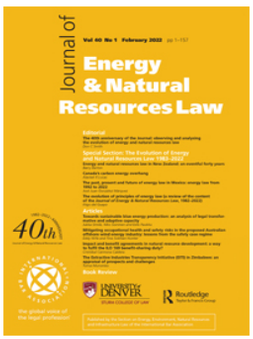

Routledge
Taylor & Francis Group

Journal of Energy & Natural Resources Law

ISSN: (Print) (Online) Journal homepage: https://www.tandfonline.com/loi/rnrl20

Impact and benefit agreements in natural resource development: a way to fulfil the ILO 169 benefit-sharing duty?

Cristóbal Carmona Caldera

To cite this article: Cristóbal Carmona Caldera (2022) Impact and benefit agreements in natural resource development: a way to fulfil the ILO 169 benefit-sharing duty?, Journal of Energy & Natural Resources Law, 40:1, 105-131, DOI: 10.1080/02646811.2021.1887676

To link to this article: https://doi.org/10.1080/02646811.2021.1887676

Journal of Energy & Natural Resources Law, 2022
Vol 40, No 1, 105–131, https://doi.org/10.1080/02646811.2021.1887676

Impact and benefit agreements in natural resource development: a way to fulfil the ILO 169 benefit-sharing duty?

Cristóbal Carmona Caldera, *Lawyer (Universidad de Chile, Chile); PhD in law candidate (Universidad Diego Portales, Chile). Adjunct researcher and lecturer on Indigenous peoples' rights at the Faculty of Law of Universidad Diego Portales, Chile.*
Email: cristobal.carmonac@mail.udp.cl

(*Received 29 September 2020; final version received 26 January 2021*)

This article examines whether impact and benefit agreements (IBAs) between industry proponents and indigenous communities, a common standard in natural resource development in Canada, could be a way to fulfil the International Labour Organization (ILO) Convention No. 169 benefit-sharing duty in Latin America, as many suggest. The article begins by analysing and determining the main features of this duty. It also reviews the key components of IBAs against the backdrop of the ILO Convention 169 benefit-sharing duty, concluding that it would be problematic to think of these agreements as ways to fulfil the obligation established in ILO Convention No. 169.

Keywords: impact and benefit agreements; resource development; indigenous peoples; ILO convention No. 169; benefit sharing; impact assessment; duty to consult

1. Introduction

International Labour Organization (ILO) Convention No. 169 (ILO 169 or the Convention) is, to this day, 'the only international treaty that comprehensively and specifically covers the rights of indigenous and tribal peoples'.[1] Despite its low number of ratifications, the Convention has attained 'global significance'[2] to the point of being considered a 'reflection of the international legal standards on indigenous peoples' rights'.[3] ILO 169 has been especially relevant in Latin America, where most of the states ratified the Convention[4] and where it has played an important role in the constitutional and legal recognition of indigenous peoples' collective rights.[5]

1 International Labour Organization, *Committee of Experts on the Application of Conventions and Recommendations. Indigenous and Tribal Peoples Convention, 1989 (No. 169). General observation* (International Labour Office, 2019) 1 (CEACR General Observation 2019)
2 Peter Bille Larsen, 'Contextualising Ratification and Implementation: A Critical Appraisal of ILO Convention 169 from a Social Justice Perspective' (2020) 24(2–3) *The International Journal of Human Rights* 94, 95.
3 *Ibid*.
4 By the end of 2020, 14 of the 23 ratification cases were among Latin American countries.
5 See Donna Lee Van Cott, *The Friendly Liquidation of the Past. The Politics of Diversity in Latin America* (University of Pittsburgh Press 2000) 262; Raquel Yrigoyen, 'El horizonte del constitucionalismo pluralista: del multiculturalismo a la descolonización' in César Rodríguez (ed), *El derecho en*

Routledge
Taylor & Francis Group

Among its different provisions, ILO 169 contains a benefit-sharing clause regarding activities of exploration or exploitation of natural resources in the indigenous lands. Specifically, art. 15(2) establishes that '[t]he peoples concerned shall wherever possible participate in the benefits of such activities'. As 'the only treaty-based reference to benefit sharing in relation to indigenous peoples'[6] in international human rights law (IHRL), this provision has proven to be influential in the reports and rulings of several human rights bodies.[7] Nonetheless, for all the attention received, the benefit-sharing duty remains undertheorised in the discourse of the ILO supervisory bodies, the human rights treaty bodies and the legal scholarship.[8] Consequently, there is not much clarity on its implementation.[9]

In this context, some authors[10] and international institutions[11] have suggested that negotiated agreements between indigenous communities[12] and industry proponents, mainly those known as impact and benefit agreements (IBAs), could be understood as ways to fulfil the benefit-sharing duty established in article 15(2) of ILO 169. IBAs are a common standard in natural resource development in such states as Canada and Australia.[13] In these agreements, a community will give its support to the project – or at least a commitment of non-objection – in exchange for an opportunity to be involved in the management of the cultural, social and environmental impacts of resource development, and to obtain some of the economic benefits generated by the project.[14] Because of this last feature, it is argued that IBAs could be way to comply with the ILO benefit-sharing rule.

At first sight, the notion of using IBAs to fulfil a human rights obligation such as benefit sharing seems counterintuitive. After all, they are private mechanisms developed in states that have not ratified the Convention. However, it is easy to see why this idea is appealing. For the companies, it allows them to give some sort of 'public law' legitimacy to their relationship with the communities. For the government, it can be seen as a way to discharge its duty without using public funds,

América Latina. Un mapa para el pensamiento jurídico del siglo XXI (Siglo Veintiuno Editores 2011) 139.

6 See Elisa Morgera, 'Under the Radar: The Role of Fair and Equitable Benefit-Sharing in Protecting and Realising Human Rights Connected to Natural Resources' (2019) 23(7) *The International Journal of Human Rights* 1098, 1100.

7 *Ibid* 1100.

8 See Jérémie Gilbert, *Natural Resources and Human Rights: An Appraisal* (OUP 2018) 73.

9 Morgera, 'Under the Radar' (n 6) 1102.

10 See eg Sébastien Grammond, *Terms of Coexistence: Indigenous Peoples and Canadian Law* (Carswell 2013) 278 ('[a]n IBA would be a privileged means of ensuring participation in the benefits').

11 See International Labour Office, *ILO Convention on Indigenous and Tribal Peoples, 1989 (No.169): A Manual* (ILO 2003) 40–41. Nevertheless, the International Labour Office has backed away from this position since then. See eg International Labour Office, *Indigenous and Tribal Peoples' Rights in Practice: A Guide to ILO Convention No. 169* (ILO 2009) 107 (ILO 169 Guide 2009).

12 I will use the term 'indigenous' to refer to the peoples who were living in a state or geographical region since before the settlements of Europeans. In this way, 'indigenous' is synonymous with 'Aboriginal', an umbrella term used in Canada that includes First Nations, Inuit and Metis. I chose the term 'indigenous' because this is the term used in International Human Rights Law and is increasingly used in Canada at least since Canada announced its unqualified support for the United Nations Declaration on the Rights of Indigenous Peoples in 2016.

13 For an overview of IBAs in both states, see Ciaran O'Faircheallaigh, *Negotiations in the Indigenous World: Aboriginal Peoples and the Extractive Industry in Australia and Canada* (Routledge 2016).

14 See Steven A Kennet, *A Guide to Impact and Benefit Agreements* (Canadian Institute of Resource Law 1999) 1.

while respecting indigenous autonomy[15] and legitimising resource extraction[16] at the same time. Finally, for the indigenous communities, the agreements represent ways to receive at least some benefits from resource extraction.

This idea has started to gain ground in the region of Latin America. As Bustamante-Rivera and Martin have pointed out, in the last few years IBAs and other types of negotiated agreements have emerged in natural resource development in different states of the region.[17] Facing this fact, the authors contend that

> the negotiations between the extractive industry and indigenous communities should be understood under [the ILO 169] legal framework, which recognizes both the right of prior consultation and that of the communities to benefit from the projects that operate in their territories.[18]

Along the same lines, María Barros Sepúlveda has stated that the ILO 169 benefit-sharing duty could be accomplished in different ways, 'be it between the State and indigenous peoples […] or between companies and indigenous peoples, through negotiations in which the benefits are agreed'.[19] Moreover, in some Latin American states party to the Convention, such as Chile, there already are indigenous–industry agreements that justify their benefit-sharing clauses by explicitly invoking the ILO 169 benefit-sharing rule.[20]

This paper aims to discuss and analyse the emerging notion that IBAs can be means to comply with the ILO 169 benefit-sharing obligation. I will contend that from a legal point of view this idea is problematic. This is not only for formal reasons – ie the fact that the legal subjects of the human rights obligations are the states themselves and not transnational companies[21] – but also for two other, more significant reasons. The first one is that in the context of IBAs, because of their contractual nature, indigenous peoples would be in a more vulnerable situation than under the ILO 169 regime where benefits would be mandatory even if these people withheld their consent to

15 See Dayna Nadine Scott, 'Extraction Contracting: The Struggle for Control of Indigenous Lands' (2020) 119(2) *The South Atlantic Quarterly* 269, 292.

16 See Roger Merino, 'The Cynical State: Forging Extractivism, Neoliberalism and Development in Governmental Spaces' (2020) 41(1) *Third World Quarterly*, 58, 62.

17 Gonzalo Bustamante-Rivera and Thibault Martin, 'Beneficios compartidos y la gobernanza de la extracción de recursos naturales en territorios indígenas: aportes y limitaciones para Latinoamérica' (2018) 26(52) *Perfiles Latinoamericanos* https://perfilesla.flacso.edu.mx/index.php/perfilesla/article/view/1084 accessed 30 March 2020.

18 *Ibid* 13. Translation by the author.

19 María Barros Sepúlveda, 'La Participación en los Beneficios para los Pueblos Indígenas, Recursos Naturales y Consentimiento Previo, Libre e Informado' (2019) 17(1) *Estudios Constitucionales* 151, 175. Translation by the author. Nonetheless, Barros does underscore that, in those cases, the state still has to guarantee the protection of indigenous peoples' rights.

20 See eg the 'Convenio de Cooperación, sustentabilidad y beneficio mutuo entre el Consejo de Pueblos Atacameños, Comunidad Indígena Atacameña de Río Grande y otras/Rockwood Litio Ltda', 2016, Sixth clause www.chululo.cl/incs/docs/download.php?f=convenio_rockwood_cpa_2016_02_21_.pdf accessed 7 January 2020.

21 On the business and Human Rights debate, this paper takes the position that currently, with perhaps the exception of state-owned enterprises, business entities do not have direct responsibility for the breach of human rights obligations under international law. See Judith Schönsteiner, 'Attribution of State Responsibility for Actions or Omissions of State-Owned Enterprises in Human Rights Matters' (2019) 40(4) *University of Pennsylvania Journal of International Law* 895, 935.

the project. The second reason is that because of their distinctive features, IBAs would not allow a substantive review of the results of the agreement by the state.

To further explore and justify these assertions, this article is divided into four sections. Section 2 presents the main features of the ILO 169 benefit-sharing norm. Then, section 3 reviews the key components of IBAs against the backdrop of the ILO 169 benefit-sharing standard, explaining why the former cannot be understood as a mechanism to comply with the latter. Section 4 ends with some brief conclusions on the subject.

Before I commence, some methodological approaches should be explained. Firstly, contrary to most of the existing literature on the subject, which tries to tackle benefit sharing in the context of resource extraction from an international or 'global' perspective,[22] I will focus instead on the benefit-sharing rule of ILO 169. This choice is warranted not only by the fact that the ILO 169 obligation is the only binding norm on benefit-sharing in IHRL, but also because of the relevance that the Convention has in Latin America. Secondly, even though negotiated agreements have been prominent in Australia and Canada, this paper focuses on IBA references and examples from the Canadian experience. This choice is due to the fact that in Canada IBAs are strongly interrelated with the duty to consult,[23] which is a major feature of the ILO 169 regime and plays an important role in implementing the ILO 169 benefit-sharing rule. Additionally, because there are many Canadian mining companies operating in Latin America,[24] Canada is usually taken as a model in Latin American discussions about the relationship between the state, indigenous peoples and extractive industries.[25] Hence, the Canadian model of indigenous–industry agreements seems to be the most fitting for this analysis. Finally, as an international treaty, ILO 169 will be interpreted following the rules of interpretation of the Vienna Convention on the Law of Treaties (VCLT or Vienna Convention).[26] Nonetheless, because the Convention is also considered a human rights treaty,[27] those rules will be 'modulated'[28] to

22 See eg Elisa Morgera, 'The Need for an International Legal Concept of Fair and Equitable Benefit Sharing' (2016) 27(2) *The European Journal of International Law* 353; Gilbert, *Natural Resources and Human Rights* (n 8) 73–84; Morgera, 'Under the Radar' (n 6); Emma Wilson, 'What Is Benefit Sharing? Respecting Indigenous Rights and Addressing Inequities in Artic Resource Projects' (2019) 8(2) *Resources* 74.

23 Keith Bergner, 'Navigating a Changing Landscape: Challenges and Practical Approaches for Project Proponents and Indigenous Communities in the Context of the Review and Assessment of Major Projects' in Dwight Newman (ed), *Business Implications of Aboriginal Law* (LexisNexis 2018) 193, 200–16.

24 See Charis Kamphuis, 'Building the Case for a Home-State Grievance Mechanism: Law Reform Strategies in the Canadian Resource Justice Movement' in Isabel Feichtner, Markus Krajewski, and Ricarda Roesch (eds), *Human Rights in the Extractive Industries. Transparency, Participation, Resistance* (Springer 2019) 460.

25 See eg José Aylwin, 'Mercados y derechos globales: implicancias para los pueblos indígenas de América Latina y Canadá' (2013) 26(2) *Revista de Derecho (Universidad Austral)* 67; Sebastián Donoso, 'Empresas y comunidades indígenas: el nuevo escenario que plantea el Convenio 169 de la OIT' (2014) 9(73) *Temas de la Agenda Pública* 16–19.

26 On the application of these rules of interpretation, see Mark Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers 2009).

27 See eg Peter Larsen, 'Contextualising Ratification and Implementation: A Critical Appraisal of ILO Convention 169 from a Social Justice Perspective' (2020) 24(2–3) *The International Journal of Human Rights* 94, 95.

28 Robert Kolb, 'Is There a Subject-Matter Ontology in Interpretation of International Legal Norms?' in Mads Andenas and Eirik Bjorge (eds), *A Farewell to Fragmentation: Reassertion and Convergence of International Law* (CUP 2015) 476.

account for the specific hermeneutical principles of IHRL,[29] ie those of effectiveness, evolutive interpretation and the *pro persona* principle.[30]

A final remark about the scope of this article is in order. Because this topic is a relatively new subject, the presented investigation does not purport to exhaust the topic, nor to answer the question in a definitive way. Rather, the reflections presented in this article should be taken as an attempt to start a long-postponed discussion about the nature and implementation of the ILO 169 benefit-sharing rule.

2. The ILO 169 benefit-sharing duty

Art. 15(2) of ILO 169 establishes that '[t]he peoples concerned shall wherever possible participate in the benefits' of the activities of exploration or exploitation of natural resources in indigenous lands. In this section, I will try to untangle the obligations that this duty entails for the state. Accomplishing this objective is not an easy feat. At face value, art. 15(2) is a rather vague provision. Furthermore, human rights bodies and the legal scholarship have given little guidance on this matter. Considering this state of affairs, I will begin by determining the nature of the ILO 169 benefit-sharing obligation (section 2.1). Then, I will continue by analysing its legal justification (2.2) and, ultimately, by unravelling the specific obligations that its implementation would imply for the state (2.3).

2.1. *The nature of the obligation: a due diligence obligation of conduct*

The first thing that draws one's attention when reading the ILO 169 benefit-sharing rule is the *wherever possible* language: '[t]he peoples concerned shall wherever possible participate in the benefits … '. What does this mean for the correlative duty of the state? There are three possible answers.

The first answer is provided by the Spanish version of the first guide published by the International Labour Office (Office) on ILO 169, in 1996. To the question 'Does ['wherever possible'] mean that governments always have the right to decide whether or not indigenous and tribal peoples share in the benefits of mining activities?', the Spanish version of the guide responds with a '[y]es, that is what it means'.[31] This is a troubling answer, as it would imply that benefit sharing is just an optional obligation for the state and, correlatively, that indigenous

29 For an overview of the interpretation of human rights treaties, see Malgosia Fitzmaurice, 'Interpretation of Human Rights Treaties' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 739.

30 See eg María Victoria Cabrera, *The Requirement of Consultation with Indigenous Peoples in the ILO. Between Normative Flexibility and Institutional Rigidity* (Brill Nijhoff 2017) 202 (on the interpretation of the duty to consult following certain human rights principles of interpretation).

31 Manuela Tomei and Lee Swepston, *Pueblos indígenas y tribales: Guía para la aplicación del Convenio núm. 169 de la OIT* (Oficina internacional del Trabajo 1996) 20 www.ilo.org/public/libdoc/ilo/1996/96B09_253_span.pdf accessed 27 April 2020. Translation by the author. It must be noted that this phrase is absent from the English version of the guide. See Manuela Tomei and Lee Swepston, *Indigenous and Tribal Peoples: A Guide to ILO Convention No. 169* (International Labour Office 1996) 20 www.ilo.org/public/libdoc/ilo/1996/96B09_253_engl.pdf accessed 27 April 2020.

peoples do not have a true rights 'claim'.[32] Therefore, this interpretation would render meaningless the word 'shall', that precedes the 'wherever possible' phrase.

A second, more cautious approach would suggest that the wording of the benefit-sharing rule is a manifestation of the *flexibility* that characterises ILO standard-setting activities.[33] One of the devices to achieve this goal is the use of a 'flexible terminology' – eg 'as far as possible' or 'to the extent possible' – regarding the scope and content of the obligation.[34] In this light, it has been argued that the qualification 'wherever possible' of art. 15(2) at least establishes an obligation on the part of the ratifying states 'to demonstrate that [benefit-sharing] is not possible before denying such participation'.[35] According to Lee Swepston, 'even a constitutional provision that the state retains entire rights to certain categories of resources would not *ipso facto* render impossible ancillary provisions for sharing the benefits of exploitation with the occupants of the lands affected'.[36] But this theory is also problematic, as it gives the state a wide margin to decide when this duty is or not 'possible', thus *de facto* depriving the norm of its effect.

Finally, according to a third interpretation, the wording of the rule does not qualify the obligation in any of the aforementioned ways. Instead, it refers to certain factual circumstances that do not depend on the state's will, that must exist in order for the implementation of the right to be 'possible'. Examples of such circumstances are the existence of an indigenous system for managing the benefits,[37] the consent of indigenous peoples to receive the benefits[38] or the simple fact that there exist benefits to share.[39] Therefore, the state would have to prove that it took all the reasonable measures to achieve this aim – including amending national legislation – and if in the end it was not possible to do so, that this was due to some external circumstances beyond the state's control. I contend that a reading of art. 15(2) under the rules of the Vienna Convention and the IHRL principles of interpretation supports this third conclusion.

I will start by analysing the ILO benefit-sharing obligation under the 'principle of effectiveness'. Art. 31(1) of the VCLT states that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in

32 Santiago Montt and Manuel Matta, 'Una visión panorámica al Convenio OIT 169 y su implementación en Chile' (2011) 121 Estudios Públicos 133 (saying that benefit sharing is not a claim right).

33 On flexibility, see George Politakis, 'Deconstructing Flexibility in International Labour Conventions' in George Politakis (ed), *Les normes internationales du travail: un patrimoine pour l'avenir. Mélanges en l'honneur de Nicolas Valticos* (Bureau international du Travail 2004) 469.

34 *Ibid* 480–83.

35 Lee Swepston, 'A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989' (1990) 15(3) *Oklahoma City University Law Review* 667, 705.

36 *Ibid* 703.

37 María Gomiz and Juan Manuel Salgado, *Convenio 169 de la OIT sobre Pueblos Indígenas: su aplicación en el derecho interno argentino* (2nd edn, ODHPI/IWGIA 2010) 223.

38 *Ibid* 223.

39 Raquel Yrigoyen Fajardo, 'De la tutela indígena a la libre determinación del desarrollo, la participación, la consulta y el consentimiento' (2009)(40) *El Otro Derecho* 11, 39. See also Luis Roel, 'El derecho al comparto de beneficios económicos de los pueblos indígenas' (2012) II (2) *Revista Internacional de Derechos Humanos* 19, 33; Juan Carlos Ruiz and Julio César Mejía 'MINEM y MINCU violan sistemáticamente el derecho de los pueblos indígenas a beneficiarse de las actividades extractivas en sus territorios' (2018) 281 *Revista Ideele* https://revistaideele.com/ideele/content/minem-y-mincu-violan-sistemáticamente-el-derecho-de-los-pueblos-ind%C3%ADgenas-beneficiarse-de accessed 28 April 2020.

their context and in the light of its object and purpose'. The reference to 'good faith' at the beginning of this provision is usually understood as 'an umbrella for the specific principle that an interpretation of a term should be preferred, which gives it some meaning and role, rather than one, which does not'.[40] This is known as the 'principle of effectiveness' or *effet utile*. In IHRL, this would mean 'that the interpretation of provisions should have real effect in terms of the concrete and actual lives of individuals who are the recognized right-holders of human rights treaty law'.[41] Accordingly, when applied to the ILO 169 benefit-sharing rule,[42] the *effet utile* principle leads us to prefer the interpretation that gives effect to the provision.

Closely intertwined with the *effet utile* is the '*pro persona* principle'. This principle requires the most favourable interpretation when the recognition and enjoyment of rights is at stake. In the VCLT rules, the basis for this principle is in the teleological element of Art. 31(1): as the 'object and purpose' of human rights treaties is the protection of human rights, then an interpretation 'in the light of its object and purpose' must always favour the holders' rights.[43] In this case, the 'object and purpose' of ILO 169 is 'to enable indigenous peoples to retain their traditional lifestyles […] and to realize their right to decide their own priorities for the process of development'.[44] Thus, in the face of different possible readings of the benefit-sharing rule, preference should be given to the interpretation that maximises the fulfilment of these objectives.

Lastly, there is the principle of 'systemic integration' contained in art. 31(3)(c) of the VCLT.[45] According to this provision, the interpreter has to take into account, together with the context, '[a]ny relevant rules of international law applicable in the relations between the parties'. However, the meaning of this particular phrase is controversial. Hence, before applying this provision to the interpretation of art. 15(2), three clarifications regarding the scope of Art. 31(3)(c) are in order.

I will commence by noticing that Art. 31(3)(c) is 'intertemporally opened:' '[t]he rules as they stood at the time of the conclusion of the treaty are covered by the provision. The rules as they exist at the time of interpretation can be accounted for in the same manner'.[46] More generally, the Vienna Convention 'leaves room for interpreters to take a stance'[47] on the subject. Because ILO 169 can be considered a human rights treaty, this article will rely on a reading of Art. 31(3)(c) that calls for an 'evolutive interpretation'. Seen in this light, the 'rules' that have to be 'taken into account' when reading the ILO benefit-sharing obligation are those in force *at the time of the interpretation*.

A second clarification regarding Art. 31(3)(c) refers to which 'rules of international law' are to be considered 'relevant' for these matters. As Richard Gardiner has pointed

40 Richard Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015) 168.
41 Başak Çali, 'Specialized Rules of Treaty Interpretation: Human Rights' in Duncan Hollis (ed), *The Oxford Guide to Treaties* (OUP 2012) 539.
42 On the use of this principle in ILO 169 interpretation, see Cabrera (n 30) 203.
43 Claudio Nash Rojas, *Derecho internacional de los derechos humanos en Chile: recepción y aplicación en el ámbito interno* (Universidad de Chile 2012) 32.
44 Cabrera (n 30) 60.
45 For an overview of this principle, see Campbell Mclachlan, 'The Principle of Systemic Integration and Article 31(3)(C) of The Vienna Convention' (2005) 54(2) *International and Comparative Law Quarterly* 279.
46 Christian Djeffal, *Static and Evolutive Treaty Interpretation: A Functional Reconstruction* (CUP 2016) 168.
47 *Ibid* 202.

out, the term 'relevant' refers 'to those [rules of international law] touching on the same subject matter as the treaty provision or provisions being interpreted or which in any way affect that interpretation'.[48] The ILO 169 obligation is a form of intra-state benefit sharing triggered by the exploitation of natural resources in indigenous territories. Therefore, one could argue that Art. 15(2) interpretation might consider 'relevant' not only the developments that have been made in this area in IHRL, but also the intra-state benefit-sharing norms existing in international environmental law (IEL) – that is, Art. 8(j) of the Convention on Biological Diversity (CBD) and Art. 5(2) of the Nagoya Protocol on Access and Benefit-sharing (Nagoya Protocol). However, a closer look reveals that this is true with respect to only the latter provision. Art. 5(2) refers to benefits arising from the utilisation of genetic resources that are 'held' by indigenous and local communities. As is evident, this hypothesis is fairly similar to that of Art. 15(2). Art. 8(j), instead, covers a different situation. In this provision, benefits arise from the utilisation of traditional knowledge and practices of indigenous and local communities relevant for the conservation and sustainable use of biological diversity. For this reason, together with IHRL, this research will consider Art. 5(2) of the Nagoya Protocol a 'relevant rule of international law' for determining the nature of the ILO 169 obligation.

A third and final clarification refers to the 'rules of international law' that must be taken into account. This is a contested issue. Many authors[49] and dispute resolution bodies[50] argue that these rules comprise only those provisions that are *binding* to the parties, contained in the sources of international law established in Art. 38(1) of the Statute of the International Court of Justice (Statute) – ie treaties, international custom and the general principles of law.[51] Conversely, human rights bodies and tribunals have used Art. 31(3)(c) 'as a bridge to a wider context for the interpretation of human rights',[52] including references to 'soft law' instruments and provisions of treaties that are not yet in force.[53] This article takes a middle ground on this debate. Despite the fact that ILO 169 can be considered a human rights treaty, there is an important hermeneutical difference between this treaty and a treaty like, for example, the American Convention on Human Rights (ACHR). Whilst the ACHR has a specific provision regulating the interpretation of the ACHR that justifies references to non-binding sources of international law (Art. 29, ACHR),[54] there is no such norm in the ILO 169 framework.[55] But this is not to say that only binding rules should

48 Gardiner (n 40) 299.

49 See Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008) 366; Villiger (n 26) 433; Panos Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration. Normative Shadows in Plato's Cave* (Brill Nijhoff 2015) 19.

50 See eg *Ireland v UK and Northern Ireland* 2001–03 (Permanent Court of Arbitration, 2 July 2003) para 101; *US – Anti-Dumping and Countervailing Duties (China)* WT/DS379/AB/R (WTO Appellate Body, 11 March 2011) para 308.

51 *Ibid*.

52 Fitzmaurice (n 29) 764.

53 *Ibid* 765. See eg *Demir and Baykara v Turkey* App no 34503/97 (ECtHR, 12 November 2008) para 85; *Atala Riffo and daughters v Chile* Serie C No. 239 (IACtHR, 24 February 2014) para 81.

54 Fitzmaurice (n 29) 764.

55 Contrary to what has been suggested by some authors, art. 35 of ILO 169 cannot perform that function. See Oficina Internacional del Trabajo, *Entendiendo el Convenio sobre Pueblos Indígenas y Tribales, 1989 (núm. 169): Herramienta para jueces y operadores del derecho* (Oficina Internacional del Trabajo 2020) 71.

be taken into account when interpreting ILO 169 provisions. That would be at odds with the nature of ILO 169 as a human rights treaty. Together with the formal sources of Art. 38(1) of the Statute, this article takes the position that the 'rules of international law' will also comprise 'judicial decisions and the teachings of the most highly qualified publicists […] as subsidiary means for the determination of rules of law' (Art. 38(1)(d), Statute).[56] Accordingly, the judicial decisions of human rights courts such as the Inter-American Court of Human Rights (IACtHR or the Court) and the observations of ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR) on ILO 169,[57] will be 'taken into account' for the interpretation of Art. 15(2). On the contrary, soft law instruments as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) or the American Declaration on the Rights of Indigenous Peoples (ADRIP) would fall outside the category of 'rules of international law'.[58]

A review of the 'relevant rules of international law' regarding benefit sharing shows that they all point, in one way or another, to a duty whose fulfilment is not dependent on state discretion. Thus, Art. 5(2) of the Nagoya Protocol, while drafted in a heavily qualified language that is common in IEL, states that '[e]ach Party shall take legislative, administrative or policy measures, as appropriate, with the aim of ensuring that benefits […] are shared'. In other words, it creates an obligation for states to establish measures to share in the benefits.[59] Along the same lines, the CEACR has repeatedly recommended that governments take measures to 'ensure' benefit-sharing,[60] including 'to amend the national legislation'.[61] The IACtHR, for its part, has consistently seen benefit-sharing as a mandatory safeguard with which states would have to comply.[62] Finally, the Special Rapporteur reports, taken as supplementary means of interpretation (Art. 32, VCLT),[63] confirm this reading.[64]

56 See Gardiner (n 40) 307.

57 Because the CEACR is an international body conformed by independent experts in international labour law (including ILO169), they can be considered equivalent to 'the teachings of the most highly qualified publicists'.

58 Additionally, it must be underscored that neither UNDRIP nor ADRIP have an explicit benefit-sharing rule.

59 Elisa Morgera, Elsa Tsioumani, and Matthias Buck, *Unraveling the Nagoya Protocol. A Commentary on the Nagoya Protocol on Access and Benefit-Sharing to the Convention on Biological Diversity* (Brill 2014) 117.

60 International Labour Organization, (CEACR) Observation (adopted 2019, published 109th ILC session (2020) Indigenous and Tribal Peoples Convention, 1989 (No. 169) – Colombia (Ratification: 1991).

61 International Labour Organization (CEACR), Observation – adopted 2012, published 102nd ILC session (2013) Indigenous and Tribal Peoples Convention, 1989 (No. 169) – Chile (Ratification: 2008).

62 See eg *Saramaka v Suriname* Series C No. 172 (IACtHR, 28 November 2007) para 127–129 (*Saramaka*); *Kaliña and Lokono v Suriname* Series C No 309 (IACtHR, 25 November 2015) para 227–29 (*Kaliña and Lokono*).

63 See Rosanne Van Alebeek and André Nollkaemper, 'The Legal Status of Decisions by Human Rights Treaty Bodies in National Law' in Hellen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies. Law and Legitimacy* (CAP 2012) 410.

64 See James Anaya, Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya* (A/HRC/15/37, 2010) para 79 (Special Rapporteur Report 2010); Victoria Tauli-Corpuz, Human Rights Council, *Report of the Special Rapporteur on the Rights of Indigenous Peoples on Her Visit to Mexico* (A/HRC/39/17/Add.2, 2018) para 106.

Taking all of the above into consideration, it seems clear now that the 'wherever possible' language of Art. 15(2) cannot be regarded as giving 'flexibility' or discretion to the state to decide on whether or not it is 'possible' to share in the benefits. The more plausible interpretation is that these terms refer instead to the fact that there might be certain external circumstances (such as the absence of benefits) that could hinder the realisation of benefit sharing. In this way, ILO 169 benefit sharing could be further characterised as a 'due diligence obligation of conduct'.[65] On the one hand, this means that the state is not under an obligation to succeed in sharing of the benefits, whatever the circumstances. There could be some external circumstances that would make it impossible to comply with the duty. On the other hand, it also means that the state should take all the measures reasonably available to ensure this result. For example, it should establish provisions requiring external audits of the financial reports of the companies in order to review the existence and amount of benefits or, when necessary, amend the national legislation.

2.2. *Legal justification: assuring proportionality in the restriction of indigenous peoples' rights*

As with the nature of the obligation, there are not many clear things about the justification of the benefit-sharing duty. Thus, to unravel its normative rationale, I will start by examining the place of this rule in the broader context of Art. 15 of the Convention.

Art. 15 recognises indigenous peoples' rights to natural resources. It is divided into two paragraphs. Art. 15(1) establishes a general obligation to 'specially safeguard' indigenous peoples' rights to the natural resources pertaining to their lands or territories.[66] These resources would encompass, *prima facie*, both 'renewable and non-renewable resources such as timber, fish, water, sand and minerals'.[67] And although the norm does not specify what rights indigenous peoples have over those resources, it asserts that these include the right to participate in their 'use, management and conservation'. Art. 15(2), meanwhile, contains an 'exception' to this general principle.[68] It specifically deals with those cases where, according to domestic provisions, the state 'retains the ownership of mineral or sub-surface resources or rights to other resources'. When the government purports to undertake or permit the exploration or exploitation of such resources, taking into consideration the serious impacts that these activities

65 On due diligence obligations, see *Fisheries Advisory Opinion* Reports 2015 (ITLOS, 2 April 2015) para 131–32; *South China Sea Arbitration* Case No. 2013–19 (PCA 12 July 2016) para 743–44; Nigel Bankes, 'Reflections on the Role of Due Diligence in Clarifying State Discretionary Powers in Developing Arctic Natural Resources' (2020) *Polar Record*, doi:10.1017/S0032247419000779. I am grateful to Professor Bankes for suggesting this approach.

66 Art. 13(2) provides that the use of the term lands in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.

67 ILO 169 Guide 2009 (n 11) 107.

68 International Labour Office, *Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169). Handbook for ILO Tripartite Constituents* (ILO 2013) 22 (ILO 169 Handbook). This is confirmed by the *travaux préparatoires* of the Convention. See International Labour Office, 'Report VI (1). Partial revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107)' (75th Session, ILO 1988) 72; and International Labour Conference, 'Provisional Record No. 4' (76th Session, ILO 1989) 31/5. For a different opinion, see Gomiz and Salgado (n 37) 224; Morgera, 'Under the Radar' (n 6) 1100.

usually have over indigenous peoples' rights, it must comply with three specific measures, namely: prior consultation processes, benefit sharing and 'fair compensation' for any damages produced by those activities.

Considering the terms and context of Art. 15(2), the first thing that must be underscored is that the justification of benefit sharing cannot lie on some form of 'sovereign rights' that indigenous peoples might have over natural resources pertaining to their lands. This is fairly obvious as Art. 15(2) explicitly deals with a situation where the state retains ownership (and other) rights over sub-surface resources. A resort to a 'qualified' version of the right of indigenous peoples to permanent sovereignty over natural resources (PSNR), which is in line with the right to internal self-determination and gravitates around the idea that indigenous peoples 'have at their disposal powers of decision-making as to how their natural resources should be utilised,[69] does not change this conclusion. This is mainly because the qualified notion of PSNR depends on an interpretative method that gives similar or equal 'weight', in defining human rights obligations, to different sources of international law – treaties, declarations, human rights bodies' observations, etc. Evidently, this is at odds with the interpretative method used in this paper. Additionally, it must be said that even under a PSNR interpretation of Art. 15(2), this provision still refers to situations where the state retains ownership rights over sub-soil resources.[70] In other words, at least in most cases,[71] the right to PSNR does not seem to challenge states' sovereignty over natural resources.[72]

Having clarified this issue, let us go back to the rights that Art. 15(2) grants to indigenous peoples in the context of exploration and exploitation of natural resources in their territories, ie consultation, benefit-sharing and compensation for damages. These rights are often conceived as safeguards[73] or procedural rights[74] against the infringement of the substantive rights of indigenous peoples[75] – eg the right to cultural identity[76] or the right of ownership over the lands they traditionally occupy (Art. 14 (1)). However, benefit-sharing has a particularity. As Roger Merino critically observed, 'the right of Indigenous Peoples to participate in economic benefits obtained by extractive industries […] responds to the fact that companies are exploiting (or are going to exploit) Indigenous land and resources'.[77] Hence, benefit-sharing proceeds on the premise that the projects are operating and, therefore, that the aforementioned

69 Endalew Lijalem Enyew, 'Application of the Right to Permanent Sovereignty Over Natural Resources for Indigenous Peoples: Assessment of Current Legal Developments' (2017) 8 *Arctic Review on Law and Politics* 222, 229.

70 *Ibid* 236.

71 It must be noted that Professor Enyew does limit the property rights that the state would have under Art. 15(2) to non-culturally relevant sub-soil resources. In the case of culturally relevant sub-soil resources, he contends, indigenous people would retain ownership. See *ibid* 235–36.

72 See Gilbert, *Natural Resources and Human Rights* (n 8) 81.

73 ILO 169 Handbook (n 68) 22.

74 Swepston (n 35) 705.

75 Cabrera (n 30) 45.

76 On the right to cultural identity, see Juan Jorge Faundes, 'El derecho fundamental a la identidad cultural de los pueblos indígenas, configuración conforme el derecho internacional y perspectivas de su recepción en Chile' (2020) 26(1) *Ius et Praxis* 77.

77 Roger Merino, 'Law and Politics of Indigenous Self-Determination: The Meaning of the Right to Prior Consultation' in Irene Watson (ed), *Indigenous Peoples as Subjects of International Law* (Routledge 2017) 137.

rights had been already limited. But if that is the case, it bears asking in what way benefit sharing could be conceived as a 'safeguard' against the infringement of collective rights.

To provide an answer, it must be remembered that most legal systems presume that states may legitimately limit the exercise of protected rights under certain circumstances.[78] In order to do so, the measures that will limit those rights would have to comply with a series of requirements. In IHRL particularly, 'the limitation must be necessary and proportional in relation to a valid State's objective motivated by concern for the human rights of others'.[79] Taking this perspective into consideration, benefit-sharing should not be conceived as a safeguard in the sense that it could halt a project that would restrict indigenous rights. Rather, it should be conceptualised as an element to assure that those restrictions are lawful – or, more accurately, as a requirement to understand that a restriction of indigenous rights is *proportional* to the benefits that the exploitation of natural resources will produce and, hence, that this restriction is valid. As Mattias Åhrén has explained in regard to indigenous property:

> If the corporation refuses to share benefits with the community (and the state fails to compel the corporation to do so), this will surely in most, if not all, instances result in the conclusion that the limitation in the community's property right places a disproportionate burden on it […]. It can hardly be called proportionate if one segment of society is left with all the burdens that follow with resource extraction, while other segments reap the benefits. To address this discrepancy, benefit-sharing must be provided.[80]

Understanding benefit sharing as a requirement to make a restriction of indigenous rights proportional and hence valid is not only aligned with the purpose of Art. 15 (2) as a norm that seeks to 'reconcile interests' between the states and indigenous peoples.[81] It can also be supported by taking into account the broader context of IHRL, especially the decisions of the IACtHR and the reports of Special Rapporteur James Anaya[82] – under Art. 31(3)(c) and Art. 32 of the Vienna Convention, respectively.

The IACtHR explicitly conceives of the concept of benefit sharing as a requirement for the lawful restriction of indigenous peoples' right to property. According to the IACtHR, Art. 21 of the ACHR[83] protects indigenous peoples' right to communal

78 Jeremy Gunn, 'Deconstructing Proportionality in Limitations Analysis' (2005) 19 *Emory International Law Review* 465, 469.

79 Human Rights Council, *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya. Extractive Industries and Indigenous Peoples* (A/HRC/24/41, 2013) para 34 (Special Rapporteur Report 2013).

80 Mattias Åhrén, *Indigenous Peoples' Status in the International Legal System* (Oxford University Press 2016) 218.

81 ILO 169 Guide 2009 (n 11) 107.

82 According to articles 31(3)(c) and 32 of the Vienna Convention, respectively.

83 Article 21. Right to Property (1): Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. (2) No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. (3) Usury and any other form of exploitation of man by man shall be prohibited by law.

property over their traditionally used lands[84] and resources.[85] At the same time, the Court has acknowledged that this protection is not absolute, as the state can still restrict these rights as long as it complies with certain requirements and safeguards. Among these safeguards, the Court has said that 'the State must guarantee that [indigenous peoples] will receive a reasonable benefit from any [development or investment] plan within their territory'.[86] The IACtHR also associated benefit sharing with the right to 'compensation' recognised in Art. 21(2).[87]

Even if this analogy can be misleading, it has to be noted that the association between benefit-sharing and compensation does not necessarily conflate 'benefit sharing' with a notion of 'compensation for damages', as some have argued.[88] Let us remember that the Court was referring to the compensation that is required in international law to understand that a deprivation of, or interference with, property by the state can be regarded as lawful.[89] As the Court noted in *Salvador Chiriboga v. Ecuador*, 'in cases of expropriation, the payment of a compensation constitutes a general principle of international law, which derives from the need to seek a balance between the general interest and that of the owner'.[90] This distinction can be further supported by latter rulings of the Court in indigenous peoples' land rights cases.[91] In effect, in the 'reparations' section of those judgements, the IACtHR ordered the state to set up a community development fund specifically as 'compensation for the pecuniary and non-pecuniary damage'[92] or 'to redress the harm' suffered by indigenous peoples.[93] But, while doing that, the Court was careful to point out that this fund 'is additional to any other present or future benefit that corresponds to the communities based on the State's general development obligations'.[94] Thus, it seems clear that the IACtHR is aware that benefit sharing cannot be equated with compensation for damages.

As a result, in the IACtHR jurisprudence benefit sharing could be seen 'as part of a general and permanent obligation to protect the right to property over natural resources of indigenous peoples, which is independent of any violation of their rights'.[95] More

84 See *Mayagna (Sumo) Awas Tingni v Nicaragua* Series C No. 79 (IACtHR, 31 August 2001) para 142–55.

85 *Saramaka* (n 62) para 122.

86 *Saramaka* (n 62) para 129; see also *Kaliña and Lokono* (n 62) para 227–29.

87 *Saramaka* (n 62) para 138 ('The concept of benefit-sharing […] can be said to be inherent to the right of compensation recognized under Article 21(2) of the Convention').

88 See eg Jérémie Gilbert, *Indigenous Peoples' Land Rights under International Law. From Victims to Actors* (2nd revised edn, Brill Nijhoff 2016) 280 ('Benefit sharing refers to a right to participate in the benefits of the project. Compensation is an absolutely different issue relating to damages'); Roel (n 32) 43; Gilbert, *Natural Resources and Human Rights* (n 8) 79.

89 *Saramaka* (n 62) para 138. On the distinction that international tribunals make between a taking that is unlawful per se and one that is lawful but defective because fair compensation has not been paid, see Dinah Shelton, *Remedies in International Human Rights Law* (Second Edition, OUP 2015) 309.

90 *Salvador Chiriboga v. Ecuador* Series C No. 179 (IACtHR, 6 May 2008) para 96.

91 See Morgera, 'Need for an International Legal Concept' (n 22) 371; Morgera, 'Under the Radar' (n 6) 1115.

92 See *Kaliña and Lokono* (n 62) para 295; *Garífuna Punta Piedra v Honduras* Series C No. 304 (IACtHR 8 October 2015) para 332; *Garífuna Triunfo de la Cruz v Honduras* Series C No. 305 (IACtHR 8 October 2015) para 295.

93 *Lhaka Honhat Association v Argentina* Series C No. 400 (IACtHR 6 February 2020) para 338

94 *Ibid*.

95 Morgera, 'Need for an International Legal Concept' (n 22) 371.

accurately, it can be understood as an element to guarantee that the burden imposed by the state over the interests of indigenous peoples is 'proportional' as required by IHRL for the restriction of human rights.[96] Hence, in the same way that compensation for the deprivation of property 'derives from the need to seek a balance between the general interest and that of the owner',[97] for the IACtHR the sharing of project benefits – as Alejandro Fuentes has explained – 'has to be interpreted as the existence of a "relation of proportionality" between the restrictions suffered by the affected communities in the enjoyment of their rights, and the possible benefits from the investment or development projects'.[98] In other words, in order for the limitations produced by a development project for the property rights of indigenous peoples to be proportional and hence justified, benefit sharing must be provided.

Although not consistently explained, a similar logic can be found in the Special Rapporteur's reports. In his 2010 report, the rapporteur indicated that '[a]side from their entitlement to compensation for damages, indigenous peoples have the right to share in the benefits arising from activities taking place on their traditional territories'.[99] For the Special Rapporteur, '[b]enefit-sharing responds in part to the concept of fair compensation for deprivation or limitation of the rights of the communities concerned, in particular their right of communal ownership of lands'.[100] In later reports, Anaya restated this rationale,[101] conceptualising benefit sharing as one of the various safeguards against measures that may affect indigenous peoples' rights.[102] He also added that this right, alongside compensation and mitigation measures, should be 'in proportion to the impact on the affected indigenous party's rights'[103] and, therefore, that it will be a factor 'in the calculus of proportionality in regard to any limitations on rights'.[104]

Seen in this light, the justification that lies behind the ILO 169 benefit-sharing rule is that it serves as a requirement to make an eventual restriction of rights proportional and, therefore, lawful. Broadly speaking, then, benefit sharing can be conceived as a measure that seeks to achieve an equitable distribution of the benefits and burdens (or negative externalities) of a given project.[105]

2.3. *Procedural and substantive obligations*

The ILO 169 benefit-sharing rule, we have seen, does not regulate explicitly how the state should discharge its duty. However, a reading that takes into account the context

96 For the application of this principle in the jurisprudence of the IACtHR on property, see Sebastián López, 'La propiedad y su privación o restricción en la jurisprudencia de la Corte Interamericana' (2015) 21(1) *Revista Ius et Praxis* 531, 566–68.

97 *Salvador Chiriboga v Ecuador* Series C No. 179 (IACtHR, 6 May 2008) para 96.

98 Alejandro Fuentes, 'Protection of Indigenous Peoples' Traditional Lands and Exploitation of Natural Resources: The Inter-American Court of Human Rights' Safeguards' (2017) 24 *International Journal on Minority and Group Rights* 229, 246.

99 Special Rapporteur Report 2010 (n 64) para 76.

100 *Ibid* para 91.

101 Special Rapporteur Report 2013 (n 79) para 76.

102 Human Rights Council, *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya* (A/HRC/21/47, 2012) para 80 (Special Rapporteur report 2012).

103 I*bid* para 68.

104 Special Rapporteur report 2013 (n 79) para 38.

105 See Dominique Hervé, *Justicia Ambiental y Recursos Naturales* (Ediciones Universitarias de Valparíso 2015) 317–20.

and the relevant interpretations made by the CEACR and other international bodies can outline at least some basic procedural and substantive obligations for the state.

2.3.1. Procedural obligations: consultation, environmental assessment and judicial review

A close examination of the benefit-sharing rule within the broad context of the Convention results in the conclusion that the state must comply with at least three procedural duties when implementing this right, namely: indigenous participation, impact assessment and the possibility of substantive judicial review of the decision.

Indigenous participation is a requirement that flows from placing the benefit-sharing duty within the object and purpose of the Convention. As mentioned above, one of the aims of ILO 169 is to allow these peoples to exercise as much control as possible over their ways of life and economic development. This objective is mostly achieved through the recognition of participatory rights to indigenous peoples, both in specific provisions – such as the right to prior consultation (Art. 6) – and as a general principle.[106] Thus, a general benefit-sharing mechanism – eg the distribution of a percentage of the revenues generated by taxes or royalties – would entail indigenous participation in the design and operation of the mechanism.[107] When dealing with benefit-sharing on a 'project-by-project' basis – which is the subject matter of this paper – this would imply a consultation process. Or, rather, it would imply that benefit-sharing definitions – the types of benefits, who are the beneficiaries, etc. – would need to be determined *during* a consultation process.[108]

In fulfilling its consultation duty, the state has to comply with certain procedural and substantive obligations. On the procedural side, consultations should be formal, full and exercised in good faith; they should be carried out through appropriate procedural mechanisms with indigenous and tribal peoples' representative institutions; measures to mitigate power asymmetries should be in place; and they must be undertaken with the objective of reaching agreement or consent to the proposed measures.[109] It is important to underscore that, under the normative framework of the ILO and IHRL, there is no doubt that the duty to consult is the responsibility

106 International Labour Organization, *Report of the Committee Set Up To Examine the Representation Alleging Non-Observance by Brazil of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), Made Under Article 24 of the ILO Constitution by the Union of Engineers of the Federal District (SENGE/DF)* (GB.304/14/7, 17 March 2009) para 43.

107 See eg International Labour Organization, *Observation (CEACR) – Adopted 2009, Published 99th ILC Session (2010). Indigenous and Tribal Peoples Convention, 1989 (No. 169) – Norway (Ratification: 1990)*.

108 Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya* (A/HRC/12/34, 15 July 2009) para 53 (Special Rapporteur report 2009). Along the same lines, see Human Rights Council, *Free, Prior and Informed Consent: A Human Rights-Based Approach Study of the Expert Mechanism on the Rights of Indigenous Peoples. Annex. Expert Mechanism Advice No. 11 on Indigenous Peoples and Free, Prior and Informed Consent* (A/HRC/39/62, 2018) para 22.b and 44 (EMRIP FPIC report).

109 See International Labour Organization, *CEACR – General Observation. Indigenous and Tribal Peoples Convention, 1989 (No. 169)* (Observation 2010/81, 2011) (CEACR General Observation 2011) and *Kichwa Indigenous People of Sarayaku v Ecuador*. Series C No 245 (IACtHR, 27 June 2012) para 177–211 (*Sarayaku*).

of the government,[110] and it is usually understood that it cannot be delegated.[111] In addition to these procedural safeguards, 'consultations should lead to decisions that are consistent with indigenous peoples' substantive rights'.[112] That is, 'even if the consultation process has been concluded without agreement or consent, the decision taken by the State must still respect the substantive rights recognized by the Convention'.[113] On certain occasions, the fulfilment of this duty may halt the realisation of a project.[114]

Regarding the scope of consultation, in the ILO 169 regime it is commonly considered that obtaining Free Prior and Informed Consent (FPIC) is the purpose of engaging in the consultation process, and not an independent requirement.[115] The sole exception to this rule would be the case of 'relocation'.[116] As Art. 16(2) points out: '[w]here the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent'. At first sight, then, 'relocation' would be a situation where FPIC is not just the 'objective', but rather a 'requirement'. However, the second phrase of this provision refers to additional procedures that could be taken by the state when consent cannot be obtained. Thus, it appears that 'the obligation to obtain the consent of indigenous peoples is not an absolute one'.[117] While admitting that it is a disputed issue, I am of the view that a case of relocation has to be seen as a situation that can only be carried out with indigenous people's consent.[118] This interpretation, I contend, is aligned with ILO 169's object and purpose and with the broader context of IHRL. In regard to this matter, it has to be borne in mind that the CEACR, in its general observations on ILO 169, has referred to the need of obtaining FPIC before the relocation of

110 CEACR General Observation 2011 (n 108).

111 See Special Rapporteur report 2009 (n 107) para 55; see also EMRIP FPIC report (n 107) para 56.

112 James Anaya, *Indigenous Peoples in International Law* (2nd edn, OUP 2004) 154–55. See also Cristóbal Carmona, 'Evaluación ambiental, consulta indígena y el "desplazamiento" de los derechos de los pueblos indígenas' (2020) 88(248) *Revista de Derecho Universidad de Concepción* 199, 224–27.

113 ILO 169 Handbook (n 68) 16.

114 See, referring to the consultation duty found in Art. 32(2) of UNDRIP, Stefania Errico, 'Control over Natural resources and Protection of the Environment of Indigenous Territories' in Jessie Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples. A Commentary* (OUP 2018) 441.

115 ILO 169 Handbook (n 68) 16.

116 There are other situations in IHRL where FPIC would be a 'requirement'. Nonetheless, I do not think that those cases could apply to an ILO 169 interpretation. Art. 29(2) of UNDRIP, for example, is a non-binding norm that introduces a different cause for FPIC as a 'requirement' than that of relocation. Because UNDRIP is a supplementary means of interpretation (art. 32, VCLT), it can only be used to confirm or clarify a certain meaning, and not to 'add' another right. In the case of Art. 32(2) of UNDRIP, both its drafting history and its wording make it clear that in this norm FPIC is presented as an 'objective' and not as a 'requirement'. Finally, the IACtHR in *Saramaka* famously stated that 'regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty […] to obtain their free, prior, and informed consent' (*Saramaka* (n 62) para 134). Nevertheless, it must be noted that after *Saramaka*, never again did the Court mention FPIC. For an extensive analysis on these issues, see Cristóbal Carmona, 'Consentimiento Libre, Previo e Informado en el contexto de proyectos extractivos en territorio indígena: ¿Regla general y derecho consuetudinario internacional?' (2019) 9(3) *Revista Brasileira de Políticas Públicas* 372.

117 Cabrera (n 30) 120.

118 On a similar note, see Cathal Doyle, *Indigenous Peoples, Title to Territory, Rights and Resources. The Transformative Role of Free Prior and Informed Consent* (Routledge 2015) 91–98 (arguing that 'under C169 any measures which threaten indigenous peoples' permanent and enduring way of life or integrity always give rise to a substantive consent requirement').

indigenous peoples in an unconditioned way.[119] This reading can be further supported by the fact that UNDRIP peremptorily states that no relocation shall take place without FPIC (Art. 10). Thus, in relocation cases FPIC would be *required*.[120]

A final point to be made concerning consultation and FPIC is that they should be understood as not limiting themselves to just a singular phase of the life cycle of the project. On the contrary, 'consultation and consent may have to occur at the various stages of an extractive project, from exploration to production to project closure'[121] – that is, 'throughout the process as it affects indigenous peoples'[122], as 'ILO Convention 169 is applicable with regard to the subsequent impacts and decisions resulting from […] projects'.[123] This means that consultation and FPIC should be conceived as an ongoing process.

The second procedural obligation that the state would have to fulfil when implementing the benefit-sharing rule is the duty to carry out social, spiritual, cultural and environmental impact assessments 'in co-operation with the peoples concerned' (Art. 7(3)). In the context of benefit-sharing, impact assessments have two objectives. The first is related to the determination of the amount of benefits to be shared. As I explained in section 2.2, benefit-sharing is conceived as a measure to protect indigenous peoples' collective rights. Specifically, I contended that benefit sharing was a means to assure proportionality in the restriction of these rights, so that their limitation could be lawful. Therefore, as Fuentes has written, '[l]arge, invasive or relevant interference will require major participation in those benefits, and lesser impacts or restrictions will reduce the right to claim benefit participation'.[124] If this is correct, then it is only logical that to determine the amount of the benefits, an impact assessment must be carried out in consultation with indigenous peoples, 'with a view to ascertaining whether and to what degree their interests would be prejudiced' (Art. 15(2)).[125] The second objective of impact assessments has to do with obtaining the 'informed' consent of these peoples. As we have seen in previous paragraphs, benefit-sharing definitions should be determined during a consultation process. These processes always have the objective of achieving FPIC; on certain occasions, consent is not only the 'objective' but rather a 'requirement'. But be that as it may, consent must always be 'informed'. This implies that the state must – as the IACtHR noted in *Saramaka* – 'ensure that members of the […] people are aware of possible risks, including environmental and health risks, in order that the proposed development or investment plan is accepted knowingly and voluntarily'.[126] Hence, an impact assessment is necessary.

Finally, the state has to ensure indigenous peoples' access to justice. This duty is part of the general obligation stated in art. 12 of ILO 169, according to which '[t]he peoples concerned shall be safeguarded against the abuse of their rights and shall be able to take legal proceedings […] for the effective protection of these rights' (Art. 12). In the context at hand, this will translate into the requirement 'for an

119 See CEACR General Observation 2011 (n 108) 6; CEACR General Observation 2019 (n 1) 4.
120 On the interplay between benefit sharing and FPIC, see Morgera, 'Under the Radar' (n 6) 1111–14.
121 Special Rapporteur report 2013 (n 79) para 67.
122 ILO 169 Guide 2009 (n 11) 108.
123 *Sarayaku* (n 108) para 176.
124 Fuentes (n 97) 246.
125 On this topic, see Special Rapporteur report 2013 (n 79) para 59.
126 *Saramaka* (n 62) para 133.

independent determination of whether or not the State has met its burden of justifying any limitations on rights'.[127] But, as Charis Kamphuis has noted, '[l]egal claims are successful not only with good facts and robust substantive rights frameworks […] they must also package themselves into a recognizable cause of action and navigate the associated procedural requirements'.[128] Considering the social and cultural context of indigenous peoples, this is no easy feat.[129] Thus, for the state to comply with this duty, 'it is not sufficient to ensure that the remedies formally exist, but rather they must be effective';[130] that is, states have to take into account 'the inherent particularities of indigenous peoples, their economic and social characteristics, and their special vulnerability, and their customary law, values, practices and customs'.[131]

It should be noted that this duty – and its correlative right – extends not only to those peoples who have withheld consent to the project, but also to those who have given it. There are many situations in which a community (or part of it) that has formally agreed to a project would have grounds to challenge the governmental decision – for example, if consent was given based on false or incomplete information.

2.3.2. Substantive obligations: proportionality and equality

The main substantive obligation of the state is to ensure an equitable sharing of benefits. This obligation can be further differentiated into two elements. The first is that unless we are in one of the few cases where the state is exempt from sharing the benefits – eg when there are no benefits to share – then it has to make sure that the peoples concerned participate in the benefits from resource extraction. It bears noticing that the ILO 169 provision does not condition the sharing of benefits on the indigenous peoples' approval or consent for the exploitation of natural resources pertaining to their lands. It just requires that those resources pertain to their territories. Moreover, because it is a 'safeguard' against the unlawful restriction of their rights, benefit sharing is especially important when indigenous peoples withhold their consent.

The second element of this substantive obligation is that the sharing of benefits has to be 'equitable'. This entails two subsequent duties. The first is that the state has to ensure that the benefits that are shared with indigenous peoples make the limitation of their rights 'proportional'. As explained above, for a limitation of indigenous rights to be lawful, the benefits that an extractive project would produce for the society as a whole should be proportional to the costs that the project would entail for indigenous peoples. Because extractive industries usually pose tremendous hardships on indigenous livelihoods, to achieve this 'proportionality' between the costs and benefits, indigenous peoples should participate in the benefits deriving from the project operation. Therefore, it is the state's duty to ensure that 'benefit sharing'

127 *Ibid* para 39.
128 Charis Kamphuis, 'Litigating Indigenous Dispossession in the Global Economy: Law's Promises and Pitfalls' (2017) 14(1) *Revista de Direito Internacional* 164, 170.
129 See Charis Kamphuis, 'Contesting Indigenous–Industry Agreements in Latin America' in Dwight Newman and Ibironke Odumosu-Ayanu (eds), *The Law & Politics of Indigenous–Industry Agreements* (Routledge 2021).
130 *Sarayaku* (n 108) 263 (talking about the right to an effective action, art. 25 ACHR).
131 *Ibid* 264.

makes the restriction of indigenous rights a 'proportional' one. To achieve this aim, consultation and impact assessment processes are of the utmost relevance.

The second duty to ensure that benefit-sharing is 'equitable' is more controversial. It refers to ensuring that the benefits would be distributed within the community in an equitable way. The point is an important one, as in some cases these benefits could create or sharpen social inequalities within the communities.[132] For example, despite being especially vulnerable to many of the risks that extractive projects pose, in some circumstances indigenous women could be marginalised from receiving the economic benefits of the project.[133] Hence, even if as a general principle the issues concerning the 'beneficiaries' should be resolved by the people concerned 'in accordance with their traditional customs and norms',[134] at the same time the state must be wary that these norms do not reproduce or intensify inequalities inside the communities.[135] As stressed in the Akwé: Kon Guidelines, the state

> should take into consideration the possible effects that a proposed development might have on the affected community and its people as a whole by ensuring that particular individuals or groups are not unjustly advantaged or disadvantaged to the detriment of the community as a result of the development. (para 51)

In any case, when the state is making decisions of this kind, the community – including the disadvantaged group – should always be involved.[136]

3. IBAs and their (in)compatibility with ILO 169 benefit sharing

The signing of IBAs between the project proponent and one or more indigenous communities has become a common practice in natural resource development in Canada. Although in some cases mandatory,[137] IBAs are mostly considered a *de facto*[138] or supra-regulatory[139] requirement for corporations interested in developing projects in indigenous traditional territories.

---

132 See Ciaran O'Faircheallaigh, 'Using Revenues from Indigenous and Benefit Agreements: Building Theoretical Insights' (2018) 39(1) *Canadian Journal of Development Studies* 101, 112.

133 *Ibid*.

134 *Case of the Saramaka People v Suriname* Series C No. 185 (IACtHR, 12 August 2008) para 27 (*Saramaka Interpretation*).

135 See *Case of Aloeboetoe et al. v Suriname*, Series C No. 15 (IACtHR, 10 September 1993) para 62 (saying that the custom of indigenous peoples should be taken into account 'to the degree that it does not contradict the American Convention').

136 See Alexandra Xanthaki, 'When Universalism Becomes a Bully: Revisiting the Interplay Between Cultural Rights and Women's Rights' (2019) *41 Human Rights Quarterly* 701.

137 See eg *Agreement between the Inuit of the Nunavut Settlement Area and her Majesty the Queen in right of Canada*, 1993 Article 26.2.1 www.gov.nu.ca/sites/default/files/Nunavut_Land_Claims_Agreement.pdf accessed 3 June 2020; see also *Agreement between the Crees of Eeyou Istchee and Her Majesty the Queen in Right of Canada Concerning the Eeyou Marine Region*, 2011, Article 19.2.1 www.gov.nu.ca/sites/default/files/files/017%20-%20Eeyour%20Marine%20Region%20Land%20Claims%20Agreement%20(EMRLCA).pdf accessed 3 June 2020.

138 Tyler Levitan and Emilie Cameron, 'Privatizing Consent? Impact and Benefit Agreements and the Neoliberalization of Mineral Development in the Canadian North' in Arn Keeling and John Sandlos (eds), *Mining and Communities in Northern Canada: History, Politics, and Memory* (University of Calgary Press 2015) 259, 260.

139 Lindsay Galbraith, Ben Bradsaw and Murray B Rutherford, 'Towards a New Supreregulatory Approach to Environmental Assessment in Northern Canada' (2007) 25(1) *Impact Assessment and Project Appraisal* 27, 28.

Even if these agreements are widely used, there are different takes on their actual 'value' for indigenous peoples. Whilst some authors see them as a means to enhance community influence over the shape and impact of extractive projects,[140] thus allowing the community 'to co-author their own governance conditions',[141] others have underscored how these agreements are just a means to deepen extractive capitalism[142] and integrate communities into the wage labour market.[143] This section does not purport to take a stance supporting one or another vision. Its objective is relatively more modest, as it focuses on analysing how IBAs fare when measured against the backdrop of the ILO 169 standard. More accurately, by examining the literature on this topic and some of the few IBAs that are publicly available,[144] this section purports to show that is problematic to think of an IBA as a legal way to fulfil the ILO 169 benefit-sharing duty.

Of course, a quick look at both the ILO 169 benefit-sharing rule and IBAs will reveal that there are many differences between them. Perhaps a more obvious one is that IBAs involve private 'horizontal' obligations, whereas the ILO duty entails a 'vertical' relationship between the state and indigenous peoples. But beyond this issue, there are two elements of these negotiated agreements that seem to be deeply problematic when compared to the obligations of the ILO 169 benefit-sharing duty. The first element (discussed in section 3.1) refers to the fact that IBAs follow a contractual logic where the benefit-sharing obligation depends on the indigenous community's reciprocal obligation to support, and not object to, the project. This transactional structure imposes more restrictions on indigenous agency than the structure that shapes the ILO 169 benefit-sharing duty. The second is that IBAs are at odds with the substantive obligation of the ILO 169 benefit-sharing duty to ensure that the benefits are shared in a proportional and equitable way (3.2). These two elements are reviewed and explained below.

3.1. *Exchanging benefits for consent*

IBAs are usually conceived as contracts between two parties, the project proponent and one or more indigenous communities. As contracts, IBAs follow a *quid pro quo* logic.[145] Proponents engage in negotiations mainly as a way to address the growing uncertainties and delays associated with environmental and indigenous legal

140 Ciaran O'Faircheallaigh, 'Shaping Projects, Shaping Impacts: Community Controlled Impact Assessments and Negotiated Agreements', (2017) 38(5) *Third World Quarterly* 1181, 1188–90; see also Galbraith, Bradsaw and Rutherford (n 138) and Darwin Hanna, *Legal Issues on Indigenous Economic Development* (LexisNexis 2017) 125–29.

141 Neil Craik, Holly Gardner, and Daniel McCarthy, 'Indigenous–Corporate Private Agreements and Legitimacy: Lessons Learned from Impact and Benefit Agreements' (2017) 52 *Resource Policy* 379, 386.

142 See eg Guillaume Peterson St-Laurent and Philippe Le Billon, 'Staking Claims and Shaking Hands: Impact and Benefit Agreements as a Technology of Government in the Mining Sector' (2015) 2 *The Extractive Industries and Society* 590, 599.

143 Levitan and Cameron (n 137) 276.

144 Because of a recent trend towards IBA publicity in Nunavut, most of the IBAs that were examined in this research were Inuit Impact and Benefit Agreements (IIBA). On this trend towards publicity, see Chris Hummel, 'Behind the Curtain, Impact Benefit Agreements Transparency in Nunavut' (2019) 60(2) *Les Cahiers de droit* 367.

145 Hanna (n 139) 123.

standards.[146] Having the support of the community, the argument goes, would effectively reduce these risks, facilitating the permitting process and avoiding litigation when approvals are obtained.[147] Arguably, indigenous communities' reasons for undertaking negotiations are also associated with risk management. Because state law does not put indigenous peoples 'in a position to envision their own projects for the territory',[148] IBAs might represent an opportunity for these peoples 'to not only gain economically from resource extraction but also affect the trajectory and scale of development from an environmental governance platform'.[149] Hence, communities give their consent to the project – and, on several occasions, to any future modification – in exchange for specified benefits and a role in the assessment and management of impacts.[150]

But this is not the only concession that indigenous peoples have to make. Complementing this commitment is typically a promise in which the group pledges not to oppose the project.[151] The formulas used to do this vary depending on the agreement. Some IBAs establish a general prohibition on indigenous peoples to 'oppose'[152] any regulatory approval to the project. Others are more specific, precluding indigenous communities from instituting 'any judicial or administrative procedure, nor initiat [ing] any other activity whatsoever, intended to delay or block the […] Project'.[153] Finally, there are those agreements that not only express a prohibition for the indigenous community, but also establish a positive obligation to take 'such steps as are reasonable to prevent any action undertaken on its own behalf or by any of its bands members' that might frustrate not just the construction of the project, but also its '[o]peration or [c]losure'.[154]

To be sure, there are many problems with these provisions from a public law point of view.[155] Nonetheless, I will not dwell on them. What I want to stress instead is how, by subjecting the community to a possible denial of the benefits in the event that they breach these clauses,[156] the 'non-objection' provisions formally make the benefits conditional to a previous acceptance by indigenous peoples to constrain their

146 See, for example Dwight Newman, 'The Economic Characteristics of Indigenous Property Rights: A Canadian Case Study' (2016) 95 *Nebraska Law Review* 432, 457–59 (for the uncertainty created by unsettled aboriginal title claims); Bergner (n 23) 198–200 (for uncertainty created by the duty to consult).

147 Bergner (n 23) 206.

148 Scott (n 15) 280.

149 Ken J Caine and Naomi Krogman, 'Powerful or Just Plain Power-Full? A Power Analysis of Impact and Benefit Agreements in Canada's North' (2010) 23(1) *Organization & Environment* 76, 77.

150 See Pierre-Yves Le Meur, Leah S Horowitz, and Thierry Mennesson, '"Horizontal" and "Vertical" Diffusion: The Cumulative Influence of Impact and Benefit Agreements (IBAs) on Mining Policy-Production in New Caledonia' (2013) 38 *Resources Policy* 648.

151 Kennet (n 14) 45.

152 IBA quoted in Dwight Newman, *Natural Resource Jurisdiction in Canada* (LexisNexis 2013) 100.

153 *Meliadine Project Inuit Impact & Benefit Agreement between The Kivalliq Inuit Association and Agnico Eagle Mines Limited*, 2017, s. 3.1.6 <http://kivalliqinuit.ca/wp-content/uploads/2019/02/Meliadine-IIBA-2017-03-01.pdf> accessed 6 June 2020.

154 IBA quoted in Craik, Gardner and McCarthy (n 140) 381.

155 See eg Janet M. Keeping, *Local Benefits from Mineral Development: The Law Applicable in the Northwest Territories* (CIRL 1999) 77–84 (arguing that these provisions 'are contrary to public law and thus unenforceable'); Caine and Krogman (n 148) 86 (saying that these provisions are 'gag orders'); and Hummel (n 143) 384 (noting how these clauses prevent communities from enforcing the duty to consult).

156 Newman, *Natural Resource Jurisdiction in Canada* (n 151) 100.

rights.[157] In sum, inside this contractual logic, without consent and promises not to object the project, there are no benefits for the communities.

These features of IBAs constrain indigenous peoples' agency in at least three ways. Firstly, because the projects are usually presented as a *fait accompli*, when engaging in negotiations with the proponents, indigenous communities face an 'all-or-nothing' decision: 'accommodate to industrialization or try to maintain traditional ways of life on landscapes ripped apart by gigantic shovels and trucks'.[158] Secondly, this contractual structure pressures the communities to make decisions without all the necessary information. When negotiating IBAs, there is a strong incentive to sign the agreement before the start of the impact assessment (IA),[159] as the communities would hold leverage over the proponent (because it does not yet have the regulatory approval).[160] But this also means that the communities would have little, if any, trustworthy information on the potential impacts and benefits of the project to make that decision.[161] For example, in the *Rupert River Diversion Project*, the Grand Council of the Crees (GCC) signed agreements with the provincial government and the project proponent before the IA. As Papillon and Rodon recount, at the moment that the IA started, many communities opposed the project out of concern for its impact, but at the same time knew that there was not much that could be done because the GCC had already consented to it.[162] The project was finally approved despite the opposition of the three most affected communities.[163] In cases like this, even if consent might be 'prior', 'it may not be informed'.[164] Thirdly, these agreements typically occur during the approval stage[165] and they usually do not require indigenous peoples' consent for future modifications and closure.[166] Evidently, this denies 'Indigenous parties the right to insist on changes to agreements when the scale, nature or impact of a project changes from that envisaged at the time an agreement was signed'.[167]

These three constraining features of IBAs are contrary to the ILO 169 benefit-sharing standard. First, as we have seen, in order to obtain some benefits in an IBA,

157 O'Faircheallaigh, *Negotiations in the Indigenous World* (n 13) 166.

158 Ian Urquhart, *Costly Fix. Power, Politics, and Nature in the Tar Sands* (University of Toronto Press 2018) 9.

159 In this paper I will use 'Impact Assessment' (used in the current *Impact Assessment Act*, 2019) instead of 'Environmental Assessment' (used in the now repealed *Canadian Environmental Assessment Act, 2012*) to refer to the Canadian impact assessment system.

160 Ginger Gibson and Ciaran O'Faircheallaigh, *IBA Community Toolkit. Negotiation and Implementation of Impact and Benefit Agreements* (The Gordon Foundation 2015) 47.

161 *Ibid*.

162 See Martin Papillon and Thierry Rodon, 'Proponent–Indigenous Agreements and the Implementation of the Right to Free, Prior, and Informed Consent in Canada' (2017) 62 *Environmental Impact Assessment Review* 216, 222.

163 *Ibid*.

164 Ibironke Odumosu-Ayanu, 'The (Legal) Nature of Indigenous Peoples' Agreements with Extractive Companies' in Dwight Newman and Ibironke Odumosu-Ayanu (eds), *The Law & Politics of Indigenous–Industry Agreements* (Routledge 2021) 21.

165 Ciaran O'Faircheallaigh, 'Negotiated Agreements, Indigenous FPIC, and the Mine Life Cycle' in Dwight Newman and Ibironke Odumosu-Ayanu (eds), *The Law & Politics of Indigenous–Industry Agreements* Routledge 2021) 68.

166 *Ibid* 72–74.

167 *Ibid* 73.

indigenous communities would have 'to put the exercise of their right to [Free Prior and Informed Consent] on the table, as an integral part of the negotiation process'.[168]

The ILO 169 benefit-sharing rule responds to a different logic. Here, benefits accrue to indigenous peoples even if they withhold their consent. This means that they could object to the project throughout the regulatory process and engage in litigation while knowing that they would still receive benefits. Even if they give their consent to the project, that consent would have more legitimacy than the one expressed in an IBA, as it would not have been an 'all-or-nothing' decision. Something similar happens concerning the information issue. In IBAs, because of their contractual nature, indigenous communities would be pressed to give their consent without all the necessary information on the impacts of the project. In the ILO regime instead, because benefits have to be proportional to the impacts and consent has to be always 'informed', an impact assessment process should be carried out and finished before indigenous communities could consent to a project. Moreover, the absence of reliable information would be a ground on which to challenge the state's decision on the project. Lastly, let us consider the fact that IBAs do not seek or require FPIC throughout the life cycle of the project. Both ILO 169 and IHRL run in a different direction. As I have already explained, consultation and consent should be understood not as limiting themselves to just a singular phase of the life cycle of the project, but as an ongoing process. Therefore, a modification on the scale and impacts of the project would have to be put to the consideration of the affected communities. Eventually, this could mean that changes to the number and type of benefits would apply. In this way, the contractual logic that structures the IBAs is more restrictive of indigenous agency than the logic that shapes the ILO 169 benefit-sharing duty.

3.2. *IBAs and the substantive obligation of the ILO 169 benefit-sharing duty*

In section 2.3.2, I explained that the substantive obligation of the state under the ILO 169 rule is to ensure a proportional and equitable sharing of benefits – proportional in the sense that the benefits shared should make the limitation of indigenous rights lawful, and equitable in that those benefits do not create or deepen existing inequalities within a given community.

On its face, there are features of IBAs that contradict the fulfilment of this substantive obligation. If an IBA is signed during a regulatory process, its confidentiality clauses may preclude the state from reviewing it to appraise the proportionality of the benefits and their distribution within the community. A commentary on this matter by the Joint Review Panel (JRP) for the *Mackenzie Gas Project* is telling. When assessing the economic impacts of the project, the JRP stated:

> the Benefits Agreements […] have the potential to provide important procurement and business opportunities within the [Northwest Territories]. However, as their contents were not disclosed to the Panel, the Panel is unable to determine the magnitude and likelihood of these benefits. The Panel assumes that if negotiated agreements are acceptable

168 Papillon and Rodon (n 161) 220.

> to both parties, then the implied benefits in those agreements must also be acceptable to those parties.[169]

This statement shows how the state explicitly refrains from judging the 'magnitude and likelihood' of the benefits. This conduct is exactly the opposite of what it is demanded from the state by the ILO 169 benefit-sharing duty. Let us take the case of, for example, gender inequality. Despite the fact that indigenous women are broadly impacted by resource development,[170] project benefits are usually unevenly distributed, as they are mainly received by men.[171] Therefore, in order to comply with the 'equitable' dimension of benefit sharing, the state should ensure that those specific impacts are adequately mitigated and that the benefits are designed having in mind the particular situation of indigenous women in a given community. Evidently, this is not possible without reviewing the agreement.

But the problem is deeper than the lack of a formal review of the results of an IBA. It concerns also the way in which the agreement was constructed in the first place. This is most clear in relation to the 'proportionality' dimension of benefit sharing. To make sure that there is proportionality between the project's cost and benefits, a first step involves knowing what these impacts would be. To achieve this objective, the ILO 169 framework requires that consultation and impact assessment processes are in place. This would allow the identification of 'whether and to what degree' indigenous interests and substantive rights would be prejudiced by resource exploitation activities (Art. 15(2)), and what measures could mitigate those effects (Art. 7(4)).

This is not that different from what happens with resource extraction projects in Canadian law. In the last decade and a half,[172] the Supreme Court of Canada (SCC) has developed the doctrine of the duty to consult as a positive obligation whenever the government contemplates conduct that might adversely affect a potential Aboriginal or treaty right.[173] From the outset,[174] the SCC declared that this duty could be fulfilled through existing regulatory schemes – such as the impact assessment process – 'if *in substance* an appropriate level of consultation is provided'.[175] Hence, in major resource extraction projects, consultation will be generally carried out through an IA process.[176] Theoretically, this process would aim at determining, with the

169 Joint Review Panel for the Mackenzie Gas Project, *Foundation for a Sustainable Northern Future. Report of the Joint Review Panel for the Mackenzie Gas Project*, Vol II (December 2009) 452–53 http://reviewboard.ca/upload/project_document/EIR0405-001_JRP_Report_of_Environmental_Review_Volume_II.PDF accessed 8 June 2020.

170 See eg Elana Nightingale and others, 'The Effects of Resource Extraction on Inuit Women and Their Families: Evidence from Canada' (2017) 25(3) *Gender & Development* 367.

171 Drew Meerveld, 'Assessing Value: A Comprehensive Study of Impact Benefit Agreements on Indigenous Communities of Canada' (Major Research Paper, University of Ottawa 2016) 22.

172 Before that, 'consultation' was considered one of the factors in determining whether limits on an aboriginal right were justified. See *R. v Sparrow*, [1990] 1 S.C.R. 1075.

173 *Haida Nation v British Columbia (Minister of Forests)* [2004] SCC 73 at para 35.

174 See *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 40 (*Taku*).

175 *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 39 (emphasis in original); see also Nigel Bankes, 'Clarifying the Parameters of the Crown's Duty to Consult and Accommodate in the Context of Decision-Making by Energy Tribunals' (2018) 36(2) *Journal of Energy & Natural Resources Law* 163, 180, doi:10.1080/02646811.2017.1403812.

176 See, generally, Kirk N Lambercht, *Aboriginal Consultation, Environmental Assessment, and Regulatory Review in Canada* (University of Regina Press 2013); Neil Craik, 'Process and Reconciliation:

participation of indigenous communities,[177] whether and in what way environmental effects could impact indigenous rights,[178] while taking steps to minimise those impacts.[179] In practice, however, this scheme does not always work. If before or during the IA communities are discussing and finalising an IBA with the proponent, this could hinder access to, and appraisal of, relevant information. This would prevent the consultation/IA process from accomplishing the aforementioned objectives and, to a degree, would frustrate the possibility of an appraisal of the proportionality of benefits. There are two scenarios where this situation can happen.

The first scenario is when indigenous communities sign an IBA before the start of the IA process. Because the community has already given its consent to the project, the proponent might pay much less attention to the impacts identified through the IA, and the governmental decision-makers may be influenced to approve the operation.[180] More importantly, whether because they might think that the decision is already made,[181] or because they have agreed to support and not to object the project, it is probable that the community would not participate in a meaningful way in the IA, thus depriving the process of key information and evidence on different potential impacts.

Something similar happens when the communities that have presented objections against the approval of a project withdraw those objections when they reach an agreement with the proponent. For example, in the environmental assessment of the *Joslyn North Mine Project*, two First Nations announced that they would present objections to the project during the JRP hearings. But when the hearings began, both Nations withdrew their objections, because they had reached an agreement with the company.[182] This is not an uncommon practice in natural resource development in Canada.[183] Thus, in a similar way to what happens when the community sign an IBA before the IA, this kind of behaviour may prevent the governmental agency from gathering evidence regarding the existence of Aboriginal rights and the potential of the project to affect those rights.[184]

Integrating the Duty to Consult with Environmental Assessment' (2016) 53 *Osgoode Hall Law Journal* 632; David V Wright, 'Public Interest Versus Indigenous Confidence: Indigenous Engagement, Consultation, and "Consideration" in the Impact Assessment Act' (2020) 33(3) *Journal of Environmental Law and Practice* 185.

177 *Taku* (n 173) at para 40.

178 *Clyde River (Hamlet) v Petroleum Geo-Services Inc*., 2017 SCC 40 at para 45.

179 *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 64.

180 Gibson and O'Faircheallaigh (n 159) 47.

181 This happened in the *Rupert River Diversion Project* mentioned above. See Papillon and Rodon (n 161) 221.

182 See Ian Urquhart, 'Thin or Thick Inclusiveness? The Constitutional Duty to Consult and Accommodate First Nations in Canada' (2019) 34(8) *London Journal of Canadian Studies* 149, 164–66, doi:10.14324/111.444.ljcs.2019v34.008.

183 See eg the declaration of the Athabasca Chipewyan First Nation during the Joint Review Panel Public Hearing in the impact assessment of the *Frontier Oil Sands Mine* project, at https://iaac-aeic.gc.ca/050/documents/p65505/125727E.pdf accessed 2 August 2020 (I am grateful to Shaun Fluker and Drew Yewchuk for this information). For an analysis of how public participation may prompt this kind of contractualisation in energy projects, see Alastair Lucas, 'Participatory Rights and Strategic Litigation. Benefits Forcing and Endowment Protection in Canadian Natural Resource Development' in Lila Barrera-Hernández and others (eds), *Sharing the Costs and Benefits of Energy and Resource Activity. Legal Change and Impact on Communities* (Oxford University Press 2016) 339.

184 See the case of the *Christina Lake Project* in Neil Reddekopp, 'Theory and Practice in the Government of Alberta's Consultation Policy' (2013) 22(1) *Constitutional Forum/fórum constitutionnel*, 47, 56–57.

The second scenario occurs when there is an overlap between a delegated consultation process and a negotiated agreement. In the landmark case *Haida Nation v British Columbia (Minister of Forests)*, the SCC stated that even if the government is legally responsible for the fulfilment of the duty to consult, it may nonetheless 'delegate procedural aspects of consultation to industry proponents seeking a particular development'.[185] In reality, though, provincial regulations and current governmental practice tend to delegate not only 'procedural aspects' such as 'identifying potential short- and long-term adverse project impacts', but also 'mitigation measures'.[186]

During this delegated consultation process, the proponents can also engage in a parallel negotiation with the same communities that are taking part in consultation. Thus, as these negotiations will generally include identification of potential impacts and measures for the mitigation or compensation of those impacts, 'a potentially problematic overlap or duplication' occurs 'between public [environmental impact assessment] and the consultation process and private [negotiated agreements]'.[187] This approach to consultation and private agreements in parallel tracks, I contend, can frustrate the IA's objective of identifying the potential impacts of the project in a credible way.

A first issue arising from this approach is that it could leave important topics out of the framework of the IA. 'Proponents are well-placed to address issues directly related to the project; however, consultation often involves other, overlapping topics'.[188] For instance, issues of cumulative impacts or alternative analysis[189] could be lost in this approach. A second issue would be that IBAs typically contain an acknowledgement by the indigenous groups that they were adequately consulted and that the potential adverse impacts were mitigated.[190] Because of this, the statutory decision maker would be influenced to approve the project. As Keith Bergner has pointed out, '[i]f the negotiations are successful – resulting in the support of the Indigenous community – the consultation process will likely never be scrutinized'.[191] Thus, the impacts and mitigations approved in a regulatory process would probably be those declared by the parties of the negotiated agreement, without any review of a public agency.

In the end, either by having no indigenous communities' participation in the IA or by overlapping the IA/consultation process with that of the IBA, it seems that it would be hard to have a proper identification of impacts (and mitigation measures) whenever an IBA is involved. Therefore, even if the state has formal access to the agreement in order to review it, without having clarity on the impacts it would not be feasible to

185 *Haida* (n 172) at para 53.

186 Government of Alberta, *The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013 (Amended 2020)* (1 April 2020) 6 https://open.alberta.ca/dataset/801cf837-4364-4ff2-b2f9-a37bd949bd83/resource/8fa6a92a-3523-457a-b3b0-1e72f3cb79b8/download/ir-policy-consultation-first-nations-land-resources-2013-amended-2020.pdf accessed 11 June 2020; see also Bernard J Roth, 'Reconciling the Irreconcilable: Major Project Development in an Era of Evolving Section 35 Jurisprudence' in Dwight Newman (ed), *Business Implications of Aboriginal Law* (LexisNexis 2018) 170, 180.

187 Courtney Fidler and Michael Hitch, 'Used and Abused: Negotiated Agreements' (Submission to Rethinking Extractive Industry: Regulation, Dispossession, and Emerging Claims Conference, 2009) 5.

188 Bergner (n 23) 215.

189 See, for both topics, Craik (n 175) 659–63.

190 See eg the IBA analysed in Craik, Gardner and McCarthy (n 140) 381.

191 Bergner (n 23) 200.

appraise the 'proportionality' of the benefit-sharing provisions. Consequently, it would not be possible to comply with the substantive obligation of the ILO 169 benefit-sharing duty.

4. Conclusions

For more than two decades, IBAs between industry proponents and indigenous communities have been a common standard in natural resource development in countries like Canada. Typically showcased as a formula that allows extractive industries to operate in indigenous lands while at the same time benefiting the communities that live in those territories, this practice has recently emerged in many Latin American countries that are party to ILO 169. In this context, it has been suggested that these negotiated agreements could be a way to fulfil the benefit-sharing duty established in art. 15(2) of ILO 169.

The aim of this work was to demonstrate that this assertion is deeply problematic, for two main reasons. Firstly, because of their contractual nature, IBAs put indigenous peoples in a more vulnerable position than that under the ILO 169 rule. Secondly, because of their confidentiality clauses and the way in which they are negotiated, IBAs can frustrate the possibility of an appraisal of the proportionality of benefits, thus preventing the state from ensuring that the benefits are shared in a proportional and equitable way. Therefore, it would be difficult to think of IBAs – at least as conceived in the Canadian experience – as legal ways to fulfil the ILO 169 benefit-sharing duty.

Acknowledgements

This article is the result of a doctoral internship carried out at the Canadian Institute of Resources Law (CIRL) (Faculty of Law, University of Calgary) under the supervision of Professor Nigel Bankes, Chair of Natural Resources Law at the Faculty of Law of the University of Calgary. I would like to thank professor Bankes for his constant guidance and review throughout this research and to many other professors and researchers at CIRL for their help during different stages of this work. I would also like to thank Professor Judith Schönsteiner of Universidad Diego Portales for her commentaries on an earlier draft and to the two anonymous reviewers for their suggestions. All errors are, of course, my own. This research was supported by Chile's National Research and Development Agency (ANID) under Doctoral Scholarship Nº21170530.

ORCID

Cristóbal Carmona Caldera http://orcid.org/0000-0002-6083-3640