

SCHOLARLY ARTICLE

‘Do-it-Yourself FPIC’: The Political Grammar of Canada’s Normative Entrepreneurship in the Global Extractive Sector

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Abstract

It seems futile to look for order in the tangle of norms that abound in the global extractive sector, even more so to look for the teleological principle that would give it meaning. In this tangle, normative regimes interact with each other—in a largely contingent manner—as elements of an ecosystem. We argue that inasmuch as order emerges in the global extractive normative ecosystem, it is a function of the success of norm entrepreneurs such as Export and Development Canada (EDC), Canada’s export credit agency, a financial institution adhering to the Equator Principles. Norms entrepreneurs like EDC perform various normative bricolages claiming to deliver different goods such as free, prior and informed consent (FPIC). We analyse how EDC tinkers with different normative instruments, including the International Finance Corporation’s Standard 7 regarding Indigenous Peoples, to deliver ‘FPIC compliance’ in jurisdictions that are deemed ‘deficient’. We argue that the political ontologies promoted by EDC’s notion of FPIC are better understood within the logic of leverage that underlies EDC’s Environmental and Social Risk Management Policy. These ontologies directly contradict notions of FPIC as expressions of Indigenous self-determination. In our view, offering such normative solutions as a palliative for ‘weak’ jurisdictions—a kind of ‘do-it-yourself (DIY) FPIC regime’ implemented by extractive companies—is thus deeply problematic. We conclude that the appraisal of such normative solutions as put forward by these norm entrepreneurs should look beyond the vocabulary these bricolages mobilise to also consider the political grammar that they induce in territories subject to extraction.

Keywords: Export and Development Canada; Free, prior and informed consent (FPIC); Global extractive norm entrepreneurs; Indigenous self-determination; UNDRIP

1. Introduction: Is there normative convergence around free, prior and informed consent?

Natural resources extraction is one of the main points of contact between Indigenous and non-Indigenous societies. Indigenous struggles to protect their communities’ ancestral territories and their people’s knowledge, political institutions and practices are increasingly being

embodied in their opposition to extractive projects.¹ Arguably, the inherent tension between Indigenous self-determinations and state sovereignties is insoluble in contexts where dominant political economies depend on extractivism. For that reason, reconciling the two implies radical social transformations and wide-ranging institutional reforms that are only viable if they are backed by vibrant political communities.² This is already challenging when these political communities share a common legal architecture;³ in many contemporary contexts, however, societies are presented with a tangle of norms whose articulation is increasingly *ad hoc*. As a corollary, in what often presents itself as a market of norms, different free, prior and informed consent (FPIC) instruments—regimes, standards, expert know-how, toolkits, mediation services and so on—are put forward as normative solutions to violence, conflict, instability, disruptions and/or human rights violations surrounding extractive projects.

In the business and human rights (BHR) literature, such instruments are often analysed discretely. One can compare, for example, the Organisation for Economic Co-operation and Development's Guidelines for Multinational Enterprises on Responsible Business Conduct (OECD Guidelines) and the International Finance Corporation's Performance Standards on Environmental and Social Sustainability (IFC Performance Standards) in terms of their distinct procedural rules and how they define FPIC.⁴ A recent study also compares a 'rigorous private standard' with 'public regulation'. In this study, researchers found that the two standards have some overlapping elements, yet they also have an 'independent coexistence'.⁵

Increasingly, however, FPIC instruments tend to refer to each other. For example, in addition to serving as a reference or being integrated into national laws, the UN Declaration

¹ Craig Benjamin, 'Free, Prior and Informed Consent: Defending Indigenous Rights in the Global Rush for Resources' in Joyce Green (ed), *Indivisible: Indigenous Human Rights* (Halifax: Fernwood Publishing, 2014) 168, 189. Several sources confirm that the expansion of the extractive frontier is accompanied by increased levels of conflict and criminalisation and violence against environmental and land human rights defenders, especially Indigenous human rights defenders: Global Witness, 'In Numbers: Lethal Attacks against Defenders since 2012', <https://en/campaigns/environmental-activists/numbers-lethal-attacks-against-defenders-2012/> (accessed 18 June 2024); Business & Human Rights Resource Centre, 'Human Rights Defenders & Business in 2022: People Challenging Corporate Power to Protect Our Planet', <https://www.business-humanrights.org/en/from-us/briefings/hrds-2022/human-rights-defenders-business-in-2022-people-challenging-corporate-power-to-protect-our-planet/> (accessed 18 June 2024); EJAtlas, 'Global Atlas of Environmental Justice', <https://ejatlas.org/> (accessed 18 June 2024). The so-called 'energy transition', which could require the acceleration of extractive activities, raises further risks of Indigenous Peoples' human rights violations. See UN Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 'Extractive Sector, Just Transition and Human Rights', A/78/155 (11 July 2023).

² See James Tully, 'Reconciliation Here on Earth' in Michael Asch, John Borrows and James Tully (eds), *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: University of Toronto Press, 2018) 3. See also Jérémie Gilbert, 'Sovereignty, Self-Determination, and Natural Resources: Reclaiming Peoples' Rights' in *Natural Resources and Human Rights: An Appraisal* (Oxford: Oxford University Press, 2018) 12, 13.

³ We use the expression 'legal architecture' to emphasise the organised character of a given legal sphere. As we hope to make clear in the theoretical section below, this does not imply a commitment to legal monism. On this, see Jeremy Webber et al, 'Sally Engle Merry, Legal Pluralism, and the Radicalization of Comparative Law' (2020) 54:4 *Law and Society Review* 846; Jeremy HA Webber and Colin M Macleod (eds), *Between Consenting Peoples Political Community and the Meaning of Consent* (Vancouver: UBC Press, 2010); Jeremy Webber, *Las Gramáticas de la Ley. Derecho, Pluralismo y Justicia* (Ciudad de México: Siglo Veintiuno, 2017); James Tully, *A Strange Multiplicity. Constitutionalism in an Age of Diversity*, 8th ed (Cambridge: Cambridge University Press, 2007).

⁴ Sara L Seck, 'Indigenous Rights, Environmental Rights, or Stakeholder Engagement? Comparing IFC and OECD Approaches to Implementation of the Business Responsibility to Respect Human Rights' (2016) 12:1 *McGill International Journal of Sustainable Development Law and Policy* 54.

⁵ Teresa Kramarz et al, 'Redundancies, Layers, and Dilemmas: Comparing Private Standards and Public Regulations in Lithium Mining' (2024) 18 *The Extractive Industries and Society* 101479.

on the Rights of Indigenous Peoples (UNDRIP) is mentioned in a myriad of private instruments, including corporate social responsibility (CSR) codes and industry standards.⁶ UNDRIP is also referred to, albeit timidly, in international investment law and investor-state arbitrations.⁷

Such cross-referencing may give the impression that norms and standards are converging; with regard to FPIC, it could be interpreted as the hegemonisation of the UNDRIP definition.⁸ This perception of convergence or, conversely, the identification and characterisation of divergences, is central for orienting collective organisation and effective political action. In our view, the thesis of norm convergence around FPIC reflects an excess of optimism, with the negative consequence that objectively essential political mobilisation might seem unnecessarily costly.

In this article, we argue that this optimism is at least partly based on a theoretical blind spot. Normative instruments are rarely applied on their own: their effects on the ground are most often the result of their interaction with other normative instruments.⁹ Normative solutions also often promise goods (regulation, order, legitimacy, justice, reparation, etc.) through bricolages combining several instruments and implementation regimes to produce *sui generis* normative devices. In our view, the ‘political grammar’ of these arrangements can have a more decisive impact than the ‘referential content’ (in other words, the *vocabulary*) that they mobilise. By ‘political grammar’ we mean the way normative devices distribute authority, obligations, accountability and truth. In this, we agree with Webber’s point that legal determination and implementation mechanisms significantly determine normative content.¹⁰

We aim to illustrate the heuristic potential of the distinction between political grammar and referential content by analysing a specific normative solution put forward by Canada’s export credit agency, Export and Development Canada (EDC), a Crown corporation. The dispositive analysed purports to provide FPIC compliance, notably in the context of extractive projects, and combines references to UNDRIP, the Equator Principles, IFC Performance Standard 7 on Indigenous Peoples (IFC PS7) and EDC’s own Environmental and Social Risk Management Policy (ESRMP). EDC, in fact, proposes a kind of do-it-yourself (DIY) FPIC kit, with the implied promise that a legitimate order can be established around extractive projects independently of the defects and shortcomings of the jurisdictions in which these projects take place. What is the underlying logic normative entrepreneurs convey when they promote their DIY FPIC kit, and what is the impact of that logic on the normative ecosystem?¹¹ We will show that EDC’s DIY FPIC toolkit draws legitimacy precisely from the narrative of deficient host jurisdiction. Before

⁶ This is the case for two of the world’s main mining industry organisations: the International Council on Mining and Minerals’ 2013 Indigenous Peoples and Mining Position Statement, and the Mining Association of Canada’s 2023 Towards Sustainable Mining Initiative (TSM)—Indigenous and Community Relationships Protocol.

⁷ See Zoé Boirin-Fargues, ‘Foreign Investors Accountability for Indigenous Peoples’ Rights Violations under International Investment Law and Arbitrations – Reflexion from the Bear Creek Case’ in Thierry Rodon et al (eds), *Mining and Indigenous Livelihoods: Rights, Revenues, and Resistance* (Abington: Routledge, 2024) 71.

⁸ See Kathryn Tomlinson, ‘Indigenous Rights and Extractive Resource Projects: Negotiations over the Policy and Implementation of FPIC’ (2019) 23:5 *International Journal of Human Rights* 880; Ana Maria Esteves, Daniel Franks and Frank Vanclay, ‘Social Impact Assessment: The State of the Art’ (2012) 30:1 *Impact Assessment and Project Appraisal* 34; John R Owen and Deanna Kemp, ‘“Free Prior and Informed Consent”, Social Complexity and the Mining Industry: Establishing a Knowledge Base’ (2014) 41 *Resources Policy* 91.

⁹ Etienne Roy Grégoire et al, ‘Ecosystemic Approaches to Extractive Business and Human Rights’ (2023) 36:2 *Revue Québécoise de droit international* 77.

¹⁰ See Webber, *note* 3, 23.

¹¹ We use the metaphor of the ‘normative ecosystem’ to emphasise the contingent nature of the links between different normative instruments and, consequently, the need for an external criterion to analyse the order induced by these interactions. In our view, for example, a normative ecosystem can be more or less favourable to the articulation of societies into political communities.

undertaking an analysis of how this has come about and certain of its implications, it is useful to take a theoretical detour. We will demonstrate that the political grammar of this normative device diverges sharply from the political grammar of self-determination included—at least virtually—in UNDRIP’s definition of FPIC. Since it transfers responsibility from public to private actors, this corporate by-passing of local (albeit imperfect) jurisdictions—Indigenous, national or otherwise—appears to be particularly risky.

We proceed in four steps. We start in Part II by outlining our theoretical framework, which highlights the role of what we call norm entrepreneurs in giving shape to the global governance of extraction. We then proceed in Part III to sketch out the implications of FPIC as articulated through the political grammar of self-determination and point to the open-endedness of UNDRIP in that regard. Part IV contrasts this with the political grammar of FPIC as put forward by EDC’s normative solution. We then conclude in Part V with certain implications and risks of the current short-sighted approach in dealing with deeply rooted structural problems that are the result of particular historical, institutional and political contexts.

II. Theoretical framework: Norm entrepreneurs and the production of order in normative ecosystems

It is a commonplace observation that globalisation has unsettled the relationship between norms and power by calling into question the hegemony that modernity had granted to states and law.¹² One could say that this observation is at the very origin of the BHR field in its current form.¹³ In a paradigm dominated by the state, the image of the pyramid, for example, implied an imperative of coherence and hierarchisation of the normative domain.¹⁴ In contemporary constitutionalism, this coherence is intrinsically linked to societies’ democratic aspirations; only by deliberately defining its own legal order can a society self-determine. As for hierarchisation, its purpose is to place, at the top of the pyramid, the fundamental values against which societies measure the legitimacy of all other norms. Under that logic, law’s worth is determined by its conformity with society’s highest aspiration: this is what we call teleological legitimacy. In contemporary constitutionalism, human dignity can therefore be posited as a teleological imperative, an imperative that is expressed, in particular, in the corpus of human rights.¹⁵

We focus on the global extractive sector—which we define here in the broadest sense as the intensive exploitation of natural resources, including mining and energy minerals¹⁶—

¹² See François Ost, ‘De l’internormativité à la concurrence des normativités : quels sont le rôle et la place du droit ?’ (2018) 59:1 *Les Cahiers de Droit* 7.

¹³ John Gerard Ruggie, ‘Multinationals as Global Institution: Power, Authority and Relative Autonomy’ (2018) 12:3 *Regulation & Governance* 317; Human Rights Council, ‘Protect, Respect and Remedy: A Framework for Business and Human Rights’, A/HRC/8/5 (7 April 2008); Robert C Bird, Daniel R Cahoy and Jamie Darin Prenkert (eds), *Law, Business and Human Rights: Bridging the Gap* (Cheltenham, UK: Edward Elgar, 2014).

¹⁴ Hans Kelsen, *Principles of International Law*, Robert W. Tucker (ed) (New York: Holt, Rinehart and Winston, 1966); Christophe Bouriaud et al, *Le droit international selon Hans Kelsen: Criminalités, responsabilités, normativités* (Lyon: ENS Éditions, 2018).

¹⁵ Jean L. Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism* (Cambridge: Cambridge University Press, 2012); Stephen Gardbaum, ‘Human Rights as International Constitutional Rights’ (2008) 19:4 *European Journal of International Law* 749. It should be noted that the metaphor of the pyramid is not devoid of problems, especially when discussing Indigenous self-determination. Anishinaabe jurist Aaron Mills uses the image of a tree to refer to his Nation’s particular form of constitutionalism. Accordingly, FPIC should be rooted in each Indigenous Nation’s particular idea of freedom. Aaron Mills, ‘Rooted Constitutionalism: Growing Political Community’ in Michael Asch, John Borrows and James Tully (eds), *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: University of Toronto Press, 2018) 133. Whether we have a tree or a pyramid in mind, the notion of a teleological organisation is central.

¹⁶ Mathilde Allain and Antoine Maillet, ‘Les mobilisations autour de l’extractivisme. Circulation et potentiel heuristique d’un concept en voie de globalisation’ (2021) 28:3-4 *Revue Internationale de Politique Comparée* 7.

because it is a good illustration of the extent to which the image of the pyramid no longer corresponds to the way in which power is constituted and exercised. Indeed, the sector's contemporary governance is characterised by a tangle of different kinds of diversely binding normative regimes, including state, Indigenous and international legal regimes.¹⁷ The governance of each extractive project is also made up of a web of contracts in several jurisdictions.¹⁸ Other normative instruments, such as standards, certification schemes, algorithms,¹⁹ self-regulation schemes and so-called best practices,²⁰ counterinsurgency doctrines,²¹ and knowledge regimes organised around 'global cities' and academic institutions²² also play important roles. Other pertinent norms are best described as 'moral economies',²³ or meta-discourses deployed here and there: 'the era of reconciliation' in Canada,²⁴ 'democratic transition' or 'post-conflict' narratives in Latin America and elsewhere, notably Africa²⁵ and the global 'energy transition' narrative.

One would be hard-pressed to find coherence in this tangle of norms, let alone an explicit teleological imperative subjected to deliberation by a given political community. The theoretical question this observation raises is one of internormativity. The notion of internormativity differs from the notion of legal pluralism, which refers to a scientific field structured around a definition of law that is not centred around the state and whose theoretical centre of gravity is a debate around the ontological and epistemological status of law. As the ontological status of these regimes is not our primary concern, we call internormativity the coexistence of a set of phenomena ranging from state law to morality and including more diffuse discursive regimes or technologies of power in the Foucauldian sense.²⁶

¹⁷ David Szablowski, *Transnational Law and Local Struggles: Mining Communities and the World Bank* (Oxford: Hart Publishing, 2007).

¹⁸ André-Jean Arnaud, *Entre modernité et mondialisation. Cinq leçons d'histoire de la philosophie du droit et de l'État*. (Paris: LGDJ, 2004).

¹⁹ François Ost and Michel van de Kerchove, *De la pyramide au réseau. Pour une théorie dialectique du droit* (Bruxelles: Faculté Universitaire Saint-Louis, 2002). Fleur Johns, Gavin Sullivan and Dimitri Van Den Meerssche, *Global Governance by Data: Infrastructures of Algorithmic Rule* (Cambridge: Cambridge University Press, forthcoming).

²⁰ Benoît Frydman et al, *Self-Regulation and Co-Regulation of Corporate Social Responsibility in Europe* (Brussels: Centre Perelman de Philosophie du Droit, Université Libre de Bruxelles, 2007).

²¹ Andrew Crosby and Jeffrey Monaghan, *Policing Indigenous Movements. Dissent and the Security State* (Winnipeg: Fernwood Publishing, 2018); Marc-André Anzueto, Etienne Roy Grégoire and Philippe Dufort, 'Beyond the "Weakness of the State": Canada's Intervention in Post-agreement Colombia' (2022) 77 *International Journal: Canada's Journal of Global Policy Analysis* 2, 248; Nina Lakhani, *Who Killed Berta Cáceres?: Dams, Death Squads, and an Indigenous Defender's Battle for the Planet* (London: Verso Books, 2020).

²² Saskia Sassen, 'Nouvelle géographie politique' (2000) 3 *Multitudes* 79; Stuart Tannock, 'Learning to Plunder: Global Education, Global Inequality and the Global City' (2010) 8 :1 *Policy Futures in Education* 82; Karen Hamilton, 'Les dons de l'industrie minière aux universités canadiennes: les enjeux de la philanthropie' (2012) *Revue Québécoise de Droit International* 129.

²³ See Daviken Studnicki-Gizbert, *The Three Deaths of Cerro de San Pedro: Four Centuries of Extractivism in a Small Mexican Mining Town* (Chapel Hill, NC: University of North Carolina Press, 2022).

²⁴ Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis, MN: University of Minnesota Press, 2014).

²⁵ Etienne Roy Grégoire, 'Dialogue as Racism? The Promotion of "Canadian Dialogue" in Guatemala's Extractive Sector' (2019) 6:3 *The Extractive Industries and Society* 688; Marc-André Anzueto, 'In the shadow of Canadian imperialism? Strategic human rights litigation in Guatemala (2009-2019)' (2021) 25:10 *The International Journal of Human Rights* 1659; Etienne Roy Grégoire and Luz Marina Monzón, 'Institutionalising CSR in Colombia's Extractive Sector: Disciplining Society, Destabilising Enforcement?' (2017) 38:2 *Canadian Journal of Development Studies / Revue canadienne d'études du développement* 253.

²⁶ On our definition of legal pluralism, see Brian Z Tamahana, 'The Folly of the Social Scientific Concept of Legal Pluralism' (1993) 20:2 *Journal of Law and Society* 192. On internormativity, see Ost, [note 12](#), 9. On technologies of power see, for example, Michel Foucault, *Surveiller et punir* (Paris: Gallimard, 1975) 31.

In what ways do these different norms interact? Is an ‘order’ produced? Is this order compatible with democracy and human dignity? At an empirical level, internormativity raises numerous questions: which agents are likely to promote which normative articulations? According to which identities, narratives, ontologies and/or objectives? Can societies effectively pursue democracy and dignity in the face of this tangle?

BHR issues are a relevant entry point for answering these questions because they are already structured, on the one hand, by the teleological imperative of human rights and, on the other, by the notion of a widening ‘governance gap’.²⁷

Following proponents of the notion of global law,²⁸ we thus propose to examine the configuration of normative interactions without prejudging their coherence or any hierarchy. The aim is therefore to see how ‘different norms or other normative instruments, whether public or private, fit together, complement (or counteract) each other, whether in a concerted manner or not, whether deliberately or accidentally, in order to produce regulatory effects’.²⁹ We note that in doing so, the normative sphere no longer appears as a pyramid, but rather as an *ecosystem*. We argue that if the normative ecosystem adopts a given configuration—if it produces a certain ‘order’—it is largely a function of the success of different networks of ‘norm entrepreneurs’ who ‘tinker’ and ‘cobble together’ different normative bricolages:

norm entrepreneurs [develop] systems that they cobble together from materials of all kinds and types that they borrow or recover from various legal and normative systems. All they have to do is help themselves to an environment saturated with norms, which is obviously no guarantee of their effectiveness. They are spoilt for choice in the multiplicity of national laws available, the proliferation of international standards and soft law rules, fundamental rights and general principles that are universal or proclaimed as such. In so doing, our normative tinkerers are in no way concerned with the coherence of any one system. In fact, they borrow standards and procedures from a multitude of different ‘orders’, whose elements they freely combine and mix.³⁰

Rather than assuming coherence in the normative sphere, the key issue is therefore to identify the underlying logic, the macro-discourse or the regime of reason that normative entrepreneurs and their DIY normative devices convey and to analyse the configuration of the resulting normative ecosystem. The underlying logics sustaining such ecosystems and the logics that emerge in these specific bricolages shape the implementation and application of normative devices and thus have a strong regulatory component. We find the metaphor of a ‘normative ecosystem’ to be heuristic, not least because it allows us to consider the

²⁷ See, for example, Human Rights Council, [note 13](#); Catherine Coumans, ‘Mining and Access to Justice: From Sanction and Remedy to Weak Non-judicial Grievance Mechanisms’ (2012) 45:3 *UBC Law Review* 652; and Penelope Simons and Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage* (London: Taylor & Francis Group, 2014).

²⁸ Frydman *et al.*, [note 20](#); Benoît Frydman, ‘La Concurrence des normes globales’ (2018) 22:3 *Revue Internationale de Droit Économique* 293; Benoît Frydman and Jean-Yves Chérot, *La science du droit dans la globalisation* (Bruxelles: Bruylant, 2012); Benoît Frydman and Gregory Lewkowicz, ‘Les codes de conduite : source du droit global ?’ in Isabelle Hachez *et al.* (eds), *Sources Droit Revisitées* (Brussels: Presses de l’Université Saint-Louis, 2012) 179; David Restrepo Amariles, ‘Judicialising Transnational Corporations in a Global Legal Order: The Chiquita Affair in Colombia’ (2008) 2 *Sortuz: Oñati Journal of Emergent Socio-Legal Studies* 1; Arnaud Van Waeyenberge, *Mapping Global Legal Pluralism* (Nagoya: Nagoya University Law School, 2015).

²⁹ Benoît Frydman, ‘Stratégies de responsabilisation des entreprises à l’ère de la mondialisation’ in Gregory Lewkowicz (ed), *Responsabilités des entreprises et corégulation* (Brussels: Bruylant, 2007) 1, 45.

³⁰ Frydman, [note 28](#), 297 (our translation).

relationship between norms and politics in a new light, that is, the type of conditions a given normative ecosystem offers to deliberation, democracy, autonomy, participation, self-determination, and so on.

Before we apply this framework to what we call EDC's DIY FPIC regime, however, it is important to recall how Indigenous revindications of FPIC are rooted in struggles for self-determination. As such, the underlying grammar of Indigenous conceptions of FPIC is informed by such struggles.

III. FPIC as an expression of Indigenous self-determination

'Self-rule', according to James Tully, 'is the oldest political good'.³¹ In this section, we describe how the right to FPIC has emerged in the context of Indigenous struggles for self-determination and why, for that reason, it is best understood, from their point of view, as *an expression of their self-determination*. This is particularly important given that doctrinal developments in international law, for example, are centred around the tension that must necessarily exist between Indigenous self-determination and state sovereignty.³² We hope that this section helps clarify, at least in part, the incongruity of a notion of FPIC compliance that ignores how this tension is expressed locally.³³

Resource extraction has historically shaped the complicated relationship between Indigenous Peoples and state administrations.³⁴ From a legal perspective, it can be argued that the narratives created to discredit Indigenous claims and existence have contributed to the legal foundations for the codification of those relationships in a way that facilitates land dispossession and the disruption of Indigenous place-based and grounded worldviews.³⁵ On the other hand, resistance to resource extraction has also led to the codification of legal regimes aimed at protecting Indigenous and human rights in general.³⁶ The different governance regimes that emerge both from the promotion of and resistance to resource extraction show how Indigenous, state and corporations' territorialities—or relationships to

³¹ James Tully, 'Property, Self-Government and Consent' (1995) 28 *Canadian Journal of Political Science* 1, 105.

³² S. James Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press, 2000); Gilbert, [note 2](#).

³³ We acknowledge the existence of tensions and layers of complexity related to FPIC that are integral to Indigenous practices and struggles for self-determination, including the issue of the legitimacy and legality of who exercises the right to FPIC. Self-identification is a fundamental aspect of both the concept and identity of Indigenous Peoples and persons. The general agreement in international human rights law is that self-identification is the fundamental criterion. Additional aspects, however, should also be considered, such as the individual and collective historical, social and territorial connections; relying solely on self-identification exposes Indigenous Peoples to false or fraudulent claims to Indigenous identity of membership in Indigenous Nations. Self-identification is nonetheless a fundamental tool for reclaiming cultural identity after displacement or forced assimilation. It is also a way to reaffirm self-determination in contexts where the state does not acknowledge the existence of Indigenous Peoples, as it is the case in several Asian and African countries. Raja Devasish Roy, 'International Human Rights Standards and Indigenous Peoples' Land and Human Rights in Asia General Overview and Strategies for Implementation' in Corinne Lennox and Damien Short (eds), *Handbook of Indigenous Peoples' Rights* (London: Routledge, 2018) 371, 373; Nancy R. Tapias Torrado, 'Wet'suwet'en women leading the defence of rivers and water from abuses committed in connection with megaprojects. The persistent legacies of the past in Canada' in Tatiana Acevedo-Guerrero et al (eds.), *Handbook of Gender and Water Governance* (New York: Routledge, 2024) 324. George Mukundi Wachira and Tuuli Karjala, 'The Struggle for Protection of Indigenous Peoples' Rights in Africa' in Corinne Lennox and Damien Short (eds), *Handbook of Indigenous Peoples' Rights* (London: Routledge, 2018) 394, 396.

³⁴ Traci Brynne Voyles, *Wastelanding: Legacies of Uranium Mining in Navajo Country* (Minneapolis: University of Minnesota Press, 2015); Coulthard, [note 24](#); Brenna Bhandar, *Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership* (Durham, NC: Duke University Press, 2018); Rebecca Hall, *Refracted Economies: Diamond Mining and Social Reproduction in the North* (Toronto: University of Toronto Press, 2022).

³⁵ Bhandar, [note 34](#), 7.

³⁶ Benjamin, [note 1](#), 168.

land—have become entangled and now contribute simultaneously to governance regimes connected to extractivism.³⁷ Extractive territories—where all those norms interact constantly—are thus sites of great tension and violence.³⁸

FPIC has emerged as one of the most important normative references for Indigenous Peoples hoping to protect their interests and their lands in the context of resource exploitation.³⁹ *Prima facie*, FPIC's objective is to establish an obligation to consult Indigenous Peoples and obtain their consent prior to the implementation of large-scale extractive development projects on their lands, ensuring bottom-up participation in the decision-making process around these projects.⁴⁰ FPIC, however, is referenced by normative instruments and actors in radically divergent ways.

Indigenous Peoples' use of FPIC can be traced to the emergence of global Indigenous movements. Violence against Indigenous Peoples led to the rise of global Indigenous activism and the peasant movement in the 1970s and 1980s.⁴¹ At the time, Indigenous Peoples in North America were fighting against states' assimilationist policies and demanding their right to exist and their right to self-determination. The difficulties these mobilisations encountered prompted their members to enter the international arena. Non-governmental organisations allied with the movement held conferences which, in 1977, led to the beginning of negotiations between Indigenous Peoples and states at the United Nations. These initiatives allowed Indigenous Peoples to carve out a place for themselves in the mechanisms of the international system.⁴²

FPIC emerged gradually in international human rights law provisions. Over the last four to five decades,⁴³ it has been included in several international instruments such as the American Declaration on the Rights of Indigenous Peoples,⁴⁴ the International Labour

³⁷ This entanglement should not lead us to lose sight of the systematic retreat of state actors in the context of neoliberal policies and reforms, which has left Indigenous communities having to deal first hand with the demands of extractive enterprises. Nor should we minimise the complexity and specificity of the different contexts that result from the existence of preexisting norms (constitutional, regional and municipal) in which governance regimes and notions such as FPIC are introduced; Bonnie Campbell and Marie-Claude Prémont, 'What Is behind the Search for Social Acceptability of Mining Projects? Political Economy and Legal Perspectives on Canadian Mineral Extraction' (2017) 30:3 *Mineral Economics* 171; Sylvie Poirier and Françoise Dussart, *Entangled Territorialities: Negotiating Indigenous Lands in Australia and Canada* (Toronto: University of Toronto Press, 2017).

³⁸ Soren C Larsen and Jay T Johnson, *Being Together in Place: Indigenous Coexistence in a More Than Human World* (Minneapolis, MN: University of Minnesota Press, 2017); Hall, [note 34](#); Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples*, 2nd ed (London: Zed Books, 2012); Leanne Betasamosake Simpson, *A Short History of the Blockade: Giant Beavers, Diplomacy, and Regeneration in Nishnaabewin* (Edmonton, AB: University of Alberta Press, 2021); Lakhani, [note 21](#).

³⁹ Anne Perrault, 'Facilitating Prior Informed Consent in the Context of Genetic Resources and Traditional Knowledge Special Issue: Prior Informed Consent' (2004) 4:2 *Sustainable Development Law and Policy* 21.

⁴⁰ Lorenza B Fontana and Jean Grugel, 'The Politics of Indigenous Participation through "Free Prior Informed Consent": Reflections from the Bolivian Case' (2016) 77 *World Development* 249.

⁴¹ Ronald Niezen, *The Origins of Indigenism: Human Rights and the Politics of Identity* (Berkeley, CA: University of California Press, 2003); Rhianon Morgan, 'On Political Institutions and Social Movement Dynamics: The Case of the United Nations and the Global Indigenous Movement' (2007) 28 *International Political Science Review* 273; Marc Edelman, *Peasant Politics of the Twenty-First Century: Transnational Social Movements and Agrarian Change* (Ithaca, NY: Cornell University Press, 2024).

⁴² Françoise Morin, 'L'Autochtonie, forme d'ethnicité ou exemple d'ethnogenèse ?' (2006) 6 *Parcours anthropologiques* 54.

⁴³ Tomlinson, [note 8](#).

⁴⁴ The 1969 American Convention on Human Rights (ACHR), a central human rights treaty of the Inter-American System of Human Rights, does not explicitly mention the right to FPIC of Indigenous peoples. It, however, protects Indigenous rights, including the right to FPIC and the protection of Indigenous ancestral territories. Both the Inter-American Court of Human Rights (IACtHR) and the Inter-American Commission on Human Rights (IACHR) have extensively documented grave human rights violations committed against Indigenous and Tribal peoples in the

Organization Convention 169 on Indigenous and Tribal Peoples (ILO 169) and more recently, UNDRIP. The United Nations Guiding Principles on Business and Human Rights also promote FPIC.⁴⁵

FPIC has been grounded in principles of autonomy and self-determination, which are also the basis for other cultural, political and land rights.⁴⁶ By claiming their Indigenous and collective rights under international law, Indigenous movements fought to allow Indigenous nations to live according to their worldviews, which are embedded and grounded in the land.⁴⁷ Consequently, what the Indigenous movements were advocating for by claiming a right to FPIC is far broader and more complex than a right to a consultation or economic participation in resource extraction. They requested that states acknowledge the multifaceted meaning of land for Indigenous nations, as articulated, for example, by Glen Coulthard: land as a central resource for material survival; land as an identity that is constitutive of the formation of a people; and land as a relationship that depends on accountability to human and non-human entities.⁴⁸

The international human rights regime is arguably favourable to this interpretation. Self-determination is central to applying FPIC as it depends on the particular status Indigenous Peoples bear in international law.⁴⁹ As laid out in Article 4 of UNDRIP, 'Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions'.⁵⁰ Sarah Morales convincingly argues that UNDRIP, in the context of increasing extraction, implies mechanisms through which Indigenous laws and practices can be operationalised.⁵¹

The fact that UNDRIP is now almost universally referenced does not, however, automatically translate to the actual realisation of FPIC as self-determination. States have been quick to (unilaterally) re-interpret the right to FPIC as an obligation to *seek* consent, not to *obtain* it.⁵² Indigenous and other critical scholars, Indigenous authorities and Indigenous communities have expressed the worry that the universal endorsement of UNDRIP merely consolidates a body of discourses, politics and laws whose aim is to 'domesticate' Indigenous self-determination's inherent unsettling of states' claims to exclusive sovereignty.⁵³ Furthermore, there are concerns that the manner in which some actors have implemented FPIC has reduced it to a technical procedure divorced from its original

Americas, including numerous negative impacts and abuses committed in connection with extractive projects. See, for example, IACHR. *Indigenous Peoples, Communities of African Descent, Extractive Industries*, OEA/Ser.L/V/II. Doc. 47/15 (31 December 2015). Furthermore, the IACtHR has taken significant decisions in this regard. The case of *Awas Tingni* was the first international decision to protect the right to collective lands of Indigenous peoples: *Case of the Mayagna [Sumo] Awas Tingni Community v Nicaragua. Merits, Reparations and Costs*, Judgement of 31 August 2001, Series C No. 79).

⁴⁵ OHCHR, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', HR/PUB/11/4 (2011).

⁴⁶ Owen and Kemp, note 8, 93.

⁴⁷ Coulthard, note 24.

⁴⁸ *Ibid.*, 63.

⁴⁹ Carol Y Verbeek, 'Free, Prior, Informed Consent: The Key to Self-Determination. An Analysis of "The Kichwa People of Sarayaku v. Ecuador"' (2012) 37 *American Indian Law Review* 263, 271.

⁵⁰ United Nations Declaration on the Rights of Indigenous Peoples, A/RES/61/295 (adopted 13 September 2007), s 32.

⁵¹ Sarah Morales, 'Digging for Rights: How Can International Human Rights Law Better Protect Indigenous Women from Extractive Industries?' (2019) 31 *Canadian Journal of Women and the Law* 58.

⁵² See Papillon, Martin, et Thierry Rodon. 'Le consentement préalable, libre et éclairé (CPLÉ) en contexte canadien'. *Les Cahiers du CIÉRA*, 2023, 43–50.

⁵³ Benjamin, note 1, 173; Smith, note 38; Bhandar, note 34; Aileen Moreton-Robinson, *The White Possessive: Property, Power, and Indigenous Sovereignty* (Minneapolis, MN: University of Minnesota Press, 2015); Aaron Mills, 'Aki, Anishinaabek, Kaye Tahsh Crown' (2010) 9 *Indigenous Law Journal* 107.

substance⁵⁴ and that extractive companies' use of FPIC as a social management tool contradicts broader principles of legitimacy, representation and inclusiveness.⁵⁵

The point here is that the political grammar of FPIC is somewhat open-ended.⁵⁶ There is no question, however, that the promotion of FPIC by Indigenous nations, activists and intellectuals, and by other human rights defenders, pursues a teleological principle: self-determination. From that perspective, FPIC regimes are legitimate inasmuch as they are coherent with Indigenous self-determination, that is, inasmuch as they *realise* self-determination. Under that logic, self-determination constitutes the political grammar of FPIC: it must be rooted in and foster the structuring of Indigenous political communities.

The next part explores Canadian norm entrepreneurs' efforts at uprooting FPIC from the principle of self-determination.

IV. Canadian normative bricolages and the uprooting of FPIC

Paradoxically or not, the inscription of Indigenous rights in international law coincides with the general devaluation of the legal form in favour of informal, diffuse and private-based instruments in global governance.⁵⁷ This shift away from teleological justifications was accompanied by a discourse exalting 'pragmatic', 'dialogic' and 'horizontal' modes of governance.⁵⁸

The global governance of natural resources itself took a sharp pragmatic turn in the 1990s. This resulted, in large part, from several waves of neoliberal reforms to national mining regimes worldwide since the 1980s. In line with international investment agreements before and since, these reforms all put forward different iterations of the 'free entry' principle, prioritising legal security and predictability for foreign investors over other principles and values such as democratic territorial organisation, sustainable development, sectoral linkages and Indigenous stewardship of the land.⁵⁹ In the process, laws were also uprooted from their teleological underpinnings, in the sense that their legitimacy depended increasingly on their effectiveness—or even their ability to self-implement through market rule—rather than on their consistency with the overall objectives they are supposed to help achieve.⁶⁰

Canada played an important role in this process, both as a model jurisdiction for extractive activities and as an active promoter of normative 'solutions' that might be applied in other jurisdictions. Indeed, the hegemonisation of the principle of free entry reproduced, in other jurisdictions, the same contradictions that existed in Canada between extractive political economies and Indigenous self-determination.⁶¹ As the extractive frontier expanded at every new boom of the commodities cycle, conflicts with local communities multiplied.⁶² A new field of 'normative innovation' has flourished in

⁵⁴ Owen and Kemp, *note 8*, 92.

⁵⁵ Fontana and Grugel, *note 40*, 249.

⁵⁶ Or 'indeterminate', in Koskeniemmi's terms: Martti Koskeniemmi, 'The Politics of International Law' [1999] 1 *European Journal of International Law* 1; Martti Koskeniemmi, 'The Politics of International Law – 20 Years Later' [2009] 20 *European Journal of International Law* 7.

⁵⁷ Indeed, Ost noted this shift in society in general: Ost, *note 12*.

⁵⁸ David Szablowski, 'John Willis and the Challenges for Public Law Scholarship in a Neoliberal Globalizing World' (2005) 55:3 *University of Toronto Law Journal* 869.

⁵⁹ Pascale Hatcher and Etienne Roy Grégoire, 'Governance of Extractive Industries' in Wil Hout and Jane Hutchison (eds), *Handbook of Governance and Development* (Cheltenham: Edward Elgar Publishing, 2022) 294.

⁶⁰ Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton: Princeton University Press, 2006); Thomas Berns, 'L'efficacité comme norme' (2011) 4 *Dissensus* 151.

⁶¹ Gilbert, *note 2*.

⁶² Leah Temper *et al.*, 'The Global Environmental Justice Atlas (EJAtlas): Ecological Distribution Conflicts as Forces for Sustainability' (2018) 13 *Sustainability Science* 573; Arnim Scheidel *et al.*, 'Environmental Conflicts and Defenders: A Global Overview' (2020) 63 *Global Environmental Change* 1.

response to these conflicts and two interrelated areas of policy intervention and research have emerged under the umbrellas of CSR and BHR. We argue that by underlining enterprises' *responsibility*, such innovations help justify their primary role in extractive sector governance and public actors' secondary role or complete retreat, despite explicit parallel legal obligations of states.

In this part of the article, we describe how Canadian entities tinker with normative innovations in the field created between the de-teleologisation of governance and the conflicts this creates and contribute to reframing the political grammar underlying the right to FPIC—in other words, uprooting FPIC from Indigenous self-determination. We advance three interrelated hypotheses. They are:

- (i) Canada frames CSR as a palliative for defective host jurisdictions ('weak governance zones', 'failed states', etc.)—a sort of DIY normative device to compensate for a supposed lack of local rule of law caused by deficiencies in local jurisdictions. These include, as we will describe, Indigenous jurisdictions;
- (ii) The notion of 'leverage', as illustrated by EDC's example, is at the core of CSR's political grammar; and
- (iii) FPIC is profoundly transformed by this political grammar—uprooted from Indigenous Peoples' self-determination, to be reframed as a social domestication instrument that extractive corporations can use to mitigate the risks of operating in Indigenous territories and in so-called defective jurisdictions.

We now examine each of these hypotheses in more detail.

Canada's framing of CSR as a palliative for defective jurisdictions

Canada has long played a role as a norm exporter in the global extractive ecosystem, promoting a particular governance configuration for the global extractive sector and generating normative innovations for extractive governance since the 1990s, several of which originate in the private sector.⁶³

Canada has positioned itself as a convenient home jurisdiction for mining firms operating globally. Companies listed on Canadian stock exchanges (TSX and TSX-V) raise between a third and a half of the capital invested in the sector worldwide, and between 40 per cent and 55 per cent of mining companies, depending on the source, are listed on Canadian stock exchanges.⁶⁴ Canadian governments have worked hand in hand with industry to promote and justify these norms, deploying a global network of 'norm

⁶³ Eric Engle, 'Corporate Social Responsibility (CSR): Market-Based Remedies for International Human Rights Violations?' (2004) 40 *Willamette Law Review* 103; Ann Mayer, 'Human Rights as a Dimension of CSR: The Blurred Lines Between Legal and Non-Legal Categories' (2009) 88:4 *Journal of Business Ethics* 561; Viviane Weitzner, 'Indigenous Participation in Multipartite Dialogues on Extractives: What Lessons Can Canada and Others Share?' (2010) 30 *Canadian Journal of Development Studies / Revue canadienne d'études du développement* 87; Prospectors and Developers Association of Canada, 'PDAC's e3 Plus Initiative Plan' (2010) 131 *Canadian Mining Journal* 22; Hevina Dashwood, 'Canadian Mining Companies and the Shaping of Global Norms of Corporate Social Responsibility' (2005) 60:4 *International Journal: Canada's Journal of Global Policy Analysis* 977.

⁶⁴ Ministère des Ressources naturelles, *Cahier d'information: Les marchés de l'énergie 2014-2015* (Ottawa: Gouvernement du Canada, 2014); TSX, '~40% of the World's Public Mining Companies are Listed on TSXV and TSXV', *Tor Stock Exch* (2023), <https://www.tsx.com/listings/listing-with-us/sector-and-product-profiles/mining> (accessed 18 July 2023). Canada's attractiveness can be explained by a variety of reasons including that it offers important financial incentives, including capital cost allowances (CCA), foreign resource expense (FRE) and foreign exploration and development expense claims and flow-through shares (FTS).

entrepreneurs'⁶⁵ such as diplomats, mining executives, industry consultants and business associations.⁶⁶

Canada's official CSR policies, for their part, have developed amid a debate that puts in opposition voluntary and mandatory measures for Canadian corporations operating overseas.⁶⁷ The notion that these measures are rendered necessary by deficiencies in host jurisdictions has been shared on both sides of the debate—although policy conclusions diverge sharply. Arguing in favour of mandatory measures implemented by home states, Simons and Macklin, for example, underline that the human rights violations corporations commit are enabled by 'weak governance zones'.⁶⁸ The government of Canada, for its part, defines CSR as 'the voluntary activities undertaken by a company over and above legal requirements'⁶⁹ and justified its voluntary *Building the Canadian Advantage* CSR policy in 2009, for example, by stating that 'many countries face considerable capacity challenges in implementing extractive sector strategies, legislations and regulations that ensure investments and operations are socially and environmentally responsible; support the protection of human rights; and, [sic] produce sustainable benefits for communities'.⁷⁰

Canada eventually adopted the term 'responsible business conduct' (RBC) rather than CSR.⁷¹ The Canadian RBC policy was last updated in 2022.⁷² Although we discuss some of the changes made with this update below, they have not fundamentally altered the underlying

⁶⁵ Finnemore and Sikkink point out that because 'norms by definition embody a quality of "oughtness" and shared moral assessment, [they] prompt justifications for action and leave an extensive trail of communication among actors that we can study'. Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' [1998] 52:4 *International Organization* 887, 892. On global norm entrepreneurs, see Roger Cotterrell, 'Transnational Networks of Community and International Economic Law' in Amanda Perry-Kessaris (ed), *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext* (London: Routledge, 2013) 133; Felix M Dorn and Christoph Huber, 'Global Production Networks and Natural Resource Extraction: Adding a Political Ecology Perspective' (2020) 75 *Geographica Helvetica* 2, 183; Kathryn Sikkink, 'Human Rights, Principled Issue-Networks, and Sovereignty in Latin America' (1993) 47:3 *International Organization* 411; Y Dezalay and BG Garth (eds), *Global prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy* (Ann Arbor, MI: University of Michigan Press, 2002).

⁶⁶ Michael L Dougherty, 'Scarcity and Control: The New Extraction and Canada's Resource Protection Network' in Kalowatie Deonandan and Michael L Dougherty (eds), *Mining in Latin America: Critical Approaches to the New Extraction* (New York: Routledge, 2016) 83. See also Daviken Studnicki-Gizbert, 'Canadian Mining in Latin America (1990 to Present): A Provisional History' (2016) 41 *Canadian Journal of Latin American and Caribbean Studies / Revue canadienne des études latino-américaines et caraïbes* 95.

⁶⁷ For an overview up to 2011, see José Carlos Marques, 'Private Regulatory Fragmentation as Public Policy: Governing Canada's Mining Industry' (2016) 135:4 *Journal of Business Ethics* 617. See also Penelope C Simons, 'Canada's Enhanced CSR Strategy: Human Rights Due Diligence and Access to Justice for Victims of Extraterritorial Corporate Human Rights Abuses' (2015) 56:2 *Canadian Business Law Journal* 167.

⁶⁸ Simons and Macklin, *note* 27, 16–17.

⁶⁹ Government of Canada, 'Responsible Business Conduct Abroad: Canada's Strategy for the Future' (2022), <https://www.international.gc.ca/trade-commerce/assets/pdfs/rbc-cre/strategy-2021-strategie-1-eng.pdf> (accessed 18 July 2024) (emphasis added).

⁷⁰ Under the 2009 policy, Canada aimed to strengthen host-country governance capacity with regards to the extractive sector by offering technical assistance on environmental and mining regulations, addressing perceived knowledge gaps on the part of Indigenous Peoples and increasing revenue transparency. The thrust of the policy, however, was to promote CSR. Department of Foreign Affairs and International Trade (DFAIT), *Building the Canadian Advantage: A Corporate Social Responsibility [CSR] Strategy for the Canadian International Extractive Sector* (Ottawa: Government of Canada, 2009).

⁷¹ The Government of Canada states that 'RBC integrates the management of risks to the environment, people and society into a business's core activities[.] Other terms related to RBC and sometimes used interchangeably include: Corporate Social Responsibility (CSR) and Sustainability and Environmental, Social and Governance (ESG)'. (Government of Canada, *note* 69, 6).

⁷² *Ibid.*

logic of Canada's approach towards voluntary and mandatory measures 'to set out expectations and legal requirements for corporate conduct'.⁷³

The rationale of the Canadian government's CSR and RBC policies is to help corporations mitigate risks inherent to operating in defective host jurisdictions. These policies do not focus on operations within Canada, as it is assumed, rightly or wrongly, that enterprises operating there will be attentive to their practices and that domestic regulations will apply if needed. The 2009 policy stated that CSR 'makes good business sense since it enables companies to manage the social and environmental risks of their operations'.⁷⁴ The Office of the Extractive Sector CSR Counsellor was established at that time as an informal mediation body under the rationale that

[u]nresolved disputes directly affect businesses through expensive project delays, damaged reputations, high conflict management costs, investor uncertainty, and, in some cases, the loss of investment capital. In consultation with stakeholders, there was a strong support for a mechanism to enable the sector to resolve CSR disputes [...] in a timely and transparent manner.⁷⁵

The political grammar of CSR as a means for businesses to mitigate operational risks in weak jurisdictions—rather than as a means to regulate corporate behaviour to prevent companies from benefitting from these weaknesses, or simply to prevent human rights abuses—was then reinforced by the fact that the CSR Counsellor would 'not review the activities of a Canadian company on his or her own initiative, make binding recommendations or policy or legislative recommendations' and would 'only undertake review with the consent of the involved parties'.⁷⁶ In other words, the 'normative good' the CSR Counsellor provided was mediation services *if extractive companies requested them*. The protection of any substantive rights would come from the mediation itself.

Under pressure from Canadian civil society, however, Canada's evolving CSR strategy progressively integrated regulations for corporations operating abroad—the underlying 'problem' being, again, deficient foreign jurisdictions since, as Seck notes, 'the possible application of the international CSR standards endorsed in the Strategy to problems associated with extractive companies operations within Canada does not appear to have been considered'.⁷⁷ Although the 2014 *Doing Business the Canadian Way* policy still considered CSR to be a risk-management tool, the policy recognised that reputational risks to 'the Canadian brand' could only be efficiently deterred by exercising a certain degree of constraint over company behaviour. As a result, companies that refused to participate in mediation processes led by the CSR Counsellor, for example, were exposed to the withdrawal of government advocacy support abroad, while participation made them eligible for 'enhanced [...] economic diplomacy'.⁷⁸ However, it is worth noting that sanctions only followed for corporations that refused to participate in mediation processes, and not for those that failed to meet substantial standards. It is also worth noting that a degree of reputational sanction was contemplated for *any* party—corporation or community, human

⁷³ See Penelope Simons, 'Developments in Canada on Business and Human Rights: One Step forward Two Steps Back' (2023) 36:2 *Leiden Journal of International Law* 363.

⁷⁴ DFAIT, note 70.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Sara L Seck, 'Climate Change, Corporate Social Responsibility, and the Extractive Industries' (2018) 31:1 *Journal of Environmental Law and Practice* 271, 274.

⁷⁸ Global Affairs Canada (GAC), *Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad* (Ottawa: Global Affairs Canada, 2014) 12.

right defender or Indigenous nation—involved in extractive socio-environmental conflicts under the CSR Counsellor’s review, since ‘a decision by *either* party not to participate in the CSR Counsellor’s Office [...] review process [would] *be made public*’.⁷⁹ The corollary of this injunction to engage in dialogue is, of course, to translate substantive human rights considerations into communication issues. Moral values associated with communication thus become the focus of legitimization narratives associated with the relationship between extractive companies and the social actors surrounding their projects, irrespective of power asymmetries or any teleological hierarchisation of the interests involved.⁸⁰

In fulfilment of an electoral promise, the Government of Canada further reviewed its CSR policy and established the Office of the Canadian Ombudsman for Responsible Enterprise (CORE) in 2019. Although CORE’s mandate is listed in the 2019 *Responsible Business Abroad* policy as ‘voluntary company-community dialogue facilitation and dispute resolution’,⁸¹ it nonetheless differs in some important ways from that of the CSR Counsellor, which it replaced.⁸² Even though CORE was denied the powers anticipated in initial government promises to give it the power to compel evidence from corporations, CORE’s power to review complaints for human rights abuses and to initiate a review independently of the consent of the corporation implicated represents a fundamental policy shift.⁸³ Furthermore, materials CORE has published explicitly acknowledge a potential contradiction between mediation and the appropriate treatment of human rights issues⁸⁴ and CORE has taken some steps towards ensuring that its processes do not increase claimants’ vulnerabilities.⁸⁵

These elements diverge from Canada’s epistemological bias towards seeing its CSR and RBC policies as tools to enhance the competitiveness of Canadian companies operating in defective jurisdictions, as CORE’s mandate and procedures clearly incorporate a teleological, human rights logic. These elements notwithstanding, however, Canada’s underlying conception of CSR as a palliative for operating in weak jurisdictions is largely maintained. As mentioned above, CSR standards are considered to be minimum norms to be followed

⁷⁹ Ibid (emphasis added). An example of such sanctions applied to civil society can be found in the CSR Counsellor’s report on Honduras, where the Counsellor laments the ‘lack of trust and confidence among major stakeholders regarding each other’s willingness or capacity to engage in open and honest dialogue’, in a context where civil society actors opposed to Canadian mining projects were subjected to endemic political violence. Office of the Extractive Sector Corporate Social Responsibility Counsellor, *Honduras Country Trip Overview* (Ottawa: Office of the Extractive Sector Corporate Social Responsibility (CSR) Counsellor, 2016). See also Above Ground et al, *Canadian Civil Society Organizations Denounce CSR Counsellor’s Report on Honduras* (Ottawa: Above Ground, 2017), <https://aboveground.ngo/civil-society-calls-retraction-csr-counsellor-report/> (accessed 18 July 2023).

⁸⁰ Etienne Roy Grégoire and Marc-André Anzueto, ‘Hearts and Mines. Communication, Dissent and Counterinsurgency around Extractive Projects from Canada to Colombia’ (2025) 13:2 *Critical Studies in Security* 212.

⁸¹ GAC, *Responsible Business Conduct Abroad* (Ottawa: GAC, 2019).

⁸² While acknowledging that the Counsellor’s Office could have played a role in ‘naming and shaming’ Canadian companies or called for the withdrawal of government support, former CSR Counsellor Jeffrey Davidson (2015–2018), recalls that ‘in its three years of operation the Office never reached the point of recommending or undertaking punitive measures’. Jeffrey Davidson and J. Andrew Grant, ‘Reflections on the Context and Implications of the Transition from Canada’s Extractive Sector Corporate Social Responsibility Counsellor to the Canadian Ombudsperson for Responsible Enterprise’ in Karin Buhmann et al (eds), *The Routledge Handbook on Meaningful Stakeholder Engagement* (London: Routledge, 2024) 172–173.

⁸³ See Peter Mazereeuw, ‘Canada Must “walk the Talk” Give Corporate Ethics Watchdog Power to Compel Evidence: UN Expert’. *The Hill Times* (29 April 2019), <https://www.hilltimes.com/story/2019/04/29/canada-must-walk-the-talk-give-corporate-ombudsperson-more-powers-and-budget-un-expert/227524/> (accessed 30 November 2025); and Canadian Ombudsperson for Responsible Enterprise (CORE), *Mandate of the Canadian Ombudsperson for Responsible Enterprise*, (Ottawa: CORE, 2019).

⁸⁴ CORE, *Listening Tour Report* (Ottawa: CORE, 2020).

⁸⁵ CORE, ‘Draft Operating Procedures of the Canadian Ombudsperson for Responsible Enterprise’, https://core-ombuds.canada.ca/core_ombuds-ocre_ombuds/operating_procedures-procedures_exploitation.aspx?lang=eng (accessed 18 July 2023).

when host country laws fail to reflect ‘Canadian values’. As well, CORE’s mandate only applies outside Canada.⁸⁶ Many limits also remain in CORE’s mandate that hinder its ability to investigate human rights abuses, such as the lack of power to compel testimonies and documents.⁸⁷ Most importantly, as CORE can only recommend sanctions to the Canadian government, what influence it may have on the extractive sector’s normative ecosystem largely depends on whether the government upholds these recommendations—or even responds to them. The government has, to date of publishing, failed to acknowledge any of the CORE’s substantive determinations.⁸⁸

As the next section illustrates, other rather powerful Canadian norm entrepreneurs also act in this normative ecosystem. For them, not only is CSR a palliative for defective jurisdictions, but through different bricolages, it can help extractive companies establish legitimate order even where local jurisdictions fail to: DIY normative orders.

EDC’s contribution to the normative ecosystem: leverage

EDC is an often overlooked but crucial element of the network of Canadian norm entrepreneurs mentioned above. EDC is one of the largest export credit agencies in the world, facilitating an annual volume of over CAD130 billion in exports, foreign investment and trade development activities, about a quarter of which are in the mining, oil and gas sectors.⁸⁹ About 60 per cent of its support is in the form of credit insurance, helping corporations mitigate credit risk and enabling them to conduct business in ‘higher-risk’ markets.⁹⁰

EDC adheres to the OECD Common Approaches, a non-binding document with recommendations for ECAs. It is also an Equator Principles Financial Institution (EPFI).⁹¹ Both the Common Approaches and the Equator Principles encourage financial institutions to ensure that those seeking financial support comply with the IFC Performance Standards. EDC’s Environmental and Social Review Directive, which has been developed ‘in close alignment’ with the IFC Performance Standards and the Equator Principles, is binding on EDC. It does not, however, oblige EDC to follow the IFC Performance Standards or the Equator Principles. EDC uses the IFC Performance Standards ‘as an overarching framework for environmental and social performance for projects where host country requirements are

⁸⁶ GAC, *note 85*. While the current RBC policy acknowledges that appropriate human rights due diligence might imply refraining from operating in certain contexts, it does not make such due diligence mandatory under Canadian law.

⁸⁷ Canadian Network for Corporate Accountability (CNCA), *Canadian Ombudsperson for Responsible Enterprise (CORE): Proceed with Caution* (Ottawa: CNCA, 2020). CORE has stated that ‘the ability to compel witnesses and documents during investigation would maximize the office’s effectiveness as a non-judicial grievance mechanism’. CORE, *Remarks for the Amnesty International Regional Conference - Saskatoon Group 33* (Saskatoon: CORE, 2019).

⁸⁸ In early 2024, CORE determined that a Canadian mining company operating in the Xinjiang region had violated human rights and recommended that official support for the company, including EDC support, be withdrawn. CORE, *Final Report: Investigation for a Complaint Filed by a Coalition of 28 Organizations about the Activities of Dynasty Gold Corporation* (Ottawa: CORE, 2024). This was an important precedent, since it was the first time in Canadian history that a body established to monitor corporate behavior abroad had made such a determination, applying positive norms informed by human rights imperatives. At the date of publication, the Canadian government had made no official response to the CORE’s recommendations, despite formal demands from civil society to do so.

⁸⁹ EDC, *Accelerating the Export Impact: 2023 Integrated Annual Report* (Ottawa: EDC, 2023) 11.

⁹⁰ *Ibid.*

⁹¹ OECD, *Recommendation of the Council on OECD Legal Instruments Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence (The ‘Common Approaches’)*, OECD/LEGAL/0393 (Paris: OECD, 2025); Collective Group of Signatories to the Equator Principles, *Equator Principles* (2020), https://equator-principles.com/app/uploads/The-Equator-Principles_EP4_July2020.pdf (accessed 6 June 2025).

less stringent than the IFC Performance Standards'.⁹² EDC maintains discretion when it comes to making a decision about funding, even where the client company does not meet the IFC Performance Standards.

EDC's human rights, environmental and social risk assessment procedure is outlined in its ESRMP, last updated in 2022 following consultations with stakeholders.⁹³ EDC's ESRMP also mobilises the IFC Performance Standards.⁹⁴ As an EPFI, EDC is expected to back these standards with formal contractual sanctions. It could, for example, withdraw funding to clients who fail to comply with the IFC Standards. Such measures, however, are rare among EPFIs and undocumented as far as EDC is concerned.⁹⁵ From the point of view of EDC, the Equator Principles are better understood as 'a risk management framework [...] for determining, assessing and managing environmental and social risk in projects and [...] primarily intended to provide a minimum standard for due diligence and monitoring to support responsible risk decision-making'.⁹⁶ Under that logic, central to EDC's understanding of its role is the notion of 'leverage':

Our practice is to use leverage to influence our customers' actions to prevent and mitigate their actual and/or potential severe human rights impacts. We recognize that the extent of our leverage is variable and impacts our ability to influence the actions of our customers. *Where we have insufficient leverage, EDC seeks ways to increase our leverage so that those severe human rights impacts can be effectively prevented and mitigated.*⁹⁷

As EDC states in its submission to a 2018 Parliament of Canada legislative review:

[W]e want our financial partners and customers to know that best commercial practices are being upheld. *This cannot always mean saying 'no' to transactions and leaving opportunities for Canada behind. Sometimes, it means being a force of positive influence for the companies we work with, and helping our customers achieve long-term responsible business success.*⁹⁸

EDC's impact as a normative entrepreneur is worth analysing in terms of the particular configuration of leverage induced in the normative ecosystem that surrounds the IFC Standards. Critics have long argued that under the logic of leverage, EDC treats the IFC

⁹² EDC, *Environmental and Social Review Directive* (Ottawa: EDC, 2022), <https://www.edc.ca/content/dam/edc/en/corporate/corporate-social-responsibility/environment-people/environmental-and-social-review-directive.pdf> (accessed 6 June 2025).

⁹³ EDC, *Environmental and Social Risk Management Policy* (Ottawa: EDC, 2022). The ESRMP is complemented by a Climate Change Policy (2022), a Human Rights Policy (2022), an Environmental and Social Review Directive (2022); and a Transparency and Disclosure Policy (2020).

⁹⁴ EDC, *note 93*, s 2.2.

⁹⁵ Simons and Macklin, *note 31*, 130. Furthermore, EDC only applies the IFC Standards to its *project* financing portfolio (about 3 per cent of its total business). Even though mining and oil and gas projects represent about a quarter of its business, EDC rarely classify this financing under 'project financing' but rather under 'general corporate purposes': EDC, *note 93*, s 5. Civil society critics have long decried that EDC does not disclose its assessment of the implementation of the IFC Standards for general corporate purposes, or whether they are part of its decision process at all. Above Ground, *Bringing Accountability and Transparency to Export Development Canada's Practices. A Submission for Parliament's Review of the Export Development Act* (Ottawa: Above Ground, 2018) 5. As such, critics argue that EDC's ESRMP captures only a fraction of EDC's environmental and human rights responsibilities. The Hidroituango project is a case in point. Above Ground, *EPM's Disastrous Dam. How Canada Financed a High-Risk Energy Venture Gone Awry* (Ottawa: Above Ground, 2020).

⁹⁶ EDC, *note 93*.

⁹⁷ *Ibid*, s 2.2 (emphasis added).

⁹⁸ EDC, *Evolving with the Changing Needs of Exporters. Submission to the 2018 Legislative Review of Export Development Canada* (Ottawa: EDC, 2018) 36 (emphasis added).

Standards as merely aspirational, aiming to enhance Canadian business competitiveness rather than preventing human rights abuses.⁹⁹ Indeed, the stated purpose of EDC's ESRMP is 'to make Canadian companies internationally recognized as leaders in sustainable and responsible business, giving them the competitive advantage they need to succeed internationally'.¹⁰⁰

If using one's leverage 'cannot always mean saying no', it is unclear under which circumstances it means, for EDC, 'not saying yes'. Civil society organisations (CSOs) have identified several instances of companies receiving EDC support despite credible or proven allegations of environmental damage, corruption and human rights violations. For instance, one year after receiving EDC support, Canadian oil company Frontera's operations were suspended by Colombia's Constitutional Court because the company violated the rights of an Indigenous community. The Canadian company Kinross Gold received four EDC loans between 2014 and 2017, and then another in 2018. Earlier loans were granted after public authorities raised concerns about environmental damage and violations of community rights at a Brazilian mine, while the latter loan came after US authorities charged the company with corruption-related offences. Finally, Canadian tech company Netsweeper received a guarantee from EDC to sell internet censorship technology in 2016 to the Government of Bahrain, a country frequently criticised for suppressing human rights defenders through censorship, surveillance, arbitrary detention and torture.¹⁰¹

Indeed, although the ESRMP allows financial support to be withheld based on environmental, social and human rights due diligence, EDC does not disclose information on such occurrences or whether there is an established threshold to do so.¹⁰²

Leverage is a powerful tool in the normative ecosystem. As noted above with regard to the injunction of dialogue, it puts aside substantial teleological principles and associated sanctions in favour of maintaining fluid communication between EDC and its clients. In doing so, the normative ecosystem tends to lose its teleological leaning in favour of implicit, pragmatic values related to reputation and competitiveness. In keeping with this logic, EDC's impact on the normative ecosystem is to consolidate a notion of FPIC as a mere procedural rule of engagement between extractive companies and Indigenous communities, rather than a means for self-determination.

DIY FPIC: From self-determination to extractive companies 'fixing' Indigenous representation

A teleologically coherent solution to conflicts, violence and human rights violations linked to extractivism in Indigenous territories, as mentioned in the introduction, implies radical social transformations and wide-ranging institutional reforms supported by vibrant political communities—Indigenous and non-Indigenous. Logically, the most determinant

⁹⁹ See Karyn Keenan's expert testimony, *Evidence - FAAE (40-2) - No. 34 - House of Commons of Canada*, 40th Parliament, Second Session, Number 34 (Ottawa: Standing Committee on Foreign Affairs and International Development, House of Commons, Parliament of Canada, 2009). The IFC itself seems to endorse the view that its standards 'are not a "compliance tool", [but that] their purpose is to achieve a positive development outcome over a reasonable period of time', cited in Simons and Macklin, [note 27](#), 139.

¹⁰⁰ EDC, *Environmental and Social Risk Management Policy* (Ottawa: EDC, 2019), s 1.1.

¹⁰¹ Above Ground, [note 95](#), 7–8.

¹⁰² EDC, [note 93](#). Since 2021, EDC only discloses 'on an annual basis, the aggregate number of financing transactions that did not proceed and prospective financing customers that were not onboarded by EDC based in whole or in part on non-credit considerations (risks related to business ethics, financial crimes, the environment, human rights, and other social factors)'. EDC does not identify such potential customers or the reasons for denying its support, arguing that it falls under commercial confidentiality exceptions to the Canadian Access to Information Act. EDC, *EDC's Transparency and Disclosure Policy Public Response Paper. Summary of Stakeholder Feedback and EDC Response* (Ottawa: EDC, 2020).

processes underlying these reforms should deploy themselves at the national and sub-national level.

EDC, however, proposes that extractive companies mobilise transnational normative instruments to ‘cobble together’ FPIC. FPIC could then be ‘had’ regardless of a coherent normative architecture organising the relationship between state sovereignty and Indigenous self-determination. With EDC’s normative solution, transnational extractive companies do not depend on host jurisdictions. Rather, they bring FPIC kits in their toolboxes: they can do it themselves.

This subsection focuses on EDC’s implementation of IFC PS7 regarding Indigenous Peoples. To comply with IFC PS7, FPIC from affected communities is required in the following cases: if a project is located on lands traditionally owned by Indigenous Peoples, and adverse impacts such as loss of access to assets or resources or restrictions on land use can be expected;¹⁰³ if a project implies relocation from ‘communally held lands and natural resources’;¹⁰⁴ if a project significantly impacts critical cultural heritage;¹⁰⁵ or if a project proposes to use cultural heritage, including knowledge, innovations, or practices of Indigenous Peoples, for commercial purpose.¹⁰⁶

IFC PS7 cites UNDRIP. It also insists, however, that ‘there is no universally accepted definition of FPIC’¹⁰⁷ and formulates its own:

[FPIC] will be established through good faith negotiation between the client and the Affected Communities of Indigenous Peoples. The client will document: (i) the mutually accepted process between the client and Affected Communities of Indigenous Peoples and (ii) evidence of agreement between the parties as the outcome of the negotiations. *FPIC does not necessarily require unanimity and may be achieved even when individuals or groups within the community explicitly disagree.*¹⁰⁸

IFC PS7 carefully ignores FPIC’s self-determination roots and reframes FPIC as procedural rules of engagement, thus avoiding any definition of FPIC that would relativise states’ sovereignty over their natural resources.¹⁰⁹ While the guidance notes that accompany IFCPS7 elaborate on issues such as Indigenous Peoples’ vulnerability with regards to ‘their past and ongoing relationship with dominant groups and the mainstream economy’ and ‘participatory approaches [that] reflect the views of the Affected Communities of Indigenous Peoples on expected project risks, impacts, and benefits’,¹¹⁰ it also explicitly dismisses these views inasmuch as they contradict the state’s unquestioned sovereignty over natural resources. The Guidance Notes insist that ‘[a] determination that a group or community is indigenous for the purpose of Performance Standard 7 does not affect the political or legal status of such a group or community within specific countries or states’¹¹¹ and that ‘states have the right to make decisions on the development of resources pursuant to applicable national law, including those laws implementing host country obligations under international law. Performance Standard 7 does not contradict the state’s right to develop its resource’.¹¹²

¹⁰³ IFC, *Performance Standard 7. Indigenous Peoples* (Washington, DC: IFC, 2012) s 14.

¹⁰⁴ *Ibid*, s 15.

¹⁰⁵ *Ibid*, s 16.

¹⁰⁶ *Ibid*, s 17.

¹⁰⁷ IFC, *Guidance Note 7. Indigenous People* (Washington, DC: IFC, 2012) 2.

¹⁰⁸ *Ibid*, 7 (emphasis added).

¹⁰⁹ Seck, *note 4*.

¹¹⁰ IFC, *note 103*, s GN11.

¹¹¹ *Ibid*, s GN5.

¹¹² *Ibid*, s GN26.

This limit to FPIC significantly contradicts the principles of self-determination and self-government outlined in UNDRIP.¹¹³ With regards to self-government, the Guidance Notes stipulate that extractive companies must take account of ‘existing social structures, leadership, and decision-making processes as well as social identities such as gender and age’.¹¹⁴ These Notes also advise seeking FPIC by ‘build[ing] upon existing customary institutions and decision-making processes’, with the important caveat that:

[i]n many situations, projects introduce issues that existing institutions and decision-making processes are poorly equipped to address. Inadequate capacity and experience may result in decisions and outcomes that have detrimental consequences for the Affected Communities and project relations with them. Specifically, poor processes, decisions, and outcomes may lead to challenges to existing institutions, decision-making processes, and recognized leadership and to disputes over agreements between the Affected Communities of Indigenous Peoples and the project.¹¹⁵

Furthermore, the Guidance Notes situate issues of Indigenous leadership, governance and representativeness squarely under proponents’ authority:

Communities of Indigenous Peoples may be affected by issues related to governance, leadership and representativeness. Assessment of these issues will inform the engagement and negotiation process. Where administrative and traditional systems recognize different leaders, *where leadership is known to be highly politicized* and/or only marginally representative of the affected population or if there are multiple groups representing different interests, FPIC should rely on identification, recognition and engagement of greater numbers or representativeness of stakeholder subgroups.¹¹⁶

The reference to ‘highly politicized leadership’ is not benign, especially where Indigenous governments invoke their own legal principles to determine their position on projects. The meaning of the expression is, to say the least, ambiguous—what political leadership is not politicised? It is safe to assume, however, that the degree of ‘politicization’, from the extractive company’s point of view, is proportional to the degree of resistance to the project or with the means employed to express opposition, and whether these are deemed ‘legal’ by state authorities.

That is already problematic, given that DIY FPIC is supposed to safeguard against the host state’s shortcomings, but the main point here is that leaving the legitimacy of Indigenous leadership to the company’s determination contradicts the very meaning of self-determination and forecloses jurisdictional arrangements that are necessary to reconcile Indigenous self-determination and state sovereignty. While states and companies often characterise Indigenous practices of opposition to extractive projects, such as road

¹¹³ UN Declaration on the Rights of Indigenous Peoples, A/RES/61/295 (United Nations, 2007), arts 3 and 4. See *Avocats sans frontières Canada, Observations et commentaires* (Quebec City: Avocats sans frontières Canada, 2022).

¹¹⁴ IFC, *note 103*, s GN16. It is noteworthy that the project proponent should take account of the *negative* impact that these social structures and decision-making processes might have on the participation of vulnerable subgroups such as Indigenous women.

¹¹⁵ *Ibid.*, s GN17. The Guidance Note also stipulates that project proponents ‘should keep in mind that the communities of Indigenous Peoples are not necessarily homogeneous and there can be divergent views and opinions within them. Experience demonstrates that: the views of the traditional elders or leaders may differ from those who have received formal education; the views of the elderly may differ from those of the youth; and the views of men may differ from women’. *Ibid.*, s GN18.

¹¹⁶ IFC, s GN35 (emphasis added).

blockades, as *de facto* rather than *de jure* measures, for example, under Indigenous legal philosophies, ‘territorial rights’ not only articulate rights over the territory but legal obligations towards it—obligations that might include, in some cases, blockading.¹¹⁷ Disqualifying Indigenous leadership as ‘highly politicized’ in that context dismisses these jurisdictional conflicts in favour of a vague, philosophically incoherent criteria associating ‘politicized’ with ‘conflictual’, ‘conflict’ with ‘negative’.¹¹⁸

In conclusion, IFC PS7 frames FPIC as a communication framework whereby the political dimensions of Indigenous Peoples’ collective decision-making are translated into technical issues to be arbitrated not by Indigenous political communities themselves, not by wider political processes at the regional or national level, but by extractive companies.

Leverage in that context, one has to assume, would involve for EDC to offer recommendations over the company’s proper identification of their interlocutors, possibly circumventing ‘highly politicized and/or only marginally representative’ political representation: a process that, *prima facie*, would seem to contradict the very essence of Indigenous self-determination.

V. Conclusion

Are norms converging around UNDRIP’s definition of FPIC? UNDRIP’s ubiquitous character in policies, codes of conduct, industry best-practices and CSR instruments would seem to suggest so. In this article, however, we argue that this convergence is based on an overly optimistic assumption. Cross-referral does not imply convergence. Even though UNDRIP is referred to as a source in other normative instruments, these can mobilise FPIC in isolation from the other elements that constitute UNDRIP’s conceptual economy, first and foremost, self-government and self-determination. In the case analysed here, EDC frames FPIC as a procedural tool for extractive companies to exert authority over Indigenous governance, effectively uprooting FPIC from self-determination.

For that reason, we suggest that it is vital to consider the interaction between all the different normative instruments that are deployed in extractive territories. We find the metaphor of a ‘normative ecosystem as an environment for political communities’ to be useful on two principal counts: first, to empirically describe the internormative dynamics at play; second, to emphasise the importance of addressing the dialectic between political processes and norms. That is why we contrast the divergent political grammars of Indigenous self-determination and DIY FPIC.

Indeed, comparing discrete FPIC instruments does not provide a complete picture, as different norm entrepreneurs constantly mobilise and combine different normative instruments as they see fit, according to the objectives they pursue. For the same reason, it is unreasonable to assume that norms are actually converging just because they share a common reference—UNDRIP, in our case. Because of this, documenting the role of different norm entrepreneurs in pushing forward different normative solutions in the global extractive sector is crucial to a proper understanding of BHR issues.

¹¹⁷ Nancy R Tapias Torrado, *Indigenous Women Leading the Defence of Human Rights from the Abuses by Mega-projects in Latin America, in the Face of Extreme Violence* (University of Oxford: DPhil thesis, 2020).

¹¹⁸ Sarah Morales, ‘Sh-tiiwun: The Struggle of the Coast Salish People to Protect, Defend and Steward their Traditional Territories in a Period of Increased Extractive Development’, *Testify* (2016), <https://testifycollective.ca/sh-tiiwun-the-struggle-of-the-coast-salish-people-to-protect-defend-and-steward-their-traditional-territories-in-a-period-of-increased-extractive-development/> (accessed 17 June 2022); Doris Farget and Nicolas Houde, ‘Documentation et mobilisation des traditions juridiques autochtones comme fondements normatifs d’ordres juridiques contemporains : de quelques approches méthodologiques possibles’ (2023) 53:1 *Revue Générale de Droit* 49.

The Canadian norm entrepreneurs described above pursue a certain configuration of the normative ecosystem, where extractive projects are protected from Indigenous self-determination and jurisdiction, from democratic control, from the teleological imperatives of law—in short, from the structuring of societies in political communities. We characterise this kind of configuration as an *extractive* normative ecosystem.

Characterising EDC as a global norm entrepreneur and showing how its FPIC regime diverges from Indigenous conceptions of FPIC as rooted in self-determination should help inform social mobilisation in Canada and elsewhere. It should also encourage Canada to reconsider the idea that DIY FPIC can serve as an effective palliative for ‘weak’—or deficient in any way, regardless of the qualificative employed—jurisdictions. Without necessary social transformations and wide-ranging institutional reforms supported by vibrant Indigenous and non-Indigenous political communities, FPIC remains subject to existing asymmetrical relations of power among stakeholders, favouring the most powerful, including industry. Although they aim to address current dissatisfaction and put forward solutions, avenues such as DIY FPIC thus tend to mask more fundamental issues and needed regulatory, institutional and political changes. Looking ahead, one of the challenges that emerges is finding the political will to engage in debates about the issue of territorial control and the conditions under which resource development and the determination of competing uses take place—in Canada and around the world.

Our argument does not assume Indigenous political representation to be unproblematic. As in any society, Indigenous political representation is by definition contested, and answering the question ‘who has the right and responsibility to represent Indigenous Nations’ is not always straightforward. It certainly is not one that can be answered unequivocally in this article. Given some of the complexities alluded to above, pragmatic approaches such as those described here can be appealing inasmuch as they would allow for political nuances and context-specific solutions.¹¹⁹

The proposition that extractive companies can serve as vectors for normative solutions, providing ‘legitimate order’ in conflict zones, unceded territories and fragile ecosystems, however, is profoundly risky. Indigenous Peoples have a long experience of colonial states tinkering with their political representation as a way to pre-empt or domesticate their collective action. The colonial toolkit has never been devoid of nuanced and context-specific instruments.

This is one of the reasons why our argument should not be interpreted as a plea for exclusively public or state-centred regulation. Indigenous self-determination, as we noted above, implies shared jurisdictions. On the other hand, EDC, as a Crown corporation, is also a stark example of how states themselves can take advantage of the blurry area between the public and private spheres to shroud certain economic interests from democratic accountability. The Canadian government is formally accountable for EDC, and EDC is ultimately accountable to the Canadian Parliament. Under the logic of leverage, however, most of EDC’s decisions are labelled as ‘private’ in the context of its relationship with its clients.

We do not, in this article, offer a way forward, but we hope to have convincingly argued that FPIC cannot be delegated exclusively to the extractive industry. If it seems illusory to put the genie of hybrid public-private regulation, so to speak, back in the bottle, we insist that by failing to strengthen the role of teleologically oriented regulation, on the assumption that private extractive enterprises are better equipped to pursue the public interest, current responses shy away from the potentially central role of public policies as transformative catalysts. Such a role would allow them to spur structural shifts, both social and economic, in favour of more equitable and environmentally sustainable options in the long term.

¹¹⁹ We are particularly grateful to reviewer 2 for raising this issue.

No sustainable solution can be attained without vibrant political communities, Indigenous and non-Indigenous, mobilised around a shared teleological imperative of human dignity. Normative solutions put forward by norm entrepreneurs such as EDC should be judged on the basis of whether they contribute to—or pre-empt—such mobilisation.

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