majority of mining companies operating globally are Canadian. For nearly two decades, social justice advocates systematically documented the concerns of mine-affected communities in relation to Canadian operations in developing countries, producing a significant body of empirical work that described not only the nature of the social conflicts associated with Canadian companies but also the mechanisms whereby the Canadian government provides companies with political, economic and legal support. Beginning in 2005, activists, policy makers, industry leaders and international human rights bodies participated in a sustained debate over the appropriate Canadian regulatory responses to these issues. This chapter analyses the strategies of law reform advocates between 2000 and 2017 to critique Canadian policy and the overseas conduct of Canadian extractive companies. It gives special attention to the 2016 law reform proposal from Canadian civil society, the draft Business & Human Rights Act. The strategies profiled here are of special interest because they resulted in a significant, if not unexpected, breakthrough in early 2018 when the Canadian government announced a globally unprecedented new grievance mechanism: the Canadian Ombudsperson for Responsible Enterprise. The discussion is of interest to those concerned with law's potential (and limitations) as an instrument of social justice in the global economy, and particularly for communities affected by foreign resource extraction.

1 Introduction: Context, Issues & Debates

On May 26, 2017, a group of Canadian activists belonging to the Toronto-based Mining Injustice Solidarity Network occupied the office of Liberal Member of Parliament Michael Levitt, chairperson of the Subcommittee on International Human Rights, a committee of the Canadian federal Parliament.[1] Their stated goal was to protest "Canadian mining abuses abroad" as well as the federal government's inaction in response to draft legislation proposed in 2016 by the Canadian Network for Corporate Accountability (CNCA).[2] The proposal, called *The Global Leadership in Business and Human Rights Act: An act to create an independent human rights ombudsperson for the international extractive sector*, [3] contemplates an International Extractive Industry

* Published in Isabel Feichtner & Markus Krajewski, eds, *Human Rights in the Extractive Industries: Transparency, Participation, Resistance* (Cham, Switzerland: Springer, 2019) 455.

[1] Saunders S, Activists occupy Liberal MP Michael Levitt's office to protest Canadian mining abuses. Now Magazine, 31 May 2015, https://nowtoronto.com/news/mining-abuse_1/.

[2] Formed in 2005, the Canadian Network for Corporate Accountability (CNCA) brings together 30 environmental, human rights, religious, labor and solidarity groups from across Canada. The CNCA's mission is to ensure that Canadian mining, oil and gas companies respect human rights and the environment when working abroad. To do this, it advocates for policy and law reform in Canada: Canadian Network for Corporate Accountability, What we do, http://cnca-rcrce.ca/about-us/what-we-do/; Canadian Network for Corporate Accountability, How we work, http://cnca-rcrce.ca/about-us/how-we-work/.

[3] Canadian Network on Corporate Accountability, *The Global Leadership in Business and Human Rights Act: An Act to Create an Independent Human Rights Ombudsperson for the International Extractive Sector*, Draft Model

Ombudsperson with the power to investigate complaints against Canadian companies and make recommendations to the Canadian government, the company and/or the complainant, including with respect to remedies. The proposed legislation also contained some limited incentive and enforcement tools.

The civil disobedience referred to represents one position in a long history of debate in Canada on the issues raised by the protestors. This debate began to take shape in Canada in the late 1990s, and consistently revolved around two interrelated issues. The first point of controversy arose from competing views of the nature of the problem to be addressed. Advocates raised serious allegations about the conduct of Canadian resource extraction companies abroad and the human rights impacts of their operations. They alleged that Canadian companies are routinely causing or contributing to a long list of harms in developing countries with impunity.[4] In contrast, some industry supporters asserted that alleged or documented abuses signal the behavior of only "a few bad apples" who are the anomaly, and not indicative of a prevalent or systemic problem.[5] Others said that Canadian companies are improving, and learning from past mistakes.[6] Some individuals in industry and government also took the view that "anti-mining" groups invent or exaggerate their claims and manipulate local communities.[7]

The second point of debate in Canada has centered on the nature of the appropriate government response to the problem, however defined. Between 2005 and 2016, Canadians were presented with a litany of law and policy initiatives and proposals in response to this issue. This included a parliamentary committee report in 2005, a series of national roundtables in 2006 and a multi-stakeholder expert report in 2007. In response, the federal government unveiled two

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Legislation, 2 November 2016, http://cnca-rcrce.ca/wp-content/uploads/2016/03/The-Global-Leadership-in-Business-and-Human-Rights-Act-An-act-to-create-an-independent-human-rights-ombudsperson-for-the-international-extractive-sector-11022016.pdf.

[4] Part 2 will review the main sources and content of these allegations.

[5] Freeman S, The case for – and against – an ombudsperson to resolve mining disputes. Financial Post, 7 March 2017, http://business.financialpost.com/business/the-case-for-and-against-an-ombudsperson-to-resolve-mining-disputes. See for example the terms of the debate on the following recent TV Ontario (TVO) interviews: Paikin S, Toronto: Mining Capital of the World. TVO, 31 May 2017, https://www.youtube.com/watch?V=6ndn1lqka3a; Paikin S, Canadian Mining Accountability Abroad. TVO, 31 May 2017, https://www.youtube.com/watch?V=Oem4r7zLTEY.

[6] Las mineras canadienses gestionan mejor los conflictos que otras de propiedad extranjera. Revista ENERGIMINAS, 14 August 2017, http://www.energiminas.com/las-mineras-canadienses-gestionan-mejor-los-conflictos-que-otras-de-propiedad-extranjera/.

[7] This assumption informed Canada's 2009 CSR Policy which allowed companies to complain to the CSR Counsellor about communities to NGOs: Kamphuis (2012). It was also present in industry rhetoric in key debates over law reform: Seck (2011), p. 73. Most recently, this position appeared in a report issued by the Canadian CSR Counsellor, see *infra* Part 3.2.

voluntary Corporate Social Responsibility (CSR) policies on point, first in 2009, followed by a modified version in 2014. Civil society's dissatisfaction with these government responses was reflected in four different legislation proposals from opposition Members of Parliament and/or civil society groups between 2008 and 2016. Finally, international institutions weighed in. Between 2002 and 2017, Canada's policy position and refusal to develop a legal framework was the subject of as many as twelve statements from international human rights bodies and three dedicated hearings before the Inter-American Commission on Human Rights.

While these discussions on the nature of the problem and the nature of the appropriate Canadian government response have been wide-ranging, Canadian civil society organizations have significantly focused their efforts on advocating for the creation of an effective state-based non-judicial grievance mechanism. This chapter's objective is to record the advocacy strategies that these organizations, in collaboration with affected communities around the world, used to pursue law and policy reform in Canada with a special focus on non-judicial grievance mechanisms. This chapter picks up the story of this debate where previous writing on these issues left off, while at the same time filling in some empirical gaps.[8]

This story, as told here, is structured in accordance with the advocacy strategies it depicts. Part Two surveys how advocates attempted to document and report on the nature of the problem from the perspective of affected communities. Part 2 also shows how advocates moved beyond case studies to develop empirically informed general descriptions of the harms associated with Canadian resource extraction abroad. It also tracks how advocates endeavored to document and problematize related forms of Canadian government support for the sector. Part Three examines how the Canadian government responded to these problematizations with the development of a voluntary CSR policy for the Canadian extractive industry abroad. This part summarizes the CSR policy status quo in Canada between 2009 and 2017 with a focus on the relevant portions of the 2014 CSR framework. This sets the context for Part Four, which profiles a second set of advocacy strategies, namely the development of informed critiques of Canada's CSR policy and associated non-judicial grievance mechanisms. These critiques were primarily rooted in experience, accumulated as advocates tested these mechanisms' efficacy by supporting affected communities to file complaints. To a lesser extent, but no less important, some critics invoked international standards for non-judicial grievance mechanisms as a metric for critiquing Canadian CSR policy.

[8] Seck (2011); Seck (2012); Simons (2015); Kamphuis (2012); Coumans (2012)

In tandem with the strategies of research-based descriptions of the nature of the problem (Part Two) and experience-based critiques of the government's CSR policy response (Part Four), advocates further took up a third strategy. This involved presenting this body of research and experience to international human rights bodies at every possible opportunity. Part Five catalogues the resulting statements of numerous international bodies and summarizes their main themes. Finally, Part Six describes a fourth and final strategy, the development of concrete proposals for law reform to create a more effective home-state grievance mechanism. Advocates pressured the Canadian government to consider their proposals, either in the parliamentary process or through direct political pressure and lobby efforts. This section introduces the history of the law and policy proposals put forward in Canada between 2005 and 2014 before undertaking an in-depth review of the groundbreaking 2016 CNCA Ombudsperson proposal.

This study of law reform advocacy in Canada on the issue of home-state non-judicial grievance mechanisms will be of interest to activists and academics participating in wider global conversation on transnational corporate accountability for harms caused in developing countries. Attention to home-state law and policy responses in this context became a permanent feature of mainstream international legal debate following the UN Human Rights Council's endorsement of the *Guiding Principles on Business and Human Rights* in 2011.[9] While there is no clear consensus over the nature of home-state responsibility in international law or the most appropriate responses, there is common ground that global society is facing a serious problem of corporate impunity, due in part to the "governance gap".[10] This refers to law's global and systemic failure to prevent, ensure accountability, and provide remedy for corporate human rights abuses in the developing countries that host their operations.[11] There is also common ground that home states like Canada must play an important role in addressing this issue by preventing human rights violations and ensuring access

[9] UN OHCHR, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*. UN Doc HR/PUB/11/04 (2011). The *Guiding Principles* were endorsed by the Human Rights Council in 2011: UNGA, Human Rights Council, *Human rights and transnational corporations and other business enterprises*. UN Doc A/HRC/RES/17/4, July 2011, para 1.

[10] G Gagnon, A Macklin and P Simons cited in Simons and Macklin (2014). Also see ETO for human rights beyond borders (2013) Maastricht principles on extraterritorial obligations of states in the area of economic, social and cultural rights. Http://www.etoconsortium.org/en/main-navigation/library/maastricht-principles/, p. 3; UNGA, Human Rights Council, *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, UN Doc A/HRC/26/L.22/Rev, 25 June 2014, http://ap.ohchr.org/documents/dpage_e.aspx?Si=A/HRC/26/L.22/Rev.1, para 1.

[11] Simons and Macklin (2014).

to effective remedies. It is also widely agreed that home-state non-judicial grievance mechanisms form an important part of these efforts.

The Canadian experience is highly pertinent to these international conversations for at least three reasons: first, due to the size of the Canadian resource extraction industry internationally; second, given the unparalleled intensity of the Canadian debate on home-state non-judicial grievance mechanisms over nearly two decades; and third, given advocates' unprecedented success in early 2018 when the Canadian government announced a ground-breaking decision to create the Canadian Ombudsperson for Responsible Enterprise, a new and more robust state-based non-judicial grievance mechanism.

This chapter is fundamentally an account of civil society strategies to address questions of global economic injustice by pursuing law and policy reform in a developed capital-exporting country. In conclusion, I will analyze these strategies, their achievements and limitations, and identify future areas of research. This chapter may also be of interest to those concerned generally with global economic injustice. It will be of particular value to those interested in tracking the ways in which states like Canada actively shape economic relationships in the global economy, as well as the ways in which social justice advocates might problematize these relations and imagine legal responses.

2 Establishing the Nature of the Problem with Empirical Research (1999-2017)

2.1 Canadian Global Dominance in Resource Extraction & Canadian State Support

For at least two decades, Canadian companies have been among the most significant players globally in resource extraction, especially in mining.[12] The majority of large and junior mining companies are incorporated in Canada and Canadian stock exchanges list more mining companies than any other exchange in the world.[13] In 2013, over 50 percent of the world's publicly listed exploration and mining companies were headquartered in Canada, numbering approximately 1500,

[12] For 2005 statistics, see Advisory Group Report (2007) National Roundtables on Corporate Social Responsibility (CSR) and the Canadian Extractive Industry in Developing Countries, pp. 3-4. For 2008 statistics, see Global Affairs Canada (2009) Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector, http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse-2009.aspx?Lang=eng. In 2008, 75 percent of the world's exploration and mining companies were headquartered in Canada with an interest in over 100 countries around the world.

[13] Kamphuis (2012), p. 1457. Also see UN OHCHR, Statement at the end of visit to Canada by the United Nations Working Group on Business and Human Rights, 1 June 2017, http://www.ohchr.org/EN/newsevents/Pages/displaynews.aspx?Newsid=21680&langid=E.

with junior companies accounting for 90% of the total count.[14] That same year, the foreign presence of Canadian mining companies extended to 107 countries worldwide and Canadian companies accounted for nearly 31% of global expenditures on exploration.[15] In 2015, Canadian stock exchanges accounted for more than half of the equity capital raised globally for mining.[16] Generally, the largest regional destination for Canadian mining investments is Latin America, with Africa in second place.[17] In 2013, nearly half of the total value of Canada's overseas mineral assets was in Latin America[18] and 41% of the largest companies in Latin America were Canadian.[19]

Without a detailed history study, it is difficult to determine exactly why the Canadian mining industry has gained such significant size and global dominance. What is clear though is that the Canadian state supports the industry in a variety of ways. Some authors have observed that the Canadian government has historically welcomed and promoted mining, both at home and abroad.[20] Others note that a favourable tax regime is one major explanation for the concentration of the global mining sector in Canada,[21] along with a securities industry designed to promote mining.[22] A cluster of mining-related equipment and service providers with wide-ranging expertise

[14] Global Affairs Canada (2014) Canada's Enhanced Corporate Social Responsibility Strategy to Strengthen Canada's Extractive Sector Abroad – Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad, http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Enhanced_CS_Strategy_ENG.pdf; Natural Resources Canada (2015) Canadian Mining Assets: Information Bulletin, December 2014, https://www.nrcan.gc.ca/mining-materials/publications/17072.

[15] Natural Resources Canada (2015) Canadian Mining Assets: Information Bulletin, December 2014. Https://www.nrcan.gc.ca/mining-materials/publications/17072.

[16] Mining Association of Canada (2016) Facts and Figures of the Canadian Mining Industry: F&F 2016, http://mining.ca/sites/default/files/documents/Facts-and-Figures-2016.pdf, p. 36.

[17] Global Affairs Canada (2009) Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector, http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse-2009.aspx?Lang=eng.

[18] Mining Association of Canada (2016) Facts and Figures of the Canadian Mining Industry: F&F 2016, http://mining.ca/sites/default/files/documents/Facts-and-Figures-2016.pdf, p. 81.

[19] Canadian Network for Corporate Accountability & Justice & Corporate Accountability Project (2014) Human Rights, Indigenous Rights and Canada's Extraterritorial Obligations. Inter-American Commission on Human Rights, Thematic Hearing for 153rd Period of Sessions, http://cnca-rcrce.ca/wp-content/uploads/2016/05/canada_mining_cidh_oct_28_2014_final.pdf, p. 6.

[20] See generally: Hughes et al. (2016); Barton (1993).

[21] Deneault (2015); Natural Resources Canada (2015) Canada's Positive Investment Climate for Mineral Capital: Information Bulletin, November 2014, https://www.nrcan.gc.ca/mining-materials/publications/8782; Wach T, Jim Flaherty's corporate tax overhaul made Canada competitive. The Globe and Mail, 20 March 2014, https://beta.theglobeandmail.com/report-on-business/economy/economy-lab/jim-flahertys-corporate-tax-overhaul-made-canada-competitive/article17590384/?Ref=http://www.theglobeandmail.com&.

[22] Canadian Network for Corporate Accountability & Justice & Corporate Accountability Project (2014) Human Rights, Indigenous Rights and Canada's Extraterritorial Obligations. Inter-American Commission on Human Rights, Thematic Hearing for 153rd Period of Sessions, http://cnca-rcrce.ca/wp-content/uploads/2016/05/canada_mining_cidh_oct_28_2014_final.pdf, p. 6.

has grown up around the Canadian mining industry.[23] The Canadian government also provides direct financial support to the industry with favourable loans from Export Development Canada (EDC) and through the provision of development assistance to promote corporate social responsibility at specific mining projects.[24]

Beyond favourable loans, tax arrangements, and stock markets, the Canadian government also provides robust legal protection and political support for the sector. In these latter areas, state support for global mining significantly ramped up during the Conservative government's time in power, between 2006 and 2015. In this time period Canada dramatically expanded its Foreign Investment Promotion and Protection Agreements (FIPPAs)[25] and by 2016 Canada had signed 33 FIPPAs in Latin America and 12 in Africa. Political support for Canadian mining companies abroad was also formalized and strengthened. In 2007, the federal government announced the Global Commerce Strategy, followed in 2013 by the Global Markets Action Plan. These policies involve "economic diplomacy", promising that "all Government of Canada diplomatic assets are harnessed to support the pursuit of commercial success by Canadian companies and investors."[26] This includes the Canadian Trade Commissioner Service, which offers companies "privileged access to foreign governments, key business leaders and decision-makers."[27] The policy claims that "other countries are doing the same, and Canada…must be more aggressive and effective than…the competition."[28] The policy of economic diplomacy remains in place to date.[29]

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[23] Natural Resources Canada (2015) Canadian Mining Assets: Information Bulletin, December 2014, https://www.nrcan.gc.ca/mining-materials/publications/17072.

[24] Canadian Network for Corporate Accountability & Justice & Corporate Accountability Project (2014) Human Rights, Indigenous Rights and Canada's Extraterritorial Obligations. Inter-American Commission on Human Rights, Thematic Hearing for 153rd Period of Sessions, http://cnca-rcrce.ca/wp-content/uploads/2016/05/canada_mining_cidh_oct_28_2014_final.pdf, p. 8; Keenan K & Hamilton K (2015) Export Credit Agencies and Human Rights: Failure to Protect. Halifax Initiative, Both Ends, countercurrent, Forum Suape & Rios Vivos, http://77.104.146.242/~aboveground/wp-content/uploads/2015/06/Failure-to-Protect.pdf; Brown (2012).

[25] Mertins-Kirkwood H (2015) A Losing Proposition: The Failure of Canadian ISDS Policy at Home and Abroad. Canadian Centre for Policy Alternatives, https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2015/08/Losing_Proposition.pdf; Mining Association of Canada (2016) Facts and Figures of the Canadian Mining Industry: F&F 2016, http://mining.ca/sites/default/files/documents/Facts-and-Figures-2016.pdf, p. 81.

[26] Global Affairs Canada (2013) Global Markets Action Plan: The Blueprint for Creating Jobs and Opportunities for Canadians through Trade, http://international.gc.ca/global-markets-marches-mondiaux/plan.aspx?Lang=eng#1b.

[27] Canadian Trade Commissioner Service (2017) What we can do for you, http://tradecommissioner.gc.ca/how-tcs-can-help-comment-sdc-peut-aider.aspx?Lang=eng.

[28] Global Affairs Canada (2013) Global Markets Action Plan: The Blueprint for Creating Jobs and Opportunities for Canadians through Trade, http://international.gc.ca/global-markets-marches-mondiaux/plan.aspx?Lang=eng#1b.

[29] Interestingly, in 2016 the federal government announced a new policy elaborating on Canadian embassies' commitment to supporting human rights defenders in the countries where they are located. However, this new policy did not modify or change economic diplomacy: Canada (2016) Voices at risk: Canada's guidelines on supporting

2.2 Problematizing the Impacts of Canadian Resource Companies Abroad

This section chronicles the various ways in which government, industry and civil society actors have studied the conduct of Canadian resource companies abroad empirically. Initially, the Canadian government worked with industry, civil society and academia to lead or enable three major studies of the issue. The first was an in-depth case study of Talisman Energy Inc., undertaken in 1999 by the Canadian Assessment Mission to Sudan, also known as the Harkat Mission. The Canadian government convened this independent fact-finding initiative in response to international pressure and allegations that Talisman was benefiting from grave human rights abuses in relation to its operations in Sudan. The Harkat Mission concluded that oil extraction and development was fueling Sudan's civil war. It also found that the Sudanese government was using oil company infrastructure to bomb civilian populations in combination with violent ground operations, including forced displacement, rape, murder and kidnapping, in order to clear a swath of land around oil operations to ensure their security in the midst of the war.[30]

After the Harkat Mission, the Parliamentary Sub-committee on Human Rights and International Development held several rounds of hearings on the activities of Canadian resource companies in developing countries. It heard evidence from an array of expert witnesses, industry representatives, Canadian civil society leaders, and leaders from affected communities. The sub-committee's 2005 final report was adopted by the Standing Committee on Foreign Affairs and International Trade (SCFAIT) and submitted to the Canadian Parliament. The report found that:

> mining activities in some developing countries have had adverse effects on local communities, especially where regulations governing the mining sector and its impact on the economic and social wellbeing of employees and local residents, as well as on the environment, are weak or non-existent, or where they are not enforced.[31]

In response to the SCFAIT report, in 2006 the Canadian government formed an Advisory Group of experts representing industry, NGOs and academia with a mandate to convene the Canadian National Roundtables on Corporate Social Responsibility and the Extractive Industry in

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human rights defenders, http://international.gc.ca/world-monde/issues_development-enjeux_developpement/human_rights-droits_homme/rights_defenders_guide_defenseurs_droits.aspx?Lang=eng.

[30] Simons and Macklin (2014), pp. 1-3, 22-78.

[31] House of Commons Standing Committee on Foreign Affairs and International Trade (2005) Mining in Developing Countries: Corporate Social Responsibility. 38th Parl, 1st Sess, 14th Rep, http://www.ourcommons.ca/documentviewer/en/38-1/FAAE/report-14.

Developing Countries. In their 2007 consensus report, the Advisory Group summarized the concerns at issue in terms of: environmental concerns, community relations, human rights, security and armed conflict, labour relations, indigenous peoples' rights, compatibility of resource development with national and local economic priorities, benefit sharing with local communities, ineffective legal systems and the potential for corruption.[32]

Following the Harkat, SCFAIT and Advisory Group reports, the Canadian government, with the Conservative Party in power, refrained from further research-based study of these issues for about ten years. In this vacuum, many academics and civil society groups continued to study the problem empirically, albeit without support or endorsement from the Canadian government. Initially, advocates focused primarily on researching and publishing case studies that documented connections between specific Canadian mining companies and human rights violations in affected communities around the world.[33]

Advocates' grassroots research into specific company misconduct enabled a handful of affected communities to bring civil claims against Canadian companies to Canadian courts. However, between 1998 and 2011 a number of attempts to access Canadian courts failed to overcome procedural objections from the company defendant at a preliminary stage.[34] Nonetheless, advocates persisted and between 2013 and 2016 they succeeded in convincing Canadian courts to try claims against three different Canadian mining companies.[35] In 2013, an Ontario provincial court ruled that a group of plaintiffs have an arguable case against Hudbay

[32] Advisory Group Report (2007) National Roundtables on Corporate Social Responsibility (CSR) and the Canadian Extractive Industry in Developing Countries, pp. 4-5.

[33] For some examples see: Imai et al. (2007); Rights and Democracy (2007) Human Rights Impact Assessment of Foreign Investment Projects: Learning from Community Experiences in the Philippines, Tibet, the Democratic Republic of Congo, Argentina, and Peru, http://publications.gc.ca/collections/collection_2007/dd-rd/E84-21-2007E.pdf; Halifax Initiative (2007) Canadian Mining Map, Blog, https://MiningWatch.ca/blog/2007/2/21/halifax-initiative-publishes-canadian-mining-map; McGee (2009); Walter and Martinez-Alier (2010).

[34] *Association canadienne contre l'impunité (ACCI) c Anvil Mining Ltd*, 2011 QCCS 1966, rev'd [2012] JQ no 3 68 (QCCA), leave to appeal to SCC refused, 34733 (November 1, 2012); *Presbyterian Church of Sudan v Talisman Energy*, No 07-0016-cv (2nd Cir 2 October 2009); *Recherches Internationales Québec v Cambior Inc*, [1998] QJ no 2554 (QL) (Qc Sup Ct); *Piedra v Copper Mesa Mining Corp,* 2011 ONCA 191, 332 DLR (4th) 118, affirming 2010 ONSC 2421.

[35] See: Above Ground (2016) Transnational Lawsuits in Canada Against Extractive Companies: Developments in Civil Litigation, 1997-2016, http://www.aboveground.ngo/wp-content/uploads/2016/02/Cases_Oct2016_LO.pdf; Bennett N, Wave of Foreign Lawsuits against Local Miners hits Canadian Courts: Human Rights Groups are Backing Several Claims against Firms Operating in Guatemala, Eritrea. Business in Vancouver, 19 April 2016, https://www.biv.com/article/2016/4/wave-foreign-lawsuits-against-local-miners-hits-ca/ .

Minerals Inc and sent the parties to trial. These suits claim damages from serious bodily harm, gang rape and death perpetrated by security forces at Hudbay's Fenix nickel mine in Guatemala.[36]

In 2016 a British Columbia (BC) provincial court sent another suit to trial, finding that BC is the most appropriate forum to hear claims against Nevsun Resources in relation to its Bisha mine in Eritrea.[37] In this case, the plaintiffs claim that they endured forced labour conditions at the mine, in violation of Canadian and international law. Finally, in 2017 the BC Court of Appeal found that that BC is the most appropriate jurisdiction to hear claims against Tahoe Resources in relation to its El Escobal mine in Guatemala.[38] The plaintiffs claim of serious bodily harm caused when Tahoe security guards shot at them during a peaceful protest will now be heard on the merits.[39]

The alleged facts in these cases certainly garnered public attention, as did their success in overcoming significant jurisdictional and procedural obstacles. However, it quickly became clear to advocates that case studies and litigation alone had limited power to influence broad policy or law reform responses. Individual studies could not reveal the severity or extent of the problem at the industry, regional or global level and were too easily written off as examples of just "a few bad apples".

Following the high-water mark of the Advisory Group report, it also became clear to advocates that the Canadian government and industry were no longer interested in collaborating with civil society to undertake larger scale studies or to create a transparent system for proactively monitoring conflicts and allegations against Canadian mining companies. One infamous example of this is a 2009 report, secretly commissioned by the Prospectors and Developers Association of Canada (PDAC) and leaked to civil society groups in 2010.[40] The PDAC report studied the rates of Canadian involvement in severe ethical, environmental, human rights and occupational incidents in developing countries.[41] It did so by surveying reports and complaints involving the activities of

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[36] *Caal Caal v. Hudbay Minerals Inc.*, 2020 ONSC 415; *Choc v. Hudbay Minerals Inc*, OSCJ, Court File No CV-10-411159" (24 September 2010), online (pdf): http://www.chocversushudbay.com/wp-content/uploads/2010/11/Choc-v-Hudbay-Statement-of-Claim-updated-Oct-2013.pdf; *Chub Choc v. Hudbay Minerals Inc*, OSCJ, Court File No CV-11-435841" (26 September 2011), online (pdf): <http://www.chocversushudbay.com/wp-content/uploads/2010/11/Chub-v-Hudbay-Statement-of-Claim-updated-Oct-2013.pdf>.
[37] *Araya v Nevsun Resources Ltd*, 2017 BCCA 401, affirming 2016 BCSC 1856.
[38] *Garcia v Tahoe Resources Inc*, 2017 BCCA 39, reversing *Garcia v Tahoe Resources Inc*, 2015 BCSC 2045.
[39] Tahoe on Trial, Security Footage Outside Escobal Mine, video, 27 April 2013, https://tahoeontrial.net/2015/11/19/security-footage-april-27-2013/.
[40] Simons (2015), p. 3.
[41] Canadian Centre for the Study of Resource Conflicts (2009) Corporate Social Responsibility: Movements and Footprints of Canadian Mining and Exploration Firms in the Developing World, http://caid.ca/csrrep2009.pdf, p. 4.

all mining and exploration companies operating in developing countries over the previous ten years. On this basis, it identified 171 incidents of human rights violations.[42] Of these, Canadian companies represented 33% of total violations, four times the number attributed to any other country.[43] Importantly, PDAC commissioned this study in the midst of an intense debate in the Canadian Parliament over proposed legislation that aimed to create a home-state non-judicial grievance mechanism. Nonetheless, PDAC did not disclose the study's findings but rather lobbied vigorously against the proposed legislation.[44]

In this context, civil society and academic research groups began to work toward their own general, research-based description of the problem from the perspective of affected communities. Their first attempt was a 2013 report to the Inter-American Human Rights Commission (IAHRC), submitted by the Latin American Working Group on Mining and Human Rights. The Working Group, comprised of six prominent organizations, collected information from grassroots organizations across eleven Latin American countries.[45] It found commonalities across 22 case studies tracked over a period of three years. On this basis, the Working Group's final report summarized the human rights issues associated with Canadian companies in terms of: damage to the environment, including to water, livelihood and health; and lack of participation and consent, including inadequate consultation, imposition of projects in spite of opposition, and irregularities in property acquisition.[46] The report also informed that local communities are not benefiting equitably and economically from mining projects.[47]

In addition to capturing social, environmental and economic impacts, the Latin American Working Group report described problems with civil liberties. In this regard, it reported that some Canadian mining projects had led to large-scale social conflicts and the criminalization of protest and dissent. A 2015 MiningWatch report picked up on this theme. It undertook detailed case

[42] *Ibid*, pp. 6-7. The report described violations under the categories of: occupational, unlawful, unethical, human rights, environmental and community conflict.
[43] *Ibid*, p. 7.
[44] Seck (2011); Coumans (2012).
[45] The six organizations included were from Chile, Colombia, Honduras, Mexico, Peru and the United States: see ETO Consortium (2017) For human rights beyond borders: How to hold States accountable for extraterritorial violations, Handbook, http://www.etoconsortium.org/nc/en/main-navigation/library/documents/detail/?Tx_drblob_pi1%5bdownloaduid%5D=204, p. 42.
[46] Working Group on Mining and Human Rights in Latin America (2013) The impact of Canadian Mining in Latin America and Canada's Responsibility: Executive Summary of the Report submitted to the Inter-American Commission on Human Rights, http://www.dplf.org/sites/default/files/report_canadian_mining_executive_summary.pdf, pp. 10-19.
[47] *Ibid*, pp. 10-19.

studies of four Latin American countries and found a connection between Canadian mining interests and the growing trend of criminalization of dissent and social protest involving land and environmental defenders.[48]

This focus on civil liberties intensified with a 2016 report published by the Justice & Corporate Accountability Project (JCAP). This report remains the most comprehensive study undertaken to date on these issues. It systematically documents reported incidents of violence and criminalization associated with Canadian mining companies operating in Latin America over a fifteen-year period, from 2000 until 2015.[49] Using a recognized, rigorous and replicable research methodology, JCAP found that 44 people were killed, over 400 people were injured and over 700 people were criminalized in conflicts related to Canadian mining companies in Latin America in the period under study.[50] On the basis of this data, the report concluded that there is close *proximity* between Canadian mining companies abroad and violence.[51] Notably, the JCAP research did not include death threats, property destruction, displacement, attempted assassination without injury, environmental contamination or psychological trauma in its definition of violence.[52] In addition to the concept of proximity, the JCAP report also explored the concept of *complicity* in order to understand the relationship between companies and violence.[53]

In a similar vein, international organizations also began to compile data on violence against human rights defenders across sectors and on a global scale. In 2017, the Business & Human Rights Resource Centre published statistics from its database tracking human rights defenders, working on corporate accountability issues, who were attacked, harassed or killed in 2015 and

[48] Notably, the MiningWatch study adopted a broader definition of criminalization than the JCAP Report. It defines criminalization as "the systematic manipulation of concepts of law and order – whether administrative, civil, or criminal – and the use of the punitive powers of the state and its organs of justice – whether initiated by state or non-state actors or some combination of the two – to forbid, dissuade and/or prosecute legitimate dissent that are portrayed by state/non-state actors as contrary to fundamental social values." See Moore J (2015) In the National Interest?: Criminalization of Land and Environment Defenders in the Americas. MiningWatch Canada, https://MiningWatch.ca/sites/default/files/inthenationalinterest_fullpaper_eng_1.pdf, p. 14. The study's fifth case study is of Indigenous communities in Canada.

[49] Justice & Corporate Accountability Project (2016) The "Canada Brand": Violence and Canadian Mining Companies in Latin America, https://ssrn.com/abstract=2886584, p. 8.

[50] *Ibid*, p. 4. The JCAP study defined criminalization as legal complaints or warrants again activists, arrests, detentions and charges. The study did not capture criminalizing discourse from public authorities or companies.

[51] The report found a link between a Canadian mining project and violent conflict where at least two independent reports provide information or analysis that credibly establishes that the project's presence is likely to have made a substantial contribution to violence or criminalization, *Ibid*, p. 11.

[52] *Ibid*, p. 5.

[53] *Ibid*, p. 28. The report uses the concept of complicity to refer to an act, or failure to act, that enables violence to occur, exacerbates the occurrence of abuse, or facilitates abuses.

2016.[54] In this two-year period, the Centre identified over 400 cases worldwide, with the largest concentration of cases in the mining sector (30%). Moreover, one-quarter of all cases were connected to companies headquartered in China, the United States or Canada. The fact that this global study tracked the nationality, not only of human rights defenders but also of companies, meant that its findings further corroborated research focused exclusively on Canada, like the reports from JCAP, the Latin America Working Group and MiningWatch.

The shift in the civil society research agenda, to move beyond case studies to aggregate data in order to describe the problem more generally, had a major impact on the debate in Canada. The JCAP report in particular appears to have had far-reaching effects. It received significant media attention in the Canadian press and was mentioned in international press, including in the *New York Times*. Its authors presented their findings to lawmakers in Canada and numerous human rights bodies internationally. Importantly, the shift to aggregate data also involved a narrow focus on civil rights and on violence in particular. Undoubtedly the quantitative clarity of statistics on violence was an effective strategy for attracting the attention of the public and policy makers. It was also methodologically rigorous and much simpler than producing large scale aggregate data on the full range of social, economic and environmental impacts of projects.

While the production of quantitative aggregate data was an invaluable strategy, detailed individual case studies also made a very important contribution. Case studies helped inform the framing of aggregate studies and captured critical details about the scope of the human rights concerns at issue. A small number of case studies also became the basis for civil suits in Canada, which helped demonstrate the cogency of the alleged facts. In combination, these strategies raised the public profile of the issues and strengthened the credibility of advocates' fundamental message: that the impacts of Canadian resource companies' operations abroad raise concerns that require a legal response from Canadian authorities.

2.3 Problematizing the Canadian State's Support for Companies

Canadian civil society has developed another important research strategy that, although garnering less attention to date than the research described above, is no less important. This refers

[54] Business & Human Rights Resource Centre (2017) Business & Human Rights Defenders: Key Database Findings, https://business-humanrights.org/en/key-findings-from-the-database-of-attacks-on-human-rights-defenders-feb-2017. Global Witness also tracks annual incidences of violence against environmental defenders. See: Global Witness (2016) On Dangerous Ground: The Killing and Criminalization of Land and Environmental Defenders Worldwide.

to a stream of research that has documented and problematized Canadian state policies and practices that support Canadian mining operations abroad. In this regard, advocates' research has focused primarily on three main modalities of support: loans from Export Development Canada (EDC); equity held by the Canadian Pension Plan (CPP) in the form of investor shares, and political support from the Canadian foreign service, known as "economic diplomacy" (see description in Part 2.1). Both the CPP and EDC are publicly owned Crown corporations that operate at arm's length from the federal government.

Early forms of research in the area of financial and political support began with case studies. In 2007 an organization called the Halifax Initiative published a collection of 23 short case studies that tracked the quantum of EDC and CPP financial support for each Canadian resource company and briefly summarized the problems allegedly associated with each companies' overseas operations.[55] In an early case that raised concerns about political support, a Canadian documentary filmmaker sued the former Canadian Ambassador to Guatemala for defamation. The filmmaker had taken live video footage of the violent forced displacement of a community of Indigenous Guatemalans in 2007 by the Guatemalan military, police, private security companies, and employees of a Canadian mining company. After the video was posted online, the Ambassador publicly accused the filmmaker of having fabricated the footage. In 2010, an Ontario judge found that the Ambassador had slandered the filmmaker by making false statements about his film.[56]

Following this early work, advocates began to develop of a more comprehensive and detailed description of the full range of Canadian public supports for companies abroad. For example, the 2013 Latin American Working Group report to the IAHRC, referred to above, included numerous examples of the Canadian state's political, legal and economic supports for companies. In addition to CPP, EDC and diplomatic support, it described the impact of Canada's free trade agreements, development aid and interference in other countries' domestic policies.[57] A second report to the IAHRC, this time submitted by the CNCA and JCAP in 2014, repeated

[55] Halifax Initiative (2007) Canadian Mining Map, Blog, https://MiningWatch.ca/blog/2007/2/21/halifax-initiative-publishes-canadian-mining-map.
[56] Voices-Voix (2013) Steven Schnoor, http://voices-voix.ca/en/facts/profile/steven-schnoor (last accessed 30 January 2018).
[57] Working Group on Mining and Human Rights in Latin America (2013) The impact of Canadian Mining in Latin America and Canada's Responsibility: Executive Summary of the Report submitted to the Inter-American Commission on Human Rights, http://www.dplf.org/sites/default/files/report_canadian_mining_executive_summary.pdf, pp. 25-29.

concerns with these policies and argued that Canada lacks effective accountability mechanisms to oversee company conduct *as well as* the provision of state support.[58]

Building on these general descriptions of policy, advocates began to develop detailed empirical accounts of the government's modalities of support for Canadian companies in specific cases. The first line of research in this area focused on the Canadian state's political support for companies abroad. In 2013 and 2015, a coalition of Canadian organizations published two substantial reports based entirely on documents obtained through federal access to information requests. The reports profiled two different case studies in Mexico, where Canadian embassy staff and Trade Commissioners had acted to defend Canadian mining companies in spite of strong opposition from affected communities and in the face of serious and credible allegations of human rights violations or risks of violations.[59] In both cases, violence occurred against community members and in one case, a high-profile community leader was assassinated. Also in 2015, MiningWatch published a report that built on these two studies to identify a wide range of specific policies and actions of the Canadian state and its representatives in four Latin American counties.[60] The report argued that these actions and policies had exacerbated specific conflicts with Canadian companies, escalating the risk of harm for affected communities and human rights defenders. Much of the research presented in these reports appeared in a 2016 book published by two Canadian political scientists who tracked many different forms of Canadian political intervention and influence in a number of Latin American countries to the benefit of Canadian resource companies.[61]

In addition to studying the Canadian state's political support for companies, advocates continued to raise the issue of public financial support through the CPP and EDC. The primary

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[58] Canadian Network for Corporate Accountability & Justice & Corporate Accountability Project (2014) Human Rights, Indigenous Rights and Canada's Extraterritorial Obligations. Inter-American Commission on Human Rights, Thematic Hearing for 153rd Period of Sessions, http://cnca-rcrce.ca/wp-content/uploads/2016/05/canada_mining_cidh_oct_28_2014_final.pdf, pp. 6-10, 17-18.

[59] Moore J and Colgrove G (2013) Corruption, Murder and Canadian Mining in Mexico: The Case of Blackfire Exploration and the Canadian Embassy. MiningWatch Canada, United Steelworkers & Common Frontiers, https://MiningWatch.ca/sites/default/files/blackfire_embassy_report-web.pdf ; Moore J (2015) Unearthing Canadian Complicity: Excellon Resources, the Canadian Embassy, and the Violation of Land and Labour Rights in Durango, Mexico. MiningWatch Canada & United Steelworkers, https://MiningWatch.ca/sites/default/files/excellon_report_2015-02-23.pdf.

[60] See: Jen Moore (2015) In the National Interest?: Criminalization of Land and Environment Defenders in the Americas. MiningWatch Canada, https://MiningWatch.ca/sites/default/files/inthenationalinterest_fullpaper_eng_1.pdf, p. 14. Also see: MiningWatch Canada (2013) Backgrounder: A Dozen Examples of Canadian Mining Diplomacy, Blog, https://MiningWatch.ca/blog/2013/10/8/backgrounder-dozen-examples-canadian-mining-diplomacy#sthash.poxyiirh.dpbs.

[61] Gordon and Webber (2016).

strategy in this regard was to publish credible research on the human rights record of companies receiving such support. A 2016 report by a coalition of organizations profiled five complaints against Canadian resource companies brought to Canada's National Contact Point (to be discussed in Parts 3 and 4). Among its many findings, the study tracked the quantum of EDC loans and CPP equity holdings in each company. It found that in three of five cases, companies facing serious allegations of human rights abuse and environmental harm continued to receive substantial financial support from these government agencies.[62]

These findings were further supported by an extremely detailed 2017 case study of serious human rights allegations against a Canadian company with operations in Brazil. The study found that despite credible, well known and ongoing allegations, EDC issued five loans to the company between 2012-2017 totally $850 million in financing, the CPP maintained an equity interest in the company worth 460 million, and the Canadian embassy continued to offer the company diplomatic support.[63] On the basis of these studies, advocates have called for reforms to ensure due diligence, transparency and accountability in the decision making of government agencies when it comes to the provision of political and financial support for companies abroad. Advocates have also called on the CPP to divest and EDC to deny loans to companies facing serious and credible allegations of human rights violations.[64]

The previous pages have referred to numerous studies published between 1999 and 2017 by the Canadian government, civil society and academics documenting a wide range of human rights and environmental concerns directed at Canadian mining companies' overseas operations. Government support for these efforts was relatively short-lived and consisted of funding three studies and the resulting reports, published between 1999 and 2007 (the Harkat Report, 1999; the SCFAIT Report, 2005, and the Advisory Group Report, 2007). Following this period, advocates continued this research, combining detailed case studies with regional, global or industry level studies. Beginning in 2013, some advocates intensified their efforts to document the breadth of the

[62] Above Ground, MiningWatch Canada and OECD Watch (2016) "Canada is Back" but Still Far Behind – An Assessment of Canada's National Contact Point for the OECD Guidelines for Multinational Enterprises, https://MiningWatch.ca/sites/default/files/canada-is-back-report-web_0.pdf, p. 20.
[63] Above Ground and JusticiaGlobal (2017), Swept Aside: An Investigation into Human Rights Abuse at Kinross Gold-s Morro Do Ouro Mine, http://aboveground.ngo/wp-content/uploads/2017/12/Swept-Aside-Kinross-Morro-do-Ouro-report.pdf.
[64] MiningWatch Canada (2017) Almost a Quarter-Million People Worldwide Join Call for Nevsun Resources Investors to Divest over Abuses at Eritrea Mine, News Release, https://MiningWatch.ca/news/2017/5/3/240000-people-worldwide-join-call-nevsun-resources-investors-divest-over-abuses.

Canadian state's economic, legal, political and policy support for the sector. These efforts consisted of general descriptions of state policy in these areas, as well as a handful of detailed case studies of conflicts between Canadian companies and local communities. In terms of the later, this research strategy also tracked the quantum of the Canadian state's financial support and/or specific practices of diplomatic support in the context of specific conflicts.

3 Canada's Corporate Social Responsibility Policy Response (2009-2017)

In response to the research described in Part 2, between 2009 and 2017 the Canadian government developed a Corporate Social Responsibility (CSR) policy framework consisting of three main elements: (1) a CSR policy document; (2) the office of the CSR Counsellor; and (3) the Canadian National Contact Point (NCP). The CSR policy and Counsellor's office were first introduced in 2009 and updated in 2014. The Canadian NCP, first established in 2000 pursuant to Canada's membership in the Organization of Economic Cooperation and Development (OECD), became a central component of Canada's 2014 CSR policy.[65] In this period, the NCP and the CSR Counsellor each oversaw a state-based non-judicial grievance mechanism available for mediating conflicts arising between Canadian companies and those affected by their operations abroad.

This section begins by establishing the main features and outcomes of the 2009 CSR policy before moving on to describe the 2014 updated policy and NCP mechanism in terms of their regulatory components: objectives, standards, procedures and potential incentives and disincentives. This summary of Canadian's CSR policy in the period in question is important, not only because it constituted the status quo policy response for nearly nine years to the problematizations described in the previous section, but also because it formed the basis of a further suite of law reform advocacy strategies, analysed in Parts 4 and 5 of this chapter.

[65] Global Affairs Canada (2016) Canada's National Contact Point (NCP) for the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (MNEs), http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/index.aspx?Lang=eng&menu_id=1&menu=R.

3.1 CSR Policy & CSR Counsellor: 2009-2014

In 2009 the Canadian government launched *Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector*.[66] Its objective was to "improve the competitive advantage of Canadian international extractive sector companies by enhancing their ability to manage social and environmental risks."[67] To this end, the policy encouraged companies to sign on to voluntary CSR Principles[68] and included the statement that the government "expects and encourages Canadian companies operating abroad to respect all applicable laws and internationally-agreed principles of responsible business conduct."[69] Any reference to human rights was notably absent from the policy's text.

The CSR strategy also involved the creation of an Office of the Extractive Sector CSR Counsellor with a mandate to review the CSR practices of Canadian extractive companies operating abroad and to advise them on the implementation of CSR guidelines.[70] This Office included a voluntary dispute resolution mechanism whereby an individual, group or community who "reasonably believes that it is being or may be adversely affected by the activities of a Canadian extractive sector company in its operations outside Canada" could ask the CSR Counsellor to initiate a review.[71] Surprisingly, the 2009 policy also allowed companies to file a complaint against individuals or civil society groups.[72] Notably, the Counsellor could only undertake reviews with the consent of all parties involved and reviews consisted of informal or formal mediation.

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[66] Global Affairs Canada (2017) CSR Counsellor, About Us, http://www.international.gc.ca/csr_counsellor-conseiller_rse/About-us-A-propos-du-bureau.aspx?Lang=eng.
[67] Global Affairs Canada (2009) Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector, http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse-2009.aspx?Lang=eng.
[68] The International Finance Corporation's Performance Standards on Social & Environmental Sustainability, the Voluntary Principles on Security & Human Rights, the Global Reporting Initiative and the OECD Guidelines for Multinational Enterprises.
[69] Global Affairs Canada (2009) Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector, http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse-2009.aspx?Lang=eng.
[70] Global Affairs Canada (2017) Office of the Extractive Sector Corporate Social Responsibility (CSR) Counsellor, http://www.international.gc.ca/csr_counsellor-conseiller_rse/index.aspx?Lang=eng.
[71] Global Affairs Canada (2009) Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector, http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse-2009.aspx?Lang=eng.
[72] For more details on this strange provision see: Kamphuis (2012).

The first CSR Counsellor served from October 2009 to October 2013.[73] During this time advocates and affected communities brought six cases or "requests for review" to the Counsellor's office. These cases involved allegations of labour rights violations, serious environmental damage, and lack of consultation with affected communities. In three cases the process ended because the company refused to participate.[74] In a fourth case, the requesters asked to keep their identities confidential and ultimately neither the company nor the requesters responded to the Counsellor's mediation efforts.[75] In another case the affected community members declined to participate in the review process.[76] In a final case, after informal mediation the company agreed to raise awareness of its site level grievance process and adopt best practices for dispute resolution.[77] However, there is no indication that the CSR Counsellor oversaw the implementation of this agreement or followed up on the resolution of the community's original complaints. In sum, in only one of six cases did the parties participate in a mediation process leading to an agreement and there is no evidence in any case that the conflicts improved or that the issues were resolved. The first CSR Counsellor resigned at the end of 2013 before completing her term.[78]

3.2 CSR Policy & CSR Counsellor: 2014-2017

Advocates intensely criticized the 2009 CSR policy and its merger results, including at hearings before the IAHRC in 2013 and 2014. This criticism in combination with the refusal of some companies to participate in the 2009 dialogue mechanism likely informed the Canadian

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[73] Global Affairs Canada (2017) CSR Counsellor, About Us, http://www.international.gc.ca/csr_counsellor-conseiller_rse/About-us-A-propos-du-bureau.aspx?Lang=eng.

[74] Global Affairs Canada (2011) Closing Report – Request for review file #2011-01-MEX, http://www.international.gc.ca/csr_counsellor-conseiller_rse/publications/2011-01-MEX_closing_rep-rap_final.aspx?Lang=eng; Global Affairs Canada (2012) Closing Report – Request for Review File Number 2012-03-ARG, http://www.international.gc.ca/csr_counsellor-conseiller_rse/publications/2012-03-ARG_closing_report-rapport_final.aspx?Lang=eng; Global Affairs Canada (2013) Closing Report – Request for Review File Number 2013-05-ARG, http://www.international.gc.ca/csr_counsellor-conseiller_rse/publications/2013-05-ARG_closing_report-rapport_final.aspx?Lang=eng.

[75] Global Affairs Canada (2013) Closing Report – Request for Review File Number 2013-06-ARG, http://www.international.gc.ca/csr_counsellor-conseiller_rse/publications/2013-06-ARG_closing_report-rapport_final.aspx?Lang=eng.

[76] Global Affairs Canada (2017) Closing Report – Request for Review File Number 2013-04-MEX, http://www.international.gc.ca/csr_counsellor-conseiller_rse/publications/2017-05-ARG_closing_report-rapport_final.aspx?Lang=eng.

[77] Global Affairs Canada (2012) Closing Report – Request for Review File Number 2011-02-MAU, http://www.international.gc.ca/csr_counsellor-conseiller_rse/publications/2011-02-MAU_closing_report-rapport_final.aspx?Lang=eng.

[78] Global Affairs Canada (2017) CSR Counsellor, About Us, http://www.international.gc.ca/csr_counsellor-conseiller_rse/About-us-A-propos-du-bureau.aspx?Lang=eng.

government's decision to launch a second CSR policy called *Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad*.[79] This new policy described Canadian companies as being on the "leading edge of CSR practice."[80]

In terms of standards, it stated that Canada expects its companies operating abroad to "integrate CSR throughout their management structures so that they operate abroad in an economic, social and environmentally sustainable manner."[81] It also articulated the expectation that companies "respect human rights and all applicable laws, and…meet or exceed widely-recognized international standards for responsible business conduct."[82] Where local laws are not consistent with "Canadian values", the policy encouraged companies to rethink their investment.[83] Notably, while the policy promoted a number of international CSR policies as sources of guidance for companies, it did not define the standard of "Canadian values" and did not refer directly to international human rights law.[84]

While the 2014 policy retained an economic rationale for responsible corporate conduct, (also prominent in the 2009 policy), it added a moral dimension. It argued that CSR will lead to "win-win outcomes" by "creating value" for companies and generating benefits and development for communities.[85] In this policy, "doing business the Canadian way" involved being economically successful *and* reflecting "Canadian values". Like its 2009 predecessor, the 2014 policy referred to local concerns as "environmental and social risks" to the company.[86] It made the "business case"

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[79] Global Affairs Canada (2014) Canada's Enhanced Corporate Social Responsibility Strategy to Strengthen Canada's Extractive Sector Abroad – Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad, http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Enhanced_CS_Strategy_ENG.pdf.
[80] *Ibid*, p. 6.
[81] *Ibid*, p. 3.
[82] *Ibid*, p. 3.
[83] *Ibid*, p. 3.
[84] Adding to the CSR standards incorporated into the 2009 policy (Global Affairs Canada (2009) Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector, http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse-2009.aspx?Lang=eng), the 2014 policy endorses the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas and the United Nations Guiding Principles on Business and Human Rights: Global Affairs Canada (2014) Canada's Enhanced Corporate Social Responsibility Strategy to Strengthen Canada's Extractive Sector Abroad – Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad, http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Enhanced_CS_Strategy_ENG.pdf, pp. 6-7.
[85] Global Affairs Canada (2014) Canada's Enhanced Corporate Social Responsibility Strategy to Strengthen Canada's Extractive Sector Abroad – Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad, http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Enhanced_CS_Strategy_ENG.pdf, pp. 2-3.
[86] *Ibid*, p. 3.

for CSR, advising companies that CSR is good for "traditional notions of profit" and that investors care about CSR "alignment". At the same time, the policy reminded companies that it is also "intrinsically valuable" to contribute to society.[87]

Within this framework, the CSR Counsellor's role was that of an expert educator and an informal complaint mediator. The Counsellor was to offer "advice and guidance for all stakeholders on implementing CSR performance guidelines" with special expertise in providing guidance on effective and meaningful dialogue with affected communities.[88] The Counsellor could also "review the CSR practices of Canadian extractive sector companies operating outside Canada."[89] A review could be requested by an affected individual, community, or by the company. In response, the Counsellor attempted to bring the parties together for informal dialogue aimed at reaching a "mutually beneficial result". Where formal mediation was required, the Counsellor could refer the parties to Canada's NCP, although the policy did not define this threshold. Notably referral was also not necessary since parties can elect to bring a complaint directly to the NCP according to its procedures.

The 2014 CSR policy also offered more detail on Canada's official policies and mechanisms for politically supporting Canadian companies. It stated that Canada's Trade Commission Service (TCS) will assist extractive companies who are contributing to Canada's economic growth, have a demonstrated capacity for internationalization, and have strong potential to add value to Canada's economy.[90] It described TCS assistance as on the ground intelligence, practical advice, local contacts, problem solving and market assessment.[91] The CSR policy also made reference to Canada's longstanding economic diplomacy policy (see Part 2.1), which it defined as a suite of services for companies including letters of support, advocacy efforts and participation in trade missions.[92]

According to the 2014 policy, companies that aligned their operations with the policy would receive "enhanced Government of Canada economic diplomacy".[93] It offered no further details or descriptions of what this involves. However, the policy did envision a new CSR related role for

[87] *Ibid*, p. 8.
[88] *Ibid*, p. 4.
[89] *Ibid*, p. 4.
[90] *Ibid*, p. 5.
[91] *Ibid*, p. 9.
[92] *Ibid*, p. 12.
[93] *Ibid*, p. 5.

Canadian embassies and the TCS with respect to Canadian companies. It suggested that these agencies might support companies' CSR practices by helping them conduct social risk analyses, form partnerships with civil society groups, facilitate dialogue with local communities, and identify opportunities for social support programs.[94]

Finally, the 2014 policy included some limited tools to encourage "alignment" with its CSR guidance and participation in dialogue. A company that refused to participate in the voluntary review and dialogue process, offered by either the NCP or the CSR Counsellor, would face the withdrawal of TCS and "other Government of Canada advocacy support abroad".[95] The situation would also be made public. If a company did not participate *and* did not "embody CSR best practice", it would further be denied economic diplomacy (as defined above) and Export Development Canada (EDC) would take its non-compliance into consideration in decisions about financing or other supports.[96] The policy offered no further detail with respect to how EDC would take these facts into consideration. Moreover, according to the terms of the policy, as long as a company participated in the dialogue process proposed, it would continue to receive government supports even if its practices were in fact contrary to the policy's standards.

3.3 Canada's National Contact Point

This section describes Canada's National Contact Point (NCP) complaint system given that it also qualifies as a home-state non-judicial grievance mechanism. As a country belonging to the Organization for Economic Cooperation and Development (OECD), Canada is required to maintain a NCP mechanism. NCPs are mandated to further the effectiveness of the OECD *Guidelines for Multinational Enterprises*, promote their implementation, and help resolve issues including through mediation. They are required to operate in an accessible, transparent, predictable and accountable manner and to effectively and impartially deal with any issues covered in the *Guidelines*.[97]

The *Guidelines*, first introduced in 2000, were updated in 2011.[98] They are also listed among the standards endorsed in Canada's 2014 CSR Policy. The *Guidelines* provide "non-

[94] *Ibid*, pp. 9-10.
[95] *Ibid*, p. 12.
[96] *Ibid*, pp. 12-13.
[97] OECD (2011) OECD Guidelines for Multinational Enterprises: 2011 Edition, http://www.oecd.org/daf/inv/mne/48004323.pdf, pp. 68, 71-72.
[98] *Ibid*, pp. 3-4.

binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognized standards."[99] They include standards that address the social, economic, environmental and human rights impacts of companies on the societies in which they operate. The human rights chapter, a 2011 addition, establishes that multinational enterprises should respect human rights, avoid causing or contributing to human rights impacts, address adverse consequences, carry out human rights due diligence and provide legitimate processes for remediation of adverse impacts.[100] The *Guidelines* are significant because they represent the only multilaterally endorsed comprehensive code of conduct that numerous governments around the world have committed to promote.[101]

The Canadian NCP's procedural guide sets out the various phases of review that may occur when a complaint is filed alleging that a Canadian company has violated the *Guidelines*.[102] If an initial assessment reveals that the issues merit further examination, the NCP will offer to facilitate dialogue between the parties, which may include non-adversarial conciliation or mediation.[103] If an agreement is not reached, the NCP will issue a public statement and if an agreement is reached, it will issue a report. According to the procedural guide, these documents will contain, at a minimum, information about the issues and the procedures initiated.[104] While participation in the NCP review is voluntary, Canada's Department of Foreign Affairs at the time stated "there are consequences if Canadian companies do not participate, or do not engage in good faith." This likely refers to the potential withdrawal of certain forms of government support, as specified in the 2014 CSR policy. In 2015, the Canadian NCP reported on the first and only known case to date where this sanction was contemplated. When the company China Gold refused to respond to the NCP's efforts to convene a dialogue, the NCP stated that its non-participation "will be taken into

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[99] *Ibid*, p. 3.
[100] *Ibid*, pp. 31-34. In the Guidelines, due diligence means accessing actual and potential human rights impacts, integrating and acting upon findings, communicating how impacts are addressed, including risks to rights holders: *ibid* at p. 34.
[101] Global Affairs Canada (2016) Canada's National Contact Point (NCP) for the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (MNEs), http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/index.aspx?Lang=eng&menu_id=1&menu=R.
[102] Global Affairs Canada (2016) Procedures Guide for Canada's National Contact Point for the Organisation of Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises, http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/procedures_guide_de_procedure.aspx?Lang=eng.
[103] *Ibid*, s. 3.
[104] *Ibid*.

consideration in any applications…for enhanced advocacy support from the Trade Commissioner Service and/or Export Development Canada (EDC) financial services".[105] At the time China Gold was not receiving EDC loans and the Canadian government has not since disclosed any further information to indicate whether or not this sanction was ever in fact applied to China Gold.

4 Empirical, Normative & Political Critiques of Canada's CSR Policy

While Canada's voluntary CSR policy framework was in place, civil society groups in Canada and around the world consistently called upon the Canadian government to improve its policy, including by developing a legal framework that regulates the human rights and environmental impacts of Canadian companies operating abroad, and provides remedies for harms. In their most political form, these calls took the form of global and national letter writing campaigns. In 2016 more than 49 organizations sent individual letters to Prime Minister Trudeau and more than 200 organizations signed a joint letter communicating this message.[106] In 2017, more than 80 Canadian university professors sent a letter to Prime Minister Trudeau with the same call for action.[107] These letters all urged the implementation of an effective non-judicial grievance mechanism like the one proposed in the CNCA's *Business & Human Rights Act* (see Part 6). Canadian and international civil society rallied around the normative claim that it is wrong for the Canadian government to continue to promote and benefit from mining abroad without putting effective mechanisms into place to ensure accountability.[108]

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[105] Global Affairs Canada (2015) Final Statement on the Request for Review regarding the Operations of China Gold International Resources Corp Ltd, at the Copper Polymetallic Mine at the Gyama Valley, Tibet Autonomous Region, http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/statement-gyama-valley.aspx?Lang=eng.

[106] Canadian Network on Corporate Accountability (2017) From Guatemala to Zambia, people affected by Canadian mining plea for a Human Rights Ombudsperson for Extractive Industries, http://cnca-rcrce.ca/recent-works/from-guatemala-to-zambia-people-affected-by-canadian-mining-plea-for-a-human-rights-ombudsperson-for-extractive-industries/; Jimenez M, Honduran activist wants Trudeau to pressure Canadian mining companies on human rights abuses. The Star, 16 August 2016, https://www.thestar.com/news/world/2016/08/16/honduran-activist-wants-trudeau-to-pressure-canadian-mining-companies-on-human-rights-abuses.html; Canadian Network on Corporate Accountability (2016) Nearly 200 organizations write to PM urging stronger accountability of Canadian mining overseas, http://cnca-rcrce.ca/recent-works/latin-american-organizations-hope-for-stronger-accountability-of-canadian-mining-overseas/ .

[107] Imai S et al. (2017) Open Letter to the Prime Minister Calling for Independent Investigation of Allegations against Mining Companies, https://www.osgoode.yorku.ca/wp-content/uploads/2017/03/Open-Letter-to-the-Prime-Minister-final.pdf.

[108] Canadian Network for Corporate Accountability & Justice & Corporate Accountability Project (2014) Human Rights, Indigenous Rights and Canada's Extraterritorial Obligations. Inter-American Commission on Human Rights, Thematic Hearing for 153rd Period of Sessions, http://cnca-rcrce.ca/wp-content/uploads/2016/05/canada_mining_cidh_oct_28_2014_final.pdf.

This section surveys the empirical and normative strategies that Canadian advocates and their international partners employed to question the efficacy of the Canadian government's voluntary CSR policies, in place from 2009 to 2017. As stated in this chapter's introduction, in January 2018 the Canadian government announced its plans to replace the 2014 policy with a new home-state non-judicial grievance mechanism: the Canadian Ombudsperson for Responsible Enterprise (CORE). While few details are available at time of writing, according to the announcement, the new mechanism will respond to civil society proposals and will be the first of its kind in the world.[109] This unexpected development after a prolonged impasse makes the Canadian civil society strategies critiquing the voluntary CSR status quo all the more important.

4.1 Critiques of Canada's National Contact Point

After Canada's updated CSR policy was published in 2014, civil society advocates and academics undertook to analyse its effectiveness. Recall that the policy relied on and incorporated Canada's NCP, which it described as a "robust and proven" complaint mechanism.[110] To test this assertion, three reputable NGOs studied the NCP's performance in five complaints involving Canadian mining companies and allegations of serious harm.[111] All five complaints were filed with the NCP after Canada's 2014 CSR policy was put into place. Following a detailed study of each complaint, the 2016 NGO report identified numerous shortcomings in the Canadian NCP: lack of independence, lack of investigative procedures; ineffective recommendations and follow-up; lack of transparency; unjustified delays; inaccessibility of the mechanism due to high threshold for accepting complaints; and ineffective penalties.

The report noted that while each OECD country has discretion in how to structure its NCP, some countries have ensured that their NCP is completely independent of the government. In contrast, Canada's NCP is composed entirely of government representatives and is chaired by

[109] Global Affairs Canada, The Government of Canada brings leadership to responsible business conduct abroad, News Release, 17 January 2018, https://www.canada.ca/en/global-affairs/news/2018/01/the_government_ofcanadabringsleadershiptoresponsiblebusinesscond.html (last accessed 17 January 2018).

[110] Global Affairs Canada (2014) Canada's Enhanced Corporate Social Responsibility Strategy to Strengthen Canada's Extractive Sector Abroad – Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad, http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Enhanced_CS_Strategy_ENG.pdf, p.12.

[111] Above Ground, MiningWatch Canada and OECD Watch (2016) "Canada is Back" but Still Far Behind – An Assessment of Canada's National Contact Point for the OECD Guidelines for Multinational Enterprises, https://MiningWatch.ca/sites/default/files/canada-is-back-report-web_0.pdf.

Global Affairs Canada, whose mandate includes expanding trade and investment and providing special support to Canada's natural resources sector abroad. The NGO report argued that this raises questions about the NCP's impartiality on the basis that Global Affairs may have a conflict of interest in hearing complaints against the very companies it is mandated to support.[112]

Another major area of concern in the NGO report was that the Canadian NCP will not investigate complaints or make any findings: it is only available to facilitate dialogue between disputing parties. When the NCP makes recommendations, these often fail to address the issues between the parties, lack justification and lack appropriate follow up mechanisms.[113] The report also found problems with transparency. While the Canadian NCP's procedural guidelines require it to publish either a public statement or a report following a complaint,[114] the NGO study found that in practice this does not always occur and any reporting that does occur is sparse.[115]

Further, the NGO report found that it is unclear how the penalties specified in Canada's 2014 CSR policy are being applied. Recall that the policy stated that a company's failure to participate in dialogue and align with the policy will result in the withdrawal of trade support and may be taken into account by Export Development Canada (EDC). In the NGO study, companies named in credible complaints nonetheless continued to receive significant government support and financing from EDC and the Canadian Pension Plan. Moreover, the report found that the threat of penalty and the penalty itself was ineffective. For example, it pointed out that China Gold had refused to participate in any dialogue regardless of the threat of withdrawal of trade support. Moreover, even after the NCP found the requisite conditions to withdraw federal Trade Commissioner Services (TCS) from China Gold, the company nonetheless subsequently participated in a trade mission organized by the provincial government of British Colombia.[116]

Finally, the NGO report noted that even if supports from EDC and the TCS are withdrawn, other government services are not impacted. There are also no consequences or penalties for a company that participates in dialogue but is not compliant with the OECD *Guidelines*. On the basis

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[112] *Ibid*, p. 17. Also see Simons (2015), pp. 26-27.
[113] *Ibid*, pp. 18-19.
[114] Global Affairs Canada (2016) Procedures Guide for Canada's National Contact Point for the Organisation of Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises, http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/procedures_guide_de_procedure.aspx?Lang=eng.
[115] Above Ground, MiningWatch Canada and OECD Watch (2016) "Canada is Back" but Still Far Behind – An Assessment of Canada's National Contact Point for the OECD Guidelines for Multinational Enterprises, https://MiningWatch.ca/sites/default/files/canada-is-back-report-web_0.pdf, pp. 17, 19.
[116] *Ibid*, pp. 5, 20.

of all of its findings, the NGO report concluded that the Canadian NCP is failing to prevent harm, improve conditions and facilitate access to remedy.[117]

4.2 Critiques of Canada's 2014 CSR Policy & Counsellor

Shortly after the 2014 CSR policy was announced, Canadian law professor Penelope Simons evaluated the extent to which it met Canada's obligations to protect human rights and to ensure that victims have access to effective remedies as set out in the UN *Guiding Principles on Business & Human Rights*.[118] In her analysis, Simons acknowledged some advances in the 2014 policy, including the statement that Canadian companies are expected to respect human rights. However, Simons pointed out that the policy does not define any of the standards it refers to, namely CSR, Canadian values, or human rights, nor does it refer to how companies should meet these standards.[119] For example, it fails to clearly set out the expectation that companies should engage in comprehensive and ongoing human rights due diligence as recommended by the *Guiding Principles*.[120] Simons also argued that merely endorsing a list of intergovernmental or international multi-stakeholder initiatives is not helpful for the purposes of establishing clear standards.[121]

Perhaps most importantly, Simons firmly concluded that Canada's 2014 CSR policy and NCP procedures, as voluntary consensus-based dialogue and dispute resolution mechanisms, do not help fulfil Canada's obligation to take measures to ensure victims' access to remedy.[122] Simons also found that the CSR Counsellor's review mechanism does not meet at least some of the criteria set out in the *Guiding Principles* for an effective non-judicial grievance mechanism.[123] For example, it lacks features to ensure that outcomes are rights-compatible and the policy's potential sanction tool, namely conditioning or withdrawing some forms of government support, fails to ensure access to justice for victims.[124] Simons also pointed out that the policy failed to offer a

[117] *Ibid*, p. 21. These findings are consistent with the conclusion reached in a 2015 report by OECD Watch in a comprehensive study of the efficacy of NCPs around the world. It concluded that the overwhelming majority of complaints failed to bring an end to corporate misconduct or provide remedy for past or on-going abuses, leaving complainants in the same or worse position as they were in beforehand: Daniel C et al. (2015) Remedy Remains Rare, OECD Watch, https://www.oecdwatch.org/publications-en/Publication_4201(last accessed 10 December 2017), p. 9.
[118] Simons (2015).
[119] *Ibid*, p. 12.
[120] *Ibid*, p. 17.
[121] *Ibid*, p. 13.
[122] *Ibid*, p. 29. Also see Coumans (2012), p. 685.
[123] *Ibid*, p. 24.
[124] *Ibid*, pp. 26, 30.

basis or guideline for measuring non-alignment with the policy such that the withdrawal of support would be warranted.[125]

Notably, Simons' analysis, undertaken shortly after the publication of the 2014 CSR Policy, was entirely textual. Experience with the implementation of the policy and complaint mechanisms between 2015 and 2017 revealed further weaknesses in practice. In 2015 the federal government appointed Jeffrey Davidson to the CSR Counsellor position. Davidson had 35 years of experience working for a number of mining companies as well as the World Bank on community relations strategies.[126] Following Davidson's appointment, there is no record of a single request for review (or complaint) being brought to his office between 2015 and 2017.[127] Given the ongoing reports of harms linked to Canadian extractive companies abroad in this period (see Part 2), this absence suggests that civil society and affected communities lacked trust in the CSR Counsellor's review process from the very beginning. According to the Counsellor's 2015/2016 Annual Report, Davidson primarily dedicated his time to public presentations and informal meetings with a wide variety of mining companies, civil society organizations, academics, industry associations, and CSR consultants.[128] There is no indication that these meetings involved a mediated dialogue of any kind.

In August 2016, Counsellor Davidson made his first reported country trip to Honduras for a period of approximately 12 days. The purpose was to explain and promote CSR expectations, develop a better understanding of the local context, issues and challenges, and establish a foundation for effective advisory support and constructive intervention if required.[129] In his country trip report, published about a year later, Davidson described his meetings with stakeholders and the concerns he heard with respect to the negative impacts of extractive activities in Honduras. However, the report also contained a series of controversial statements in a section called "The Canada NGO Connection," where the Counsellor stated that foreign and local NGOs have

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[125] *Ibid*, p. 21.
[126] Global Affairs Canada (2017) Jeffrey Davidson, Extractive Sector Corporate Social Responsibility (CSR) Counsellor, http://www.international.gc.ca/csr_counsellor-conseiller_rse/jeffrey-davidson.aspx?Lang=eng.
[127] Global Affairs Canada (2017) Registry of Request for Review, http://www.international.gc.ca/csr_counsellor-conseiller_rse/Registry-web-enregistrement.aspx?Lang=eng.
[128] Global Affairs Canada (2016) 2016 Annual Report to Parliament: May 2015 – May 2016, http://international.gc.ca/csr_counsellor-conseiller_rse/publications/2016_annual_report-rapport_annuel_2016.aspx?Lang=eng.
[129] Global Affairs Canada (2017) Honduras Country Trip Overview: Office of the Extractive Sector Corporate Social Responsibility (CSR) Counsellor, http://www.international.gc.ca/csr_counsellor-conseiller_rse/trip_overview_Honduras-apercu_voyage_Honduras.aspx?Lang=eng.

contributed to the strained and tense situation around extractive activities in Honduras. In this section, Davidson accused two Canadian NGOs in particular of being ideologically against mining, of adopting confrontational and adversarial approaches to companies, and of being inherently opposed to collaborative relationships. The Counsellor's language also suggested that these groups *perceive* themselves as human rights defenders and *perceive* a culture of impunity for mining companies in Honduras.

Two weeks after the Counsellor released his report, a group of twenty-four Canadian NGOs, unions and churches sent a letter to Canada's Minister of International Trade calling for its retraction.[130] In their letter, these groups accused the Counsellor of making "sweeping, unsubstantiated, biased and irresponsible accusations against Canadian CSOs" which minimize the agency of entire communities, local civil society leaders and organizations in Honduras who have long expressed legitimate concerns about the extractive sector and regularly mobilized in defense of their rights and environment.[131] The civil society letter further argued that the Counsellor had misrepresented the role of Canadian NGOs in Honduras and fundamentally misunderstood the nature of international solidarity relationships between organizations. The letter also stated that the Counsellor "minimizes the danger faced by human rights defenders in Honduras" which has been widely recognized by numerous international human rights bodies. These groups charged that the Counsellor's "irresponsible assertions" may give license to certain actors in Honduras to take action against international organizations, something which has occurred in recent years.

It seems fair to say that the CSR Counsellor's 2017 country trip report resulted in a total breakdown of his relationship with a considerable cross-section of Canadian civil society. Given the nature of the statements, the report may have also directly damaged his relationship with civil society groups abroad. This result is ironic given that the Counsellor's primarily mandate was to facilitate dialogue and his goal in visiting Honduras was "constructive intervention". To date, the Minister of International Trade has not responded to the civil society letter or request for retraction of the report.

In sum, advocates critiqued the efficacy and even the legitimacy of the 2014 CSR policy in three ways. First, by critically analysing the NCP's response to complaints against Canadian

[130] Letter from Canadian civil society organizations to the Honourable François-Philippe Champagne, Minister of International Trade, 28 July 2017, http://aboveground.ngo/wp-content/uploads/2017/07/CSO-letter-re-CSR-Counsellor-Honduras-Report.pdf.
[131] *Ibid.*

resource companies submitted after 2014. Second, by evaluating the CSR policy against the norms articulated in the UN *Guiding Principles*. And third, by rallying together to publicly challenge the CSR Counsellor's judgment and capacity to facilitate constructive dialogue. Together, these strategies combined empirical study, normative analysis and political critique. The next section will examine how advocates took their dissatisfaction with the Canadian CSR policy status quo to international fora.

5 Building Strong Consensus with International Human Rights Bodies (2002-2017)

Previous sections of this chapter have referred to numerous civil society reports that documented the human rights concerns of communities affected by the Canadian extractive industry abroad and further argued that Canada's existing CSR policies are inadequate. In conjunction with these strategies, civil society organizations persistently brought this evidence before international human rights bodies, asking them to evaluate Canada's approach to its international extractive sector in light of its international human rights obligations. In the United Nations (UN) system, advocates brought their concerns to treaty bodies, Special Rapporteurs and Working Groups, all tasked with interpreting core UN human rights treaties and reviewing state signatories' compliance. In the Organization of American States (OAS), advocates made submissions to the Inter-American Commission on Human Rights (IACHR) at thematic hearings addressing Canada's human rights obligations in the area of extractive industries abroad.

This international legal work generated a significant body of commentary. Over a period of fifteen years, human rights bodies in both systems pronounced on the human rights and environmental impacts of Canadian resource extraction abroad and the concomitant responsibilities of the Canadian state. In total, between 2002 and 2017, seven UN bodies issued at least ten separate statements to Canada on these issues: the UN Special Rapporteur on Toxic Waste,[132] the Committee on the Elimination of Racial Discrimination,[133] the Committee on the Rights of the

[132] UNESC, Commission on Human Rights, Adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, Mission to Canada, UN Doc E/CN.4/2003/56/Add.2 (2003), http://ap.ohchr.org/documents/alldocs.aspx?Doc_id=3326, para 126.

[133] UNCERDOR, Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada, UN Doc CERD/C/CAN/CO/18 (2007), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?Symbolno=CERD%2FC%2FCAN%2FCO%2F18&Lang=en, para 17; UNCERDOR, Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada, UN Doc CERD/C/CAN/CO/19-20 (2012), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?Symbolno=CERD/C/CAN/CO/19-20&Lang=En, para 14; UNCERD, Early Warning and Urgent Action Procedure Letter to the Permanent

Child,[134] the Human Rights Committee,[135] the Committee on Economic, Social and Cultural Rights,[136] the Committee on the Elimination of Discrimination Against Women,[137] and most recently, the UN Working Group on Business and Human Rights.[138]

In 2013, 2014 and again in 2017, the IACHR dedicated three thematic hearings specifically to the topic of Canadian resource companies in Latin America and the Canadian government's associated policies, laws and responsibility.[139] It also received submissions on this issue in 2015 from the Human Rights Research and Education Centre at the University of Ottawa[140] and from

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Representative of Canada to the United Nations, UN Doc CERD/89th/EWUAP/GH/MJA/ks, (27 May 2016), http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/GTM/INT_CERD_ALE_GTM_8031_E.pdf ; UNCERDOR, Concluding observations on the combined twenty-first to twenty-third periodic report of Canada, UN Doc CERD/C/CAN/CO/21-23 (2017), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?Symbolno=CERD%2FC%2FCAN%2FCO%2F21-23&Lang=en, para 21.

[134] UNCRC, Committee on the Rights of the Child, Concluding observations on the combined third and fourth periodic report of Canada, adopted by the Committee at its sixty-first session (17 September – 5 October 2012), UN Doc CRC/C/CAN/CO/3-4 (2012), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?Symbolno=CRC%2fc%2fcan%2fco%2f3-4&Lang=en, para 28.

[135] UN Human Rights Committee, Concluding observations on the sixth periodic report of Canada, UN Doc CCPR/C/CAN/CO/6 (2015), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?Symbolno=CCPR%2fc%2fcan%2fco%2f6&Lang=en, para 6.

[136] UNESC, Committee on Economic, Social and Cultural Rights, Concluding observations on the sixth periodic report of Canada, UN Doc E/C.12/CAN/CO/6 (2016), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?Symbolno=E%2fc.12%2fcan%2fco%2f6&Lang=en, para 15.

[137] UN Committee on the Elimination of Discrimination against Women, Concluding observations on the combined eighth and ninth periodic reports of Canada, UN Doc CEDAW/C/CAN/CO/8-9 (2016), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?Symbolno=CEDAW%2fc%2fcan%2fco%2f8-9&Lang=en, para 18. .

[138] UN OHCHR, Statement at the end of Visit to Canada by the United Nations Working Group on Business and Human Rights, (1 June 2017), http://www.ohchr.org/EN/newsevents/Pages/displaynews.aspx?Newsid=21680&langid=E.

[139] Canadian Network for Corporate Accountability & Justice & Corporate Accountability Project (2014) Human Rights, Indigenous Rights and Canada's Extraterritorial Obligations. Inter-American Commission on Human Rights, Thematic Hearing for 153rd Period of Sessions, http://cnca-rcrce.ca/wp-content/uploads/2016/05/canada_mining_cidh_oct_28_2014_final.pdf; Working Group on Mining and Human Rights in Latin America (2013) The impact of Canadian Mining in Latin America and Canada's Responsibility: Executive Summary of the Report submitted to the Inter-American Commission on Human Rights, http://www.dplf.org/sites/default/files/report_canadian_mining_executive_summary.pdf; IACHR, Measures to prevent human rights violations by Canadian extractive industries that operate in Latin America, Schedule of Public Hearings, 166th Sess, 7 December 2017, p. 2, http://www.oas.org/en/iachr/sessions/docs/Calendario-166-audiencias-en.pdf (last accessed 23 January 2018).

[140] Human Rights Research and Education Centre (2015) Extraterritoriality and Responsibility of Home States in the Protection of Human Rights for the Activities of Extractive Industries in Latin America, IACHR Thematic Hearing on Corporations, Human Rights and Prior Consultation in the Americas, https://cdp-hrc.uottawa.ca/sites/cdp-hrc.uottawa.ca/files/hrrec-_oral_presentation_iachr-_march_17_2015.pdf.

the Counsel of Latin American Catholic Bishops[141] at hearings of a more general nature. On this basis, the IACHR has commented on two separate occasions on Canada's obligations with respect to these issues.[142] Taking the statements from UN and OAS bodies in combination, in total eight international human rights bodies made at least twelve relevant statements to Canada on point between 2002 and 2017.

The timing of these statements in relation to the development of Canada's CSR policies is important. The first two UN statements on these issues occurred in 2002 and 2007, before Canada had announced its 2009 CSR policy. In the five years that the 2009 policy was in place, advocates obtained two more statements from UN human rights bodies and participated in two IAHRC hearings. However, the majority of the above-cited statements from international human rights bodies occurred in a short three-year period after Canada updated its CSR policy in late 2014.

One possible explanation for this distribution is that the 2014 policy change did little if anything to remedy concerns with the 2009 policy, making Canada appear increasingly intransigent in its commitment to a voluntary approach. In this context, advocates intensified their efforts to frame their concerns in terms of Canada's international human rights commitments. Another important factor is that advocates began to accumulate a breadth and depth of research establishing problems with company conduct, state conduct and state policies. International human rights bodies clearly found this research compelling and they responded accordingly with strong statements to Canada.

Taken together, these statements contain three main themes. First, human rights bodies commonly expressed concern in response to numerous reports and findings that Canadian resource companies are causing environmental harm and contributing to human rights violations in the developing countries where they operate. Second, all of the bodies in question called on the

[141] Posición de la Iglesia católica ante vulneración y abusos contra los derechos humanos de las poblaciones afectadas por las industrias extractivas en América Latina, Audiencia pública ante la Comisión Interamericana de Derechos Humanos, 154th Sess, 19 March 2015, p. 12; Due Process of Law Foundation (2015) Comunicado: Iglesia Católica ante CIDH sobre DDHH e industrias extractivas en América Latina, http://www.dplf.org/es/news/comunicado-iglesia-catolica-ante-cidh-sobre-ddhh-e-industrias-extractivas-en-america-latina; Obispos denuncian peligros de la minería en Latinoamérica. El Observador: De la Actualidad, 23 March 2015, http://elobservadorenlinea.com/2015/03/obispos-denuncian-peligros-de-la-mineria-en-latinoamerica/.

[142] OAS, IACHR Wraps Up its 153rd Session, Press Release, 7 November 2014, http://www.oas.org/en/iachr/media_center/preleases/2014/131.asp; OAS, Inter-American Commission on Human Rights, Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities, OR OEA/Ser.L/V/II. Doc 47/15 (2015), http://www.oas.org/en/iachr/reports/pdfs/extractiveindustries2016.pdf, paras 20, 23, 78-9, 136-8, 141.

Canadian government to establish effective legislative and administrative law measures to oversee companies and to prevent human rights violations abroad. In this respect, several statements recommended that Canada monitor the human rights impacts of Canadian companies' overseas operations and require companies to undertake human rights impact assessments of proposed projects.

Third, a considerable majority of these bodies made recommendations about access to justice in Canada. This included recommendations that Canada establish an effective state-based non-judicial system of independent investigation of allegations against Canadian companies, including accountability mechanisms and possible sanctions such as the withdrawal of state support.[143] This line of recommendations also included reforms to ensure access to judicial remedies in Canada. In sum, numerous international human rights bodies sent a strong, unified and consistent message over a period of fifteen years that Canada's CSR policies were inadequate from the perspective of its international obligations.

6 Creating & Advocating for Concrete Law Reform Proposals (2009-2016)

In addition to the strategies mentioned above, Canadian advocates focused their efforts on developing law and policy proposals in Canada that aimed to address, at least in some way, the human rights impact of Canadian extractive companies abroad.[144] Most of these efforts focused on the creation of an effective home-state non-judicial grievance mechanism. The first set of proposals in this regarded emerged from the recommendations of two government commissioned reports (described in Part 2): the 2005 report of the Parliamentary Sub-committee on Human Rights and International Development, and the 2007 report of the Advisory Committee for the National Roundtables on Corporate Social Responsibility and the Extractive Industry in Developing Countries.[145]

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[143] More research is needed to identify the significance of this consensus. As far back as 2011, Seck argued that Canadian efforts to regulate could serve as evidence of state practice supporting the emergence of customary international rules with consequences for the international community as a whole. Seck observed that customary international law rules could support the position that home state jurisdiction to regulate and adjudicate to prevent and remedy environmental and human rights harms is either permissible or mandatory: see Seck (2011), p. 113.

[144] For a detailed analysis of the standards, scope of application, sanctions and enforcement mechanisms contemplated in these proposals, see: Kamphuis (2012).

[145] See House of Commons Standing Committee on Foreign Affairs and International Trade (2005) Mining in Developing Countries: Corporate Social Responsibility. 38th Parl, 1st Sess, 14th Rep, http://www.ourcommons.ca/documentviewer/en/38-1/FAAE/report-14; Advisory Group Report (2007) National

Unsatisfied with the 2009 CSR Policy response to these reports, civil society groups in Canada worked hard to support Bill C-300, *An Act respecting corporate accountability for the activities of mining, oil or gas in developing countries*,[146] proposed by an opposition Member of Parliament. The Bill would have required certain Canadian companies to comply with international human rights standards in their overseas operations and would have obligated the Ministers of Foreign Affairs and International Trade to receive complaints about these companies. If either Minister determined that a company had not met the standards specified, the Bill would have required the withdrawal of Export Development Canada loans, Canada Pension Plan equity holdings, as well as diplomatic support. The Bill would have also made the provision of these forms of financial support conditional on companies' compliance with the standards specified. With a minority Conservative government in power, Bill C-300 passed first and second reading in the Canadian Parliament before it was narrowly defeated in 2010 in its third and final reading.[147]

Following the defeat of Bill C-300, opposition Members of Parliament introduced two related bills between 2010 and 2013. The first, Bill C-571, *An Act respecting corporate practices relating to the purchase of minerals from the Great Lakes Region of Africa*[148] would have required certain companies to undertake due diligence, and the second, Bill C-323, *An Act to amend the Federal Courts Act (international promotion and protection of human rights)*[149] would have given the Canadian federal courts universal jurisdiction over claims of violations of international human rights law. Neither Bill moved beyond initial stages.

Roundtables on Corporate Social Responsibility (CSR) and the Canadian Extractive Industry in Developing Countries.

[146] Bill C-300, *An Act respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries*, 2nd Sess, 40th Parl, 2009, http://www.ourcommons.ca/Content/Bills/402/Private/C-300/C-300_1/C-300_1.PDF, s. 3.

[147] Those who voted against Bill C-300 cited concerns that it would "negatively impact Canada's competitiveness as a world leader in mining": Dagenais P (2010) Canadian Mining Industry Wins with Bill C-300's Defeat. Canadian Mining Journal, http://www.canadianminingjournal.com/features/canadian-mining-industry-wins-with-bill-c-300-s-defeat/. Advocates for the Bill reported that industry launched an intense lobby and misinformation campaign against the Bill: Seck (2011); Coumans (2012), p. 673.

[148] Bill C-571, *Trade in Conflict Minerals Act: An Act respecting corporate practices relating to the purchase of minerals from the Great Lakes Region of Africa*, 3rd Sess, 40th Parl, 2010, https://openparliament.ca/bills/40-3/C-571/.

[149] Bill C-323, *An Act to amend the Federal Courts Act (international promotion and protection of human rights)*, 2nd Sess, 41st Parl, 2013, https://openparliament.ca/bills/41-2/C-323/.

6.1 Draft Legislation: the Business & Human Rights Act (2016)

The concept of an independent Canadian ombudsperson with the power to receive complaints about the human rights impacts of the Canadian extractive industry abroad first appeared as draft legislation in 2014 with Bill C-584 - *An Act respecting the corporate social responsibility inherent in the activities of Canadian extractive corporations in developing countries*.[150] Like those before it, this Bill, proposed by an opposition Member of Parliament, was defeated at a preliminary stage. However, after nearly a decade in power, the federal Conservative government fell the next year in 2015. The Liberal Party came to power on an election platform that included a commitment to implementing an ombudsperson for the Canadian extractive sector abroad.[151]

With the apparent opportunity for legislative change at hand, the CNCA intensified its work on model legislation, unveiling *The Global Leadership in Business and Human Rights Act: An Act to Create an Independent Human Rights Ombudsperson for the International Extractive Sector*[152] in late 2016. This proposal was considerably more sophisticated and comprehensive than previous proposals. It likely drew some inspiration from a similar concept developed by two Canadian law professors in a book published two years prior.[153] Also, unlike previous proposals, the CNCA did not bring the *Business & Human Rights Act* forward in the Parliamentary process. Rather, they presented it to government representatives in countless private meetings. This section will describe the proposed Act's main features in the following categories: administrative body, regulatory objectives and jurisdiction; standards; investigatory powers and recommendations; and potential sanctions.

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[150] Bill C-584, *An Act respecting the Corporate Social Responsibility Inherent in the Activities of Canadian Extractive Corporations in Developing Countries*, 2nd Sess, 41st Parl, 2014, https://www.parl.ca/legisinfo/billdetails.aspx?Language=E&billid=6489787&View=0.

[151] Cumming J, What the Liberals, Greens and NDP Have to Say on Mining in Canada. *Huffington Post*, (5 October 2015), http://www.huffingtonpost.ca/john-cumming/mining-canada-federal-election_b_8235824.html.

[152] Canadian Network on Corporate Accountability, *The Global Leadership in Business and Human Rights Act: An Act to Create an Independent Human Rights Ombudsperson for the International Extractive Sector*, Draft Model Legislation, 2 November 2016, http://cnca-rcrce.ca/wp-content/uploads/2016/03/The-Global-Leadership-in-Business-and-Human-Rights-Act-An-act-to-create-an-independent-human-rights-ombudsperson-for-the-international-extractive-sector-11022016.pdf .

[153] Simons and Macklin (2014). There are however important differences between the CSR agency that Simons and Macklin propose and the CNCA legislative proposal. The focus of the former was on government due diligence prior to offering companies' public supports, while the latter focused on dispute resolution.

6.2 Administrative Body, Regulatory Objectives & Jurisdiction

The draft *Business and Human Rights Act* aimed to address the harms suffered by individuals and the natural environment in foreign states in connection with Canadian extractive industries.[154] In relation to these harms, the Act's objectives were: to promote the avoidance of harms; to promote the meaningful participation of individuals, groups and local communities in decisions that affect them; to investigate and report on harms; and to promote the resolution, remedy and full reparation of harm.[155] It also aimed to increase accountability and transparency with respect to harms.[156]

In order to meet these objectives, the proposed legislation would have created an oversight body called the Office of the Extractive Industries Human Rights Ombudsperson, appointed by a majority vote of the members of the House of Commons and the Senate as a public servant and an Officer of Parliament, independent from the Government.[157] Anyone employed, on the board of directors or otherwise closely associated with Canadian extractive companies in the previous five years would not have been eligible for the appointment.[158]

The proposed Act required a prospective Ombudsperson to have qualifications in three main arenas: (1) expertise and experience in the investigation and documentation of human rights infringements; (2) knowledge of international best practice in gender-sensitive investigation and analysis; and (3) experience in at least one of the following areas: international best practice in the investigation of sexual violence, extractive industries, Indigenous rights and human rights and environmental impact assessment and auditing.[159]

Another important feature of the CNCA's draft legislation was the intended scope of its application to any corporation, with a Canadian nexus, engaged in the commercial development of

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[154]Canadian Network on Corporate Accountability, *The Global Leadership in Business and Human Rights Act: An Act to Create an Independent Human Rights Ombudsperson for the International Extractive Sector*, Draft Model Legislation, 2 November 2016, http://cnca-rcrce.ca/wp-content/uploads/2016/03/The-Global-Leadership-in-Business-and-Human-Rights-Act-An-act-to-create-an-independent-human-rights-ombudsperson-for-the-international-extractive-sector-11022016.pdf , s. 3.20.

[155] *Ibid*, s. 3.20. Throughout the proposed Act, the Ombudsperson is required to undertake their duties with gender sensitivity.

[156] *Ibid*, s. 3.21.

[157] *Ibid*, ss. 3.1, 3.2, 3.8.

[158] *Ibid*, s. 3.8. The proposed Act includes other provisions to avoid the existence of a conflict of interest between the Ombudsperson and the Canadian companies that would be subjected to the Act. The Office of the Ombudsperson would also include one or more assistants and other staff: ss. 3.11-3.16.

[159]*Ibid*, s. 3.10.

oil, gas or minerals in a foreign state.[160] A Canadian nexus existed if a company: (1) was listed on a Canadian stock exchange; (2) incorporated anywhere in Canada; (3) had a principal place of business in Canada; or (4) was receiving or had received support, subsidy, promotion, partnership or protection from the Canadian government or a government agency.[161] The proposed Act also captured any affiliate of, including a subsidiary or a company controlled by, a Canadian corporation, also engaged in the commercial development of oil, gas or minerals.[162] Accordingly, the Ombudsperson's jurisdiction to investigate would have been established if there was a nexus between the subject of the complaint and Canada.[163] Notably, the scope of the Ombudsperson's proposed jurisdiction parallels that set out in existing Canadian legislation with extra-territorial reach.[164]

6.3 Standards

Under the draft *Business & Human Rights Act*, the Ombudsperson had a duty to initiate an investigation where a complaint named a company with a Canadian nexus and alleged a specified harm.[165] The proposed Act defined harm[166] as an infringement of any of the human rights referred to in numerous instruments of international law: nine core UN human rights treaties,[167] two UN

[160] *Ibid*, ss. 2.3, 6.1, 6.2.
[161] *Ibid*, s.5.1.
[162] *Ibid*, ss. 2.1, 2.2, 2.3, 2.9, 5.1. Control is defined as owning 20% or more of the voting interests in another company, controlling 30% of the Board of Directors, control over management and policies, or control over salary levels for executives or employees at another company: s 2.2.
[163] *Ibid*, s. 6.2(i).
[164] The *Extractive Sector Transparency Measures Act* applies to any company engaged in, or that controls another company engaged in, the commercial development of oil, gas or minerals in Canada or abroad. This Act captures companies listed on Canadian stock exchanges that have a place of business in Canada, that do business in Canada or have assets in Canada. It requires companies to report payments of a certain size made to any government or governmental body in Canada or in a foreign state: S.C. 2014, c. 39, s. 376, ss. 2, 8, 9.
[165] Canadian Network on Corporate Accountability, *The Global Leadership in Business and Human Rights Act: An Act to Create an Independent Human Rights Ombudsperson for the International Extractive Sector*, Draft Model Legislation, 2 November 2016, http://cnca-rcrce.ca/wp-content/uploads/2016/03/The-Global-Leadership-in-Business-and-Human-Rights-Act-An-act-to-create-an-independent-human-rights-ombudsperson-for-the-international-extractive-sector-11022016.pdf , ss. 6.1, 6.2.
[166] *Ibid*, s. 2.5.
[167] International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (ICESCR); International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT); Convention on the Rights of the Child (CRC); Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW); Convention on the Rights of Persons With Disabilities (CRPD); International Convention for the Protection of All Persons from Enforced Disappearance (CED).

Declarations,[168] nine core ILO Conventions,[169] the Geneva Conventions and one OECD Convention.[170] Together, these sources of international human rights law would have established the formal standards for evaluating Canadian companies. When determining whether or not specified standards had been infringed, the draft Act required the Ombudsperson to consider: the practice of competent international bodies, certain international environmental standards[171] and the UN *Guiding Principles*.[172] The CNCA's Ombudsperson would also have had the discretion to consider international CSR norms, including state-based, multi-stakeholder and norms emanating from international financial institutions.[173]

In relation to these standards, a complaint could allege that a Canadian company had, by act or omission, caused or contributed to a specified harm in a foreign state.[174] An investigation would have similarly been triggered by allegations of a significant risk that such harm could occur. The same thresholds would have applied to third parties in a material contractual relationship with a Canadian company.[175] The proposed Ombudsperson would also have had the discretion to

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[168] UN Declaration on the Rights of Indigenous Peoples (UNDRIP); UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms.

[169]Indigenous and Tribal Peoples Convention, 1989 (No 169); Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); Right to Organise and Collective Bargaining Convention, 1949 (No. 98); Forced Labour Convention, 1930 (No. 29); Abolition of Forced Labour Convention, 1957 (No. 105); Minimum Age Convention, 1973 (No. 138); Worst Forms of Child Labour Convention, 1999 (No. 182); Equal Remuneration Convention, 1951 (No. 100); Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

[170] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

[171] Rio Declaration on Environment and Development; the Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox: "Mapping report" (Human Rights Council).

[172] Canadian Network on Corporate Accountability, *The Global Leadership in Business and Human Rights Act: An Act to Create an Independent Human Rights Ombudsperson for the International Extractive Sector*, Draft Model Legislation, 2 November 2016, http://cnca-rcrce.ca/wp-content/uploads/2016/03/The-Global-Leadership-in-Business-and-Human-Rights-Act-An-act-to-create-an-independent-human-rights-ombudsperson-for-the-international-extractive-sector-11022016.pdf, s. 13.2.

[173] OECD Guidelines on Multinational Enterprises; OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High Risk Areas; OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector; IFC Performance Standards on Environmental and Social Sustainability; Guidance Notes to those standards; the World Bank Group's Environmental, Health and Safety General Guidelines; Voluntary Principles on Security and Human Rights; Sustainability reporting guidelines of the Global Reporting Initiative; and any international Codes of Conduct, or Corporate Codes of Conduct, which the company in question has signed on to or adopted.

[174] Canadian Network on Corporate Accountability, *The Global Leadership in Business and Human Rights Act: An Act to Create an Independent Human Rights Ombudsperson for the International Extractive Sector*, Draft Model Legislation, 2 November 2016, http://cnca-rcrce.ca/wp-content/uploads/2016/03/The-Global-Leadership-in-Business-and-Human-Rights-Act-An-act-to-create-an-independent-human-rights-ombudsperson-for-the-international-extractive-sector-11022016.pdf, ss. 6.1, 6.2. The proposed Act would not subject complaints to a limitation period and would extend a certain level of protection to complainants from civil suit in respect of their complaint: ss. 4.4, 4.7.

[175]*Ibid*, s. 6.2.

initiate an investigation without a complaint where they suspected that such harm had occurred.[176] However, if the alleged harms were trivial or the complaint was frivolous, vexatious or not made in good faith, the Ombudsperson retained the discretion to decline to investigate.[177]

6.4 Investigatory Powers & Recommendations

In terms of the investigation itself, the CNCA proposal obliged the Ombudsperson to take into account the personal circumstances of complainants, including by designing specialized procedural rules to this end.[178] In order to collect evidence in the course of an investigation, the Ombudsperson could have received submissions and requested documents and evidence from the parties.[179] The Ombudsperson could also have resorted to the courts to request a warrant to search a location and/or an order to produce documents, including the examination, under oath or not, of the person named in the order.[180] Finally, the draft legislation established terms for coordinating between the Ombudsperson's investigation and other Canadian legal procedures[181] and it would have allowed the Ombudsperson to gather evidence in a foreign state with permission.[182] In short, the Ombudsperson contemplated in the proposed Act was imbued with extensive investigatory powers, which in some cases could be enforced and supervised by a Canadian court.

The CNCA proposal provided that an investigation could be discontinued for one of three reasons. First, the investigation would end if the Ombudsperson was of the opinion that there was

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[176] *Ibid*, s. 6.3.
[177] *Ibid*, s. 6.4.
[178] *Ibid*, s. 8.1. In particular the Ombudsperson would be required to consider the age, gender and health of the complainant, as well as the nature of the violence alleged, including sexual violence.
[179] *Ibid*, ss. 8.2, 8.4, 8.5.
[180] *Ibid*, s. 8.9, 8.10. The Act required reasonable grounds to believe that the location contained evidence that would assist in the investigation. Upon obtaining a warrant, the Ombudsperson would have been authorized to search the location and was required to report back to the justice who had issued the warrant. The ombudsperson could have also requested a court order for an investigative interview in order to gather more information, provided that reasonable attempts have been made to obtain the information by other means: s. 8.11.
[181] First, it would give the Ombudsperson the power to suspend an investigation if the matter is already before a Canadian or foreign court. If the matter is in a foreign court, the Ombudsperson must be satisfied that the proceedings are independent, impartial, and not subject to delay: *ibid*, ss. 7.1, 7.3. Second, if during an investigation the Ombudsperson believes that there is evidence of the commission of an offence against the laws of Canada or a foreign jurisdiction, they may disclose this evidence to the appropriate officials. Notably this is not required: ss. 8.7, 8.8. Third, none of the information obtained in an investigative interview conducted by court order can be used in any criminal proceedings against the witness, with the exception of criminal prosecution for perjury: ss. 8.14, 8.15. Fourth, upon concluding the investigation, the Ombudsperson can recommend further investigations by a separate authority: s. 13.4(iv).
[182] *Ibid*, s. 9. The Ombudsperson would be required to inform the foreign government of the planned activities and would to endeavour to enter into a mutual assistance agreement with the local authorities in the foreign state.

no harm, or risk of harm, and that there were no compelling reasons to continue the investigation.[183] Second, an investigation would discontinue if the parties entered into a settlement agreement in accordance with certain requirements.[184] In this respect, the draft Act would have permitted mediation, provided that: the Ombudsperson believed the matter was appropriate for mediation; the complainant had given informed consent to mediation; and the relevant facts were known.[185] The Ombudsperson would have had the discretion to approve (or not) a mediated settlement agreement, having regard to the Act's objectives.[186] Final agreements would have been binding on the parties and enforceable in a Canadian court.[187]

The third basis upon which an investigation could conclude was if the proposed Ombudsperson were to find that a Canadian company, or a third party with whom it is in a material contractual relationship, had failed to respect applicable human rights. This was defined as a situation where the entity in question had, by act or omission, caused or contributed to harm in a foreign state, or there was a significant risk that it would do so.[188] Upon making such a finding, the proposed Ombudsperson was required to give any affected party reasonable notice and an opportunity to respond.[189]

Following an adverse finding, the Ombudsperson was further required to issue a public report with an opinion, reasons and appropriate recommendations "of any kind, to any person, or any agency and body of the Government of Canada".[190] With respect to the company, recommendations might have included: to remedy and repair harm done; to prevent further harm with respect to the specific complaint; or to avoid future harm in all of its operations. Recommendations could also have been directed at consultation with affected communities at the project level or at a company's consultation policies and practices more generally. The proposed Ombudsperson could have also made recommendations to the complainant, the company or a third party regarding steps to avoid conflict arising from a project. Finally, with respect to the Government of Canada, the Ombudsperson had the discretion to make recommendations,

[183] *Ibid*, s. 12.1(iii).
[184] *Ibid*, s. 12.1(i).
[185] *Ibid*, ss. 11.1, 11.2. The Ombudsperson may decide to pay for the legal expenses of the complainant(s) participating in mediation: s. 11.5.
[186] *Ibid*, s. 11.7.
[187] *Ibid*, s. 11.6.
[188] *Ibid*, s. 13.1.
[189] *Ibid*, s. 13.12.
[190] *Ibid*, s. 13.4.

"regarding any acts or omissions in the case under investigation" or any related practice, law or policy or the need for any practice.[191]

Building on this rubric of potential recommendations following an adverse finding, the draft Act contemplated significant follow up provisions. The proposed Ombudsperson's recommendations would have included specific timeframes and the addressees of a recommendation were required to provide written notice of their progress. Moreover, complainants retained a right to offer their perspective on the implementation of recommendations and the Ombudsperson was required to issue a follow-up report.[192]

In this connection, it is important to acknowledge the provisions of the CNCA's proposed Act that aimed to ensure transparency throughout the grievance process: in the decision to investigate, in the investigation itself, and in the outcome. First, the investigation would have begun with notice to the subjects of the investigation, which would also be posted publicly.[193] Alternatively, if the Ombudsperson decided not to investigate, the complainant would be informed in writing with reasons.[194] Where the parties agreed to a settlement, the Ombudsperson was required to issue a public report on the settlement at the conclusion of the investigation, or, in lieu of this report, the parties could agree to publicly disclose a written summary of the complaint, investigation and the settlement. Notably, this joint disclosure had to be approved by the Ombudsperson in light of the draft Act's mandate to improve transparency and accountability.[195]

Finally, following the conclusion of an investigation, reports and follow-up reports would have been made public and shared with relevant international bodies as well as the federal Parliament.[196] When issuing these reports, the Ombudsperson would have had the discretion to deem sources, information or evidence obtained in the investigation confidential for reasons of privacy, commercial sensitivity, privilege or safety.[197] However, the Ombudsperson would also

[191] *Ibid*, s. 13.4.
[192] *Ibid*, ss. 13.5-13.7.
[193] *Ibid*, ss. 6.8-6.10.
[194] *Ibid*, s. 6.5. A complainant can also ask for reconsideration for the refusal to investigate. The Ombudsperson would also have extensive provisions directing the Ombudsperson's exercise of discretion to suspend an investigation where the human rights concerns have also been brought to a Canadian or foreign court: s. 7.
[195] *Ibid*, s. 11.8.
[196] *Ibid*, ss. 13.9-13.12.
[197] *Ibid*, s. 10.

have had the discretion to weigh these confidentiality concerns against the public interest in disclosure.[198]

6.5 Potential Sanctions

The draft *Business and Human Rights Act* would have equipped the Ombudsperson with the power to recommend a limited set of sanctions. This power would have been triggered where the proposed Ombudsperson was not satisfied that the company had taken, or was undertaking, all reasonable steps to comply with either the terms of a settlement or any recommendations. In these circumstances, the Ombudsperson could have recommended to any and all government agencies or departments that they withdraw any existing support or subsidy and terminate any promotion or protection of the company or the project for a stipulated period, or until specific conditions were met.[199] If the company was not currently receiving any such support, the Ombudsperson could have recommended that it be deemed ineligible for future support. In limited circumstances, the draft Act would have allowed the Ombudsperson to recommend sanctions of this nature before giving the company a chance to comply with recommended remedies. This route would only have been available where the Ombudsperson had found harms of such a serious nature that it would be inappropriate for the Government of Canada to provide the company with support.

Finally, the proposed legislation included a limited enforcement mechanism in relation to these narrow sanctions. If the Ombudsperson believed that the government has failed to implement the recommended sanction within the stipulated timeframe, they could serve the government body in question with a notice of non-compliance, requiring it either to establish that it had complied, or to provide reasons for its actions or inactions.[200] Upon receipt of a government response, the Ombudsperson could have then applied to Federal Court for judicial review of the reasonableness of the response. Complainants would have had the opportunity to appear as a party to the review with funding for their reasonable legal expenses.[201] In sum, the proposed legislation allowed for potential enforcement (judicial review) only with respect to a decision on the part of the Canadian

[198] *Ibid*, s. 10.6. A person who might be affected by the Ombudsperson's decision to disclose otherwise confidential information in the public interest may apply to Federal Court for judicial review.
[199] *Ibid*, s. 14.2.
[200] *Ibid*, s. 14.4.
[201] *Ibid*, s. 14.5.

government *not* to withdraw support and protection from a company that had violated human rights abroad.[202]

6.6 Analysis of the Draft Business & Human Rights Act

The CNCA's International Extractive Industry Ombudsperson draft legislation emerged as an important innovation and strategic maneuver in the debate over home state non-judicial grievance mechanisms in Canada. Among its strengths, three stand out. First, its standards drew directly from a large number of international human rights instruments. Second, it envisioned relatively strong investigation, participation and public reporting features. Third, it contemplated a strong prerogative for the Ombudsperson to issue, on the basis of case-specific findings, a potentially wide range of recommendations to the Canadian government, the complainant and the company in question with respect to remedies, policies and practices.

These strengths are countered by the draft Act's relative weakness in the area of enforcement. The proposed Ombudsperson had no power to enforce its recommendations with respect to its company-specific findings, including any recommended remedies. Its only recourse vis-à-vis a non-compliant company was to attempt to leverage the withdrawal of Canadian government support in order to pressure the company to comply with applicable recommendations. If the government were to refuse to comply with this effort, such leverage would only have been available if the Ombudsperson could convince a Canadian court that the government's refusal was unreasonable, under administrative law principles.

The CNCA's proposed Ombudsperson regime appeared to be organized around a calculated trade-off between strong independent investigations, public transparency and broad scope for recommendations on one hand; and on the other, very limited enforcement power, including no enforcement of recommended remedies and tenuous enforcement of recommended withdrawals of government support. Access to remedy under this regime would have depended entirely on the capacity of the Ombudsperson's findings and recommendations to generate public (including governmental) pressure on companies. The proposed legislation's (albeit weak) sanction feature could not directly result in remedies. Rather, it was solely directed at the public conscience, in the sense that, if successfully activated, it could eliminate state support for an offending company. The

[202] Further research is required to identify how Canadian administrative law principles might apply to the government's response to the Ombudsperson's recommendations more generally.

actual impact of such a sanction on any given company would likely depend significantly on the circumstances of the company, and perhaps even more significantly, on the nature of the withdrawal of state support. Recall that the concept of state supports articulated in the draft Act was very broad. At any rate, for companies that do not receive dedicated diplomatic or financial state support, the available sanction under the proposed regime would have been greatly limited.

7 The Canadian Ombudsperson for Responsible Enterprise (January 2018)

At first it seemed that the CNCA's strategic trade-offs in its model legislation had failed to render the desired results. This chapter began with a short description of a 2017 activist protest demanding government action on the CNCA's proposal. The protestors' frustration stemmed in part from the governing Liberal Party's representations during the 2015 election campaign. At that time, Liberal Party documents professed to share "Canadians' concerns about the actions of some Canadian mining companies operating overseas" and claimed it had "long been fighting for transparency, accountability and sustainability in the mining sector."[203] The Liberals promised to ensure that corporations engaged in resource extraction with government support respect international environmental standards and human rights, including by setting up an independent Ombudsperson office to consider complaints made against Canadian companies and to investigate those complaints where warranted.[204]

During the first two years of their four-year mandate, the Liberals failed to make good on these promises in two consecutive budgets.[205] After being elected, key federal Ministers declined to say that change was needed and refused to publicly reiterate their Party's pre-election commitments.[206] Then, in Fall 2017, the government took an unexpectedly active interest in the issues when the federal Parliamentary Subcommittee on International Human Rights decided to convene hearings on human rights and resources extraction in Latin America.

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[203] Cumming J, What the Liberals, Greens and NDP Have to Say on Mining in Canada. *Huffington Post* (5 October 2015), http://www.huffingtonpost.ca/john-cumming/mining-canada-federal-election_b_8235824.html.
[204] *Ibid*, p. 2.
[205] Canadian Network on Corporate Accountability, Canadian Network Expresses Concern that Federal Budget does not Mention Human Rights Ombudsperson, Press Release, 22 March 2017, http://cnca-rcrce.ca/recent-works/press-release-canadian-network-expresses-concern-that-federal-budget-does-not-mention-human-rights-ombudsperson/.
[206] Mazereeuw P (2016) Liberals 'Seriously' Considering Mining Ombudsperson, says Federal Corporate Social Responsibility Adviser. The Hill Times, https://www.hilltimes.com/2016/11/09/feds-seriously-considering-mining-ombudsman-says-canadas-corporate-social-responsibility-envoy/86691.

However, after several weeks of hearings, the CNCA sent an urgent letter to the subcommittee, raising serious concerns that the hearings were skewed.[207] In addition to calling very few civil society representatives, the committee ultimately declined to call any witnesses representing: Indigenous peoples and affected communities in Latin America, experts on Canada's international human rights obligations, and the proponents and legal experts behind the CNCA draft legislation.[208] The 2017 hearings were a marked departure from the 2005 SCFAIT hearings, which had invited a relatively wide range of perspectives including from human rights experts, a spectrum of civil society representatives and affected communities.[209]

As the subcommittee hearings wrapped up, advocates argued that they had been "designed to justify the do-nothing status quo" and that the process had precluded any critical examination of Canada's current policy.[210] Then, unexpectedly, this dismal assessment of the political moment was abruptly cast into doubt. In the final weeks of 2017, government officials told Canadian media that plans were underway to announce a change to Canada's CSR policies in the area of extractive industries abroad.[211] On January 17, 2018, the Minister of International Trade made good on this promise and announced his intention to create the Canadian Ombudsperson for Responsible Enterprise (CORE) as part of the government's "progressive trade" agenda.[212]

While the announcement involved only a few specific details, it is clear that the government's CORE mechanism will adopt many of the features proposed in the CNCA's *Business*

[207] Letter from Canadian Network on Corporate Accountability to the Members of the Canadian Parliamentary Subcommittee on International Human Rights, 19 October 2017 (on file with author).
[208] House of Commons, Subcommittee on International Human Rights (2017) Human Rights Surrounding Natural Resource Extraction within Latin America, https://www.ourcommons.ca/Committees/en/SDIR/studyactivity?Studyactivityid=9618050.
[209] House of Commons Standing Committee on Foreign Affairs and International Trade (2005) Mining in Developing Countries: Corporate Social Responsibility. 38th Parl, 1st Sess, 14th Rep, http://www.ourcommons.ca/documentviewer/en/38-1/FAAE/report-14, Appendix A.
[210] Moore J, House subcommittee hearings on mining in Latin America a public disservice: The committee hasn't heard from people most directly affected by Canadian mining operations in the region. The Hill Times, Opinion, 18 October 2017, https://www.hilltimes.com/2017/10/18/house-subcommittee-hearings-mining-latin-america-public-disservice/122327.
[211] Mcsheffrey E, Trudeau government may dig up the truth about Canadian mines. National Observer, 6 December 2017, https://www.nationalobserver.com/2017/12/06/news/raids-incarceration-and-decimated-indigenous-land-stains-canadas-reputation.
[212] Global Affairs Canada, The Government of Canada brings leadership to responsible business conduct abroad, News Release, 17 January 2018, https://www.canada.ca/en/global-affairs/news/2018/01/the_government_ofcanadabringsleadershiptoresponsiblebusinesscond.html (last accessed 25 January 2018).

& Human Rights Act.[213] For example, the forthcoming Ombudsperson will be mandated to independently investigate allegations of human rights abuses abroad against Canadian companies operating in the mining, oil and gas, or garment industries. The Ombudsperson will be empowered to compel documents, report independently, recommend remedy and monitor implementation. This includes recommendations for compensation, corporate policy changes and apologies, where appropriate. The Ombudsperson will also have the power to recommend changes to government policy and/or the withdrawal of trade advocacy support and Export Development Canada financial support. To support the development of the Ombudsperson's mandate and operating procedures, a Multi-Stakeholder Advisory Body (MSAB) of experts from business and civil society will be put in place. The MSAB will counsel the government on the further development of its laws, policies and practices with respect to business and human rights.

8 Conclusion & Future Research

There are many details to work out following the Canadian government's early 2018 announcement of its intention to create a Canadian Ombudsperson for Responsible Enterprise (CORE). However, there can be no doubt that this new home-state non-judicial grievance mechanism will be globally unprecedented and appears to signal a sea change in Canadian law and policy. It is also absolutely clear that this turn of events is a direct result of nearly two decades of Canadian activism, in collaboration with partner organizations, affected communities and human rights defenders around the world. The Minister of International Trade actually acknowledged and celebrated Canadian advocates in his public address announcing the CORE.

This chapter has examined how Canadian advocates employed law and politics to address concerns with global economic injustice in the Canadian resource sector. Four main strategies emerge from this account. First, advocates worked with affected communities abroad to document harms allegedly connected to Canadian extractive projects. In doing so, they compiled detailed case studies of social, economic and environmental harm, as well as studies based on aggregate data on infringements of civil liberties. Some case studies led to litigation in Canada, which in turn helped establish the credibility of advocates' allegations of harms. In developing their account of

[213] Global Affairs Canada (2018) Responsible business conduct abroad – Questions and answers, http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/faq.aspx?Lang=eng (last accessed 25 January 2018).

the nature of the problem, advocates also tracked the practices and policies employed by the Canadian state to support Canadian companies abroad. In this area, they identified insufficient government transparency, accountability, and even practices that appeared to exacerbate harm or the risk of harm.

Second, advocates engaged with Canada's voluntary CSR mechanisms, including by assisting affected communities to bring complaints. This generated the data necessary to critically examine these mechanisms' performance and outcomes. Advocates also critically analyzed the government's CSR policy normatively, against criteria for effectiveness, as well as politically, in relation to the CSR Counsellor's judgment and capacity to facilitate dialogue with civil society.

Third, advocates presented their concerns with respect to Canadian companies' conduct and Canadian state practices and policies to a wide range of international human rights bodies. These bodies in turn sought representations from the Canadian state and in some cases industry representatives or companies themselves. In their statements, international bodies were unified and categorical in their conclusion that Canada was falling short of its international law obligations in this area and that reform was necessary.

Advocates appealed to this body of data, reports and normative statements in order to pursue a fourth strategy, building a compelling case for law reform in Canada. To do so, they developed and advanced concrete reform proposals through a number of formal channels: parliamentary committee hearings, multi-stakeholder roundtables, legislation proposals to Parliament from opposition members, and finally through draft legislation proposed directly to the Liberal majority government. In the process, advocates consistently refined their law reform proposals, ultimately trading strong transparency and investigatory powers for weak or no enforcement powers.

Importantly, advocates also used political methods to advocate for their proposals. References to many of these tactics appear throughout this chapter: coalition building, speaking tours, documentary films, opinion editorials, open letters to high ranking officials, rallies, sit-ins and petitions. The main objective was to convince law makers, and the broader Canadian public, that Canada needs an effective non-judicial grievance mechanism and laws to condition state support for resource companies on compliance with human rights standards.

Running through all of these strategies is advocates' larger strategic decision to coalesce their efforts around calls for an effective home-state non-judicial grievance mechanism. From one

perspective, this kind of mechanism is attractive because, relative to judicial mechanisms, it is a potentially less expensive, more accessible avenue for seeking mediated solutions and remedies in the jurisdiction that theoretically has the strongest institutions and the most power vis-à-vis companies. From a critical legal studies perspective, perhaps the most interesting feature of the mechanism now emerging in Canada is its potential capacity to expose the political, economic and legal relationship between a capital-exporting country and its transnational corporations. One important feature of the Canadian debate has been a consistent focus on state supports for companies and the legal frameworks that govern these supports.

However, at this critical point of transition and on the eve of a new status quo, there are unsurprisingly many unanswered questions. Two of these are worth mentioning here. First, it is uncertain that the emerging Canadian non-judicial grievance mechanism will actually be effective. As already observed, it represents a clear trade-off between strong investigatory and disclosure powers and zero power to enforce recommendations or remedies that benefit communities. It remains to be seen whether or not transparent and independent investigations, based on a full record of evidence, will on their own be able to improve the situation of affected communities or secure remedies in practice. While the government has now conceded that a purely voluntary approach is not effective, the question of what constitutes an effective home-state non-judicial mechanism is far from settled. In fact, with the government's announcement of a forthcoming Ombudsperson, this debate is really only beginning in Canada. As before, empirical evaluations of the mechanism's performance will be important. Another important future area of research will be to develop a clear normative framework for evaluating the effectiveness of home-state non-judicial grievance mechanisms, based on accepted principles of international law as well as on experience with their implementation. [214]

The Canadian government's announcement also neatly skirts a second line of questioning, one that has been lurking in the background for some time now. The Canadian debate on the terms and conditions that should govern the state's political, legal and economic support for companies

[214] A starting point for the development of such a framework would be the *Guiding Principles,* UN OHCHR, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UN Doc HR/PUB/11/04(2011); and the *Maastricht Principles,* ETOs for human rights beyond borders (2013) Maastricht principles on extraterritorial obligations of states in the area of economic, social and cultural rights. Http://www.etoconsortium.org/en/main-navigation/library/maastricht-principles/. The *Guiding Principles* have been widely endorsed by states while the *Maastricht Principles* are preferred by many human rights organizations. Further analysis on the substantive convergences and differences between these documents on the topic of non-judicial grievance mechanisms would be useful.

is also only just beginning. The Ombudsperson discussion to date has focused on investigating company misconduct and withdrawing existing political and economic supports or denying future supports. However, advocates' research to date has indicated that there are serious issues with state due diligence at the outset, before support is provided. There are also unanswered questions about the norms that should govern state support and how the Canadian public can satisfy itself that public officials and agents are abiding by these norms.

Moreover, to date the Canadian debate has focused primarily on diplomatic and financial support (loans) for companies. However, this focus must not distract from the many ways in which the Canadian government facilitates and enables global markets and the resources extraction industry in particular.[215] There are many other legal regimes that constitute and support companies and more research is needed to identify how state supports could be addressed in these other areas. At stake is the nature of the relationship between the state and the transnational corporation, as well as the state's obligations to further the public interest, social justice and the protection of human rights.[216]

For the moment though, the commitment, creativity and tenacity of Canadian advocates must be celebrated. After nearly 20 years of sustained advocacy they have accomplished an incredible feat in moving Canadian policy from voluntary mediation to a mandatory investigation approach to alleged human rights violations abroad. Undoubtedly, the Canadian experience offers a wealth of materials for advocates around the world who seek to pressure their home states to regulate the human rights impacts of their companies' overseas operations. At the same time, it is difficult to identify a single lesson or strategy that was most important in the Canada debate. The most plausible answer is that they were all important and perhaps even essential.

This being said, the account put forward in this chapter does reveal that three important factors converged in the two years prior to the government's decision to change its long standing voluntary CSR policy: the publication of the 2016 JCAP report aggregating data on violence in Latin America over a 15 year period; the 2016 launch of the CNCA's draft *Business & Human Rights Act*; and the proliferation of strong statements from numerous international human rights bodies between 2016 and 2017. While the election of a new government was important, the Liberal Party's delay and clear reluctance to make good on its campaign promises indicates that a new

[215] Simons and Macklin (2014); Kamphuis (2012).
[216] Drache (2001); Augenstein and Kinley (2015); Spiro (2013).

government alone was certainly not sufficient. In the end, perhaps two things are certain: that the experiment with law's capacity to create a more just global economy is only just beginning, and that partnership between legal researchers and social justice advocates is a critical part of the journey.

CHAPTER FIVE: The Transnational Mining Justice Social Movement: Reflecting on Two Decades of Law Reform Activism in the Americas

- **Charis Kamphuis**

Abstract

In this article, I consolidate research that tracks the activism of the mining justice social movement from the late 1990s to present. As a starting point, I conceptualize this movement as a transnational political project that seeks to transform the terms of corporate resource extraction pursuant to the political and legal arrangements of neo-liberal economic globalization. In this context, I reflect on the movement's most significant human rights-oriented law reform projects in the Americas: Indigenous right to consultation legislation in several Latin American countries, and a series of non-judicial grievance mechanisms in Canada, in response to the right to remedy norm in international law. Drawing on existing research, I conclude that in both cases the state has responded with law and policy reforms that fall far short of achieving advocates' objectives. I argue that these shortcomings are due in part to the persistence of three liberal/neo-liberal ideologies in the reforms in question: formalism, voluntarism and privatism. To better understand and explain these findings, I turn to three critical theories of human rights legal activism: pragmatism, left critique/critical legal liberalism and counter-hegemony. I examine the work of a range of scholars writing under the banner of each theory in order to identify key debates and insights that may be instructive as the mining justice movement, and related social and environmental justice movements, continue to aspire toward a law reform agenda capable of addressing pressing global environmental and social justice issues.

1 Introduction

The legal instruments associated with economic globalization, including foreign investment agreements, global markets and trade agreements, have significantly facilitated foreign resource extraction and imbued it with particular geographic patterns. The majority of mining companies operating globally are headquartered in Canada, making it an important "home country" for companies.[1] At the same time, almost half of these Canadian companies' activities take place in resource rich countries in Latin America, sometimes referred to as "host countries".[2] The social conflicts that extraction often generates between local communities and foreign companies are increasingly trans-border in that they may implicate home and host states, investors, NGOs, lawyers, journalists and researchers in multiple jurisdictions.

[1] See for example: UN OHCHR, *Statement at the end of visit to Canada by the United Nations Working Group on Business and Human Rights* (1 June 2017), online: *OHCHR* <http://www.ohchr.org/EN/newsevents/Pages/displaynews.aspx?Newsid=21680&langid=E>.

[2] The Mining Association of Canada, "Facts and Figures of the Canadian Mining Industry: F&F 2016" (2016) at 81, online (pdf): *MAC* <http://mining.ca/sites/default/files/documents/Facts-and-Figures-2016.pdf>.

I use the term "transnational mining justice social movement" to refer to the alliances and coordinated practices that result when mine-affected communities search for legal remedies or law reform in collaboration with trans-border networks. This article reflects on two of this movement's key law reform projects in the last twenty years: Indigenous right to consultation/consent legislation in Latin America and right to remedy legislation in Canada.[3] In undertaking this reflection, I draw on my experiences and observations accumulated over more than ten years participating in the movement, as a Canadian advocate, lawyer and an academic, who has also lived and worked in Latin America.[4] My participation in the movement has included academic publications alongside close work with civil society organizations in Canada and Latin America, as well as advocacy for the law reforms and/or the underlying rights claims that I study here.[5]

In this article's *second part*, I refer to literature on social movements in order to identify the political and institutional aspects of the mining justice movement's engagement in law reform activism as a means for changing the terms, conditions and relations of neo-liberal globalization that characterize the dominant model of resource extraction.[6] Advocates and affected communities

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[3] In identifying the prominence of these projects in terms of the attention and resources they have received from advocates within the movement, I do not assume that there was or is a consensus within the movement about these proposed reforms. I do my best to capture this nuance throughout this article.

[4] The community-based lawyering tradition calls for critical reflection on one's social location and epistemological assumptions in relation to the communities one seeks to support: Shin Imai, "A Counter-Pedagogy for Social Justice: Core Skills for Community-Based Lawyering" (2002) 9:1 Clinical L Rev 195. In 2011 I co-founded the Justice & Corporate Accountability Project (JCAP), a Canadian organization that provides legal support to resource-affected communities and their allies in a framework of community self-determination, community-based lawyering and corporate and state accountability.

[5] For some examples of my public and collaborative statements on these issues, see: Charis Kamphuis, Shin Imai & Juan Carlos Ruiz Molleda, "Comunidad de San Andrés de Negritos vs. Minera Yanacocha: ¿Como despojar a comunidad campesina de su territorio para favorecer a la megaminería? *Instituto de Defensa Legal* (May 31, 2019) online: https://idl.org.pe/comunidad-de-san-andres-de-negritos-vs-minera-yanacocha-como-despojar-a-comunidad-campesina-de-su-territorio-para-favorecer-a-la-megamineria/; Charis Kamphuis, "Why does Justice Trudeau succumb to corporate pressure?" *The Conversation* (May 5, 2019) online: https://theconversation.com/why-does-justin-trudeau-succumb-to-corporate-pressure-116134; Shin Imai & Charis Kamphuis, "Canadian government promises stronger monitoring of Canadian companies operating abroad" *Due Process of Law Foundation* (Washington, January 2018), online: Https://dplfblog.com/2018/01/30/canadian-government-promises-stronger-monitoring-of-canadian-companies-operating-abroad/; Penelope Simons, Shin Imai & Charis Kamphuis, "Independent accountability needed for Canadian mining companies abroad" *The Hill Times* (Ottawa, March 15, 2017), online: https://www.hilltimes.com/2017/03/15/independent-accountability-needed-canadian-mining-companies-abroad/98982.

[6] Fábio De Castro, Pitou Van Dijck & Barbara Hogenboom, "The Extraction and Conservation of Natural Resources in South America: Recent Trends and Challenges" (2014) at 6-7, online (pdf): *Centre for Latin American Research and Documentation (CEDLA)* <http://www.cedla.uva.nl/50_publications/pdf/cuadernos/cuad27.pdf>; UN Economic Commission for Latin America and the Caribbean (ECLAC), *Foreign Direct Investment in Latin America and the Caribbean, 2016*, UN Doc LC/G.2680-P, (Santiago, 2016) at 107, online (pdf): <https://repositorio.cepal.org/bitstream/handle/11362/40214/6/S1600662_en.pdf>.

have argued that the state's regulation of transnational mining is inadequate and that mining companies are not properly held to account for harm that may flow from their actions and operations.[7] They argue that companies are able to violate human rights and degrade the environment with impunity, while unjustly accumulating enormous wealth. They believe that states and companies have repressed legitimate critiques of, and opposition to, these practices.[8] This compels them to employ a number of political and legal tactics, including a turn to law reform advocacy an effort to address their concerns. While my social movement approach highlights the significance of the movement's fundamental normative positions, it does not presume consensus on the goals or the appropriate strategies or tactics.[9]

In this article's *third part*, I examine the mining justice movement's efforts to advance two related justice-oriented law reform agendas in both home and host countries. The first achievement builds on advances in the inter-American human rights system with a body of jurisprudence, first initiated in 2001, that recognizes Indigenous collective property rights in relation to resource extraction. As countless resource-related protests, blockades, and domestic lawsuits unfolded across the Americas, beginning in 2011 several Latin American countries passed national legislation that purported to codify Indigenous communities' rights to free, prior and informed consultation in relation to government decision-making about resource extraction.[10]

The second achievement profiled here is related, and follows a similar temporal trajectory, albeit in the northern half of the Americas. In the late 1990s, the question of effective remedies for harms caused by Canadian resource companies overseas became a topic of discussion in Canada among federal public officials, and beginning in 2005 it became the subject of a series of law reform

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[7] Penelope Simons & Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage* (New York: Routledge, 2014).

[8] OAS, Inter-American Commission on Human Rights, *Criminalization of the Work of Human Rights Defenders* OROEA/Ser.L/II.Doc.49/15 (2015) at paras 48-50; Global Witness, "On Dangerous Ground: The Killing and Criminalization of Land and Environmental Defenders Worldwide" (20 June 2016) at 5, online (pdf): *Global Witness* <https://www.globalwitness.org/en/campaigns/environmental-activists/dangerous-ground/>.

[9] Social movement scholars and participants alike are well aware that movements often encompass a diversity of positions with respect to the normative goals of the movement and the appropriate, necessary or effective tactics. As such, the general statements offered in this article provide a contextual description of the movement based on my research and observations, without purporting to definitively define its ideals and without assuming a consensus.

[10] In Peru this legislation is general and in theory captures all areas of state decision-making, but other Latin American countries with right to consultation legislation have made it sector-specific, applying only to particular forms of resource extraction or infrastructure development: see Roger Merino and Carlos Quispe "Consulta previa y participación ciudadana en proyectos extractivos. Los límites de la gobernanza ambiental" (2018) Escuela de Gestión Pública de la Universidad del Pacífico, *Policy Brief* N° 5, online: https://www.up.edu.pe/egp/Documentos/Policy-Brief-05.pdf

proposals and federal policy statements. These efforts culminated in 2019 when the Canadian government created the Canadian Ombudsperson for Responsible Enterprise (CORE), a mechanism that purports to improve access to remedies for individuals and communities harmed by the overseas operations of Canadian companies.

While acknowledging these important achievements, my concern in this article is also with their limitations (at least to date) from the point of view of the objectives of the mining justice movement and the advocates and communities who have pushed for these changes. After nearly twenty years of sustained and focused transnational activism on these issues, research and critical analysis indicate that the resulting law reforms fall short of generating material and meaningful improvements in the circumstances of the communities they seek to benefit. Given the powerful social and political mobilizations behind these reforms, this observation compels deeper inquiry and reflection in an effort to more fully conceptualize and explain these achievements and limitations.

With an analysis that brings my chosen case studies into conversation, I identify three key themes in the movement's law reform outcomes that signal the persistence of problematic classical liberal and neo-liberal ideologies and legal forms.[11] These are: (1) a formal equality view of relations between companies, communities and civil society actors (*formalism*); (2) a view of state and company obligations as voluntary/unenforceable (*voluntarism*); and (3) a view of the state as a private actor, solely or primarily concerned with promoting private economic interests, instead of as a public regulator acting in the public interest (*privatism*). To the extent that the movement has sought to address these three issues at the outset in its law reform proposals, it has been unsuccessful in influencing the final result, fashioned and approved by lawmakers.

In *part four*, I review the work of theorists across the disciplines of political science, law & society, history and international relations who are similarly interested in examining how progressive political projects engage in legal activism in their efforts to create a more just society. I identify three frameworks that grapple with this issue: (1) pragmatism, (2) left critique / critical legal liberalism, and (3) counter-hegemony. Under the banner of each approach, the theorists reviewed in this section share a common interest in activists' use of liberal legal constructs to pursue political projects built upon principles and values that are critical of some of liberalism's

[11] See section 3.B.1 for a definition of liberalism and see section 3.C.1 for a definition of neo-liberalism.

foundational frameworks. This review of each approach is by no means comprehensive, but rather represents a sampling of key concepts, priorities and critiques.

My approach to each theoretical framework follows a similar method. I begin by summarizing the contribution of each author in order to identify key points of consensus and debate. With this foundation, I put each theoretical approach into dialogue with my empirical observations about the mining justice movement's law reform efforts (described in Part 3). The objective of this exercise is to draw insights from each approach in order to better understand the achievements and limitations that emerge from the mining justice movement's 20-year experiment with law reform-oriented activism.

This article's transnational lens on the movement's sustained engagement with domestic law reform in Canada and Latin America offers an important opportunity to examine law's potential as a tool in the pursuit of a more just global economic system. The successes of the progressive activists studied here deserve recognition and celebration, while their setbacks warrant careful reflection. In conclusion I reflect on the common themes and debates that appear to cut across all three theoretical traditions and I explore some potential pathways forward in light of my reflection on the experiences, knowledge and strategies accumulated by the mining justice movement to date.

2 Transnational Lawyering & the Social Movement Context

Social movement lawyers agree that one's approach to lawyering must be informed by the nature of the actors and issues at play.[12] This position stands against an approach that articulates the legal professional's tasks and obligations in accordance with a generic set of standards and procedures, regardless of context. In their work on "cause lawyering", Austin Sarat and Stuart Scheingold argue that conventional ideas of legal professionalism are challenged where a lawyer has a personal commitment to the cause underlying the legal work being performed.[13] They further

[12] Imai, *supra* note 4; Deena R Hurwitz, "Lawyering for Justice and the Inevitability of International Human Rights Clinics" (2003) 28:2 Yale J Intl L 505; Caroline Bettinger-Lopez et al, "Redefining Human Rights Lawyering Through the Lens of Critical Theory: Lessons for Pedagogy and Practice" (2011) 18:3 Geo J on Poverty L & Pol'y 337; Gerald Lopez, "Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice" (2005) 73:5 Fordam L Rev 2041.
[13] Austin Sarat & Stuart Scheingold, eds, *Cause Lawyering: Political Commitments and Professional Responsibilities* (New York: Oxford University Press, 1998).

assert that when "cause lawyers" begin to work for social movements, the departure from conventional approaches to lawyering becomes even more profound and complex.[14]

Sarat and Scheingold rely primarily on the work of Charles Tilly to define a social movement in terms of its ability to generate a "sustained series of interactions between power holders and persons successfully claiming to speak on behalf of a constituency lacking formal representation".[15] In Tilly's conception, these interactions are notable for their capacity to make "publicly visible demands for changes in the distribution or exercise of power".[16] Further, in his view a social movement is also marked by its ability to mobilize public demonstrations of support for its demands. To this definition, Sarat and Scheingold add that social movements are "concrete and embodied" in the people, organizations and actions that constitute them.[17]

Social movements are also defined by their transcendence of any particular place, event, institution or individual. Although interest groups (understood primarily as advocacy organizations) participate in, and act as conduits of, social movements, a movement cannot be reduced to these organizations.[18] Reading Tilly together with the work of political scientist Michael McCann, Sarat and Scheingold take the view that a social movement is an expression (a "collective voice") of political protest and *moral vision*[19] that leads its participants to seek the social and political transformation of their society in the hope of creating a better society.[20]

Drawing on the work of Sarat and Scheingold, it is clear that the actors, concerns and legal strategies analyzed in this article constitute elements of a broader, and considerably consolidated, social movement, defined in part by its dissent to, criticism of and/or protest against what are viewed as the unjust consequences of foreign mining activities in developing countries. This mining justice movement is made up of affected communities, faith groups, not-for-profit

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[14] Austin Sarat & Stuart Scheingold, "What Cause Lawyers Do *For*, and *To*, Social Movements: An Introduction" in Austin Sarat & Stuart Scheingold, eds, *Cause Lawyers and Social Movements* (Stanford: Stanford University Press, 2006) 1 at 2 [Sarat & Scheingold].

[15] Charles Tilly, "Social Movements and National Politics" in Charles Bright & Susan Harding, eds, *Statemaking and Social Movements* (Ann Arbor: University of Michigan Press, 1992) 297 at 306 cited in Sarat & Scheingold, *ibid* at 2.

[16] Tilly, *ibid.*

[17] Sarat & Scheingold, *supra* note 14 at 2.

[18] *Ibid* at 8.

[19] *Ibid* at 8 citing Tilly, *supra* note 15.

[20] Sarat & Scheingold draw on Michael McCann's chapter "Law and Social Movements" in Austin Sarat, ed, *The Blackwell Companion to Law and Society* (London, UK: Blackwell Publishing, 2004) 506. Other works of interest by McCann on this topic are: Michael McCann, "Law and Social Movements: Contemporary Perspectives" (2006) 2 Ann Rev L & Soc Sci 17; and Michael McCann, *Law and Social Movements: International Library of Law and Society*, vol 15 (New York: Routledge, 2016).

organizations, labour unions, lawyers, academics and journalists, located in numerous countries in both the global North and South. No single group or community represents this movement and groups work together through a series of overlapping and fluid networks. The advocacy and dissent tactics adopted by this movement include civil disobedience, media strategies, letter writing campaigns, research and report writing, law reform efforts, litigation, complaints to domestic and international bodies, and various kinds of appeals directly to company executives or investors.[21] The interface between some of these tactics and the law is the precise focus of this study.

This diversity of tactics indicates that the members of the movement have specialized roles and a range of proximities to the issues. Mine-affected communities in the global South, including Indigenous communities, are on the front lines of the impacts of industrial mining. They often receive direct support from local civil society organizations, including not-for-profits, faith groups and unions. These local groups bear witness to the concerns of mine affected communities, provide information and resources, and assist in articulating communities' objectives. Moreover, they often liaise with their civil society counterparts in a developing country's capital city and/or in the global North, sharing information and developing research, communication and advocacy strategies. Academics and journalists in both the North and the South are embedded in these civil society relations, with a specialized role due to their training in credible and independent research methods, and their capacity to disseminate research and information to the public and policy makers. Finally, lawyers in the global North and South may work with all of these groups, providing legal advice and translating communities' concerns into legal claims that have traction with adjudicators, public authorities and company executives.

In this way, this movement's actors have been able to sustain interactions with both international and domestic law and policy makers in multiple jurisdictions, as well as in some cases with corporate executives. These interactions have led to a growing list of law reform initiatives in a number of domestic contexts, together with institutional policy and normative responses in diverse international and domestic arenas.[22] Moreover, these interactions, initiatives and responses

[21] See Charis Kamphuis, "Home-State Grievance Mechanisms: Law Reform Strategies in the Canadian Resource Justice Movement" in Isabel Feichtner & Markus Krajewski, eds, *Human Rights in the Extractive Industries: Transparency, Participation, Resistance* (Cham, Switzerland: Springer, 2019) 455-509 [Kamphuis, "Home-State Grievance Mechanisms"].

[22] For some European examples see law reform work of the European Network for Corporate Accountability. For some examples from Canada and international bodies, see Charis Kamphuis & Leah Gardner, "Effectiveness Framework for Home-State Non-Judicial Grievance Mechanisms" in Amissi M Manirabona & Yenny Vega

often overlap with the activities of other interrelated movements, including most notably those concerned with the intersection between transnational corporate activity and human rights more generally, and with other specific industries or sectors, such as for example the garment industry. There is also considerable overlap between the mining justice movement and Indigenous peoples' movements as well as with the environmental and labour movement, especially those elements concerned with other forms of resource extraction, such as petroleum and forestry.[23]

In spite of the overlapping nature of these movements, it is possible to identify a discrete trans-border movement specifically concerned with the impacts of industrial mining on communities in the global South and the capacity of these communities and their allies to dissent to these mining practices. This movement appears to coalesce more or less around a critique of neo-liberal globalization, along with a loosely shared moral vision, often articulated with one or more of the following concepts or principles: corporate accountability/responsibility, environmental sustainability, business respect for human rights, and Indigenous rights to consultation, consent, and self-determination. The movement's central objective is to articulate and implement new ways of formulating the relationship between the corporation, the state (both host and home states), and affected communities, in an effort to approximate socio-economic relations and environmental practices that are more just and sustainable.

This article focuses on ways in which movement actors have pursued this vision and translated it into concrete legal and advocacy strategies that aim to support two specific rights claims: (1) the Indigenous right to consultation/consent in relation to resource extraction, and (2) the right to remedy for corporate-caused harm in the resource extraction process and related activities such as security operations. As such, my approach here resonates with Sarat and Scheingold's concept of law as a "useful site for articulating and advancing alternative visions of the good."[24]

Having characterized in general terms the actors, issues and normative vision of the mining justice movement, the next step is to evaluate how this comes to bear on the movement's

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Cardenas, eds, *Extractive Industries and Human Rights in an Era of Global Justice: New Ways of Resolving and Preventing Conflicts* (Toronto: LexisNexis Canada, 2019) 75-100.

[23] For a study of the legal activism of the labour movement with a focus on trade agreement, see Ruth Buchanan & Rusby Chaparro, "International Institutions and Transnational Advocacy: The Case of the North American Agreement on Labour Cooperation" (2008) 13:1 UCLA J Intl L & Foreign Aff 129-160 [Buchanan & Chaparro, "Transnational Advocacy"].

[24] Sarat & Scheingold, *supra* note 14 at 9.

engagement with liberal legal forms. For Sarat and Scheingold, lawyering with a social movement raises a fundamentally political question: "what do cause lawyers do *for*, and *to* a social movement".[25] In this way, they conceive of lawyering as a political and social practice that will come to bear in some way on a political force (the movement) that is already in motion. In their view, law's utility as a tool for social movements depends on the ability of the movement (and lawyers) to "politicize the law" by strategically exploiting the cultural resonance of rights and legality.[26]

One contribution of this approach is its focus on the movement's political processes outside of law. Sarat and Scheingold understand social movement lawyering as an essentially political practice, where law is a political resource used by social movements as part of a series of strategic choices in a broader political struggle. This undoubtedly resonates with experiences in the mining justice movement, where communities frequently resort to protest and/or civil disobedience when other channels fail where specific legal arguments and lawsuits are only one part of a broader set of demands and justice concerns with respect to global resource extraction.

Yet this emphasis on politics outside of law highlights the need for its counterpart. In other words, a full exploration of the mining justice movement's achievements and limitations requires a theoretical frame that captures not only *the politics of how social movements use law in a broader political process*, but that also recognizes that *the identification and articulation of law by a social movement is itself a political act*. In other words, the theoretical perspectives explored in Part 4 all share a sensitivity to the ways in which lawyering with social movements involves making political and strategic choices both inside and outside of law. In the course of emphasizing the politicization of the law, Sarat and Scheingold seem to take for granted the fundamentally political question of the very content and form of the law. Although they insightfully point out that the lawyer's effective exploitation of the cultural resonance of legality is crucial for the movement, this point nonetheless circles around equally crucial questions of what law, in what form, and with what consequences for the movement's vision.[27]

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[25] *Ibid* at 3 [emphasis in original].
[26] *Ibid* at 10.
[27] For an interesting study of a movement's strategic choices with respect to adopting a particular legal frame in the domestic context to advance a cause (protecting a river), see: Laura Spitz & Eduardo Moises Penalver, "Nature's Personhood and Property's Virtues" (March 13, 2020), University of New Mexico School of Law Research Paper No. 2020-1.

While it is undoubtedly true, as Sarat and Scheingold state, that social movement lawyering significantly involves responding to decisions made by the movement, this study of the mining justice movement reveals that it is not often obvious, especially in the transnational context, what "right" should be claimed[28] and what form of law should be deployed. As a movement turns to the law, complex decisions must be made regarding how to translate its moral vision into legal argumentation and legal processes. The mining justice movement does not simply seek to access established rights, but rather is attempting to re-imagine the way that relationships are constituted and regulated in the global economy. Thus, while Sarat and Scheingold's pragmatic concept of "politicization" is useful in that it calls attention to some of the choices made in a movement's use of law as a political resource, it does only part of the conceptual work necessary to understand the translation of the movement's moral vision into legal formulas and strategies.

At this juncture, it is important to once again recognize that opinions have certainly varied among mining justice movement participants about the strategic value of the specific law reform proposals analyze here.[29] This highlights the comments above with respect to the political, internally contested and complex nature of a social movement's engagement with law. However, this disagreement does not detract from the fact that the proposals studied here are undoubtedly the most prominent developed by the movement over the last twenty years. They reflect a vision that has garnered broad civil society support in key moments, although the eventual state-controlled legal outcomes are criticized by many movement actors.

In sum then, two useful insights can be drawn from the work of Sarat and Scheingold. The first is the importance of characterizing the political context and the moral vision of a particular social movement. In response, I have made some general assertions about the mining justice movement. The second insight comes as a reminder to be attentive to the political decisions made by social movements outside of law, which includes the instrumentalization of law. In response, I have added that these decisions are often inextricable from political decision made inside of law, in relation to the form and content of the law to be deployed. This argument will be explored more fully in part three of this article.

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[28] *Ibid* at 10 (Sarat and Scheingold adopt a typology that suggests social movements are fundamentally involved in "rights claiming" at 10).

[29] In one study of transnational human rights activism that included interviews with advocates, the authors observed that the human rights lawyers involved were ambivalent but also pragmatic about the legal strategies they adopted: Buchanan & Chaparro, "Transnational Advocacy", *supra* note 23.

3 The Transnational Mining Justice Movement: 20 Years of Law Reform Activism

As indicated, this article analyzes the mining justice movement's use of litigation and law reform in two key areas. The first area captures an inter-related set of collective legal claims, namely to communal property rights and Indigenous rights to consultation and consent, that aim to modify the terms and conditions of the state's prerogative to privatize, and the companies' legal rights to exploit, natural resources. Several Latin American countries are currently leaders among developing countries in the area of constitutional Indigenous rights recognition and related law reform in the area of consultation.[30] The second area of legal activism refers to efforts to address the potential harm caused by a company's overseas operations, by advocating for the right to effective remedy and accessible mechanisms for redress in a company's home country. In this area, Canada, as the most important home state for mining companies globally, has been the site of significant law reform debate and innovation on the topic of access to remedies.[31] Interestingly, law reform debates and new developments in these two areas have unfolded almost contemporaneously in Latin American and Canada.

The interconnections between these two areas of mining justice advocacy makes this study all the more pertinent. These efforts have required the transnational mining justice movement to engage in legislative drafting of proposed new administrative and regulatory regimes in Canada and Latin America. In terms of related litigation efforts, lawyers in Canada have focused on bringing civil law claims, while efforts in Latin America have focused on constitutional Indigenous rights claims.[32] Taken together, these two areas of legal activism have typically involved framing the issues in relation to public international law and in terms of at least four fundamental rights claims: the right to property/land/resources, the right to consultation/consent, the right to free expression and association, and the right to remedy.

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[30] See Charis Kamphuis, "Contesting Indigenous-Industry Agreements in Latin America" in Dwight Newman & Ibironke Odumosu-Ayanu, eds, *Indigenous-Industry Agreements*, *Natural Resources, and the Law* (Routledge, 2020) [Kamphuis, "Contesting Indigenous-Industry Agreements"].

[31] See Coumans, *infra* note 53; Kamphuis, "Home-State Grievance Mechanisms", *supra* note 20.

[32] For one early study of transnational private law litigation as a mechanism for addressing human rights violations, see Craig M. Scott & Robert Wai, "Transnational Governance of Corporate Conduct through the Migration of Human Rights Norms: The Potential Contribution of Transnational 'Private' Litigation." In Christian Joerges, Inger-Johanne Sand & Gunther Teubner, eds, *Transnational Governance and Constitutionalism* (Oxford: Hart Publishing, 2004) 287.

More specifically, mining related conflicts are often framed as struggles over the terms and conditions of property relations between companies and affected communities. The issue of control and distribution of land, resources and wealth is often at the core of contestations over consultation/consent, and the very meaning of these concepts. When expressions of critique or opposition to mining are met with repression or coercive practices, activists often frame the issues in terms of the right to free expression and protest. Finally, when social and environmental conflicts escalate and companies become perpetrators of harm or are complicit, the movement has documented the problem of impunity and has invoked the right to remedy as the basis for fashioning novel transnational law regimes.

These interrelated rights claims, and the law reform efforts they underpin, are an important site of analysis because together they have constituted a dominant mode of political engagement by activists and local communities with the social justice issues raised by transnational resource extraction. In the remainder of this section, I draw on previous studies to synthesize and integrate my findings of the strategies, challenges and contradictions generated by activists' invocation of the aforementioned rights in an effort to advocate for the law reforms referred to above. Not only does this involve distilling the content of these rights claims, it also requires assessing the efficacy of these law reform strategies from the perspective of mining-affected communities, their justice concerns and the aforementioned moral vision of the movement. Drawing on my findings in a larger body of work, I analyze the ongoing presence of problematic liberal and neo-liberal ideologies and legal forms in the state-controlled laws that have resulted from the movement's efforts.

3.1 Indigenous Rights Recognition and Law Reform in Latin American "Host" Countries

The intensification and expansion of resource extraction in Latin America since the early 2000s has provoked opposition from many Indigenous peoples and affected communities. States and companies have not managed this opposition constructively and Indigenous leaders, human rights and land defenders have often faced threats, violence and repression in response to their opposition.[33] Communities and whole regions have often concluded that they have no choice but

[33] Jayalaxshmi Mistry, "Defending the environment now more lethal than soldiering in some war zones – and indigenous peoples are suffering most" *The Conversation* (5 August 2019), online:

to resort to protest and civil disobedience in order to defend their interests, environment and livelihoods. Alongside this phenomenon, and in response to litigation, inter-American human rights bodies and Latin American constitutional courts began to recognize a range of Indigenous rights in relation to resource extraction.[34] Then, beginning in 2011, and typically in response to protest, a handful of countries in the region enacted Indigenous right to consultation legislation, often specifically focused on resource-related decision-making. These major achievements in the areas of judicial recognition and law reform represent a relatively rapid transformation of the normative landscape in the Americas in relation to Indigenous peoples, territory and resources, especially at the domestic level.

However, close and applied study reveals that these normative advances in Latin America in the areas of free, prior and informed consultation/consent, collective property and equitable compensation, are precarious in practice, especially in relation to foreign resource extraction. One fundamental issue is that the recognition of these rights in constitutional and/or international law has for the most part ignored the question of how they might be claimed and enforced in practice.[35] Critically, rights recognition has not included related reforms to the procedural rules that establish the specific processes whereby Indigenous rights might be claimed and potentially enforced. This observation applies to both the Inter-American legal system as well as Latin American constitutional law.

Inter-American human rights law requires Indigenous communities to exhaust internal remedies before bringing a petition to the Inter-American Commission or Court on Human Rights against a member state. However, in practice communities often find it extremely difficult to identify and/or access appropriate domestic remedies or pathways to remedies. If communities seek an exception to the exhaustion of remedies rule for the purposes of pursing their claim in the

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<https://theconversation.com/defending-the-environment-now-more-lethal-than-soldiering-in-some-war-zones-and-indigenous-peoples-are-suffering-most-118098>.

[34] See *Mayagna (Sumo) Awas Tingni Cmty v Nicaragua* (2001) Merits, Reparations, and Costs, Judgment, Inter-Am Ct HR (Ser C) No 79 at para 148 [*Awas Tingni*]. *Awas Tingni* was the first indigenous rights claim brought to the Inter-American Commission. The petition was filed in 1995 and the Court issued a final judgment in 2001. See Charis Kamphuis, "Litigating Indigenous Dispossession in the Global Economy: Law's Promises and Pitfalls" (2017) 14:1 Brazilian J Intl L 165 [Kamphuis, "Litigating Indigenous Dispossession"] for a reference to many of the Indigenous rights cases in the Inter-American system since *Awas Tingni*. For a summary of Latin American jurisprudence on the Indigenous right to consultation, **see** María Galvis & Ángela Ramirez, *Digesto de jurisprudencia latinoamericana sobre los derechos de los pueblos indígenas a la participación, la consulta previa y la propiedad comunitaria* (Washington, DC: Fundación del Debido Proceso, 2013).

[35] Kamphuis, "Litigating Indigenous Dispossession", *supra* note 33; Kamphuis, "Contesting Indigenous-Industry Agreements", *supra* note 30.

inter-American system, they then incur the additional evidentiary burden of proving the lack, or inadequacy, of appropriate domestic remedies. If communities pursue their rights claims before domestic courts, among other obstacles, they will undoubtedly encounter generic constitutional procedures that are not designed to account for the historical, social, cultural and economic contexts that inform Indigenous peoples' rights violations. This in turn affords the courts discretion to impose onerous and inequitable procedural requirements on Indigenous claimants. For example, there are often few if any legal safeguards to prevent courts from resorting to formal/strict interpretations of procedural rules like limitation period requirements, with the effect of blocking substantive analysis of Indigenous rights claims.[36]

These deficiencies and oversights create serious obstacles for Indigenous peoples in Latin America who seek to assert their constitutional and internationally recognized rights in legal venues that are binding on their state governments: domestic courts and the Inter-American Court of Human Rights. In contrast to the intensity of the social conflict between Indigenous communities and resource companies, communities have brought relatively few cases to the courts and even fewer have been successful. For example, the Constitutional Court in Peru first recognized Indigenous consultation rights in 2008 and then decided several related cases between 2008 and 2012. However, the Court has not decided a single Indigenous right to consultation case since 2012, and only one of the decided cases has involved an Indigenous claimant asserting a specific right, the others were brought by NGOs or associations on behalf of Indigenous peoples generally. A similar pattern is observed in the inter-American system. Between 2001 and 2015 approximately eleven Indigenous or Afro-descendant property and/or consultation/consent rights related petitions against seven South and Central American member states were admitted, although not all have yet been the subject of decisions on the merits.[37] Not only is this less than one case a year for the entire region, missing from this timeframe are many countries with large Indigenous populations, including Colombia, Peru, Brazil and Mexico.

As such, a situation has emerged whereby there is relatively widespread legal or constitutional recognition of Indigenous legal rights to communal property, but comparatively few examples of these rights being invoked by specific communities in domestic legal proceedings.

[36] *Ibid.*
[37] Kamphuis, "Litigating Indigenous Dispossession", *ibid* at 178.

While a full examination of the reasons for this situation is beyond the scope of this study[38], it is clear that the progressive international recognition and domestic constitutionalization of Indigenous rights in Latin America has *not* been accompanied by the development of accessible and equitable procedures for enabling claims brought by specific communities in relation to specific foreign-owned resource extraction projects.

Adding to the inequities and obstacles that Indigenous peoples encounter in accessing domestic and international courts for the purposes of making property and consultation/consent rights claims, a second fundamental issue arises from the experience across South America with the codification of the right to consultation in national legislation. This refers to the emergence between 2011 and 2015 of statutes in four Andean countries (Bolivia, Ecuador, Colombia and Peru) that establish mechanisms and rules to govern state consultations with Indigenous peoples in relation to, *inter alia*, proposed resource extraction projects.[39] There is now an abundance of empirical research (field work) and positive law analysis that evidences the grave deficiencies in these statutes.[40] Indeed the negotiations between Indigenous communities, their allies, and the state that led up to the creation of these statutes were fraught with political conflict and in some cases communities and allies withdrew from the process in protest.[41]

There is also broad consensus that consultation processes in the region, implemented pursuant to these laws and regulations, have failed to ameliorate profound power disparities and information gaps. This includes poorly designed processes, lack of accessible and adequate information, together with inadequate or non-existent safeguards and oversight of agreements reached between communities and private or state actors. As such, there are few if any examples of consultation processes and resulting agreements that meet the standards required by international human rights law.[42]

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[38] For one attempt at a more fulsome explanation, see *ibid*.
[39] Patricia Urteaga-Crovetto, "Implementation of the Right to Prior Consultation in the Andean Countries: A Comparative Perspective" (2018) 50:1 J Leg Pluralism & Unofficial L 7 at 8.
[40] For a summary of this work, see Kamphuis, "Contesting Indigenous-Industry Agreements", *supra* note 30.
[41] Deborah Delgado-Pugley, "Contesting the Limits of Consultation in the Amazon Region: On Indigenous Peoples' Demands for Free Prior and Informed Consent in Bolivia and Peru" (2013) 43 RGD 151; Claire Wright, "Indigenous Mobilisation and the Law of Consultation in Peru: A Boomerang Pattern?" (2014) 5:4 Intl Indigenous Pol'y J 1 at 8; Almut Schilling-Vacaflor & Riccarda Flemmer, "Conflict Transformation through Prior Consultation? Lessons from Peru" (2015) 47:4 J Latin Am Stud 811.
[42] For a framework setting out the required standard, see James Anaya, "Report of the Special Rapporteur on the rights of indigenous peoples: Extractive industries and indigenous peoples", UNGAOR, 24th Sess, UN Doc A/HRC/24/41 (2013).

One sign that business as usual appears to continue in spite of Indigenous rights recognition and Indigenous consultation legislation in Latin America is the reality of ongoing social conflict and violence that surrounds resource extraction in the region.[43] Moreover, there is an unfortunate compounding impact between the problems with consultation and consent/agreement legislation, and the problem of inequitable and inappropriate procedural rules that function as gatekeepers to substantive judicial scrutiny of Indigenous rights claims. As described above, the research indicates that legal and political conditions in many Latin American countries generate a serious risk that Indigenous communities may enter into agreements with state entities and/or resource companies in the absence of full information and knowledge of the meaning and significance of the agreement, without a variety of safeguards and sometimes as a result of inappropriate or illegal tactics on the part of company and/or state officials. When this occurs, communities may find it difficult or even impossible to resort to the courts to challenge inequitable consultation processes and/or illegitimate "agreements" due at least in part to the lack of appropriate procedural pathways to accessing the courts for Indigenous rights claimants.

This analysis signals that Indigenous rights recognition and consultation legislation have not necessarily resulted in the achievement of concrete and substantively positive results for affected communities. This article does not presume to explore all of the complex, multifaceted and contextual reasons for this. As indicated above, the analysis developed here is primarily conceptual in that it is narrowly focused on the content and form of the law reforms that have resulted from the movement's activism.

In this regard, one relevant observation is the fact that these reforms have ultimately required Indigenous communities and their advocates to translate their concerns into the classical liberal legal frameworks of property rights and contract/free choice. When land is taken and agreements are broken or misunderstood, human rights law has required Indigenous peoples to package their justice concerns as alleged violations of procedural obligations to consult, communal property rights and/or of contractual obligations in relation to benefit agreements. Researchers have observed that in both the implementation of right to consultation legislation, as well as in the judicial interpretation of procedural rules that govern the admissibility of rights claims, existing

[43] Shin Imai, Leah Gardner & Sarah Weinberger, "The 'Canada Brand': Violence and Canadian Mining Companies in Latin America" (2017) Osgoode Legal Studies Research Paper No 17/2017, online: *SSRN* <https://ssrn.com/abstract=2886584>.

laws have allowed state and company authorities to adopt a formal equality stance to circumscribe the scope of consultations or to preclude Indigenous rights claims alleging violations from being heard on the merits.[44]

Added to this, right to consultation legislation to date has not included mechanisms that enable Indigenous peoples to effectively enforce resulting agreements with government or to challenge deficient consultation processes in the courts. In other words, the codification of the state's obligations to recognize consultation rights and seek agreements has paradoxically left the effective enforcement of this obligation unaddressed. Importantly, this reality of weak or inexistent enforcement mechanisms for state actors is consistent with the standard treatment of company obligations to consult and respect Indigenous rights as a matter of voluntary or discretionary corporate social responsibility. Legislative advances in Latin America to date have not directly addressed the legal obligations of companies in relation to Indigenous peoples and their consultation rights. For example, the formation of industry-Indigenous agreements remains entirely unregulated.[45]

These weaknesses in the regulation/enforcement of Indigenous peoples' legislated rights to consultation vis-à-vis private and public actors exist in combination with the absence of appropriate procedural pathways for judicial enforcement of Indigenous constitutional rights, described above. When these gaps and deficiencies are viewed in combination, state and company obligations to consult Indigenous peoples and respect their land and natural resource related rights, are potentially rendered inaccessible and unenforceable in practice, even in the face of positive law recognizing these rights.

There is another common thread between the shortcomings of Indigenous rights principles and jurisprudence, as recognized by international human rights bodies and Latin American constitutional courts, and the creation of statutes that codify Indigenous consultation processes in the context of proposed resource extraction. The research cited in this section reveals that reform in both of these areas have insufficiently accounted for the significance of social context, power and epistemology in determining how positive law becomes meaningful and emancipatory in practice. Judicial recognition and statutory reforms to date have not adequately contended with the

[44] For examples of this observation as it relates to the implementation of consultation legislation, see literature cited supra notes 40-4.1 For examples of this observation as it relates to Indigenous rights litigation, see Kamphuis, "Litigating Indigenous Dispossession", supr*a* note 3o.
[45] Kamphuis, "Contesting Indigenous-Industry Agreements", *supra* note 30.

problem of power and the reality of longstanding and radical economic deprivation/exploitation, and social and cultural domination, of Indigenous communities at the hands of public authorities and private actors. This context has serious implications for how knowledge and agency are conceptualized within the legal constructs of property, contract, and consultation, which are fundamentally predicated on the presumption/possibility of free and informed choice (consent).

3.2 Right to Remedy Law Reform in Canada "Home" Country

A second major area of law reform activism taken up by the transnational mining justice movement focuses on the responsibilities of capital exporting "home states" to ensure that adequate remedies are available to those in developing countries who are harmed by their companies' oversees operations. Discussion of law reform in Canada in this area first began in the late 1990s, intensifying after 2005, and is ongoing. The bulk of these discussions, and various concrete proposals, have focused on the creation of a non-judicial state-based grievance mechanism in Canada.[46] This refers to an administrative body, created by the Canadian (federal) government, and empowered to receive and investigate human rights complaints with respect to the overseas operations of Canadian resource companies. Within the frameworks of international law, calls for this kind of mechanism have invoked the human rights concepts of the victim's right to a remedy and the state's duty to protect human rights.[47]

Advocates have employed a range of strategies to support their argument that Canada should create this kind of grievance mechanism. This includes extensive empirical and documentary research to establish that Canadian mining companies are credibly linked to a range of human rights violations in connection with their overseas operations.[48] Advocates have further

[46] As stated earlier, there has been disagreement among movement participants regarding the strategic value of home-state grievance mechanisms as a priority area for law reform. More recently, some Canadian organizations have begun to focus on proposals for corporate due diligence legislation. So far relatively less attention has been given to the development of concrete law reform proposals to improve access to civil law remedies in Canadian courts. At present, only a few civil cases have overcome the formidable procedural obstacles to admissibility, no claim has been decided on the merits and one claim has settled.

[47] Sara L Seck, "Canadian Mining Internationally and the UN Guiding Principles on Business and Human Rights" (2011) 49 Can YB Intl L 51; Kamphuis & Gardner, *supra* note 22.

[48] See for example: House of Commons Standing Committee on Foreign Affairs and International Trade (2005) Mining in Developing Countries: Corporate Social Responsibility. 38th Parl, 1st Sess, 14th Rep, http://www.ourcommons.ca/DocumentViewer/en/38-1/FAAE/report-14; Working Group on Mining and Human Rights in Latin America (2013) The impact of Canadian Mining in Latin America and Canada's Responsibility: Executive Summary of the Report submitted to the Inter-American Commission on Human Rights, http://www.dplf.org/sites/default/files/report_canadian_mining_executive_summary.pdf; Imai et al, *supra* note 43.

sought to uncover certain forms of Canadian government economic and political supports for companies who are the subject of serious allegations. Added to this, they have undertaken a variety of strategies to establish that existing remedies and mechanisms in Canada are inadequate.[49] Finally, advocates have brought these concerns to international human rights tribunals, who have in turn issued numerous statements that together establish an emerging consensus that Canada has a duty to ensure access to effective remedies in Canada for harms caused by its corporate nationals abroad.[50]

Initially, the Canadian government responded by creating two different mechanisms, the Canadian National Contact Point (2000) and the Corporate Social Responsibility (CSR) Counsellor (2009 and 2014), each with a similar mandate to receive complaints and mediate if all parties consent. The standards that govern these mechanisms are non-binding and both lack any power to investigate, make findings of fact or require action or remedy from any party. Numerous studies have concluded that they are not effective in providing remedies for alleged harm, resolving conflicts, or improving the situation of mine-affected communities.[51]

With this background, the mining justice movement in Canada proposed an Ombudsperson, an agency with the power to fully investigate alleged human rights violations perpetrated by Canadian industries overseas. In the civil society proposal, this included the power to compel the participation of the company respondent, including the production of documents, to make findings of fact, and to make these available to the public. This also included the power to make recommendations: to the company with respect to reparations or other actions linked to remedies, as well as to government with respect to appropriate responses or policies, including potentially withdrawing financial and political support for a company found responsible for a violation. In

[49] See for example: Above Ground, MiningWatch Canada and OECD Watch (2016) "Canada is Back" but Still Far Behind – An Assessment of Canada's National Contact Point for the OECD Guidelines for Multinational Enterprises, https://miningwatch.ca/sites/default/files/canada-is-back-report-web_0.pdf; Canadian Network for Corporate Accountability & Justice & Corporate Accountability Project (2014) Human Rights, Indigenous Rights and Canada's Extraterritorial Obligations. Inter-American Commission on Human Rights, Thematic Hearing for 153rd Period of Sessions, http://cnca-rcrce.ca/wp-content/uploads/2016/05/canada_mining_cidh_oct_28_2014_final.pdf. For a comprehensive survey of these strategies, see Kamphuis, "Home-State Grievance Mechanisms", *supra* note 21.

[50] See for example UNESC, Committee on Economic, Social and Cultural Rights, Concluding observations on the sixth periodic report of Canada, UN Doc E/C.12/CAN/CO/6 (2016), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fCAN%2fCO%2f6&Lang=en, at para 15. For a comprehensive summary of these statements see: Kamphuis & Gardner, *supra* note 22 at 89-91.

[51] See literature cited at *supra* note 49.

this proposal, financial support referred to loans from Export Development Canada (a crown corporation) and political support referred to diplomatic support through embassies and trade officials.

Significantly, in their proposal, Canadian civil society decided *not* to demand that the proposed Ombudsperson would have the power to *enforce* remedies or sanctions.[52] Thus advocates made a strategic choice to orient their proposal toward strong investigatory powers and transparency provisions, with weak or no enforcement power. As such, the worst outcome for a company under the proposed regime was a negative final report and the loss of certain federal government supports. The company could have continued to operate in Canada under provincial law and could have therefore avoided compliance with recommended remedies.

There was much celebration in early 2018 when the Canadian government publicly announced its intention to create a Canadian Ombudsperson for Responsible Enterprise (CORE) with a number of key features that aligned with the civil society proposal. This was an extraordinary step forward after many years of government resistance and inaction. However, the status of this achievement quickly fell into question. Following this announcement, the government faced intense opposition from industry representatives who lobbied vigorously against the government's planned approach.[53] After 15 months of delay, in April 2019 the Prime Minister's Office finally created the CORE with an Order-in-Council (OIC).[54] However, the details revealed that the government had stripped the Ombudsperson of all of the features that would make it effective. The CORE as created is not independent from government, has no power to compel the production of documents, and has no power to enforce remedies or sanctions.

Perhaps most shocking, the new CORE included provisions that would have allowed companies to file complaints, and seek remedies, against civil society groups for "unfounded

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[52] In the civil society proposal, the Ombudsperson could resort to the courts and seek judicial review of the Canadian government's refusal to respond to a recommendation.

[53] Justice and Corporate Accountability Project, "Lobbying by mining industry on the proposed Canadian Ombudsperson for Responsible Enterprise (CORE)" (24 July 2019), online: *JCAP* <https://justice-project.org/wp-content/uploads/2019/07/2.-Report-on-Lobbying-by-Mining-Industry-july-24fin.pdf>. This was not the first time that industry marshalled an intensive lobby campaign to counter a law reform proposal supported by Canadian civil society, see Catherine Coumans, "Mining and Access to Justice: From Sanction and Remedy to Weak Non-Judicial Grievance Mechanisms" (2012) 45:3 UBC L Rev 651.

[54] *Order Setting out the Mandate of the Special Adviser to the Minister for International Trade, to be known as the Canadian Ombudsperson for Responsible Enterprise*, PC 2019-0299 (2019), online: *Government of Canada* <https://orders-in-council.canada.ca/attachment.php?Attach=37587&lang=en> (an OIC is a unilateral decision of the federal executive, or Cabinet, that is made known when it is published online and in the Canada Gazette, but is not discussed or voted on in Parliament).

human rights allegations". Unfortunately, this kind of provision is not new to the Canadian debate in this area, as a version of it first appeared in the 2009 CSR policy, referred to above.[55] While the government ultimately decided to remove this provision from the CORE terms of reference about six months later,[56] its decision to adopt such a provision in both the 2009 and 2019 versions of its framework is deeply troubling for at least two reasons. First, there is strong evidence that companies are more than capable of availing themselves of existing civil laws available to seek remedies for unfounded allegations (defamation).[57] Moreover, it is well documented that companies are willing to abuse defamation laws to silence their critics.[58] Indeed, in recent years, several Canadian provinces have enacted legislation to address this problem.[59] As such, there is no basis for the government's apparent conclusion that companies are suffering from inadequate remedies or access to justice problems vis-à-vis their critics.

Second, the government's decision to allow companies to use the Ombudsperson to complain about human rights activists cynically contorts a mechanism whose ostensible purpose was to address the problem of inadequate remedies for human rights abuses perpetrated by transnational companies in developing countries. This contortion reflects a logic of false equivalence (or formal equality) between companies on one hand, and affected communities and human rights activists on the other. This formalist approach negates the well-documented problem of corporate impunity and the economic, legal and political power imbalance between corporations and those affected by their operations.

The extensive work of the mining justice movement in advocating for access to remedies in Canada has made a significant contribution to raising the profile of these issues, in conceptualizing law and policy responses, and in shaping the international law conversation. Notwithstanding these major achievements, at present, the outcome of these efforts is rather dismal.

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[55] For analysis of this see Charis Kamphuis, "Canadian Mining Companies and Domestic Law Reform: A Critical Legal Account" (2012) 13:9 German L J 1456 [Kamphuis, "Canadian Mining Companies and Domestic Law Reform"].

[56] The OIC was updated on September 2019: *Canadian Ombudsperson for Responsible Enterprise*, Schedule, PC 2019-1323 (2019), online: Government of Canada <https://orders-in-council.canada.ca/attachment.php?Attach=38652&lang=en>.

[57] Susan Lott, "Corporate Retaliation Against Consumers: The Status of Strategic Lawsuits Against Public Participation (SLAPPs) in Canada" (September 2004), online: *Public Interest Advocacy Centre* <https://www.piac.ca/wp-content/uploads/2014/11/slapps.pdf>.

[58] Byron Sheldrick, *Blocking Public Participation: The Use of Strategic Litigation to Silence Political Expression* (Waterloo: Wilfrid Laurier University Press, 2014).

[59] *Protection of Public Participation Act*, SO 2015, c 23; *Protection of Public Participation Act*, SBC 2019, c 3.

After nearly two decades of extensive research, numerous reports, strong statements from international human rights bodies, and significant debate and discussion at the federal level, including in Parliament and at parliamentary committee hearings, advocates have been unable to convince the Canadian government to create an effective home-state non-judicial grievance mechanism. In spite of election promises, and even public commitments once in power, federal political leaders have reneged and remained unwilling to create an investigatory body that is independent and has adequate power to acquire the relevant evidence, ensure that harms are remedied, and require government to halt support for problem companies. Civil society organizations were so appalled by the end result, that in 2019 they collectively resigned in protest from the government created Multi-Stakeholder Advisory Board.[60]

Like the Latin American case study referred to above, this Canadian case study forces the question of why the sustained advocacy and mobilization of this social movement over nearly two decades has thus far been unable to achieve law reform results that approximate its goals and vision. As before, this article's analysis of this complex question is conceptual, and by no means comprehensive. It does not even begin to flesh out and analyze the larger political, legal and economic contexts that have impacted this outcome, such as for example the role of corporate lobbying.[61] At this stage the discussion is limited to some narrow, albeit important, observations about the strategic and conceptual choices that advocates have made to date in its law reform efforts in Canada.

As mentioned, for the past decade, some proponents for corporate accountability have devoted significant effort to pursuing the idea of a Canadian federal agency empowered to receive complaints from alleged victims of human rights abuses in connection with Canadian resource extraction projects abroad. These advocates have argued that this agency, or Ombudsperson, must be independent from government, and with the power to undertake mandatory and thorough investigations followed by public reporting requirements. They calculated that they would be more likely to obtain an agency with these features alone, than an agency with additional enforcement

[60] Canadian Network on Corporate Accountability, News Release, "Government of Canada turns back on communities harmed by Canadian mining overseas, loses trust of Canadian civil society" (11 July 2019), online: *CNCA* <http://cnca-rcrce.ca/recent-works/news-release-government-of-canada-turns-back-on-communities-harmed-by-canadian-mining-overseas-loses-trust-of-canadian-civil-society/>.

[61] See for example research cited above: *supra* note 53. For a very insightful study of the impact of corporate capture on domestic Canadian environmental policy, see Jason MacLean, "Regulatory Capture and the Role of Academics in Public Policymaking: Lessons from Canada's Environmental Regulatory Review Process" (2019) 52:2 UBC L Rev 479 [MacLean, "Regulatory Capture"].

powers. Likewise, this included a focus on advocating for an Ombudsperson with the power to make policy recommendations to government, including for the withdrawal of financial and political support for problem companies. In this civil society proposal, the agency could pursue judicial review of government inaction in response to the Ombudsperson's recommendations.[62]

These strategic trade-offs have meant that the civil society proposed mechanism would have been much weaker than Canada's existing federal and provincial human rights bodies with a territorial focus.[63] The proposal also fell significantly short of the emerging international consensus on what is required for home-state non-judicial mechanisms to be effective in relation to the objective of remedying the harms that flow from transnational human rights violations.[64] Yet even this compromise proposal has not gained traction with the Canadian government and industry.

This summary helps isolate two defining characteristics of the pragmatic approach to law reform taken by proponents of the Ombudsperson proposal. The first is a pragmatic approach to regulation. As mentioned, advocates intentionally avoided proposals that include an agency with the power to *enforce* remedies and sanctions.[65] As such, these proposals adopted a self-regulation or voluntary approach when it comes to *remedy* for harm. I refer to this as a pragmatic decision because many members of the movement are proponents of improving access to remedy and are highly critical of voluntary approaches, which are part-and-parcel of the neoliberal economic arrangements that they oppose.

Strategically speaking, advocates hoped that strong provisions for getting to the truth and making it public (investigation, the power to order disclosure and mandatory transparency) would generate sufficient public pressure on companies to follow a recommended course of action (ie remedy). Thus, even though the civil society proposal includes some mandatory features, it nonetheless also has some resonance with neo-liberal regulatory approaches, where attention is dedicated to transparency with the assumption that companies will voluntarily adjust their behavior

[62] For a full summary of the Ombudsperson as proposed by civil society, see Kamphuis, "Home-State Grievance Mechanism", *supra* note 21.
[63] This refers to the Canadian Human Rights Commission, and provincial commissions, which are connected to quasi-judicial human rights tribunals.
[64] Kamphuis & Gardner, *supra* note 22.
[65] In the civil society proposal, the Ombudsperson's enforcement power was limited to the power to compel disclosure of documents.

in response to public pressure.[66] For example, this is the same logic behind many industry-backed initiatives, like Publish What you Pay, the Extractive Industries Transparency Initiatives, or the *Extractive Sector Transparency Measures Act*, which all focus solely on transparency.

The second key feature of the civil society approach to the Ombudsperson is its concept of the relationship between the state and the private sector. Recall that the sole sanction component of the civil society proposal was the potential withdrawal of state financial and political support for a specific company. While this reflects one dimension of the relationship between the Canadian state and Canadian companies, a wider view reveals that this relationship also manifests in the Canadian state's role in constituting foreign investment markets and in enabling and facilitating the industry itself.[67] For example, the Canadian state (federal and/or provincial) has a role in: enabling the formation of companies in Canada through corporate law; establishing the terms according to which companies raise capital through securities law; determining the rules that govern the taxes they owe the public through corporate tax law and tax treaties; providing companies with privileged access to foreign government decision-makers through services provided by Canadian embassies and the larger foreign service; and establishing the rules that govern companies' foreign investments through investment law and treaties. This list highlights some of the areas where the Canadian state takes a range of positive steps to shape and enable the market and the industry.

This also helps put civil society's focus in its law reform proposal on political support, through special services provided to companies by the Canadian foreign service, and financial support, through preferential loans and insurance provided by Canada's export credit agency (Export Development Canada or EDC) into context.[68] This focus on withdrawing political and

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[66] See Ronen Shamir, "Corporate Social Responsibility: A Case of Hegemony and Counter-Hegemony" in Boaventura de Sousa Santos & Cesar A Rodriguez-Garavito, eds, *Law and Globalization from Below* (New York: Cambridge University Press, 2005) 92, cited below in section 3.C.1 for a discussion of voluntary regulation as a response to social movement demands for corporate accountability.

[67] For a more extensive discussion of this point in relation to earlier law reform proposals, see Kamphuis, "Canadian Mining Companies and Domestic Law Reform", *supra* note 55.

[68] For some examples of case studies depicting these forms of support, see Jen Moore & Gillian Colgrove, "Corruption, Murder and Canadian Mining in Mexico: The Case of Blackfire Exploration and the Canadian Embassy" (2013), online (pdf): *MiningWatch Canada, United Steelworkers & Common Frontiers* <https://MiningWatch.ca/sites/default/files/blackfire_embassy_reportweb.pdf>; Jen Moore, "Unearthing Canadian Complicity: Excellon Resources, the Canadian Embassy, and the Violation of Land and Labour Rights in Durango, Mexico" (2015), online (pdf): *MiningWatch Canada & United Steelworkers* <https://MiningWatch.ca/sites/default/files/excellon_report_2015-02-23.pdf>; Above Ground, "Anti-Corruption and Export Development Canada: Recommendations for an Effective Policy and Improved Regulatory Oversight" (2018), *Above Ground*

economic services as the sole form of regulatory sanction tacitly accepts the state-company relationship as a direct bilateral relationship, similar to the logic of private contract, where the state appears to operate as a private contracting party, instead of as a public regulator. This is not to say that these contractual relationships don't formally exist or are not relevant, indeed EDC support is issued pursuant to a contract and more recently Canadian diplomatic support also requires companies to sign an agreement called an Integrity Declaration in exchange for various support services (wherein the company is referred to as the government's client).[69] The point here is to highlight that civil society's approach to public regulation has attempted to infuse this contractual relationship with certain human rights conditions. However, this attempt to add new terms to the contract has not challenged or changed the fundamental logic of casting the state-company relationship as one of private contract. On its own, this approach omits from view the multifaceted, proactive structural and systemic role of the Canadian state in constituting the market and the sector.

This analysis reveals that Canadian mining justice advocates' home-state grievance mechanism law reform proposals significantly, albeit inadvertently, resonate with neo-liberal approaches to regulation, the state and the company. In this approach, transparency/reporting is the goal of the investigation, remedies for human rights violations remain voluntary, and the Canadian state's relationship with the company is narrowly defined in terms of contract. It is important to acknowledge that this approach was the product of a pragmatic trade off in that advocates hoped that it would be relatively more politically palatable to government and industry. This article does not aim to second guess or criticize these difficult strategic choices, which are shaped by numerous constraints and factors. Rather, it seeks greater insight into these trade-offs by examining this pragmatic approach to law and regulation conceptually. Here this examination highlights apparent contradictions between these civil society-based law reform proposals (and their state-controlled outcomes) and the movement's political and philosophical opposition to neo-liberalism as a political and economic system, that is not only unjust and antithetical to meaningful respect for human rights, but is also fundamentally predicated on formalism, voluntarism and privatism.

<https://aboveground.ngo/wp-content/uploads/2018/04/Anti-corruption-and-EDC-Above-Ground-report.pdf>.

[69] Government of Canada, "About Canada Trade Missions", online: https://www.international.gc.ca/trade-commerce/trade_events-evenements_commerciaux/trade_missions-missions_commerciales/about-a_propos.aspx?Lang=eng&_ga=2.223401883.1471054383.1581707825-1103413297.1566577377

In other words, the analysis here suggests that activists concerned with inadequate state regulation and remedies have made pragmatic choices that (perhaps paradoxically) find them promoting a law reform proposal that reflects a voluntary model of regulation (re remedy), and tacitly accepts the role of the state as a provider of political and economic services to companies. Ultimately, the Canadian government's 2019 Ombudsperson regime maintained this voluntary approach, added in (at least initially) the formal equality dimensions discussed above, and even discarded the features necessary for adequate reporting/transparency. Unfortunately, civil society's strategic trade-offs in formulating its proposal appear to have had little success in securing law reforms that align with the substantive change that the movement desires.

3.3 Themes & Common Problems

The introduction to this section described how the regulation of Indigenous peoples' right to consultation in Latin American, and access to remedy law reform proposals and outcomes in Canada, are both a product of the activism of the transnational mining justice social movement, often working in conjunction or overlapping with other social movements.

These two case studies share a common focus on activists seeking to create new state-based regulation of the harms potentially generated by private sector activities (resource extraction). The recognition of the right to consultation and its legal regulation in the Latin American context emanated from the domestic judiciary and the state (respectively) in response to Indigenous peoples' resource-related protests, advocacy and litigation on one hand, and norm development in international courts, on the other. In the Canadian context, the movement focused on developing proposals for a home-state non-judicial grievance mechanism, most recently called the Canadian Ombudsperson for Responsible Enterprise. Thus, these two case studies share a common focus on those instances where the movement has demanded that the state develop new legislation and create new processes (consultation and investigation/remedies) to respond to the movement's specific justice demands. Notably, in both case studies these regulation-oriented law reform efforts emerged on the heels of private law litigation against companies (Canada) and public law litigation claiming constitutional rights (Latin America).

There are also commonalities in the limitations that emerge from the reforms ultimately adopted in each context. In the Latin American context, the judicial recognition of Indigenous rights to property and consultation/consent have not addressed the issue of whether or not the

existing rules of civil procedure that ultimately mediate rights claims are appropriate, given Indigenous peoples' social, cultural and economic context. This contributes to a situation where, even decades after the judicial recognition of rights, massive social protests are common and very few communities have brought their rights claims to the courts. Likewise, the regulation of the right to consultation has lacked effective enforcement and oversight mechanisms and has failed to create the conditions necessary to ensure that communities can obtain just and equitable agreements. Thus, there is a yawning gap between positive law and the conditions and mechanisms required to make it meaningful.

In Canada, civil society law reform proposals to advance the right to remedy for mine-affected communities abroad have also had mixed results. As described above, the movement made strategic choices in the framing of its most recent proposal, first, by adopting a relatively narrow (contractual) view of the Canadian state's support for companies, and second, by trading enforcement of remedy provisions in the hope of strong independent and transparent investigations. While the campaign around the proposal certainly generated greater public awareness, including in the Canadian financial press,[70] unfortunately, the trade-off did not materialize as hoped. The resulting mechanism is weak, not only from a remedy perspective, but it retains inadequate reporting/investigation powers. Moreover, at first the result appeared to be even worse than the status quo when the government was initially willing to adopt a bizarre formal equality logic that would have allowed companies to use this purported human rights mechanism to request an investigation of human rights activists.

Thus, notwithstanding the remarkable strengths, commitments and tactics of the mining justice movement, another common thread that unites these two case studies is the prevalence of three liberal and neo-liberal approaches to law, imbedded in both law reform outcomes: (1) formal equality treatment of actors that ignores power (formalism); (2) inadequate or inexistent enforcement mechanisms that effectively amount to voluntary treatment of state and company legal obligations (voluntarism); and (3) a view of the state as a private/economic actor rather than a public regulator (privatism). This analysis reveals that the social movement's legal strategies, developed in a human rights law framework, have been unable to overcome imbedded liberal and neo-liberal concepts of the state, the individual/community and the private sector. These concepts

[70] For one example, see Gabe Friedman, "'Lobbied to death': Liberals face backlash over corporate responsibility ombudsman" *Financial Post*, April 8, 2019.

have ultimately shaped the law reforms that resulted from the movement's activism, to the dismay of many movement participants.

4 Theorizing the Mining Justice Movement's Law Reform Activism

The observations presented in the previous section provide an entry point into a rich tradition of debate on the question of how to theorize the relationship between progressive movements and the law in liberal and neo-liberal legal orders. The next section turns to examine the four different approaches that directly grapple with this question: pragmatism, left critique, critical legal liberalism, and counter-hegemony. This review identifies assumptions, propositions and conceptual tools in each approach in an effort to isolate analyses, critique and prescriptions that offer insight into the successes and limitations of the mining justice social movement's law reform outcomes, described above. As such, the discussion represents a survey of some important thinkers in each area, rather than a comprehensive assessment of any given theoretical tradition.

4.1 Pragmatism

For the purposes of this discussion, pragmatism is understood both as a philosophy of social movement activism and action, and as an approach to studying social movement's use of the law. Among the texts discussed in this section, two take a pragmatic approach to the study of social movements (Kennedy 2001; Sarat & Scheingold), another studies social movement pragmatism (Kennedy 2013), while the fourth blends these distinct lines of inquiry (White & Perelman). The significance of these distinctions is taken up in more detail at the end of this section. This section begins with a summary of the treatment of pragmatism by these authors in the context of social movement lawyering, and then goes on to analyze the value of their insights in relation to the mining justice social movement.

a. Pragmatism and Human Rights Lawyering

The analytical frame (described in section 1 above) that Sarat and Scheingold use to study social movement lawyering is implicitly built upon a particular definition of pragmatism. They evaluate the efficacy of lawyering in terms of its ability to maximize the movement's capacity to approximate its moral vision of a better society. As stated previously, Sarat and Scheingold's

central thesis is that lawyering tactics will be most effective if they are able to exploit the cultural resonance of legality and rights in favor of the movement's objectives.

In an essay first published in 2001, David Kennedy also takes a pragmatic approach in his critical analysis of the international human rights movement.[71] Kennedy poses this question: "assuming the goals and intentions of humanitarian action are clear, how can we improve our ability to assess whether humanitarian work in fact contributes more to 'the solution' than to 'the problem'?"[72] To answer this question, Kennedy argues that one must weigh the "benefits" against the "costs" generated by the movement. While the bulk of his essay is dedicated to developing hypotheses about possible costs, Kennedy also briefly defines what he views to be indicators of movement success. He argues that the "benefits" of the movement materialize in the form of "distributions of power, status, and means" in favor of those who share its objectives.[73]

In a follow up essay published in 2013, Kennedy takes the position that it is now more accurate to speak of international human rights as a regime rather than as a movement or an idea.[74] He uses the term "regime" to refer to human rights both as a professional practice and as a practice of governance. Kennedy argues that human rights in this sense currently suffer from two "dangers": idolatry and pragmatism.[75] In this framework, idolatry refers to the veneration of classical human rights tools and norms, such that advocates become blind to other approaches to human emancipation, other issues of injustice not easily captured by human rights frames, or the unintended costs of human rights victories. On the other hand, Kennedy defines pragmatism as participation in governance, which includes the use of instrumental reasoning and the weighing of costs and benefits.[76] Pragmatism provokes significant concerns for Kennedy, indeed, he states that the "most significant challenges for the human rights movement in the years ahead will be to understand what it means to be a participant in governance".[77]

To resolve the idolatry/pragmatism conundrum, Kennedy argues that human rights proponents must acknowledge humanism as a political project, together with the concomitant fact

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[71] David Kennedy, "The International Human Rights Movement: Part of the Problem?" (2001) 3 Eur HRL Rev 245.
[72] *Ibid* at 4.
[73] *Ibid*.
[74] David Kennedy, "The International Human Rights Regime: Still Part of the Problem?" In Rob Dickinson et al, eds, *Examining Critical Perspectives on Human Rights* (New York: Cambridge University Press, 2013) 19 at 19.
[75] *Ibid* at 22 (Kennedy understands idolatry and pragmatism in a dialectic relationship, in that each one is the antidote for the other).
[76] *Ibid* at 22-3.
[77] *Ibid* at 27.

that the practice of human rights involves making political decisions, increasingly as "rulers".[78] In this context, Kennedy calls for humanitarian professionals to engage in "responsible rulership", defined as a willingness to exercise power, participate in political conflict, and responsibly exercise human freedom, which he contrasts with "the ethical self-confidence of idolatry or the evasions of instrumental reason".[79] Yet in spite of his forward looking prescription for human rights practice, Kennedy ultimately forecasts the decline of human rights as a politically relevant project with the potential to productively address pressing global concerns of climate and social inequality.

Lucie White and Jeremy Perelman also reflect on pragmatism in their case study of human rights campaigns that have unfolded on the African continent in relation to social and economic issues.[80] Drawing on these experiences, they endeavor to theorize the "on the ground" human rights practices of African lawyers, all of whom view their legal activism as a political practice.[81] In doing so, White and Perelman observe two common "strategic patterns of engagement" among activists: pragmatism and performance.[82] In their analysis, pragmatism is defined by activists' conscious decision to engage in human rights activism in spite of their awareness of the limits of human rights as a liberal legal form.[83] White and Perelman argue that in doing so, activists attempt to "devise a new kind of [rights] practice" that goes beyond formalistic legal practice and is capable of framing public debate, influencing political will and spurring a social movement.[84]

Building on this definition of activist pragmatism, White and Perelman identify three features of the pragmatic practices observed in their study. More than just characteristics, these features are essentially theories of effective movement tactics. The first is the belief that litigation is not the best method for achieving economic and social rights objectives, but that under certain conditions, and together with a toolbox of other political tactics, it can be used to help build the strategic power of a movement's campaign.[85] The second is a concerted focus on the state as a

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[78] *Ibid* at 23.
[79] *Ibid* at 32-3.
[80] Lucie E White & Jeremy Perelman, eds, *Stones of Hope: How African Activists Reclaim Human Rights to Challenge Global Poverty* (Stanford: Stanford University Press, 2011) [White & Perelman, *Stones of Hope*].
[81] Lucie E White & Jeremy Perelman, "Introduction" in White & Perelman, *Stones of Hope*, *ibid*, 1 at 2-3 [White & Perelman, "Introduction"].
[82] Lucie E White & Jeremy Perelman, "Stones of Hope: Experience and Theory in African Economic and Social Rights Activism" in White & Perelman, *Stones of Hope, ibid*, 149 at 149 [White & Perelman, "Experience and Theory"].
[83] For a similar conclusion in another context, see Buchanan & Chaparro, "Transnational Advocacy", *supra* note 23.
[84] White & Perelman, "Experience and Theory", *supra* note 82 at 149-50.
[85] *Ibid* at 150.

target of advocacy, which includes multiple public actors and domains.[86] However, White and Perelman report that there is no consensus among activists on the degree to which the state should be prioritized among other possible targets of advocacy. In fact, they argue that the third feature of activist pragmatism is its explicit willingness to engage both private and public actors.[87] White and Perelman observe that the advocates in their study "reject the moral logic of the public/private divide."[88]

Turning to the movement's goals (ends), White and Perelman identify two main objectives, first, the disruption of inequitable social and economic patterns, and second, sustainable institutional change.[89] However, they also identify a common set of normative commitments among the activists they study. Specifically, these activists are committed to engaging with liberal legalism from a critical perspective, to incorporating an ethos of critical epistemological pluralism into their human rights work, and to prioritizing the possible redistributive outcomes of their political practices.[90]

b. Pragmatism and the Mining Justice Movement

This section distils three key themes at play in the literature reviewed above, and considers their significance for the law reform experiences of the mining justice movement as described in the previous section.

Pragmatic Study vs. Movement Pragmatism

The concepts and frameworks discussed above reflect two different approaches, the first is the study of social movement pragmatism on one hand, and the second is the pragmatic study of social movements, on the other. The latter of these is concerned with the extent to which a social movement achieves particular results, however defined. In this vein, Kennedy (2001) enquires into the "costs" of the human rights movement, and Sarat and Scheingold are concerned with the degree to which social movement lawyers are able to exploit the cultural resonance of rights and legality.

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[86] *Ibid* at 151.
[87] *Ibid* at 152.
[88] *Ibid.*
[89] *Ibid* at 167-171. The second of these two objectives is described at length in another chapter of the same book, see Peter Houtzager & Lucie E White, "The Long Arc of Pragmatic Economic and Social Rights Advocacy" in White & Perelman, *Stones of Hope, supra* note 80, 172 at 172-94.
[90] *Ibid* at 155.

In contrast, a study of social movement pragmatism examines how social movements employ pragmatism as a philosophical approach to engaging with law to achieve the changes they seek. This is the approach taken by Kennedy in his 2013 essay where he conveys caution about pragmatism among human rights practitioners. Interestingly, White & Perelman's study melds these two approaches together. While they specifically theorize social movement pragmatism, they also dedicate considerable energy to measuring the social movement's capacity to achieve a specific result, namely that of structural institutional change.

The distinction between pragmatism as an object of study and pragmatism as an approach to study assists in analyzing the mining justice movement's engagement in law reform. It also reveals that this study combines both elements. On one hand it studies social movement pragmatism, such as the mining justice movement's pragmatic decision to use liberal legal human rights forms (consultation, remedy) to argue in favor of law reform. Another example is the movement's pragmatic trade off in Canada between transparent investigations and enforceable remedies. In this specific sense, this study resembles White and Perleman's and Kennedy's (2013) examination of social movement pragmatism. At the same time, this study is also pragmatic in the sense described by Sarat & Scheingold, in that it examines the movement's law reform efforts in terms of their success in achieving a desired result, normative goal or ideal, and in the sense proposed by Kennedy (2001) in that it endeavors to identify unintended costs. .

Definitions of Pragmatism

A second group of observations relate to the definitions of social movement pragmatism that the authors reviewed here employ. Recall that Sarat & Scheingold define pragmatism as the use of political tactics, primarily outside of the law, to exploit law's cultural renaissance in an effort to garner broad support of the movement's normative vision. Kennedy (2013) defines pragmatism as the conversion of the movement's practices into professional practices and practices of governance. Finally, White and Perelman define pragmatism as the conscious use of a legal form (human rights) that is perceived to be problematic but that is employed strategically in the pursuit of some normative end that aligns with deeper values (pluralism and redistribution).

These conceptions of movement pragmatism are not necessarily incompatible; rather they highlight that there is a possible range of pragmatic practices that a movement may take up at any given time, or even simultaneously. This reveals that the mining justice movement has been

pragmatic in the ways described here. It has employed many tactics outside of positive law to exploit the cultural renaissance of international human rights norms in order to advocate for domestic law reform. In both case studies discussed here (right to remedy in Canada and right to consultation in Latin America), movement actors formed coalitions and focused on the state as a target of advocacy in an effort to engage in the "practice of governance", referring to concerted discussions of the contours of proposed new legislation. Finally, movement actors have attempted to use liberal legal forms strategically by infusing them with community/Indigenous perspectives (pluralism), and to achieve greater accountability for the distribution of the costs and benefits of resource extraction. However, in this final area, that of shifting economic, political and cultural power, the largest gap appears to emerge between the actual law reforms that have ultimately resulted from the movement's efforts, and its ideals of pluralism and redistribution.

Pragmatism and Normative Commitments

Another item of interest is the way that the authors reviewed here locate ethics, principles and normative commitments in their analysis. Norms emerge in Sarat and Scheingold's analysis in their identification of the movement's ends. The movement is defined by its pursuit of a social arrangement that is more acceptable in moral terms ("a different better society"), an ideal that they suggest is never fully realizable.[91] They write that for cause lawyers, "the Good is known in the causes for which they work even as its realization may be deferred."[92] Part 2 of this article described in general terms some of the features of "the Good" or the "better society" sought by the mining justice movement.

The relationship between pragmatic social movement practices and ethics or normative commitments is also a theme in White and Perleman's article. While they describe the activists in their study as fundamentally pragmatic, at the same time they observe these activists to be operating within the bounds of a consistent and identifiable ethical framework that guides and orients their pragmatism in some respect. Notably, in the law reform case studies described in Part 3 of this article, governments created mechanisms to facilitate civil society participation in law reform discussions relating to consultation laws in Latin American and the Ombudsperson in Canada

[91] For this idea they cite Judith Butler, "Deconstruction and the Possibility of Justice: Comments on Bernasconi, Cornell, Miller, Weber" (1990) 11:5-6 Cardozo L Rev 1716 cited in Sarat & Scheingold, *supra* note 14 at 9.
[92] Sarat & Scheingold, *supra* note 14 at 10.

(2018 and 2019). However, when the government's course veered too far away from core movement principles (for example, with respect to the effectiveness of the Ombudsperson as a tool for corporate accountability, or with respect to meaningful consultation processes for Indigenous communities), civil society partners and/or Indigenous organizations withdrew in protest. Thus, pragmatic decisions to participate in governance were limited by certain principled commitments, which were ultimately put to the test.

As stated previously, in his 2001 article Kennedy takes the position that there is never a consensus regarding a movement's normative goals. Rather, he opts for a materialist definition of movement goals, proposing that the success (benefits) of the movement can be evaluated in terms of the redistribution of power, resources and status toward those who share the movement's goals. For him, participation in the social movement raises the ethical obligation to reflect on the possible negative outcomes (costs) of the movement and weighing these against its positive achievements (benefits). While Kennedy acknowledges that different individuals will see and value costs and benefits in different ways, he asserts that this does not deter from the ethical duty to weigh costs and benefits. This theme is extended in his 2013 follow up article where he argues that to the extent that movement participants pragmatically become powerholders, they must engage in "responsible rulership". In sum, Kennedy shifts the focus away from the movement's normative vision and toward a series of ethical concerns about the movement itself. His goal is to develop and defend a concept of movement ethics or a normative framework that might guide movement pragmatism.

The discussion in Part 3, examining the limitations associated with the mining justice movement's law reform outcomes, reflects Kennedy's proposal to identify potential costs of the decision of some movement actors to participate in governance through law reform advocacy. In this regard, studies have concluded that in Latin America, rights recognition without appropriate and equitable procedural pathways, and consultation legislation that fails to account for colonial histories, power and epistemology, have carried unintended costs. This includes for example legitimizing unfair agreements between communities and companies/the state while at the same time insulating these agreements from judicial scrutiny. In other words, where the legal recognition of human rights claims leaves the status quo of business as usual unaddressed in practice, there is a risk that powerful actors will appeal to human rights norms to legitimate the status quo. This is most crudely depicted in the Canadian case study where advocacy for a non-judicial human rights

remedy in Canada has twice resulted in a mechanism that also allows companies to bring complaints against human rights activists.

This summary highlights that the "weighing" process that Kennedy proposes is difficult to undertake in practice. State recognition of the right to consultation and the right to remedy has certainly strengthened the movement's capacity to appeal to the "cultural resonance" of these rights, thereby potentially influencing state and company conduct for the better. However, the countervailing cost of inadequate or partial reforms that legitimate unfair outcomes is a serious concern. While Kennedy's assertion, that there is an ethical duty to weigh costs and benefits, is well received, he offers little guidance on how exactly this might be undertaken.

These different accounts of the location of normative and ethical concerns in relation to social movement pragmatism suggest that there are at least three different ways of emphasizing principle in relation to pragmatism: (1) in the movement's ends; (2) in the movement's values; and (3) in the movement's ethical responsibilities. In the first, the movement's normative commitment is to its ultimate goal or ideal form of social change. In the second, the movement undertakes its work within the constraints of certain movement values. And in the third, the movement is charged with an ethical commitment to weigh the costs and benefits of its achievements.

Summary: insights from pragmatism for the study

The discussion above reveals that pragmatism is an approach that offers helpful tools for this article's analysis of the mining justice movement and the limitations of its law reform outcomes to date. Taken together, the authors cited here make three contributions to this article's research question. First, they help to characterize this study as a pragmatic study of the mining justice movement, as well as a study of the movement's pragmatism. Second, they provide a spectrum of definitions of pragmatism that help conceptualize different aspects of the movement's pragmatism. Finally, they establish the importance of identifying the relationship between normative commitments, and the movement's pragmatic practices. For example, both case studies in Part 3 included examples where movement actors decided to withdraw from participation in governance in the name of their values.

However, Kennedy's assertion that movements undertake a balancing exercise between the costs and benefits of their achievements is particularly pertinent. This highlights not only that movements may fall short of their goals, but that engagement with law may generate costs. In the

study undertaken here, both issues emerge. While the movement has achieved definite gains in raising the public profile if its concerns, in other respects its law reform outcomes fell short of its goals when the state responded by adopting legal instruments that perpetuate problematic liberal or neoliberal forms. The next section will shed greater light on this issue and in particular the challenge that inheres in evaluating the net outcome of countervailing wins and losses.

4.2 Left Critique and Critical Legal Liberalism

The discussion above hints that social movement pragmatism and the pragmatic study of social movements are both inevitably laden with a particular relationship with liberalism. Recall that Sarat and Scheingold define progressive social movements, in part, by their interaction with power holders, protest, and the pursuit of societal change. Where liberalism is the dominant organizing philosophy of a particular society, social movements must necessarily contend with liberal institutions, legal frameworks and subjectivities in the formulation of their ends and means. In Part 3, this article described how the mining justice movement developed specific law reform proposals in its attempt to transform the relations that characterize resource extraction. It also analyzed how the reforms ultimately adopted by the state have incorporated and perpetuated certain liberal and neo-liberal frameworks and assumptions.

Critical legal scholars have focused on theorizing the relationship between progressive activists, the law and liberalism. This section will review two contributions to the topic: that of Wendy Brown and Janet Halley, followed by that of Lucie White and Jeremy Perelman. These two pairs of authors each make their contributions as the editors of a collection of book chapters. Thus, their reflections are particularly helpful as they center on developing a theoretical framework for understanding the range of empirical contexts studied in each book's case study-based chapters.

a. Critique & Liberal Law

Wendy Brown and Janet Halley introduce their edited collection *Left Legalism / Left Critique* with a chapter dedicated to theorizing "left critique" and advancing a case for its importance as a component of left politics.[93] Brown and Halley conceive of left critique as an intellectual and political commitment to relentlessly and critically assess ostensibly progressive

[93] Wendy Brown & Janet Halley, "Introduction" in Wendy Brown & Janet Halley, eds, *Left Legalism / Left Critique* (Durham, NC: Duke University Press, 2002) 1.

political or legal projects. In their framework, liberalism and liberal legalism constitute the central targets of, but also threat to, progressive political projects. They define liberalism as a political order characterized by modern democratic constitutionalism and abstract individualism.[94] In this political order, the state's legitimacy is tied to its role as the guarantor of equality before the law and individual freedom, both of which are secured through the legal protection of individual rights.[95] Liberalism thus casts the state and the law as neutral vessels for the pursuit of these ideals.

Brown and Halley's define "the left" in terms of its relationship to liberalism: it is a project committed to revealing the limitations of liberal justice as well as to advancing alternative visions of justice.[96] In their view, critique is the left's necessary starting point because it illuminates the ways in which the liberal state and the law function as sites and instruments of domination. Brown and Halley fashion their concept of critique by drawing on a long intellectual history of theorizing critique. They find strands of this history in the German philosophical tradition, from Kant to Hegel, Marx, Nietzsche and the Frankfurt School, as well in the work of Derrida and Foucault.

Notwithstanding the differences and strains of critique in these and other traditions, Brown and Halley assert that critique is fundamentally a method of inquiry into a formulation that aims to examine and test its premises.[97] Critique seeks, not to determine truth or acquire objective knowledge, but rather to obtain greater perspective and insight. As such, it often works at the level of epistemology, uncovering how ideology and power produce what is understood to be the problem, as well as the range of available political and legal possibilities. Importantly, since critique requires the critic to interrogate their most revered maxims, the political commitments that compel the critic toward critique will almost inevitably change in its wake.[98]

This frames Brown and Halley's concern with the fact that progressive projects increasingly and significantly articulate their understanding of the political or social problem they seek to address, and the model of justice they seek to advance, in terms of a need for law reform or change within the legal system.[99] Brown and Halley refer to this orientation and its attendant practices as "left legalism", which comprises two different modes: rights legalism and governance legalism. The latter arises when the left attempt to capture or influence some part of the state's administrative

[94] *Ibid* at 5.
[95] *Ibid* at 6.
[96] *Ibid.*
[97] *Ibid* at 26.
[98] *Ibid* at 28.
[99] *Ibid* at 1.

apparatus.[100] In Brown and Halley's analysis, left legalism demands scrutiny (critique) for the reason that, at least at some level, it takes up the liberal promise that law can provide an effective vehicle for the pursuit of justice.[101]

This informs the question that underlies Brown and Halley's edited collection: what are the limits, paradoxes, and perils of contemporary practices of left legalism?[102] In pursuing this line of inquiry, they are interested in identifying lessons that point to ways in which the left might productively reformulate its politics. The nature of this question and its related objective reveal that a normative definition of the good may underlie Brown and Halley's project of left critique. Arguably, lessons learned from the pitfalls of left legalism can only be understood in reference to some ultimate objective. As stated above, Brown and Halley refer to left critique's objective of greater insight and perspective into practices of domination. However, they also appear to subscribe to a definable normative vision, namely greater substantive freedom and equality.[103]

As Brown and Halley apply the method of critique to practices of left legalism, they demonstrate one of critique's key qualities: it is not oriented toward providing clear answers, political prescriptions, outcomes or resolutions.[104] The first example of this is depicted in their treatment of the theme of the relationship between the left and liberalism. On one hand, they argue that when left projects are translated into the frames of liberal legalism, the progressive project necessarily enters into tension with, or perhaps will even be forced to abandon, its original values and aims.[105] In their view, this occurs because the values and objectives of the left are inherently in tension with those of liberalism. They point out that the very fact of making a claim to justice in the language of liberalism shapes the subjects and the relationships that are spoken of. At this juncture Brown and Halley warn that to the extent that left legalism reproduces a liberal normative order, it is responsible for the consequences, however unintended.[106]

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[100] *Ibid* at 10.
[101] *Ibid* at 7.
[102] *Ibid* at 4.
[103] *Ibid* at 2, 5.
[104] *Ibid* at 27.
[105] *Ibid* at 16.
[106] *Ibid* at 17-18 (Brown and Halley name some of these unintended consequences in the following passage: "The preemptive conversion of political questions into legal questions can displace open-ended discursive contestation: adversarial and yes/no structures can quash exploration; expert and specialized languages can preclude democratic participation; a pretense that deontological grounds can and must always be found masks the historical embeddedness of many political questions; the covertness of norms and political power within legal spaces repeatedly divests political questions of their most crucial concerns" at 19).

Yet on the other hand, they make a point of *not* categorically rejecting either legalism or liberalism as inherently flawed.[107] Rather, they argue that it is the left's *current* engagement with the law that has robbed the left of its power and potential. For example, they argue that rights, while classically central to liberal orders, maintain a "certain formality and emptiness which allows them to be deployed and redeployed by different political contestations."[108]

A second example of the slippery nature of critique in Brown and Halley's analysis is depicted by their articulation of the relationship between the left and law. On one hand they argue that left projects in liberal democratic orders cannot avoid rights and governance legalisms and their problematic baggage.[109] They specifically discount the (possibly utopian) idea that there could be a "pure left political space independent of legalism".[110] According to Brown and Halley, this is the case because, given that culture and law are not distinct, the left cannot escape the law just as it cannot escape culture.[111] Yet even while they reject this ideal, Brown and Halley are fascinated by the possibility of discovering politics outside of legalism,[112] or politics that is relatively "less saturated" by legalism.[113] They describe these politics as "radically democratic" and focused on deep deliberations about society's governing values and practices.[114]

In light of critique's function to provide perspective rather than truth, it is perhaps not surprising that Brown and Halley's response to the question of the limitations and effects of left legalism is open-ended. They suggest that critique reveals that the effects of law (and law reform) are complex, multiple and contingent, in a way that is analogous to the effects of the exercise of other forms of cultural power and norms. Accordingly, they describe the effects of left legalism as "mutable and contestable interventions into complex discursive and distributive systems", rather than as "monolithic installations of 'justice'".[115]

Lucie White and Jeremy Perelman's theory of critique offers further insight into the relationship between social movements and liberalism. As stated previously, White and Perelman's intervention is informed by their empirical study of economic and social rights activism

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[107] *Ibid* at 6.
[108] *Ibid* at 9. Also see Stanley Fish, *The Trouble with Principle* (Cambridge, Mass: Harvard University Press: 2001).
[109] *Ibid* at 11, 20.
[110] *Ibid* at 20.
[111] *Ibid* at 13 (Brown and Halley describe law as operating the "background rules" for culture at 11-13).
[112] *Ibid* at 19.
[113] *Ibid* at 20.
[114] *Ibid.*
[115] *Ibid* at 13.

on the African continent, presented in their book *Stones of Hope*. In interpreting and bringing together multiple case studies, they identify "critical/transformative legal liberalism" as a theoretical vantage point[116] that helps explain the approach taken by the activists they study. (Note that their description of critical legal liberalism as a theory, resonates and somewhat overlaps with their account of pragmatism).

White and Perelman describe activism carried out in this framework as "an engaged but critical stance toward liberal values" that employs a "set of recognizably legal, but also explicitly political, advocacy strategies."[117] A "critical stance" means that activists attempt to develop politically progressive interpretations of liberal legal norms and further, they are reflexive about the interpretations that they put forward.[118] Moreover, White and Perelman assert that this stance is politically committed to a fair distribution of resources and power.[119] Finally, critical legal liberalism is grounded in democratic deliberation. Not only do activists fashion their progressive interpretations of the law as a result of participation and debate, but they also pursue the redistribution of resources in part in order to better equip the poor with the material conditions necessarily to participate in liberal democracy.[120]

Activists operating in a critical legal liberalism framework are also realistic about what can be accomplished with liberal legal claims because they believe that the rules of the game are not substantively fair, even though they might be objectively neutral.[121] However, in spite of, or perhaps because of this, these activists are committed to using the law pragmatically in an effort to realize their redistributive aims. In practice, this often involves using the language of rights strategically and stretching it to support claims that entail economic and social redistribution.[122]

According to White and Perelman, because of its political commitment to redistribution, critical legal liberalism is able to *fully answer* progressive critiques of rights-centered activism,

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[116] White and Perelman draw on a range of contemporary theorists to articulate their critical liberal legalism lens: Jeremy Waldron, Nancy Fraser, Thomas Pogge, Amartya K Sen, Alan Hunt and Michael W McCann. They also identify four other theoretical approaches to analyzing the activists in their study: distributive legal analysis, legal experimentalism, subaltern cosmopolitanism, and historical institutionalism. See White & Perelman, "Introduction", *supra* note 81 at 5.
[117] *Ibid.*
[118] White & Perelman, "Experience and Theory", *supra* note 82 at 155.
[119] *Ibid* at 156.
[120] *Ibid.*
[121] *Ibid.*
[122] *Ibid* at 156-7. Also see *ibid* at 164-7.

which they attribute to "the skeptics".[123] The activists in White and Perelman's study do not depart from the assumption that successful rights claims in and of themselves will result in greater social equality. Rather, they invoke these claims as part of a broader political struggle by harnessing their normative and moral force. The rights claim affords activists greater symbolic power to inspire social mobilization, strengthen political organizing, and pressure power-holders. In this framework, White and Perelman argue that activists are able to use human rights claims to open up broader democratic debates about deeper policy questions regarding the nature of the relationship between the market, the state and its population.[124] In their study, activists were able to avoid the pitfalls of formalism and formal equality because they interpreted human rights claims in light of underlying commitments to the deeper values of dignity, security and political democracy.[125]

Skeptical Critique vs Engaged Critique

White and Perelman's conversation with "the skeptics" raises the possibility of tensions between "critical legal liberalism" and "left critique". In general terms, these concepts are evidently focused on the same set of legal practices, namely those of activists and social movements loosely understood as progressive, or as part of the left. However, there are important distinctions between the two approaches. Left critique evaluates the engagement of progressive political projects in left legalism in order to gain greater perspective and insight. Critical legal liberalism is a theory of human rights activism that attempts to answer critiques of this activism that originate on the left.

Thus, these two concepts are in a direct conversation: left critique marshals a critique that critical legal liberalism attempts to answer. Some contours of this conversation can be distilled from the critique of "pragmatism" launched by Brown and Halley and from White and Perelman's vigorous response to "the skeptics". Thus a question emerges: how does Brown and Halley's critique of pragmatism apply, if at all, to the pragmatism that forms part of White and Perelman's

[123] *Ibid* at 165. For a representative summary of the skeptics' critique, White and Perelman cite David Kennedy, *The Dark Side of Virtue* (Princeton: Princeton University Press, 2004). Chapter one of Kennedy's book reprints his 2001 essay "The International Human Rights Movement: Part of the Problem?", *supra* note 71, discussed at length in the previous section on pragmatism.
[124] *Ibid* at 166 (they summarize these policy questions as: "where to allocate, when to expand, and how best to renew limited resources in ways that enable all people to live decent lives" at 166).
[125] *Ibid.*

framework? Or stated somewhat differently, how does White and Perelman's concept of critical legal liberalism answer the concerns expressed by Brown and Halley's left critique?

As a starting point, both sets of authors define pragmatism similarly. Brown and Halley define it as those instances where a progressive political project consciously adopts a legal category that is problematic from the perspective of the values of that project. As stated earlier, White and Perelman define pragmatism as activists' conscious and reflexive decision to engage in human rights activism in spite of their awareness of the limits of human rights as a liberal legal form.

Brown and Halley observe that pragmatists often rationalize that the strategic use of liberal legal tools will provide justice for disadvantaged groups who stand to benefit from the advancement of specific changes to the law.[126] Brown and Halley's central problem with this is that, in their view, it inadvertently relies on a liberal concept of law as merely instrumental (a means to an end), rather than as a form of politics with substantive content and consequences.[127] They assert that rights and governance legalisms are always dependent on normative categories that draw their meaning and power from the broader social context and that contain substantive elements that contradict progressive projects. For their part, and in response to those who question the potential of human rights activism to approximate its aspirations, White and Perelman argue that the political commitment of activists to redistribution helps to avoid the possible pitfalls and limitations of packaging social and economic claims into human rights legal frames.

The apparent divergences in these authors' respective treatment of pragmatism can be explained in part by scrutinizing in closer detail the role in their analysis of two fundamental concepts: law and politics. The above review reveals that these authors appear to be emphasizing different theories of the nature of law, and its relationship with politics. For Brown and Halley, law is inherently political and its political nature is inescapable because of its status as a cultural form. They are unflinching in their assertion that law cannot be a neutral, empty vessel for the pursuit of politics. This leads them to the potentially contradictory conclusion that the left must engage *differently* with the law, while at the same time developing politics that are somehow "less saturated" by the law. Brown and Halley respond to this conundrum with the concept of critique.

[126] Brown & Halley, *supra* note 93 at 24. The example they provide is of gay rights litigation where, for the sake of obtaining equality rights protection, litigants argued that "homosexuality" was an immutable characteristic.
[127] *Ibid.*

They believe that critique holds the potential to open pathways toward transcending, transforming or subverting liberalism's legal categories.

White and Perelman agree with the assertion that law is political and carries problematic liberal baggage. However, they argue that a radical political commitment to redistribution is capable of surmounting this baggage and pushing the boundaries of liberal interpretations. Recall their contention that activism carried out in the critical legal liberalism framework provides a *full answer* to the concerns of the skeptic. They assert that a progressive political agenda has the power to harness the symbolic power of the law in a larger process of social transformation. In this view, the problem of the political nature of law can be resolved by an equally political project, namely that of redistribution. Thus, unlike Brown and Halley, White and Perelman do not long for politics outside of law. Rather they aim to politicize law by bringing it into the politics of anti-poverty activism, and by bringing politics to bear on law.

Thus, while both sets of authors agree that law is political, they emphasize different aspects of this point. White and Perelman see law as political primarily because of its role in the constitution and maintenance of a power structure, defined most importantly by social inequality. On the other hand, Brown and Halley's emphasize law's political role in a series of cultural processes and productions of norms and subjectivities, all of which are implicated in power relations. This analysis of the nature of law and politics in the work of these authors returns this discussion full circle to the questions above, which interrogated critical legal liberalism's attempt to answer the concerns of left critique. At this juncture, two avenues of response emerge.

In one sense, it may be that White and Perelman commit the error that Brown and Halley attribute to pragmatism, namely they believe that the human rights movement can use liberal law instrumentally in the service of the objectives of redistribution. In this view, the weakness in White and Perelman's theory is the fact that it significantly relies on activists' political commitment to redistribution in order to address the skeptics' concerns with left legalism. As a result, they do not seem to account for the cultural force of law and the possibility that the very process of engaging liberal legal forms will in turn shape the nature of the political struggle for economic and social justice. When White and Perelman make the assertion that pragmatism involves a commitment to epistemological pluralism, and that a legal claim's utility to a political struggle is derived from its symbolic normative power, they implicitly acknowledge that law carries cultural/ideological content that prefigures activists' engagement with it. However, perhaps due to a problem of

emphasis, their theory falls short of accounting for the possibility that the transformative process is a two-way street. Just as activists seek to transform liberal law, their political projects are similarly shaped by their very engagement with this cultural form.

On the other hand, a second avenue of interpretation is available, leading to a more charitable response to the question above. It might be argued that by reflexively politicizing the law, White and Perelman are on a path toward resolving the conundrum encountered by Brown and Halley in their desire for politics outside of law. In this view, the politicization of the law serves as an opportunity to apply the lessons of critique in renewed contexts and struggles and to explore different and more satisfactory modes of left legalism. As such, the value of critical legal liberalism may be in its potential to move beyond critique's apparent propensity toward political paralysis. However, the lessons of critique suggest that such aspirations may well depend on the capacity of critical legal liberalism to be robustly reflexive. In White and Perelman's framework, reflexivity is a component of critical legal liberalism but its role and importance is arguably under-discussed. In the spirit of left critique, reflexivity must extend to include not only awareness of the possible pitfalls of human rights activism and the cultivation of strategic lessons, but also intensive scrutiny of the assumptions and categories that frame one's activist engagement with law, and with what consequences.

The discussion so far highlights two interrelated areas where further theoretical development would enhance the capacity of critical legal liberalism to respond to the challenge of left critique. The first relates to the need to fully acknowledge and theorize the ways it in which redistributive politics are themselves shaped by the use of the human rights legal form, and the second refers to the need to develop a robust theory of reflexivity that includes critique of activists' practices, assumptions, and categories. These two concerns allude to a fundamental tension that arguably underlies the conversation between left critique and critical legal liberalism, namely, the extent to which the human rights practices in White and Perelman's study take epistemological concerns into account.

To be fair, certain features of White and Perelman's concept of critical legal liberalism directly respond to some concerns of the so-called skeptics, in addition to the fact that it includes a commitment to epistemological pluralism.[128] However, it is not clear how critical legal liberalism

[128] For example, White and Perelman's focus on redistribution, substantive equality, and engagement with private actors responds to several of the critiques advanced by Kennedy, including that human rights views the problem and

effectively addresses the epistemological issues raised by activists' engagement with human rights legal forms. Not only are these concerns paramount in Brown and Halley's intervention, they are also prominent in David Kennedy's article, which White and Perelman cite as a representative placeholder for "the skeptics". Kennedy opens his article with the concern that human rights activism occupies the field of emancipatory possibilities, ways of thinking, vocabularies, projects and institutions.[129]

Substantive Equality & Radical Democracy

In spite of these potential tensions and differences in emphasis, left critique and critical legal liberalism share deep normative commitments to substantive equality and radical democracy. They evaluate activist interventions in terms of the degree to which they contribute to creating greater conditions of equality, freedom and human dignity in the individual and collective lived experience of daily life. They hope that progressive activism might help enable the necessary conditions for radical democracy, defined in part as widespread participation in inclusive conversations regarding society's most fundamental governing arrangements. For Brown and Halley this refers to the values and practices that regulate subject formation, while White and Perelman single out policies that determine the arrangement and distribution of resources and power.[130] For both sets of authors, these normative aspirations spring from their yearning for a society capable of overcoming the failures of liberalism.

The second important similarity between these authors is the recognition that the results of a movement's engagement with liberal legalism are inevitably complex and uncertain. Neither approach takes the perspective that progressive advocacy efforts are certain to produce their desired effects. Rather, these authors are explicitly anti-essentialist in their view of these practices. This is most clearly demonstrated in Brown and Halley's argument that the effects of law are complex,

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the solution too narrowly by delegitimizing remedies in the domain of private law, by insulating the economy from critique, by privileging form over substance and by ignoring context. See Kennedy, *supra* note 71 at 10-13.

[129] *Ibid* at 8.

[130] White and Perelman also refer to this as a commitment to "voice" that they argue resonates with the work of Roberto Unger on democratic experimentalism, Charles Sabel and Mouffe and Laclau's work on radical democratic renewal. See White and Perelman, "Experience and Theory", *supra* note 82 at 166, nn 35, 36, 37 (respectively: Roberto Unger, *Democracy Realized: The Progressive Alternative* (New York: Verso, 1998); Charles Sabel & Joshua Cohen, "Directly Deliberative Polyarchy" (1997) 3:4 Eur L J 313; Anna Marie Smith, *Laclau & Mouffe: The Radical Democratic Imaginary* (New York: Routledge, 1998)).

multiple and contingent, and in White and Perelman's use of the theoretical lens of legal pluralism and historical institutionalism in order to illuminate and anticipate possible unintended effects.

b. Critique and the Mining Justice Movement

The concepts, tensions and themes that emerge in the conversation between left critique and critical legal liberalism are at the heart of this article's analysis of the mining justice movement. The concept of left legalism accurately describes the movement's turn to litigation and law reform as a means for realizing its goals. Similarly resonating with left critique, many of the movement's participants are critical of liberalism's most fundamental legal frameworks, such as property and contract, and most central institutions, in particular the market, voluntary or soft law, and the corporation. Concepts from critical legal liberalism are also relevant. Its focus on economic and social rights activism and its political commitment to redistribution resonates with the concerns and commitments of the mining justice movement. Moreover, the activist orientation within critical legal liberalism toward *engaged critique* connects with the mining justice movement's decision to use law reform to fashion concrete proposals for positive change.

The theoretical questions posed by left critique and critical legal liberalism closely parallel those that drive this study of the mining justice movement. Like Brown and Halley, this study is concerned with the question of how movement actors, by taking up liberal legal forms, inadvertently became party to the reproduction of certain liberal ideologies and their legal counterparts. This is reflected in the results of two areas of law reform activism, where formal equality (formalism), voluntary approaches to legal obligations (volunteerism) and a privatized view of the state (privatism) have prevailed in the resulting reforms, notwithstanding movement actors' best efforts. The findings summarized in Part 3 suggest that in taking up "the liberal promise that law can be an effective vehicle for the pursuit of justice", mining justice movement participants advocated for law reforms that ultimately reproduced or further entrenched certain elements of the liberal and neo-liberal normative order. This observation appears to validate the position of the skeptics and the concerns expressed by Brown and Halley.

Left critique and critical legal liberalism offer insights that help further explain these observations. Taken together, these theories help capture the operation of two forms of power that underlie the relationship between law and politics, namely power as knowledge and power as material resources. Both are at play in the shortcomings of the mining justice movement's law

reform outcomes. Focusing on power as knowledge, Brown and Halley insist on the meanings, symbols, relationships, norms and subjectivities that flow from the concepts and forms of law employed by the left. In this regard, the law reform outcomes studied here have maintained the abstract decontextualized subjectivities and relationships embedded in formalism, along with the corporate norms and relationships that underlie privatism and volunteerism. In terms of power as material resources, White and Perelman emphasize the hierarchies, inequalities, asymmetries and erasures implicated in the construction and maintenance of legal concepts and regimes. This highlights that the mining justice movement's law reform outcomes in the two areas studied appear to have done little to disrupt the entrenched systemic and unequal distribution of economic and political power in favor of the private sector.

Both critical theories also add greater depth and complexity to this study's effort to put the mining justice movement's law reform outcomes into a larger context or perspective. To be clear, this reflection on unintended outcomes should not serve to minimize or ignore the accomplishments and positive results of the movement's important work. Indeed, Part 3 of this article reveals that the movement's activism has raised the public profile of its concerns, and transformed the way in which all actors, corporate, state and community, see and frame the issues. Recall that Brown and Halley argue that the effects of left legalism are always multifaceted, paradoxical, contradictory and contingent. In other words, no result is all "good" or all "bad". Moreover, Brown and Halley agree with White and Perelman that at any point in time, it is not possible to be deterministic or predictive about the future impacts of legal activism. Notably, this approach seems to diverge from the more simplistic costs/benefits analysis that Kennedy prescribed, which led to the unanswered question about how a movement might undertake a balancing exercise of this kind.

Brown and Halley's approach in particular suggests that the significance and impact of left legalism may be very difficult to anticipate prospectively and may shift over time and in relation to other factors. For example, how might we understand and capture the multifaceted impacts, especially for grassroots political mobilization and consciousness raising, of the historically ground-breaking recognition by states and companies alike that Indigenous communities have special communal property rights/claims and must be freely consulted and potentially compensated? How might we balance this positive, albeit symbolic change, with the negatives of formalism embedded in the resulting consultation laws that perpetuate colonial assumptions, power inequities and risk legitimating unfair results? Would we have been better off without this

symbolic recognition? Or does it constitute another (albeit imperfect) legal and political tool in a much longer process of struggle?

Similar questions might be asked of right to remedy law reforms in Canada. How can we understand the impact of the Canadian state's (albeit symbolic and indirect) recognition that it has an obligation to create a mechanism to investigate and remedy human rights abuses alleged against Canadian companies abroad? Does this impact outweigh the problems with the resulting mechanism, which is (on its own) incapable of providing meaningful remedies and perpetuates neoliberal approaches to public regulation and corporate accountability?

While these questions are critically important, they also can feel impossible to answer, and as a result disheartening, when structured as a kind of balancing exercise. Brown and Halley's proposal is helpful in this sense because it encourages us to explore the limitations, contradictions and paradoxes of left legalism without slipping into a simplified one-off costs/benefits framework. Moreover, a simple cost/benefit frame may also be unhelpful because it can foment polarization within the movement of different view about tactics. While the identification of unintended consequences is important, it does not mean that positive results are irrelevant or were not worth the effort. The fact of an unintended consequence does not necessarily mean that the chosen tactic was unwise. Indeed, activists and social movements work within a whole raft of constraints that shape their choices, including with respect to tactics.

In the spirit of Brown and Haley's concept of critique, the purpose of questions like those formulated above, is to gain insight and perspective, not truth and categorical conclusions. In this regard, one insight derived from the questions themselves is the revelation that the main accomplishments of the mining justice movement's law reform efforts to date is the affirmation/recognition (explicit or implied) of state obligations in positive law (right to consultation legislation) and/or policy (right to remedy mechanisms). It is a major milestone for the Canadian state to accept that it has a duty to strengthen access to remedies, and for Latin American states to codify in legislation that Indigenous peoples have procedural and substantive collective rights in relation to resource extraction. However, in both the Canadian and the Latin American case studies, the movement has encountered serious obstacles and resistance among state and corporate actors, who have worked to ensure that law reform outcomes maintain liberal subjectivities, ideologies (formalism, volunteerism, privatism) and entrenched inequities.

In recognizing and analysing the pitfalls encountered by specific mining justice movement law reform efforts (left critique), this study nonetheless shares critical legal liberalism's interest in the possibility of an engaged response to left critique. In other words, it seeks insight and lessons from past efforts in order to formulate a more productive re-engagement with law. Critical legal liberalism's efforts to respond to the skepticism of left critique contains two key elements that may assist in forging a way forward: commitment to redistribution and contribution to democratic politics.

First, White and Perelman asserts that human rights activism can overcome the perils of left legalism, formalism and formal equality if it stretches the language of rights to support social and economic rights and redistribution. Part 2 described how economic and environmental justice (redistribution) is arguably central to the mining justice movement's moral vision, while Part 3 described how the movement adopted demands for law reform in the areas of Indigenous rights to property and consultation (Latin America) and the right to remedy/accountability for corporate caused human rights abuse (Canada). However, the movement's experience, at least to date, indicates that it has been difficult to infuse these liberal rights claims with redistributive content/ outcomes, either in terms of knowledge (epistemological pluralism) or in material distributions of wealth and power. Movement actors have found it difficult to subvert the ideologies of formalism, volunteerism and privatism, embedded in neo-liberal constructs of consultation (contract) and the right to remedy. In other words, contrary to White and Perelman's assertion, movement actors' political commitment to redistribution was not sufficient to overcome the pitfalls of left legalism. It has not been easy for activists to meaningfully translate this commitment into tangible results. Ultimately, when designing new laws, the state has fallen back into its old liberal habits.

Second, White and Perelman argue that the movement must use human rights claims to foster wider democratic debate about deeper policy questions regarding the relationship between the market, the state and its population. Brown and Halley similarly share the conviction that legal activism must be supportive of "radical democracy" and deep deliberations about society's governing values and practices. This fits with their concept of operating inside the law while simultaneously attempting to transform it, transcend it, and seek politics that are "less saturated" by law.

In this area, it is not easy to identify the extent to which the mining justice movement's right to remedy and right to consultation law reform proposals have been able to foment

mainstream debate on underlying global economic arrangements. While the movement has certainly used the media and a variety of knowledge dissemination strategies to encourage public debate on specific issues, it has found it challenging to attract sufficient mass popular support for its causes. In Canada, the government's responses to date (and failed promises) signal that it has consistently calculated that it can ultimately ignore the movement's demands with little political cost, at least domestically.[131] Similarly, in Latin America, the movement has faced criminalizing and at times violent and racist rhetoric in the media and directly from elected officials in response to Indigenous and Campesino protest and justice claims, pitting these "backward minority" groups against the interests of the broader population in so-called "progress" and "development". In this light, right to consultation laws have done little to trouble the entrenched economic arrangements and the political ideologies that underpin industrial resource extraction in Latin America. Indeed, it is possible that the mere fact of right to consultation laws may more readily enable powerholders to construe opposition and dissent as irrational and backward when mine affected groups reject proposed processes and outcomes.[132]

In the end, the insights of left critique appear to have held true. The mining justice movement's experience with the law reforms studied here indicates that its commitment to redistribution, on its own, has not necessarily safeguarded its proposals from the pitfalls of left legalism. At least for the moment, the liberal claims to consultation and remedy do not appear to have resulted in a more expansive approach to economic, social and environmental justice. Similarly, the presence of voluntarism, privatism and formalism in resulting law reforms suggest that movement actors have not been able to subvert or shift a liberal and neo-liberal worldview of the legal (rights-bearing) subject, the market and the state. Moreover, the movement's capacity to connect its goals to broader societal normative debates about society's governing principles appears, at least for the movement, to be limited. There is evidence that the larger population has not responded in a sustained and meaningful way to the call for democratic debate on these issues, notwithstanding the movement's laudable public education and knowledge dissemination efforts,

[131] There is speculation that Canada is beginning to pay some political costs internationally. Some have connected Canada's foreign policy on mining to its failed bid for a seat at the UN Security Council in 2020: Bianca Mugyenyi, "Why Black and brown countries may have rejected Canada's security council bid" *Ottawa Citizen*, June 18, 2020.
[132] For a poignant depiction of this dynamic, see the short documentary film: Quisca Productions, *Parana – el río* (Peru, 2016) online: https://vimeo.com/195532048.

especially through the media.[133] What is significant here is that while many members of the mining justice movement hold deep commitments to redistribution and democratic politics, they have been unable to obtain law reform results (governance legalism) that connect meaningfully with these goals.

4.3 Counter-Hegemony

This section turns to the concept of counter-hegemony as the final step in its exploration of critical approaches to law and their potential application to the experience of the mining justice movement. The writing of Antonio Gramsci make interesting, but limited comments on the role of law in hegemony theory: in the formation of the state, the hegemonic bloc, civil society, and the strategies of counter-hegemony.[134] As such, the authors considered here adapt Gramsci's framework to the specific context of their analysis. This section begins by distilling each author's treatment of the concept of counter-hegemony before making some comparative observations that help assess the contributions of the concept to this article's examination of the mining justice movement. This analysis picks up on and extends the insights developed in the discussion above of pragmatism, left critique and critical legal liberalism.

a. Counter-Hegemony, Human Rights and Economic Globalization

In her 2005 article, Claire Cutler applies Gramsci's concept of law to the international plane in order to theorize the role of international law in the constitution of the global political economy.[135] In doing so, she comments on the relationship between resistance and international legal hegemony.[136] To this end, she presents the praxis conception of international law.[137] This

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[133] While the mining justice movement's law reform proposals have triggered debate among law-makers at certain intervals, the reference here to democratic debate refers to Brown and Halley's concept described above of radical democratic debate over society's governing norms.

[134] See Alan Hunt, "Rights and Social Movements: Counter-Hegemonic Strategies" (1990) 17:3 JL & Soc'y 309 at 310; Claire A Cutler, "Gramsci, Law and the Culture of Global Capitalism" (2005) 8 Crit Rev Intl Soc & Pol Phil 527 at 530. The authors here refer to Antonio Gramsci, *Selections from the Prison Notebooks*, ed and translated by Quintin Hoare and Geoffrey Nowell Smith (New York: International Publishers Company Inc, 1971).

[135] Cutler, *ibid* at 527. Certain elements of Cutler's discussion are outside of the scope of this review. Specifically, Cutler argues extensively that Gramsci's conceptions of historical bloc and hegemony can be adapted to the international arena and are useful for understanding the role of international law in the global political economy, *ibid* at 533-38.

[136] *Ibid* at 538.

[137] *Ibid* at 529. Cutler builds on Gramsci's praxis conception of law, where law operates both coercively and consensually within the state to secure the economic interests of the dominant class. In its consensual iteration, law

refers to law's potential to give rise to "forces of both domination and potential emancipation."[138] In this view, law's emancipatory potential is contingent on its capacity to transform global asymmetries of power and influence.

The concept of the commodity legal form is central to Cutler's analysis of resistance. Drawing on the work of a number of theorists, Cutler suggests that law takes on a specific form and significance in different historical moments, and that this form derives from its relationship with economic production and political power. Under conditions of capitalism, law takes on a form that mirrors the commodity form of production, which reduces diverse objects to their exchange-value.[139] Cutler attributes the following characteristics to the commodity form of law: it conceals inequalities by creating the "appearance of equality between people as legal subjects"; it presents "the communal protection of private property rights…as natural"; and it "formalizes the private/public distinction, emptying the private sphere of political content".[140] These qualities signal the fetishization of the commodity form of law, meaning that it presents the coercive, oppressive and inherently inequitable economic and political system as rational and equitable.[141]

Cutler then describes the commodity form of law under contemporary conditions of globalization. She argues that the global political economy is undergoing a process of juridification whereby Anglo-American legal concepts have expanded their scope and influence on local orders.[142] The result of juridification in this historical moment is that the commodity form of law has become hegemonic and now defines the international historical bloc,[143] which Cutler characterizes as postmodern and late capitalist.[144] She finds evidence of postmodern forms of law

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educates the subaltern in the ideology of conformity, turning coercion into freedom. This is also described as the double face or dialectic of law.

[138] *Ibid* at 538.

[139] See *ibid* at 531-32. Here Cutler relies on interpretations of Karl Marx developed in Perry Anderson, *Lineages of the Absolutist State* (Brooklyn, NY: New Left Books, 1974); Evgeny Pashukanis, *Law and Marxism: A General Theory* (New Jersey: Transaction Publishers, 1978); and Isaac D Balbus, "Commodity Form and Legal form: An Essay on the 'Relative Autonomy' of the Law" (Winter 1977) 11:3 Law & Soc'y Rev 571.

[140] *Ibid* at 532.

[141] *Ibid.*

[142] *Ibid.*

[143] *Ibid* (Cutler cites Gramsci's definition of historical bloc: "the complex, contradictory and discordant *ensemble* of…the social relations of production" at 534; Cutler also cites Robert Cox's definition: "the overall configuration of productive, institutional and ideological forces of a given historical period" at 534).

[144] *Ibid* at 535 (Cutler describes the legal elements of post-modernity and late-capitalism on three levels: materially, institutionally and ideologically. In this review I limit my references to her material description).

in the phenomenon of legal pluralism,[145] while late capitalist forms are those that "facilitate the displacement of welfare states…through deregulation and privatized legal codes", including "soft-law re-regulation".[146] Cutler further argues that the commodity form of international law under late capitalism is also dialectical. This is represented by the tension between hard legal regimes, which purport to enforce private property rights on an equal playing field, and soft laws, which are rationalized as the most efficient means of regulating the social dimensions of global capitalism.[147] For Cutler, this dialectic fundamentally functions to protect capital: hard laws "constitutionalize private regimes of accumulation" while soft law regimes incorporate and eliminate critique.[148]

Having characterized in detail the commodity form of international law, Cutler sketches some ideas for resistance. Crucially, she argues that resistance must be accomplished "through the revelation of the fetishism and mystification of the legal and commodity forms".[149] This involves, at least in part, critiquing dominant representations of private interests as communal, rational and common sense.[150] Cutler also argues that resistance is linked to the dialectical operation of international law. This means that the distinction between hard and soft law must be challenged to reveal that its fundamental function is to protect capital.[151] Cutler further argues that the praxis of international law requires that resistance be grounded in practical, local experiences, where "common sense understandings of power and authority might be challenged".[152] Finally, Cutler suggests that the objective of resistance is to pursue "emancipatory politics both through law and against law" or, stated somewhat differently, to "negate law through law".[153] This articulation refers back to Cutler's praxis conception of international law, which encapsulates law's double face of coercion and consent, its dialectic of hard and soft law, as well as its transformative potential.

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[145] *Ibid* at 535 (Cutler describes legal pluralism as multiple legal orders that operate sub-nationally, nationally, regionally and transnationally, linking local and domestic economies and societies through the creation and expansion of legal regimes governing myriad areas of social life).
[146] *Ibid*.
[147] *Ibid* at 537, 539.
[148] *Ibid* at 539 (in reference to soft laws, Cutler adopts Gramsci's term "*transformismo*" defined as the "process by which opposition and resistance to hegemony is absorbed into the dominant ideology" resulting in the elimination of opposition at 536).
[149] *Ibid* at 538.
[150] *Ibid* at 537-38.
[151] *Ibid* at 539.
[152] *Ibid* at 529-30, 539.
[153] *Ibid* at 528-29, 540 (Cutler takes the idea of the negation of law through law from Gramsci's conception of the ethical, integral, or perfect state: at 529).

Like Cutler, in their 2005 edited collection *Law and Globalization from Below*, Boaventura de Sousa Santos and César Rodríguez-Garavito focus on corporate globalization.[154] While they build on the work of hegemony theorists who track the reproduction of the hegemony of transnational capital,[155] they also distinguish themselves. Rather than focusing on the reproduction of hegemony, they concentrate on identifying the legal strategies and tactics that effectively subvert it.[156] To this end, they focus on the question of how and why hegemonic structures change.[157] To answer this question, they elaborate on their project of cosmopolitan subaltern legality, which they refer to as "a mode of socio-legal theory and practice" and "an approach rather than a theory".[158] They position this approach as the legal counterpart of counter-hegemonic globalization.

For Sousa Santos and Rodriguez-Garavito, the term "cosmopolitanism" incorporates two key features: first, the moral claim that justice and equality concerns transcend state boundaries; and second, the ethical commitment to collaboration, pluralism and diversity.[159] Importantly, the authors "revise" cosmopolitanism's "Western" or "Northern" origins and orientations by introducing the concept of the subaltern. They use this term to refer to all who are the victims of discrimination, exclusion or deprivation of any form, anywhere in the world.[160] In this view, counter-hegemonic strategies and tactics fundamentally privilege the role and perspectives of the subaltern in order to conceive of new forms of global politics and legality.[161]

Framed with the moral lens of cosmopolitanism and the political lens of the subaltern, Sousa Santos and Rodriguez-Garavito turn to the concept of "legality" in relation to the study of counter-hegemonic responses to globalization. They describe this mode of study as "bottom-up"

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[154] Boaventura de Sousa Santos & Cesar A Rodriguez-Garavito, "Law, politics, and the subaltern in counter-hegemonic globalization" in Boaventura de Sousa Santos & Cesar A Rodriguez-Garavito, eds, *Law and Globalization from Below* (Cambridge, UK: Cambridge University Press, 2005) 1.
[155] *Ibid at* 5 (Sousa Santos and Rodriguez-Garavito associate hegemony theorists with the work of Marx, Bourdieu and Foucault, and in particular those works that reveal the contribution of law to arrangements of domination at 6).
[156] See *ibid* at 9-12 (Sousa Santos and Rodriguez-Garavito offer an extended critique of the contributions and limitations of hegemony theorists).
[157] *Ibid* at 12.
[158] *Ibid* at 5, 13 (Sousa Santos and Rodriguez-Garavito present this approach as a critique of two dominant areas of research in law and globalization studies: the global governance literature and the post-law and development literature).
[159] See *ibid* at 13. For their description of cosmopolitanism, Sousa Santos and Rodriguez-Garavito rely on Debra Staz, "Equality of What Among Whom? Thoughts on Cosmopolitanism, Statism, and Nationalism" in Ian Shapiro & Lea Brilmayer, eds, *Global Justice: Nomos XLI* (New York: New York University Press, 1999) 67; Walter Mignolo, "The Many Faces of Cosmo-Polis: Border Thinking and Critical Cosmopolitanism" in Carol Breckeridge, et al, eds, *Cosmopolitanism* (Durham: Duke University Press, 2002) 157; and Anthony K Appiah, "Citizens of the World" in Matthew Gibney, ed, *Globalizing Rights* (Oxford: Oxford University Press, 2003) 189.
[160] *Ibid* at 14.
[161] *Ibid* at 9.

in that it favors "the detailed empirical study of legal orders as they operate on the ground."[162] This includes tracking the legal, illegal and non-legal strategies of transnational and local movements, in relation to state and non-state legal orders at every scale.[163]

The cosmopolitan subaltern legality approach is at once pragmatic and pluralist. First, it is willing to go beyond law, in that it examines "the potential and limitations of law-centered strategies for the advancement of counter-hegemonic political struggles", as well as the importance of political mobilization for the success of subaltern legal strategies.[164] Second, it is willing to affirm the full range of rights related strategies. Sousa Santos and Rodriguez-Garavito's observe that individual rights strategies may be important for the subaltern who face, among other things, the coercive imposition of neoliberal political and legal arrangements. At the same time, subaltern legality cultivates and explores conceptions of rights that go beyond liberalism and that might be characterized by "solidaristic understandings of entitlements grounded on alternative forms of legal knowledge."[165] Finally, cosmopolitan subaltern legality is focused on legal projects emerging from local, non-English speaking, grassroots organizations and community leaders.[166] It aims to shed light on the alternative forms of knowledge, law and politics that subaltern counter-hegemonic legal practices advance in their effort to introduce a "new common sense". [167] However, it does not idealize these coalitions and strategies; rather it is attentive to their tensions, contradictions or shortfalls.

Among the contributions to Sousa Santos and Rodriguez-Garavito's edited collection, Ronen Shamir's chapter on the politics of corporate social responsibility (CSR) fits squarely with this article's focus on the mining justice movement.[168] Shamir sets up his analysis as a dialectic between the hegemonic economic, political and cultural power of multinational corporations (MNCs) on one hand, and on the other, counter-hegemonic efforts to subject this form of private power to legal oversight and control in favor of the public good.[169] These counter-hegemonic practices take place at the international level, where activists advocate for the international

[162] *Ibid* at 4.
[163] *Ibid* at 15-16.
[164] *Ibid* at 4, 15.
[165] *Ibid* at 16.
[166] *Ibid* at 11.
[167] *Ibid* at 17-18.
[168] Shamir, *supra* note 66.
[169] *Ibid* at 92-3 (Shamir also refers to counter-hegemony in this context as "the use of law as means for bringing about social emancipation from corporate tyranny" at 95).

regulation of MNCs according to universal standards. They also occur at the domestic level, in MNCs' home states, where activists pressure the courts and governments of developed countries to regulate the human rights consequences of corporate activity abroad.[170] Shamir's first fundamental assertion is that the study of these counter-hegemonic practices must take hegemonic responses into account.[171]

Shamir casts voluntary CSR as a fundamentally important "hegemonic counter-response" to counter-hegemonic efforts to critique and politicize corporate practices. In his detailed description of the numerous practices, discourses and tools of voluntary CSR, two key features emerge that are central to its status a hegemonic counter-response. The first is the principle of self-regulation, which Shamir characterizes as "the corporation's most crucial frontline in the struggle over meaning and an essential ideological locus".[172] The second key feature is the integration of CSR into the corporation's profit model through "the language of instrumental-rationality", or more simply put, under the slogan "CSR is good for business".[173] He concludes that *by design*, CSR constitutes an attempt to pre-empt, de-radicalize and de-politicize counter-hegemonic efforts to develop enforceable laws capable of controlling corporate power.[174]

Building on this, Shamir makes his second fundamental assertion, namely that neoliberal tendencies *within* civil society organizations and transnational social movements must be taken into account when theorizing counter-hegemonic globalization.[175] He believes that these tendencies have consequences for the movement's ability to successfully advance alternative agendas.[176] This is especially pertinent because, writing in 2005, Shamir concludes that these movements have largely failed to control corporate power.[177] Two features of the "neoliberal

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[170] *Ibid* at 96-99. In describing these practices Shamir omits to acknowledge that they also take place in the "host states" where MNCs conduct their operations.
[171] *Ibid* at 94.
[172] *Ibid* at 101.
[173] *Ibid* at 101, 107.
[174] *Ibid* at 95.
[175] *Ibid* at 109. In addition to corporate funded ngos, Shamir includes in this category those organizations who are heavily funded by corporate philanthropic foundations, as well as those that are established or indirectly governed by governments. He distinguishes these from those groups with "institutional and ideological independence" and autonomy, *ibid* at 109-10.
[176] *Ibid* at 95.
[177] For this proposition Shamir cites Prakash S Sethi, "Corporate Codes of Conduct and the Success of Gloablization" (2002) 16:1 Ethics & Intl Aff 89; Morton Winston, "NGO Strategies for Promoting Corporate Social Responsibility" (2002) 16:1 Ethics & Intl Aff 71. While Shamir's chapter dates to 2005, since its publication many of the trends he describes have only intensified. His subsequent work tracks some of these trends. See for example: Ronen Shamir, "Socially Responsible Private Regulation: World Culture or World-Capitalism?" (2011) 45:2 Law and Soc'y Rev 313; Ronen Shamir, "The Age of Responsibilization: On Market-Embedded Morality" (2008) 37:1 Econ & Soc 1; Ronen

blueprint of civil society" emerge from his arguments. The first is the rise and expansion of a segment of the not-for-profit sector that functions to enhance corporate and/or government power, such as through the promotion of voluntary CSR. Shamir has gathered a wealth of information on the influence of "corporate-sponsored and corporate-oriented NGOs" on the CSR movement.[178] Dubbing them market-oriented NGOs (MaNGOs), he places them as part of a broader and somewhat older trend toward the corporatization of civil society.[179]

The second civil society feature of concern for Shamir is perhaps more complex and subtler in its design and consequences. He argues that many of the organizations that participate in counter-hegemonic social movements have come to share some fundamental social characteristics with the MNCs that they oppose.[180] Specifically, he is concerned with the NGO's institutional paradigm and what he sees as its bias "toward the corporate hegemonic model of organization and implementation."[181] He is also concerned with what has become the typical configuration of counter-hegemonic coalitions, where the poor and oppressed advance their claims principally through the formation of ties with large institutional players and Northern experts.[182]

Shamir argues that these counter-hegemonic elites share a particular culture of professional expertise and of scientific managerial language, that in some important respects resembles that of the corporate classes, and that in some cases amounts to a managerial approach to social action and social change.[183] In what is perhaps his most important example of this, Shamir points out that, while disagreeing on a number of substantive matters, corporate and the counter-hegemonic elites both tend to rationalize, legalize, codify and regulate moral claims, particularly through the language of human rights.[184] Interestingly though, for Shamir this second concern and its features do not automatically preclude the counter-hegemonic status of particular movements. He seems to accept that these features might exist *within* counter-hegemonic coalitions.[185] However, in his

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Shamir & Dana Weiss, "Corporations, Indicators, and Human Rights: A Material Semiotics View" in Kevin Davis et al, eds, *Governance by Indicators: Global Power through Data* (Oxford: Oxford University Press, 2012).

[178] *Ibid* at 95.

[179] *Ibid* at 105, 109.

[180] *Ibid* at 110. Shamir draws on Gouldner's concept of the "new class" as a heuristic device to describe some of his concerns in this regard. See Alvin V Gouldner, *The Future of the Intellectuals and the Rise of the New Class* (Oxford: Oxford University Press, 1979).

[181] *Ibid* at 113.

[182] *Ibid* at 110-13.

[183] *Ibid* at 110-15.

[184] *Ibid* at 115.

[185] Shamir cites the Treatment Action Campaign (TAC) in South Africa, a movement to demand access to affordable HIV/AIDS treatment, as an example of the potential counter-hegemonic impact that a transnational coalition might

view, they compel us to identify and come to terms with their potential adverse consequences for imagining and realizing emancipatory alternatives to contemporary globalization.[186] In this sense, his contribution calls for greater critical awareness and reflection on the institutional forms, knowledge forms and languages adopted by counter-hegemonic movements.

b. Counter-Hegemony and the Mining Justice Movement

The counter-hegemony theorists discussed above develop and adapt their interpretation of Gramsci's writing to a context. Claire Cutler focuses on international law and the global political economy. Boaventura de Sousa Santos and César Rodríguez-Garavito share Cutler's scale of analysis, although they are concerned more broadly with all contemporary forms of globalization, as well as local articulations of law. Finally, Ronen Shamir concentrates specifically on the international politics of corporate social responsibility. Although each author's conclusions are grounded in their respective context, there are common themes and debates that run through these contributions. In the remainder of this section, I extract common points of interest and consider their relevance to the mining justice movement's experience with the law reform activism studied here.

Two of the authors reviewed here theorize hegemonic responses to counter-hegemonic resistance. While Cutler and Shamir use different terminology, they seem to agree on a basic premise: hegemony responds to counter-hegemony by partially addressing and incorporating its concerns, such that critique loses its cogency and capacity to generate substantive changes to hegemonic arrangements. Cutler uses Gramsci's term "*transformismo*", defined as the "process by which opposition and resistance to hegemony is absorbed into the dominant ideology" resulting in the elimination of opposition.[187] Shamir adopts the phrase "hegemonic counter-responses" to describe voluntary CSR's effect of pre-empting, de-radicalizing and de-politicizing efforts to develop enforceable laws capable of controlling corporate power.[188]

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have. Interestingly, the TAC is also the focus of a chapter in White & Pearlman's edited book: William Forbath, "Cultural Transformation, Deep Institutional Reform, and ESR Practice: South Africa's Treatment Action Campaign" in White & Perelman, *Stones of Hope* 54, *supra* note 80. Further research could examine similarities and differences in the ways in which these two different theoretical frameworks (counter-hegemony and critical legal liberalism) approached and interpreted this case study.

[186] *Ibid* at 113.

[187] Cutler, *supra* note 131 at 536. Note that Cutler also sees soft laws and CSR as part of the dialectic of the international commodity legal form under conditions of late capitalism. As such, she sees these legal innovations both as part of the hegemonic development of international law, *and also* as a specific response to resistance.

[188] Shamir, *supra* note 65 at 95.

These descriptions of counter-hegemonic responses help to characterize state responses to the mining justice movement's calls for law reform. As described previously, state-driven reforms have recognized certain human rights obligations, while retaining liberal and neo-liberal frameworks (formalism, privatism and voluntarism) that arguably preclude these reforms from serving as effective instruments of justice. The concept of "*transformismo*" helps to highlight the power relations at play in this dialectic. The state's response, and in particular formal equality, risk (superficially) legitimating the very relations of injustice that the movement has sought to transform. The case study of right to consultation legislation in Latin America is one clear example of this. Moreover, the state's response to resistance may exhaust the movement by generating a new burden to once again demonstrate empirically and normatively the shortcomings of new laws. The Canadian case study of a litany of deficient right to remedy mechanisms is a good example of how *transformismo* can become an endless cycle that risks exhausting the movement. In sum, the experience of the mining justice movement resonates with these authors' assertion that resistance will be met with a hegemonic counter-response that incorporates demands in an effort to weaken them and maintain the power status quo.

This discussion raises the important question of how these theorists define movement practices as counter-hegemonic (or not). Shamir in particular cautions against the assumption that the efforts of NGOs and inter-governmental organizations are necessarily counter-hegemonic. He demands a critical interrogation of civil society practices in order to determine their implications for corporate hegemony. As a group, the authors display some variance in their willingness to classify human rights claims as counter-hegemonic. Shamir is suspicious of the dominance of these claims in counter-hegemonic movements, especially because corporations and the institutions that support them have incorporated human rights language. In contrast, Sousa Santos and Rodriguez-Garavito more readily accept that rights claims have the potential to produce strategically valuable results for counter-hegemonic movements, although they would prefer to foster claims that advance alternative forms of knowledge. In sum, there is consensus among these authors that rights claiming *could* be transformative of power relations, but that this tactic is also (significantly) vulnerable to *transformismo*.

The question of how the authors reviewed here define counter-hegemony is linked to the way they define movement success. Sousa Santos and Rodriguez-Garavito's begin with cosmopolitan subaltern legality, the term they use to describe the legal counterpart of counter-

hegemonic movements. In this framework, success is articulated in moral and epistemological terms: it is the approximation of the cosmopolitan values of justice, equality and pluralism, defined from the perspective of the subaltern. On the other hand, Cutler and Shamir's concept of success focuses on power: Cutler describes counter-hegemony as a transformation in power asymmetries, while Shamir suggests that it is evidenced by greater public or popular control over corporate power.

The differences in emphasis among these authors in defining counter-hegemonic success can be woven into a three-part framework. First, a movement is successful when it changes dominant ideas (common sense). Second, these changes must have real consequences for the distribution and exercise of power. And finally, these changes must advance an alternative normative vision of the good (justice and equality) defined from the perspective of a less-powerful group (the subaltern).

Applying this framework to the mining justice movement's law reform results helps to analyze the dynamics of hegemony and counter-hegemony in this case study. These law reform efforts have certainly impacted ideas/common sense about state obligations. As described in Part 3, the state has recognized and created new legal regimes, ostensibly to support the right to consultation (Latin America) and the right to remedy (Canada). These regimes certainly represent some change in state norms and practice. However, research and critical analysis has shown that these changes have done little to transform power asymmetries (Cutler) or ensure greater public control over corporate power (Shamir). While activists and community leaders have worked hard to communicate the lived experience of mine affected communities (the subaltern) and an alternative normative vision of social and economic relations, they have not been able to ensure that the resulting reforms enacted by the state (the executive branch) reflect this vision or substantively assist these communities.

The discussion of movement success raises another interesting theme among the authors, namely the route that they would prescribe for achieving the goals of counter-hegemony. This follows the logic of "what do we want?" and "how do we get there?". For Cutler, the crucial work of counter-hegemony involves critically deconstructing the law and the economy to demonstrate that they are not morally or politically neutral forces, but rather the result of political choices that benefit capitalist classes. She refers to this process as the demystification of the commodity form of law.

Still on the theme of prescriptions, the authors engaged here rally around the idea that counter-hegemonic politics must be rooted in practice. On this basis, Cutler's demystification of the commodity form must connect with people's everyday experience of the economy and the law. Similarly, Sousa Santos and Rodriguez-Garavito call for the detailed empirical study of how legal orders actually operate on the ground, and an approach to scholarship that is sensitive to alternative forms of legal knowledge, otherwise hidden in local practices and forms of resistance. Given his emphasis on hegemonic counter responses, Shamir takes a slightly different approach to the topic of practice. He is concerned with the extent to which the dominant civil society institutional form, the NGO, imposes technocratic, managerial ways of thinking and being onto claims that emanate from grassroots social movement actors. His concern is that the neoliberal NGO institutional form has the effect of disassociating the politics of counter-hegemony from practical experience. It is worth noting that Shamir's frame resonates with Kennedy's reflection (Part 4.1) on the politics and ethics of the human rights movement's participation in governance or "rulership".

Once again, these insights from this group of counter-hegemony theorists are significant for the mining justice movement. Movement actors pursued law reform by packaging their claims in the language of human rights. However, these proposals to date have not addressed fundamental issues with the legal and economic arrangements that enable and protect transnational corporate resource extraction (Cutler and Shamir). Rather, the resulting reforms have added a layer of law, namely procedure (consultation) or weak oversight (complaint/review), to existing arrangements. This helps explain, at least in part, why power relations appear to have continued largely undisrupted by these reforms.

In terms of the call from these authors to root legal change in everyday/ordinary/subaltern experience, the approach of the mining justice movement has been mixed. On one hand, the movement has been remarkably effective in gathering data and telling the story of affected communities and their experiences of social and economic injustice and violence. Further, advocates have consistently appealed to this evidence of injustice to advocate for the law reforms studied here. However, on the other hand, advocates have faced obstacles in ensuring that law reform outcomes account for, and respond to, the realities of social and economic power and context. Thus, while advocates have done well to document grassroots community experiences and connect these with its advocacy efforts, they have been less successful in achieving law reform outcomes that meaningfully address these documented realities of injustice. The prospect of

fashioning rights claims and securing law reforms that are responsive to the perspectives and experiences of the subaltern, represents a formidable and as yet unresolved challenge for the mining justice movement.

Finally, some of the authors reviewed here pick up the theme of the relationship between counter-hegemonic movements and the law as a potentially progressive tool for social change. It is common ground among them that this is always contingent on the strength of accompanying forms of non-legal political mobilization. Further, they all agree that law is a crucial site of struggle. In Cutler's praxis conception, international law has the potential to give rise both to forces of emancipation or domination. As a result, law as domination must then be negated, or overcome, with law as emancipation. This is what she means by the phrase "negate law through law". Rather than a debate over what the law says (how rights are recognized and interpreted), for Cutler the struggle is over the actual form that law takes – the commodity form. In this view, struggle occurs over what the law is, and in particular its relationship with the state and capital. Cutler's challenge to reconceive of law resonates with Sousa Santos and Rodriguez-Garavito's conception of subaltern cosmopolitan legality. While they see practical value in rights strategies organized around classically liberal rights, their main interest is to identify conceptions of rights that go beyond liberalism and represent alternative forms of knowledge.

Building on these discussions in relation to this final theme, three interconnected ways of thinking about the role of the law in social struggles seem to emerge. In the first, the struggle revolves around what the law says or should say, including debates over interpretation of law. This involves attempts to introduce new ideas and practices, and it conjures up commonly observed struggles over distribution, entitlements and recognition. In the second, the struggle takes place over what the law is (ie the commodity form), how it reflects, produces and rationalizes the state and the market. This moves toward deeper political transformations of power and legitimacy, market and state. Finally, in the third approach, the struggle is over the knowledge or worldview that the law embodies. This alludes to deeper transformations of the values, ethics, culture and histories that underlie law's vision of the good.

The three-part typology once again serves as a useful guide for analysis of the achievements and limitations of the law reforms pursued and obtained by mining justice advocates. Proposed reforms have focused on obtaining legal recognition of, and regimes to support, new state duties in relation to the right to consultation and the right to remedy. However, the outcomes have done

little to disturb key elements of law's "commodity form" under conditions of late capitalism (Cutler), namely formalism, voluntarism, and privatism. While advocates have appealed to community-based forms of knowledge and worldviews, they have not been able to ensure that the state-controlled results are infused with subaltern ways of knowing.

In sum, these counter-hegemony theorists offer a variety of perspectives that enrich our understanding of mining justice advocates' experiment with law reform. In some areas these theorists echo the debates at play in the previous discussions of pragmatism and left legalism. In particular the debate over the strategic value, or inevitability, of rights is a common theme, as well as the role of alternative forms of knowledge and the complexity of civil society's potential role in governance legalism or decision-making (rulership). Counter-hegemony as an approach adds value to this discussion due to its emphasis on (international) capitalism, structural power relations, and the relationship between the state and capital. This emphasis is certainly important in light of the concerns of the mining justice movement. The next section picks up on this by drawing together common themes and important differences across the theoretical approaches consulted in this article.

5 Conclusion

This article has examined key law reforms that have emerged from the activism of mining justice movement advocates over the last twenty years. In Latin America, courts began in 2001 to recognize Indigenous rights and a number of states responded to Indigenous peoples' ongoing opposition to neo-liberal natural resource extraction with right to consultation legislation, beginning in 2011. In Canada, over the course of nearly twenty years of corporate accountability "right to remedy" advocacy, the state responded with a series of home-state, non-judicial grievance mechanisms, primarily directed at extractive industries (2009, 2014 and 2019). However, a wealth of critical analysis and empirical research suggests that these reforms have had limited success, at least to date, in meaningfully furthering the movement's human rights and social justice goals. In this article I have argued that this is due, at least in part, to the persistence of three fundamental liberal and neo-liberal ideologies, formalism, privatism and volunteerism, that are tenaciously embedded in these law reforms. This assessment of twenty years of transnational law reform activism on the part of mining justice movement advocates calls for reflection on the strengths and

weaknesses of their experiment with law reform in the age of human rights and neoliberal economic globalization.

This article attempts to respond to this call by consulting the work of critical theorists who, while working from a variety of different contexts, are united by their examination of progressive movements' engagement with law in an effort to transform the unjust economic and social conditions that result from liberal and neo-liberalism political and economic arrangements. These authors adopt specific and varied vocabulary to refer to this engagement: pragmatism, left legalism (rights or governance legalism), critical/transformative legal liberalism, subaltern cosmopolitan legality, and counter-hegemony. Although there are certainly differences in emphasis, these authors and approaches have much in common. They all believe that law is an important, perhaps inevitable, site of struggle. However, they also see social movement engagement with liberal law as fraught with political and epistemological risks, paradoxes and tensions with the movement's goals. They similarly agree that this necessitates a commitment within the movement to ongoing critique of liberalism/capitalism/hegemony, alongside reflexivity and critical assessment of the costs/benefits, limitations, contradictions, etc. of legal activism. At the same time, all authors recognize that political action outside of law is critical to the movement's successful engagement in legal activism, and some authors push for political projects that are less reliant on liberal legal claims.

The theorists here also agree that progressive social movement's productive engagement with liberal law should be informed (and constrained) by a variety of normative commitments to: meaningful/substantive equality and freedom, epistemological pluralism, fomenting deeper and richer democratic debate, redistribution, and public control of corporate power. In terms of legal tactics, these authors are fixated on the dominance of human rights as the contemporary language and tool of progressive movements. Generally, they see rights legalism as problematic in that it inevitably carries political content that risks narrowing the movement's capacity to conceive of human freedom, prevents other ways of knowing, and is easily coopted by hegemonic liberalism and capitalism. However, their strategies and degree of optimism in relation to rights activism varies. Some authors emphasize the strategic value of rights due to their malleability and lack of fixed content, as demonstrated by ongoing struggles and shifts over time in their meanings and interpretations. Some authors see rights as uniquely able to capture and advance the specific concerns of marginalized groups.

Less optimistically, the experience of mining justice movement advocates with law reform rooted in human rights frames, appears to resonate, at least for now, with some of the pitfalls of rights legalism that these theorists identify. As indicated, the state has responded to advocates' demands and fashioned law reforms that are predicated on some of the same problematic liberal and neo-liberal ideologies that many members of the movement oppose (formalism, voluntarism and privatism). The persistence of formalism in particular indicates that these new laws and regimes are not appropriately sensitive to alternative worldviews, power relations and context. Voluntarism and privatism reflect the well-known legal foundation of neo-liberal resource extraction: private ownership of and profit from resources, without effective state protection of the public interest, broadly defined, and without effective accountability mechanisms. In the result, the laws, practices and systems of unjust mining arguably remain fundamentally intact and undisturbed, albeit with an added layer of largely ineffective (consultation and remedy) reforms. There is a risk that these kinds of reforms may serve to legitimate business as usual, as rhetorical and even legal devices in the hands of powerful states and companies.

At the same time, advocates' success in pressuring the state to recognize and create regimes in relation to Indigenous peoples' right to consultation and a general right to remedy, represents a significant and perhaps even radical change in the normative status quo in the last twenty years. These new laws and regimes, however limited, provide new tools and platforms for advocacy and mobilizing that may propel more meaningful change in the future. Notwithstanding their pitfalls, it is arguably better for marginalized communities to have a recognized law and a process to appeal to, instead of no law at all. On the other hand, do these inadequate laws merely distract and exhaust the movement with few results? It is methodologically difficult, and likely too early, to evaluate the medium and long-term impact of these changes for the strength of the movement and future demands/changes.

At this juncture, the empirical and theoretical analysis marshaled here provides a preliminary map of some potentially key sites of struggle and legal innovation going forward. Given this article's focus on public law regulation, these conclusions likely have greater direct relevance to that domain, although knowledge gained about public law activism may also provide important insights to other domains, such as for example civil litigation activism. An important lesson is that the movement must continue to challenge liberal law's commodity form (to use Cutler's term) as manifest in formalism, privatism and voluntarism. In the law reform experiment

of the last twenty years, these features of liberal law have emerged as tenacious obstacles to the movement's social change agenda. This lesson pushes toward the development of proposals that change the fundamental legal arrangements that enable mining injustice, rather than adding a (potentially symbolic) layer of human rights reforms to existing structures. Moreover, the movement will continue to be challenged to fashion its demands with reflexivity and with particular attention to the significance of social context, power, epistemological pluralism and subaltern worldviews. This will require further innovation in translating subaltern ways of being and knowing into law reform agendas that are responsive to this diversity.

This article's scope, and the insights summarized above, have focused on the substantive content of specific public regulation law reform proposals and outcomes. This of course does not address the political and ideological obstacles to pursing counter-hegemonic reforms in practice, such as for example the corporate capture of most liberal states, which consistently prevents governments from implementing even modestly progressive proposals.[189] Both avenues of research and inquiry are equally important. The theorists surveyed here have argued that critical reflection on the question of how movements translate their vision into specific law reforms is incredibly important. At the same time, the strategic and practical question of how to engage effectively with the state to pursue social change is equally crucial. Movements need both an agenda that will help approximate their vision, as well as a strategy for achieving that agenda.

The reality of serious structural obstacles to the mining justice movement's social justice law reform agenda presents an important area of further research as well as a potential opportunity. Perhaps these structural issues will ultimately push toward a broader re-conception of the movement itself, one that integrates its focus on the specific injustices of global mining with a clear articulation of how these injustices connect with the larger unfolding injustice faced by all of humanity, that of catastrophic climate change, growing global inequality and radical and rapid environmental degradation. The same legal and economic arrangements, liberal ideologies, and state-corporate relations that produce mining injustice are at the root of the broader planetary environmental and social justice crisis. In this light, the lessons learned from the mining justice

[189] See for research documenting the corporate lobby against the Ombudsperson proposal, see *supra* note 53. For an in-depth study of the history of corporate capture of environmental law and policy by oil and gas companies, see MacLean, "Regulatory Capture" *supra* note 61.

movement's experiment with public regulation law reform activism over the last twenty years may have broader significance and application.

Observing the emerging signs of the times, a greater emphasis on large-scale structural change may indeed be the way of the future for the mining justice movement. In 2018, Swedish activist Greta Thunberg began a simple act of protest that galvanized youth around the world to join her and demand that elected politicians undertake swift and radical societal changes in order to address the climate crisis. In August 2019, Thunberg began a journey to visit Canada, the US and several Latin American countries.[190] She had decided to connect her climate crisis struggle to the situation of environment and land defenders globally who face criminalization, threats and violence due to their opposition to harmful resource extraction, including and often especially industrial mining.[191] Indeed, in 2019 the UN Human Rights Council and Special Rapporteurs also began to emphasize this important connection.[192]

These developments suggest that the mining justice movement may begin to more explicitly conceive of its law reform agenda in concert with other movements calling for structural changes to address the environmental and human costs that flow from corporate globalization. The mining justice movement may intensify its efforts to connect with other movements to formulate and pursue fundamental changes to the interrelated systems of extraction, consumption, pollution, and the economic and environmental injustices, that characterize modern life and liberal societies. In this frame, the mining justice movement would remain rooted in the concerns of Indigenous and other marginalized mine-affected communities, while also actively connecting these to related

[190] "Greta Thunberg will sail across the Atlantic on a zero-emissions yacht for the UN climate summit" *CNN* (18 August 2019), online: <https://www.cnn.com/2019/07/29/europe/greta-thunberg-sailboat-scli-intl/index.html>.
[191] Brent Patterson, "Thunberg's visit to Mexico could draw attention to the risks faced by human rights defenders" *PBI* (29 July 2019), online: <https://pbicanada.org/2019/07/29/thunbergs-visit-to-mexico-may-draw-attention-to-the-risks-faced-by-human-rights-defenders/>; Front Line Defenders, "Front Line Defenders_; Front Line Defenders, "Front Line Defenders_Global Analysis 2018" (2018), online (pdf): *Front Line Defenders* <https://www.frontlinedefenders.org/sites/default/files/global_analysis_2018.pdf>; Global Witness, "Enemies of the State?: How governments and business silence land and environmental defenders" (July 2019), online (pdf): *Global Witness* <https://www.globalwitness.org/en/campaigns/environmental-activists/enemies-state/?Utm_source=hootsuite&utm_medium=twitter%3e;%20Front%20Line%20Defenders,%20"Front%20Line%20Defenders>.
[192] UNGA, Human Rights Council, *Recognizing the contribution of environmental human rights defenders to the enjoyment of human rights, environmental protection and sustainable development*, UN Doc A/HRC/40/L.22/Rev.1, 20 March 2019, online (pdf): *UN* <https://undocs.org/A/HRC/40/L.22/Rev.1>; UN Human Rights Office of the High Commissioner, "UN human rights experts applaud children fighting climate change" (22 March 2019), online (pdf): *OHCHR* <https://www.ohchr.org/EN/newsevents/Pages/displaynews.aspx?Newsid=24393&langid=E>.

concerns and debates unfolding in the broader society, which is increasingly concerned with the survival of life on the planet.[193]

As the mining justice movement continues to experiment with substantive law reform, it will require innovative lawyering capable of marrying the political and epistemological insights and commitments of left critique, counter-hegemony and critical legal liberalism, together with the engaged, yet reflexive, stance of pragmatism. The task at hand is the articulation of a more radical law reform agenda that moves beyond adding a layer of process or oversight to existing legal and economic arrangements. The agenda of the future, if it will be able to address these urgent issues, must aim to fundamentally transform the ways in which law structures the relationship between the state, the private sector, people and all living things. The knowledge, experiences, strategies and commitments of the transnational mining justice social movement undoubtedly make an important contribution to these broader, ongoing and collective efforts to forge a productive and effective agenda for legal activism and research, in pursuit of global social and environmental justice.

[193] Louis J Kotze, "Editorial: Coloniality, neoliberalism and the Anthropocene" (2019) 10:1 J HR & Envtl 1, online: *Elgar Online* <https://www.elgaronline.com/view/journals/jhre/10-1/jhre.2019.01.00.xml>.

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