UiT THE ARCTIC UNIVERSITY OF NORWAY

Consultations, Indigenous Peoples and Industry

Report on the conference arranged by the Centre for Sami Studies, University of Tromsø, The Arctic University of Norway, Tromsø, 19. – 20. September 2016

First Nations Protest in British Columbia, in August 2017. Courtesy of Dorothee Schreiber

UNIVERSITY OF TROMSØ

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1 Introduction: Setting the Stage

This report provides a summary of the remarks, presentations, and discussions at the conference titled “Consultations, Indigenous Peoples and Business”, which was held in Tromsø, Norway from 19. to 20. September 2016.

The conference, which focused on issues pertaining to negotiations and consultations among government, Indigenous peoples and the industry sector, was organised by the Centre for Sami Studies, at UIT the Arctic University of Norway. Research on cooperation among political institutions, research communities, and industry on ways of safeguarding the livelihoods and cultures of Indigenous peoples in the High North is critical to the achievement of the goals of the Norwegian and Canadian High North Strategies. Consequently, the significance of this conference to the attainment of High North policy goals cannot be underestimated. The conference is also pertinent to the achievement of the Arctic University of Norway’s strategic goals of building cutting-edge knowledge base on topical Sami and Indigenous issues (c.f. opening remarks, Ms. Sonni Olsen, Dean of the Faculty of Humanities, Social Sciences, and Education, UiT). Ms. Olsen highlighted the increasing pressure imposed on Indigenous livelihoods and cultures, by large industrial projects such as mining, production of electric power, forestry, and aquaculture[1], as a reason for further investments in capacity building to facilitate the participation of rights holders and stakeholders in consultations with authorities and industry on an equal footing.

In Norway, Section 2-1 of Chapter two of the Saami Act[2] stipulates, "The business of the Saami Parliament is any matter that in the view of the Parliament particularly affects the Sami people." Hence, the Sami Parliament plays an important role in consultations between Samis and the Norwegian state. In her opening remarks, the President of the Sami Parliament, Ms. Aili Keskitalo, emphasized the need for Indigenous people to acquire powerful tools to secure and develop their cultures, in light of increasing pressures on their lands and livelihoods, emanating from increased global demand for resources on their territories. According to Ms. Keskitalo, consultations and negotiations to acquire Free, Prior and Informed Consent (FPIC) could be the tool to ensure that development takes place within a framework, which guarantees respect for Indigenous rights.

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[1] National Research Council. (2015). *Arctic Matters: The Global Connection to Changes in the Arctic*. Washington, DC: The National Academies Press. https://doi.org/10.17226/21717.

[2]The Government of Norway. (1987). The Saami Act Retrieved fromhttps://www.regjeringen.no/en/dokumenter/the-sami-act-/id449701/

The obligation for governments and industry to consult and engage impacted Indigenous communities is recognized in international human rights framework and law. This is especially the case with the principle of FPIC, which is outlined in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and in the International Labour Organization (ILO) Convention 169. Quoting the 2016 report by the UN Special Rapporteur on the Rights of Indigenous Peoples, on the human rights situation of the Sámi people in Sapmi, Ms. Keskitalo reiterated that the Norwegian government has not established clear expectations, and the necessary legal framework to ensure that extractive industries respect human and Indigenous rights in their operations. She noted that the refusal of the government of Norway to revise the Mineral Act, to ensure that it conforms to relevant international standards, such as the inclusion of provisions for adequate consultations with affected Indigenous communities and their FPIC, has created deep skepticism within the Sami parliament about new mining projects in Sami areas.

In light of these outstanding policy issues, Ms. Keskitalo emphasized the importance of consultations and negotiations in protecting the rights of Samis and other Indigenous people and in obtaining their FPIC. She expressed strong support for the conference and its research goals, noting that the interaction among state, research communities, and industry, is key to a greater understanding and establishment of functioning negotiation and consultation mechanisms.

The rest of the report will follow the structure of the conference, starting with the first session titled "Understanding consultations and negotiations" and ending with the last session titled "Internationalization of Indigenous Peoples' Rights".

In this Report, portions of statements, speaking notes and PowerPoint presentations of presenters in each session has been transcribed, and the pertinent issues highlighted in the text, in the sequence in which they were expressed. The texts in italics reflect the authors' analytical contributions to the respective subject matter in the presentations. A conclusion or detailed summary of the discussions of the main topics of the conference follows.

This Report should be read as a record of a conversation from rights holders, diverse stakeholders and academics, not the expression of a consensus, among the participants in the conference. Therefore, certain statements may appear inconsistent with others, as should be expected within the context of a conference bringing together different stakeholders.

All participants in the panels and discussions have been given the opportunity to submit comments and corrections to the summary of their statements. Please note that despite this due diligence, there is always a possibility that we may have misinterpreted the statements of the presenters.

The Centre for Sami Studies, University of Tromsø was the organizer of this conference, and is responsible for writing this report. Thus, the Centre and the authors are solely responsible for the content of the report. Finally, we would like to thank all the contributors to the seminar, including speakers, panelist and those who participated in the debate.

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2 Day 1, Session 1: Understanding Consultations and Negotiations

Introduction

Consultations and negotiations form an important part of good governance, sound policy development and decision-making. Different local contexts, industry and government approaches, and national legislative frameworks have resulted in a variety of negotiated agreements between Indigenous groups, governments, and resource companies. Consultation is a procedural right granted to Indigenous people, which is enshrined in article 6 of the ILO Convention No. 169.[3] *But what are consultations and negotiations? Are consultations and negotiations identical concepts? This topic was the focus of the first session of the conference.*

Dr. Dwight Newman, Professor, University of Saskatchewan, and Canada Research Chair in Indigenous Rights in Constitutional and International Law, whose presentation was titled "Understanding Consultation and Negotiation," distinguished between the concepts of "consultations" and "negotiations," and how this distinction is manifested within the Canadian, Nordic and Australian legal contexts.

Dr. Newman noted that although within the context of government or industry relationships with Indigenous communities, the concepts of consultations and negotiations may overlap sometimes, they are significantly different concepts in principle. He gave a brief account of the emergence of the doctrine of the "Duty to consult" in Canada, noting that this doctrine can be attributed to the Supreme Court of Canada's (SCC) ruling in three cases (Haida, Mikisew Cree, and Taku River Tlingit Nations) in 2004-2005. These decisions declared that the federal and provincial governments in Canada have a duty to consult potentially affected Aboriginal communities, prior to making any administrative

[3] International Labour Organization (ILO) (27 June 1989) *Indigenous and Tribal Peoples Convention, C169*. Available at: http://www.refworld.org/docid/3ddb6d514.html (accessed 23 February 2018).

decisions that could negatively impact upon the community's asserted Aboriginal or Treaty rights. This proactive duty arises even in the face of ongoing uncertainty about the rights (such as unsettled court cases or modern treaty negotiations).[4] Dr. Newman also stated that Aboriginal and Treaty rights are entrenched under Canadian law (Section 35 of Canada's Constitution Act, 1982), hence, according to him, the Crown's "Duty to consult" stems from both the purposes of section 35 of the Constitution and the concept of the honour of the Crown.[5]

Furthermore, Dr. Newman outlined some of the misconceptions about the content of the "Duty to consult" in the Canadian context. These include: (a).The perception that the duty to consult gives Aboriginal communities veto power. He noted that the courts have clearly stated that this is not the case. (b). The "Duty to consult" is a duty owed by the government (not third parties), although the government can delegate procedural aspects of that duty to industry stakeholders. (c). The duty to consult is not meant to solicit the views of communities or their members, instead, it is rather to receive information from rights-bearing communities and to meaningfully consider the information, in so far as the information concerns impacts of planned projects or activities on asserted Aboriginal or treaty rights.

Dr. Newman contended that the last point, is what distinguishes consultation from negotiations. While negotiation is a process aimed at an agreement that has Aboriginal consent, consultation is a procedural obligation to consider certain types of information that must be collected before any administrative decision that may impact Aboriginal rights is taken. The collected information need not include anything that relates to whether or not the consulted communities agrees with the proposed project. However, he qualified his claim in light of two exceptional circumstances: First, he noted that while the "Duty to consult" is a duty owed by the government, what actually obtains in practice is negotiations between industry and Indigenous communities, culminating in the signing of Impact Benefit Agreements (IBAs).[6] Hence, negotiation with industry has substituted for consultation with government. Second, he added that the SCC's monumental Tsilhqot'in decision on Aboriginal title authorized the use of negotiated consent in place of ensuring that consultation requirements are met (signifying an overlap of the concepts). However, Dr. Newman added that the Court's ruling that in certain circumstances, consultation must be negotiation appears to be limited to cases where Aboriginal communities have strong title claim. The court reasoned that since the normal requirement for using Aboriginal title lands is having the consent of the title-holding community, the

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[4] Prior to the trilogy of cases, the SCC declared that consultations is among the factors it might consider when analyzing whether infringement of an Aboriginal or treaty right was justified (Sparrow Test).

[5] The concept of the "honour of the Crown" stems from the SCC's pronouncement that it is the Crown's obligation not to engage in sharp dealings and to consult in advance of a negative impact on Aboriginal or treaty rights rather than infringing and sorting matters later.

[6] IBAs do contain clauses in which the Aboriginal community waives its right to raise any complaints or concerns regarding government consultation.

contents of consultation in the case of strong Aboriginal title claim verges on consent. He was of the opinion that despite this transition from consultation to negotiation under this special circumstance, the concepts of consultation and negotiation remain conceptually distinct in Canadian jurisprudence.

Dr. Newman argued that in Canadian jurisprudence, there appears to be the emergence of a "Duty to negotiate", which is distinct from the "Duty to consult". He opined that, like the latter, this "Duty to negotiate" stems from the honour of the Crown, and applies to unresolved claims as a distinct obligation arising from their ongoing status as unresolved claims. An unresolved claim gives rise to a "Duty to negotiate" on the claim itself and interim obligations to consult concerning potential negative effects on the asserted right during the interim period, before those negotiations are concluded. He noted that this is an important development of an additional doctrine out of the honour of the Crown, which is incomplete and unnoticed by many. He added that this new "Duty to negotiate" emphasizes the distinctiveness of consultation and negotiation.

Commenting on consultations and negotiations in the Norwegian context, Dr. Newman asserted that in Norway, consultation and negotiations are distinct principles in the relationship between Samis and the Norwegian government. He cited the consultation requirements in Norway's 2005 "Procedures for Consultation between State Authorities and the Sami Parliament" to back his point. According to him, Article 6 of the agreement states "The consultations carried out with the Sami Parliament, in application of the agreement on consultation procedures, shall be undertaken in good faith, with the objective of achieving agreement to the proposed measures." Dr. Newman noted that in this context, consultations have negotiation-related objectives concomitant with their nature as consultations. However, an objective of obtaining agreements does not necessarily imply an obligation to obtain agreement, so consultation is still here distinct from an obligation of obtaining consent or negotiation.

Dr. Newman posited that the proposed Nordic Sami Convention makes separate provisions for negotiations and consultations with local Sami communities when necessary. For example, Article 21 of the Convention provides that: "The states shall respect and when necessary consult Sami villages (samebyar), siidas, reindeer herders' communities (renbeteslag), the village assemblies of the Skolt Sami (byastämma) and other competent Sami organizations or local Sami representatives." In Article 16, the obligation of negotiation is embedded in the following statement "in matters of major importance to the Sami, negotiations shall be held with the Sami Parliaments before decisions on such matters are made by a public authority. These negotiations must take place sufficiently early to enable the Sami parliaments to have a real influence over the proceedings and the result. The states shall not adopt or permit measures that may significantly damage the basic conditions for Sami culture, Sami livelihoods or society, unless consented to by the Sami Parliament concerned." He stressed that even the obligation of negotiation in article 16 is limited. It arises, only in respect of a limited range of matters "of major importance to the Sami". Evidently, some negotiations apparently do not require consent, but require only that there have been a chance for the Sami to have had a real influence. Only in the case of particularly severe impacts on Sami culture, livelihoods, or society is there an obligation that the states obtain the consent of the Sami Parliament before proceeding. This obligation of negotiation, aiming at consent and requiring it in certain circumstances, arises in particular circumstances as between Nordic governments and the Sami Parliament.

Dr. Newman noted that other jurisdictions cast negotiations differently, for example, Australia's "Right to negotiate" system arises concerning certain future acts in relation to grants of resource development permits in areas claimed to be subject to Native title. It requires the government and industry proponent to reach an agreement on Indigenous Land Use Agreements (ILUA) with the Native title party. He asserts that ILUAs are similar to IBAs in Canada in content, but these systems come from different sources. In Canada, IBAs emanate from negotiations around certain vagaries of consultation, while ILUAs occur as a response to specific statutory requirement of negotiation. Dr. Newman added that in ILUAs, consultation may be part of negotiations, but it is never clear if negotiation contains all that consultation would have. Nevertheless, consultation and negotiation are conceptually different and are differently related to the concept of consent.

Dr. Newman highlighted the conflation of the concepts of consultation and negotiation in some international legal instruments and decisions pertaining to Indigenous people. For example, he noted that some articles in the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), reported by many as having requirements of Free, Prior, and Informed Consent (FPIC), contain wording concerning consultation aimed at consent. For example, Article 32(2) provides that "states shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources." The requirement of consulting "in order to obtain" consent is wording that has given rise to different views on whether consent is required or whether, as they are worded, such articles simply describe processes that ought to make a good faith effort at obtaining consent. In the latter case, the concepts of consultation and consent have again been juxtaposed in a way that neglects the conceptual differences between consultation and negotiation.

Dr. Newman noted that other international law norms have also blurred the two concepts even more badly. According to him, a case in point is the judgment of the Inter-American Court of Human Rights in the Kichwa *Indigenous People of Sarayaku v Ecuador*.[7] Dr. Newman noted that after going through a list of countries that have adopted prior consultation requirements, the Court pronounced

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[7] The ruling said that whenever large-scale development will have a significant impact within Indigenous territory, the state has the obligation to obtain the FPIC of Indigenous peoples with respect for their culture and traditions.

that its widespread adoption evidenced its status as a general principle of international law, thus binding non-parties to the specific treaty ILO 169 in question to which Ecuador was subject. However, in doing so, the Court mixed evidence of countries that do and do not make consent the aim of this process, thus mixing different types of consultation with fundamentally different parameters.[8] He asserted that ignoring the conceptual distinction challenges the coherence of the development of a more broadly applying international norm out of the purportedly established "general principle". He noted that the conceptual distinctions matter to the coherence of the law.

In conclusion, Dr. Newman noted that it may be that consultation and negotiation with Indigenous peoples stem from similar underlying principles. In Canada, that can be a principle of the honour of the Crown, something that obviously does not apply in the same way across various other jurisdictions. He argued that it may be that an underlying principle of the relationship that states must have with Indigenous communities supports "Duties of consultation" to avoid unnecessary adverse impacts on Indigenous communities, and "Duties of negotiation" to avoid unnecessary ongoing uncertainties. However, he noted that such a claim requires further discussion and analysis of a sort that scholars and judicial bodies have so far avoided. He added that understanding Indigenous rights requires understanding careful conceptual distinctions and then carefully working within the confines of such distinctions.

Dr. Hans-Kristian Hernes, Professor, UiT The Arctic University of Norway, whose presentation was titled "The Norwegian consultation agreement - Promises and challenges," commenced his talk by noting that consultations in Norway, which is underpinned by international law and internal political considerations, is a new and innovative governance arrangement. He also highlighted the fact that the consultation process has gone through different phases of development in Norway.

Dr. Hernes traced the evolution of consultation to the period leading up to the promulgation of the Finnmark Act (2005). In 2003, a bill for the new Finnmark Act concerning land governance and management of Finnmark County was introduced in Parliament. However, the Sámi Parliament criticized the bill for its lack of proper identification and recognition of Sámi rights. The Sami Parliament also charged that the process breached Norway's international legal obligations under ILO 169, because the Sami Parliament had not been consulted in the drafting of the bill. This disagreement triggered a strong focus on the government's legal duties to consult the Sámi on Sámi interests, as is enshrined in ILO 169.

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[8] Some consultation requirements pertain to an exchange of information and the meaningful consideration of that information.

Dr. Hernes noted that in a break with tradition, the Norwegian Parliament invited the Finnmark County Council and the Sámi Parliament to participate in consultations relating to the Finnmark bill, a process for which no provision is made in the regulations of the Norwegian Parliament, and which was unique in the Norwegian political landscape. He noted that the participants met four times and these meetings led to considerable changes to the original bill, leading to a practical implementation of ILO 169 in the final Finnmark Act.

According to Dr. Hernes, the Finnmark Act negotiations also led to the signing of a Consultation Agreement between the Ministry of Local Government and Modernisation and the Sami Parliament in May 2005. He noted that the agreement, titled "Procedures for Consultations between State Authorities and the Sami Parliament" is seen as a practical means to implement Norway's obligations under international law, particularly Article 6 of ILO Convention No. 169. Dr. Hernes stated that the agreement sets the ground rules for how the Government authorities and the Sami Parliament communicate and seek to reach consensus on decisions that may directly affect Sámis. According to Dr. Hernes, the agreement covers the Norwegian government and its ministries – directorates and other subordinate state agencies, such as state agencies at the regional level and state enterprises. In addition to the consultation procedures, regular meetings are held between the Sami Parliament and various sectoral ministers.

On the nature of consultations, Dr. Hernes noted that consultations usually involve high level talks between the Sami Parliament President and various Norwegian government ministers, especially the Minister of Regional Development. There are also administrative contacts with various policy fields. He added that consultations can be understood as a form of shared rule or multi-level governance, designed to achieve agreement between the Sami Parliament and government authorities before decisions that affect the Sámi are made.

Dr. Hernes added that consultations are used for laws and single issues, including resources management, land and water issues, and welfare state services. He catalogued some of the areas that pose challenges for consultations. These include, primarily, reindeer herding conflicts. These include disputes over land use with multiple new actors, such as wind power plants, mining, tourism, nature conservation, and fisheries.

On the consultation process, Dr. Hernes stated that the authorities are obliged to provide information to the Sami people on decisions that may affect Sami interests. The Sami Parliament can demand consultations based on the information provided. According to the consultation agreement, consultations must be undertaken in good faith, and with the aim of reaching unanimity or consent.

Dr. Hernes also notes that the consultation procedures are still not enshrined in law, and a proposal to do so from the Committee on Sámi Rights in 2007 has not yet been implemented. However, he stated that in 2015, the government started the process of crafting the consultation law, and it held consultations with Sami Parliament on the issue.

On weaknesses of the current consultation system, Dr. Hernes noted that the invitations to consultation are weak because in many cases, the state has already made a decision on the issues in question. He notes "The Sami Parliament has on occasions claimed that consultations have taken the form of request for suggestions and views on the implementation of government positions that have already been formed, and so have more the character of briefings and explanations than of meaningful discussion on choice of solutions." He added that that the state is a powerful actor in the process and does not always inform – or listen to other parties, including the Sami Parliament. Disapproval of a policy by the Sami Parliament does not necessarily lead to the non-implementation of that policy, in other words, the Sami Parliament does not have a veto. In light of this situation, Dr. Hernes asked whether there is a danger of co-optation of the Sami parliament.

On possible solutions to the highlighted problems of consultations, Dr. Hernes suggests that giving the Sami parliament the right to veto decisions, external review of government decisions and the use of a third party negotiator, are possible solutions to the problems of power imbalance in the consultation process. Dr. Hernes concludes by stating that the institution of effective governance is the technical solution to the problem. He also opined that equality necessitates the recognition by the government, of the need for Sami to give their consent on issues affecting their lives.

Introduction

In Canada, the duty to consult with Indigenous peoples and, where appropriate, the duty to accommodate their interests, is a Crown obligation. It was established at common law through three Supreme Court of Canada cases, starting with the Haida Nation v British Columbia (Minister of Forests)[9]*, Taku River Tlingit First Nation v British Columbia*[10]*, and Mikisew Cree First Nation v Canada.*[11] *This principle is rooted in the imbalance of power and resulting injustices that have historically characterized the relationship between the Crown and Indigenous peoples.*[12]

In Norway, the Consultation Agreement between the government and the Sami Parliament forms the basis of consultations between the Norwegian state and Samis. The duty to consult

[9] Haida Nation v British Columbia. (2004). SCC 73 at para 35 [Haida Nation].
[10] Taku River Tlingit First Nation v British Columbia (Project Assessment Director), 2004 SCC 74 [Taku River].
[11] Mikisew Cree First Nation v Canada (Minister of Canadian Heritage). (2005). SCC 69 [Mikisew Cree].
[12] Newman, D.G. (2014). Revisiting the Duty to Consult Aboriginal Peoples. Saskatoon: Purich Publishing Ltd.

highlights that state authorities are required to seek agreement with the Sami Parliament in good faith.[13] *The agreement is an important tool that helps to ensure that Samis have input in decisions that may impact their interest. Since the confirmation of the consultation agreement by Royal Decree in July 2005, the Sami Parliament's position has been strengthened on a general basis, by the fact that various ministries have become more aware of the need to include the body in important policy processes.*

The next session highlighted the experiences of consultations and negotiations between Indigenous peoples and governments in both Canada and Norway.

Mr. Tom Molloy, the former Chief Negotiator of the Government of Canada in the Nunavut Land Claims negotiations, commenced his presentation, which was titled "Negotiating Land Claims: The Nunavut Land Claim Settlement and the Nisga'a Final Agreement and others, " by emphasizing the important role of innovation in the success of consultations. He narrated instances in which innovative thinking contributed immensely to the success of the negotiations leading to the Nunavut Land Claim, and the Nisga'a Final Agreements.

Mr. Molloy recounted his pessimism about the chances of success at the beginning of the negotiations leading to these two agreements, given the seemingly insurmountable differences among the parties. He also pointed out that his pessimism about success was heightened by the fact that there was either no relationship between the parties at the negotiations, or the relationship was already strained because of past conflicts. Mr. Molloy also recounted that there was generally little to no trust, nor any cultural understanding between the parties to help form the foundation of an agreement. In addition, each party had minimal comprehension of the other party's interests. However, despite the initial pessimism, negotiations continued to explore the various parties' perspectives.

Mr. Molloy recalled that the government side was positional at first, but over time, that changed, as the parties developed a relationship based on understanding Indigenous interests, culture, and governance mechanisms. He also noted that over time, the Indigenous parties began to understand government culture and the constitutional requirements of state governance. Mr. Molloy observed that as a result of these developments, the parties started exhibiting the characteristics of trust, understanding, and patience.

Mr. Molloy stressed the importance of trust, understanding, and patience in the success of negotiations. He emphasized that trust creates mutual belief that everyone is working in good faith to

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[13] Norway. (2005). Procedures for consultations between State authorities and the Sami Parliament. Available at: http://www.regjeringen.no/en/dep/ fad/Selected-topics/Sami-policy/midtspalte/PROCEDURES-FORCONSULTATIONS-BETWEEN-STA.html?id=450743

find a common solution. It also helps all parties feel comfortable taking risks and making space for the kind of innovation that is required to complete a complex agreement.

Mr. Molloy also argued that understanding each party's interests is essential to a successful negotiation. This includes learning the history, culture, and decision making aspects that each party brings to the table. Lastly, he added that patience is essential to allow the trust and understanding to develop.

Mr. Molloy noted that most negotiations begin with mandates that are completely unacceptable to the other parties, because these mandates are often developed in isolation from each other, and do not understand or take into account the other party's interests. He emphasized the importance of innovation in solving negotiation deadlocks caused by unacceptable mandates. Mr. Molloy believes that some of the characteristics needed for innovation are flexibility, imaginative thinking, openness, and solid relationships.

According to Mr. Molloy, difficult negotiation points that reflect opposing interests between the government and the Indigenous parties involved in the Nunavut Land Claim and the Nisga'a Final Agreement negotiations, required innovative solutions. For example, he recalled that when he joined the Nunavut Land Claims Agreement negotiations as Chief Federal Negotiator, the issue of the creation of Nunavut had created a deadlock in the negotiations. The Inuit were insisting that the creation of the Territory of Nunavut should be part of their land claim. On the other hand, the federal and territorial governments believed the territory of Nunavut was a political devolution, separate and apart from any legal rights that may flow from the Inuit's' aboriginal rights and title. He noted that after protracted discussions and innovative thinking, a mutually agreed upon solution was found. The land claim agreement would apply to the Inuit Traditional Territory – land that they traditionally used and occupied (which would be defined by geographic descriptions based on land use studies). The defined settlement area will then be called the Nunavut Settlement Area (not the Territory of Nunavut). Mr.. Molloy stated that this was agreed upon and the parties' interests were not compromised.

Mr. Molloy recalled that since the Nunavut Settlement Area was located in the Northwest Territories, reference needed to be made to the authority of the Government of the Northwest Territories in respect to certain aspects of the land claims agreement. However, the Inuit were not prepared to have the term "Government of the Northwest Territories" appear in their agreement, fearing it would prejudice their aspirations for Nunavut.[14] The two other governments could not use

[14] Nunavut**,** a territory in northern Canada was created in 1999, out of the eastern portion of the Northwest Territories. Nunavut encompasses the traditional lands of the Inuit, including the areas subjected to the Nunavut Land Claim Agreement.

the term Nunavut Territorial Government, as it would prejudice their position that the political devolution was not part of land claims settlement. Mr. Molloy revealed that an innovative solution was found, with the government of Northwest Territory being referred to as the "Territorial Government" which was defined as "the Territorial Government having jurisdiction over the Nunavut Settlement Area."

Mr. Molloy also noted that the Nisga'a Final Agreement was another example of an agreement that required innovation for the successful completion of the negotiations. He pointed out that the Nisga'a Final Agreement was the first agreement to provide constitutionally protected self-government under Section 35 of the Constitution. Mr. Molloy recalled that at the commencement of the negotiations, the Nisga'a wanted self-government that was exclusive in its areas of jurisdiction. In other words, Nisga'a Law would be paramount to federal and provincial laws. However, both the federal and provincial governments believed that this was not possible, because the existing constitution divided all of the powers of government between them (federal and provincial governments). Hence, without a constitutional amendment, a new constitutionally-protected government with exclusive law making authorities could not be created. In the federal and provincial view, jurisdiction could only be delegated to a Nisga'a government.

According to Mr. Molloy, the Nisga'a were concerned that a delegation of powers can be rescinded in the future, and also, by the fact that without legal backing, Nisga'a law could be overridden by federal and provincial laws, if they were not exclusive. He noted that the first concern was settled by putting the division of jurisdiction in the land claim agreement, which would prevent the delegation from being removed unilaterally. The second concern was satisfied through development of the Concurrent Law Model - a technique which determined in the event of a conflict of laws, which law would prevail, when compliance with one law would result in the breach of another. He revealed that the Nisga'a were largely concerned about laws governing Nisga'a citizenship, language, culture, Nisga'a property on Nisga'a lands, and the Nisga'a Lisims Government itself. With the addition of checks and balances, such as ensuring that the Canadian Charter of Rights and Freedom would apply to the Nisga'a Lisims Government and its institutions, and with the protection of the Nisga'a Constitution, Canada, and British Columbia were able to agree that in the areas governing Nisga'a citizenship, language and culture, Nisga'a property on Nisga'a lands and the Nisga'a Lisims Government), in the event of a conflict between a Nisga'a Law and a federal or provincial law, the Nisga'a law would prevail. In other defined jurisdictions, it was agreed that Nisga'a Law could provide more stringent provisions than federal or provincial laws.

Mr. Molloy reiterated that innovation often requires bold and risky political decisions, on both sides. He also stressed that comprehensive negotiations are the only viable way to ensure that Indigenous people are included within the economic mainstream in Canada, while maintaining control over their social and cultural lives. He remarked "We need to continue to be creative and innovative to make this happen." He added that innovation must occur at two levels; at the level of individual negotiations, and within broader government policy. At individual negotiation tables, negotiators must develop creative solutions to the challenges that emerge. From a broader perspective, government must continually reflect on the evolving political and economic climate for negotiations. These include the need to better integrate Indigenous peoples into the Canadian economy; and on the ever-changing legal landscape of Indigenous rights. He added that these call for new and innovative approaches to negotiations and policy development.

In conclusion, Mr. Molloy observed that creating a climate of constant innovation enables progress in consultations. He stated that innovation is seldom found in initial mandates, but is more often the product of months and years at the table, working to develop acceptable shared solutions. He stressed that innovation is found by all sides being fully engaged. Mr.. Molloy also added that innovation often takes a long time to achieve, and never comes from one side only. He also pointed out that all of the examples of innovative solutions he described, came to fruition after participants developed a relationship of trust and understanding, and exercised much patience.

Dr. Eva Josefsen, a researcher with UiT, The Arctic University of Norway, presented on the topic "Consultations with state authorities – The Sami experience in Norway." Dr. Josefsen commenced her presentation by remarking:

> *At its best, consultation secures Indigenous people's influence on public decisions that have an influence on them, but the concept of consultations may also turn to cover the state's unilateral decision making, leaving Indigenous people to be merely heard, but not necessarily listened to."*

Dr. Josefsen then narrated the experience of the Sami parliament in consultations with the Norwegian government, leading to the signing of the Finnmark, Planning and Building, and the Mineral Acts. She also discussed the consultation process related to amendments to the Reindeer Husbandry Act. Dr. Josefsen stated that she chose the latter three cases (Planning and Building Act, the Mineral Act, and the amendment of the Reindeer Husbandry Act) for discussion because they are relevant to land and resource issues, and because they exemplify three different consultation experiences for the Sami Parliament in dealing with the Norwegian authorities.

Dr. Josefsen noted that when the Finnmark act was initially proposed, the Sami parliament opposed it, because it did not have provisions that acknowledged the rights of the Sami people to be consulted, a key provision of the ILO convention 169. She revealed that in a bid to gather more contextual information, the Norwegian Parliamentary Justice Committee visited several municipalities in Finnmark County. Also, the committee, together with the president of the Sami Parliament, embarked on a fact-finding trip to Canada, to learn how such issues are dealt with in that country. According to Dr. Josefsen, this trip created an opportunity for members of the delegation to know each other, and develop bonds of trust. After the trip, the Parliamentary Justice Committee started a formal consultation process with the Sami parliament on Norwegian government commitments under the ILO169 Convention.

Dr. Josefsen noted that the consultation process was characterized by a willingness of all parties to learn, and to establish a foundation for deliberation and dialogue. She also noted that there was a process of knowledge building, and the establishment of the common understanding of the issues at hand. Dr. Josefsen emphasized that the dynamic of the consultation was unique for a Norwegian Parliamentary Committee. She also noted that although there were clear aspects of power imbalance, an environment of trust prevailed during the interactions. She noted that this unprecedented process resulted in the Finnmark Bill being amended.

Dr. Josefsen noted that the consultations on the Finnmark Bill also led to the signing of a Consultative Agreement between the Sami Parliament and the Norwegian government in May 2005. The agreement instructs all state administrations to consult with the Sami Parliament on any issue related to Sami interests. This agreement, which regulates consultations between the Sami Parliament and public authorities, covers state institutions and state bodies at different levels of governance. Dr. Josefsen remarked:

> *"The agreement aims at giving the Sami people participation rights in public decision making, thereby promoting self-determination by dialogue, and by building common understanding of how Sami rights should be understood, interpreted and operationalised in public decision making."*

Dr. Josefsen noted that the principles of equality and partnership are important underlying factors in consultations, where the aim is to establish a common understanding and an agreement. She remarked that this ideally includes prompt and complete information sharing, and acceptance of Indigenous knowledge as part of the knowledge base.

According to Dr. Josefsen, the Sami Parliament was included early in the process of consultations for the Planning and Building Act (PBA), and the negotiating parties agreed on the consultation format, as stipulated in the Consultation Agreement. She also revealed that there was early information sharing, and efforts were made to build common understanding of what Indigenous rights are. Dr. Josefsen noted that there was "exchange of viewpoints as a foundation for change", and although the Sami Parliament did not get all its demands met, it was of the opinion that the consultation process was effective. Dr. Josefsen added that this was particularly the case because real partnership was established, marked by participation, influence, and dialogue. She noted that most importantly, the Sami Parliament was of the perception that the consultations were done in good faith.

Dr. Josefsen noted that the dynamics of consultations process leading to the promulgation of the Mineral Act were in marked contrast to those leading to the promulgation of the PBA. She acknowledged that the first phase of the consultations for the Mineral Act closely mimicked those of the PBA consultation process. However, she remarked:

> "The Sami parliament did not seem to have prioritized the learning elements of establishing a common knowledge platform, regarding the Norwegian government's obligations to secure Indigenous rights in mining and mineral extraction."

She then added that the issue of establishing an Indigenous People's Fee created a negative public debate, leading to the removal of this important issue from the negotiations agenda. Dr. Josefsen believes that political expediency led to the removal of a vital issue from the negotiating table, thereby "poisoning" the atmosphere of the negotiations. According to her, the withdrawal of the Indigenous people's fee from the negotiating agenda was politicized by the government to avoid a backlash from their party members, and the general public. Dr. Josefsen added that the government's decision to remove the issue of the Indigenous People's Fee as a topic of negotiations, created the impression that the Sami Parliament's approval of the Mineral Act was less important than a political backlash from the ruling party or the general public. This resulted in the Sami Parliament opposing the Mineral Act, and warning prospective investors that any investment in mining in Sami areas would be considered a breach on Sami rights. Dr. Josefsen wonders if the consultation results would have been different, if the minister had been informed of the Sami Parliament's strategy of warning financial institutions and investors from investing in mines in Sami areas. She responded "we would never know."

Dr. Josefsen also narrated the dynamics of the consultation process leading to the amendment of the Reindeer Husbandry Act. The amendment of the ct was meant to give legislative backing to the reorganization of the reindeer herding system. The proposed changes included the phasing out of regional boards with Sami representatives, and the transfer of local administration to a different system under county governance. The Sami Parliament was included late in the process, when most decisions had already been taken. She also noted that when contact with the Sami Parliament was made, it was of an enquiry nature. She noted that the Minister's priority was more about efficiency improvement and harmonization of the system, rather than tackling Sami concerns about the proposed changes. Consequently, the Sami parliament concluded that the Ministry had not consulted in good faith, and so refused to accept the changes of the act. Dr. Josefsen noted that the act was still adopted by the Norwegian parliament.

In concluding, Dr. Josefsen noted that the state holds decision making power, and real consultations call for the state to act in good faith. She noted that the consultations relating to the Finnmark Act and the PBA, were useful in creating a common understanding on Sami rights between the Norwegian state and the Sami Parliament. However, she noted that the implementation of Indigenous rights can be challenged by bureaucratic values of expert knowledge and strong corporatist channels, dominated by interest organizations and bureaucracy. Also, Indigenous rights may be flouted when regarded as being in opposition to the rights of the non-Indigenous majority or when such rights are regarded as a political problem that could negatively impact electoral fortunes. Dr. Josefsen also noted that Indigenous rights may suffer when it comes to the exploitation of natural resources, when ‘development ‘is a key state priority.

Dr. Josefsen noted that the Consultation Agreement was established to avoid the violation of Sami rights and create predicable situations. However, she observed that the consultation agreement alone is not a guarantee for state taking its human rights obligations seriously, noting that it is the implementation of the agreement that reveals the intentions of the state. Dr. Josefsen concluded by noting that in August 2016, the UN Rapporteur noted that "There appears to be a lack of common understanding between the government and the Sami Parliament about how consultation agreement is to be complied with in practice especially through reindeer herding and mining extraction."

3 Day 1, Session III: Experiences with Business Consultations

Introduction

According to the European Commission (2011), Corporate Social Responsibility (CSR) is "the responsibility of enterprises for their impacts on society". The main idea behind CSR is known as the triple bottom line principle, implying that businesses should serve economic, social, and environmental ends.[15]

Indigenous peoples often bear the brunt of the negative social, and environmental costs of extractive industries, while gaining only a relatively small percentage of the benefits that these projects generate.[16] *The expansion of international guidelines for CSR, and CSR initiatives among businesses, provide mechanisms through which Indigenous peoples can ensure that their rights are respected by companies.*

In Canada, apart from being a legal requirement in some jurisdictions, Impact Benefit Agreements (IBAs) form part of the CSR objectives that many companies implement as part of their broader business and sustainability strategies. O'Faircheallaigh (2002) identify an absence of

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[15] Elkington, J. (1994). Towards the sustainable corporation: Win-win-win business strategies for sustainable development. *California Management Review*, 36, 2, pp 90-100.

[16] O'Faircheallaigh, C. (2013).Extractive industries and Indigenous peoples: A changing dynamic? *Journal of Rural Studies***,** 30, pp 20-30.

specific penalties for non-compliance with IBA provisions as one of the reasons for weak implementation of IBAs. Gibson and O'Faircheallaigh (2010) also identify penalties and incentives for compliance; monitoring; and review mechanisms, as factors impacting the successful implementation of IBAs.

Dr. Catherine Howlett, Associate Professor, of Griffith University, Australia, made a presentation titled "Who is monitoring corporate compliance in the mining sector? An Australian Case Study from a Swedish project." Dr. Howlett's presentation focused on the issue of company adherence to CSR policies and Indigenous Land Use Agreements (ILUAs) (in Australia) and the issue of Free Prior and Informed Consent (FPIC). She noted that corporations have been ambiguous about endorsing the principles of FPIC. She also suggests that FPIC should be more than a negotiated settlement among elites, arguing that it should be more community-based, and inclusive.

Dr. Howlett noted that one drawback of the voluntary nature of CSR policies is that they can be abandoned, or diluted, due to changing ownership or shifting economic conditions. Thus, compliance, and enforcement is an important issue – who monitors company adherence to its own CSR policies? She also highlighted the impact of the United Nations Declaration on the Rights of Indigenous People (UNDRIP) on CSR, noting that the norms derived from FPIC principle states that companies in the extractive industries must seek consent of indigenous peoples, when seeking to develop resources on their traditional lands. In this light, Dr. Howlett noted that the language of FPIC is increasing being incorporated into the CSR policy and guidelines of major companies.

Dr. Howlett emphasised that given the contemporary neoliberal context of a withdrawal of the state, the deregulation of the market and corporations – and the concomitant rise in various international imperatives, there is a need to study if and how the international norms on Indigenous rights that have developed recently, are influencing extractive industry corporate behaviour, in relation to Indigenous people.

Dr. Howlett presented the results of a case study of an Oil and gas extraction project by Santos, an Australian company, on lands belonging to the Mithaka peoples (QLD, Australia). Dr. Howlett stated in 2014, Mithaka lodged a complaint with UN's Special Rapporteur. Hence, she noted that the goal of the project was to examine Santos' commitment to FPIC, and their own CSR policy.

According to Dr. Howlett, the results of the project show that Santos, which is under extreme financial pressure due to commodity price decline, is not adhering to its own CSR policy. She also reported that the Queensland State government took a hands-off approach from monitoring CSR policies. She quoted a government official saying "our role is to facilitate mineral and petroleum development, not regulate corporations". Dr. Howlett notes that a significant limitation of CSR initiatives is the absence of any mechanism to allow communities or public groups to enforce company commitments". Companies can abandon CSR initiatives as a result of change in company ownership or shifts in economic conditions. She cites O'Faircheallaigh (2015:93), who highlights evidence of a substantial gap between company rhetoric and delivery and lack of economic benefits and social/ environmental outcomes for Indigenous people

Dr. Howlett then posed the question: who is monitoring corporate behaviour and their commitment to their stated CSR initiatives in their agreements with Indigenous people? She stressed that given that states own minerals and the nature of the social contract, states should play a key role in managing company commitments to CSR obligations. Yet Dr. Howlett noted that key components of the regulatory system for extractive industries, in particular environmental regulation are being dismantled. She highlighted evidence from both Canada and Australia of winding back of regulatory requirements, because public regulations are often seen as inflexible, bureaucratic, inefficient, and excessively costly for industry. Again, following O'Faircheallaigh, (2015), she questioned if there is regulatory capture of the system by the extractive industry.

Dr. Howlett recommends the enhancement of monitoring initiatives to ensure that corporate adherence to CSR commitments are written into agreements and made legally binding. She also advocates a more active role of the state in policing agreements. This raises the question - What role should the state play? According to the United Nations Global Compact (2010)[17], creating a policy environment that facilitates, provides incentives, encourages or even mandates responsible business activities is crucial to building a sustainable and inclusive economy. Thus, CSR as a governance approach entails governments establishing conditions in which corporate responsibility (CR) can flourish. The United Nations Global Compact (2010) emphasizes the importance of exploring new forms of governance by entering into public-private partnerships. In this light, Dr. Howlett called for the creation of ideal conditions in which both MNCs and the state will 'champion' First Nations companies.

Dr. Howlett also questions whether Impact and Benefit Agreements (IBAs) in Canada and Indigenous Land Use Agreements (ILUAs) in Australia are consistent with the spirit and intent of FPIC to obtain prior informed community consent prior to development, given that they are negotiated via elite confidential negotiations. She notes that, if companies are genuinely committed to the norms

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[17] United Nations Global Compact (2010). The role of governments in promoting corporate responsibility and private sector engagement in development. New York. Retrieved from http://www.vub.ac.be/klimostoolkit/sites/default/files/documents/role_of_governments_in_csr.pdf

inherent within FPIC, their negotiations with Indigenous communities need to include all of the community – not just leaders and representative organizations.

The negotiation of IBAs constitutes one of the governance mechanisms employed to mediate the relationship between project proponents and Indigenous communities. IBAs provide the roadmap to mitigate the various social, economic, and biophysical impacts of projects on indigenous people[18]. *The following presentation highlights the complexities that are engendered in negotiating IBAs or identical agreements, between industry and Indigenous peoples.*

Mr. Johan Aslak Logje, head of the Reindeer Herding Disrict-36,[19] Cohkolat ja Biertavárri**, whose presentation was titled – "Experience from Negotiations that ended with agreement",** started by cataloguing a number of industrial intrusions in the Reindeer Herding Disrict-36. These developments include electric power transmission lines, small hydroelectricity power stations, holiday cabins, and roads.

Mr. Logje highlighted the fact that increased tourism activities in the Raisa National Park, is creating disturbances for the reindeers. He noted that although the Sami Parliament appoints people to the Boards of National Parks within Sami areas, the Sami Parliament is distant from these parks. Also, the members appointed by the Sami Parliament are not knowledgeable about the effects of Parks on reindeer herding.

Mr. Logje talked about the Reindeer herders' concerns that they have with the new road, the E-6 highway. Cohkolat ja Biertavárri could not reach an agreement with the roads authority, so they went to court. They escalated the matter to a higher court, because they did not agree with the ruling of the lower court.

Mr. Logje also talked about problems relating to small hydroelectricity power plants, which had been authorised by the Norwegian Directorate of Water Resources and Energy. However, in this case, their concerns were taken into account, and the projects were stopped.

An important and focal issue is the effect of the construction of *Norway's* longest power line between Ofoten and Hammerfest, on reindeer herding land. On the existing mechanisms of solving some of these problems with the construction of the above-mentioned transmission line, Mr. Logje noted that for example, they can enter into agreements with Statnett on mitigating the impacts of

[18] Hitch, M. (2006). Impact and benefit agreements and the political economy of mineral development in Nunavut. (Ph.D. Thesis), Waterloo, Ontario: Department of Geography, University of Waterloo.

[19] The district is a part of several complaining partners consulted by the Ministry of Petroleum and Energy. See letter from OED to Statnett dated 10.06.14.

the company's project to erect power transmission lines. However, if agreement is not reached, then the parties have the option of forwarding the matter for judicial assessment at the Court of Assessment.

Mr. Logje recounted his experience with the main transmission line between Ofoten and Hammerfest, which affects 30 reindeer herding areas. According to him, as a result of the coercive effects of the Expropriation Law, which he called the "Pirate Law", he had no choice but to negotiate a mitigation agreement with Statnett. After many meetings, in which the reindeer herders represented themselves (having refused to hire the services of a lawyer), an agreement was reached with Statnett. As part of the agreement, the company agreed to pay for the replacement of reindeer management fence in an area of the reindeer herding district.[20] Presupposing that Statnett financed the district's fence, the view of the district in the consultations, was that the location of the line was of less significance (cf. letter from OED to Statnett, 10.06.14, p. 51, 58). However, the County Governor vetoed the agreement because the fences would be constructed in what is considered a protected area.

This incident exemplifies some of the complexities inherent in reindeer husbandry governance systems in Norway. In this case, the interdependency of the three goals of energy transmission security, and the conservation of both biodiversity and Sami socio-cultural landscapes, creates a governance dilemma at the local level.

The experience of the Reindeer Herding Disrict-36, Cohkolatja Biertavarri narrated above, exemplifies the manner in which complex, and multi-layered nature of governance systems, can impede the success of consultations and negotiations in the reindeer husbandry industry in Norway. The fact that the reindeer herders had to engage in uncoordinated parallel processes with the County Governor and Statnett, led to a less than optimal outcome for the reindeer herders, as vital resources had to be spent on re-negotiating with the County authorities.

The situation outlined by Mr. Logje also highlights the power differentials between state and industry actors on one hand, and Indigenous people on the other hand. One mechanism that exists to level the playing ground between Indigenous people and industry is the mediation role played by the Organization for Economic Cooperation and Development (OECD) National Contact Points (NCPs). The following presentation focused on the role of the OECD NCPs in mediating in disputes between industry and indigenous people.

Ms. Kamilla Kolshus, OECD National Contact Point (NCP) Norway presented on the topic – "Consultations: What are the Expectations in the OECD Guidelines". Ms. Kolshus

[20] See also notice in the newspaper Altaposten, and Statnetts' own website, both dated 07.09.15, about contracts between the reindeer husbandry and the Statnett.

commenced by providing a brief background of the case involving the Jijnjevaerie Saami village and Statkraft (both in Sweden), that the OECD NCPs in Norway and Sweden were asked to adjudicate. She recalled that in October 2012, the Jijnjevaerie Saami village in Sweden submitted a complaint to both the Swedish and the Norwegian NCPs regarding Statkraft's planned wind power project in areas where the Saami village engages in reindeer herding. Ms. Kolshus stated that the Swedish courts had ruled in favour of Statkraft, and ordered the parties to reach concrete agreements out of court. The NCPs were asked to facilitate dialogue and to evaluate, amongst other things, if earlier consultations had been in line with the OECD Guidelines for Multinational Enterprises (referred to as "the OECD Guidelines" in this paper from now on).

Ms. Kolshus stated that the "OECD Guidelines" are the most comprehensive set of government-backed recommendations on responsible business conduct. She noted that these recommendations, which are backed by 46 countries, apply to enterprises engaged internationally, regardless of where they operate. Ms. Kolshus noted that the "OECD Guidelines" provide voluntary principles and standards for responsible business conduct, in a variety of areas including employment and industrial relations, human rights, environment, information disclosure, and avoiding bribery and corruption. She noted that the Due Diligence provisions in the "OECD Guidelines" recommend that enterprises diligently identify, prevent, or mitigate potential adverse impacts of their projects on communities.

Figure 1: Expectations of the OECD Guidelines on Responsible Business Conduct. Courtesy of Ms. Kamilla Kolshus

While the guidelines are voluntary, Ms. Kolshus stated that there is an incentive for businesses to implement it, because the adhering countries, other businesses, and investors expect that the recommendations in the guidelines are implemented by businesses. Other reasons for adhering to the recommendations include businesses' desire to obtain the social license to operate from affected communities, reputational reasons, and businesses' desire to fulfil expectations from civil society and their own employees.

Ms. Kolshus pointed out that the "OECD Guidelines" establish a unique grievance and mediation mechanism through NCPs. She noted that any "interested party" can file a complaint to the NCP. The complainant may be a community affected by a company's activities, employees, a trade union, or an NGO. The complaints must be related to enterprises' implementation of the "OECD Guidelines."

Ms. Kolshus revealed the key issues assessed by the NCP in their mediation efforts in the dispute between the Jijnjevaerie Saami village and Statkraft were: a. Whether Statkraft carried out risk-based human rights due diligence assessment. b. Whether Statkraft remedied any adverse impacts when they became aware of them. c. The kind of consultations carried out by Statkraft with the Sami village. d. What the “OECD Guidelines” say regarding Indigenous rights. e. What kind of recommendations the NCP should make.

According to Ms. Kolshus, the NCP’s mediation on the Jijnjevaerie Saami village vs Statkraft case concluded in June 2014, without a negotiated agreement between the parties. The NCP’s final statement, which was issued in February 2016, did not find grounds for concluding that Statkraft failed to comply with the OECD Guidelines, but provided recommendations for how Statkraft can work in a manner that promotes Indigenous people’s rights and the implementation of the OECD Guidelines.[21]

Ms. Kolshus revealed that in their final statement, the NCP recommended that when businesses establish projects on Indigenous lands, they should give special consideration to Indigenous peoples’ right to retain their traditional way of life, and their right to be consulted in matters affecting them. Hence, businesses should conduct stakeholder engagement and consultations, with the aim to achieve the FPIC of the people. She also revealed that the NCP’s statement emphasized the need for businesses to avoid or reduce the negative impacts of their projects, and if they cannot avoid negative impacts, they should reach agreements with communities on how to remedy such impacts. Ms. Kolshus stated that such remedies could include compensation.

On lessons learned from the Statkraft case, Ms. Kolshus stated that mediation is a tool and method, hence enough time should be set aside for parties to be able to understand the risks of not reaching agreement. She noted that the final statement of the NCPs had significantly influenced the process, because the statement underlined the responsibilities of the company, recognized the rights of the Samis, and encouraged the parties to renew their efforts to reach an agreement.

In order to promote the effective observance of the “OECD Guidelines,” Ms. Kolshus stated that the OECD has developed sectoral guidelines **(**the OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in various sectors)**,** which aim to help enterprises identify and respond to risks of adverse impacts associated with particular sectors. According to Ms. Kolshus, the OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector (which will be referred to as the “OECD Due Diligence Guidance” from now on) provides a practical framework for addressing the challenges related to stakeholder engagement in the extractive industry.

[21] Organization for Economic Cooperation and Development (OECD) Watch (ND). Issue: Statkraft's wind power plans breach Saami rights in Sweden. Retrieved from https://www.oecdwatch.org/cases/Case_280/@@casesearchview?type=Issue&search=en_Statkraft%27s%20wind%20power%20plans%20breach%20Saami%20rights%20in%20Sweden

Figure 2: OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector. Courtesy of Ms. Kamilla Kolshus

Ms. Kolshus noted that the "OECD Due Diligence Guidance" includes an assessment framework for industry to evaluate their stakeholder engagement performance, and provides targeted guidance for specific stakeholder groups such as Indigenous peoples, women, workers, and small-scale miners.

Ms. Kolshus highlighted the importance of early stakeholder assessment, noting that it is "good business" to have a proper corporate policy on how to avoid negative impacts of projects, and conduct good stakeholder engagement. She also noted that identifying risks before the company enters into a project, reduces the chance of having to deal with unexpected conflicts and delays after they arise. Adding that enterprises can avoid extensive efforts and cost to remedy negative effects. Ms. Kolshus also added that consultations could provide the enterprise with a social license to operate in the community, reminding businesses that building up new trust with stakeholders after conflicts have arisen will also demand much more effort.

Ms. Kolshus noted that the "OECD Guidelines" require consultation with stakeholders, such as Indigenous people. The OECD Due Diligence Guidance also requires enterprises to carry out risk-based due diligence, to avoid and reduce negative impacts of their projects on Indigenous people. She argued that this is important given that Indigenous people are particularly vulnerable, and rely on the protection of their rights to maintain their culture.

Ms. Kolshus acknowledged that the consultation process can be fraught with many challenges. One major challenge is the unbalanced power dynamic between the parties. Specifically, she recommended that Indigenous people should be assisted to be fully grasp the consequences of the projects being developed in their areas. This could include the hiring of third parties to educate Indigenous people on the content of company and regulatory documents. Another challenge is the need to provide support to Indigenous people to enable them to consult freely. Support could include reimbursement of travel costs, and compensation for lost wages. Other challenges identified include the lack of a commonly accepted definition of what "appropriate consent" is, how to identify the true representatives of Indigenous people (although she noted that the OECD Guideline recommends that consultation is done with the groups most affected, and not necessarily the ones most vocal), and what to do if one party refuses to negotiate or decides to use the negotiations as a way to stop the project, rather than reach an agreement, or if one party withdraws from an agreement**.**

Clearly, the need for monitoring the activities of industry vis-avis their dealings with Indigenous people is important in ensuring that the rights of indigenous people are protected. The important role played by the state and transnational organizations in holding industry accountable for their actions, cannot be overstated. Given the important role played by the NCPs, it would be pertinent to study how the cases that NCPs have mediated in progressed. What impacts have the NCPs had on the cases that they have mediated in?

Question and Answer Session (1)

During the Q&A session, a participant wanted to know why the IBAs between the company and Aboriginals in Australia are confidential. In response to the question, Dr. Howlett stated that Aboriginals sign a legal document agreeing to keep the IBAs confidential and so cannot release them to the general public. She noted that the communities usually know about the details of the agreement, but they are bound by confidential clauses in the agreement not to publicly release the contents of the agreements. Dr. Howlett stated the emphasis on the confidentiality of the agreements in Australia is from the corporate side, not from Indigenous people (as is sometimes the case in Canada).

On the issue of the confidentiality of agreements, a conference participant was of the opinion that the confidentiality of such agreements may be of value to Indigenous people. Recounting her experience with her employer, Dominion Diamond Mining Corporation, in the Northwest Territory of Canada, she revealed that the company has four different IBAs with four different First Nations groups, all of which were signed in the late 1990s. According to her, these agreements are all confidential. The participant revealed that DeBeers recently opened a mine in the Northwest Territory, and they are in the process of negotiating new IBAs with the Indigenous groups. However, because the four IBAs are confidential, DeBeers is unaware of their content, hence the Indigenous groups have the opportunity to negotiate better IBAs than the previous ones they signed with Dominion Diamond Mining Corporation. She then stated that had those IBAs been public, Debeers could have used the old provisions in old IBAs signed in the late 1990s to negotiate the new IBAs.

The conference participant also observed that from her experience, it is at the Aboriginal leadership level that the content of the agreements are not shared with even members of their communities.

Commenting on Mr. Logje's presentation, Ms. Muotka noted that there is increased pressure from the government for the use of National Parks for tourism. She expressed her belief that reindeer herding tourism-related activities within National Parks, should not be done without close dialogue with reindeer herders involved. She also mentioned that all the Sami Parliament's Guidelines on mining[22] will be reviewed, to ensure that they expressed the views of the Sami community.

Dr. Torjer Olsen, the moderator for the session, asked the participants, what kind of role research should have in dealing with the issues and problems identified in the presentations by members of the panel. In response, Ms. Kolshus noted that it would be critical for researchers to study how companies involved in indigenous areas are using the "OECD guidelines", the kind of engagement that they have with Indigenous people, and the systems that have in place to facilitate the implementation of the guidelines. She also noted, it would be useful to study the outcomes of those cases that were brought to the NCPs for mediation, whether or not agreements were reached, what the recommendations given by the NCPs were? Did the companies follow the recommendations? Has there been developments in these areas over time?

[22] Ms. Muotka was referring specifically to the Sami Parliament's agreement with Arctic Gold and other guideleines that were established. The Arctic Gold agreement has since been revoked.

On her part, Dr. Howlett expressed the need for the principles of reciprocity to be respected. She stressed the importance of researchers "giving back" to Indigenous communities, stressing that research should not only be about academic career building. She noted that "giving back" could also be in the form contributing to the levelling of the imbalance between Indigenous people and businesses within the extractive industry. Sheremarked "Many academic careers have been built of research with Indigenous people but not necessarily for Indigenous people."

4 Day 1, Session IV: Green Industries: Comparing Canadian and Swedish Experiences

Introduction

Wild reindeer are strongly linked to the cultural identity and social and economic well-being of many northern societies. Studies show that reindeers avoid industrial sites, buildings, and move away from aircrafts.[23] *The impact of industrial disturbance on the health of reindeers is well documented.*[24] *Integrating indigenous and Western scientific knowledge into ecosystem management systems is increasingly recognized as a valuable approach to ensuring the co-existence of traditional reindeer herding and industrial projects.*[25]

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[23] Wolfe, S.A., Griffith, B., & Gray Wolfe, C.A., 2000. Response of reindeer and caribou to human activities. Polar Research 19, 63–73.

[24] Cameron, R.D., W.T. Smith, R.G. White, and B. Griffith. (2005) Central Arctic Caribou and Petroleum Development: Distributional, Nutritional, and Reproductive Implications. *Arctic* 58 (2005): 1–9.

[25] Uprety, Y., H. Asselin, Y. Bergeron, F. Doyon, and J.-F. Boucher. Contribution of Traditional Knowledge to Ecological Restoration: Practices and Applications. *Ecoscience* 19 (2012): 225–37.

Figure 3: A windmill in Sweden. Courtesy of Dr. Per Sandstrom

In his presentation, titled "**When science hits the court room – The case of wind power development on reindeer grazing lands," Dr. Per Sandstrom** notes that reindeer husbandry usually coincides with other diverse and overlapping as well as competing land use forms. These uses include forestry, mining, hydro and wind power. The complex and unique land use in reindeer husbandry and its relationship and dependency on other land users' planning led to the idea of producing the Reindeer Husbandry Plans (RHP) in Sweden. The goal of a RHP was to provide clear and understandable information about habitat use and movement of reindeer across the landscape, which would improve dialog and consultation procedures with other land users. The process of producing RHP included the development of a custom-made participatory GIS (pGIS) termed RenGIS (ReindeerGIS in English). Sami reindeer herders use GIS to gather information about reindeer husbandry to better communicate impacts of mining on reindeer grazing areas. It is a community-based monitoring by Sami reindeer herders, which integrates indigenous knowledge (IK) with Geographic Information Systems (GIS), allowing Sami communities in Sweden to monitor the effects and assess the risks of human disturbance associated with mining on reindeer husbandry and caribou hunting, and to communicate their land use requirements.

Figure 4: Reindeer Herders in Sweden. Courtesy of Dr. Per Sandstrom

Dr. Sandstrom noted that the sources of information used to assess effects of wind power developments on reindeer is the GPS positions from reindeers, pellet counts, and Reindeer herders' information. Working through a process of indigenous mapping, Sami reindeer herders digitized important grazing lands for each of the eight reindeer seasons, combining traditional knowledge of the land and satellite images. The mapping of important seasonal grazing lands was followed by field inventories carried out by the reindeer herders. Information from GPS equipped reindeer contributed detailed habitat use and movement information. Also, digital data about other land uses was incorporated into RenGIS.

It is worth noting that even though multiple human disturbances affect reindeer populations and multiple parts of their ecosystem, mapping is often carried out primarily through a sector-by-sector approach, by focusing on one impact at a time. Potential cumulative effects are thus not dealt with, and management does not account for other stressors, and mitigation measures have not proven to be effective. Managing each impact in isolation is insufficient to conserve species in fragile ecosystems.

Dr. Sandstrom noted that the pGIS system has been used in land use consultations with forest companies for harvest planning and in environmental impact assessments with mining and wind power companies. He noted that wind power developments are the last land use form entering the landscape. Wind power developments are different because they involve a mixture of both industrial and light land use form. Dr. Sandstrom added that wind power developments always include major road construction, power lines, high visibility features, and varied levels of sound.

Dr. Sandstrom stated that researchers and reindeer herders were called to testify in a number of court cases relating to impact of industrial intrusion on reindeer husbandry. He noted some of the results reported include; a zone of avoidance by reindeers of 3-5 kilometres, faster movement rates noticed closer to the wind park, barrier effects, and more extensive reindeers use of areas out of sight of the turbines. He noted that these findings closely mimic previous research on the topic (United Nations Environment Program (UNEP) 2011).

According to Dr. Sandstrom, the wind power company's perspective was to look at the development as a single factor as opposed to looking at the cumulative effects of industrial interference with the landscape. He also highlighted some of the obstacles faced in gaining acceptance of the data from the pGIS. For example, the company lawyers cast doubt on the validity of the data by querying the content of the data, and the scientific rigour used in creating the system. The government agency also refused to accept the results of the study. When the report was sent to a scientific journal, industry reviewers recommended that the report not be published. Also, no reindeer herders were included as relevant reviewers.

The questioning of the scientific rigour of the data that includes indigenous knowledge, brings to the fore the question of evaluating indigenous knowledge (IK) using Western scientific processes of validation. As argued by Gratani et al.[26] the evaluation of IK needs to go beyond scientific processes of validation to ensure that the evaluation does not involve only scientists and scientific paradigms. Instead, evaluation processes must recognize that IK and Western science may not be commensurable because of differences in worldviews, and in theoretical and methodological approaches to understanding the world.[27]

Dr. Sandstrom also recounted some of the challenges faced by the team. These include; the unique nature of each context (each development is always part of a multiple land use situation),

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[26] Gratani, M., J. Butler, F. Royee, P. Valentine, D. Burrows, W. Canendo, and A. S. Anderson. 2011. Is validation of Indigenous Ecological Knowledge a disrespectful process? A case study of traditional fishing poisons and invasive fish management from the Wet Tropics, Australia. Ecology and Society 16(3): 25. http://dx.doi.org/10.5751/ES-04249-160325

[27] Bohensky, E. L., and Y. Maru. 2011. Indigenous knowledge, science, and resilience: what have we learned from a decade of international literature on "integration"? Ecology and Society 16(4): 6. http://dx.doi.org/10.5751/ES-04342-160406

generalising correctly to make best use of available knowledge, and the difficulty in getting data on the original state of the landscape.

5 Day 2, Session 1: Blue Industries: Comparing Canadian and Norwegian Experiences

Introduction

Aquaculture is one of Norway's most important export industries, accounting for over 12 per cent of the value of total Norwegian exports in 2016.[28] *The industry is also an important economic pillar for several Norwegian coastal communities. In Canada, in 2015, the Canadian aquaculture industry generated over $1 billion in GDP, generating close to $3 billion in total economic activity.*[29] *The industry is the economic backbone of a number of coastal communities, especially First Nations communities in British Columbia (BC).*[30] *However, aquaculture in Canada and Norway is controversial, triggering intense public debate among Indigenous people, environmentalists, scientists, and the public, about the environmental consequences of the industry.*[31]

Mr. Hugh Braker, Vice President of First Nations Fisheries Council of British Columbia (BC), emphasized the importance of fishing to the economic and cultural sustenance of First Nations people in BC. In Mr. Braker's view, there are three prerequisites that should be met in order for meaningful consultations between First Nations and other stakeholders to occur. First, all parties involved in consultations should understand First Nations culture and its diversity. He questioned, "How can government realize the consequences of their actions if they do not know that we (First Nations) pray to the 'salmon people"? Second, the need for the acknowledgement of the historical marginalisation of Aboriginals. Mr. Braker noted that the history of injustice against Aboriginals has led to a high level of mistrust of government within the Aboriginal community. Hence, acknowledging

[28] Federation of Norwegian Industries. (2017). Roadmap for the Aquaculture Industry. Retrieved from https://www.norskindustri.no/siteassets/dokumenter/rapporter-og-brosjyrer/veikart-for-havbruksnaringen---kortversjon_eng.pdf

[29] Department of Fisheries and Oceans (DFO). (ND). Facts on Canadian Fisheries. Retrieved from http://www.dfo-mpo.gc.ca/fm-gp/sustainable-durable/fisheries-peches/species-especes-eng.htm

[30] Department of Fisheries and Oceans (DFO). (ND). Aquaculture Statistics: Economic Contribution to Canada. Retrieved fromhttp://www.dfo-mpo.gc.ca/aquaculture/sector-secteur/stats-eng.htm

[31] Osmundsen, T. & Olsen, M. (2017). The imperishable controversy over aquaculture. *Marine Policy, 76*, pp 136-142

this history would foster a trusting environment for consultations. Lastly, given the disadvantaged economic situation of Aboriginals and the increasing demands for consultation on various projects, Mr. Braker emphasized the need for stakeholders to provide resources to enable Aboriginals effectively participate in consultations. Mr. Braker also emphasised the need for industry not to consider consultations with First Nations as an obstacle, but as a process that could lead to mutually beneficial outcomes.

Dr. Bjorn Hersourg, a Professor at UiT, The Arctic University of Norway, briefly outlined the regulatory framework of the Norwegian aquaculture system, noting that currently, the central government allocates licenses to aquaculture companies, while the coastal municipalities are responsible for approving fish farming sites. He stated that the Planning and Building Act (PBA) of 2008 establishes municipalities as planning authorities at the local level, empowering them to approve fish farm site plans. The municipal-led coastal zone planning process, which includes the mechanisms for allocating sites for new fish farms, is the governance framework within which consultations take place between Samis (represented by the Sami Parliament) and the municipalities. To illustrate the value of consultations under the Norwegian dispensation to the protection of Sami rights in the aquaculture sector, Dr. Hersourg narrated the case involving the Alta municipality, one of the main aquaculture areas in Norway with a big Sami interests in the fishery, and the Sami parliament, regarding the siting of fish farms in the municipality in 2010. The Sami parliament rejected the municipal authority's initial plans because they did not consider Sami interests in the coastal zone planning process. The municipality had to go and amend the plan to take into account Sami interests. In the end, the eight original sites in the municipality's initial plans were rejected, because they did not take into account Sami cultural interests. Dr. Hersourg pointed out that the Alta case was the first test case for Consultation agreement signed between the Norwegian government and the Sami Parliament, which requires that the latter to be consulted on matters that may affect Sami interests. The Sami Parliament's intervention was successful in protecting Sami interests.

While the PBA enhances the role of municipalities in the planning process, these entities often lack the competencies to effectively plan.[32] Highlighting some of the impediments to efficient consultation, Dr. Hersourg identified the lack of competence in coastal municipalities to effectively conduct coastal planning, as a barrier to effective consultation. The complexity of the decision-making process, which involves five government ministries (each with a veto power), is also another area of concern he cited.

[32] Falleth, E. & Nordahl, B. (2017). The Planning system and practice in Norway. In Sigridur, Kristjánsdóttir, (ed.), *Urban planning and environment. Nordic Experiences of Sustainable Planning. Policy and Practice.* Chapter 6. p. 87-104. NYNY: Routledge

Mimicking the situation in Canada, Dr. Hersoug (in response to a question from a conference participant) highlighted the problem of 'engagement overload'. He noted that the Sami parliament's resources are being stretched by increasing demands for consultations relating to the aquaculture industry.

In concluding, Dr. Hersoug observed that the issue of fish farms is a conundrum facing northern municipalities because of the economic need to encourage aquaculture, given that the small-scale fishery is not sufficient to sustain Sami and other coastal communities. While aquaculture provides significant economic benefits to many coastal communities, there are growing concerns about the environmental foot print of the industry. He also observed that while coastal planning comes at a significant economic and political cost to coastal municipalities, consultations can reduce conflicts and facilitate mutually beneficial solutions.

In their joint presentation titled "Consultations between Indigenous communities and blue industries - a comparative perspective", Dr. Camilla Brattland, a Post-Doctoral Fellow with the Sami Centre, and Dr. Dorothee Schreiber, a researcher with the Sami Centre, gave a comparative perspective of consultation mechanisms utilised by Indigenous people in Northern Norway and BC, Canada, in their interactions with industry and government. Dr. Brattland emphasised the importance of distinguishing the differences in the context within which the relationship between Indigenous peoples and aquaculture companies are playing out in the two jurisdictions. In Norway, the wild salmon is subject to many state protection mechanisms, and both the commercial and recreational wild salmon fishery is severely restricted, due to the precarious nature of the stocks. Sami concerns emanate from the increasing number of escaped farmed salmon into salmon rivers and the effects of aquaculture on traditional salmon and marine fisheries. She also acknowledged that both jurisdictions have different mechanisms for consultations to deal with these issues. Dr. Brattland observed that although the contexts differ, the environmental impacts of aquaculture on the lives of Indigenous peoples in both jurisdictions have generated much controversy in recent times.

Dr. Brattland restated the point elaborated upon by Dr. Hersourg that the municipal coastal planning is the primary framework within which consultation between the Sami Parliament and the Norwegian government occurs. She refers to the successful interventions of the Sami parliament in two cases, as evidence that the Norwegian dispensation takes into account local voices and respects the status of the Sami parliament. The two cases are: first, the Alta coastal zone planning consultation case in 2010 (and the subsequent incorporation of Sami traditional knowledge in the planning process of the Alta coastal zone plan); and second, the intervention in 2016, to prevent the Spildra municipality from making exceptions to the existing coastal zone plan and allocating fishing sites to Marine Harvest. Dr. Brattland noted that these cases show that the level of conflict in Norway is lower, and the Sami parliament has an influential role in the regulation of aquaculture in Northern Norway.

She also stated that while municipalities can take donations from companies to support local community activities and infrastructure, the municipalities do not enter into socio-economic or environmental agreements with aquaculture companies.

The Norwegian dispensation is in sharp contrast to the model of consultation in Canada, where direct agreements between First Nations and industry are more common, and state authorities play a minimal role after it has granted operating licenses. In her presentation, Dr. Schreiber noted that one of the primary reasons for aquaculture controversies in BC is the concentration of fish farms along the wild salmon migration routes, on B.C.'s central coast. Hence, concerns about wild salmon being infected by diseases in the pens, and the resulting negative impact on the traditional fishery have partly fueled the aquaculture controversy. Dr. Schreiber identified IBAs as the primary framework within which consultations between Aboriginals and aquaculture companies occur. These agreements, which are confidential, do have provisions for the mitigation of identified impacts of fish farms, and provide a range of socio-economic envelopes of benefits. These benefits could include royalty payments, employment, and provisions for the procurement of goods and services from Aboriginal companies, environmental monitoring, and community support provisions.

Industry proponents in Canada have identified the business case of IBAs and have embraced the opportunity to partner with First Nations on whose land they intend on carrying out their projects.[33] Dr. Schreiber noted that aquaculture companies in BC have utilised IBAs as a business strategy to attain predictability and security of their production activities. First Nations who have signed IBA,s view such agreements as a mechanism to get the benefits that flow from engaging with industry, while escaping the slow process that comes with dealing with the government bureaucracy. *Evidence suggests that the negotiation of IBAs has become the main process for consultations between Aboriginals and industry project proponents in Canada.*[34] *It has even been argued by some researchers that IBAs have the potential to serve as an expression of an Indigenous community's FPIC.*[35] *However, from a 'rights-based' perspective, IBAs can be problematic for Indigenous*

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[33] Lapierre, D. & Bradshaw, B. (2008). Why mining firms care: Determining corporate rationales for negotiating Impact and Benefit Agreements. Canadian Institute of Mining, Metallurgy and Petroleum Conference.

[34] Fidler, C. & Hitch, M. (2007). Impact and Benefit Agreements: A contentious issue for environmental and aboriginal justice. *Environments Journal*, ***35***(2) 45-69

[35] Nunatsiavut Government (2016). Characterization of Voisey's Bay Impact and Benefit Agreement. Available at http://www.nunatsiavut.com/department/co-management/

communities, because these agreements limit their ability to access the courts to exercise their Indigenous or even basic human rights.[36]

Dr. Schreiber notes while the signing of IBAs gives an outward appearance of consent, she questioned, how it is possible to freely give consent under "conditions of massive dispossession". She linked this dispossession to the fact that First Nations have been severely negatively impacted by waves of restructuring and privatisation of the fishery sector in BC.

The issue of consent and economic constraints raise the question of the impact of power imbalances on consultation outcomes.[37] *Indeed, it can be argued that the term 'consultation' itself reflects a power imbalance inherent in the process, because for consultation to happen, someone is doing the consulting (active) and someone is being consulted (passive).*[38] In this light, Dr. Schreiber noted that the legal and political environment in Canada is shifting from "one that prioritises and protects Aboriginal rights to one where First Nations are expected to shift their position over the course of consultations, otherwise they are perceived as frustrating the process." She opined that this environment is making it difficult for first nations with zero tolerance levels for aquaculture to maintain their positions during consultations.

Dr. Schreiber also revealed that, despite the existence of IBAs, community members have successfully protested against fish farm sites. She noted that this exemplifies a higher level of conflict in Canada, compared to Norway.

Consultation involves an exchange of information regarding the nature and potential impact of a project on Indigenous people; consequently, publicly available information can play an important role in the process. One of the important points of discussion during this session revolved around the availability of environmental data on fish farms in the public domain, to facilitate debate on the issues. According to Dr. Schreiber, information on the health of fish on fish farms in BC is virtually unavailable, as company information on fish diseases in BC is kept confidential. She also highlighted the refusal of Department of Fisheries and Ocean (DFO) (the Canadian Ministry responsible for regulating the aquaculture industry) and the aquaculture companies to allow independent testing of fish on the fish farms. It is important to note that in Canada, some IBAs do have provisions for

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[36] O'Faircheallaigh, C. (2010). Aboriginal-Mining company contractual agreements in Australia and Canada: Implications for political autonomy and community development. *Canadian Journal of Development Studies*, 30(1-2):69-86.
[37] St-Laurent, G. P. & Le Billon, P. (2015). Staking claims and shaking hands: Impact and Benefit Agreements as a technology of government in the mining sector. *The Extractive Industries and Society* 2(3):590-602.
[38] Weitzner, V. (2002). *Cutting Edge Policies on Indigenous Peoples and Mining: Key lessons for the world summit and beyond.* Ottawa, Canada: North-South Institute.

environmental monitoring of farms.[39] However, because the agreements themselves are confidential, it is unclear what types of environmental monitoring are conducted and what the type of environmental data are made available to communities during the negotiations and after the signing of the IBAs.

The situation in Norway regarding the availability of environmental data of aquaculture companies appears to be different from what obtains in Canada. As Dr. Brattland revealed, in Norway, the aquaculture companies are legally required to periodically make public, information on the environmental status of their fish farms. Tests can also be carried out by independent entities (Institute of Marine Research) on the environment around the farm sites. Thus, there is a huge amount of publicly available information on the environmental conditions of the fish farms in Norway.

During the questions and answer session with the panel, Dr. Hersoug noted that in Norway, the problem is not the availability of data, but it is the ability of interest groups to understand the vast volume of data and use the information to raise policy issues with the relevant authorities. Dr. Brattland noted that while there is a big volume of information out there, the main problem is the lack of specific data on issues that are of importance to Sami fishermen. For example, she lamented the non-existence or scarcity of data on the effects of the interaction between fish farming and wild salmon.

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[39] Kramer, L. (November. 21, 2016). In Canada, salmon farmers building social license with First Nations. McColl Magazine. Retrieved from https://www.mccollmagazineonline.com/salmon-farmers-build-social-license-in-canada.html

6 Day 2, Session II: The Current Role of Business: New Models of Interaction

Introduction

In the coming decade, the Government of Canada anticipates that current and planned resource development projects across Canada will yield total investments estimated at $650 billion.[40] *Approximately 1,200 Aboriginal communities are located within a 200-kilometre radius of 180 producing mines and over 2,500 active exploration sites.*[41] *In Northern Norway, the expansion of the energy industry (oil and gas and renewable energy) could provide opportunities but also create challenges for residents. Increased activities in the mineral extraction and aquaculture industries also create challenges. Anaya (2011: para. 56) sees the herding of reindeer as especially threatened by oil and gas extraction in Northern Norway.*[42] *All of these developments in both countries necessitate extensive focus on the opportunities and challenges of consultation and negotiations among Indigenous people, industry, and governments in both Canada and Norway. The next session focused on models of business-Indigenous people interaction in Canada and Norway.*

In his presentation titled **"The current role of business: New models of interaction?" Mr. Jean Paul Gladu, President of the Canadian Council of Indigenous Businesses (CCAB)** provided a brief history of the CCAB, and the context of the changing relationship between industry and Indigenous communities within which his organization operates. In Mr. Gladu's words, the CCAB exists as a space for Indigenous and non-indigenous people to get together in a meaningful way to 'co-create value'.

Mr. Gladu cited jurisdictional uncertainty between the federal and provincial government over Aboriginal issues, complex laws, and industry's need for certainty, as some of the precipitating factors that led to increased and close dialogue and collaboration between industry and Aboriginals in

[40] Government of Canada. (2014). Facts & Figures of the Canadian Mining Industry

[41] Mining Association of Canada. (2014). Aboriginal Peoples' Participation in Canada's Resource Economy. Canada's Economic Action Plan, 22 March 2014.

[42] Anaya, J. 2013. 'Extractive industries and indigenous Peoples'. A/HRC/24/41. July 1, 2013, pp 1- 27

Canada. He also noted that Aboriginals have significant influence over vast natural resources in Canada, hence, they are significant players in the resource extraction industry.

While noting that significant positive changes are occurring in the relationship between Aboriginals and industry in Canada, Mr. Gladu also acknowledged the emergence of some challenges within Aboriginal communities in Canada. One of such challenge is the dichotomies that have emerged within Aboriginal communities, which have occasionally permeated Aboriginal peoples' relationship with government and industry. These dichotomies include differences between elders and youth in their aspirations of the future, the conflicting interests of on-reserve Aboriginal population versus off-reserve Aboriginal population, and the complexities of the governance structures of hereditary chiefs versus elected chiefs. Mr. Gladu emphasized the need for these internal differences to be reconciled.

According to Mr. Gladu, shared interests, and values are some of the driving forces behind the collaboration between Aboriginals and Industry. For example, he noted that industry wants security for their shareholders, while Aboriginals want security for their future generations. Also, industry wants employees; and Aboriginals are the fastest growing demographic group in Canada, hence they represent a good source of labour.

Mr. Gladu also highlighted the growing economic power of Aboriginals in Canada. He revealed that Community Economic Development Corporations (CEDCs or EDCs), the economic and business development arms of many Aboriginal communities, account for an important portion of indigenous business contributions to the Canadian economy. Indeed, evidence suggests that EDCs are major economic drivers in many Aboriginal communities.[43] Mr. Gladu urged Samis to consider setting up business development corporations to represent their interests.

Mr. Gladu also talked about the CCAB's Progressive Aboriginal Relations (PAR) program, a third party certification program, which uses an Aboriginal jury to adjudicate industry performance in a number of areas of Aboriginal engagement. These areas include Aboriginal employment, engagement, procurement activities, and Aboriginal leadership development in their companies and in the communities in which they operate. The certification program has three levels of assessment of corporate performance in Aboriginal relations; the Bronze, Silver, and the Gold levels. Mr. Gladu revealed that companies at the gold level are those that can be credited with significantly contributing to the health and well-being of Aboriginal communities. This contribution could be in the form of

[43] Canadian Council of Aboriginal Businesses. (2011). Community and Commerce: A Survey of Aboriginal Economic Development Corporations. Retrieved from http://www.nadf.org/upload/documents/community-and-commerce-final-report.pdf.

making significant procurements from Aboriginal companies and having a high percentage of their employees being Aboriginals. He also revealed that some gold level companies also insist that other companies within their supply chain adhere to PAR gold standard practices, thereby further propagating the importance of working with Aboriginal communities. Mr. Gladu also added that there is a business case for businesses to engage Aboriginals to provide business services for their projects. He noted that employing Aboriginals and procuring goods and services from local Aboriginal companies, provide access to a secure supply chain that is needed for the projects, especially given the high cost of flying in workers to the North.

Mr. Gladu revealed that the CCAB also provides entrepreneurial training to Aboriginals, because of the organization's belief in the importance of entrepreneurship in raising the living standards in these often socio-economically depressed communities. He also noted "building local economies is critical to the long-term sustainable development results." In reference to what he perceives as an ongoing change in the mindset of Aboriginals, he noted 'In Canada, you can only do so much fur trading and animal harvesting, and then you have to look at other economies".

Figure 5: Magazine of the Canadian Council of Aboriginal Businesses (CCAB). Courtesy of Mr. J.P. Gladu

Mr. Sven-Roald Nysto, Advisor to the Árran Lule Sami Centre, and former President of the Sami Parliament (1997-2005), delivered the second presentation, which was titled "Developing new relationships between mining, Sami, and governance bodies in Norway."

Mr. Nysto provided a brief overview of a research project that he was leading, titled "Indigenous Peoples and Resource Extraction in the Arctic: Evaluating Ethical Guidelines." According to him, the goal of the project is to facilitate ethical resource extraction in the Arctic, which takes into account the rights and interests of Indigenous people. Mr. Nysto revealed that all the companies in the study were ranked according to twenty criteria related to Indigenous rights. The criteria used to rank these companies were selected by evaluating the main guidelines and legal instruments related to resource extraction and Indigenous rights in the Arctic. These include commitments to international standards, the presence of organizational units dedicated to handling Indigenous rights, competent staffing, track records of accomplishment on Indigenous issues, transparency, and procedures for consulting with Indigenous peoples. Fieldwork was conducted in Russia and Norway to study actual applications of the guidelines. While he did not state the ranking of Norwegian companies, he revealed that the preliminary results would surprise many. The rankings were released a few weeks after the conference.[44]

Mr. Nysto conceded that it is premature to talk about a new relationship between the mining industry and Samis in Norway, noting that there is still a lot of work to be done. He revealed that one of his responsibilities is to facilitate dialogue among Indigenous people, government, and industry. He stated that he is in negotiations with the Mineral Cluster[45] in Norway to collaborate with them on a project. Quoting Tom Molloy, he remarked, "It takes time to build trust." On the relationship between Samis and the extractive industry in Norway, Mr. Nysto stated, "we are at a stage where we are looking more for starting points as opposed to solutions."

Mr. Nysto wondered why despite the long history of Sami interaction with the mining industry, there is no stored knowledge on the mutual experience between the two parties. He questioned - Where are the Sami experiences stored? Where are the experiences of industry stored? He stated that he had asked the Mineral Cluster the same question, but has not gotten a response. He wondered whether the answer to these questions could end up with significant organizational and institutional re-arrangements of the industry. Mr. Nysto stressed the need for stakeholders to answer

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[44] ÁrranLule Sami Centre (December 2016). Ranking Oil, Gas and Mining Companies on Indigenous Rights in the Arctic. Retrieved from https://brage.bibsys.no/xmlui/bitstream/handle/11250/2451729/2016%2B-%2BArctic%2Bindigenous%2Branking%2BArran.pdf?sequence=1

[45] The Mining& Mineral Cluster Norway is an organization focusing on R&D, innovation and human resources development within the mining industry in Northern Norway.

the question in a positive manner. However, he acknowledged efforts made by companies in the past few years to develop the knowledge base about Sami issues.

He was of the opinion that as Norway is in the process of developing a new mechanism to deal with mining in Sami areas, there may be a need to use the "carrot and stick" approach in that new mechanism. He noted that there are some voluntary international instruments such as the "OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector", which could be a good starting point from the operational level, for companies. He noted that some companies are even having problems implementing the voluntary instruments.

Mr. Nysto also made reference to the Towards Sustainable Mining (TSM) Framework of the Mining Association of Canada (MAC), as an example of a best practice regime that could be adopted and adapted by the mining industry in Norway. According to Mr. Nysto, the TSM which focuses on six operational areas, including Aboriginal and community, ranks companies from AAA to C, with the highest rated companies getting triple A. He doubted whether any Norwegian mining company would score a triple A, if they are assessed using the TSM framework. He called for Norway to look at the advantages and disadvantages of implementing the TSM framework in Norway. He noted that Finland adopted the TSM Framework, and then made changes to suit the Finnish context. For example, Finland adapted the TSM framework by introducing measures to tackle the issue of water management, an important issue in that country, due to its many fresh water lakes.

Mr. Nysto stressed the need for all parties in Norway (Samis, industry, and government) to learn from Canada, so that they can increase the mining knowledge base. He concluded by remarking that "Knowledge improvement or building measures in tandem with work at various levels of government in improving the political and legislative machinery regarding mining in Norway, would benefit all parties." He also stressed that the emphasis should be on "starting points and not fixed future solutions." While pointing to the importance of trust, understanding, and patience, Mr. Nysto also acknowledged that it would take several years for these characteristics to develop.

Mr. Olav Hallset, Communication Manager, the Norwegian Mineral industry, offered his organization's **"Perspectives on possibilities for building new industries in areas with Indigenous people."**

Mr. Hallset emphasised the importance of minerals to society's everyday needs, but he also acknowledged the need for regulations to protect the interests of different stakeholders; declaring that "traditional activities and mining can co-exist in our common future". Mr. Hallset stated that although Norway's ranking as a favourable destination for mining investment on the Frasier Institute's Mining Attraction Index improved from 18^{th} position to 12^{th} in 2016, the country has consistently lagged behind Sweden and Finland. He attributed this to the unpredictable nature of the regulatory framework of mining in Norway. Mr. Hallset posited that the processes involved in establishing mining activities in Indigenous areas are also partly to be blamed for the unpredictability of the process.

Mr. Hallset acknowledged that Norway has ratified ILO Convention 169, which gives Samis the right for their "voice to be heard," but he conceded that there are other parts of the legislative framework that do not work well. He admitted that the Mineral Act is deficient, because of its incompatibility with other laws. Consequently, he revealed that his organization has asked the Ministry to revise the Act, with a view to remedying the pitfalls of the law in areas relating to the predictability of the process, and the acceptance of the law within Sami society.

Mr. Hallset noted that unlike industry partners, other stakeholders have not dealt with the systems as designed by the national government. He lamented the lack of mutual respect in the process of establishing mines in Indigenous areas. He criticised the actions of the Sami parliament earlier in the year, in sending out letters to several actors in financial and investment institutions, warning them to desist from investing in the Nussir ASA mining project in Repparfjord. He claimed that such actions by the Sami Parliament devalues the image of Norway as a country with democratic processes. According to him, Nussir ASA has gone through all the democratic regulatory processes that was required- from local approval at the municipality level, to the area planning approval by the ministry, and their mission approval by the Directorate of Mining. He added, "The Sami parliament's action can hardly be considered a dignified code of conduct in this matter."

Mr. Hallset opined that the expectations of each stakeholder in negotiations might have to be re-assessed. He noted, "The industry cannot force things through, luckily; and the Sami parliament is entitled to be consulted, but does not have a veto power. There has to be a certain (level of) predictability." He expressed the hope that a revised Mineral Act would provide this predictability in the future. He appealed to members of his organization to strive towards policy improvements that facilitate positive co-existence with traditional activities and the protection of traditional activities. He then added that the Norwegian Mineral Industry is willing to take part in regulatory changes that benefit all stakeholders.

Like the mining industry, the operations of globalised aquaculture industry impacts the lives of coastal indigenous peoples of Canada and Norway. The aquaculture industry has courted controversy in both Canada and Norway due to concerns about the environmental consequences of the industry. The next presentation focused on the operations of the aquaculture industry in Canada and Norway.

Ms. Lise Bergan, a Director, Cermaq, spoke on her organization's "Perspectives on possibilities for building new industries in areas with Indigenous people." Ms Bergan started her presentation by giving a few statistics about Cermaq, a salmon producing company. She stated that Cermaq operates in Norway, Canada, and Chile. Out of a total employee count of 2,700, 2000 are in Chile, 500 in Norway, and the rest are in Canada.

The operations of multinational corporations (MNCs) across state borders have become an increasingly important part of global economic activity. Cross-country differences in laws and regulatory requirements affect the operations and ways in which multinational aquaculture companies consult and engage with Indigenous people. Ms. Bergan stated that Cermaq's approach to Indigenous consultation approach varies from one country to another, due to differences in the local contexts in the countries in which they operate.

According to Ms. Bergan, in Norway, every Cermaq fish farming site has to be approved through a democratic process at the local level. She also stated the regulatory process involves the disclosure of a wide range of company information on issues such as environmental tests on the sites, and plans to deal with fish escapes. A process that she describes as involving "extreme disclosure". According to Ms. Bergan, conflicts between Cermaq and Sami are seldom related to the former's sea sites (a major difference with the BC case). However, conflicts or the potential for conflicts are more prevalent on land installations, such as fish processing plants, and fish slaughter facilities. She noted that consultations with local authorities to solve or avert such conflicts usually centre on the protection of local heritage sites, and issues pertaining to access routes for reindeer herding.

In Canada, Ms. Bergan noted that Cermaq has a defined Aboriginal engagement policy, with Protocol Agreements (another name for IBAs) being at the centre of this framework. According to her, Protocol Agreements form the basis of consultations and the provision of key benefits to First Nations communities. Ms Bergan revealed that these benefits include provisions relating to the procurement of goods and services from Indigenous companies, and the employment of locals on Cermaq installations. She noted that employment is an important part of protocol agreements, noting that although there are no quotas, a significant number of locals are employed on the fish farms. She revealed that more than half of Cermaq's fish farms are on the Ahousaht First Nations territory; and that the Protocol Agreement with the Ahousaht Nation been improved and renewed several times, since the first one was signed.

Ms. Bergan also spoke about Cermaq's recognition of the importance of respecting nature. She added "We produce in public waters, so there is a shared interest with Indigenous people to maintain these resources." In response to an earlier presentation, which questioned the availability of information on environmental and health of fish on the fish farms in BC, Ms. Bergan, she referred the audience to Cermaq's periodic sustainability reporting on the company's website.

Ms Bergan also outlined some of the barriers faced by Cermaq in consultation with First Nations. These include the diversity of First Nations culture, multiple and competing First Nations claim to traditional territories, and internal social and political divisions within communities. She stated that the policy of the company is to allow First Nations communities to solve their internal divisions without interference from Cermaq. She expressed Cermaq's desire to have Protocol Agreements with all the First Nations on whose territories they have fish farms.

Question and Answer Session (2)

During the Q&A session, Dr. Brattland asked Ms. Bergan whether Cermaq would consider the idea of signing Protocol Agreements or similar agreements with Norwegian municipalities. In her response, Ms Bergan argued that there are contextual differences between Canada and Norway, adding that such agreements might not be necessary in Norway because in her view "Cermaq's sea sites are not closely impacting Sami interests." She also cited the normative requirement for Protocol Agreements in Canada as another reason why Cermaq negotiates these agreements with First Nations.

In response to Mr. Hallset's criticisms of the Sami Parliament's decision to send letters to financial institutions and investors warning them not to invest in Nussir ASA, Ms. Muotka from the Sami Parliament stated that it is the duty of a responsible politician to make the investors know about the situation of the Nussir ASA project vis-a-vis the Sami Parliament. She noted that it is important for investors to be provided with this information because they also have CSR policies, which deal with Indigenous rights. Consequently, she added that, she had a duty to inform them of the opposition of the Sami Parliament to the project. In a follow-up comment, Mr. Hallset again pointed out that Nussir ASA has followed all the regulatory requirements, and when a stakeholder with the title "Parliament" in its name, writes a letter warning investors not to invest in the company, it has grave consequences. He added that he would like to improve the industry's dialogue with the Sami parliament in order prevent such actions in the future, because the Norwegian mining companies are involved in global competition with others.

In response to Mr. Hallset's earlier comment that Nussir ASA has gone through all the "democratic regulatory processes," Dr. Josefsen commented that the reindeer herders (and other Sami interest parties) are not represented in the decision making structure, at the local government level, where the mine was approved. Hence, she warned Mr. Hallset to be careful with the use of the word "democratic." *This exchange brings to the fore, the extent to which municipalities consider the* *interests of Samis in the approval processes of development projects. Evidence suggests that factors such as location of municipality (whether in Finnmark or not) and the level of Sami influence in the municipality impact how much a municipality considers the interest of Samis in the approval process for large-scale projects.*[46]

Commenting on what she observed in some of the presentations which she believes paint a distorted picture of the relationship between Samis and industry or that Samis are anti-industry, Dr. Josefsen reminded the speakers that Samis have historically been engaged in industry, and are currently engaged in various industries. However, because they live in ethnically mixed communities, they do not necessary organize into ethnic business associations. She added that Samis are currently involved in the reindeer, fisheries, agriculture, and the construction industries in the communities within which they reside. Dr. Josefsen also reminded the audience that Samis have been involved in mining for over 100s years as independent miners. In this light, she pointed out that Samis are not averse to the industry. Mr. Nysto also added that mining is part of the Sami identity in some parts of Sapmi, especially in Tysfjord.

Dr. Josefsen observed that the biggest problem facing Samis is the lack of resource control. She noted that the Finnmark Act is one symbol of successful Sami challenge to that phenomenon, which has led to the decentralisation of resource control from the Government to the local level.

Mr. JP Gladu commented that in Canada, there are several Indigenous business associations. These groups organize around the local Indigenous business enterprises, and serve as spaces where industry can build relationships with local communities, by procuring goods and services from Aboriginal companies. He noted that the relationships that industry builds with local Aboriginal companies in these associations provide industry with predictability and security for the operation of their projects. These Aboriginal business associations also create a space for Indigenous businesses to get together and share business thoughts and ideas. In this vein, Mr. Nysto emphasized the need for a Sami business organization to facilitate business collaboration with Indigenous people in other countries.

Mr. Gladu also revealed that some Aboriginal communities in the Oil Sands in Alberta, are opting to enter into agreements and partnerships with industry, in a bid to gain influence over the development process, instead of opposing these projects. He gave the example of the equity partnership between Suncor and Fort McKay First Nations in Alberta, which gave the latter a 33.3%

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[46] Koivurova, T; Masloboev, V.; Hossain, K.; Nygaard,V.; Petrétei,A.; &Vinogradova, S. (2015). Legal Protection of Sami Traditional Livelihoods from the Adverse Impacts of Mining: A Comparison of the Level of Protection Enjoyed by Sami in Their Four Home States. *Arctic Review on Law and Politics.* 28 Feb 2015 DOI: 10.17585/arctic.v6.76

stake on one of Suncor's Oil Sands projects. He also noted that this approach has transformed Aboriginals from just employees, to suppliers of business services, and more recently, to "primary producers" or owners or part owners of these projects. However, he observed that while many companies are increasingly realizing the need to share their profits with Aboriginals, many others still need to be pushed to do so.

A participant asked whether Mr. Nysto's suggested approach of "finding starting points and mutual agreements" applies if the starting point of Samis is "no" to mining in Sami areas. Mr. Nysto acknowledged differences in opinions within the Sami community on mining, however, he called for each side of the debate to at least consider the arguments of the other side, and explore the possibilities of mining. He also emphasized that the response to that question would also depend on what the position of the Sami parliament is regarding the issue of mining. Mr. Nysto conceded that the current impasse on the Mineral Act cannot go on forever, and needs to be resolved soon. However, he noted that the current situation provides an opportunity for all parties to accumulate knowledge about mining and its impacts on Sami rights.

In a related comment, Mr. Gladu noted that with linear projects (projects such as pipelines whose route could stride many First Nations communities) in Canada, one main problem that is likely to emerge is the question of - what percentage of First Nations communities should consent to a project for it to be assumed that all First Nations stakeholders have consented? He cited the example of the Northern Gateway Project, which had the consent of 70% of the communities on the pipeline route, with the rest rejecting the project. Mr. Gladu predicted that this issue could lead to the next round of court cases in Canada.

The changes occurring in the Arctic has led to increased human activities in the Arctic, and has heightened interest in, and concerns about, the future of the Indigenous people who inhabit this region. The need for consultation with the various industries becomes obvious. The impact of change in the Barents region was the topic for the following presentation.

Dr. Monica Tennberg, Professor in the Arctic Centre, University of Lapland Finland. Ms. Tennberg's presentation was titled "Local people's talk about the future." Dr. Tennberg gave an overview of a project titled "Adaptation Actions for Changing Arctic" (AACA), established by the Arctic Monitoring and Assessment Programme (AMAP). The goal of the project is to assess the cumulative impacts of climate change, environmental stressors, and socio-economic change on the Arctic. The project also assesses adaptation strategies employed at various levels of governance in the Arctic. The regions studied are the Barents, Baffin Bay/Davis Strait, and Bering/Chukchi/Beaufort regions, however, Ms. Tennberg's presentation focused on the Barents Region project.

Dr. Tennberg noted that change has been a constant theme in the Arctic, and adaptation has been a key word to describe what is happening in this region. She stated that the project aims to produce knowledge that supports timely, cost effective, and responsible multilevel adaptation actions.

Dr. Tennberg noted that the Barents region is unique, because compared to other Arctic regions, the region has the bulk of the Arctic population, the most developed infrastructure, more conflict around resources development, mixed populations, and is highly industrialised. She also noted that most of the developments in the region are impacted by social, political and economic factors external to the region. Given these characteristics, she admitted that it is difficult to predict how change would evolve in this region in the future.

Dr. Tennberg's observed that the Barent's region is experiencing a wide variety of changes, and depending on people's contextual situation, these changes present risks, challenges, and opportunities. She stated that climate change will affect many things, but the regulatory framework, and socio-economic factors will shape the region's capacity to adapt to these changes. *Dr. Tennberg's observations are pertinent in view of evidence which suggests that the climate in Sapmi will rise faster than in the rest of the Scandinavia. Hence, Sapmi will face the impacts of climate change sooner than others in Europe.*[47]

Dr. Tennberg's presentation then focused on the projected impact of climate change on reindeer herding and mining in the Barents region. She reported that with respect to mining, more precipitation due to climate change, could create more problems for water management in mines. Also, fluctuating global mineral prices could impact mines and neighbouring communities. On the issue of reindeer husbandry, Dr. Tennberg noted that the fragmentation of pastures due to multilevel challenges such as industrial development, urbanization, and institutional barriers, combined with unpredictable and unstable weather conditions, could constrain the mobility and the wellbeing of the reindeer, and the future of the husbandry.

Dr. Tennberg outlined some of the challenges of reporting local perspectives. These include the difficulty of capturing the diversity of views of different stakeholders, at different levels of society. Other factors include, the diversity of the groups studied, the complexity of change, varying impacts on sub regions, and different perceptions of the impacts of the ongoing changes.

Ms. Silje Karine Muotka, member of the governing council of the Sami Parliament, and the member responsible for education, fishery, mining, reindeer herding, and oil and gas,

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[47]Keva, J. (November 30, 2015). Arctic Indigenous People and Climate Change. Presentation at a Seminar:"Is Climate Change Destroying Indigenous Peoples?" Available https://www.visili.fi/sites/visili.fi/files/files/news/803-eurooppasalissa-keskusteltiin-ilmastonmuutoksesta-ja-alkuperaiskansoista/juho-keva-arctic-indigenous-people-and-climate-change.pdf

presented on the topic of "Internationalisation of Indigenous peoples' rights". Ms. Muotka commenced her presentation by expressing her firm belief in business development, and in cooperation between the Sami people and industry, as long as that cooperation brings true and sustainable development to Samis and the rest of society. In her view, Indigenous people's understanding of "development," is different from other stakeholders' (businesses and government) perception of the concept. According to Ms. Muotka, this gap in understanding is one of the reasons for the challenges in the dialogue about the extraction of natural resources. In her view, business development should be sustainable, both ecologically and culturally. She noted that this requirement is an expectation that is embedded in the framework of international Indigenous rights and Norwegian law. Ms. Muotka also emphasized the requirement for FPIC in these interactions.

Ms. Muotka noted that Samis have a strong political link to the international indigenous movement, which has chalked up significant legal and political developments for Indigenous peoples globally. She attributed this connection not only to the participation of the early Sami movement in the international efforts in the field, but also Norway's high profile role in supporting the United Nations (UN) system, and international human rights framework. In this light, Ms Muotka stated that Samis have a responsibility to other Indigenous people, because Sami are better situated to advance the interests of other Indigenous people.

Ms Muotka mentioned that Norway was the first to sign the ILO 169 Convention. Also noting that Norway has also signed, but not yet fully implemented, the UNDRIP. She highlighted a lack of coherence between internationally recognised rights and local Norwegian policy and legislation. In this vein, she noted that Sami parliament does not recognise the Mineral Act because the legislation lacks a mechanisms for FPIC, and just benefit sharing. Ms. Muotka also stated that the Mineral Act's non-recognition of Sami areas outside of Finnmark, and its deficiencies relating to responsibility for mine closure and reclamation, are the other reasons why the Sami Parliament has not accepted the legislation. She declared that the only way forward is for the revision of the Mineral Act, emphasizing the need for consultations and negotiations between developers and rights owners.

Ms Muotka revealed that the Sami Parliament has a keen interest in international guidelines framework for consultations between rights owners and businesses. Of particular interest are the UN Guiding Principles on Business and Human Rights, and the OECD's Guidelines for Multinational Enterprises and Industrial Companies. She also mentioned that the CSR policies of companies are of interest to her organization, especially the content on Indigenous people.

Ms. Muotka raised the possibility of stakeholders creating a CSR roadmap for mining in Sami regions, with "several stops and no parking signs." In that light, she mentioned that she was looking forward to the results of the various projects led by Mr. Sven Roald Nysto.

In concluding, Ms. Muotka refuted the claim that the Sami Parliament is made up of people who are opposed to jobs, and to development in general. She clarified that the Sami Parliament wants jobs in Sapmi, but that the Parliament wants sustainable jobs that would not endanger Sami culture. She listed areas in which the Sami Parliament would welcome job creation. These include jobs in traditional industries (Arctic berries, reindeer, Cloudberry, tourism, fishery, adventure, cultural industry, Sami foods) and jobs in the knowledge industry. Ms. Muotka then declared "I cannot accept an approach to development where one man's development is another woman's ruin. I think we need to see development in a broader perspective, so maybe that is a good starting point."

Question and Answer Session (3)

During the Q&A session, asked whether the Sami parliament is open to the establishment of a fund from proceeds from the mining and other industry, from which money will be transferred to the Sami parliament and municipalities. Ms. Muotka noted that while it is important to explore benefit sharing, it is more important to solve the impasse over the Mineral Act first. Citing the case of the fishery sector, Ms. Muotka noted that because the Sami Parliament plays a prominent role in the coastal zone planning for fish sites, the Parliament would not want a conflict of interest, hence the body recommended that the extra taxes collected by the government from aquaculture firms should be given to municipalities, instead of the Sami Parliament.

In a response to a question from Mr. Hallset on whether the Sami parliament is open to a proposal from industry for the government to allocate a quarter of the taxes from mining companies to the municipalities in which the mines are located, and for a share of the landowners fee in Finnmark to go to the Sami parliament. In response, Ms. Muotka felt that this question is premature given the current impasse between the Sami Parliament and the Norwegian government. She remarked "I feel like we are trying to set up a date, and we are already talking about how to split the check. We are not there eating dinner yet." Ms. Muotka stressed the need for the impasse with the government on the Mineral Act to be solved before the issue of benefit sharing is dealt with. In addition, she stated that she is not sure whether the Sami parliament should receive more funding or whether the funding should go to the municipality. But she added that that there are many benefit sharing models that can be explored.

Ms. Muotka stressed that one peculiar thing in Norway is the little contribution of the mining industry in terms of taxes or contributions to the municipalities in which they operate. In response to this comment, Mr. Hallset noted that mining companies in Norway face higher taxes than other companies, and many of these companies do not make profit in their operations. In response to Mr.

Hallset's comment, Ms. Muotka noted that before reaching decisions, the Sami Parliament assesses the economic benefits of a mine against the cost of such projects to Sami interests. Citing the Nussir ASA project, she noted that, after taking into account the economic value of the project, and the price that Samis must pay in terms of the project's impact on already stressed communities, who have made way for power lines, vacation cabins, and other major projects, the parliament did not consider the project worthwhile.

7 Summary and Conclusion

Consultations and negotiations are important tools for Indigenous Peoples to address issues related to their rights. Consultations also provide mechanism by which industry and government can more effectively recognize and address potential social and environmental impacts of their project, thereby reducing the inequities and conflict that surround industrial developments on Indigenous territories. However, the deliberations during the conference revealed important differences between Canada and Norway regarding opportunities for consultations and negotiations among Indigenous people, government, and industry. Cross-country differences in the levels of direct engagement between Indigenous peoples and industry in both countries were also evident during the presentations.

In Canada, the right to consultation stems from the constitutional "Duty to consult and accommodate" indigenous communities in Canada. This legal requirement does not only create the opportunities for consultations and negotiations, it also strengthens the position of Aboriginals in negotiations with government and industry. Despite some problems with the consultation processes in Canada (such as the lack of a concrete guidelines on what context- specific "meaningful consultation" is, leading to instances where some industry proponents adopt an approach of "check box" consultation), the process has chalked up important successes for Aboriginal communities.

As borne out in the presentation of Mr. Gladu, the legal and normative requirement to consult Aboriginals has impacted the way industry interacts with Indigenous communities in Canada. The proliferation of IBAs and joint ventures between industry and Aboriginal communities in Canada, emanate from processes that are required by the duty to consult. Ms. Bergan, the representative from Cermaq, a Norwegian aquaculture company, stated that Protocol Agreements (another name for IBAs) form the basis of consultations and the provision of key benefits to First Nations communities. However, it must be noted that Cermaq does not have such agreements with the Samis in Norway. This brings to fore, the important role played by the state in promulgating legislation or encouraging norms that provide protection for indigenous peoples in their interaction with industry and government.

Differences in socio-economic and political contexts between Canada and Norway, partially account for differences in CSR policies between the two jurisdictions. Advanced welfare states, such as Norway and other Nordic countries, are well-known for strong government engagement in social and environmental policy issues, strong democratic market regulation, and extensive taxation of companies. [48] Esping-Andersen[49] notes that a key characteristic of the welfare state is the degree to which social policy transfer payments are made independent of the market mechanisms or "decommodified". Evidently, entrenched welfare state programs in Norway has generally impacted the way CSR provisions are regarded by government and industry. Consequently, the idea of having industry play a big role in social and economic issues at the local level is not entrenched in Norwegian society or industry (a situation that is different in Canada). Also, the fact that egalitarian principles fostered by the welfare state have largely avoided questions of ethnic differences,[50]sometimes make it difficult for Indigenous peoples to have their concerns acknowledged in many instances, especially by the industry and the general public.

As enshrined in Article 15 of ILO Convention 169, Indigenous peoples have *the right to share in the benefits* arising from activities taking place on their traditional territories, especially in relation to natural resource exploitation. IBAs provide a mechanism for Indigenous peoples to benefit from industrial projects that are carried out on their lands or areas that they have traditionally used for their livelihood. From the Australian and Canadian perspectives, conference participants had a vigorous debate about the "pros and cons" of the confidentiality clauses enshrined in IBAs. While IBAs (at least in the form negotiated in Canada and Australia) are not in place in Norway, the exchanges between industry and Sami Parliament representatives focused on benefit sharing are indications that this issue may take centre stage in Norway in the future. Hence, there is a need for knowledge building measures on benefit sharing models that reflect the Norwegian and Nordic contexts. Contextual factors include the welfare state provisions, Sami rights and territoriality, the type of mining activities in Norway, and more generally impacts of industrial developments on Sami culture.

The need for government intervention, in the form of policy or legislation, to lay out a framework to systematically protect indigenous rights was made obvious by the presentations of Dr. Josefsen, Dr. Howlett, and Ms. Kolshus. While the Sami Parliament's position has been strengthened by the fact that various government organisations have become more aware of the need to include the Sami Parliament in important processes that relate to Sami interests, evidence suggest that the spirit of

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[48] Joly, C., & Olsen, P. I. (2011). The Nordics and the myth of the welfare state. In A. Midttun& N. Witoszek (Eds.), *The Nordic model: Is it sustainable and exportable* (pp. 8-11). Oslo, Norway: CERES21 Report.
[49]Esping-Andersen, G. (Ed.). (1990). The three worlds of welfare capitalism. Cambridge, UK: Polity.
[50] Aasen, H. S., Gloppen, S., Magnussen, A. &Nilssen, E. (2014). Juridification and social citizenship in the welfare state: A collaborative research work. Edward Elgar, Cheltenham, UK

the Consultation Agreement has not always been followed. These shortcomings buttress the need for the Consultation Agreement to be anchored in law. Dr. Josefsen's account of the less than optimal consultation experiences of the Sami Parliament with respect to the drafting of the Mineral Act and the amendment of the Reindeer Herding Act, provide ample rationale for a law to provide backing for the goals of the agreement. The lack of a clear legal framework to deal with processual issues related to consultations on Sami interests, has impacted consultations and negotiations among Samis, the Norwegian state, and industry. A legal framework mimicking the bill on *"Administrative procedures and consultation measures regarding issues that may affect natural resources in Sami areas,"* which was proposed by the Sami Rights Committee in 2007, should be given thorough consideration.

The issue of FPIC and the right of Indigenous peoples to give or withhold their consent on industrial developments on their lands was a topical theme during the conference. The President of the Sami Parliament, Ms. Keskitalo, and Ms. Muotka (a member of the Sami Parliament) highlighted the fact that the exclusion of FPIC provisions in the Mineral Act is one reason for the Sami Parliament's rejection of the act. Also, evidence presented by Dr. Josefsen, highlighted the fact that in certain cases, Sami rights have been downplayed because of political expediency or when implementing these rights is seen as being in opposition to the interests of the majority population (as is often the case with mining and electric power projects). Hence, the implementation of the FPIC provisions of UNDRIP within national legal frameworks governing indigenous issues, was highlighted as an important vehicle for enhancing Indigenous self-determination.

One important theme that permeated many of the presentations during the conference is inequalities of bargaining power between Indigenous peoples on the one hand and industry and governments on the other, with the latter parties advancing an agenda that increasingly favours open markets and the liberalization of regulatory systems. Mr. Logje's presentation, about his dealing with Statnett, reflects the position of many Indigenous peoples in relation to industrial development. The lack of veto power by Indigenous peoples over industrial developments on their land, creates the possibility that these developments would go ahead despite their opposition, leaving them with no option but to negotiate co-existence agreements with industry. This lack of viable alternatives then leads to an unequal playing field in the agreement negotiation process. The need for policies and programs to level the consultation playing field among the parties was emphasised by Dr. Howlett in her presentation.

For many communities, industrial developments provide a viable means to desperately needed economic sustenance. As noted by Mr. Braker and Dr. Hersourg, the issue of aquaculture is a conundrum for communities in both Canada and Norway, because of the economic need to encourage the industry despite the environmental and social concerns generated by the industry. This situation necessitates the need for consultations, to reduce conflicts and facilitate mutually beneficial solutions. The incorporation of TEK in environmental monitoring could also contribute to reducing conflict.

An underlying theme that emerged from some of the presentations during the conference is the importance of incorporating Traditional Ecological Knowledge (TEK) in ecological systems management. Dr. Sandstrom's presentation on the difficulties faced by - RenGis (a mapping process that uses TEK from reindeer herders) in gaining acceptance as a legitimate land planning tool highlights the continuing difficulty faced by Indigenous people in gaining acceptance of their knowledge, as a credible alternative or equal partner in ecosystems management. The potential of TEK in facilitating sustainable management of ecological systems and in gaining social acceptance of industrial projects, remains largely untapped.

In concluding, it is evident that there is a greater recognition amongst governments and industry of national and international legal developments on the need to meaningfully consult Indigenous peoples in resource development and planning. However, deliberations during the conference show that while consultations and negotiations are important tools for enhancing Indigenous self-determination, important barriers and constrains remain in achieving the potentials of consultations.   As was emphasized by Mr. Tom Molloy, successful consultations and negotiations require innovation at the negotiations table, trust, patience, and the political will to make hard choices on important matters. The role of governments is crucial in the process of engagement with Indigenous Peoples, since governments, not companies, are parties to UNDRIP and ILO Convention 169. Thus, the important role of governments in protecting the interests of Indigenous peoples should be emphasized. Also, the role of the research community in developing best practices for consultations and negotiations is important.

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10. Appendix: Program

Negotiations and consultations between Indigenous Peoples, Government, and the Industry Sector, Tromsø, Norway, 19- 20 September 2016

Place: Auditorium 2, UiT The Arctic University of Norway

Monday 19th 2016

08:30: Bus to campus from Radisson BLU

08:30: Registration outside AUD-2

09:00-09:30: ***Opening Session: Setting the stage***

Ms. Sonni Olsen, Dean, Faculty of humanities, social sciences and education, UiT The Arctic University of Norway

Ms. Aili Keskitalo, President of the Sami Parliament, Norway

Understanding consultations and negotiations

09:30-10:00: Mr. Dwight Newman, Professor, University of Saskatchewan, Canada Research Chair in Indigenous Rights in Constitutional and International Law

10:00-10:20: *The Norwegian consultation agreement* **-** *premises and challenges* Mr. Hans-Kristian Hernes, Professor, UiT The Arctic University of Norway

10:20-10:40: Coffee

Experiences from indigenous-state negotiations and consultations

10:40-11:10: *Negotiating land claim settlements: the Nunavut Land Claim Agreement, the Nisga'a Final Agreement and others* Mr. Tom Molloy, former Chief Negotiator for the Government of Canada in the Nunavut Land Claims Agreement and for the Nisga'a Final Agreement

11:10-11:30: *Consultations with State authorities – the Sámi experience in Norway* Ms. Eva Josefsen, UiT The Arctic University of Norway

11:30-12:00: Questions and comments

12:00-13:00: Lunch

Experiences with business consultations

13:00-13:20: *Who is monitoring corporate engagement with Indigenous peoples? An Australian Case Study from a Swedish project* Ms. Catherine Howlett, Associate Professor, Griffith University

13:20-13:40: *Experiences from negotiations that ended with agreement* Mr. Johan Aslak Logje, reindeer owner

13:40-14:00: *Aspects when agreement is not reached: Sami rightholders' experiences with business negotiations and the rule of law* Ms. Ragnhild Marit Sara, reindeer owner and lawyer

14:00-14:20: *Duty to consult: Expectations to business* Ms. Kamilla H. Kolshus, OECD National Contact Point, Norway

14:20-15:00: Questions and comments

15:00-15:15: Coffee

Green industries: Comparing Canadian and Swedish experiences

15:15-15:35: *The history of hydroelectric power and mining in Northern Sweden* Mr. Patrik Lantto, Professor, Umeå University

15:35-15:55: *When science hit the court room – the case of wind power development on reindeer grazing lands* Mr. Per Sandström, Swedish University of Agricultural Sciences

15:55-16:15: *The Rise of Indigenous Power Producers: First Nations and the Future Energy Sector in Canada* Mr. Greg Poelzer, Professor, University of Saskatchewan

16:15-16:45: Questions and comments

17:00: Bus from campus to Radisson BLU

19:00: Dinner at Radisson SAS hotel

Tuesday 20th 2016

08:30 Bus to campus from Radisson BLU

Blue industries: Comparing Canadian and Norwegian experiences

09:00-09:30: *Aquaculture on Canada's Pacific; First Nations' Experiences* Mr. Hugh Braker, Vice-President, First Nations Fisheries Council of British Columbia

09:30-09:50: *Norwegian community experiences with fish farming* Mr. Bjørn Hersoug, Professor, UiT The Arctic University of Norway

09:50-10:15: Coffee

10:15-10:35: *Consultations between indigenous communities and blue industries - a comparative perspective* Ms. Camilla Brattland, post doctor, UiT The Arctic University of Norway and Ms. Dorothee Scheiber, resesearcher in TriArc

10:35-11:00: Questions and comments

11:00-12:00: Lunch

The current role of business: new models of interaction?

12:00-12:30: *The current role of business: new models of collaboration.* Mr. Jean Paul Gladu, President of the Canadian Council for Aboriginal Business

12:30-12:50: *Developing new relationships between mining, Sami and governance bodies in Norway* Mr. Sven Roald Nystø, special adviser, Árran Lulesami Centre

12:50-13:10: *Comments from Industry: Industry - Indigeous peoples interaction* Olav Hallset (Norwegian Mineral Industry) and Lise Bergan (Cermaq Group AS)

13:10-13:30: Questions and comments

13:30-13:50: *Presentation of local peoples talk about the future* Ms. Monica Tennberg, Professor, Arctic Centre, University of Lapland, Finland,

13:50-14:10: *Internationalization of Indigenous Peoples' Rights* Ms. Silje Karine Muotka, member of the Governing Council of the Sámi Parliament, Norway

14:10-14:30: *Implications of indigenous self-determination* Mr. Mathias Åhren, Professor, UiT The Arctic University of Tromsø

14:30-14:45: Questions and comments & summing up

15:00: Bus to Radisson BLU