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# The Social Licence to Operate in the Context of Mining Projects and Indigenous Peoples: Is it Sufficient Just to Comply with the Law?

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# The Social Licence to Operate in the Context of Mining Projects and Indigenous Peoples: Is it Sufficient Just to Comply with the Law?

by

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## Abstract

Hard rock mining companies that comply with the law related to permits, approvals and indigenous consultation are not always successful in developing good relationships with the affected communities. Most of them are pushed to undertake actions beyond the limits of the law to create a good relationship with the project's host indigenous community(ies).

In the late 1990's, the concept of social licence to operate emerged in the mining industry, to refer to the level of acceptance that a mining company has in the community where a project is intended to be developed. The process of acquiring a social licence to operate, which is not a permit provided by law, is necessary for the success of a mining development and the generation of certainty on its operations.

This thesis describes the theory of the social licence to operate and the legal framework for indigenous consultation in Canada and Ecuador, two countries with different hard rock mining history and heritage. It then describes two projects per jurisdiction, a successful one in terms of social relationships with indigenous communities, and another one in which conflict and grievances occurred during the development of the project. The objectives of this research are to: (i) demonstrate that the company's compliance with the law is not sufficient to acquire a social licence to operate; and (ii) based on the experience of the analyzed cases, identify the practices beyond the limits of the law, that aid in the acquisition of the social licence to operate.



Key words: social licence to operate, impact-benefit agreements, mining, community relationships, conflicts, Canada, Ecuador, early engagement, consultation.

## Preface

This thesis is original, unpublished, independent work by the author, Diego Xavier Almeida Campana.

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## Dedication

To my wife, Estefi, for her love and constant support through this journey.

To Pedro, the reason I get up every morning.

## Table of Contents

## List of Symbols, Abbreviations & Nomenclature

| | |
|---|---|
| **EA:** | Environmental Assessment |
| **Encanto:** | Encanto Potash Corp. |
| **EXSA:** | Explorcobres S.A. |
| **FDN:** | Fruta del Norte |
| **FPIC:** | Free, prior and informed consent |
| **IBA:** | Impact-benefit agreement |
| **ICMM:** | International Council on Mining and Metals |
| **ILO 169:** | International Labour Organization Convention No. 169 |
| **INAC:** | Indigenous and Northern Affairs Canada |
| **JV:** | Joint Venture agreement |
| **KI:** | Kitchenuhmaykoosib Inninuwug First Nation |
| **MFN:** | Muskowekwan First Nation |
| **MMSD:** | Mining and Mineral Sustainable Development project |
| **PDAC:** | Prospectors and Developers Association of Canada |
| **SLO:** | Social Licence to Operate |
| **TB:** | Thomson and Boutilier's model of SLO |
| **UNDRIP:** | United Nations Declaration on the Rights of Indigenous Peoples |

## Introduction

It is common knowledge that mining activities are ecosystem-invasive and affect large amounts of land and resources. While the environment is indeed adversely affected by mining activities, entire rural communities, indigenous and non-indigenous, are often affected by the development of mining projects. The reason is that mining projects usually occupy large territories, mostly far from urban areas and close to small rural areas and indigenous lands.[1] Under this scenario and because the development of mining activities is prone to cause corporate-community conflicts, the relation between local communities and mining companies becomes extremely relevant when developing a sustainable and socio-economically responsible project.

Disagreements of any type between indigenous/non-indigenous communities and mining companies could lead to protests, legal battles or violent episodes. Some of these conflicts could arise, for example, from the lack of implementation of appropriate mechanisms to consult indigenous communities before the development of resource projects on their lands. Such conflicts could also be due to the potential negative effects that projects may cause to their lands, culture, society and surrounding ecosystems. As a response to the rise in conflicts of this type and in order to protect the rights of indigenous peoples, the international community, through the United Nations, worked on the creation of a framework that guaranteed the rights of indigenous peoples to be consulted by the government before the adoption of any legislative measure or

[1] Luis Sánchez-Vázquez *et al.*, Perception of Socio-Environmental Conflicts in Mining Areas: The case of the Mirador Project in Ecuador (2016) 2:1 Ambiente & Sociedade 23 at 26.

administrative decision that would affect their rights.[2] Aligned with the development of the international framework, many governments adopted statutory provisions for the protection of indigenous rights. Canada, for instance, developed through case law and based on section 35 of the Constitution Act, 1982,[3] the legal framework for the duty to consult indigenous peoples, which has been applied and constantly enforced by courts. On the other hand, Ecuador adopted for the first time the provisions related to indigenous rights in the Constitution of 1998 and broadened its scope in the Constitution of 2008.[4] Despite this recognition, no consultation processes have been recorded in Ecuador up to this date.

The existence of legal regimes that protect the rights and interests of indigenous peoples, has not ensured the end of conflicts between mining companies and indigenous communities. The application of the duty to consult framework in Canada has made some projects succeed in terms of consultation and company-community relationships. Still, there are projects that have caused protests and grievances, like the Platinex and the Eabametoong projects in Ontario, and the Sission project in New Brunswick.[5] On the other hand, Ecuador has constitutional and legal provisions in force that promote early engagement of mining companies with local communities, as well as prior consultation with indigenous peoples, but they have neither been applied nor enforced properly. This has produced social conflicts in some mining projects, from as early as

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[2] *See* Chapter 2 *below*.
[3] *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11 at s 35. The most relevant cases where such regime was developed are: *Haida Nation v. British Columbia*, [2004] 3 SCR 511, *Taku River Tlingit First Nation v. British Columbia*, [2004] 3 SCR 550, and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388. *See* section 2.1.1 *below.*
[4] *See* section 2.2 *below.*
[5] Shane Fowler, "Protest camp built on proposed site of Sission mine project", *CBC News* (18 July 2017) online: https://www.cbc.ca/news/canada/new-brunswick and Jorge Barrera, "Ontario court quashes gold mining permit over lack of meaningful consultation with First Nation", *CBC News* (17 July 2018) online: https://www.cbc.ca/news/indigenous/eabametoong-ring-of-fire-landore-permit-1.4750681

the exploratory phases.[6] Surprisingly, there are other mining projects in the country that, despite the absence of formal consultation as provided by the law, have had successful outcomes.[7] This leads to a preliminary assumption that compliance with the law is not a primary determinant of the nature of the relationship between mining companies and indigenous peoples. There are other factors outside of the scope of consultation regimes, and outside of the legal framework, that aid in building a good company-community relationship.

**Research Questions**

Academics have linked the successful relationship between mining corporations and host communities, with the existence of a Social Licence to Operate [SLO]. This term was adopted to refer to the approval that an indigenous or non-indigenous community gives to a resources company for the development of a project.[8] The theory of the SLO has shown that a community would potentially authorize the development of a resources project if the company interested in obtaining a SLO seeks for it by acting beyond the limits of the law.[9]

This thesis analyzes whether compliance with the legal framework is sufficient for mining companies to acquire a SLO. The objective is to identify the practices "beyond-the-law" that have been implemented by mining companies, which have been successful in building good relationships with indigenous communities and have allowed the acquisition of the SLO. This objective is translated into the following research questions:

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[6] *See* e.g. *Panantza-San Carlos* in "Hay cinco frentes de tensión minera entre indígenas y Gobierno", *El Universo Ecuador* (22 December 2016) online: <https://www.eluniverso.com/noticias/2016/12/22/nota/5965612/hay-cinco-frentes-tension-minera-indigenas-gobierno>

[7] *E.g.* Fruta del Norte project developed by Canadian *Lundin Gold Inc.*

[8] *See* section 1.1.1 *below.*

[9] *See* section 1.1.3 *below.*

a) Does compliance with regulations, including consultation and accommodation guidelines, prevent social conflicts in the development of mining projects?

b) What are the practices implemented by project proponents, which are not required by law, that aim to prevent or overcome social grievances or conflicts caused by mining projects, and therefore, allow the acquisition of the SLO?

**Research Methodology**

The methodology used for addressing these two questions is a mixture of theoretical and empirical research. The theoretical part of the thesis is a qualitative description of the theory of the SLO and Impact-benefit agreements [IBA], along with the legal frameworks on the duty to consult in Canada and Ecuador. The empirical component of the thesis is a description and analysis of four cases, two in Canada and two in Ecuador. These jurisdictions have been chosen considering that: (i) Canada has vast experience in mining operations; and (ii) Ecuador is a country which is opening to the mining industry and does not have large mining projects at the exploitation stage yet. Two cases per jurisdiction were chosen to illustrate a successful process of relationship-building between companies and indigenous communities. As well, two cases (one per jurisdiction) were chosen to describe the reasons why the process of relationship-building failed despite the compliance of the companies with legal provisions. The four cases are analyzed in the light of legal provisions and the existence of practices beyond the limits of the law that determine whether or not a company could obtain the SLO. This analysis will allow us to determine whether compliance with the legal framework is sufficient for the acquisition of the SLO, and will further aid us in identifying the practices that were effective for the acquisition of the SLO.

In this sense, chapter one analyzes the theory of the SLO and the IBA; while chapter II analyzes the legal framework in force in Canada and Ecuador for indigenous consultation, including a description of the relevant guidelines and principles on sustainable mining issued by private mining organizations. Chapter III analyzes the Platinex and Muskowekwan projects in Canada, and the Panantza-San Carlos and Fruta del Norte projects in Ecuador; and chapter IV infers and analyses the most successful practices implemented by mining companies, in the light of the theory of the SLO and the applicable legal framework, to determine which ones are effective for the acquisition of the SLO.

## Chapter I

### The Social Licence to Operate and Impact-Benefit Agreements

The year is 1997. Placer Dome Inc. is one of the most prominent gold-extractive companies in the world.[10] Its Director of International and Public Affairs, James Cooney, was invited to a World Bank Conference held in Washington DC, entitled 'Roundtable on Mining: the next 25 years'. His speech was about his perceptions of political risks for mining companies in the upcoming 25 years.[11] In his presentation he emphasized that community involvement will become crucial to reducing political risks during mining operations. He gave two reasons to support his argument: (i) many developing countries were opening their markets to mining investments; and (ii) as a result of the rapid development of communications, any grievance between mining operators and remote local communities could be instantly known by the entire world, affecting the reputation of the company.[12]

The idea of community involvement led Cooney to distinguish government approvals from community approvals, what he referred to as "two-track mine approval process."[13] He said that government approvals were those provided by the applicable law of the country were operations are or will take place and issued by the government. Community approval, on the other hand, was the acceptance of local communities to 'allow' mining operations. He referred to the latter as a "social licence".[14]

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[10] Placer Dome Inc. was acquired by Barrick Gold Corp. in 2006.
[11] Jim Cooney, "Reflections on the 20th anniversary of the term 'social licence'", (2017) 35:2 Journal of Energy and Natural Resources Law 197.
[12] *Ibid*, 198.
[13] *Ibid*, 199.
[14] *Ibid*, 198-9.

Two months later, at a Conference about Mining and Communities organized by the World Bank in Quito, Ecuador, the term 'social licence' was used again in every discussion about community involvement in mining projects. The idea of a 'social licence' was rapidly adopted, studied and applied by the industry and researchers in the field.[15]

## 1.1 The social licence to operate

### 1.1.1 The early concept

At the time of the development of the concept, its author realised that the SLO was not only a matter of getting involved with the affected community(ies), understood as "those who live in the immediate and surrounding areas of mining operations and who are affected by the operation's activities".[16] Because of globalization and the development of communications, affected communities were gaining support from external, national and international allies, making it difficult to perform actual operations on site. The SLO had to involve local communities and their allies, including, but not limited to, neighbour communities, local and national governments, NGOs and, sometimes, even the international community, in a broader sense.[17] These groups will be referred to in this thesis as *relevant stakeholders.*

The idea was simple. A mining project could not be developed if it there are no governmental permits. If the project has all the required permits and lacks the acceptance of relevant stakeholders, there is a considerable risk of protests and stoppages. The project could

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[15] *Ibid*, 199.
[16] Carla Martínez & Daniel Franks, Does mining company-sponsored community development influence social licence to operate? Evidence from private and state-owned companies in Chile (2014) 32:4 Impact Assessment and Project Appraisal 294 at 295.
[17] Cooney, *supra note* 11 at 199.

become highly risky and financially non-viable.[18] In this sense, the SLO encompasses all the non-formal and out-of-the-law processes and mechanisms aiming to gain an intangible authorization from relevant stakeholders for the development of a project that would affect their values, culture and practices, with the objective to reduce risks as much as possible.

### 1.1.2 The evolution of the concept

The initial approach given to SLO – the approval given by relevant stakeholders to extractive companies to perform activities that may affect them – is coming to an end. Scholars have developed new theories around SLO. It is now generally accepted that the SLO does not imply getting only a one-time acceptance from the community, but to build trust among the relevant stakeholders to gain a continuous acceptance before, during and after operations.[19]

In a study, 16 managers of mining companies in Australia were asked about their perception of the SLO.[20] One of the most interesting findings was that a few managers do not consider the SLO as a one-time authorization to be acquired or lost. SLO is constructed based on expectations from relevant stakeholders regarding the operations of the company. If such expectations are met, SLO is maintained and operations could continue.[21] Expectations of stakeholders could vary in time, depending on many factors. This means that the proponent of a project or the operator has a duty to continuously monitor and meet the expectations of relevant

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[18] *Ibid*.
[19] Robert Boutilier, "Frequently asked questions about the social licence to operate", (2014) 32:4 Impact Assessment and Project Appraisal 263 at 264. *See also* Sara Bice *et al.,* Putting social licence to operate on the map: A social, actuarial and political risk and licensing model (SAP Model) (2017) 53 Resources Policy 46 at 47.
[20] Richard Parsons *et al.*, "Maintaining legitimacy of a contested practice: How the minerals industry understands its 'social licence to operate' (2014) 41 Resources Policy 83.
[21] *Ibid,* 86.

stakeholders to ensure a continuous maintenance of the SLO.[22] One of the managers interviewed in the study shared his impressions:

> Social licence is something that has to be continually renewed. It's a perception which is variable across time and amongst stakeholder groups, and it will change in response to different issues, in response to the context, in response to the actions that any one or a number of actors in a stakeholder network might take. So, we do emphasise to them that it's a variable phenomenon. If a company were to take it literally to the point that they think it's possible to earn it, and then it's static and you've got it for all time, they've missed the point.[23]

SLO implies the interaction between stakeholders and companies. It measures the strength of the relationship between these two parties.[24] To successfully obtain SLO, relevant stakeholders must sense that the company seeking the SLO is legitimate.[25] Legitimacy is a term that, in the context of SLO, could have different approaches, all of which could be useful. Legitimacy could imply the compliance with formal laws for the existence of the organization, and the company's compliance with social norms and values.[26] It could also mean the compatibility of the corporation's social values with the values of the society where it operates.[27]

The concept of legitimacy is relevant when analyzing Thomson and Boutilier's[28] model of SLO [TB], which will be extensively described later. Legitimacy is considered in such model as the 'boundary criterion' between acquiring a minimum level of the SLO and not having it.[29] It is the entry level to acquire SLO, and the path to further levels of SLO, such as credibility and

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[22] *Ibid.*
[23] *Ibid*, 87.
[24] Sara Bice & Kieren Moffat, "Social Licence to Operate and Impact Assessment, (2014) 32:4 Impact Assessment and Project Appraisal 257 at 257.
[25] Boutilier, *supra note* 19 at 267.
[26] Parsons *et al.*, *supra* note 20 at 84. *See also* Nina Hall *et al*, "Social licence to operate: understanding how a concept has been translated into practice in energy industries", (2015) 86 Journal of Cleaner Production 301 at 302.
[27] Parsons *et al.*, *Ibid.*
[28] Ian Thomson and Robert Boutilier, "The Social License to Operate" in Peter Darling, ed., *SME Mining Engineering Handbook*, (Littleton, CO: Society for Mining, Metallurgy and Exploration, 2011) 1779.
[29] Parsons *et al.*, *supra* note 20 at 84.

trust.[30] Legitimacy could be understood from the optic of economic or geo-political views. Economic legitimacy is the perception that stakeholders have when the company plays a role that is economically beneficial to stakeholders.[31] Geo-political legitimacy refers to the perception of the company being a contributor to the well-being of the area of influence of the project.[32]

One of the ways to show and transmit legitimacy of the company is to involve people in the development process of a project. Public participation is ideal and a key element for relevant stakeholders and companies to engage and build long-lasting relations.[33] Legitimacy, and at the end, credibility and trust could not be built in the minds of relevant stakeholders if there is not a good perception of the industry in general.[34] If there is a mining company anywhere in the world that affects the rights of local communities, openly violating human rights or causing irreversible environmental damage, the image of the whole mining industry is affected, therefore making it more difficult to generate trust among relevant stakeholders and obtaining SLO.

Significant changes have been made to Cooney's initial concept of the SLO. Nowadays, it has reached a point in which it is considered to be a "key condition for successfully establishing and running a mining project"[35] SLO is not a mere acceptance, it is a process of respecting rights, meeting expectations, showing legitimacy, generating trust and confidence on the industry, and ultimately getting communities and relevant stakeholders involved in projects, through public participation processes and early engagement.

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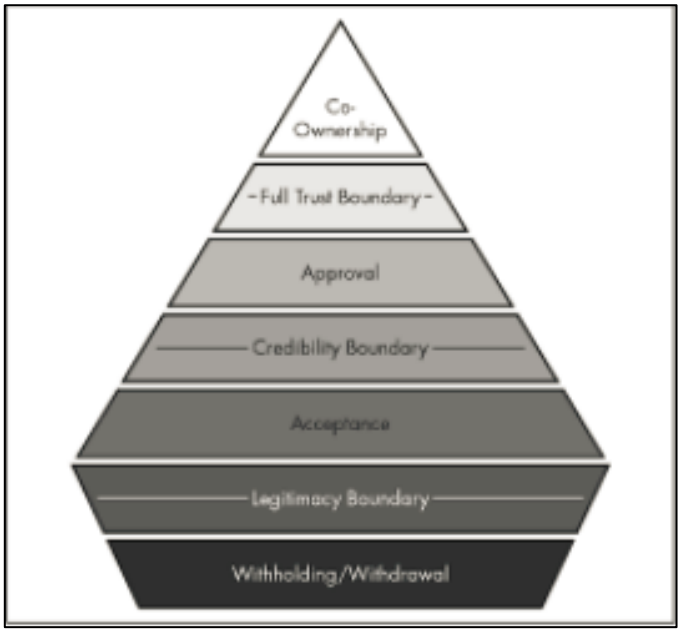
[30] *Ibid.*
[31] Ruth Aguilera *et al.,* Putting the S back in corporate social responsibility: A multilevel theory of social change in organizations (2007) 32:3 Academy of Management Review 836 at 838.
[32] Parsons *et al., supra* note 20 at 84.
[33] Hall, *supra note* 26, 304
[34] *Ibid,* 302.
[35] W. Eberhard Falck and Joachim Spangenberg, "Selection of social demand-based indicators: EO-based indicators for mining" (2014) 84 Journal of Cleaner Production 193 at 193.

### 1.1.3 The Thomson and Boutilier's pyramid: levels of the Social Licence to Operate

The TB model was proposed in 2011 as a method to identify the different possible levels of acquisition of SLO for the mining industry.[36] The authors illustrated it as a hierarchical pyramid, which includes the perception of how communities see mining companies, and how mining companies see communities. The pyramid proposed by Thomson and Boutilier is shown below: [37]




The extremes of the pyramid reflect both extreme cases of SLO. The bottom end symbolizes the withholding or withdrawal of the SLO, while the top end symbolizes the highest level of engagement with relevant stakeholders. Between both ends are the levels in which stakeholders could be engaged with mining companies: Legitimacy, credibility and full trust. Above and below each boundary lie the results of moving between limits. For example, if

[36] Thomson and Boutilier, *supra* note 28.
[37] *Ibid* at 1784

relevant stakeholders believe that the mining company has lost legitimacy, it is most likely that such company will lose the SLO. But, if the community considers that the company is legitimate, they will accept mining operations.

By using the pyramid, the TB model shows that there are different levels in which the SLO could be held. To ensure continuity of operations, a company would not want to fall below the legitimacy boundary, as the SLO would most likely be withdrawn.[38] Below are the descriptions made by the authors of the TB model for each level of the SLO.[39]

**Legitimacy**

The TB model refers to legitimacy as "the acceptance by the general public and by elite organizations of an association's right to exist and to pursue its affairs in its chosen manner".[40] The concept of legitimacy could be linked to the fact that the company has to be legally existent and has to hold all necessary permits to operate. If there is no acceptance of the right of an organization (company) to perform activities, SLO will most likely be withheld. If, on the other hand, the company is considered as legitimate, the company will reach an acceptance level, which is the basic level to acquire a SLO.

**Credibility:**

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[38] Daniel Franks and Tamar Cohen, "Social Licence in Design: Constructive technology assessment within a mineral research and development institution" (2012) 79 Technological Forecasting & Social Change 1229 at 1232.
[39] Thomson and Boutilier, *supra* note 28 at 1786.
[40] David Knoke, *Organizing for collective action: the political economies of associations* (New York: Aldine de Gruyter, 1990).

Companies build credibility when they are consistent with regard to what they say and what they do. A company that listens to community's concerns, addresses them, keeps promises and respects contracts, is likely to generate credibility among people. The basic component of credibility is action. If actions are consistent with the offers previously made, people will begin to trust the company. Also, "an essential component of credibility comes from openness and transparency in the provision of information and decision making that demonstrates the company to be consistent in the way it treats different groups."[41]

Building credibility puts the company in a position of approval, which is a step further than mere acceptance. Approval, as Thomson and Boutilier suggest, differs from acceptance in the fact that approval implies a sense of satisfaction because of the operations of a company. People do not only accept the fact of having operations on site, they agree on them, and are content with the operations.[42] Not building credibility and having legitimacy will put the company in a state of mere acceptance.

**Full trust:**

A state of full trust is reached when the company meets all the expectations of relevant stakeholders, addresses all of their concerns, and the community is driven by a sense of certainty that all their expectations, in some way or another, will be met.[43] Trust is also a state in which relevant stakeholders have the certainty that engagement has been made in good faith, the

[41] Thomson and Boutilier, *supra* note 28 at 1786.
[42] *Ibid.*
[43] *Ibid.*

company will not violate the community's rights, and will not engage in any harmful activity against the community.[44]

The trust theory has been further developed by splitting it into two types: (i) integrity-based trust, in which stakeholders recognize that the mining organization is adhering to a set of community principles; and (ii) competence-based trust, in which stakeholders recognize that the mining organization has the knowledge and values to manage the community's issues on behalf of the community.[45]

Full trust is based on good faith, strong communication and execution between relevant stakeholders and the mining company, which will lead to real dialogue between the parties. From this dialogue, agreements could be reached, and stakeholders will most likely feel that their concerns are well addressed, their voices heard, and will support the idea of the project development.[46]

The immediate consequence, according to the TB pyramid is the community's sense of co-ownership of the project (this term was later changed by the same authors to "psychological identification"). It refers to the fact that the vast majority of the community will consider the project as a part of their collective identity. Mere and sometimes reluctant acceptance will then turn to a state of self-identification with the project, up to the point of even defending it from any outside threat.[47]

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[44] Kieren Moffat and Airon Zhang, "The paths to social licence to operate: an integrative model explaining community acceptance of mining", (2014) 39 Resources Policy 61 at 62.
[45] *Ibid*.
[46] Thomson and Boutilier, *supra* note 28 at 1786.
[47] *Ibid*.

### 1.1.4 Who is entitled to grant a Social Licence to Operate?

As referred before, the process for obtaining a SLO does not only involve the local community directly affected by the project and the proponent of the project.[48] Other people and organizations come into play. Under this scenario, a project proponent should identify three basic elements before engaging in the process of the SLO: (i) legitimate local communities; (ii) legitimate stakeholders (local or national governments, organizations, NGOs, etc.); and, (iii) the role each stakeholder plays on a case-by-case basis.[49]

Identifying legitimate local communities affected by a project could be challenging, and the result will depend on the type of project being proposed, its location and the elements of the project. There might be cases in which some communities not initially identified at the project design stage could be affected by the project when fully operational.[50]

"Local communities are often a key arbiter in the process by virtue of their proximity to projects, sensitivity to effects, and ability to affect project outcomes"[51] The best way to identify local communities is to know the area of the proposed project, know the communities, their values and culture. Other authors suggest that communities could be defined: "(1) as host communities and local residents living near the mining project, (2) as groups that are affected by the project, or (3) as groups that have an influence on the development of the project at the local

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[48] *See* section 1.1 *above*.
[49] Boutilier, s*upra* note 19 at 269
[50] Pamela Lesser *et al.* "Challenges that mining companies face in gaining and maintaining a social license to operate in Finnish Lapland" (2017) 30:1 Mineral Economics 41 at 44.
[51] Jason Prno, "An analysis of the factors leading to the establishment of a social licence to operate in the mining industry" (2013) 38 Resources Policy 577 at 577.

level."[52] Still, some issues may arise, as the effect of the project could go beyond its planification.

The identification of the relevant levels of government, authorities and representatives within the community is necessary to obtain the SLO. Legitimation of the community leaders is crucial for this purpose, as the representatives must be recognized by the majority of the local community and must have the power to speak for its members.[53]

Local, national and international stakeholders, if any, must be identified as well. It may seem that the concept of outsiders conflicts with the concept of local communities, from whom the SLO normally comes. But local communities are somehow represented by local governments, and some communities, normally indigenous, have the support of international organizations and NGOs.[54] The identification of relevant stakeholders must include a clear panorama of the role played by each one and how relevant they are.[55]

A method has been proposed to do that. In a first stage, the tag "local community" has to be replaced with another referring to "stakeholders network".[56] This will erase the idea that the SLO is centrally located in the context of a reduced and isolated geographical space. A stakeholder network may include different actors with opposite views on a certain issue (for example, a national government avid for foreign investment and an environmental NGO).[57] Acknowledging the existence of more than one level of stakeholders will allow the mining

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[52] Lesser *et al.*, *supra* note 50 at 45.
[53] *Ibid*.
[54] *Ibid.*
[55] Boutilier, *supra note* 19 at 269.
[56] Robert Boutilier, *A stakeholder approach to issues management* (New York, Business Expert Press, 2011) at 97.
[57] *Ibid.*

company to address the stakeholder's concerns individually in a better way. It will also become easier to identify if such stakeholders are likely to affect the project or be affected by the project.[58]

Finally, a measurement of the weight of each stakeholder and the relevance of the stakes in play could be made. This measurement will vary depending on the case,[59] so it will be up to the proponent to assess the elements of the project, the impacts that it may cause, and the benefits that could be offered to each one of the stakeholders based on the characteristics and expectations of the project.

### 1.1.5 The relevance of the Social Licence to Operate

Why is it necessary to obtain a SLO and how relevant could it be, especially if there are governmental permits that need to be obtained to proceed with a mining project? Experience has shown that compliance with the law and regulations is not enough to successfully develop a mining project. An example of this occurred in Ecuador in 2016, when violent events resulted in one casualty, 3 injured and a governmental declaration of *state of emergency* after a protest at the *San Carlos Panantza* copper project, developed by a Chinese company, *CRCC-Tongguan.*[60] A relatively recent episode of violence occurred in Peru in 2015, when protests against the development of the *Tia Maria* project by *Southern Copper Corporation* resulted in 7 casualties

[58] *Boutilier, supra* note 19 at 270.
[59] *Ibid*, 269.
[60] "Un fallecido y varios heridos tras enfrentamientos entre comuneros militares en Panantza", *El Comercio Ecuador* (14 December 2016) online: <http://www.elcomercio.com/actualidad/fallecido-heridos-enfrentamientos-panantza-mineria.html>.

and several injured people.[61] In that case, the most relevant discrepancies between local communities and the project proponent were the use of water for processing minerals, and how this would affect agricultural activities. The project received governmental approval without even contacting local communities. The project was rejected by the locals and then rejected by the government due to the intensity of the protests.[62] SLO was never granted, nor even discussed with local communities.

### 1.1.6 The power of communities

The common discourse that there is an imparity of strength between local (especially rural) communities and big corporations, has led to the erroneous idea that local communities are weak.[63] It might be true that local communities do not normally have the scientific expertise or knowledge to rebut a proposed mining method or technic to be implemented, but that does not mean that they could not force a change in the way a project might be developed, or enforce previous agreements.[64] It might even be the case that a community accepts or rejects an element of the project after fully understanding the causes and consequences of it. An agreement could be reached in full understanding without a sense of disparity.[65]

Because of the idea of power disparity between communities and big mining companies, "a whole counter-industry has developed around opposing mining and energy projects."[66] Some national and international NGOs tend to influence the decision of local communities in rejecting

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[61] Honorio Pinto Herrera, "Proyecto Minero Tía María: Razones de la protesta" (2016) 20:36 Investigaciones Sociales 199 at 201.
[62] *Ibid.*
[63] Boutilier, *supra* note 19 at 266.
[64] *Ibid.*
[65] *Ibid.*
[66] *Ibid.*

proposals made by companies, sometimes without knowing the facts or elements that were discussed.[67] There is a tendency to make mining companies look as evil entities, and this has influenced the way mining is perceived globally, especially in rural communities.

The power disparity and the fact that locals are normally influenced by unverified information result in a predictable reaction from communities: strong opposition to mining activities. Some companies would rely on the enforcement of the governmental permit issued according to the law. In most of these cases, such enforcement ends up causing or aggravating conflict. The example of the Tia Maria project in Peru shows that governmental involvement trying to enforce the approval by means of force could lead to violent episodes and casualties.

Government involvement in Canada does not have a different outcome, though the intensity of conflict is lower. For instance, as discussed in Chapter 3, the strong opposition of the *Kitchenuhmaykoosib Inninuwug* First Nation in Ontario to the exploration activities to be performed by Platinex Inc. triggered the involvement of the provincial government in, among other elements, trying to re-write regulations to ensure resumption of mining activities. In the end, opposition remained. The Provincial Government ended up withdrawing the environmental permit and reimbursing CAD$ 5 million of investment made by the company.[68]

The real power of communities goes beyond official permits and law enforcement. Conflicts will most likely arise if there is opposition to a mining project, or if, despite opposition, there are actions of the government trying to enforce such permits. "The executives seem to tend to assume that a legal licence will be enforced should a conflict arise as long as the company

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[67] *Ibid.*
[68] *Ibid.* The *Platinex v Kitchenuhmaykoosib Inninuwug* case is analyzed in Chapter 3 *below*.

obeys the law. By contrast, community defenders seem to tend to assume that companies will find ways to circumvent their legal obligations to communities, or to have those obligations legally reduced."[69]

The power of communities to prevent activities, or to temporarily or permanently stop them, could result in elevated financial costs for companies. In a study that examined the costs associated with social conflicts in mining, the conclusion was that "the biggest cost incurred by mining companies is normally related to 'staff time spent on risk and conflict management.'"[70]

### 1.1.7 Community involvement in a project

The moment and the way in which communities are approached are a key determinant of the results and outcomes of the interaction to obtain a SLO.[71] Also, the level of trust and the image of the industry determine how a community gets involved in the project.[72] The first element to address is trust. Trust could be affected by previous experiences with different actors, or experiences in other parts of the world. Trust is built through engagement activities, keeping promises and being consistent with promises and actions.[73]

> "Community engagement activities build trust through both direct involvement in engagement activities, and as a consequence of the flow-on effects of this involvement to others not directly involved. Achieving trust through direct involvement depends not only on the engagement process, but also on the legacy of past activities and relationships."[74]

The most relevant engagement activity involves a two-way communication channel, as well as a consideration of all the concerns expressed by members of the community. One of the

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[69] *Ibid.*
[70] *Ibid.*
[71] Melanie (Lain) Dare *et al.*, "Community engagement and social licence to operate", (2014) 32:3 Impact Assessment and Project Appraisal 188 at 192.
[72] *Ibid.*
[73] *Ibid. See also* section 2 above.
[74] Dare *et al. supra* note 71.

interviewees in Dare *et al.*'s research, after being involved in a two-way communication process seeking approval for forestry activities, expressed herself in the following terms:

> "[…] I thought it showed that they had listened to our concerns and had dealt with them . . . My perception of the whole process has changed from one of negativity and fear, into "I can do this". I can discuss things with these people and I can get a resolution, or get someone to hear me. (TAS Community Member 1)"[75]

The reaction of this member of the community would not have been the same if the communication channel was one-way, like an information session or an open house. Companies have to make sure they reach as much of the community's population as possible, as some of the engaging activities may be useless if people do not participate in an acceptable number.[76]

Giving people a say in the project, addressing their concerns in good faith, considering them during the modeling of the project and showing them results, will certainly build trust in the consultation process, the company and the project itself.

Expectations of stakeholders may change over time, and cases may differ depending on the project, location and needs. Companies have the challenge to identify expectations and address them in a way that would be perceived as legitimate by stakeholders. Companies must consider historic, cultural and societal elements, and have to be aware to adjust such practices and even change them, while stakeholders' values and expectations continue changing through time.[77] This is the reason why the SLO has to be constantly assessed and obtained.

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[75] *Ibid.*
[76] *Ibid*, 193.
[77] *Ibid*, 194.

### 1.1.8 The benefits of social licence

From a business perspective, obtaining a social licence will ensure spending less on controlling and managing social grievances and protests, avoiding stoppages and even preventing operations from shutting down for good. Following the TB pyramid, "[r]esearch indicates that seeking a higher level of social licence beyond the bare minimum can be a strategy for controlling costs.[78] Each year more empirical evidence is published demonstrating how stakeholder discontent can translate into several categories of costs for businesses".[79] If companies target and obtain a SLO in the level of approval of co-ownership, they will be less likely to face protests, legal battles or grievances with relevant stakeholders. This would mean a lower risk of stoppages or related production disturbances.

The financial risks arising from these kinds of issues are relevant. A research conducted by Goldman Sachs Global Investment shows that "sustainability issues are implicated in 70% of project delays on the largest capital investment projects. This exceeds the delays owing to commercial factors (63%) and technical factors (21%)."[80] Research also shows that "up to half of the discount on the value of the gold companies had in the ground, as reflected in their stock market valuations, depended on the level of conflict or cooperation with stakeholders."[81] This means that an exploration company wanting to sell a mining project with commercial quantities of mineral, would be forced to discount up to half of the value of the marked-based price of such project, if there is social discontent and/or risk of protests.

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[78] Justine Lacey *et al., Exploring the concept of a Social Licence to Operate in the Australian minerals industry: Results from interviews with industry representatives* (Brisbane: CSIRO, 2012) at 1.
[79] Boutilier, *supra note* 19 at 267.
[80] *Ibid.*
[81] *Ibid.*

From the environmental and social perspectives, obtaining a SLO and engaging with local communities will most likely benefit communities and mining operators by (i) avoiding unnecessary injuries and casualties; (ii) enhancing local economies; (iii) incorporating traditional knowledge to the planification of the project, resulting in the respect of social values and environmental practices; and (iv) making the community a meaningful component of the project.[82]

### 1.1.9 Critique of the Social Licence to Operate

Although the concept, characteristics and even the existence of SLO is widely accepted among the mining industry, civil society and governments, there are voices that dispute the relevance and existence of the SLO. Critics point out the fact that relevant stakeholders are so heterogeneous that a consensus to grant a social licence is impossible to achieve.[83] This is why, detractors say, legislation provides for regulatory bodies to grant legal licences for resource developments, provided that these bodies adequately address all environmental, social and economic concerns of host communities.[84]

Detractors also allege that the concept of social licence undermines the existence of legal licences, which are mandatory for resources development. When obtaining a social licence to operate, they argue, there would be no need to obtain a legal licence (i.e. perform an

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[82] Bram Noble, *Learning to Listen: Snapshots of Aboriginal Participation in Environmental Assessment"*, 1st ed (Ottawa: MacDonald-Laurier Institute, 2016) at 3.

[83] Jen Gerson, "Rise of 'social licence': claiming they speak for their community, protest groups are undermining the law", *The National Post* (17 October 2014) online: <https://nationalpost.com/news/canada/rise-of-social-licence-believing-they-speak-for-their-community-protest-groups-are-undermining-the-law>

[84] Don Smith and Jessica Richards, "Social license to operate: hydraulic fracturing-related challenges facing the oil & gas industry (2015) 1:2 OneJ 81 at 95.

environmental assessment), which allegedly breaks the rule of law.[85] It could even promote social grievances and violent protest between resources developers and indigenous communities. As Dwight Newman argues,

> Those who have rushed to embrace some interpretations of social license because they are socially minded and support better flourishing of people in society should really think about whether they want to embrace a form of the concept through which they may legitimize physical violence (…) legitimization of a concept that breaks down the rule of law is not helpful to industry, and it is not helpful to Indigenous communities.[86]

Another key issue identified by detractors of the SLO is the fact that the development of the natural resources industry, economic growth and the creation of jobs would depend entirely on a select group of people, who are only concerned about the impact caused by the project on their lives and are mindless of the benefits that the same project could bring to other, potentially larger communities.[87] It places "too much authority in the general public", and leaves government and private industry aside from planification and development.[88]

Last, but not least, is the criticism regarding the contradiction between the concept of the SLO and how it is actually applied. Some critics believe that mining companies use the concept of SLO up to a point in which opposition to the project is avoided, even if the point of meaningful engagement with relevant stakeholders is not reached.

> If companies were successfully responding to the aspirations and concerns of stakeholders in the manner implied by the social licence, one might conclude that the industry's fears over expectations were unwarranted and or misplaced. However (…) the contemporary

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[85] Dwight Newman, *Be careful what you wish for- Why some versions of "social licence" are unlicensed and may be anti-social* (Regina: Commentary – Macdonald-Laurier Institute Publication, 2014).
[86] *Ibid* at 3-4.
[87] Smith and Richards, *supra note* 84 at 96.
[88] *Ibid.*

> application of social licence is more about reducing overt opposition to industry than it is about engagement for long-term development.[89]

### 1.1.10 SLO and legislation

It was previously mentioned that the SLO is an intangible approval issued by relevant stakeholders, especially communities where mining projects are being explored or planned. Due to the intangibility of the approval and because of the differences among stakeholders, projects and companies, it is extremely complicated to embed the social licence to operate in legislation, at any level.

Although there have been some voices clamoring for the legalization of the SLO[90] there are some key features of the SLO that makes legalization, from a theoretical perspective, difficult to achieve. These features are easy to identify when comparing the characteristics of the SLO with elements already provided by the law, like the Free, Prior and Informed Consent [FPIC] [91], probably the most similar institution to the SLO. [92] First, while FPIC is a duty of the State or government, the SLO is normally pursued by the project proponent, most of the time without the involvement of the government. Secondly, FPIC, as its name implies, has to be obtained before the project is developed, while the SLO has to be obtained, maintained and constantly renewed through the life of the project; and, thirdly, FPIC has to be implemented when dealing with indigenous peoples, while the SLO, as referred before, has a broader spectrum of actors and participants (i.e. relevant stakeholders).

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[89] John Owen & Deanna Kemp, "Social licence and mining, a critical perspective" (2013) 38:1 Resources Policy 29 at 34.

[90] *See* Nigel Bankes, The social licence to operate: mind the gap, ABlawg, online: <https://ablawg.ca/wp-content/uploads/2015/06/Blog_NB_SLO_June2015.pdf>

[91] As provided by ILO 169 and the United Nations Declaration on the Rights of Indigenous Peoples.

[92] Jason Prno and Scott Slocombe, "Exploring the origins of 'social licence to operate' in the mining sector: perspectives from governance and sustainability theories", (2012) 37 Resources Policy 346 at 349.

Due to the characteristics of SLO, especially its intangibility, continuity through the lifecycle of a project and broader application among different stakeholders, it could be useful, based on empirical research, to create a set of guidelines that would orient mining project proponents to identify, approach and engage in meaningful conversations with relevant stakeholders. The Canadian federal and provincial governments have done so by developing consultation guidelines, as it will be detailed later in this thesis.

### 1.2 Impact-benefit agreements as means for acquiring a Social Licence to Operate

Also referred to as *Community Development Agreements* or *Participation Agreements*, IBAs are contractual instruments which aim to deliver benefits derived from mineral activities directly to local communities. Their main objective is to ensure that local communities potentially affected by extractive activities share the economic benefits associated with them,[93] as well as make commitments to manage the environmental and social impacts caused by resource development in a responsible way.[94] IBAs also intend to create a mutual beneficial relationship, in which mining operators could perform their activities with the consent of potentially affected local communities, while the latter receive economic and social benefits derived from the mining operations.[95]

On a more contemporary approach, as IBAs are bilateral instruments negotiated between mining operators and indigenous communities, they have the potential to strengthen the

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[93] World Bank, *Mining community development agreements source book* (New York: World Bank, 2012) at 1.
[94] Neil Craik *et al.*, "Indigenous – corporate private governance and legitimacy: Lessons learned from impact and benefit agreements" (2017) 52 Resource Policy 379 at 379. *See also* Kennett Steven, *A guide to impact and benefit agreements* (Calgary: Canadian Institute of Resources Law, 1999) and Courtney Fidler and Michael Hitch, "Impact and benefit agreements: a contentious issue for environmental and indigenous justice" (2007) 35:2 Environmental Journal 49 at 49.
[95] World Bank, *supra note* 93 at 5.

relationship between both parties, making it possible to extend potential agreements to elements beyond economic benefits. The Mining Association of Canada refers to the topics addressed in IBAs in the following terms:

> While earlier agreements typically contained provisions for employment and training, more recent IBAs have been expanded to include the promotion of opportunities for Indigenous businesses through set-aside contracts and joint ventures. They also consider social and cultural matters, provide for environmental monitoring involving Indigenous Traditional Knowledge, set up funding arrangements and dispute resolution mechanisms, and include direct payment and resource-sharing arrangements, among other provisions.[96]

### 1.2.1 Characteristics of IBAs

IBAs are privately negotiated written contracts, which are the result of a negotiation process between mining permittees/lessees and the indigenous communities potentially affected by mineral activities. There is no specific protocol or formula to negotiate and develop IBAs. The negotiation process will depend on the case and the parties involved.[97] Governments are normally not involved in the IBA negotiation process or execution.[98] For this reason, the economic benefits shared through IBAs are different from mining royalties, taxes or any other mandatory payment due to the government, pursuant to the applicable legislation. Also, as written contracts, some of them could be enforceable before the Courts, although others may include provisions precluding the parties to enforce IBAs before the Courts.[99]

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[96] Brendan Marshall, *Facts & figures of the Canadian mining industry* (Ottawa, The Mining Association of Canada, 2017) at 61.
[97] Brad Gilmour and Bruce Mellett, "The role of impact and benefit agreements in the resolution of project issues with First Nations" (2013) 51:2 Alberta Law Review 385 at 389.
[98] Norah Kielland, *Supporting Aboriginal participation in resource development: the role of Impact and Benefit Agreements* (Ottawa, Library of Parliament, 2015) at 1.
[99] Ciaran O'Faircheallaigh, "Community development agreements in the mining industry: an emerging global phenomenon" (2013)44:2 Community development 222 at 235.

IBAs have also become instruments to encourage indigenous peoples to get involved in mining activities. The benefits brought to indigenous communities through IBAs have attracted the attention of sceptical indigenous communities and have made them to become interested in the development of mineral exploration on their lands.[100] For example, the Muskowekwan Potash Project, located in the province of Saskatchewan, is currently under development after the authorities of the Muskowekwan First Nation became interested in the benefits that mining could bring to their people, and following an agreement reached between the First Nation and the project proponent - Encanto Potash Corp. - which included the creation of a partnership, so that the members of the band could own a part of the project. [101] Conditions also included job opportunities, careers and training in the mining industry for members of the band, as well as ownership of shares and an allocation of royalties.

#### 1.2.1.1 Content of IBAs

IBAs are negotiated between project proponents and indigenous communities. As communities, firms and projects have their own and unique characteristics, there is no template of IBA, or negotiation guide, that could fit in the characteristics of every project. Having this in mind, there are certainly typical topics and provisions that, ideally, ought to be considered in the negotiation and drafting of an IBA.

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[100] Kielland, s*upra* note 98.

[101] Secutor – Capital management Corporation, Company Update – Encanto Potash Corp., online: <http://www.encantopotash.com/Repository/Home/Secutor_EPO_0615.pdf?v=101> The Muskowekwan Potash Project is analyzed in Chapter 3 *below*.

The first relevant element to be considered is a statement of the position of the Indigenous community towards the project.[102] It is strongly recommended that the IBA states, ideally, the community's support to the project, and at the same time considering and addressing the community's concerns towards it. This element constitutes the backbone of the IBA and the overall relationship between the project proponent, the community and the project itself.[103] This statement would also become an element of certainty of the project, lowering the risk of litigation, social or political opposition to the project.[104] "An IBA will therefore typically contain appropriate and carefully drafted terms to reflect non-objection, and in some cases, express support obligations on behalf of the party First Nation."[105] Non-objection provisions should, ideally, be extensive to the next steps of the project development, such as the permitting process and the duty to consult, instead of referring only to the opposition to the project. They should also consider the possibility of future project's expansion, amendments or any other future activity.[106]

The second element to be considered in an IBA is representation and warranties. They refer to the recognition and proof of the powers that the parties have in order to enter into an IBA.[107] Relevant representation and warranties include, for example, the written band resolution required by the Indian Mining Regulations,[108] or the document that states that the persons signing the

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[102] Gilmour and Mellet, *supra* note 97 at 390.
[103] *Ibid.*
[104] *Ibid.*
[105] *Ibid.*
[106] *Ibid* at 391.
[107] Gilmour and Mellet, *supra* note 97 at 391-2
[108] *See* section 2.1.2 below.

agreement are those appointed as authorities in the community. This is relevant for the validity and eventual enforceability of the agreement.

A third relevant element is a provision that would allow to link the negotiation process undertaken during the construction of the IBA, with the formal consultation process. A key element is to allow some confidential information to be disclosed for consultation purposes. This will allow to use such information as inputs for consultation, and to show, for example, that the procedural aspects of the consultation have been completed. If the consultation takes place at the same time in which the IBA is negotiated, the IBA should also allow for the utilization of the information collected during consultation, for the purpose of negotiating the IBA.[109]

A fourth relevant element is the inclusion of financial economic benefits for the community.[110] This is a key element of the IBA, and one of the reasons for its existence. Financial economic benefits will depend on a number of factors, such as the dimension of the project and its impact on the community, the needs of the community, its size or composition, and in general, the characteristics of both the project and the community.[111] Financial and economic benefits could include, but are not limited to, cash payments, royalties, funding for consultation or for the negotiation of the IBA itself; training, personal and professional development, employment, or business opportunities, mainly for the provision of products or services for the development of the project.

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[109] Gilmour and Mellet, *supra* note 97 at 392
[110] *Ibid.*
[111] *Ibid.*

Typical IBA provisions related to employment and training include, among others:[112]

> "A preferential recruitment and hiring policy for local Aboriginal workers;
> A process to identify actual and potential employment opportunities and the skills and qualifications required to perform the specific jobs;
> An annual employment plan to enable the Aboriginal community to plan for the opportunities;
> A commitment to consult with the Aboriginal community regarding job opportunities and the potential workers that may be able to fulfill them;
> Commitments to training and apprenticeship programs, educational programs in primary and secondary schools, donations to scholarships and bursaries, participation in local career days, stay-in-school programs, etc.;"

A fifth relevant element is the consideration of environmental matters.[113] Due to the connection of Indigenous communities with the land and the resources found on it, this provision could embrace several elements, which are ideally monitored constantly from as early as the exploration phase, and up to reclamation.

> "First Nation concerns regarding resource development projects frequently include apprehension over the impact to the environment. Such impacts can affect treaty rights, such as hunting and fishing rights, through adverse effects on wildlife, restricted access to traditional areas, increased access for non-Aboriginals, or apprehended impact on water and air quality. Impacts to other aspects of traditional ways of life such as traditional and medicinal plants may also loom as a significant matter to be addressed."[114]

Other relevant elements to be included in IBAs are confidentiality and enforceability clauses, which due to their relevance, are described and analyzed in the following sections.

#### 1.2.1.2 Enforceability

The objective of IBAs is to establish binding obligations between the negotiating parties.[115] As IBAs are considered commercial contracts between mining companies and communities, they

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[112] Sandra Gogal *et al*., "Aboriginal Impact and Benefit Agreements: Practical Considerations" (2005) 43:1 Alberta Law Review 129 at 148.
[113] *Ibid* at 395.
[114] *Ibid.*
[115] Carmen Diges, *Sticks and Bones: Is Your IBA Working? Amending and Enforcing Impact Benefit Agreements* (Toronto: McMillan Binch Mendelsohn LLP, 2008) at 3.

are, in principle, enforceable under contract law.[116] For this, some IBAs specify the governing law, this is, laws under which they shall be interpreted and enforced.[117] In this sense, during the implementation and/or enforceability of the IBA, the rules on which law is applicable and the mechanisms to enforce the IBA are clearly stated.

Although it may seem that the enforceability of IBAs is a straight-forward practice, uncertainties regarding the enforceability of IBAs sometimes arise.[118] Vague language is one of the most common causes that make enforceability a difficult task.[119] Also, when IBAs are negotiated as a requirement of government prior to obtaining a permit, the resulting IBA is normally not as clear and precise as it ought to be, therefore making it difficult to enforce.[120] Despite these difficulties, enforcement of IBAs "has not been a matter which has received significant judicial attention".[121] The reasons behind these facts could be that IBAs are a relatively recent development, and that the one of the objectives of IBAs is to prevent disputes and grievances, instead of triggering new ones.

For the purpose of implementation of IBAs and to solve eventual disagreements during this stage, there is an increasing tendency to include alternative dispute resolution provisions in IBAs.[122] These mechanisms are "usually layered from informal to increasingly formal as the

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[116] Gogal, *supra* note 112 at 155.
[117] *Ibid.*
[118] Guillaume Peterson St. Laurent and Philippe Le Billon, "Staking claims and shaking hands: Impact and benefit agreements as a technology of government in the mining sector" (2015) 2:1 The Extractive Industries and Society 590 at 594.
[119] *Ibid.*
[120] *Ibid.*
[121] Gilmour and Mellet, *supra* note 97 at 397.
[122] Diges, *supra* note 115 at 3.

dispute continues to be unresolved at the initial levels of the resolution mechanism."[123] An example of layers of dispute resolution mechanisms are: (i) meetings between high-level representatives of the parties, (ii) negotiation, (iii) mediation, (iv) arbitration, and (v) court.[124] An example of enforceability of an IBA is the *Raglan Agreement*, entered between Falconbridge corporation and the Northern Quebec's Native Makivik Corporation, which includes an escalating dispute resolution mechanism that begins with negotiation, and if no solution is reached, the issue is, in this order, brought (i) before the Raglan Committee, (ii) mediation/arbitration, and (iii) Court.[125]

Other mechanisms for making IBAs enforceable are penalty provisions in cases of non-compliance,[126] or to tie the implementation of IBAs with investment contracts signed between the host state and the company, in jurisdictions where such contracts are required.[127] Although these are valid mechanisms, their implementation would result difficult, as imposing penalties to a party who is a business partner would not be appropriate for the development of a project.

#### 1.2.1.3 Confidentiality

Most IBAs are confidential from the negotiation stage, through implementation and even after it has been implemented and fully executed.[128] Confidentiality includes all the information shared between the parties and the agreements reached during such negotiations.[129] The

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[123] *Ibid.*
[124] Gilmour and Mellet, *supra* note 97 at 397
[125] Kevin O'Reilly and Erin Eacott, *Aboriginal Peoples and Impact and Benefit Agreements: Report of a National Workshop* (Yellowknife: Canadian Arctic Resources Committee, 1998) at 4-5.
[126] *Ibid* at 24.
[127] Jennifer Loutit *et al*, "Emerging Practices in Community Development Agreements (2016), 7:1 Journal of Sustainable Development and Policy 64 at 92.
[128] O'Reilly, *supra* note 125 at 19.
[129] *Ibid.*

information to be kept as confidential is determined by a previous agreement or *Memoranda of Understanding*, and by the IBA itself, and could include all the components of the negotiation and agreement, or some elements of them.[130] Confidentiality is put in place to protect sensitive information shared between the parties, such as financial, employment or contracting commitments, to avoid information leakage and to protect the investment and benefits. Other reasons for confidentiality are "strengthening the position of the parties in subsequent third-party negotiations, and to keep proprietary business plans confidential."[131]

Confidentiality raises a number of problematic issues. First, confidentiality "hinders the freedom to speak and express opinions".[132] In the cases where an entire community is subject to the confidentiality clause of an IBA, it is difficult to draw a line from where the community is liable for a breach if a member expresses a negative opinion or a disagreement with the IBA. A second issue with confidentiality is that, despite the character of confidentiality, IBAs could be ordered to be produced before a Court in cases in which, for instance, Indigenous communities sue the government for alleged infringement of their Indigenous rights. This was a decision made by British Columbia Supreme Court in *Yahey v. British Columbia*.[133] John Olynyk *et al.*, regarding this judicial decision, are of the opinion that:

> If Indigenous groups sue governments for infringement of their Aboriginal or treaty rights, this decision shows that governments can take the position that those IBAs are relevant and seek disclosure on those grounds. In such cases, the fact that an IBA may have

[130] *Ibid.*
[131] Gilmour and Mellet, *supra* note 97 at 396.
[132] O'Reilly, *supra* note 125 at 19.
[133] Yahey v. British Columbia, [2018] BCSC 123.

> confidentiality obligations as between the Indigenous group and the proponent may not necessarily shield the IBA from disclosure.[134]

A third issue arising from confidentiality is that many of the elements used during negotiations, such as information relating to the project, environmental issues and concerns, and measures for mitigation of impacts, are the same elements that must be used during the consultation process and Environmental Assessment, thus, they ought to be disclosed at some point.[135] To avoid disclosure conflicts, IBAs should identify the elements that may be disclosed under certain conditions, and the elements that will not be subject to disclosure. Most IBAs had foreseen scenarios in which they might be disclosed, for instance, if required by law or during an enforcement process.[136]

### 1.2.2 Drivers of IBAs

IBAs have became instruments to gain social acceptance, thus materializing SLO.[137] Following the Thomson and Boutilier's pyramid of the SLO, an IBA could exist subject to the presence of a SLO on, at least, the legitimacy level. In fact, one of the most powerful drivers of IBAs is the desire to build trust among the relevant stakeholders to gain the acceptance of the proponent's presence on the land and the development of the project.[138] Depending on external circumstances, there are three main reasons why mining companies would negotiate and sign an IBA.

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[134] John Olynyk *et al.*, "Disclosure of Impact Benefit Agreements Ordered in BC Treaty Right Infringement Case", Lawson Lundell LLP (20 January 2018) online: <https://www.lawsonlundell.com/project-law-blog/disclosure-of-private-impact-benefit-agreements-ordered>
[135] Gilmour and Mellet, *supra* note 97 at 396.
[136] *Ibid.*
[137] Martin Papillon and Thierry Rodon, "Proponent-Indigenous agreements and the implementation of the right to free, prior, and informed consent in Canada", (2017)002061 Environmental Impact Assessment Review 216 at 220.
[138] World Bank, s*upra* note 93 at 6.

### 1.2.3 Requirement of a land claim agreement

This is how IBAs began to develop in the context of mining activities,[139] especially in Canada and other jurisdictions in which land claim agreements have been reached between the Crown and indigenous peoples. Some of these land claim agreements require that an IBA be reached before obtaining the project's approval from the government. An example of this is the Nunavut Land Claims Agreement, which came into effect in 1993 and required the consent of the Nunavut Tunngavik Incorporated – a body that represents the beneficiaries of the land claim – through an IBA, before allowing a project to advance on the claimed territory.[140] This requirement could also be applicable to lands claimed by indigenous peoples, over which no provision about IBAs is prescribed.[141]

#### 1.2.3.1 Initiative of the mining company

Mining companies could voluntarily propose to negotiate an IBA due to the number of benefits it could confer on its operations. The World Bank notes at least three main drivers for mining companies to voluntarily pursue an IBA with indigenous communities:[142]

*Share of benefits derived from mining with communities*

There has been increasing pressure coming from society and governments, demanding that the extensive benefits of mining be shared with indigenous communities. IBAs are the mechanism to materialize such sharing. As observed by Stefan Matiation, "mining projects can

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[139] Gilmour and Mellett, *supra* note 97 at 387-8.
[140] Stefan Matiation, "Impact benefit agreements between mining companies and aboriginal communities in Canada: a model for natural resource developments affecting indigenous groups in Latin America", (2002-2003) 7 Great Plains Natural Resources Journal 204 at 210.
[141] *Ibid.*
[142] World Bank, s*upra* note 93 at 6.

have significant adverse effects on communities, from pollution to displacement, to the creation of tension and economic inequalities. Mining can also have extensive economic benefits. In many cases, communities are unable to share in these benefits (…). One way to minimize the impacts of mining operations and maximize benefits is through IBAs." [143]

*The maintenance of good name and prestige:*

As it happens with the SLO, in a globalized world, Indigenous communities have gained the support of external actors, such as governments, environmental groups and NGOs committed to the defence of Human Rights. The existence and compliance with IBAs are a key element to build trust and good relationships between mining companies and relevant stakeholders. As it is the case with SLO, the news of non-compliance with an IBA between a mining company and an indigenous community could trigger grievances that could rapidly spread and significantly affect the prestige of the mining firm, and the overall extractive industry. The existence of IBAs and compliance with its provisions can become physical evidence of responsible extractive practices.

*Reduction of costs and business strategy:*

If IBAs could be considered in some way as a materialization of the SLO, companies are driven to reach an agreement with indigenous communities to secure funding for the project, reduce the cost of possible stoppages or disturbance on their operations. Also, reaching agreements and working together with indigenous communities could translate into good reputation, stakeholder's satisfaction and an increase in share prices.[144]

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[143] Matiation, *supra* note 140 at 206.

[144] Dianne Lapierre & Ben Bradshaw, *Why Mining Firms Care: Determining Corporate Rationales for Negotiating Impact and Benefit Agreements* (Edmonton: Canadian Institute of Mining, Metallurgy and Petroleum Annual Meeting, 2008).

#### 1.2.3.2 Requirement of government or the law

IBA negotiation and agreement could be either encouraged by the government or mandated by law. For instance, in some countries such as Chile, Papua New Guinea, Mongolia and South Africa, applicable legislation provides for the negotiation and development of an IBA.[145] In other countries, although it is not a requirement of law, governments encourage their development.

### 1.2.4 Benefits of IBAs

From the perspective of a mining company, in general terms, the development of an IBA could ensure the acquisition and maintenance of a SLO; speed up the regulatory and permitting process of a project; and allow the development of mining activities without disturbances and stoppages.[146] From the indigenous perspective, IBAs are instruments that allow economic benefits to remain in the community to aid its development. They are also instruments that contain rights that are enforceable through dispute resolution mechanisms provided by the same IBA[147]. In between these two perspectives, a wide variety of benefits lie between both parties: (i) IBAs give clarity to the relationship between mining companies and indigenous communities. They clarify expectations for both parties and determine the roles and responsibilities for each one, (ii) IBAs build confidence in the relationship, enhance the chances of a fruitful consultation process and increase the participation of community members and leaders. "The results of the consultation between developer and the impacted Aboriginal community are typically captured in an IBA, which will outline the impacts of the project and benefits provided, including financial compensation. In essence, the IBA contains the terms and conditions on which the

[145] World Bank, *supra note* 93 at 7.
[146] Matiation, *supra note* 140 at 211.
[147] See section 1.2.1.2 above.

development may proceed on the lands claimed by Aboriginal peoples."[148] It is an objective of IBAs to maintain good relationships between both parties through the lifecycle of a project, thus reaching an agreement at the earliest possible stage will ensure that two-way confidence remains and increases through time. This will be a determinant factor in the acquisition or rejection of SLO, (iii) while indigenous communities receive economic and social benefits from mining operations, mining companies expect to develop a smooth mining operation, free from grievances and possible stoppages. The costs associated with conflict-solving will reduce dramatically, and (iv) best practices will benefit the company and indigenous communities. The company will comply with its Corporate Social Responsibility policies, meeting its goals and enhancing its shareholders expectations, while indigenous communities will ensure that their views, concerns and interests are considered and applied during the development of the project.[149]

### 1.2.5 Risks associated with IBAs

IBAs have to be negotiated in good faith and with real intentions to construct an agreement that will benefit all the parties involved. A misunderstanding on the elements negotiated, or an erroneous interpretation of one or more clauses of the agreement could turn the IBA into an element of conflict rather than an element of consensus.[150] Risks associated with IBAs include: (i) lack of confidence and commitment when the IBA is the product of a legal mandate. Both parties could be put into a position of being forced to sign something in order to comply with a legal requirement, (ii) conflicts associated with changes on early agreements made before the

[148] Gogal *et al*., *supra* note 112 *at* 133.
[149] World Bank, *supra* note 93 at 8.
[150] *Ibid* at 9.

definitive agreement, that could generate distrust among the parties, and (iii) due to the nature of IBAs, there is a risk that the role of the government is perceived to be replaced/overlapped by the mining company, which could make the community perceive that the company is an essential component for their economic and social development. Excessive dependency on a company that will eventually stop operations could trigger social conflict in the future. [151]

### 1.2.6 Critique of IBAs

During the past decades, several hundred of IBAs have been negotiated and executed in Canada and abroad.[152] Most of the analysis made on IBAs is directed to their purpose, benefits, content and drivers, but due to their confidentiality and lack of enforcement in Courts, little is known about how successful they are when implemented.[153] Also due to the confidential character of IBAs, little is known about the implementation of IBAs. As mentioned previously,[154] the provisions of IBAs are diverse and depend on what the parties agreed on. The enforcement process then (i.e. negotiation, mediation, arbitration) is also confidential, and the outcome of such process is difficult to know.[155]

Also, as a result of the confidentiality of IBAs, Indigenous communities go to the negotiation table without knowledge of the lessons from past experiences of IBAs negotiated by fellow communities. This constitutes a disadvantage, as corporations normally come to the

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[151] *Ibid.*
[152] Ken J. Caine and Naomi Krogman, "Powerful or Just Plain Power-Full? A Power Analysis of Impact and Benefit Agreements in Canada's North" (2010) 23:1 Organization & Environment 76 at 81.
[153] *Ibid.*
[154] See section 1.2.1.2 *above*.
[155] Caine and Krogman, *supra* note 152 at 84.

negotiation table with historical knowledge acquired from previous negotiations.[156] Also, by accepting confidentiality clauses, Indigenous communities leave aside government bodies that could potentially review and give their view about what has been negotiated, thus reducing their bargaining power.[157]

A critique has made to IBAs in cases in which resource developments were made in the past, without proper consultation with affected Indigenous communities. In those cases, IBAs are the last option to direct some benefits of resource developments back to the community. It is somehow perceived as the only recourse for this purpose, thus forcing communities to engage in negotiations with project proponents.[158] This could also be applicable to project developments on lands in which claims have not been settled, and thus Indigenous peoples are somehow "forced" to engage in negotiations. The absence of "veto power" for Indigenous communities also contributes to this idea of forcing communities to negotiate on something that may be out of their desire.[159] "As a result, the IBA becomes more about mitigation than about enhancing local opportunities."[160]

Finally, the idea of having to negotiate could eventually make communities focus on the idea of reaching an agreement, instead of seeking for the best outcome for the community.[161] "The routinized process that development proponents bring to the negotiation table may lead to an acceptance of a status quo by the dominated and ultimately lead to a culture of silence, given

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[156] *Ibid* at 85.
[157] *Ibid* at 86.
[158] *Ibid* at 85.
[159] *Ibid.*
[160] *Ibid.*
[161] *Ibid at 88.*

the focus is on finalizing the agreement rather democratizing development decisions and benefit streams."[162]

### 1.2.7 Impact-Benefit Agreements and Social Licence to Operate

As it was referred before, one of the characteristics of SLO is that it is, in its essence, an intangible authorization given by a community for the development of a resources project.[163] Relying on an intangible or tacit authorization for the development of a mining project is not ideal, as it will increase its risk and complicate its funding. "From a governance perspective, the tacit and amorphous nature of a social licence is a key constraint.".[164]

In this sense, investors have been pushing mining companies to obtain a tangible authorization, this is, something that they could rely on. The response of mining firms has been to direct their efforts to the negotiation and signing of agreements with communities, thus consolidating their support to the project.[165] This is why an IBA would ideally include, as it was discussed before, the position of the community towards the project, as well as provisions of non-objection to the project.[166]

IBAs would also reflect the level of acceptance of the project, and so, strengthening the process for reaching an IBAs would contribute to the obtention of the SLO. An IBA negotiated in good faith, which addresses all the concerns from the community and shows effective communication between the parties, would ideally result in a strong support to the project, thus a

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[162] *Ibid.*
[163] *See* section 1.1.1 *above.*
[164] Owen & Kemp, *supra* note 89 at 33.
[165] *Ibid.*
[166] *See* section 1.2.1.1 *above.*

solid SLO. On the contrary, an IBA negotiated without transparency would result in a weak or no SLO.[167]

> "(…) the degree to which expectations of the parties have been articulated, understood, and met is an important driver of SLO outcomes. The types and effectiveness of communication, decision making, and dispute resolution processes in place are also of notable importance, as they determine how those expectations are to be reconciled. These processes may be formal and codified (e.g., through legal instruments like Impact and Benefit Agreements)."[168]

The way in which IBAs are negotiated and SLOs are obtained are a crucial element of the relationship between mining companies and Indigenous communities. The existence of good faith in both parties before, during and after negotiations is a decisive element. This will enhance the chances to come to a better understanding of the real interests of the parties, address all the concerns raised during negotiations and make the IBA reflect the real intentions, desire and interests of both the company and the community.

[167] *Ibid.*
[168] *Ibid.*

## Chapter II

### The Legal Framework for Indigenous Consultation in Canada and Ecuador

There has been ongoing discussion during the last 3 decades about indigenous rights in the international context. It was not until 1989 that a declaration was made recognizing the unique cultures and ethnicity of indigenous peoples, therefore giving them special protection.[169] It was the International Labour Organization Convention No. 169 [ILO 169] that affirmed for the first time in the international context that indigenous peoples have the right to be consulted "before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands."[170] Such declaration did not have a relevant impact because indigenous peoples were not part of the drafting process, and the convention was not widely ratified.[171] Years later, ILO 169 set the stage for the 2007 United Nations Declaration on the Rights of Indigenous Peoples [UNDRIP], a document widely ratified by states that reaffirmed their duties to "consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."[172]

Despite the wide ratification of UNDRIP, there are still questions about how to effectively protect the indigenous rights thereby declared. The two countries under examination in this thesis, signatories of UNDRIP, have different outcomes when it comes to the protection of these

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[169] Cher Weixia Chen, Indigenous rights in international law (2017) Oxford Research Encyclopedia, International Studies at 5-6.
[170] International Labour Organization Convention No. 169, at Article 15(2).
[171] Weixia Chen, *Supra* note 169 at 6.
[172] United Nations Declaration on the Rights of Indigenous Peoples, New York, 2007, at Article 32(2).

recognized indigenous rights, in particular those referring to the free, prior and informed consent before the approval of natural resources projects. While Canada adopted legislative measures before the ILO 169 convention (specifically section 35 of the *Constitution Act,* 1982[173]) and has developed a comprehensive policy on indigenous consultation, Ecuador has constitutionally recognized prior consultation since 1998,[174] but has never enacted an act on indigenous consultation, developed a guideline or conducted a single process.[175]

While public participation and indigenous rights were being incorporated in international and domestic laws, NGOs were advocating for the recognition and respect of these rights, and natural resources firms and the organizations they formed began to develop policies and guidelines that would include recommendations on how to address indigenous affairs within their operations. In this sense, the Mining and Mineral Sustainable Development project [MMSD],[176] a comprehensive and general study about sustainable development in mining, was developed in the year 2000 after some of the most relevant mining companies, international environmental organizations and governmental agencies sponsored the research project through the International Institute for Environment and Development. This project made some conclusions and recommendations that were later considered by the newly created (at the time) International

[173] *The Constitution Act*, *supra* note 3.
[174] *Political Constitution of the Republic of Ecuador*, RO 1 11 August 1998.
[175] Joaquín López Abad *et al, "*La consulta libre, previa e informada en el Ecuador", (Quito: CDES, 2016) at 40-1.
[176] International Institute for Environment and Development, *The Report of the Mining, Minerals and Sustainable Development Project* (London: Earthscan Publications Ltd., 2002)

Council for Mining and Minerals [ICMM],[177] which issued a good-practice framework for sustainable development.

This chapter describes the legal framework of the duty to consult for both Canada and Ecuador, along with the most relevant private frameworks on sustainable mining issued by the mining industry. The purpose of this chapter, in conjunction with the literature review made in chapter I, is to identify the boundaries of the law, allowing further analysis on which of the practices of mining companies fall into the legal framework and which ones are performed outside of it.

## 2.1 The duty to consult in Canada

For more than 3 decades, all extractive projects developed on non-reserve indigenous lands in Canada have required consultation with indigenous peoples. The supporting reason is that projects of this type have the potential to affect, positively or negatively, indigenous people's cultures, economic activities and lives.[178] The way in which the duty to consult is put into practice has its background in section 35 (1) of the *Constitution Act* (1982), which provides that "(1) [t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."[179] This provision "establish[ed] the modern framework of

[177] Abbi Buxton, *MMSD +10: Reflecting on a decade of mining and sustainable development* (London: International Institute for Environment and Development, 2012) at 2.
[178] Caroline Findlay, "Canadian Aboriginal Rights and Mineral and Energy Development: Risks and Related Strategies" (2010) 56:5B Rocky Mt. Min. L. Inst. 5B-2-3.
[179] Jacob Damstra, "Heroic or Hypocritical: Corporate Social Responsibility, Aboriginal Consultation, and Canada's Extractive Industries Strategy" (2015) 25:153 Transnat'l L. & Contemp. Probs. 172.

reconciliation or the need to balance pre-existing Aboriginal rights and interests with other competing societal interests and governmental authority".[180]

The Supreme Court of Canada developed various principles applicable to the duty to consult on non-reserve indigenous lands. They were initially outlined in three relevant cases decided between 2004 and 2005: *Haida Nation v. British Columbia (Minister of Forests)*, [181] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [182] *and Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage).*[183] The Court outlined and clarified, for instance, that (i) the duty to consult is owed solely by the Crown; (ii) has to be performed when both asserted or unasserted indigenous treaties or right claims could be affected; (iii) the process is triggered when there is knowledge of a potential impact caused by the project on indigenous rights or title; and (iv) the scope and depth of the consultation depends on the impact that the project will have on such rights.[184]

Consultation on reserve lands goes beyond the scope of the duty to consult for non-reserve lands. The actual *consent* of indigenous peoples, in a form of a written authorization, is required before a project proponent could access reserve lands to perform any activity. A specific process was delineated for that purpose in the *Indian Mining Regulations*.[185]

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[180] Findlay, *supra* note 178 at 5B-3.
[181] *Haida Nation v. British Columbia*, [2004] 3 SCR 511 [*Haida*].
[182] *Taku River Tlingit First Nation v. British Columbia*, [2004] 3 SCR 550 [*Taku River*].
[183] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388 [*Mikisew Cree*].
[184] Neil Smitheman and Tracy A. Pratt, "An overview of the duty to consult in Canada: from Haida to Frontenac" (2009) Chapter 10A International Mining and Oil & Gas Law, Development and Investment 10A-2
[185] *Indian Mining Regulations*, CRC, c 956.

### 2.1.1 Consultation on non-reserve lands

Five core elements of the duty to consult will be described in this section: (i) when is the process triggered; (ii) who is entitled to conduct it; (iii) how is it to be performed; (iv) scope of the duty to consult; and, (v) mechanisms of public participation.

#### 2.1.1.1 When is the process triggered?

The Supreme Court clarified when the duty to consult arises in the decision made on *Rio Tinto Alcan Inc. v Sekani Tribal Council*[186]. The decision delivered by McLachlin C. J. described three elements that "give rise to the duty to consult":[187]

1. There has to be "knowledge by the Crown of a potential claim or right".[188]

Based on the elements that founded the decisions made on *Haida* and *Mikisew Cree*, the Court considered that the duty to consult arises when the Crown becomes acquainted that a project could affect indigenous rights or title under a treaty.[189] McLachlin C. J. used the phrase "*real or constructive"*[190] knowledge, as in *Haida,*[191] to clarify that the lands subject of the claim "are known or reasonably suspected to have been traditionally occupied by an Aboriginal community or an impact on rights may reasonably be anticipated".[192] The knowledge of a claim or potential claim is required, but it is not necessary to prove the success of such claim.[193]

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[186] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 SCR 650 [*Rio Tinto*].
[187] *Ibid* at para 39.
[188] *Ibid.*
[189] *Ibid* at para 40.
[190] *Ibid.*
[191] Haida, *supra* note 181 at para 35.
[192] *Ibid.*
[193] *Ibid.*

2. There has to be a Crown conduct or decision that could compromise established or potential indigenous rights.[194]

The Crown's conduct or decision could "adversely impact on the claim or right in question",[195] and does not have to be necessarily founded on statutory powers.[196] It is not necessary to expect an immediate impact on indigenous rights or title caused by the decision or conduct of the Crown, "a potential for adverse impact suffices".[197] An example of an action or decision of the Crown related to mining activities could be the decision to grant mineral rights over land for exploration purposes, or the approval to perform exploration activities. The Crown conduct or decision does not have to necessarily affect an established indigenous right or title to rise the duty to consult. It is enough that such decision could possibly affect potential indigenous rights, this is, claims regarding indigenous rights that have not been yet clarified.[198]

3. There has to be a relation between the Crown's decision or conduct and the potential adverse impact on indigenous rights.[199]

The potential impact on indigenous rights or title has to be linked to the Crown's decision or conduct. The Court affirmed that there is no duty to consult if there is no "causal relationship"[200] between decision and impact. This element is narrowed when the Court asserts that "past wrongs, including previous breaches of the duty to consult, do not suffice"[201]. Then,

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[194] *Ibid*.
[195] *Rio Tinto, supra* note 186 at para 42.
[196] *Ibid* at para 43.
[197] *Ibid* at para 44.
[198] Dwight Newman, "The Rule and Role of Law. The Duty to Consult, Aboriginal Communities and the Canadian Natural Resource Sector" (2010) 4:1 MacDonald-Laurier Institute at 7.
[199] *Rio Tinto, supra* note 186 at para 45.
[200] *Ibid.*
[201] *Ibid.*

the government's decision must be the main and supportive cause of the adverse impact, no matter if there were previous actions that affected indigenous rights. The scope of "adverse impacts" was also explained by the Court, when mentioning that they include decisions that may cause immediate physical action, or eventual impacts on indigenous rights or title.[202]

#### 2.1.1.2 Who is entitled to conduct the process?

The Supreme Court stated in *Haida* that:

> "the duty to consult and accommodate, as discussed above, flows from the Crown's assumption of sovereignty over lands and resources formerly held by the Aboriginal group. This theory provides no support for an obligation on third parties to consult or accommodate. The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests. The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development; this is not infrequently done in environmental assessments."[203]

The Crown bears sole responsibility for conducting the process of consultation, and is therefore, as the Court affirmed, responsible for any decision that could potentially affect indigenous rights or title. This idea was reaffirmed in recent decisions made by the Supreme Court of Canada[204]. The Court opened the door to the project proponents for the conduction, through delegation, of "procedural aspects of the consultation".[205] These procedural aspects have been addressed by most provinces by issuing policies for third-party involvement in the consultation process,[206] although, it remains clear that consultation is the sole responsibility of the Crown.

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[202] *Ibid* at para 47.
[203] *Haida*, *supra* note 181 at para 53.
[204] *See Tsilhqot'in Nation v. British Columbia* [2014] 2 S.C.R. 257 at paras 25 &79.
[205] *Ibid.*
[206] Newman, *supra* note 198 at 11.

The level of government responsible for conducting the consultation with indigenous peoples depends on the types of lands in which a project is proposed. Dwight Newman clarified this in the following terms:

> "In a resource context, because of primary provincial jurisdiction in relation to natural resources, it will often be the provincial government that owes the duty. Gradual devolution to the territories has created resource jurisdiction in the territorial governments comparable to that held by provincial governments, such that the territorial governments will properly be consulting, although with some further complex dimensions such that the federal government is also involved. However, there can also be certain resource contexts – certain kinds of environmental assessments, interprovincial pipelines, and uranium-related decisions, amongst others – where the federal government has primary constitutional jurisdiction and thus owes the duty outright."[207]

As provincial governments have broad jurisdiction over natural resources, they are often entitled to perform consultation on extractive projects. The federal government could perform consultation for some extractive projects, if the scope of the project reaches elements of federal exclusive jurisdiction.

#### 2.1.1.3 What is the scope of the process?

As projects could be developed in all types of scales and ways, the impact caused by a project is likely to differ from the impact caused by another project. Demographics and indigenous peoples in Canada are so diverse in number, characteristics and culture, that the impact of one project on an indigenous community will be different from the impact caused by that same project on another group of indigenous peoples.[208] In some cases, the relations

[207] *Ibid* at 8-9.
[208] Dwight G. Newman, *Revisiting the Duty to Consult Aboriginal Peoples*, rev. ed (Saskatoon: Purich Publishing Ltd, 2014) at 13.

between extractive industries and indigenous communities have caused some confrontations.[209] These factors make it extremely difficult to create a uniform process for consultation purposes.

In the trilogy of cases decided between 2004 and 2005, the Supreme Court of Canada described the extent to which the consultation process should be undertaken. Such extent, as referred by the Court, "is proportionate to the strength of the claim as well as the potential impact on it."[210] In *Haida*, the Court acknowledged that there may be different situations to be addressed when engaging in consultation, and considered a "*spectrum"* as the best way to determine the extent of the process.[211] The Court said:

> "I turn to the kind of duties that may arise in different situations. In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty […] on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. […]
>
> At the other end of the spectrum lie cases where a strong prima facie case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required."

This spectrum is wide, as "[b]etween these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light."[212]

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[209] Newman, *supra* note 198 at 1.
[210] Smitheman and Pratt, *supra* note 184 at 10A-3.
[211] *Haida*, *Supra* note 181 at paras 43-4
[212] Findlay, *supra* note 178 at 5B-16.

It is inferred that the process of the duty to consult will depend on the proposed project and the level of impact that it will have on certain indigenous rights, and, as stated by the Court in *Taku River* "it is impossible to provide a prospective checklist of the level of consultation required."[213]

The analysis of the spectrum and the content of the duty leads to the analysis of the scope of consultation, which refers to the extent and content of the consultation, including: (i) the minimum requirements for considering the process as a meaningful consultation; (ii) good faith from the parties involved in the process; and, (iii) the duty to accommodate.[214]

It was mentioned before that there are no strict regulations on how to perform consultation in a specific case, as the content and actions to be taken depend on the claimed indigenous right or treaty and the impact caused on such rights. Due to the conciliative goal of the duty to consult and based on its objective, it could be inferred that a good approach to engage in a meaningful consultation includes: (i) providing information to indigenous communities on the proposed project; (ii) requesting, producing or obtaining information that could potentially affect indigenous rights or treaty; (iii) listening to the concerns of the affected indigenous communities; and (iv) minimizing impacts on indigenous rights or treaty. [215]

Meaningful consultation could embrace additional characteristics. For a consultation to be labelled as meaningful, "[t]here must be an identification of the Aboriginal communities potentially affected and an identification of contact people among those communities. There must be appropriate form of notice given and further information made available where

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[213] *Taku River*, s*upra* note 182 at para 32.
[214] Findlay, *supra* note 178 at 5B-15
[215] *Ibid* at 5B-15.

necessary […]".[216] Meaningful consultation could also imply for the Crown "to make changes to its proposed action based on information obtained through consultations".[217]

The result of a meaningful consultation could be agreement between the Crown and indigenous communities regarding accommodation, compensation, and any other settlement agreement.[218] These agreements are different from IBAs, although commitments could be made through these instruments. Agreements are encouraged as the Crown has a duty to consult, but indigenous peoples do not have a veto power.[219] This prompts both parties to engage in negotiations aimed at finding a solution, as "what is required is a process of balancing interests, of give and take."[220]

Good faith is an essential part of meaningful consultation. It is the key element for balancing interests in a process in which there is an obligation to consult, but not a right to refuse decisions. Good faith reflects the honour of the Crown in dealing with indigenous matters and is the basis for accommodating interests of the Crown and the Aboriginals,[221] thus making agreements that promote social and economic development for indigenous peoples possible.

Meaningful consultation and good faith are very wide concepts, but relevant for the ultimate purpose of reconciliation.[222] As Newman has observed, "[t]hese principles of meaningful consultation and good faith efforts at consultation are admittedly less than precise,

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[216] Newman, *supra* note 208 at 113-4.
[217] *Haida*, s*upra* note 181 at para 46.
[218] Findlay, *supra* note 178 at 5B-16.
[219] *Haida*, *supra* note 181 at para 48.
[220] *Ibid.*
[221] Newman, *supra* note 198 at 9.
[222] *Ibid.*

but they reflect real expectations, and governments do endeavour to live by them in their consultation activities."[223]

#### 2.1.1.4 Mechanisms for public participation

It is hard to define a way in which indigenous peoples participate in the consultation process, as there is not a "one-size-fits-all process".[224] On the contrary, their participation will respond to the idea of the *extent of the process*.[225] This is, their participation will respond to the existence, or potential existence, of indigenous right or title, and the impact caused to it by the project or decision.[226]

Minimum elements of participation for consulting indigenous peoples are considered in the federal[227] *Aboriginal Consultation and Accommodation — Updated Guidelines for Federal Officials to Fulfill the Duty to Consult and Accommodate*.[228] These elements could be considered as the most relevant means in which indigenous peoples are approached during consultation processes, considering the idea of a *spectrum* set by the Court in *Haida*.[229]

The guidelines propose a pre-consultation and consultation phases. The pre-consultation phase includes (i) identifying the indigenous peoples and communities that will be affected by the project or government decision; and (ii) contacting the indigenous peoples by any mean,

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[223] *Ibid*.
[224] Anna Johnston, *Federal Environmental Assessment Reform Summit*, (Ottawa: West Coast Environmental Law, 2016) at 53.
[225] *See* part 2.1.1.3 *above*.
[226] *Haida*, *Supra* note 181 at para 39.
[227] Provincial governments have also issued similar consultation guidelines, which address specific elements for each one.
[228] Minister of the Department of Aboriginal Affairs and Northern Development Canada, *Aboriginal Consultation and Accommodation —Updated Guidelines for Federal Officials to Fulfill the Duty to Consult and Accommodate* (Ottawa: 2011), online: <http://www.aadnc-aandc.gc.ca/eng/1100100014664/1100100014675>
[229] *Ibid* at paras 43-4.

informing about the project or decision and requesting their views and concerns on the impact to their established or potential rights.[230]

The consultation phase includes (i) holding meetings or crossing correspondence with the indigenous communities, relating to their concerns and seeking for ways in which such concerns could be considered and/or addressed; and (ii) concluding the consultation, with either an agreement or a decision by the Crown that adequate consultation has been undertaken and no further actions are required. The latter could potentially lead to the Court's involvement. The expected outcome when involving indigenous peoples in the duty to consult process is to reach a "collaborative consent."[231] This could be achieved by engaging in a "deliberative dialogue process that aims at achieving consent and agreement."[232]

The idea of "engagement with Indigenous Peoples"[233] has gained traction in the last years. Project proponents and indigenous peoples agree on this idea. It encourages project proponents and the government to build a strong and meaningful relation between the parties.[234] This could be achieved by learning about the indigenous people's language, culture and decision-making process, as a way to show respect and to build a strong relationship.[235] It is a good idea also to engage with indigenous peoples and create a good relationship before proposing a project.[236] Another mechanism to involve indigenous peoples in a meaningful consultation process is

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[230] Martin Olszynski, *The Duty to consult and Accommodate: an overview and discussion*, Appendix 1 of Seizing Six Opportunities for more clarity in the duty to consult and accommodate process, (2016: Canadian Chamber of Commerce) at 40 – online: <http://deslibris.ca.ezproxy.lib.ucalgary.ca/ID/10065037>
[231] Johnston, *supra* note 224 at 58.
[232] *Ibid.*
[233] Martin Olszinski, *supra* note 230 at 11.
[234] *Ibid.*
[235] *Ibid.*
[236] *Ibid* at 12.

through the provision of funding. It should normally be directed to hire their own experts, who will conduct the studies required to inform the extent and scope of the project, as well as alternatives and solutions to their concerns.[237]

### 2.1.2 Consultation on Reserve lands for mining purposes

Reserve lands are defined as those set apart by the Crown for the exclusive use of indigenous peoples, [238] who exercise all rights related to the use and benefit of the land, including natural resources. However, title of the land remains with the Crown.[239] Section 2(1) of the Indian Act is defines Reserve as "a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band".[240] To regulate the use of reserve lands, and specially the natural resources found on them, the federal government adopted the Indian Mining regulations[241] and the Indian Oil and Gas regulations,[242] which among other elements, clearly state that the consent of First Nations, in the form of a written authorization, is required in order for a private entity to access reserve lands and perform natural resources activities. Legislation about reserve lands and mineral developments made on them are within federal jurisdiction, according to section 91(24) of the Constitution Act,1867.

Specifically for mining activities, section 6 of the Indian Mining Regulations provides that any mineral activity to be performed on reserve lands requires the "approval of the council of the

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[237] *Ibid* at 21.
[238] Kent McNeil, "The meaning of Aboriginal Title" in Michael Asch Ed., *Aboriginal and Treaty Rights in Canada: essays on law, equality, and respect for difference*, (Vancouver: University of British Columbia Press, 2000) at 148-9.
[239] As it provides section 2(1) of the *Indian Act*: "Reserve (a) means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band"
[240] *Indian Act*, RSC 1985, c-1-5.
[241] *Indian Mining Regulations*, *supra* note 185.
[242] *Indian Oil and Gas Regulations*, 1995, SOR/94-753.

band". For this to happen, the Indian Mining Regulations provide for a mechanism to obtain such authorization. The process begins with a surrender or designation in a way of surrender of land, which is a declaration that implies giving up either all interests in land or some interests on it. The surrender or designation of lands needs to comply with the conditions provided by section 39 of the Indian Act: (i) it has to be made to the Crown and not to any third party; (ii) has to be made with the consent of the majority of the band, obtained through a general or special meeting, or referendum; and (iii) has to be accepted by the Crown. Conditions could be imposed by the band when surrendering or designating land. Such conditions will normally include the purpose of the designation or surrender.

Once the land has been surrendered conditionally or unconditionally, indigenous peoples are constantly involved in the permitting process. The Indian Mining Regulations require the consent of the band before Aboriginal and Northern Affairs Canada (later named Indigenous and Northern Affairs Canada and soon Crown-Indigenous Relations and Northern Affairs Canada) [INAC] can issue a permit or lease with respect to minerals located on-reserve, which means that the band also has a veto power over mining developments on their lands. The permit issued by the government to the proponents of a mining project has to be in accordance with the conditions set by the band. Such conditions may include, among others, the term of the lease, entitlement to recovered minerals and the amount of royalties to be directed to the band. These conditions are set apart from the obligations set by provincial regulations. Other conditions not specified in the Indian Mining Regulations could be set as well, such as employment and training opportunities, or other environmental or social commitments. An example of a successful mining project under development on reserve lands is the already referred Muskowekwan Potash Project, in which the

involvement of the band on a mining project developed on reserve lands could create the conditions for a prosperous development.[243]

## 2.2 Prior consultation with indigenous peoples in Ecuador

It was previously mentioned that Ecuador recognized in its Constitution the right of indigenous peoples to be consulted before the development of a natural resources project, or in general, the adoption by the government of any decision that could affect, or potentially affect their rights. Even though such recognition was made 20 years ago, consultation with indigenous peoples has been continuously ignored. Moreover, government authorities often confuse prior consultation with the mandatory process of socialization of a project during the Environmental Assessment.

### 2.2.1 Constitutional recognition of prior consultation

The Political Constitution, 1998[244] was the first domestic instrument in Ecuador that recognized the rights of indigenous peoples to be consulted. Article 84 made such recognition:[245]

> The State recognizes and guarantees to indigenous peoples, in conformity with this Constitution and the law, the respect to public order and human rights, the following collective rights:
> (…)
> 5. Be consulted about plans and programs to prospect and recover non-renewable natural resources within their lands, that could potentially affect their environment or culture; share the benefits of these projects, if possible, and be compensated for any socio-environmental damages that they may cause.

The text of this article was drafted almost exactly as article 15 of ILO 169,[246] with the difference that ILO 169 refers to "programs of exploration and exploitation", while the

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[243] The Muskowekwan Potash Project is described in Chapter 3 *below.*
[244] Political Constitution of the Republic of Ecuador, *supra* note 174.
[245] *Ibid* at s 84. Translated from Spanish by the author.
[246] International Labour Organization, C169 Convention on Indigenous and Tribal Peoples, 1989, at a 15.

Ecuadorian Constitution requires that prior consultation shall happen before prospecting activities, this is, before mining rights are granted to a third party. This is probably the reason why this article never saw the light for its application, as it was an aspirational concept rather than realistic in terms of the needs of indigenous peoples and resources activities.

In 2008, Ecuador went through major political changes. A Constitutional Assembly elected by popular vote replaced the 1998 constitution with a new one. The recognition of prior consultation made in 1998 remained in the 2008 Constitution. More requirements were put in place in the 2008 Constitution than in the 1998 Constitution. Articles 57 and of the new Constitution provides that:[247]

> Art. 57.- Indigenous communes, communities, peoples and nations are recognized and guaranteed, in conformity with the Constitution and human rights agreements, conventions, declarations and other international instruments, the following collective rights:
>
> 7. To free prior informed consultation, within a reasonable period of time, on the plans and programs for prospecting, producing and marketing nonrenewable resources located on their lands and which could have an environmental or cultural impact on them; to participate in the profits earned from these projects and to receive compensation for social, cultural and environmental damages caused to them. The consultation that must be conducted by the competent authorities shall be mandatory and in due time. If consent of the consulted community is not obtained, steps provided for by the Constitution and the law shall be taken.
>
> Art. 398.- All state decision or authorization that could affect the environment shall be consulted with the community, which shall be informed fully and on a timely basis. The consulting subject shall be the State. The law shall regulate prior consultation, public participation, time-limits, the subject consulted and the appraisal and objection criteria used with regard to the activity that is being submitted to consultation.
>
> The State shall take into consideration the opinion of the community on the basis of the criteria provided for by law and international human rights instruments.
>
> If the above-mentioned consultation process leads to majority opposition by the respective community, the decision whether to implement or not the project shall be

[247] *Constitution of the Republic of Ecuador*, RO 447 20 October 2008.

> adopted by a resolution that is duly substantiated by the corresponding higher administrative body in accordance with the law.

In summary, it could be inferred that the recognition made on the 2008 Constitution, currently in force, brought along a set of requirements that shall be considered when consulting indigenous peoples. These are: i) consultation is mandatory and due prior to prospecting activities; ii) indigenous peoples are entitled to share the benefits of the proposed activities, and to receive compensation for possible environmental and social damages; iii) the government is responsible for conducting the consultation process; and, the objective of consultation is to obtain the consent of indigenous peoples. If consent is not obtained, the decision to approve the project has to be made by the higher administrative body (i.e. the Non-Renewable Resources Minister).

### 2.2.2 Prior consultation in the law

A further development of prior consultation mechanisms, scope and process was expected to be made in the laws enacted following the constitutional recognition. There are two pieces of legislation in which prior consultation was included, though no significant developments were made. *The Organic Environmental Code*[248] and the *Organic Law for Public Participation*[249] are these two pieces. They refer to prior consultation on the same terms as the Constitution does. The main difference between the content of free, prior and informed consent in these two statutes is that the Environmental Code refers to consultation for the purpose of the Environmental Impact Assessment, thus making the consulted subjects broader than only indigenous peoples;

[248] *Código Orgánico del Ambiente*, RO 983 12 April 2017.
[249] *Ley Orgánica de Participación Ciudadana*, RO 175 20 April 2010.

while the Law for Public Participation describes, in only 3 articles, the process for prior consultation with indigenous peoples.

The only highlighting element found in the Law for Public Participation that further develops prior consultation is that if there is opposition to the development of a project, the higher administrative body in charge of the project has to make a decision on the approval or not of the project, and if approving it, shall include mechanisms to mitigate environmental and social damages; a system of compensation for indigenous peoples; and a plan to integrate indigenous peoples in the workforce of the project.[250]

There are some elements that may cause more than one problem with the current framework. First, the fact that consultation is due before prospecting activities is still an issue. Prospecting activities, as defined by Ecuadorian regulations, include visual observations and recollection of surface samples.[251] These activities have minimal impact on the environment or indigenous peoples. Performing consultation before prospecting activities then drives consultation down a pathway in which there is no proposed project to be consulted on, no project proponent, and therefore, no identifiable impacts, damages or benefits to guide the discussions. Second, the current framework provides for mechanisms to integrate indigenous peoples in the workforce of the projects that are developed in their lands, but there is no project proponent involved in the consultation process because, as mentioned before, consultation made before prospecting stages makes it impossible. This also applies to the benefits that indigenous peoples are entitled to, according to the constitution and the law. If there is no project and there is not a

[250] *Ibid* at Art. 83.
[251] *Environmental Regulations for Mining Activities*, RO 213 27 March 2014 at Art. 32.

quantification on the possible revenues a project might produce, the discussion about economic benefits is useless.

The third conflicting element is that there is confusion between consultation for environmental assessment purposes, which embraces indigenous and non-indigenous communities, and free, prior and informed consultation with indigenous peoples. The Ecuadorian legislation assumes that the same process and requirements apply to both consultation processes.[252] The consequence is that communities are normally approached, if ever, with information of an advanced-stage project, and this sharing of information is deemed as consultation. This is also a result of the lack of identification of indigenous territories, as boundaries have not been drawn to limit which portions of territories shall be considered as indigenous.[253]

As a consequence, not even one process of prior consultation with indigenous peoples related to natural resources activities has been undertaken in Ecuador. This contrasts with the increasing interest of mining companies and investors to perform exploration and project development in the country during the past years.

### 2.3 Frameworks created by private mining organizations

The conduct and practices of mining companies on their legal operations are not guided solely by national and international law. Companies are also responsible for the application of frameworks and guidelines issued by private organizations, such as the IMMC or the Prospectors

[252] This is a conclusion based on the text of the 2008 Constitution, the Organic Environmental Code and the Public Participation Law.
[253] Interview made to Mr. Raúl Guaña, Attorney at the Environmental Ministry of Ecuador on January 2017, during the IV Mining Law Congress in Quito, Ecuador.

and Developers Association of Canada [PDAC]. The IMMC was formed in 2001, an organization that followed the Global Mining Initiative, which was formed by mining companies with the purpose of identifying and addressing the different social and environmental issues that mining companies were facing at the time.[254] The IMMC was promoted by the GMI organization and the MMSD report issued at the time, which identified issues faced by mining companies and made recommendations on how to address such issues.[255] In 2003, the ICMM 10 principles were issued as a response to the challenges identified by the MMSD report.[256] These principles were later revised in 2015. ICMM members are required to commit to these principles upon joining the organization.

Relating to the social component of sustainability, the principles provide for the respect of "human rights and the interests, cultures, customs and values of employees and communities affected", [257] including customs and heritage of local communities and indigenous peoples. They also encourage companies to engage in consultation processes with local communities and indigenous peoples. Consultation should aim to "identify, assess and manage all significant social, health, safety, environmental and economic impacts".[258] Engagement with local communities and indigenous peoples has to happen at the "earliest practical stage […] to discuss and respond to issues and conflicts concerning the management of social impacts."[259] Companies are also encouraged to continuously interact with social actors and stakeholders, including the

[254] International Council on Mining and Metals, Our History, *ICMM* online: <https://www.icmm.com/en-gb/about-us/our-organisation/annual-reviews/our-history>
[255] *Ibid.*
[256] International Council on Mining and Metals, Sustainable Development Framework ICMM Principles (London: ICMM, 2003).
[257] *Ibid* at principle 3.
[258] *Ibid* at principle 4.
[259] *Ibid* at principle 9.

participation of minorities, and contribute to their economic and social development from early stages of mining operations and all the way through the life of the project.[260]

With regards to consultation, the MMSD, which constitutes the foundation of the ICMM principles, provides that companies should acquire the consent of local communities and indigenous peoples even if such consent is not required under local jurisdiction:

> Indigenous lands have been and, many would say, are still under threat from all sorts of exploitative uses, including mining. Land is often used without the consent of indigenous peoples. Companies should act as if consent to gain access to land were required even when the law does not demand this. Decision-making processes appropriate to the cultural circumstances of indigenous peoples must be respected.[261]

The same document also encourages mining companies to follow and comply with the content of ILO 169 and any other international instrument that protects human and indigenous rights. Acknowledging that international instrument's adoption and ratification is a government duty, "there is nothing to prevent companies from freely and openly committing themselves to observing the standards laid down in these instruments"[262] Compliance with international treaties, says the report, "could, in future, be a key indicator of whether a company is seriously contributing to the social pillar of sustainable development."[263]

National mining organizations have issued frameworks on best practices as well. In Canada, the Mining Association of Canada has issued its "Towards Sustainable Mining" Guiding Principles,[264] which are the guiding foundations for the practices of the members of the association. These principles encourage the members of the association to take measures for

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[260] *Ibid.*
[261] MMSD report, *supra* note 176 at xviii.
[262] *Ibid* at 126.
[263] *Ibid.*
[264] The Mining Association of Canada, "TSM Guiding Principles", *MAC*, online: <http://mining.ca/sites/default/files/documents/TSMGuidingPrinciples_0.pdf>

"proactively seeking, engaging and supporting dialogue", "respect human rights and treat those with whom [they] deal fairly and with dignity", "respect the cultures, customs and values of people" and "recognize and respect the unique role, contribution and concerns of Aboriginal peoples (First Nations, Inuit and Métis) and indigenous peoples worldwide".[265]

Another mining association in Canada that has issued a similar framework is the PDAC. The "Principles and Guidelines Notes" were issued as a part of the "E3 Plus: A Framework for Responsible Exploration" and provide for the respect of human rights and interaction "with communities, indigenous peoples, organizations, groups and individuals on the basis of respect, inclusion and meaningful participation."[266]

There are no mining associations in Ecuador which have issued guidelines on human rights, consultation and community engagement.

[265] *Ibid.*
[266] Prospectors and Developers Association of Canada, *E3 Plus: A Framework for Responsible Exploration – Principles and Guidelines Notes* (Toronto: E3Plus, 2014) at 24 & 41.

## Chapter III

## Case Analysis on how Project Proponents have (or have not) Engaged with Indigenous peoples in Canada and Ecuador

The literature review made on Chapter One and the description of the legal framework about indigenous consultation in Canada and Ecuador made in Chapter Two make us question how, despite the differences in legislation, policy and enforcement, the mining industry has developed successful mining projects in both countries. Canada has developed a comprehensive framework on the duty to consult, and consequently, many mining projects that have successfully engaged indigenous communities have been developed. Still, there are projects that have caused protests and major opposition. On the other hand, Ecuador has constitutional and legal provisions in force that oblige mining companies to consult and engage with local communities in early stages, but have been applied and enforced poorly. This has generated social conflicts in some mining projects, from as early as the exploration phases. Surprisingly, there are other mining projects in Ecuador that, despite the lack of application of the law, have been developed with entire community support. This leads to the assumption that compliance with the legal framework is not the determinant variable in a resource development.

This Chapter will analyze the cases of two mining projects per jurisdiction, one that resulted in good community relations and another which resulted in conflicts and grievances. The objective is to highlight the actions of mining companies in each case, identifying the determinant conducts that lead to the successful development or failure of a mining project.

## 3.1 Canada

Section 3.1.1 will discuss the *Platinex v Kitchenuhmaykoosib Inninuwug* case, which was located on off-reserve lands and in which the general consultation regime was applicable. Section 3.1.2 will discuss the *The Muskowekwan Potash Project*, which is located on reserve lands, and thus the consultation regime for reserve lands is applicable.

### 3.1.1 *Platinex v Kitchenuhmaykoosib Inninuwug*: A poor community engagement and the inaction of the government

#### 3.1.1.1 Facts of the case

The Platinex v Kitchenuhmaykoosib Inninuwug case took place in a region known as Ontario's Ring of Fire, a region located north of the province, in the James Bay Lowlands, in which major mineral discoveries have been made in the past decades. The region is considered by the government of Ontario as the "home to one of the most promising mineral developments anywhere on the globe."[267] The Kitchenuhmaykoosib Inninuwug First Nation [KI], a community of approximately 1500 people, has occupied part of the Ring of Fire lands, near the Big-Trout Lake for centuries. After signing the 1929 adhesion to Treaty 9, they were entitled to a portion of reserve land and treaty rights.[268] In 2000, the KI filed a Treaty Land Entitlement claim, requesting the recognition of the extension of their reserve lands towards the south, based on the

[267] Government of Ontario, *Ontario's Mineral Development Strategy* (Sudbury: Northern Development and Mines, 2015) at 11

[268] Rachel Aris and John Cutfeet, "Kitchenuhmaykoosib Inninuwug First Nation: Mining, Consultation, Reconciliation and Law" (2011) 10:1 Indigenous Law Journal 1 at 11.

existence of culturally and spiritually significant sites on the claimed lands, and on the promises made on Treaty 9, which were never fulfilled.[269]

Prior to the filing of the Treaty Land Entitlement claim, in 1999 a junior mining company, Platinex, staked and claimed mining rights over the KI claimed land, under the Free Entry System in force at the time in the province.[270] It then requested and obtained the necessary permits to begin exploration activities in the territory. When the KI were notified with the mining claims made by Platinex, they began conversations with the company in an effort to consider the mineral development on their claimed lands. In 2001, along with other 5 First Nations located nearby, they requested a moratorium on the mineral development. The moratorium was to be in place "until proper consultation had taken place. The KI First Nation stated that it was not opposed to development, but wanted to be a "full partner" and to be fully consulted."[271] In fact, in the decision made by Ontario's Superior Court of Justice, Mr. Justice G.P. Smith points out the openness of the KI to the mining development and to be consulted:

> As indicated in its development protocol, KI is not opposed to development on its traditional lands, but wishes to be a full partner in any development and to be fully consulted at all times. Whether any proposal for development will be accepted depends on the merits of each proposal, and whether the development respects KI's special connection to the land and its duty, under its own law, to protect the land.[272]

Due to the openness of the KI, negotiations and conversations between the First Nation and the company representatives took place over the ensuing years. It is relevant to mention that, at

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[269] *Ibid* at 5.
[270] Republic of Mining, K.I. vs. Platinex: a 'worst case' example of community relations – Canadian Business Ethics Research Network, *RofM* online: <https://republicofmining.com/2011/09/22/k-i-vs-platinex-a-%E2%80%98worst-case%E2%80%99-example-of-community-relations-canadian-business-ethics-research-network/>
[271] Scott Kerwin, "Analysis of Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation case", *Borden Ladner Gervais LLP Aboriginal Legal Issues e-Newsletter* (15 September 2006) online: <https://miningwatch.ca/blog/2006/9/15/analysis-platinex-inc-v-kitchenuhmaykoosib-inninuwug-first-nation-case>
[272] *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, 2006 ONSC 26171 at para 19. [Platinex 1]

the time in which these facts were taking place, the framework for the duty to consult outlined in Chapter Two of this thesis was under development, therefore, there were no outstanding guidelines or legal framework on how to perform consultation.[273] For this reason, the KI developed a protocol for consultation, which was based on the ideals expressed at the time by the Supreme Court on consultation, and which included broad community involvement and reflected their level of connection with the land.[274]

The breaking point came in 2005, when KI members alleged that the representatives of Platinex failed to follow the consultation protocol and that there was a lack of community involvement in the consultation. For this reason, they directed a letter to Platinex in these terms: "It was decided that effective immediately, August 30, 2005, all previous Agreements and Letters of Understanding between all affected parties…related to your proposed work around the above mentioned area, both verbal and written, will be null and void."[275] According to KI, there was a clear consensus among the community that no drilling was going to be allowed on their lands.[276] Platinex had already raised around 1 million dollars in funding for exploration activities. The corporation made public a form on the TSX Venture Exchange, disclosing that they had obtained KI's verbal consent to proceed with "low impact exploration". This happened a couple of months after receiving KI's letter, in which such consent was specifically denied.[277] In November 2005, Platinex disclosed that the KI people denied exploration activities, but "have indicated however that the Company may proceed without opposition provided that continued

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[273] Aris and Cutfeet, *supra* note 268 at 16.
[274] *Ibid*.
[275] Platinex 1, *supra* note 272 at para 23.
[276] *Ibid* at para 22.
[277] *Ibid* at paras 24-5.

consultations are held during the work program and that local employment needs and care for the environment be considered."[278] Again, this was in contradiction with the content of KI letter.

In February 2006, Platinex attempted to begin the exploratory campaign and prepared to move trucks and drills to the site, despite the opposition of the KI, communicated in the form of a letter which reads: "Therefore as every member of this community and as Chief and Council we are committed to take **ALL** measures and means **TO STOP** you from entering anywhere in Kitchenuhmaykoosib Inninuwug Aaki or to conduct any activity therin whatsoever."[279]

When the KI members and the Chief of the Band became aware of the attempt of Platinex to bring a drilling crew to the site, they protested. However, this part of the story is disputed by both sides. The KI affirm that 15 to 20 people, mostly children and elders, gathered in the road to block the way of the trucks and drills. They said their protest was peaceful and that they never used, or attempted to use, tires or any other elements to block the road.[280] Platinex, on the contrary, said that the members of the drilling crew faced hostility, the road was blocked with threats and that their physical safety was in danger. At the end, they had to abandon the site and flew out.[281]

Both parties sought injunctive relief before the Court. After analyzing the facts and exhibits tendered by both parties, Mr. Justice G.P. Smith granted an injunction to KI. His reasons were various, including: (i) the disrespectful conduct of Platinex, as it attempted to conduct

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[278] *Ibid* at para 27.
[279] *Ibid* at para 31.
[280] *Ibid* at paras 37-8.
[281] *Ibid* at paras 35-6.

exploration activities knowing that there was a strong opposition from the KI;[282] (ii) the fact that the harm Platinex affirms it suffered is the result of their own actions, as it appeared that they were confident that the KI would not stand for their rights and interests;[283] (iii) the eventual loss of the land by the KI "could constitute an irreparable harm" due to the cultural and spiritual connection of the KI people with the land;[284] and, (iv) that the actions of the KI to protect their land and culture were justified.[285]

The Court also highlighted the inaction of the provincial Crown in this case:

> The Ontario government was not present during these proceedings, and the evidentiary record indicates that it has been almost entirely absent from the consultation process with KI and has abdicated its responsibility and delegated its duty to consult to Platinex. Yet, at the same time, the Ontario government made several decisions about the environmental impact of Platinex's exploration programmes, the granting of mining leases and lease extensions, both before and after receiving notice of KI's TLE Claim.
>
> In the several years that discussions between Platinex and KI have been ongoing, the Crown has been involved in perhaps three meetings. There is no evidence that the Crown has maintained a strong supervisory presence in the negotiations, despite Platinex having expressed its concerns to Ontario it on a number of occasions."[286]

The injunction granted by the Court prevented Platinex from performing any exploration activity for a period of five months, conditioned upon the return of any seized property by the KI to Platinex and the setting up of a "consultation committee", which along with Platinex and the Crown, would develop an agreement that would fulfill the duty to consult.[287] This conflict, though, was far from reaching a solution.

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[282] *Ibid* at para 75.
[283] *Ibid* at para 72.
[284] *Ibid* at para 80.
[285] *Ibid* at para 126.
[286] *Ibid* at paras 92-3.
[287] *Ibid* at paras 138-9.

An agreement was not reached within the period granted by the Court. Platinex was still holding the funds for exploration, and due to the pressure of the investors, they resorted to the Court to begin the exploration campaign. This time, they had enough resources to convince the Court that there was an attempt to undertake a meaningful consultation, as they held all regulatory approvals to begin exploration and they have attempted to meaningfully consult the KI, proposing to perform exploration by limiting the number of holes to be drilled and to keep them away from sensitive areas. If Platinex was not allowed to resume exploration activities, they were in a position of going out of business.

The KI did not agree. They brought before the Court a new motion for an interlocutory injunction to prevent exploration activities on their lands. After analyzing the new evidence produced by the parties from the last judicial decision, Mr. Justice G.P. Smith dismissed the motion for injunction. His reasons were the following:

> "In my July 28, 2006, reasons I found that the balance of convenience at that point in time favoured KI, and that the financial harm to Platinex was outweighed by the harm to KI's spiritual and cultural connection to the land and to its ability to select lands in its TLE claim.
>
> The harm that Platinex will likely suffer if it cannot conduct its proposed drilling operation is that it will go out of business, since the Trout Lake claims and leases are its major asset. It has managed to survive until now, but I am satisfied that there is a very strong probability that it could not survive until trial if an injunction were granted, even with an order expediting trial. Being put out of business is irreparable harm that cannot be readily compensated for in damages.
>
> The harm that KI will suffer as a result of damage to the land itself will relate to a maximum of 80 drill holes, of approximately 2 inches in diameter, in 12,080 square acres of wilderness. I have already commented that the evidence of harm to treaty harvesting rights, culture, Aboriginal tradition, and the community is inconclusive.
>
> Aboriginal rights deserve the full respect of Canadian society and judicial system. Those rights do not, however, automatically trump competing rights, whether they be government, corporate, or private in nature.

> After balancing the respective interests of the parties in relation to the harm that each would suffer, I find that the evidence supports a finding that the balance of convenience favours Platinex." [288]

With this reasoning and considering the rights of the KI people, the Court dismissed the motion, allowed Platinex to begin with Phase One of the exploration program, which included 24 holes. The Court also ordered the parties to implement a consultation protocol and to continue with the consultation process, with the supervision of the Court.[289]

Despite the order made by the Court, some KI members established a protest camp on the exploration site. Some of them, including the Band's Chief, met Platinex workers and turned them back.[290] For these actions, the Court charged six of the KI members, including the Chief of the band, with contempt of Court. They accepted to be jailed after they refused to substitute their time in jail with the payment of fines.[291] The decision made by the Court to imprison the "KI six", as they were then known, attracted media attention to this case, which also called the attention of the public, who supported and advocated for the rights of the KI six and the people who they represented.[292] Public and media attention also directed their critics to the inaction and indifference shown by the Ontario government,[293] pointing out the antiquated mining legislation and policy that was in force at the time.

A decision made by the Ontario Court of Appeal on May 2008 released the KI six from prison, and advocated for a new attempt to resume consultation and negotiation between KI,

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[288] *Platinex v. Kitchenuhmaykoosib Inninuwug First Nation & A.G. Ontario*, [2007] ONSC 16637 at paras 168-72. [Platinex 2]
[289] *Ibid* at para 188.
[290] Republic of Mining, *supra* note 270.
[291] *Ibid.*
[292] *Ibid.*
[293] *Ibid.*

Platinex and the provincial government. The relationship was so deteriorated that it was virtually impossible for these parties to sit together and discuss about mining in KI territory. In fact, a declaration made by Chief Morris was very clear in this regard: "I'm not sitting down with Platinex. I believe we paid our dues when we were jailed and that company does not exist here"[294]

All the parties involved in this dispute, including the KI, Platinex, the Court and even the public pointed to the government of Ontario as bearing the ultimate responsibility for the dispute between KI and Platinex. Their inaction was a key determinant for this dispute to have reached such intensity. A spokesperson for Platinex said, "A confrontation is likely unless the government starts taking this seriously… We've been forced into this situation by government inaction and incompetence".[295] As a result, the government of Ontario and Platinex began negotiations to make Platinex surrender its mining claims in the area and desist on the lawsuit brought against the KI and the Crown. In December 2009, an agreement was announced, which involved a cash compensation of CAD $5 million payable to Platinex, a royalty of 2.5% of the mining benefits that could eventually be produced on those lands, payable to Platinex, if ever, and the commitment to initiate the Mining Act Modernization Program, an attempt to re-write the mining legislation and regulations, updating them based on the rights of indigenous peoples and the needs of the mining sector, and creating a dispute resolution mechanism.[296] The implementation of the Ontario Mining Act Modernization program finished in 2018, when the

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[294] *Ibid.*
[295] *Ibid.*
[296] Karen Howlett, "Mining company surrenders claim to native land in $5-million settlement, opening Ontario's far north", *The Globe and Mail* (15 December 2009) online: <https://www.theglobeandmail.com/news/national/mining-company-surrenders-claim-to-native-land-in-5-million-settlement-opening-ontarios-far-north/article1205845/>

province launched a map selection system for the acquisition of mining claims, leaving the free entry system in the past.[297]

#### 3.1.1.2 Analysis

Engagement with local communities has to occur at the earliest stage possible. This is a recommendation made by most of the self-regulatory frameworks developed on company-community relations,[298] and a recommendation made by most government agencies that deal with indigenous affairs and resources development.[299] Engagement is different from consultation process, although it constitutes a key element of it.[300] The Platinex case is an example of lack of engagement in an early stage, as the company approached the KI people after they obtained the mining claims and all necessary permits for exploration. From the community point of view, the fact that a third party accesses its land simply claiming rights over it, constitutes a violation of the member's rights to be consulted, to participate in resource development and to be informed.[301] The recommendation made by industry frameworks and government agencies is that the earliest stage possible constitutes the moment before accessing the land.[302] This will allow the company to negotiate with local communities the conditions upon which they will be

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[297] Ministry of Energy, Northern Development and Mines, Mining Act, online: <https://www.mndm.gov.on.ca/en/mines-and-minerals/mining-act>

[298] *See* section 2.3 *above*.

[299] *See i.e.* Ministry of Aboriginal Affairs and Northern Development Canada, Aboriginal Consultation and Accommodation – supra note 228 at 12.

[300] *Ibid.*

[301] United Nations, *supra* note 172.

[302] *See, i.e.* International Council on Mining & Metals, Mining Association of Canada, and the Prospectors and Developers Association of Canada.

allowed to access land, to identify burial sites and/or sites of cultural significance, and provide information to the community about the types of proposed activities, timelines and deadlines.[303]

Despite the lack of early engagement, the KI people were open to mineral development on their land, as long as their culture and values were respected. A huge flaw in this case was the absence of a government guideline to support the consultation process, as well as the complete absence of the provincial government during consultation. As stated in Chapter 2, the duty to consult rests on the Crown,[304] and even though the duty to consult framework was not yet developed in Canada, a notion of the duty to consult and some elements of the process were already set by the Court in *R. v Sparrow*, [305] even suggesting that the government was entitled to conduct the consultation process: "the honour of the Crown is at stake in dealings with aboriginal peoples".[306] In this sense, the provincial government had the duty to intervene in the relationship created between Platinex and the KI people, instead of watching the course of events as an outsider.

However, not all the responsibility for the conflict rests on the inaction of the province. If Platinex was left alone in the negotiation table with the KI, they had to ensure that the approach they made to them, as well as the entire negotiation process, was made in a way that respected the rights of the KI. They could have envisaged them as partners in the development of the mining project, knowing that the geology of the Ring of Fire in Ontario could be very promising. Instead, their main interest was to begin the exploration program as soon as possible.

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[303] Shift, Discussion Paper Stakeholder Engagement and the Extractive Industry Under the OECD Guidelines for Multinational Enterprises (New York: Shift, 2013) at 5.
[304] *See* section 2.1.1.2 *above.*
[305] *R. v Sparrow* [1990] 1 S.C.R. 1075.
[306] *Ibid.*

On more than one occasion, the KI made declarations referring to the possibility of allowing mining activities on their land as full partners.[307] This gave Platinex a very clear guide on the objective they had to pursue to be successful with their operations, and to obtain a SLO. Applying the TB model,[308] to achieve a level of co-ownership of the project, Platinex had to reach the Full Trust Boundary. To reach this level, Platinex had to assure the KI that all of their concerns were addressed and all of the community's expectations were going to be met. This includes following the Consultation Protocol developed by the KI, which could be applied in the absence of a government guideline. Platinex had to assure also that the community's rights and the land were not going to be affected. Based on the requirements of the KI and according to the theory of the TB model, the only way in which the KI members would have accepted the presence of the company on their lands is if Platinex adhered to a set of community principles, outlined in the Consultation Protocol and mentioned several times by the Chief. These circumstances fall under the description of the integrity-based trust, which was described before as a further description of the TB's full trust theory.[309]

Instead of doing so, Platinex aimed to reach the "acceptance" level of the SLO, by simply crossing the legitimacy boundary. They relied on the issuance of government permits and believed they were entitled to access the lands and begin the exploration program. The reality was that Platinex never even reached the legitimacy boundary, as the company was not considered legitimate to access the KI lands. The phrase mentioned by Chief Morrison, of the KI

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[307] Platinex 1, *supra* note 272.
[308] *See* section 1.1.3 *above*.
[309] *Ibid.*

"that company does not exist here"[310] is a clear signal of the absence of legitimacy of Platinex among the KI people.

Trust cannot be built if the company tries to access the lands with lies. A breaking point in the conflict between Platinex and the KI was when the company lied to its shareholders when stating that they had obtained a "verbal consent to perform low impact exploration"[311] from the community, even though they had received a letter stating the contrary. The results of this undermining of the position of the KI were: (i) a protest on site; (ii) economic loses to the company for mobilization expenses and personnel; and, (iii) most importantly, KI's loss of trust in the company and the overall project. Things got worst after the company obtained an authorization from the Court to begin the exploration program. Forcing their way to the site by using a Court order, despite the opposition of the community, only guaranties a continuous loss of trust and assures the permanence of conflict. When the "KI six" were imprisoned following the protest, Platinex lost trust, legitimacy, time, and resources; while building up the opponent's strength by turning the public opinion against the company and the overall mining industry. The relevant stakeholders at this stage were not only the KI people, but also the public and the media.

When conflict escalates to this level, it is very difficult to find a solution. This is why the solution had to come from the government. In the end, the agreement reached by Platinex and Ontario put an end to the KI and Platinex conflict, but Ontario's taxpayers were forced to pay a company that failed to manage conflict in an appropriate manner.

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[310] Republic of Mining, *supra* note 270.
[311] Platinex 1, *supra* note 272 at paras 24-5.

### 3.1.2 The Muskowekwan Potash Project: A joint corporate - community development

#### 3.1.2.1 Facts of the case

The Muskowekwan First Nation [MFN] is located on the Indian Reserve No. 85, approximately 140 kms northeast of Regina, Saskatchewan. They were one of the First Nations that signed Treaty No. 4 in 1874, and thus acquired rights over land within the reserve. The total area occupied by MFN is 16479 acres, and its population by 2008 was 1517 people, with about 400 living on the reserve.[312] As the land in which the MFN live is an Indian Reserve, the legal regime for mineral developments is provided by the Indian Act[313] and the Indian Mining Regulations.[314]

It came to the attention of a junior mining company, Encanto Potash Corp. [Encanto] that there was a great potential for the extraction of potash on the MFN reserve land, a mineral widely used in agriculture. Encanto approached the MFN, knowing that the land of interest was part of a reserve land. Chief Reg Bellerose of the MFN was approached by Encanto in 2007 and conversations began about the possibility of performing exploration activities that could confirm the existence of marketable potash on the reserve, as they had explored surrounding areas and the geology was promising.[315] A couple of Exploration Participation Agreements were reached in 2009, supported by a Band Council resolution dated July 31, 2009, in which the band, with the consent of Aboriginal and Northern Affairs Canada (later named Indigenous and Northern

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[312] Muskowekwan First Nation, History, online: <http://www.muskowekwan.ca/history>
[313] Indian Act, *supra* note 240.
[314] Indian Mining Regulations, *supra* note 185. *See* section 2.1.2 *above.*
[315] Kerry Benjoe, "Muskowekwan First Nation signs agreement with Encanto Potash Corp.", *Regina Leader Post* (11 September 2010), online: <http://www.leaderpost.com/muskowekwan+first+nation+signs+agreement+with+encanto+potash+corp/3803225/story.html>

Affairs Canada and soon Crown-Indigenous Relations and Northern Affairs Canada) [INAC], authorized the exploration activities on reserve lands.[316]

The results of exploration came out fast and were promising. They showed findings of approximately 162 million of proven and probable potassium chloride (KCI) reserves, as well as relevant indicated and inferred reserves. These reserves could guarantee a 70-year mine operation at a rate of 2.8 million of tonnes per year. [317]

In 2010, the parties signed a Joint Venture Agreement [JV], in an effort to move forward on the development of the mine and for the resulting company of the JV to run the operations. During and after the development of the project and the construction of the mine, the JV Encanto committed to provide training for band members, create job opportunities, and give preference to the Band's business to supply goods and services for the operation of the mine. Also, ownership of individual shares in the project and overall royalties of 5.5% were agreed.[318] After the successful engagement with the MFN by Encanto, Chief Bellerose was of the opinion that Encanto's approach was respectful and in good faith, while some other experiences they had before were not like that. He observed that "[n]one of the Big Boys [BHP, PotashCorp, K+S] ever came to talk to us before Duty to consult, before the Courts made them."[319]

A second big step had to be taken. Under the Indian Act and the Indian Mining Regulations, the land in which a mineral development is going to be made by a third party must

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[316] Joint Venture Agreement signed between Encanto Resources Ltd., Muskowekwan First Nation and the Muskowekwan Reasources Limited Partnership, 16 October 2010.
[317] Encanto Potash Corp, Home, online: <http://www.encantopotash.com/english/default.aspx>
[318] JV agreement, *supra* note 316 at articles 7, 8 and schedule D.
[319] Saskatchewan First Nations Economic Development Network, "Muskowekwan to become First Band in Canada to get Mineral Rights on own reserve land by April", *SFNDN* online: <http://sfnedn.com/2016/05/02/muskowekwan-to-become-first-band-in-canada-to-get-mineral-rights-on-own-reserve-land-by-april-roberts-and-heather-exner-pirot/

be designated.[320] A total of 61.400 acres of the MFN reserve lands were designated in 2014 after the majority of the band members gave their consent to proceed with the mining development and accepted the designation. This was made by ballot in which the majority of the members participated,[321] showing the overwhelming acceptance that Encanto had among the MFN people. This acceptance was driven not only by the offers of training, employment and the economic development of the community, but also by the openness of Encanto and the trust it built among the community.

The governing agency entitled to manage and administer the entire lifecycle of the Muskowekean Potash Project, besides the provincial agencies and regulators, is the INAC, pursuant to the Indian Mining Regulations. As this was the first project of this type, there were no outstanding regulations in force that could harmonize the mining regulations of the federal government and those of the province. "The project needed to conform to the 42 laws that make up the provincial regulatory regime, and get rolled into a federal law applied uniquely to the Muskowekwan project."[322] In this sense, another hurdle in the way was the enactment of a specific set of regulations applicable to this specific project. After a few years of conversations between the federal and provincial governments, along with MFN and Encanto, these regulations received royal assent in 2017.[323]

Another reason for the creation of specific regulations was to secure the investment made by Encanto and its shareholders:

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[320] See section 2.1.2 *above*.
[321] Muskowekwan First Nation, "Chief's Message", MFN (23 April 2014) online: http://www.muskowekwan.ca/noblindreferrals
[322] Saskatchewan First Nations Economic Development Network, *supra* note 319.
[323] *Muskowekwan First Nation Solution Potash Mining Regulations*, P.C. 2017-258.

> "In order to secure investment to reserve, they also had to be able to offer a stable and predictable investment environment: "you can't raise tens of millions of dollars based on a BCR (Band Council Resolution) that can be overturned by a single vote." Like many urban reserve and TLE properties, and First Nation property developments in BC and elsewhere, Muskowekwan developed a property rights regime that allows them to offer 99-year leases on their reserve land."[324]

With the support of the community, the project was able to explore and determine the land of interest by completing a total of 7 drilling holes in the MFN lands, all of them guided by technical reasons and by guidance of the community in regards to sites of cultural significance.[325] Currently, the Muskowekwan Potash Project has secured most of the funding needed to finalize the environmental assessment for the project, feasibility study, and front end engineering and design work, and has secured a partnership with two relevant customers in India, to sell 7 million tonnes of potash annually.[326] As the project involves active participation and is made in partnership with the MFN, the federal government has also committed funding for the project, in an undisclosed amount, which will cover the cost of "the environmental gap analysis, water study and value engineering study".[327] The project is expected to begin operations in November 2019.

#### 3.1.2.2 Analysis

The Indian Act and the Indian Mining Regulations are applicable to the Muskowekean Potash Project. This framework is uncommonly applied for mining activities, as they have been

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[324] Saskatchewan First Nations Economic Development Network, *supra* note 319.
[325] Encanto Potash Corp., Muskowekwan Prospect, online: <http://www.encantopotash.com/english/properties/firstnations/muskowekwanprospect/overview/default.aspx>
[326] "POTASH: Encanto de-risks Muskowekwan project", *Canadian Mining Journal* (24 May 2018) online: <http://www.canadianminingjournal.com/news/potash-encanto-de-risks-muskowekwan-project/>
[327] "POTASH: Encanto, Muskowekwan secure federal funds for mine" *Canadian Mining Journal*, (24 July 2018), online: <http://www.canadianminingjournal.com/news/potash-encanto-muskowekwan-secure-federal-funds-for-mine/>

normally developed on non-reserve lands. Under this regime, the First Nations have a *de facto* veto power over resources development on their lands, as a written band resolution consenting on the activities is required. The objective of the negotiation between the mining company and First Nations does not aim for consultation and accommodation; it rather aims to convince the First Nation to accept the project. This balances the strength and capabilities of both parties and allows them to reach a consensus based on their interests and points of intersection.

From the company's perspective, securing the authorization from the First Nation before performing any activity creates certainty, a highly valuated characteristic in the mining industry. Certainty creates an ideal atmosphere for project financing and clears the path for the development of a mining project and the construction of the mine site, if the technical data allows it. From the indigenous perspective, the authorization regime ensures that all mineral resources located within the boundaries of the reserve will remain for the benefit of the Band.

Encanto knew from the beginning that they had to obtain the authorization of MFN before planning to access the land. Their strategy to approach the MFN at the earliest stage possible and in good faith resulted in beneficial outcomes, as they showed respect for the MFN, their lands and culture. They also acknowledged that the MFN were the owners of their land and their resources, which sets a very solid foundation to begin negotiations about the development of a project. By engaging in conversations from the early stage, Encanto became a legitimate entity among the MFN. When conversations went on and the possibilities of a mineral development were growing, this legitimacy acquired an economic component, meaning that the MFN saw in

the company an opportunity for meeting their economic needs,[328] which were relevant at the time of contact: "We are just like the other 630 nations. We have the same problems, suicides, poverty. But there is a vision: what do we see for tomorrow and the day after that?"[329]

Early engagement also contributed to building trust. It was founded on respect, and further maintained and strengthened by the creation of a partnership between Encanto and the MFN through a JV, and the inclusion of typical IBA clauses in the agreement, such as percentage of royalties, job and career opportunities and training for the MFN people.[330] Chief Bellerose and the Band Council's vision, as it is inferred from the media declarations previously cited, is to create long-term benefits for their people. If a 70-year mine operation is secured, many generations will benefit from the mining industry on reserve lands, boosting their economy and giving opportunities for a growing community. The creation of a partnership not only responded to the conditions set by the MFN, but also enabled Encanto to reach a level of Full trust, based on the TB model.[331] The JV provided for a company jointly owned by the MFN and Encanto, that would be the mining operator. This secured the SLO at the highest point of the pyramid and ensured the MFN will be consulted at every step of the development of the project.

A relevant characteristic of this project to be highlighted is that conversations were held with a valid and legitimate representative of the MFN. Chief Bellerose and the Band Council were legitimate authorities of the Band, and had the full support of the members of the

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[328] *See* section 1.1.2 *above.*
[329] Saskatchewan First Nations Economic Development Network, *supra* note 319.
[330] *See* section 1.2.1 *above.*
[331] *See* section 1.1.3 *above.*

community to engage in conversations with Encanto. An agreement could not have been reached if there was no legitimation of the MFN authorities.

In summary, this case shows that meaningful and respectful engagement with an indigenous community could be very rewarding for the project proponent and the future of a resources development. In this case, consultation in good faith assured, among other benefits: (i) a continuous and consented operation; (ii) certainty in the development of the project; (iii) governmental support, even with funding for environmental and feasibility studies; and, (iv) community strengthening and economic development.

## 3.2 Ecuador

### 3.2.1 Panantza - San Carlos: No consultation, no engagement and no recognition of indigenous rights

#### 3.2.1.1 Facts of the case

In 1999 and early 2000, Corriente Resources, a Canadian Mining company headquartered in Vancouver, BC, acquired 24 mining concessions in southeastern Ecuador, which were previously held and explored by BHP Billiton. Corriente Resources carried on exploration activities in four of the 24 mining concessions, determining potential for the development of at least two mining projects for the extraction of gold, copper and silver. These two projects were named Mirador and Panantza – San Carlos.[332] From 2008 to 2010, Corriente Resources closed a deal with Chinese CRCC Tongguan for the sale of all of its assets, which included Mirador and Panantza-San Carlos. The Chinese corporation purchased the mining concession with the

[332] Corriente Resources Inc., History, online: <http://www.corriente.com/corporate/corporate_history.php>

objective to develop both mining projects, and to perform exploration on the other mining concessions.[333]

The Panantza-San Carlos project is located in the province of Morona Santiago, in southeastern Ecuador. This province, along with its southern neighbour province of Zamora Chinchipe, are renowned for their biodiversity, as they are located on the west end of the Amazonian jungle. It is also home of the Shuar, an indigenous group formed by various First Nations that inhabit some of the territories of both provinces and part of the territories on the other side of the Ecuadorian-Peruvian border.[334]

The Panantza-San Carlos project covers 14.000 hectares. It has been under exploration for more than a decade. BHP Billiton, Corriente Resources and CRCC Tongguan have been involved in these activities, the latter having its subsidiary, Explorcobres S.A. [EXSA], as the operator. The initial results of the exploration activities were promising: 900 million tonnes of copper with 0.59 ore concentration. Gold, silver and molybdenum were found in minor quantities, but enough to be recoverable.[335] Subject to further exploration, some refer to this project as a potentially world-class copper project.

From the time in which BHP Billiton was operating in the area, members of the Shuar community and several other stakeholders showed their opposition to the mining activities, alleging that the area is located within Shuar territories and was granted as a mining concession

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[333] Comisión Ecuménica de Derechos Humanos and Federación Internacional de Derechos Humanos, *Resumen Ejecutivo - Intervención Minera a Gran Escala en Ecuador y Vulneración de Derechos Humanos – Caso Corriente Resources Inc.* (Quito: CEDHU, 2010) at 8.

[334] Javier Rodríguez Pardo, "El territorio de los Shuar: Minería transfronteriza", *Ecoportal* (28 July 2009) online: <https://www.ecoportal.net/temas-especiales/mineria/en_territorio_de_los_shuar_mineria_transfronteriza/>

[335] Environmental Justice Atlas, Panantza – San Carlos Ecuador, *EJA*, online: <https://ejatlas.org/conflict/panantza-san-carlos-ecuador>

with no previous consultation with the Shuar peoples. They were not even considered in the environmental assessment process conducted in the early 2000s.[336] The Shuar's main concerns focused on three aspects: (i) the presence of the mining company on their ancestral territory; (ii) the negative impacts caused by the mining activities to the environment, and the contamination of water sources; and (iii) the program of acquisition of lands implemented by the company, which aimed to purchase lands located on Shuar territory from third parties, as they were previously purchased from the government by non-Shuar people, without Shuar consent.[337] The third aspect has a very relevant role as the main cause of future conflict, as will be later explained.

The Shuar people blamed EXSA for the violation of their human rights. They affirmed that EXSA has never attempted to engage with local communities or discussed the convenience of the project with them. They also pointed out that the Ecuadorian government was responsible of these violations, as it did not conduct a consultation process, despite the provisions of the 1998 and 2008 Constitutions[338] and the provisions of ILO 169 and the UNDRIP related to the rights of free, prior and informed consent of indigenous peoples.[339]

The position of EXSA and the Ecuadorian government before the media was that the project is not located on Shuar lands. EXSA affirmed this, despite the fact that they recognized a "direct influence of the project on Shuar peoples and its territories" in the environmental

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[336] Comisión Ecuménica de Derechos Humanos and Federación Internacional de Derechos Humanos, *supra* note 333 at 15.
[337] *Ibid.*
[338] *See* section 2.2.1 *above.*
[339] *Ibid.*

assessment [EA] filed in 2005.[340] They also made these statements in an EA filing: "The project is in an area inhabited by indigenous peoples. For the development of mining activities, especial consideration has to be taken in order to safeguard peoples, institutions, material possessions, jobs, culture and the environment of indigenous peoples."[341]

Due to the continuous changes of the environmental legislation in Ecuador, EXSA had to file more than one environmental assessment. During one of the processes, EXSA and the Environmental Ministry of Ecuador organized an information session in which the signatures of the people were required at the entry of the venue to be part of the event. Later, the same signatures were shown to the media alleging that they corresponded to people who supported the mining project.[342] In 2006, due to social protests and political instability, EXSA suspended exploration activities on site.

In 2011, exploration activities resumed, again without indigenous consultation. A small piece of land, 80 hectares, out of the 14.000 that comprised the project, was purchased by the company from a man who had acquired it in the early 1990s from the government. On this piece of land, which surface titles were now legally owned by EXSA, the small Shuar community of Nankints was settled in 2006. In an attempt to recover the possession of these 80 hectares, EXSA obtained a judicial order to evict from the land the 32 people who formed the Nankints community. By the means of force, almost 2000 police officers and army evicted the 32 people from the area. They used trucks and shovels to destroy houses and crops in the area. The evicted

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[340] Comisión Ecuménica de Derechos Humanos and Federación Internacional de Derechos Humanos, *supra* note 333 at 64.
[341] *Ibid.* Translated from Spanish by the author.
[342] *Ibid* at 65.

people were never notified with the judicial order.[343] After this episode, one of the evicted members of the Nankits community gave these declarations to the media: "This mining project will expand to all the Cordillera del Cóndor territory and we are afraid that all the Shuars will be evicted. We are not the invaders, we live on our ancestral territories."[344]

To complete the possession of the territory, a few days later, EXSA installed a camp site in the very same spot were the Nankints community was settled, from where exploration activities were directed. Military protection on site was granted to EXSA by the Ecuadorian government. This action was considered by the Shuar people as a threat to their lands and their sovereignty. Despite further protests and the indignation of the general public, the government and EXSA won this battle and nothing else could be done in the upcoming days.[345] The camp established in this area became the centre of the conflict between EXSA and the Shuar.

In November 2016, a few members of the Shuar broke their way into EXSA's camp site and evicted all the company personnel, taking over the installations of the company. This take-over only lasted 24 hours, after which the army regained control over the site. Another take-over took place on December 2016. This time, while military troops and police officers were trying to recover control of the site, police officer José Mejía died after receiving a gun shot. Control was later gained by the military, but the death of José Mejía triggered actions from the government to stop the Shuars from continuing conflict in the zone. A state of emergency was declared, and

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[343] Daniela Aguilar, "Desalojo a una comunidad shuar de la Amazonía aviva resistencia indígena contra la gran minería", *Mongabay Latam* (12 October 2016) online: <https://es.mongabay.com/2016/10/desalojo-comunidad-shuar-amazonia-indigena-mineria/>

[344] Confederación de Nacionalidades Indígenas del Ecuador (CONAIE), "Press release: No vamos a dar un pie atrás, estamos prestos para recuperar nuestro territorio", *CONAIE* (23 August 2016) online: <https://drive.google.com/file/d/0B9xnvkmElMEAeVN4czRTQVBEeGs/view> Translated from Spanish by the author

[345] Daniela Aguilar, *supra* note 343.

military officers started to seize Shuars possessions in the surroundings of the mining project. Another eviction took place near Nankints a few days later, and one of the heads of the Shuar community was imprisoned. After this episode and due to the intensity of the conflict generated, mining operations were suspended by decision of the company.

#### 3.2.1.2 Analysis

The role of governments is extremely relevant in resource developments. Governments are not only supposed to set requirements and verify their compliance; they must guarantee the existence of good conditions for investments and resource developments in their territories. In the Panantza-San Carlos project, the government is responsible for the major flaws: (i) there was no consultation with the Shuar people, or even an attempt to do so; (ii) instead of consultation, force was used to grant territory to EXSA; (iii) it criminalized and persecuted Shuar members involved in the take-overs of Nankits; (iv) it deprived the Shuar peoples of the ownership of the area, and instead "sold" pieces of their land to third parties, after considering them as "vacant lands".[346]

Consultation was never made despite the provisions of the 1998 Constitution and international treaties ratified by the Ecuadorian government. It was evident that there was a conflict and the Ecuadorian government was totally reluctant to address it. The government had several opportunities to engage with the Shuar and perform consultation, after the project suffered several stoppages during the exploration phase. The government ignored the conflict and instead of negotiating a solution in an appropriate manner, the decision was to exercise force

[346] Daniela Aguilar, "Conflict erupts between Chinese mining company, government and indigenous communities in Ecuador", *Mongabay Latam* (26 January 2017) online: <https://news.mongabay.com/2017/01/conflict-erupts-between-chinese-mining-company-govt-and-indigenous-communities-in-ecuador/>

disproportionately. This constituted a violation of indigenous human rights and dispossessed families of everything they had.

The Ecuadorian government also bears responsibility for the conflict because decades before granting the exploration permits to Corriente Resources, it sold parts of the lands of the Shuar peoples to third parties, without consulting about it. This was made under a program which identified "vacant lands", so that the government could claim property and sell them to third parties for agriculture purposes.[347] This was the immediate cause of the conflict and the subsequent violent episode that caused the death of police officer José Mejía.[348]

The actions of the government after the death of the police officer were a cause for more conflict, rather than a solution to it. Using military force to capture indigenous people is never a solution to a conflict about possession of indigenous lands. The use of force in situations like this will only lead to more violence, and a mining development in the area would be unlikely to succeed due to the uncertainty, intermittence of operations and constant conflict. This is one of the reasons why operations have not yet resumed after the episode in late 2016.

But it is not only the government's fault. EXSA and its predecessors had a great stake of responsibility in the conflict as well. It is true that consultation processes had to be performed and guided by the government, pursuant to the provisions of the 1998 and 2008 Ecuadorian constitutions, and of the ILO 169 and UNDRIP conventions. But apart from formal consultation, it is expected that resources companies engage with communities and First Nations, aiming to reach an agreement on how the lands will be used, and the benefits to be obtained from such

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[347] Pierre Gondard, Hubert Mazurek, 30 años de reforma agraria y colonización en el Ecuador: (1964-1994): dinámicas espaciales (2001) 10:1 Estudios de Geografía 15 at 22.
[348] Aguilar, *supra* note 346.

intervention. As it was explained in the first chapter of this thesis, how companies approach communities to acquire a SLO is different from a formal consultation process. Therefore, it was expected from EXSA and its predecessors to approach the Shuar communities and engage in meaningful conversations that would aim to gain the acceptance of EXSA on Shuar territory. Instead, EXSA denied that the project was being developed on Shuar lands, contradicting the statements made on their own filings for EA, and it sought for a Court order to vacate a piece of land in which a community was settled, which was considered as an invitation to engage in disputes and as an act of "bad neighbor".[349] Dialogue was never considered as an option by EXSA.

When evaluating the case of the Panantza-San Carlos project with the TB model,[350] it is clear that EXSA never reached the legitimacy boundary. The Shuars did not agree on the presence of EXSA on their territory, and thus considered the company as illegitimate and entirely foreign to their society. The result of not reaching the legitimacy boundary,[351] as the TB model refers to, is the withdrawal of the SLO, a licence that in this case was never granted.

This is a case that shows the real power of communities.[352] Despite the great disparity of forces between the Ecuadorian government, EXA and the Shuar community, the latter was victorious in their efforts to stop the mining operations on their land. The Panantza-San Carlos project, which could be promising in resources, could end up becoming a mining failure due to the irresponsibility of EXSA and the government.

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[349] CONAIE, *supra* note 344.
[350] *See* section 1.1.3 *above*.
[351] *Ibid.*
[352] *See* section 1.1.6 *above.*

### 3.2.2 Fruta del Norte: A successful mining development with no formal consultation

#### 3.2.2.1 Facts of the case

Fruta del Norte [FDN] is an underground gold mine currently under construction. It is located in south-east Ecuador, in the province of Morona Santiago, municipality of Yantzaza, parish of Los Encuentros. The mining concessions that are part of the project were first granted in 2006 by the Ecuadorian government to Aurelian Resources Inc., a junior mining company. The initial stages of exploration led to the discovery of a gold deposit with a potential for further development of the mine.[353] Two years after the acquisition of the assets, a major mining company, Kinross, acquired Aurelian resources and continued performing exploration activities on the concessions. After a few disagreements with the Ecuadorian government related to royalties and the tax regime in force in the country, Kinross decided to sell the mining concession to Lundin Gold, a major Swedish-Canadian mining company based in Vancouver, BC.[354]

After the exploration program on the mining concessions was completed, Lundin Gold determined a huge potential for developing a mine. The feasibility study indicated reserves of 23.8 Million tonnes with 9.61 gold grade, and 11.6 million tonnes with 5.69 gold grade inferred.[355] The quantity of reserves, the extremely high-grade of gold concentration and its recoverability made experts to consider this project as one of the largest high-grade undeveloped

[353] Lundin Gold, Project overview, online: <https://www.lundingold.com/en/fruta-del-norte/project-overview/>
[354] *Ibid.*
[355] *Ibid.*

gold deposits in the world.[356] By processing 3.500 tonnes per day, the life of the mine is expected to be 15 years.[357]

The province in which the project is located, Morona Santiago, along with Zamora Chinchipe, are known to be home of the Shuar First Nation.[358] Although the project is not located within ancestral lands, and its main impact will occur on non-indigenous Los Encuentros parish, the construction of roads and the overall impact of the project was considered to most likely affect Shuar lands and communities. In this sense, Lundin Gold's predecessor, Aurelian Resources, began informal consultations with Shuar peoples in 2007, soon after they acquired the mining concessions.[359]

> Aurelian Resources Inc., which was acquired by Kinross in 2008, began informal consultations with the Shuar in 2007, in the earliest days of exploration after acquiring the FDN mineral concessions. Recognizing that the modern Shuar Nation may not fully reflect ancestral land use, the FDN project staff met with leaders of the Shuar Nation in order to understand the extent of their ancestral land rights (which are protected by the Constitution of Ecuador) and to maintain open communication regarding the progress of exploration and, once the deposit was discovered, project development.
>
> (…) Through consultation, we have been able to design the FDN project in a way that does not affect ancestral land rights of the Shuar Nation, or negatively impact sacred sites and resources. We have also focused on proactive engagement to ensure an integrated, balanced and inclusive development for the indigenous community.[360]

Early engagement with indigenous peoples and informal consultations led to the signature of a Co-operation agreement in 2009 between the Shuar Federation and Kinross, which had already taken operations over and continued with the consultation began by Aurelian Resources.

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[356] Market one Media Group Inc., Fruta del Norte is one of the highest-grade undeveloped gold deposits in the world, *MOMG Inc.*, online: <https://www.youtube.com/watch?v=eZIqNqeXJXs>
[357] Lundin Gold, *supra* note 353.
[358] The Fruta del Norte Project is located southwest of the Panantza-San Carlos project. *See* section 3.2.1 *above.*
[359] Kinross, Taking Responsibility: 2011 Corporate Social Responsibility Report (2011) at 85.
[360] *Ibid* at 85-6.

The agreement set the guidelines for the Shuar Federation and Kinross to jointly determine the economic and social projects of interest for the Shuar Nation, which were to be supported by Kinross.[361] During the negotiation of the agreement, the Shuar Nation showed interest on obtaining support for the development of new community infrastructure and the improvement of existing infrastructure, such as schools, roads and water pipelines. They were also interested in getting support for the development of economic activities that are aligned with their values and traditions, as well as employment. They also showed interest in obtaining support for the organization of traditional, cultural and sporting events.[362] In response to these needs, in 2011 Kinross provided funding for the construction of the Shuar Nation's Ethnographic Museum, which supports the preservation and display of cultural artifacts from Shuar history. By implementing personal development programs, Kinross funded the training of 70 Shuar youth to help them develop leadership skills and self-confidence.[363]

Kinross did not engage only with the Shuar Federation. Los Encuentros parish was the community most affected by mining operations, and as such, there was a need to engage with the non-indigenous community of the parish. Conversations were held with the parish council, the local government of the parish elected by popular vote. This dialogue began at the same time in which Aurelian Resources engaged in conversations with the Shuar Federation. The results of the dialogue were the identification of the needs of the community, which were basically the renovation of 17 educational centres, the development of accelerated educational programs for children and adults, the provision of funding for training of children and youth in

[361] *Ibid* at *86.*
[362] *Ibid.*
[363] *Ibid* at 84.

entrepreneurial, leadership and decision-making skills, and support for the creation of small businesses and employment opportunities, like the APEOSAE coffee farmers. In addition,[364]

> Kinross continues to support the APEOSAE organic coffee farmers' association in the province of Zamora-Chinchipe near our FDN project. Since 2009, we have provided micro-loans, seed capital, technical assistance and infrastructure support. APEOSAE is reaping the rewards. By the end of 2011:
>
> - Coffee production had increased to 3,000 quintales from 1,200 in 2009;
> - APEOSAE-brewed coffee placed 2nd in Ecuador's 2010 national "Golden Cup" competition; Three new products (banana chips, honey and fruit teas) had been introduced to APEOSAE's organic product line; and
> - The number of beneficiaries had increased to 450 from 412 in 2009.

Porfirio Zhiñin, the President of APEOSAE (2010-2011) attests to these positive outcomes when he states that "the social investment that Kinross has made in organic producers allows us to safeguard international certifications, generate new productive tests, and consolidate us as an agro-ecological group worldwide."[365]

Aurelian and Kinross had to address another potential focus of conflict: artisanal miners. Since 2007, at least 42 artisanal operations were spotted within the mining concession, which were performing anti-technical excavations and affecting the environment. These groups claimed that they have mined for decades, but never held a government permit to do so.[366] The legislation at the time gave Aurelian and Kinross the chance to seek for an eviction order and vacate artisanal miners from the mining concession.[367] Instead, Aurelian, and later Kinross, engaged in negotiations with artisanal miners. The objective was to formalize their activities by obtaining all the required licences and permits from the government, and to enter into an agreement with the

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[364] *Ibid* at 94.
[365] *Ibid.*
[366] *Ibid* at 95.
[367] Ley de Minería, RO Sup. 695 31 May 1991.

company, which would allow artisanal miners to mine within the concession, after receiving training by the company on the legal framework, health and safety practices, and mining techniques that care for the environment. By 2012, eight artisanal operations were legalized, while the other 34 artisanal groups were still under negotiation or training with the company.[368]

The implementation of the Co-operation agreement with the Shuar Federation, the support given to Los Encuentros community and the strategy to address artisanal mining operations on the concession allowed Kinross to perform a smooth mining operation. Sampling and drilling activities were approved by the majority of the surrounding community and relevant stakeholders. There was still some opposition to the activities of the company, but on a much smaller scale.[369] The following are testimonies of Los Encuentros community members and company workers:

> "Our relationship with Kinross is one of trust. With the other organizations it is neutral – based on respect and communication…Kinross has common values that coincide with what one learns as a child. The company is integrated: there is no egoism. It is a "second family"[male local Kinross employee]
>
> Kinross has a policy of not seeing any difference between workers, geologists, technicians: all are equal and treated as equals…The different mentality of the people that work in Kinross makes that everything with the community is better managed…The relation between the president of the parish council and the management of Kinross is very much based on respect and trust, which makes that community objectives are achieved…The community will not allow a company other than Kinross to enter… [male community members]"[370]

The level of engagement reached between the community of Los Encuentros and Kinross was so strong, that when Kinross sold the project to Lundin Gold, the community representatives

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[368] Kinross, *supra* note 359 at 96.
[369] Johannes Boon, *Corporate Social Responsibility, Relationships and the Course of Events in Mineral Exploration – an Exploratory Study* (PhD Thesis, Carleton University, 2015) [unpublished] at 62.
[370] *Ibid* at 232.

"presented Kinross with a plaque expressing its appreciation, and symbolically handed the keys of Los Encuentros over to the CEO of Lundin [Gold]."[371] The expectations of the community regarding engagement with the mining company were high, and Lundin Gold had to take over the task.

Lundin Gold acquired the mining concession with the objective to complete the exploration program and keep social relationships with the community in good standing. By 2015, the exploration program was completed, and the feasibility studies were ready to allow the beginning of the negotiation process with the Ecuadorian government for the development of the mine. Such negotiation successfully ended in 2016, with the signature of the agreement. It kicked off the construction of the mine site.[372]

Lunding Gold identified relevant stakeholders locally and globally, and created strategies for addressing their needs and concerns, based on the stakes they had.[373] It did so by continuing the work performed by Aurelian and Kinross, which reported a benefit for the company due to the good results they had achieved. Before the beginning of the construction of the mine site, Lundin Gold organized community roundtables with local communities and government entities. Topics addressed in these roundtables included inter-institutional coordination, agro-economic development, environmental responsibility, road safety and infrastructure, promotion of community ethics and cultural values, opportunities for local businesses, employment and

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[371] *Ibid* at 181.
[372] Lundin Gold, "Lundin Gold Signs Exploitation Agreement for Fruta del Norte", *Lundin Gold* (14 December 2016) online: <https://www.lundingold.com/en/news/lundin-gold-signs-exploitation-agreement-for-fruta-122521/>
[373] Lundin Gold, 2017 Sustainability report, building the future through responsible mining (Lundin Gold, 2017) at 26.

capacity building and tourism development.[374] "During the week-long process, the roundtables provide[d] a facilitated forum for participants to express their opinions, engage with other relevant stakeholders, and identify opportunities for collective action to address these priority issues."[375]

The rationale for involving government entities in the roundtables was to coordinate the community strategy with the goals and objectives of the government for the parish and surrounding communities. The involvement of the government was relevant for the continuity of the community support given by Lundin and turned out to be a key component of the planification of development made by the government for the area.[376]

New agreements were reached with the community of Los Encuentros, and new projects and developments were supported by Lundin Gold. Entrepreneurship programs continued, most of them focusing on livestock and agriculture, which were primarily designed to meet the needs of Lundin Gold's workers.[377] Engagement with the Shuar members continued as well. The framework produced in 2009 was updated and as a result, many projects were developed, such as "cross-cultural engagement, training, and the promotion of the Shuar culture and language."[378] Also, members of the community and the Shuar Nation were employed and are working in the construction of the mine site.[379]

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[374] *Ibid.*
[375] *Ibid.*
[376] Market one Media Group Inc., *supra* note 356.
[377] *Ibid.*
[378] *Lundin Gold*, *supra* note 373 at 27.
[379] Market one Media Group Inc., *supra* note 356.

Artisanal mining issues were addressed in the same way as Aurelian and Kinross did. The contracts signed between the former concession holders and artisanal miners were respected, and new contracts were signed with other miners. In total, 41 new contracts were signed by Lundin Gold and artisanal miners. They continued to receive training and were allocated small parcels of land for their activities. Other artisanal miners voluntarily abandoned the mining concession, and some miners who refused to negotiate or leave the mining concession were removed by the enforcement of eviction orders.[380]

The construction of the mine site is still undergoing according to the planification, without facing any opposition from the community. It is expected to be completed in 2019, and the first gold production is expected to begin on quarter four of 2019.

#### 3.2.2.2 Analysis

As was the case in the Panantza-San Carlos project, the Ecuadorian government was not involved in the consultation process made by Lundin Gold and its predecessors. The government got involved in 2016, upon the invitation by Lundin Gold to participate in the roundtables. This is almost 10 years after the mining concessions were granted. The role of the government during the roundtables was reduced to acknowledge the benefits that the community received and make them a part of the government's development plan for the region. It also had to harmonize the content of the education programs sponsored by the company with the national education guidelines. This involvement, however, is far from what the Ecuadorian constitution and international treaties provide with regards to prior consultation, as a formal consultation program

[380] *Lundin Gold, supra* note 373 at 28.

was never conducted by the government, and during informal consultation, the government was completely absent.

The strategy implemented by Lundin Gold and its predecessors to identify key relevant stakeholders was successful. Los Encuentros Parish and the Shuar Nation were the most affected communities by the mining activities. Many other stakeholders were identified as well, such as surrounding communities and artisanal miners. Early engagement in good faith with relevant stakeholders enabled the company to identify the views and needs of the communities from an early stage, and to address such concerns in an adequate manner. Early engagement also helped to obtain the approval and consent of the community to host mineral activities on their lands. It constituted a respectful way of approaching communities and introducing them to the potential benefits of mining activities.

A relevant cornerstone for a meaningful engagement between Kinross and the community was the negotiation and signing of the Co-operation agreement with the Shuar Federation. The strategy implemented by Aurelian Resources to approach and negotiate with the Shuar Federation from an early stage, contrasts with the way EXSA dealt with the members of the same Nation in the Panantza-San Carlos project. It is striking how two different and opposed approaches from mining companies to the same indigenous community resulted in completely different outcomes. Early engagement and dialogue lead to the approval of a project, while the lack of dialogue lead to conflicts and misunderstandings.

The engagement with the Shuar Federation led to the signing of a Co-operation agreement, which set the guidelines to determine the interests of the Shuar community with regards to the project. An element to highlight about the Co-operation agreement is that, despite the fact that it

has some typical IBAs clauses, such as infrastructure development and improvement or employment opportunities, there are no provisions related to royalties or any other similar economic benefit directly payable to the communities. This shows that IBAs do not have standard clauses. Different communities in different locations over the world have different needs, and royalties, considered a typical IBA clause, was not as relevant for the Shuar as was the respect for their culture, values and traditions.

The strategy implemented to address conflicts with artisanal miners was also successful. Not many companies agree to keep artisanal mining within their properties, as it constitutes a risk for the operations and reputation of the company. The Ecuadorian legislation makes the concession holder liable for any environmental damages caused within the boundaries of the concession, even if the damages are caused by contractors or any other operator authorized by the title holder.[381] In this sense, Aurelian Resources, Kinross and Lundin Gold assessed the risks that conflicting with artisanal miners might cause, and compared them with the risks that they were assuming by allowing artisanal operations within the mining concession. The conclusion drawn from their strategy is that it is better to enter into agreements and seek for the regularization of artisanal miners, allowing them to operate in small pieces of the concession, rather than conflicting with them. For this, the companies considered that most of the operating artisanal miners were members of Los Encuentros parish and the Shuar Nation.

Overall, the strategy implemented by the company was successful. Despite the fact that there was no formal consultation and no government involvement during the implementation of the exploration program, the companies that performed exploration for a decade managed to

[381] Constitution of the Republic of Ecuador, *supra* note 247 at 396.

administer risks in a way that avoided conflicts and, instead, allowed the acceptance of their presence and the acquisition of a SLO. Good faith was a key element during early engagement and negotiations, as it created trust among the parties. There were no stoppages reported for the FDN project, and the construction of the mine site is progressing according to Lundin Gold's planification.

Using the TB model to assess the FDN project, it could be inferred that the concession holders aimed to reach the full trust boundary. The community reached a level of "psychological identification" with the company, this is, that the majority of the community considered the project as a part of their identity.[382] This level, as the TB model provides, grants a SLO in the co-ownership level, and even though the community does not formally co-own the project, as is the case of the Muskowekwan Potash Project, they feel that the project is a relevant part of their day-to-day life, and a relevant partner for their daily economic activities.[383]

[382] *See* section 1.1.3 *above.*
[383] Boon, *supra* note 369.

## Chapter IV

## Company Actions Beyond the Law that could Lead to the Acquisition of the Social Licence to Operate

One of the objectives of this thesis is to determine whether compliance with the legal framework is in and of itself, sufficient to prevent social conflicts in the development of a mining project. Based on the description of the theory of the SLO, the legal frameworks and the analysis of the cases made previously, this Chapter will attempt to answer the question whether compliance with the law is enough to acquire the SLO. To do so, the most relevant actions of the mining companies described in Chapter 3 will be analysed to determine if such conducts: (i) were effective in the acquisition of the SLO; and, (ii) lie within or beyond the applicable legal framework.

### 4.1 Early engagement and two-way communication

Early engagement in good faith is the most crucial element of a successful relationship between resources companies and indigenous peoples.[384] This element was a key component for the success of the Muskowekwan and FDN projects. In contrast, the absence of early engagement in the Platinex case, and the lack of engagement in Panatza-San Carlos, led to misunderstandings and conflicts between indigenous peoples and mining titleholders.

Early engagement is understood as a process in which the mining proponent and indigenous communities (sometimes along with the government) set up a two-way communication process, in which the interests of both parties are shared and identified. For the

[384] Sara L. Seck, "Indigenous Rights, Environmental Rights, or Stakeholder Engagement: Comparing IFC and OECD Approaches to Implementation of the Business Responsibility to Respect Human Rights", (2016) 12:1 McGill International Journal on Sustainable Development and Policy, 53 at 96-7.

corporate side, this translates into "prevention of disputes at their early detection and understand[ing] local customs, culture and expectations."[385] It could also represent an opportunity to incorporate traditional knowledge as a part of the planification of the project.[386] For indigenous peoples, early engagement constitutes a sign of respect for their culture, values and territory. It acknowledges the fact that their land is being respected, and that there is a commitment to respect indigenous and human rights.[387]

In the Muskowekwan project, Encanto approached the indigenous community with a founded suspicion that the reserve territory was rich in mineral resources, but they did not enter the territory or made any exploration on it before contacting the Band's authorities and obtaining their consent to do so. Although there were legislative provisions obliging Encanto to do so, pursuant to the Indian Act and the Indian Mining regulations,[388] the action would probably have had the same effect if the lands of interest were located off-reserve. The consultation and accommodation regime for lands off-reserve in Canada created through case-law and most of the consultation and accommodation guidelines in the federal and provincial level encourage, though do not mandate, project proponents to engage at the earliest stage possible with indigenous peoples, to identify their views, needs and concerns, and accommodate such interests in the best possible way.[389]

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[385] Cynthia Kwakyewah and Uwafiokun Idemudia, "Canada-Ghana Engagements in the Mining Sector: Protecting Human Rights or Business as Usual" (2017) 4:1 Transnational Human Rights Review 146 at 168.
[386] Noble, *supra* note 82 at 25.
[387] *Ibid.*
[388] *See* section 2.1.2 *above.*
[389] *See* sections 1.7 and 2.1.1.4 *above.*

In the Platinex case, conversations did not start at an early stage. They began after Platinex acquired interest in land and obtained all necessary permits to perform exploration works on the land in which the KI had a claim. This was considered by the First Nation as disrespectful and a threat to their claim and rights. This most likely undermined the process of building trust between both parties, and ended up in a conflict that was only solved by a decision of a third party (the court and ultimately the Ontario government).

In the FDN case, early engagement was also a key element for the success of the project. It helped to build trust between the project proponent and the Shuar community. Early engagement in that case included information about the potential benefits of mining activities, the identification of sites of relevance for the Shuar Nation and the conceptualization and design of the project in a way that would not affect the Shuar's most relevant interests. It also showed respect for Shuar's culture, values and traditions.[390] This contrasts with Panantza-San Carlos, a project that affected the rights of the same indigenous community, but in which there was no engagement at all. The Shuar Nation was open to dialogue with Aurelian Resources at the early stage of the FDN project, and was open to dialogue with EXSA in Panantza-San Carlos as well. The different outcomes in these two projects were greatly determined by early engagement. This practice set the foundations for the acquisition of the SLO in the FDN project, and its absence caused conflicts in the Panantza-San Carlos project.

"Experience has shown that engagement with Aboriginal groups early in the planning and design phases of a proposed project can benefit all concerned. Conversely, there have been

[390] *See* section 3.2.2.2 *above.*

instances where failure to participate in a process of early engagement with Aboriginal people has led to avoidable project delays and increased costs to proponents."[391]

Corporate early engagement is a practice that is not provided by law in Canada or Ecuador. The legal framework for the duty to consult and consultation on reserve lands in Canada, and the legal framework for prior consultation in Ecuador, do not oblige, but encourage, mining resources companies to engage with indigenous communities. The legal framework in both jurisdictions provide for governments to conduct consultation processes at an early stage, but such provisions do not impose a duty on corporations, but on governments. The only exception, though not literal, could be the on-reserve consultation regime, in which project proponents are required to obtain the consent of the Band before performing any activity on reserve lands. Such consent would most likely be obtained, as the Muskowekwan project shows, after engaging in good faith in effective conversations with the Band.

### 4.2 Corporate-led consultation

Corporate-led consultation is different from early engagement. Early engagement is the beginning of conversations at an early stage, which sets the foundations for a better understanding between the parties, showing commitment and respect. Consultation is a continuous process of conversations, in which every aspect of the proposed project is discussed with indigenous peoples, and if possible, accommodated to their needs and requests. It is continuous because it starts with early engagement, but conversations are maintained during all the life of the project.

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[391] Association of Consulting Engineering – British Columbia, Resources for engaging First Nations & Aboriginal Communities (Victoria, BC, ACE-BC, 2015) at 11.

As mentioned previously, consultation with indigenous peoples is a duty of the government. In some cases, such as in Canada, "[t]he Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development."[392] These procedural aspects have been regulated by the federal and provincial governments in Canada through guidelines and policy documents, stating to what extent and how project proponents are to be involved in consultation.[393] In Ecuador, consultation is to be conducted by the government, through the "competent authority", pursuant to the Constitution, the Organic Environmental Code and the Organic Law for Public Participation. Ecuador does not allow project proponents to conduct procedural aspects of parts of the consultation process, as is the case in Canada.[394]

But in the absence of legal provisions or the unwillingness of governments to conduct a process of prior consultation with indigenous peoples, some companies have taken over the responsibility and performed consultation on their own, in a process of corporate-led consultation. This initiative was first considered in the MMSD report, which provided that "[c]ompanies should act as if consent to gain access to land were required even when the law does not demand this."[395] In some cases, the initiative extended to cases in which, even though the law provides for a process of consultation, the government is reluctant to perform it.

Corporate-led consultation is an initiative of the project proponent and is thus not provided by the law. An example of a successful corporate-led consultation process is the FDN project. In that case, even though the 1998 and 2008 Ecuadorian constitution provided for prior consultation

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[392] *Haida*, *supra* note 181 at para 53.
[393] *See* section 2.1.1.2 *above.*
[394] *See* section 2.2 *above.*
[395] MMSD report, *supra* note 176 at xviii.

before the prospecting stage, the government never attempted to perform consultation with the Shuar peoples. Instead, Aurelian Resources approached the Shuar Nation at an early stage and began the consultation process, which was continued by Kinross and which led to the signature of a co-operation agreement. The consultation process included many of the elements normally considered in processes of this type, such as the establishment of two-way communication, the consideration of indigenous concerns and the accommodation of their interests in the design of the project. This model was later taken over by Lundin Gold, which continued to consult the Shuar Nation during the final exploration stages and the construction of the mine site.[396]

If Lundin Gold and its predecessors would have left the government to decide whether or not to perform a formal consultation process, it is probable that the FDN project would not have been as successful as it turned out to be, and could have potentially encountered the same issues that the Panantza-San Carlos project went through. In that case, EXSA did not conduct a consultation process, did not require the government to undertake such process, and relied on the regulatory permits and enforcement. The result was a conflict that caused a casualty.

### 4.3 Impact-benefit and partnership agreements

IBAs are a very important component of the relationship between project proponents and indigenous communities. They are not only beneficial for the continuous development and operation of a project, but they also ensure that some of the benefits derived from projects would accrue to the community.[397] These benefits are not only economic, they include training and

[396] *See* section 3.2.2.1 *above*.
[397] *See* section 1.2.3 *above.*

employment opportunities, the construction of community infrastructure or the possibility to receive training for personal development.[398]

In the two successful cases discussed on Chapter 3, Muskowekwan and FDN, IBAs had a very important role in the relationship between the project proponents and indigenous communities. In the Muskowekwan case, the JV agreement contained typical IBAs clauses, such as training, employment for indigenous members and the payment of royalties once the project begins production. This agreement is the cornerstone of the relationship between the MFN and Encanto, as it was required by the MFN that any development within their lands had to be made in partnership with the community. [399] The conditions set upon the designation of land for mineral purposes were those finally considered for the development of the JV, which allowed the development of the project.

In the FDN project, the signing of the Co-operative agreement between Kinross and the Shuar community allowed the development of the project with full support of the indigenous community. Under the provisions of this agreement, the Shuar received compensations such as the construction of an Ethnographic Museum, improvement of existing infrastructure and the construction of new infrastructure, and employment opportunities in the project. This agreement also set the guidelines for the identification of areas of interest for the Shuar Nation during the development of the project.[400]

Although both agreements were not labelled as IBA, they contained the typical IBAs provisions and clarified the terms and conditions in which the mineral developments were to be

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[398] *See* section 1.2.2 *above.*
[399] *See* section 3.1.2 *above.*
[400] *See* section 3.2.2 *above.*

conducted on indigenous lands. In contrast, in the Platinex and Panantza-San Carlos cases, no IBAs were negotiated between the project proponents and indigenous communities. In these cases, they could not reach a point to negotiate an IBA because of the deficiencies in the indigenous consultation process. While in Panantza-San Carlos there was no consultation at all,[401] in Platinex the consultation was inappropriately conducted, and engagement with the community was so poor that an IBA became impossible to reach under those circumstances.[402]

Although negotiation of IBAs is solely between project proponents and communities,[403] legal frameworks in Canada and Ecuador make references to IBAs, although avoiding that name. In Canada, for instance, the Indian Act and the Indian Mining Regulations provide for a resource development to be made only "with the consent of the council of the band for whose use and benefit lands have been set apart and subject to such terms and conditions as the council of the band may approve."[404] In practical terms, this means that the resource development could proceed only if the conditions set by the band are met by the project proponent, subject to a process of negotiation, which was what indeed happened during the negotiation process for the development of the Muskowekwan Potash Project. The conditions and how they will be met would most likely be captured in an agreement.

As for the duty to consult in off-reserve lands, the outcome of a successful consultation will be the agreement on the terms and conditions of an IBA. "The legal requirement for IBAs principally come from three sources: (1) the common law duty to consult and s. 35 of the

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[401] *See* section 3.2.1 *above*
[402] *See* section 3.1.1 *above.*
[403] *See* section 1.2.1 *above.*
[404] *Indian Mining Regulations, supra* note 185 at s 6(1)

Constitution Act, 1982; (2) statutory requirements, including land claim or settlement agreements; and (3) regulatory requirements."[405] Although the case law related to the duty to consult does not refer specifically to reaching an IBA after consultation, it is expected that a successful consultation would lead to an agreement of this type.

In Ecuador, the 2008 Constitution provides that indigenous peoples have the right to "participate in the profits earned from these projects and to receive compensation for social, cultural and environmental damages caused to them."[406] The level of participation in the benefits of a project by indigenous peoples is not determined by law, so this issue constitutes an element to be addressed by project proponents. The FDN project constitutes a model for the negotiation of benefits for the community, which are not limited to economic benefits, but also include social and personal development for the community.

### 4.4 Good faith as a cross element

The two successful projects described in this thesis have a critical element in common. Encanto and the companies involved in the FDN project contacted, negotiated and addressed all the concerns of their communities of interest in good faith. They began building trust by being transparent in what their interest were in relation to the land and opened a communication channel to know and openly discuss the position and interests of the affected communities. Good faith builds trust, which is a crucial requirement for the acquisition of the SLO.[407] Communities responded the actions of these companies with similar good faith, up to the point that the MFN is a partner of Encanto, for the development of the project. In both cases, support for projects has

[405] Sandra Gogal *et al.*, supra note 112 at 130.
[406] Constitution of the Republic of Ecuador, *supra* note 247.
[407] *See* section 1.1.3 *above.*

been constant through the years and activities in both projects have not been disrupted by social conflicts.

## Conclusions and Recommendations

Compliance with the law does not guarantee the acquisition of the SLO. Companies that seek to comply with the environmental assessment process and are involved in the consultation led by the government only in "procedural aspects" are prone to fail in the acquisition of the SLO. The cases of Platinex and Panantza-San Carlos clearly show that obtaining all regulatory

approvals and permits does not entitle project proponents to enter lands where there are indigenous interests or rights. It is also a mistake to believe that the enforcement of the rights acquired by a permit holder is an effective mechanism to access lands. These two unsuccessful projects sought for the enforcement of these titles and permits, and the consequence was an escalation of conflict rather than a solution to it. Enforcement becomes less useful if force is used for that purpose. Platinex and Panantza-San Carlos employed legal actions and sough remedies provided by law, including the use of force (though in different levels). The consequences of such actions were detrimental to the interests of the companies.

Early engagement in good faith is the most effective strategy to build relationships between project developers and indigenous communities. As was shown in the Muskowekwan and FDN projects, early engagement was the foundation for the fruitful conversations that the mining developers engaged in during the development of the projects. Early engagement shows respect for the land and culture of indigenous communities and changes the discourse of "invasion of indigenous lands" to one of "partnership" and socio-economic development. It is manifest that early engagement is a crucial component for the acquisition of the SLO, as the two projects that practiced it had successful outcomes, while the two projects that did not engage with local communities at an early stage generated increasing conflict along the way. It is important to note the relevance of early engagement when analyzing the Panantza-San Carlos and FDN projects, as the indigenous community involved in both projects is the same Shuar Nation. On Panantza-San Carlos, the lack of early engagement led to conflict with the Shuar, while the same Shuar accepted the development of the FDN project because its developer had a different approach to them.

Early engagement is not provided by law, though it is encouraged by government agencies in Canada. In Ecuador, there are no provisions that mandate project developers to engage at an early stage with indigenous communities. In this sense, early engagement could be considered as a practice beyond the limits of the law that aids in the acquisition of the SLO. This is the reason why private mining guidelines, such as the ICMM principles and the Mining Association of Canada Guiding Principles, promote early engagement as a desired practice among their members.

Another successful practice that helps in the acquisition of the SLO is corporate-led consultation. In countries in which indigenous consultation is not promoted or enforced by the government, corporations are encouraged to take a step forward and conduct consultation by themselves. This constitutes a significant part of early engagement, and includes listening and addressing, as much as possible, the concerns of the community, incorporating their views and giving solid answers to their concerns. The development of IBAs, or agreements containing typical IBA clauses is likely to be the conclusion of negotiations. Reaching an IBA could be considered as the materialization of the SLO, though after committing to an IBA would still require a continuous process of consultation through the life of the project, in order to maintain the SLO and the overall trust of indigenous communities.

The two successful projects analysed in this thesis signed agreements that contained typical IBA clauses, such as employment opportunities, training, personal development programs, the identification of community needs, and the construction and provision of local infrastructure aligned with their culture and values. In contrast, the two unsuccessful projects analyzed in this

thesis did not reach the point in which there was enough trust to reach an IBA, and therefore the SLO never materialized.

The acquisition of a SLO depends mainly on how the company approaches indigenous communities, on how well they respond to the concerns and needs of the community and in the good faith of the parties during the entire process. It is also a continuous process in which constant consultation and full transparency is required in order to maintain it. The level of trust that the company would build in the community will depend on how transparent and how efficient the company is in terms of responding to the needs of the community. For the acquisition of the SLO, the government has a secondary, almost inexistent role. It is recommended that the project developer takes the lead in engaging with indigenous communities at an early stage, and ensure that its relationship with the community is strong enough to obtain and maintain the SLO, even if the project is situated in a jurisdiction like Ecuador, where the government does not perform or support any formal consultation.

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