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Rasmus Kløcker Larsen

To cite this article: Rasmus Kløcker Larsen (2017): Impact assessment and indigenous self-determination: a scalar framework of participation options, Impact Assessment and Project Appraisal, DOI: [10.1080/14615517.2017.1390874](https://doi.org/10.1080/14615517.2017.1390874)

To link to this article: <http://dx.doi.org/10.1080/14615517.2017.1390874>



Published online: 23 Oct 2017.



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Impact assessment and indigenous self-determination: a scalar framework of participation options

Rasmus Kløcker Larsen

Stockholm Environment Institute, Stockholm, Sweden

ABSTRACT

The implementation of the right of indigenous peoples to participate in impact assessment (IA) has moved rapidly in many jurisdictions. To facilitate comparative learning, this paper offers a scalar framework of participation options through standard IA phases and examines five IA regimes in Sweden, Norway, Canada, Australia, and Aotearoa/New Zealand. It is shown how practice is moving toward co-management and community-owned IA, with developments driven by strong indigenous demands and political recognition of material rights to lands and resources. Yet, while influence in IA has allowed for shaping project outcomes it has rarely supported the rejection of unwanted projects altogether. Moreover, some jurisdictions, such as Scandinavia, retain a much more limited consultation and notification approach. Community influence tends to be in evidence generation and follow-up while developers or state authorities retain control over decisive phases of scoping and significance determination. It is argued that indigenous participation is most meaningful through IA co-management that takes places *directly with the state and throughout all IA phases*, complemented with strategic community-owned IA.

ARTICLE HISTORY

Received 13 July 2017
Accepted 5 September 2017

KEYWORDS

Impact assessment;
indigenous Rights; self-
determination; participation;
Sami; Sweden

1. Introduction

In most parts of the world, impact assessment (IA) is the main statutory instrument for predicting and mitigating impacts of natural resource exploitation. Yet, its practice has historically been little aligned or even contradictory to indigenous peoples' rights to self-determination. Steered by state laws and corporate interests, indigenous participation has often-times been cast not as a right but as a privilege. When indigenous peoples *have* participated in IAs it has, as O'Faircheallaigh and Corbett (2005, p. 630) observed, most often been a result of conflict due to a failure to involve them in decision-making in the first place. Moreover, influence in IA may not necessarily equate influence in the ultimate permitting and/or land use planning decision. In fact, participation in IA has proven to evoke many of the same risks observed in the wider field of natural resource governance, namely cooption by corporate interests and foreign worldviews that ignore or at least partially silence indigenous ontologies (Nadasdy 2007; Coombes et al. 2014).

In contrast, as has been reviewed by other contributors to this journal (e.g. Kemp and Vanclay 2013), the recognition of indigenous rights to self-determination has by now crystallized into generally accepted international norms. With the endorsement of international and

regional treaties and conventions, notably the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and the International Labor Organization's Convention 169 on Indigenous and Tribal Peoples in Independent Countries (ILO-169) indigenous peoples have seen the recognition of collective human rights. Indigenous communities have the right to ownership of resource traditionally used and to significant degrees of participation in decision-making affecting their lands, e.g. with the right to give or withhold their Free Prior and Informed Consent (FPIC, see UNDRIP Art. 32.2) (Åhrén 2016).

Dovetailing with these developments in international norms, several jurisdictions have seen growing recognition that indigenous peoples and communities *must*, in fact, be provided the opportunity to be involved in IAs if these are to be considered meaningful and legitimate. As Ehrlich and Ross (2015, p. 92) have eloquently outlined, in situations 'where the potentially affected public includes primarily Aboriginal communities, social values of the potentially affected community should be an important factor in determining significance'. The Expert Panel in the Canada review of environmental assessment, responding to widespread public and especially indigenous distrust in IA, also recently recommended that indigenous peoples 'be included in decision-making at

all stages of impact assessment, in accordance with own laws and customs' (Canadian Environmental Assessment Agency 2017, p. 30).

In many parts of the world indigenous peoples, governments, companies, and hosts of lawyers and consultants are working to clarify what such ambitions of indigenous participation in IAs mean in concrete terms. The *Aashukan Declaration*, presented at the 2017 International Association of Impact Assessment (IAIA) conference in Montréal, offers one recent example of how indigenous peoples themselves have articulated such a vision (<https://aashukan.com/>). Similarly, a growing body of scholarly literature is emerging on 'new mechanisms of participation' employed by indigenous peoples in resisting, negotiating, and/or potentially benefiting from resource developments, including through IAs (Leifsen et al. 2017).

In this rapidly moving field, accounts of innovative examples of practice are increasingly being made available (e.g. Noble 2016) and there is growing interest in ways to facilitate comparative exchange and learning. Given the inherently contextual nature of IA practices experiences can rarely if ever be directly 'replicated' (O'Faircheallaigh 2009). Instead, the challenge before us is that of discerning emerging patterns from often very diverse practices. The development of sense-making frameworks is, arguably, an important task for research, as means of creating new possibilities to learn from one another and, potentially, finding new ways of improving practice, policy, and guidelines over time.

2. Objective and method

Thus motivated, the purpose of this paper is to examine indigenous peoples' experiences with transforming IA practice some way toward aspirations of self-determination. The key question springs from the dilemma articulated above, namely:

How can we make sense of and compare rapidly evolving and inherently diverse practices of indigenous participation in IA?

More concretely, three subquestions will be addressed:

- (i) What level of influence have indigenous communities so far obtained in IAs?
- (ii) Why do differences in indigenous participation exist between IA regimes?
- (iii) How has increased indigenous influence in IA affected land use decisions?

The key conceptual offering is a framework that organizes different participation options for indigenous communities through the standard IA phases. This framework has been constructed through a mode of iterative inquiry known, within action research, as *abduction and retroduction* (Peirce 1878). In such a process, the building of theory makes accommodation for the 'resistance'

encountered in real-life situations. In other words, I have reflected upon concrete experiences from working with indigenous communities participating in IAs and reviewed documented experiences from elsewhere in the world, exploring how these insights could be analyzed, despite their diversity, in a common framework.

Some words should here also be said about my positionality in undertaking this study. Important prompts for undertaking this review came from Sami reindeer herding communities with whom we presently collaborate to pilot improved forms of IA. They asked: what lessons do indigenous peoples elsewhere have that could support us in transforming IA practice in Swedish Sápmi? (Sápmi denotes the customary lands of the Sami, now located within the nation states of Norway, Sweden, Finland, and Russia.) Such questions are also increasingly being asked by Swedish civil servants, who are recognizing the limitations of their own practice within permitting authorities in Sweden (e.g. Larsen et al. 2017). Even some consultants, developers and branch organizations have (at least in informal conversations) expressed similar concerns, recognizing the need to reconsider current IA practice and learn from other jurisdictions.

To test the applicability of the conceptual framework, I draw on a set of empirical cases. The notion of 'case' is here mobilized in its phenomenological meaning (Flyvbjerg 2006), i.e. to facilitate sense-making of irreducibly different contexts and practices and distill some higher-order patterns. Cognizant of the frequent divergence between written accounts of IAs and the actual experiences of those who have been directly involved, I focus on insights into procedural aspects of IA regimes rather than substantive project outcomes. Hence, while I do mention project examples for purposes of illustration, I seek to leave to those directly involved to comment on the efficacy of the actual practices employed.

Below, I first offer a theoretical foundation for indigenous participation in IA, resulting in a simple comparative framework (Section 3). Next follows a review of the selected IA regimes (Section 4). In the discussion (Sections 5–7), I return to each of the three detailed research questions before arriving at some concluding remarks (Section 8).

3. Theoretical foundation: self-determination, impact assessment, and participation

With the recent progress in indigenous rights norms, a great deal of attention in natural resource governance has been devoted to understanding indigenous influence in decision-making, notably the intricacies of consent processes and the application of FPIC (e.g. McDonald and Wood 2016; Papillon and Rodon *forthcoming*). Similarly, studies have considered the related challenges by local communities in participating in IA in low-income countries (e.g. Nadeem and Fischer 2011). Still, notwithstanding

important research on impact-benefit agreements (IBAs) and direct engagement regimes between communities and industry (e.g. O'Faircheallaigh and Corbett 2005; Szablowski 2010) and social impact assessment (SIA) and community-based impact assessment (CBIA) (e.g. Howitt 2005), scholars have paid less attention to participation in IA from the perspective of evolving indigenous rights norms. This may partly owe to the contradiction we observed in the outset of this paper between standard IA practice and principles of indigenous self-determination: indigenous recognition, sovereignty, and authority simply do not resonate with mainstream IA practice that remain rooted in positivist or rationalist assessment theories (Weston 2010; Morgan 2012).

Yet, it is exactly *because* of the urgent need to reconfigure IA practices based on evolving indigenous rights norms, that research needs to inquire more into the emerging spaces that test if and how IAs may potentially offer new tools for the concrete performance of indigenous rights claiming. One argument is that IA approaches mandating community engagement may support the creation of situations more conducive to the application of larger consent processes in which they are embedded (Papillon and Rodon *forthcoming*). As McDonald and Wood (2016, p. 722) note, inscribed rights must be put to concrete use if they are to help 'question what the confirmation or denial of such rights means'. IA may here offer one such tool, serving as part of a foundation for FPIC, i.e. for decisions to be properly 'informed'. By providing a more solid evidence base needed for informed consent IA should, under the right conditions, support indigenous peoples in (re)appropriating rights-based discourses so they have actual bearing on their lives. As in evolving research on indigenous consent (e.g. Costanza 2015) this paper thus aims to help *nuance* what principles of self-determination so far have come to signify in the practice of IA.

3.1. A Scalar framework for indigenous participation in IA

Indigenous self-determination builds on recognition of group rights and the need to ensure equal opportunities and proactive means of participation in decision-making. Progress has been inspired, in part, by the political philosophy of multiculturalism that has supported a rejection of colonial discovery doctrines (such as *terra nullius*), accompanied by recognition of indigenous worldviews, norms, and legal cultures. According to James Tully (1995, p. 116), three social conventions are required to promote conditions for new 'intercultural common ground' in concrete encounters: (i) agreeing on forms of mutual recognition, (ii) guaranteeing consent from all parties affected by decisions, and (iii) ensuring that new institutional arrangements continue the parties' independent, coexisting, and equal nationhood.

In his extensive analysis of evolving international norms, human rights lawyer Mattias Åhrén (2016) has reviewed how such conventions translate into both material and procedural rights for indigenous communities. *Material rights* concern the ownership or use rights to resources traditionally used (i.e. a right to property). In contrast, *procedural rights* concern the right to participate in decision-making – such as through the state duty to consult and the right to give or withhold FPIC. Importantly, procedural rights do not guarantee actual control over the resources traditionally used but provide the grounds for exerting influence in decision-making that effects these resources. Participation in IA concerns, moreover, a limited part of the procedural rights potentially held by indigenous peoples to meaningfully participate in *all* relevant decision-making processes.

If IA is to be rendered more relevant for the enactment of principles of self-determination, procedures need, hence, to be reconfigured to offer new types of social engagement in respect of indigenous worldviews. This reconfiguration must, following Howitt and Suchet-Pearson (2006), co-construct conceptual building blocks in dialog between indigenous people and majority society. Here, I suggest focusing on two key variables that should have central interest in comparing the extent to which IA regimes are seeing such co-construction: (i) the *degree of influence* in IA obtained by indigenous peoples and (ii) the *phase of the IA* in which concrete practices are employed.

Focusing on these two variables facilitates a scalar approach to indigenous participation across key IA phases. It builds on an interpretation of indigenous rights to self-determination, and participation, following what Åhrén (2016, p. 139) terms a 'sliding scale' theory: 'the more important the issue to the indigenous people's culture, society and way of life, the greater influence the people should be allowed to exercise over the decision-making process'. While much ambiguity remains across jurisdictions regarding the legal content of indigenous peoples' procedural rights (e.g. Ward 2011), this interpretation has won support based on international legal precedence (Anaya, 2005). The scalar legal interpretation has already shaped some areas of practice, e.g. on the state duty to consult indigenous peoples (see e.g. the British Columbia 2010 Consultation Procedure). For a first test of the framework I discern four degrees of influence in IA, ranging from no influence, over limited and shared influence, to full control (Figure 1). The framework aims to serve as a 'dialogical tool' to support comparison of experiences and there is no intention of conveying exact (or legal) distinctions between the four levels.

Four key phases in a typical IA process are considered (based e.g. on the 1999 IAIA Principles of Environmental Impact Assessment Best Practice), after it is established that a full IA is required (i.e. the screening): (i) scoping

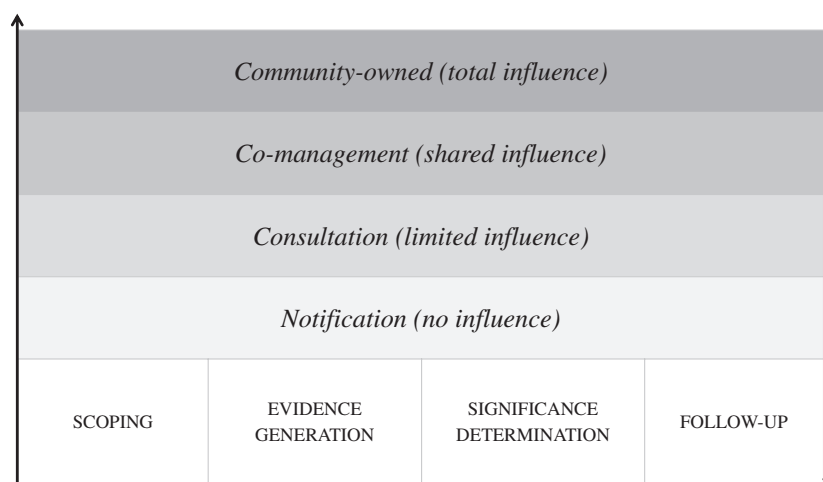


Figure 1. Scalar framework for indigenous participation in IA.

(including conditions of cooperation, terms of reference (TOR), etc.), (ii) evidence generation, (iii) significance determination, and (vi) follow-up (monitoring/management). For analytical convenience, examination of alternatives, mitigation options, and impacts are here combined into one phase (evidence generation). From these four phases are also excluded the final decision/justification phase, since this is typically owned by somebody with the federal/state government (i.e. the licensing agency or responsible ministry). Similarly, if the indigenous people or community has acquired title or other legal instruments to assert complete control over their land and resources, then presumably they will also own the entire IA process.

4. Review of practices in selected IA regimes

The IA experiences included in this review are derived from four jurisdictions, in addition to Sweden: Canada, Norway, Australia, and Aotearoa/New Zealand. The search was delineated based on the already stated interest in supporting a comparative discussion relevant from the perspective of professionals in Swedish Sápmi. Examples were thus selected from jurisdictions that share some key characteristics with Scandinavia, notably being (i) industrialized countries, and (ii) exhibit governance regimes shaped by European colonialism. The selection also ensured cases from the northern (Canada and Norway) as well as southern (Australia and New Zealand) hemisphere.

In terms of limitations it should be clarified, first and most importantly, that while the line arguably is somewhat fluid, emphasis is on indigenous influence in IA and only brief backgrounds are provided on influence in decision-making more broadly, e.g. through the state duty to consult and/or consent processes. This qualification is critical since improvements in IA clearly must take place *within* larger nation-to-nation negotiations on self-determination including visions of reconciliation, alignment of national laws to UNDRIP and other international norms,

state funding and capacitation, protection of indigenous knowledge and the general state duty to prevent impacts on resolved as well as unresolved material rights to land and resources (for further discussion of the connection between IA and these concerns, see e.g. Canadian Environmental Assessment Agency 2017, pp. 26–35).

A second limitation is that the search for overarching principles in the IA regimes invariably means that much diversity, e.g. between sectoral and subnational legislation and states/territories, is not adequately accounted for. Third, the focus is on project-level IA and not all types of IA. This is a purely practical delineation of scope to allow for a focused discussion, although it is assumed that many of the general insights that apply to project-level IA also will be relevant in other IA processes. Fourth, given the interest in IA per se, this paper does not review wider lessons from indigenous planning (e.g. Walker et al. 2013) and indigenous natural resource governance (e.g. Coombes et al. 2014). Fifth, this review is naturally constrained by the scope of the retrieved literature.

Below, I review the five IA regimes in separate subsections, with procedural practices as regards indigenous participation being captured in the framework (Table 1).

4.1. Corporate-owned IA (Sweden)

Standard practice in Sweden is that of entirely corporate-owned IAs. Moreover, the Environmental Code (SFS 1998:808) only requires assessment of environmental (and not social or cultural) impacts. The developer generally has a responsibility to meet and hear the views of the directly affected Sami communities but retains full authority to decide how to interpret and use community inputs. Sectoral legislation may limit the participation options further: under the Minerals Act (SFS 1991:45), mining proponents have no legal responsibility to consult communities when developing IAs for the most important phase of permitting (concession permits). Developers have started to make some additional,

Table 1. Key elements of indigenous participation in the selected IA regimes.

| | | | | |
|--|--|---|--|--|
| <i>Community-owned (total influence)</i> | | <ul style="list-style-type: none"> Extraction and re-insertion of SIA from formal EIA process and/or SIA with full community control. Recruitment of indigenous researchers into SIA team. Consultants supporting community with negotiation positions (AUS) Communities (iwi and hapu) undertake own cultural IAs and employ their own IA experts (A/NZ) | | |
| <i>Co-management (shared influence)</i> | <ul style="list-style-type: none"> Review Board members are nominated by community and government (50–50%) and drafts TOR for studies. Work funded jointly by developer and government (NWT) Permanent Coordinating Committee composed of equal numbers from community and developer. Funding in-part provided by the developer (AUS) Maori legally recognized as partners to government (A/NZ) | <ul style="list-style-type: none"> All parties actively invited to submit evidence for hearings. Broad view on evidence, incl. testimony and other traditional knowledge, physical objects, photos, site visits. All matters of substance publicly disclosed online (NWT) Culturally appropriate consultation process designed by elders. Legitimacy and weight to indigenous knowledge, oral submissions permitted, ample time for contributions and hearings, avoiding overt adversarial nature. Confidentiality agreements regulating disclosure of sensitive knowledge (AUS) Culturally customized impact assessments (A/NZ) | <ul style="list-style-type: none"> Decision by majority vote, aiming for consensus. The Review Board explains views on and weighing of evidence (NWT) | <ul style="list-style-type: none"> IMAs play watch-dog role throughout project lifetime (NWT) Private agreements guaranteeing role in the project's Management Committee, benefits, funding, and protection from subsequent undermining of agreement (AUS) Joint management agreements and long-term co-management and performance monitoring bodies (A/NZ) |
| <i>Consultation (limited influence)</i> | <ul style="list-style-type: none"> Centralized consultation with the Sami Parliament prior to new developments (NO) Statutory requirements, in some sectors and limited parts of the planning process, to meet and hear the views of the community (SE, NO) | <ul style="list-style-type: none"> Statutory requirement to consider social and cultural impacts. Incorporation of Sami traditional knowledge, i.e. in traditional use studies and through oral testimonies (NO) Voluntary corporate practice of inviting inputs to specific 'reindeer herding analyses' (SE) | <ul style="list-style-type: none"> Determined by public authority through professional judgment and decision support tools (AUS) Determined by sub-national government (i.e. councils) (A/NZ). Legal mandate for the Sami Parliament to temporarily veto permit processes till agreement is reached or government overrules the Sami Parliament. Obligation of authorities to consider social and cultural impacts (NO) | <ul style="list-style-type: none"> Public authority defines permit conditions, incl. management and mitigation plans, with inputs from Sami communities (SE, NO) |
| <i>Notification (no influence)</i> | <ul style="list-style-type: none"> Some sectoral legislation, e.g. for mining, places no requirements on the developer to meet or hear the views of the affected community (SE) | <ul style="list-style-type: none"> Preference to Western and scientific knowledge. Failures to account for cumulative effects (SE) | <ul style="list-style-type: none"> Determination made entirely by public licensing agency (SE, NO) | <ul style="list-style-type: none"> Confidential and private compensation agreements disconnected from IAs (SE) |
| | SCOPING | EVIDENCE GENERATION | SIGNIFICANCE DETERMINATION | FOLLOW-UP |

voluntary efforts to consult communities and invite their inputs to specific 'reindeer herding analyses' (Tarras-Wahlberg 2014). Overall, however, Sami communities are involved late, if at all, in the IA process, most often only invited to comment on already determined investment plans and permit applications.

This situation has had the consequence that Sami communities tend to opt for two alternative strategies: either to protest the development through the courts or to settle early on for confidential compensation agreements with the developer (e.g. Lawrence and Larsen 2017). Whereas no systematic and consolidated research

is yet available on the nature of these agreements, Sami communities testify in our communication to how many establish highly problematic patron–client relationships (see also Sehlin MacNeil 2015). Compensation appears to be negotiated prior to, without or disconnected from any IA and thus without full knowledge of the impacts or the infringement on Sami rights. These private contracts allow the parties to negotiate compensatory payments for land dispossession without the impacts on Sami rights being tried in public, a major concern to government authorities (County Administrative Board of Norrbotten and Sweco 2016).

Permitting and planning across sectors generally lack methods to account for cumulative effects and include Sami traditional knowledge (Larsen et al. 2017). Community-owned IAs that Sami communities may launch with or without external support (but typically without cost recovery) represent efforts that can scarcely be considered anything but crisis responses outside the formal IA regime (Lawrence and Larsen 2017). United Nations (UN) bodies have, among other for the above-mentioned reasons, provided longstanding criticism of the Swedish Government for the lack of regard of Sami rights in IA and permitting (e.g. UNHRC 2016).

4.2. Corporate-owned IA with stronger non-territorial self-government (Norway)

Compared to the Swedish part of Sápmi, Norway stands out in terms of somewhat stronger recognitions of Sami rights. Early landmark events include the 1998 constitutional amendment, ratification of ILO-169, and the Sami Rights Commission, paving way for the first Sami Parliament (*Samediggi*) (Mörkenstam et al. 2016). These developments are often credited to the popular Sami resistance against hydropower developments in the Alta-Kautokeino River during the late 1970s and early 1980s (Falch et al. 2016). The model of Sami self-determination in Norway has commonly been described as comprising a non-territorial ('relational') approach, combining political self-government with political integration rather than direct territorial control (Broderstad 2001).

A centralized consultation procedure provides a mandate with the Sami Parliament to infuse Sami perspectives into the state's policies and legislative procedures (Government of Norway and Samediggi 2005). Through the 2009 Planning and Building Act (PBL) the Sami Parliament also holds a formal right to place objections and thus at least temporarily veto permit and planning processes impacting Sami culture. The plan must be suspended till agreement is reached, however the ministry may overrule the veto. Since 2005, the Finnmark Act formally recognizes that Sami communities in so-called 'core Sami areas' may have earned property rights through customary use (this recognition also applies to non-Sami, with the intention of the Act being

'ethnically blind'). These areas are to be recognized by the Finnmark Commission, with disputes settled by the Land Tribunal. Land ownership has also been transferred from the state to a new co-management body, the Finnmark Estate (*Finnmarkseiendomen*, FeFo) with board members appointed in equal numbers by the Sami Parliament and the Finnmark County Council (Josefsen et al. 2016).

The IA regime in the Norwegian part of Sápmi remains characterized by the same general corporate-owned IA approach observed in Sweden (e.g. Holmgaard et al. 2017). Still, the relative progress in recognition of Sami rights has supported some advances in IA. The PBL offers a broader statutory view on the scope of assessments, including also social and cultural impacts (14-1§), and obliges authorities to consider impacts specifically on Sami culture and livelihoods (3-1§). Within the Finnmark Estate, the Sami Parliament has a mandate, when consulted on plans, to request that developers undertake traditional land use studies to assess project impacts on Sami communities (regulation No. FOR-2007-06-11-738). Related guidelines also exist throughout the traditional Sami territories outside Finnmark (Norwegian Sami Parliament 2010). Altogether, more leg room has been provided for IAs to incorporate Sami traditional knowledge, such as through oral testimonies (Eythorsson and Thuestad 2016).

4.3. Institutionalized IA co-management (NWT, Canada)

Across Canada, provinces and territories have seen the development of varied IA regimes, dependent on among other the nature of land claims, existence of treaties and current policy directions of government. Here, focus is on the Northwest Territories (NWT), which offers an example of institutionalized IA co-management, rooted in modern land claims agreements. Related co-management models exist in the Nunavut Impact Review Board (NIRB) and the Yukon Environmental and Socio-economic Assessment Board (YESAB).

The Mackenzie Valley Environmental Impact Review Board was established, as co-management boards in other areas of land use planning and wildlife management, with the passing of the Mackenzie Valley Resource Act of 1998. The Review Board is permanent and governed by board members nominated in equal numbers by First Nations and territorial/federal government, and operates in a court-like (quasi-judicial) manner (White et al. 2007). Project-specific impact monitoring agencies (IMA) apply the same principles of co-management but are confined to individual projects (Ehrlich 2015).

The Review Board decides in a proceeding, formally by majority vote but in practice almost always by consensus (unanimity), though only after each member have reached an individual position. Appointees are expected to act independently, from own judgment, and proceed

in court-like manner without bias. The process thus operates from principles of independence and a theory of procedural justice, wherein the Review Board interprets ambiguous provisions of legislation (e.g. the notions of 'significant adverse impact' or 'public concern') (White et al. 2007, p. 7) and the burden of proof lies with the party wanting to demonstrate a fact. The Review Board also drafts the terms of reference that guide the IA and the content of reports. This also helps maintain the required emphasis on indigenous values to consider cultural impacts in line with the Mackenzie Valley Resource Act (Ehrlich 2010).

While the government has retained the permitting authority, it has thus shared authority over the full IA process with First Nations. This means that the federal government makes the licensing decision and holds the authority to justify significant impacts. However, not following a Review Board decision is rare and would trigger an extended review procedure, often over several additional years. Likewise, IMAs are project-specific watchdogs and their recommendations are often followed due to reputational risks. In at least four cases of small-scale uranium exploration, IAs resulted in Review Board decisions to reject the projects, due to expected cumulative cultural impacts (Ehrlich 2010).

4.4. Community-owned SIAs and negotiated IBAs (Australia)

Aboriginal IA experiences in Australia are similarly shaped by the colonial legacy in the respective state/territory, corporate policies, and the political directions of government. However, overall, the IA regimes reflect a greater absence of the state and reliance on negotiation of IBAs in direct engagement with developers. As O'Faircheallaigh and Corbett (2005) have outlined, IBAs have emerged in different situations: (i) where state/territory legislation recognize indigenous rights (e.g. with the high court Mabo decision of 1992), (ii) where legislation allows for consultation or affords procedural rights to communities, and (iii) where no legal requirements exist but the developer negotiates with the community owing to corporate policy commitment. Following the Environmental Protection Act 1986 significance determination and conditions for follow-up are decided by government, e.g. the Environment Protection Agency (EPA) (Jones and Morrison-Saunders 2016).

Two cases are reviewed here in more detail, being well documented in the scholarly literature, namely Hope Vale v. Cape Flattery Silica Mines, Cape York, Queensland and the site selection process for liquid natural gas (LNG) developments in Kimberley Land Council (KLC). In the Hope Vale case, the community negotiated based on an FPIC clause in the revised 1989 Queensland Mineral Resources Act when the developer, Mitsubishi Corp., was required to obtain community consent for an additional

license (O'Faircheallaigh 1999). A key feature, giving legal weight to the community's engagement, was that the process comprised of community-led ex-ante and ex-post SIA that was integrated into negotiation of legally binding agreements.

Kimberley Land Council (KLC), in contrast, entered the negotiation with the developer based on the Federal Native Title Act of 1993 recognition of native title, which provided a 'right to negotiate' (O'Faircheallaigh 2013). Interestingly, the community's space for action was here also shaped by the political direction of the Labor-led state government at the time, who was ready to make the license of the LNG precinct contingent on full consent, i.e. go further than federal legislation. The state government also funded the Traditional Owner consultations. The procedural rights offered leverage for KLC to exert pressure, e.g. through causing significant delays and the pre-existing political structure in the KLC benefited from solid experience from earlier negotiations.

The two reviewed cases show how the community-owned SIAs, strategically integrated into legally binding IBAs with developers, empowered communities to shape the project outcomes and secure benefits. Meanwhile, in many other instances, IBAs have led to severely detrimental outcomes, including the extinguishment of rights and imposing of unfortunate confidentiality clauses (e.g. O'Faircheallaigh 1999; O'Faircheallaigh and Corbett 2005). By their very nature, IBA-type agreements with developers normally imply that projects go ahead in one form or another. Opportunities for community influence in the management and steering of developments offer means of shaping projects but rarely rejecting them altogether.

4.5. Culturally customized IA (Aotearoa/New Zealand)

In Aotearoa/New Zealand, the national IA regime evokes principles of IA co-management in recognition of the obligation of the crown to engage communities in partnership (e.g. Ruckstuhl et al. 2014). Ward (2001) has reviewed how strong and persistent Māori demands, from 1970s onward, gave way to the recognition of the Treaty of Waitangi 1840, a political compact between the crown and Māori chiefs considered to be New Zealand's founding document. In 1975, the Treaty of Waitangi Act was passed, establishing the Waitangi Tribunal – a commission which hears claims brought by Māori regarding actions where the Crown has breached the terms set in the Treaty of Waitangi. This Act was significant as prior to the establishment of the tribunal, there were limited mechanisms for Māori to seek redress for grievances with the Crown, with many people even considering the Treaty to be a nullity. A string of court rulings helped establish the crown's obligation to consult and remedy past breaches, and the Treaty of Waitangi has

had a powerful effect for Māori claims, through a combination of tribunal findings, statutory references, and judicial interpretation.

These political and legal developments have, among other, resulted in a model of 'cultural customization' of IAs to indigenous Māori concepts (Ruckstuhl et al. 2014). Turvey (2009) has discussed how such incorporation of Māori concepts has been one way for the government to seek to give effect to the Treaty of Waitangi. Key administrative processes, incl. the Resource Management Act (RMA) (esp. Sections 5–8), has been shaped to better recognize Māori values, for instance providing for joint management agreements. IAs ought hence to be based on traditional values, e.g. related to guardianship and specific rights and guarantees, as articulated by the affected Māori groups (Ruckstuhl et al. 2014). Many Iwi (tribes) and Hapu (subtribes) have established their own community protocols and guidelines for how IA is to be rooted in their indigenous values (e.g. Morgan and Fa'au *forthcoming*). Significance determination is, however, still owned by government (e.g. subnational councils).

Despite some progress, the implementation of the RMA and associated procedures has received significant criticism – as regards IA as well as natural resource management more broadly. This includes that local councils are failing to obtain formal and prior agreement, address grievances and generally respect Māori sovereignty (Jacobson et al. 2016). Turvey (2009, p. 553) has described how Māori concepts 'rather than promoting Māori culture, are being interpreted in accordance with the underlying values and interests of the dominant group'. While mandated government agencies may have strong commitments to adjust their operations, the risk is that co-management remains nothing but a token resolution of grievances rooted in a failure of the state to

more properly engage with and honor underlying tribal land claims (Coombes and Hill 2005). A central concern is that co-management is, still, not situated in a sufficient recognition of material Māori rights and authority (Dodson 2014).

5. What level of influence have indigenous communities obtained in IAs?

The comparison of the selected IA regimes first and foremost points to the diversity of ways by which indigenous peoples have managed to secure participation in IAs. Nonetheless, some interlinked patterns (several of which will be discussed in more detail in Sections 5 and 6 below) can be discerned (Figure 2):

- (i) The field of practice, where most dynamic, is moving toward IA co-management and community-owned IA, showcased by the examples from NWT, Aotearoa/New Zealand and Australia;
- (ii) Marked difference exists between these three jurisdictions and the two IA regimes in Scandinavia/Sápmi, which are dominated by a much more limited notification/consultation approach;
- (iii) Four of the five reviewed IA regimes are characterized by what we may term a 'sleepy-S' influence curve, suggesting that greatest influence is obtained in the evidence generation and follow-up phases. The only IA regime that maintains indigenous influence in the critical phase of significance determination is the institutionalized co-management approach in NWT;
- (iv) Looking specifically at the three IA regimes witnessing IA co-management, a central point of divergence is regarding *who* acts as the community's counterpart. In the NWT and New Zealand,

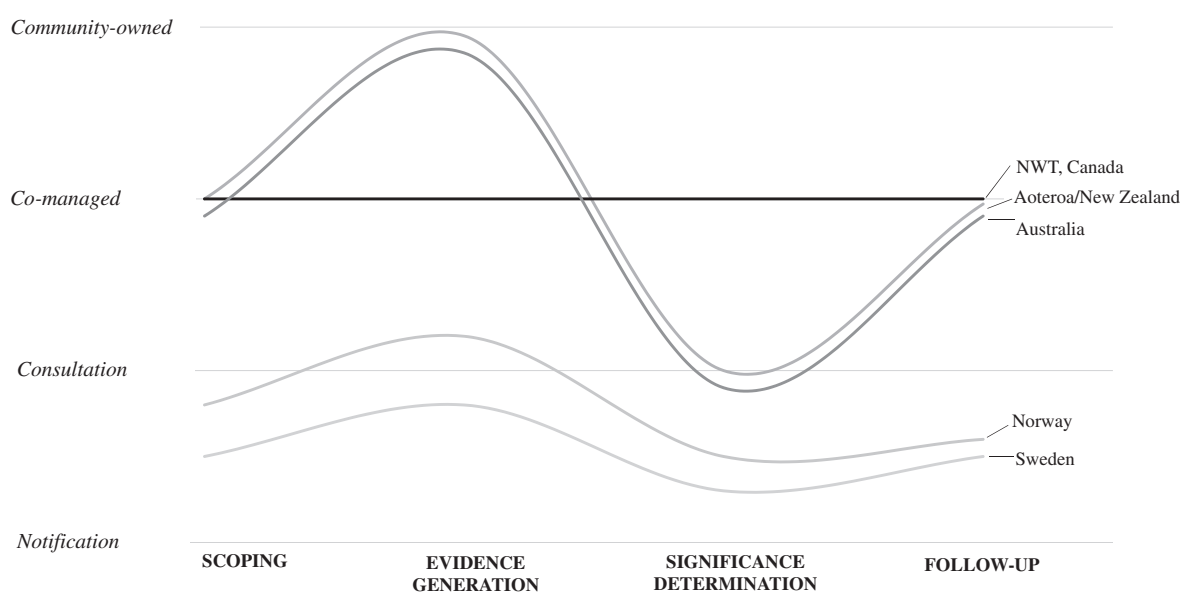


Figure 2. Indigenous influence across key IA phases.

the government is directly involved while in the Australian IBA experiences the direct engagement is with the developer.

The contours of the five different IA regimes are indeed somewhat fluid and constantly re-negotiated through court challenges, policy, and legal reforms as well as locally adopted practices. As noted, this review has also missed many of the nuances manifest in subnational contexts and sectoral legislation. For instance, provinces in Canada with limited coverage of treaties, such as British Columbia, have seen developments in community-owned IAs and IBAs that share characteristics with those in Australia (e.g. Noble 2016). Moreover, communities may pursue 'blended' participation options. Gibson (2006) has provided one such account of how the Innu and Inuit 1997–2002, apparently successfully, combined indigenous state IA co-management with direct negotiation with the developer in the Voiseys Bay environmental assessment, Labrador. Papillon and Rodon (forthcoming) have similarly discussed how parallel modes of consent were at play, but here seemingly with detrimental consequences, in Nunavut between Areva and Qamani'tuaq, combining developer-owned IBA negotiation with government supported IA co-management.

6. Why do differences exist between IA regimes?

While once more acknowledging the difficulties in drawing conclusions across diverse contexts, one principal and recurrent factor has clearly shaped the ability of indigenous peoples to move their participation 'up' the scale in the five reviewed IA regimes: the role of strong indigenous demands in securing political recognition of rights to self-determination, resulting in concrete legal instruments. This is especially visible in way in which land claims, treaty negotiation and court rulings has played a pertinent role in NWT, Aotearoa/New Zealand and Australia in enabling the emergence of deepened IA participation options. In turn, this observation testifies to how procedural rights are indeed most often contingent on state recognition of the indigenous peoples' and community's material rights (Åhrén 2016).

The limited participation options in the IA regimes in Scandinavia/Sápmi may then be partly explained by the relative absence of, for instance, successful land claims. Some isolated court rulings have served to clarify the nature and strength of Sami communities' customary reindeer herding rights (Allard 2015). Yet, Scandinavian countries follow the civil law tradition and court rulings, while still being important, do not provide the force of case law that has helped clarify state duties and national interpretations of international rights norms in common law jurisdictions. Moreover, the nature of the underlying property regimes may play a role. In jurisdictions such as Canada and Australia, many of the indigenous struggles

over land have been primarily with the state as property owner (e.g. King 2012). In contrast, in Scandinavia, conflicting land claims for lowland pastures are more often held by private property owners (forestry, agriculture) (e.g. Allard 2015). This arguably creates a different conflict potential in which the state may find it harder to consent to Sami claims. Such differences may also be one of the reasons why the establishment of a co-management body in Norway (the Finnmark Estate) has only prompted limited progress in IA procedures.

Scandinavia/Sápmi has so far seen the reliance on a so-called non-territorial approach to self-determination (Broderstad 2001; Josefsen et al. 2016). These welfare states are characterized by what Falch et al. (2016, p. 127) term 'state-friendly societies', i.e. with a generally high trust in the state's role as guardian of the public interest. This is one possible reason for why Sami negotiators have, so far, tended to focus on securing participation in the nation state decision-making processes rather than territorial autonomy. However, it is well known that the Sami Parliaments in all three Scandinavian countries have obtained very little influence in natural resource governance, with extensive political steering exerted by the state and legislation that retains many colonial legacies (Mörkenstam et al. 2016). Comparing the advances made in IA co-management and even community-owned IA in NWT, Australia and New Zealand we may here add an additional element to this critique. That is, despite the structural differences between the five IA regimes examined, the findings suggest that the currently practiced non-territorial mode of self-determination in Scandinavia/Sápmi does not provide the necessary leverage in securing substantial changes in procedural rights for IA participation.

Do the many structural differences between IA regimes mean, then, that it is impossible to learn from other jurisdictions? More specifically, are procedures for IA co-management and community-owned IA simply not relevant or feasible in Scandinavia/Sápmi? I would argue the contrary. In several of the reviewed cases, communities only enjoyed a procedural right and yet could successfully negotiate for high levels of influence. These findings resonate with O'Faircheallaigh and Corbett's (2005) argument as to how a variety of preconditions may enable indigenous participation in IA. Likewise, in the larger context of indigenous influence in decision-making, Szablowski (2010) has documented how communities may be able to work toward a de facto consent process, even while there may be no formal 'consent rule'. These dynamics play into what Papillon and Rodon (forthcoming, p. 3) have termed the 'structuring effect' of procedural rights on the relations between communities and state/developer. In the context of Sápmi, progress toward greater influence in IA may not, then, necessarily be entirely dependent on the state's political recognition of Sami material land and resource rights. Government

authorities have much discretion to enact own ordinances and guidelines that could encourage a change in practice even within existing legislation. In fact, I will contend, the above explanations why Sápmi has not seen the same progress toward IA co-management and community-owned IAs has less to do with *incompatibility* and more to do with *inertia* in obtaining political recognition for the importance of such changes in IA procedures.

7. How has increased influence in IA affected decision-making?

Recalling the critique of corporate-owned IA in the opening of the paper, it is fair to ask whether greater participation in IA offers means of influence congruent with principles of indigenous self-determination. Put bluntly, this third of the three detailed research questions posed in this study concerns whether struggling for increased participation in IA really makes a difference in land use planning and permitting. Experiences from the implementation of wider consent processes certainly motivate this question. UNDRIP's rather strong statement on FPIC has, so far, resulted in ambiguous applications by states that generally stop short of incorporating a state duty to consult or requirements for full consent (Papillon and Rodon [forthcoming](#)). As McDonald and Wood (2016, p. 713) have noted, this ambiguity is reflective of a general state practice of 'writing down' international norms domestically.

Judging from the substantial criticism directed toward the everyday performance of the IA regimes in even the more 'progressive' jurisdictions reviewed here, the risks involved in IA co-management are considerable. Seemingly robust norms of IA co-management (whether embedded in law or private contracts) may be insufficient, circumvented or outright ignored by developers and/or state actors. To be sure, the wider literature provides related critiques of IAs embedded in direct engagement with the developer (e.g. Szablowski 2010). As Colchester and Ferrari (2007) have argued, agreements are oftentimes undermined by unequal capacities and power relations between communities and developers and lack of proper recognition of indigenous political and customary institutions.

Meanwhile, this review adds an additional dimension to this critique of the cooption risks associated with IA participation, namely that the problem is not simply with the direct engagement with the developer. Substantial problems were observed also in the Aotearoa/New Zealand IA regime (supposedly governed as a partnership between Maori and the Crown). Rather, the fundamental risk appears to be with the *overall governance* of the IA (i.e. the 'sleepy-S' influence curve, see Figure 2): it only allows for (often constrained) influence in the evidence generation and follow-up phases while the developer or public authority retains control over the outcome through the more decisive phases of scoping

and significance determination. It is noteworthy that the only example of an IA regime that offered consistent co-management throughout the IA phases (NWT) was also, based on the retrieved documentation at least, the only regime that supported indigenous peoples in rejecting projects altogether (Ehrlich 2010).

Based on these insights, indigenous participation seems to provide the most meaningful contribution to decision-making when (i) IA co-management takes places with the *state* as the counterpart, and (ii) co-management principles consistently apply *throughout* the IA phases. Note here that, as observed for the NWT (White et al. 2007), this does not preclude communities from leading own SIAs or CBIAs as inputs to a larger process of IA co-management. A central function of an IA process governed between community and state is that it serves to reinforce the nation-to-nation dialog essential to principles of indigenous self-determination. Moreover, the full disclosure of evidence and judgments made in significance determination (e.g. by the Review Board in NWT) also helps ensure public deliberation and avoid some of the risks of elite capture associated with confidential IBAs (see also O'Faircheallaigh and Corbett 2005; Papillon and Rodon [forthcoming](#)). That said, no pretense is made here of foreclosing what constitutes an 'ideal' IA regime. Under the right conditions, strategic community-owned SIAs and CBIAs may probably adequately meet community objectives (e.g. Noble 2016).

8. Concluding Remarks

This paper has provided a review of some of the experiences that indigenous peoples have had with transforming IA practice at least some way toward principles of self-determination. They all represent negotiated outcomes that have grown out of long-term struggles and have come into existence in parallel to other modes of engagement. As such, it should not be read to expound on indigenous visions of 'ideal' IA regimes. Rather, the examples reflect the temporary and unsettled outcomes of what indigenous peoples and communities have been able to achieve so far (on this argument see further in e.g. King 2012).

In terms of methodology, it is worth acknowledging that scalar frameworks of participation, such as 'Arnsteins ladder of citizen participation' (Arnstein 1967), have received a great deal of critique for conveying an overly simplistic view of social relations. Beyond the fact that participation naturally can be much more multidimensional in its expression, the concerns also include the risk of perpetuating an objectivist assumption that there is only one 'single knowable world' over which the parties can disagree (Collins and Ison 2006). Clearly, this latter critique is particularly relevant in situations where epistemologies and even ontologies diverge, such as in multicultural encounters (e.g. Howitt and Suchet-Pearson 2006).

Meanwhile, I believe the analytical benefits for this study's purpose outweighs the risks. First, the framework is founded on a clear legal interpretation of emerging norms of indigenous self-determination (e.g. Åhrén 2016). Second, a scalar framework helps recall how parties to a conflict situation must, before more nuanced social interactions on IA and permitting of development projects can take place, experience a relatively level playing field (e.g. Larsen et al. 2017). Viewed from the perspective of indigenous methodologies (Smith 2012), this approach, despite its limitations, also helps foster increased awareness of the pallet of participation options that, in fact, are available. That is, facilitating the sharing and celebrating of progress and, at least I hope so, ultimately envisioning the possibility of more just futures. This may, then inspire renewed political demands, protest and resistance through court proceedings as a means for communities to move 'up' the participation scale.

The larger argument, to which I seek to contribute is thus that improved participation in IA, under the right conditions, offers one *alternative* engagement strategy. Borrowing from Colchester and Ferrari (2007, p. 20) it is worth reiterating that, like larger efforts for the development of consent processes, IA participation offers 'no free-standing right that acts as a panacea'. That is, it is nothing but *one* expression of indigenous peoples' right to self-determination. Taking this agenda forward, within larger nation-to-nation negotiations, should be relevant for indigenous communities but also state actors and developers. For government agencies, it helps implementing their duties under both national and international law. For developers and investors, it supports the creation of more effective and predictable planning and permitting regimes. For everyone involved it should be desirable to more constructively manage protracted conflicts over land and resources and avoid long-drawn and often costly appeals and complaints in the face of proposed projects.

Acknowledgments

This paper is an output from the project 'Contested landscapes: navigating competing claims on cumulative impacts (CO-LAND)'; funded by the Swedish Environmental Protection Agency 2016-2018 [NV-03501-15]. I am indebted to my project colleagues for stimulating conversations and encouragements. Kaisa Raitio (Swedish University of Agricultural Sciences) and Alan Ehrlich (Mackenzie Valley Environmental Impact Review Board) generously commented on previous drafts of this paper. Sanne Holmgaard (Norwegian Institute for Cultural Heritage Research) kindly provided valuable inputs specifically to the review of Norway and Tumanako Ngawhika Fa'au (University of Auckland) to the review of Aotearoa / New Zealand. I also thank two anonymous reviewers and the journal editor for helpful critique to improve the arguments. Any remaining errors in interpretation, especially of international examples, are of course mine alone.

Disclosure statement

No potential conflict of interest was reported by the author.

Funding

This work was supported by the Swedish Environmental Protection Agency 2016–2018[NV-03501-15].

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