

The *Násávárre* Indigenous–Industry Dialogue: Knowledges and Agency in the Permit Process

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Abstract

This paper offers an insight into a single case study, the permit process of the Nasa mountain – *Násávárre* mining case in Nordland County, Norway. At *Násávárre*, the Chinese-owned mining company Elkem plans to open a pit mine to extract quartz. The area in question has the highest reindeer density in Nordland County, and the proposed mining operation would affect five Indigenous Sámi reindeer herding districts on both the Norwegian and the Swedish side of Sápmi. Despite incentives aimed at improving corporate respect for Indigenous rights such as the OECD Due Diligence Guidance, Indigenous peoples often face asymmetric power relations and uneven playing fields, particularly in terms of costs and capacity to respond to corporate positions on and understandings of Indigenous knowledges and rights. The knowledge base of this encounter, as it is experienced by the reindeer herders, can be discussed in terms of structural and agential factors. Our analysis focuses on the extent to which the reindeer herders have been enabled to engage with Elkem, with a particular emphasis on the reindeer herders' experience of how their knowledges have been assessed by the company. The work is based on a review of case documents.

Keywords: *Násávárre, reindeer herding, quartz mining, permit process, due diligence, corporate dialogue, reindeer herding knowledge, structural factors, Indigenous agency*

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1. Introduction

1.1 The topicality and the right holders

Despite the development of international law recognizing the rights of Indigenous peoples and ethical standards and guidelines that seek to govern the behavior of corporations,¹ Indigenous peoples like Sámi reindeer herders experience that extractive industries add heavily to already exploited land areas.² The relationship to ancestral lands and the ability to care for, use, and live on them is the very basis for many Indigenous social, economic, legal, cultural, and spiritual systems, and therefore closely connected to knowledge transmission and group identity.³ In the Nordic countries, politicians and industry highlight the prospects of economic opportunities and the need for resources like minerals, wind, or similar for a green shift.⁴ This rush on resources has led to many longstanding conflicts between Indigenous communities on one side and state/industry on the other. Often these conflicts are about the way decision-making happens and the unequal power relations during the process that give rise to distrust, disagreement, and conflict. The four most identified causes of conflicts are according to Lindahl et al.⁵ socio-environmental impacts on land, waters and livelihoods, lack of monetary compensation, distrust of mining companies and governments and lack of participation in decision-making processes. O’Faircheallaigh⁶ underlines that very few Indigenous peoples trust corporations or state regulators to protect Indigenous interests. In this respect, the Nasa Mountain/Nasafjell – hereafter Násávárre – in Nordland County, Norway, where the company Elkem, owned by China National Bluestar, plans to extract quartz through open pit mining, can serve as a case in point. According to Elkem, the mine and its direct operation surroundings would span over approximately 5 km² in addition to an access road of 7 km leading to highway E6. The entire operation period is

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- 1 Rebecca Lawrence & Sara Moritz, “Mining Industry Perspectives on Indigenous Rights: Corporate Complacency and Political Uncertainty,” *The Extractive Industries and Society* 6, (2019): 41.
 - 2 Ibid., 42; Kaisa Raitio, Christina Allard, Rebecca Lawrence, “Mineral Extraction in Swedish Sápmi: The Regulatory Gap between Sami Rights and Sweden’s Mining Permitting Practices,” *Land Use Policy* 99, <https://doi.org/10.1016/j.landusepol.2020.105001>
 - 3 Ciaran O’Faircheallaigh, *Indigenous Peoples and Mining. A Global Perspective*. (Oxford University Press, 2023), 45, 63. UNESCO 2004, Indigenous Peoples’ Permanent Sovereignty over Natural Resources: Final Report of the Special Rapporteur, E/CN.4/Sub.2/2004/30. New York: UNESCO.
 - 4 See, among others, Norway’s mineral strategy. Norges mineralstrategi, Nærings- og fiskeridepartementet, Ministry of Trade, Industry and Fisheries, 2023.
 - 5 Karin Beland Lindahl, Andreas Johansson, Anna Zachrisson, Roine Viklund, “Competing Pathways to Sustainability? Exploring Conflicts over Mine Establishments in the Swedish Mountain Region.” *Journal of Environmental Management* 218, (2018): 403.
 - 6 Ciaran O’Faircheallaigh, *Mining, Development and Indigenous Peoples*. School of Government and International Relations Griffith Business School Griffith University. 2018.

estimated to exceed 30 years, with an annual withdrawal of 200,000 tons of quartz.⁷ The annual operations are scheduled between March 1st and October 31st.

The location of the mine is a core area for several reindeer herding units, in Norway called *reinbeitedistrikt* (RBD)/reindeer herding districts, in Sweden called *sameby* (SB), literally translated as Sámi village. However, this translation can be misleading as SBs are administrative, economic, and organizational units like the RBDs in Norway, rather than physical settlements. In Norway the traditional Sámi reindeer herding area is divided into 82 administrative units (RBDs), each composed of one or several *siidas*. A *siida* is a cooperating family group or a working community.⁸ The 51 SBs in Sweden are distinguished between mountain-, forest- and concessionary SBs.⁹ Each RBD and SB is a legal person. The planned mining site is close to the border between Norway and Sweden, located on the Norwegian side in Rana Municipality (RM). The area has the highest reindeer density in Nordland. The summer flocks together consist of up to 40,000 reindeer, while around 25,000 reindeer graze on the winter pastures. The mine will directly impact four reindeer herding units, Saltfjellet RBD on the Norwegian side and Svaipa, Gran, and Semisjaur-Njarg SB on the Swedish side, as well as another unit, Ildgruben RBD, in the form of a secondary, but as important impact, namely through an increased risk of mixing of herds due to decreased available land to keep them apart.

1.2 The permit system

In Norway, the Ministry of Trade, Industry and Fisheries (MTIF) is responsible for the mining industry, including the 2009 Minerals Act and the Directorate of Mining. The mining process is subject to extensive legislative regulation.¹⁰ To start mining activities, a proponent needs a permit from the directorate and the municipality involved, in this case RM. Following the 2008 Planning and Building Act (PBA), the municipality is responsible for spatial planning and must develop a zoning plan for large building and construction work. Thus, it is the municipal council that first decides mining cases by approving the plan program, which in this instance was accepted in 2010. Subsequently, the municipal zoning plan decision followed in 2014.¹¹ This municipal zoning plan was approved by the Ministry of

7 Nasafjell kvartsforekomst. Høyren kvarts til silisiumproduksjon, [Nasafjell quartz deposit. High-purity quartz for silicon production.] September 2015, revised 2020.

8 Landbruksdirektoratet, reindriftsnæringen: [online]. <https://www.landbruksdirektoratet.no/nb/reindrift/reindrift-i-norge/reindriftsnaeringen> (accessed November 23, 2023)

9 Sámediggi Sweden, [Sámi Parliament, Sweden]. 2022. Kontaktoppgifter till Sveriges samebyar <https://www.sametinget.se/samebyar> (accessed November 15, 2023).

10 The Directorate of Mining provides an overview over legislation and regulations here: <https://dirmin.no/veiledere-og-lovverk>

11 Rana Municipality: Plan 6022: Detaljregulering for Nasafjellets kvartsforekomst. Sluttbehandling.; Sakprotokoll – Kommunestyret, 11.11.2014 – sak 92/14.

Local Government and Regional Development (MLGRD) on February 16th, 2016, as this Ministry has the final say when objections are raised, which was the case here. Following the PBA, the affected central government, regional bodies and the Sámi Parliament have the right to object to the zoning plan.¹² In their decision, the MLGRD emphasized the national goal of arranging for growth in the mining industry, but also underlined the critical importance of the area for reindeer herding. Furthermore, the MLGRD stated that their official authorization presupposes a dialogue between Elkem and the reindeer herders.¹³

The ministerial decision is predicated on an anticipated dialogue between Elkem and the impacted reindeer herding groups. This stipulation serves as our starting point, prompting us to concentrate on this Indigenous-industry dialogue. Such dialogue can be examined through the interplay of agency and structure emphasizing how agency can be enabled, but also constrained by underlying structures. We concentrate on the knowledge base of the structural factors affecting Indigenous agency. Simultaneously, knowledge is also agential, and we highlight the treatment of Indigenous knowledge in decision-making.

1.3 The research question and its justification

Legislation and corporate policies constitute core structural frameworks for the Indigenous-industry dialogue. While companies are not subject to obligations under international law, they are responsible for human rights in connection with their businesses.¹⁴ Simultaneously, the state with specific obligations on substantive human rights, cannot delegate its human rights responsibility to businesses.¹⁵ This makes sense given research that has shown that “business, due to its self-interest, cannot be assumed to act ethically¹⁶ and that business might also significantly downplay

12 Vigdis Nygaard, “Do Indigenous Interests Have a Say in Planning of New Mining Projects? Experiences from Finnmark, Norway.” *The Extractive Industries and Society* 3 (2016): 20.

13 MLGRD, Kommunal- og moderniseringsdepartementet, brev til Fylkesmannen i Nordland: Rana kommune – innsigelse til reguleringsplan for Nasa-fjellet kvartsforkomst [letter from the Ministry to Nordland County Governor], dated February 16, 2016.

14 James Anaya, *Report of the Special Rapporteur on the Rights of Indigenous Peoples. Extractive Industries and Indigenous Peoples. A/HRC/24/41*. Geneva: Human Rights Council, 2013. NIM, Norwegian National Human Rights Institution. *Human Rights Protection Against Interference in Traditional Sami Areas*. 2022, 73. <https://www.nhri.no/en/report/human-rights-protection-against-interference-in-traditional-sami-areas/>

15 The Constitution of Norway, § 92; The Human Rights Act, 1999; NIM, Norwegian National Human Rights Institution, and National Contact Point for Responsible Business Norway. *Natural Resource Development, Business and the Rights of Indigenous Peoples*. 2019, Oslo: NIM.

16 Rasmus Kløcker Larsen, Carl Österlin, Laura Guia, “Do Voluntary Corporate Actions Improve Cumulative Effects Assessment? Mining Companies’ Performance on Sami Lands.” *The Extractive Industries and Society*, 5, no. 3 (2018): 375–383, <https://doi.org/10.1016/j.exis.2018.04.003>.

negative consequences for local communities.¹⁷ Thus, legislation and government regulations must secure material right and Indigenous peoples' effective participation in land and resource utilization. Indigenous participation in the Násávrre case can be discussed as Indigenous-industry dialogue and Indigenous-state consultations, a procedural requirement on the state anchored in national and international law demanding how cases should be processed. Here we emphasize the first approach – Indigenous-industry dialogue.

As mentioned, our starting point is the decision of the formal zoning plan process that presumed a dialogue between the company and the reindeer herders. The subsequent attempts to reach an agreement between the parties ended with Elkem filing an expropriation application. In this situation, we question the reindeer herders' anticipated room of maneuver or agency, despite the prevailing legal and corporate frameworks. How do the reindeer herders advocate for their rights and influence the process by knowledge sharing? We aim to shed light on Indigenous-state-industry relationships in a Sámi-Norwegian context by discussing the reindeer herders' agency within the legal, corporate, and procedural structures. Thus, by discussing the role of knowledge, we ask *what characterizes the Indigenous-industry dialogue in the Násávrre case and how can this dialogue shed light on Indigenous-state-industry interactions framed by the state's legal obligations as a duty bearer and the company's responsibility as a business actor?*

As the primary duty-bearer of human rights obligations under international law, the states are expected to protect, promote, and regulate Indigenous rights. However, in resource development, state interests are also aligned with corporations.¹⁸ Examining how the state responsibility is reflected in the ministerial expectation of a corporate dialogue between the company and the right holders can reveal insights into the role played by the state in structuring Indigenous-industry relations.¹⁹ The findings of Tennberg et al.²⁰ do not support a withdrawal of the state from governance in conflictual resource development cases on Indigenous lands. They see the state as a central actor in the governance triangle for natural resources, as simultaneously there is a growing recognition that Indigenous rights nationally and internationally change

17 Michael Blowfield. "Corporate Social Responsibility: Reinventing the Meaning of Development?" *International Affairs* (Royal Institute of International Affairs 1944-) 81, no. 3 (2005): 515–24. <http://www.jstor.org/stable/3569631>. Gunhild Rosqvist, Hannu I. Heikkinen, Leena Suopajarvi, and Carl Österlin. "How Should Impacts Be Assessed?" In *Resource Extraction and Arctic Communities: The New Extractivist Paradigm*, ed. Sverker Sörlin (Cambridge University Press, 2022), 125–42.

18 Lawrence & Moritz, "Mining Industry Perspectives on Indigenous Rights: Corporate Complacency and Political Uncertainty," 42.

19 Cf. O'Faircheallaigh. *Indigenous Peoples and Mining. A Global Perspective*, 9.

20 Monica Tennberg, Else Grete Broderstad, Hans-Kristian Hernes, "Revisiting the Governance Triangle in the Arctic and Beyond." *Indigenous Peoples, Natural Resources and Governance. Agencies and Interactions*, (Tennberg, Broderstad, Hernes. Eds. Routledge) 2022.

the legal and political context of business enterprises.²¹ However, if a withdrawal is not the case, how can one understand the state's handling of the Násávárre case when Indigenous-industry relations are challenging? Ahmed²² shows in her work on racism and diversity in institutional life how having a policy can become a substitute for action. She gives the example on how universities get judged as doing well because of their well-written diversity statements rather than on their diversity practices. This means that the written document form of a policy can become a type of concealment, rather than a guideline to achieve diversity. Can a parallel be drawn to the situation at Násávárre?

The business community is increasingly being challenged to respect human rights,²³ through standards for corporate behavior. The Norwegian National Human Rights Institution (NIM) points out that “both the UN and the OECD have tried to ‘build bridges’ over the gap that exists between the legal obligations of states and the responsibilities of companies.”²⁴ The new Norwegian Transparency Act²⁵ is based on the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Companies. The act aims to promote the enterprises’ respect for basic human rights. An example of what can be regarded as a negative consequence is destruction or interference of Indigenous land areas.²⁶ However, as the act is new, there are less experiences of how the law takes effect.

Still, as pointed out by O’Faircheallaigh,²⁷ companies are not obliged to comply with these standards, they only serve as ‘guides.’ How these above-mentioned structural factors assert themselves and the way knowledge is valued, recognized, and made use of within these structures in the reindeer herders-Elkem dialogue, is the focus of our work.

Indigenous agency, defined as the power to act, has led to significant milestones in international law.²⁸ However, when reindeer herders apply their knowledge in

21 Ciaran O’Faircheallaigh. “Extractive Industries and Indigenous Peoples: A Changing Dynamic?” *Journal of Rural Studies*, (2023): 30.

22 Sara Ahmed, *On Being Included. Racism and Diversity in Institutional Life*. (Duke University Press, 2012), 100–103.

23 Hans-Kristian Hernes, Else Grete Broderstad, Monica Tennberg, “Indigenous Rights and Governance Theory: And Introduction”. In *Indigenous Peoples, Natural Resources and Governance. Agencies and Interactions*, Eds. Tennberg, Broderstad, Hernes (Routledge 2022), 5.

24 NIM, *Human Rights Protection Against Interference in Traditional Sami Areas*, 73.

25 Transparency Act. Act Relating to Enterprises’ Transparency and Work on Fundamental Human Rights and Decent Working Conditions (Transparency Act) of 18 June 2021.

26 The Consumer Authority, Forbrukertilsynet, webinar om åpenhetsloven, om aktsomhetsvurderinger og aktsomhetsplikt, 2023, <https://www.forbrukertilsynet.no/webinar-om-apenhetsloven> (accessed January 4, 2024).

27 Ciaran O’Faircheallaigh, *Social Equity and Large Mining Projects: Voluntary Industry*, (2015): 94.

28 Mathias Åhrén, *Indigenous Peoples’ Status in the International Legal System*, (Oxford University Press., 2016).

dialogue with a company, to what extent does the company recognize this knowledge, how is the communication facilitated in the process and what efforts are taken to address power asymmetries? As underscored by NIM,²⁹ to enhance compliance with human rights, measures must be implemented to guarantee adequate knowledge regarding the gradual reduction of reindeer grazing lands and cumulative impacts of various projects in these areas. In the context of reindeer herding, cumulative effects can be described as how an activity together with other ongoing, past, and future activities affect reindeer herding in an area.³⁰

In the next section, we present the core concepts framing our examination, namely the interplay between agential and structural factors. In the third and fourth section we respectively account for methods and for the company-reindeer herding interactions, starting with the municipal decision on the zoning plan ending with Elkem's expropriation application. Thereafter, we discuss this 'dialogue' within the knowledge frameworks of structural and agential factors by focusing on three main subjects identified as central to the Násávárre case, before we conclude.

2. Knowledge as structural and agential factors

Like other extractive projects, the Násávárre case shows complex governance interactions between the Indigenous reindeer herders, state and municipal actors, and the company Elkem. We follow Tennberg et al., who define governance of natural resources as "the principles, institutions and processes that determine how power, obligations and responsibilities over natural resources are exercised, how decisions are taken and how peoples and communities participate in, benefit from and oppose the extraction of natural resources".³¹ Principles, institutions, and processes are structures that can constrain social action and are slow to change, however, these structures can be transformed by individuals and communities, a capability known as agency.³² Agents have the capacity to undertake action through the very structures that constrain them.³³ However, Howlett reminds us that "... history matters and

29 NIM, *Human Rights Protection Against Interference in Traditional Sami Areas*, 8.

30 Protect Sápmi. *Guidance Document: Indigenous-led Participatory and Cumulative Impact Assessment on Indigenous Cultural Landscapes and Traditional Ecosystem Services (IPCIA)*. 2023. <https://aluminium-stewardship.org/wp-content/uploads/2023/04/IPCIA-Documents-25.4.23-TM-update-redux.pdf> (accessed March 15, 2023)

31 Tennberg, Broderstad, Hernes, "Revisiting the Governance Triangle in the Arctic and Beyond", 178.

32 Theresa Petray, "Can Theory Disempower? Making Space for Agency in Theories of Indigenous Issues," (School of Arts & Social Sciences James Cook University), 2012. O'Faircheallaigh, *Indigenous Peoples and Mining. A Global Perspective*.

33 Alexander Page & Theresa Petray, "Agency and Structural Constraints: Indigenous Peoples and the Australian Settler-state in North Queensland" *Settler Colonial Studies*, 6 no. 1, (2016): 89, 90, DOI: 10.1080/2201473X.2014.993057

the historical distribution of resources and interests laid down structurally over time may exert an important enabling or constraining influence on agency.”³⁴ While a full exploration of the interplay between agency and structure is beyond the scope of this paper, we draw upon this conceptual framework to analyze how knowledge serves as a structural and agential factor in the dialogue.

As a structural factor, knowledge systems are embedded in institutions and practices and may include governance instruments that stem from the recognition of Indigenous rights. Legal knowledge systems as norms and principles of international law address state duties towards Indigenous peoples. While consultations and active participation are necessary conditions for compliance with Article 27 of the International Covenant on Civil and Political Rights (ICCPR)³⁵ and ILO Convention 169 concerning indigenous and tribal peoples in independent states,³⁶ the state cannot consult itself away from the more absolute demands for cultural protection.³⁷ Therefore, Article 27 assigns the state a result responsibility to protect the viability of Indigenous (in Norway’s case Sámi) culture and has through practice become the important international provision on the protection of Indigenous peoples against interference.³⁸ This article is weighed in land rights conflicts³⁹ and played a significant role when the Norwegian Supreme Court in October 2021 found that two wind farms in Fosen, in the South Sámi area, violated the reindeer herders’ right

34 Catherine Howlett, “Indigenous Agency and Mineral Development: A Cautionary Note.” Paper presented to the Annual Canadian Political Science Association Conference, May 2009, Ottawa, Ontario, 2009. <https://cpsa-acsp.ca/papers-2009/Howlett.pdf>

35 The Article reads: In those States in which ethnic, religious, or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language. In 1999, the ICCPR was given precedence over internal legislation due to the adoption of the Human Rights Act (1999) incorporating the human rights conventions.

36 ILO, International Labour Organization Convention (1989) *C169 – Indigenous and Tribal Peoples Convention (No. 169)* [online]. Available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312314

37 NOU 2007: 13 A: 208–209. *Den nye sameretten: Utredning fra Samerettsutvalget Del I, II og III (kap. 1–15)* [Public report, the second Sámi Rights Committee, part A] [online]. Available at: <https://lovdata.no/static/NOU/nou-2007-13a.pdf>

38 NIM. *Human Rights Protection Against Interference in Traditional Sami Areas*, 6, 18, 23.

39 NOU 2007: 13 A. *Den nye sameretten: Utredning fra Samerettsutvalget Del I, II og III (kap. 1–15)* NOU 2007: 13 B *Den nye sameretten: Utredning fra Samerettsutvalget Del III – kapittel 16–24* [Public report, the second Sámi Rights Committee, part B] [online]. Available at: <https://www.regjeringen.no/contentassets/e1e9506bce034637a6cfec8bdf2eec75/no/sved/nou200720070013000dddpdfs-b.pdf> Geir Ulfstein 2013, *Samiske folkerettslige rettigheter ved naturinngrep. Utredning for Olje- og energidepartementet i forbindelse med utbygging av kraftledninger og vindkraft*. [International legal rights of the Sámi. A report to the OED in connection with development of power lines and wind power] Oslo: Olje- og energidepartementet. NIM. *Human Rights Protection Against Interference in Traditional Sami Areas*.

to enjoy their culture under Article 27. The industrial encroachment constituted a human rights violation.⁴⁰ The verdict established that the license and expropriation decisions were invalid. Two of the aspects clarified by the Supreme Court were the questions of the threshold for violation under article 27 where the Court stated that “there will be a violation when a measure with limited effect work together with previous and planned measures, and thus create significant consequences for the cultural practice.”⁴¹ Regarding the proportionality principle, the Supreme Court concluded that the wording of Article 27 does not allow the States to strike a balance between the rights of Indigenous peoples and other legitimate purposes.

Industry standards and guidelines address industry responsibilities towards Indigenous peoples. Corporations themselves may as well have developed codes addressing sector-specific human rights standards,⁴² but the “right to negotiate provides only an opportunity to pursue a degree of Indigenous control, it does not guarantee it.”⁴³ Voluntary arrangements most often imply limited state interference, still the state has obligations to ensure that applicable safeguards are implemented.⁴⁴ The UN Guiding Principles on Business and Human Rights (UNGPR) constituting the leading international standards for corporate human rights responsibility, distinguish between (i) states’ obligation to protect, (ii) companies’ responsibility to respect and (iii) states and companies’ responsibility to ensure effective complaint mechanisms. OECD has furthermore prepared a guide for meaningful stakeholder dialogue that provides practical guidance on handling challenges related to this dialogue.⁴⁵ These standards and guidelines represent an additional knowledge system of structural factors impacting Indigenous agency. As an agential factor, actors’ specialized knowledge and access to information can enable informed decisions and participation in dialogue and awareness raising. The reindeer herders’ knowledge, expertise, and advocacy, which is embedded in a legislative context, can in principle be a source of power in their engagement with the industry. Within the structural context of legal

40 Eva Maria Fjellheim, “Wind Energy on Trial in Saepmie: Epistemic Controversies and Strategic Ignorance in Norway’s Green Energy Transition.” *Arctic Review on Law and Politics*, Vol. 14 (2023): 140–16. Øyvind Ravna, “SP artikkel 27 og norsk urfolksrett etter Fosen-dommen.” *Lov og Rett*, 2022, 61:7, <https://doi.org/10.18261/lor.61.7.4>.

41 HR-2021-1975-S (Fosen), paragraf 115 – Norges høyesterett, dom avsagt 11. oktober 2021 i storkammer.

42 Cf. Tilda Pontén, *Mineral Extraction in Sápmi. The Legal Nexus of the Sámi People’s Free, Prior and Informed Consent, Sweden’s Domestic Standards and the Responsibility of Extractive Companies*. (Master thesis, Uppsala university, 2015), 32.

43 Ciaran O’Faircheallaigh, *Mining, Development and Indigenous Peoples*. School of Government and International Relations Griffith Business School Griffith University. (2018): 129.

44 Anaya, *Report of the Special Rapporteur on the Rights of Indigenous Peoples. Extractive Industries and Indigenous Peoples*, 21.

45 OECD, *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector*. OECD Publishing, Paris. 2017. <http://dx.doi.org/10.1787/9789264252462-en> NIM. *Human Rights Protection Against Interference in Traditional Sami Areas*, 73, 74, 77.

requirements and voluntary industry initiatives, to what extent does the application of the above-mentioned knowledge frameworks enable reindeer herders' agency?

A framework in which Indigenous agency can manifest is the processes of impact assessment. Studies comparing community-led impact assessments with corporate-led assessments have revealed significant differences in how potential impacts from mining operations are evaluated.⁴⁶ However, when it comes to social impacts of large-scale extractive industrial development, there is not a single actor nor mechanism in place to ensure social sustainability.⁴⁷ Furthermore, if corporate-led environmental impact assessments and dialogues with rights-holders are carried out too late and/or seem to simply serve the purpose of justifying and legitimizing a proposed project, rights-holders are forced into a moral dilemma between participating in a project that they do not consider as legitimate to start with or the refusal to participate and through this losing the possibility to save what there is to save.⁴⁸ Therefore, participation needs to be early on and meaningful, where a "no" to projects that are deemed too harmful is a possible option. A "yes" to participate in environmental impact assessments should not be seen as a "yes" to the project itself.⁴⁹

Drawing on the framework presented above, our discussion in the fifth section distinguishes between structural versus agential factors of knowledge. We aim to uncover key features of the Indigenous-industry dialogue in the Násávárre case by focusing on the reindeer herders' exercise of their agency in interaction with the company. This analysis will shed light on how the state attends to its legal obligations as a duty bearer and how the company handles its responsibility as a business actor.

3. Methods

The work is connected to the IndKnow research project.⁵⁰ The pandemic and connected contact restrictions, in addition to the high workload of reindeer herders and our hesitation to contribute to further research fatigue, led to choosing document analysis as our main method. We have followed the Indigenous research methodologies' relational accountability, respectful representation, reciprocal appropriation,

46 Rosqvist et al., *How Should Impacts Be Assessed?* 131.

47 Ibid., 133.

48 Ibid. 136.

49 Dale, Ragnhild Freng and Lena Gross, "The Arctic: Last Frontier for Energy and Mineral Exploitation?" in *Handbook on International Development and the Environment*, eds. Benedicte Bull & Mariel Aguilar-Støen (Edward Elgar Publishing, 2023), 154–169. Halvor Dannevig, and Brigt Dale. "The Nussir Case and the Battle for Legitimacy: Scientific Assessments, Defining Power and Political Contestation." *The Will to Drill-mining in Arctic Communities* (2018): 151–174.

50 *Indigenous Knowledge Systems, Planning and Environmental Decision Making: The Role of Community-Based Impact Assessments*, funded by the Research Council of Norway, project number 288598.

and rights and regulations during the research process⁵¹ to our very best ability. Thus, we have drawn on the expertise of the chair of Semisjaur Njarg SB – Anders Erling Fjällås. As research consultant, he provided relevant information and advice during all stages of the project completion, including about choosing Násávárre as our case. This way of going forward was inspired by Indigenous methodologies and a collaborative community-based research approach. It further includes extensive reflections about research ethics, our positionality and making sure that research results are accessible and that the concerned reindeer herding units are informed about research outcomes.

We draw on publicly available case documents, though for some we needed to request access. Nine interviews with involved parties were conducted between July 2021 and August 2022. Interview partners represented most of the main “actors” in the case, however, as the decision-making process is still ongoing and highly politicized, we are not free to use parts of our interview material yet. Our analysis is, therefore, mostly based on the written correspondence between the lawyers of Elkem and the different reindeer herding units. In addition, we have included case documents of state agencies, the Swedish and Norwegian Sámi Parliaments, and Rana Municipality, as well as the municipal zoning plan, the impact assessment plus its amendments and a later impact analysis, media reporting, and minutes from meetings between different parts of the conflict. We applied aspects of practical argumentation analysis in our reconstructing of the actors’ issue expressions, arguments and premises.⁵² We looked for the issue expressions of the reindeer herding units as they have particular tasks in the argumentation, and how they were presented by their respective law firms in the hearings. These hearings cover, as we see it, the main concerns of the reindeer herders, while the expropriation application, Elkem’s correspondence with the reindeer herders, and Elkem’s response to the hearings, depicts Elkem’s view on the situation. After having identified what we regarded as the most important material, we identified core themes recurring in the documents. A categorization of these has left us with the following main set of subjects: the ministerial conditions of the 2016 municipal zoning plan; the attempted agreement-making; and the reindeer herders’ submissions on process and substantial material factors affiliated with the expropriation application. In the next section these subjects will be presented in the same sequence as mentioned above.

As the case has been going on for about two decades, the paper trail by now is overwhelmingly large and it is complicated to keep an overview. Our difficulties in creating a coherent timeline of events and maintaining an overview are telling in

51 Bagele Chilisa, *Indigenous Research Methodologies*. Second Edition. (Sage, 2020), 24.

52 Isabela Fairclough and Norman Fairclough, *Political Discourse Analysis. A Method for Advanced Students*. (Taylor & Francis Group, 2012). Kristina Boréus, *Argumentation Analysis. Analyzing Text and Discourse. Eight Approaches for the Social Sciences*. K. Boréus and Göran Bergström. (SAGE, 2017), 53–85.

themselves, as they demonstrate how time-consuming it is to keep track of what is happening. We can just imagine how exhausting the situation must be for the impacted rights holders, who need to have control over what has been said to be able to represent themselves.⁵³ This makes the documents as a whole less accessible, even though they are available. Ahmed writes that accessible documents are documents where it is relatively easy to find information about what an organization is doing.⁵⁴

4. From the zoning plan to the expropriation application

4.1 The municipal zoning plan: from proposal to approvment

When the proposed zoning plan of Rana Municipality (RM) was out on public scrutiny in 2012, the County Governor (CG), the Area Board (AB) of the Reindeer Herders⁵⁵ and the Sámi Parliament (SP) in Norway objected to the plan. The CG objected to the localization and scope of the dumping ground. According to the AB the measure collided with the reindeer herding interests. The board required an additional report on the consequences of mixing herds on winter pastures for the district Saltfjellet, and the implications in relation to cross-border reindeer husbandry. Based on contact with Saltfjellet reindeer herding district (RBD) and the reindeer herding management of Nordland County, the SP in Norway pointed out the need to limit the work in the operation season and during construction work.⁵⁶ During the public scrutiny of the zoning plan, RM realized that some of the samebys (SBs) had been left out, and they were approached with an extended deadline.⁵⁷

The objections led to a revision of the plan proposal, and a new one was presented for public scrutiny. The CG maintained their objection and stated that the plan area is situated in important bare ground and winter pasture areas, and that the planned proposal will prevent migration and moving routes. According to the reindeer herders, the impact assessment following the zoning plan was not a foundation for assessing necessary mitigation measures nor a basis for assessing whether the measures conflict with international law requirements. The SP in Norway abandoned the

53 Wahl-Larsen 2018. Elkem-Nasafjell: Salten RBD og Svenske Samebyer – presentasjon av prosjektet, miljøoppfølgingsplan mm [Attachment to letter to Dalan advokatfirma and Advokatfirmaet Lund & Co], dated August 29, 2018. Elkem's Power Point Presentation from a dialogue meeting between Elkem and the Swedish SB, August 23, 2018 points towards the issue of having control over all case documents, as Elkem's representative noted in the presentation that the SBs wished to get a copy of all previous meeting notes and protocols.

54 Cf. Ahmed, *On Being Included. Racism and Diversity in Institutional Life*, 96.

55 The county Area Boards of the Reindeer Herders were closed in 2014, and the task of these boards was transferred to the County Governor.

56 Sámi Parliamentary Council. Vern av samiske rettigheter og interesser i forbindelse med planer om kvartsbrudd på Násávárre/Nasafjellet i Rana kommune. Datert 17.08.2016. Notat. Sámediggi. 2016: 3, 4.

57 Rana Municipality: Plan 6022: Detaljregulering for Nasafjellets kvartsforekomst. Sluttbehandling, 2014, 7.

objections as they in November 2014 saw their objections accommodated in terms of reindeer herding and Sámi cultural heritage.⁵⁸ In the parliament's correspondence⁵⁹ with the Ministry of Trade, Industry and Fisheries (MTIF), where the parliament requested to halt the expropriation process (see below), they also accounted for their 2014 withdrawal of the objections to the zoning plan. The withdrawal is explained by the ambiguities of task allocations following the 2014 closure of the regional ABs. These boards with majority herder representation, held the authority to object on behalf of the reindeer herding communities. Prior to the abolishment of the AB, the SP reserved themselves from objections based on reindeer herding operation and industry, as this was the competence area of the ABs. The objections would have been sustained if these concerns were assessed by the SP, as became the case after the closure of the ABs.⁶⁰ The Sámi Parliament in Sweden pointed out that in addition to the cultural, environmental, and psycho-social issues, the project would also be problematic regarding international obligations to cross-border reindeer herding.⁶¹ While the chief municipal executive of RM proposed to reject the zoning plan due to the severe conflicts,⁶² the Municipal Council adopted the zoning plan on November 11, 2014, as they considered the quartz deposit to be of a considerable local value, thus, permission should be granted.⁶³ In February 2015, a mediation process was initiated, but failed to achieve consent, leading to the Ministry of Local Government and Regional Development (MLGRD) receiving the case for final decision. By June 2015, the CG and the Ministry of Agriculture and Food (MAF) had advised the MLGRD against approving the proposed zoning plan, citing severe repercussions for reindeer herding. Subsequently, in September 2015, an inspection was conducted with participants from RM, the County Municipality, the CG, Elkem, the RBDs and the SBs, the mining directorate, and representatives from the three ministries involved. In November 2015, the MTIF recommended a confirmation of the zoning plan, acknowledging that it would be disadvantageous for reindeer herding. However, the MTIF concluded that the benefits derived from the

58 Sámi Parliamentary Council. Vern av samiske rettigheter og interessser i forbindelse med planer om kvartsbrudd på Násávárre/Nasafjellet i Rana kommune. 2016: 4.

59 Sámediggi. Myndighetstillatelse for Násávárre/Nasafjellet kvartsforekomst i Rana kommune, brev til Nærings- og fiskerdepartementet. Sámediggi. [Letter to the MTIF, dated July 3, 2018].

60 Sámediggi. Myndighetstillatelse for Násávárre/Nasafjellet kvartsforekomst i Rana kommune, brev til Nærings- og fiskerdepartementet. Sámediggi. [Letter to the MTIF, dated July 3, 2018]. 2018: 3.

61 Sámi Parliamentary Council. Vern av samiske rettigheter og interessser i forbindelse med planer om kvartsbrudd på Násávárre/Nasafjellet i Rana kommune. 2016: 5.

62 Rana Municipality: Plan 6022: Detaljregulering for Nasafjellets kvartsforekomst. Sluttbehandling

63 MLGRD, Rana kommune – innsigelse til reguleringsplan for Nasa-fjellet kvartsforekomst, p. 5.

mining project compensate for the negative consequences to reindeer herding. For the MTIF, the decisive factor was that the quartz mine would “contribute to value creation that with comfortable margin exceeds possible loss of value creation for the reindeer husbandry”.⁶⁴ Having initially opposed an approval of the zoning plan in June 2015, the MAF shifted its position by November 2015, recommending that the objection raised by the CG should not be upheld, provided that the reindeer herders and Elkem could reach an agreement on mitigation and compensating measures that would enable economic activities for all involved parties. However, the MAF acknowledged that the mine could lead to the blockage of migration routes and reindeer trails, with a significant risk of the herds intermingling. Consequently, they specified mitigation measures concerning the road and imposed restrictions on the timing of mining operations, which were to be incorporated into the plan.

When processing the approving of the zoning plan on February 16, 2016, the MLGRD referred to a predictable and general plan process by RM, which was based on knowledge-driven decisions. The Ministry’s decision included amendments with restrictions on the construction, which were made in response to objections by the CG. Following the recommendations from the MAF, the MLGRD recognized the necessity for mitigating measures. However, these measures were not incorporated into the planning regulations. Instead, it was assumed that the required solutions would be achieved through direct dialogue between Elkem and the affected reindeer herding groups.⁶⁵

4.2 The attempted agreement-making

Following the MLGRD’s decision, Elkem proposed a process agreement to the reindeer herding units.⁶⁶ This proposal included the undertaking of further impact assessments, but with the stipulation that the reindeer herders would sign their consent to the mine in advance. In the same document, Elkem indicated that they would pursue expropriation if an agreement on their terms was not reached. Elkem presented the situation as a choice between the process agreement or what they referred to as the “law track”⁶⁷ or “force track,”⁶⁸ which would involve the expropriation of the land in question. The reindeer herders rejected Elkem’s proposal, arguing that they could

64 Ibid.: 3.

65 Ibid.: 5, 6.

66 See for example Geir Kjelland (Elkem Technology). 2017. Kopia på tilstand for planerad gruvedrift i Nasafjell samt avtalsförslag mot samebyar som föreligger, [E-mail from ELKEM to the Swedish SBs, which had as an attachment the process agreement], dated September 11, 2017.

67 Geir Kjelland (Elkem Technology). 2017. Møte mellom Elkem og Svenske samebyer, [E-mail from ELKEM to the Swedish SBs], dated September 21, 2017.

68 Dalan Advokatfirma. Høringssvar til endelig søknad fra ELKEM om ekspropriasjon av nødvendige rettigheter for etablering av anlegg for utvinning av kvartsforekomst i Nasafjell i Rana kommune, datert 3. september 2019. 2020: 9.

not sign away their rights through such a preconditioned accession. In October 2017, Elkem submitted their application for expropriation, and in December 2017, they initiated an impact analysis, connected to the expropriation application. In 2018, this analysis was released for public hearing by the MTIF, concluded in late 2019 or early 2020. The reindeer herders disagreed that the conditions for expropriation had been met.⁶⁹ To support their position that the expropriation conditions were not satisfied, the reindeer herders highlighted several procedural errors and unfulfilled material conditions. These points will be outlined in the subsequent overview. At the time of writing (October 2024), the MTIF has not yet decided regarding the expropriation application. Elkem maintains that coexistence between the quartz mine and reindeer herding is feasible and that an agreement is attainable, as they believe it is entirely possible for both activities to occur concurrently in the same area.⁷⁰

4.3 The submissions of the reindeer herding units

4.3.1 *The process of involvement*

The reindeer herding units argued that there was a lack of genuine involvement of the reindeer herders, as required under international law.⁷¹ Specifically, they referred to the ILO 169 Articles 6 on consultations, 7 on among other things requirements on impact assessments and 15 on securing Indigenous peoples' right to resources, as well as Article 27 of ICCPR. While Article 27 does not explicitly mention consultations, effective participation in decisions concerning economic, social, and cultural rights is interpreted as a right through practice by the Human Rights Committee.⁷² Thus, regarding an expropriation decision, procedural errors would make the decision invalid. These claims put forward by the reindeer herders applied to both the zoning plan and the expropriation process. According to the SBs, the incomplete involvement of the reindeer herders in the zoning plan process still influenced the ongoing case. Regarding the hearing of the impact analysis, ambiguities accrued about whether this was a hearing only about the analysis or about the expropriation application as well. The SBs said that this lack of clarification implied that the case had not been sufficiently illuminated and the general public's right to comment not

69 Dalan Advokatfirma 2018. Ekspropriasjonssøknad kvartsforekomst Nasafjell – Kommentar fra Salfjellet reinbeitedistrikt etter befarings- og konsultasjon 19. og 20. juni 2018. Brev av 15. august 2018. Dalan Advokatfirma 2020. Høringssvar til endelig søknad fra ELKEM om ekspropriasjon av nødvendige rettigheter for etablering av anlegg for utvinning av kvartsforekomst i Nasafjell i Rana kommune. Lund & Co, 2018. Ekspropriasjon – Kvartsutvinning – Nasafjell – Høringsuttalelse fra samebyene, 23. mars 2018. Lund & Co, 2020. Ekspropriasjon – Nasafjell – høringsuttalelse fra samebyene, 15. februar 2020.

70 GEO.365.no 2023. Har fortsatt tro på sameksistens, 31. Oktober, 2023, <https://geo365.no/har-fortsatt-tro-pa-sameksistens/> accessed January 26, 2024.

71 Lund & Co, 2018. 17/5187–58 NFD -Elkem AS – Nasafjell – kommentar fra samebyene, 15.08.2018.

72 NIM, *Human Rights Protection Against Interference in Traditional Sami Areas*, 26.

safeguarded.⁷³ They criticized Norwegian authorities' insufficient organization that should have secured effective participation of the reindeer herders in the process since early 2000 but did not.

Understanding the implications of Elkem's proposed process agreement, the SBs pointed to the Swedish experiences with cooperation agreements. This concept or model, developed by the National Union of the Swedish Sámi People (SSR), was presented to Elkem as a proposed framework for an agreement. However, Elkem considered it merely as an informative document.⁷⁴

Elkem asserted that the reindeer herders had "definitely been granted a real possibility to exert influence on both the process as such and the outcome of the case."⁷⁵ However, the RBD contested this claim, highlighting Elkem's precondition that required the RBD to grant permission through pre-accession before any additional impact assessment was conducted. The RBD referenced a specific case involving the development of a power line in Troms and Finnmark. In this case the Ministry of Oil and Energy (MOE) emphasized that the constructor has a legal obligation to negotiate with the reindeer herding districts regarding mitigation measures, regardless of whether the districts sought a judicial review.⁷⁶ Drawing on this precedent, the RBD argued that Elkem's proposed process agreement was a clear contradiction to international law.⁷⁷

In their description of the dialogue with the company, the RBD indicated that they did not experience any genuine involvement in the process. They substantiated this by pointing to Elkem's perspective of the case, which included, among other things, the assertion that it was crucial for them to gain access to the area as soon as possible and that they were not required to conduct an impact analysis per the zoning plan. Elkem outlined two options for moving forward. Their preferred option was a process agreement that would allow them to go beyond what they were legally obligated to do. The alternative was to follow the process based on the zoning plan, which included provisions on the expropriation decisions and pre-accession, as well as judicial assessment. Under this second option, as Elkem understood it,

73 Lund & Co, 2020: 5–8. Ekspropriasjon – Nasafjell – høringsuttalelse fra samebyene.

74 Lund & Co, 2018: 4, 5. Ekspropriasjon – Kvartsutvinning – Nasafjell – Høringsuttalelse fra samebyene. Geir Kjelland (Elkem Technology). 2017. Møte mellom Elkem og Svenske samebyer, [E-mail from ELKEM to the Swedish SBs,], dated September 21, 2017.

75 "... er definitivt gitt en reell mulighet til å øve innflytelse både på prosessen som sådan og sakens utfall." Dalan Advokatfirma 2020, 7. Høringssvar til endelig søknad fra ELKEM om ekspropriasjon av nødvendige rettigheter for etablering av anlegg for utvinning av kvartsforekomst i Nasafjell i Rana kommune.

76 Decision of July 5, 2017, by the MOE in the complaint about development of the 420 kV power line in Troms and Finnmark.

77 Dalan Advokatfirma 2020: 8. Høringssvar til endelig søknad fra ELKEM om ekspropriasjon av nødvendige rettigheter for etablering av anlegg for utvinning av kvartsforekomst i Nasafjell i Rana kommune.

the RBD would not be entitled to any form of mitigating measures and could only seek compensation for potential economic loss – a loss that the RBD would have to prove and document themselves.⁷⁸ Elkem maintained their stance and applied for an expropriation license on October 9, 2017, a move that the reindeer herders perceived as inflexible. As previously mentioned, Elkem began work on the impact analysis in December 2017. In April 2018, the RBD requested to be involved in shaping the mandate for this analysis, but their request went unanswered. Additionally, Elkem did not accommodate the RBD’s request in November 2018 to include cumulative impacts in their assessment. Elkem stated that they had

sought dialogue with the impacted reindeer organizations to discuss what measure can best be taken to avert the impact on the reindeer herding activities. It has been difficult to achieve dialogue and the spokespeople for the reindeer families in the area do not accept the outcome of the permit process. Due to the difficulties in achieving dialogue and progress, Elkem has sought expropriation of land use rights in the area around Nasafjell.⁷⁹

Elkem also expressed their intention to “continue to seek cooperation with stakeholders to find the best possible measures to mitigate our impact on reindeer herding activities.”⁸⁰ In the same Global Reporting Initiative report, Elkem stated that they are “committed to understand the situation and political status of indigenous peoples that may be impacted by our activities and to seek to limit our impact.” Both sentiments are in line with Elkem’s two stated core values: “respect” and “involvement” (the other two are “continuous improvement” and “precision”).⁸¹ While Elkem throughout the process made use of the concept ‘dialogue’, the realities seen from the reindeer herders’ point of view, was a discussion of only possible mitigating measures without assessing the cumulative impacts.

The reindeer herders perceived Elkem’s lack of willingness to assess the impacts, including the cumulative ones, as a significant barrier to their real involvement in the process.⁸² This was seen by the reindeer herders as major procedural errors. Below is an outline of what the reindeer herder units considered to be substantial material factors that could affect their livelihood.

78 Ibid.: 9.

79 Elkem 2017. GRI Report. Introduction to Elkem and sustainability reporting. GRI Report 2017 | Sustainability reporting 2017 | Previous reports and related information | Sustainability | Elkem.com Accessed February 5, 2024.

80 Ibid.

81 Wahl-Larsen 2018. Elkem -Nasafjell: Salten RBD og Svenske Samebyer – presentasjon av prosjektet, miljøoppfølgingsplan mm [Letter to Dalan advokatfirma and Advokatfirmaet Lund & Co], dated August 29, 2018.

82 Dalan Advokatfirma 2020: 10–11. Høringssvar til endelig søknad fra ELKEM om ekspropriasjon av nødvendige rettigheter for etablering av anlegg for utvinning av kvartsforekomst i Nasafjell i Rana kommune.

4.3.2 Material factors

Both the SBs and the RBD highlighted deficiencies in the zoning plan and the associated impact assessment, specifically the lack of evaluation of actual and cumulative impacts.⁸³ The impact analysis related to the expropriation application did provide some information on the use of the Násávárre area by the reindeer herding, the impacts, and the mitigation measures, but failed to consider several impacts of the mine and underestimated the consequences by setting the percentage of reindeer avoidance too low.⁸⁴ Despite these shortcomings, the analysis acknowledged that the consequences of establishing in the area were not well understood. Therefore, the SBs invoked the precautionary principle, advocating for an analysis of the broader ripple effects, such as the potential outcomes of losing significant portions of bare ground grazing areas. The impact analysis did not adequately evaluate the risk of reindeer dispersal and mixing or the economic repercussions for the herders. Cumulative impacts were only touched upon, without a thorough assessment. The broader legal context of the proposed mine, including the fact that the area is used for cross-border reindeer herding, and the social implications, such as the potential for increased conflicts between different reindeer herding groups, were either insufficiently addressed or completely overlooked.⁸⁵ The traditional co-use of the area, which had developed over generations, was at risk of being disrupted by the mine, potentially altering the established pattern of joint use.⁸⁶ The SBs were under the impression that they were being perceived as unwilling to contribute to the assessment of mitigating measures. However, the SBs clarified that they were open to discussing mitigating measures directly with Elkem, but with the stipulation that the measures under discussion be genuine improvements to the situation. This would require a comprehensive mapping of the impacts of Elkem's activities. The only mitigation measure that both the RBD and the SBs considered to be relevant was the provision of compensatory areas to replace those lost due to Elkem's operations.⁸⁷

83 Dalan Advokatfirma 2019. Konsekvensanalyse av Nasafjell kvartsforekomst for Salfjellet reinbeitedistrikt – Kommentar fra Salfjellet reinbeitedistrikt.

84 Dalan Advokatfirma 2019: 4. Konsekvensanalyse av Nasafjell kvartsforekomst for Salfjellet reinbeitedistrikt – Kommentar fra Salfjellet reinbeitedistrikt. Lund & Co, 2020: 12. Ekspropriasjon – Nasafjell – høringsuttalelse fra samebyene.

85 Lund & Co, 2020: 13–14. Ekspropriasjon – Nasafjell – høringsuttalelse fra samebyene

86 Dalan Advokatfirma 2018. Ekspropriasjonssøknad kvartsforekomst Nasafjell – Kommentar fra Salfjellet reinbeitedistrikt etter befaring og konsultasjon 19. og 20. Juni 2018. Dalan Advokatfirma 2020. Høringssvar til endelig søknad fra ELKEM om ekspropriasjon av nødvendige rettigheter for etablering av anlegg for utvinning av kvartsforekomst i Nasafjell i Rana kommune.

87 Dalan Advokatfirma 2019,2, Konsekvensanalyse av Nasafjell kvartsforekomst for Salfjellet reinbeitedistrikt – Kommentar fra Salfjellet reinbeitedistrikt. Lund & Co, 2020, 15, Ekspropriasjon – Nasafjell – høringsuttalelse fra samebyene.

They argued that even if such areas are currently inaccessible, the potential of compensatory areas should still be evaluated.⁸⁸

Elkem did not consider Article 27 of ICCPR to be an obstacle to their mining project. However, SBs, referencing the practice of the Human Rights Committee, argued that granting an expropriation license would be in violation of Article 27. They identified a series of probable impacts that the mining project could have on the reindeer herding communities, including:

- Deterioration of areas used for marking calves and gathering reindeers;
- Disruption of reindeer movements to higher snowy areas of Násávárre, which are used for aeration;
- Loss of grazing lands and an increased grazing burden on remaining areas;
- Increased risk of herds being mixed;
- Increased workload, working intensity and costs associated with gathering, moving, partitioning, and surveillance of reindeers;
- More frequent collisions with reindeers on the E6 highway and the railroad;
- Social impacts and internal conflicts within the reindeer herding communities.⁸⁹

The CG also addressed the risk of mixing herds in 2015, stating that “With the many reindeer herding actors and the large number of reindeers involved, chaotic conditions can arise at the peril of collapse in the current structure of reindeer herding in the area.”⁹⁰ This statement underscores the potential for significant disruption to the traditional reindeer herding practice in the area if the mining project were to proceed.

The impact analysis itself acknowledged the uncertainties surrounding the mining project, outlining a worst-case scenario where the area could lose its function for reindeer herding, and a best-case scenario that still involved significant deteriorations in conditions for reindeer herding.⁹¹ These concerns were also highlighted in the reindeer herders’ response to the impact analysis. The reindeer herders emphasized that the impacts would result in a comprehensive loss of winter grazing area, the obstruction of migration routes, an increased risk of herds being mixed, and a higher likelihood of collisions on the road and with the railway.⁹² The impact analysis was criticized for

88 Lund & Co, *ibid.*

89 Lund & Co, 2020, 20, Ekspropriasjon – Nasafjell – høringsuttalelse fra samebyene.

90 “Med de mange reindriftsaktørene og de store reinmengdene som her er involvert, kan det oppstå kaotiske forhold med fare for sammenbrudd i dagens reindriftsstruktur i området.” *Ibid.*, 21.

91 Lund & Co, 2020, 21, Ekspropriasjon – Nasafjell – høringsuttalelse fra samebyene.

92 Dalan Advokatfirma 2019. Konsekvensanalyse av Nasafjell kvartsforkomst for Salfjellet reinbeitedistrikt – Kommentar fra Saltfjellet reinbeitedistrikt. Dalan Advokatfirma 2020: 1. Høringssvar til endelig søknad fra ELKEM om ekspropriasjon av nødvendige rettigheter for etablering av anlegg for utvinning av kvartsforkomst i Nasafjell i Rana kommune.

not providing a thorough assessment of the cumulative impacts, the effectiveness of mitigation measures and the project's compliance with relevant international law.⁹³ Despite this, Elkem maintained that the interests of the reindeer herders had been comprehensively considered during the process that led to the authorization of the zoning plan. Elkem described the process agreement as “a terms of reference for the realization of the zoning plan” until the parties could reach an agreement on compensation. According to Elkem, a fundamental condition for such an agreement was that the reindeer herders would not prevent Elkem from accessing the area. The issues brought forward by the reindeer herders in their responses to the expropriation application, were also addressed during a joint digital meeting in May 2020.

4.4 A joint digital meeting between right-holders, the company and the authorities, May 2020

During a joint digital meeting held on May 28, 2020, with representatives from Elkem, the affected reindeer herders, the MTIF, the MAF and the Norwegian Environment Agency, further discussions took place.⁹⁴ The minutes from this meeting indicate that the purpose was to gather additional input for Elkem's expropriation application. Elkem expressed the view that the case had been thoroughly investigated and clarified. They acknowledged that there would be disadvantages for the reindeer herding communities but emphasized that the area to be impounded would be limited. Elkem suggested that the negative impacts on reindeer herding could largely be mitigated through monetary compensation and that the consequences would not be devastating. Furthermore, Elkem argued that the establishment of the mine would not violate international or domestic law. They stated that it was the responsibility of the MTIF to weigh the various interests involved when deciding on the expropriation application.

The representatives of RBD opposed Elkem's expropriation application and called for its rejection, arguing that no proposed mitigation measures could adequately reduce the severe impacts that had been overlooked in the impact assessment. From their perspective, the assessment failed to account for the cumulative impacts of the mine, particularly the scarcity of late winter pastures. Drawing a parallel to the decision of the MOE in the Kalvvatnan case, where the Ministry halted the construction of a wind power station in 2016 based on Article 27,⁹⁵ the reindeer herders contended

93 Dalan Advokatfirma 2020. Høringssvar til endelig søknad fra ELKEM om ekspropriasjon av nødvendige rettigheter for etablering av anlegg for utvinning av kvartsforkomst i Nasafjell i Rana kommune, datert 3. september 2019.

94 MTIF, Referat fra fjernmøte over Teams 28. Mai 2020 – Nasafjell – Elkem – ekspropriasjon beite- og ferdselsrettigheter. [Minutes from a digital meeting, May 28, 2020].

95 Cf. Else Grete Broderstad, “International Law, State Compliance and Wind Power: Gaelpie (Kalvvatnan) and Beyond.” *Indigenous Peoples, Natural Resources and Governance. Agencies and Interactions*, Eds. M. Tennberg, E. G. Broderstad, H-K. Hernes, (Routledge, 2022).

that a balancing of interests was not applicable. They emphasized that the impacts on reindeer herding were too significant to be offset by other considerations. The reindeer herders also shared insights into the potential disturbances to the female reindeers during the calving period, outlined scenarios such as a flooded river blocking reindeer crossing, and criticized Elkem's proposed mitigation measures for not being based on expertise in reindeer herding. Furthermore, the reindeer herders from the SBs requested historical accounts, analyses of cumulative impacts, archaeological investigations, and assessments of social consequences. They highlighted the risk of mixing herds and the variable use of the Násávárre, stressing the importance of the precautionary principle. In response to Elkem's expectation that the RBD and SBs should agree to mitigation measures, the reindeer herders clarified that each unit, as a legal entity, holds distinct rights.

Considering the intricate nature of the Násávárre case, this overview acknowledges that there may be omissions due to its complexity. Nonetheless, three main subjects have been identified as central to the Indigenous-industry-state interactions of the Násávárre case: (i): the municipal zoning plan process and the ministries balancing of interests; (ii): the reindeer herders' submissions on substantial material factors of the expropriation application and (iii): the process of involving the reindeer herders in the attempted agreement-making and their experience with the corporate dialogue. These themes will be used to structure our following discussion section.

5. Constrained or empowered? The Indigenous-industry dialogue

5.1 Objections to the zoning plan and the ministries balancing of interests

Having accounted for the main features of the Indigenous-industry dialogue based on the contributions of the reindeer herders, we now seek to understand the characteristic of this dialogue, considering structural and agential factors. Our focus is on the embedded knowledge in these frameworks, and how this knowledge is valued, recognized, and made use of within these structures in the reindeer herders-Elkem dialogue.

In the municipal zoning plan process, the County Governor's (CG) consistent emphasis on the severe impacts of the mine on reindeer herding, demonstrates how knowledge embedded within institutions can acknowledge and integrate Indigenous rights. With the dissolution of the Area Boards for reindeer herders, the CG, as a regional state institution, assumed these responsibilities in 2014, raising the same concerns that the Area Board had previously addressed.⁹⁶ In contrast to the CG's stance, the handling of the case by the three ministries shows a different approach. The sectoral ministry for reindeer herding – the Ministry of Agriculture and Food (MAF) – shifted from opposition to support for the mining plans, arguing that the

96 MLGRD, Rana kommune – innsigelse til reguleringsplan for Nasa-fjellet kvartsforkomst, letter to Nordland County Governor.

CG's objections should not be upheld if the reindeer herders and Elkem reached an agreement on mitigation and compensation measures.⁹⁷ While acknowledging the negative impacts on reindeer herding, the Ministry of Trade, Industry and Fisheries (MTIF) highlighted that the economic benefits of the mine would surpass any potential losses in value for the reindeer husbandry. This shows not only a value hierarchy that puts economy benefits above the socio-cultural value of reindeer herding, but it also points to different temporalities: While reindeer herding in the area stretches from the past to the future, and through this providing income for reindeer herders for generations to come, the mine's lifespan is estimated to be about 30 years. With these uneven temporalities, and not including the potential loss of workplaces in reindeer herding, the economic benefits estimation becomes biased.

Similarly, Rana Municipality (RM) made an assessment akin to the MTIF and the Ministry of Local Government and Regional Development (MLGRD), which recognized the need for mitigating measures, but assumed that these could be resolved through dialogue between the involved parties.⁹⁸ It is noteworthy that all the ministries and RM acknowledged the mine's detrimental effects on reindeer herding. Despite this recognition of the mine's harmful effects on reindeer herding, this admission of knowledge was not deemed significant enough to overturn the decision. On the contrary, the MLGRD noted that RM's decision was made on a knowledge-based foundation. It is significant that the chief municipal executive proposed that the municipal council should reject the zoning plan due to the consequences for the environment, outdoor recreation, and reindeer herding.⁹⁹

Thus, despite structural arrangements intended to ensure the involvement of reindeer herders at the early stages of a zoning plan process, and despite their own engagement and agency, the outcome of the zoning plan process, ultimately failed to acknowledge the reindeer herders' knowledge.

The MTIF evaluation, which posits that the benefits from the mining project will outweigh the negative consequences for the reindeer herders, is rooted in a mindset and value system characterized by modernization theory and developmentalism.¹⁰⁰ This perspective views mining as a beacon of progress and operates under the assumption that "use of labour, land, and resources is more productive in mining than within a subsistence economy."¹⁰¹ This grants mining companies a special status as agents of social progress and change, a point Elkem itself illustrates in an additional statement to the MTIF about their expropriation application, where they

97 Ibid.

98 MLGRD, Rana kommune – innsigelse til reguleringsplan for Nasa-fjellet kvartsforekomst, letter to Nordland County Governor.

99 Rana Municipality: Plan 6022: Detaljregulering for Nasafjellets kvartsforekomst. Sluttbehandling, 2014, 29.

100 O'Faircheallaigh, *Indigenous Peoples and Mining. A Global Perspective*, 11.

101 Ibid.

refer to the reindeer herding’s “uncertain economic net contribution” to the country’s economy.¹⁰²

However, the legal framework does not support a simple balancing of Indigenous peoples’ rights against industry objectives. The Supreme Court’s ruling in the Fosen case has set a significant precedent by emphasizing the importance of Article 27 in safeguarding Sámi reindeer herding from actions that would deny or limit it. This ruling is a structural factor that carries substantial weight in other land use conflicts involving Indigenous reindeer herders and industrial interests. The government itself addresses the lessons learned from the Fosen case in Fiscal Budget of 2025,¹⁰³ including a review of the regulations of the impact assessment regime. While each conflict necessitates its own detailed evaluation, the Fosen judgement has illuminated the manner in which Article 27 should be interpreted and applied within Norwegian law.¹⁰⁴ The ministries’ balancing of interests in the Násávrre case took place prior to the landmark Fosen verdict. But in 2016, the Ministry of Oil and Energy (MOE) made a statement regarding the wind power plans in Kalvvatnan, which reflects an awareness of the limitations imposed by international law:

Even if a proportionality principle applies within international law, international law sets an absolute limit to what kind of endeavors can be allowed. Where there is reasonable doubt about whether an endeavor can be realized within the boundaries of material protection of international law applying to Indigenous peoples, ordinary societal considerations cannot determine whether a license should be granted or not.¹⁰⁵

Despite this recognition, when the MLGRD made its decision on the zoning plan in 2016, the potential adverse effects on reindeer herding and the risk of violating Article 27 of ICCPR did not prevent the decision of the mining project. The expectation seemed to be that any challenges would be addressed through corporate dialogue with the affected reindeer herding communities.

Tennberg et al.¹⁰⁶ suggest that state withdrawal from extractive conflicts has less explanatory power in understanding the dynamics in play. We concur with this view and are more persuaded by the analysis of O’Faircheallaigh,¹⁰⁷ who points out that regulatory bodies and public interests can often develop close relationships with industry, which may influence their decisions. Norway has ratified a series of human rights instruments and passed several domestic acts to uphold human rights obligations.

102 Wahl-Larsen, Nasafjell – tillegguttale [additional statement, letter to the MTIF], dated August 14, 2020.

103 Prop. 1 S (2024–2025), under the Ministry of Energy, chapter 9.

104 Cf. NIM, *Human Rights Protection Against Interference in Traditional Sami Areas*, 19–20, 80.

105 Olje- og energidepartementet. Fred. Olsen Renewables AS – Kalvvatnan vindkraftverk i Bindal og Namskogan kommuner – klagesak. In Broderstad *International Law, State Compliance and Wind Power: Gaelpie (Kalvvatnan) and Beyond*, 31.

106 Tennberg, Broderstad, Hernes, *Revisiting the Governance Triangle in the Arctic and Beyond*.

107 Ciaran O’Faircheallaigh, *Social Equity and Large Mining Projects: Voluntary Industry*, (2015): 95.

However, as our analysis demonstrates, the mere existence of a legal framework designed to ensure state compliance in both procedure and substance is insufficient. The case illustrates that, despite stringent regulations, the structures in place may not effectively safeguard Indigenous agency and rights when faced with industrial interests. Rather, following Ahmed on the agency of documents, the reference to legal frameworks makes it seem as if Indigenous agency and rights are well protected, when in fact, the lack of implementation of these frameworks, is concealed.

5.2 The reindeer herders' submissions on substantial material factors of the expropriation application

The substantive concerns raised by the reindeer herders, based on their knowledge of how the mining activities could affect their livelihood, were only minimally considered in the zoning plan process and the impact analysis. The reindeer herders identified a variety of potential impacts, such as the risk of harm to the cross-border co-use of the area, which has been developed over generations. Even the impact analysis acknowledged that the consequences of the mine were not well understood.

A key issue highlighted by the samebys (SBs) and reinbeitedistrikt (RBD) was the failure of the impact assessment to evaluate the cumulative impacts of the mining project. Without this, the impact on reindeer herding cannot be fully understood and addressed. An analysis by Statistics Norway sheds light on the fact that significant areas traditionally used for reindeer herding have already been affected by various forms of reduction and development.¹⁰⁸ Most often environmental impact assessments wield with the impact of a single industrial endeavor instead of the cumulative impact on reindeer herding of all land use activities in the region (that might stretch over national borders) in a short period of time. While reindeer herders point to reindeer herding as a long-term activity that goes both back and forward in time, mining is an activity related to the span of a few decades, though its impact is much more long-term. Furthermore, the guidelines set forth by the OECD,¹⁰⁹ state that a Social and Environmental Impact Assessment or a Human Rights Impact Assessment should be conducted during the development phase of a project. The importance of conducting social impact assessments is underscored by a study conducted in South Sámi areas, which revealed that a majority of reindeer herders experience stress and additional work because of encroachments on reindeer herding lands.¹¹⁰

108 Erik Engelién, Iulie Aslaksen og Jørn Kristian Undelstvedt, "Utbygging får konsekvenser for reinbeiteområder" ("Development has consequences for reindeer grazing areas"), Statistics Norway, 16 (SSB, 2020), <https://www.ssb.no/natur-og-miljo/artikler-ogpublikasjoner/utbygging-far-consequences-for-reindeer-grazing-areas>.

109 OECD, *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector*, 35.

110 Snefrid Møllersen, *Helserelaterte leve- og arbeidsforhold for reindriftssamisk befolkning i sørsamisk område*. Samiske tall forteller 11. 2018.

Obligations following national and international law and commitments of due diligence and meaningful stakeholder engagement, as outlined by OECD,¹¹¹ require that stakeholders themselves can contribute important knowledge to identify possible or actual impacts. Despite this, the “polluter pays” principle for environmental impact assessments, implies that companies applying for permit, are the ones that can set the conditions for the environmental impact assessment. Companies are responsible for the costs for the assessments, which leads to reports that look into the near future and the direct impact of a single project instead of investigating long-term and cumulative effects of locally accumulated land use disturbances.¹¹² A similar objection against impact assessments, pointed out by NIM,¹¹³ is that the developer’s duty to investigate alternative solutions “is limited to what the Act describes as ‘relevant and realistic’ alternatives.” The developer can then at an early stage rule out alternatives as unrealistic if the alternative is not considered cost-effective.¹¹⁴ As in our case the reindeer herders’ references to the precautionary principle, and their call for an analysis of the ripple effects on the larger area, can then be disregarded.

Drawing on the work of Kirsch¹¹⁵ and Proctor,¹¹⁶ Fjellheim¹¹⁷ demonstrates in another land-use conflict case how industry representatives “produced doubt about all knowledge which threatened their commercial interests,” a tactic used to disregard knowledge that supported the reindeer herders’ claim. This strategic ignorance was also evident in our case. The reindeer herders highlighted deficiencies in the impact assessment and the inadequate knowledge base for evaluating mitigation measures, which also failed to consider the requirements of international law.

5.3 The reindeer herders’ experience with the corporate dialogue

Elkem’s proposed process agreement included further impact assessments, but only on the condition that the reindeer herders gave their consent to the mine in advance. However, such a precondition contradicts the principles of the UNGP and the OECD guidelines,¹¹⁸ particularly those concerning meaningful stakeholder

111 OECD, *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector*, 18.

112 Rosqvist et al., *How Should Impacts Be Assessed?*

113 NIM, *Human Rights Protection Against Interference in Traditional Sami Areas*, 64.

114 Ibid.: 64.

115 Stuart Kirsch, *Mining Capitalism* (University of California Press, 2014). <https://doi.org/10.1525/9780520957596>.

116 Robert N. Proctor, “Agnotology. A Missing Term to Describe the Cultural Production of Ignorance (and Its Study).” *Agnotology: The Making and Unmaking of Ignorance* Eds. Robert N. Proctor. and Linda Schiebinger (Stanford University Press, 2008).

117 Eva Maria Fjellheim, “Wind Energy on Trial in Saepmie: Epistemic Controversies and Strategic Ignorance in Norway’s Green Energy Transition.” *Arctic Review on Law and Politics*, Vol. 14, (2023): 160.

118 OECD, *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector*.

engagement and due diligence. The OECD guidelines offer specific advice on how to identify the collective rights claimed by Indigenous peoples, and how to establish, develop, and maintain dialogue with them. An important aspect of this process is the implementation of Free, Prior and Informed Consent (FPIC), with a process that “should always be based on good faith negotiation free of coercion, intimidation or manipulation”.¹¹⁹ Larsen et al.¹²⁰ point out that agreements most often reflect manufactured consent where reindeer herding units enter agreements because of no other alternatives. However, they also state that reindeer herding districts that opt to enter negotiations on private agreements, ought to challenge companies that want to delimit the ambitions of agreements, “based on their right to self-determination, and broaden the scope of what should be legitimate to include in agreements.”¹²¹

Elkem’s stance that they would pursue expropriation if the reindeer herders did not consent and no agreement was reached, is hardly in line with these OECD guidelines, nor their own commitment of seeking to limit the extractive impacts.¹²² Furthermore, Elkem’s approach on involving the reindeer herders in the Násávárre case did not align with the OECD’s engagement strategy, which advocates for involving concerned groups “in the process of seeking consent as soon as possible during project planning, before activities for which consent should be sought commence or are authorised, including in the context of exploration activities.”¹²³ The SBs expressed their willingness to discuss mitigating measures directly with Elkem, conditioned that those measures must be genuine and capable of improving the situation, which requires a thorough assessment of the impacts. The SBs also drew attention to the Swedish Sámi experiences with cooperation agreements. Elkem’s approach of merely considering this an informative document, also contradicts the OECD’s position, which states that in the

initial project planning, Indigenous peoples should be involved in the design and implementation of engagement activities. Engagement activities should reflect indigenous decision making institutions developed and maintained by the community, as well as decision making processes prescribed by law or regulations.¹²⁴

119 Ibid.; 97. For further application of FPIC in participatory impact analyses in a Sámi context, see Protect Sápmi, 2023, 18, 19.

120 Rasmus Kløcker Larsen, Jannie Staffansson, Inger-Anne Omma, Rebecca Lawrence, Avtal mellan samebyar och exploatörer. Hur påverkas renans välmående? Senter for samiske studier, skriftserie, nr 22, 2022, 11.

121 Ibid.: 11.

122 Elkem, GRI Report. Introduction to Elkem and sustainability reporting.

123 OECD, *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector*.

124 Ibid., 99.

The authorities' expectations that corporate dialogue would succeed in resolving the issues surrounding the Násávrre case were not met, despite corporate structures ostensibly being designed to facilitate genuine Indigenous involvement free from coercion. The decision by the MLGRD to leave the resolution of these issues to the involved parties, without qualifying what counts as a dialogue, and despite considering the significant asymmetries between the parties in terms of resources, makes the dialogue appear as an exchange of opinions without any obligations. The authorities' assumption that the necessary solutions regarding mitigation measures would emerge from direct dialogue between the parties proved to be unfounded. NIM highlighted in their response to the public report on a new minerals act,¹²⁵ that mitigation measures are crucial in the practice of the Human Rights Committee and the Supreme Court when assessing Article 27 of ICCPR in cases of interferences with Indigenous land rights.¹²⁶

In summary, we have seen that the reindeer herders called for the application of international law and the precautionary principle, their main concerns were the lack of cumulative impact assessments and material issues, including closed migration routes, mixing of herds, removal of bare ground grazing areas, increased grazing on remaining areas, etc. Consequently, the necessary foundation for the anticipated dialogue between the parties was absent.

6. Concluding remarks

In this paper, we have discussed the role of Indigenous reindeer herding knowledge in decision-making processes based on the Násávrre case and asked what characterizes the Indigenous-industry dialogue in the Násávrre case. Furthermore, do these interactions between the reindeer herders and Elkem hold any significance beyond the case itself in terms of the state's legal obligations and company responsibility?

6.1 The dialogue

The correspondence between the lawyers of the reindeer herders and Elkem shows clearly a mismatch in the parties' view of the dialogue, the content of the impact assessment and the impact analysis, and the procedural involvement. The reindeer herding units emphasized the complex negative impacts of the mine regarding economic, cultural, historical, and psychosocial aspects, and concluded that there is no basis for licensing an expropriation. These negative impacts were only partly included in the impact assessments, still containing a best-case scenario of the impact analysis

125 NOU 2022: 8 Ny minerallov, brev til Nærings- og fiskeridepartementet, datert 30.11.2022, <https://www.nhri.no/2022/horingsuttalelse-nou-2022-8-ny-minerallov/>

126 NIM 2022: 3. Høringsuttalelse – NOU 2022: 8 Ny minerallov, brev til Nærings- og fiskeridepartementet, datert 30.11.2022, <https://www.nhri.no/2022/horingsuttalelse-nou-2022-8-ny-minerallov/>

indicating significant deteriorations as conditions for reindeer herding. Following the reindeer herders' argumentation, a mining license at Násavárre would be invalid following Article 27 of ICCPR. Elkem did not regard Article 27 as a hindrance to the mining project. This despite the reindeer herders insisting that a real assessment of cumulative impact was lacking.

However, legally, the requirement of an impact assessment was fulfilled. One might almost say that, in parallel with Ahmed's work, having an impact assessment became a substitute for knowing the impact. Similarly, simply being in contact became a substitute for having a dialogue. Norwegian authorities required Elkem to engage in a dialogue with the reindeer herders, without specifying the quality and objectives of that dialogue.

Regarding the procedural factors, Elkem on the one hand, claimed that the interests of the reindeer herders had been thoroughly processed in the process leading to the authorization of the zoning plan. On the other hand, while the reindeer herders had room for maneuver within both the legal and corporate frameworks and advocated for their rights by claiming both procedural errors and substantial impacts running counter to the requirements of Article 27, also pointed out by the County Governor, this was still not enough to stop the permit process.

6.2 The significance of the case

The shortcomings identified concerning the meaning of dialogue, procedural mistakes, and the effects that contradict international law requirements, are not unique to this single case. The importance of the case highlights the relevance of international law as a benchmark for industrial interventions, the inconsistency in evaluating negative impacts, the convergence of state and industry interests, and the failure to comply with international norms for corporate human rights responsibility.

NIM¹²⁷ points out that the Ministry of Petroleum and Energy in interference cases seemed to move away from general proportionality assessments of the threshold after its consideration of the Fosen case in 2013. However, the involved ministries' Násavárre assessment from 2016, that the societal benefits from the mining project will make up for the negative consequences for the reindeer herding, weighs protected Indigenous rights against majority group's interests. Broderstad¹²⁸ indicates that ministerial decisions in wind power cases appear to be less consistent and that the views from case to case differ on past and present negative impacts on reindeer herding. This inconsistency can be further amplified as the state's interest closely aligns with the industry, leaving the reindeer herders and their interest in an even more marginalized position.

127 NIM, *Human Rights Protection Against Interference in Traditional Sami Areas*, 71.

128 Broderstad, "International Law, State Compliance and Wind Power: Gaelpie (Kalvvatnan) and Beyond", 31.

Our findings show that even though Norway is committed by national and international law when it comes to extractive industries on Indigenous lands in Sápmi, having a legal framework for participation is not enough, as long as participation is not defined more closely. The Norwegian state ultimately remains the primary duty-bearer of human rights obligations.¹²⁹ In the Násávárre case the Norwegian state sets the parameters by asking for dialogue between industry and reindeer herders and by having laws and regulations in place, however, without following up when it comes to content and action. Thus, an obvious question to ask is whether the Norwegian state merely left their duty behind during the processes leading up to the filing for expropriation by giving the responsibility for handling the case in accordance with human rights obligation to Elkem, without checking Elkem's way of complying with international and national legislation and best practice. In conclusion, our work shows that even when reindeer herders use all the possible tools available, their agency is limited if “no” is not an option in land-use decision-making and as long as guidelines and regulations are not filled with concrete definitions of their content. We have concentrated on the aspect of corporate dialogue and show that the process did not advance via this dialogue. Among other frameworks, the OECD guidelines and the new Transparency Act could serve as structures that facilitate Indigenous agency. Lessons drawn from agreement-making experiences in Swedish Sápmi highlight severe risks, but also point out that such agreements potentially can be important tools where the SBs can defend their rights if these are based on their right to self-determination.¹³⁰

As the interest of industry and state often overlap, the state is not necessarily a neutral judge of due process, and strategic ignorance can be employed by both industry and state without repercussions for them. While strong guidelines and regulations to protect Indigenous rights can be a goal in themselves, they will not automatically realize themselves without proper control and more equalizing strategies like for example taking the power to define the content of impact assessments out of the industry's hands. The state must regulate and monitor the activities of the private sector to prevent human rights abuses.¹³¹

129 The Constitution of Norway, § 92; Human Rights Act, 1999; NIM, Norwegian National Human Rights Institution, and National Contact Point for Responsible Business Norway 2019. *Natural resource development, business and the rights of Indigenous peoples*. Oslo: NIM.

130 Larsen, Staffansson, Omma, Lawrence, *Avtal mellan samebyar och exploatörer. Hur påverkas renans välmående?*, 28–29.

131 Cf. Nathan J. Bennet, Elisa Morgera, David Boyd, “The Human Rights to a Clean, Healthy and Sustainable Ocean”, *npj Ocean sustainability*, 3–19, (2024): 5. <https://doi.org/10.1038/s44183-024-00057-7>

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