Indigenous Participation and Free, Prior and Informed Consent in the Green Energy transition

A case study into Canadian (non)Compliance with International Human Rights Norms regarding Indigenous participation in the green energy transition

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ABSTRACT

The UN Declaration on the Rights of Indigenous Peoples established a base level standard on Indigenous rights. This paper analyses Canada's failure to comply with norms on Indigenous participation and the principle of free, prior and informed consent in the context of the green energy transition. Within this case study, process tracing is used to determine which mechanisms can explain the failure to comply. This paper finds evidence of a pattern of 'over-compliance' in Canada due to its roots in colonial ideas of sovereignty which are hindering progress towards Indigenous self-determination. This is evidenced by Canada's support for progress in 'soft' rights while resisting change in 'hard' rights such as self-governance. Further, this paper finds that increased state involvement in environmental impact assessments can induce meaningful Indigenous participation. Lastly, threats of reputational loss were not found to affect non-compliance, and evidence for an effect of discourse was too ambiguous to draw conclusions. This paper therefore argues that Canada's 'over-compliance' caused by its settler-colonial history is preventing compliance with norms of Indigenous participation and the principle of free, prior and informed consent.

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LIST OF ACRONYMS AND ABBREVIATIONS

B.C.	British Columbia
CERD	UN Committee on the Elimination of Racial Discrimination
ERP	Emissions Reduction Plan
EU	European Union
FPIC	Free, prior, and informed consent
GHG	Greenhouse Gas
IA	Impact Assessment
ICE	Indigenous Circle of Experts
ILO C.169	International Labour Organization Convention 169
IPCAs	Indigenous Protected and Conserved Areas
PCF	Pan-Canadian Framework on Clean Growth and Climate Change
TAN	Transnational Advocacy Network
The Act	Canadian Net-Zero Emissions Accountability Act
The Declaration	United Nations Declaration on the Rights of Indigenous Peoples
TRC	Truth and Reconciliation Commission
UN	United Nations
UDHR	UN Universal Declaration of Human Rights
UNDRIP	UN Declaration on the Rights of Indigenous Peoples

1. INTRODUCTION

Indigenous[1] communities are disproportionally affected by the effects of climate change while they have contributed the least to greenhouse gas emissions (Laduzinsky, 2019). They are especially vulnerable to the effects of global warming due to the close relationship they often have with their natural environments (Baird, 2008; Kelman, 2010). Their access to important cultural and livelihood resources is affected, which adds to social vulnerabilities and cultural degradation (Finley-Brook & Thomas, 2011). The effects of climate change are felt particularly strongly by Canada's Indigenous communities as the country is warming at about twice the global average which indicates even more devastating impacts of climate change on Indigenous populations in Canada in the future (Human Rights Watch, 2020). The increasingly unpredictable weather is reducing the availability of traditional food sources for Indigenous peoples and making it more difficult and risky to harvest food from the land, which has led Canada's Indigenous peoples to suffer from growing problems of food poverty and related negative health impacts (Human Rights Watch, 2020). So far, Human Rights Watch found that the Canadian government has not successfully implemented sufficient measures to support First Nations in coping with the effects of climate change (ibid.). Climate change policies at both the federal and provincial level have not taken into consideration the effects of climate change on First Nations' right to food.

Indigenous participation in the development of green energy projects in Canada is becoming increasingly significant (Indigenous Clean Energy, 2020b). A significant share of global forests and agricultural land is managed by Indigenous peoples, local farmers and communities, and they should thus play a key role in the land-based mitigation strategies (IPCC, 2022). Climate policies can have disproportionate impacts on vulnerable communities and can exacerbate existing structural inequities (Reed et al., 2021). Reed et al (2021, p. 1) have argued that climate policies are "reproducing settler-colonial relations, violating Indigenous rights, and systematically excluding Indigenous Peoples from policy making". Overall, various analyses have shown that there is still a lack of meaningful inclusion of Indigenous peoples in the green energy transition, which increases their vulnerability (Kornelsen et al., 2019; Reed et al., 2021).

The recognition of these issues has grown with the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007 (UN, n.d.). This declaration represents an emerging international Indigenous rights regime and outlines a baselevel of Indigenous rights that states are obliged to recognize and protect (S. R. Lightfoot, 2010). The Declaration was accepted with 143 votes in favour, 11 abstentions and 4 votes against (USA, Canada, Australia and New Zealand). Canada's

[1] This thesis uses Indigenous as this is the term preferred by Canada's native people because the etymological meaning reinforces land claims and encourages territory acknowledgements (Animikii, 2020). The people who are Indigenous to Canada belong to 3 groups – First Nations, Métis, and Inuit (WelcomeBC, n.d.).

opposition to the UNDRIP is surprising since the country has a global reputation as a defender of human rights, helped by a solid record on core civil and political rights (Human Rights Watch, n.d.). Canada has taken a leadership role in many initiatives promoting international human rights, which makes their position towards the UNDRIP even more paradoxical (Wylie, 2009). Canada not only did not ratify the Declaration, but Canada is also reported to have been to most active lobbyist against the Declaration amongst UN member states (S. Lightfoot, 2016). This stance was confusing as there was no legal or constitutional barrier that prevented Canada from endorsing the Declaration according to a group of more than 100 legal scholars who argued that the Declaration "is consistent with the Canadian Constitution and Charter and is profoundly important for fulfilling their promise." (S. Lightfoot, 2016, p. 172). Furthermore, Canada has implemented certain domestic policies regarding the right to self-government that have brought it into at least partial compliance with the Declaration.

In 2016, Canada officially adopted UN Declaration on the Rights of Indigenous Peoples and on June 16 2021 the Parliament of Canada finally passed an act which outlines Canada's obligation to uphold the human rights of Indigenous Peoples affirmed by the UNDRIP (Assembly of First Nations, n.d.; Fontaine, 2016). However, this progression in the recognition of Indigenous rights has not yet translated into greater control by Indigenous peoples over the development on their lands (O'Faircheallaigh, 2012).

1.1 Research question

This previous section hints at an interesting puzzle regarding Canada's paradoxical approach to the protection of Indigenous rights in the green energy transition. On the one hand Canada presents itself as a global leader in human rights discourses and has been praised often for its progressive approach to domestic Indigenous rights with its early Proclamation which "acknowledges the Indians as continuing to own the lands which they have used and occupied" (S. Lightfoot, 2016, p. 170; Tennant, 1990, p. 10). On the other hand, Canada was one of the leading voices in opposition of the UN Declaration on the Rights of Indigenous Peoples and its green energy policies still fail to meaningfully involve Indigenous peoples. This thesis aims to shed light on the factors that determine domestic compliance with human rights norms and can thus help understand Canada's paradoxical approach. This leads to the following research question:

Why has Canada failed to comply with norms on Indigenous participation and FPIC in the context of its green energy transition?

There are various perspectives on states' compliance with international human rights norms. Rationalists argue that states will obey international law when this is in their interest, whereas constructivists claim that these interests can be changed through a socialization effect initiated by discourse, persuasion and

collective rationality (Lewis, 2003, p. 99; S. R. Lightfoot, 2010). Both perspectives are not able to explain the Canadian paradox of why they excel in some areas regarding Indigenous peoples' rights but simultaneously prevent meaningful participation of Indigenous peoples. Therefore, this thesis will consider theories that combine elements from both perspectives.

Risse, Ropp, and Sikkink (1999, 2013) have developed a 'spiral model' of human rights change which aims to understand the process between norm commitment and norm compliance. They recognize four different mechanisms that can motivate a state to comply with the norm: coercion, incentives, persuasion and discourse, and capacity building (Risse et al., 2013, pp. 13–15). Furthermore, they recognize five different scope conditions under which they expect the mechanisms to cause compliance. While many of the scope conditions are present in the Canadian case, the mechanisms have not yet been able to push the state into compliance with Indigenous participation norms and FPIC. Therefore, this thesis will analyse the Canadian failure to adequately comply with Indigenous participation norms through the 'spiral model' as well as discuss alternative constructivist explanations.

1.2 Societal and scientific relevance

While the first section stressed the importance of climate mitigation policies in protecting the livelihoods of Indigenous communities, Finley-Brook and Thomas (2011, p. 863) argue that "carbon offsets in oppressive societies have the potential to cause social harm". They outline the ways in which greenhouse gas (GHG) mitigation projects can violate Indigenous rights and can add to a resurgence of historical prejudices. Stefanelli et al (2019) also argue that energy initiatives can reinforce colonial exploitative frameworks.

This presents an important issue since there has been a growth in allegations of displacement, harm to livelihoods, and violence against Indigenous communities since 2010 (Shah & Bloomer, 2018). More than 200 claims of human rights breaches related to the renewable energy sector were made to the Business and Human Rights Resources Centre between 2010 and 2021. (Rubiano A., 2021). Additionally, their study revealed a dearth of recognition for Indigenous peoples' rights to consultation when renewable energy projects are developed on their lands. The failure to consult Indigenous people leads to increased conflict (Zentner et al., 2019). Zentner et al. (2019, p. 535) argue that "the marginalization of Indigenous rights in natural resource development decision making represents a systematic failure on the part of the federal government to uphold its duty and legal obligations to protect Indigenous lands and peoples". In many places, this failure has further strained the already shaky relationships between government and Indigenous peoples. Papillon and Rodon (2020, p. 325) claim that FPIC in Canada is at a critical juncture: the norm is increasingly recognized by governments, but simultaneously its implementation remains uncertain and contested. It is therefore important to better understand the mechanisms that cause a state to comply with norms on Indigenous participation and

FPIC to be able to ensure the safety and welfare of Indigenous communities through the green energy transition.

Gaining insight into the norm compliance process might help future domestic and international efforts to persuade a target state to adopt a new norm. The progression from commitment to compliance is complicated and much is still unknown about the factors that drive this transition (Harrison & Sekalala, 2015, p. 926). Furthermore, most research looks at the compliance with Indigenous participation norms at the federal level, while many of the interactions between First Nations and the government in Canada are taking place at the provincial level. This research aims to bridge this gap by including a provincial level analysis where relevant. Lastly, most of the research looks at the compliance with norms within the existing structures, but neglects to question whether human rights can adequately be protected within the existing system. This is especially important when discussing cases of settler colonialism.

1.3 Thesis structure

This thesis starts with an overview of the literature on norm compliance and norm contestation. The research design is discussed in section 3, followed by the hypotheses and an operationalization of the mechanisms studied in this thesis. Section 4 starts with an overview of current state of affairs regarding Indigenous participation norms and Canadian policy. This is followed by the analysis. Lastly, section 5 covers the conclusion, the limitations of this study and the recommendations for further research.

2. LITERATURE REVIEW

This thesis looks at the compliance with human rights norms, specifically in the green energy transition in Canada. The shift to renewable energy is the cornerstone of Canada's strategy to achieve the reduction goals outlined by the Paris Agreement because energy production and usage account for 80% of the country's greenhouse gas emissions (Kornelsen et al., 2019). The shift to renewable energy is fundamentally an Indigenous rights issue because Indigenous people will frequently be the first to feel the effects of climate change on their livelihoods and because green energy projects frequently have a detrimental impact on Indigenous territories.

The aim of this thesis is to understand why Canada has failed to comply with norms regarding Indigenous participation in the green energy transition. To answer this question, we need to understand the factors that determine whether a state will comply with norms that are embedded in international institutions. To this end, this chapter will outline the different perspectives on norm compliance. The first half of this chapter will cover the norm life cycle and the 'spiral model' of human rights change. The next section discusses criticisms and norm contestation. The final part of this chapter will discuss the paradoxical approach taken by common law countries with regards to compliance with Indigenous participation norms.

2.1 Perspectives on norm commitment

Most perspectives on state compliance with norms can be sorted into two categories – rationalist and constructivist (Checkel, 2001). Rationalists emphasize cost/benefit mechanisms and argue that actors base their decisions on the estimated response or the threat of sanctions. If states are to comply, rationalists argue, it is because they have determined it is in their interest to do so. The most prominent rationalist compliance mechanism can be located in the external incentives model for EU candidate countries and holds that states adopt new norms if external incentives (such as EU membership) can offset domestic implementation costs (Brosig, 2012, p. 392). According to this perspective, reinforcement is necessary to make states comply with norms.

The basic assumption here is that conflicting domestic interests can increase the costs of norm adoption and states are thus more likely to comply when their domestically held norms match with international norms (ibid., p. 393). Further, if the domestic adjustment costs are low, norms are more likely to diffuse. This makes the Canadian case more puzzling as there was no clear legal or constitutional barrier that prevented Canada from endorsing the Declaration according to a group of legal scholars who argued that the Declaration "is consistent with the Canadian Constitution and Charter and is profoundly important for fulfilling their promise." (S. Lightfoot, 2016, p. 172). Furthermore, Canada has implemented certain domestic policies regarding the right to self-government that have brought it into at least partial compliance with the Declaration. Therefore, the domestic adjustment costs are low and norm compliance would be expected.

Constructivists on the other hand recognize two causal mechanisms by which actors abide by norms: social protest/mobilization – where domestic actors cooperate with transnational organizations to exert pressure on governments to adhere to standards through the exploitation of international norms – and social learning (Checkel, 2001, p. 557). Rationalists assume that people have pre-existing interests and identities, whereas constructivists argue that discourse, persuasion and collective rationality can play a big role in changing these interests through a socializing effect that includes the internalization of norms and rules into self-interest calculations (Lewis, 2003, p. 99).

While these perspectives are considered to be opposites, Checkel (2001, p. 558) argues that both perspectives employ a very similar behavioural logic "where agents may pursue nonmaterial goals (normative values, say), but consequentialism—means and ends calculations— underlies their choices". Since both theoretical perspectives on their own are not sufficient to answer the research question, this thesis will consider elements from both theories. This decision was made because a rationalist analysis would require the establishment of coherent actors' preferences and cost–benefit calculations which are difficult here due to the inherently complex and long-term process of norm compliance, which would cause the actors' interests to almost inevitably be inconsistent (Brosig, 2012, p. 393). Furthermore, from a rationalist perspective Canada would be expected to comply with Indigenous participation norms since the domestic adjustment costs are low. Yet, various scholars argue that norm compliance cannot be fully explained by constructivism either as the initial acceptance of a norm might be motivated by a concern for reputation or legitimacy to benefit an actor's interest (Barker & Capie, 2010, p. 5). Over time, the norm may become sufficiently embedded to form part of the state's habituated behaviour and its identity (ibid.). Therefore, this thesis aims to find an alternative explanation and thus takes a more modern constructivist approach which integrates some rationalist and constructivist elements (Bates, 2014).

In their highly influential work *The Power of human Rights* Risse et al. take a "sophisticated constructivist" approach i.e. "integrating rational choice approaches where the data suggest but anchoring their analysis in the interaction between norms, institutions, and political actors" (Bates, 2014, p. 1171). Specifically, they consider constructivism to be the context which integrates the mechanisms, while some of the mechanisms (i.e. incentives) are rationalist in nature. They argue that the expansion of international human rights norms depends on the establishment and sustainability of domestic- and transnational actor networks (Bates, 2014; Risse et al., 1999). These networks are able to draw attention to norm-violating states and legitimate the domestic opposition to these norm-violating governments. Risse et al. (1999, p. 2) examine the relationship between evolving human rights practices and international human rights norms and use this to develop a theory of the stages and mechanisms through which international norms can affect behavioural changes. To this end, they analyse a selection of the rights established in the UN Universal Declaration of Human Rights (UDHR). These are the most likely cases to witness the advancement of human rights norms on human rights practices since these rights

are widely entrenched in international treaties that have been accepted by countries all over the world (ibid., p. 3).

The norms of 'Indigenous participation' and 'free, prior, and informed consent' thus fit within the model as these norms have been institutionalized in international treaties such as the ILO Convention 169 (1989) and the UNDRIP (2007) (Boutilier, 2017; United Nations, 2008). Especially the UNDRIP is similar to the UDHR as it establishes the same basic human rights for Indigenous peoples. The right to FPIC has been recognized in case law by human rights bodies and international human rights bodies have clarified that states must implement FPIC in compliance with their commitments under the corresponding treaties (Savaresi, 2012). This obligation exists regardless of the legal status of the UNDRIP and follows from the interpretation of the already existing human rights framework. FPIC is a human right rooted in other rights such as self-determination and the right to a cultural identity (Giupponi, 2018). Thus, it is appropriate to use the spiral model of human rights change to analyse compliance with the norms of Indigenous participation and FPIC.

Finally, it's critical to note that FPIC is a specific type of Indigenous participation. There is no universally agreed upon definition of FPIC, but all human rights instruments on Indigenous rights reference the need to consult or obtain consent from indigenous people (Fontana & Grugel, 2016). The extent of this participation is ambiguous however as the ILO C.169 only requires Indigenous people to be consulted, whereas the UNDRIP explicitly calls for free, prior, and informed *consent*. This ambiguity might present a risk as Eimer and Bartels (2020, p. 236) find that more recent agreements have replaced the requirement to obtain consent with the weaker formulation 'Indigenous consultation'.

2.2 Norm diffusion: commitment to compliance

Risse et al. (1999) argue that the implementation and internalization of international norms happens through a process of socialization. A norm can be defined as "a standard of appropriate behavior for actors with a given identity" (Finnemore & Sikkink, 1998, p. 891). There are different types of norms recognized by scholars, the most common distinction being between regulative norms, which order and constrain behaviour, and constitutive norms, which create new actors or interests (Finnemore & Sikkink, 1998, p. 891; Ruggie, 1998). Of specific interest to this thesis is the way in which international norms affect the behaviour of states. This makes it relevant to consider the interactions between international and domestic norms. Finnemore and Sikkink (1998) argue that they are deeply entwined. They state that international norms often begin as domestic norms and are made international through the work of entrepreneurs. These international norms are then able to influence domestic norms due to the efforts of domestic "norm entrepreneurs" who use international norms to strengthen their minority position in domestic debates (Finnemore & Sikkink, 1998, p. 893). To better understand this process, the following section will discuss the norm life cycle.

2.2.1 Norm life cycle

Finnemore and Sikkink (1998, p. 895) understand norm influence as a three-stage process in which a norm emerges, reaches a tipping point at which it is widely accepted – a "norm cascade" – and the last stage involves internalization. They argue that different actors, motives, and mechanisms drive change at each stage of the cycle.

The first stage describes the emergence of norms which is driven by persuasion by norm entrepreneurs who have convinced a critical number of states (norm leaders) to accept a norm (Finnemore & Sikkink, 1998, p. 895). Norm entrepreneurs play a critical role in the emergence of norms because they create the cognitive frames that are necessary for certain issues to resonate with the broader public and lead them to adopt new views (ibid., p. 897). This is because new norms are not created within a vacuum. People have pre-existing norms and perceptions that need to be altered to create the space for them to be willing to accept the new norm. The promotion of new norms by norm entrepreneurs thus takes place within the standards of "appropriateness" as they are defined by prior norms (ibid.). It is often necessary for norms to become institutionalized into international rules and organizations for it to be able to reach the second stage of the cycle (ibid., p. 900). To this end, norm promoters will use international organizations as a platform through which they can promote their norms. Once enough states have been persuaded, the norm reaches a tipping point. Empirical research has shown that both the quantity as well as the composition of the group of states that have been persuaded matters (ibid., p. 901). When the tipping point is reached, the norm moves to stage two of the cycle: the "norm cascade". At this point, transnational and international norm influences are more successful at changing norms than domestic politics through a process of international socialization which is designed to motivate norm breakers to become norm followers (ibid., p. 902). State compliance at this stage is largely motivated by their identity as members of an international society and once enough states commit to a new norm it will redefine what is considered appropriate behaviour. This may eventually lead a norm to progress to the third stage at which point it becomes so universally accepted that it becomes internalized by actors and compliance becomes almost automatic (ibid., p. 903).

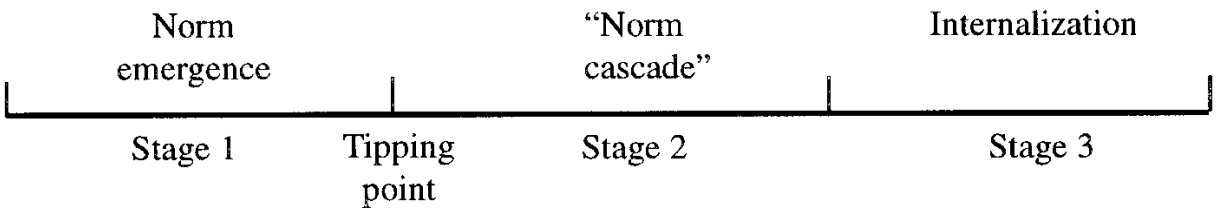

Figure 1. Norm life cycle (Finnemore & Sikkink, 1998, p. 896).

2.2.2 The spiral model

There has been an increasing focus on questions regarding the diffusion of international norms and the ways in which these influence behaviour (Risse et al., 1999). Risse et al (1999) build on earlier research regarding transnational advocacy networks (TANs) and argue that linkages between international regimes and transnational actors are crucial in the diffusion of international norms through a process of socialization. Socialization refers to the process "by which principled ideas held by individuals become norms in the sense of collective understandings about appropriate behavior which then lead to changes in identities, interests, and behavior" and is made up of three types of causal mechanisms, namely: the process of instrumental adaptation and strategic bargaining; the process of moral consciousness-raising, argumentation, dialogue, and persuasion; and the process of institutionalization and habitualization (Risse et al., 1999, p. 11).

Risse and colleagues develop a five-phase "spiral model" of norms socialization which allows for an empirical analysis of human rights changes and establishes the causal mechanisms and logic of action in each phase of the process (Risse et al., 1999, pp. 17–18). The process of human rights change usually involves a combination of instrumentally or strategically motivated adaptations which set into motion a process of identity transformations. The model builds on earlier work on transnational advocacy networks in the human rights area – "relevant actors working internationally on an issue, who are bound together by shared values, a common discourse, and dense exchanges of information and services" (Risse et al., 1999, p. 18) – and looks at the way that these advocacy networks are able to bring pressure "from above" and "from below" through what is considered a "boomerang effect". This refers to the situation where domestic groups directly seek out international allies in an effort to apply pressure to their repressive states from outside (ibid., p. 18). The spiral model combines multiple boomerang effects to create a dynamic conceptualization of the impacts of domestic-transnational-international linkages on domestic political change (ibid.).

The following sections will proceed with identifying the five phases in the spiral model (illustrated in figure 2), the dominant mode of social interaction in each phase and the different causal mechanisms (Risse et al., 1999, p. 19).

Domestic societal opposition is too weak or suppressed to offer any meaningful resistance to the government at the beginning of the process when a new norm is established (Risse et al., 1999, p. 22). The transnational advocacy networks cannot put the norm-violating state on the world agenda until they have successfully gathered enough data on the repression in target states. This is similar to the norm emergence stage in the model by Finnemore and Sikkink (1998).

Once this advocacy process has begun, the state moves to the second phase of the model. Putting the norm-violating state on the international agenda raises the public attention and allows for the

distribution of information regarding the human rights practices in the target state (Risse et al., 1999, p. 22). Here, the domestic opposition is often still too weak to meaningfully challenge the regime, but the increased lobbying and moral persuasion of international human rights organizations often elicits outraged denials from the officials in the repressed states (Risse et al., 2013, p. 6). While this denial indicates a refusal to accept the legitimacy and validity of the international human rights norm, engaging with it in any way shows that the state feels compelled to deny the allegations which suggests that the process of international socialization is already taking place (Risse et al., 1999, p. 23, 2013, p. 6). Due to the weakness of the domestic opposition during this phase, the capacity and mobilization of transnational networks as well as the vulnerability of the norm-violating government to external pressures will be key factors in the transition to phase three (Risse et al., 1999, p. 24). This means that a state will be more vulnerable to external pressures the more it values its membership in an emerging community of liberal states (ibid.).

When pressures continue to rise, the repressive government will resort to "cosmetic changes" for instrumental or strategic reasons, namely, to appease international pressures and regain military or economic assistance (Risse et al., 1999, p. 25). This stage is the most fragile as the tactical "low cost" concessions can either move the process forward or result in a backlash as Risse et al (2013, p. 6) found these steps to have an important secondary effect in facilitating the rapid mobilization and normative empowerment of domestic advocacy groups. It is during this phase that the norm-violating government starts to lose control since the domestic-transnational network is now developed enough that it becomes activated to commit pressures "from above" and "from below" whenever serious human rights violations are committed (Brysk, 1993). Here, norm-violating governments also stop denying the validity of the international human rights norms and through this the government becomes trapped into a true dialogue over human rights allegations (Risse et al., 1999, p.

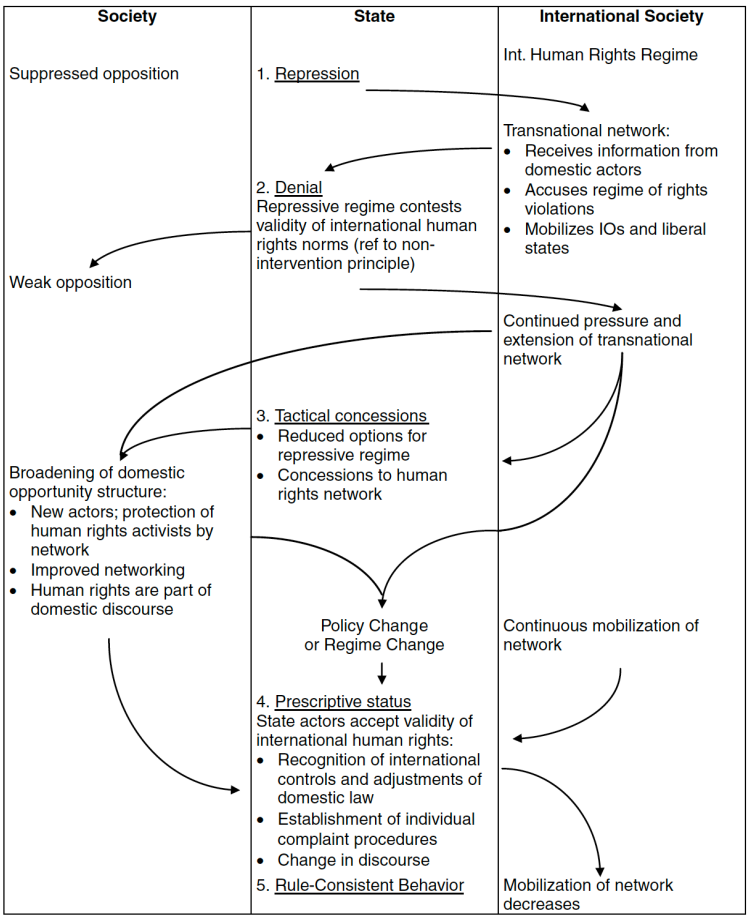

Figure 2. The "spiral model" of human rights change (Risse et al., 2013, p. 8).

28). At this stage the domestic opposition has become fully organized and mobilized and there is no way back for the repressive government.

Following this, the norm will achieve "prescriptive status" meaning that "the actors involved regularly refer to the human rights norm to describe and comment on their own behavior and that of others" (Risse et al., 1999, p. 29; Rittberger, 1993, pp. 10–11). Risse et al. (1999, p. 29) use a number of indicators to recognize when governments have accepted the validity of human rights norms: first, they ratify the international human rights conventions; second, the norms are institutionalized domestically; third, there are mechanisms in place for citizens to report human rights violations; and lastly, the government no longer denies the validity of the human rights norms in its discursive practices. Over time, the "prescriptive status" phase is expected to progress into phase five: "rule-consistent behavior" when continuous pressures are applied to the national government (ibid., p. 30). At this stage, the authors do not specify a mechanism through which they expect this progression to take place.

The spiral model thus expands on the life cycle model developed by Finnemore and Sikkink (1998) by further specifying the process that takes place in stage 2 where enough states have committed to a norm that it changes what is considered appropriate behaviour and the developments that eventually lead to internalization.

2.3 Social mechanisms

Scholars have recognized different, but often overlapping sets of causal mechanisms for the diffusion of norms (Allison-Reumann, 2017). This next section will discuss some of the most prominent socialization mechanisms that guide the human rights development process. Nowadays, it is redundant to discuss state commitment to international human rights because every state has accepted at least one international human rights treaty. (Risse et al., 2013). It is thus more interesting to look at the process from commitment to compliance. This is particularly true since quantitative research has indicated that there is tension between treaty ratification and subsequent state practices, and strict enforcement is needed to prevent a decline in compliance with human rights norms following treaty ratification (Bates, 2014). Thus, in their revised model, Risse et al (2013) find that it does not make sense to look at human rights progression from either a rational choice perspective or a theory that emphases norm-guided behaviour. Rather they find that there is often a combination of cost-benefit calculations and norm-guided behaviour, so they focus on examining the mechanisms by which the various modes of social action engage to accomplish human rights change (ibid., p. 13).

Some others make a distinction between mechanisms following from a logic of consequences such as coercion, positive incentives, and negative sanctions on the one hand and mechanisms following from a logic of appropriateness such as norm socialization and persuasion on the other (Risse, 2016).

Coercion occurs when states receive external pressure to conform with an idea (Lai et al., 2017). This can occur through the "legal enforcement of an agreed-upon prior commitment" which has been ratified in an international treaty and is enforced by a domestic, regional, or international court such as the International Criminal Court (Risse et al., 2013, p. 13). However, this is not relevant in this study as the UNDRIP is not binding (Mitchell et al., 2019) and is not being enforced by any international court.

Incentives and sanctions play an important role in the process of human rights change as raising the costs of non-compliance changes the utility-calculations made by states. Sanctions can be used as a negative incentive by the international community to punish non-compliance and as a positive incentive to enhance compliance (ibid., p. 14). These sanctions will be more effective if the target actor is very socially and materially vulnerable.

Following from a logic of appropriateness, *socialization and persuasion* involves the emulation and mimicking of other actors partly due to the idea that certain practices are 'fashionable' among other states (Allison-Reumann, 2017; Risse, 2016; van Heijster & DeRock, 2022, p. 69). Using persuasion to convince actors into voluntary compliance is more useful than coercion or manipulation as it is more durable because it influences an actor's interests and convictions (Risse et al., 2013). However, persuasion is mostly used in combination with other tools such as incentive-based mechanisms. Discourse also plays an important role in facilitating compliance since "naming and shaming" practices will only be effective if the target actor believes in the validity of the norm.

2.4 Norm contestation

Throughout the years, the spiral model has received a fair amount of criticism. Shor (2008) argues that the model is over-deterministic and idealistic in its claim that "there is no turning back" once a certain level of human rights progress has been achieved. Yet, there are various cases where a country regresses and moves towards further repression. Risse et al. (1999, p. 242) acknowledge this applies to one of the cases they studied – Tunisia – but argue that this is "the exception that proves the rule". Yet similar patterns have been found in some of the countries considered "success stories" in their work, for example The Philippines and Uganda that have shown regression since the publishing of the original work by Risse and colleagues (Shor, 2008). Additionally, the spiral model merely conceptualises the influence of global human rights norms on the identities, interests and behaviours of a target state, but it neglects to conceptualise the influence of the target state on the international human rights norms or network (Fleay, 2006, p. 43). Furthermore, Shor argues that the spiral model treats a country's human rights practices as a homogenous block (Shor, 2008, p. 122). Countries are either stagnant or they move forward uniformly towards norm compliance, which eliminates the space for any nuances or differentiations in the practices of a country (ibid., p. 118).

A similar argument was made by Van Kersbergen and Verbeek (2007) who argue that many theories on norm compliance tend to assume that a norm retains its original meaning once it is adopted. They state that there is an unjustified emphasis on how norms become institutionalized and that scholars neglect the issues of norm vagueness and elusiveness (ibid.). Similarly, Papillon and Rodon (2020) recognize this as the reason that FPIC is not yet properly implemented. They argue that "conflicts over norm interpretation can hinder its institutionalisation and leave it subject to power politics" and while FPIC as a concept is widely recognized, its substance and operationalization remains contested (ibid., p. 318). The imprecise nature of these norms might lead to a new conflict over its meaning, but this will be different than the battle that led to its initial recognition (Van Kersbergen & Verbeek, 2007). The adoption of the norm may have empowered actors that were previously inconsequential but are now legitimate participants of the conflict over its meaning. In the Canadian case, Papillon and Rodon (2020, p. 320) demonstrate that Indigenous peoples are increasingly asserting their own vision of FPIC through their own mechanisms, which is possible due to the uncertain context. They argue that norm definition involves not only a framing strategy – to give meaning to the norm in public discourse – but also an institutional strategy, thus creating a process for expressing FPIC (ibid.). This process has been taken over by Indigenous peoples who are challenging state-centred views of FPIC. This process of norm appropriation is expected to be most successful in contexts where FPIC enjoys a certain level of recognition and legitimacy, but its scope and operationalization remain ambiguous (ibid.).

2.5 Compliance paradox

Following from the spiral model, we would expect to see a linear movement from commitment to compliance where the norms at interest in this thesis (Indigenous participation and FPIC) would progress from causing tactical concessions, to prescriptive status, and then finally to rule-compliance. However, Lightfoot (2010) argues that we should actually consider Canada over-compliant with Indigenous rights, namely, their legal and policy behaviour exceeds their treaty commitments. This implies that rule-following behaviour (phase 5) would precede the ratifying of international treaties (phase 4) and thus forms an alternative explanation for Canada's behaviour.

An over-compliant state is defined as one that: "paradoxically takes constitutional, legal and/or policy actions which recognize specific rights or a category of rights that go beyond that state's international human rights treaty obligations or its normative international commitments" (S. R. Lightfoot, 2010, p. 87). It refers to a paradoxical situation where a state either recognizes Indigenous land or self-determination rights that go beyond the state's legal obligations, or the state opposes certain rights in international discourse while simultaneously recognizing these rights in domestic law (ibid., pp. 89-90). This is surprising because signing an international covenant would be expected to be easier than executing the actual policy, so if we were to see either one, the commitment would be expected to exceed compliance.

The constructivist explanation offered by Lightfoot (2010, p. 92) to account for over-compliance argues that common law countries – that rely on legal precedents and prior rulings (that were founded on the Doctrine of Discovery) are stuck in a difficult position between their colonial past and their postcolonial image. The Doctrine of Discovery created the spiritual, political, and legal justification for colonization and it makes it very costly for Canada to commit to Indigenous human rights standards because fully renouncing the Doctrine of Discovery would call into question the foundation and legitimacy of the Canadian state (S. R. Lightfoot, 2010; Upstander Project, n.d.). Allowing Indigenous peoples FPIC and self-determination rights encroaches on the principle of state sovereignty (Eimer & Bartels, 2020). Since FPIC requires the consent of Indigenous peoples before advancing on their lands, it reduces a government's privileges to regulate property rights. Thus imposing 'legal pluralism' at the domestic level since it forces governments to absorb the rules of Indigenous citizens within the existing state laws (ibid., p. 240). Hence, rather than fighting the progression of Indigenous rights, Canada is fighting the challenges to Westphalian sovereignty (S. R. Lightfoot, 2010). Canada wants to maintain an image as a "harmonious multicultural society and a 'good human rights steward'" (ibid., p. 103). Lightfoot (2010) argues that while reconciliation efforts in Canada might be considered substantial progress from an international perspective, it excludes Indigenous co-management of resources and it avoids renegotiation of power relations between Indigenous peoples and Canada. Thus, over-compliance actually reflects a resistance to the Indigenous rights discourse and Canada is trying to maintain its image as a 'good human rights steward' by moving forward in 'soft rights' while resisting any meaningful change that would threaten the status quo (S. R. Lightfoot, 2010, p. 103). Actors will utilize the participation of Indigenous representatives to legitimize the negotiations, but they will fail to award them any real self-determination when it endangers their interests (Eimer & Bartels, 2020). The expectation is therefore to see an increase in symbolic indigenous involvement without any progress on 'hard rights' that would lead to self-determination.

3. METHODOLOGY

The following section will discuss the setup of this thesis and the methodology that will be used to answer the research question. First, the design of the case study will be explained and the use of process tracing will be discussed. The next section will cover the case selection process. Following that, the hypotheses are formulated and in the subsequent section the different mechanisms are operationalized.

3.1 Research design

This thesis aims to explain Canada's failure to respect Indigenous peoples' rights to participation in the green energy transition. To achieve this, a case study will be conducted. A case study refers to "the intensive study of a single case where the purpose of that study is – at least in part – to shed light on a larger class of cases (a population)" (Gerring, 2006, p. 20). Rather than establishing the causal effect – i.e., the magnitude of the causal relationship – this thesis is concerned with identifying the causal mechanisms (ibid., p. 44). Understanding the causal pathways is important in accurately specifying the model and answering the research question. These mechanisms will be identified through a process-tracing analysis, which is particularly well suited to answer 'why' and 'how' questions because it focuses "on the causal conditions, configurations and mechanisms which make a specific outcome possible" (Blatter & Haverland, 2014, p. 59). Furthermore, this technique allows for the identification of sequential interplay and interactions between causal conditions. This has the advantage over large-N studies as it allows for the understanding of the "black box" of causality and can thus, unlike in large-N studies, demonstrate the reasons for correlations between independent and dependent variables (Gerring, 2006). So, while large-N studies allow for a study that is representative of the population of interest, case study research allows for a more in depth understanding of the causal mechanisms at play and is therefore more appropriate for answering the 'why' question that is of interest to this thesis.

Thus, a process-tracing analysis will be executed to answer the research question. A process-tracing analysis involves "attempts to identify the intervening causal process – the causal chain and causal mechanism – between an independent variable (or variables) and the outcome of the dependent variable" (George & Bennett, 2005, p. 206). The hypotheses will outline the causal mechanisms and the next section – operationalization – includes the evidence that is necessary to adopt a hypothesis.

To execute the analysis, this thesis will draw on a combination of legal and policy documents issued by the government; policy and research reports issued by NGOs and interest groups; media reports; public opinion surveys; and academic literature. The starting point of the analysis is the implementation of the UNDRIP in 2007.

3.2 Case selection

While large-sample research studies perform a randomized case selection to ensure the sample is representative of the population, this is often not the most appropriate method of selecting cases in a small-N study (Gerring, 2006, pp. 86–87). Because of the small sample, randomly selecting cases will often cause many of the sample means to be far from the population mean, leading to problems with precision. Therefore, cases should be selected through a purposive (nonrandom) procedure (ibid., p. 88). This study employs a deviant-case selection method and thus selects a case that "by reference to some general understanding of a topic (either a specific theory or common sense), demonstrates a surprising value" (ibid., p. 105). Canada has been selected as a deviant case here. Following from constructivist theories such as the 'spiral model' of human rights (Risse et al., 1999, 2013), Canada would be a likely case for norm compliance as it contains many of the scope conditions that would make it more likely to succeed[2]. The expectation is thus that we would see Canada progressing through the five stages of the model towards norm compliance. Yet, an initial assessment of the Canadian case shows that the country was slow to recognize Indigenous rights, and after eventually recognizing the UNDRIP has not sufficiently safeguarded the norms regarding Indigenous participation and FPIC. Therefore, the Canadian case seems to deviate from the expected outcome following constructivist theories of norm compliance. The analysis will primarily focus on understanding the mechanisms that influenced actions and decision-making at the level of the government.

Additionally, some attention will be paid to the provincial level. Presenting the relationship between Indigenous communities and the federal government fails to account for the fact that most of the interaction between the government and Indigenous peoples happens through provincial governments who act on behalf of the federal government (Tay-Burroughs et al., 2021). Furthermore, while Indigenous lands are under federal jurisdiction, management of natural resources is the responsibility of the provincial government (Bains & Ishkanian, 2016). Therefore, the analysis will include a study of the provincial governments where relevant.

3.3 Hypotheses

This thesis aims to explain why Canada has failed to comply with norms on Indigenous participation and FPIC in the context of its green energy transition. The previous section outlined various perspectives on the compliance with norms. Following from these theoretical approaches, this section will formulate expectations and subsequently hypotheses which will be tested in the next section.

[2] Risse et al. (2013) recognize five scope conditions that determine the circumstances under which the previously described mechanisms will be more or less successful: Democratic vs. authoritarian regimes; Consolidated vs. limited statehood; Centralized vs. decentralized rule implementation; Material vulnerability; Social vulnerability.

The first hypothesis concerns the transition towards rule compliance and will be largely based on the social mechanisms outlined in the previous chapter. Multiple scholars have recognized that consistent pressure from 'below' (by the domestic civil society) and from 'above' (by the transnational advocacy network) leads to long-term rule-following behaviour from the target state (Alhargan, 2012; Schroeder, 2008). To test this hypothesis, two different causal mechanisms will be studied: incentives and persuasive arguments and discourse. This leads to the following hypothesis, with two sub-hypotheses based on the established mechanisms:

Hypothesis 1: Canada's failure to comply with norms on Indigenous participation can be explained by a lack of consistent pressure provided by the domestic civil society and the transnational advocacy network.

A key aspect of these hypotheses is the notion that the substance and operationalization of FPIC and Indigenous participation norms are clear and unambiguous. Scholars such as Van Kersbergen and Verbeek (2007) argue that this is not always the case. Instead they claim that the ambiguity will lead to further conflict regarding the norm's definition, this time involving previously inconsequential actors who have become empowered through this process. Papillon and Rodon (2020, p. 320) show that the contestation over FPIC has so far prevented it from being properly institutionalized, which they argue has created space for Indigenous peoples to challenge and take control over the institutionalization process. Their analysis shows significant variations in how FPIC is understood and subsequently big variations in how it is operationalized (ibid.). This uncertain and contested norm environment may create space for Indigenous peoples to affirm their own interpretation of FPIC through their own mechanisms, thus challenging the central role of the state in this process. However, the lack of compliance with FPIC and participation norms suggests that this has not taken place in Canada. Instead, the expectation is that the Canadian government still controls the interpretation of these norms and has implemented a weaker interpretation of the norm, therefore causing a more state-centric approach to FPIC. This leads to the following hypothesis:

Hypothesis 2: Canada's failure to comply with norms on Indigenous participation is due to a <u>state-centric process</u> of Indigenous participation.

The previous hypotheses build on the idea that there is a linear progression from commitment to compliance. However, Lightfoot (2010) argues that we should actually consider Canada over-compliant with Indigenous rights, namely, their legal and policy behaviour exceeds their treaty commitments. This implies that there is no clear linear path from norm commitment to compliance. Instead, Lightfoot (2010, p. 92) argues that common law countries that were founded on the Doctrine of Discovery, are stuck in a difficult position between their colonial past and their postcolonial image. This causes them to take a

paradoxical approach where they will make progress in 'soft rights' and resist change in areas that would threaten the legitimacy of the Canadian state (S. R. Lightfoot, 2010). The previous hypothesis formulated the expectation that not allowing Indigenous communities more control over the process decreases the compliance with FPIC. The third expectation is based on the theoretical assumption that state-centric models of Indigenous reconciliation can address Indigenous individuals' discrimination and soft collective rights, but they are unqualified for addressing the reliance on the Doctrine of Discovery and the complications that occur when trying to fit Indigenous self-governance within the existing structures (ibid., p. 104). Concretely, the expectation is that Indigenous peoples will often be invited to participate as a way to legitimize the negotiations (Eimer & Bartels, 2020), but it will not be required to obtain consent from Indigenous communities before infringing on their lands, as this is sometimes interpreted as awarding Indigenous peoples a veto and is therefore controversial. This section will also analyse the possibilities for plural sovereignty as a way to comply with FPIC.

Hypothesis 3: Canada's failure to comply with norms on Indigenous participation is due to the limitations of the legal system which is rooted in the colonial history.

3.4 Operationalization

After outlining the expectations and causal mechanisms, it is now important to translate this into case-specific expectations of the observable manifestations of each causal mechanism if it is present (Beach & Pedersen, 2013, p. 95). These observable manifestations can be defined as "evidence that we should expect to find in the case if each part of a causal mechanism is present" (ibid.).

Dependent variables

The objective of this thesis is to understand the failure to comply with norms on Indigenous participation and FPIC (specifically in the context of the green energy transition). Part of answering this question is determining what constitutes Indigenous participation. This is especially challenging as Papillon and Rodon (2020) argue that there is significant variation in the substantive interpretation of FPIC, its operationalization, and the quality of Indigenous peoples' participation (Eimer & Bartels, 2020). This thesis will use the definition of FPIC formulated by Mitchell et al. (2019, pp. 3–4) following a thorough analysis of the literature: *free and prior* meaning that consent was sought and given before governments grant land tenure with time for identification of environmentally or culturally sensitive areas, and did not involve any coercion, bribery, rewards, intimidation, or manipulation (ibid.). *Informed* refers to a process that requires the access to information that is understandable and adequate to make informed decisions (Mitchell et al., 2019, p. 4). Finally, *consent* which is defined as a "collective decision made by the rights holders and reached through the customary decision-making processes of the affected Indigenous People" (ibid.). Thus, the dependent variable is the Canadian government's compliance with

FPIC, which in its most comprehensive definition can be considered the ideal form of Indigenous participation and is thus considered as 'full' compliance with the norm.

Independent variables

This section will discuss the independent variables that are expected to explain Canada's failure to comply with Indigenous participation norms. Each causal mechanism studied in this thesis will be discussed. Additionally, this section will outline how the hypotheses are tested.

External pressure

The first hypothesis considers the effects of pressure from the domestic civil society and the transnational advocacy network on the compliance of the state. Non-governmental organizations have been central in understanding how and why human rights values became salient (B. A. Simmons, 2013). Furthermore, transnational human rights networks are hypothesized to be essential in the process of state socialization (ibid., p. 46). This makes it interesting to test the effects of pressure applied "from below" by domestic civil society actors combined with pressure "from above" by external actors such as NGOs who are key in reminding "liberal states of their own identity," and protecting "domestic groups by giving external legitimacy to their claims" (ibid.). The first hypothesis is measured through two different mechanisms which are expected to cause external pressure that would lead to compliance.

Incentives

The first mechanism studied is the effect of incentives to pressure the state into compliance. This thesis recognizes that incentives can be positive or negative, either making it beneficial to comply or costly not to comply. Sanctions or the use of foreign aid as a positive incentive is not likely to be very effective here given the lack of enforcement mechanisms and the fact that Canada is not very materially vulnerable. However, the threat of reputational loss can also be a very effective tool in changing the utility calculation and making non-compliance more costly (Weisiger & Yarhi-Milo, 2015). Reputation can be defined as "judgment of another's character that is then used to predict or explain future behavior" (Mercer, 2018, p. 17). Trying to influence a state's reputation through a "naming and shaming" campaign is regarded as one of the most effective strategies for upholding human rights standards (Terechshenko et al., 2019, p. 721). Canada has a global reputation as a defender of human rights (Human Rights Watch, n.d.) so in the first part of the analysis, pressure from external actors that affects incentives will be analysed through the actions of external actors aimed at altering the state's reputation. To this end, reports produced by the transnational advocacy network (specifically human rights organizations) will be analysed for statements that criticize Canada's approach to Indigenous rights and specifically reference Canada's reputation.

Persuasion and discourse

Risse et al. (2013, p. 14) consider persuasion and discourse to be more sustainable as a socialization mechanisms than the manipulation of incentive structures. Therefore, this thesis will also look at changes in the actors' opinions and ideas. This will be done through the analysis of governmental statements and documents to determine if there has been a shift in opinions or ideas. Furthermore, discourse is important as reputational losses will only matter to the actors if they consider the norm to be valid. This thesis will therefore also analyse the degree to which the norm of Indigenous participation is considered to be legitimate by the national population by looking at trends in public opinion.

Community-driven process

The ambiguity of FPIC and its unclear operationalization may empower previously inconsequential actors to take a larger role in the institutionalization process. The second hypothesis analyses whether this has occurred by looking at the community-driven impact assessments (IA) and the extent to which Indigenous actors are involved as an equal partner in project developments. The expectation is that a larger role for the government in the process will lead to less compliance with participation norms. The more institutionalized the IA process is, the less space there is for Indigenous actors to take control of the process and ensure meaningful involvement. To test this hypothesis, this thesis determines which types of IA processes are most compliant with participation norms and analyses the characteristics of the institutional context that led to this norm compliance. To evaluate different types of Indigenous participation and co-management in IA, Larsen (2018) created a "Scalar framework for Indigenous participation in IA". This framework recognizes four different degrees of influence: (1) Notification (no influence); (2) Consultation (limited influence); (3) Co-management (shared influence); (4) Community-owned (total influence) (ibid., p. 211). Through various case studies, Larsen (2018, p. 208) finds that Indigenous participation is most meaningful "through IA co-management that takes places directly with the state and throughout all IA phases, complemented with strategic community owned IA". Therefore, this thesis looks the institutional characteristics of successful co-management in the IA process. This will provide insight into the factors that have contributed to Canada's failure to comply (on a larger scale) so far.

Compliance paradox

The third hypothesis argues that Canada's failure to comply with Indigenous participation norms is due to the limitations of the Canadian common law legal system which is rooted in the Doctrine of Discovery. The expectation following from Lightfoot's (2010) theory of overcompliance is that states will try to save their reputation by making progress on symbolic measures and 'soft' rights while resisting progress on 'hard' rights. This hypothesis will be tested by analysing governmental policies to see to what extent the government has invested in the protection of Indigenous languages, culture and education (soft rights). Following this, the government's position on Indigenous self-determination and

self-governance (hard rights) will be assessed. The expectation is that Canada will show a resistance of progress on rights of self-determination combined with statements that FPIC is aspirational rather than mandatory and a failure to implement mechanisms to report violations.

3.5 Limitations

3.5.1. Validity

Validity concerns the extent to which a study measures what it is supposed to measure. Part of this is the "appropriateness" of the tools that were used: whether the research question is right for the outcome that the study aims to explain, the methodology is suitable to answer the research question, and the data analysis and conclusions are valid (Leung, 2015). The following section will discuss the internal and external validity of this thesis.

As briefly mentioned in the research design, there are multiple trade-offs between case studies and large-N designs. Case study designs are known for high levels of internal validity as the in-depth analysis allows for the thorough examination of mechanisms (Gerring, 2017, p. 244). However, due to the small number of cases studied, the results are often not generalizable. Furthermore, case studies allow for the identification of mechanisms, but are not able to determine the size of the effect of X on Y.

This thesis executes a deviant case study which leads to some issues with generalizability. The nature of a deviant case study naturally implies that this case differs from the norm (deviates). However, the expectation is that the results of this study at least apply to the other three countries who opposed the UNDRIP (Australia, New Zealand and the United States) as they have similar characteristics. Furthermore, the emphasis of this study is not on the refusal to sign Indigenous rights treaties, but rather on the failure to comply with these norms. This makes it reasonable to assume that the findings of this study could also apply to other countries with similar characteristics (functional democracies with low material vulnerabilities and a history of settler-colonialism).

3.5.2. Reliability

The reliability of a study refers to the possibility that procedures of the research can be repeated by others and lead to similar findings (Riege, 2003). This is a limitation of case studies as it is often not possible to replicate a case study under its original conditions (Quintão et al., 2020). People are not as static as measurements used in quantitative research so even when the exact same procedure is followed, results may vary (Riege, 2003, p. 81). To improve the replicability of this study, the operationalization of the variables earlier in this section aims to outline clear criteria that were used to analyse the data. Furthermore, the analysis aims to be transparent regarding the interpretation of sources and evidence and where possible, multiple sources were consulted.

4. ANALYSIS

In this section, the evidence will be collected and assessed, and the hypotheses will be tested. The first part of this section gives an overview of Indigenous participation in Canada and Canada's history with the UNDRIP and other treaties outlining Indigenous rights. The following section discusses the developments in Canada's sustainability policies following from the 2015 Paris agreement. The second half of this chapter is focused on the testing of the previously formulated hypotheses.

4.1 Context

4.1.1 Indigenous participation in Canada

After many decades of advocacy and mobilization, Indigenous peoples have achieved substantial agency in shaping decisions with regards to resource developments on their lands (Papillon & Rodon, 2017). The culmination of this was the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007 with 144 votes in favour, 11 abstentions and 4 votes against (Australia, Canada, New Zealand and the United States) (UN, n.d.). Canada not only opposed the Declaration but is also reported to have been actively lobbying against the Declaration amongst UN members (S. Lightfoot, 2016). Following the recommendation by the Indian Residential Schools Truth and Reconciliation Commission (TRC) in 2015 to implement the UNDRIP, Canada finally approved the declaration in 2016 (Boutilier, 2017). However, the government still explicitly stated that the UNDRIP was purely aspirational when they finally approved it.

The Declaration set out to protect the rights that "constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world." (Indigenous Foundations, n.d.). The first article states that "Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law." (United Nations, 2008). It further guarantees their right to practice their cultures and their right to a nationality. The Declaration also establishes Indigenous peoples' right "to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired," and it states that "No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return." (Indigenous Foundations, n.d.; United Nations, 2008, p. 9).

The most controversial part in Canada has been the "Free, Prior, and Informed Consent" (FPIC) norm included in the UNDRIP which guarantees Indigenous peoples' right to delf-determination (Boutilier, 2017). The UNDRIP strengthens the FPIC standards established by the 1989 International Labour Organization's (ILO) Convention 169 which first established that Indigenous peoples are entitled to some control over resource extraction on their traditional lands (Boutilier, 2017; Papillon & Rodon,

2017). However, the UNDRIP goes further in establishing this norm as it requires securing consent whereas ILO Convention No. 169 solely requires attempting to do so (Boutilier, 2017). The FPIC norm is included in six articles of the UNDRIP:

- Article 10: "Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without *the free, prior and informed consent* of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return" (United Nations, 2008, p. 9, emphasis added).
- Article 11(2): "States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their *free, prior and informed consent* or in violation of their laws, traditions and customs" (ibid.).
- Article 19: "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their *free, prior and informed consent* before adopting and implementing legislative or administrative measures that may affect them" (United Nations, 2008, p. 11, emphasis added).
- Article 28(1): "Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their *free, prior and informed consent*" (United Nations, 2008, p. 13, emphasis added).
- Article 29(2): "States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent" (United Nations, 2008, p. 14, emphasis added).
- Article 32(2): "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their *free and informed consent prior to the approval of any project* affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources" (United Nations, 2008, p. 15, emphasis added).

Canada's initial justification for their refusal to adopt the UNDRIP was its incompatibly with Canadian law, however numerous academics and Indigenous leaders argue that the opposition to the Declaration was primarily ideological (Boutilier, 2017). This is supported by an open letter issued by a group of more than 100 legal scholars who stated that there was no constitutional barrier and that the Declaration "is consistent with the Canadian Constitution and Charter and is profoundly important for fulfilling their promise." (S. Lightfoot, 2016, p. 172).

The Canadian government finally adopted the UNDRIP in 2016 and on June 16 2021 the Parliament of Canada passed an act which outlines Canada's obligation to uphold the human rights of Indigenous peoples affirmed by the UNDRIP (Assembly of First Nations, n.d.; Fontaine, 2016).

4.1.2. Green energy policy in Canada

The 1972 Stockholm Declaration on the Human Environment first established the link between human rights and environmental degradation by stating that "an environment of a certain quality is necessary for human beings to lead a life of dignity and well-being" (Schapper, 2021, p. 1953). However, some have argued that climate policy is reproducing settler-colonial relations in Canada through the violation of Indigenous rights and systematic exclusion of Indigenous peoples from policy making (Reed et al., 2021).

Following the 2015 Paris Agreement, the Canadian government adopted the Pan-Canadian Framework on Clean Growth and Climate Change (PCF) in December 2016 which includes concrete actions that will position Canada to meet the Paris Agreement GHG emission reduction target by 2030 (Government of Canada, 2019b). It is built on four pillars: pricing carbon pollution; complementary actions to reduce emissions across the economy; adaptation and climate resilience; and clean technology, innovation, and jobs. The Pan-Canadian Framework makes various references to working with Indigenous peoples and explicitly states its commitment to the UNDRIP and FPIC (Kornelsen et al., 2019). Kornelsen et al. (2019) analysis of involvement of Indigenous peoples in Canadian renewable energy projects showed that out of the 57 provincial and territorial policy programs analysed, 37 mention Indigenous peoples as potential stakeholders or affected parties. However, only eight of those reference Indigenous rights, and only two directly reference the UNDRIP or Aboriginal and Treaty rights. Indicating as Kornelsen et al. (2019, p. 3) put it: "it is one thing to build in some mention of UNDRIP, TRC or Aboriginal and Treaty rights into policy or program wording; it is quite another to develop and implement policy and programming in ways that substantively respect and enable the exercise of Indigenous rights".

Following the Pan-Canadian Framework, the Canadian government implemented a revised federal climate plan in 2020: *A Healthy Environment and A Healthy Economy* to "build a better future with a healthier economy and environment" (Minister of Environment and Climate Change, 2020, p. 8). This plan progresses on the foundation created by the PCF and it reaffirmed the government's support of the UNDRIP and FPIC (ibid, p. 68). Still, consent is only mentioned once in the whole document and much of the commitment to Indigenous participation seems to be centred around dialogue, rather than allowing Indigenous communities the right to self-determination. Furthermore, the plan specifically mentions the intention to continue supporting partnerships with Indigenous communities through Indigenous Protected and Conserved Areas (IPCAs) and Indigenous Guardian programs (ibid, p. 55). The government also invested in a large number of Indigenous Guarding projects all over the country to provide more opportunities for Indigenous peoples to exert stewardship of their traditional lands,

waters, and ice, arguing that these steps form the "most concrete steps forward in advancing Indigenous leadership in conservating in recent times" (ibid). The Indigenous Circle of Experts (ICE) defines IPCA as "lands and waters where Indigenous governments have the primary role in protecting and conserving ecosystems through Indigenous laws, governance and knowledge systems" (The Indigenous Circle of Experts, 2018, p. 5). Essential to these initiatives is that they are Indigenous-led and acknowledge international law (i.e. Canada's Treaties and the UNDRIP) and should thus facilitate more Indigenous-led governance.

In 2021, the Canadian government updated its emissions targets and passed the Canadian Net-Zero Emissions Accountability Act (the Act), to enshrine the targets into law for the first time and establish a formal procedure for regular reviews of progress (Canadian Press, 2022a). This law reaffirms the commitment to the UNDRIP and to collaboration with Indigenous peoples – including taking Indigenous knowledge into consideration, however, the formulation remains quite vague and does not include any real obligations beyond the consideration of Indigenous interests (Canadian Net-Zero Emissions Accountability Act, 2021).

The targets formalized by the Canadian Net-Zero Emissions Accountability Act were translated into policy with the Emissions Reduction Plan (ERP). This plan outlines the measures that will be taken to meet the GHG reduction targets formulated in the Act (Lambie et al., 2022). In this plan, the government commits 10 percent of its $1.5 billion reserved for energy efficiency in housing to Indigenous communities (ibid.). The government further reserves $180 million for the Indigenous Leadership Fund which supports green energy projects led by First Nations, Inuit, and Métis communities and organizations (Environment and Climate Change Canada, 2022, p. 8). Additionally, this plan acknowledges the requirement under the UNDRIP to take Indigenous Knowledge into consideration and states that the government will work in partnership with Indigenous communities (ibid., p. 21). However, Indigenous peoples' right to self-determination (also established in the UNDRIP) is exclusively mentioned in the Indigenous submissions that were gathered during the "ERP engagement process" and not in the actual plan, which indicates that there might still be tension surrounding the issue of Indigenous self-determination.

This is further substantiated by the continuing lack of meaningful involvement of Indigenous communities. In 2020 there were 197 medium-to-large renewable energy generating projects that involved Indigenous peoples (Indigenous Clean Energy, 2020a). Over 50 percent of the medium-to-large scale projects that involved Indigenous peoples were hydroelectric, which has been known to cause significant destruction to ecosystems (Indigenous Clean Energy, 2020a; Reed et al., 2021; Stefanelli et al., 2019). Furthermore, an analysis of Clean Energy Policy in Canada performed by the Yellowhead Institute found that out of the 57 texts analysed, only ten mention that Indigenous peoples were consulted or participated in the development of the policy (Kornelsen et al., 2019). The Yellowhead Institute report further states that in the few instances that consultation was mentioned, it appeared to be more for the validation of pre-existing policies, rather than meaningful inclusion. Additionally, Reed et al (2021, p.

1) found that both the Pan-Canadian Framework and the Québec Zén (net-zero emissions) Roadmap failed to uphold the right to self-determination and free, prior, and informed consent. All of this indicates that even with the recognition of FPIC in the Pan-Canadian Framework, there is still a lack of meaningful inclusion of Indigenous peoples and some have argued that climate policy is reproducing settler-colonial relations in Canada through the violation of Indigenous rights and systematic exclusion of Indigenous peoples from policy making (Reed et al., 2021).

4.2 External pressure

As outlined earlier in this thesis, multiple scholars recognize the effects of consistent pressure from 'below' (by the domestic civil society) and from 'above' (by the transnational advocacy network) and the ability of actors to create incentives and sanctions that change the utility-calculations made by states. In the Canadian case, the expectation is that material threats are not very effective due to Canada's lack of material vulnerability; however, the threat of reputational loss might be a very effective tool in changing the utility calculation and making non-compliance more costly (Weisiger & Yarhi-Milo, 2015). In line with the hypothesis presented in the third section, the first part of the analysis will focus on TANs threats regarding Canada's reputation and any efforts to create incentives that might encourage compliance. The next section will discuss the establishment of discourse and persuasive arguments that might incentivise Canada to comply. Following the hypothesis established in the third section, the expectation is that there is a lack of consistent pressure from external actors, which would explain Canada's failure to comply with norms on Indigenous participation.

4.2.1 Reputation

The first part of this analysis will focus on external pressures on the state. Risse et al. (2013, p. 16) recognize various scope conditions under which certain pressures and mechanisms are expected to be more likely to lead to compliance. They argue that the target state's vulnerability to external pressures plays a big role in the transition from commitment to compliance (ibid.). Specifically states with large material vulnerability are likely to be affected by this. A wealthy state like Canada is expected to be less vulnerable to the threat of potential sanctions; however, regime vulnerability also implies vulnerability to moral pressures (Risse et al., 1999, p. 245). States care about their international reputation and want to be considered "normal" members of the international community (ibid.). Therefore, the expectation here is that Canada's failure to comply can be explained by a lack of incentives created by external actors, specifically those targeting Canada's reputation.

Transnational networks of Indigenous organizations often form the basis of new ideas, identity, legitimacy and money (Niezen, 2000, p. 120). In Canada specifically, political activism among Indigenous peoples has been focused on organizing political associations at the national level to pursue common interests and political recognition (Dyck & Sadik, 2021). Part of this is the Idle No More

movement, founded in 2012 as a protest against the introduction of a bill by Stephen Harper's Conservative government (De Bruin, 2019). This movement gained support from Indigenous and non-Indigenous communities in Canada and internationally, which, combined with consistent media coverage put significant pressure on the government, leading to a meeting between prime minister Harper and a First Nations' delegation (ibid.). The Idle No More movement has played an important role in the politicizing of Native rights and environmental issues in Canada and internationally which, Friedel (2015, p. 879) argues, is evidenced by the solidarity network that quickly formed around it. Indigenous leaders in Canada have also taken on prominent roles in international Indigenous peoples' organizations (Dyck & Sadik, 2021) and through this, they are able to put consistent pressure on the federal government.

Earlier in this thesis, reputation was defined as "judgment of another's character that is then used to predict or explain future behavior" (Mercer, 2018, p. 17). Canada enjoys a reputation as a global human rights defender, so this section will look at efforts by TANs to reference this reputation and influence or alter it. In 2007, Canada's vote against the UNDRIP was described as an "astonishing move for a country that claims to be a model of tolerance and diversity" by UN Human Rights Commissioner Louise Arbour (Canadian Press, 2007). She further stated that Canada claims to be important in the international community in the progression of human rights, but that Canada's historic commitment to "rise above narrow self-interest on the world state" is declining (ibid.). A 2010 report by Amnesty International further criticises the continuation of Canada's human rights violations of the Lubicon Cree Indigenous peoples in Alberta, twenty years after United Nations Human Rights Committee ruled that rights had been violated (Amnesty International, 2010). The report specifically states that "Canada's failure to act in good faith to implement the views and recommendations by UN treaty bodies and special procedures on this case sets a poor example for the international community, especially when Canada is often held up as a model of the rule of law and human rights protection", therefore specifically referencing Canada's reputation (ibid., p. 6).

In 2015, a report by the UN Human Rights Committee revealed that Canada was failing Indigenous peoples by not adequately protecting their rights (Amnesty International, 2015). These concerns were significant enough for the Committee to require Canada to report back within one year on progress made in the implementation of the recommendations from the Committee. In its report, the Committee expresses their concern that Indigenous peoples are not always consulted and asked to give consent to projects and initiatives that affect them, so they call on the Canadian government to require the acquiring of free, prior and informed consent whenever legislation and actions impact Indigenous lands and rights (UN Human Rights Committee, 2015). Furthermore, the Canadian government has been called out repeatedly by the UN Committee on the Elimination of Racial Discrimination (CERD) for violating the right to FPIC in the context of various resource development programs and has failed to provide information regarding measures to address these concerns (Li, 2020). CERD emphasized that Canada will not be in compliance with legally binding human rights treaties until they develop a process

where Indigenous peoples have to give consent (Cox, 2021). As of May 11 2022, the human rights experts of the CERD are continuing to pressure the Canadian government to stop construction on two pipelines until consent is given by the affected communities (Canadian Press, 2022b).

All of this shows continuous external pressure on Canada since the initial implementation of the UNDRIP. It indicates that various domestic and international actors have continuously questioned Canada's reputation as a global human rights defender. Following the framework created by Risse et al (2013), the expectation was that Canada would be vulnerable to moral pressures and threats to its reputation. Yet, the continuous pressure described in the paragraphs above shows that this cannot explain the lack of compliance from the Canadian government.

4.2.2 Discourse and social pressure

Persuasion and discourse are considered to be more sustainable mechanisms of socialization than the changing of incentive structures (Risse et al., 2013, p. 14). It is expected that Canada's failure to comply stems from the inability of domestic civil society and the transnational advocacy network to create norm salience and alter governmental discourse through persuasive arguments.

The Canadian case clearly shows a change in discourse from governmental sources. In 2008, then prime minister Stephen Harper issued an apology for the harms suffered by Indigenous peoples at residential schools, expressing how these schools "had a lasting and damaging impact on aboriginal culture, heritage and language" (Joffe, 2010, pp. 152–153). However, at the time that the UNDRIP was adopted the Harper government stated that Canada is committed to "promoting harmony and reconciliation", but Harper argued that the Declaration text falls short (Joffe, 2010, p. 146). Thus, the Permanent Missions of Canada, Colombia, New Zealand and the Russian Federation send a "Non-Paper on Proposed Amendments" to the President of the United Nations General Assembly (Global Indigenous Peoples' Caucus, 2007). In it they proposed various relevant changes to the Declaration. For instance, they propose a change to article 26 that would give Indigenous peoples only rights to the lands they currently own, with the addition that they *may* have rights to lands they traditionally owned[3] (ibid., p. 34). Furthermore, the right not to be forcibly removed from their lands is reduced to only applying where removal is not "justified by a significant public interest" and FPIC only applies "where possible"[4], therefore reducing it be merely aspirational (ibid., p. 35). Lastly, while the government has publicly expressed the damaging impact of residential schools on the aboriginal cultural heritage, it also proposed

[3] "Indigenous peoples have **the** right**s** to the lands, territories and resources which they **own, and may have rights to the lands, territories and resources which** they have traditionally owned, occupied or otherwise used **or acquired**." [emphasis added to indicate proposed changes]

[4] "Indigenous peoples shall not be forcibly removed from their lands or territories, **unless justified by a significant public interest**. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned where possible, and just and fair compensation and, **where possible**, with the option of return." [emphasis added to indicate proposed changes]

to “delete the right to “control” and “protect” Indigenous peoples’ cultural heritage, traditional knowledge, and traditional cultural expressions” from the UN Declaration (Joffe, 2010, p. 153). Furthermore, during his time as prime minister Harper refused to implement the 2005 Kelowna Accord which proposed a $5 billion dollar investment in education and social welfare programs for Indigenous Canadians over the span of 10 years, intended to reduce poverty (Joffe, 2010, p. 154; Tunney, 2017). All of this gives the impression that while the Harper government expressed its commitment to “promoting harmony and reconciliation” and expressed its regret for the harms suffered by Indigenous peoples, they were not committed to awarding Indigenous communities the right to self-determination and *requiring* the consent of these communities before the infringement of their lands. This suspicion is supported by the Indian Affairs Minister’s hesitation to apologize and his negligence to mentioning “human rights” or the UNDRIP as he argued that the government “prefers to work on practical matters in Canada rather than endorse “flowery words” of a declaration of principles” (Joffe, 2010, p. 156). However, this characterization of the UNDRIP as “flowery words” is contradicted by the Harper government’s concerns that the Declaration could lead to a veto for Indigenous communities, which is claimed to be the reason for its opposition to signing the UNDRIP and later the unwillingness to sign the outcome document in 2014 (Smith, 2015).

After the liberal government was sworn in in November 2015, the new Indigenous and Northern Affairs Minister Carolyn Bennett reaffirmed the new government’s intention to implement the UNDRIP (Smith, 2015). However, when asked how the government plans to do this “without losing control of the agenda” Bennett stressed the importance of “having a conversation”, thus once again emphasizing the importance of dialogue without committing to giving Indigenous communities substantial powers (ibid.). Yet, Prime Minister Trudeau and Minister Bennett have shown hesitation to consider FPIC as a veto, therefore straying from earlier justification for the refusal to adopt and implement the UNDRIP (Boutilier, 2017, p. 8). Despite these early indications of change, it soon became clear that the liberal government was also not as committed to FPIC as it initially seemed (Patterson, 2017). In 2016, Justice Minister Wilson-Raybould stated that the adaptation of the UNDRIP was “unworkable” and that copying it directly into Canadian law is an “overly simplistic and untenable method of protecting indigenous rights in Canada” and subsequently stated that government was looking to meaningfully implement the Declaration rather than directly copy (Boutilier, 2017, p. 1; Patterson, 2017). Nevertheless, throughout 2016 the Liberal government approved various natural resource projects without having free, prior and informed consent (Patterson, 2017). Environment Minister Catherine McKenna claimed that Indigenous peoples were meaningfully consulted and accommodated but neglected to mention consent (ibid.). Furthermore, Natural Resources Minister Jim Carr outright stated that “The federal government will not require consent from First Nations […] despite endorsing a UN declaration earlier this year that includes the principle of 'free, prior and informed consent’” (ibid.).

In May 2021, the UNDRIP was close to becoming Canadian law, even though the concerns that FPIC would give Indigenous communities a veto over natural-resource or other development projects

had not been adequately addressed (The Globe and Mail, 2021). The wording of the bill could be adjusted to eliminate this uncertainty, but it has not because the "lack of clarity allows the government to straddle the fence, and to drop hints out of both sides of its mouth" (ibid.). The substance and impact of the UNDRIP is deliberately kept ambiguous and Justice Minister David Lametti stated that the execution of FPIC "will be contextual, so there is no way to precisely define it at the outset, and there is no way it should be precisely defined at the outset" (House of Commons, 2021). All of this shows that there is a clear change in discourse and reaching of the prescriptive phase; however, the ambiguity and lack of commitment prevent the movement towards norm-compliance.

Risse et al. (2013) argue that the effect of domestic pressure on governmental discourse is especially strong in functional democracies. Ranked 24th in the world, Canada can be considered a full and working democracy (Amoros, 2022; Universität Würzburg, 2020). Therefore, domestic pressure and public opinion is expected to have a significant effect. Research conducted by the Environics Institute (2021) finds that attitudes regarding Indigenous communities in Canada are shifting. They find a growing awareness of the mistreatment suffered by Indigenous peoples and a growing willingness to say that the Canadian governments' policies are to blame for the economic and social inequality, rather than the Indigenous peoples themselves. Specifically, in 2016 Canadians were split when asked about the biggest obstacle to achieving social and economic equality, with 26 percent believing that the policies of Canadian governments form the biggest obstacles and an equal percentage of people (26%) arguing it is Indigenous peoples (ibid., p. 3). Opinions have shifted drastically since then with now 37 percent believing the biggest obstacle is the policies of Canadian governments and only 16 percent thinking it is Indigenous peoples (ibid.). This gap is likely to increase as Canadians under 40 are twice as likely to blame governmental policies for the inequalities.

Risse et al. (1999, p. 33) argue that sustainable changes in human rights conditions will only be achieved when governments are continuously pressured "from below" and "from above". Surprising about the Canadian case is the fact that changes in government position are already visible before changes in domestic discourses. Practices of "naming and shaming" are only expected to be efficient when the human rights norm is salient and the state is receiving public criticism (Risse et al., 2013, p. 284). Yet, current Prime Minister Trudeau committed to implementing the UNDRIP and giving Indigenous communities a veto over natural resource development projects in their territories during his 2015 election, thus before the shift in public opinion (Barrera, 2015). As recent as 2018, only a third of Canadians believed that Indigenous communities should have greater independence and control over their affairs (Angus Reid Institute, 2018; Hutchins, 2018). Furthermore, a third of Canadians felt that Trudeau gives too much attention to Indigenous issues and 53 percent said that "the country spends too much time apologizing for residential schools and it's time to move on" (ibid.). Interestingly, both in 2019 and 2021 Indigenous reconciliation was not considered an election priority by many voters (3.7% and 5% respectively) (Anderson & Coletto, 2019; Bourque et al., 2021). However when asked specifically about natural resource projects, almost 80 percent of Canadians in 2019 support a federal

program to help Indigenous protected areas that conserve lands and wildlife (Abacus Data, 2019). Additionally, eight in ten Canadians support long-term federal funding for Indigenous Guardian programs and altogether, the study found broad support for both climate action and Indigenous reconciliation (ibid.). Similarly, a 2021 study found that the majority of Canadian people believes that resource development on Indigenous lands require Indigenous peoples' consent and 70 percent of Canadians agree that "the development of natural resources on Indigenous land should not proceed unless the Indigenous community that lives there agrees" (The Confederation of Tomorrow, 2021, p. 2).

Altogether this section has shown clear evidence of external top-down pressure on the Canadian government to comply with Indigenous participation norms. Thus, Canada's lack of compliance cannot be explained by a lack of pressure from the transnational advocacy network. The evidence regarding bottom-up pressure is less clear. The Canadian population is becoming more positive regarding Indigenous rights as a whole, and a strong majority of Canadians believe that resource development on Indigenous lands require Indigenous peoples' consent. The expectation was that this pressure from below would be absent to be able to explain Canada's lack of compliance. However, as governmental discourse has also started to shift in recent years, it is possible that the effect of bottom-up pressure is currently taking place. To further evaluate this, the next section will look at regional differences as there are provinces who are more compliant with FPIC norms than the federal government. This might give some more insight into the effects of bottom-up pressure.

Regional differences

It is useful to consider the regional variations in public opinion as much of the contact between Indigenous peoples and the government occurs at the provincial level (Tay-Burroughs et al., 2021). There is a clear east-west divide in opinions of non-Indigenous Canadians on Indigenous peoples, with the notable exception of British Columbia (Environics Institute for Survey Research, 2016, p. 6). In general, Canadians living in Ontario, Quebec, Atlantic Canada[5], British Columbia and the Northwest Territories have the most positive opinion of Indigenous peoples across various topics (ibid.), whereas non-Indigenous Canadians in the Prairie[6] provinces are less sympathetic to the challenges faced by Indigenous communities and hold more negative opinions overall (ibid., p. 7). Furthermore, Canadians in the Prairie provinces are significantly less likely (24%) to say that the biggest obstacle to equality for Indigenous peoples is the policies of Canadian governments when compared to the rest of the country (40%) (Parkin, 2021, p. 4). Instead, Canadians in Prairie provinces were more likely to blame Indigenous communities themselves as the biggest obstacle in achieving equality (Environics Institute for Survey Research, 2016). These regional differences continue when looking at land claims and natural resource

[5] Provinces on the Atlantic coast: New Brunswick, Newfoundland and Labrador, Prince Edward Island, and Nova Scotia
[6] Region in Western Canada encompassing three provinces: Manitoba, Saskatchewan and Alberta

projects, with strong support in Atlantic Canada, Ontario, and the Territories for settling all outstanding land claims regardless of cost, while the Prairie provinces were more divided (ibid.). Allowing Indigenous communities full control over natural resources is met with strong opposition in Quebec (35%), Alberta (36%), Saskatchewan (34%), and the Territories (36%) (ibid.). This trend continues in a more recent survey conducted by Nanos Research in 2020, where respondents were asked to rate the importance of First Nations/Indigenous issues where 1 is not at all important and 10 is very important as a priority for the Government of Canada. Canadians in the Prairies rated this lower (5.6) than all other provinces (Nanos, 2020, p. 5). In almost all questions, residents of British Columbia had the most positive opinions regarding Indigenous peoples, while residents of the Prairies consistently scored the lowest. Additionally, when asked whether they support the creation of more Indigenous Protected and Conserved Areas, only 21% of Prairie residents was strongly in favour, compared to nearly 45% in B.C. (and 33% Canada-wide) (ibid, p. 86). Lastly, while a majority of Canadians agree (39%) or somewhat agree (25%) that the Canadian government should pass legislation to implement the UNDRIP, only 29% of residents in the Prairies agree compared to 43% in British Columbia (ibid., p. 16).

To summarize, there is a clear east-west divide in public opinion regarding Indigenous peoples, with British Columbia being a notable outlier. Within the context of this thesis, it is interesting whether this regional divide is reflected in governmental discourse and legislation. Therefore, the following section will compare statements and legislation from the provincial governments. The expectation is that positive attitudes and salience regarding Indigenous rights and participation norms will provide pressure "from below" and affect governmental discourse, which subsequently influences legislation. The previous paragraph indicated that residents in the Prairie provinces consistently hold the most negative views of Indigenous rights and issues. These negative views are echoed by former Manitoban premier Brian Pallister[7] who characterized the divide between Indigenous and non-Indigenous people over illegal night hunting as "the makings of a race war" (Kives, 2021). Furthermore, in 2020 the Premier stated that prioritizing the Indigenous population for COVID-19 vaccinations "puts Manitobans at the back of the line", implying that Indigenous peoples are not Manitobans (ibid.). Regarding Indigenous participation, the Pallister government cancelled the support for self-government negotiations and refused to invite the Manitoba Métis Federation to discussions to develop a provincial mineral development protocol for projects on Indigenous territories (Indigenous Watchdog, 2020). Pallister further stated that the UNDRIP "would enshrine in Canadian law renewed public signals that are already encouraging veto-based demands, as well as illegal blockade actions – in defiance of court orders" (Pallister, 2020). He argues that the government is moving forward on "developing a coherent framework for how to respectfully consult and accommodate Indigenous concerns" but neglects to mention consent (ibid.). Pallister further asserts that a balance should be achieved "that recognizes fundamental obligations and Crown duties, holds governments to account, empowers accommodation

[7] Pallister was the premier of Manitoba from 2016-2021

and reconciliation and recognizes that absolute veto powers do not exist" (ibid.). According to the Indigenous Watch Dog, Pallister's underlying argument is that "UNDRIP will undermine the legal, investment and regulatory cohesion that provide the foundations to advance Canadian society – even if it's on the backs and at the expense of Indigenous people. In other words, he is saying that Aboriginal rights and title don't count. As he and the province continue to say, "This land is our land, not yours"" (Indigenous Watchdog, 2020).

In Saskatchewan, Premier Scott Moe ironically stated he wants the province to be a "nation within a nation" through an increase in autonomy in areas such as policing, taxation and immigration, as he argued "When the federal government implements policies that are detrimental to our province, our government will continue to stand up for Saskatchewan people" (A. Hunter, 2021). Even more ironic was his complaint that he was not consulted on decisions made by the federal government which he argued to be "quite harmful" to the province (ibid.). Similar arguments were used when Ontario Premier Doug Ford, Alberta Premier Jason Kenney, Saskatchewan Premier Scott Moe, Manitoba Premier Brian Pallister and New Brunswick Premier Blaine Higgs wrote a joint letter to Prime Minister Justin Trudeau to include an obligation to consult with the provinces in the implementation of the UNDRIP (The Canadian Press, 2021). Furthermore, they asked for amendments that would clarify that bill C-15 (which implements the UNDRIP into Canadian law) would not change provincial laws or challenge provincial jurisdiction (ibid.).

On the opposite end of the spectrum, residents of British Columbia were shown to consistently hold the most positive opinions regarding Indigenous rights and participation norms. However, the governmental discourse has gone back and forth. In 2005, then premier Gordon Campbell, formed an accord with Indigenous communities called A New Relationship in which he accepted Indigenous self-government and emphasized reconciliation (J. Hunter, 2007). Further, Campbell endorsed the Kelowna accord – which involved extensive investments to improve Indigenous lives – and characterized it as "Canada's 'moment of truth.' […] It was our chance to end the disparities in health, education, housing and economic opportunity" (ibid.). However, a bit more recently, Amnesty International argued for the suspension of all construction approvals related to a megaproject in northeast B.C., stating that it threatens the human rights of Indigenous peoples (The Canadian Press, 2016). Energy and Mines Minister Bill Bennett argued that the report ignored the "benefits associated with the project" such as the jobs it creates – especially for Indigenous peoples. He further stated that "This group and many of the groups want to focus on the negatives, without ever acknowledging all the positive things" (ibid.). In 2012, former B.C. premier Christy Clark wrote a letter to Alberta Premier Alison Redford regarding pipeline projects across their provinces (BC Gov News, 2012). This letter outlined the requirements needed for support from the B.C. government, including "Legal requirements regarding Aboriginal and treaty rights are addressed, and First Nations are provided with the opportunities, information and resources necessary to participate in and benefit from a heavy oil project", thus failing to acknowledge the requirement for consent (ibid.). The position of the B.C. government seems to have shifted in more

recent years as current Premier John Horgan stated that "Free, prior and informed consent is what we would expect from our neighbours" (Fletcher, 2019) and argued that he would try to "make amends for a whole host of decisions, that previous governments have made to put Indigenous peoples in an unwinnable situation. To talk about resource sharing when all the resources are gone is not true reconciliation." (Linnitt, 2017). Horgan has further acknowledged that "First Nations in the region have entrenched constitutional rights. Not just the requirement for consultation and accommodation […] but they have entrenched constitutional rights to practice hunting and fishing as before.", thus taking a considerably different stance than his predecessors (ibid.). Perhaps this explains how British Columbia became the first jurisdiction in Canada to pass the UNDRIP legislation[8], while provincial governments of Alberta, Saskatchewan, Manitoba, Ontario, Québec and New Brunswick still oppose Bill C-15. (Indigenous Watchdog, 2022; King, 2020). Furthermore, as recent as June 2022, the B.C. government entered a first-of-its-kind "consent-based" agreement with a First Nation over land use, which changes the way resource projects progress in this territory (The Canadian Press, 2022). All of this suggests that British Columbia is at the front of the movement. They were the first to implement the UNDRIP and the first to sign a consent-based treaty. Considering the recent nature of this last agreement, it might be too early to draw any conclusions. The difference in public opinion between the regions seems to be reflected in the opinions by governments and their compliance with norms of Indigenous participation; however, the evidence is not consistent and extensive enough to draw solid conclusions. Changes are ongoing and it will be necessary to compare progress in the Prairie provinces with B.C., the Northwest Territories, and Atlantic provinces over a longer time period to be able to confirm the effects of public opinion and discourse.

To summarize this section, there has been a significant shift in the governmental position regarding the UNDRIP and FPIC, from the Harper government refusing to acknowledge the norm as anything more than "aspirational" to the Trudeau government committing to implementing the UNDRIP very early on. This is interesting as this shift cannot be explained by public opinion, which only started to shift in the late 2010s. However, a closer look at the Trudeau governmental discourse revealed that despite their public support for the UNDRIP, their policies mainly revolved around maintaining a dialogue rather than requiring consent and thus do not reflect full compliance with participation norms. On the provincial level, public opinion is very clearly split between the eastern and western provinces (with B.C. as a notable exception). Public opinion has consistently been the most positive regarding Indigenous rights in British Columbia. As this province is also the most compliant with Indigenous participation norms, it suggests that bottom-up pressure is successful in pressuring governments towards compliance. This indicates that these changes are also likely to occur at the federal level as public

[8] The Northwest Territories will complete their implementation plan in summer 2022 (Executive and Indigenous Affairs, n.d.)

opinion continues to become more positive towards Indigenous peoples. However, the development of a "consent-based" agreement with a First Nation over land use has occurred so recently that longer-term evaluation is needed to determine its compliance with FPIC norms.

The first hypothesis stated that the lack of compliance with participation norms could be explained by a lack of external pressure on the Canadian government. This section has shown that top-down pressure has consistently existed and can therefore not explain the failure to comply. Bottom-up pressure is growing and seems to be pushing to government towards further compliance. Whether this pressure is able to push to government towards full compliance and whether this change is sustainable remains to be seen, but the developments thus far fall in line with Risse et al (2013, p. 14) and their expectation that external pressure on a state will only be successful if the target believes in the social validity of the norm. Thus, as Indigenous participation norms gain salience among the Canadian population, naming and shaming practices are expected to become more successful and the Canadian government is expected to move towards norm compliance.

4.3 Decentralization

The first half of the analysis builds on the premise that the substance and operationalization of Indigenous participation norms are clear and unambiguous, a notion which is challenged by various scholars (e.g. Papillon & Rodon, 2020; Van Kersbergen & Verbeek, 2007). Instead, these scholars argue that contestation over Indigenous participation norms creates the space for these Indigenous actors to take control of the institutionalization process and challenge state-centric views of FPIC. Empirical analysis shows significant variations in the interpretation and operationalization of FPIC and consent between countries (Papillon & Rodon, 2020). The effect this has on compliance with participation norms depends on the actors that are awarded the agency to define the interpretation of these norms. The expectation here is that Canada's lack of compliance means that the government has implemented a weaker interpretation of FPIC and Indigenous communities have insufficiently been able to take control of the process. This has led to a process of Indigenous participation in resource projects that centres around the government rather than Indigenous actors, leading to reduced norm compliance.

The Canadian government's weak interpretation of participation norms was confirmed when the UNDRIP was implemented into Canadian law, as the wording of the bill was deliberately kept ambiguous. Justice Minister David Lametti stated that the execution of FPIC "will be contextual, so there is no way to precisely define it at the outset, and there is no way it should be precisely defined at the outset" (House of Commons, 2021). However, this also allows for significant regional variations. As the government's interpretation of participation norms is weak and ambiguous, the expectation is that a less formalized process allows more space for Indigenous actors to guide the process and thus leads to more compliance. Therefore, this section will look at different resource projects in Canada and

determine whether the lack of compliance can be explained by a state-centric participation process and if compliance is better in projects where Indigenous actors shape the process.

The analysis so far has focused on FPIC and the state's duty to consult Indigenous peoples. One way in which this occurs is through Indigenous peoples' participation in Impact Assessments (IA): a statutory instrument for predicting and mitigating the impacts of natural resource exploitation (Larsen, 2018, p. 208). This section will start with describing the type of IA process that leads to full compliance with Indigenous participation norms. The following section will consider the circumstances that are needed for this procedure and discuss the role of norm ambiguity and unclear operationalization in the institutionalization of this Indigenous participation process.

Larsen (2018) created a "Scalar framework for Indigenous participation in IA" to evaluate different levels of Indigenous participation in IA. This framework recognizes four different degrees of influence ranging from notification (no influence) to community-owned (total influence) (ibid., p. 211). Through various case studies, Larsen (2018, p. 208) finds that Indigenous participation is most meaningful "through IA co-management that takes places directly with the state and throughout all IA phases, complemented with strategic community owned IA". This study specifically finds that the ability for Indigenous peoples to meaningfully participate in IA depends largely on state recognition of Indigenous peoples' right to land and the political recognition of their right to self-determination (ibid., p. 216). The only IA regime that allowed Indigenous peoples to wholly reject projects offered consistent co-management throughout the IA phases (ibid., p. 217), therefore showing that this continuous involvement is necessary for the full compliance with Indigenous participation norms. This finding is reinforced by Reo et al. (2017, p. 65) who find that consent or consultation has to take place at the conceptual state of the planning of a project to ensure that Indigenous peoples' governmental and political authority will be respected, and also confirmed that in cases where Indigenous peoples were involved throughout the entire process, Indigenous nations were more likely to be acknowledged as legitimate governments rather than special interest groups.

The next part of the analysis will look at successful projects and determine the circumstances that are needed to establish a successful co-management process. The presence of these factors in successful cases might offer some insight into the circumstances that are preventing general compliance with participation norms at the federal level. While the duty to consult has been established in an overarching federal level framework, natural resource management falls under provincial jurisdiction and the guidelines on consultation vary considerably between provinces (Bains & Ishkanian, 2016, p. 7). A report published by the Gwich'in Council International considered the factors that influence the effectiveness and limitations of Indigenous-led impact assessments (Gibson et al., 2018). They found that it was often very difficult for Indigenous groups to establish the consent conditions within the collaborative framework when there was not a legislated framework or nation-to-nation agreement outlining the joint decision-making process with the state, as the Crown will still have the ultimate

decision-making power in these instances (ibid., p. 19). Additionally, analysis by Armitage et al. (2011, p. 1003) showed that the existence of a policy environment "with commitment from higher order institutions to foster knowledge co-production and learning" is needed to facilitate the co-management of resource projects.

An analysis of the successful participation of the Tłı̨chǫ government in the environmental assessment for the proposed Fortune Minerals NICO poly-metallic mine project in the Northwest Territories revealed that both the Tłı̨chǫ Land Claims and Self-Government Agreement were key in the formation of the co-management process (Gibson et al., 2018, p. 20). It is specifically this governance framework that has established a clear process rather than needing to negotiate the terms on a case-by-case basis (ibid.). This created space for Indigenous actors within and gave them a lot of agency in the process. Altogether, the Tłı̨chǫ government held a lot of power during the process and was consistently treated as an equal party.

It is thus especially in territories with land claim agreements or where Indigenous rights and self-determination have been clearly established that the process for impact assessment review is guaranteed (Gibson et al., 2018). British Columbia forms an interesting case as it houses hundreds of First Nations communities but has very few historic treaties and through competing and overlapping claims Indigenous communities have claimed ownership of the whole province as traditional territory (Bains & Ishkanian, 2016, p. 15; Todd, 2021). This means that the duty to consult could apply to the entire province. However, in comparison with other provinces, B.C. policies are severely lacking as it is one of only three jurisdictions that does not explicitly state Indigenous communities' responsibility to participate in the consultation process (ibid., p. 7). There is also no established time frame for consultation and there is some controversy regarding the Crown delegating the responsibility to consult to outside parties (ibid., p. 12; M. Simmons, 2021). The lack of existing treaties and land claim agreements have caused a development in community-owned IAs and IBAs reflecting an absence of the state and a reliance on direct negotiations with developers (Larsen, 2018). The lack of existing framework forces Indigenous communities to create a process that is based on their values; however, the outcomes may not be accepted by the state.

In the development of the Orca Sand and Gravel Project, the proponent approached the 'Namgis First Nation three years before the Environmental Assessment process began and prior to the planning stages of the project (Natural Resources Canada, 2011; Noble, 2016). This enabled both parties to develop a working relationship and led to a project design that the Indigenous community considered to be appropriate. The agreement drafted by both parties gave the 'Namgis power to veto the project up to the conceptual design stages of the mining operation, which far exceeds the obligations under provincial and federal law (Noble, 2016, p. 12).

In the case of the Squamish Nation, they created their own impact assessment process to compensate for the lack of authority awarded by the law to create an enforceable IA process (Papillon

& Rodon, 2020). This process operated independently of, and parallel to, the provincial and federal EA processes for this project (Noble, 2016, p. 3). This worked because the project proponent was willing to work with them, but in other cases nations have been disregarded by industry and government (Gibson et al., 2018). This highlights that even though in some cases unilateral IA processes might be respected, to ensure the compliance with Indigenous participation norms, governance frameworks need to be created which establish the Indigenous peoples' right to collaborate with the state in the entire assessment process.

The evidence presented in this section shows that a co-managed impact assessment is the best way to ensure Indigenous peoples in Canada can participate and consent to resource projects that impact their lands. The previous section showed that successful IA co-management processes require direct cooperation with the state throughout all phases of the process, which is most likely to occur in contexts with an established and legally binding governance framework (Gibson et al., 2018, p. 21; Larsen, 2018, p. 208). Provinces and territories with land claim agreements have institutionalized the requirements for the government to involve Indigenous communities in resource development projects. For example, Tłı̨chǫ Land Claims and Self-Government Agreement outlines the conditions for the environmental impact assessment and review process and establishes the requirement for 50 percent of the members of the Environmental Impact Review Board to be Indigenous; the requirement for affected communities to be consulted throughout the entire process; and most importantly when a proposed projected is located on Tłı̨chǫ lands, the Tłı̨chǫ Government is required to issue a recommendation that the project be approved, with or without conditions, or rejected (Tłı̨chǫ Land Claims and Self-Government Agreement, 2003, pp. 182–186). The Northwest Territories are also one of the only examples in which Indigenous peoples were allowed to completely reject projects and was thus the most compliant with FPIC (Larsen, 2018). This contradicts the expectation that the lack of institutionalization due to ambiguity and norm contestation would increase norm compliance because it allows Indigenous peoples to control the process and design their own process of participation. Instead, these findings seem to fall somewhat in line with Risse et al (2013, p. 19) who argued that norm compliance is more likely in situations with centralized rule implementation.

The examples from British Columbia showed that it is possible for Indigenous participation and compliance with FPIC to occur even when the institutional frameworks are lacking; however, this depends on the willingness of the project proponent to involve Indigenous communities. This could therefore never lead to full compliance with FPIC as Indigenous peoples are dependent on the industry and the government to engage with them. As O'Faircheallaigh (2017, p. 1182) states "The definition of impacts and the choice of IA methods help shape, in turn, IA findings and so heavily influence the information on which regulators or politicians decide whether and under what conditions projects will be approved.". When the agents who construct the IA methods are the same as the agents who decide what to do with the findings, norm compliance is more likely to occur. Following from the literature,

the expectation was that a weak operationalization of FPIC would leave space for Indigenous communities to take control over the process and would subsequently lead to more compliance. The lack of norm compliance in the Canadian case was therefore expected to be caused by a too state-centric process of participation in IA. Contrary to the expectation, the evidence in this section showed that a more institutionalized process with more state involvement leads to increased compliance with participation norms. Thus, Canada's failure to comply is not due to a too state-centric process of participation. Instead, a more formalized process with a continuous role for the state is needed to increase norm compliance.

4.4 Compliance paradox

As discussed in the theoretical section of this thesis, Lightfoot (2010, p. 92) argues that common law countries that were founded on the Doctrine of Discovery are stuck in a difficult position between their colonial past and their postcolonial image. The expectation is that this will create a paradoxical situation in which public officials will openly support the UNDRIP and the Indigenous norms of participation, while simultaneously stating that these norms are merely aspirational and do not actually award Indigenous peoples the right to self-determination.

The Canadian government has clearly shown support for 'soft' rights through the implementation of legislation such as the Indigenous Language Act, adopted in 2019 (Government of Canada, 2019a). Following this, the First Peoples' Cultural Council received $14.6 million for language projects from the federal government in 2021 (First Peoples Cultural Council, 2021). Furthermore, the government contributed more than $10 million to the funding of language projects in Ontario from 2019-2021 (Deer, 2021). Altogether, the federal government has committed to spending $333.7 million over five years for Indigenous languages (ibid.). The 2021 federal budget further reserved $275 million over 5 years for Canadian Heritage to support Indigenous peoples in the restoring and strengthening of Indigenous languages as a foundation for culture and identity, another $108.8 million for re-establishing Indigenous cultural spaces, and $14.9 million over 4 years for the preservation of Indigenous heritage through archives (Government of Canada, 2021a). This shows a strong commitment to the protection of 'soft' rights. On the other hand, the discussion in section 4.1.2 of this thesis showed that while the Emissions Reduction Program states that the government will work in partnership with Indigenous communities, these communities' right to self-determination is not mentioned (Environment and Climate Change Canada, 2022). Furthermore, there are no clear mechanisms in place for citizens to report FPIC violations. This seems to indicate that there is indeed a progression on 'soft' rights, while 'hard' rights are still controversial.

Thus, the right to self-determination remains an ongoing struggle for Indigenous communities; however, some argue that the pursuit itself is self-defeating as seeking recognition from the colonial oppressor requires First Nations to implicitly accept the sovereign authority of the Crown as legitimate (Youdelis, 2016, p. 1375). The struggle for co-management or self-government as discussed in this thesis takes place within the Canadian legislative system and thus can impossibly lead to real self-determination. While the previous section argued that co-management is especially likely to lead to meaningful co-management when it takes place in cooperation with the state, some critics argue that it restricts Indigenous decision-making because Indigenous communities often only get an advisory status (Mabee & Hoberg, 2006; Youdelis, 2016). Furthermore, integrating these co-management processes within existing institutional structures has created a tendency to "view co-management as a series of technical problems (primarily associated with the question of how to gather "traditional knowledge" and incorporate it into the management process), rather than as a real alternative to the existing structures and practices of state management" (Nadasdy, 2005, p. 216; Youdelis, 2016, p. 1377) and thus neglects to challenge the existing power relations that led to the unequal treatment of Indigenous peoples.

In 2021, the Canadian parliament implemented an act which outlines Canada's obligation to implementing the UNDRIP and changing the laws to be consistent with the Declaration (Government of Canada, 2021b). The action plan for the implementation has not been published yet, but to comply with the UNDRIP it must include the right to self-determination for Indigenous peoples. The UNDRIP takes a contradictory perspective on self-determination by stating that Indigenous peoples' right to self-determination should be respected equal to all other people; however, Indigenous self-determination "cannot disrupt the sovereignty and territorial integrity of existing UN Member States in their exercise of that right" (S. Lightfoot, 2021, p. 972). Through this statement, the UNDRIP changes the international understanding of self-determination by disconnecting sovereignty and self-determination for Indigenous peoples to de-colonise "away from its state-centric form in order for human rights to be respected" (ibid., pp. 974-975). The understanding of self-determination needs to be broadened to accommodate Indigenous self-determination without creating a two-class system where Indigenous self-determination has to fit within the existing structure (ibid.).

To summarize, this perspective questions the possibility of achieving Indigenous self-determination within the existing system. However, some argue that self-determination is possible if we step away from Westphalian notions of 'sovereignty' and 'territoriality' (S. Lightfoot, 2021, p. 971). The Westphalian system created an international system "where power became vested in the bounded territory of states" (Shadian, 2010, p. 503). In this system, the state formed the base of legitimate sovereignty. Indigenous communities often exist across these constructed borders, which, in the case of the Inuit, let them to seek self-determination through the Inuit Circumpolar Council as a trans-national NGO which seeks sovereignty as a political collectivity (S. Lightfoot, 2021, p. 977; Shadian, 2010, p.

490). Through this, Indigenous actors are redefining the 'inside-outside' boundaries of the global political system as constructed throughout Westphalia (Shadian, 2010, p. 504).

The Haudenosaunee Confederacy[9] takes this even further by asserting themselves as a sovereign actor in the international space (S. Lightfoot, 2021, p. 977). As the oldest continuously functioning constitutional democracy, the Haudenosaunee have successfully negotiated treaties with the European colonialists which provides evidence that they were – at least at one point – considered a sovereign actor (ibid., p. 978). They continue to exert their claim of sovereignty and self-determination by issuing and travelling with their own passports. Since the late 1970s, these passports have been recognized by many countries, including Canada (ibid., p. 982). The international acceptance of this passport reveals a more nuanced understanding of self-determination beyond the commonly accepted state-centric idea. Changing the common understanding of sovereignty to involve plural sovereignty and multi-level citizenship is challenging, but the Haudenosaunee case shows that it is possible and already occurs (ibid., p. 988).

In conclusion, the current practices of the Canadian government seem to follow Lightfoot's theory of overcompliance (2010). Many positive steps are taken in the form of public apologies (Canadian Press, 2019) and extensive investments in Indigenous languages and culture (Deer, 2021; First Peoples Cultural Council, 2021; Government of Canada, 2021a) while progress on 'hard' rights is still resisted. However, true self-determination might not be possible within the existing system as it is founded on the illegitimate notion that the Canadian government owns the land. Thus, in order to have genuine Indigenous self-determination, it might be necessary to separate Westphalian 'sovereignty' and 'territoriality' to create plural sovereignty. The Haudenosaunee case shows it can be done.

[9] The confederacy is made up of the Mohawks, Oneidas, Onondagas, Cayugas, and Senecas and was founded as a way to unite these nations and create a means of decision-making (Haudenosaunee Confederacy, n.d.). They have reservations throughout upstate New York, southern Ontario and south-eastern Quebec (S. Lightfoot, 2021, p. 978)

5. CONCLUSION

5.1 Conclusion

Climate change exacerbates the problems already faced by vulnerable Indigenous communities, such as the loss of land and resources, human rights violations, political and economic marginalization and discrimination (United Nations Permanent Forum on Indigenous Issues, n.d.). To address these issues, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted in 2007 (UN, n.d.). After initially opposing the declaration, Canada officially adopted the UNDRIP in 2016 and on June 16 2021 the Parliament of Canada passed an act which outlines Canada's obligation to uphold the human rights of Indigenous peoples affirmed by the UNDRIP (Assembly of First Nations, n.d.; Fontaine, 2016). However, this has so far failed to translate into meaningful participation and self-determination for Indigenous peoples. Therefore, this thesis aims to answer the following question: *Why has Canada failed to comply with norms on Indigenous participation and FPIC in the context of its green energy transition?*

The analysis confirmed that the current practices fall in line with Lightfoot's theory of overcompliance (2010). Concretely, this thesis found evidence of support for soft rights (i.e. extensive investments in Indigenous languages and culture), while resisting progress on hard rights such as self-determination. Thus, Canada has failed to comply with norms on Indigenous participation and FPIC in the green energy transition due to the limitations in its legal system that do not allow for plural sovereignty. This hinders their support for Indigenous self-determination as it would threaten the legitimacy and sovereignty of the Canadian state.

5.1.1 Findings

To answer the research question, three different hypotheses were formulated and subsequently tested using process tracing. The results of this analysis will be briefly summarized and interpreted here.

The first hypothesis looked at the effect of external pressure provided by domestic civil society and the transnational advocacy network. The expectation was that Canada's failure to comply with Indigenous participation norms could be explained by the lack of external pressure. Two different mechanisms were analysed to test this hypothesis. The first part looked at the presence of positive or negative incentives created by external actors, specifically those aimed at targeting Canada's reputation. The analysis found significant pressure from actors such as the UN Human Rights Commissioner, Amnesty International and the UN Committee on the Elimination of Racial Discrimination. All of these actors questioned Canada's reputation as a global human rights protector. Following the theoretical framework, the expectation was that the absence of this kind of pressure would explain Canada's lack of compliance. The first mechanism was therefore not able to explain the research question.

The next part studied persuasion and discourse and its effect on Canada's lack of compliance. The expectation was that Canada's failure to comply can be explained by the inability of domestic civil society and the transnational advocacy network to change governmental discourse and create norm salience amongst the population. The analysis revealed that the position of the Canadian government has somewhat shifted over time. When the UNDRIP was adopted, the Canadian government expressed that it was committed to harmony and reconciliation, but FPIC was considered to be merely aspirational. The governmental discourse became slightly more positive and constructive around the transition to the liberal Trudeau government; however, the emphasis was still primarily on dialogue and accommodation, rather than consent. When the UNDRIP was close to being implemented into law, the government made the deliberate decision to keep the substance and impact of the UNDRIP rather ambiguous.

Domestic pressure and public opinion are expected to have a significant effect on government decisions in a functioning democracy. The analysis showed that attitudes regarding Indigenous communities in Canada are changing and issues regarding Indigenous self-determination and FPIC are becoming more salient. Altogether there was a clear shift from primarily negative to primarily positive statements, but the ambiguity and lack of commitment prevent a transition from the prescriptive to the compliance phase. This change cannot be explained by public opinion as the shift in governmental discourse predates the changes in public opinion. However, the ongoing changes in public opinion might be able to explain Canada's failure to fully comply with Indigenous participation norms. Perhaps this is an ongoing process and the norms have not yet become salient enough for the population to seriously pressure the government into compliance. Developments in British Columbia reinforce this suspicion as this province is the most compliant with Indigenous participation norms, while also consistently holding the most positive opinions regarding Indigenous rights. This suggests that bottom-up pressure is successful in pressuring governments towards compliance and changes are also likely to occur at the federal level as public opinion continues to become more positive towards Indigenous peoples.

To summarize the findings, the first hypothesis stated that the lack of norm compliance was due to a lack of consistent pressure on the Canadian government. The analysis showed that top-down pressure has consistently existed and can therefore not explain the failure to comply. Pressure provided by domestic civil society is increasing as FPIC norms become more salient. The developments in B.C. suggest that bottom-up pressure can push the government towards compliance; however, the development of a "consent-based" agreement with a First Nation over land use has occurred so recently that longer-term evaluation is needed to determine its compliance with FPIC norms. Additionally, the limitations presented by Canada's legal system complicate compliance with FPIC which, combined with the weaker bottom-up pressure, might explain the lack of compliance so far. As pressure 'from below' increases, this might be enough to push the Canadian government towards norm compliance.

The second hypothesis concerns the state-centric process of Indigenous participation and the influence this has on compliance with FPIC. The analysis found that a co-managed impact assessment is the best way to ensure Indigenous peoples in Canada are able to participate and consent to resource projects that impact their lands. Successful co-management requires direct cooperation with the state throughout all phases of the process. This is more likely to occur in cases with an established and legally binding governance framework and a way for Indigenous peoples to report non-compliance. The Tłı̨chǫ government case showed that successful IA co-management requires direct cooperation with the state throughout all phases of the process, which is most likely in contexts with an established and legally binding governance framework. Thus, contrary to the expectations that a lack of formal frameworks would enable Indigenous peoples more agency, this thesis finds that stronger institutional frameworks increase the chances that Indigenous peoples are seen as an equal partner throughout the whole process and thus increases compliance. The examples from British Columbia showed that Indigenous peoples can unilaterally perform an IA if the project proponent is willing to engage; however, the results are often not accepted by the state. Perhaps this is because state agents are more likely to accept the outcome of an IA process when they have also been involved in the process and the construction of the methods. Thus, Canada's failure to comply is not due to a too state-centric process of participation. Instead, a more formalized process with a continuous role for the state is needed to increase norm compliance.

Lastly, the third hypothesis studied the effect of Canada's colonial history on its failure to comply with participation norms. This thesis found support for the hypothesis that Canada would be openly supportive of 'soft' rights, while resisting change in 'hard' rights. Specifically, this thesis found ample support by the Canadian government for the restoration and protection of Indigenous languages, culture, and identity while neglecting to mention Indigenous self-determination in the Emissions Reduction Program. The third hypothesis is therefore accepted.

This part of the analysis also considered the possibilities for Canada to overcome its challenges following from its current legal system and found that there are examples of nations who were able to challenge the Westphalian notions of sovereignty and assert themselves as sovereign actors in the international space. This suggests it might be possible for Canada to move beyond a state-centric notion of self-determination and accept plural sovereignty.

Lastly, as suggested earlier in this chapter, it is possible that the overcompliance mechanism affects the way that some of the other mechanisms studied in this thesis operate. The evidence for the first hypothesis indicated that there is an effect of public opinion on norm compliance, but somehow this has not led to full compliance yet. Considering bottom-up pressure has only recently started to increase, it is possible that the combination of the compliance mechanisms with the weaker bottom-up pressure have so far hindered the effects of this mechanism.

5.1.2 Societal and theoretical relevance of the findings

The livelihoods of Indigenous communities are greatly affected by the effects of climate change and many of the renewable energy projects in Canada are developed on Indigenous lands. Thus, these projects have the potential to contribute to the harm done to Indigenous communities. An important step in preventing this is ensuring compliance with the norms of Indigenous participation and FPIC as established in the UNDRIP. After initially opposing the Declaration, the Canadian government adopted the Declaration in 2016 and is currently working to implement it. So far, compliance with FPIC has been limited. This thesis aimed to find out which factors are hindering compliance and simultaneously test the spiral model of human rights compliance in a Western country with a strong human rights reputation and very little material vulnerability.

The first part of the analysis explored the spiral model of human rights change. This thesis found no evidence of the effects of incentives on norm compliance. The scope conditions outlined by Risse et al. (2013) already stated that the effects of this mechanism would be the strongest in states with strong material or social vulnerability, however, the expectation of this thesis was that Canada would experience moral vulnerability and an incentive to comply due to the threat of reputational loss. This study did not find any evidence to support this, however, the effect might still apply to states with more material and social vulnerabilities.

Furthermore, this thesis looked at the effects of norm ambiguity on compliance with FPIC and found that a larger role for the state and a more state centric and more institutionalized approach is actually beneficial in ensuring meaningful participation for Indigenous peoples. This appears to fall in line with the Risse et al. (2013, p. 19) who argued that norm compliance is more likely in a centralized implementation system. This should be further explored to determine if this holds true in more cases as it could offer important insight into ways to ensure compliance with Indigenous participation norms.

The analysis further showed that Canada's failure to comply is due to its system being founded on the Doctrine of Discovery which makes it impossible for the government to accept Indigenous self-determination without inadvertently harming the legitimacy of Canada as a sovereign state. It moves them into a paradoxical situation where they are on the one hand strongly supporting the protection and conservation of Indigenous culture and languages – because it matches their intended reputation as a human rights defender – while simultaneously resisting progression on issues regarding Indigenous self-governance and self-determination. These findings are important as it clearly outlines an area in which change is necessary for progress to occur. The mechanisms outlined in the spiral model might still have an effect in this case, but tangible progress is hindered by the limitations of Westphalian notions of sovereignty. Especially the effect of discourse and persuasion might still apply, but the effects could be limited or change could be slower due to the complicated settler-colonial history. Specifically, this thesis found ambiguous evidence regarding the effects of public opinion on governmental statements and legislation, however, much of the evidence was very recent so it might be too early to draw conclusions.

A failure to consult Indigenous peoples leads to increased conflict (Zentner et al., 2019), violence (Canadian Press, 2020), and blockades (BBC News, 2020). FPIC and norms of Indigenous participation are argued to be at a critical juncture in Canada with most governments now recognizing it in principle, but implementation remains uncertain and contested (Papillon & Rodon, 2020). To guide this process, increased understanding of the mechanisms that contribute to norm compliance is important. In this case, this thesis showed the effects of the Doctrine of Discovery and Canada's colonial history on the current workings of the legal system, and subsequently, Canada's paradoxical approach to norm compliance. It is now important to work towards a new understanding of sovereignty and develop ideas regarding multi-level citizenship and plural sovereignty in Canada, but more research is needed.

5.2 Reflection on methodology

The third section of this thesis already discussed some of the limitations of case study research. Case studies are a useful tool to investigate complex situations with multiple variables (Queirós et al., 2017). They are appropriate for challenging current theoretical assumptions and exploring new ones. However, the small number of cases (n=1) limits the external validity, and the nature of a case study makes replication very difficult, therefore reducing the reliability of the research. This are limitations inherent to the case study method, but there are other limitations that apply specifically to this case study.

To improve both the validity and the reliability of this thesis, it would have been beneficial to include a triangulation process – using multiple sources of evidence (Quintão et al., 2020, p. 269). Specifically, it would have been beneficial to include interviews with both Indigenous peoples and Canadian government officials. Furthermore, this thesis largely depends on the interpretation of evidence from various data sources and as a result, the quality of this thesis is largely dependent on the researcher's impartiality. The reliability of the thesis would have been improved through researcher triangulation – i.e. the involvement of multiple researchers who analysed the same sources, thus ensuring that the results are replicable – however, this was not feasible due to the limitations of a master's program (ibid.).

Further, while the focus on a single case allowed for a more in-depth analysis, extending this research to other similar cases would strengthen the findings. This is especially important as it is difficult to establish cause-effect connections in case studies (Queirós et al., 2017). The time-consuming nature of this type of researched hindered the addition of more cases, but to draw stronger, generalizable conclusions, this study has to be extended to other countries.

5.3 Future research

Following from the previous section, the recommendation for further research is to replicate this study in other countries and see if it holds up. It would be particularly interesting to see if the findings apply

to the other three countries who initially refused to adopt the UNDRIP (USA, Australia, New Zealand). It would be especially interesting as these are also common law countries with a settler-colonialist history so it would improve the value of the findings of this study if they also applied to similar countries. Moreover, it would be relevant to see if the same patterns in public opinion and discourse are visible in these countries as it could suggest that these factors do affect compliance but are hindered by the limitations of the settler-colonial legal system.

In line with this, this thesis identified multiple changes currently taking place in Canada. The UNDRIP is in the process of being implemented and institutionalized, and public opinion is changing. It would be interesting to repeat this study in a few years and see whether these changes significantly impacted the level of norm compliance.

Lastly, this thesis showed that Canada has taken a paradoxical approach towards compliance due to its colonial history and the ensuing legal system. To be able to continue progress in Canada (and possibly other settler-colonial nations) it will be important to expand the current understanding of sovereignty – as this is threatened by Indigenous self-determination – and instead work towards a model of plural sovereignty and multi-level citizenship, but more research is needed to achieve this.

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