The Juridical Nature of Participatory Governance and the Integration of Community Interests in Natural Resource Extraction and Management in Canada and Ghana

by

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Abstract

There has been relatively little scholarly engagement with the question of how Ghana could best ensure adequate consideration for local interests, regarding natural resource development projects in mining communities such as Obuasi, Tarkwa, Prestea, and Akwatia. This dissertation attempts to fill that void by exploring ways in which the Ghanaian government could successfully balance the interests arising from its mineral rights, with those arising from the land rights of mining communities, thereby ensuring that the latter benefit from mineral resource development. In this regard, one approach suggested in the literature is to enhance the participation of these communities in the decision-making process surrounding mineral development. The present study interrogates this approach and develops a regime or framework for the meaningful participation of Ghana's mining communities in mineral development decisions. It draws upon Canadian jurisprudence on the duty to consult and accommodate Indigenous peoples in natural resource development, as well as on principles of public international law, the democratic theory of participation, and Sherry Arnstein's concept of power and participation, by way of comparison. Hence, the impact of a legal right to participation – or lack thereof – is exposed, specifically relating to community participation in natural resource development. It is revealed that legitimizing participation by foregrounding it in a legal or juridical right could provide mining communities with sufficient leverage to negotiate with stakeholders, especially the government and mining companies, by adding weight and drawing attention to their interests. The existence of such a right would enable these communities to legally challenge and influence government decisions concerning mineral development. It could also serve as the basis for contractual and other arrangements with mining companies, aimed at advancing the local interests of mining communities. Accordingly, this dissertation argues and advocates for the recognition of a legal right of mining communities to participate in decisions about mineral development. Also examined

in this study are the features of a legal regime to promote meaningful participation in Ghana, whereupon it is proposed that the regime must first guarantee an enforceable right to participate in decision-making. Such a right would permit the courts to provide structural encouragement for meaningful participation. Second, the regime must ensure that the affected communities receive all the necessary information to make informed decisions about a proposed project. Third, to ensure that mining communities can respond to and challenge any decisions that might be contrary to their interests, they should be included at an early enough stage of the decision-making process to be able to influence a decision. Finally, the regime should provide financial and economic benefits to mining communities, where appropriate. These features of a meaningful participation regime are reflected in the experience of the duty to consult and accommodate, as institutionalized and practiced in Canada. This dissertation recommends workable measures for implementing a meaningful participation regime or framework, thereby ensuring sufficient consideration of the interests of mining communities in Ghana's natural resource development projects.

Dedication

To Dr. Ernest Owusu-Dapaa, Kwame Nkrumah University of Science and Technology, thank you for your enormous support in my academic career.

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Contents

CHAPTER ONE: THE GLITTERING FAÇADE – AN INTRODUCTION TO THE PARADOX OF GHANAIAN MINING COMMUNITIES

1.1 Background to the Dissertation

Ghana's mineral industry has contributed significantly to its socio-economic development. However, the communities affected by mining activities are still not deriving their fair share from the exploitation and development of the country's abundant mineral wealth. According to data from the Bank of Ghana, proceeds from the export of minerals amounted to US$ 6,004 million in 2017, compared to US$ 5,060 million in 2016.[1] This represents an increase of 19%. In 2018, the Ghana Chamber of Mines reported that the realized mineral revenue of its member companies rose by 13% to US$ 5.945 billion in 2017, from US$ 5.262 billion in 2016.[2] The Golden Star Resources Wassa Mine, for example, recorded a 31% growth in output from 11,062 ounces of gold in 2016 to 61,437 ounces in 2017.[3]

For mining communities, the exploitation of these minerals is associated with significant risk to personal safety and the environment. In most cases, the socio-environmental impact of mining most directly affects the livelihoods of those who live in the vicinity of mining projects. Natural resource exploitation and development have negative impacts on the original owners in communities which rely on the large tracts of arable land that are required for the livelihood of

[1] See Bank of Ghana, "Annual Report 2017" (17 July 2018), online: *Bank of Ghana* <https://bog.gov.gh/privatecontent/Publications/Annual_Reports/Annual%20Report%202017%2012th%20July.pdf> at 16 - 17. See also African Eye Report, "Ghana Receives $6,004 Million from Minerals Export" (26 November 2018) online:<https://africaneyereport.com/ghana-receives-6004-million-from-minerals-export/> [https://perma.cc/K3T6-4GRZ].

[2] The Ghana Chamber of Mines, *Performance of the Mining Industry in 2017* (06 January 2018), online: < https://ghanachamberofmines.org/wp-content/uploads/2016/11/Performance-of-the-Industry-2017.pdf> [https://perma.cc/ETB2-EHLN] at 13.

[3] *Ibid* at 17.

their members. Communities that once owned such land and depended on this resource must now look elsewhere to earn a living.[4] As a result, most of these environments have become death traps instead of freeing their inhabitants from poverty and hunger. Rarely are these concerns included as a key component of mineral development.

Thus, although communities living around mining areas bear the brunt of the social and environmental impact of mining operations, they have not significantly benefited from mining activities.[5] The evidence shows that mining communities do not capture the wealth produced by their land, despite the minerals that are obtained from it. For instance, in May 2018, the President of the Republic of Ghana asked some poignant questions in his address at the *12th West African Mining and Power Conference* in Accra:

> Why is Obuasi not the most beautiful city in Ghana or the world if it hosts the richest Gold mine? Why do Tarkwa and Prestea not look like the Golden towns they are? Why does Akwatia's appearance not reflect anything about the diamonds that have been taken from the soil all these years?[6]

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[4] In their research on the "Impacts of Surface Gold Mining on Land Use Systems in Western Ghana," Schueler et al observed that surface mining resulted in deforestation (58%), a substantial loss of farmland (45%) within mining concessions, and widespread spill-over effects as relocated farmers expand farmland into forests. See generally Vivian Schueler et al, "Impacts of Surface Gold Mining on Land Use Systems in Western Ghana" (2011) 40:5 AMBIO 528.

[5] See Victor Kwawukume, "State of Akwatia, Tarkwa, Obuasi is a Disgrace to Ghana's dev — Akufo-Addo" (31 May 2018), online: Graphic Online < https://www.graphic.com.gh/news/general-news/state-of-akwatia-tarkwa-obuasi-is-a-disgrace-to-ghana-s-dev-akufo-addo.html> [https://perma.cc/8DLF-MSDS].

[6] *Ibid*. Residents of mining communities in Ghana are increasingly voicing their dissatisfaction with their living conditions and the lack of socio-economic development in the communities. For example, as a means of protest, the residents of Tarkwa (a mining community in Ghana) on 26th September 2018, forcibly prevented the Minister for Lands and Natural Resources, Mr Asumah Kyeremah from accessing the community. See Oswald K Azumah, "Tarkwa Residents Block 'Bad Roads'; Prevent Minister from Entering" (26 September 2019), online: myjoyonline < https://www.myjoyonline.com/news/2018/September-26th/tarkwa-residents-block-bad-roads-prevent-minister-from-entering.php> [https://perma.cc/6UZH-YEPC].

These sentiments capture what is unquestionably a dilemma that is common to many resource-rich African countries. Communities affected by mining activities are usually dissatisfied with mineral exploitation for two reasons: the lack of socio-economic benefits from the mineral development and the adverse impact of mineral operations on the environment and on the livelihood of the community.[7] The purpose of this work is to identify what legal provisions Ghana could adopt to help redistribute the socio-environmental cost of mining, which is currently borne by the communities affected by such projects, and to ensure that these communities reap some of the benefits of mining activities.

One avenue to look for answers to the problems faced by communities affected by mining operations in Ghana is the country's existing minerals production regime. The *Constitution of the Republic of Ghana,* 1992, splits property rights between landowners and the owners of mineral rights. Traditional authorities own the surface, but the State owns the minerals underground. Allodial title (the highest proprietary interest identified in the customary scheme of interests in land) to the surface of most mineral-rich land in Ghana is vested in traditional communities, which are usually managed by a custodian (a chief or head of a family), assisted by the principal elders of the community.[8] Conversely, every mineral in its natural state belongs to the Republic and is

[7] See Evaristus Oshionebo, "Community Development Agreements as Tools for Local Participation in Natural Resource Projects in Africa" in Markus Krajewski, ed., *Human Rights in the Extractive Industries: Transparency, Participation, Resistance* (Cham, Switzerland: Springer, 2019) 77 - 109 at 94.

[8] See generally Gordon R Woodman, "The Allodial Title to Land" (1968) 5:2 UGLJ 79; Kwamena Bentsi-Enchill, *Ghana land law; an Exposition, Analysis, and Critique* (London: Sweet & Maxwell, 1964) and N A Ollenu, *Principles of Customary Land Law in Ghana*, 2nd ed (Birmingham: Cal Press, 1985) at 11.

vested in the President on behalf of and in trust for the people.[9] The Supreme Court of Ghana (SCG) has held that:

> the lodgment of the ownership of minerals in their natural state in the Republic of Ghana and the President in trust for the people of Ghana, generally, does also exclude the enjoyment, management, and control of such minerals from the stools[10] and individuals in whose lands such minerals are found.[11]

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[9] See *Constitution of the Republic of Ghana*, 1992, art 257(6) and the *Minerals and Mining Act*, 2006 (Act 703), s1. The position of trustee that the President assumes raises the question of whether the government has a duty to consult the people, or for that matter, mining communities in the discharge of its duties. Although a complete discussion of this is beyond the scope of this dissertation, it is important to mention that in the US and under some Canadian authorities (see generally *Burns Bog Conservation Society v Canada (Attorney General)*, 2012 FC 1024), the government's position as a trustee creates a strong argument for the public trust doctrine. For a more detailed discussion of the trust relationship, see generally Anna Lund, "Canadian Approaches to America's Public Trust Doctrine: Classic Trusts, Fiduciary Duties, & Substantive Review" (2012) 23:2 J Envtl L & Prac 135; J C Maguire, "Fashioning an Equitable Vision for Public Resource Protection and Development in Canada: The Public Trust Doctrine Revisited and Reconceptualized" (1997) 7 JELP 1; Paul V Baker & Peter J Langan, *Snell's Principles of Equity, 28th ed* (London: Sweet and Maxwell Ltd, 1982) at pp 197-293. It is also worth mentioning that despite the vesting of mineral rights in the President through the land tenure system, the law recognizes the strong emotional and historical ties of rural or Indigenous people to their land.

[10] Kasanga and Kotey explain a stool as 'the seat of a chief of an Indigenous state (sometimes of a head of family) which represents the source of authority of the chief (or head of family). It is a symbol of unity and its responsibility devolves upon its living representatives, the chief, and his councilors. Land owned by such a state is referred to as stool land.' See Kasim Kasanga & Nii Ashie Kotey, "Land Management in Ghana: Building on Tradition and Modernity" (February 2001), online: International Institute for Environment and Development < https://pubs.iied.org/pdfs/9002IIED.pdf> [https://perma.cc/77R6-ZTLT] at note 18. Meanwhile, a skin in northern Ghana is the equivalent of a stool in southern Ghana. In *Nkwantabisah III v Bonsu* (1997-98) 1 GLR 892-914 [Nkwantabisah], the Court of Appeal explained that 'stools represent the sovereignty of the people and held land to the benefit of the people, so when land is said to belong to the people it means stool land in the occupation of individual subjects and families and it is the stool which is the rightful person with capacity to deal with such land.' The authority indicates the significant role of the chieftaincy institution in Ghana's land tenure system. For a general overview of the disposition of stool property, see Articles 267(3) and (4) of the 1992 Constitution; Sections 44-48 of the *Chieftaincy Act*, 2008 (Act 759); section 10 of the *Lands Commission Act*, 2008 (Act 767); section 7 of the Office of the *Administrator of Stool Lands Act*, 1994 (Act 481), and section 8 of the Administration of Lands Act, 1962 (Act 123). A prospective investor must know the right person(s) to deal with when contemplating acquiring an interest in land to avoid saddling himself with litigation.

[11] See *Okofo Sobin Kan II v Attorney General* (30 July 2014), Writ No. JI/2/2012, Supreme Court of Ghana at para 20 [Okofo Sobin]. In a different but related context, see generally Alexandra Carleton, "Constitutional Incorporation of the (Collective) Freedom to Govern Mineral Wealth: Comparing the

What is evident from the existing regime is that mining communities, or any member of a mining community, have no inherent or direct right to explore for minerals on the land that they occupy; neither can the community grant or exercise such a right. There is no legal avenue for benefiting from mineral-rich land by participating in mineral development that would guarantee mining communities "to be in full charge of policy and managerial aspects,"[12] because this is foreclosed by the Constitution.

The existing legal regime for regulating minerals production differs significantly from that of the pre-colonization era, where mining communities had exclusive control over the exploitation and development of minerals on their land. This historical participation of mining communities in mineral development is well documented, and there is much evidence of mining communities participating actively in mining operations, whether directly or indirectly. However, the colonial and post-colonial eras witnessed a regulatory 'command and control' framework under which the right and power of traditional communities to participate in the development of minerals on their land was restricted.[13]

The current state of affairs makes it pertinent to explore other avenues of participation and to examine how the Ghanaian government can successfully balance its mineral rights with the land

Democratic Republic of the Congo and the Republic of Zambia" (2020) 28:1 Afr J Int'l & Comp L 1 – 29 (on the limitations upon a people's claim to freely govern their mineral wealth).

[12] See Sherry R Arnstein, "A Ladder of Citizen Participation" (1969) 35:4 Journal of the American Planning Association 216 at 233. At this rung, 'participants or residents can govern a program or an institution, be in full charge of policy and managerial aspects, and be able to negotiate the conditions under which "outsiders" may change them.'

[13] See Ollenu, *supra* note 8 at 9 – 15, and Raymond E Dumett, "Precolonial Gold Mining in Wassa: Innovation, Specialization, Linkages to the Economy and to The State" in Enid Schildkrout, ed *The Golden Stool: Studies of the Asante Center and Periphery* (New York: Order of the Trustees, 1907) at 213.

rights of mining communities so that the affected communities can benefit from the development of these resources.

1.2 Research Questions to Be Addressed

A fundamental problem created by the State control of minerals is that mining communities cannot influence or benefit from mineral exploitation. This is compounded by the fact that there is little or no mechanism for the communities affected by these projects to be consulted or involved in decision-making processes over mineral development. There are few or no means for addressing their concerns. Given the current regime, the potential for mining communities to benefit from mineral exploration is a function of the President of Ghana's discharge of obligations as a trustee of Ghana's mineral resources and sometimes such other benefits that mining company initiatives may voluntarily confer. A major challenge presented by companies' voluntary initiatives to the communities affected by mining projects consists of their non-binding or voluntary nature. This dissertation argues that although such initiatives could in some cases help mitigate the impact of mineral exploitation on project-affected communities, they are no substitute for comprehensive mining legislation, which could be enforced to protect mining communities. Advocates have rightly suggested that for the long-term success of voluntary corporate codes, these corporate values should be transformed into private law obligations.[14]

This dissertation will analyze the effectiveness and meaningfulness of community participation in Ghana's mineral exploitation. It will determine whether Ghana's current participatory regime for mineral development is effective in providing benefits and avoiding costs

[14] See, for example, HiiL Innovation Justice, "Enforcing Corporate Social Responsibility: Transforming voluntary corporate codes into private law obligations?" (17 October 2014) online: <http://www.hiil.org/events/enforcing-corporate-social-responsibility-transforming-voluntary-corporate-codes-private-law-oblivation> [https://perma.cc/3ZNP-U2FT].

to project-affected communities, as well as in improving their local circumstances. The dissertation will examine the extent to which power relations influence decision-making and whether the imbalance of power really matters in participatory practice. The central argument is that 'community participation,' if it is to be more than palliative, involves shifts in power. The following questions will consequently be addressed:

i. Does a substantive right to community participation present an opportunity for mineral exploitation to contribute to the socio-economic development of mining communities in Ghana?
ii. How can the Ghanaian government successfully balance its mineral rights with the land rights of mining communities in order for the communities affected by mining projects to benefit from the development of mineral resources?
iii. How can the communities affected by mining projects ensure that decision-making agencies recognize their concerns?
iv. Can the communities affected by mining projects participate meaningfully in mineral development, without access to the court, if unacceptable decisions are imposed by the decision-maker?
v. What are the appropriate criteria for evaluating an effective participatory process?

1.3 Approach to Resolving the Research Questions

This dissertation will first address these questions by drawing on participatory scholarship to explore what is considered participation that can benefit the communities affected by mining projects. Secondly, this dissertation will examine whether a legal foundation for community participation in mining, energy, and natural resource decision-making can be found in international law, subsequently identifying the normative basis of that rule. Finally, the practice and

implementation of a 'duty to consult' in Canada will be reviewed as a potential model for the formulation of a meaningful participation regime to protect mining communities in Ghana.

International natural resources law and the academic literature recommend community participation as an effective means of ensuring that the interests of affected communities are represented in mining projects and policies.[15] The *1992 Rio Declaration* emphasizes public participation as a fundamental prerequisite for the sustainable development of natural resources.[16] In addition, the *African Convention on the Conservation of Nature and Natural Resources*[17] incorporates a right to community participation as a prerequisite for the sustainable development

[15] The scholarship on the benefits of community participation is extensive; see generally Barry Barton, "Underlying Concepts and Theoretical Issues in Public Participation in Resource Development" in Donald N. Zillman, Alastair R. Lucas & George Pring, eds., *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford: Oxford University, 2002) 77; Donald N Zillman "Introduction to Public Participation in the Twenty-first Century" in Donald Zillman, Alistair Lucas, George (Rock) Pring, eds *Human Rights in Natural Resource Development, Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford University Press, Oxford, 2002) 1; Ciaran O'Faircheallaigh, "Public Participation and Environmental Impact Assessment: Purposes, Implications, and Lessons for Public Policy Making" (2010) 30 Environmental Impact Assessment Review 19; Rebeca Macias, *Public Participation in Energy and Natural Resource Development: A Theory and Criteria for Evaluation* (Calgary: Canadian Institute of Resources Law, 2010); Leanne Farrell et al, "A clash of cultures (and lawyers): Anglo Platinum and mine-affected communities in Limpopo Province, South Africa" (2012) 37:2 Resource Policy 194. See also Report of the United Nations Conference on Environment and Development, Resolution 1, UN Doc.A/Conf.151/26/Rev.1 (vol. 1) (1993), 31 I.L.M 876 [Rio Declaration], Principle 10; United Nations Economic Commission for Europe (UNECE), *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, 25 June 1998, 38I.L.M. 517 (1999) (entered into force on 30 October 2001) [Aarhus Convention]; and *African Convention on the Conservation of Nature and Natural Resources*, 15 September 1968, AU CAB/LEG/24.1 (entered into force on 16 June 1969).

[16] Report of the United Nations Conference on Environment and Development, Resolution 1, UN Doc.A/Conf.151/26/Rev.1 (vol. 1) (1993), 31 I.L.M 876 [Rio Declaration], online: United Nations <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>, Principle 10.

[17] African Convention on the Conservation of Nature and Natural Resources (07 March 2017) Organization of African Unity, online: < https://au.int/sites/default/files/treaties/7782-treaty-0029_-_revised_african_convention_on_the_conservation_of_nature_and_natural_resources_e.pdf>. The Convention was rectified by Ghana on 13 June 2017. See <https://au.int/sites/default/files/treaties/7782-sl-revised_african_convention_on_the_conservation_of_nature_and_natural_resources.pdf>.

of Africa's natural resources.[18] Community participation has the advantage of increasing the trust and support of the communities concerned. In jurisdictions where community participation is effective in practice, there is evidence of fair decision-making outcomes.[19] These are some of the many advantages that governments, mining companies, and mining communities stand to gain through effective community participation.

Despite the extensive literature on the importance and value of this participation, few guidelines exist on how to achieve it effectively in practice. The present dissertation endeavors to fill this gap in the literature. This dissertation uses the Canadian experience with the duty to consult concept to bring to the foreground the ways in which reforms to the power relationship between the government, mining companies, and marginalized communities could help yield socio-economic benefits to the affected communities, protecting them from adverse infringement of their cultural and land rights. The duty to consult enables Indigenous communities to benefit from the natural resource development that takes place on their land, even empowering them to block some solutions that are unacceptable from their perspective. The dissertation subsequently presents the argument that the duty to consult provides a sound model for developing a workable community participation framework for marginalized communities in Ghana, whose traditional lands are exploited for mining purposes. Some curious minds, or rather pessimists, may contest that attempting to transplant the duty to consult from Canada to Ghana may not be feasible due to differences in legal culture between the two countries. Nevertheless, this study will ascertain how

[18] See also United Nations Economic Commission for Europe (UNECE), *Convention on Access to Information Public Participation in Decision-Making and Access to Justice in Environmental Matters*, 25 June 1998, 38I.L.M. 517 (1999) (entered into force on 30 October 2001) [Aarhus Convention].

[19] See generally Patrick D Smith & Maureen H McDonough, "Beyond Public Participation: Fairness in Natural Resource Decision Making" (2001) 14:3 Society Natural Resources 239.

far mining communities in Ghana can be characterized as Indigenous and if not, how traditionally marginalized communities share some characteristics with Indigenous communities (or their Indigenous counterparts).

1.4 Theoretical Framework

The theoretical framework of this dissertation builds on valuable contributions made by Sherry Arnstein,[20] Carole Pateman,[21] and others within the sphere of community participation[22] in natural resource development. However, it constitutes a distinctive work in significant respects as it addresses meaningful participation through the lens of power relations between the government, mining companies, and mining communities. This dissertation does not argue for participation as an *end* in itself (where mining communities set up a process to control their resources and development).[23] Rather, this dissertation explores how the institutionalization of a substantive right to consultation and participation provides opportunities for project-affected communities to be

[20] See Arnstein, *supra* note 12.

[21] See generally Carole Pateman, *Participation & Democratic Theory* (Cambridge: Cambridge University Press, 1970).

[22] See generally James Bohman, "Complexity, Pluralism, and the Constitutional State: On Habermas' Faktizität und Geltung" (1994) 28:4 Law & Soc'y Rev 897; Thomas Webler, "'Right' Discourse in Citizen Participation: An Evaluative Yardstick" in Ortwin Renn, Thomas Webler & Peter M. Wiedemann, eds, Fairness and Competence in Citizen Participation: Evaluating Models for Environmental Discourse (Dordrecht, Boston, London: Kluwer Academic Publishers, 1995) 35; Thomas Webler & Seth Tuler, "Fairness and Competence in Citizen Participation: Theoretical Reflections from a Case Study" (2000) 32:5 Administration & Society 566; Simone Chambers, "Deliberative democratic theory" (2003) 6 Annu Rev Polit Sci 307; Andrea Cornwall, "Unpacking 'Participation': Models, Meanings and Practices" (2008) 43:3 Community Development Journal 269;

[23] See Arnstein, *supra* note 12. See also Alexandra Carleton, "Constitutional Incorporation of the (Collective) Freedom to Govern Mineral Wealth: Comparing the Democratic Republic of the Congo and the Republic of Zambia" (2020) 28:1 Afr J Int'l & Comp L 1 – 29 (on the limitations upon a people's claim to freely govern their mineral wealth).

treated as partners in the development of minerals beneath their land. In essence, the present dissertation invites participatory scholars and policymakers alike to refrain from merely assessing meaningful participation in terms of democratic principles, such as fairness, legitimacy, and the quality of decisions, but to look more at its potential for extending socio-economic and sustainable benefits to the impacted communities. This dissertation highlights the role of the courts as a third sector that can exert influence over the shaping of meaningful participation to benefit project-affected communities.

This dissertation concludes that the effectiveness of Ghana's community participation regime is substantially reduced by the balance of power between the government, mining companies, and mining communities. So far, community participation has had no meaningful impact on the communities affected by mining activities. The lack of legal leverage for these communities to enforce and demand meaningful participation is fatal when they seek to benefit from the development of natural resources. I argue for the elevation of participatory conditions from mere policy preferences to substantive legal requirements in order to ensure the communities can meaningfully engage in the development of mineral resources.[24] Without any legal power to influence government decisions, participation will only be an empty ritual with no meaningful impact on the affected communities.

Ultimately, this dissertation illustrates that a legal right to participation is the key to defining the relationship between the government and mining communities, as well as the relationship

[24] See Arnstein, *supra* note 12; Pablo A Leal, "Participation: The Ascendancy of a Buzzword in the Neo-Liberal Ear" in Andrea Cornwall ed. *The Participation Reader* (London: Zed, 2011) 77; Jules N Pretty, Participatory Learning for Sustainable Agriculture (1995) 23:8 World Development 1247; Marisa B Guaraldo Choguill, "A Ladder of Community Participation for Underdeveloped Countries" (1996) 20:3 Habitat International 431.

between mining companies and the communities that they impact. To overcome the deficiencies in the existing regime, model laws and practical schemes are proposed for adoption in Ghana as a means of ensuring more effective participation of mining communities in the development of mineral resources, ultimately advancing their socio-economic development. The dissertation develops a mechanism that could mediate and facilitate meaningful community participation for the benefit of the affected communities. This would consequently help redefine mining communities such as Obuasi, Tarkwa, Prestea, and Akwatia with an "appearance [that reflects the fact that minerals] have been taken from the soil all these years."[25]

1.5 Organization of the Dissertation

This dissertation is divided into six chapters. Chapter Two provides the theoretical context, which guides the analysis in this study, examining the theories and scholarship on community participation. The chapter begins with justifications for community participation in natural resource development and reviews the processes and substantive rationales for participation to establish a basis for community participation in the exploitation of natural resources. The chapter demonstrates the value of participation by mining communities in the design and implementation of mining projects, showing that community participation increases collective gains for governments, mining companies, and project-affected communities.

Chapter Two also establishes that community participation holds a clear advantage over conventional development models for the exploitation and management of natural resources. Towards this end, the chapter employs democratic/participatory theory to explore the ideals of

[25] In a different but related context, see generally Chris Adomako-Kwakye, "Neglect of Mining Areas in Ghana: the Case for Equitable Distribution of Resource Revenue" (2018) Commonwealth Law Bulletin 1 (on the recommendation that part of the revenue that accrues to the nation from its minerals must be reserved for a national fund for the development of the mining areas).

effective community participation and uses Arnstein's ladder of citizen participation to analyze what constitutes beneficial participation for an affected community. Drawing on both the democratic/participation theory and Arnstein's model, Chapter Two concludes with a framework for promoting meaningful participation, referred to here as substantive participation, as well as with the rules to guide that framework.

Chapter Three examines public participation in international instruments of environmental and natural resource law. The chapter examines the extent to which international laws and processes have shaped the content and implementation of community participation in the exploitation and management of minerals. On an international level, there appears to be a shift in community participation from a mere aspiration towards a legal system that requires compliance. The chapter discusses the emerging trend in international natural resource law toward enforceable participatory rights and explores the concerted efforts made towards the justiciability of three 'access rights' – access to information, access to decision-making, and access to justice – in order to ensure meaningful community participation. The chapter demonstrates that global and regional natural resource instruments have, at their core, legal principles that seek to legally balance the power relationship between the government, mining companies, and the communities affected by mining projects. Finally, the chapter examines the status of these international law instruments in Ghana, concluding that they entitle the communities affected by natural resource development in Ghana to meaningful participation in decision-making over natural resources. However, it is unclear whether the Ghanaian courts will apply the instruments that Ghana has ratified but failed to incorporate in domestic law.

Canada is a well-known leader in natural resource exploitation and management, with a participatory regime that has attracted a great deal of attention. Chapter Four presents a case study

on community participation by examining the participation and consultation of Indigenous communities in mineral exploitation and development in Canada. The discussion supports the proposition that Indigenous and marginalized groups can obtain greater benefits from resource extraction if their rights are recognized in a solid legal framework. The chapter begins with an overview of the participation of Indigenous peoples at common law before the Supreme Court of Canada developed a constitutional duty to consult. The chapter demonstrates how the imbalance of power in the relationship between the government, mining companies, and Indigenous communities previously allowed the Crown to conduct activities and make decisions that could seriously affect the rights of Indigenous peoples without consultation or even reference to the affected Indigenous group. The chapter discusses the emergence of a substantive right to consultation amongst Indigenous communities with regard to mineral development. It shows how the duty to consult empowers Indigenous peoples to influence the decisions of government and mining companies to the benefit of the communities.

Chapter Four reveals that, unlike the common law, the duty to consult guarantees Indigenous peoples meaningful participation in natural resource development wherever this could infringe their rights. More importantly, the duty to consult is a substantive constraint on government discretion to engage Indigenous communities in natural resource projects. The discussions clarify that the duty to consult has prompted both the government and mining companies to give much greater attention and weight to the interests of Indigenous communities. Moreover, the duty to consult has led to the emergence of Impact Benefit Agreements (IBAs), which have contributed to the socio-economic development of many Indigenous communities. Chapter Four, therefore, provides useful comparative insights into how a legally balanced power relationship between the

government, mining companies, and project-affected mining communities can ensure meaningful participation.

Chapter Five examines the current legal regime for the participation of communities affected by mining activities in Ghana. The chapter focuses on the established legal framework for the participation of communities which are affected by the exploitation and development of mineral resources. Understanding the customary legal principles of land ownership in Ghana is a fundamental prerequisite in the debate over meaningful community participation in Ghana's mineral development. Chapter Five begins by outlining Ghana's land tenure system and the historical participation of mining communities in mineral development, both pre- and post-colonization. The chapter discusses the impact of colonization on the participatory and controlling role played by traditional communities in mineral development. It then examines the current legal regime governing community participation in the exploitation and development of minerals.

This examination involves a detailed assessment of the participation rights of mining communities in the *Constitution of the Republic of Ghana,* 1992, the *Minerals and Mining Act*, the *Environmental Impact Assessment Act*, and the *Minerals Development Fund Act*. The chapter shows how the existing regimes regulate the power relationship between the government, mining companies, and mining communities. The chapter concludes that although there are opportunities for mining communities in Ghana to participate in minerals development, the current community participation regime could be described as mere 'tokenism', with no meaningful impact on the affected communities. In fact, the existing power relationship significantly disadvantages mining communities because it provides them with no meaningful legal recourse. The government offers opportunities for the affected communities to participate, but they lack any power to influence government decisions or actions.

The creation and institutionalization of a consultation regime depend on the legal regime and history of each country. The duty to consult in Canada has achieved relevance because of the status of Indigenous peoples in the Canadian legal system. The same conditions are not present in countries like Ghana. Thus, it cannot be assumed that Ghana will be able to adopt this regime. Chapter Six examines the foundations for institutionalizing the duty to consult in Ghana. The chapter explores the extent to which mining communities in Ghana could be characterized as 'Indigenous' and the potential legal implications of such characterization. The chapter provides evidence of similarities between Indigenous groups in Canada and communities in Ghana which are affected by natural resource development. It demonstrates that both are traditionally marginalized communities, often in remote areas, where mineral exploitation is likely to affect a long-established traditional lifestyle. Accordingly, the chapter argues in favour of a focus on the real or potential conflict situations that the duty to consult is intended to regulate. I argue that the duty to consult is intended to deal with the same type of problems faced by mining communities in Ghana. Chapter Six concludes that many mining communities in Ghana, which are affected by natural resource development, could cast themselves as either 'Indigenous peoples,' even if a cognate expression has not hitherto been used in Ghanaian law, or an equivalent of Indigenous people in Canada.

Chapter Seven summarizes this dissertation and draws conclusions from its discussions. It makes an original case for the recognition of community participation in the development and management of natural resources as a justiciable legal right in the Ghanaian legal system, while at the same time defining the content and contours of this right. Finally, the chapter proposes a draft model Community Development Agreement regulation that could be adapted to the Ghanaian

context to balance the power relations between the government, mining companies, and mining communities as a basis for promoting meaningful community participation in Ghana.

CHAPTER TWO: COMMUNITY PARTICIPATION IN RESOURCE MANAGEMENT: A THEORETICAL FRAMEWORK

2.1 Introduction

New opportunities are emerging for the participation of communities that may be adversely impacted by government decision-making in mining, energy, and natural resource projects. Participation is central to advancing and safeguarding the interests of mining communities and ensuring the fair allocation of the benefits of environmental resources.[1] Quite clearly, precise methods and well-structured processes are preconditions for effective community participation and the effective development and management of natural resource projects that benefit project-affected communities. Despite the general recognition of the value of participation, specific criteria for promoting and assessing an effective participatory process have not been precisely defined. There are few well-developed techniques or guidelines for the practical achievement of effective participation. The lack of well-defined methods and processes for involving the affected communities is a major challenge to the effective implementation of meaningful participation.

The value of effective processes in participation has inspired advocates of resource management to search for principles and techniques for well-structured participatory schemes. Democratic theorists have contributed to techniques that promote effective participation, with a central emphasis on procedural rules such as equality and fairness. The theorists have challenged decision-making approaches that emphasize decision outcomes and exclude key procedural

[1] The *Aarhus Convention*, for example, recognizes that the effective involvement of potentially affected publics enhances "the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns." See *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, 25 June 1998, UNECE 38I.L.M. 517 (1999) preamble (entered into force 30 October 2001) [Aarhus Convention].

elements of public involvement. Despite the widespread appeal of the democratic principles, many communities affected by natural resource development have not achieved the practical benefits of participation. In most cases, participation has been reflected more in rhetoric than reality. Significant questions regarding the implementation of the participatory processes remain unresolved.

Some scholars have indicated that a democratic right to participation without access to the mechanisms for participation and the enforcement of the right is an "empty ritual" with no benefit to the affected community. To achieve effective participation, Sherry Arnstein has stated that there should be adequate structures to make the target institutions responsive to the concerns, interests, and needs of the community.[2] A promising mechanism is legal empowerment. In order to benefit the affected community, participation must shift from the more common passive, manipulative, and "therapeutic" activities toward a more obligatory mechanism that guarantees meaningful engagement. Legal empowerment advances and safeguards meaningful participation and, consequently, increases the likelihood of decision-making that benefits communities. This empowerment requires the integration of formal and enforceable public involvement structures as part of decision-making. In other words, the structures of participation must have a binding force through legal requirements to benefit the affected community.

The purpose of this chapter is to identify the theoretical framework for promoting meaningful participation.[3] The chapter explores and examines the conditions under which

[2] See generally Sherry R Arnstein, "A Ladder of Citizen Participation" (1969) 35:4 Journal of the American Planning Association 216.

[3] The Environmental Protection Agency defines the phrase "meaningful participation" to mean that: (1) potentially affected community residents have an appropriate opportunity to participate in decisions about a proposed activity that will affect their environment and/or health; (2) the public's contribution can influence the regulatory agency's decision; (3) the concerns of all participants involved will be considered

meaningful community participation can be achieved. It proceeds on the basis that effective participation requires justiciable opportunities for the affected people to influence the final decision on a proposed project.

The remainder of the chapter is organized into three sections. Section 2.2 explores the democratic/participation theory, which has been the common basis for participation in natural resource management. Section 2.3 analyzes participation techniques based on Arnstein's *Ladder of Citizen Participation*. Specifically, it addresses Arnstein's concept as the theoretical basis for the study and the genesis of the effective methods and processes for promoting meaningful community participation. Section 2.4 concludes the chapter and offers a theoretical framework for promoting effective participation, which shall guide the remainder of the dissertation.

2.2 A Meaningful Participation Model: the Perspective of Participatory/Democracy Theory

The democratic/participatory theory contributes to the community participation debate by challenging resource management based on a top-down, exclusionary decision-making approach and provides new ideas about how to conduct meaningful participation. In the words of Peter Bachrach, to be a citizen is to be able "to participate in decisions that affect oneself and one's community."[4] Bachrach's proposition indicates the need for administrative institutions and government decision-making processes to reflect the ideals of a democratic society. A purely

in the decision-making process; and (4) the decision- makers seek out and facilitate the involvement of those potentially affected. See Bill Lawson, "The Value of Environmental Justice." (2008) 1:3 Environmental Justice 155 at 1 cited in Michael Menser, *We Decide!: Theories and Cases in Participatory Democracy* (Temple University Press, 2008) at 55.

[4] See Peter Bachrach, *The Theory of Democratic Elitism: A Critique* (Boston: Little, Brown, 1976) at 26 cited in Daniel J Fiorino, "Citizen Participation and Environmental Risk: A Survey of Institutional Mechanisms" (1990) 13:2 Science, Technology & Human Values 226 at 227.

technocratic orientation is incompatible with democratic ideals.[5] Democratic theory is built on the assumption that those vitally affected by any decision must have an effective voice in how the decision is made. The theorists take the view that a centralized system of decision-making cannot be reconciled with the concept of democracy. As will be discussed in Chapter Three, many international and regional environmental and natural resource instruments have justified the call for the full participation in decisions that affect people and their communities on this ground.

The importance of democratic theory to community participation lies in its emphasis on the general will of the public and the desire to advance and safeguard the public interest.[6] This approach to participation can be contrasted with the position of liberalism, which is strongly characterized by a focus on individual interests. Unlike the liberal approaches, the democratic ideal encourages the greatest utilization of the capabilities of individuals in the interest of the community.[7] In *Participation & Democratic Theory,* Carole Pateman remarks that the experience of participation in decision making itself, and the complex totality of results to which it may produce for the people, is instrumental in developing it into a true community.[8]

Some theorists locate meaningful participation in its potential to improve the acceptance and quality of decisions. One study selected participants living in two mining municipalities in the Canadian province of Saskatchewan and in three mining municipalities in the northern part of Sweden to analyze whether there is a relationship between community participation and support

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[5] *Ibid* at 239.

[6] This is not to say that the individual interest is not important in the participatory process. However, as Pateman rightly notes, participation in decision making helps the individual to take into account wider matters than his own immediate private interests, and he learns that the public and private interest are linked. See Carole Pateman, *Participation & Democratic Theory* (Cambridge: Cambridge University Press, 1970) at 25.

[7] See Bachrach, *supra* note 4 at 3.

[8] See Pateman, *supra* note 6 at 27.

for mining decisions.[9] The study offered some evidence that a community's propensity to support mining development increases if local interests are represented and if the community had an influence on the decision-making processes.[10]

Pateman describes the feeling that participation has a positive influence on government decisions as "political efficacy."[11] One can argue that the most important positive correlation between community participation and natural resource development is to provide benefits to communities and improve their circumstances.[12] Pateman's emphasis on political efficacy presupposes that effective participation requires the institutionalization of a regime that allows community engagement to have an impact on government policy and the direction of authoritative power.[13] This is hardly a novel conclusion, as the extent to which a community will participate in decision-making depends on whether the community would benefit from the project or suffer from a decision taken without the involvement of community members.

[9] See generally Sverker C Jagers et al, ''The Impact of Local Participation on Community Support for Natural Resource Management: The Case of Mining in Northern Canada and Northern Sweden'' (2018) 9 Arctic Review on Law and Politics 124 – 147.

[10] *Ibid* at 143.

[11] See Pateman, *supra* note 6 at 46.

[12] This is not to say that participation should be defended solely on the basis of its service to the interest of the potentially impacted or affected community. As Bachrach rightly notes, such a definition construes the interests of the people narrowly and wrongly assumes that effective participation should be measured only by the degree to which it benefits the affected community. Such a position assumes a one-dimensional view of participation and fits into the elitist argument that the populace need not be involved participants if the technical and professional expertise of professional planners and statutory consultees, such as the Environmental Agency, can secure their interests. See Bachrach, *supra* note 4 at 95.

[13] See Lawrence R Jacobs, Fay Lomax Cook & Michael X. Delli Carpini, *Talking Together: Public Deliberation and Political Participation in America* (Chicago and London: The University of Chicago Press, 2009) at 13 – 14.

Some have suggested that under the conditions of equality,[14] participation would not only enhance the economic prospects of a project-affected community but ensure that the social cost of environmental hazards faced by the community is taken into account for its benefit. Participation is a vehicle for social transformation in the affected community. Michael Menser reinforces the argument of economic and social transformation as a key tenet of participatory democracy. According to what he terms as "maximal democracy," the general view of participatory democracy is "capacity development and delivery of economic, social, and/or political benefits to members or constituents."[15] As Bachrach demonstrates, people generally have a twofold interest in participation – interest in the end results and interest in the process of participation.[16] This means that effective participation requires not only following proper procedural principles but should be linked with capacity development and economic benefits for the potentially affected community. Participation should thus embody an overriding objective of providing the opportunity for development of the affected community. This is "the integrative benefits of participation."

This raises the question of how we can achieve political efficacy and the integrative benefits of participation in practice. What is necessary to foster and develop the qualities necessary for meaningful community participation? The realization of the integrative benefits of participation and political efficacy can only be achieved by a multi-dimensional approach. Meaningful participation requires the elaboration of a set of techniques and specific prescriptions for its attainment.[17] Democratic scholars continue to advocate for conditions and requirements to enhance

[14] Pateman refers to equality as "equality of power in determining the outcome of decisions." See Pateman, *supra* note 6 at 43.

[15] See Menser, *supra* note 3 at 57.

[16] See Bachrach, *supra* note 4 at 101.

[17] See Pateman, *supra* note 6 at 21.

the participatory process and promote meaningful participation. Simone Chambers posits that the central theoretical principles underlying community participation are debate and discussion aimed at producing reasonable, well-informed opinions in which the participants are willing to revise preferences in light of the discussion, new information, and claims made by fellow participants.[18] Chambers' theory requires the affected community to share in collective decision-making. The participation process should ensure that the voices of ordinary people and marginalized communities are heard and considered in decision-making. Chambers' assertion sets a theoretical framework for effective participation but does not address situations where an agency initiates a participatory process simply to legitimize the project, with no intention of affecting its decision.[19] However, I argue that this will be the situation wherever the participation regime is discretionary or lacks explicit legal foundation.

A series of commentators have proposed fairness as a meta criterion to be used to judge the quality of a participatory process.[20] Fairness requires the opportunity for all interested or affected parties to assume a legitimate role in the decision-making process and have a say in that

[18] See Simone Chambers, "Deliberative democratic theory" (2003) 6 Annu Rev Polit Sci 307 at 309.

[19] Some critics perceive this as "political manipulation." See Thomas Dietz & Paul C. Stern, *Public Participation in Environmental Assessment and Decision Making* (Washington, DC: National Academies Press, 2008) 52 to 54. Admittedly, political manipulation is a major constraint to effective participation. It exploits a gap between the rhetoric and the reality of participation. It has the potential to create "consultation or participation fatigue," which arises as people are approached more and more often to participate but perceive little return on the time and energy. See Caspian Richards et al, Practical Approaches to Participation (2004) SERG Policy Brief No. 1. Macauley Land Use Research Institute, Aberdeen, online:< https://macaulay.webarchive.hutton.ac.uk/ruralsustainability/SERG%20PB1%20final.pdf> [https://perma.cc/RYQ5-KXEW] at 12.

[20] See generally Thomas Webler & Seth Tuler, "Fairness and Competence in Citizen Participation: Theoretical Reflections from a Case Study" (2000) 32:5 Administration & Society 566.

decision.[21] This allows the affected community to understand how a natural resource project benefits them and the potential risks before they arise. Procedural fairness enhances the satisfaction with decision outcomes.[22] A fair participatory process requires all interested parties "to attend (be present); initiate discourse (make statements); participate in the discussion (ask for clarification, challenge, answer, and argue); and participate in the decision-making (resolve disagreements and bring about closure)."[23]

These conditions of fairness appear straightforward when individuals are involved, but the question of who can participate when such a right is claimed by a community is extremely controversial. Who has the legitimate right to participate when a decision affects a mining community? Some scholars state that all members of the community who may be potentially impacted or affected by such a decision should be part of the decision-making process.[24] This is known as the concept of universalism. Full universalism is, however, implausible given the difficulties of involving everyone in decisions in modern pluralistic societies. It is for this reason that some scholars have suggested that the condition of universalism will be satisfied either by the participation of all who will be affected by the decision or by their representatives.[25] The question

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[21] See Thomas Dietz, "What is Good Decision? Criteria for Environmental Decision Making" (2003) 10:1 Human Ecology Review 33 at 35.

[22] The empirical evidence that is available suggests that there is merit to such claims. Moffat and Zhang, working in the context of community acceptance of mining operations, found that the way companies engage with communities and the quality of contact among companies and communities will shape communities' trust in a mining company, and thus their acceptance of its mining operation. This conclusion was consistent with the results from two online surveys with 142 community members of a mining region conducted 12 months apart. See Kieren Moffat & Airong Zhang, "The Paths to Social Licence to Operate: An Integrative Model Explaining Community Acceptance of Mining" (2014) 39 Resources Policy 61 at 62.

[23] See Webler & Tuler, *supra* note 20 at 569.

[24] See Jacobs et al, *supra* note 13 at 11-13.

[25] See Jon Elster, "Introduction", in J Elster (ed.), *Deliberative Democracy* (Cambridge: Cambridge University Press, 1998) 1 at 8.

of representation can be determined by the community selecting those authorized to act on their behalf. The challenge of finding ways of organizing meaningful participation in larger communities can be answered by ensuring that a diversity of interests is represented, or by taking effective steps to ensure inclusion. The decision-making agency must endeavour to hear a full range of voices and interests.

As mentioned above, the condition of fairness requires rationality in deliberation in order to promote effective participation. Rationality involves reasonableness in decision making and the giving of reasons by the decision maker. Deliberations during participation should be supported by reasoned arguments. There is evidence to support the position that a natural resource project may be approved against the wishes of the affected community if consultation has been genuine and effective.[26] The thrust of rationality is a concern for fairness – people must presume that they will have equal chances to affect the formulation of the agreement.[27] It demands taking all views seriously. A major barrier to effective participation is the predominance of scientific rationality over all other forms of rationality. For community participation to be meaningful, the participatory process should ensure that all value positions or interests are represented. The process of argument and reasoning is placed at the center of deliberation. This improves the quality of citizens' deliberation by "expanding their knowledge and understanding."[28] Community participation could achieve consensus if informed by reasoned arguments and information exchange.[29] As one writer

[26] For a discussion on this point as it relates to the duty to consult, see Chapter Four, S 4.3.2.

[27] See Thomas Webler, "'Right' Discourse in Citizen Participation: An Evaluative Yardstick" in Ortwin Renn, Thomas Webler & Peter M. Wiedemann, eds, Fairness and Competence in Citizen Participation: Evaluating Models for Environmental Discourse (Dordrecht, Boston, London: Kluwer Academic Publishers, 1995) 35 at 47.

[28] See Jacobs et al, *supra* note 13 at 11 – 12.

[29] There is a widespread belief that deliberation should generate agreement. As popular as this requirement may sound, it is debatable whether the condition of agreement has relevance to the reality of

has suggested "seeing the world as it appears from the perspective different from ours generates an appreciation of joint gains and a common shared perspective."[30]

There are many obstacles to institutionalizing the requirements of fairness and rationality in practice that this chapter cannot fully address. It is debatable whether we can achieve the requirement for fairness and rationality without improving the capacity of the affected parties to have access to relevant knowledge and information. Rationality and fairness require marginalized communities to competently ascertain the validity of claims made by the decision-making agencies. Democratic theories emphasize the need for participation models to encourage access to the scientific knowledge of experts, which may not be known to the affected communities.[31] This access demands the use of outside experts to validate claims. Rebeca Macis also suggests paying for the transportation of potential participants to and from a decision-making meeting.[32] The discussions in Chapter Four show that Canadian courts completely agree with the views expressed by Macis.[33] This recommendation is important to ensure a leveling effect if the affected community lacks the financial resources to effectively participate in the decision-making process.

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community participation. Critics point to the fact that the requirement of unanimity is not possible in the face of deep bound preferences. This argument cannot be contested. To this end, deliberative theory "has moved away from a consensus-centered teleology—contestation and indeed the agonistic side of democracy now have their place—and it is more sensitive to pluralism." See Chambers, *supra* note 18 at 321. It is argued that effective participation, with its shared term of information sharing and informed reasoned argument, will promote toleration and understanding between groups which will have a salutary effect on people's opinions.

[30] See Seyla Benhabib, "The Utopian Dimension in Communicative Ethics" (1985) 35 New German Critique 83 at 89 cited in Jacobs et al, *supra* note 13 at 12.

[31] See Webler, *supra* note 27 at 56.

[32] See Rebeca Macias, *Public Participation in Energy and Natural Resources Development: A Theory and Criteria for Evaluation* (Calgary: Canadian Institute of Resources Law, 2010) at 20.

[33] See, for example, *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41, where the Federal Court of Appeal placed considerable weight on the financial support received by the First Nation. See contrary *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, 2017 SCC 40 where the Supreme Court Canada held, *inter alia*, that the First Nation's lack of funding significantly impaired the quality of the consultation. This position is further discussed in Chapter Four.

If the conditions of fairness and rationality are well implemented, they promote meaningful participation. There must be an assurance that they are not mere rhetoric. According to Gail Whiteman, "procedural justice is highly dependent upon whether or not people feel that they have the institutional space to voice their opinion in a meaningful way within decision-making processes."[34] The discussions on the duty to consult in Chapter Four show that the elevation of participatory conditions from preferences to substantive legal requirements is essential in achieving meaningful community engagement. Canadian courts have strived to establish a substantive consultation requirement that imposes far more significant constraints on decision makers.[35] The requirements of fairness and rationality cannot be met without any normative standards or criteria to evaluate their application in particular decision. We cannot ensure fairness if the process does not permit participation decisions to be questioned. The participatory process must ensure that decisions are driven by evidence rather than rhetoric or political power. If the participation process is to achieve consensus through informed decision, there must be an assurance that these conditions are not exploited to engineer acceptance of preconceived solutions or preconceived goals.

I argue that the democratic conditions of fairness and rationality are worthless unless translated into law. As evidence with the duty to consult the legal institutionalization of participation activities entitles the affected community to recognition as active participants in the decision-making process. The usefulness of the courts in this regard cannot be overemphasized. A substantive right to participation establishes the court as external brokers to offset asymmetries of

[34] See Gail Whiteman, "All my Relations: Understanding Perceptions of Justice and Conflict Between Companies and Indigenous Peoples" (2009) 30:1 Organization Studies 101 at 108.

[35] See Lorne Sossin, "The Duty to Consult and Accommodate: Procedural Justice as Aboriginal Rights" (2010) 23 Can J Admin L & Prac 93 at 106 – 107.

power in participation. Meaningful participation requires legal and legislative guidelines to evaluate the effectiveness of the participatory process. Commentators have noted that law is a means for making participation effective in solving society-wide problems.[36] The legal recognition of these conditions in legislation does not guarantee their successful consideration in practice, but it certainly creates a situation in which the conditions must not only be respected, but very good reasons will be needed for not adhering to prescribed rules.[37]

Some democratic theorists have recognized the importance of this condition with respect to equality of power in particular. The case study of Thomas Webler et al on "What is a Good Public Participation Process?" points to the essential requirement of provisions to ensure that abuses do not occur. The plausible interpretation of the requirement of equality of power cannot be concerned with policy preferences. It requires the legal institutionalization of the participatory process. A good participation process requires equal power among all participants and the implementation of democratic principles of equality.[38] Participants have equal power to influence decision-making and have the reasonable expectation that they may affect its outcome. This expectation calls for "leveling the playing field" by making the process fair and by ensuring that the participatory process is not used to rubber-stamp decisions that have already been taken.[39]

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[36] See James Bohman, "Complexity, Pluralism, and the Constitutional State: On Habermas' Faktizität und Geltung" (1994) 28:4 Law & Soc'y Rev 897 at 898.

[37] For an interesting discussion of this point in the context of whether environmental rights are really necessary, see J G Merriles, "Environmental Protection and Human Rights: Conceptual Aspects" in Alan E Boyle & Micheal Anderson, eds, *Human Rights Approaches to Environmental Protection* (Oxford: Clarendon Press, 1996) 25 at 25-27.

[38] See generally Thomas Webler et al, "What Is a Good Public Participation Process? Five Perspectives from the Public" (2001) 27:3 Environmental Management Vol. 435.

[39] Leveling the playing field, as Webler et al suggest, would mean having an open process that is strongly driven by evidence as opposed to rhetoric. *Ibid* at 444. To this end, they echoed Lawrence et al condition of rationality.

What method can be used to ensure equality of power? In Canada, for example, the participation and consultation of Indigenous peoples at common law discussed in Chapter Four show that the mere opportunity to participate does not solve the problem of ensuring that the participatory process has a preponderant influence on decision-making. Robert Dahl remarks that "we must not be beguiled into assuming that equality of *opportunity* to gain influence will produce equality of influence."[40] This observation reinforces Arnstein's position that there is a critical difference between going through the empty ritual of participation and having the real power needed to affect the outcome of the process.[41] As evident in the duty to consult, equality of power will be mere rhetoric unless there are binding standards to evaluate the efficacy of the participatory process. This requires a legal foundation to regulate the participatory process. Without a legal foundation, the public will not maintain an active interest in participation without the hope of influencing a decision or changing a situation.

The existence of avenues that enable participation does not ensure effective participation – such opportunities exist in many jurisdictions. The common law principle of procedural fairness requires, at a minimum, the right to notice and the right to a hearing where an administrative decision affects the rights, privileges, or interest of an individual or community. Yet, the discussions in Chapter Four show that Indigenous communities that were negatively affected by natural resource decision-making did not gain access to agency decisions under this rule. Democratic principles of deliberation, fairness, rationality and inclusiveness are likely to increase participation. Whether the principles are being respected in practice is yet to be seen. While not

[40] See Robert A Dahl, "Equality and Power in American Society" in William V. D'Antonio & Howard J Ehrlich, eds, *Power and Democracy in America* (Notre Dame, Ind: University of Notre Dame Press, 1961) 80 at 87.

[41] For an interesting discussion of this point, see Arnstein, *supra* note 2.

discrediting the fact that community participation should address the democratic values of involving the public in matters that affect them, the question of *'what is in it for the community*?' to participate should be noticed as well.

The public involvement goals of achieving integrative benefits through participation are often not met because of power imbalance between the government, project proponents, and the affected communities. For this reason, international law emphasizes principles that promote a rights-based position in relation to community participation. The law must establish substantive rules to ensure that participation adds to the economic value, development, and an increase in the wealth of the affected community. A legal foundation would guarantee meaningful participation. This proposition is key in many international natural resource management instruments discussed in Chapter Three and further supported by Arnstein's concept of what promotes meaningful participation.

2.3 Power Relations in Community Participation: A Critical Discussion of Arnstein's Ladder of Citizen Participation

The fact that community participation may merely be used as a means of legitimating pre-ordained decisions cannot be contested. It is more common for community participation to be rhetorical when the real decisions are clearly being made elsewhere. Andrea Cornwall is right to suggest that if people have been consulted without seeing any result, self-exclusion may be a pragmatic choice to avoid wasting time once again.[42] Therefore, the question is: what counts for participation to benefit the affected community?

[42] See Andrea Cornwall, "Unpacking 'Participation': Models, Meanings and Practices" (2008) 43:3 Community Development Journal 269 at 280.

Many writers offer insights into the forms of participation classified as 'good' or 'bad.' Arnstein makes an important contribution to the literature on meaningful participation from the perspective of those on the receiving end (the affected community). One argument running throughout her work is that "participation without redistribution of power is an empty and frustrating process for the powerless."[43] Arnstein maintains the centrality of power as laying the groundwork in an ideal participatory process. She draws a distinction between non-participation, which includes consultation, informing and placation, and real participation, which includes partnership, delegated power, and citizen control.

Arnstein's work intensifies the understanding of how effective community participation will induce significant social reform, which enables the affected community to share in the benefits of the affluent society. She anchors the democratic theory that participation is the 'cornerstone of democracy' and 'vigorously applauded' by many, but she rightly asserts that very few take real measures to ensure effective participation. Many countries claim to have genuine participatory regimes that allow people who may be potentially affected by the government decision-making processes to participate, but most of these processes are not participatory at all. Non-participation only allows government agencies to claim that they have involved the public in the agency's decision-making process while maintaining the status quo.

For example, the participatory process may only be used to "educate" or "cure" the participants with no guarantee that what is said will be taken into account. Arnstein characterized this contrived substitute for genuine participation as manipulation and therapy. Jules Pretty views

[43] See Arnstein, *supra* note 2 at 216.

manipulative participation simply as pretense.[44] The term participation can be used, knowing it will not lead to an action. This illusory form of "participation" serves as a public relations vehicle for the government to engineer the support of the affected public. According to Arnstein, the masquerade of involving citizens in decision-making is not only shambolic, but it is "both dishonest and arrogant."[45]

Information flow, consultation, and placation are important steps toward legitimate participation, but a one-way flow of information from decision-makers to citizens with no power for negotiation has no benefit for the affected community. Although participation under the rungs of information, consultation, and placation may allow the affected community to hear and to have a voice, there is no assurance of changing the project decision. Arnstein characterized this type of participation as "tokenism." She explains that under this condition, the participants lack the power to ensure that their views will be *heeded* by the decision-making agency. Participation in this regard is more of "window dressing."[46] There is no legal obligation on the decision-making agency to take onboard the views of the affected public; nor is there a legal foundation to enable redress for inadequate participation. This type of contrived participation is prevalent in most development organizations claiming to promote participation.

Cornwell, for example, notes that the World Bank includes both giving information and consultation as forms of participation and goes on to equate the provision of information with 'empowerment.'[47] The giving of information and consultation may rightly be considered as

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[44] See Jules N Pretty, "Participatory Learning for Sustainable Agriculture" (1995) 23:8 World Development 1247 at 1252. See also Marisa B Guaraldo Choguill, "A Ladder of Community Participation for Underdeveloped Countries" (1996) 20:3 Habitat International 431.

[45] See Arnstein, *supra* note 2 at 218.

[46] *Ibid* at 217.

[47] See Cornwall, *supra* note 42 at 270.

participation, but it is difficult to understand how such a process can constitute 'empowerment' if it only involves people being told what has been decided or has already happened. Pretty is right to suggest that the term "participation" should not be accepted without appropriate clarification.[48] Arnstein rightly posited: "[W]hat citizens achieve in all this activity is that they have participated in participation. What power holders achieve is the evidence that they have gone through the required motions of involving those people."[49]

The problem is not simply 'enabling the people to participate' but ensuring that the participatory process enables the affected community to share in the socio-economic development of the country. I agree with Arnstein that participation should not be defined to allow stakeholders to be involved simply as recipients or informants. Participation should shift from the more common passive and consultative participation toward the top-of-the-ladder that allows participants to have real substantive influence over the outcome and the alternatives considered. Clearly, for participation to realize these goals, it is important for people to have a legal leverage to be able to negotiate the conditions under which decisions are made. The question of meaningful community participation must be seen in the context of the legal distribution of power; otherwise, it remains a theoretical discussion.

A major problem of community participation is the legitimation of the concerns and interests of locally-impacted communities vis-à-vis claims of decision-makers. The literature on community participation has focused on the effect of participation on the 'quality' of decision outcomes and ignores how the exercise of power can provide a specific way of securing the interest of the affected community. Arnstein's top rung reminds us that participation is ultimately about

[48] See Pretty, *supra* note 44 at 1253.

[49] See Arnstein, *supra* note 2 at 219.

power and control. There is a need for a degree of power if, for example, communities affected by natural resource development are to benefit from participation. In many cases, community participation has usually been sought without any meaningful reform of the power relations between government and affected communities. The Arnstein model shows us that power is important for the affected community to be able to negotiate the conditions under which 'outsiders' exploit those resources. Frank Laird takes a similar perspective on the condition of power in promoting meaningful participation. He posits that meaningful participation requires real power over decisions because only such power can realize the desired goals for the affected community.[50] A substantive right to participation can militate against undue exercise of government discretion as to whether to involve the community or not.

Arnstein and Laird's position on power resonates with the understanding of other scholars that meaningful participation depends on the structure of the participation process. Daniel Fiorino views ideal participation as rooted in achieving "a level of participation that is more than therapeutic, oppositional, or pleading, but in which citizens share in governing."[51] The success of participation depends largely on the affected community having a legitimate and recognized role in the decision-making process. Marisa Guaraldo Choguill shows meaningful community participation has a twofold benefit for the affected community – as a means to enable the people to get the basic needs that would not otherwise be available to them and to influence decisions about issues that affect them.[52] The elements of this twofold benefit are not mutually exclusive.

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[50] See Frank N Laird, "Participatory Analysis, Democracy, and Technological Decision Making" (1993) 18:3 Source: Science, Technology, & Human Values 341 at 344.

[51] See Daniel J Fiorino, "Citizen Participation and Environmental Risk: A Survey of Institutional Mechanisms" (1990) 15:2 Science, Technology, & Human Values 226 at 229.

[52] See Choguill, *supra* note 44 at 431.

The affected community will share in the benefits of a more affluent society if the participatory process gives them some leverage over decision-makers. Leverage can take many forms, but its vital component is the existence of opportunities for a legal challenge of agency decisions. The duty to consult, for example, legitimizes Indigenous peoples' participation, which provides the communities with significant cards to ensure that the program is accountability to them.[53] The condition of power helps to prevent strategic manipulation of the participatory process. Power in some cases will mean that participants share planning and decision-making responsibilities with the decision-makers. At the highest level, the affected community may have dominant decision-making authority over particular activities and have a stake in determining how available resources are used.

Meaningful community participation is highly contingent upon the power relations between the impacted community and the decision-makers. The source of this power is a matter of dispute. Audrey McFarlane notes that Arnstein's typology sets a normative goal for participation – citizen power – but does not take on the task of prescribing how to get there.[54] Pablo Leal also posits that although power is and has always been at the center of the participation paradigm, the institutionalization of power has been contained within the bounds of the existing order.[55] Power is handed down from "the powerful to the powerless." However, the genuine "power" that communities require to participate effectively in decision-making cannot emerge spontaneously or naturally out of the good hearts of the decision-makers. This supports other research that found

[53] The matter will be discussed in more detail in the analysis of the duty to consult.

[54] See Audrey G McFarlane, "When Inclusion Leads to Exclusion: The Uncharted Terrain of Community Participation in Economic Development" (2000) 66 Brooklyn L Rev 861 at 925-926.

[55] See Pablo A Leal, "Participation: The Ascendancy of a Buzzword in the Neo-Liberal Ear" in Andrea Cornwall ed. *The Participation Reader* (London: Zed, 2011) at 77-78.

that internalization of justice principles cannot advance meaningful participation.[56] Some scholars have observed that mining communities have trust in legal routes (where they are available) or avenues such as protest to assert their position and challenge the legitimacy of existing power dynamics.[57]

Arnstein does not expressly state that there is a need for formal legal structures for power relations to function properly, yet such a conclusion can be easily derived from the entirety of her work. Legal norms must exist to prevent the abuse of the participatory regime and to guarantee the democratic principle of fairness of the process. The legitimacy of the participatory process provides a means to check that the decision is consistent with the legal requirements and to provide sanctions if decision-making agencies act outside the intent of legal provisions. Absent this, the participatory process could fall into the rung of being manipulative and therapeutic. The balance of power between decision-makers and the affected community shape what the participatory process could achieve. The affected community must be able to enforce meaningful participation if they feel the government has ignored their concerns.

Laird explains that the affected community should not be without any coercive influence over the decision-makers. He rightly asserts that the community cannot derive any benefits from participation "if all they can do is to make noise."[58] As later discussed in Chapter Three, international and regional natural resources law instruments have emphasized the requirement of power under the access to justice principle. This is viewed as a major pillar in participation, especially if the impacted communities are to benefit from participation. Chapter Four also

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[56] See generally Deanna Kemp et al, "Just Relations and Company–Community Conflict in Mining" (2011) 101 Journal of Business Ethics 93.

[57] *Ibid* at 104.

[58] See Laird, *supra* note 50 at 344.

contributes to this perception by exploring how the duty to consult balances the power relationship between government, project proponents, and project-affected communities to the benefit of the latter. Structured models and mechanisms of participation must institute processes for affected communities to challenge discretion and force the decision-making agency to reconsider their concerns.

Different projects may demand different degrees of community engagement. As discussed in Chapter Four, the duty to consult ensures that different participation and consultation mechanisms are developed to apply to a broad range of situations. Arnstein's failure to take this into account has been seen as a major weakness in her narrative. Cornwall advised that it is important to be clear about exactly *which* decisions the public have the opportunity to participate in and the extent of their participation.[59] A one-dimensional scale such as Arnstein's ladder may be deemed inadequate. Other scholars have argued that effective participation relies on the structure of the participation mechanism adopted and the way in which this mechanism is applied in the specific exercise.[60] The traditional forms of community engagement, such as communication, public consultation, information sharing, and public hearing certainly have advantages and may be important to facilitate other levels of participation. These participation models can be tailored to specific situations and cannot be entirely dismissed as contributing nothing to empower the affected community. As in the duty to consult, each project will determine how closely to engage the affected community in some aspect of decision-making. Cornwell advocates for optimum participation: getting the balance between depth and the level of

[59] See Cornwall, *supra* note 42 at 280.

[60] See Gene Rowe & Lynn J Frewer, "A Typology of Public Engagement Mechanisms" (2005) 30:2 Science, Technology and Human Values 251 at 264.

participation required.[61] Thus, it is useful to have a participation process that covers a full range of levels of participation and distinguishes how deeply to engage the affected community.

These arguments are not to be taken lightly. Whether consultation and other forms of involvement offer genuine influence or only the appearance of participation remains a difficult problem. The fact that the participation model could be case-specific cannot be disputed. The intuitive appeal of Arnstein's power model stems from the fact that it places community participation in the context of an enforceable right and its ability to restrain the exercise of discretion on the part of the decision-maker. The concept of power is not to provide the impacted community with an absolute veto over a project but rather to buttress the legitimacy of their participation right by ensuring that government's decisions that affect the community are procedurally fair and rationally acceptable in light of the existing constitutional or legislative framework.

In the absence of a formal legal structure to promote meaningful participation, there is a major risk that participation will be mere rhetoric while giving the appearance of genuine participation, without having a substantive impact on the affected community. The argument is that whatever the level of participation may be (whether deep consultation or a mere notice to the locally-impacted community), the lack of an adequate legal framework may not establish a favourable background for meaningful engagement if the community has no power to challenge the final decision or proposed alternatives. Conversely, providing an enabling constitutional or legislative framework for community engagement enhances legitimacy and ensures meaningful participation by limiting agency discretion in decision-making.

[61] See Cornwall, *supra* note 42 at 276.

2.4 Summary

Community participation is currently a buzzword. There is widespread adoption of the language of participation in policy processes and other legal frameworks. New spaces and opportunities are emerging for the participation of communities that may be adversely impacted by government decision-making in natural resource projects. It is an undeniable fact that community participation is a tool for local communities potentially impacted by government decision-making to have an effective voice in those decisions. Participation ensures that the interests of traditionally marginalized communities are recognized in governments' decisions. Participation is a significant means through which the affected community may derive certain benefits that would otherwise not be available to them. However, despite these potential benefits, it is more common for community participation to be rhetorical.

The harder question of how to implement meaningful participatory schemes remains unanswered. This chapter has developed an expanded notion of the democratic principles of fairness and equality and explored the conditions for achieving meaningful community participation. I argued that meaningful community participation is achievable when the affected community has the potential to challenge or influence agency decisions. The democratic conditions of fairness and equality are insufficient, and the requirement of legal power provides a more meaningful tool for effective participation. Therefore, when analyzing what constitutes effective community participation, we should not focus only on the narrow value of providing an opportunity for the impacted community to be heard but also on how the community would influence the outcome of decisions and provide alternatives. In most cases, the power relations in

community participation and the extent to which the absence of power hinders meaningful participation seems to be overlooked.[62]

As the chapter shows, both democratic theorists and Arnstein's model build on the idea that meaningful participation requires some level of community power to influence decision outcomes. While the democratic principles of deliberation, inclusiveness, fairness and equity could support meaningful community participation, the selective use of legal force helps to further ensure it. The democratic principles will have no real impact if the affected community has no legal power to challenge the abuse of the participation process. The emphasis on power represents a key shift from situations where decision-makers can unilaterally impose a decision on local communities. Significant discretionary power over the final decision may keep alternative information out by unnecessarily restricting the community expressions of concern. As Arnstein's study shows, the legitimacy of community participation provides the affected community with leverage to negotiate with decision-making agencies to give greater attention and weight to the interests of the community. Put more concretely, the right of the affected community to challenge agency decisions is an important prerequisite if the community participation is to have any meaningful impact on the local community.

In a nutshell, the following three criteria will mediate and facilitate meaningful community participation that will benefit the affected community: (1) community participation requires a clearly defined and established legal foundation; (2) the democratic principles of fairness and

[62] See John Gaventa, *Power and Powerlessness: Quiescence and Rebellion in an Appalachian Valley* (Urbana: University of Illinois Press, 1980) at 229-237.

equality should be incorporated into the participation process; and (3) the participation regime should be justiciable. The following standards should characterize the design of the legal regime:

- The legal foundation should promote a rights-based approach to community participation and support the legitimacy of participation.
- The legal regime should regulate power relations to ensure that the government does not hold the absolute power to determine the final decision.
- The legal framework should control and structure the exercise of discretionary powers.

In order to comply with the democratic principles of fairness and equality, the participation process should fulfill the following minimum conditions:

- Participation of the potentially impacted community should take place when it is possible for the community to influence the decision.
- The participation process should provide the affected community with a legitimate role in the decision-making process.
- The affected community should have access to complete and non-biased information (favourable and unfavourable) relevant to the project under consideration.
- In some cases, the affected community should be supported financially to participate effectively in the decision-making process, and this may include the means to travel to a hearing at minimum.
- Deliberation at participation meetings should promote reasonableness and the giving of reason.

The third component, justiciability, requires a separate set of principles

- There should be a possibility for the affected community to challenge the outcome of the participation process through judicial and administrative proceedings, including redress and remedy.
- The right of appeal should be embodied into the legal framework as a means through which the affected community can make its voice heard.

These criteria may not be impeccable, but they offer meaningful tools that would be useful in analyzing and clarifying the extent to which participation in natural resource development will benefit the affected community. The next chapter explores and examines how the model of power and the democratic principles of equality and fairness are reflected in international natural resources and environmental law instruments.

CHAPTER THREE: THE INTERNATIONAL LEGAL CONTEXT FOR COMMUNITY PARTICIPATION IN THE DEVELOPMENT OF NATURAL RESOURCES

3.1 Introduction

The notion that a community affected by the exploitation of natural resources ought to be included as a participant in the development and management of these resources has been widely acknowledged at global, regional and sub-regional levels. The effectiveness of community participation will largely depend on the normative structure of the participatory regime. One of the fundamental prerequisites for meaningful community participation is to identify its legal foundation, but most countries lack the required domestic legal basis to foster such participation. In the absence of an express recognition of a right to participation in domestic legislation, the participation of communities affected by resource development lies at the discretion of public officials and voluntary corporate initiatives, as well as the extent to which courts are prepared to find an alternative basis for it.

International law seeks to incorporate a human rights dimension into the participatory rights of local communities which are likely to be affected by resource development. Many international law instruments inject a rights-based approach in matters of mineral, energy, and resource development to ensure the full and effective participation of community members who may be susceptible to the effects of exploiting and developing these resources. Public participation in international environmental and natural resource law consists of two types; first, international instruments may prescribe that State parties incorporate public participation at a national level. Secondly, they can also provide for public participation at an international level by establishing

opportunities for participation within a treaty mechanism.[1] Accordingly, community participation ranges from being a merely voluntary government policy decision to becoming part of a growing body of international legal requirements.

Ghana is party to major international and regional/sub-regional arrangements aimed at incorporating community participation in the development and implementation of natural resource programs as a general principle. International law has its paradoxes and challenges, but it can form the basis for mining community participation in countries where the source is not found in domestic legislation. In addition, international law establishes legal principles that are important for evaluating the effectiveness of community participation.

The present chapter looks critically at the concept of community/public participation within the international legal context. The chapter analyzes the role of international law in promoting meaningful participation. It addresses the possibility that communities in Ghana affected by natural resource development may claim a right to participate in decision-making processes over mining, energy, and natural resources. In particular, it examines whether a rule that requires community participation in decision-making exists in international law and identifies the normative basis of that rule. It also assesses how international law addresses the power relationship between government, mining companies, and communities affected by mining projects. The chapter concludes that there is widespread acceptance of the right of affected communities to participate in decision-making in the exploitation and development of natural resources. The chapter finds that international and regional law instruments entitle communities affected by natural resource

[1] See Jeroen van Bekhoven, "Public Participation as a General Principle in International Environmental Law: Its Current Status and Real Impact" (2016) 11:2 National Taiwan University Law Review 219 at 238.

development in Ghana to participation and consultation on matters of natural resource decision-making, but the absence of domestication of some of these instruments in Ghana's legal system makes it difficult for affected communities to benefit from mineral development.

To cover the issues outlined above, the remainder of this chapter is divided into 4 sections. Following this Introduction, section 3.2 examines the public participation requirements in international legal instruments that are applicable to Ghana. It gives specific attention to the *United Nations Conference on Environment and Development (Rio Declaration)*[2], which seeks to reconcile the aims of international collective actions on community participation. Section 3.3 then evaluates the nature and scope of community participation in Africa, in order to determine the extent to which communities affected by mining activities in Ghana can claim a right to consultation and participation, based on regional international legal instruments that impose obligations at a national level. Against the background set out in the preceding sections, section 3.4 looks closely at the status of these international instruments in Ghanaian law, while section 3.5 expresses some concluding thoughts.

3.2 The Increasing Relevance of a Rights-Based Approach to Natural Resources Governance in International Law

Many international legal instruments recognize the right of citizens to participate in natural resource and environmental decision-making.[3] Public participation is viewed as an established and

[2] Report of the United Nations Conference on Environment and Development, Resolution 1, UN Doc.A/Conf.151/26/Rev.1 (vol. 1) (1993), 31 I.L.M 876 [Rio Declaration].

[3] For example, the *World Charter for Nature* states that "all persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their

justiciable right. Indeed, it is considered as one of the cornerstones of modern democracy. In many cases, multilateral environmental and natural resource agreements, treaties, and conventions contain provisions for the participation of individuals and communities which may be affected by natural resource projects. Some of these instruments also appear as "soft law": i.e. generally non-binding rules that have legal consequences because they shape the conduct of states' expectation to the creation of more binding rules.[4]

Ghana is a member of the United Nations and has participated in the development of international principles for public participation, most notably agreeing to the Rio Declaration and Agenda 21. The Rio Declaration and Agenda 21 are not the only legal instruments of the system, but their much stronger case for participation rights justifies recognition of the Rio Declaration as the central instrument of the system. The Rio Declaration and Agenda 21 provide a general framework for citizen participation, thus requiring State parties to put in place enabling legislation, which will actualize the objectives of the instrument.

An increasingly widespread approach in international law is to promote a rights-based position in relation to community participation, emphasizing principles that will not only ensure the integration of marginalized communities into the main phases of resource development, but will also render their participation effective, justiciable, and enforceable. The right to meaningful

environment has suffered damage or degradation." See *World Charter for Nature*, G.A. Res. 37/7, U.N. GAOR, 37th Sess., Supp. No. 51, at 18, U.N. Doc. A/37/ 51 (1982) (referencing principle 23).

[4] See generally Tadeusz Gruchalla-Wesierski, "Framework for Understanding "Soft Law"" (1984) 30:1 McGill LJ 37 where he discusses some of the possible sanctions for non-compliance with soft law obligations, placing special emphasis on the case of nonlegal soft law. Gruchalla-Wesierski argues that soft law is often unenforceable because the parties retain discretion over the content of the obligation or over its eligibility but beyond the subjective element limits of soft law, they contain an objective element which is enforceable.

participation guarantees that a community can play an active role in decision-making processes over matters that affect their environment. Principle 10 of the *United Nations (UN) Rio Declaration on Environment and Development (Rio Declaration)* requires State parties to ensure that

> …each individual [has] appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.[5]

Principle 10 guarantees the participatory rights of the parties concerned, establishing the three pillars of public participation: namely, access to information, public participation in decision-making, and access to justice. These crucial concepts and minimum standards are important prerequisites for the meaningful participation of affected communities.[6] It is evident from the previous chapter that these principles collectively form the cornerstone of effective participation. The Rio Declaration also introduced the Precautionary Principle, another tool for international environmental governance, which invokes transparency in decision-making processes.

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[5] See Rio Declaration, *supra* note 2 at Principle 10. Ghana has agreed to this principle. See Report of the United Nations Conference on Environment and Development, UN Doc.A/CONF.151/26 (Vol. IV) (1992), online: United Nations < https://www.postsustainabilityinstitute.org/uploads/4/4/6/6/4466371/agenda.21.attendees.pdf >. Principle 10 of the Rio Declaration echoes what is without doubt a major tenet of the *Draft Principles on Human Rights and the Environment,* which requires that all persons shall have the right to active, free, and meaningful participation in planning and decision-making activities and processes, where these could have an impact on the environment and development. See *Draft Principles on Human Rights and the Environment*, E/CN.4/Sub.2/1994/9, (1994) Annex I, Principle 18.

[6] See George (Rocks) Pring & Susan Y Noe, "The Emerging International Law of Public Participation affecting global mining, energy and resource development" in Donald N Zillman et al, eds, *Human Rights in Natural Resource Development: Public participation In the Sustainable Development of Mining and Energy Resources* (Oxford: University Press, 2000) 11 at 29.

Access to information obliges States to ensure that mechanisms are put in place for communities to obtain information on natural resource projects. As further discussed in Chapter Four, the duty to consult shows that the dissemination of information requires more than the simple transmission of data. Access to information empowers and motivates people to participate in an informed and meaningful manner. Popovic has rightly observed that community participation without access to information "would seldom advance beyond shots in the dark."[7] In contrast, the right to information bolsters the right to participation. With the correct information, stakeholders can participate effectively in the exploitation and development of natural resources where this potentially affects the communities in which they live. Participation in decision-making ensures that the government engages the affected community in meaningful dialogue on the potential benefits and effects of a proposed project; it guarantees the integration of the community into the government's decision-making processes over the relevant natural resources. It gives the affected community the opportunity to express an opinion before consent to development is granted.

In light of the above, community participation in decision-making has the potential to build consensus and improve acceptance of and compliance with natural resource decisions because the community will feel a sense of ownership over these decisions. Where there is a breach of these procedural guarantees, the affected community may seek redress and remedy in a competent court of justice. The third leg of Principle 10 considers public participation to be a justiciable matter, which can be enforced by the courts in the event of a breach. It emphasizes the usefulness of the courts in establishing meaningful participation. Principle 10 requires State parties to provide "[e]ffective access to judicial and administrative proceedings, including redress and remedy."

[7] See Neil AF Popovic, "The Right to Participate in Decisions That Affect the Environment" (1193) 10 Pace Envtl L Rev 683 at 694.

The fundamental tenets of Principle 10 of the Rio Declaration set out the basic principles for good participatory justice. When followed, they ensure that communities affected by resource development participate effectively in the exploitation of these resources. Before the Rio Declaration, a rights-based approach was never at the forefront of promoting meaningful public participation.[8] The Rio Declaration avoids any language that might infer rights, but it has been widely noted that Principle 10 provides a legal foundation for the full exercise of substantive environmental rights,[9] whereby the procedural right to participation is incidental to the substantive right to a clean and healthy environment.

According to Ebbesson,

> it is reasonably impossible for a state to properly comply with Principle 10 without granting, in some sense, rights to access to information, rights to citizens to participate in decision-making, and rights to access administrative and judicial proceedings, including redress and remedy.[10]

The identification of a right is an important prerequisite for supporting the empowerment of individuals and local communities. Without any identifiable right to participate, public participation is merely "an illusory spectacle, delivering nothing more than a veneer of democratic participation, merely a pro forma matter."[11] Silverman has noted that a rights-based approach

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[8] The provision of Principle 10 is not novel, but it differs in the degree of detail and ambition, with regard to its approach to participatory rights. See, for example, Report of the United Nations Conference on the Human Environment, GA Res. 2997, UN GAOR,27th Sess., Supp. No. 30, UN Doc. A/8901/Rev.1 (1972) [Stockholm Declaration].

[9] Dinah Shelton, "A Rights-Based Approach to Public Participation and Local Management of Natural Resources", online < https://www.iges.or.jp/en/publication_documents/pub/conferenceproceedings/en/739/3ws-26-dinah.pdf> [https://perma.cc/F5RP-ZQXM].

[10] Jonas Ebbesson, "Principle 10: Public Participation", in Jorge E. Vinuales, ed *The Rio Declaration 0n Environment and Development* (United Kingdom: Oxford University Press, 2015).

[11] See Marie Appelstrand, "Participation and Societal Values: the Challenge for Lawmakers and Policy Practitioners" (2002) 4 Forest Policy and Economics 281 at 288.

translates and operationalizes norms, standards, and principles into rights-based policies that provide for more effective and equitable responses to governance.[12] To ensure that a participation process does not simply give the affected community an opportunity to vent before the government proceeds with its original intention, participants must be allowed to have a decisive influence on the outcomes of the decision-making process. This is what is guaranteed under Principle 10 of the Rio Declaration.

Following the Rio Declaration is Agenda 21, which sets forth a comprehensive action plan for implementing the principles expressed in the Rio Declaration.[13] Agenda 21 is a non-binding action agreement focused on four key areas, including the need to conserve and manage natural resources for development, the social and economic dimensions of sustainability, the need to strengthen the role played by stakeholder groups in public policy decision-making, and a plan for implementing these principles. Agenda 21 was adopted as a voluntary initiative by 178 countries at the 1992 Rio conference, including Ghana. Agenda 21 contains a very strong reference to public participation and recognizes that the full participation of the parties concerned is essential for fulfilling the policy directions and objectives, which are stipulated in the instrument.

Governments are encouraged to promote effective participation by ensuring public access to relevant information and effective use of the information. It should be added here that Agenda 21 not only refers to popular participation, but also addresses the interests of specific communities,

[12] See generally Allison Silverman, "A Rights-Based Approach - What is it and how Should it be Integrated into the IUCN Natural Resources Governance Framework?" (17 July 2013), Commission on Environmental, Economic and Social Policy, online < https://www.iucn.org/downloads/nrgf_rba_brief_silverman.pdf> [https://perma.cc/6YMJ-AJN6].

[13] United Nations Conference on Environmental and Development, Rio de Janeiro, Braz., June 3-14, 1992, Agenda 21 Programme of Action for Sustainable Development, U.N. Doc. A/CONF.151/26 (1992) [Agenda 21].

groups, and individuals, who may be affected by government decision-making processes. Local communities should be permitted to participate effectively in government decision-making processes to achieve a sustainable livelihood.[14] This is because it is important to manage resources in such a way that the communities which depend on them for their livelihood are not adversely affected.

Governments are encouraged to support a community-driven approach to sustainability by giving communities a large measure of participation in natural resource management.[15] Following the access to justice right under Principle 10 of the Rio Declaration, governments are urged to establish judicial and administrative procedures for legal redress and remedy of actions that affect the environment and its development, particularly where these may be unlawful or infringe upon the rights of individuals and groups with a recognized legal interest. Thus, both Agenda 21 and Principle 10 of the Rio Declaration initiate "a movement towards the proceduralization of environmental rights, probably as a substitute for the steadfast recognition of the substantive human right to a healthy environment."[16]

The Rio Declaration and Agenda 21 are non-binding instruments, but their present legal significance is not in any doubt. They establish legal principles that are important for meaningful participation. One commentator has rightly noted that Agenda 21, together with the Rio Declaration, represents progress from earlier environmental and natural resource instruments by openly endorsing an active role for citizens and communities in sustainable development

[14] *Ibid* at Chapter 3.

[15] *Ibid* at Chapter 3 s 3.7.

[16] See Esmeralda Colombo, "Enforcing International Climate Change Law in Domestic Courts: A New Trend of Cases for Boosting Principle 10 of the Rio Declaration" (2017) 35 UCLA J Envtl L & Pol'y 98 at 117.

decisions.[17] Both the Rio Declaration and Agenda 21 address the power differential between governments and affected communities; the instruments confirm that access to justice is an essential part of meaningful participation in natural resource and environmental decision-making. The principles and values of the Rio Declaration and Agenda 21 are widely accepted as international norms. As Handl rightly notes, "while the actual state of their realization domestically may still be a matter of concern… today the rights of access to information, public participation, and access to justice arguably represent established human rights."[18]

Handl's observation reveals the current paradox concerning whether the right to public participation, as a widely accepted principle, could be considered a general principle of international human rights law. Bekhoven has argued that public participation should be regarded as a principle of international environmental law, even though its manifestation in the international and national legal systems is flawed.[19] This position cannot be far from right. There is a general acceptance of community participation in both binding and non-binding international law instruments. The Rio Declaration and Agenda 21 prescribe principles of participation that State parties should incorporate at a national level to promote the meaningful participation of affected communities.

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[17] See Rose Mwebaza, *The Right to Public Participation in Environmental Decision Making: A Comparative Study of the Legal Regimes for the Participation of Indigenous People in the Conservation and Management of Protected Areas in Australia and Uganda* (PhD Thesis, Macouarie University, August 2006) at 107.

[18] See Günther Handl, "Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), 1972 and the Rio Declaration on Environment and Development, 1992" (2012) United Nations Audiovisual Library of International Law, online: < http://legal.un.org/avl/pdf/ha/dunche/dunche_e.pdf> [https://perma.cc/S953-JPD7] at 6.

[19] See Bekhoven, *supra* note 1 at 248

More binding requirements to consult project-affected communities have been created following the Rio Declaration and Agenda 21 than have ever existed before. The approach to the proceduralization of the participatory rights of individuals and communities, who may be affected by a natural resource project, has acquired important regional support in binding treaties. Of relevance for the present purposes is the European *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*.[20] In *Taskin and Others v Turkey* (the Taskin Case)[21], the European Court of Human Rights (ECtHR) hinted that the Aarhus Convention may qualify as a norm of customary law.[22] Ghana is not a party to the Aarhus Convention but, as Turner has rightly argued, the Aarhus Convention is the most far-reaching manifestation of Principle 10 of the Rio Declaration.[23] One commentator has also posited that given its ambition to become a universal treaty, the Aarhus Convention could provide some support for a customary right to participation.[24] The Aarhus Convention model offers a concrete example of a legal right to participation and establishes legal principles that are important for evaluating the effectiveness of public participation. Article 1 states:

> in order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.

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[20] United Nations Economic Commission for Europe (UNECE), *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, 25 June 1998, 38I.L.M. 517 (1999) (entered into force 30 October 2001) [Aarhus Convention].

[21] No 46117/99, ECHR 2004-X.

[22] *Taskin and Others v Turkey*, No 46117/99, ECHR 2004-X at para 99 [Taskin]. Also reported in Leslie-Anne Duvic-Paoli, "The Status of the Right to Public Participation in International Environmental Law: An Analysis of the Jurisprudence" (2012) 23:1 YB Intl Env L 80 at 81.

[23] See Steve Turner, "The Human Right to a Good Environment — The Sword in the Stone" (2004) 4:3 Non-State Actors and International Law 277 at 281

[24] See Duvic-Paoli, *supra* note 22 at 85-86.

The participatory norms embodied in Article 1 of the Aarhus Convention challenge traditional ideas of public participation, revealing them to be mere policy aspirations that are applied at the discretion of State parties. Instead, the Aarhus Convention has granted participatory rights to the 'public' and the 'public concerned'. Under the Aarhus Convention, the 'public concerned' alludes to "the public affected or likely to be affected by, or having an interest in, the environmental decision-making."[25]

It follows from Article 1 of the Aarhus Convention that a community has a legal right to participate, wherever a natural resource or the government's environmental decision-making is likely to affect such a community. The right to participation gives the affected community sufficient standing to present a legal challenge if its rights are violated or to enforce the law where there is a breach. As underlined in the Implementation Guide to the Aarhus Convention, one of the main obstacles to effective participation is the denial of standing to the affected communities, and the fact that bodies with judicial functions lack the authority to provide injunctive relief or other appropriate remedies to enforce their decisions effectively.[26] Hence, it is significant that public participation is made a justiciable right, which communities and individuals can enforce in the event of a breach.

In the Slovakian case of *Krajsky sud v Banskej Bystrici*,[27] one of the issues related to whether a civil association had the standing to initiate an action for participation in decisions over

[25] See Aarhus Convention, *supra* note 20 at article 2(5).

[26]Aarhus Convention: An Implementation Guide" (2nd Edition, 2014), online: < https://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf> at 187.

[27] *Krajsky sud v Banskej Bystrici*, case no. 23S/113/2011, 4 April 2012 [Kraisky Sud] cited in Justice and Environment, "Developments in National Case Law with regards to the Aarhus Convention: Synthesis report of case studies on particular aspects of access to justice in environmental matters in selected EU Member States" (2017), Online: Justice and Environment

the designation of a mining area. The mining authority argued that since public participation in mining law is not expressly regulated under domestic legislation, the petitioner bringing the case to court could not be granted legal standing in the proceedings. The Regional Court in Banská Bystrica rejected the mining authority's reasoning and upheld the Petitioner's argument that in a matter on which legislation is silent, it should be interpreted in the spirit of the Aarhus Convention. The Court ruled that the Aarhus Convention is an international treaty that takes precedence over national legislation, although without direct effect. Thus, national legislation must be applied in compliance with the Aarhus Convention, in order to achieve the aims of environmental legislation.[28]

Any restraint on public participation in the procedures associated with preparing for and considering a planned activity that could affect the public may be recognized as a breach of the Aarhus Convention and constitute grounds for annulment. In *Inter-Environnement Wallonie v Walloon Region*,[29] the Constitutional Court of Brussels held that the *Walloon Town and Country Planning Code* (Decree of the Walloon Region of 3 February 2005) violated Article 7 of the Aarhus Convention on public participation, as it did not provide a participatory process that satisfied the requirements of Article 7 of the Convention. Effective participation requires that the opinions of the public concerned be appropriately assessed. Here, it is important that traditional or community knowledge is considered to be at least as important as scientific knowledge. A

<http://www.justiceandenvironment.org/fileadmin/user_upload/Publications/2017/Synthesis_report_of_case_studies_.pdf> [https://perma.cc/V7R8-JY2D] at 2.

[28] Justice and Environment, "Developments in National Case Law with regards to the Aarhus Convention: Synthesis report of case studies on particular aspects of access to justice in environmental matters in selected EU Member States" (2017), Justice and Environment, Online: <http://www.justiceandenvironment.org/fileadmin/user_upload/Publications/2017/Synthesis_report_of_case_studies_.pdf> at 2.

[29] Nr. 137/2006.

participation process may not be considered to comply with the requirements of the Aarhus Convention if public opinion has been heard but not taken into account.[30]

In a case concerning Armenia, a special mining licence was issued for the developer to exploit deposits in the Teghout region in 2004, whereupon the developer organized public participation in the framework of the EIA procedure in 2006. The Aarhus Compliance Committee subsequently ruled that:

> providing for public participation only after the licence has been issued reduced the public's input to only commenting on how the environmental impact of the mining activity could be mitigated but precluded the public from having input on the decision on whether the mining activity should be pursued in the first place, as that decision had already been taken. Once a decision to permit a proposed activity has been taken without public involvement, providing for such involvement in the other subsequent decision-making stages can under no circumstances be considered as meeting the requirement under article 6, paragraph 4, to provide "early public participation when all options are open." This is the case even if a full EIA is going to be carried out.[31]

Participation requires an environment that promotes equitable and transparent decision-making. Chapter Two of this dissertation has already demonstrated that participatory approaches are least effective where participants have no opportunity to influence the outcome.

Although not legally binding in Ghana, the Aarhus Convention is an important benchmark by which public participation can be measured. The Convention's principles conform to the criteria proposed in Chapter Two of this dissertation. The above cases demonstrate that only providing for participation after a project has been completed places participants in a reactive position, where they are asked to respond to proposals that have already been finalized. The cases support the

[30] *Gruba et al* v *Jurmala City Council*, No.2008-38-03 [Gruba et al].

[31] Armenia ACCC/C/2009/43, ECE/MP.PP/2011/11/Add.1, 12 May 2011 at para 76. [Armenia] cited in Uzuazo Etemire, *Law and practice on public participation in environmental matters: the Nigerian example in transnational comparative perspective* (London: Routledge, 2016) at 180-181.

proposition that regulated public participation is essential for the legitimacy of the participation process. In all three cases, the identification of a legal right gave a judicial avenue to the public concerned.

Government and institutional policy may give general direction to decision-making authorities on public participation, but reliance on mere participatory guidelines will only serve an illusory spectacle. In contrast, according to Lucas, regulatory and management decisions by public resource and environmental agencies require a basis in law. The Aarhus Convention illustrates that the rights of members of the public to participate in agency decisions, if these rights are to be enforced, must also have an explicit legal foundation.[32]

Duvic-Paoli's review shows that the right of public participation is consolidating in international environmental law and human rights law, and that there are hints of its potential customary nature.[33] Whatever assessments are made of the present position on the Rio Declaration and Agenda 21 cannot dispose of the fact that there is wide spread acceptance of the rights of affected communities to participate in decisions that affect them. The Rio Declaration and Agenda 21 intend to inform the key actors in the mining industry – namely the government, project proponents and affected communities – about good principles and practice for meaningful participation, based on international standards. The key expectation is that states will take the content of the instruments seriously and give them some measure of respect, but the Aarhus Convention shows that procedures could be strengthened if new substantive rules are developed in a more binding instrument. In the cases discussed, the national courts found a violation of the

[32] See generally Alastair R Lucas, "Legal Foundations for Public Participation in Environmental Decision making" (1976) 16 Nat Resources J 73.

[33] See Duvic-Paoli, *supra* note 22 at 105.

participatory rights of the petitioners, taking into account the provisions of the Aarhus Convention. In the Slovakian case of *Krajsky sud*, public participation was not expressly regulated under domestic legislation, but this did not stop the Regional Court in Banská Bystrica from enforcing the government's treaty obligations under the Aarhus Convention.

3.3 The Systematic Integration of a Legally Enforceable Right to Community Participation in Africa

The Aarhus Convention shows that a major benefit of having legal rules is the possibility of recourse to legal sanctions. It is not only at the international level that public participation has been accepted, but also on national and regional planes. In the African context, the global initiative on the right to public participation has inspired regional initiatives. Ghana, for example, has participated in several natural resource and environmental law instruments that provide for the participation of communities which are affected by decision-making processes over natural resources. In Africa, the idea of a legally enforceable right to community participation was brought to the center stage of regional discourse under the revised *African Convention on the Conservation of Nature and Natural Resources*.[34] The revised African Convention amended the 1968 Algiers *African Convention on the Conservation of Nature and Natural Resources*[35] by expanding elements related to sustainable development. The African Convention incorporates a right to

[34] *African Convention on the Conservation of Nature and Natural Resources*, 15 September 1968, AU CAB/LEG/24.1 (enter into force 16 June 1969) [Africa Convention].

[35] African Convention on the Conservation of Nature and Natural Resources (07 March, 2017) Organization of African Unity, online: < https://au.int/sites/default/files/treaties/7782-treaty-0029_-_revised_african_convention_on_the_conservation_of_nature_and_natural_resources_e.pdf> [Africa Convention 2017]. The Convention was rectified by Ghana on 13 June 2017. See <https://au.int/sites/default/files/treaties/7782-sl-revised_african_convention_on_the_conservation_of_nature_and_natural_resources.pdf>.

community participation as a prerequisite for the sustainable development of Africa's natural resources.

Towards this end, State Parties are to ensure that public participation is treated as an integral part of national and/or local development plans.[36] The African Convention mandates State Parties to take the necessary measures to enable active participation by local communities in the process of planning and managing natural resources upon which such communities depend, with a view to creating local incentives for conservation and the sustainable use of such resources.[37] It highlights the three pillars of effective participation: public access to environmental information; public participation in decision-making on matters of potentially significant environmental impact, and access to justice in matters relating to the protection of the environment and natural resources.[38] As noted earlier, the three rights are inseparable, as public participation presupposes access to information and both require access to justice for their implementation.[39]

Little by little, international conventions and agreements on the environment and natural resources have reflected the international community's recognition that individuals, as well as groups and communities, possess a number of environmental and participation rights.[40] The participatory requirements in the *African Convention on the Conservation of Nature and Natural*

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[36] In Kenya, for example, communities have the right to be informed prior to any upstream petroleum operations being carried out within their county. The right to be informed includes a right to inquire and interrogate, concerning any planned activities that could directly or indirectly affect the environment. See the *Petroleum (Exploration, Development and Production) Bill*, 2017, s 117.

[37] See African Convention 2017, *supra* note 35 at Article XVII.

[38] *Ibid* at Article XVI

[39] See IUCN Environmental Law Centre, *An Introduction to the African Convention on the Conservation of Nature and Natural Resources*, 2nd ed (Gland, Switzerland: IUCN Publications, 2006) at 13-14.

[40] See Giulia Parola, *Environmental Democracy at the Global Level: Rights and Duties for a New Citizenship* (Warschau/Berlin: De Gruyter Open, 2013) at 122.

Resources echo Principle 10 of the Rio Declaration. As has been noted, both instruments emphasize access to information and access to justice as a fundamental *sine qua non* of community participation since no meaningful participation in decision-making can occur without relevant information and effective access to judicial proceedings. Like the Aarhus Convention, the requirement of a right to participation is not an aspiration in the context of the African Convention, but something that must be grounded and cemented in law. The fact that the African Convention requires the three pillars to be grounded in legislation erases any distinction between soft and hard law in the context of enforcement. The African Convention follows the current trend in international environmental and natural resource law instruments by introducing a justiciable rights-based approach to natural resource governance at the center of effective community participation.

The emerging trend of international law on public participation has shifted away from unenforceable aspirations towards a worldwide compliance system. International environmental and natural resource laws are beginning to introduce a more active form of participation for non-State actors: in particular, underground stakeholders in the development of natural resources. Article XVI of the revised *African Convention* self-consciously highlights this new trend by emphasizing the rights of parties who may be affected by their government's decision-making. Article XVI provides that States shall ensure timely and appropriate

> (a) dissemination of environmental information (b) access of the public to environmental information (c) participation of the public in decisions making with a potential significant environmental impact, and (d) access to justice in matters related to the protection of the environment and natural resources.

Article XVIII (3) requires governments to enable active participation by the local communities in the process of planning and management of natural resources upon which

such communities depend with the view to creating local incentives for the sustainable use of such resources. Read together, Articles XVI and XVIII of the Convention introduce a justiciable right to the natural resource governance regime by emphasizing the participatory rights of the parties concerned.

Additional general principles recited in the Preamble indicate the thematic overlay that should guide the interpretation of the African Convention towards the proceduralization of the participatory rights of affected communities. In fact, African countries have generally been aware of international developments in a rights-based approach to environmental protection and public participation. The Convention affirms that African countries have been conscious of the need to continue furthering the principles of the Stockholm Declaration, in order to contribute to the implementation of the Rio Declaration and Agenda 21, and to work closely together towards the implementation of global and regional instruments in support of their goals. It stands to reason that the substantive content on community participation is in tune with current international natural resource and environmental thinking, policies, and principles that seek to guarantee a legal right to community participation.

The right of all populations to a satisfactory environment, which will favour their development, is a guiding principle in the implementation of the Convention's provisions.[41] In addition, States have a duty to uphold the right to development and to ensure that this desire for development and the accompanying environmental needs are met in a sustainable, fair and equitable manner. It has been rightly suggested that a substantive right to a satisfactory environment, or a right to development, is meaningless without the necessary procedural right to

[41] See *African Convention* 2017, *supra* note 35 Article III

pursue respect for, protection of, and promotion of that right.[42] It is submitted that the African Convention imposes a clear obligation on its parties and public authorities towards the 'community', as far as access to information, public participation, and access to justice are concerned. The African Convention is similar to the Aarhus Convention in that both provide a treaty mechanism for the meaningful participation of affected communities.

Many other regional law instruments have considered an explicit legal framework for the enforcement of public participatory rights in typical natural resource decision-making processes. Aside from the *African Convention on the Conservation of Nature and Natural Resources,* there are regional declarations and resolutions, on the basis of which communities in Ghana with special relationships to a particular environmental or natural resource decision-making procedure may argue for participation. A natural resource community's right to participation has been reaffirmed in a 2012 resolution adopted by the African Commission on Human and Peoples' Rights, entitled *Resolution on a Human Rights-Based Approach to Natural Resources Governance* (HRBA Resolution).[43] The HRBA Resolution may be considered as a non-binding instrument, but it shapes the conduct of States in the creation of binding domestic rules. The HRBA Resolution calls upon governments to take all necessary measures to ensure participation, including the free, prior and informed consent of communities, in decision-making related to natural resources governance. The HRBA Resolution requires State Parties

> to promote natural resources legislation that respects the human rights of all and requires transparent, maximum and effective community participation in a) decision-making about, b) prioritisation and scale of, and c) benefits from any

[42] See Parola, *supra* note 40 at 131.

[43] Resolution on a Human Rights-Based Approach to Natural Resources Governance, African Commission on Human and Peoples' Rights, 51st Sess, ACHPR/Res.224(LI)(2012) [Resolution on HRBA to Natural Resources Governance].

development on their land or other resources, or that affects them in any substantial way.[44]

The HRBA Resolution creates the opportunity for the enforcement of effective community participation by requiring the participating countries to ensure that the rights to participation are justiciable and that extractive industries and investors are legally accountable to the country hosting their activities.

Unlike other international law instruments, the HRBA Resolution does not limit the scope of its application to free, prior and informed consent to Indigenous peoples. One commentator has noted that the HRBA Resolution is arguably the most significant attempt so far by African governments to recognize, adapt and bring the human rights language into the development and use of natural resources.[45] The HRBA Resolution ensures minimum procedural and participatory rights for communities affected by natural resource governance. It draws heavily upon international human rights thinking.[46] It places a positive obligation upon States to ensure that natural resource communities participate effectively in decision-making about resources, and ultimately benefit from resource development.

Article 31 of the ECOWAS Treaty provides for the coordination and harmonization of national policies in the natural resources of member States. In consonance with this provision, the *ECOWAS Directive on the Harmonisation of Guiding Principles and Policies in the Mining Sector*

[44] *Ibid.*

[45] See Damilola S Olawuyi, "The Increasing Relevance of Rights-Based Approaches to Resource Governance in Africa: Shifting from Regional Aspiration to Local Realization" (2015) 11 JSDLP 293 at 317.

[46] See Jonas Ebbesson, "Public Participation and Privatisation in Environmental Matters: An Assessment of the Aarhus Convention" (2011) 4:2 Erasmus Law Review 71 at 74.

*(*ECOWAS Directive)[47] is aimed at improving economic and social justice in communities during decision-making processes concerning the exploitation of natural resources. This is part of an efficient conflict prevention policy in the sub-region. The Directive places an obligation on member States to respect the rights of local communities while exploiting and developing any resources that affect the latter. Countries are requested to ensure that they obtain the Free, Prior, and Informed Consent ("FPIC") of local communities, before mineral exploration begins, and prior to each subsequent phase of a mining or post-mining operation.[48]

A detailed discussion of the concept of FPIC is well beyond the scope of this section, but a comment is warranted. There is no clear and authoritative position on whether FPIC does imply the right to veto mining projects. FPIC has been recognized by a growing number of international human rights documents as the panacea to empower Indigenous and local communities and further enhance their standing and power at the negotiation table. One commentator has suggested that consultation and participation ring hollow if the potentially affected communities can say anything except "no."[49] Thus, local communities should be able to withhold their consent and refuse access to the development of resources that negatively affect their land use rights. While it is certainly true that the right to veto a project is sound from the perspective of a project-affected community, it remains important that natural resources should be exploited for the benefit of the entire country.

[47] Economic Community of West African States, Directive on the Harmonization of Guiding Principles and Policies in the Mining Sector, 62nd Sess of the Council of Ministers, Directive C/DIR.3/05/09 (2009) [ECOWAS Directive].

[48] *Ibid* at Article 16(3).

[49] See Robert Goodland, "Free, Prior and Informed Consent and the World Bank Group" (2004) 4:2 Sustain Dev Law Policy 66 at 66.

For Manirakiza, the right to a veto entails the risk of paralyzing extraction and developmental projects of the government.[50] It is for this reason that the FPIC should be construed to allow project-affected communities to affect the outcome of decisions and require decision-makers to sufficiently accommodate the needs and concerns of the community. Mining communities should have the power to negotiate on equal terms with the government and project proponents. In this regard, as discussed in Chapter Four, the duty to consult has opened the space for Indigenous and local communities to resist power imbalances and influence decision-making related to natural resources governance.

FPIC gives mining communities the right to insist that certain actions are implemented before exploitation or development activities take place. The Directive obliges Member States to maintain consultation and negotiation on important decisions that affect local communities throughout the mining cycle.[51] The Directive emphasizes the importance of stakeholder engagement and consultation in resource development. As has already been argued, effective participation cannot be achieved without the affected mining community having access to the requisite information for their participation. Member States are encouraged to ensure the free flow of information on mining activities and that laws are put in place to promote public access to such information.[52]

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[50] See Pacifique Manirakiza, "Asserting the Principle of Free, Prior and Informed Consent (FPIC) in Sub-Saharan Africa in the Extractive Industry Sector" in Markus Krajewski, ed., *Human Rights in the Extractive Industries: Transparency, Participation, Resistance* (Cham, Switzerland: Springer, 2019) 219 – 243 at 234

[51] See ECOWAS Directive, *supra* note 47 at Article 16(4).

[52] *Ibid* Article 13.

Effective stakeholder engagement and participation should have the potential to benefit the affected communities. To this end, Member States must ensure the equitable and effective distribution and transfer of portions of mining revenue for the benefit of local communities. In addition, they must encourage the strengthening of their capacities.[53]

In joining ECOWAS, member States have already acknowledged the importance of a concrete legal mandate and emphasized the domestic use of legal and regulatory means to ensure the application of the principles enshrined in the Directive. Sarpong has opined that apart from the consistency and uniformity that the Directive's application should engender within the ECOWAS community, its implementation ought to bring about a significant improvement in the state of mining in the States of the sub-region.[54] It (the Directive) demonstrates a concerted effort towards the justiciability of the three 'access rights' to empower mining communities. Thus, communities living in close proximity to mining areas and affected by mining activities can claim a right to participation, based on the Directive.

It becomes clear from the foregoing that the successful implementation of these international law principles has great potential to transform resource exploitation into sustainable benefits for mining communities. International law seeks to balance the power relationship between government, mining companies and mining communities by ensuring that participation is grounded in law. The access to justice right embedded in many international natural resource instruments demonstrates a move towards a justiciable right to participation. Community participation in decision-making over natural resources has shifted from a mere policy aspiration

[53] See ECOWAS Directive, *supra* note 47 at Article 8(5).

[54] See George A Sarpong, *Ghanaian Environmental Law: International and National Perspectives* (London: Wildy, Simmonds & Hill Publishing, 2018) at 221.

to a legal compliance system. In order to mitigate the negative impact of mining operations on communities, international law ensures that project-affected communities have full and active participation in the decision-making process.

The HRBA Resolution and the ECOWAS Directive contain mandatory language for the participation and engagement of mining communities, but some scholars have argued that, in accordance with Articles 9 and 12 of the ECOWAS Treaty, the Directive is only binding upon member States.[55] One commentator has suggested that the Directive does not create any direct rights or obligations for individual or mining project-affected communities.[56] In other words, the Directive regulates the rights and obligations of the State on the international plane without changing rights and obligations under domestic law. Thus, a mining community cannot use the Directive as a strategic reference point to claim a right to 'free, prior, and informed consent' or to challenge breaches of the Directive in the law courts. In the absence of domestic law giving effect to these international requirements, it is uncertain whether they can form the legal bases for the participation of communities that are affected by mining projects. Hence, the extent to which mining communities can claim a right to participation under these international instruments is the subject of discussion in the next section.

[55] See generally Mayer Brown, "Recent Legal Developments in the Mining Sector of West African States" (January 2010); online < https://www.mayerbrown.com/files/Publication/a10390b1-79cb-4dee-b6bb 16bd5af12d96/Presentation/PublicationAttachment/653da675-bc14-439a-bc79-87abeb85ccbb/NEWSL_MINING_JAN10_BULLETIN_WEST_AFRICA.PDF> [https://perma.cc/72US-G73N].

[56] *Ibid* at 2.

3.4 The Right to Community Participation in Ghanaian Law

Ghana has participated in the negotiation, conclusion, and ratification of numerous human rights treaties of the United Nations and African Union, giving the communities affected by natural resource development the apparent right to participate in decision-making over natural resources. However, the country has not followed the ratification of these instruments with the necessary incorporation processes to transform the relevant treaties into domestic law, particularly, the *African Convention on the Conservation of Nature and Natural Resources*, the *Resolution on a Human Rights-Based Approach to Natural Resources Governance*, the ECOWAS Directive and the Rio Declaration. The absence of confirmation or incorporation of these instruments presents a challenge to citizens who may wish to enforce the participatory rights arising from them. As a result, citizens are deprived of the benefits due to them under these international norms, which raises the question of whether the courts can adjudicate upon and apply these instruments without the intervention of Parliament.

In Ghana, the dominant position is that international laws have no domestic effect until they are incorporated through an Act of Parliament or via the issuing of parallel domestic legislation.[57] For example, a law may be passed which indirectly gives effect to the obligations of the treaty, without necessarily or directly referring to that particular instrument of international law. As with other common law countries, the principle that unincorporated international law instruments

[57] The fundamental human rights provisions of the 1992 Constitution and other instruments draw inspiration from the text of international law instruments such as the International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171 (entering into force on 23 March 1976, and signed and ratified by Ghana on 7 September 2000).

cannot create directly enforceable rights is rooted in Ghana's constitutional orthodoxy and Parliamentary sovereignty.[58]

In consonance with the common law tradition, Ghana adopts a dualist approach to the incorporation of international treaties into its national law. It is beyond the scope of this section to give an account of the general theories of international law governing the importation of international law instruments into Ghana's national legal system, but it is clear that Parliament can decide whether or not to fulfill treaty obligations imposed upon the State by the executive. The general view is that in order for international law to become part of Ghanaian law, the requisite legislative action needs to be taken to incorporate such ratified instruments into the domestic legal system before the courts can apply them.[59] This position is backed by a string of authorities in Ghana and other common law countries. At common law, a treaty has no legal effect upon the rights and duties of the subjects of the Crown and no power resides in the Crown to compel subjects to obey the provisions of a treaty, or to expel them without supporting legislative authority.[60]

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[58] For the United Kingdom, see Shaheed Fatima, *Using International Law in Domestic Courts* (Oxford: Hart, 2005) at 8.1-8.11.

[59] See Emmanuel K Quansah, "An Examination of the Use of International Law as an Interpretative Tool in Human Rights Litigation in Ghana and Botswana", in Magnus Killander, ed., *International Law and Domestic Human Rights Litigation in Africa* (Cape Town: Pretoria University Law Press, 2010) 37 at 37 – 56

[60] See *Attorney-General (Canada) v Attorney-General (Ontario)*, [1937] AC 326 [Canada v Ontario], where Lord Atkin stated at p 347 "it will be essential to keep in mind the distinction between (1) the formation, and (2) the performance, of the obligations constituted by a treaty, using that word as comprising any agreement between two or more sovereign States. Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes." See also *Walker v Baird*, [1892] AC 491 at para 497 [Walker].

Justice Ampaih persuasively stated the modern application of the common law position in the celebrated case of *New Patriotic Party v Attorney-General*[61] where he wrote that

> International laws, including intra African enactments, are not binding on Ghana until such laws have been adopted or ratified by the municipal laws… This is a principle of public international law which recognizes the sovereignty of States as prerequisite for international relationship and law.[62]

Justice Ampaih's dictum represents the two traditional overlapping principles on the use and application of unincorporated international law instruments in the domestic context: firstly, that domestic courts have no jurisdiction to construe or apply such treaties; and secondly, that unincorporated treaties are not part of domestic law and cannot directly create enforceable rights in domestic law nor deprive individuals of existing domestic law rights.[63]

In a ruling on Ghana's attachment of an Argentine warship, the Supreme Court of Ghana in *Republic v High Court Accra, ex parte Attorney General*[64] explained that customary international law is "part of Ghanaian law," incorporated into domestic common law through judicial decisions to the extent that it does not conflict with domestic statutory or case law.[65] The practical significance of customary international law finds expression in the fact that the distinction between incorporated and unincorporated international norms becomes almost entirely irrelevant in this realm. Once a rule of international law attains the status of customary law, it automatically becomes part of Ghana's laws. Treaties, by contrast, are treated according to the dualist approach:

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[61] [1997-98] 1 GLR 378 [New Patriotic Party].

[62] See *New Patriotic Party v Attorney-General*, [1997-98] 1 GLR 378 at 413

[63] See Shaheed Fatima, *Using International Law in Domestic Courts* (Oxford: Hart, 2005) at 8.

[64] (20 June 2013), Writ No. J5/10/2013 [*High Court Accra, ex parte Attorney General*].

[65] *Republic v High Court Accra, ex parte Attorney General* (20 June 2013), Writ No. J5/10/2013 Supreme Court at para 2 – 5 [High Court Accra, ex parte Attorney General]. See also Sadie Blanchard, "Republic v High Court Accra, ex parte Attorney General" (2014) 108:1 The American Journal of International Law 73 at 75.

they do not change municipal law, and thus may not be applied by domestic courts unless incorporated by appropriate legislation.[66] It is clear that, even if the executive has expressed consent as a matter of international law, a treaty must be incorporated by standard legislation in order for it to have the force of domestic law.

It has never been suggested, however, and it is not the law, that a treaty cannot be enforced without legislative implementation. The common law position assumes that legislation is only required if some alteration in the domestic law is needed for the implementation of the treaty. If the treaty does not seek to amend existing law, there is no need for any national legislation to give effect to it. Scholars who adhere to the traditional dualist approach (requiring the domestication of international law instruments) suggest that the failure to incorporate an international instrument may be a manifestation of parliamentary resistance to the treaty.[67] By giving effect to a treaty in the absence of a national implementing measure, the judiciary may be indirectly setting itself up against the will of an elected branch of government, or upsetting the balance of power between the various organs of government.[68] In other words, it usurps the powers of the legislature for the courts to apply, use, or enforce treaties that have been executed but not yet incorporated into domestic law.

The dualist position thus raises the key questions of whether the Ghanaian courts can use and apply conventions and treaties that the country has ratified but has not yet domesticated as part of its legal system, and possibly, whether unincorporated international norms can create justiciable

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[66] *Ibid* at para 2 – 5. See Blanchard, *ibid* at 75.

[67] See Richard Frimpong Oppong, "Re-Imagining International Law: An Examination of Recent Trends in the Reception of International Law into National Legal Systems in Africa" (2007) 30 Fordham Int'l LJ 296 at 317.

[68] *Ibid* at 317

rights and obligations in the Ghanaian legal system. The Constitution of Ghana does not expressly incorporate international law into Ghana's legal system, but it is trite to say that the 1992 Constitution promotes respect for international law and treaty obligations. The Directive Principles of State Policy, for example, enjoin the Government to adhere to the principles, aims, and ideals of:

i) The Charter of the United Nations;
ii) The Charter of the Organisation of African Unity;
iii) The Commonwealth;
iv) The Treaty of the Economic Community of West African States, and
v) Any other international organisation of which Ghana is a member.[69]

Additionally, Article 73 of the Constitution enjoins the government to conduct its international affairs in line with the accepted principles of public international law. In tandem with this, Ghana has applied numerous principles of international law in its legislative enactments.

Can it be said that Ghana is not bound by its obligations under the *African Convention on the Conservation of Nature and Natural Resources,* given that the country has yet to pass a law to incorporate this Convention into its legal system? Are the provisions of the Rio Declaration, the *African Convention on the Conservation of Nature and Natural Resources* or the *HRBA to Natural Resources Governance* justiciable in the Ghanaian courts?

Scholars have pointed to the growing use of unincorporated international law instruments in the domestic courts of Ghana.[70] Okeke, for example, demonstrates that the fact of an international law instrument not being domesticated in Ghana's legal system has not stopped the Ghanaian courts from making use of international norms. He submits that the courts are prepared

[69] *Constitution of the Republic of Ghana*, 1992, Article 40(d).

[70] See generally Christian N Okeke, "The Use of International Law in the Domestic Courts of Ghana and Nigeria" (2015) 32:2 Ariz J Intl & Comp L 271.

to enforce international norms and conventions wherever necessary, even when such instruments have not been incorporated into the national legal system, citing the case of *New Patriotic Party v Inspector General of Police*[71] to support his position. In that case the Supreme Court of Ghana, *inter alia*, decided on whether some provisions of NRCD 68 were inconsistent with and a contravention of the Constitution and were therefore null, void and unenforceable. By way of obiter, Chief Justice Archer held that the African Charter has the force of law to make its provisions justiciable in Ghana's courts, notwithstanding the absence of incorporation, observing that:

> Ghana is a signatory to… African Charter, and member states of the OAU and parties to the Charter are expected to recognize the rights, duties, and freedoms enshrined in the Charter and to undertake to adopt legislative and other measures to give effect to the rights and duties. I do not think the fact that Ghana has not passed specific legislation to give effect to the Charter means that the Charter cannot be relied upon.[72]

Chief Justice Archer's obiter dictum is presumptively not binding and does not represent the majority opinion of the Court but provides some support for the argument that an unincorporated treaty can create enforceable rights in the national law. His observation is similar to the Slovakian case of *Krajsky sud v Banskej Bystrici*, in that both courts show that a State may be receptive to international human rights principles, even in areas where its internal laws have not expressly made any provisions.[73] In *Inspector General of Police*, the provisions of the African Charter were not inconsistent with the provisions of the Constitution. It did not entail alteration of the existing domestic law.

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[71] (1993-1994) 2 GLR 459 467 [Inspector General of Police].

[72] *Ibid* at 466

[73] See Okeke, *supra* note 70 at 400.

In support of Chief Justice Archer's conclusion, it should be emphasized that the Bangalore Principles direct national courts to respect any international obligations that the country undertakes, regardless of whether they have been incorporated into domestic law.[74] This is in consonance with the general rule of international law that a State cannot plead a gap in its national law as a defense against satisfying its international obligations.[75] The *African Convention on the Conservation of Nature and Natural Resources* is a treaty within the definition of the *Vienna Convention on the Law of Treaties*. Ghana cannot invoke its municipal law as an excuse for failing to perform an obligation imposed by the Convention.

Some scholars have also examined the extent to which international law is applied and used as an interpretative tool in Ghana. A review of the literature will reveal that the dichotomy between the use and application of incorporated and unincorporated international norms is blurred in practice. For instance, Quansah examined the jurisprudence on the use and application of international human rights norms in Ghana's courts, revealing that the Ghanaian courts were prepared to go beyond the traditional use of unincorporated treaties as an aid to interpretation.[76]

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[74] The Commonwealth iLibrary, "First Judicial Colloquium on the Domestic Application of International Human Rights Norms" (24–26 February 1988), online: *The Commonwealth iLibrary* < https://www.oecd-ilibrary.org/docserver/9781848594456-en.pdf?expires=1533072213&id=id&accname=ocid177104&checksum=FCC9A0E63732C41E7B1D41B2533A4020> [https://perma.cc/T4BT-WZ9D] at x. See also, Melissa A. Waters, "Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties" (2007) 107:3 COLUM L REV 628 at 642-664.

[75] Article 27 of the Vienna Convention on the Law of Treaties provides that, "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." See *Vienna Convention on the Law of Treaties*, 23 May 1969, UN Treaty Series vol 1155, art 27 (entered into force 27 January 1980).

[76] See Quansah, *supra* note 59 at 37 – 56.

Quansah demonstrates that the Ghanaian courts have no qualms about relying on unincorporated international norms when required to determine human rights issues.

The trend towards relying on international principles in litigation is also evident from Appiagyei-Atua's analysis of the place of international human rights norms in Ghana's courts.[77] Appiagyei-Atua suggests the erosion of the normative borders between incorporated and unincorporated international law instruments, showing that there have been occasions when the courts have relied on unincorporated international law instruments to determine cases. For example, he cites *Inspector General of Police* to suggest the investing of unincorporated international human rights instruments with superiority over a domestic enactment.[78]

A comparative study of the status of ratified but unincorporated international law instruments from other African countries also indicates support for the position espoused above. For example, Hansungule describes a similar position in Zambia, where the High Court applied an international human rights instrument that had not been incorporated into the country's domestic law as required by the Zambian Constitution. In *Longwe v Intercontinental Hotels Limited*,[79] the High Court considered whether the petitioner could seek protection under the *Convention on the Elimination of all Forms of Discrimination against Women* (CEDAW) and the *African Charter on Human and Peoples' Rights*. The respondent argued that the petitioner had no right under the Conventions,

[77] See generally Kwadwo Appiagyei-Atua, "Ghana at 50: The Place of International Human Rights Norms in the Courts" Mensa-Bonsu et al ed, *Ghana Law since Independence: History, Development and Prospects* (Accra: Black Mask, 2007) 179 – 215.

[78] *Ibid* at 197 – 199.

[79] *Sara Longwe v Intercontinental Hotels 1992/HP/765*, [1993] 4 LRC 221 [Sara Longwe].

given that Zambia had not domesticated these Conventions in local law. Thus, the Court had no jurisdiction to apply them. Musumali J held that:

> ratification of such documents by a nation-state without reservations is a clear testimony of the willingness of the State to be bound by the provisions of such a document. Since there is that willingness, if an issue comes before this court which would not be covered by local legislation but would be covered by such international document, I would take judicial notice of that treaty or Convention in my resolution of the dispute.[80]

Sara Longwe v Intercontinental Hotels shows that the courts are open to the use of undomesticated international human rights instruments, even though there may be no specific statute mandating the judiciary to use its discretion. Although Hansungule points out that some judges are still hesitant to resort to undomesticated international law instruments, *Sara Longwe v Intercontinental Hotels* makes it clear that any attempt to assess the perception of international law purely through the dualist prism may be inadequate – a trend described as "creeping monism."[81]

As Quansah rightly notes, it makes a mockery of the country's international obligations that it ratifies these international treaties and conventions, but then leaves them on the shelves of the national implementing authority.[82] Human rights treaties contain rights for citizens and obligations for the States that execute such treaties. As Ako rightly argues, to deprive citizens of the enjoyment of these rights, merely because treaties have not been domesticated, brings to naught the efforts expended in negotiating and executing such treaties.[83]

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[80] *Ibid*. See also Michelo Hansungule, "Domestication of international human rights law in Zambia" in Magnus Killander, ed, *International Law and Domestic Human Rights Litigation in Africa* (Cape Town: Pretoria University Law Press, 2010) 71 at 74-75.

[81] See Melissa A Waters, "Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties" (2007) 107:3 Colum L Rev 628 cited in Okeke, *supra* note 70 at 400.

[82] See Quansah, *supra* note 59 at 55.

[83] See Ernest Yaw Ako, "Re-Thinking the Domestication of International Treaties in Ghana" in Richard Oppong & Kissi Agyebeng, eds, *A Commitment to Law, Development and Public Policy: A Festschrift in*

The public law principle of fairness does not allow ratification to be treated as a hollow pretense, with the knowledge that obligations under ratified instruments will rarely be enforced. The execution of a treaty is a serious exercise, and the courts ought to be prepared to go beyond the bounds set by traditional dualism, which dictates that international law should form no part of domestic law unless enacted by the legislature. Ratified but unincorporated international human rights principles should create binding obligations at a national level, even where the country has not taken formal steps to incorporate the rules of international instruments into its national law.

This position gives credence to the application of the doctrine of legitimate expectation, which rests on the expectation that the executive/legislature will take the requisite steps to enact the legal treaties and conventions in which a country has participated into the national legal system. In the Nigerian case of *Abacha v Fawehinmi*,[84] the Supreme Court of Nigeria observed that citizens are entitled to legitimately expect that the government, after signing a treaty, will observe the terms of the agreement. A treaty or convention *stricto sensu* may have no effect on citizens' rights and duties in statutory law. However, the government's act of participation and ratification gives rise to a legitimate expectation by its citizens that said government will observe the terms of the treaty.[85]

In *Minister for Immigration and Ethnic Affairs v Teoh,*[86] the issue was whether the ratification of the *UN Convention on the Rights of the Child* confers rights or imposes duties under Australian domestic law, given that Australia has ratified the Convention but not yet incorporated

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Honour of Nana Dr. Samuel Kwadwo Boaten Asante (London: Wildy, Simmonds and Hill Publishing, 2016) 587 at 595.

[84] *Abacha v Fawehinmi*, [2001] AHRLR 172 [Abacha].

[85] *Ibid.*

[86] (1995) 183 CLR 273.

its provisions into its statutory national law. The Court held that Australia's participation in the making of the Convention constitutes a promise or representation to other sovereign States, the world, and the people of Australia. Accordingly, the ratification of the treaty cannot be "a merely platitudinous or ineffectual act."[87] The Court's position ensures that treaty ratification is an act of real juridical (legal) value.

The position that treaty ratification can give rise to a legitimate expectation has received impetus in many jurisdictions and is deemed to represent "the correct position of the law" in many countries.[88] Oppong is of the view that "jurisprudence on the doctrine of legitimate expectation significantly relaxes the rule that an unincorporated treaty cannot confer rights or impose duties in domestic law."[89] It would, therefore, be inaccurate to suggest that the absence of incorporation unilaterally abrogates rights and obligations in an international law instrument that a country has ratified.

The literature demonstrates support for the use of unincorporated international law instruments in Ghana but cannot be taken as representing the current position of the law. The cases referred to in the literature should be interpreted in light of the modern developments in courts' use of international human rights law as interpretative aids. The courts are ready to interpret and apply treaties and international human rights instruments that are binding because they do not require ratification or because there is no contrary legislative intention. This cannot be used as a

[87] *Ibid*.

[88] See *Abacha*, *supra* note 84

[89] See Oppong, *supra* note 67 at 314 & 317.

basis for an abstract proposition about treatment of treaties in general, or about human rights treaties in particular, or about the effects of ratification without incorporation.

In the absence of any authoritative pronouncement from the court, *High Court Accra, ex parte Attorney General* is conclusive, and properly forms the basis of the use of ratified but unincorporated treaties in Ghana. However, it seems probable that a community will argue that government must conduct itself in accordance with the norms and principles enshrined in these instruments. The government should not use the court and the legislature to immunize itself from doing that which it has committed to do. The government cannot be accused of turning into a legislature simply because its actions are consistent with the country's international obligation. The government must not take measures to undermine the agreements. By virtue of the provisions of the Rio Declaration, *African Convention on the Conservation of Nature and Natural Resources* and the *HRBA to Natural Resources Governance*, mining communities could legitimately expect the government to consult them in the exploitation and development of natural resources affecting their land.

It is also important to mention that the failure to incorporate these instruments does not, ipso facto, affect Ghana's obligations at an international level. Regarding international conventions and norms in general, these international legal instruments arguably have the force of law as soon as they are ratified – including instruments deposited or registered with the Secretary-General of the United Nations.[90] Thus, the absence of incorporation may only affect Ghana's obligations at the national level. It follows that a treaty may come into force and regulate the rights and obligations

[90] See E A Addo, "The Implementation of International Law Conventions and Norms into Domestic Law in Ghana" (lecture delivered at the University of Ghana, 6 August 1992) [Unpublished] cited in Sarpong, *supra* note 54 at 60.

of the State on an international plane without changing rights and obligations under municipal law.[91]

3.5 Summary

Many governments continue to exercise discretion as to whether communities affected by resource development should be allowed to participate in the decision-making processes associated with mining, energy, and natural resources, as well as the extent of that participation. As discussed in the preceding chapter, a solid legal foundation for participation not only guarantees meaningful engagement but also provides a significant constraint on the government's discretionary power over the management of natural resources. International law follows the democratic/participatory principles in promoting meaningful community participation. International natural resources and environmental instruments have at their core legal principles that seek to address the power imbalances between governments, mining companies, and project-affected communities. These legal principles are important for promoting meaningful community participation.

Ghana's environmental and natural resource law on community participation has been influenced by the country's participation in a number of international law instruments. However, the legal application of the right to participation has not received the necessary domestic sanction. It is certainly far from safe to conclude that the courts of Ghana will apply and use instruments of international law, which the country has ratified but are yet to be incorporated. The lack of detail in the Ghanaian Constitution regarding the use and application of unincorporated international treaties and conventions implies an especially important role for the Ghanaian courts. In this

[91] *Operation Dismantle Inc v R*, [1985] 1 S.C.R. 441 at para 92 [Operation Dismantle Inc].

regard, further elaboration of the status of unincorporated treaties and conventions in the Ghanaian courts is important, as citizens will wish to rely on some of these instruments to vindicate their rights.

The absence of a constitutional provision may not relieve the government from its obligations under conventions and treaties that Ghana has ratified. This discussion supports the position that although some of these international instruments may not be legally binding, given that Ghana practices a dualist system, the communities affected by natural resource development may still claim a right to participation under ratified but unincorporated international conventions. International conventions and norms on community participation may, in some cases, be justiciable, despite the absence of implementing legislation that could give domestic legal effect to such rights.

Given the significant risks to government and industry from community dissent, there are serious practical reasons for supporting the access to information, public participation in decision-making, and access to justice model of engagement proposed in the international law instruments. The next chapter examines how Canada's duty to consult and accommodate Indigenous communities integrates these international law principles.

CHAPTER FOUR: PARTICIPATORY GOVERNANCE IN NATURAL RESOURCE EXTRACTION AND MANAGEMENT IN CANADA

4.1 Introduction

In the context of energy, mining, and natural resource development, a legal right to participation is critical for traditionally marginalized communities that are seeking social and economic progress. As evidenced in the previous chapters, a formal legal structure establishes a favourable background for meaningful community engagement. Drawing upon the experience of the duty to consult and accommodate in Canada, the present chapter contributes to the proposition that community participation must have a binding legal foundation in order to benefit the potentially impacted communities. The chapter identifies the duty to consult and accommodate as a type of participation that will enable affected communities to share in the benefits of mineral development. This identification should be useful in developing a possible community participation model for Ghana.

Canada is a world-renowned leader in natural resource exploitation and management, with a consultation regime that has attracted a great deal of attention. Building on the landmark decision in *Delgamuukw,*[1] 1997, the Supreme Court of Canada (SCC) set out in a trilogy of cases in 2004, the fundamental principle that where the government has real or constructive knowledge of the potential existence of Aboriginal rights, title, or treaty rights, and is contemplating conduct that could injure these interests, it has a duty to consult and accommodate the affected Indigenous

[1] *Delgamuukw v British Columbia*, (1997) 3 SCR 1010 [Delgamuukw]. In *Delgamuukw*, the Supreme Court of Canada (SCC) held that "…there is always a duty of consultation. Whether the Aboriginal group has been consulted is relevant to determining whether the infringement of Aboriginal title is justified…." See *Delgamuukw* at para 168. In this chapter, the term "Indigenous peoples", "Aboriginal peoples" and "First Nations" are used interchangeably to represent all identifiable Indigenous groups in Canada.

peoples.[2] This solid legal foundation for consultation has triggered a fundamental change in government and corporate behavior towards Indigenous communities. The duty to consult and accommodate fundamentally alters the course of action that governments must take before making various decisions over natural resources. This chapter shows that the duty to consult has enabled Indigenous communities to share in collective decision-making and enabled them to derive greater socio-economic benefits from exploration and development activities.

This chapter explores and evaluates the current regime for the participation of Indigenous peoples in natural resource development in Canada, with a special focus on the duty to consult and accommodate. The chapter undertakes an extensive evaluation of the jurisprudence on the duty to consult and accommodate and examines those regulatory regimes and institutions in Canada that have a bearing upon its participatory system. This will be placed within the context of a broader discourse on a right to participate, arguing that a defined legal framework for participation and consultation is the key to effective and beneficial community engagement.

The remainder of this chapter is organized into 4 sections. Section 4.2 introduces the history of the participation of Indigenous peoples in the development of natural resources, prior to creation of the duty to consult and accommodate. It considers whether the common law position, which essentially applies in Ghana today, offered any protection to the Indigenous communities. Section 4.3 then examines the jurisprudence on the doctrine of the duty to consult and accommodate and the way in which the Canadian courts have enforced this doctrine. The section sets out the legal considerations surrounding the duty to consult and accommodate, including when

[2] See generally *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73[Haida Nation]. See also the companion case issued simultaneously by the Court: *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 [Taku River].

the duty arises, its content, and how it should be fulfilled. The section identifies that the duty to consult has had an enormous significant impact on the government, project proponents, and Indigenous communities and argues that it will certainly continue to shape natural resource development affecting Indigenous lands into the future. Section 4.5 then examines the economic benefits for Indigenous communities that can result from the recognition of a legal foundation for consultation in the form of the emergence of impact and benefit agreements. Finally, section 4.6 summarizes the chapter and draws conclusions that are applicable to traditional communities in Ghana.

4.2 In the Beginning: The Consultation and Participation of Indigenous Peoples in Natural Resource Development at Common Law

Chapters Two and Three of this dissertation revealed that the socio-economic problems of communities affected by resource development are not resolved through mere policy aspirations that are applied at the government's discretion. Instead, a solid legal foundation for participation has immense potential to address the concerns of mining communities and extend greater socio-economic development to those affected. In the words of Davis and Dixon:

> An important advantage of an entrenched, judicially enforceable consultation model…is that it could go a significant way to providing reassurance to these communities that forms of consultation based on -or following - a process of constitutional recognition would in fact look different – or be based on true norms of listening, dialogue, negotiation and engagement.[3]

[3] See Megan Davis & Rosalind Dixon, "Constitutional Recognition Through a (Justiciable) Duty to Consult? Towards Entrenched and Judicially Enforceable Norms of Indigenous Consultation" (2016) 27:4 Public Law Review 255 at 260. See also *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 [Tsleil-Waututh Nation].

There is a real risk that participation will be mere rhetoric if governments continue to exercise discretion over whether project-affected communities should be allowed to participate in decision-making processes, as well as over the depth and level of participation required.

The experiences of the participation of Indigenous communities under the common law regime underscore the fact that project-affected communities are likely to find it difficult to challenge the legitimacy of existing power dynamics via administrative procedures. Prior to the recognition of a legally binding duty to consult and accommodate, the right of Indigenous communities to participate in the development of natural resources that could have an impact on their land or treaty rights existed only under the common law rule of procedural fairness. In *R v Van der Peet*,[4] Lamer, C.J. observed that Indigenous rights exist within Canada's general legal system. The rule that those affected by a decision must be given the opportunity and platform to put forward their views and have them considered by the decision-maker is a long-held principle within common law administrative rules and consistently upheld in the Canadian legal system.[5] This principle also forms part of the duty to consult and accommodate as enunciated by the Canadian judiciary. In *Simon v Canada (Attorney General*),[6] Justice Simpson referred to the principle of procedural fairness, underscoring that in the absence of treaty rights, Indigenous communities may still be entitled to consultation within the common law principle of procedural fairness.[7] Although the common law previously recognized a 'duty to consult and accommodate', the common law rule – as it existed prior to the development of the Crown's duty to consult and

[4] [1996] 2 SCR 507 at para 49 [Van der Peet].

[5] See generally *Baker v Canada (Minister of Citizenship & Immigration)* [1999] 2 SCR 817 [Baker].

[6] 2012 FC 387 [Simon].

[7] *Ibid* at paras 83, 84 & 58.

accommodate – did not sufficiently guarantee Indigenous peoples meaningful participation in the development of natural resources.

Evidence shows that for the most part, the Crown frequently made decisions that had potential adverse effect on Indigenous lands and treaty rights without consultation or reference to the affected Indigenous groups. In the words of Supreme Court Chief Justice Beverley McLachlin in *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*[8], the above statement represented "the practice at the time."[9] For example, in *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.*,[10] it was recognized that a pipeline was opened by Enbridge Inc. in 1976, connecting Sarnia with Montreal for the purpose of transporting crude oil from western Canada to eastern refineries. The pipeline cut through Chippewas First Nation's traditional territory. Nevertheless, it was approved and built without any consultation with the First Nation. The history behind the case *Rio Tinto Alcan Inc* also speaks to the marginalization of Indigenous communities at common law. In that case, the government of British Columbia authorized the construction of the Kenney Dam in Northwest British Columbia in the 1950s to produce hydropower for the smelting of aluminum. The dam and reservoir altered the flow of water to the Nechako River, which the Carrier Sekani Tribal Council ("CSTC") First Nations had been using for fishing and sustenance since time immemorial. The dam was constructed without consulting the CSTC First Nations, whose historic use of the river was affected by the altered flow of water.

[8] 2010 SCC 43 [Rio Tinto Alcan Inc].

[9] *Ibid* at para 6.

[10] 2017 SCC 41 [Chippewas of the Thames First Nation].

Similarly, in *Adams Lake Indian Band v British Columbia (Minister of Forests, Lands and Natural Resource Operations)*,[11] the Province entered into a Master Development Agreement (the "MDA") in 1993, in which it undertook a commitment to authorize the phased development of ski facilities and related resort amenities within a 4,140 hectare area, northeast of Kamloops. This was to be designated as a "Controlled Recreation Area." In 2010, the Province acknowledged that consultation over the 1993 MDA for Sun Peaks was inadequate for meeting the standard of the duty to consult and accommodate, as articulated in *Haida Nation*.[12] In *Adams Lake,* the Court observed that if the decision to develop the resort in 1993 had been subject to the kind of consultation that was now required under the duty to consult and accommodate, the adverse impact on the First Nation would have been addressed.[13]

The cases considered here have been examined by the courts in the context of the current duty to consult and accommodate – and in some cases, the courts have held that the Crown did not breach its consultation obligations.[14] The historical context is essential to gaining an understanding

[11] 2013 BCSC 877 [Adams Lake Indian Band].

[12] According to the government, there was no duty to consult Adams Lake before issuing the permits and any consultation that it undertook regarding these permits was rather gratuitous. The Court admitted this line of reasoning as the position at common law. Fenlon J observed that the common law, as it stood in 1993, permitted the Province to enter into a contract and to commit to authorizations for development, without consulting the First Nations affected by those decisions (at least in relation to unproven claims). See *Adams Lake Indian Band*, *supra* note 11 at para 38. The Court ruled that much has now changed.

[13] *Ibid* para 44.

[14] Since the Supreme Court of Canada (SCC) specified a constitutional duty to consult, the courts have had the opportunity to address whether this duty is triggered by subsequent decisions, made on the basis of these past wrongs or previous failures to consult. While the courts have generally admitted a lack of consultation and past wrongs, regarding government conduct that has adversely affected Indigenous communities, the courts have held that past wrongs, including previous breaches of the duty to consult, are insufficient for triggering the duty to consult. For example, in *Rio Tinto Alcan Inc* the issue was whether the decision of the British Columbia government to enter into an Energy Purchase Agreement (EPA) in 2007, in order to purchase electricity from an existing hydroelectric generating facility on the Nechako River, located in the First Nation's traditional territories, triggered a duty to consult. The first Nation asserted that the 2007 EPA for the power generated by the project should be subject to consultation, and the Court should consider the fact that the First Nation was not consulted over the

of practice before the Supreme Court of Canada (SCC) pronounced a constitutional duty to consult and accommodate. At the very least, these cases make it clear that the common law provided little or no protection for Indigenous rights. Instead, it is apparent that Indigenous communities, aggrieved by the government's administrative action, faced a number of difficulties. This was especially evident in the area of enforcement since they had no legally binding rights to consultation or accommodation. In fact, it does not appear that Indigenous communities had any legal rights over and above those of any other Canadian communities.

The degree of the Indigenous peoples' participation (if any) at common law falls under Arnstein's categories of "non-participation" or "degrees of tokenism" discussed in Chapter Two.[15] The common law regime provided opportunities for the people to be heard, but they ultimately lacked any power to alter government decisions. Moreover, there was no assurance of changing the status quo, as the government had the right to decide whether and to what extent the claims of the people should be considered. The form of participation permitted under the common law did not allow Indigenous communities to influence processes such as the licensing of development

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diversion of the river, which took place as a result of the 1950s dam project. Chief Justice McLachlin held that the subject of the consultation was the impact on the claimed rights of the decision currently under consideration. In so holding, the Court agreed with the British Columbia Utilities Commission that approving the 2007 EPA would have no new physical impact on the First Nation's territorial rights. The duty to consult is forward-looking and is only triggered if the conduct or decision contemplated by the present Crown has the potential to cause a novel adverse impact on a present claim or existing right. One can appreciate that even if the SCC's position did not intend the duty to consult as a means of addressing past wrongs, it is moving in the right direction. A decision to allow litigation on past breaches would open the floodgates to several cases that could potentially destroy government business. That said, while past wrongs, including previous breaches of the duty to consult, are insufficient grounds in themselves, the courts may consider an existing state of affairs, when addressing the possible consequences of current government conduct. It is believed that this position will promote the reconciliation process, strengthening section 35 and allowing the courts to consider the future impact of any decisions made today, which could negatively affect Aboriginal title.

[15] See generally Sherry Arnstein, "A Ladder of Citizen Participation" (1969) ALP Journal 216. See also, Rebeca Macias, *Public Participation in Energy and Natural Resources Development: A Theory and Criteria for Evaluation* (Calgary: Canadian Institute of Resources Law, 2010) at 23.

and extraction. Participation was mainly cosmetic, with little possibility of having any impact on the protection of Indigenous rights.

Two main factors may have accounted for the lack of meaningful consultation at common law. First, the government was only required to give notice of the matter to be decided and to listen to the affected communities. There was no obligation on the government to take on board the views of the affected community. Neither was there any substantive duty for the government to accommodate their concerns. Secondly, the common law seldom permitted the use of legal force to challenge abuses of the participation process; instead, participation at common law was invariably an administrative decision with no inferable legal duty. In essence, there was no judicially enforceable right to participation. Furthermore, the courts approach to administrative decisions was non-interventionist; in most cases, the courts deferred to the "expertise" of statutorily established and administered agencies.[16] Finally, there was no substantive framework to determine whether government actions, with the potential to affect Indigenous communities, were performed with the full and meaningful participation of the community affected by a project.

The SCC has constitutionalized the common law rules of procedural fairness by establishing a consultation requirement, thereby imposing far more significant constraints on the Crown than the duty of fairness at common law. The Crown's obligation to consult with Indigenous peoples goes beyond the simple exercise of its discretionary powers in the context of administrative law. It now has assumed a constitutional dimension where natural resource development may adversely affect actual or asserted Indigenous rights. The constitutional duty to

[16] *BHP Billiton Diamonds Inc. v Wek'eezhii Land & Water Board*, 2010 NWTSC 23 at para 43 [BHP Billiton Diamonds Inc]. See also *British Columbia Telephone Co. v T.W.U. of B.C.*, [1988] 2 SCR 56 at para 68 [British Columbia Telephone Co].

consult and accommodate has guaranteed the meaningful participation of Indigenous communities in natural resource development.

4.3 Entrenched and Judicially Enforceable Rights of Indigenous Consultation

The SCC has replaced administrative law rules with rules of consultation in the constitutionally protected realm of Indigenous rights and honor of the Crown. The Canadian Constitution[17] contains no express reference to the duty to consult and accommodate, but the duty follows from the declaration of respect for Aboriginal treaty rights set out in section 35 of the Constitution.[18] Chapter Six of this dissertation discusses the foundation and purpose of the duty to consult and accommodate in detail. For the present purposes, it is important to note that this duty, as developed by the Canadian judiciary, is not entirely *sui generis.* It cannot be wholly divorced from the common law principle of procedural fairness; many of the actual rights involved in the duty to consult and accommodate may be traced back to the common law rules governing procedural fairness at administrative law.

What is significant is that the duty to consult adopts a rights-based approach to participation by providing Indigenous communities with a substantive recognition of their right to consultation and participation against actual or potential adverse infringement resulting from government decisions. In the context of discretionary decision-making, the duty to consult and accommodate

[17] The *Constitution Act*, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11.

[18] Section 35 of the *Constitution Act* can be contrasted with the Bolivian Constitution, 2009, Article 30 of which provides: "…Indigenous peoples enjoy [the right] …to be consulted by appropriate procedures, in particular through their institutions, each time legislative or administrative measures may be foreseen to affect them. In this framework, the right to prior obligatory consultation by the State with respect to the exploitation of non-renewable natural resources in the territory they inhabit shall be respected and guaranteed, in good faith and upon agreement."

may limit results and require the government to follow certain procedures. This is in direct contrast to the previous position under administrative law. Now, the courts may always review government conduct to determine whether the Crown has discharged its duty to consult and accommodate. In the words of Sossin:

> the duty involves not just a procedural guarantee, but also, more importantly, a substantive constraint. Governments cannot discharge their duty to aboriginal communities simply by demonstrating that they provided a venue for those communities to be heard. The duty also includes accommodation and not just consultation, and in this sense, provides a far more significant constraint on the Crown than the duty of fairness at administrative law.[19]

One commentator has noted that the duty to consult and accommodate is geared towards Indigenous communities having a say in any resource development that is undertaken on their land and thus creates a potential to derive greater benefits from such development.[20]

This section focuses on how the constitutional leverage of the duty to consult and accommodate empowers Indigenous communities to share in collective decision-making, thereby enabling them to benefit from natural resource development that may affect their land or rights. The section considers when the duty arises, the content of the duty to consult and accommodate, the factors that engage the duty to consult, how the duty should be fulfilled, and who bears this duty.

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[19] See Lorne Sossin, "The Duty to Consult and Accommodate: Procedural Justice as Aboriginal Rights" (2010) 23 Can J Admin L & Prac 93 at 106 – 107.

20 See Dwight Newman, *The Rule and Role of Law: The Duty to Consult, Aboriginal Communities, and the Canadian Natural Resource Sector* (Ottawa: Macdonald Laurier Institute for Public Policy, 2014) [Newman] at 8.

4.3.1 When Does a Duty to Consult Arise?

While the benefits of community participation are not in doubt, there is a dearth of research on the test to determine when a natural resource project will negatively affect a community. The question that is often raised is whether the government has a duty to consult and accommodate a community when contemplating a project in the environs of that community. In order to promote optimal participation and balance the interests of the government, project proponents, and mining communities, the participation regime must set clear rules and standards to guide the various actors in determining when to involve project-affected communities.

The duty to consult requires the government to proactively engage with Indigenous communities on matters that could negatively impact their treaty rights or title. Quite clearly, the government's obligation to consult a community requires that community to show some kind of *locus standi* in the form of a recognizable legal interest, affected by the proposed project. The courts have provided a three-part test to determine when the government must consult and engage an Indigenous community, as follows:

> (i) does the Crown have knowledge, actual or constructive, of a potential aboriginal claim or right;
> (ii) is there contemplated Crown conduct; and
> (iii) is there a potential that the contemplated conduct may adversely affect an aboriginal claim, or right?[21]

The courts have applied the test in a number of cases to determine when and where the Crown has a duty to consult and accommodate Indigenous communities.

[21] See *Haida Nation*, *supra* note 2. See also *Carrier Sekani Tribal Council v British Columbia (Utilities Commission),* 2010 SCC 43 at para 31.

To trigger the duty to consult and accommodate, the Crown must have real or constructive knowledge of a claim to the resource or land to which it is attached. In a treaty context, or when a claim has been filed in court or advanced in the context of negotiations, the SCC has indicated that the government, as a party, is presumed to have notice of the actual or potential existence of Indigenous rights or title.[22] Thus, where title to land has already been established, there is no question as to whether the Crown has knowledge of the Aboriginal claim or rights. The issue is rather the degree to which the activities contemplated by the Crown will adversely affect those rights, thereby triggering the duty to consult.[23]

Aside from actual knowledge, constructive knowledge may arise when lands are known or reasonably suspected to have been traditionally occupied by an Indigenous community or where an impact on rights may be reasonably anticipated. In *Haida Nation*, for example, the government had issued a licence to harvest trees without consulting or engaging the Haida Nation. The project concerned land to which the Haida Nation laid claim to title, but this had not yet been recognized at law. Nevertheless, the SCC found that the Haida Nation had a strong *prima facie* claim to Aboriginal title to at least some of the affected lands. The Court held that knowledge of the credible but unproven claim sufficed to trigger the duty to consult.[24]

The first element of the duty to consult and accommodate shows that the existence of an actual or asserted credible right imposes a duty on the government to avoid acting in ways that might affect that right. This does not suggest that an established or credibly asserted right, *ipso*

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[22] See *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 34 [Mikisew Cree First Nation].

[23] *Ibid* at para 34

[24] See *Haida Nation*, *supra* note 2 at para 37.

facto, triggers the duty to consult, no matter how remote or insubstantial the impact of the proposed project. The SCC has emphasized that there is no duty to consult unless the contemplated Crown conduct creates a risk of "an 'appreciable adverse effect on the First Nations' ability to exercise their Aboriginal right.'"[25] For example, there is no potential adverse impact on the exercise of Aboriginal rights, where a government's decision has not authorized any development activity within an Aboriginal area or committed any party to engage in a physical activity.[26]

The second and third elements show that there must be government conduct contemplated, which could have a negative impact on the claimed right or title in question, thereby triggering the duty to consult. In *Haida Nation*, the SCC noted that the red cedar tree covered by the timber licence was integral to the Haida culture. It is from cedarwood that they had traditionally made their ocean-going canoes, clothing, utensils and the totem poles guarding their lodges. Cedar forests remained central to their lives and self-conception. The Haida Nation had established a credible, but unproven, asserted right to the cedar for their traditional use. It was also evident that the tree was in limited supply. The prospect of the continued logging of this limited resource pointed to a potential impact on the Haida Nation's rights. The SCC held that the impact of the contemplated Crown conduct was sufficient to satisfy the third requirement ("might adversely affect") that underlies the duty to consult. Similarly, in *Chippewas of the Thames First Nation*, the duty to consult was triggered when the National Energy Board (NEB) approved the modification

[25] See *Rio Tinto Alcan Inc.*, *supra* note 8 at para 46, quoting with approval *R v Douglas*, 2007 BCCA 265 at para 44 [Douglas].

[26] This comment is peripheral to the current discussion, but the broader issue it raises, regarding the stage at which the duty to consult is triggered – where a proposed development requires several different approvals, or several different stages of approval to proceed – will be addressed in section 4.3.1.1 of this dissertation. See also, *Blueberry River First Nations v British Columbia (Ministry of Natural Gas Development)*, [2017] B.C.J. No. 640 [Blueberry River First Nations].

of a pipeline, which cut through the First Nation's traditional territory. The SCC noted that the authorized work – increase in flow capacity and change to heavy crude – could adversely affect the Aboriginal and treaty rights asserted by the Chippewas of the Thames.[27]

"Contemplated Crown conduct" is not confined to physical activities undertaken by the Crown. The SCC has indicated that strategic or high-level decisions, with "no immediate impact" on actual or asserted Aboriginal rights, can generate consultation obligations.[28] However, the jurisprudence has generally been consistent in requiring a causal relationship between the proposed government conduct or decision and the potential for adverse impact on the established or asserted right before the duty to consult is triggered.[29] The requirement is that the decision must have an impact on the continuous exercise of asserted Aboriginal land or rights.[30]

This requirement also establishes the scope and content of consultation, which is determined by the impact of the proposed project. As mentioned in Chapter Two, different projects can have varying degrees of impact on affected communities. It is impossible to have a 'one size fits all' approach to participation. The level and scope of the duty to consult will depend on the strength of the case supporting the existence of an Indigenous right or title and the seriousness of the potential impact on that right.[31] In circumstances where potential interference is minimal, the participation of the affected communities may require giving notice, disclosing information, or

[27] See *Chippewas of the Thames First Nation*, *supra* note 10 at para 31.

[28] See *Rio Tinto Alcan Inc., supra* note 8 at para 44.

[29] *Ibid* at para 45.

[30] See generally Diana Audino et al, "Forging a Clearer Path Forward for Assessing Cumulative Impacts on Aboriginal and Treaty Rights" (2019) 57:2 Alta L Rev 297 (on the relevance of cumulative impacts resulting from future decisions and activities).

[31] See *Haida Nation*, *supra* note at para 39.

discussing issues raised in response to this notice. At the other end of the spectrum, the Crown must demonstrate that the Indigenous community has formally participated in the decision-making process and that the Crown has considered their concerns fairly.[32] This will obviously be the case where a preliminary assessment of the strength of the claim suggests a strong *prima facie* claim and a substantial risk of non-compensable damage.[33]

The SCC has provided a touchstone for determining the required level and extent of participation for project-affected communities. In *Haida Nation*, the Court emphasized that the range of consultation and processes are by no means exhaustive.[34] The integration of notice and information-sharing into the duty to consult in this decision supports Cornwall's position that it is useful to have a participation process that covers a full range of levels of participation.[35] The Crown does not always have to deeply engage project-affected communities whenever it contemplates a decision. Instead, it is possible for Indigenous communities to alleviate some of their concerns through notification, where the impact of a project is highly remote or where there is no appreciable adverse effect on the rights of the communities concerned. Meanwhile, the government is required to consider any issues raised in response to such notice, allowing community decision-making to be added to the process. The SCC has emphasized that in all cases, the Crown must act in good faith to provide meaningful consultation, appropriate to the

[32] *Ibid* at para 37.

[33] *Ibid* at para 44.

[34] *Ibid* at paras 43 – 45.

[35] See Andrea Cornwall, "Unpacking 'Participation': Models, Meanings and Practices" (2008) 43:3 Community Development Journal 269 at 276.

circumstances.[36] This provides legitimacy and substance to the common law rule of procedural fairness.

4.3.1.1 Duty to Consult at the Disposition Stage in the Multi-Step Natural Resource Approval Process

The duty to consult is clearly triggered at the first stage of development. The question is whether it extends to an initial disposition of mineral rights, which may not be followed by development for many years, if ever.

This question has been raised in several cases, most recently in *Buffalo River Dene Nation v Saskatchewan (Minister of Energy and Resources)*.[37] In *Buffalo River Dene Nation,* the Saskatchewan Court of Queen's Bench (SKQB) refused an application for judicial review, which challenged the issuance of an exploration licence by the Province without consulting the relevant First Nation. The Chambers' judge rejected the argument that the Crown had breached the duty to consult by failing to engage the First Nation before issuing the exploration permit. The judge held that the permit could not affect the rights of the First Nation, as the permit did not allow the project proponent to carry out any activities. On appeal to the SKQB, the Court suggested that the result would almost certainly have been different if surface access or other development rights had been contemplated at the time of issuing the permits.[38] On further appeal, the Saskatchewan Court of Appeal (SKCA) affirmed the SKQB's conclusion and ruled that the adverse impact argument

[36] See *Haida Nation*, *supra* note 2 at para 41.

[37] 2014 SCQB 69 followed in *Coastal First Nations - Great Bear Initiative Society v British Columbia (Minister of Environment)*, 2016 BCSC 34 [Coastal First Nations - Great Bear Initiative Society].

[38] See generally Donald E Greenfield et al, "Recent Judicial decisions of Interest to Energy Lawyers" (2016) 54:2 Alta L Rev 495.

amounted to nothing more than speculation. The SKCA held that if the adverse impact was unlikely to occur until an independent decision was made at a later point in time, it would be this later decision that triggered the duty to consult.[39]

Although Indigenous peoples have challenged this position, the proposition appears to be gaining momentum in the jurisprudence of the Canadian legal system. In *Hupacasath First Nation*[40] (a different but related context), the Court also adopted the position that "[a]n impact that is, at least, indirect, that may or may not happen at all […], and that can be possibly fully addressed later is one that is speculative and does not trigger the duty to consult."[41] Despite the fact that *Hupacasath First Nation* is unrelated to resource development, it appears to support the position adopted in *Buffalo Nation,* where the SKCA declared that it is only at the surface or disturbance access phase of natural resource development that parties "would have something meaningful, in the sense of quantifiable, to consult about, or reconcile."[42]

The decision in *Buffalo Nation* is plausible from a practical perspective in that a mineral lease or an exploration licence may not necessarily lead to mineral development. Thus, it may not have any potential to adversely affect Aboriginal title or rights. The SCC emphasized in *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council* that "government action is not confined to decisions or conduct which have an immediate impact on lands and resources. A potential for adverse impact

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[39] *Buffalo River Dene Nation v Minister of Energy and Resources,* 2015 SKCA 31 at para 104 [Buffalo River Dene Nation].

[40] *Hupacasath First Nation v Canada (Minister of Foreign Affairs)*, 2015 CAF 4 [Hupacasath First Nation]. See also *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40.

[41] *Ibid* at para 102.

[42] See *Buffalo River Dene Nation*, *supra* note 39 at para 92.

suffices,"[43] but it is debatable whether this dictum could be interpreted as requiring consultation at the disposition stage of mineral development.

In *West Moberly*,[44] an exploratory permit for coal was issued, allowing for the mining of coal if it was found on treaty lands, which provided the First Nation with the right to hunt. There was no other purpose for the exploratory program, but the British Columbia Court of Appeal held that the exploration programs would have had an adverse impact in the area and, consequently, on the applicants' ability to hunt. The Crown breached its duty to consult when it failed to consider the future impact of the project, beyond the immediate consequences of the exploration permits. The Court ruled that consideration could be given to the potential impact of the overall project and not just the current incremental step.[45] In *Ross River Dene Council v Yukon*,[46] the regime for mineral rights disposition under the *Quartz Mining Act*[47] allowed a mineral claim to be staked without regard to asserted Aboriginal rights. The YKSC found that the Act in its current stage breached the duty to consult because the duty did not require any immediate physical impact on land or resources but rather the potential for an adverse impact on Aboriginal claims or title.[48] The Court reasoned that exploratory programs have the potential to injure asserted Aboriginal rights and cannot be treated as speculative in the sense of being theoretical or academic.[49]

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[43] See *Rio Tinto Alcan Inc*, *supra* note 8 at para 44.

[44] *West Moberly First Nations v BC (Chief Insp. of Mines),* [2011] BCCA 247 [West Moberly First Nations].

[45] *Ibid* at paras 123 – 125. See also *Saugeen First Nation v Ontario (Minister of Natural Resources and Forestry)*, [2017] O.J. No. 3701 at para 29 [Saugeen First Nation].

[46] 2011 YKSC 84 [Ross River Dene Council].

[47] S.Y. 2003, c. 14.

[48] See *Ross River Dene Council*, *supra* note 46 at para 68. See also, *Ross River Dena Council v Yukon*, 2012 YKCA 14.

[49] *Ibid* at para 68.

West Moberly First Nation and *Ross River Dene Council* appear to expand obligations to consult, particularly in the context of early-stage exploration. The cases seem to suggest that an exploration licence may have an impact on Aboriginal title and trigger the duty to consult,[50] but both cases should be analyzed in context. For example, in *Ross River Dene Council*, the *Quartz Mining Land Use Regulation*[51] allowed exploration activities to take place without notice or consultation. These activities may include clearing land; constructing lines, corridors and temporary trails; using explosives; removing subsurface rock, and other activities.[52] It is obvious that these activities raise the possibility of a wider application of the duty to consult. Accordingly, in *Ross River Dene Council,* the Court found that the exploratory work under the applicable regulation could adversely affect claimed Aboriginal rights.

West Moberly and *Ross River Dene Council* do not fit with the traditional application of the duty to consult doctrine. Some commentators have stated that the *Ross River Dene Council* case is an example of a dramatic shift in the doctrine that undermines, rather than bolsters, legal certainty in this area of law.[53] The case should be distinguished on its facts, as the exploration activities, in that case, were found to have an impact on the rights of the First Nation. There was an actual foreseeable adverse impact on the rights of the Indigenous group, which flowed from the activities permitted by the Regulation. However, in most cases, unlike exploration programs permitted by the *Quartz Mining Land Use Regulation,* the holders of mineral rights do not have the automatic right to access land, or to undertake activities upon it. In Alberta, for example,

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[50] See *Rio Tinto Alcan Inc., supra* note 8 at para 44.

[51] O.I.C. 2003/64.

[52] *Quartz Mining Land Use Regulation,* O.I.C. 2003/64 s 3.

[53] See Malcolm Lavoie & Dwight Newman, *Mining and Aboriginal Rights in Yukon: How Certainty Affects Investor Confidence* (Vancouver, B.C.: Fraser Institute 2015) at 34.

petroleum and natural gas licences and leases are disposed of by the Crown at sales in public bids for tender, known as the bonus bidding system. The successful bidder receives an interest in term of subsurface rights, but actual mineral development requires other Crown approvals, including surface access approvals and (potentially) hearings on conservation and environmental issues.[54] It is clear that at this stage, there is no appreciable adverse effect on the ability of an Indigenous community to exercise its right, and it cannot create a duty to consult.[55]

The acquisition of a lease is not a licence to proceed with a mining project but rather constitutes just one, albeit important, step required in the overall project approval process. As the Alberta Court of Appeal (ABCA) observed in *Athabasca Chipewyan First Nation*, not all leases lead to development.[56] Many project proponents acquire leases, which eventually revert to the government without any development taking place by the end of the term. Thus, adverse impact is unlikely until the project proponent proceeds with the contemplated conduct.[57] Imposing a

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[54] See *Athabasca Chipewyan First Nation v Alberta (Minister of Energy),* 2011 ABCA 29 [Athabasca Chipewyan First Nation].

[55] In *Louis v British Columbia (Minister of Energy, Mines, and Petroleum Resources)*, the British Columbia Court of Appeal held that decisions in respect of applications for such rights, although "high-level management decisions", are not those of the Crown, but rather of the project proponent. See *Louis v British Columbia (Minister of Energy, Mines, and Petroleum Resources)*, 2013 BCCA 412 at paras 106 – 107 [Louis v British Columbia].

[56] See *Athabasca Chipewyan First Nation*, *supra* note 54 at paras 8 – 12.

[57] In Alberta, for example, while the actual development of mineral resources under the terms of leases, such as exploration, drilling and mining activities, is subject to First Nations consultation guidelines, the government has adopted a stance where there is no duty to consult over mineral dispositions made under the tenure system. See Ministry of Aboriginal Relations, *The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013* (Edmonton: Government of Alberta, 2013), online: *Ministry of Aboriginal Relations* <http://www.assembly.ab.ca/lao/library/egovdocs/2013/alar/167299.pdf> [https://perma.cc/4KQJ-DQ22] [2013 Alberta's Policy on Consultation with First Nations] at 3. See also: *Athabasca Chipewyan First Nation v Alberta (Minister of Energy)*, 2009 ABQB 576 at para 9 [Chipewyan v Alberta]. This position has been justified by the argument that mineral dispositions do not result in the actual procurement of land under the terms of Alberta's historical treaties. In addition, it has been contended that the leasing of Crown mineral rights does not result in any adverse impact on the exercise of the rights of First Nations

consultation obligation at an earlier stage would be highly disruptive to the country's natural resource development. It was in this context that the ABCA held in *Athabasca First Nation* that the mechanism set up by the Alberta government to give public notice of postings of land sales, and the award of leases resulting from these sales, may constitute sufficient consultation to fulfill the Crown's duty to consult.[58]

The courts' reached different conclusions on the merits in the cases examined, but the decisions articulate a common understanding of the relevant legal principles surrounding the duty to consult. First, not every action contemplated by the Crown and impacting Indigenous rights triggers a duty to consult. Instead, this duty is triggered by the potentially adverse effects that could flow from the decision being considered. Second, there must be a causal connection between the contemplated action and its adverse impact on Indigenous community rights. In cases where the contemplated Crown conduct carries only a very tenuous connection to possible adverse impact on the rights of the affected community, the courts have found that the duty to consult does not arise – subject of course to any circumstances that should arise and require it.[59]

4.3.2 How Significant is the Duty to Consult and Accommodate?

The Supreme Court of Canada has truly provided considerable negotiating leverage to the Indigenous peoples in Canada. The SCC in *Tsilqoth'in Nation* warned that "if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the

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or their traditional uses. See 2013 Alberta's Policy on Consultation with First Nations at 3. See also *Chipewyan v Alberta*, supra note 57 at para 9.

[58] See *Athabasca Chipewyan First Nation*, *supra* note 54 at para 7.

[59] For example, see *Coastal First Nations - Great Bear Initiative Society v British Columbia (Minister of Environment)*, 2016 BCSC 34 at paras 193 – 204 [Coastal First Nations - Great Bear Initiative Society].

project upon establishment of the title if continuation of the project would be unjustifiably infringing."[60] As further discussed in section 4.4 of this chapter, *Tsilqoth'in Nation* falls under situations where the standard of consultation and accommodation of Indigenous peoples is strongest, but the duty to consult and accommodate has absolutely shaped Indigenous peoples role in natural resource development decision-making. The discussions of Indigenous peoples' participation at common law shows Indigenous communities had serious issues with how the government included affected groups in natural resource projects and addresses their concerns.

The duty to consult and accommodate provides a constitutional lens through which government actions are measured.[61] Lambrecht has emphasized that the "failure to meet the duty can lead to a range of remedies, from an injunction against a particular government action altogether (or, in some instances, damages) but, more commonly, an order to carry out the consultation prior to proceeding."[62] The courts may firmly strike down government acts or projects that do not meet the threshold of the Crown's consultation requirement. Failure to adequately consult and accommodate Indigenous communities have cost governments and industry proponents significant financial resources.

In August 2018, the Federal Court of Appeal (FCA) quashed the approval of the Trans Mountain pipeline expansion, which resulted in direct financial harm to the company and the

[60] *Tsilhqot'in Nation,* 2014 SCC 44 at para 92.

[61] The SCC stated in *Haida Nation* that where the government's conduct is challenged on the basis of allegations that it failed to discharge its duty to consult and accommodate…, the matter may go to the courts for review. See *Haida Nation*, *supra* note 2 at para 60.

[62] See Kirk N Lambrecht, *Aboriginal consultation, Environmental Assessment, and Regulatory Review in Canada* (Regina: Sask: University of Regina Press, 2013) at 26. See also *Wahgoshig First Nation v Ontario*, 2012 ONSC 2323 and *Gitxaala Nation v Canada,* 2016 FCA 187.

government.[63] Trans Mountain estimated that delays to the project could create financial harm in the order of $5.6 million a month in direct costs and potentially several million dollars more a month in lost revenue.[64] The company had sufficiently consulted with the affected First Nations, but the FCA ruled, *inter alia*, that Canada had failed to fulfill its consultation and accommodation duties with respect to Indigenous peoples before the government issued the licence for the expansion of the project. In a decision that may be viewed as a direct application of the majority's reasoning and findings in *Gitxaala Nation*[65], the Court held that Canada had failed in its duty to engage, dialogue meaningfully, and grapple with the real concerns of the Indigenous applicants, so as to explore the possible accommodation of these concerns.[66] Many impacts of the Project—some identified in the Report of the Joint Review Panel, some not—were left undisclosed, undiscussed and unconsidered.[67] In short, the duty to consult was not adequately discharged. The project cannot proceed notwithstanding the enormous financial investment by the company in consultation with the affected Nations.

The Trans Mountain pipeline project highlights some of the economic perils of inadequate consultation. The case provides the necessary context to understand the changing face of Indigenous peoples' participation and consultation as a result of the duty to consult and accommodate. The duty to consult not only guarantees Indigenous peoples a substantive right to consultation and accommodation where resource development threatens their land or treaty rights

[63] See *Tsleil-Waututh Nation*, *supra* note 3. See generally David V Wright, "Case Comment: Tsleil-Waututb Nation v Canada" (2019) 22 CELR 8.

[64] See *Trans Mountain Pipeline ULC v Gold*, 2014 BCSC 2133 at para 25 [Trans Mountain v Gold].

[65] See *Gitxaala Nation supra* note 62 discussed at page 106.

[66] See *Tsleil-Waututh Nation*, *supra* note 3 at paras 6, 599, 603, 626 & 754.

[67] *Ibid* at para 352

but also includes the fundamental right to enforce this duty. Legal challenges have stalled and frequently shut down developments when adversely impacted Indigenous communities have argued that governments have granted licences or permits to developers without appropriate consultation.[68] This is a considerable change from the approach taken in judicial challenges under the common law where the courts would invariably refrain from pronouncing on the validity or otherwise of government plans and guidelines.

In *Gitxaala Nation*[69], the cost of construction of the project was estimated to exceed $5.5 billion and would have supported the export of 30 million tonnes of crude oil and the import of 11 million tonnes of condensate requiring the annual transit of 250 oil tankers.[70] The FCA overturned the federal government's approval of the Enbridge Northern Gateway Project on the basis that the Crown did not provide a reasonable way to address the concerns of the First Nation. The Court underscored that Canada failed to engage in dialogue and grapple in good faith with the concerns expressed by the First Nations. The Court observed that there was no indication of an intention to amend or supplement the conditions of the project based on the submissions of the First Nations. Nor was there a real and sustained effort to pursue meaningful two-way dialogue.[71] The Crown failed the reach of a standard of meaningful consultation with the Indigenous communities. In

[68] Northern Development Forum, "Benefits Agreements in Canada's North" (August 2013), online: *Northern Development Forum* < http://www.nadc.gov.ab.ca/Docs/benifit-agreements-2013.pdf > [https://perma.cc/R2BB-UJKF] at 17.

[69] *Supra* note 62.

[70] See *Gitxaala Nation v The Minister of Transport, Infrastructure, and Communities and Northern Gateway Pipelines Limited Partnership*, 2012 FC 1336 at paras 5 – 6.

[71] See *Gitxaala Natiion supra* note 62 at para 279.

November 2016, the federal government directed the National Energy Board to dismiss the Enbridge Northern Gateway Project application.[72]

The Enbridge Northern Gateway project and the Trans Mountain pipeline illustrate how the duty to consult and accommodate has been imperative in re-imagining the role of Indigenous peoples in natural resource development decision-making. One could not have imagined that such massive, multimillion dollar projects could be shut down or significantly delayed by the failure to ensure adequate consultation and participation of the affected communities. The government can no longer rely on the exercise of discretionary powers where its actions affect Aboriginal rights, without satisfying the requirement of consultation or accommodation. Meaningful participation is at the heart of the duty to consult.

In *The Fort Nelson First Nation v BC Oil and Gas Commission*,[73] the British Columbia Supreme Court quashed the Gas Commission's decision to allow pipeline and storage facilities to be constructed on the land of the Fort Nelson First Nations group. It was apparent from the evidence that the Commission was not prepared to discuss the First Nation's concerns about the cumulative impact of the project on their treaty rights, or the specific impact that the project could have on the health of their population. From the onset, the Commission determined that the project would not have a material adverse effect on the First Nation and consequently limited the scope of consultation. The consultation process was effectively a sham because the government was determined to allow the construction to proceed. In the circumstances, the Court quashed the

[72] National Energy Board, "Northern Gateway Pipelines Inc. (Northern Gateway) Enbridge Northern Gateway Project (Project) Project application dismissal and rescinding of certificates" (6 December 2016) online: *National Energy Board* <www.ceaa.gc.ca/050/documents/p21799/116832E.pdf> [https://perma.cc/WW6G-3TU9].

[73] 2017 BCSC 2500.

permit on the basis that the Crown had failed to adequately consult and accommodate the affected First Nation.

In *Clyde River (Hamlet) v Petroleum Geo-Services Inc*,[74] the SCC stressed that any decision affecting Aboriginal or treaty rights, made on the basis of inadequate consultation, would not be in compliance with the duty to consult.[75] The NEB issued the project proponent authorization under s. 5(1)(b) of the *Canada Oil and Gas Operations Act* to conduct seismic testing, adjacent to an area where a First Nation had treaty rights to harvest marine mammals. The Board had previously concluded that significant environmental effects to marine mammals were unlikely, and effects on traditional resource use could be addressed through mitigation measures. However, the SCC subsequently established that the proponents' failure to offer substantive answers to basic questions on the impact of the proposed seismic testing on the First Nation's treaty right to harvest marine mammals. When the proponents purported to answer these questions, they filed a 3,926 page document with the NEB, the vast majority of which, as the Court found, "was not translated into Inuktitut" and "[n]o further efforts were made to determine whether this document was accessible to the communities, and whether their questions were answered."[76] A lot of material was only available on the internet, to which the First Nation scarcely had any access. It was evident that the consultative inquiry was directed toward the environmental effects of the project, rather than its impact on the rights of the affected First Nation.[77] Consequently, the SCC concluded that the consultation fell short in several respects and quashed the NEB's decision, emphasizing that

[74] 2017 SCC 40 [*Clyde River (Hamlet)]*.

[75] *Ibid* at para 39.

[76] *Ibid* at para 11.

[77] *Ibid* at para 45

"where the Crown's duty to consult remains unfulfilled, the NEB must withhold project approval. Where the NEB fails to do so, its approval decision should be quashed on judicial review."[78]

Thus, a process that lacks authenticity can lead to the cancellation of permits if the participation procedure has merely been used to legitimize a constitutional or regulatory requirement.[79] Kate Glover Berger describes *Clyde River (Hamlet)* as fitting comfortably in the arc of the contemporary duty to consult jurisprudence.[80] It follows from the Court's decision that the duty to consult must be fulfilled, prior to any action that could adversely affect the Indigenous rights in question. The decision-maker must withhold approval until the Crown has adequately consulted the affected community about the proposed project. This is because consultation is meant to give real opportunities to influence and shape decision-making. To do otherwise is inconsistent with the principle of fair dealing and reconciliation.[81]

Nevertheless, there are significant concerns as to whether the courts' decisions in quashing authorization for these projects were in the public interest. Some have argued that legal decisions recognizing Aboriginal rights have been bad for Canada's resource industries.[82] It is incontrovertible that the successful completion of these projects would have had a positive impact on the Canadian economy. Instead, the duty to consult has stalled these projects or led to their cancellation, leading to huge financial concerns. It would seem appropriate to suggest that the duty

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[78] *Ibid* at para 39. See also *Gitxaala Nation supra* note 62 at para 237.

[79] See also *Mikisew Cree*, *supra* note 22 at para 54.

[80] See Kate Glover Berger, "Diagnosing Administrative Law: A Comment on Clyde River and Chippewas of the Thames First Nation" (2019) 88 SCLR (2d) 107 – 136 at 108.

[81] See *Gitxaala Nation*, *supra* note 62 at para 308.

[82] For a robust discussion on this, see generally Cherie Metcalf, "Market Reactions to Aboriginal Rights: A Look at Canada's Resource Industries" (2018) 83 SCLR (2d) 107 – 128.

to consult undermines the country's economic interests, but as the majority of the justices observed in *Clyde River*, the public interest and the duty to consult do not operate in conflict.[83] The courts have provided a framework within which the government, project proponents and Indigenous rights holders can work together to ensure that one side is not relatively disadvantaged.[84] Justice Donald of the British Columbia Court of Appeal addressed this issue of conflict in relation to the "public interest inquiry" provision in section 71 of the *Utilities Commission Act,*[85] holding that the existence of the duty to consult and the allegation of the breach must form part and parcel of the public interest inquiry.[86] On appeal, the SCC emphasized that "[t]he constitutional dimension of the duty to consult gives rise to a special public interest which surpasses economic concerns."[87] A similar position was adopted in *Clyde River*, where the SCC stated that a project authorization that breached the constitutionally protected rights of Indigenous peoples could not serve the public interest.[88]

There is a need to balance competing societal interests with Indigenous interests, and there must be justifiable reasons for the Crown to infringe on the rights of the latter. The courts have stressed that the government may interfere with the rights of Indigenous peoples for the benefit of all Canadians, but the extent of consultation with the affected group is relevant in determining whether the infringement is justified.[89] The courts will not uphold a decision permitting the

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[83] See *Clyde River (Hamlet)*, *supra* note 74 at para 40.

[84] See Cherie Metcalf, "Market Reactions to Aboriginal Rights: A Look at Canada's Resource Industries" (2018) 83 SCLR (2d) 107 – 128 at para 3.

[85] RSBC, 1996, C.473.

[86] See *Rio Tinto Alcan Inc. v Carrier Sekani Tribal,* 2009 BCCA 67 at para 42.

[87] See *Rio Tinto Alcan Inc., supra* note 8 at para 70,

[88] See *Clyde River (Hamlet)*, *supra* note 74 at para 40.

[89] See *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2001 FCT 1426 at para 133.

development of a project if there was inadequate consultation before that decision was made. In *Wahgoshig First Nation*,[90] the First Nation brought a motion for an interlocutory injunction that restrained the defendant, Solid Gold Resources Corp. ("Solid Gold") from engaging in all activities relating to mineral exploration in the region of Treaty 9 lands, based on the failure to consult and accommodate. The Crown admitted that the duty to consult was triggered, and that it had delegated the operational aspects of the duty to Solid Gold, which had failed to fulfill this duty.

In response, Solid Gold submitted that it had raised its exploration funds through flow-through shares and that it was required to use these funds or risk incurring significant financial costs, which could destroy its activities. The company argued that granting injunctive relief would jeopardize its financial well-being and essentially "shut down" its operations. The Ontario Superior Court (ONSC) held that the duty to consult and accommodate the concerns of Aboriginal peoples was recognized as a constitutional requirement, which, in this case, had not been fulfilled by either Solid Gold or the Crown. Although the ONSC acknowledged that an injunction would place the Company in serious financial jeopardy, the Court granted the injunction indicating that it was in the public interest to ensure that the Constitution was honoured and respected.[91]

The decisions in these cases represent a significant recognition and entrenchment of the duty to consult in the context of mining exploration. They sent out a very strong message to the government and companies that the duty to consult cannot be deferred or ignored. In contrast, an opportunity should be provided for Aboriginal communities to articulate their concerns in order to find a solution aimed at achieving mutual satisfaction. The duty to consult balances the level of

[90] See *Wahgoshig Fisrt Nation v Ontario*, 2011 ONSC 7708 [Wahgoshig Fisrt Nation].

[91] *Ibid* at para 72.

power held by decision-makers and provides project-affected communities with a framework to question decision-making procedures and outcomes. The fact that Indigenous communities can challenge government conduct based on an alleged failure by the government to discharge its duty to consult and accommodate means that communities can have their concerns addressed.

It is possible for a natural resource project to be approved against the wishes of an Indigenous group, if the duty to consult requirement has been scrupulously observed. The failure of the consultation process to persuade a community to support a project is an irrelevant consideration for a decision-maker when determining whether to approve a project or whether consultation has been genuine and effective. In assessing what constitutes "effective consultation," regard must be given to the activities of the person or body engaging in the consultation, rather than focusing on the results of the consultation in the minds of the persons being consulted. In essence, "effective consultation" refers to the quality of the actual consultation process, rather than any outcome, whereby the persons at the center of the consultation are subsequently persuaded. Government business would grind to a halt if the success of a participation program was to be measured by the consent of the affected community.

The preceding narrative fits comfortably into the broader debate over the principle of free, prior and informed consent (FPIC) and the current state of the law on the duty to consult, as addressed in section 4.4 of this dissertation. The courts have emphasized that the duty to accommodate is to be balanced with other interests. Accordingly, a claim that a project could irrevocably impair the religious beliefs and practices of an Indigenous group may be insufficient

to deny the government's approval of that project if the Crown can establish adequate consultation and accommodation with the relevant First Nation.[92]

In fact, the duty of the Crown is not to determine whether a community supports a project[93] but rather to consult proactively concerning the impact of a decision on an Aboriginal claim to rights or title. The courts have provided several guideposts and clarifications with respect to the duty to consult, which may help the government to fulfill its duty obligation. The next section will look at how the Crown fulfills its duty obligation.

4.3.3 How Does the Crown Fulfill Its Duty to Consult and Accommodate?

The SCC's decision in *Chippewas of the Thames First Nation* is an example of adequate consultation, which represents an important point to examine in terms of the way in which decision-makers fulfill the duty to consult. The SCC was called upon to examine the Crown's duty to consult Indigenous peoples before the NEB – an independent regulatory agency – authorized Enbridge Pipelines (Enbridge)'s Inc. Line 9 pipeline project. Enbridge applied to the NEB for approval of a modification of Line 9, which would reverse the flow in one section of the pipeline, increase its capacity, and enable it to carry heavy crude. These changes would raise the assessed risk of spills along the pipeline, which crossed the Chippewas' traditional territory. The Chippewas requested Crown consultation before the NEB's approval, but the Crown signaled that it was relying on the NEB's public hearing process to address its duty to consult. After the NEB had approved Enbridge's proposed modification, the Chippewas brought an appeal against this

[92] *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54.

[93] See Newman, *supra* note 20 at 13. See also *Haida Nation*, *supra* note 2 at para 48.

decision to the FCA, arguing that the NEB had no jurisdiction to approve the Line 9 modification in the absence of Crown consultation. The majority of the FCA dismissed the appeal. On further appeal to the SCC, the Court held that the Crown had an obligation to consult the First Nation with respect to the project application but had adequately fulfilled its duty to consult and accommodate.

In arriving at its decision, the Court made the following observations: first, the NEB had provided the potentially affected Indigenous groups with adequate information about the project. Additionally, the Chippewas of the Thames were able to pose formal information requests to Enbridge, to which they received written responses. Second, the NEB provided the Chippewas of the Thames with participant funding, which allowed them to prepare and tender evidence that included an expertly prepared "preliminary" traditional land-use study. Third, the First Nation had adequate opportunity to participate in the decision-making process, as the NEB had given them an opportunity to make submissions to the NEB as part of its independent decision-making process (consistent with *Haida Nation*). Fourth, the NEB had sufficiently assessed the potential impact on the rights of Indigenous groups and found that the risk of negative consequences was minimal and could be mitigated. Fifth, in order to mitigate potential risks to Indigenous rights, the NEB had provided appropriate accommodation through the imposition of conditions on Enbridge.[94] For these reasons, the SCC concluded that the Crown had satisfied its consultation obligation.

While the duty to consult remains highly fact dependent, *Chippewas of the Thames First Nation* provides general guidance on the circumstances in which the Crown can discharge its duty. As can be seen, these principles do not significantly differ from those proposed in the literature and espoused in various international law instruments, discussed in Chapters Two and

[94] See *Chippewas of the Thames First Nation*, *supra* note 10 at paras 51, 52, 54, & 57.

Three respectively. In this regard, *Chippewas of the Thames First Nation* affirms that access to information is of vital importance in consultative activities. The Crown's obligation to undertake consultation in good faith requires processes through which the affected Indigenous communities can participate in an informed way. To satisfy the duty to consult, the Crown must also ensure that the affected communities are provided with all necessary information in a timely manner, so that they have an opportunity to express their interests and concerns. Moreover, the government should not only supply information in response to requests from First Nations but must also compile, prepare, and disseminate—without needing to be asked—specific information to those communities, whose rights may be adversely affected by resource exploitation.[95]

In *Canada (Attorney General) v Long Plain First Nation*, the FCA cautioned that the Crown cannot satisfy its duty merely by meeting the bare minimum of the obligation's requirements, namely giving notice, disclosing information, and responding to any concerns raised.[96] Rather, there is a need to address issues of participants' competence and capacity-building to enable the affected community to participate meaningfully and effectively. While implementation of the duty to consult is "not to be assessed by the dollar figures contributed by the Crown," [97] in some cases, the government may be required to provide the relevant Indigenous communities with adequate capacity funding in order to enable them to engage meaningfully in consultation activities. The court may also consider whether the community required external financial support to be able to

[95] See George (Rocks) Pring & Susan Y Noe, "The Emerging International Law 0f Public Participation Affecting Global Mining, Energy And Resource Development" in Donald N. Zillman et al, eds, *Human rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford: University Press, 2000) 11 at 29 – 30.

[96] *Canada (Attorney General) v Long Plain First Nation*, 2015 FCA 177 at para 100 [Long Plain First Nation].

[97] *Ka'a'Gee Tu First Nation v Canada (Attorney General)*, 2012 FC 297 at para 114 [Ka'a'Gee Tu First Nation].

participate meaningfully in consultations when deciding whether the consultation was sufficient.[98] In *Chippewas of the Thames First Nation*, the FCA placed considerable weight on the financial support received by the First Nation from Enbridge with respect to its participation in the hearing. The financial capacity of an affected community may constitute an impediment to the participation process and even be serious enough to render the consultation process unreasonable. The Ontario Superior Court of Justice emphasized that the issue of appropriate funding is essential to a fair and balanced consultation process to ensure a level playing field.[99]

In *Clyde River (Hamlet)*, the Indigenous group had no financial resources for submitting their own scientific evidence on the potential impact of a seismic testing project on marine mammals or any opportunity to test the proponents' evidence. The SCC held, *inter alia*, that the First Nation's lack of funding significantly impaired the quality of the consultation, noting that if the First Nation had possessed the resources to submit its own scientific evidence, the result of the environmental assessment could have been very different. The absence of financial support had made it difficult for the First Nation to present a formidable argument to influence the Crown's decision over the approval of this project. It was in this context that the Ontario Superior Court of Justice in *Kitchenuhmaykoosib Inninuwug First Nation,* ordered the Ontario government to fund a First Nation's "reasonable expenses" with respect to a court-approved consultation process.

Nevertheless, this is not to say that the government cannot satisfy the duty to consult without providing funding to affected communities; the duty to consult only imposes an obligation on the Crown to ensure meaningful consultation. A denial of funding, *ipso facto*, does not preclude fair

[98] See generally *Adam v Canada (Environment)*, 2014 FC 1185 and *Council of the Innu of Ekuanitshit v Canada (Attorney General)*, 2014 FCA 189.

[99] *Platinex Inc. v Kitchenuhmaykoosib Inninuwug First Nation*, 2007 CarswellOnt 3553 at para 27 [Kitchenuhmaykoosib Inninuwug First Nation].

and meaningful consultation.[100] In *Tsleil-Waututh Nation* the FCA noted that the level of funding provided to some of the affected First Nations for participation actually constrained their participation in the process before the NEB, but the Court ruled that the issue of participant funding was not sufficient to render the entire consultation process unreasonable.[101]

Conversely, while the court may consider the provision of funding to an Indigenous community for participation as a reason for concluding that the Crown's consultations have been insufficient, the provision of financial support alone to an affected First Nation does not constitute proof that the consultation was adequate. In *Wii'litswx v British Columbia (Minister of Forests),*[102] the Crown argued that it had carried out a reasonable and extensive process of consultation and accommodation, which complied with the guidelines established in *Haida Nation*. It pointed to the significant funding provided by the Crown for the consultation process and to facilitate the First Nation's participation.

Although the British Columbia Supreme Court found that the Crown had provided funding to support the First Nation's participation, it had failed to fulfill its duty to meaningfully consult and adequately accommodate the First Nation and its interests. The Court noted that the Crown had unreasonably minimized the strength of the First Nation's claim and the potentially adverse impact of the project because it had placed too much weight on the fact that the claim to title was

[100] While the provision of participant funding to Indigenous communities, affected by natural resource development, may have its own difficulties and disadvantages, it has nevertheless been a major key employed by the Crown and project proponents to address the issue of access to information that negatively impacts meaningful consultation. As noted by the Ontario Divisional Court, a First Nation cannot reasonably be expected to spend its limited resources on promoting meaningful consultation as a result of a proponent's desire to pursue a project, usually for gain, and the Crown's desire to see the project go ahead. See *Saugeen First Nation*, *supra* note 45 at paras 158 – 159.

[101] See *Tsleil-Waututh Nation*, *supra* note 3 at paras 533 – 541.

[102] 2008 BCSC 1139 [Wii'litswx v British Columbia].

not yet proven. The Court held that there was essentially no change of position on the part of the Crown following consultation, demonstrating that the consultation had not been meaningful.[103]

There is now some guidance on what satisfies the duty to consult, which follows from *Wii'litswx v British Columbia* and *Chippewas of the Thames First Nation,* namely that consultation should have an impact on the final decision. Responsiveness is a key requirement of meaningful consultation, but this must not be interpreted to mean that the government must always change its position after consultation. The substance of the consultation is not affected by the fact that the government or decision-making agency holds the final decision-making authority in respect of a project.[104] Instead, the government must show that it has adequately considered the interests and concerns of the affected community and made appropriate provisions to address those concerns.

4.3.3.1 The Use of the Environmental Impact Assessment Processes

The SCC has held that while the Crown always owes the duty to consult, regulatory processes can partially or completely fulfill this duty.[105] The Crown is not required to establish specific consultation processes in all cases, but can instead choose to rely on existing regulatory schemes when seeking to fulfill the requirements of its duty to consult and accommodate. In *Brokenhead Ojibway Nation v Canada (Attorney General),*[106] the Federal Court indicated that some existing review processes may be sufficient to address the concerns of project-affected communities,

[103] *Ibid* at paras 156, 166, 186, 220 & 244. See also, Lorne Sossin, "The Duty to Consult and Accommodate: Procedural Justice as Aboriginal Rights" (2010) 23 Can J Admin L & Prac 93 at 103-104.

[104] See *Clyde River (Hamlet), supra* note 74 at para 1.

[105] *Ibid* at para 1.

[106] 2009 FC 484.

subject always to the Crown's overriding duty to consider the adequacy of their consultation and accommodation.[107]

Taku River is a leading authority (issued at the same time as *Haida Nation*) in which the SCC found that British Columbia's environmental assessment process could amply satisfy the duty to consult and accommodate. The Taku River Tlingit First Nation participated in the environmental assessment of a project to reopen an old mine and build a road through lands that were traditionally used by the First Nation. After an environmental assessment process, which took three and a half years, the Minister issued a Project Approval Certificate for the project to proceed. The First Nation subsequently applied to quash the Minister's decision on the grounds, *inter alia*, that the Province had failed to meet its duty to consult and accommodate them. The Chambers' Judge and the majority of the British Columbia Court of Appeal concluded that the Minister's action had triggered the duty to consult but held that the process engaged in under the *Environmental Protection Act* did not sufficiently address the First Nation's concerns.

On appeal, the SCC held that the First Nation's participation in the environmental assessment was adequate to uphold the Province's honour and meet the requirements of its duty to consult and accommodate. The SCC was careful to review in considerable detail the specific elements of the environmental assessment scheme.[108] The Court noted that the group had been part of the project

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[107] See *Brokenhead Ojibway Nation v Canada (Attorney General)*, 2009 FC 484 at para 25 [Brokenhead Ojibway Nation]. The Federal Court in *Brokenhead Ojibway Nation* indicated that "this is not a delegation of the Crown's duty to consult but only one means by which the Crown may be satisfied that Aboriginal concerns have been heard and, where appropriate, accommodated." See *Brokenhead Ojibway Nation* at para 25.

[108] For a detailed comment on why the SCC found that the environmental assessment process fulfilled the requirements of the duty to consult and accommodate in this instance, see Neil Craik, "Process and Reconciliation: Integrating the Duty to Consult with Environmental Assessment" (2016) 53 Osgood Hall LJ 632 at 648 – 652.

committee, participating fully in the environmental review process. The SCC also observed that the project committee had been the primary engine driving the assessment process and found that through this assessment process, the First Nation's concerns over the road proposal had become apparent. In response, the environmental assessment was adapted to alleviate the First Nation's concerns. Although the environmental assessment was unable to address all the concerns directly; the Province provided other avenues to consider them, including the approval of funding to enable the First Nation to participate meaningfully in the process.[109] The SCC also noted that the Province had adopted mitigation measures to adequately address the First Nation's concerns. It was evident that the Minister had considered these concerns, with the final project approval containing measures designed to address them in both the short and long term. Based on these findings, the SCC concluded that the Province had fulfilled the requirements of the Crown's duty to consult.

The decision in *Taku River* indicates that the government is not required to develop special consultation measures to address the concerns of project-affected communities where there are existing schemes that specifically set out consultation with affected communities. This is practically sound, insofar as the regulatory process is adequate for ensuring meaningful participation and accommodation. For example, most environmental assessment processes allow for the early identification and evaluation of all potential environmental consequences of a proposed project. The SCC has stated that environmental assessment, as a planning tool, "has both an information-gathering and a decision-making component which provide the decision-maker with an objective basis for granting or denying approval for a proposed development."[110]

[109] See *Taku River*, *supra* note 2 at para 37.

[110] *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at para 103 [Friends of the Oldman River Society].

Governments can rely on these environmental review processes to satisfy the legal requirements and aspirations of the duty to consult. Thus, a project-affected community cannot demand a separate or discrete consultation with the government, where regulatory procedures are readily accessible to that community to address its concerns.[111]

The decisions that followed *Taku River* indicate that it is now a well accepted practice that Crown consultation can take place through the environmental assessment process.[112] However, it is overly simplistic to conclude that the government can always resort to the environmental assessment process as a vehicle for consultation. The mere existence of an environmental assessment process does not in itself determine that the actual process will meet the Crown's obligation to meaningfully consult and accommodate the affected community. While the environmental assessment framework governs the actual process, the SCC has indicated that it must be applied in a way that fully respects the Crown's duty to consult.[113] The issue is whether, in the circumstances of the case, the particulars of the actual process and the level of consultation and accommodation undertaken meet the government's obligation to consult in a meaningful way. The Federal Court has emphasized that it is not enough for governments to rely on the process provided in regulatory schemes as a means of discharging the duty to consult simply because it is

[111] See *Brokenhead Ojibway Nation*, *supra* note 107 at para 42. The Court at paragraph 42 went further to indicate that project-affected communities have a responsibility to use such processes, when they are readily available. The Court also cautioned that to satisfy the Crown's duty to consult, the available regulatory processes must be accessible, adequate, and provide the affected community with an opportunity to participate in a meaningful way.

[112] See *Conseil des Innus de Ekuanitshit v Canada (Procureur général)*, 2013 FC 418 at para 113 [Conseil des Innus de Ekuanitshit].

[113] *Quebec (Attorney General) v Moses*, 2010 SCC 17 at para 45 [Quebec v Moses].

provided in the statutes.[114] In the words of the Court, "the Crown's duty to consult cannot be boxed in by legislation."[115]

The practical implication of the relationship between the duty to consult and environmental assessment is that the constitutional duty to consult and accommodate takes precedence over any regulatory scheme. As *Taku River* particularly demonstrates, the Crown's obligation to carry out its statutory duty must be adapted in some cases in order to meet the concerns of the project-affected community involved.[116] This will mainly be the case where the duty is determined to be near the high end of the spectrum. The Crown cannot justify adequate consultation on the basis that the process was in accordance with its statutory requirements. Thus, even though the government may institutionalize processes to discharge its consultation obligation, the Crown cannot substitute the duty to consult and accommodate with a statutory process. The duty to consult ensures that careful attention is paid to the concerns of Indigenous communities along all stages of the environmental assessment process. As Craik rightly argues, it is this constitutional lens that pushes environmental assessment towards its more deliberative and justificatory construction.[117]

4.3.3.2 Policies and Guidelines for Indigenous Consultation

Lucas has mentioned that the judicial elaboration of the constitutionalized duty to consult and accommodate has caused government policy-makers, as well as approval agencies, to give greater

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[114] *Ka'a'Gee Tu First Nation v Canada (Attorney General)*, 2007 FC 763 at para 121 [Ka'a'Gee Tu First Nation].

[115] *Ibid* at para 121.

[116] See *Taku River*, *supra* note 2 at para 2.

[117] See Craik, *supra* note 108 at 680.

attention and weight to the interests of Indigenous peoples.[118] Federal and some Provincial governments, who bear the responsibility for consultation, have developed policies and guidelines for agencies that conduct this process.

In recent years, Alberta's process of Indigenous consultation has helped to illustrate some of the developments initiated by the constitutional leverage of the duty. In 2013, Alberta adopted its new policy framework for Indigenous consultation under the *Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resources Management*.[119] Consultation under the Consultation Policy is defined as "a process intended to understand and consider the potential adverse impacts of anticipated Crown decisions on First Nations' Treaty rights, with a view to substantially addressing them."[120] The framework emphasizes the legal requirement of the duty to consult and the fact that the policy was guided by the SCC's decision in *Mikisew Cree Nation v Canada*, amongst others. The 2014 *Government of Alberta's Guidelines on Consultation with First Nations on Land and Natural Resource Management*[121] implements the 2013 Consultation Policy, emphasizing the need for consultation with First Nations to be consistent with

[118] Alastair R Lucas, "Canadian Participatory Rights in Energy Resource Development: The Bridges to Empowerment" (2004) 24 J Land Resources & Envtl L 195 at 203.

[119] See 2013 Alberta's Policy on Consultation with First Nations, *supra* note 57. See also Aboriginal Consultation Office, "The Government of Alberta's Guidelines on Consultation with Metis Settlements on Land and Natural Resource Management 2016" (4 March 2016), online: *Alberta Indigenous Relations* <http://www.Indigenous.alberta.ca/documents/Updated_Metis_Settlements_Consultation_Guidelines.pdf ?0.9780818083596996> [https://perma.cc/Q5G6-5FPY].

[120] See Alberta's Policy on Consultation with First Nations, *ibid* at 1.

[121] See Ministry of Aboriginal Relations, *The Government of Alberta's Guidelines on Consultation with First Nations on Land and Natural Resource Management, 2014* (Edmonton: Government of Alberta, 2014), online < https://open.alberta.ca/publications/3775118-2014> (Alberta's Guidelines on Consultation with First Nations).

case law and to demonstrate a practical approach in meeting the requirements established by the courts.[122]

As already seen, previous voluntary commitments by governments to engage Indigenous communities in natural resource development have not been perceived favourably by Indigenous peoples. It is significant that the Consultation Policy and subsequent Guidelines recognize the Provincial duty to consult as a legal obligation, grounded in law. This position differs from an earlier version in the 2005 policy guidelines, which state "a commitment by the province to consult with Aboriginals"[123] – a myth that was exploded in the *Mikisew Cree Nation* case and clearly outlawed in the Court's decision.

The Guidelines established the Aboriginal Consultation Office (ACO),[124] which has the authority to decide whether the duty to consult is triggered.[125] The ACO may delegate some procedural aspects of consultation to project proponents,[126] but it retains responsibility for all substantive aspects of consultation, including decisions over whether the duty to consult is triggered, as well as its adequacy. Alberta has detailed guidelines in place, which provide project

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[122] *Ibid* at 1.

[123] Alberta Government, "Government of Alberta First Nations Consultation on Policy on Land Management and Resource Development" (May 16, 2005), online: *Alberta Government* <http://Indigenous.alberta.ca/documents/GOAFirstNationsConsultationPolicy-May-2005.pdf> [https://perma.cc/YKJ2-65EJ] [2005 Alberta First Nations Consultation on Policy on Land Management and Resource Development] at 2.

[124] See 2014 Alberta's Guidelines on Consultation with First Nations, *supra* note 12 at 3.

[125] In *Athabasca Chipewyan First Nation v Alberta*, the issue, *inter alia*, was whether the ACO had the authority to decide whether the duty to consult had been triggered. The Alberta Court of Queen's Bench held that Alberta could rely on the ACO to determine whether a duty to consult arose from a proposed project. The Court held that the ultimate responsibility for consultation rests with the Crown, which is the government, acting through Ministers and their departments – in this instance, the ACO. See *Athabasca Chipewyan First Nation v Alberta*, 2018 ABQB 262 at 59 – 69.

[126] The fact that project proponents may legitimately satisfy the procedural requirement of the duty to consult is explained more fully in section 4.3.3.2.

proponents with the minimum requirements to be satisfied within the consultation process.[127] To meet the standards set out in the case law, approval agencies determine the requirements for consultation and identify the level of consultation required.

The government uses pre-consultation assessment to identify the concerns of Indigenous communities and to assess the impact of a proposed project on such a community. This assists the government in undertaking appropriate strategic initiatives to meet its consultation duty. Level 1 (streamlined consultation) is for projects that are typically short in duration, with low or limited impact on the environment and the exercise of Aboriginal rights.[128] Examples include coal exploration programs and other mineral exploration activities.[129] Low impact projects only require notification to the affected community and an opportunity for that community to respond. In British Columbia, the notification level may require a letter informing the affected Nation "about the proposed decision or activity… and generally indicate what information [British Columbia] already has about known Aboriginal Interests and potential impacts… seek clarification and input regarding the information provided."[130] This is analogous to the position in Alberta. Laidlaw and

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[127] Alberta Government, *The Government of Alberta's Proponent Guide to First Nations and Metis Settlements Consultation Procedures* (6 June 2016), Aboriginal Consultation Office, online: *Alberta Government* < https://open.alberta.ca/publications/proponent-guide-to-first-nations-and-metis-settlements-consultation-procedures > [https://perma.cc/U6WV-FZM6].

[128] See 2014 Alberta's Guidelines on Consultation with First Nations, *supra* note 121 at A2.

[129] *Ibid* at A2.

[130] See Government of British Columbia, "Updated Procedures for Meeting Legal Obligations When Consulting First Nations Interim" (07 May 2010), online: *Government of British Columbia* < http://www.llbc.leg.bc.ca/public/pubdocs/bcdocs2010_2/466370/updated_procedures.pdf> [https://perma.cc/5AQZ-ECCM] at 14. The government has also introduced a process of involving landowners and surface rights holders in the disposition of the Province's mineral rights. Surface rights holders are notified prior to the auction of mineral tenure. The Landowner Notification Program ensures that landowners are aware of the possibility that the subsurface rights to their property may be sold. It provides registered landowners with information about the monthly competitive auctions of petroleum and natural gas tenure, taking place in their area. See Government of British Columbia, Ministry of Energy, Mines and Petroleum Resources, *Oil and Gas Landowner Notification Program Launched,* News

Passelac-Ross explain that a First Nation's response will allow the government to determine whether its preliminary assessment is correct and to communicate any decision on consultation levels in writing to the First Nation, prior to conducting any consultation.[131]

The Guidelines require Level 2 consultation where, in pre-consultation assessment, the government determines that a project will have a moderate impact on Indigenous rights. For example, a new underground mining activity on existing sites requires a standard consultation.[132] Level 3 extensive consultations are for projects with potentially significant and permanent impact on treaty rights and traditional use. This includes activities that are typically long in duration and have extensive environmental impact.[133] This section will not go into detail concerning the processes and required consultation for each level. However, a general comment can be made.

Release No 2008EMPR0024-000477 (4 April 2008), online: <https://archive.news.gov.bc.ca/releases/news_releases_2005-2009/2008EMPR0024-000477.pdf> [https://perma.cc/K7TF-AN2C]. It should be emphasized that this program exclusively involves notification and as such, it does not ensure that the landowner makes any input into the tenure process, or that there are any caveats attached to it. See Jodie Hierlmeier, "BC Provides Notice of Subsurface Mineral Sales to Surface Owners" (2008) 23:2 Environmental law centre at 13-14. The fact that it informs landowners who are affected by potential oil and gas developments at an early stage of the process, prior to exploration and development activities, is a move in the right direction. See Jodie Hierlmeier, "BC Provides Notice of Subsurface Mineral Sales to Surface Owners" (2008) 23:2 Environmental law centre at 13 – 14.

[131] See David Laidlaw & Monique Passelac-Ross, "Alberta First Nations Consultation and Accommodation Handbook", Canadian Institute of Resource Law, Occasional Paper No. 44 updated to 2014, online: <https://dspace.ucalgary.ca/bitstream/handle/1880/50216/ConsultationHandbookOP44.pdf;sequence=1> [https://perma.cc/VG9G-6Q9A] at 41. It is difficult to resist the inference that the policy promotes the good faith principle built into the duty to consult, and additionally serves as a "risk reduction" mechanism. As the saying goes, "an ounce of prevention is better than a pound of cure." The Province has taken a step forward in its attempt to satisfy the consultation requirement. A brief announcement may be all that is required as notice to avoid huge cost to the government and project proponents.

[132] See 2014 Alberta's Guidelines on Consultation with First Nations, *supra* note 121 at A2.

[133] *Ibid* at A2.

To determine the adequacy of consultation, the ACO will ascertain whether the following factors have been considered:

> • Were all identified First Nations provided project information and given an opportunity to participate in the consultation process?
> • Did the proponent provide project-specific information within a reasonable timeframe, before approvals were required or before the project was scheduled to start?
> • If the First Nation provided site-specific concerns over the way in which the proposed project could adversely impact their Treaty rights and traditional uses, did the proponent make reasonable attempts to avoid and/or mitigate this potential impact?
> • Did the proponent indicate how they intended to mitigate potentially adverse impacts on the exercise of Treaty rights and traditional uses?[134]

The Consultation Policy and the Guidelines have been useful in satisfying the duty to consult. What is evident is that Alberta's Consultation Policy and the Guidelines adopt several principles derived from the case law.[135] In 2005, when there were few or no concrete standards for satisfying the duty to consult, the courts have provided enough pointers regarding the ways in which decision-

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[134] *Ibid* at 17.

[135] The following are the guiding principles for the Policy: (1) Alberta will consult with honour, respect, and good faith, with a view to reconciling First Nations' Treaty rights and traditional uses within its mandate to manage provincial Crown lands and resources for the benefit of all Albertans; (2) Consultation requires all parties to demonstrate good faith, reasonableness, openness, and responsiveness; (3) Consultation should be carried out before Crown decisions on land and natural resource management are made. Where appropriate, consultation will be done in stages; (4) Alberta and project proponents will disclose clear and relevant information regarding the proposed development, decision, or project to First Nations and allow reasonable time for review; (5) The level of consultation depends on the nature, scope, magnitude, and duration of the potential adverse impacts on the Treaty rights and traditional uses of the affected First Nation; (6) Alberta will inform First Nations and project proponents of known potential adverse impacts and the degree of consultation to be undertaken; (7) Alberta will solicit, listen carefully to, and seriously consider First Nations' concerns with a view to substantially address potential adverse impacts on Treaty rights and traditional uses; (8) Proponents must act within applicable statutory and regulatory timelines and in accordance with The Government of Alberta's Corporate Guidelines for First Nations Consultation Activities; (9) First Nations have a reciprocal onus to respond with any concerns specific to the anticipated Crown decision in a timely and reasonable manner and to work with Alberta and project proponents on resolving issues as they arise during consultation; (10) The Crown's duty to consult does not give First Nations or project proponents a veto over Crown decisions, nor is the consent of First Nations or project proponents required as part of Alberta's consultation process; and (11) Accommodation will be assessed on a case-by-case basis and applied when appropriate. See 2013 Alberta's Policy on Consultation with First Nations, *supra* note 57 at 3 – 4. As further recommended in Chapter 7, some of these principles provide important lessons for Ghana in the search for a meaningful participation framework for mining communities.

makers can meet their consultation obligation. For example, one of the guiding principles in the consultation process is that the government will consult and engage the affected community before Crown decisions on land and natural resource management are made. This includes disclosing clear and relevant information to First Nations, regarding the proposed development, decision, or project, and allowing reasonable time for review. The Consultation Policy requires decision-makers to listen carefully to, and seriously consider, First Nations' concerns, with a view to substantially addressing potentially adverse impacts on their rights. In addition to the Consultation Policy and the Guidelines, Alberta has enacted the *Aboriginal Consultation Levy Act*[136] to provide funding to Indigenous communities as a means of increasing their consultation capacity. The discussions in section 4.3.2 show that the provision of external funding to project-affected communities will, in some cases, be an important pre-requisite of the meaningful participation of those communities.

In *Huu-Ay-Aht*, the British Columbia Supreme Court stated that "the Crown is obligated to design a process for consultation that meets the needs for discharge of this duty before operational decisions are made."[137] *Haida Nation* shows that, while falling short of a regulatory framework, such policies provide a guide for decision-makers.[138] Governments may develop policies and guidelines to satisfy the duty to consult, but any framework adopted must recognize that they arise out of a legal duty owed to Indigenous communities. The existence of a legal duty to consult is imperative, since it is what subjects the policy to judicial scrutiny. While consultation with

[136] SA 2013, c A-1.2.

[137] *Huu-Ay-Aht First Nation v British Columbia (Minister of Forests)*, 2005 BCSC 1121 at para 113 [Huu-Ay-Aht First Nation].

[138] See *Haida Nation*, *supra* note 2 at para 51.

Indigenous groups may be designed to build a 'made-in-Alberta' policy approach,[139] this cannot be divorced from the legal requirement expounded by the courts.

Admittedly, the Consultation Policy and the Guidelines have not in and of themselves guaranteed the protection of Indigenous communities from the adverse impact of exploration activities. There are identified flaws and issues in Alberta's current approach to consultation under the Consultation Policy.[140] However, in order to determine whether adequate consultation has taken place, the courts would ordinarily look at the legal requirements defined by the case law. The question of whether a consultation process under the Consultation Policy and the Guidelines has been effective is measured by these requirements, not the tenets of the Consultation Policy and the Guidelines. Thus, a claim that the government consultation on a project has followed the process set out in its policy does not, *ipso facto*, prevent a finding of inadequate consultation.[141] Indigenous communities have the right to challenge the consultation process where there is an alleged breach. This underscores the essential nature of the legal foundation offered by the duty to consult.

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[139] For example, see 2005 Alberta First Nations Consultation on Policy on Land Management and Resource Development, *supra* note 123 at 2.

[140] For comments on this issue, see generally David Laidlaw & Monique Passelac-Ross, "Alberta First Nations Consultation and Accommodation Handbook", Canadian Institute of Resource Law, Occasional Paper No. 44 updated to 2014, online: <https://dspace.ucalgary.ca/bitstream/handle/1880/50216/ConsultationHandbookOP44.pdf;sequence=1>.

[141] For example, in the Ontario Superior Court case of *Saugeen First Nation v Ontario (MNRF)*, the Court held that the consultation with the Saugeen First Nation did not pass constitutional muster. The Court, *inter alia*, found that the Ministry of Natural Resources and Forestry had a consultation policy, but never followed through on its own designated processes. See *Saugeen First Nation v Ontario (MNRF)*, 2017 ONSC 3456 at para 6.

4.3.3.3 Role of the Government and Project Proponents in Fulfilling the Duty to Consult

An issue that arises from the implementation of the duty to consult and accommodate is the question of who has the obligation to satisfy the consultation requirement. Clearly, the duty to consult and accommodate is incumbent on the Crown, but the SCC has emphasized that the Crown may delegate procedural aspects of consultation to the industry proponents seeking development.[142] This is in line with the decision in *Fort McKay First Nation v Alberta (Minister of Environment and Sustainable Resource Development),*[143] wherein the Alberta Court of Queen's Bench indicated that a project proponent may be best placed to address and mitigate the impact of a proposed project on an Indigenous community.[144] At the practical level, it is in the interests of the project proponent to ensure meaningful consultation in order to avoid project delays caused by inadequate consultation.

In *Northern Superior Resources Inc. v Ontario*,[145] the ONSC explained that the project proponent is the party that has understood its own exploration plans, the limits of what is needed, and what it could do in response to the concerns of the affected First Nations.[146] A project proponent must then take steps to address the concern of the project-affected community, including the identification and consideration of potential mitigation or accommodation measures.

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[142] See *Haida Nation*, *supra* note 2 at 53. See generally *Clyde River (Hamlet)*, *supra* note 74 and *Chippewas of the Thames First Nation*, *supra* note 10.

[143] 2014 ABQB 393. The delegation of the Crown's duty to the proponents of a project is set in government policies and aligns with the legal principles established by the courts.

[144] See *Fort McKay First Nation v Alberta (Minister of Environment and Sustainable Resource Development)*, 2014 ABQB 393 at paras 103 – 107 [Fort McKay First Nation].

[145] 2016 ONSC 3161 [Northern Superior Resources Inc].

[146] *Ibid* at para 88.

But the Crown remains liable for failing to discharge the duty to consult and accommodate.[147] *Haida Nation* makes it clear that the government has the ultimate responsibility to adopt a consultation process, which meets the standards set by the courts.[148] For this reason, the fact that a proponent has sufficiently carried out consultation with affected communities is not enough if the government fails to carry out its own duty.[149] There is a real danger that economic interests may surpass the concerns of project-affected communities if the government's role in protecting its citizens is supplanted by project proponents. The duty to consult ensures that the government behave responsibly towards the communities, and that they are accountable to those who are affected by resource permits granted by government agencies.

4.4 The Duty to Consult and Accommodate versus the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

Canada generally does not require the consent of Indigenous groups where resource development affects their rights, but there is an exception to this principle when Aboriginal title has been established. The SCC in *Tsilhqot'in Nation v British Columbia*[150] strongly suggested that,

> after Aboriginal title to land had been established by court declaration or agreement, the Crown must seek the consent of the title-holding Aboriginal group to developments on the land. Absent consent, development of title land cannot proceed unless the Crown had discharged its duty to consult. If the Aboriginal group does not consent to the use, the government's only recourse is to establish that the proposed incursion on the land is justified under s. 35 of the Constitution Act, 1982.[151]

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[147] See *Haida Nation*, *supra* note 2 at 56.

[148] *Ibid* at 53.

[149] See *Tsleil-Waututh Nation*, *supra* note 3.

[150] See *Tsilqoth'in Nation*, *supra* note 60.

[151] *Ibid* at para 76.

The Court in *Tsilqoth'in Nation* breaks new ground in using the language of consent in a way that can significantly alleviate the power imbalance existing between the government and Indigenous communities.[152] It follows from the Court's decision that the standard of consultation and accommodation of Indigenous peoples is strongest in the case of Aboriginal title lands.[153] The government could infringe upon Indigenous title, but whether the Indigenous group has been consulted is relevant to determining whether the infringement is justified.[154] It is for this reason that the Canadian government has committed to "look for opportunities to build processes and approaches aimed at securing consent, as well as creative and innovative mechanisms that will help build deeper collaboration, consensus, and new ways of working together."[155]

One particular international law instrument that has been developed and one which presents Indigenous communities meaningful participation in the exploitation and development of natural resources is the *United Nations Declaration on the Rights of Indigenous Peoples*[156] (UNDRIP). UNDRIP addresses the history of territorial dispossession and marginalization of Indigenous communities in matters affecting their rights. Its Articles 19 and 32 bear directly on the content and implementation of the duty to consult and accommodate. Article 19 of UNDRIP obliges States to:

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[152] For a robust discussion of the significant consequences of the *Tsilhqot'in Nation* decision, see generally Bradford W Morse, "Tsilhqot'in Nation v. British Columbia: Is It a Game Changer in Canadian Aboriginal Title Law and Crown-Indigenous Relations" (2017) 2:2 Lakehead LJ 64.

[153] See Dominique Leydet, "The Power to Consent: Indigenous Peoples, States, and Development Projects (Canada)" (2019) 69:3 UTLJ 371 at 382.

[154] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2001 FCT 1426 at para 133.

[155] Government of Canada, Department of Justice, "Respecting the Government of Canada's Relationship with Indigenous Peoples" (14 February 2018), online: *Department of Justice* <https://www.justice.gc.ca/eng/csj-sjc/principles-principes.html> [https://perma.cc/NY3D-FE7U] at 12.

[156] *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007) [UNDRIP].

> consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.[157]

Regarding the development of natural resources, Article 32 requires States 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.[158]

Without free, prior and informed consent, Indigenous communities not only risk losing the rights to their land but their very way of life. In *Saramaka People v Suriname,*[159] the Inter-American Court of Human Rights stated that, where the impact of a proposed project would severely affect Indigenous rights, the State has a duty not only to consult the affected Indigenous group but also "to obtain their free, prior, and informed consent, according to their customs and traditions."[160]

UNDRIP does not constitute a legally binding document in Canada, but the Government has committed to implementing it and giving binding effect to its provisions.[161] In May 2018, the Canadian Parliament passed third reading of a Private Members' Bill, the *United Nations Declaration on the Rights of Indigenous Peoples Act*, which to date has not been adopted into

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[157] *Ibid* Article 19.

[158] *Ibid* Article 32.

[159] *Saramaka People v Suriname* (28 November 2007), Inter-Am Comm HR, No 172 [Saramaka People].

[160] *Ibid* at paras 133 – 137.

[161] See Justin Trudeau, "Statement by Prime Minister on Release of the Final Report of the Truth and Reconciliation Commission" (Ottawa: Prime Minister of Canada, 15 December 2015), online: *Justin Trudeau, Prime Minister of Canada* <https://pm.gc.ca/en/news/statements/2015/12/15/statement-prime-minister-release-final-report-truth-and-reconciliation >.

Canadian law.[162] The Bill dead on the Order paper and there is presently no bill before the House incorporating FPIC in Canada, but a comment is warranted.

Bill C-262, when implemented, requires the Government of Canada to take all measures necessary to ensure that Canada's laws are in harmony with UNDRIP. The UNDRIP is still considered controversial in Canada. The path ahead to implement UNDRIP is not an easy one as no one knows its implications. At the Second Reading in the House of Senate, Hon Nicole Eton emphasized that the former Minister of Justice Wilson-Raybould took the position that the UDRIP is unworkable in Canadian law.[163] Many have raised concerns in the case of article 32, which calls for the free and informed consent of Indigenous peoples prior to the approval of any project affecting their lands. But, while the debate to enshrine UNDRIP into Canadian law carries on federally, British Columbia is the first province to make it law. The *Declaration on the Rights of Indigenous Peoples Act*[164], received Third Reading on 26 November 2019 and came into force by Royal Assent on 28 November 2019.

The legal status and consequences of UNDRIP in Canada are still being tested, but Canada's courts have implicitly operated on the basis that UNDRIP has not become part of Canadian law. The courts have held that the duty to consult and accommodate should not be interpreted as a veto against Crown decision-making. In *Taku River*, the SCC indicated that the

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[162] Bill C-262. See Online: Openparliament.ca, Bill C-262 (Historical), (11 June 2019), online: *openparliament.ca* < https://openparliament.ca/bills/42-1/C-262/?tab=mentions&-page=2> [https://perma.cc/VU6X-DQVT]. The Bill was at third reading (Senate), as at June 11, 2019.

[163] Canada, Official Report of Debates of the Legislative Assembly (Hansard), 42ed Parliament, 1st Sess, Vol 150, No 290 (16 May 2019) at 8189 – 8190 (Hon N Eaton). See also James Munson "Ottawa Won't Adopt UNDRIP Directly into Canadian Law: Wilson-Raybould", (12 July 2016), online: ipolitics <https://ipolitics.ca/2016/07/12/ottawa-wont-adopt-undrip-directly-into-canadian-law-wilson-raybould/> [https://perma.cc/6AGZ-FUFU].

[164] S.B.C. 2019, c. 44.

government was not required to reach an agreement in seeking to fulfill the duty to consult, and its failure to do so did not breach the obligation to consult meaningfully with project-affected Indigenous communities.[165] There is no duty for the government to agree with Indigenous communities.[166] In *Adams Lake Indian Band v British Columbia (Minister of Forests, Lands and Natural Resource Operations)*, the British Columbia Supreme Court emphasized that the Crown may proceed to make decisions, even if First Nations oppose them, as long as the consultation process and accommodation are fair, reasonable and consistent with the duty to consult.[167] The Saskatchewan Court of Appeal has held that the government could issue exploration permits on treaty lands without consulting with the First Nation community where there is no foreseeable impact on treaty rights[168]

This, then, is the puzzle: how can the view that the duty to consult does not require agreement be reconciled with the application of UNDRIP?[169] Should we view the fact that the duty to consult does not provide Indigenous peoples with a right of veto over projects as being in conflict with the principles of UNDRIP? Dominique Leydet has argued that the significance of the change in *Tsilhqot'in Nation* is limited because of two factors:

> (a) the account of what can justify overriding a title-holder's refusal to consent is inadequate and does not ensure that only in cases where more compelling rights considerations militate in favour of infringement can a refusal to consent be

[165] See *Taku River*, *supra* note 2 at para 22.

[166] See generally *Adams Lake Indian Band*, *supra* note 11. See also, *Beckman c. Little Salmon / Carmacks First Nation*, 2010 SCC 53 at para 14 and *Nunatukavut Community Council Inc. v Canada (Attorney General)*, 2015 FC 981 at para 212.

[167] See *Adams Lake Indian Band*, *supra* note 11 at para 100.

[168] See *Buffalo River Dene Nation*, *supra* note 39.

[169] For an excellent discussion on this, see generally Sasha Boutilier, "Free, Prior, and Informed Consent and Reconciliation in Canada: Proposals to Implement Articles 19 and 32 of the UN Declaration on the Rights of Indigenous Peoples" (2017) 7:1 UWO J Leg Stud 4 and Michael Coyle, "From Consultation to Consent: Squaring the Circle?" (2016) 67 UNBLJ 235.

> overridden and (b) given how difficult and onerous the process of establishing proof of title remains, it appears that, in the vast majority of cases, Aboriginal peoples potentially affected by development projects will not be recognized as agents of consent.[170]

Leydet suggests that the Court offered a restatement of the reasons justifying infringement in earlier decisions since it still considers the 'broader public good' as a sufficient reason legitimating the overriding of a refusal to consent.[171]

UN Special Rapporteur, James Anaya, in his guidance notes on consultation with Indigenous peoples, specifies that UNDRIP's free, prior informed consent (FPIC) standard "should not be regarded as according Indigenous peoples a general 'veto power' over decisions that may affect them, but rather as establishing consent as the objective of consultations with Indigenous peoples."[172] This view is supported by many scholars, including Ward, who views FPIC as a means of "ensur[ing] that Indigenous peoples meaningfully participate in decisions directly impacting their lands, territories, and resources,"[173] rather than as a veto.[174] The principle of FPIC is subject to the limitation that the exercise of this right "shall not dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States."[175] The right to FPIC could be restricted for the "purpose of securing due recognition and respect for the rights and

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[170] See Leydet, *supra* note 153 at 382.

[171] But, see Grace Nosek, "Re-Imagining Indigenous Peoples' Role in Natural Resource Development Decision Making: Implementing Free, Prior and Informed Consent in Canada through Indigenous Legal Traditions" (2017) 50 UBC L Rev 95 (arguing that the decision in *Tsilhqot'in Nation* necessitates the development of legal and administrative mechanisms for obtaining Indigenous peoples' consent and the federal government should build on that necessity for a broader application of FPIC).

[172] See United Nations Human Rights, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, James Anaya*, A/HRC/12/34, (14 July 2009) at 16.

[173] See Tara Ward, "The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law" (2011) 10:2 NW J Intl Human Rights 54 at 56.

[174] See Boutilier, *supra* note 169 at 6.

[175] See UNDRIP, *supra* note 156 at Article 46.

freedoms of others and for meeting the just and most compelling requirements of a democratic society."[176]

Thus, Canada may be within its right to implement the FPIC in harmony with the Canadian legal order, insofar as it is in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.[177] The Federal Court has stated that UNDRIP cannot be used to displace Canadian jurisprudence or laws regarding the duty to consult, which would include the question of whether the duty to consult is owed, and the content of that duty.[178] Reading Articles 19 and 32 in the context of the duty to consult, one would not be wrong in suggesting that the current content and implementation of the duty to consult is consistent with the principles of FPIC. The duty to consult does not provide Indigenous communities with a right of veto over projects, but it does ensure that the government works with Indigenous groups to address their concerns. In the words of Coyle, "the obligation during consultations to engage in good faith dialogue, with the intention of addressing the other's concerns… appears very similar to the process of negotiating with a view to seeking agreement."[179]

Logically, the decision in *Tsilhqot'in Nation* should lead to a broader conception of when FPIC is required. Chief Justice Beverley McLachlin has warned that "governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested

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[176] *Ibid* at Article 46.

[177] *Ibid* Article 46.

[178] *Nunatukavut Community Council Inc. v Canada (Attorney General)*, 2015 FC 981 at para 104 [Nunatukavut Community Council Inc]. See also *Ross River Dene Council v Canada (Attorney General)*, 2017 YKSC 59 at 304.

[179] See Michael Coyle, "From Consultation to Consent: Squaring the Circle?" (2016) 67 UNBLJ 235 at 266.

Aboriginal group."[180] The duty to consult has given Indigenous communities a dramatic lever to influence government decisions that affect their lands. It provides a powerful tool by ensuring that not only are their interests and concerns addressed in government decisions, but in some cases, government projects accommodate their concerns. The duty to consult and accommodate ensures that the broader public interest is not the sole consideration for the development of natural resources.

Such participation is consistent with the current international standard under UNDRIP. In the absence of consent, the Crown remains "bound to respect and protect the rights of Indigenous peoples and must ensure that other applicable safeguards are implemented, in particular, steps to minimize or offset the limitation on the rights through impact assessments, measures of mitigation, compensation and benefit sharing."[181]

One possible approach to harmonizing the implementation of the FPIC standards with the principles set by the duty to consult and accommodate is through legislation. It would be appropriate for the government to clearly define what FPIC means and sets out what is expected of all parties, as opposed to having this worked out by the courts. As Gray explains,

> leaving this issue to be defined by the courts will likely undermine efforts to improve federal-Aboriginal relations and have significant and unnecessary financial costs for Aboriginal communities, federal, provincial and territorial governments, third parties and the Canadian economy. All parties need legal and practical certainty of what may be required going forward.[182]

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[180] See *Taku River*, *supra* note 2 at para 97.

[181] See United Nations General Assembly, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive Industries and Indigenous Peoples*, HRC Res 6/12 and 15/14, UNHRC, 24th Sess, UN Doc A/HRC/24/41 (2013) at para 38.

[182] See Bryn Gray, *Building Relationships and Advancing Reconciliation through Meaningful Consultation* (Gatineau, QC, CA: Indigenous and Northern Affairs, 2016) at 69.

A statutory clarification to Canada's approach to the law governing the principles of FPIC in the context of UNDRIP will provide directions for government agencies, project proponents, and project-affected Indigenous communities.

4.5 The Duty to Consult and Accommodate: A Lever for Impact and Benefit Agreements (IBAs)

The SCC has developed the duty to consult and accommodate as a means for Indigenous communities to avert or mitigate the negative effects of natural resource activities in their environs. A beneficial result of the duty to consult and accommodate is the increased willingness of project proponents to enter into contractual arrangements with Indigenous communities, to the potential benefit of these communities. The duty to consult and accommodate has provided meaningful economic participation for Indigenous communities in resource development. Private arrangements between project-affected Indigenous communities and companies have mainly been in the form of Impact and Benefit Agreements (IBAs) and other community development initiatives.

Although there is no single definition of an IBA, it can be viewed as a privately negotiated agreement between project proponents and project-affected communities, aimed at addressing the negative impact of natural resource development, and providing socio-economic benefits to the affected communities.[183] IBAs are premised on the fact that Indigenous communities cannot be

[183] See Norah Kielland, *Supporting Aboriginal Participation in Resource Development: The Role of Impact and Benefit Agreements* (Ottawa: Library of Parliament, 2015) at 1.

allowed to suffer the adverse effects of natural resource development while the benefits are sent elsewhere.[184]

Benefit agreements do not form part of the content of the duty to consult and accommodate but flow from it by offering a demonstrable way of ensuring that meaningful community participation has occurred.[185] The right to consultation has enabled Indigenous groups to negotiate lucrative mutual-benefit agreements with the project proponents. The absence of any legal requirement for industries to report on these negotiations, makes it difficult to track the full range of benefit agreements,[186] but those that are publicly known speak to the general trend of the new

[184] See Ken J Caine & 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 80-81.

[185] The question has sometimes been raised over whether an Indigenous community, which has participated in IBAs, can claim against a government for allowing industrial development to infringe on its rights under section 35 of the *Constitution Act*, 1982? In *Yahey v British Columbia*, 2018 BCSC 123, the BCSC indicated that IBAs may represent important evidence to support a claim that an Indigenous community has benefitted from or acquiesced to the industrial developments. Thus, the government may rely on an IBA to prove that an Indigenous community has adapted to changes in the exercise of their treaty rights. However, an Indigenous community cannot be held to have participated in industrial development, where projects have proceeded despite objections from the First Nation.

[186] IBAs are typically kept private, but this may change. The *Extractive Sector Transparency Measures Act* S.C. 2014, c. 39 (ESTMA) requires Canadian companies to divulge payments in excess of $100,000 to foreign and domestic governments. The legislation requires the same disclosure of payments made to Indigenous governments in Canada. Although the implementation of the Act may be challenging to many mineral extraction companies, given the confidentiality characterizing most of these payments, the Act serves to further entrench resource revenue transparency in the country. As rightly noted, "without transparency, resource companies that make legitimate, but undisclosed payments to governments could potentially be accused of contributing to the conditions that allow corruption to thrive within government." See Business in Calgary, "Policy Bites: What You Need to Know About the New Extractive Sector Transparency Measures Act (ESTMA) and How it Could Affect Your Business" (2016) 26:12 Busines in Calgary 56. In addition, information on the flow of revenue from natural resource extraction companies to Indigenous communities could help stimulate national debates as to whether the latter benefit from mineral projects being undertaken on or near their territories. Inhabitants of Indigenous communities will henceforth be armed with information on how much their governments receive on their behalf and hold their government to account for such revenue. For an overview of the reports published in the last five years, see Government of Canada, "Links to ESTMA Reports" (25 September 2019), online: *Government of Canada* < https://www.nrcan.gc.ca/our-natural-resources/minerals-mining/mining-resources/extractive-sector-transparency-m/links-estma-reports/18198> [https://perma.cc/9ET6-FUA6].

relationships emerging between industry and communities.[187] The Mining Association of Canada stated that 455 bilateral agreements (IBAs or other community benefit agreements) have been signed between mining companies and Indigenous communities from the year 2000 to 2019.[188] Impact benefit agreements (IBAs) for proposed natural resource projects are worth, in the aggregate, hundreds of millions or even billions of dollars to Indigenous groups, who could use this money to improve the socio-economic goals of the communities.[189]

An illustration of how Indigenous communities have benefited from resource development as a result of the duty to consult and accommodate is the benefit agreements over the Trans Mountain Pipeline project. The precise number of communities that have signed benefits agreements with Trans Mountain is not quite clear, but in April 2018, Barrera reported that 43 communities have benefit agreements or conditional pacts with the project proponent related to the pipeline expansion project.[190] Flanagan recounts that Trans Mountain claims to share "in excess of $400 million" with Indigenous communities through benefit agreements.[191] It has been reported that the Tk'emlúps te Secwepemc (Kamloops Indian Band) received over $3 million in

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[187] Agreements between the government, resource developers, and Aboriginal communities may include exploration agreements, impact and benefit agreements (IBAs), participation agreements and socio-economic agreements. For a general overview of some of these negotiations, see: Natural Resources Canada, "Agreements Between Mining Companies and Aboriginal Communities or Governments" (February 2013), online: Natural Resources Canada <http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/mineralsmetals/files/pdf/abor-auto/aam-eac-e2013.pdf> [https://perma.cc/597Y-UXQU].

[188] The Mining Association of Canada, *Facts and figures 2018* (25 March 2019), online: *The Mining Association of Canada* < https://mining.ca/wp-content/uploads/2019/03/Facts-and-Figures-English-Web_0.pdf> [https://perma.cc/3H6V-TW53] at 63 – 64.

[189] See generally Tom Flanagan, *How First Nations Benefit from Pipeline Construction* (Vancouver, CA: Fraser Institute, 2019) at 1 – 2.

[190] See generally Jorge Barrera, "B.C. First Nation Says Passage of Trans Mountain Project Through Reserve Not a Done Deal" (19 April 2018), *CBC News* online:< https://www.cbc.ca/news/Indigenous/bc-first-nations-kinder-morgan-pipeline-1.4626497> [https://perma.cc/98QT-X9ZG].

[191] See Flanagan, *supra* note 189 at 4.

exchange for signing an IBA with the proponent. The Whispering Pines/ Clinton Band received $440,000 in 2016/17, plus $300,000 to distribute to holders of Certificates of Possession who would be affected by pipeline construction.[192] Beaumont also reports that the benefit agreement between the Whispering Pines Indian Band and the proponent was worth between $10 and $20 million over 20 years. Other benefits for the First Nation included pensions for elders and support for youth programs.[193] In 2014/2015, the Peters Band, received $606,000 from Kinder Morgan for "capacity building," that is, hiring consultants to analyze the company's proposal.

In Saskatchewan, Newman states that Enbridge negotiated a memorandum of understanding with five Dakota First Nations in Manitoba, each of whom received a payment of $100,000.[194] It has also been reported that the Baffinland Iron Mines Corporation paid $20 million in direct payments to the Qikiqtani Inuit Association in the North Baffin area, as part of its IBA under the Mary River Project.[195]As Flanagan rightly points out, there are other benefits in addition

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[192] *Ibid* at 5.

[193] See generally Hilary Beaumont, Why First Nation Chiefs Sign Trans Mountain Pipeline, Deals" *Vice* (3 May 2018), online: Vice < https://www.vice.com/en_ca/article/ne9ayw/why-first-nation-chiefs-sign-trans-mountain-pipeline-deals > [https://perma.cc/VZ5N-66UJ].

[194] See Dwight G. Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Saskatoon: Purich Publishing Limited, 2014) at 136 – 137.

[195] See generally Joel Barde, "Tension over Transparency Impact and Benefit Agreements with Indigenous Groups may soon see Light of Day" (June/July 2016), online: CIM Magazine < https://republicofmining.com/2016/06/28/tension-over-transparency-impact-and-benefit-agreements-with-indigenous-groups-may-soon-see-light-of-day-by-joel-barde-cim-magazine-junejuly-2016/> [https://perma.cc/BLW4-NZU2]. See also: "The Mary River Project Inuit Impact Benefit Agreement Between: Qikiqtani Inuit Association and Baffinland Iron Mines Corporation, entered into pursuant to Article 26 of the Nunavut Land Claims Agreement" online: <http://ccsi.columbia.edu/files/2015/01/mary_river_inuit_impact_and_benefit_agreement.pdf> [https://perma.cc/T828-6N9B] at Articles 5.1-5.6.

to these passive resource revenue benefits, impossible to quantify accurately but probably worth more than the cash payments, of employment, job training, and contract set asides.[196]

The signing of IBAs can provide the companies with a degree of certainty that affected communities would not oppose the project. TransCanada, for example, is reported to have signed IBAs with all 20 First Nations located along the proposed route of its Costal GasLink Pipeline Project. The Company in 2018 announced a conditional award of $620 million in contract work to northern British Columbia Indigenous businesses for the project's right-of-way clearing, medical, security and camp management needs. The Project also anticipates another $400 million in additional contract and employment opportunities for Indigenous and local B.C. communities during pipeline construction.[197]

Providing an active equity participation interest to Indigenous communities has also been a key element in obtaining social licence from affected communities and for operations to be conducted without disruption.[198] Unlike passive resource revenue benefits, equity participation can provide affected communities a greater voice in decisions making. The now defunct Mackenzie Valley Gas pipeline proposal had a 30% Indigenous equity stake. At the time, it was reported as the first time Indigenous groups were given substantial ownership over a major energy

[196] See Flanagan, *supra* note 189 at 5.

[197] See Coastal GasLink' "Coastal GasLink Pipeline Project Conditionally Awards $620 Million in Contracting Opportunities to B.C. First Nations.", (26 June 2018), online: *Coastal Gaslink* < https://www.coastalgaslink.com/whats-new/news-stories/2018/2018-06-26coastal-gaslink-pipeline-project-conditionally-awards-$620-million-in-contracting-opportunities-to-b.c.-first-nations/> [https://perma.cc/XMY6-GUWK] reported in Flanagan, *supra* note 189 at 16.

[198] See Peter Forrester et al, "Energy Superpower in Waiting: New Pipeline Developments in Canada, Social Licence, and Recent Federal Energy Reforms" (2015) 53:2 Alta L Rev 419 at 426 – 435 (arguing that the primary role of regulators having the final say on whether or not a resource project is in the public interests is at risk of being subordinated to the "Bureau of Social Licence").

infrastructure project.[199] Similarly, the Northern Gateway Pipeline project offered a 10% equity share to Indigenous communities and an additional $300 million in employment and contracts as part of the company's proposed IBA. Terrace Standard in 2016, reported that the 10% Aboriginal stake worked out to $800 million in equity. Commercial arrangements that provide equity participation ensure that both parties share in the costs, benefits, and risks of the project.[200] The Mackenzie Valley Gas pipeline and the Northern Gateway Pipeline project have now been abandoned, but the proposed arrangements had the potential to transform many Indigenous communities.

There is a clear indication that Canadian resource companies have increasingly embraced the signing of negotiated agreements with Indigenous people. Project proponents have employed IBAs in practice to obtain voluntary consent of Indigenous communities. Governments have also created resource revenue sharing (RRS) as part of the reconciliation process and an important means to strengthen the relationship between government and Indigenous groups. The concept of RRS and IBAs are not significantly different. From a government perspective, RRS is a means to compensate for the potential negative effects of resource development on Indigenous communities and play a key role in unlocking stalled major projects. Indigenous communities can receive RRS

[199] See generally Jesse Snyder, "Arrested Development: For the Town of Inuvik, the Mackenzie Valley Pipeline was the Lifeline that Never Came", *Financial Times*, (12 December 2016), Online: *Financial Post* <https://business.financialpost.com/commodities/energy/arrested-development-for-the-town-of-inuvik-the-mackenzie-valley-pipeline-was-the-lifeline-that-never-came> [https://perma.cc/PVT7-AV7Y]. See also Flanagan, *supra* note 189 at 1.

[200] Laurin and Jamieson have opined that equity participation presents many opportunities to Indigenous communities, but the inherent restriction on the communities ability to monetize its ownership position is a challenge to joint venture arrangements. Indigenous governments prefer creating fiscal certainty without putting the current or future assets of the community at risk. This risk-free fiscal certainty is mostly achieved through passive resource revenues. See William M Laurin & JoAnn P Jamieson, "Aligning Energy Development with the Interests of Aboriginal Peoples in Canada" (2015) 53:2 Alta L Rev 453 at 474.

from governments on top of any funding secured by the communities from their relationship with companies.[201] Newfoundland and Labrador applies a government RRS agreement through land claim agreements and that apply to resource development within defined areas.[202] Quebec has instituted a RRS agreement between the province and the Cree of Quebec.[203] The government of British Columbia currently has 32 signed revenue sharing agreements with 44 Indigenous groups.[204] According to the Chief Inspector of Mines annual report, the Government of BC in 2017 shared $22 million under Economic and Community Development agreements (ECDA).[205] RRS secure support for mining projects, increase process certainty for the government, communities and industry, and reduce litigation risks for the life of a project.

Impact and benefit agreements and the most substantial RRS arrangements produce hundreds of millions of dollars in cash and other benefits for Indigenous communities. It is obvious that Indigenous Canadians are getting a great deal wealthier than in the past, but it is important to examine the incentives that some of these arrangements would generate. Equity participation generates incentives to create wealth, unlike direct cash payments and revenue sharing that predominantly see wealth as something that exist to be shared or "taken." Flanagan rightly notes

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[201] See Ken Coates, *Sharing the Wealth: How Resource Revenue Agreements Can Honour Treaties, Improve Communities, and Facilitate Canadian Development* (Ottawa: Macdonald-Laurier Institute, 2016) at 15 – 19 (examining how resource revenues are shared in Canada).

[202] See Prospectors & Developers Association of Canada, "Government Resource Revenue Sharing with Aboriginal Communities in Canada: A Jurisdictional Review" (2014), online: *Prospectors & Developers Association of Canada* <https://www.pdac.ca/docs/default-source/priorities/aboriginal-affairs/pdac-grrs-report-2014.pdf?sfvrsn=12d4dd98_0> [https://perma.cc/7RLS-DUZ9] at 4 – 7.

[203] *Ibid* at 4 – 7. See also Coates, *supra* note 201 at 33 – 34.

[204] Government of British Columbia, "Chief Inspector of Mines 2017 Annual Report" (December 2018) online: *Government of British Columbia* <https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/mineral-exploration-mining/documents/health-and-safety/ci-annual-reports/2017_ci_annual_rpt.pdf> [https://perma.cc/R7ED-YATX] at 6.

[205] *Ibid* at 6.

that wealth arises from "making" – creation through human ingenuity and those who contribute to its creation – resources owners, investors – are rewarded in proportion to their contribution.[206] There is little statistical evidence on the impact of revenue-sharing arrangements on the communities, but RRS agreements have been growing considerably.[207] The benefits of IBAs and revenue sharing to Indigenous communities largely depend on the terms that communities can negotiate. Indigenous communities can bargain to maximize their share from resource development by advocating for proposals that feed back into the wealth creating process. Indigenous groups should explore new models of participation that help communities to create their own source of revenue through IBAs to ensure consistent revenue that will benefit present and future generations.

To date many Indigenous groups continue to support resource development that affects their title and treaty rights.[208] There is more support to come, but not all Indigenous communities have been able to capitalize on the benefits from resource development. In the case of the Trans Mountain project, for example, the almost 43 supporters of the project have their economic development hopes being stymied by what Flanagan terms as political opposition. He suggests that the delay of the project resulted from the provincial government of British Columbia making environmental and fiscal demands and later Vancouver and Burnaby, providing support to the

[206] See Tom Flanagan, *Wealth of First Nations* (Vancouver: Fraser Institute, 2019) at 135.

[207] In 2018, government of Ontario signed resource revenue sharing agreements with Grand Council Treaty #3, Wabun Tribal Council and Mushkegowuk Council. See Government of Ontario, "Resource revenue sharing" (30 April 2018), online: *Government of Ontario* < https://www.ontario.ca/page/resource-revenue-sharing#section-1> [https://perma.cc/7DFX-ZC5A].

[208] See generally Ken Coates, "Not all Indigenous peoples oppose pipeline development" (9 July 2017), online: The Global and Mail < https://www.theglobeandmail.com/report-on-business/rob-commentary/not-all-Indigenous-peoples-oppose-pipeline-development/article35625151/> [https://perma.cc/UXT5-9MU2].

Tsleil-Waututh litigation that has impeded the project.[209] Commentators attribute the collapsed of the Mackenzie Valley Pipeline project to repeated regulatory delays during which declines in the price of gas made the pipeline uneconomic.[210] It is not surprising that IBAs have become institutionalized as companies have come to recognize that it is in their commercial interest to assist in the process of regulatory approvals.

As Flanagan shows the duty to consult and accommodate can be a powerful tool for the economic growth of many Indigenous communities. In his view, it will not realize its full potential until the law is reformed to prevent essential corridor developments from being blocked by small groups of political opponents. One should not conclude from the preceding paragraph that political resistance has been the primary cause for the collapse of these developments. As the discussion in section 4.3.2 shows, some Indigenous groups have played a crucial role in killing some of these projects. However, the evidence supports the conclusion that many Indigenous communities want to participate in the benefits of these projects. Those who oppose resource development do not speak for all Indigenous groups who may be affected by the project. Stephen Buffalo, president and CEO of the Indian Resource Council[211] has rightly observed that the opposition and subsequent cancellation of some of these projects have resulted in undercutting the few economic prosperity opportunities Indigenous people have to enjoy.[212] Perhaps, as Flanagan advised, it is

[209] See Flanagan, *supra* note 189 at 18 – 19.

[210] *Ibid* at 1. See generally Snyder, *supra* note 199.

[211] The Indian Resource Council (IRC) was founded in 1987 and made up of First Nations across Canada that have oil and gas production on their land including those that have the potential for production. The IRC currently have 207 members. See Indian Resource Council, "About" online: *Indian Resource Council* < http://irccanada.ca/about/> [https://perma.cc/Z89Y-M4KB].

[212] See generally Stephen Buffalo, "We are First Nations that Support Pipelines, When Pipelines Support First Nations" (13 September 2018), online: *Financial Post*

important for the Indian resource Council find a way to change the climate surrounding consultation and make it productive for those who want to benefit from participation.[213]

Data on current benefit agreements are not readily available because of confidentiality, but there are reasons for optimism that the increase in IBAs is continuing. The reasons for the rise in IBAs are diverse, but it is almost certainly due to the development of the duty to consult, or simply from recognition by government and project proponents of the adverse impact that a breach of this duty can have on resource development. The discussions in Section 4.3.2 of this chapter support the conclusions that companies seek the approval of Indigenous groups, because they are vulnerable to the unpredictable nature of the threats that communities can pose. Resource extraction companies never gave as much priority to IBAs before the duty to consult provided Indigenous groups the necessary leverage.[214] Project proponents employ IBAs as a risk management strategy in the context of natural resource and infrastructural development.

Despite years of experience in negotiating IBAs, the contributions of negotiated agreements to the development of Indigenous communities are generally limited in the existing literature.

<https://business.financialpost.com/opinion/we-are-first-nations-that-support-pipelines-when-pipelines-support-first-nations> [https://perma.cc/Q7XP-AFFS].

[213] See Tom Flanagan, *Wealth of First Nations* (Vancouver: Fraser Institute, 2019) at 129.

[214] For example, some of the agreements are tied to an obligation that the community will not raise issues with the government or before the courts over the duty to consult. For further discussion, see Dwight Newman, *Natural Resource Jurisdiction in Canada* (Markham, Ontario: LexisNexis, 2013) at 98-101. The Pinehouse Collaboration Agreement stipulates that "the community signatories agree that they have been broadly consulted to date on existing operations and the proposed Millennium mine, and they further agree to support the uranium mining operations of Cameco/AREVA in the area." See Northern Development Forum, *supra* note 68 at 38. While negotiated agreements between companies and Indigenous communities are mostly confidential, the village of Pinehouse made the full contents of its agreement public in the interests of transparency. See Pinehouse.info, "Pinehouse Collaboration Agreement" (12 December 2012), online: *Pinehouse.info* <https://www.pinehouse.info/documents_taxonomy/pinehouse-collaboration-agreement/ > [https://perma.cc/XX6J-BFQY].

What benefits are being delivered to project-affected communities through negotiated agreements? A common theme in the literature suggests that in the area of resource development, benefits from agreements are in fact highly variable.[215] Ken Coates rightly observed that Indigenous people respond differently to the financial and commercial opportunities presented by impact and benefit agreements and RRS arrangements.[216] Some Indigenous communities have used the funding to launch new businesses, create additional jobs, and drive their communities away from reliance on government transfer payments. Others have supplemented existing economic activity and government programs.[217] In 2015, Poelzer and Coates reported that the Inuvialuit Regional Corporation had more than $500 million in assets with an annual revenue exceeding $100 million.[218] Athabasca Basin Development has a turn-over of more than $100 million annually. The basic point is that Indigenous communities are deriving a great deal more money and opportunities than they had before the creation of the duty to consult and accommodate.

While some agreements allow Indigenous communities to achieve substantial socio-economic benefits, in some cases, outcomes are negligible.[219] Recently, Bullock et al analyzed

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[215] See generally Ryan Bullock et al, "Analyzing Control, Capacities, and Benefits in Indigenous Natural Resource Partnerships in Canada" (2019) 21:2 Environmental Practice 85.

[216] See generally Ken Coates, Increased Wealth in Aboriginal Communities is Part of the New Canadian Landscape" Inside Policy (12 February 2015), Macdonald-Laurier Institute, online: < https://www.macdonaldlaurier.ca/files/pdf/201502FEBRUARYInside%20PolicyCOATES.pdf > [https://perma.cc/MZU7-3BUF].

[217] *Ibid*. See also Greg Poelzer & Ken S Coates, *From Treaty Peoples to Treaty Nation: A Road Map for all Canadians* (Vancouver: UBC Press, 2015) at 145.

[218] *Ibid* at 145.

[219] See generally Ciaran O'Faircheallaigh, "Evaluating Agreements Between Indigenous Peoples and Resource Developers" in Marcia Langton et al (Eds.), *Honour Among Nations? Treaties and Agreements with Indigenous Peoples* (Melbourne, Australia: Melbourne University Press, 2004) 303 at 303 – 328 (noting that, in some cases, the benefits are impact-minimization provisions, which are similar to those that are already provided in general legislation).

Indigenous partnership arrangements and the conditions associated with natural resource development, highlighting the benefits of negotiated agreements to Indigenous communities. Based on their analyses, they cited employment (50%), improved decision-making (46%), and financial support (33%) as the most frequently mentioned benefits for project-affected communities.[220] The success of negotiated agreements in relation to the development of Indigenous communities will depend on the type of agreement that is negotiated, how it is drafted, its implementation plans, whether it is conceived with a long-term vision, and how it is linked to development policy.[221]

What is evident is that IBAs have emerged as a useful tool to encourage the participation of Indigenous peoples in resource development projects. The situational and contractual context of IBAs varies from project to project, but the structure remains curiously similar. IBAs may provide for local development opportunities, such as social programs, community projects and physical infrastructure. They may also lead to employment and business opportunities for project-affected communities. Some agreements even contain provisions that give signatory communities preferential access to contracts for the provision of goods and services to companies.[222]

IBAs are unique in providing Indigenous communities with enforceable rights. They can establish a formal legal binding relationship between Indigenous communities and companies.[223] Unlike regulations, IBAs are community-focused and thus more capable of remediating specific

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[220] See Bullock et al, *supra* note 215 at 93.

[221] Irene Sosa & Karyn Keenan, *Impact Benefit Agreements Between Aboriginal Communities and Mining Companies: Their Use in Canada* (Calgary, Alberta: Canadian Environmental Law Association, 2001) at 18 & 21.

[222] See generally Ciaran O'Faircheallaigh, "Mining Agreements and Aboriginal Economic Development in Australia and Canada" (2006) 5:1 Journal of Aboriginal Economic Development 74.

[223] See generally Kielland, *supra* note 183.

instances of harm to communities. Moreover, negotiated agreements allow project-affected communities to bargain for terms that are not available through legislation. In return, companies can satisfy the duty to consult and secure the support of Indigenous communities, so that they are able to proceed with planned developments

IBAs have the potential to benefit project-affected communities, provided that they are well negotiated and implemented. However, although IBAs offer a better way for communities to gain a seat on the negotiating table and to address community interests, there is also cause for concern, including problems with unequal bargaining power.[224] In fact, Caine and Krogman acknowledge that notwithstanding the fact that IBAs appear to promote power-sharing between Indigenous groups and companies, it is inaccurate to assume or portray this power as essentially neutral with the potential for a level playing field prior to negotiation.[225] Very often, Indigenous communities do not have the financial, institutional or technical capacity to negotiate deals that recognize their own real interests. Bargaining inequalities between Indigenous communities and companies may push such agreements towards the implementation of market-based values, which are not beneficial to those communities.[226] An important consideration is the period leading up to the

[224] See Brad Gilmour & Bruce Mellett, "The Role of Impact and Benefits Agreements in the Resolution of Project Issues with First Nations" (2013) 51:2 Alta L Rev 385 (examining the meaningful role of IBAs in the reconciliation of the interests and the importance of a robust regulatory process in reaching such agreements).

[225] See Caine & Krogman, *supra* note 184 at 80.

[226] Graben has commented that rather than manifest traditional Indigenous values, IBAs are highly legalistic contracts, which implement market-based policies for resource development. She further states that "due to the inequality of negotiating power held by industry parties, industry can press for negotiations on issues the Indigenous party might see as non-negotiable. Because of these realities, negotiated instruments may not fully reflect certain types of values held by community members vis-à-vis resource development. The inability of negotiations to fully reflect the range of participant values undermines their characterization as participatory in a deliberative democratic sense." See Sari M Graben, "Assessing Stakeholder Participation in Sub-Arctic Co-Management: Administrative Rulemaking and Private Agreements" (2011) 29 Windsor YB Access Just 195 at 217.

negotiation of IBAs. Where projects have been finalized, the negotiation of IBAs "puts the community at a bargaining disadvantage that may encourage them to agree to terms that are not beneficial to them."[227] Negotiating benefit agreements after project approval is essentially remedial, rather than giving the people a genuine opportunity to negotiate.

Unequal bargaining power allows companies to include confidentiality and non-compliance clauses that are not favourable to the affected communities. Confidentiality clauses restrict openness, transparency to the public, and thus contradict democratic principles.[228] An agreement can also raise issues of implementation, especially where IBAs contains provisions that hinder enforcement. Caine and Keenan refer to the North West Territories First Nations increasing concern over what recourse they have to enforce industry obligations, and furthermore, how they can monitor whether or not the promises made are kept over time.[229] O'Faircheallaigh has indicated that one of the major factors explaining implementation failure is the absence of specific penalties or sanctions for non-compliance.[230] Without regulatory protection from the government, most

[227] See Kristen van de Biezenbos, "The Rebirth of Social Licence" (2019) 14 McGill J Sust Dev L 149 at 174.

[228] See Caine & Krogman, *supra* note 184 at 83 – 88 (discussing the idea that power imbalance affects the content and implementation of IBAs).

[229] *Ibid* at 86.

[230] See Ciaran O'Faircheallaigh, "Implementing Agreements Between Indigenous Peoples and Resource Developers in Australia and Canada (13 January 2003), online: Centre for Australian Public Sector Management< http://metisportals.ca/MetisRights/wp/wp-admin/images/Implementing%20Agreements%20between%20Indigenous%20Peoples%20and%20Resource%20Developers.pdf > [https://perma.cc/44XA-77HC] at 12 – 15 (other factors include: lack of clarity and precision in the agreements and relevant legislation; failure to deal with critical issues in agreements; absence of appropriate institutional arrangements; lack of commitment to the agreements by some of the parties; inadequate resources; failure to recognize 'aboriginal political agency', and lack of information on agreements, related policy and legislation).

Indigenous communities lack the capacity to enforce contractual obligations or to ensure effective implementation.

To remedy these challenges, Biezenbos has recommended that IBAs be incorporated as a precondition of approval or renewal. It is only the *Nunavut Land Claims Agreement (NLCA)* and the *Inuvialuit Final Agreement* that contain the requirement for an IBA to be negotiated.[231] The capacity of Indigenous communities could be enhanced if the issuance of legal licences was tied to the performance of obligations in the community contract.[232] Biezenbos suggests that government's role in permitting agencies could be modified to allow agencies "to act as a third party to assist in resolving disputes over community contracts and, in an indirect way, provide enforcement mechanism."[233] This recommendation is ideal in jurisdictions where there is no legal recognition of a duty to consult.[234] In Canada, many Indigenous communities have been able to negotiate successful IBAs as the result of the sophisticated legal precept surrounding the duty to consult and legal advice.

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[231] See Indian and Northern Affairs Canada, "Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada (NLCA)" (13 April 2017), online *Indian and Northern Affairs Canada* < http://www.tunngavik.com/documents/publications/LAND_CLAIMS_AGREEMENT_NUNAVUT.pdf> [https://perma.cc/M5MF-YPF9] at art 26 and Indian and Norther Affairs Canada, "Inuvialuit Final Agreement" (April 2005), online: < https://www.irc.inuvialuit.com/sites/default/files/Inuvialuit%20Final%20Agreement%202005.pdf> [https://perma.cc/XYN6-86X5] at chapter 10.

[232] See Biezenbos, *supra* note 227 at 179.

[233] *Ibid*.

[234] See generally Evaristus Oshionebo, "Community Development Agreements as Tools for Local Participation in Natural Resource Projects in Africa" in Markus Krajewski, ed., *Human Rights in the Extractive Industries: Transparency, Participation, Resistance* (Cham, Switzerland: Springer, 2019) 77 – 109 and Kendra E Dupuy, "Community Development Requirements in Mining Laws" (2014) 1 Extractive Industries and Society 200.

The legal considerations arising from the duty to consult and accommodate have largely motivated the use of IBAs. As Matiation has noted, neither the Canadian government nor companies want valuable projects to be delayed by litigation or other tactics backed up by legal claims.[235] This has fostered a closer focus on companies' 'social licences' to develop resource projects.[236] Indigenous peoples have negotiated for benefits, which they were previously unable to achieve. This change has been encouraged by the duty to consult. While this duty is primarily owed by the Crown, the front-line negotiations are undertaken by project proponents, because a failure to meet the consultation requirement will impact negatively on a project.

4.6 Summary

The duty to consult emerged as a response to the continued marginalization of Indigenous communities in natural resource development that affects their land. The legal leverage provided by this duty ensures that not only that Indigenous communities are consulted over resource development, but also that their participation is meaningful, and in many cases, that their interests are accommodated. The enforceability of the duty to consult strongly motivates the government and resource developers to strive towards meaningful participation. Where the development of natural resources adversely affects Indigenous rights or title, any regime that does not allow for effective consultation, and that fails to provide any other equally effective means of acknowledging and accommodating Indigenous claims, should be considered defective and cannot

[235] See Stefan Matiation, "Impact Benefits Agreements Between Mining Companies and Aboriginal Communities in Canada: A Model for Natural Resource Developments Affecting Indigenous Groups in Latin America?" (2002) 7:1 Great Plains Nat Resour J 204 at 211. Matiation has stated that as a result of the protection they enjoy, Indigenous communities recognize that they need not bend easily to threats that a company will simply walk away from a major project, rather than making concessions, or concede too quickly when insufficient incentives are offered.

[236] See Northern Development Ministers Forum, "Benefit Agreements in Canada's North" (August 2013), online: <http://www.nadc.gov.ab.ca/Docs/benifit-agreements-2013.pdf> at 17.

be allowed to subsist. The courts can and do reject proposed projects on the grounds of inadequate consultation, often at the cost of billions of dollars. In some cases, resource development has been delayed by the courts so that the government can meaningfully engage the affected communities before projects proceed. Previously, under the common law regime, Indigenous peoples did not enjoy such rights.

Indigenous participation in natural resource development supports Arnstein's theory that meaningful participation is better achieved at the top of the participation ladder, if there are shared planning and decision-making responsibilities between the three main actors during the development of natural resources.[237] The duty to consult contributes to the position adopted in the literature and in international law instruments, which requires a binding legal right to participation as the baseline condition for meaningful participation. As the SCC indicated in *Rio Tinto Alcan Inc*, one underlying purpose of the duty to consult and accommodate is to provide equal advantage to each side in the negotiation process.[238] There is a need for legal empowerment if project-affected communities are to benefit from participation. The duty to consult reforms power relations between the government, project proponents and Indigenous communities. It represents a shift from the position under ordinary administrative law, where the government had the ability to unilaterally impose a decision on Indigenous communities. The selective use of legal force helps to further ensure that Indigenous communities have an influence on the outcome of decisions and in some cases, that alternatives are provided.

[237] See Arnstein, *supra* note 15 at 221 – 223.

[238] See *Rio Tinto Alcan Inc.*, *supra* note at para 50.

It is evident that a binding legal right to consultation has helped Indigenous communities gain many advantages, which were not realized under the common law. Issues like economic opportunity and fairness, health and safety, and protection of the environment are common to resource-rich countries such as Ghana, but many jurisdictions lack effective tools and mechanisms to promote meaningful participatory governance within mining communities. In the context of natural resource development, the duty to consult and accommodate presents a practical model to governments and policymakers, where they struggle to ensure the meaningful participation of project-affected communities.

The next chapter examines the way in which Ghana's mining regime addresses the concerns and interests of project-affected communities.

CHAPTER FIVE: COMMUNITY PARTICIPATION IN MINERAL DEVELOPMENT IN GHANA

5.1 Introduction

The World Bank's Operations Evaluation Department (OED), in its assessment of Ghana's mining performance in 2003, noted that:

> local communities affected by large-scale mining have seen little benefit to date in the form of improved infrastructure or service provision, because much of the rents from mining are used to finance recurrent, not capital expenditure. A broader cost-benefit analysis of large-scale mining that factors in social and environmental costs and includes consultations with the affected communities, needs to be undertaken before granting future production licenses.[1]

Few will deny that seventeen years after this report was released, there has been no cogent evidence that the circumstances observed in the above assessment have changed significantly.

Despite the wealth generated by the government and by mineral-producing companies, local communities living in the vicinity of mining areas remain some of the most impoverished societies in Ghana. There are numerous developmental and environmental challenges besetting communities in areas that are rich in mineral resources.[2] Growing concerns continue to be expressed over the social costs of mining activities as mining communities struggle for better conditions and financial returns on the activities carried out in their regions.[3] The environmental

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[1] See The World Bank, "Ghana Mining Sector Rehabilitation Project (Credit 1921-GH) Mining Sector Development and Environment Project (Credit 2743-GH)", Report No.: 26197 (01 July 2003), online: *The World Bank* < http://documents.worldbank.org/curated/en/120891468749711502/pdf/multi0page.pdf > [https://perma.cc/SFJ5-CEK4] at 23.

[2] See generally Timothy Ngnenbe, "Very Rich Yet, So Poor: The Sad Story of Mining Communities in Ghana", Graphic Online (29 October 2018), online: *Graphic Online* < https://www.graphic.com.gh/features/features/very-rich-yet-so-poor-the-sad-story-of-mining-communities-in-ghana.html > [https://perma.cc/T59T-7CJ3].

[3] *Ibid*.

impact of mining and loss of livelihood in these communities create additional issues.[4] Local communities consequently see mineral extraction companies making what appear to be substantial financial profit but equally note the failure to do enough, if anything, for the communities that they affect.

It is (highly) questionable whether Ghana's mining regime ensures equitable and sustainable benefits for the communities affected by mining projects and whether the existing legal regime accommodates and addresses the concerns and interests of mining communities. The reality is that Ghana's current mining regime focuses overwhelmingly on 'national interest,' which may not always correspond to the interest of the local communities affected by mining activities. Scholars suggest one approach to increase the benefits of mineral extraction for these communities is to enhance their participation in decision-making processes involving mineral development.

This chapter examines the existing legal regime for community participation in mineral development in Ghana. Its objective is to determine whether Ghana's current participation regime for mineral development is effective in ensuring the meaningful participation of potentially affected communities. In this chapter, I argue that the lack of legal leverage for community participation in Ghana's mineral laws is a problem that prevents mining communities from benefiting from the development of natural resources.

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[4] The Human Rights Clinic at the University of Texas School of Law (HRC), in a report on communities affected by mining in the Tarkwa region of Ghana, identified corruption; inadequate compensation; unsafe living and working conditions; violence associated with mining activities, and lack of access to justice as some of the human rights violations in the region investigated (see Human Rights Clinic, "The Gold Coast: Communities Affected by Mining in the Tarkwa Region of Ghana" University of Texas (June 2009), online: *University of Texas* < https://law.utexas.edu/wp-content/uploads/sites/11/2015/04/2010-HRC-Ghana_CostofGold-Report.pdf > [https://perma.cc/9WFF-8Q8C].

The remainder of this chapter is organized into four sections: section 5.2 begins with an examination of the customary law interest in land and an historical inquiry into the participation of mining communities in the exploitation of minerals in pre-colonial Ghana. Finally, it examines the involvement of mining communities in the colonial and post-colonial period before independence. Section 5.3 then examines the existing legislative provisions that deal with community participation in Ghana, offering an evaluation of the legal provisions on community participation in the relevant statutes, with a view to assessing whether the existing regime ensures meaningful community engagement. Finally, section 5.4 presents some concluding thoughts.

5.2 Customary Interests in Land and Community Participation in Mineral Exploitation: A Historical Perspective

Understanding the customary law principles of land ownership in Ghana and the incidents that go with them is important for understanding why project-affected communities should participate in mineral development. Land tenure in present-day Ghana is still largely based on customary laws, which existed prior to colonization. Larbi states that about 78% of land in Ghana is held under customary tenure: the State owns 20% and the remaining 2% is owned by the State and customary authorities in a form of partnership (split ownership).[5]

Allodial title was (and still is) the highest proprietary interest known to the customary scheme of interests in land.[6] At one time, traditional land in Ghana was largely communally

[5] See generally Wordsworth Odame Larbi, "Compulsory Land Acquisition and Compensation in Ghana: Searching for Alternative Policies and Strategies" (2008), online: <https://www.fig.net/resources/proceedings/2008/verona_fao_2008_comm7/papers/09_sept/4_1_larbi.pdf > [https://perma.cc/3A2U-LMUL]. The basis of ownership is not by statutes, but under customary law, which is made part of the laws of Ghana by virtue of Article 11 of the 1992 Constitution.

[6] See generally Gordon R Woodman, "The Allodial Title to Land" (1968) 5: 2 UGLJ 79.

owned. Allodial title was vested in traditional communities and usually managed by a custodian (a chief or head of a family), along with the principal elders of a community. As will be discussed further, the allodial interest was not previously subject to any restrictions on the user's rights or obligations. The customary concept of land was understood to have wide application, which not only included the land itself but also everything enjoyed as naturally belonging to the land. NA Ollennu, for example, refers to streams, lakes, lagoons, creeks and growing trees as some of the elements included in the definition of land.[7] The customary nature of land ownership was understood to extend to every mineral in its natural state within the jurisdiction of the community that owned it.[8]

In contrast to the allodial title, traditionally, individuals could own only a usufructuary interest. A member of a land-owning community has a beneficial interest in using that land, both by taking its natural fruits and by developing it into farms or buildings. However, the communal nature of land meant that users were prohibited from exercising their rights in a manner that would be detrimental to the community's interests. The position was that the exercise of the usufructuary interest should not violate the inherent rights of the community. Where the usufruct was granted by custom for mining purposes, Francis Botchway, for example, wrote that the exploitation of minerals must not be pernicious to the interests of the members of that community.[9] The principle

[7] See N A Ollennu, *Principles of Customary Land Law in Ghana*, 2nd ed (Birmingham, Cal Press, 1985) at 9.

[8] Ghana's customary law followed the broad English definition of land: "'Land' includes land of any tenure and mines and minerals, whether or not held apart from the surface, buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way) and other corporeal hereditaments; also a manor, an advowson and a rent and other incorporeal hereditaments, an easement right, privilege or benefit in over, or derived from land." See *Law of Property Act*, 1925, 15 & 16 Geo 5, s 205(1)(ix).

[9] See Francis N Botchway, "Land Ownership and Responsibility for the Mining Environment in Ghana" (1998) 38 Nat Resources J 509 at 513 – 514.

of group ownership was not infringed by mining concessions, which, as David Kimble notes, did not involve any transfer of ownership from a group to an individual.[10]

A major consequence of the allodial title was the unqualified dominion of the community to manage, control and exploit the natural resources on their land. There was no tension between mineral and land rights. The participation of the local community in mineral production dates back to pre- and post-colonial times. The weight of opinion from both 19th-century chroniclers and more recent historical studies is that mining operations, especially in the case of gold, comprised a widespread and important activity along the Gold Coast. Mining concessions were negotiated directly with traditional leaders. Many pre-colonial communities of the Gold Coast participated in the development of mineral resources, either through direct mining by members of the land-owning community or by means of mining concessions granted to strangers by the chief.[11] The native population worked in mining for their own benefit, although Raymond E Dumett writes that not all miners were Indigenous to the land-owning communities.[12]

Much has been said about the socio-economic impact of mining activities on pre-colonial communities. Gold was used for adornment and later came to be accepted as a medium of

[10] See David Kimble, *A Political History Ghana* (Oxford: Clarendon Press, 1963) at 16-17. Asante explains that the evolution of the subject's estate created a situation in which two species of ownership – the subject's estate and the community's "absolute" or paramount interest – exist simultaneously in respect of the same piece of land. See S K B Asante, *Property Law and Social Goals in Ghana 1844-1966* (Accra, Universities Press, 1975) at 64. Asante's position emphasizes the customary law principle that the community's inherent interest in land cannot be extinguished.

[11] Kimble refers to a 'stranger', for the purposes of land tenure, to mean a member of a different kinship group. *Ibid* at 20.

[12] See Raymond E Dumett, "Precolonial Gold Mining in Wassa: Innovation, Specialization, Linkages to the Economy and to The State" in Enid Schildkrout, ed *The Golden Stool: Studies of the Asante Center and Periphery* (New York: Order of the Trustees, 1907) 209 at 213.

exchange in a number of communities.[13] Kwame Arhin writes that gold was used for internal marketing, in exchange for consumer items such as clothes, salt and drinks from retailers.[14] Arguably, in general, mineral development was the most important industry in pre-colonial Ghana and one of the main pillars for building of most of its communities and kingdoms. That said, it does not appear that mining was profitable. A review of the literature reveals the neglect of economic development at the expense of military power. Arhin, for example, clarifies that gold mining did not have as much effect on the Ashanti society and economy as one might expect, given the wealth that the industry generated.[15] He observes that much of the mineral wealth was used to build the State's power.[16] In a related but different context, Robertson echoes Arhin's position on this and emphasizes that working in a gold-mining operation was not a profitable form of employment.[17] Robertson's conclusion is based on similar work carried out by Skertchly, who also observed that the low returns on mining did not warrant the enormous effort expended.[18]

Although there is not enough evidence to debunk the pessimistic conclusions of these observers, it is important to note that the benefits associated with resource development are not defined in the same way by everyone. As Dumett suggests that what is considered "profitable" is

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[13] See Francis N Botchway, "Pre-Colonial Methods of Gold Mining and Environmental Protection in Ghana" (1995) 13 J Energy & Nat Resources L 299 at 301. Oral tradition maintains that the earliest medium of exchange was a piece of smelted iron in the form of a rod. See Timothy F Garrard, *Akan Weights and Gold Trade* (London: Longman, 1980) at 3

[14] See Kwame Arhin, "Gold Mining and Trading Among the Ashanti of Ghana" (1978) 48 Journal des Afranistes 89 at 94.

[15] *Ibid* at 97.

[16] *Ibid*.

[17] See G A Robertson, *Notes on Africa* (London: Sherwood, Neely and Jones, 1819) at 126 cited in Dumett, *supra* note 12 at 221.

[18] See generally J A Skertchly, "A Visit to the Goldfields of Wassaw, West Africa" (1879) 48 J Roy Geogr Soc 274 cited in Dumett, *supra* note 12 at 221.

relative, varying with the culture, locale and individual community involved.[19] The whole benefit of mining to pre-colonial communities must, therefore, be analyzed from an archetypal, pre-colonial angle. From the perspective of pre-colonial communities, the benefits of mineral development were closely associated with political dominance and the management of the political economy, which was considered another form of wealth.[20]

Other commentators have pointed out the connections between mining and the development of some of pre-colonial Ghana's major cities.[21] The significance of mining to pre-colonial communities is summed up in the words of Botchway, as follows:

> The importance of gold mining to pre-colonial Gold Coast was reflected in the customary laws which regulated the industry. The laws ranged from absolute prohibitions such as not mining in specified areas and on specified days, to procedural requirements such as specification of the nature and depth of the mining pits and the kind of implements that could be used to dredge the rivers for gold. These laws, though unwritten, were observed strictly.[22]

In light of this account, it is not surprising that in most traditional communities, mineral production was singled out for special attention and control.[23] The customary law position, wherein a member of the land-owning community did not need to obtain the express permission

[19] See Dumett, *supra* note 12 at 221.

[20] The state also benefited from royalties, taxation and duties, imposed on ordinary individuals and mining concessionaires.

[21] Adu Boahen in "A Nation in Exile: The Asante On the Seychelles Islands, 1900-24", presents an account of Kumasi as "a fairly modern town with motorable roads, a railway station, multiple-storied buildings, department stores, and motor cars, a far cry from other communities." See A Adu Boahen, "A Nation in Exile: The Asante On the Seychelles Islands, 1900-24" in Enid Schildkrout, ed *The Golden Stool: Studies of the Asante Center and Periphery* (New York: Order of the Trustees, 1907) 146 at 156.

[22] See Francis N Botchway, *Towards an Environmental Legal Regime for Gold Mining in Ghana* (LLM Thesis, Dalhousie University, 1994) at 67.

[23] See Botchway (1995), *supra* note 13 at 301.

of the stool to occupy vacant community land,[24] gave way when land was required for mining activities.[25] Botchway writes that in such cases, the express permission of the chief and elders was required before any mining could take place.[26] It was the duty of the stool (community), in which absolute ownership was vested, to protect the land from any activities that might be injurious to the interests of the community as a whole. As Ollennu declares, "the stool or skin holding means that the community or tribe as a whole is under a duty to protect the land for quiet enjoyment of the beneficial interest therein."[27] The chiefs adopted various schemes to regulate the production of minerals, using legal norms, customs and practices. Some of these measures were to control the environmental consequences of mining and ultimately, the condition of the land.[28]

This does not mean that the various extractive methods used by pre-colonial miners in their exploitation had no effect on the land or water resources. Many environmental scholars have written about the negative impact of some of these methods.[29] This dissertation does not attempt

[24] "But if to avoid a clash with other subjects already occupying land in the area it should become necessary for the stool to make an express grant of stool land to a subject for farming, all that the elders would do is to take this subject to the land and show him the boundary from which and the direction in which he can farm." See *Oblee v Armah*, (1958) 3 WALR 484.

[25] Asante's position that the stool's dominion over land, encumbered by the subject's usufruct, and reduced to "a pure legal estate to which beneficial attachment was not attached", did not apply where land was acquired for mining.

[26] See Botchway (1995), *supra* note 13 at 308.

[27] See Ollennu, *supra* note 7 at 11.

[28] For example, traditional communities had rules in place that were intended to conserve and protect water resources for the Indigenous community. As a part of the management of rivers through customary regulations, gold mines were located miles from the nearest water body. In this regard, Botchway writes that the part of the river where water was fetched for domestic purposes was often located upstream from parts where other uses of water, especially for mining activities, were permitted. In the same vein, to avoid disturbing the fishery resources of the water body, riverside locations for fishing differed from mining locations on the same river. Moreover, as much as possible, fishing seasons did not coincide with seasons or times for mining in the same river. See Botchway (1995), *supra* note 13 at 307.

[29] See generally Botchway (1995), *supra* note 13.

to rehearse these perspectives. Suffice to say that the traditional methods of mining were encouraged, so long as they did not affect the general well-being of those who shared the land.[30] Although there were no strict, secular institutional checks, traditional sanctions and beliefs effectively deterred breaches. For example, Botchway, in his examination of pre-colonial methods of gold mining and environmental protection in Ghana observed that a combination of customs and traditions served to protect the environment from excessive damage due to gold-mining activities.[31] Customary restrictions on the exploitation, use and disposition of minerals helped native rulers track and supervise the extent of mining activities within their jurisdiction.

There is no doubt that prior to colonization, local populations were involved in decision-making and actively participated in the development of mineral resources. These resources were utilized for the benefit of the entire community, as in most cases, the optimal benefits of mining trickled down to the respective communities. However, this changed with colonization. The colonial government took over the role that was traditionally played by chiefs and elders with respect to granting mineral concessions and any accompanying regulations. The following subsection explores the extent to which colonization affected the Indigenous peoples' rights to participate in mineral development.

[30] The grantee of a mining concession could not prevent other members of the community from enjoying benefits such as rights of way, hunting, grazing, the watering of animals, or collection of firewood, sticks, grass, etc. See Botchway (1998), *supra* note 9 at 514. In general, the holder of the usufruct had the right to develop his land, if the activities did not interfere with mining operations, but the exploitation of minerals was not allowed at the expense of similar important natural resources.

[31] See Botchway (1995), *supra* note 13 at 300. See also AE Ofosu-Mensah & Emmanuel Ababio, "Traditional Gold Mining in Adanse" (2010) 19:2 Nordic Journal of African Studies 124–47.

5.2.1 The Colonial Regime and Indigenous Participation in Mineral Development

The arrival of the Europeans saw a progressive erosion of native power and jurisdiction to regulate the mining industry. The Europeans initially arrived in pre-colonial Ghana as merchants and were not involved in mineral production. Botchway points out that notwithstanding their closeness to the mining areas, the Europeans had no controlling power over the exploitation and production of minerals on native soil.[32] As noted earlier, prior to European control, the native people exercised exclusive rights over the minerals on their land. Nevertheless, there are historical accounts of early attempts by the Europeans to directly mine minerals themselves, all of which were unsuccessful. Botchway refers to one attempt by a European geologist to prospect for gold near Kommenda, where he was resisted by the local population. This resulted in a war that prevented the Europeans from going ahead with the project.[33] However, by 1884, the first gold rush on the Gold Coast was underway, with around 25 European concessionaires "bidding" for concessions.[34] Following the grant by the chiefs of concessions to European companies, the introduction of European capital-intensive methods of gold mining saw a disruption of the traditional system. The active participation of the Europeans in mining operations in the pre-colonial era and the formal colonization of the Gold Coast affected the participation rights of Indigenous communities in the exploitation and development of minerals on their land.

Formal colonization had a concrete impact on the participation and controlling role of traditional communities in mineral development. Colonization weakened and limited the powers of traditional rulers to regulate mining operations. In 1936, the *Minerals Ordinance* was enacted

[32] See Botchway (1995), *supra* note 13 at 302.

[33] See Botchway (1994), *supra* note 22 at 39.

[34] *Ibid* at 41.

to "regulate the right to search for, mine and work minerals."[35] The Ordinance vested the control of all minerals in the Protectorate in the Crown,[36] and it was only the Governor who had the power to grant licenses for mining operations. The *Minerals Ordinance* restricted the participation rights of Indigenous peoples. It was an offence for anyone to prospect or mine without the appropriate licence from the Governor.[37] The limitations on the controlling rights of Indigenous peoples under the *Minerals Ordinance* were no different from those under the *Concessions Ordinance,*[38] which regulated concession rights with respect to land owned by native communities.

Land was defined to include the bed of any river, stream, lake or lagoon while minerals included "mineral oil", and mining covered "any operation for the winning or obtaining of minerals or precious stone."[39] Specific to the context of community participation, it was an offence for anyone to prospect and/or undertake mining activities without a mining licence from the Inspector of Mines.[40] The courts had the jurisdiction to cancel, modify or impose restrictions on concessions.[41]

The *Concessions Ordinance* and *Minerals Ordinance* did not alter the customary ownership of land. Lauren Coyle recounts that "the British colonial administration, in collaboration with Indigenous sovereigns, established a system of dual legal domains — 'customary' and 'state', each with its own authorities — as separate, interacting spheres of government under indirect

[35] See *Minerals Ordinance*, 1936 (Cap 155) (date of commencement: 1 April 1936).

[36] *Ibid* at s 3.

[37] *Ibid* at s 3 (2)(3).

[38] See *Concessions Ordinance*, 1939 (Cap 136) (date of commencement: 15 May 1939).

[39] *Ibid* at s 2.

[40] *Ibid* at ss 36 & 37. See also *Minerals Ordinance*, *supra* note 35 at ss 3(2)(3) & 5.

[41] See *Concessions Ordinance*, *supra* note 38 s 6.

rule."[42] Land continued to be vested in communities, but the exclusive rights that ownership was supposed to entail were limited by the restrictions imposed on it. A major thrust of the colonial regime arose from the difficulty in subjecting European miners to customary law at that time. The colonial regime made it difficult for Indigenous peoples to monitor mining activities, with a view to controlling the situation. In some instances, the regime relaxed the customary restrictions on the use of land for mining activities and made it an offence to impose any prohibitions. Under the *Concession Ordinance,* it was an offence for a chief or other individual or group to declare or represent any land affected by a concession as a fetish land or land with religious significance.[43]

However, the post-colonial native communities retained some participation interests in mining activities. The validity of a mining concession under the *Concession Ordinance* depended on whether the customary rights of native people were reasonably protected.[44] In addition, a concession could not grant or purport to grant the right to remove natives from their dwellings within the area of a concession.[45] The *Minerals Ordinance* also protected the interests of Indigenous peoples regarding land that could be subject to mining activities. As far as Indigenous rights were concerned, mining was not permitted on or beneath land that was occupied by a town, village market or burial ground, land that was habitually used or occupied for sacred or ceremonial

[42] See Lauren Coyle, "Fallen Chiefs and Sacrificial Mining in Ghana" in Jean Comaroff & John Comaroff, ed, *The Politics of Custom: Chiefship, Capital, and the State in Contemporary Africa* (Chicago: The University of Chicago Press, 2019) at 243 – 267..

[43] See *Concession Ordinance*, *supra* note 38 at s 41.

[44] See *Concessions Ordinance*, *supra* note 38 at s 13(6). See also *Concessions Ordinance*, 1900 (Cap 87) (date of commencement: 1 November 1900), s 11(6). As further discussed in subsection 5.3.2 of this chapter, this is one provision that is ignored in the current mineral rights disposition regime in Ghana.

[45] See *Concession Ordinance*, *supra* note 38 at s 13(8). See also *Concession Ordinance* (1900), *ibid* at s 11(8).

purposes, or any land under cultivation, except where consent had been obtained.[46] These provisions provided a legal basis for protecting the interests of Indigenous peoples in their land.

Even during formal colonization, the power of the native people to grant mining concessions was not completely negated.[47] It is unsurprising that at the time of independence, all known mineral resources in the country were subject to concession agreements between stools and foreign concerns.[48] Section 37 of the *Concessions Ordinance* provided that

> No person who is not a native shall carry on mining without being the holder of (a) a concession granting the right to do so from the native having the power to grant such right; and (b) either (i) a mining licence from the Chief Inspector of Mines in Form D of the Schedule hereto; or, (ii) where the mining is conducted solely by dredging operations, an appropriate dredging license under the Rivers Ordinance.[49]

The condition was that for a concession to be valid, it should receive the blessing of the Chief Inspector of Mines.[50] A native did not require a licence to mine, if the mining was in accordance with native custom.[51] A native claiming to own the land on which minerals were deposited had the inherent right to mine those minerals, insofar as the method adopted followed native custom.[52] This provision ensured that the native community played an active part in mineral production. In addition, the right to grant concessions entitled the native people to receive rent in respect of

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[46] See *Minerals Ordinance*, *supra* note 35 at s 8.

[47] The *Mining Rights Regulation Ordinance* defined a "Concession holder" to include anyone holding, or a holder claiming to be entitled to exercise any right granted under a mining concession by the native grantor. See *Mining Rights Regulation Ordinance*, 17th July 1905 (Cap 153), s 2.

[48] See Samuel K Asante, "Interests in Land in the Customary Law of Ghana - A New Appraisal" (1965) 74:2 Yale LJ 848 at 880.

[49] See *Concessions Ordinance*, *supra* note 38 at s 37.

[50] *Ibid* at s 37.

[51] See also *Concessions Ordinance* (1900), *supra* note 44 at s 31(b).

[52] Section 38 made it an offense for a native to dredge a river for the purposes of mining, without the appropriate licence. See also the *River Ordinance*, 1903 (Cap 226), s 5.

concessions that they had granted, although the law required the concessionaire to make a payment to the Treasurer, who then paid the native who was entitled to the rent.[53]

The engagement between traditional mining communities, the government, and mineral resource companies thus dates back to pre- and post- colonial times. Indigenous mining communities participated actively in the mineral development that affected their land. Aside from direct participation in mineral operations, there were defined customary norms to ensure that the interests of local communities were protected from mining operations. Colonization subsequently had a huge impact on the participation rights of Indigenous peoples. Although there were instances where the colonial government accommodated the concerns of the Indigenous peoples, the colonial regime was mainly oriented toward ownership and exploitation rights.

The period immediately after independence did not see any major changes to the participation rights of local communities in mineral development. On Independence Day, 6th March 1957, the government of Ghana stepped into the shoes of the Crown[54] and exercised supervisory and regulatory control over the development of minerals in the country. Consistent with the regimes discussed under the *Minerals Ordinance* and *Concessions Ordinance*, mining communities, represented by chiefs and traditional leaders, continued to receive payments for concessions and various other fees from mining companies.[55]

The Constitution of the Republic of Ghana, 1960, did not significantly alter the participation rights of local communities in mineral development. The first major mining-related statutes – the

[53] See *Concessions Act*, 1939 (Cap 136), s 35.

[54] See generally *Ghana Independence Act*, 1957 (CH. 6).

[55] See *Minerals Ordinance*, *supra* note 35 s 29.

Minerals Act[56] and the *Concessions Act*[57] – were passed in 1962. The *Minerals Act* vested the ownership and control of minerals throughout Ghana in the "President on behalf of the Republic of Ghana, in trust for the People of Ghana."[58] The *Minerals Act* repealed sections 29 and 45 of the *Minerals Ordinance,* which granted compensation rights and payment of rent to the owner or occupier of land for disturbance of the rights of that owner or occupier, and for any damage caused to the surface of the land.[59] The *Concessions Act* repealed the *Concessions Ordinance* and abolished the right of mining communities to grant mining concessions. In addition, the *Concession Act* obliterated the right of mining communities to carry on mining activities without a licence.[60] The *Minerals Act* and the *Concessions Act* effectively extirpated the active participation of mining communities in mineral activities. The *Concessions Act* and the *Minerals Act* set the benchmark for subsequent mining legislation in Ghana.

The next section follows with a critical analysis of the current legal regime for community participation in mineral development in Ghana. The objective is to determine how the existing regime guarantees the effective participation of traditional communities that are affected by mineral development.

5.3 The Legal Context for Community Participation in Natural Resource Development

[56] 1962 (Act 126).

[57] 1962 (Act 124).

[58] See Preamble to the *Minerals Act*, 1962 (Act 126).

[59] See *Minerals Act*, 1962 (Act 126), s 13. See also *Minerals Ordinance*, *supra* note 35 at s 29.

[60] See *Concession Ordinance*, *supra* note 38 at s 37.

The participation of mining communities in mineral development has undergone various changes over the years. This section examines Ghana's legal regime for natural resource development to identify measures aimed to prevent, reduce or avoid and, if possible, offset likely significant adverse effects of mining activities on the affected communities. The section first explores the way in which the legal regime institutionalizes enforceable 'rights' to participate in the exploitation and development of natural resources - or perhaps more accurately, rights to be consulted. It will then consider how the legal contexts in which these rights sit tend to limit meaningful participation of the affected communities.

5.3.1 Community Participation or 'Community Acceptance'? An Evaluation of the Current Participation Regime for Mining Communities in Ghana

The model for the management and exploitation of natural resources in Ghana is founded on a classical perspective of sovereignty, under which the pursuit of the national interest is the guiding criterion for the evaluation of any decision making. It does not follow, however, that the evaluation of the 'national interest' always corresponds to the interests of local communities. The state retains the ownership and rights to exploitation over natural resources, such as minerals, even if they are found on and within traditional local lands. Local communities are excluded from control and authoritative rights, which are exercised by state agencies. Communities occupying the land where minerals are found cannot claim an enforceable right to be consulted in the development of the mineral resources.[61]

[61] See *Okofo Sobin Kan II v Attorney General* (30 July 2014), Writ No. JI/2/2012, Supreme Court at 20.

The 1992 Constitution of Ghana provides that every mineral in its natural state within the jurisdiction of Ghana is the property of the Republic of Ghana.[62] The Constitution further provides that any transaction, contract or undertaking involving the grant of a right or concession for the exploitation of any mineral shall be subject to ratification by Parliament.[63] The *Minerals and Mining Act*, like the 1992 Constitution, separates the ownership of land on which there are mineral deposits from ownership of the minerals themselves. The Act distinguishes among diverse bundles of rights. Section 9(1) of the Act provides that:

> Despite a right or title which a person may have to land in, upon or under which minerals are situated, a person shall not conduct activities on or over land in Ghana for the search, reconnaissance, prospecting, exploration or mining for a mineral unless the person has been granted a mineral right in accordance with this Act.[64]

The Supreme Court of Ghana has interpreted these provisions to exclude mining communities from the management and control of natural resources that affects their lands.[65] Mining communities have no power to decide on any mining activities in their area. The government assumes complete and exclusive rights to mineral ownership in the country.

The right to community participation does not enjoy constitutional recognition, but ownership of land continues to be vested in the traditional communities in accordance with customary law and usage.[66] The 1992 Constitution splits property rights between owners of the

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[62] See 1992 Constitution of the Republic of Ghana, art 257(6).

[63] See 1992 Constitution of the Republic of Ghana, art 268(1). The Supreme Court of Ghana has stated that the intention of subjecting any transaction involving the exploitation of any mineral to Parliamentary ratification, was to provide the people of Ghana, through their representatives in Parliament a voice in any contract or undertaking involving the grant of any mineral. See *The Republic v High, General Jurisdiction (6), Accra; Ex Parte Attorney General (Exton Cubic Group Ltd, Interested Party)* (31 July 2019), [Civil Motion Number J5/40/2018] paras 12-14. See also *Minerals and Mining Act*, s 5(4).

[64] On the contrary, see *Concessions Ordinance* (1900), *supra* note 44 at s 31(b).

[65] See generally *Okofo Sobin Kan II*, *supra* note 61.

[66] *Supra* note 62 at Article 267 (1).

surface rights and the owners of the mineral rights. In general, the state does not own land, except lands acquired by lawful proclamation, ordinance or statutory procedure.[67] The State accesses lands through the invocation of its power under statutes, mainly through state land ownership and compulsory acquisition.[68]

To the extent that the State continues to assert ownership of natural resources within traditional lands, the right of the state must be exercised consistently with the land rights of the communities. The devastating effect of mining activities on affected communities has been reported widely in the literature.[69] The local communities living around mining areas fall victim to the social and environmental impact of mining activities including widespread contamination, public health risks and the deprivation of their lands for farming activities. Scholars have documented the destruction of archaeological sites with priceless antiquities.[70] Atuburoah notes that almost all the ancestral shrines, ancient cemeteries and sacred groves, like the shrine of the deity called Nana Buo Abogwese at the Aketewa concession of Prestea, have been mined and

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[67] See Anthony Arko-Adjei, *Adapting Land Administration to the Institutional Framework of Customary Tenure: the Case of Peri-Urban Ghana* (Amsterdam, The Netherlands: IOS Press, 2011) at 55-84.

[68] See the *State Lands Act*, 1962 (Act 125). See also the *Minerals and Mining Act*, 2006 (Act 703), s 2. It is debatable whether the stool or community has a reversionary interest after the mineral operations. The Supreme Court has held that the State, in the exercise of its eminent domain powers, may compulsorily acquire property in the public interest or for public use. Where, for some reason, the State is unable to use land for the intended purpose, the original owner (that is, the person(s) from whom the property was compulsorily acquired), is entitled as of constitutional right to the first option to re-acquire the unused property. See *Madam Nafisa Iddrisu v Norga Grumah*, (24 May 2013) Civil Appeal NO J4/21/2012. See also 1992 Constitution of the Republic of Ghana, art 20(6). It is doubtful whether this provision could be extended to give a reversionary interest to a stool/community whose land is the subject of a mining concession. For the ways in which compulsory acquisition may generally be put into effect, see the *State Lands Act*, 1962 (Act 125). See also generally, Asante Ansong S, "Compulsory Land Purchase and Compensation" (1976) 8:1 RGL 28-38.

[69] See generally Emmanuel Y Aboka et al, "Review of Environmental and Health Impacts of Mining in Ghana" (2018) 8:17 J Health Pollut 43 and Wazi Apoh et al, "Law, Land and What Lies Beneath: Exploring Mining Impacts on Customary Law and Cultural Heritage Protection in Ghana and Western Australia" (2017) 15:4 African Identities 367.

[70] See generally Wazi Apoh et al, *ibid*.

buried with rock waste.[71] Communities have permanently lost their lands because of abandoned mining pits and the lack of effective reclamation, and the inadequacy and unfairness in the legal regimes have deprived local communities valuable economic resources. Equally, the legal regime does not address the concerns and the cumulative impacts of mining activities on affected communities. Mining communities have seen little by way of development compared to the resources extracted from their lands.

Even though the 1992 Constitution does not expressly guarantee the right of mining communities to participation and consultation, there exist, on the statute books, certain pieces of legislation that are relevant to community participation. The *Minerals and Mining Act* requires the Minister to give notice of a pending application for the grant of a mineral right in respect of land to the chief and/or local community.[72] This notice shall be in writing and communicated to the appropriate authority, no less than 45 days prior to the granting of the mineral rights.[73] This is an important step in the participation process, as it informs the affected communities at an early stage of any developments that may affect their land. The requirement of notice presents an opportunity for traditional leaders to become aware of any projects that could affect their title. Notice is an

[71] See E Atuburoah, "An ethnographic study of surface mining: The case of Prestea in the Western Region of Ghana (2015) Unpublished Long Essay. Accra Department of Archaeology and Heritage Studies, University of Ghana at 46 reported in Wazi Apoh et al, *supra* note 69 at 377.

[72] In a related context, see Alberta: *Oil and Gas Conservation Rules,* Alta Reg 151/71, s 2.020(4) which provides that "An applicant under this section shall notify any landowners or residents as necessary of the applicant's plans to drill a well."

[73] The notice requirement under Act 703 is not significantly different from the position under the British Columbia Oil and Gas Landowner Notification Program. See British Columbia: Ministry of Energy, Mines and Petroleum Resources, *Oil and Gas Landowner Notification Program Launched,* News Release No 2008EMPR0024-000477 (4 April 2008), online: <https://archive.news.gov.bc.ca/releases/news_releases_2005-2009/2008EMPR0024-000477.pdf> [https://perma.cc/5DMJ-6VG8].

indicative of a serious concern for the rights and interests of communities and lawful occupiers in the process of granting mineral rights.[74]

The *Environmental Protection Act*[75] and *Environmental Assessment Regulations*[76] require a project proponent to develop and complete a scoping report prior to filing an environmental permit application. Among other things, a project proponent must consult with the community likely to be affected by the operations of the undertaking.[77] The Environmental Impact Agency (Agency) may not approve an environmental impact assessment unless there are provisions to address the effects of the proposed mineral project on all parties with a direct interest in the land, such as landowners, residents and occupants. Accordingly, the granting of an environmental work permit should be sufficient evidence that the project proponent has consulted the affected community about the potential effects of the proposed projects on the community's rights.

The *Environmental Assessment Regulations* also enable affected communities to have a say in the decision-making process by requiring that:

> The Agency shall hold a public hearing in respect of an application where (a). upon a notice issued under regulation 16 there appears to be great adverse public reaction to the commencement of the proposed undertaking; (b). the undertaking will involve the dislocation, relocation or resettlement of communities; or (c). the Agency considers that the undertaking could have extensive and far reaching effect on the environment.

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[74] In *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd*, the Constitutional Court of South Africa held that failure to give adequate notice to the affected community, so that they can comment on the nature and purpose of a proposed project, renders the granting of mineral rights procedurally unfair. Accordingly, the court may set aside a decision to grant a prospecting right, where it is proved that no consultation has taken place. See generally *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* (2010) ZACC 26.

[75] 1994 (Act 490).

[76] 1999 (LI 1652).

[77] *Ibid* at r 12.

The requirement for a public hearing is laudable to the extent that it provides an opportunity for members of the affected community to voice their concerns. A public hearing aims to obtain the opinions and views of stakeholders and local communities on the proposed project as well as the perceived associated impacts. The provision could be interpreted as an invitation to the affected community to participate in the Agency's decision-making process and, at the very least, it provides the Agency with the legal power to invite community participation into its decision-making processes.

The *Minerals and Mining (Compensation and Settlement) Regulations*, 2012,[78] and the *Minerals and Mining Act* have established regimes that provide for the payment of compensation and rent to affected communities. The *Minerals and Mining Act* provides for the holder of a mineral rights to pay annual rent to landowners and the traditional society whose land may be affected by mineral development. The Act also ensures that communities affected by mining operations are not completely dispossessed of their land usage. Section 72 of the Act provides that

> The holder of a mineral right shall exercise the rights under this Act subject to limitations that relate to surface rights…. The lawful occupier of land within an area subject to a mineral right shall retain the right to graze livestock upon or to cultivate the surface of the land if the grazing or cultivation does not interfere with the mineral operations in the area.[79]

Interests in mines and minerals are severable from the land. A holder of mineral rights has no exclusive or unqualified possession of land that is the subject of a mineral lease. In *Nana Kofi Karikari v Ghanaian Australian Goldfields*,[80] the Court held that even though a concessionaire's mineral right takes precedence over that of the owner of the land, the right of the concessionaire

[78] LI 2175.

[79] *Minerals and Mining Act*, s 72 (1)(3).

[80] *Nana Kofi Karikari v Ghanaian Australian Goldfields*, Suit No. LS.34/97 (20 December 2007) The High Court of Justice.

did not abridge or extinguish the rights of the surface owner. The affected community's rights must be respected and protected.[81] A mining community retains the right to use land in ways that do not interfere with the mineral operations in the area. The community's right to use land, in parallel with the right of the mineral rights holder to use that land, have almost the same features and conditions as the colonial regime

The *Minerals and Mining (Compensation and Settlement) Regulations* provide for compensation to communities and individuals whose lands have been affected by a proposed mining project. The right to compensation, given by the statute, is distinct from the community's land use right. Section 73(1) of the *Minerals and Mining Act* provides that

> The owner or lawful occupier of any land subject to a mineral right is entitled to and may claim from the holder of the mineral right compensation for the disturbance of the rights of the owner or occupier.

For the purpose of determining a fair and adequate compensation, the Regulation considers the manner in which the claim, right or interest has been affected, or is likely to be affected, by the operations and activities of the mineral rights holder, or the extent of the eventual damage.[82] The applicant and the occupier of the land shall determine the amount of compensation. However, if the parties are unable to reach an agreement as to the amount of compensation, the law allows the Minister to determine the compensation payable by the holder of the mineral rights. Section 75 of the Act and rule 5 of the Regulation give rights to a claimant who is dissatisfied with the compensation determined to be payable to apply to the High Court for a review of the Minister's determination.[83]

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[81] *Ibid* at page 13.

[82] See LI 2175, *supra* note 78 at r 1.

[83] *Ibid* r 5.

It is difficult to draw conclusions as to whether the payment of rent and/or compensation constitute participation.[84] The payment of rent and compensation points to a model of engagement aimed at public acceptance rather than targeted at meaningful participation.[85] The provisions of notice and public hearing present a deliberative and consensus building engagement directed at enabling impacted communities to articulate – and have addressed – their concerns, development goals and aspirations. Dismissing the role of notices and public hearings in promoting meaningful participation would be naive. At the minimum, they enable affected communities to participate in the decision-making process with the hope of influencing the outcome. The discussion in Chapter Two shows that sustained efforts toward public consultation and disclosure of information at the onset of mining activities and during its operation generate an appreciation of joint gains and a common shared perspective. Participation is important in promoting community satisfaction with decision outcomes and contributes to legitimizing natural resource project decisions.[86]

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[84] Ayine has observed that: "The protection afforded local communities in terms of payment of compensation with respect to land surface rights is rendered useless because local communities are treated as obstacles and not as right-bearers to mining operations by both mining companies and the central government." See D Ayine, *The Human Rights Dimension to Corporate Mining in Ghana: The Case of Tarkwa District, in Mining, Development and Social Conflicts in Africa* (Accra: Third World Network, 2001) at 12. See also Patrick K Agbesinyale, "Ghana's Gold Boom and Multinational Corporations: Resource Nationalism or Countervailing Force?" in Virginius Xaxa et al ed, *Work, Institutions and Sustainable Livelihood: Issues and Challenges of Transformation* (Singapore: Palgrave Macmillan, 2017) 35 at 54.

[85] While in participatory models, all options are open and participants are able to influence outcomes, in acceptance models, engagement is rhetorically sought, but the ability to influence is restricted. See Chiara Armeni, "Participation in Environmental Decision-making: Reflecting on Planning and Community Benefits for Major Wind Farms" (2016) 28 Journal of Environmental Law 415 specifically distinguishing between models of engagement directed to 'participation' and those aimed at 'public acceptance'.

[86] See generally Barry Barton, "Underlying Concepts and Theoretical Issues in Public Participation in Resource Development" in Donald N Zillman, Alastair R Lucas & George Pring, eds., *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford: Oxford University, 2002) 77-120.

Jagers et al selected participants living in two mining municipalities in the Canadian province of Saskatchewan and in three mining municipalities in the northern part of Sweden to analyze whether there is a relationship between community participation and support for mining decisions.[87] The study offered some evidence that a community's propensity to support mining development increases if local interests are represented and the community has an influence on decision-making processes.[88] This finding is consistent with the view that the effective involvement of the affected community in the decision-making processes has a positive effect on the acceptance of the outcomes. The early participation of the affected community helps resource developers address unexpected negative outcomes before they occur. The affected community can bring information, issues, and interests that may have been overlooked or underrated to the attention of the decision-maker.[89] The proper implementation of Ghana's participation regime thus offers a long-range of benefits, most importantly fostering a more holistic and integrated way of looking at a problem.

However, legislatively embedding the right to notice and public hearing does not capture the incongruous and persistent myths entrenched in its practice. Measures to ensure participation have proved to be insufficient or inadequate in terms of taking into account views and concerns of affected communities. The extent to which mining communities are satisfied with the current processes is very questionable. The existing regime has failed to ensure project-affected communities are treated as partners in resource development. The challenge that engulfs mining

[87] See generally Sverker C Jagers et al, ''The Impact of Local Participation on Community Support for Natural Resource Management: The Case of Mining in Northern Canada and Northern Sweden'' (2018) 9 Arctic Review on Law and Politics 124–147.

[88] *Ibid* at 143.

[89] See Barton, *supra* note 86 at 104.

communities is intertwined with the current legal regime. For example, the *Minerals and Mining Act* merely requires the Minister to give notice of a pending application for the grant of a mineral to affected communities, but there are no further details on what happens after notice has been given. Section 13 of the Act does not specify what procedural rights accrue to customary landowners during the notification period or what happens at the end of that period.[90] The lack of details on the scope and parameters makes the notion of public participation deeply ambiguous and poses challenge to its practice.

The participation regime tends to frustrate the ability of the communities to influence processes such as licensing development and extraction. Mining communities are not able to have their interests and concerns addressed in government decisions; nor does the existing regime enable communities to derive greater benefits outside rent and compensation. The *Environmental Assessment Regulations* require public hearing about a proposed mineral project, but it is unclear how the public is encouraged to contribute meaningfully during a hearing. It is also not clear what opportunities exist for participants to inform themselves independently about a proposed project and its effects on the community. Under the Regulation, the developer must provide information on potential, positive and negative impacts of the proposed undertaking from the environmental, social, economic and cultural aspects in relation to the different phases of development of the undertaking.[91] This information must be made available for inspection by the general public in the locality of the proposed project.[92] This procedure is necessary for participation, but in many cases

[90] See "Customary law and mining: comparing the interaction between the two in Ghana and Western Australia, with a focus on heritage" online: <https://im4dc.org/wp-content/uploads/2015/07/Customary-Law-and-Mining-Completed-Report.pdf> at 9.

[91] See LI 1652, *supra* note 76 at r 12(f).

[92] *Ibid* r 15 (1)(c).

the ability of the public to effectively participate in decision making is challenging due to the highly technical character of the information. As the Supreme Court of Canada stated in *Clyde River (Hamlet),* furnishing information in the form of a practically inaccessible document is not true participation.[93] It is important that relevant information is given to the affected community in a non-technical form to provide them with an opportunity to express meaningful opinion.

Appiah and Osman have written that the conduit for reporting and soliciting information from affected communities are primarily the national press or the premises of District Assemblies, which are in most cases inaccessible, in terms of distance and cost for the communities.[94] The discussions in Chapter Four clearly illustrate that the financial capacity of the affected community could also constitute an impediment to the participation process. In some cases, meaningful participation requires that the affected community be supported financially to participate effectively in the decision-making process. Such support may include means to travel to a hearing and to independently verify whatever information the Agency supplies on a given project. There is no provision or requirement in the Regulation to fund participants. For the purposes of conducting a public hearing, the Agency appoints a panel composed of no fewer than three and no more than five persons. The law requires that at least one member of this panel be a resident of the mining-affected community.[95] Meanwhile, the Agency appoints the panel chairman, who must not be a resident of the affected community. The panel then submits its recommendations to the

[93] "'Consultation' in its least technical definition is talking together for mutual understanding." Thomas Isaac and Anthony Knox, "The Crown's Duty to Consult Aboriginal People" (2003) 41 Alta L Rev 49 at p. 61.

[94] See generally Divine Odame Appiah & Balikisu Osman, "Environmental Impact Assessment: Insights from Mining Communities in Ghana" (2014) 16:4 Journal of Environmental Assessment Policy and Management 1.

[95] See LI 1652, *supra* note 76 at r 17(1).

Agency, which has the final decision-making authority, following a further review of the panel's recommendations.[96]

The fact that such avenues may be used only to prove that "grassroots people are involved in the program cannot be ignored."[97] In some cases, public hearings are the means to educate, persuade and advise members of the affected community, with no intention to reverse the project. The affected community has little or no power to question the Agency's decision. Pursuant to rules 18 and 19 of the Regulation, the panel has no ultimate power, insofar as its recommendations are not binding on the Agency. If rules 18 and 19 are viewed from the perspective of power relations discussed in Chapter Two, it could easily be concluded that the aim of the hearing is to enable the Agency to "cure and educate the public."[98] The Agency has the power to issue a permit against the panel's recommendations. Scholars who advocate for participation are aware of the manipulation contrived by some as a substitute for genuine participation. Sherry Arnstein, in her *Ladder of Citizen Participation*, refers to such an illusory form of participation under the Community Action Agencies (CAAs).[99] She posits that there are instances where members of the affected population are placed on advisory boards merely to rubberstamp decisions that have already been made. Arnstein's observation may well describe the participatory regime under the *Minerals and Mining Act* and the *Environmental Assessment Regulations*.

Justice Nyigmah Bawole studied the involvement of local stakeholders in the environmental impact assessment (EIA) processes of Ghana's first off-shore oil fields (the Jubilee

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[96] See LI 1652, *supra* note 76 at r 17(5).

[97] See Sherry R Arnstein, "A Ladder of Citizen Participation" (1969) 35:4 Journal of the American Planning Association 216 at 218.

[98] *Ibid* at 217.

[99] *Ibid* at 218.

fields).[100] He observed that public hearings and the other stakeholder engagement processes were cosmetic; they were conducted in order to meet the legal requirements rather than motivated by a purposeful interest in eliciting input from local stakeholders. Using key informant interviews and documentary reviews, the study revealed that information access and ability to comprehend the content of the environmental impact statement (EIS) were problematic.[101] There were no local language versions of the EIS.[102] The size and technical nature of the impact statement prevented the community members from being able to comprehend its content.[103] The lack of capacity of some local community members to read and understand the EIS contributed to limiting effective engagements during the EIA process.[104] There was overwhelming resentment among all the respondents about their inability to influence the impact assessment process. All the respondents who participated in the EIA process indicated how the process went without the indication that concerns of the citizens were being addressed.[105] He suggests that important decisions had been taken by the time that consultation on the environmental impact of the project took place.

Bawole's findings are consistent with the Supreme Court of Canada's observation in *Clyde River (Hamlet) v Petroleum Geo-Services Inc*. Armeni makes a similar point with respect to the way in which participation is dealt with within planning and community benefits for wind energy in England and Wales. He notes that "[d]espite the institutionalization of procedural rights to

[100] See Justice Nyigmah Bawole, "Public Hearing or 'Hearing Public'? An Evaluation of the Participation of Local Stakeholders in Environmental Impact Assessment of Ghana's Jubilee Oil Fields" (2013) 52:2 Environmental Management 385–397.

[101] *Ibid* at 391.

[102] *Ibid* at 391.

[103] *Ibid* at 393.

[104] *Ibid* at 394.

[105] *Ibid* at 393.

participate in environmental decision-making, this notion tends to mislead the public with respect to what is really open for debate and the extent to which they can influence a decision by exercising that right."[106] Participation is directed at meeting the legal requirements and validating decisions that have already been taken. This is not surprising in light of the general approach to balancing interests. Companies invest substantial amounts under the tenure system in Ghana. The government places considerable weight on the financial gains from mineral project. The project proponent comes to the participatory table with substantial economic and financial rights to be protected.[107] Unless there are compelling reasons to do so, it is debatable how any consideration of the affected community's interests, which is meant to be a guiding principle in the Agency's determination, could weigh against a project proponent.

Bernard Guri Yangmaadome et al present an account of a situation in the Tanchara community of the Upper West Region of Ghana, where the local people fiercely resisted the commencement of a mining project in their locality.[108] In 2004, the government granted permission to Azumah Resources Limited, a Ghanaian company owned by an Australian company, to prospect for gold in and around the Tanchara community, despite the fact that this activity threatened sacred groves in Tanchara, green clusters of Indigenous trees and shrubs, revered as sacred land. The importance of sacred groves to the Tanchara community is reflected in their traditional regulations for its protection.

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[106] See Armeni, *supra* note 85 at 421.

[107] Regarding resource development on Indigenous land, it has been stated that the interests of project proponents in moving forward with a proposed project are not valid reasons for defeating the constitutional consultation requirement. See *Saugeen First Nation v Ontario (Minister of Natural Resources and Forestry)*, [2017] O.J. No. 3701 at para 8.

[108] See generally Bernard Guri Yangmaadome et al, "Sacred Groves Versus Gold Mines: Biocultural Community Protocols in Ghana" in Krystyna Swiderska et al, ed, *Participatory Learning and Action* (London, UK: IIED, 2012) 121-130.

The people of Tanchara believe the sacred groves to be the home to the community's ancestral spirits, which play a key role in the community's spiritual life.[109] Ghana has ratified the *Convention on Biological Diversity* (CBD),[110] which requires parties to "respect, preserve and maintain knowledge, innovations, and practices of Indigenous and local communities."[111] There is no evidence of the government having consulted the community, prior to granting prospecting rights in accordance with Ghana's human and environmental rights obligations, as set out in regional and international law. In this case, the community protested against the mining activities, "asking the government to safeguard their sacred groves and sites from both legal and illegal mining."[112] In Canada, the duty to consult shows that where exploitation generates a direct or indirect limitation on the enjoyment of the communities peoples' land rights, a prior consultation and effective participation of the involved community is needed. A more recent study conducted by Lauren Coyle also provides an account of how Sansu, another mining community in Ghana, had lost 23 sacred streams, which were home to tutelary deities and spirits. These streams also provided fish and, even more critically, drinking water to the community.[113] These concerns of the Sansu community were not considered, nor were provisions made to accommodate them in granting mineral rights.

The cases above raise questions over the ways in which the current regime protects mining communities from irreparable harm. Unlike the situation in Canada, the courts in Ghana have not

[109] *Ibid* at 121.

[110] 5 June 1992, 1760 U.N.T.S. 79, 31 I.L.M. 818 (1992).

[111] *Ibid* at Article 8(j).

[112] The Tanchara community's continuous protests have resulted in a significant delay in the project. As at May 2019, Azuma Resources have not started prospecting in the vicinity of this community.

[113] See Coyle, *supra* note 42 at 243 – 267.

pronounced irreparable harm to mining communities, where development activities are likely to interfere with or damage culturally significant sites and artifacts, such as burial sites or sacred sites of Indigenous peoples. The cases of Sansu and Tanchara represent what is, regrettably, the situation facing many of the communities affected by mining operations in Ghana.[114] The legal regime wrongly assumes that any loss suffered by an affected community can be compensated with money.[115] Ghana's current regime excludes claims for 'compensation' for loss of damage for which compensation cannot be assessed according to legal principles in monetary terms. The destruction of a sacred stream cannot be quantified in monetary value.

The colonial legal regime brought about some negative conditions, but there were also positive aspects. The *Minerals Ordinance* of 1936 did not permit mining on or under burial ground, or on any land that was habitually used or occupied for sacred or ceremonial purposes by mining communities.[116] It is not clear why the legislature did not provide for similar protection in subsequent legislation. In the context of irreparable harm, the government has a duty to

[114] Daniel Owusu Koranteng, Executive Director of Wassa Association of Communities Affected by Mining (WACAM) has referred to issues such as the mining of cemeteries and the destruction of shrines of immense spiritual significance to mining communities as the most serious of all, since one cannot attach a monetary value to them, although their impact is huge and always ignored by mining companies. He decried, for example, a decision by Newmont to exhume the bodies of chiefs of the Akyem Kotoku Traditional Area, perform rituals, and send the bodies to another cemetery, so that mining could begin on Akyem Kotoku traditional land. As he rightly emphasized, these are "the things that touch on the very existence and the mind and the soul of people, things that make people feel that they are human beings and have an identity as human beings; these are the things that mining companies destroy and there is no value put on it." See Bernice Agyekwena, "Ghana to Mine in Forest Reserves Ignores pleas by United Nations and 6000 petitions" (27 April 2010), online: *RUMNET* <https://rumnet.wordpress.com/2010/04/27/ghana-to-mine-in-forest-reserves/> [https://perma.cc/87Z7-CYBV].

[115] See Botchway (1994), *supra* note 22 at 166 – 167.

[116] *Minerals Ordinance*, 1936 (Cap 155), s 8.

accommodate the affected communities. Financial compensation cannot be an adequate or appropriate response to such harm.

However, in light of the more compelling national interest of resource development, it is difficult to proceed with consultation and participation that could delay projects. This defeats the democratic principle that *fairness* should be the focus in the process of public participation and constituting an important concept in the evaluation of its effectiveness.[117] The discussions in Chapter Four shows the role of the courts as an institution that can exert influence over the shaping of meaningful participation. The *Environmental Assessment Regulations* enable a person affected by the Agency's decision to file a complaint with the Minister.[118] Rule 27 of the *Environmental Assessment Regulations* provides that "[a] person aggrieved by a decision or action of the Agency may submit a complaint in writing to the Minister."[119] One commentator has posited that the appeal process has proven to be an effective mechanism for dispute settlement in the environmental impact assessment regime but did not provide any evidence to support such a finding.[120] However, the increase in mining related conflicts undermines any inference that rule 27 has been effective in reaching consensus and eradicating dispute in an industry typically associated with conflicting interests and goals.[121] More research is needed to explain the factors contributing to the emergence

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[117] See Rebeca Macias, *Public Participation in Energy and Natural Resources Development: A Theory and Criteria for Evaluation* (Calgary: Canadian Institute of Resources Law, 2010) at 13-22.

[118] "Minister" means the Minister responsible for the environment. See LI 1652, *supra* note 76 at r 30.

[119] See LI 1652, *supra* note 76 at r 27.

[120] See George A Sarpong, *Ghanaian Environmental Law: International and National Perspectives* (London: Wildy, Simmonds & Hill Publishing, 2018) at 98.

[121] See generally Patrick K Agbesinyale, "Ghana's Gold Boom and Multinational Corporations: Resource Nationalism or Countervailing Force?" in Virginius Xaxa et al ed, *Work, Institutions and Sustainable Livelihood: Issues and Challenges of Transformation* (Singapore: Palgrave Macmillan, 2017) 35 - 72; Frederick A Armah et al, "Management of natural resources in a conflicting environment in Ghana: unmasking a messy policy problem" (2014) 57:11 Journal of Environmental Planning and Management 1724; Joseph Taabazuing et al, "Mining, Conflicts and Livelihood Struggles in a Dysfunctional Policy

of mining-related conflicts in Ghana, but perceived insufficient conflict management mechanism cannot be ignored.[122]

It is not clear whether the complainant can appeal the Minister's decisions since the Regulation has no clear provision on a right of appeal against the Minister's decision. Sarpong has suggested that a constitutional argument can be made for an aggrieved person to invoke the supervisory jurisdiction of the High Court to challenge the Minister's decision.[123] In support of his position, he cites Article 33 of the Constitution of Ghana, which provides that

> where a person alleges that a provision of this Constitution on the fundamental human rights and freedoms has been, or is being or is likely to be contravened in relation to him, then, without prejudice to any other action that is lawfully available, that person may apply to the High Court for redress. The High Court may, under clause (1) of this article, issue such directions or orders or writs including writes or orders in the nature of habeas corpus, certiorari, mandamus, prohibition and quo warranto as it may consider appropriate for the purposes of enforcing or securing the enforcement of any of the provisions on the fundamental human rights and freedoms to the protection of which the person concerned is entitled. A person aggrieved by a determination of the High Court may appeal to the Court of Appeal with the right of a further appeal to the Supreme Court.

Environment: The Case of Wassa West District, Ghana" (2012) 31:1 African Geographical Review 33; and G Hilson, "The Environmental Impact of Small-Scale Gold Mining in Ghana: Identifying Problems and Possible Solutions" (2002) 168:1 Geographical Journal 57.

[122] Conde and Billion has reported that by January 2017, the Environmental Justice Atlas (EJ Atlas) had identified a total of 423 conflicts relating to mineral ores and building materials extraction. See Marta Conde & Philippe Le Billon, "Why Do Some Communities Resist Mining Projects While Others Do Not?" (2017) 4 The Extractive Industries and Society 681–697 at 683. A study conducted by Urkidi on the Marline mining conflict in Guatemala observed that a major concern of the anti-mining movement was to reclaim both the legal participation rights of communities and the democratization of the decision-making processes. The anti-mining movement justified the claim for greater participation in the fact that the socio-environmental impacts of mining most directly affected the livelihoods of the people close to the projects, but they did not benefit from it. See See generally Leire Urkidi, "The Defence of Community in the Anti-Mining Movement of Guatemala" (2011) 11:4 Journal of Agrarian Change 556–580. In a similar case study, Urkidi and Walter identified participation and recognition as key dimensions of two gold mining conflicts in Latin America. The study revealed that even where there appeared to be measures to ensure participation, it often proved to be insufficient or inadequate in terms of taking into account local views and concerns. See generally Leire Urkidi & Mariana Walter, "Dimensions of Environmental Justice in Anti-Gold Mining Movements in Latin America (2011) 42 Geoforum 683–695.

[123] See Sarpong, *supra* note 120 at 97.

Sarpong's position would be largely correct to the extent that the impugned action constitutes a fundamental human rights violation. The applicant can only invoke Article 33 if the aggrieved person alleges a human rights violation in the Minister's decision. In other words, not all decisions are amendable to the High Court's supervisory jurisdiction. The discussions in Chapter Three show that it is difficult to draw conclusions whether the right to public participation, as a widely accepted principle, could be considered an established human right in Ghanaian law. The absence of clear provisions for a right to appeal thus presents a real difficulty for aggrieved persons to challenge the Minister's decisions.

Ghana's legal regime offers a limited scope for affected communities to participate in decision-making. Certainly, community participation brings additional cost to natural resource projects, but Caspian Richards et al have observed that the potential costs of non-participation of the affected publics far outweigh the costs of running an adequately resourced participatory process.[124] Participation may reduce or avoid resistance to a project and help the resolution of conflicts that would otherwise cause more expensive problems.[125] Effective participation of the affected community can significantly reduce implementation costs. Aaron Zazueta and Thomas Beierle have found that the participation of the affected community has the overall value of increasing the cost effectiveness of natural resource decisions.[126] Kirk Herbertson et al show how community engagement during the development of the Malampaya natural gas project in the

[124] See generally Caspian Richards et al, Practical Approaches to Participation (2004) SERG Policy Brief No. 1. Macauley Land Use Research Institute, Aberdeen, online:<http://macaulay.webarchive.hutton.ac.uk/ruralsustainability/SERG%20PB1%20final.pdf>.

[125] See Barton, *supra* note 86 at 108.

[126] See Aaron Zazueta, *Policy Hits the Ground: Participation and Equity in Environmental Policy-Making* (Washington, DC: World Resources Institute, 1995) and Thomas Beierle, "The Quality of Stakeholder-based Decisions" (2002) 22:4 Risk Analysis 739.

Philippines allowed the proponent to avoid anticipated delays that could have cost an estimated US$50-72 million. In contrast, community opposition to a proposed expansion of the Yanacocha gold mine in Peru, where the proponent invested little in community engagement, cost an estimated US$1.69 billion in project delays.[127]

Ghana's regime reflects a model of participation that emphasizes community acceptance over genuine participation. The discussion so far has laid the basis for advocating stronger measures on the part of the state to deal with the threat of resource development on mining communities. Comparative insights from Canada indicate the potential for significant changes in state-centered natural resource governance to promote power sharing and extend economic and social benefits to affected communities. The current legal regime for mineral development falls short of ensuring effective participation by the affected communities. The main barrier to meaningful participation is the concentration of power in the government and the lack of avenues for communities to enforce compliance by the government and resource companies. Mining communities have limited opportunities to influence the Agency's decisions. A legal right to participation would play an important role in reducing the power imbalance between the Agency and the affected community. Community participation under the *Environmental Protection Act* and *Environmental Assessment Regulations* fits into Arnstein's 'non-participation' rung, which, as she explains, is an empty ritual of supposed participation, with no real impact on the outcome of the Agency's decisions.[128]

[127] See Kirk Herbertson, et al, *Breaking Ground: Engaging Communities in Extractive and Infrastructure Projects* (Washington: World Resources Institute, 2009) at 7.

[128] See generally Arnstein, *supra* note 97.

Building on the discussions on measures to avoid and mitigate the impact of mining operations on the affected communities, the next section examines the approach to community benefits directed at improving the socio-economic situation of mining communities.

5.3.2 The Mineral Development Fund Act

Currently, the government is working to link community participation in mineral development with benefit sharing. The Mineral Development Fund was established in 1993 as a response to concerns expressed by various traditional rulers and community leaders that communities located where mining activities were taking place should receive a direct benefit from mining operations. The Fund was established to improve the living conditions (economic, social and environmental) of local communities which were affected by mining activities in Ghana and to reduce the negative impact of mining projects on those communities. However, the Fund did not have any legislative basis. In 2016, the *Minerals Development Fund Act*[129] was enacted to regularize the Fund's activities and operations, following complaints of abuse, uncertainty, and the lack of clarity that characterized the Fund's operations.

The *Minerals Development Fund Act* deals specifically with mining communities.[130] The Act addresses the criticism concerning a lack of focus on mining communities in Ghana's mining legislation.[131] The Act follows the emerging trends in African legislative regimes, which seek to

[129] 2016 (Act 912).

[130] A "mining community" is defined as a community in which mining operations take place or which is affected by mining operations. *Ibid* at s 27.

[131] In 2013, the Ghanaian government passed the *Petroleum (Local Content and Local Participation) Regulation*, 2011 (LI 2204). See also the *Petroleum Commission Act*, 2011 (Act 821), s 3(7). For the purpose of community participation, this Regulation seeks to achieve and maintain a degree of control amongst Ghanaians over development initiatives for local stakeholders. In addition, it promotes the

adopt benefit-sharing as a means of mitigating the harmful impact of mining activities on project-affected communities.[132] The Act appears to align with the desire to ensure that the optimal benefits of mining trickle down to the communities that are most affected by mineral operations.[133] Indigenous communities' experience of Impact Benefit Agreements (IBAs) points

development of local capacity in the petroleum industry value chain by means of education, skills transfer and the development of expertise, active research and development programs. See *Petroleum (Local Content and Local Participation) Regulation,* s 1. Although the Regulation has received mixed reactions, it aims to give Ghanaians equity in petroleum development by integrating them into the main phase of petroleum development in their country. See, in general, Africa Centre for Energy Policy, "Local Content Development in the Petroleum Upstream Sector: A Comparative Analysis of Ghana, Nigeria, and Angola" (2014) online: *Africa Centre for Energy Policy* < https://new-acep-static1.s3.amazonaws.com/publications/COMPARATIVE-ANALYSIS-OF-LC-IN-GHANA-ANGOLA-AND-NIGERIA-Rev.pdf> [https://perma.cc/Z4HU-GKLE]. It remains to be seen whether the local content requirement constitutes meaningful community participation in the petroleum industry. It is worth mentioning that the *Petroleum (Local Content and Local Participation) Regulation* aims at translating resource investments into sustainable benefits for local populations in Ghana while meaningful participation mainly concerns the local communities affected by natural resource development.

[132] The Mineral Development Fund is comparable to other revenue distribution arrangements, such as CDAs, IBAs, Community Benefit Agreements, Memoranda of Understanding, and Local Development Agreements with similar goals. All the above-mentioned regimes emphasize benefit sharing as a means of providing opportunities for the sustainable development of communities that are affected by mining operations. However, MDF differs to a significant extent in the context of government involvement, control, managing the activities of the fund, and the agreement-making process. For an excellent discussion on this, see generally Kristi Disney Bruckner, "Community Development Agreements in Mining Projects (2016) 44 Denv J Int'l L & Pol'y 41; Ciaran O'Faircheallaigh, "Social Equity and Large Mining Projects: Voluntary Industry Initiatives, Public Regulation and Community Development Agreements" (2015) 132:1 J Bus Ethics 91.

[133] The MDF may be contrasted with the Petroleum Revenue Fund, which is for the benefit of the citizens of Ghana. See the *Petroleum Revenue Management Act*, 2011 (Act 815). This may be explained by the fact that the country's petroleum exploration and production activities are mostly conducted offshore. It is debatable whether petroleum produced offshore can be said to be derived from a community whose land abuts the production area. In this context, there is an ongoing debate between residents of Ghana's Western and Central Regions – where most of the country's oil fields have been discovered – and the Ghanaian government, regarding the regions' right to share in the revenue generated by the government from petroleum activities in these regions. See Nathan Gadugah, "The Western Chiefs Storms Parliament to demand 10% Oil Revenue" (17 August 2010) *ModernGhana,* online: < https://www.modernghana.com/news/304726/western-region-chiefs-storm-parliament-to-demand.html > [https://perma.cc/T68E-XZTT]. In a related context, see Kendra Dupuy & Helga Malmin Binningsboe "Implementing a Wealth Sharing Policy in Sierra Leone" Conference Papers -- International Studies Association 2010 Annual Meeting.

to the importance of benefit-sharing as a means through which revenue from mineral exploitation can be redistributed to the communities where these resources are extracted.

It is not clear that the Act provides the best framework for addressing the concerns of mining communities.[134] The Act established the MDF, a fixed income arrangement to provide financial resources for the direct benefit of mining communities.[135] The MDF receives 20% of the mineral royalties paid by holders of mining leases, in respect of their mining operations.[136] Section 3 of the Act provides for other sources of finance for the MDF, but the royalty provision is the only certain source of income for the Fund. The receipt of the 20% earmarked for the MDF may appear to establish a statutory requirement, which prevents the government's from deciding not to save into the MDF. The mining communities do not receive the total royalty earmarked in the Fund. Out of this 20%, 50% of the money is allocated to the Office of the Administrator of Stool Lands; 20% to the Mining Development Scheme; 4% to the Ministry's mining operations; 13% to supplement the Minerals Commission's mining operations; and 8% to supplement the Geological Survey Department's mining operations.[137]

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[134] The use of law to mandate the government to undertake socio-economic development projects in mining communities offers more certainty to mining communities that the benefits of mining will be shared. A regulatory regime provides leverage for the affected communities to hold the government accountable. It should, however, be mentioned that the legalization of benefit-sharing, although desirable, is not enough; it needs to be accompanied by measures to ensure compliance and effective implementation of the provision.

[135] See Act 912, *supra* note 129 at s 2.

[136] *Ibid* at s 3.

[137] *Ibid* at s 21(3). In addition, the law allocates 5% of the money for research, training and projects aimed at the promotion of sustainable development through mining. See Act 912, *supra* note 129 at s 21(3)(f). The current allocation formula under Act 912 is quite different from the position under the 1991 MDF. Under the old regime, the Fund received 10% of mining royalties. Of this 10%, 25% is allocated to chiefs for the maintenance of their offices and status, 20% to traditional councils, and 55% to local government units. See Kendra E Dupuy, "Corruption and Elite Capture of Mining Community Development Funds in Ghana and Sierra Leone" in David Aled Williams, ed, *Corruption, Natural Resources, and Development: From Resource Curse to Political Ecology* (Edward Elgar Publishing, 2017) at 72-73.

Revenue from the Fund is applied to: (a) redress the harmful effects of mining on affected communities and persons, and (b) promote local economic development and alternative livelihood projects in communities affected by mining activities. Nonetheless, these are not the only activities that the Fund could be applied to; section 5 allows for the Fund's use in minerals-related research, the development of human resource capacity in mining institutions and institutions that train manpower for regulatory institutions. In addition, revenue earmarked for the MDF can be channelled into supporting the Ministry's policy-planning, evaluation and monitoring functions in respect of mining-related activities.

The World Bank, in its 2013 project assessment report on Ghana's mining sector, commented that "the payment of a portion of royalties from the MDF to the sector entities was a pragmatic way of ensuring that they had adequate funding to operate effectively and to be able to pay their staff more than civil service scales."[138] However, these activities do not promote economic development in mining communities which bear the primary social, economic and environmental risks associated with mining. It is important that the Fund focuses on the specific issue of advancing direct benefits to mining-project affected communities. The use of the Fund for "other related matters" undermines the Fund's capacity to turn resource revenue into community-wide improvements in areas where the mining activity is located. One commentator has observed that the total sum of money used for projects that are explicitly designed to improve

[138] See World Bank, "Ghana - Mining Sector Rehabilitation Project and the Mining Sector Development and Environment Project (English)" (1 July 2003), online: *World Bank* <http://documents.worldbank.org/curated/en/120891468749711502/Ghana-Mining-Sector-Rehabilitation-Project-and-the-Mining-Sector-Development-and-Environment-Project> [https://perma.cc/ZK29-EKM2] at 20-21.

local economic development and compensate for the costs of mining is small.[139] A large percentage of the Fund's expenditure goes to support the capacity-building of public institutions, which study or work towards the regulation of mining.[140] This, as André Standing argues, is unlikely to ensure that the Act will succeed in achieving its stated objective of delivering benefits to mining communities.[141]

The Act places the responsibility for ensuring the management of the MDF on a Board comprising members appointed by the President.[142] The composition of the Board includes a representative from a mining community. One might assume that a position on the Board would ensure that its work reflects the interests of the affected communities. Another aspect of the Act that seeks to promote the interests of mining communities is the establishment of a Mining Community Development Scheme to enhance the socio-economic interests of mining communities. The Act requires the setting up of a local management committee for the purposes of administering and operating the Scheme within the mining community for which the committee is established. Unlike the Board, the law requires that the local management committee reflect the various interest groups within the corresponding community. The committee members must include a government representative, traditional rulers of the mining community, and

[139] See André Standing, "Ghana's Extractive Industries and Community Benefit Sharing: The Case for Cash Transfers" (2014) 40 Resource Policy 74 at 75.

[140] *Ibid* at 76.

[141] *Ibid*.

[142] See Act 912, *supra* note 129 at s 6. Adomako-Kwakye has argued that this arrangement does not work to the advantage of mining communities. The State has failed to use the revenue generated for the development of the affected communities. This is attributed to the unfettered powers the government has in managing the Fund. He suggests the creation of a new fund administered by a body independent of the State. See generally Chris Adomako-Kwakye, "Neglect of Mining Areas in Ghana: the Case for Equitable Distribution of Resource Revenue" (2018) Commonwealth Law Bulletin 1.

representatives of each mining company within the district. In addition, there should be a representative of an identified women's group and an identified youth group in that community.

The composition of the committee indicates a move in the right direction. Kendra Dupuy has criticized the previous position under the Fund, where traditional authorities mainly governed in parallel with the State and acted as custodians of the land on behalf of the community, for the purpose of receiving and spending redistributed mining revenue.[143] Dupuy's comparative study of mining revenue distribution policies in Ghana and Sierra Leone found that the conversion of mining revenue into development gains within local mining-affected communities had been undermined by corruption among traditional local authorities (chiefs), who were responsible for receiving and spending revenue.[144] This was attributed to the unaccountable power of traditional authorities in the use of funds, and the lack of any requirement or system to track the funds granted to these authorities. It is evident from Dupuy's observation that the local management committee must not have unfettered power but should be accountable to the mining community. This raises questions regarding mechanisms for ensuring that under the new regime, the local management committee remains accountable to the communities.

At first glance, it appears that, unlike the composition of the Board, the local management committee established under Act 912 makes a positive contribution to meaningful community participation. The local management committee ensures the representation of a broad range of community interests. Unfortunately, political rhetoric is rarely backed up by significant action, as there appears to be a lack of political will to implement the Act.[145] Although the Act requires

[143] See Dupuy, *supra* note 137 at 69-79.

[144] *Ibid* at 69-79.

[145] This point raises the issue of whether the government should confine itself to regulatory roles and leave the negotiations and implementation of benefit agreements to the affected community and mineral

setting up a Board and committee at local level for the purpose of achieving the objectives of the MDF, none of these institutions have been constituted to date. The law requires that one year after coming into effect, the Minister must develop regulations for the effective implementation of the Act. It is more than three years since the Act passed into law, but there is no subsidiary legislation to support its implementation.

Although the Act provides a vehicle to mitigate the effect of mining operations on mining communities, it fails to provide the mechanism for realizing the object of the Act. An important issue is whether the Act allows the communities affected by mining operations to sue the government or violators for breaches of the Act. Since it is legislation (rather than a political document), the *Minerals Development Fund Act* is at least prima facie legally enforceable. However, because the language of the Act contains no provision to allow citizens to sue (or other means of redress), it is difficult to find any ground for allowing the communities and individuals affected by mining activities to file suits for violations of the Act.

The failure to include any provision to support citizens' suits makes it difficult for mining communities to require compliance with the Act. According to a recent news report, in 2017 and 2018, the government failed to allocate the stipulated 20% of mineral royalties to the MDF.[146] In the financial year 2017, an amount of GH¢78.4 million was allocated to the MDF out of the

rights holder. Nwapi makes the point that this position would enjoy support from communities where governments are distrusted. He suggests that it would be valuable to involve local governments in the negotiation and implementation process, if communities lack the requisite capacity to engage mining companies. See Chilenye Nwapi, "Legal and Institutional Frameworks for Community Development Agreements in the Mining Sector in Africa" (2017) 4 The Extractive Industries and Society 202 at 206-207.

[146] See Francis Kobena Tandoh, "Ghana Records Shortfall in Allocations to Minerals Development Fund Meant to Develop Mining Communities – Report" (20 November 2018), online: NewsGhana <https://www.newsghana.com.gh/ghana-records-shortfall-in-allocations-to-minerals-development-fund-meant-to-develop-mining-communities-report/> [https://perma.cc/NU5H-WN7G].

expected amount of GH¢626.5 million to be received from mineral royalties. In 2018, an amount of GH¢95.7 million was allocated to the MDF out of the expected amount of GH¢766.4 million to be received in the same year.[147]

This is not a surprise result. The *Minerals Development Fund Act* does not establish a permit-based scheme that would allow communities which are supposed to benefit under the Act to ensure compliance with its standards.[148] The wording of the Act suggests that the legislature never intended to allow significant public participation in its enforcement. The right to demand accountability is an important factor in bridging the gap between the law in the books and the law in practice. The Act does not significantly alter the power relations between mining communities and the government. Community participation under the Act could be enhanced by making available other administrative law remedies like certiorari, quo warranto, mandamus or other forms of judicial review for full enforcement of the Act. The statutory language should clearly allow mining communities liberal access to the courts to facilitate implementation of the Act. The absence of enforceability on the part of mining communities weakens the implementation of the Act and inhibits the use of the Fund for its stated objects.[149]

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[147] *Ibid*. It has also been reported that in 2016, for instance, mining companies in the country paid mineral royalties of Ghc550 million to the government, but only GHC27 million was returned to the mining district assemblies for community development. See Ghanaweb, "Implement Minerals Development Fund Act - Chamber of Mines" (22 March 2018), online: *Ghanaweb* <https://www.ghanaweb.com/GhanaHomePage/business/Implement-Minerals-Development-Fund-Act-Chamber-of-Mines-636778> [https://perma.cc/B92W-5AKU].

[148] In a jurisdiction like the US, citizens' suits are encouraged to support enforcement provisions of an Act. The *Clean Water Act*, for example, provides that "any citizen may commence a civil action on his behalf [...] against any person [...] who is alleged to be in violation" of standards established pursuant to the Act." See *Clean Water Act*, (1983) 33 USC s 1365(a)(1), as amended by the *Water Quality Act* of 1987 cited in Gail J Robinson, "Interpreting the Citizen Suit Provision of the Clean Water Act" (1987) 37 Case W Res L Rev 515 at 517.

[149] See Dupuy, *supra* note 137 at 69-79. Regarding the citizen suit provision in the *Clean Water Act*, for example, Robinson has argued that the possibility of a citizen suit being brought to enforce the standards

From the perspective of effective participation and accountability, it is important for the beneficiary communities to be able to determine whether revenue from the MDF is being used to achieve its objects. How is the MDF monitored and how do mining communities participate in that monitoring? As noted earlier in Chapters Two and Four, information sharing is an important requirement for the meaningful participation of affected communities in the decision-making process. The only step of the Act in this direction is the requirement for the Board to submit an annual report on MDF operations to the Auditor General and Parliament.[150] This is an important move towards transparency and accountability.

Monitoring ensures that revenue from the Fund goes in the direction of clearly stated goals and in measuring whether outcomes are being met. Monitoring mechanisms in the Act have not been effective so far in ensuring that revenue for the MDF is indeed used for the benefit of mining communities. There is no accountability mechanism for making sure that revenue for the Fund is used to ensure the welfare of communities. This absence of effective monitoring mechanisms greatly inhibits transparency and accountability. True transparency and accountability require the expenditure of revenue, earmarked for the Fund, to be accessible to the public, especially mining communities.[151]

Trends toward community participation in the form of benefit sharing have been on the increase in many natural resource-rich countries. The Act has a valuable role to play in achieving

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set by the Act is likely to prod the agency into taking action. See Gail J Robinson, "Interpreting the Citizen Suit Provision of the Clean Water Act" (1987) 37 Case W Res L Rev 515 at 519.

[150] See Act 912, *supra* note 129 at ss 23 & 25.

[151] In Kenya, the *Mining (Community Development Agreement) Regulations* require quarterly written publication of the status of CDA implementation, made available on the Ministry of Mining's official website. See *Mining (Community Development Agreement) Regulations,* s 16. In addition, the parties meet on a quarterly basis to discuss issues of monitoring and implementation, with regard to CDAs.

a more equitable distribution of benefits to communities affected by mineral development. Like other community-based natural resource management initiatives, the Act is designed to improve the collective welfare of mining communities in the form of revenue redistribution, with a view to providing some compensation for the effects of mining operations on the affected communities. However, the Act lacks measures to ensure the realization of its purposes. In short, Act 912 does not address the power issues that shape meaningful community participation. The preceding discussion shows that there are considerable weaknesses, particularly in the area of enforcement and monitoring. These weaknesses make it challenging for mining communities to effectively derive the necessary benefits under the Act. Thus, there is little or no evidence to support any claim that the MDF has achieved its purpose so far.

5.3.3 Localizing Benefits and Sharing Rewards

The *Minerals Development Fund Act* is the most important statute that seeks to extend the direct economic benefits of mineral exploitation to mining communities in Ghana. The MDF introduces a new form of community participation in mineral projects. The MDF is aimed at addressing the negative effects of mineral operations on project-affected communities and extending socio-economic benefits to the communities. The Fund has the potential to transfer resource benefits to mining communities. However, as discussed above, there are inherent weaknesses in the Act, which make it difficult for mining communities to ensure that revenues earmarked for the Fund trickle down to the affected communities.

Calls for greater participation in decision-making have legitimately led to the investigation of alternative fora for enabling substantive community influence in the decision-making process on, at least, the distribution of impacts and benefits. Mining communities and resource developers

have considered other parallel and complementary procedures to cope with the limitations and deficiencies of state-led-benefits-sharing arrangements. One particular tool that has been developed and one which communities can resort to in their efforts to enjoy greater benefits from the exploitation and development of natural resources is the concept of Community Development Agreements (CDAs).[152] In recent times, several African countries have introduced pre-development agreements and other revenue-sharing arrangements into their mining laws.[153] In Kenya, a Community Development Agreement (CDA) is a condition for granting mineral rights or a mineral licence. The *Mining Act*, 2016[154] requires the holder of a mineral right to implement a CDA for the benefit of people living around an exploration or mining operations area.[155] In addition, an application for the renewal of a mineral right or mining licence must include a CDA between the applicant and mining community. In Sierra Leone, the *Mines and Minerals Act*, 2009[156] requires the holder of a mining licence to

> assist in the development of mining communities affected by its operations to promote sustainable development, enhance the general welfare and the quality of life of the

[152] See generally Evaristus Oshionebo, "Community Development Agreements as Tools for Local Participation in Natural Resource Projects in Africa" in Markus Krajewski, ed., *Human Rights in the Extractive Industries: Transparency, Participation, Resistance* (Cham, Switzerland: Springer, 2019) 77 – 109 and Ciaran O'Faircheallaigh, "Community Development Agreements in the Mining Industry: An Emerging Global Phenomenon" (2013) 44:2 Community Development 222.

[153] See generally Nwapi, *supra* note 145. The *ECOWAS Directive on the Harmonization of Guiding Principles and Policies in the Mining Sector* requires the Member States to ensure that mining companies submit information on community-focused corporate social responsibility programs to enhance the livelihoods of the mining communities in the mining rights application process. See Economic Community of West African States, Directive C/DIR.3/05/09, On the Harmonization of Guiding Principles and Policies in the Mining Sector, online: <documentation.ecowas.int/download/en/publications/Ecowas%20Directive/o20and/20policies%20in%20the%20minning%20sector.pdf> art 16.

[154] NO. 12 of 2016.

[155] *Ibid* s 42 & 109.

[156] NO. 12 of 2009.

> inhabitants, and shall recognize and respect the rights, customs, traditions, and religion of local communities.[157]

Section 142(2) requires that the CDA take into account the unique circumstances of the host community and address issues of benefit to the community, including infrastructural development and other community services.

Similarly, in Mozambique, there is a requirement for a CDA prior to the commencement of a mining project. Mozambique's mining regime requires a mining contract to contain the social responsibility activities that will be developed by the mining rights holder.[158] In addition, the contract must spell out the ways in which the communities within the mining area will be engaged and the benefits due to them in the venture.[159] Such agreements are considered as a memorandum of understanding between the government, the mining company and the community(ies).[160] The growing literature on CDAs indicates a rapid increase in the use of community development statutory requirements, although there are other forms of voluntary company initiatives to address the socio-economic concerns of mining communities.

There are examples of CDAs in Ghana, but these are mainly voluntary programs between mining communities and companies in the context of corporate social responsibility and industry initiatives.[161] Voluntary CDAs have their own advantages but are open to the criticism that Jedrzej Frynas makes of corporate social responsibility initiatives, which, he argues, have often been

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[157] *Ibid* at s 138.

[158] See Mozambique: *Mining Law*, 2014 (NO 20/2015), Article 8.

[159] *Ibid* at Article 8.

[160] *Ibid* Article 8.

[161] See, for example, "Ahafo Social Responsibility Agreement Between the Ahafo Mine Local Community and Newmont Ghana Gold Limited" (29 May 2008), online: <http://ccsi.columbia.edu/files/2016/11/Ghana-Ahafo-Mine-Local-Community-Newmont-Ghana-Gold-Ltd-2008-Social-Responsibility-Agreement.pdf > [https://perma.cc/H9ST-LJ2H] at Article 4.2.

conceived by the companies rather than through ongoing participation with the affected communities.[162] This dissertation does not argue that voluntary company initiatives are discredited because of evidence of a gap between the stated intentions of companies and their actual delivery and impact on communities. It would be naïve to dismiss the role of voluntary company initiatives in addressing the concerns and interests of communities. However, this dissertation suggests that the trend towards legislatively mandated benefit-sharing agreements has a greater potential to facilitate the redistribution of benefits to local communities, compared to voluntary agreements.[163] A state mandated system can be used to define the respective roles of companies in the community development process. Mining laws in Ghana do not require arrangements of benefit-sharing as a prerequisite for mineral rights or licence. Relying on companies to voluntarily assist in community development is risky, but most would agree that CDAs, whether required by legislation or not, can be a useful tool to manage community expectations.[164]

The current trend in CDAs signal a potential move toward far more community-company modes of resource extraction and governance. When properly designed, CDAs have the significant potential to transform resource exploitation into sustainable benefits for affected communities. A

[162] See Jedrzej George Frynas, "The False Developmental Promise of Corporate Social Responsibility: Evidence from Multinational Oil Companies" (2005) 81:3 International Affairs 581 at 589. Frynas argues that there are fundamental problems with the capacity of private firms to deliver development, and the aspiration of achieving broader development goals through voluntary initiatives may be flawed. He looked at local community development projects funded by oil companies on the Gulf of Guinea and their actual and potential impact on development. The research involved 89 interviews conducted with oil company staff, consultants, NGO staff, government officials and others in the United Kingdom, the United States, Nigeria, Cameroon and Equatorial Guinea.

[163] See generally Nwapi, *supra* note 145.

[164] See James M Otto, "How Do We Legislate for Improved Community Development?" in Tony Addison & Alan Roe, Extractive Industries: The Management of Resources as a Driver of Sustainable Development (Oxford: Oxford University Press, 2018) 673 at 676 – 677. Otto suggests that statutorily required CDA and voluntary CDA can be mutually exclusive and that the existence of one does not preclude the other. He cites, for example, the Brazil hybrid approaches combining mandated elements and voluntary activities. Otto at 676 – 677.

model tool that could assist with the development of CDAs for communities affected by mining projects and guidelines for a model government regulation is found in the Appendix to this dissertation.

The requirement of a CDA transforms the power dynamics of the company-community-state relationship. The literature on CDAs in Africa has very little to say about how mining communities have benefited from specific agreements, but the answer to this lies in the nature of the specific CDA, and the rules that govern it. The CDA has the potential to legally empower communities, facilitate company-community engagement, and result in a greater regulatory role of the government.[165] It ensures the legal recognition of affected communities as full participants at the negotiating table, along with governments and corporations. It enables affected communities to effectively articulate their concerns and interests in a domain where they have been historically excluded from the decision-making process. Examples abound in countries where communities have successfully used CDAs to fund infrastructural projects, gain employment and training opportunities, and to address the adverse social and environmental impact of mining on communities. In Canada, Indigenous communities have used CDAs in the form of IBAs as a means of achieving maximum socio-economic benefit. In addition to providing material benefits to host communities, CDAs ensure that mining operations are consistent with the continuous cultural viability of communities, providing an arena for communities to register their concerns and participate in the governance of mineral development affecting their land-use rights.

[165] See P Y Le Meur et al, "'Horizontal' 'vertical' diffusion: The Cumulative Influence of Impact and Benefit Agreements (IBAs) on Mining Policy-Production in New Caledonia" (2013) 38 Resources Policy 648 at 649.

Conversely, companies favour the reciprocal and cooperative relationship with mining communities offered by a CDA. CDA can help companies obtain the social licence to operate that may lessen company-community conflicts which might prove to be costly to the company. The potentially disastrous consequences at stake if a community opposes a project makes it important for companies to take charge of community relations rather than rely on the government whose interests are not always aligned with those of the community.

CDAs offer greater opportunity to advance the economic interests of local communities and to mitigate the negative effects of mining operation on host communities. However, a number of significant challenges and issues arise in realizing this opportunity and in sustaining the gains potentially available from CDAs. This includes the apparent inequality in bargaining power and the incapacity of host communities. Many mining communities are in an inherently weak position, whereas mining companies are, for the most part, financially powerful and highly capitalized. This raises the question of whether affected communities can benefit from such agreements. Recognizing the challenge faced by mining communities, legislatively mandated CDAs must set out the minimum content of a CDA, so that it specifically includes impact mitigation measures and the economic development of the project-affected community. For example, governments can help maximize the benefits for these communities by prescribing standards to reduce concerns over bargaining inequalities. Perhaps more specifically, there must be mandatory minimum requirement for the sharing of information, the development of local capacity in the mining industry by means of education, employment and development programs, monitoring, enforcement, and conflict resolution. Such a regulation provides a blueprint for negotiations and protect the interests of communities by ensuring that key subject matter is covered.[166] The relevant

[166] See Otto, *supra* note 164 at 689.

legislation and CDA must seek to achieve and maintain a degree of control amongst the members of an affected community regarding development initiatives for local stakeholders.

The government can strengthen the capacity of communities by ensuring that mining companies abide by their CDAs, including the timelines defined therein. This includes government resolving issues between companies and mining communities, where, for example, the mineral rights holders and the affected community fail to conclude a CDA by the time that the mineral rights holder is ready to commence operations. There needs to be a well-established regulatory context for enforcement and compliance. The role of the government in resolving disputes between mining communities and project proponents should not prevent recourse to the courts for judicial relief. In Canada, Gathii and Odumosu-Ayanu found that most IBAs include dispute settlement provisions, especially in the form of tiered dispute settlement.[167] Dispute resolution often involves recourse to consultation or informal dispute settlement; mediation or conciliation; arbitration, or litigation. For example, the *Mary River Project Inuit Impact and Benefit Agreement* contains a section on dispute resolution, which contemplates negotiation, mediation and binding arbitration.[168] This Agreement is set in the socio-legal context of Indigenous peoples in Canada, but in the absence of express prohibition by statute, there is nothing in principle to prohibit a community from incorporating such clauses in its CDA.

It is important to enhance transparency and to ensure that corruption does not undermine CDAs. There must be periodic audit to ascertain the implementation of CDAs. In addition, mining communities must establish specific institutional structures and community-based implementation

[167] See James Gathii & Ibironke T Odumosu-Ayanu, "The Turn to Contractual Responsibility in the Global Extractive Industry" (2015) 1:1 Bus Hum Rights J 69 at 89.

[168] *Ibid* at 89.

units to manage the ongoing relationship between project proponents and the community. Some regimes encourage the publication of all signed CDAs and avoid any characterization of such agreements as confidential documents, although some provisions may be redacted to protect legitimate corporate interests. Kenya's *Mining (Community Development Agreement) Regulations* provides:

> The parties shall use best efforts to establish meaningful mechanisms that ensure transparent transactions relevant to Community Development Agreement commitments including but not limited to (a) quarterly written publication of status of Community Development Agreement implementation to be available on the Ministry of Mining official website, using any typical mode of information and communication for the affected mine community, or as may be mutually agreed by the parties; (b) quarterly public meetings by the parties in a place that shall be accessible to the holder and members of the affected mine community.[169]

Such a provision ensures that the agreement is made public. Companies argue that CDAs contain commercially sensitive information and hence ought not to be publicly disclosed. Although important, this rationale is more likely to weaken the capacity and power of local communities by prohibiting them from communicating with other stakeholders for advice and support, when needed. The commercial nature of an agreement should not undermine the broader public interest in transparency.

The requirement of a CDA as a condition for the grant and/or renewal of a mineral and mining right strengthens the economic interests of communities affected by mining projects.[170] The contractual nature of such agreements makes them enforceable by the courts, reflecting the relative power of the community. Agreements between companies and project-affected communities increase the assurance that these communities will benefit from such operations and

[169] See Kenya: *Mining (Community Development Agreement) Regulations*, 2016 (NO. 12 of 2016), r 16.

[170] See generally Kendra E Dupuy "Community Development Requirements in Mining Laws" (2014) 1 Extractive Industries and Society 200.

that the social and environmental impact of mining is mitigated according to their expectations. Corporate contracts in the form of CDAs have a real potential to better distribute economic benefits to mining communities, compared to state-run models such as the MDF. The contractual nature of CDAs offers certainty to mining communities that they can enforce the Agreement.

5.4 Conclusion

The nature of customary interests in land confers on mining communities the right to benefits associated with the use of that land: to use it, enjoy it, and profit from its economic development. There is evidence that mining communities actively participated in mineral development prior to colonization. Steps to vest minerals in the government were first taken during the colonial period, but there was no outright prohibition of the right of Indigenous peoples to mine on their own land. In contrast, mining communities currently have no "jurisdictional interests" in minerals deposited on their land, as the government constitutionally retains all mineral rights. The interest of mining communities in mineral development has been restricted to compensation claims with little or no attention to the socio-economic development of communities or to the adverse effects of mining operations upon them.

As the discussion in Chapters Two and Three demonstrate, community participation presents an opportunity for the government to successfully balance its mineral rights with the land rights of mining communities in order to ensure that the affected communities benefit from the development of these resources. The government's right to take up land for mineral exploitation should not be exercised without the necessary consideration of the underlying title to the land. Ultimately, the government must exercise its right in a way that benefits the affected community.

The question of how effectively this can be done is a dilemma that is common to many resource-rich countries. A key feature of Ghana's mining regime is the limited legal avenues for mining communities to be involved in mining activities. This gap makes it difficult for communities to ensure that the benefits of mining trickle down into the areas that are most affected by mineral operations. It is unsurprising that there is a dearth of decided cases on community participation in Ghana because there is no legal foundation for participation.

This chapter shows that mining laws in Ghana appear to provide opportunities for mining communities to be involved in mineral development. At the disposition stage of mineral production, the community, represented by a chief or allodial owner, is entitled to notice from the Minister in respect of the land. There are also opportunities for community members to participate in mineral development at the project approval stage, within the environmental impact assessment process. The Ghanaian government has established the MDF to distribute revenue from mining operations directly to affected communities. These steps taken by the government to engage mining communities are laudable, but successful implementation remains a challenge. The discussion shows that fine rhetoric is rarely matched by equivalent action. Mining laws in Ghana lack robust accountability, transparency mechanisms, and community participation rights. In contrast, the Canadian experience demonstrates the benefits of a defined legal foundation for consultation and participation with local marginalized communities. It is evident that the existing participatory regime in Ghana is incapable of providing an environment that is conducive to the meaningful participation of mining communities.

Unlike Indigenous communities in Canada, mining communities in Ghana do not have the standing or resources to demand meaningful participation in mineral development that affects their land. In the current regime, the potential for mining communities to benefit from mineral

exploration largely depends on two factors. First, there is the President of Ghana's function in discharging the obligations of a trustee of minerals in Ghana. Second, there are other benefits that may be conferred on mining communities through the voluntary initiative of mining companies. The chapter suggests that the current regime is insufficient to ensure that mining operations benefit the affected communities. The chapter proposes the concept of Community Development Agreements as an important complement to the current benefit-sharing regime in the efforts to ensure that affected communities enjoy greater benefits from the exploitation and development of natural resources. The next chapter explores avenues to achieve community benefits by institutionalizing the duty to consult in Ghana.

CHAPTER SIX: CONTEXTUALIZATION OF INDIGENEITY IN AFRICA: A CASE STUDY OF COMMUNITIES AFFECTED BY NATURAL RESOURCE DEVELOPMENT IN GHANA

6.1 Introduction

International law instruments have given considerable attention to the protection of the rights and interests of "Indigenous peoples."[1] Despite this recognition, significant questions remain unresolved, especially regarding *why* Indigenous peoples should enjoy special rights over other nationals who suffer equally from disadvantage and marginalization.[2] Identifying the category of people/communities one can count as an Indigenous group is even more complicated. While some international law instruments and literature on the subject emphasize the ancestral identity of the people, others focus on the cultural particularity and collective identity of the group.[3] Issues concerning social dynamism, modernization, secularization, and urbanization, which may lead to *loss* of ancestral identity, make any attempts towards a precise categorization difficult. Categorization is further complicated when a group with a clear Indigenous identity has become so displaced or urbanized as to not have a connection with any particular "ancestral" identity.

The uncertainties associated with identifying the category of people/communities to include in the category of Indigenous group have contributed to the marginalization of many communities affected by mining activities in Ghana. Although the inhabitants of these

[1] See generally *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, 27 June 1989, ILO C169 (entered into force 05 September 1991). See also *Resolution on Indigenous Populations /Communities in Africa*, 25 February 2016, ACHPR/Res. 334 (EXT.OS/XIX).

[2] See Will Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship* (Oxford: Oxford University Press, 2001) at 120-133.

[3] See generally James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, New York, 1996).

communities can be practically identified as Indigenous peoples, they have not gained official recognition. Consequently, they have been denied the moral, institutional, and cultural protections afforded to Indigenous groups. Similar cases exist in other African countries where mining communities suffer from the blanket non-recognition of the existence of Indigenous peoples within their territories. Most of these communities do not entirely fit into the category of Indigenous peoples as understood in international law. Nonetheless, these communities share similar characteristics with Indigenous peoples in other jurisdictions such as Canada and as partly described in international law. An assertion of Indigeneity provides one of the best strategies available for traditionally marginalized mining communities to seek a fair share in the development of natural resources that affects their land. A reconceptualization and reinterpretation of what it means to be Indigenous in African countries would ensure that these marginalized mining communities benefit from the rights and protection afforded to Indigenous peoples.

This chapter explores and examines the classification of Indigenous peoples and its applicability to Africa, using mining communities in Ghana as its case study. The chapter focuses on the standards of territorial association, marginalization, and vulnerability. The chapter also examines the extent to which communities affected by mining activities in Ghana can claim Indigenous status and comparatively explores the foundation for Indigenous status in Canada and in international law instruments. The chapter proceeds to assess how these different approaches to classifying Indigenous peoples could apply to mining communities in Ghana. The resulting examination demonstrates that many mining communities affected by natural resource development in Ghana, as well as other African countries, fall within the category of "Indigenous peoples," even if a cognate expression has not hitherto been used in Ghanaian politics and laws. The chapter concludes that there is a strong basis for transferring the elements of the duty to consult

Indigenous peoples in Canada into the treatment of communities in Ghana affected by mineral development.

6.2 Theorizing Indigeneity: A Search for Definition

Although the concept of Indigeneity has significantly developed within both international and regional law instruments, the determination of exactly who does or does not have Indigenous status remains controversial. There is currently no single, fixed meaning of Indigenous peoples in international law. The position at the regional level is no different. For example, the adoption of the Resolution on the Rights of Indigenous Populations/Communities in Africa[4] was not conditioned on the articulation of a definition of Indigenous peoples. Scholars have suggested that while a precise definition will theoretically ground an interpretative process to determine who falls within the rubric of the term, "any strict definition is likely to incorporate justifications and referents that make sense in some societies but not in others."[5] Accordingly, the emerging consensus is that a formal definition of the term "Indigenous peoples" is highly contextual and is neither necessary nor desirable.[6] Instead, international law has focused on the special characteristics/foundations of Indigenous peoples that set them apart from other nationals.

In this regard, the United Nations' working definition provides evidence that the concept of Indigenous peoples is intended to include those communities, nations, and people who, "having

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[4] See *Resolution on the Rights of Indigenous Peoples' Communities in Africa*, 06 November 2000, online: African Commission on Human and Peoples' Rights <http://www.achpr.org/sessions/28th/resolutions/51/>. See also *Resolution on Indigenous Populations*, *supra* note 1.

[5] See generally Benedict Kingsbury, "Indigenous Peoples in International Law: A Constructivist Approach to the Asian Controversy" (1998) Am J Intl L 414.

[6] See UN Secretariat of the Permanent Forum on Indigenous Issues, 'The Concept of Indigenous Peoples' (Background Paper to Workshop on Data Collection and Disaggregation for Indigenous Peoples, New York, US, 19–21 January 2004) UN Doc PFII/2004/WS.1/3, online: <http://www.un.org/esa/socdev/unpfii/documents/workshop_data_background.doc> at para 8.

a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them."[7] Two possible characteristics of Indigenous peoples can be inferred from the UN's description: (a) Indigenous peoples are the descendants of the first human inhabitants of a land, and (b) Indigenous peoples are the descendants of those who inhabited the land at the time of European colonization.[8] Also at the heart of the concept of Indigenous peoples is the presumption that Indigenous communities, peoples, and nations at present form the "non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system."[9]

The UN's approach adopts a potentially limited and controversial view of Indigenous peoples by emphasizing "historical continuity with pre-invasion and pre-colonial societies that developed on their territories." The UN Special Rapporteur, José Martinez Cobo, adopted this description to collect information for a study dedicated to the problem of discrimination against Indigenous peoples in specific countries.[10] Cobo's historical continuity may consist of the continuation, for an extended period reaching into the present, of one or more of the following factors:

(a) Occupation of ancestral lands, or at least of part of them;

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[7] *Ibid*.

[8] See generally Jeremy Waldron, "Indigeneity - First Peoples and Last Occupancy" (2003) 1 NZJPIL 55.

[9] *Supra* note 6.

[10] "Study of the problem of discrimination against Indigenous populations" (final report (supplementary part) submitted by Special Rapporteur José R Martínez Cobo, May 1982), UN doc E/CN.4/Sub.2/1982/Add.1, Chapter five, online: <http://www.un.org/esa/socdev/unpfii/documents/MCS_v_en.pdf>.

(b) Common ancestry with the original occupants of these lands;
(c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an Indigenous community, dress, means of livelihood, life-style, etc.);
(d) Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language);
(e) Residence in certain parts of the country, or in certain regions of the world; or
(f) Other relevant factors.[11]

Indigenous identification can rest on either objective elements (ancestry, culture, language, etc.) or subjective elements (self-identification and acceptance) or a combination of both elements. The objective elements are matters of fact and form the bases for the characterization and depiction of a group as Indigenous, but historical continuity is not premised on the presence of all the objective criteria. The definition allows for flexibility in this context, and the existence of one or more of the elements may be enough ground for a group to self-identify as Indigenous. Indeed, the modernization and dynamism of social life make it untenable to demand a community claiming Indigenous status to satisfy all of the conditions. A rigid definition of the continuity model will distort the main functions and significance of the concept of Indigeneity. Accordingly, as discussed below, many subsequent international law instruments and jurisprudence have sought to de-emphasize Cobo's "historical continuity element."

The study that produced this definition of Indigeneity did not include countries in Africa and, as Cobo suggested, a corresponding study on Africa may have resulted in a different definition.[12] For example, the requirement of historical continuity may be more applicable to the

[11] "Study of the problem of discrimination against Indigenous populations" (final report (supplementary part) submitted by Special Rapporteur José R Martínez Cobo, May 1982), UN Doc. E/CN.4/Sub.2/1986/7/Add.4, online: <http://www.un.org/esa/socdev/unpfii/documents/MCS_xxi_xxii_e.pdf> at paras 379-80.

[12] *Study of the Problem of Discrimination Against Indigenous Populations*, 30 September 1983, E/CN.4/Sub.2/1983/21/Add.8, online: United Nations Economic and Social Council <http://www.un.org/esa/socdev/unpfii/documents/MCS_xxi_xxii_e.pdf>.

Indigenous peoples in countries in North and South America and other places in the Pacific. In these places, Indigenous communities did not gain independence from non-Indigenous powers, nor were they integrated with immigrant populations. This is unlike those in Africa who were decolonized. Chidi Oguamanam has rightly argued that "because of the ambiguity caused by the 'salt-water' test, most African and Asian countries deny the existence of Indigenous peoples within their territories or have, at best, remained ambivalent about it."[13] The 'salt-water' test required a colonial territory and the people who claimed first occupation and prior possession to be geographically and ethnically distinct from the settlers. The test made it easy to identify a group as Indigenous if they were separated from the mother country by geographical and cultural distance.[14] In Africa, a rigid historical approach is problematic and cannot be recommended because most peoples in Africa cannot establish historical continuity with pre-colonial occupants of the continent.[15] A different approach to identifying the status of Indigenous peoples in Africa is required since the historical continuity approach is inappropriate in the African context.

The *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (ILO)[16] adopts a more diffused approach to the historical continuity model. Its legal definition includes an additional category of "tribal peoples." Article 1 of the Convention provides that the Convention applies to:

> (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and

[13] See Chidi Oguamanam, "Indigenous Peoples and International Law: the Making of a Regime" (2004) 30 Queen's LJ 348 at 370.

[14] See generally Amy Maguire, "Contemporary Anti-Colonial Self-Determination Claims and the Decolonisation of International Law" (2013) 22:1 Griffith L Rev 238. See also Oguamanam, *ibid* at 370.

[15] See generally Paul Tamuno, "New Human Rights Concept for Old African Problems: An Analysis of the Challenges of Introducing and Implementing Indigenous Rights in Africa" (2017) 61:3 J Afr L 305.

[16] See ILO C169, *supra* note 1.

> whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
> (b) peoples in independent countries who are regarded as Indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.
> Self-identification as Indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.

The *Convention* places tribal peoples in much the same position as Indigenous peoples whether or not these peoples or portions of them might be described as "Indigenous." Samuel K Date-Bah, a Ghanaian jurist, has argued that the decision of the ILO to cover Indigenous and tribal peoples was to cover a social situation rather than to establish a priority based on whose ancestors first arrived in a particular area.[17]

While the ILO concept seems to be aimed at peoples needing special protection from their national governments or "dominant society," it is not settled whether the emergence of a community that previously embodied many of the complexities of Indigeneity into the mainstream of national life excludes them from the Indigenous category. Such a concept suggests Indigenous peoples and modernization represent aspects of a linear development; one looking back, the other forward. The ILO's approach recognizes the fluidity and dynamism of social life rather than looking at Indigeneity from a pristine community perspective. Jeremy Waldron explains,

> humans have been migratory animals since our emergence in Africa more than 100,000 years ago … we have not sprung from the earth or evolved within the territories in respect of which we claim to be Indigenous. Usually what is emphasised is that the Indigenous peoples have strong ancestral links to the land because they have made a life there for many generations.[18]

[17] See Samuel K Date-Bah, "Rights of Indigenous People in Relation to Natural Resources Development: An African's Perspective" (1998) 16 J Energy & Nat Resources L 389 at 392.

[18] See Waldron, *supra* note 8 at 63-64.

A community should not be deprived of the legal protection granted to Indigenous peoples by reason of the fact that they have no continuous historical connection to the original occupants of the land. A community should be able to claim all the rights and protection granted to Indigenous groups if they share similar characteristics.

In *Saramaka People v Suriname*, the Inter-American Court of Human Rights (IACtHR) held that the Saramaka people are not "Indigenous" to the region they inhabit; they were instead brought to Suriname during the colonization period.[19] However, this did not deprive them of their Indigenous status. The Court observed that the Saramaka people are a distinct tribal group that share similar characteristics with Indigenous peoples, such as having social, cultural, and economic traditions different from other sections of the national community; identifying themselves with their ancestral territories; and regulating themselves, at least partially, by their own norms, customs, and traditions. Based on these commonalities, the Court held that the jurisprudence regarding Indigenous peoples' rights is also applicable to tribal peoples as both require special measures under international human rights law in order to guarantee their physical and cultural survival.[20] Accordingly, the Saramaka people, though a tribal group, are entitled to the rights and protection granted to Indigenous peoples.

The decision of the Court in *Saramaka* clearly shows that the Court did not adhere to existing criteria of Indigeneity but rather looked at the substance of the Saramaka's realities and rightly accorded them the legal protection that is traditionally conferred on Indigenous people. The

[19] See *Saramaka People v Suriname*, IACtHR (series C no 172) judgment of 28 November 2007 at paras 79–86.

[20] *Ibid* at paras 79–86.

Court's decision follows its earlier observation when it considered the case of the Moiwana community, which did not possess formal legal title – either collectively nor individually – to their traditional lands.[21] The Court held that in the case of Indigenous communities which have occupied their ancestral lands in accordance with customary practices but lack legal title to the property, the continued possession of the land should suffice to obtain official recognition of their communal ownership. The Court rightly observed that the Moiwana community members are a tribal people who possess an "all-encompassing relationship" to their traditional lands and that the rights of Indigenous communities to property must also apply to the tribal Moiwana community members. The Court emphasized the need to protect the community in the enjoyment of property rights in order to safeguard their physical and cultural survival.[22] The Court looked beyond the lack of historical continuity to include the shared characteristics of established Indigenous communities.

The position of the Inter-American Court of Human Rights deviates from a strict "historical continuity model" that Cobo espoused. Nonetheless, the Court's decision supports Cobo's suggestion of a contextual approach to identifying Indigenous peoples, which accommodates variation in different societies. This constructivist approach, as proposed by Benedict Kingsbury, allows for "a continuous process in which claims and practices in numerous specific cases are abstracted in the wider institutions of international society, then made specific again at the moment of application in the political, legal and social processes of particular cases and societies."[23]

The preceding analysis of approaches to Indigenous identification demonstrates that without flexibility and dynamism in the definition of Indigeneity, it would be difficult for the

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[21] *Moiwana Community v Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of June 15, 2005. Series C No. 124.

[22] *Ibid* at paras 130-135.

[23] See Kingsbury, *supra* note 5 at 415.

concept to be applied in Africa, where there is no evidence to indicate that certain groups first arrived in a traditional territory before others. A one-sided approach to historical continuity will fail to take into account the distinct social, economic, and cultural features, which are, in essence, not different from those of recognized Indigenous communities. An attempt at a definition should be contextual and flexible enough to capture the diversity of Indigenous cultures, histories, and current circumstances.

In 2005, the African Commission's Working Group of Experts on Indigenous Populations/Communities (ACWG) published its "made in Africa" report on the criteria for identifying Indigenous peoples.[24] The Commission started by noting that many groups in Africa, due to past and ongoing processes, have become marginalized in their own countries, and they need recognition and protection of their basic human rights. Although the ACWG did not start by identifying these marginalized groups as "Indigenous peoples," it acknowledged that the kind of human rights protection the communities urgently need is reflected in the international law regime on the rights of Indigenous peoples.[25] The ACWG adopted a progressive approach to the concept of Indigenous peoples which, as it stated, "has come to have connotations and meanings that are much wider than the question of 'who came first.'"[26] The ACWG departed from Cobo's historical continuity criteria and explained that the term 'Indigenous' connotes:

> a global movement fighting for rights and justice for those particular groups who have been left on the margins of development and who are perceived negatively by dominating mainstream development paradigms, whose cultures and ways of life

[24] See Report of the African Commission's Working Group of Experts on Indigenous Populations /Communities (2005, African Commission and IWGIA Publications) at 87, adopted in the 34th session of the African Commission in Banjul in 2003, online: <https://www.iwgia.org/images/publications/African_Commission_book.pdf> [https://perma.cc/RY8C-MXA3].

[25] *Ibid* at 86.

[26] *Ibid* at 87.

> are subject to discrimination and contempt and whose very existence is under threat of extinction.[27]

Guided by this understanding, the ACWG relied on a modern analytical approach that focuses on four criteria, namely: occupation and use of a specific territory, self-identification as a distinct collectivity, marginalization, and cultural difference.[28] These four guiding principles that characterize Indigenous peoples are mutually exclusive; one element suffices for classifying Indigenous peoples.[29]

Self-identification as a distinct characteristic of a tribal/Indigenous group is an important requirement of Indigeneity. The emphasis on self-identity is to avoid the challenge of externally imposed identity by political actors. The ACWG criterion emphasizes an approach that highlights and analyzes the situation of Indigenous peoples. The criterion does not accommodate a narrow notion of "political domination of the descendants of colonial settlers," which has no place in Africa. While self-identification is an important prerequisite, the element of "distinct collectivity" allows for more flexibility given that relationships between Indigenous peoples and dominant or mainstream groups vary from country to country. Regarding cultural differences, some scholars have suggested that "it is not any *a priori* cultural difference that makes Indigenous identity so pertinent, but rather the specificity of power relations at a given historical moment and in a particular place."[30]

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[27] *Ibid* at 87.

[28] *Ibid* at 92-93. See also *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, Comm. 276/2003, 27th ACHPR AAR Annex (Jun 2009 - Nov 2009) at para 150.

[29] *Supra* note 24.

[30] See Hanne Veber & E. Waehle, "'…Never Drink from the Same Cup': An Introduction", in Hanne Veber et al (eds), *Never Drink from the Same Cup* (Copenhagen: IWGIA and Centre for Development Research, 1993) cited in Gabrielle Lynch, "Kenya's New Indigenes: Negotiating Local Identities in a Global Context" (2011) 17:1 Nations and Nationalism 148 at 159.

The African Commission on Human and Peoples' Rights[31] emphasized in *Endorois Welfare Council* [32] that the term "Indigenous" is not intended to create a special class of citizens. Rather, the term seeks to address historical and present-day injustices and inequalities.[33] The case underlines the similarities evident in most traditionally marginalized communities, irrespective of their status, namely, the usurpation of their land and resources, the destruction of their culture, and the eventual domination of the people. This understanding is in line with the Commission's decision that "it is much more relevant and constructive to try to bring out the main characteristics allowing the identification of the Indigenous populations and communities in Africa."[34]

In the context of natural resource development, these criteria place traditionally marginalized communities in the spotlight and encourage the adoption of a new identity as "Indigenous" in the pursuit of meaningful community participation and consultation in the exploitation of resources that affects their rights. A key characteristic for most of these communities is that the survival of their particular way of life depends on access and rights to their traditional lands and the natural resources thereon. This modern analytical approach to understanding the term 'Indigenous peoples' has underlined the ACHPR jurisprudence on the identification of an Indigenous identity.

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[31] Established under the African Charter on Human and Peoples' Rights, the Commission is charged with the protection of human and peoples' rights; the promotion of human and peoples' rights; and the interpretation of the African Charter on Human and Peoples' Rights. See African Commission on Human and Peoples' Rights, About ACHPR, online: <http://www.achpr.org/about/>.

[32] See *Endorois Welfare Council*, *supra* note 28.

[33] *Ibid* at para 149.

[34] Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples (30 May 2007), online: African Commission on Human and Peoples' Rights < https://www.iwgia.org/images/publications/Advisory_Opinion_ENG.pdf > [https://perma.cc/Q4W5-9Q6R].

In the *Endorois Welfare Council* case,[35] the complainants alleged that the Government of Kenya had violated the human rights of the Endorois community, an Indigenous people. These violations resulted from: (i) the Government forcibly removing them from their ancestral land; (ii) the failure to adequately compensate them for the loss of their property; and (iii) the disruption of the community's pastoral enterprise and violations of the right to practice their religion and culture, as well as the overall process of development of the Endorois people. The Government disputed the classification of the Endorois as a distinct community to be included in the Indigenous peoples' category and denied that the Endorois, as a tribe, do not reside in their ancestral lands owing to forced relocation. Relying on urbanization and dynamism, the Government argued that the inclusion of some of the members of the Endorois in "modern society" has affected their cultural distinctiveness to the extent that it would be difficult to define them as a distinct legal personality.[36]

The Commission rejected the urbanization and dynamism argument. The Commission held that the Endorois form a distinct tribal group capable of exercising all the rights of Indigenous peoples. The facts of the case showed that some individual members of the community were living outside the traditional territory and in a way that may differ from other members of the tribe who were living on the traditional territory. But the Commission held that the impact of urbanization and dynamism does not affect the tribal status of the group. The Commission continued to hold that, besides the fact that the Endorois identified themselves as distinct from other groups in their state, their way of life also depends on their land and natural resources for survival. Consequently, the Commission held that the Endorios cannot be denied a right to protection just because there is a lack of individual identification with the group's traditions.

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[35] See *Endorois Welfare Council*, *supra* note 28 at para 149.

[36] *Ibid* at footnote 122.

Discrimination and cultural distinctiveness may be useful in identifying a group as Indigenous, but a community could claim Indigenous status because of a particularly strong spatial connection to the land without a radically distinct cultural identity. Indeed, social dynamism, modernization, and globalization have made it impossible for those who self-identify as Indigenous to enjoy any particularly high level of cultural distinctiveness. In the words of Ken Coates:

> culture is not a fixed element destined to stand unchanged against the shifting culture, social, economic, and political forces impinging on any society or group of people. Culture and society adapt and change, dropping off elements that no longer suit and adding others that reflect more adequately the realities of the contemporary world.[37]

An approach that incorporates 'frozen culture' must be rejected. Cultural identity does not imply *fixedness*. What makes a people/community Indigenous should not be judged by the same cultural practices they were associated with at the time of historical "first" contact. A one-sided, narrow approach that understands Indigenous peoples as confined to culturally distinctive societies is not advisable. The expectation that Indigenous peoples are a homogenous group (everyone must participate in the same tradition) is also not tenable. It ignores a multi-dimensional approach of the multiple, overlapping spheres of communities, commonalities, and interdependencies among people in a world. This multi-dimensional approach is evolving as a promising and inclusive way of identifying Indigenous people.[38] A rigid culturalist approach to the categorization of Indigeneity fails to recognize the inevitable changes of behaviour, norms, perception, and the way of life of a

[37] See Ken Coates, "Being Aboriginal" in Michael Behiels, ed, *Futures and Identities: Aboriginal Peoples in Canada* (Montréal: Association for Canadian Studies, 1999) at 35.

[38] See Anaya, *supra* note 3 at 77-78.

people. Assuming Indigenous life is incompatible with modern state structures is both erroneous and prejudicial.

Indigenous peoples have been active participants in larger social and political structures and do not live in isolation, but this active participation does not dilute their identity. The Miskito Indians of Nicaragua have secured greater representation in the Nicaraguan government while opening their isolated region to more commerce with the outside world.[39] While cultural differences between Indigenous peoples and the larger society may diminish over time as each side learns from and adapts to the other,[40] one cannot argue that such interventions, whether voluntary or not, change the Indigeneity of the people. A problem with a radical cultural approach is that once Indigenous peoples participate in the modern world, they lose their claim to Indigeneity.[41] The danger of this culturalist framework is that it restricts the term "Indigenous peoples" to exclude many Indigenous communities which have been affected by social dynamism and globalization but, nonetheless, maintain historical connection to their land. A non-culturalist approach would not require a community to establish a high level of discrimination or cultural distinctiveness to prove its Indigeneity. Proof of a special relationship with the land would suffice.

In the *Endorois Welfare Council* case, the focus was whether the activities of the government had gone against the Endorois' rights to culture, religious practice, land, natural resources, and development that stemmed from their strong relationship with a particular geographic space. Regarding the exploitation and development of resources that affect the Endorois' lands, the Commission observed that no effective participation was allowed for the

[39] *Ibid* at 77-78.

[40] See Kymlicka, *supra* note 2 at 130.

[41] *Ibid* at 130.

Endorois, nor had there been any reasonable benefit enjoyed by the community. The Commission held that the failure to guarantee effective participation and a reasonable share in the profits (or other adequate forms of compensation) also extends to a violation of the right to development.[42]

This position is a significant departure from the ruling of the Kenyan High Court, which had earlier held that the law does not allow individuals to benefit from state resources simply because they happen to be born close to the natural resource.[43] The judgment of the Kenyan High Court reflects the position in most African countries. In most countries, minerals in their natural state are vested in the government, which invariably excludes affected communities in the management and control.[44] To a certain extent, the protection of such communities depends on the elaboration of international norms on Indigenous rights.

It is a misconception to suggest that the advocacy for such protection gives special rights to Indigenous peoples. The African Commission has insisted that certain groups are discriminated and marginalized because of their position within the state, and it is important for these groups to call for the protection of their rights in order to alleviate this particular form of discrimination. The destruction of land through resource exploitation and development deprives the affected community of their collective rights to the lands as a people. The protection of such communities should not be founded solely on the Indigeneity of the people.

Neither the 'cultural distinctive definition' nor the 'historical approach' to Indigenous peoples provides sound theoretical grounds for exclusion of groups from the Indigenous category. In fact, the predominantly multi-ethnic nature of African countries has inspired a growing

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[42] See *Endorois Welfare Council*, *supra* note 28 at para 228.

[43] *Ibid* at para 97.

[44] See generally *Okofo Sobin Kan II & Others v Attorney General & Others* (30 July 2014), Writ No. JI/2/2012, Supreme Court.

recognition of multidimensional criteria and indicators for the determination of contemporary Indigeneity. The issue of the right to self-determination, self-government, and historical redress may be more pertinent to Indigenous peoples in countries in North and South America and other places in the Pacific, who were in substance never decolonized. On the other side, Indigenous rights and status in Africa are particularly asserted within the framework of human rights.

First peoples' status and historical experiences of colonization and intensive settlement have no place in the characterization of Indigenous peoples in Africa. For example, the inclusion of the Ogoni community within Indigenous rights activism downplays the importance of any historically and culturally distinctive conceptualization of contemporary Indigeneity in Africa. The historical approach to Indigenous peoples could hardly set the Ogoni apart from the other small ethnic groups in Niger Delta or in Nigeria.[45] The marginalization and vulnerability of the community have been major arguments for the recognition of the Ogoni people as a distinctive tribal group and, consequently, deserving of inclusion in the category of Indigenous people.[46] The new identification criteria of occupation and use of a specific territory, self-identification as a distinct collectivity, marginalization, and cultural difference have successfully located Africa within the global Indigenous rights framework. This position supports the argument for contemporary determinant yardsticks of Indigeneity in favour of the situational and constructive characteristics of marginalized groups.

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[45] See Felix Ndahinda, "Historical Development of Indigenous Identification and Rights in Africa" in Korir Sing'Oei & Ridwan Laher eds, *Indigenous People in Africa: Contestations, Empowerment and Group Rights* (Oxford: African Books Collective, 2014) 24 at 34.

[46] Inherent in the campaign for Indigenous status is the fact that although they are a natural resource community, the Ogoni people derive no benefits from mineral exploitation. Oil exploration has turned Ogoni into a wasteland; lands, streams, and creeks are totally and continually polluted; the atmosphere has been poisoned.

In summary, the concept of Indigeneity in Africa context has adopted a more human rights approach rather than the historical continuity and cultural distinctiveness model, which was the predominant attribute in most traditionally marginalized communities in countries such as Canada and Australia. This is not to say that historical continuity and cultural particularity are not acceptable criteria for determining Indigenous status. A broad-brush, one-size-fits-all approach cannot be recommended; not all Indigenous peoples are similarly placed. Any strict justifications that make sense in some societies may not be appropriate in others. Social dynamism and urbanization allow less emphasis to be placed on other criteria in the context of some marginalized groups while other classifications will be predominantly endorsed in certain communities.

Four common themes stand out in the approach to the characterization of Indigenous peoples. These are: self-identification, occupation and use of a specific territory, cultural difference, marginalization and exploitation. Most communities may not satisfy all criteria, but these approaches create more equitable opportunities for Indigenous peoples to achieve recognition during assessment. However, the question of Indigeneity would not even arise without identifying the principles of "first occupancy" and "prior occupancy" implicit in all Indigenous peoples' claims. The next subsections apply these criteria in the context of Indigenous groups in Canada and communities affected by natural resource development in Ghana.

6.3 The Justification for Indigenous Status in Canada

The identification and categorization of Indigenous peoples is a complicated and complex issue in Canada.[47] There is a difference in Canadian law between the identification and categorization of

[47] This is premised on the litany of terms used by the Canadian government and legislators to identify Indigenous groups in the country; in fact, some of the terms have numerous definitions and redefinitions in statutes and treaties.

Indigenous persons and peoples and the tests for Aboriginal rights and titles. For example, the term "Indian" has a specific legal meaning, is an individual status that is determined by the federal government based on federal legislation.[48] Section 35.2 of the *Constitution Act*, 1982, defines "Aboriginal peoples of Canada" to include the First nations, Inuit, and Métis peoples of Canada.[49] While each term has its own implications, this section, employs the terms Indigenous and Aboriginal interchangeably to represent all identifiable Indigenous groups in Canada.

In Canada, the genesis of Indigeneity is premised on the fact that Indigenous peoples were already living in communities on the land and participating in distinctive cultures as they had done for centuries before Europeans arrived.[50] The concept of prior occupation is acknowledged and recognized under the Canadian *Constitution Act*, 1982. Section 35 provides that "[t]he existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed."[51] This section establishes a constitutional framework that seeks to acknowledge and reconcile the practices, traditions, and cultures of Indigenous peoples with the sovereignty of the Crown.[52]

In *R v Van der Peet,* Lamer J sets out a test for determining "crucial elements" of pre-existing Indigenous societies holding that a community may be included in the Indigenous category if the community can prove that (a) they occupied the territory before the Crown invaded; and (b) the community regulated themselves by their own distinctive norms, customs, and

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[48] See *Constitution Act*, 1967, (R.S.C 1985 Ap II. No. 5) s 91(24). See also See also Bill C-31, An Act to Amend the Indian Act, 1st Sess, 33rd Parl, 1985 (assented to 28 June 1985), RSC 1985 c I-5 [Bill C-31]

[49] In 2003, the SCC determined what individuals would qualify to be Metis for Aboriginal rights in a complex, ten (10) step test for Metis identity. See generally *R v Powley*, 2003 SCC 43.

[50] See generally R v *Van der Peet*, [1996] 2 SCR 507.

[51] *Constitution Act*, 1982, s 35.

[52] See *Van der Peet*, *supra* note 50 at paras 31 – 32.

traditions. These categories set Indigenous communities apart from other minority groups. Regarding Indigenous occupation of territory laid out in the first category, the elements of the test for proving Aboriginal title (property interest in land) can be answered by reference to (a) the descendants of the first human inhabitants of the land and (b) the descendants of those who inhabited the land at the time of Crown colonization.[53] Indigenous peoples were already living and thriving with their own systems of polity, law, and economy prior to the Crown's assertion of sovereignty. A community claiming Indigenous status must establish that they (or their ancestral predecessor) occupied that land "regularly and exclusively" at the time the Crown asserted sovereignty over it. One commentator has noted that Indigenous peoples have "ancestral roots embedded in the lands in which they live, or would like to live, much more deeply than the roots of more powerful sectors of society living on the same lands or close proximity."[54] Indigenous peoples in Canada satisfy the salt-water test from domestic boundaries within imperial polities with an Indigenous status developed on the basis of prior occupation and historical continuity.

The courts have emphasized that it is not necessary that the chain of occupation be unbroken or that its nature remain unchanged; prior existence or claimed occupation by an Indigenous group need not be continuous. What is required is a substantial connection between the people and the land before the Crown's invasion. It should suffice if the people have maintained a substantial connection to the land and the uses to which they have put the land are consistent with continued use by future generations of Indigenous peoples.[55]

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[53] For a robust explanation on this, see Waldron, *supra* note 8. To Waldron, the principle holds that the first person, or the first people, to take possession of a piece of land acquires special rights over it, so far as property and sovereignty are concerned. See Waldron, *supra* note 8 at 59.

[54] See Anaya, *supra* note 3 at 3.

[55] See *Delgamuukw v British Columbia*, (1997) 3 SCR 1010 at para 153.

The contemporary approach to Indigeneity in Canada recognizes the dangers of holding existing systems hostage to a strict historical continuity model. Rigidly defining Indigeneity through literal continuity model will impact recognition of Indigenous rights and title. The SCC has stated that a strict application of the continuity test will undermine the very purposes of s. 35(1) by "perpetuating the historical injustice suffered by Aboriginal peoples at the hands of colonizers who failed to respect Aboriginal rights to land."[56] Accordingly, continuity could still be established where, for instance,

> one aboriginal group may have ceded its possession to subsequent occupants or merged its territory with that of another aboriginal society. As well, the occupancy of one aboriginal society may be connected to the occupancy of another society by conquest or exchange. In these circumstances, continuity of use and occupation, extending back to the relevant time, may very well be established.[57]

The modern position does not look to the dawn of time—that is, to the moment when the land in question was first taken into use and possession; rather, the emphasis is on what was happening at the moment just before the Crown's arrived.[58] In Canada, both prior occupancy and the date of Crown sovereignty are important indicia in Indigenous claims.[59]

This section will not provide a detailed examination of Indigenous title, but it must be noted that prior occupancy is part of Indigenous culture in a broad sense and is absorbed into the notion of Indigenous title. Indigenous title is on spectrum with Indigenous rights, but both are interest in land. Indigenous title deals with claims of rights to land and have implications for land use

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[56] *Ibid* at para 153.

[57] *Ibid* at para 198.

[58] See Waldron, *supra* note 8 at 71.

[59] Recognition of a group as Indigenous is not limited to pre-contact or pre-sovereignty. Indigenous groups such as the Métis have been accorded Indigenous status even though there were no Métis people prior to contact with Europeans as the Métis are the result of intermarriage between First Nations and European settlers. See *Van der Peet*, *supra* note 50 at para 169. See also *Constitution Act*, 1982, s 35.

control.[60] An established or asserted Indigenous title imposes a duty on the Crown to consult with the Indigenous group before undertaking any development that has the potential to adversely affect the title. To establish Indigenous title, the claimant must satisfy the following conditions:

> (i) the land must have been occupied prior to sovereignty;
> (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation; and
> (iii) at sovereignty, that occupation must have been exclusive.[61]

Taken together, the first and third criteria underline the requirement of historical occupation, which is a major characteristic of the concept of Indigeneity. Occupation prior to sovereignty and exclusive possession assert the relevance of a time prior to the arrival of Europeans.

The case law does not currently settle the issue of the "date of the arrival of Europeans and the date of Crown sovereignty" since first contact with Europeans occurred at different times in different locations. There is also the question of whether the date is when the Crown first asserted sovereignty or when it actually acquired sovereignty. Indigenous groups are Indigenous because they inhabited the land prior to any external invasion, yet historical occupation does not preclude a claimant from relying on present occupation as proof of occupation pre-sovereignty where there is proof of "a continuity between present and pre-sovereignty occupation."[62] A substantial connection between the people and the land may be enough ground for a group to claim Indigenous rights to the land involved. While Indigenous title is an Indigenous right, the relevant time period

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[60] *Tsilhqot'in Nation v British Columbia,* 2014 SCC 44 [*Tsilqoth'in Nation*].

[61] See *Delgamuukw, supra* note 55 at para 143. The approach adopted in *Delgamuukw* draws on earlier decisions, which required that the Indigenous group and their ancestors were members of an organized society; that the organized society occupied the specific territory over which they assert the Aboriginal title; that the occupation was to the exclusion of other organized societies; that the occupation was an established fact at the time sovereignty was asserted by England. For example, see *Hamlet of Baker Lake v Minister of Indian Affairs*, [1980] 1 FC 518 at para 80.

[62] See *Delgamuukw*, *supra* note at para 154.

for the establishment of the title is different from the establishment of Indigenous rights to engage in specific activities. Both Indigenous title and Indigenous rights arise from the existence of distinctive Indigenous communities occupying "the land as their forefathers had done for centuries."[63] In assessing the validity of claims to Indigeneity, the way of life of the claimant community is an equally important criterion as their territorial claims. The difference between Indigenous rights and Indigenous title lies in the occupancy and prior possession and prior activities on the land. Occupation and prior possession ground title to the land, while prior activities give rise to certain rights.

In *Van der Peet,* category B identifies Indigenous peoples by whether the community regulated itself by its own distinctive norms, customs, and traditions. The identification of Indigenous groups deals with the way of life, habits, and customs of a claimant group and forms the bases of most Indigenous rights claims. As the Court held in *Van Der Peet,* "Aboriginal rights arise from the prior occupation of land, but they also arise from the prior social organization and distinctive cultures of Aboriginal peoples on that land."[64] Indigenous rights focus on identifying the integral, defining features of those societies. In this context, cultural particularity and social organization determines whether an activity deserves protection as Aboriginal right. Cultural distinctiveness does not equate to *fixedness*; neither does the sovereignty of the Crown operate to freeze the way of life of the Indigenous group.

What constitutes a practice, a tradition, or a custom distinctive to an Indigenous society is not examined through the eyes of stability. Culture is inherently unstable and subjective. Any approach to the categorization of Indigenous peoples based on the fixedness of their way of life

[63] *Van der Peet* at para 33.

[64] *Van der Peet* at para 74.

serves to create systematic barriers in the determination of Indigeneity. A fixed approach cannot be recommended; it seeks to comprehend Indigenous peoples' ways of life from a pristine society perspective without the practices, traditions, and customs being permitted to maintain contemporary relevance in relation to the needs of the communities as their practices, traditions, and customs change and evolve with the overall society in which they live.[65] The mobile approach to cultural categorization, as opined by Arjun Appadurai, requires culture or the way of life of a community to be evaluated "as adjectival rather than as a noun, as a process rather than a thing, as an integral part of identity formation not a paradoxical object of fixed history."[66] The modification of a traditional society does not relinquish traditional identity, provided the general nature of the connection between the Indigenous people and the land remains.

In Canada, Indigenous rights are interpreted flexibly so as to permit their evolution over time. Ancestral rights may find modern expression. In *Van Der Peet*, the Court held that

> the period of time relevant to the assessment of aboriginal activities should not involve a specific date, such as British sovereignty, which would crystallize aboriginal's distinctive culture in time. Rather, as aboriginal practices, traditions and customs change and evolve, they will be protected in s. 35(1) provided that they have formed an integral part of the distinctive aboriginal culture for a substantial continuous period of time.[67]

A "dynamic right" approach is the preferable method in the categorization of Indigenous rights. The dynamic right approach requires that "distinctive aboriginal culture would not be frozen as of any particular time but would evolve so that aboriginal practices, traditions and customs maintain a continuing relevance to the aboriginal societies as these societies exist in the contemporary

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[65] See *Van der Peet* at para 172.

[66] See Arjun Appadurai, *Modernity at Large: Cultural Dimensions of Globalization* (Minneapolis: University of Minnesota Press, 1996) at 13, cited in Ronald Niezen, "Culture and the Judiciary: The Meaning of the Culture Concept as a Source of Aboriginal Rights in Canada" (2003) 18:2 CJLS 1 at 2.

[67] *Van der Peet* at para 180.

world."[68] This approach accommodates changes in the lifestyle of an Indigenous community. In Canada, the choice to participate in modern life does not diminish Indigenous identity. Many Indigenous communities cannot practice the lifestyles of their ancestors due to colonial intervention (cultural genocide, the impact of climate change on hunting and land-based practices, forced relocation, etc). Failing to recognize the contemporary form of Indigenous communities is to condemn Indigenous peoples to practise their way of life, traditions, and customs precisely as they were performed centuries ago and to deny them the right to adapt to the changes in the society in which they live.[69] The modern expression of traditional practices may be the only viable way traditional practice can be exercised in a contemporary world. While the group's customs and traditions must not be wholly transformed, the dynamic right approach to categorization prevents an unfair confinement of Indigenous rights simply by adapting to changes in modern society. The choice to participate in modern life does not diminish one's identity as Indigenous nor should it jeopardize the legal recognition of an individual as Indigenous. A contrary view is unconscionable. Such a position sees Indigeneity from only a pristine community and a backwards-looking perspective.[70]

Presently, Indigenous identity is partly constituted through generations of Indigenous peoples living within Canadian society and by their ties to a traditional Indigenous world.[71] Indigenous peoples continue to interact with "the West," adopting ways of thinking and acting that have roots in European culture. Categorizing Indigeneity with reference to only a static and

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[68] *Van der Peet* at para 173.

[69] See *R v Bernard*, 2003 NBCA 55.

[70] See Waldron, *supra* note 8.

[71] See Gordon Christie, "Culture, Self-Determination and Colonialism: Issues Around the Revitalization of Indigenous Legal" (2007) 6 Indigenous LJ 13 at 23-26 (on the suggestion that the fluidity and dynamism inherent within the sense of identity allows for manipulation).

historical vision of community is impossible. Western ways of life and cross-cultural interactions have influenced Indigenous traditions and customs. Toby Rollo's work demonstrates how:

> colonialism persists and often thrives within democratic regimes in part because liberal conceptions of civilization, progress, and reason can be used to justify the marginalization of Indigenous ways of being…compelling communities to transpose their forms of life into a western idiom that mischaracterizes Indigeneity and leads over time to the deformation of Indigenous subjectivities.[72]

A hunting community can still be Indigenous even if they no longer engage in hunting. Though a change in the way of life of an Indigenous group may impact a recognized right, Indigeneity cannot be lost through the abandonment of traditional customs and ways of life where the relevant group or community continues to occupy or use the land.

The fact that Indigenous peoples are descendants from the "native" inhabitants of the country is not particular to Canada. In many countries, ancestral occupation of the territory has always been the underlying criterion in the justification of Indigeneity.[73] In New Zealand, Indigeneity is justified based on prior occupancy or first occupancy. The Maori, for example, are Indigenous inhabitants of Aotearoa because they were its first human inhabitants or people who inhabited the land when persons of other groups arrived.[74] In Australia, pre-colonial possession is proven by reference to descendants of Indigenous citizens who can establish their entitlement to

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[72] See Toby Rollo, "Mandates of the State: Canadian Sovereignty, Democracy, and Indigenous Claims" (2014) 27 Can JL & Jur 225 at 238.

[73] See in general Study of the Problem of Discrimination Against Indigenous Population: Definition of Indigenous Populations, 20 June 1982, E/CN.4/Sub.2/1982/2/Add.6, online:

United Nations Economic and Social Council <http://www.un.org/esa/socdev/unpfii/documents/MCS_v_en.pdf > [https://perma.cc/CV6W-M993] at paras 39-68.

[74] See Waldron, *supra* note 8at 62.

rights and interests that survived the Crown's acquisition of sovereignty.[75] Some scholars have criticized the use of the principle of first occupancy and the principle of prior occupancy in the analysis of Indigenous claims.[76] Nonetheless, any attempt to belittle the two principles undermines the very foundation implicit in the "relatively unsophisticated commonsensical definitions of Indigeneity."[77] Any other justification without reference to the underlying "here first" and "here prior" arguments misrepresents the nature of most Indigenous peoples' claims.

The next section explores whether mining communities in Ghana qualify as Indigenous peoples based on the various approaches to characterizing Indigenous groups both in international law and the approach in Canada.

6.4 Are there "Indigenous People" in Ghana?

Ghana is a country of diverse ethnic communities, previously unrelated, who were brought together during colonial rule and at independence to form Ghana. The *Constitution of the Republic of Ghana* is generally silent on "Indigenous people," but the general anti-discrimination clause and directive principles of state policy give a sense that Indigeneity is not too remote to the country's politico-legal system. Unlike Canada where there was "political domination of the descendants of colonial settlers," in Ghana, like in many other African countries, the colonizers were a minority who did not settle permanently and left at independence. Given Ghana's political and historical context, identifying the category of people/communities to include as an Indigenous group proves to be complicated. In Africa, this complexity is also premised on the distressing precedents in other places where making Indigeneity the crucial question has been a deadly and vicious ingredient in

[75] *Mabo v Queensland (No 2)*, (1992) HCA 23 at para 55.

[76] See generally Waldron, *supra* note 8.

[77] See generally Mark Bennett, "'Indigeneity' as Self-Determination" (2005) 4 Indigenous LJ 71.

social and political pathology. One commentator has cautioned that if a country seeks to buy into the *general* discourse of Indigeneity, as opposed to solving its problems with its own legal and ideological resources, then it had better be aware of the volatile substance it is playing with.[78]

In his article, *Rights of Indigenous People in Relation to Natural Resources Development: An African's Perspective,* Date-Bah puts forward the thesis that

> [W]here Indigenous peoples have an equal right of access to the political process of the state which exercises sovereignty over them, it is the function of that political process ultimately to settle the issue of the allocation of the benefits of the exploitation of natural resources in that jurisdiction, whether between Indigenous people, local people or central government.[79]

He argues that the main thrust of nation building in most post-colonial African states has been to weld disparate traditional political entities or states into a cohesive nation-state. Other commentators refer to nation building and the need to pursue an explicit non-ethnic form of nationalism as an aspiration inconsistent with the concept of Indigeneity.[80] Therefore, any legislative push for Indigeneity has the potential to politically jeopardize the hegemonic representation of a unified nation.

Unsurprisingly, many African states dispute the presence of Indigenous peoples in their territory. The predominant view is that most Africans do not fit into the category of Indigenous peoples as understood in international law instruments. And even where Indigeneity is admitted, the general view is that the term is applicable to an entire country given that "all Africans are Indigenous peoples." Even where it is relevant to consider the rights of Africans from an

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[78] See Waldron, *supra* note 8 at 82.

[79] See Samuel K Date-Bah, *supra* note 17 at 394.

[80] See Christopher Kidd & Justin Kenrick, "Mapping Everyday Practices as Rights of Resistance: Indigenous Peoples in Central Africa" in Sita Venkateswar & Emma Hughes, eds, *The Politics Of Indigeneity: Dialogues and Reflections on Indigenous Activism* (London: Zed, 2011) 77 at 95.

Indigenous angle, some scholars have recommended an analysis from the alternative perspective of 'local people,' whether such 'local people' are Indigenous within recognized parlance or not.[81] However, all the factors discussed above in support of what it means to be Indigenous are clearly satisfied in most communities in Africa. What makes the members of the mining community in Obuasi, a mining community in Ghana, 'local people,' but the group in the Fort McMurray district, in Alberta, Canada, Indigenous?

The Canadian experience shows that first occupancy and prior occupancy are the normative basis of Indigeneity. Although Indigenous communities may form minorities in most countries, the specificity of Indigenous peoples lies in the occupation of their territories since time immemorial. They are Indigenous because they occupied a particular area before other population groups arrived. This claim of prior occupation lays the firm ground for other political rights like self-determination. This proprietary claim survives any subsequent changes in the historical way of life of the group. Without the claim to land, there is no significant difference between Indigenous groups and other minorities.[82] While a change in the way of life of an Indigenous group could affect a recognized right exercised by the group, the transformation does not affect Indigenous status so far as the basic claim of "we were here first" has been established. If the Indigenous peoples in Canada are Indigenous peoples to the land by reason of prior occupation, how different is the claim to land from the concept of allodial title in Ghana? The allodial title refers to the concept of being on the land for a very long time. In *Ohimen v Adjei*[83], the modes for acquiring

[81] See generally Date-Bah, *supra* note 17. See also Waldron, *supra* note 8 at 82.

[82] Any description that indigeneity could be lost to globalization or a change in status equates Indigenous peoples to other minority groups.

[83] (1957) 2 WALR 275.

the allodial title were listed as discovery of unoccupied land and subsequent settlement thereon, and conquest and subsequent settlement by the claimant group.

In Ghana, the contemporary use of the term 'Indigenous people' does not carry with it the connotations as understood in various international law instruments. However, the term 'Indigenousness' and related concepts such as 'nativism' have a long history within the socio-legal and political landscape of the country. The protection of Indigenous peoples and their traditional activities is not a new concept in Ghana. The historical presence of traditional Indigenous communities prior to the arrival of the Europeans in Ghana is not significantly different from the experiences of Indigenous communities in Canada.[84] Before the advent of the Europeans, there were distinctive tribal/Indigenous groups occupying the lands in the country. These groups were also living within their own social and political organization. The traditional narratives of the pre-independent state of Ghana have attracted a considerable amount of scholarship within and outside the country.

This section does not offer a detailed account of the colonial struggle of pre-contact traditional groups; suffice to say that the historical presence of these various Indigenous peoples is reflected in the relationship between the traditional polities of the Gold Coast and the European companies and nations.[85] The primeval Ghanaian communities, like many other recognized Indigenous groups around the world, had established important economic and recognized political

[84] The *Ashanti Administration Ordinance*, 1902, (No. 1-1902) defines "native" as any member of the Aboriginal races or tribes of West Africa. See Donald Kingdon, *The laws of Ashanti; Containing the Ordinances of Ashanti and the Orders, Proclamations, Rules, Regulations and Bye-laws made Thereunder in Force on the 31st day of December, 1919: rev. ed.* (London: Waterlow & Sons, 1920) at 2.

[85] For example, it has been reported the Kingdom of Fetu was the first Akan community in 1659 to enter into a treaty with the representatives sent by the King of Denmark and the Danish Africa Company. See Ole Justesen, "Treaties between Gold Coast Polities and the King of Denmark and the Danish Africa Company" in Kwasi Konadu & Clifton C. Campbell ed, *The Ghana Reader: History, Culture, Politics* (Durham: Duke University Press, 2016) 109 at 109-111.

structures before the invasion by Europeans. Native groups like the Ashanti people (or the Asantes) were the predominant ethnic group in the region. They now occupy most of the mining communities in Ghana. The Ashanti have in place sustained and formidable political institutions akin to present day government structures.[86] Moreover, tribal groups like the Akan, the Ga, and the Dagomba claim that their ancestors occupied the previously uninhabited country.[87] This assertion is supported by various historical commentaries.[88]

The Asantes had already established various forms of 'archaic' state systems before the Europeans arrived. As David Kimble rightly points out, all of these societies had their own clearly defined systems of rights and obligations.[89] The natives rightly owned the soil and all the natural resources. Gold, for example, was traditionally regarded by the Akans as sacred and only to be extracted for the well-being of the State.[90] The ownership of minerals entitled the chiefs to grant mining concessions to the Europeans, although these concessions did not involve a transfer of ownership of the land from the group to the colonizers. As with other Indigenous groups in Canada, the land was a symbol of continuity of the people, and in this lay a good deal of religious significance. The land is held in trust for the ancestors, the living and the unborn, and accordingly, determined as inalienable to "strangers." In 1912, the Omanhene of Adansi (Obuasi is one of the

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[86] See generally Ivor Wilks, *Asante in the Nineteenth Century: The Structure and Evolution of a Political Order* (Cambridge: Cambridge University Press, 1975).

[87] See J K Fynn, *Asantes and Its Neighbours 1700-1807* (Evanston: Northwestern University Press, 1971) at 2.

[88] See W T Balmer, *A Historical of Akan Peoples of the Gold Coast* (London: Atlantis Press, 1925) at 26-31.

[89] See David Kimble, *A Political History of Ghana: The Rise of Gold Coast Nationalism, 1850-1928* (Oxford: Clarendon Press, 1963) at 125-128.

[90] See Eva L Meyerowitz, *The Sacred State of the Akan* (London: Faber and Faber, 1951) at 197 cited in David Kimble, *A Political History of Ghana: The Rise of Gold Coast Nationalism, 1850-1928* (Oxford: Clarendon Press, 1963) at 15.

mining communities significant to this research) emphasized that "all land in Adansi is the property of the Adansi people…the fact of the British having come to the country has made no difference; things are exactly as they were before…there is no land in individual ownership."[91]

The fact that the territory of Ghana was, before colonialization, home to a variety of traditional political states is documented in the literature and reflected in pre-colonial laws and post-independence legislation. Of particular importance was the right and protection offered to communities within which mining activities take place. Significantly, under the *Concession Ordinance No 3,*[92] the traditional rulers had the rights to grant concessions to investors to extract minerals and undertake other natural resource development projects within their territories. Also, natives could carry on mining activities within their territories in accordance with native customs without the need to obtain a concession licence from the Chief Commissioner.[93] The Canadian experience shows that the fact that the pre-contact communities were members of an organized society is an important criterion for determining who is to be included in the Indigenous category.[94]

In Ghana, it is indisputable that some tribal groups in various mining communities will satisfy pre-contact criterion. Various statutes and the Constitution of the Fourth Republic of Ghana, 1992 give legal recognition to traditional administrations, customs, activities, and laws of Indigenous groups. Articles 11 and 270 of the 1992 Constitution acknowledge customary law and

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[91] See Kimble, *supra* note 89 at 17. Omanhene is the title of the supreme traditional ruler in a region or a larger town.

[92] *Concession Ordinance No. 3 of 1903.* See also the *Concession Ordinance*, 1900, which it is claimed was enacted to "institute a machinery for giving protection to foreigners seeking title security in respect of interests in lands acquired by them." See K Bontsi-Enchill, *Ghana Land Law* (Lagos: African Universities Press, 1964) p 334 cited in Kwame A Ninsin, "Land, Chieftaincy, and Political Stability in Colonial Ghana" (1986) 2:2 Research Review 135 at 142.

[93] See *Concession Ordinance No. 3 of 1903*, s 29.

[94] See *Hamlet of Baker Lake*, *supra* note 61at 557-58.

traditional institutions as part of the laws of Ghana and the state institutions respectively.[95] These constitutional guarantees and acknowledgments are similar to those in section 35 of the Canadian *Constitution Act*, 1982. The land tenure system is of particular importance to this constitutional guarantee. As the Omanhene of Adansi emphasized, in Ghana Indigenous peoples' land rights were left intact by the colonial power during colonialism, unlike settler colonies elsewhere. The customary authorities (i.e. the stool, the skins, the clans, and the families) predominantly own the lands in their communities. Wordsworth Odame Larbi has reported that these customary authorities own about 78 percent of all lands in the country, the state owns 20 percent, and the remaining 2 percent is owned by the state and customary authorities in the form of partnership (split ownership).[96] Community interests in land continue to subsist mainly in the form of an allodial title, which as noted is traceable to first and prior settlement before the invasion by other groups.

Many mining communities in Ghana are currently in the mainstream of the political and economic life of the country. This raises the question of whether the communities can claim Indigenous rights. Date-Bah has asserted that the ILO Convention No. 169 is not intended to include Indigenous people who have a mainstream role in their national life. While this sets the situation in Ghana apart from other settler colonies, I argue that the concept of Indigeneity does not cease with the attainment of a modern status. Changes to the way of life of an Indigenous group do not make them cease to be Indigenous. Any assumption that some Indigenous peoples can no

[95] See also the *Court Ordinance*, 1876 s 9, which recognized the primacy of Indigenous law and custom in matters affecting the Indigenous people.

[96] See generally Wordsworth Odame Larbi, "Compulsory Land Acquisition and Compensation in Ghana: Searching for Alternative Policies and Strategies" (10 September 2008), online: <https://www.fig.net/resources/proceedings/2008/verona_fao_2008_comm7/papers/09_sept/4_1_larbi.pdf >. The basis of ownership is not by statutes but under customary law, which is made part of the laws of Ghana by virtue of article 11 of the 1992 Constitution of Ghana.

longer be recognized as Indigenous because such groups have attained modern status not only equates Indigeneity to inferiority but also views Indigenous societies as being permanently low in the scale of social organization. Determining Indigeneity cannot be tied to a backward-looking approach. An Indigenous group does not lose its Indigenous status simply because its members have progressed from a state of "primitive" penury to "modern" affluence.

The position that Indigeneity does not include Indigenous people who occupy a mainstream role in their national life is partly accounted for by scholars and activists who see Indigenous rights as the language of the oppressed, not the oppressors.[97] Analytical tools have not been developed to deal with situations where Indigenous peoples are conceived as dominant either regionally or nationally, but any suggestion that the internationally recognized category "Indigenous peoples" has no direct equivalent in majoritarian Indigenous countries is fundamentally flawed. It is erroneous to suggest, for example, that the fact that Indigenous people form the majority population in Bolivia[98] makes any claim to their constitutionally recognized right to consultation inconceivable.

In majoritarian Indigenous countries, Indigeneity is essentially a political relationship between the government and the Indigenous people. The government stepped into the shoes of the colonial powers and thus owes the same duties to Indigenous peoples as the Crown in the colonial period. Andrew Canessa has observed that in jurisdictions where Indigeneity is conceived as something shared by most nationals, marginalized Indigenous communities can use the concept to

[97] See Andrew Canessa, "Indigenous Conflict in Bolivia Explored through an African Lens: Towards a Comparative Analysis of Indigeneity" (2018) 60:2 Comparative Studies in Society and History 308 at 320.

[98] It has been stated that Indigenous people account for 60% of Bolivia's population. See World Population Review, "Bolivia Population 2018" (14 June 2018), online: *World Population Review* <http://worldpopulationreview.com/countries/bolivia-population/> [https://perma.cc/FRJ2-CT4G].

lobby for greater resources, rights, or inclusion.[99] Thus, in majoritarian Indigenous countries, the "oppressed and oppressor" theory sees Indigeneity as depending not upon essential differences between the populations themselves but as local subordinated people who seek to access the state's support rather than those who struggle against the state.

The diversity of traditional societies in Ghana and many other African countries makes any blanket non-recognition of Indigeneity hazardous. Admittedly, these organized societies no longer function as they used to. As David Owusu-Ansah has rightly argued,

> contemporary society is grafted onto traditional roots, and although traditional social relationships have often partially transformed to fit the needs of modern life, they continue to endure. The result is that, even those who live primarily in the modern urban setting are still bound to traditional society through the kinship system and are held to the responsibility that such association entails.[100]

Many African governments find it difficult to acknowledge the Indigenous status of certain ethnic groups in their country. Such countries intimately link Indigeneity with the struggle for land rights, self-determination, power sharing, reversing the role of domination, claims for restitution, reparations, and claims for a unified nation. Understandably, many governments dispute the presence of Indigenous peoples within their borders to avoid the volatilities associated with Indigeneity as a concept, but the claim for Indigenous status has not always been associated with this destructive stereotype. Indigeneity could be formed without reference to a sacrosanct boundary between the Indigenous group and the mother country. In the context of Africa and Ghana, a situational approach to the concept of Indigeneity supports the position that the modern struggle

[99] See Canessa, *supra* note 97 at 324.

[100] See David Owusu-Ansah, "The Society and its Environment", in La Verle Berry 3rd ed *Ghana: A Country Study* (Washington: Federal Research Division, Library of Congress, 1995) 59 at 90.

for Indigenous peoples' rights is largely within the boundaries and constitutions of current state-nations.[101]

6.5 Is There Logic in Transferring the Duty to Consult and Accommodate into Ghana's Mining Regime?

> *If one wishes to ascertain the real similarities and differences between the substantive contents of two (or more) legal systems, one must not pay attention to the names and labels of the legal rules, but instead consider the real or potential conflict situations that the rules being studied are intended to regulate. The compared legal rules and institutions must be comparable functionally, i.e. they must be intended to deal with the same problem.*[102]

Comparative lawyers have long debated whether it is possible to transfer legal rules from one jurisdiction to another.[103] In the words of Friedman, a legal transplant involves the "diffusion of rules, codes and practices from one country to another."[104] Legal transplantation entails the adaptation or importation of legal norms and practices among countries. Some scholars are optimistic about the possibility of transferring one rule from one legal system to another.[105] Others contend that a people's law is particular to that people, and accordingly, a legal transplant cannot happen.[106] A detailed discussion of the varying positions regarding the importation of rules among jurisdictions is beyond the scope of this dissertation, but the contributions of legal transplantation

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[101] Christopher Kidd & Justin Kenrick, "Mapping Everyday Practices as Rights of Resistance: Indigenous Peoples in Central Africa" in Sita Venkateswar & Emma Hughes Eds *The Politics of Indigeneity: dialogues and reflections on Indigenous activism* (London: Zed, 2011) 77 at 99.

[102] Michael Bogdan, *Concise Introduction to Comparative Law* (Amsterdam: Europa Law Publishing, 2013) at 48.

[103] See generally Shen Zongling, "Legal Transplant and Comparative Law" (1999) 51:4 RIDC 853.

[104] See Lawrence Friedman, "Some Comments on Cotterrell and Legal Transplant" in David Nelken & Johannes Feest, ed, *Adapting Legal Cultures* (London: Hart Publishing, 2001) 93 at 94.

[105] See Alan Watson, *Legal Transplants: An Approach to Comparative Law*, 2nd ed (Athens, Georgia: University of Georgia Press, 1993) at 21.

[106] See generally Pierre Legrand, "The Impossibility of 'Legal Transplants'" (1997) 4 MJECL 111.

to legal change cannot be overstressed.[107] This section shows that there is significant logic in transferring the duty to consult to Ghana's mining regime.

As the preceding discussions have revealed, the concept of "Indigenous peoples" in Canada is comparable to Ghana's politico-legal system. In addition, Canada and Ghana are both common law countries. Chapters Four and Five have shown that the two share significant similarities such as the split title regime regarding ownership of land and minerals. In so far as Indigenous peoples in Canada and mining communities in Ghana are concerned, the allodial title to land is vested in the traditional state, i.e. in the whole community.[108] It is a group or collective title. In addition, both countries constitutionally recognize and protect the cultural practices of its peoples. But, despite these seemingly similar contexts, one cannot safely assume that there is sufficient ground for the duty to consult to be transferred to Ghana.

The belief that particular cultures are s*ui generis* and that certain rules can only be understood from within sits well with the jurisprudence on the duty to consult. Legal thinkers of

[107] With respect to natural resource development, for example, various aspects of the Canadian framework have been a subject of comparative study for many African countries. See generally Ibironke T Odumosu, "Transferring Alberta's Gas Flaring Reduction Regulatory Framework to Nigeria: Potentials and Limitations" (2007) 44 Alta L Rev 863; Ifueko Sandra Badejo, *Towards Effective Development of Nigeria's Natural Gas: Lessons from Alberta* (LLM Thesis, University of Alberta, 2010); Solomon F Amoateng. *Fiscal Regimes and Managing Oil Revenue for Economic Development: A Comparative Study of Legal Regimes in Ghana, Alberta and Norway* (LLM Thesis, University of Alberta, 2014). In a different but related context, see also Fuentes Hernandez & David Percy, "Prior Consultation in Mining and Hydrocarbon Projects: Comparative Experiences in Colombia and Canada" (2015) 3 Mineral Law Series 2-76.

[108] Perhaps implied in the split title regime is the power of traditional authorities (also called chiefs) in the two countries. In Ghana, for example, Ray has argued that traditional authorities form a parallel power to the state. Ray notes that the "chiefs derive (or claim to derive) their legitimacy and authority from pre-colonial roots while the contemporary Ghana state is a creation of, and a successor to, the imposed colonial state." See Donald I Ray, "Divided Sovereignty – Traditional Authority and the State in Ghana" (1996) 37 J Legal Pluralism & Unofficial L 181 at 181. Ray's observation is not significantly different from the way Indigenous traditional authorities' function in Canada. These overlaps of traditional authority with the state have implications for the state's share of authority, although not necessarily inimical to national development.

the mirror theory argue that a rule does not exist in a solitary state but rather is deeply embedded in a nation's life.[109] Law mirrors society or some aspect of it in a consistent, theoretically specifiable way.[110] Law is inherently shaped and informed by social context. Watson's assertion that "the idea of a close relationship between law and society is a fallacy"[111] is problematic as it fails to recognize unique cultural contexts. The duty to consult, for example, could be argued as the product of divergent and conflicting interests in Canadian society. The duty to consult originated as a response to the continuous neglect of the concerns of Indigenous peoples' regarding the development of natural resources that affected their rights. The duty to consult has achieved its relevance because of the unique identity of Indigenous groups in the Canadian social setting. To a significant extent, the duty to consult is culturally specific and intrinsically linked to the historical experiences of Indigenous peoples' in Canada. This relationship supports Legrand's point: "as an accretion of cultural elements, it is supported by impressive historical and ideological formations."[112] As expected, this argument is consistent with the position that for legal transplant to occur both the entirety of the language and community surrounding the rule, and its invested meaning – which jointly constitute the rule – must be transported from one culture to the receptor country.[113]

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[109] See generally William Ewald, "Comparative Jurisprudence (11): The Logic of Legal Transplants" (1995) 43 Am. J. Comp. L. 489. See also Legrand, *supra* note 106 at 120.

[110] See Roger Cotterrell, "Is There a Logic of Legal Transplants?" in David Nelken & Johannes Feest, ed, *Adapting Legal Cultures* (London: Hart Publishing, 2001) 71–92 at 71.

[111] See Watson, *supra* note 105 at 108.

[112] See Legrand, *supra* note 106 at 116.

[113] *Ibid* at 117.

If the duty to consult "is necessarily an incorporative cultural form,"[114] then it is virtually impossible to transfer the principle to another country. This perception emphasizes Weber's position that students of comparative law "should not aim at finding 'analogies' and 'parallels'… in different legal systems, but… rather, to identify and define the individuality of each development, the characteristics which made the one concludes in a manner so different from that of the other."[115] Sociological and economic, cultural, and political elements are forces that link a particular rule to one jurisdiction.[116] These sociological forces explain how law and institutions operate in certain ways in different legal regimes. It stands to reason that these forces can be an obstacle to legal transplantation. Thus, in the context of the duty to consult, proponents of the mirror theory will argue that the conceptualization and characterization of the duty to consult as embedded in the legal culture of the Canadian constitutional system, or as an instrument designed for particular purposes, present an obstacle to the legal transplantation of the rule. Indeed, the duty to consult is inherently embedded in the socio-cultural milieu, which informs its content and exercise.

But is it true that a concept such as the duty to consult is so closely linked to the Canadian environment that it could hardly ever change its habitat? Not surprisingly, proponents of the mirror theory will insist that any study that requires community participation to the high standard of Indigenous participation under the duty to consult risks rejection. The question then is whether

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[114] See Legrand, *supra* note 106 at 116.

[115] See Max Weber, *The Agrarian Sociology of Ancient Civilizations, transl. by R.I. Frank* (NLB, 1976) at 385.

[116] See Robert Shacideton, *Montesquieu; A Critical Biography* (London: Oxford University Press, 1961) p 316 cited in O Kahn-Freund, "On Uses and Misuses of Comparative Law" (1974) 37 Mod L Rev 1 at 6 - 7.

Ghana can make a successful legal transfer of the concept of the duty to consult to its mining regime? How receptive is Ghana's legal regime to the duty to consult?

It is a fundamental mistake to suggest that the sociological character of a rule *ipso facto* makes it impossible for another jurisdiction to borrow such law into its legal system. To use the words of David Nelken, any "claim that sociologists of law are unaware that law travels can hardly be taken seriously."[117] Many scholars may disagree with Watson's characterization of law, but it is difficult to contest his assertion that law changes as a result of transplant and borrowing of rules and structures from elsewhere.[118] It is not uncommon for foreign patterns of law to be used to promote domestic changes that the foreign law is designed either to express or to produce.[119] Looking through the lens of foreign law enables us to better understand our own.

While a detailed review of the influence of English-derived law in Ghana is unnecessary to the scope of these arguments, the fact that much of the applicable legislation in the country had been received from the United Kingdom cannot be contested. The development of Ghana's own law has relied on the key involvement of people who studied in other common law jurisdictions. The Ghana's *Companies Code*, 1963, was inspired by the advice of Professor L. C. B. Gower, then of the London School of Economics. One commentator describes the Code as a good example of codification of company law based on English law.[120] The design of Ghana's Petroleum Development Fund to manage petroleum revenue is generally perceived to be an emulation of

[117] See David Nelken, "Towards a Sociology of Legal Culture" in David Nelken & Johannes Feest, ed, *Adapting Legal Cultures* (Oxford: Hart Publishing, 2001) 7 – 54 at 8.

[118] See generally Alan Watson, "Comparative Law and Legal Change" (1978) 37 Camb LJ 313.

[119] See generally Kahn-Freund, *supra* note 116.

[120] See Paul L Davies, *Gower's principles of modern company law*, 6th ed (London: Sweet & Maxwell, 1997) at 8.

Norway's Government Pension Fund-Global and Government Pension Fund.[121] What is borrowed in this regard is not 'a meaningless form of words,' as some scholars want us to understand, but the underlying principle. Legal rules, in addition to being part of the social structure, also operate on the level of ideas.[122] If this observation is accurate, the ultimate question for legal transplant is whether there are lessons that can be learned from the existing rule.

Borrowing other people's law is a just method of speeding up the process of finding legal solutions to similar problems.[123] For example, there are likely to be considerable variations when local people seek participation in natural resources development projects undertaken in their locality. However, it is evident from the discussions in Chapters Four and Five that most communities affected by natural resources development have very comparable priorities. To quote from Kingsbury,

> As a practical matter, in many situations local 'communities' are in much the same position vis-à-vis the state or vis-a-vis development projects whether or not these communities or portions of them might be described as 'Indigenous.' In practice, there will often be no sharp line between policies applicable wherever Indigenous peoples are involved and policies applicable in cases of similarly situated 'communities.'[124]

As with Indigenous communities in Canada, those marginalized communities in Ghana living around mining areas bear the cost of lost farmland, soil and water contamination, air pollution, deforestation, forced relocation, physical damage to dwellings, and an unsafe living

[121] See generally Heikki Hohnas & Joe Oteng-Adjei, "Breaking the Mineral and Fuel Resource Curse in Ghana" in J Brian Atwood, ed, *Development Co-operation Report 2012: Lessons in Linking Sustainability and Development* (OECD, 2012) 123 at 123-131.

[122] See Watson 1998, *supra* note 118 at 315.

[123] See Nelken, *supra* note 117 at 13.

[124] See Kingsbury, *supra* note 5 at 451.

environment.[125] The exploitation of minerals can disturb a long-established lifestyle of both Indigenous groups in Canada and mining communities in Ghana. Even if the duty to consult cannot wholly be transferred to Ghana, the country can learn from the experience and jurisprudence on the implementation of the concept to benefit communities affected by mining operations.

For many years, Indigenous communities in Canada have struggled to persuade the government and corporations to give due consideration to sacred sites affected by natural resource development. Mining communities in Ghana are also currently experiencing a similar unfortunate neglect by the government and project proponents to respect and reasonably protect their sacred sites and cultural resources. There is no significant difference between the claim that a proposed resort would desecrate a sacred area of paramount spiritual importance to the Ktunaxa Nation in Canada[126] and the assertion that mining operations will cause spiritual destruction to the sacred groves of the Tanchara community in the Upper West Region of Ghana. Nor can one argue that the destruction of sacred streams, which housed tutelary deities and spirits in the Sansu mining

[125] See: Open Society Institute of Southern Africa et al, "Breaking the Curse: How Transparent Taxation and Fair Taxes Can Turn Africa's Mineral Wealth into Development" (March 2009), online: *Sothern Africa Resource Watch* < http://www.documents.twnafrica.org/breaking-the-curse-march2009.pdf > [https://perma.cc/9YPX-SXKF] at 17. In its 2011 Factsheets on the Quality of Life of First Nations, the Assembly of First Nations reported that one in four children in First Nation communities lives in poverty. That is almost double the national average. See Assembly of First Nations, "Quality of Life of First Nations" (June 2011) online: *Assembly of First Nations* <www.afn.ca/uploads/files/factsheets/quality_of_life_final_ fe.pdf> [https://perma.cc/VU3X-46Q6]. In 2016, Statistics Canada reported that one in five Aboriginal people live in deplorable homes that were unfit for human habitation as they required major repairs. These facts represent 19.4% of the people who reported an Aboriginal identity on the 2016 Census of Population, compared to 6.0% of the non-Aboriginal population who reported living in a dwelling in need of major repairs. Statistics Canada, "The Housing Conditions of Aboriginal People in Canada" (25 October 2017) online: *Statistics Canada* < http://www12.statcan.gc.ca/census-recensement/2016/as-sa/98-200-x/2016021/98-200-x2016021-eng.cfm > [https://perma.cc/R4XX-XVRZ]. These conditions further marginalize Indigenous peoples and reinforce the hegemonic subordination of their cultural, political, and economic ways of life.

[126] See generally *Ktunaxa Nation Council v British Columbia (Minister of Forests, Lands and Natural Resource Operations)*, 2014 BCSC 568.

community in Ghana, for the purposes of mining is less worthy of attention compared to the use of the ancestral burial ground of the Penelakut First Nations as a sewage treatment site.[127] The duty to consult ensures that adequate engagements are been undertaken with Indigenous communities and that the implementation of government sanctioned projects does not negatively affect peoples' livelihoods. In contrast to Ghana, the current regime of Indigenous consultation in Canada under the duty to consult has translated into actual benefits for the protection of Indigenous communities.

There is room for debate on the best process for ensuring that the local interests of mining communities in Ghana are considered in relation to natural resource development projects. The importation of a concept such as the duty to consult has real potential to benefit mining communities which, as noted, share priorities similar to those of Indigenous communities in Canada. Legal transfers are invited or adopted because the experiences that happened in one legal system are expected to be realized in the future in a different legal system.[128] The problem-solving approach is an important means to find answers to a common need or problem in multiple legal systems. In the context of Ghana, the development of the duty to consult is consistent with the country's obligations under various international and regional law instruments to adopt measures to ensure the free prior and informed consent (FPIC) of local communities affected in development

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[127] See Generally *Penelakut First Nations Elders v British Columbia (Regional Waste Manager)*, 2004 CarswellBC 197. In *Ukrainian Greek Orthodox Church v Independent Bnay Abraham Sick Benefit & Free Loan Assn*, the Manitoba Court of Appeal quoted with approval the doctrine laid down by Dr Lushington in *Rector and Church-wardens of St. John, Walbrook v London Parishioners* (1852) 2 Rob Ecc 515, 518, 163 ER 1398, that ground once consecrated for sacred purposes cannot by any authority known to the law, except an Act of Parliament, be divested of its sacred character so as to become applicable to secular purposes:" See *Ukrainian Greek Orthodox Church v Independent Bnay Abraham Sick Benefit & Free Loan Assn*, 1959 CarswellMan 38 at para 84.

[128] See David Nelken, "Comparatists and transferability" in Pierre Legrand & Roderick Munday, eds, *Comparative Legal Studies: Traditions and Transitions* (Cambridge: Cambridge University Press, 2003) 437 at 454. See also George Rodrigo Bandeira Galindo, "Legal Transplants between Time and Space" in Thomas Duve, ed, *Entanglements in Legal History: Conceptual Approaches* (Frankfurt am Main: Max Planck Institute for European Legal History, 2014) 129 – 148 at 133.

decision-making. The spread of standards, regulations, or "soft law" are some of the possible ways through which legal adaptation can take place. The discussions in Chapter Three clearly show that increasing attention has been directed at the right to free, prior and informed consent as the panacea to empower local communities, but not much progress has been made so far on a concrete localized form of FPIC in Ghana. Chapter Four shows that the duty to consult provides valuable learning opportunities.

One study has established that in Africa, although many states are obliged to respect FPIC under international law, no case could be found where FPIC was implemented.[129] The implementation of FPIC is still in its infancy. The duty to consult can shape the application of the concept of FPIC in the future, and Ghana's mining regime could adapt to some of the ideas inherent in the duty to consult. Ghana, like many African countries, lacks mechanisms to regulate and implement meaningful consultations with project-affected communities. Canada is a well-known leader in natural resource exploitation and management with a consultation regime that has attracted a significant amount of attention. As an emerging player in this area, Ghana can learn from the merits of the duty to consult in advancing the interests of traditionally marginalized communities.

The duty to consult, as explained earlier, does not require consent, but the absence of consent is not an obstacle to the successful transplantation of the concept. In the case of Ghana, the ECOWAS Directive, for example, allows the Member States to adopt such methods and structures to implement the Directive. As argued in the case of the UNDRIP in this dissertation and its application in Canada, Ghana's obligation under the FPIC concept does not provide mining

[129] See generally R Roesch, "The Story of a Legal Transplant: The Right to Free, Prior and Informed Consent in Sub- Saharan Africa" (2016) 16 African Human Rights Law Journal 505-531 at 514.

affected communities the absolute right to give or withhold consent. Consent under FPIC does not mean mining communities have the right to veto these projects. The duty to consult model illustrates how Ghana can implement its obligation within the treatment of internal law.

6.6 Summary

Indigenous can be a problematic term because it is not always clear which groups should be included within its meaning. The concept of Indigeneity requires a definition that is "sufficiently flexible to accommodate a range of justifications."[130] Looking at Indigeneity in terms of different justifications makes it possible for many communities to cast themselves as 'Indigenous.' This chapter has conceptualized Indigeneity and its relevance and applicability to communities affected by natural resource development in Ghana. The examination confirms that many mining communities in Ghana satisfy the principle of first occupancy and prior occupancy that many Indigenous groups have invoked to substantiate their Indigenous identify. The chapter also justifies some determinant yardsticks of Indigenousness in favour of situational approaches to traditionally marginalized mining communities in Ghana regarding their prior occupation of the land. The chapter firmly disposes the major objection that the duty to consult cannot apply because there are no "Indigenous people" in Ghana.

Studying Indigenous peoples in Canada and traditionally marginalized mining communities in Ghana together might seem to be an unusual endeavor given the apparent difference in the array of rights usually enjoyed by recognized Indigenous groups. Yet the chapter shows that placing these two case study in conversation with one another is not a comparison of apples to oranges. A number of common characteristics can be observed between Indigenous

[130] See Kingsbury, *supra* note 5 at 414.

communities in Canada and local mining communities in Ghana, including first occupancy, proprietary claims to land, cultural background, vulnerability, and marginalization. The shared characteristic between the Indigenous groups in Canada and traditionally marginalized mining communities in Ghana is important for the analysis of the legal rights of the latter to participate in the development of natural resources that affects their land. A legal right to participation is an important prerequisite for communities which have traditionally been marginalized by the exploitation of natural resources to benefit from resource development.

CHAPTER SEVEN: CONCLUSION

7.1 In Search for a Meaningful Participation Framework

Mineral exploration can have significant, irreversible, adverse impacts on the land and environment of mining communities. Communities in Ghana living in mining areas bear the environmental, health, and socio-economic costs of mining activities, but they seldom enjoy the gains from the mining sector. Compared to the benefits that mineral extraction companies and the government derive from mining activities, little attention is devoted to mitigating the impacts of mineral exploitation on affected communities. Local communities see mineral extraction companies making what appear to be substantial financial profit, but they equally note these companies' failures to do even the bare minimum to improve lives in the affected communities. Mining communities in Ghana have received little benefit from resource development in terms of socio-economic development and improved standard of living. Given the apparent dissatisfaction of communities with the current approach to resource exploitation in Ghana, real change should be advanced—legally and practically—to ensure mining communities derive maximum benefit from resource development.

Several empirical studies have concluded that Ghana's mining regime has not contributed to the positive development of mining communities and the broader process of ensuring that mining communities derive sustainable benefits from resource development.[1] The question of how Ghana can best ensure that the local interests of mining communities are sufficiently considered

[1] See generally Obed Adonteng-Kissi, "Poverty and Mine's Compensation Package: Experiences of Local Farmers in Prestea Mining Community" (2017) 52 Resource Policy 226; Elaine Tweneboah Lawson & Gloria Bentil, "Shifting Sands: Changes in Community Perceptions of Mining in Ghana" (2014) 16 Environ Dev Sustain 217 and Emmanuel Ato Aubynn, *Community Perceptions of Mining: an Experience from Western Ghana* (Master of Science Thesis, University of Alberta, 2003).

in relation to natural resource development projects has received relatively little scholarly and policy engagement. This dissertation addresses this gap in the literature by exploring how the government of Ghana can successfully balance its mineral rights with the land rights of mining communities for the communities affected by mining projects to benefit from the development of mineral resources.

Scholars on natural resource development such as Otto[2], Botchway[3], Oshionebo[4], and Adomako-Kwakye[5] have endeavored to propose solutions to the problems mining communities face in resource development. A dominant theme that pervades the literature (as well as the wider international law instruments on "new governance" approaches to natural resource development) is that community participation holds a clear advantage over the conventional, top-down models for the exploitation and management of natural resources. One approach to increase the benefits of mineral extraction for affected communities is to enhance their participation in decision-making processes involving mineral development. Community participation models are firmly embedded in the literature, but the search for an appropriate framework has had little or no

[2] See generally James M Otto, *Mining Community Development Agreements: Source Book (Vol. 4): Community Development Agreement Model Regulations and Example Guidelines* (Washington, DC: World Bank, 2010) and James M Otto, "How Do We Legislate for Improved Community Development?" in Tony Addison & Alan Roe, *Extractive Industries: The Management of Resources as a Driver of Sustainable Development* (Oxford: Oxford University Press, 2018).

[3] See generally Francis N Botchway, "Land Ownership and Responsibility for the Mining Environment in Ghana" (1998) 38 Nat Resources J 509 and Francis N Botchway, *Natural resource investment and Africa's Development* (Cheltenham, UK: Edward Elgar, 2011).

[4] See generally Evaristus Oshionebo, *Regulating Transnational Corporation in Domestic and International Regimes: An African Case Study* (Toronto: University of Toronto Press, 2009) and Evaristus Oshionebo, "Community Development Agreements as Tools for Local Participation in Natural Resource Projects in Africa" in Markus Krajewski, ed., *Human Rights in the Extractive Industries: Transparency, Participation, Resistance* (Cham, Switzerland: Springer, 2019) 77 – 109.

[5] Chris Adomako-Kwakye, "Neglect of Mining Areas in Ghana: The Case for Equitable Distribution of Resource Revenue" (2018) Commonwealth Law Bulletin 1.

positive impact on the lives of the communities. Few guidelines exist for the practical achievement of the benefits of participation. The main problem of the existing literature is that it tends to explore meaningful participation via the existing administrative procedures without any attempt to alter the prevailing power dynamics between the government, companies, and communities.

In a significant departure from the existing literature, this dissertation foregrounds the importance of power dynamics. I have argued that the extent to which communities can derive greater benefits from participation is contingent upon the power relations between the community and decision-makers. By comparatively examining Canada's jurisprudence on the duty to consult Indigenous peoples in natural resource development and how local communities in Ghana participate in mineral development, I have shown that the duty to consult and accommodate provides the best approximate model of what a meaningful participation framework should be to benefit affected communities. The duty to consult and accommodate significantly alters the power dynamics in mineral exploitation and enhances the capacity of mining communities to derive significant benefits from the exploitation of minerals. This dissertation has highlighted a number of basic features of that meaningful participation framework.

First, the participatory regime must guarantee an enforceable right to participate, thereby discouraging non-compliance and ensuring that the concerns of project-affected communities are considered in the final decision. An enforceable right to participate is relevant for the court to provide structural encouragement to meaningful participation in some circumstances. Second, the regime must ensure that the affected community receives all the necessary information to make an informed decision about a proposed project. In order for the affected community to respond to and challenge any decisions that they do not agree with or which appear disadvantageous, they must be included early in the process, when it is still possible to influence a decision. Finally,

participation should provide financial and economic benefits to mining communities where appropriate. Meaningful participation should result in the institutionalization of programs that improve the circumstances of the affected communities.

These basic features of a meaningful participation framework are consistent with international law principles on participation. They are also reflected in the practical experience of the duty to consult and accommodate as institutionalized and practiced in Canada, the comparator I used in this dissertation. Before the Supreme Court of Canada's institutionalization of a constitutional duty to consult, the common law offered little or no protection for Indigenous communities. The powers of these communities when it came to mineral exploration were concomitantly weak. Their position was akin to the position of mining communities currently in Ghana. The institutionalization of a constitutional duty to consult addressed and indeed altered the power imbalances. The legal recognition of the right to consultation and participation means Indigenous communities can enforce the Crown's duty in the event of a breach. This has resulted in meaningful socio-economic benefits for Indigenous groups.

The manifest impact of the institutionalization of a constitutional duty to consult on Indigenous communities in Canada supports the literature and the international law position that the importance and value of community participation in resource development lie in the alteration of the power relations between the government, companies and the communities concerned. The duty to consult and accommodate highlights how legal reform of the power relationship between the government, companies and communities ensures the protection of Indigenous rights and extends socio-economic benefits to affected communities.

In contrast to the Canadian situation, this dissertation has shown that Ghanaian law

currently lacks the basic features of a meaningful participation framework. The law currently does not provide a legal right to participate in decision-making. Various administrative procedures exist. However, as this dissertation demonstrates, they do very little to alter or affect the prevailing power dynamics and to advance the interests of mining communities. There are no effective avenues for mining communities to participate in mineral development. The participation regime does not enshrine meaningful community participation, nor is the regime arranged to give communities a genuine opportunity to influence outcomes. Communities have no appropriate channel to identify and access the information needed to form a basis for decision-making. There are no mechanisms to improve the ability of communities to utilize information gathered to make decisions, which further hinders their power to test the evidence of project proponents.

Given the excessive discretionary powers of the government in decision-making, it is difficult to see how the interests and concerns of affected communities can influence project outcomes. In terms of public participation, the law usually provides little on how engagement must occur and how it should inform decisions. Communities have no real decision-making power to ensure their inputs and concerns are reflected in the outcome. Decision-makers are obliged only to seek advice; they are not obliged to follow it. There is no robust oversight through appeal and review mechanisms. Ghana's participation framework is simply one of allowing the community to let off steam before the government proceeds to do whatever it has intended all along.

This dissertation has argued that Ghana's participation regime lacks the essential elements that enable participation for the benefit of mining communities. The existing administrative procedures are inadequate and should be replaced with a framework that is attentive to the power dynamics between the government, companies, and communities. I have argued that the duty to consult and accommodate, when appropriately adapted to the Ghanaian context, could provide a

promising framework for integrating the interests and concerns of Ghanaian mining communities into the development and management of mining projects, one that the current system and its power dynamics can never achieve. As Leslie A. Stein has accurately observed in a related but different context, if it is not legally mandated, full participation is rare because decision-makers have difficulty sharing power and may not have or want to commit the resources.[6]

If there is a true desire for meaningful participation, Ghana could implement the duty to consult and accommodate through legislation that creates an enforceable right for community consultation and/or participation in natural resource decision making. In the absence of legislation, the Supreme Court of Ghana could recognize a duty to consult and accommodate as arising from the customary nature of land ownership. The Supreme Court of Ghana can recognize the duty to consult through a purposive interpretation of mining communities' land rights and Ghana's international law obligations.

7.2 The Contributions of this Dissertation

This dissertation advances the existing literature on meaningful participation. First, it builds on the theory regarding the struggle for redistribution of power by highlighting how the existence of a legal right to participation or lack thereof affects meaningful community participation in natural resource exploration. In particular, I have drawn on the principles of judicial recognition and enforcement of the duty to consult and accommodate to illustrate that the balance of power in the relationship between the government, companies, and communities can provide useful explanatory factors not present in the discussion about meaningful participation.

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[6] See Leslie A Stein, *Comparative Urban Land Use Planning: Best Practice* (The University of Sydney, NSW: Sydney University Press, 2017) at 101 (on the different models for implementation of full participation rights).

Surprisingly, most of the natural resource literature on community participation does not examine power relations from the perspective of a substantive right to participate. Extant studies have mainly focused on developing preconditions for participatory governance, including education, training, and awareness building on community rights to strengthen capacity through which communities can engage and participate. In this case, a reform of the power relations might offer these entry points to community members so that they can obtain the qualifications necessary for informed decision-making. Chapter Two of this dissertation has shown that capacity building and training are of greater relevance to the participation process but rarely lead to substantial alterations in the distribution of power. This is because attempts to empower marginalized communities to be involved in decision-making without also challenging the broader structural conditions of that participation are likely to fail. The institutionalization of capacity building measures and training may empower the community and raise awareness of local need, but their impact on decision making is likely to be minimal if the existing power dynamics remain unaltered. As such, this dissertation supports Gaventa's position that the transformative potential of these new spaces for participatory governance "must be analyzed in relationship to the larger power fields which surround and imbue them."[7]

Second, this dissertation contributes to the current debate on shared decision-making and control in natural resources management by introducing a 'shared decision-making' framework that gives communities the power to ensure that the government's right to use and transform natural resources does not adversely affect the communities' right to use their land. In recent years, there has also been a growing interest in forms of participation that promote collective, shared

[7] See John Gaventa, "Towards Participatory Governance: Assessing the Transformative Possibilities" in Giles Mohan & Samuel Hickey eds., *Participation: From Tyranny to Transformation: Exploring New Approaches to Participation in Development* (London: Zed Books. 2004) 25 at 34.

decision-making power and integrated resource management between the government and communities.[8] This deeper level of participation provides greater autonomy for those who are affected by resource development to act and get things done in their way.[9] Advocates for this model of power reform demand genuinely cooperative decision-making power, if not outright control over resources.[10] They argue that marginalized stakeholders can participate in new governance arrangements like co-management and alter decision-making. As a result, a reform of the power relations is associated with increased mobilization of stakeholder ownership of policies and control of projects. The design and practice of co-management of resources in the 3 Northern Territories of Canada, for example, offers insight into the new governance trends to incorporate greater community participation.[11] Co-management and shared decision-making are products of land claim agreements and negotiations that have established Indigenous ownership and the right to participate in administrative decision-making. They have led to the establishment of co-

[8] See generally Grant Murray et al, "Devolution, Coordination, and Community-Based Natural Resource Management in Ghana's Community Resource Management Areas" (2019) 38:4 African Geographical Review 296 (examining the benefits and challenges of community-based natural resource management as an effective way to involve local communities in the management of natural resources).

[9] See generally Maureen G Reed, "Governance of Resources in the Hinterland: The Struggle for Local Autonomy and Control" (1993) 24: 3 Geoforum 243 (on the ability to retain a co-management arrangement for resource management and the suggestion that the extent to which a co-management approach can meet substantive goals of resource productivity and economic benefits for communities remains unclear).

[10] See generally Jane Addison et al, "The Ability of Community Based Natural Resource Management to Contribute to Development as Freedom and the Role of Access" (2019) 120 World Development 91 (showing that community-based natural resource management or co-management structures development is primarily conceptualized as 'control, leadership, empowerment and independence').

[11] For discussion of resource governance approach in Canada's Indigenous communities in the sense of actual co-management of natural resources and power-sharing, see generally Geneviève Motard, "Personal legislative powers in hunting, fishing and trapping activities in land claim agreements: the limits of co-management" (2016) 61 McGill LJ 907; Sari Graben, "Living in Perfect Harmony: Harmonizing Sub-Artic Co-Management through Judicial Review" (2011) 49:2 Osgoode Hall LJ 199. In a related context, see generally Jeremy Baker, "The Waikato-Tainui Settlement Act: A New High-Water Mark for Natural Resources Co-Management" (2013) 24:1 Colorado Natural Resources, Energy & Environmental L Rev 163.

management boards that now govern resource use in particular regions of the Northern Territories.

This represents a significant departure from the conventional nature of participation in natural resource decision-making. However, shared decision-making and community resource management control may only be appropriate in situations where a community possesses what Thomas Sikor et al term as "control rights."[12] Communities that have control property rights over land and resources can determine the scope of direct and indirect use of the rights and the right to transform the resource. This is significantly different from communities that have "use rights" who can only obtain direct and indirect benefits associated with the resource.

Understanding the property rights regime is crucial for the participation model that should be adopted. This dissertation has demonstrated that the question of power relations cannot be ignored in the debate for meaningful participation, but to suggest that redistribution of power should only reflect the control-shared-decision making model may not be appropriate given the different rights regimes. In terms of Thomas Sikor et al's concept of rights regimes and how it applies to Ghana, the introduction of the duty to consult and accommodate provides an appropriate framework for the coexistence of dual property rights: the government "control right" to the natural resources and the communities "control right" to land. The legal enforcement of participation alters the power relations and provides greater benefits to communities, but does not exclude the potential use of community-based natural resource management schemes. But in a jurisdiction like Ghana where such a system is highly unlikely, a concept like the duty to consult and accommodate can produce as much acceptance as may be wished for.

[12] See generally Thomas Sikor et al, "Property Rights Regimes and Natural Resources: A Conceptual Analysis Revisited" (2017) 93 World Development 337 (on how property rights regimes affect natural resource governance arrangements).

Third, this dissertation initiates conversation around Ghana's international obligation to ensure free prior informed consent (FPIC) of mining communities in resource development and prompt further research on the implementation of FPIC in Ghana. Ghana has participated in major international and regional/sub-regional arrangements that give mining communities a substantive right to consultation and/or participation. Evolving international law principles towards the FPIC regime offers important practical lessons for Ghana. The duty to consult provides a legal lens through which Ghana can utilize and implement FPIC. At first glance, it may appear to be a formidable risk to implement an FPIC regime, but the economic cost of resource-related conflict may be even more daunting. I have argued that the concept of FPIC should not be interpreted as a veto against government decision-making.

The increased interest in the concept of FPIC in Africa and elsewhere suggests that the formal applicability of the concept in Ghana is worth exploring. There are a number of challenges to implementing FPIC in Ghana, including the lack of an operational framework or guideline, limited institutional capacity, inadequate resources, and lack of political will. However, there are certainly practical means that the government can consider for operationalizing FPIC. By studying the synergies between the duty to consult and accommodate and FPIC, this dissertation has shown that a participation regime as set out in the duty to consult and accommodate provides an important starting point to better understand how Ghana could implement FPIC obligation.

Fourth, this dissertation also develops an argument for the recognition of mining communities in Ghana as Indigenous peoples using comparative insights from Canada. In doing this, I have demonstrated that the genesis of Indigeneity in Canada is not significantly different from the experiences of communities in Ghana. Ghanaian mining communities have interests and characteristics that are similar to Indigenous communities in Canada. Some commentators have

suggested that the concept of Indigenous peoples seems to be aimed at people needing special protection from their national governments or the "dominant society."[13] However, this dissertation has argued that this understanding of the concept fails to consider other contextual and flexible approaches to the concept that allow many marginalized groups to cast themselves as Indigenous. This dissertation has undertaken a comprehensive analysis of the concept of Indigeneity in international law and the approach to recognizing Indigenous peoples in Canada. As well, it has examined arguments around the use of the concept in Africa and explored the applicability of the concept to Ghanaian mining communities. The dissertation's contribution exploits this interest and builds on the existing scholarship that advocates for a contextual approach to the concept of Indigeneity to accommodate variation in different societies.

Although this dissertation supports the recognition of many Ghanaian mining communities as Indigenous peoples, it does not advocate for formal substantive recognition of those communities as "Indigenous peoples." Rather, the dissertation views the underlying issues and interests of Indigenous peoples in Canada, and their members are not dissimilar to many other mining communities in Ghana. The dissertation has shown that issues of economic opportunity and fairness, health and safety, and protection of the environment and communal land are important concerns common to the Indigenous peoples in Canada and mining communities in Ghana. However, even if one accepts the different justifications or arguments that make it possible for many communities in Ghana to cast themselves as 'Indigenous,' there may be lingering questions about its viability in practice. How do the concept of Indigenous people's sovereignty and self-determination persist alongside Ghana's settled constitutional and political order? How

[13]See ILO C169, *supra* note one.

can the government ensure that the establishment of a specific category of rights holders does not create tension among ethnic groups and instability between tribes in the country? This undoubtedly constitutes a major challenge to the formal recognition of mining communities in Ghana as Indigenous peoples that requires further research.

7.3 Implementing a Meaningful Participation Framework in Ghana

A major challenge in implementing the duty to consult in Ghana, whether through judicial recognition or legislation, is the concern against unsettling an existing order relating to resource development and management, and the role a concept such as the duty to consult and accommodate plays in privileging of some groups over others. Minogue and Carino have warned that in proposing regulatory frameworks, one must be careful with the "strong tendency to transfer to Third World countries 'best practice' models of regulation rooted in the different economic, social and political conditions of developed countries."[14] As I have mentioned, scholars and policymakers have attempted to develop models of participation to ensure that mining communities benefit from resource development, but successive governments have shown little or no discernable intention to implement the recommendations. One can speculate that the reason why implementation has been hindered is to prevent a "destruction" of the existing order resulting from the inability to identify factors that make success more likely.

For example, Adomako-Kwakye proposes that the government must reserve part of mining revenue for a national fund for the development of the mining areas. However, the author does not examine the applicability of the fund to address the different types of problems faced by mining

[14] See Martin Minogue & Ledivina Carino, "Introduction: Regulatory Governance in Developing Countries" in Martin Minogue & Ledivina Carino eds, *Regulatory Governance in Developing Countries* (Cheltenham, UK; Northampton, Mass: Edward Elgar, 2006) 3 at 6. See also Ibironke T Odumosu-Ayanu, "Multi-Actor Contracts, Competing Goals and Regulation of Foreign Investment" (2014) 65 UNBLJ 269 at 297.

communities or the potential success of the fund once implemented. Questions remain regarding which problems are appropriate for resolution through a model. What policy instruments are available to implement the proposed solutions, and how likely are the solutions to be superior to the existing arrangement? Although the literature often confronts these questions at the margins, for the most part, it does not critically reflect upon them.[15] These topics require further exploration before such proposals receive endorsement from public officials and natural resource agencies. By examining only success stories from the community perspective of the issue, advocates deprive themselves of potential insight into the difficult process of effecting a regime change.

Many commentators agree that if the resources of the state are wrongly distributed, there must be a good-hearted and pragmatic way that a decent society ought to struggle to make things more just.[16] But a concept that provides a section of the society with a practical veto right over development could not be reconciled with existing Ghanaian law. Writers and politicians may see the duty to consult as a more radical approach to address maldistribution that will result in fundamentally overturning existing arrangements. Moving from the status quo of government decision-making on natural resource projects to a regime that sees mining communities as equal partners will be a monumental shift with attendant hurdles and risks. The Canadian experience and jurisprudence on the duty to consult and accommodate show that it has far-reaching effects on resource exploration and development. Rightly so, politicians will avoid the concept of the duty to consult and accommodate in order not to constitute a negotiating polity between the government and project proponents.

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[15] In a related but different context, see generally William J Wailand, "Evolving Strategies for Twenty-First Century Natural Resource Problems" (2006) 81:4 NYUL Rev 1518.

[16] See Jeremy Waldron, "Indigeneity - First Peoples and Last Occupancy" (2003) 1 New Zeal & J of Public & Intl L 55 at 61.

Such concerns may seem intuitive. Nonetheless, they are counterfactual characterization as they ignore the many possibilities of just reconciliation and the space for creating a positive relationship between government, communities, and project proponents. Any argument that the legal transplant of the duty to consult and accommodate demand a reconstitutionalization of the existing legal order misses the point of what the importation of the duty is meant to achieve. The duty to consult provides forms of accommodation or protection for mining communities in Ghana that can be justified on grounds of their positional difference. These positional differences, including the destruction of their lands and excessive curtailment of their land-use rights, have been the primary cause of mining community conflicts in the country.

The broad message of empirical research on mining-related conflict suggests that besides disappointment with the overall results of mining operations, 94% of mining conflicts in Ghana are related to land-use issues.[17] Loss of agricultural land and the environmental effects of mining have been major sources of resource conflict in Ghana. Meaningful community participation could reduce conflict and foster more amicable relationships between investors, government, and project-affected communities. Given the conflict that sometimes exists between mining companies and communities, the government should consider a regime that sees affected communities as legitimate partners in the industry. Some obvious challenges surround the implementation of the duty to consult. However, the Supreme Court of Canada's jurisprudence and other provincial consultation policies provide greater guidance on how Ghana can effectively implement such a regime. The duty to consult and accommodate could provide a win-win situation for the government, companies, and affected communities.

[17] See generally Obed Adonteng-Kissi & Barbara Adonteng-Kissi, "Living with Conflicts in Ghana's Prestea Mining Area: Is Community Engagement the Answer?" (2017) 16:4 Journal of Sustainable Mining 196.

Government policy on resource development should be driven by the overall public interest and the need to exploit resources for the economic development of the country. Legitimate though these are, a regime that pays little or no attention to the concerns and interests of communities, which often feel the immediate tangible negative effects of mining, cannot be in the national interests. Ghana's current participation regime has serious drawbacks, which make it unreliable and ineffective in avoiding conflict and extending sustainable benefits to mining communities.

This dissertation makes a number of recommendations for implementing a meaningful framework of participation of mining communities in mineral exploitation in Ghana. First, I recommend that Ghana enacts legislation to implement and give effect to the regional and international law instruments that purport to guarantee the rights of mining communities to participate meaningfully in resource activities on their land. These include the *African Convention on the Conservation of Nature and Natural Resources*, the *Resolution on a Human Rights-Based Approach to Natural Resources Governance* and the *ECOWAS Directive on the Harmonisation of Guiding Principles and Policies in the Mining Sector* (the Directive). Regrettably, Ghana has done little to implement any of these instruments. The extent to which Ghana has implemented its international obligations leaves a lot to be desired.

As shown in Chapter Three, although it remains unsettled whether mining communities can claim the right to participation and consultation under some of these international instruments, those ratified by Ghana bind it at the international level. This dissertation argues that Ghana is in breach of a binding obligation to implement these international agreements into domestic law. Ghana must take advantage of all the opportunities that are offered under the available instruments and avail herself of the necessary mechanisms in the instruments to address some of the concerns of project-affected communities. For example, the implementation of Article 16(3) of the Directive

would guarantee that mining communities have free prior informed consent (in the limited sense as defined in this dissertation) before the exploration and development of minerals that affect their land-use rights. Also, mining communities would be able to assert their rights to active participation under Article XVII of the *African Convention on the Conservation of Nature and Natural Resources* and to resort to the court to pronounce on the justiciability of these asserted rights.

Second, this dissertation recommends that Ghana should accede to the Aarhus Convention. Although the Convention's primary focus is on European countries, it opens the door for accession by non-European states. The Convention embeds participatory democracy, which should be pursued globally. The Convention states rules on what constitutes participation for the benefit of project-affected communities. It provides a good model to promote the three 'access rights' – access to information, participation in decision-making, and access to justice – as an effective means of ensuring meaningful participation by project-affected communities. It would be useful for Ghana to adopt the Aarhus Convention to provide minimum structures for the participation of mining communities in mineral development. While the principles enshrined in the Convention need to be modified to fit the Ghanaian context, it provides a conceptual starting point for thinking about what is involved in participation that benefits the community concerned.

Third, legislation must be enacted to enshrine meaningful community participation at all levels of assessment and make information transparent and accessible to communities in mining areas. The public-hearing regime under the *Environmental Impact Assessment Regulation* must be expanded to ensure that all information is made available in a method that is suitable for use in a community. The government should put in place regulations to ensure that affected communities

understand and appreciate the environmental consequences of a mineral development proposal and the measures to mitigate or resolve any negative impact.

Additionally, I also recommend that the government develop a program to provide financial and other assistance to project-affected communities so that they can participate meaningfully in the engagement and delineate their concerns. This can be done according to a standard of reasonableness in consideration of whether the community will be able to participate in the decision-making process without external support. An independent funding review committee should be established under the environmental impact assessment regime to administer this funding.

Moreover, there is a need to ensure all proposals and mitigation measures contained in a scoping report are binding and enforceable so that proponents can be held accountable. The scoping report documents interested parties' concerns about the scope of the proposed course of action as well as identifying significant issues, resources, and suggested alternatives. There are problems with how the scoping reporting currently works. Regulation 11 of the EIA Regulations requires a project proponent to include mitigation measures as a project condition, including how a proponent proposes to address key negative impacts of a project on the affected community. The scoping report is submitted to the Environmental Protection Agency (EPA) for consideration. As per the EIA Regulation, the EPA will determine whether the scoping report is acceptable, but there is nothing in the Act or EIA Regulation to suggest that the proponent must publicly report on compliance. It seems very unlikely that a project proponent, on its own, will readily assume responsibility in a scoping report without any mandatory requirement. Effective monitoring and public reporting are key stimuli in ensuring public enforcement and follow-up. There is a need

to ensure proponents follow the report by setting out in legislation or regulation mechanisms to enforce reporting and non-compliance.

The law should give communities a genuine opportunity to influence outcomes and appeal decisions. The current arrangement where the Minister serves as the appellate body does not ensure fairness. The legislation should be amended to establish a meaningful public right of appeal through an independent and impartial reviewing body to reconsider process and final decisions. The mechanism should not impede access to other judicial or administrative remedies available to affected parties.

Finally, I recommend that Ghana consider mandatory and legally binding Community Development Agreement (CDA) as part of its legal framework for mining company operations. There should be a standardized model agreement that would be suitable for introduction as a requirement under the *Minerals and Mining Act*. A legally mandated CDA would avoid problems that arise when every mine is handled on an ad hoc basis. Although companies can voluntarily implement a CDA in their operations, I have argued the process works best when they are supported through legislative or policy means. The *Minerals and Mining Act* should be amended (or alternative legislation enacted) to provide for a holder of a mineral right or a mining lease to enter into a CDA with the host community before the commencement of mining operations by the holder. A robust CDA, such as the model legislation provided in the Appendix to this dissertation offers a clear roadmap of provisions that are critical to the success of a CDA.

In conclusion, it is hoped that as the trustee of "every mineral in its natural state"[18] in Ghana, the government will implement the recommendations of this dissertation so that the

[18] See *Constitution of the Republic of Ghana*, 1992 Art 257(6).

communities that are directly affected by mining operations gain substantially from mining.

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APPENDIX

Increasingly, governments are considering legislation that would require holders of mining concessions to enter into Community Development Agreements (CDAs), and the subject matter that such agreements might address. Below, this dissertation proposes a draft model of a CDA regulation that could be adapted to the Ghanaian context.

COMMUNITY DEVELOPMENT AGREEMENT MODEL REGULATION [*]

(1) Citation

This Regulation may be cited as the [Mining (Community Development Agreement)] Regulation, 20[XX], and shall come into force on [date].

(2) Object

The objects of this Regulation are:

(a) to enhance the sustainable social, cultural and economic well-being of communities impacted by mining operations;

(b) to define when a community development agreement ("Agreement") is required, and to provide a framework for such an Agreement; and

(c) to ensure accountability and transparency in mining related community development.

[*] This model community development agreement regulation takes into consideration examples and provisions from Nigeria's *Minerals and Mining Act*, 2007 (No. 20 of 2007), Kenya's *Mining (Community Development Agreement) Regulations*, 2017 (No. 12 of 2016) and James Otoo, "Community Development Agreement: Model Regulations and Example Guidelines" (01 January 2010) World Bank report, online: <http://documents.worldbank.org/curated/en/278161468009022969/Community-development-agreement-model-regulations-and-example-guidelines>.

(3) Application

The holder of a mineral right granted under the *Minerals and Mining Act* shall conclude with the host community where the operations are to be conducted, an Agreement that will ensure the transfer of social and economic benefits to that community.

(4) General obligation to promote community development

The holder of a mineral right shall assist in the development of communities affected by its operations; promoting sustainable development, enhancing the general welfare and quality of life of the inhabitants, and recognizing and respecting the rights, customs, traditions and religion of local communities.

(5) Identifying the affected mining communities

1. The holder of a mineral right shall, as part of the Environmental Social Impact Assessment, assess the potential impacts of its proposed operations on the communities concerned, and identify the communities with whom it proposes to execute an Agreement.
2. The holder of a mineral right shall notify in writing the affected mining community or communities, with copy of such notice to the Minister, within seven days of the granting of a mineral right.
3. A community that has not been identified by a mineral right holder may give notice to the mineral right holder that it should be identified as a party to a Community Development Agreement.
4. The Minister, in consultation with the Local Authority, shall, within sixty (60) calendar days of receiving a submission under sub-regulation three (3), notify both the community

of persons and the holder of the mineral right of whether the community of persons qualifies as a community, and if it does not, it shall provide reasons for this assessment.

(6) Content of the Community Development Agreement

1. Subject to sub-regulation 8(3), the holder of a mineral right shall negotiate the terms of the Agreement with each qualified community. The Agreement shall include at least the following provisions:

(a) the persons or institutions which shall manage the Agreement;

(b) the persons or institutions that represent the qualified community for the Agreement;

(c) the means by which a registry of persons, comprising the qualified community, will be developed, maintained and updated;

(d) the means by which members of the qualified community will participate in the decision-making processes related to the Agreement;

(e) the means by which the interests of women, youth, minority and marginalized groups, and sub-communities of the qualified community will be represented in the decision-making processes and implementation of the Agreement;

(f) the goals and objectives of the Agreement;

(g) a Community Development Program Plan, which shall include:

i. objectives,

ii. milestones;

iii. the implementation timetable;

iv. a schedule of anticipated expenditures;

v. metrics by which to measure progress;

vi. periodic reporting, including actual expenditure;

vii. the way that the plan works in coordination with the government plans, services, infrastructure and activities provided to or affecting the community;

viii. the way that the provision of any service provided by the mineral right holder to the community will be terminated or transferred to that community, government or other entity;

ix. how and when the plan will be periodically updated;

x. how the plan and amendments to the plan will be ratified by the community; and

xi. such other content as may be mutually agreed by the qualified community and the mineral right holder.

(h) the roles and obligations of the holder of the mineral right to the qualified community, which may or may not be part of the development program plan, including:

i. undertakings with respect to the social and economic contributions that the project will make to the sustainability of the community;

ii. assistance in creating self-sustaining, income-generating activities, such as, but not limited to, the production of goods and services that are necessary to the mine and the community; and

iii. consultation with the community over the planning of mine closure and post-closure measures, with a view to preparing the community for the eventual closure of the mining operations;

(i) the roles and obligations of the qualified community to the holder of the mineral right;

(j) the roles and obligations of the [Local Authority], if it is a party to the Agreement or otherwise so chooses to be obligated;

(k) the means by which the Agreement shall be reviewed by the holder of the mineral right and qualified community every five (5) calendar years, and the commitment to be bound by the current Agreement in the event that any modifications to the Agreement sought by one party cannot be mutually agreed with the other party;

(l) the consultative and monitoring frameworks between the holder of the mineral right and the qualified community, and the means by which the community may participate in the planning, implementation, management, measurement (including indicators) and monitoring of activities carried out under the Agreement;

(m) the dispute resolution mechanism;

(n) the duration of the agreement;

(o) termination of the agreement; and

(p) transfer of all the agreement rights and obligations to any party to whom the mineral right holder transfers its mineral right.

2. Subject to sub-regulation 8(3), the Agreement shall take into account the unique circumstances of the holder of the mineral right and qualified community, and the issues to be addressed in the Agreement and the Community Development Program Plan, which may include the following:

    (a) the employment quota or percentage allocation for sub-communities;

    (b) financial or other forms of contributory support for infrastructural development and maintenance, such as education, health or other community services, roads, water and power;

    (c) support for cultural heritage, the treatment of cultural and sacred sites;

(d) the treatment of ecological systems, including restoration and enhancement, for traditional activities such as hunting and gathering; and

(e) other matters as may be agreed.

3. Goals, objectives, obligations and activities specified in the Agreement should aim to achieve sustained community development, which:

(a) lasts from generation to generation;

(b) is based on the actual needs of the community;

(c) has long-term benefits;

(d) prepares the community for closure of the mine;

(e) complements but does not replace government-led development and services; and

(f) recognizes and incorporates traditional knowledge.

(7) Negotiation of the Community Development Agreement

1. Negotiation of the Community Development Agreement shall be conducted by the authorized representatives of the parties, which shall be the same representatives of the parties designated to oversee the implementation of the Agreement.
2. The parties may employ outside assistance such as legal, technical, or financial experts or otherwise to assist in the negotiations of the Community Development Agreement.
3. The parties shall develop, in writing, a Community Development Agreement negotiation schedule that will include the date, time and issues for each negotiation meeting.
4. Minutes shall be taken of each negotiation meeting.
5. If the parties are not able to negotiate agreed-upon Community Development Agreement terms they may by mutual consent seek to resolve their differences through mediation.

6. If the parties fail, after reasonable good faith attempts, to negotiate Community Development Agreement terms by the time the holder is ready to commence operations, the holder, affected mine communities or the parties jointly may refer the matter, jointly or individually, by notification to the Minister for resolution.
7. A written notification shall be prepared in a form as prescribed under sub-regulation (8) from either or both parties and submitted to the Minister.
8. The notification shall include but not be limited to:
    (a) the draft Community Development Agreement;
    (b) description of negotiations to date;
    (c) issues holding up the conclusion of the final agreement; and
    (d) proposals to resolve issues.
9. The Minister shall determine the matter within a timeframe that may be agreed with the parties.
10. The Minister's decisions shall be final and binding.

(8) Approval of the Community Development Agreement

1. An Agreement executed by the authorized representatives of a holder of a mineral right and the qualified community shall be submitted to the Minister for approval. The Minister shall, if the agreement meets the requirements set out in this Regulation, approve the Agreement within fourteen (14) days of its submission.
2. The Agreement shall come into force on the date that it is approved by the Minister.
3. If an Agreement is not approved, the Minister shall notify both parties to the Agreement. The notice shall contain the specific reasons for its rejection and any recommended corrections or amendments.

4. If the holder of the mineral right and the qualified community should fail, after reasonable attempts in good faith to conclude an Agreement by the time the mineral right holder is ready to commence development work on the mineral rights area, either party may refer the matter to the Minister for resolution, and the Minister's decision thereon, in consultation with the Local Authority, shall be final.
5. The Minister shall, within thirty (30) calendar days from the date on which the Agreement is approved, cause a copy of the agreement to be made accessible to the public on the website of the Ministry.
6. The Ministry shall use its best efforts to respect and facilitate the implementation of an Agreement.

(9) Minimum expenditure requirement

The holder of a mineral right who has executed an approved Agreement shall expend the following amounts to implement that Agreement:

(a) in the first calendar year, following the commencement of mineral sales, no less than [text] percent ([number] %) of the net revenue amount earned, pursuant to that right from mineral sales in the previous calendar year;

(b) in the second calendar year, following the commencement of mineral sales, no less than [text] percent ([number] %) of the net revenue amount earned, pursuant to that right from mineral sales in the previous two calendar years, divided by two (2);

(c) in the third calendar year, following the commencement of mineral sales and in each subsequent calendar year, no less than [text] percent ([number] %) of the net revenue amount earned, pursuant to that right from mineral sales in the previous three calendar years, divided by three (3).

(10) Community Development Agreements and transparency

The parties shall establish meaningful mechanisms that ensure transparent transactions, which are relevant to Community Development Agreement commitments; including, but not limited to:

(a) quarterly written publication of the status of Community Development Agreement implementation, made available on the Ministry's official website and using any typical mode of information and communication for the affected mining community, or as may be mutually agreed by the parties;

(b) quarterly public meetings by the parties, in a place that shall be accessible to the holder and members of the affected mining community.

(11) Reporting requirements

1. A holder of a mineral right shall submit to the Minister a copy of an annual report for each Agreement to which it is a party, no later than sixty (60) days after the end of the year; indicating in sufficient detail its community development expenditure on every item or service provided, and the total expenditure for January through December of the previous calendar year.
2. All community development agreements, community development agreement annual reports, and community development annual expenditure reports (including all required attachments), submitted by past and present holders of a mineral right in furtherance of this Regulation, shall be open to free inspection by members of the public.

(12) Transfer of community development rights and obligations

When a mineral right is transferred to another holder in accordance with the *Minerals and Mining Act*, the transferee shall assume all rights and obligations of the transferor under any Agreement relating to the mineral right.

(13) Suspension of mineral rights

1. The Minister may suspend without limit a mineral right, if the mineral right holder fails to substantially comply with:
   (a) regulation 3 (requirement to have and implement community development agreements with all qualified communities); or
   (b) regulation 4 (requirement to identify all qualified communities); or
   (c) regulation 8 (requirement to expend annual amount on community development).
2. The Minister shall, before suspending any mineral right, give notice to the mining right holder and shall, in such a notice, require the holder to remedy in not less than (90) ninety calendar days, any breach of these regulations.