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10 Revisiting the governance triangle in the Arctic and beyond

Monica Tennberg, Else Grete Broderstad and Hans-Kristian Hernes

From the governance triangle to meta-governance

Large-scale projects to extract energy resources, minerals and fish are attractive to governments as well as for local communities. They promise to bring income, employment and well-being, while concerns over social and environmental consequences of such projects are also widely known and shared. Our cases in this book—of wind power development, aquaculture and mining—represent extractive industries. Recent Arctic research has focused on the conflicts between extractivism, Indigenous self-determination and government policies (Kuokkanen, 2019; Lawrence and Moritz, 2019; Willow, 2019; Alcantara and Morden, 2019; and Tysiachniouk, Petrov and Gassiy, 2020). Extractivism pertains to the industrial use of natural resources and land: it is a response to ever-growing global resource demands and has become increasingly dominated by foreign investments, privatization of industrial activities and company-led practices of corporate social responsibility as "neo-extractivism" (Wilson and Stammler, 2016; Junka-Aikio and Cortes-Severino, 2017).

Governance of natural resources refers to 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 their communities participate in, benefit from and oppose the extraction of natural resources. The principle of self-determination is central in natural resource governance for Indigenous peoples and their political, social and economic rights confirmed in numerous global human rights conventions and declarations discussed in this book. These rights have been applied widely and differently in different national contexts, but as the Australian sociologist Louisa Humpage (2010, p. 539) notes, "uncertainty thus remains about the best mix of recognition and redistribution needed to produce good outcomes for Indigenous peoples in terms of both welfare *and* greater Indigenous autonomy and control."

Central to governance is the way governments, authorities, private bodies and non-governmental organizations interact with each other while aiming to solve governance challenges, avoid failures and create opportunities for better governing. Our approach seeks to go beyond governance as practical problem-solving or general rule-making, and rather view it as meta-governance (Kooiman and Jentoft, 2009; see also Meuleman, 2008; Jessop, 2011). Meta-governance embraces

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principles, norms and values: it is about the normative bases that underpin different forms of natural resource governance and also includes the application of principles guiding interactions and communication between agencies and responsible institutions (Kooiman et al., 2005).

The different modes of governance here refer to *hierarchical, state-led governance* with authority and legitimacy as its main values; *industries-led market governance*, where the main values are profit, effectiveness and time; and *civil society-based network governance*, which is steered most of all by trust and consensus. These modes usually appear in various combinations and together they also produce different kinds of interactions between different parties and governance failures (Meuleman, 2008, 2019). From the meta-governance perspective, governance failures stem from the mix of different modes of governance. Governance failures can be expected, firstly, if there is an institutional mismatch between the issues to be governed and institutional arrangements, and secondly, when capacity and resources for governance are lacking. (See also Smith, 2008; Larsen and Raitio, 2019; Meuleman, 2019; La Cour and Aakerstroem Andersen, 2016).

Our analysis of meta-governance centers on how Indigenous self-determination as a major, internationally recognized principle and nationally implemented norm is interpreted in interactions between Indigenous communities, states and extractive industries. In these interactions, three principal sites have been identified on the basis of the investigated cases. First of all, there are the legal processes balancing economic interests, Indigenous rights and national and international commitments, which in practice become tangible in various consultation processes, authorities' decisions, court hearings and legal developments. Second, there are the different forms and procedures in private agreement-making between industry representatives and Indigenous peoples' organizations, while the third site is that of individual projects, local debates between Indigenous activists, local and national decision-makers and authorities and company representatives. It is here that the different modes of governance, values, principles and norms meet and mix, resulting in both successes and failures in natural resource governance from the Indigenous peoples' perspectives.

Our analysis examines both structural constraints and discursive opportunities that Indigenous peoples have in communicating their concerns about current extractive industry plans and projects. We have analyzed how the agency of Indigenous peoples manifests—as rights-holders, stakeholders and contesting the norms and the different mixtures in practice—in natural resource governance in Nordic countries, Russia, Canada, Australia and New Zealand. Our cases represent both positive and negative outcomes from the Indigenous peoples' perspectives.

Balancing Indigenous rights, economic interests and national commitments in court

In our cases, hierarchical governance is a combination of the countries' colonial pasts and current, mostly neoliberal, governmental policies, framing in different ways how the states apply global human rights mechanisms. From the perspective of hierarchical governance, Indigenous peoples are rights-holders. The results from our case studies show that governments are struggling to recognize this role for

Indigenous peoples. In her chapter, Else Grete Broderstad discusses state compliance with international law obligations, especially the role of article 27 of the International Covenant on Civil and Political Rights (ICCPR) in the Sámi rights development in Norway. The discussion focuses on a specific case where the Norwegian Ministry of Petroleum and Energy halted the plan for building a wind power station on traditional reindeer herding lands in 2016. The ministerial decision to revoke the existing license can be interpreted as avoiding violation of human rights through government action. However, the government's assessment of the very same article 27 has in other cases led to a different outcome. In order to understand this mismatch, Broderstad identifies different indicators for state compliance, including structural indicators to assess states' commitment to the protection of human rights in domestic legislation while process indicators evaluate their implementation. Outcome indicators are important in the assessment in concrete cases of state failure to comply with human rights. Despite these inconsistencies in state compliance with international law in Norway, Broderstad concludes that "[t]he state nevertheless remains the primary duty-bearer of human rights obligations."

The failure to honor international and national commitments is evident in the Swedish wind power cases discussed by Dorothée Cambou, Per Sandström, Anna Skarin and Emma Borg in this volume. The increasing number of court cases in the governance of natural resources is testimony to the opaque application of the central principles of the governance process, including such issues as sustainable development and Indigenous rights, and their legitimacy. The courts have become the last arena where the different economic interests, Indigenous rights and national commitments are mediated. However, due to Swedish legislation, the courts' role as mediator is limited in ensuring the protection of the rights of the Sámi. According to Cambou et al., in these Swedish cases, the final court decisions favor a market-oriented perspective of sustainable development in allowing wind energy development in the reindeer herding areas. The courts have not confronted the political imbalance between national environmental and economic interests and those of the Sámi as an Indigenous people and the sustainability of their traditional lands and livelihoods at the local level. As Cambou et al. argue, these Swedish cases "epitomize the persistent challenges faced by the Swedish courts to ensure sustainability at every level amid increasing demands to promote sustainable development for all."

Unclear obligations on company consultations with Indigenous peoples emphasizes the role of the courts, as Gabrielle Slowey shows in her chapter about a mining case in Ontario, Canada and the concerns of Ontario First Nations. As the Canadian courts now require that Indigenous nations be consulted, the state encourages and may in some cases demand that companies negotiate impact benefit agreements (IBAs) with communities as proof of such consultation before issuing the companies with permits and licenses. However, recent developments in Canadian legislation may undermine this obligation: in 2020, the Ford government in Ontario introduced a new bill (Bill 197: The COVID-19 Economic Recovery Act), which among other things modifies the main parts of the provincial environmental assessment regulations. Slowey sees this governmental move as an attempt in the shadow of the global pandemic to "further push mining and northern

development onto the backs of First Nations." Slowey points out that although Ontario First Nations have constitutionally protected treaty rights and the courts have mandated consultation in advance of development projects, the Ford legislation streamlines and, in some cases, removes the established procedures and protections which are essential in areas where First Nations remain directly tied to state action and are subject to extraction. This is especially challenging given the small number of modern, post-1975 treaty land claims with accompanying self-government agreements which offer more agency for First Nations. Slowey stresses that "[w]here First Nations do not have modern treaties, there is no level playing field" between Indigenous peoples and industry plans.

The role of the state in ensuring Indigenous rights in agreement-making

In market governance, contracts are key and the role of the state is similarly important in drawing up fair agreements. In Australia, under neoliberalism, the state encourages private agreement-making for natural resource governance, which renders the industries and Indigenous peoples responsible for making such deals. Similar processes are underway in Canada, where Indigenous participation in decision-making over extractive projects on their lands is channeled through highly regulated impact assessment procedures and the negotiation of agreements with developers. The contractual nature of market governance has resulted in company-based tools for natural resource governance, such as impact benefit agreements (IBA); free, prior and informed consent (FPIC); corporate social responsibility (CSR); and social license to operate (SLO). These practices promise Indigenous communities compensation for cooperation with companies and access to their traditional areas, and construct Indigenous peoples as economically driven stakeholders and rational actors following a neoliberal governmental logic. These company-led approaches have been criticized for privatization of consultation, naturalizing market-based solutions and limiting access to important political and legal channels (MacDonald, 2011; Strakosch, 2015).

The Canadian cases in this book show the importance of state support in agreement-making between industries and Indigenous peoples. The Tłı̨chǫ of Mackenzie Valley are a Canadian First Nation that have both a modern land claims treaty and self-government. The creation of the Tłı̨chǫ government with law-making authority over citizens, communities and lands in the Northwest Territories has produced an Indigenous governing body which is influential as a decision-maker and resource manager in its traditional area. Horatio Sam-Aggrey discusses in his chapter the role of the impact benefit agreement, negotiated between the mining industry and Tłı̨chǫ communities. The case also shows that comprehensive land claims agreements (CLCAs) in northern Canada have provided a legal framework to ensure Indigenous participation, political leverage in natural resource governance and clarity in terms of land ownership and Indigenous rights. Sam-Aggrey concludes that "it is not far-fetched to argue that in the case of the Tłı̨chǫ, the relationship between the State and the Tłı̨chǫ is the most important angle of the governance triangle." It has given the Tłı̨chǫ political leverage in

their relationship with industry, thereby slightly leveling the playing field between the two parties.

In the case of Australia, Catherine Howlett and Rebecca Lawrence investigate the agreement-making tools to support the idea that Indigenous peoples agree with and consent to resource developments on their lands and territories at the expense of their rights. The recent case of the agreement-making process for the Adani Carmichael coal mine in Queensland illustrates the problems in the agreement-making process. The Wangan and Jagalingou peoples have previously rejected the company's development proposals for the Carmichael mine. Despite the resistance, several mining leases have been issued to the company by the Queensland government without the consent of all of the Wangan and Jagalingou native title claimants. Under the current Australian legislative framework, it is not necessary to obtain consent of all Indigenous parties whose native title rights will be affected by development. Howlett points out that the Australian agreement-making practice allows only an extremely limited form of "agency," one where Indigenous peoples are forced to engage with, and consent to, tools that ultimately dispossess them.

Comparing the Nordic and Australian circumstances, Howlett and Lawrence argue in their chapter that the Nordic states are not immune to neoliberal natural resource policies; in fact, if anything, "they have in some ways been all the more willing to take on neoliberal logics and practices." Benefit-sharing and part-ownership agreements with local municipalities, landowners and neighboring (non-reindeer herding) local communities have been negotiated for wind power projects in Sweden while the Sámi have been completely marginalized in these processes. In the case of the Stekenjokk agreement between the County Board and the wind power company, the local Sámi community was not party to the agreement nor to any of the negotiations. What the Swedish state did instead, according to Howlett and Lawrence, was play the role of paternal protector by claiming to represent Sámi interests, but it also took "the role of market actor by staking a claim to a market share of any profits." In this way, the state leveled the playing field between wind power developers and landowners.

Indigenous agency in network governance

Network governance refers to situations where the state engages with non-governmental actors, such as Indigenous peoples and industries, while maintaining some degree of control over the activity of such governance networks (Jessop, 1998; Sørensen and Torfing, 2007). In our analyses, network governance has been understood as a mostly locally constituted but often rather dispersed network of representatives of Indigenous peoples, authorities from different levels of administration, local people and company representatives interacting upon a project idea or a more concrete plan. This is the least defined site of governance among our cases, and complex power relations between different actors are also at play here. Most importantly in this context, the normative power of Indigenous peoples often translates to an issue of knowledge. Knowledge and the use of various kinds of knowledge by different knowledge holders are key to creating a common

understanding of the values, principles and norms to be negotiated and implemented. This is an important aspect of Indigenous agency in natural resource governance, as it entails the very ability of Indigenous peoples to participate in the planning of extractive projects, influence development in their areas and represent their interests and rights (Brattland et al.; see also Cambou et al. in this volume).

As Camilla Brattland, Else Grete Broderstad and Catherine Howlett stress in their chapter, Indigenous peoples' political agency is a result of multiple power relations that define their scope and forms of political action. The comparison between the Norwegian and New Zealand salmon industry highlights structural and discursive constraints on Indigenous agency. In both countries, Indigenous peoples are heavily involved in marine livelihoods, but in markedly different ways. Whereas the Māori hold a share of marine industry development in New Zealand, in Norway marine development is seen as the domain of the municipalities. Likewise, the process of consultation and participation in aquaculture licensing differs greatly between the two countries. The standards set by global human rights mechanisms on consultations and agreements with Indigenous local communities have been implemented in the New Zealand governance system, which serves to strengthen Indigenous agency as seen in the Marlborough Sounds case. In contrast, the lack of state recognition of Sámi presence and interests in the coastal areas of Norway, as is evident in the Vedbotn aquaculture case, seriously hinders Indigenous agency in local aquaculture development and beyond. In their analysis in this volume, Brattland and colleagues identify a clear need to recognize the obligation of local communities to consult the Sámi on issues that affect Sámi interests and livelihoods.

Networks also function in the context of coercive, authoritarian modes of governance (Kropp and Schuhmann, 2016; see also Berg-Nordlie, 2018), as becomes clear in the analysis by Marina Peeters Goloviznina in this volume. Goloviznina discusses a Russian case by applying the principle of free, prior and informed consent in her chapter about normative conflicts between Indigenous peoples and a gold mining company in the Nezhda mining plan in the Tomponskyi municipal district, northeast Yakutia, Russia. Goloviznina notes that the interactions between the extractive company, Indigenous peoples and authorities take place in the context of the rights-incompatible Russian state where the authorities deliberately replace community (Indigenous) voices and speak on their behalf. This mode of interactions encourages companies to deal with government representatives instead of working with Indigenous peoples directly. In this case, the two regional institutionalized practices in the Sakha Republic (Yakutia)—ethnological expertise and the Ombudsman for Indigenous Peoples' Rights—complement and enhance each other's work, and offer Indigenous peoples ways to broaden their participation in the local governance of natural resources. In addition, as Goloviznina points out in her chapter, the local community benefits from its networks with

> The brothers and their families herd the deer and watch these remote territories all-year-round, whereas the chairwoman's job in Yakutsk is crucial to accessing the authorities, company headquarters and Indigenous associations to carry out necessary paperwork and networking. The combination of rural

> and urban members in the organizational structure and its strong ties with authorities and Indigenous associations ensure the *obshchina*'s access to various sites of negotiations, resources and flows (material and nonmaterial) regionally, nationally and internationally.

The networks in the Nordic countries are to a considerable extent meta-governed by national governments and legitimated by the participation and control by regional and local politicians (Fotel and Hanssen, 2009). This dilemma is discussed by Kaja Nan Gjelde-Bennett with reference to the mining case of Kallak in northern Sweden. Tensions have been building for years between the company, the municipal and national governments and Sámi communities in Jokkmokk municipality. Giving the Sámi a privileged claim to a part of this territory would challenge the authority of the state and the municipality, and it can also be viewed as a threat to their authority and security. As Gjelde-Bennett maintains,

> the Swedish state's interests in economic growth and protecting its sovereignty present formidable obstacles to ruling in favor of the Sámi communities. The legitimization of Indigenous rights domestically could alter the existing power structures that give preferential treatment to states operating within a neoliberal paradigm.

The state in the governance triangle

Will the states withdraw from governance, as has been frequently claimed in recent years, and will other forms of governing take their place? The findings of different cases in this book suggest the opposite. The state is leveling the playing field for Indigenous peoples in each form of governance and their concrete mixes. The state is a central actor in the governance triangle for natural resources: it is at the same time protector, promoter and regulator of natural resources, Indigenous rights and the distribution of welfare. In the everyday interactions between states, Indigenous peoples and industries, Indigenous self-determination remains a widely accepted norm, which is contested in practice. While some of the cases in this book have produced a positive outcome for Indigenous peoples—such as a withdrawn extraction license, successful agreement-making and inclusion in local debates—most of the cases represent governance failures.

From the perspective of Indigenous peoples, these cases show that governance failures result from different degrees of state compliance with international law and protection of Indigenous rights and self-determination. There is little government support for Indigenous peoples to tackle structural inequalities in interactions with governmental actors and companies, and the institutional opportunities are similarly limited for Indigenous peoples to voice their concerns, to participate and to influence development on their lands. Governance failures lead to poorly organized consultations with Indigenous organizations, while the lack of support for Indigenous participation is evident in the local and

Table 10.1 An overview of the findings from a meta-governance perspective

	Central actor(s)	*Main values*	*Mode of governing*	*Conflict*	*Interactions*	*Indigenous agency*	*State role*	*Governance failures due to*	*Cases, including both positive and negative outcomes for Indigenous peoples*
Hierarchical governance	UN mechanisms, national parliaments, governments and ministries, directorates and local administration, courts	Legitimacy, authority	Regulation, coordination	Unclear legal setting for consultations with Indigenous peoples, gap between legislation and policy implementation	Inconsistent application at national level of international law and obligations	Indigenous peoples as rights-holders in legislation and courts	The state's role as promoter of resource development vs. role as protector of Indigenous lands and rights	Lack of implementation of legal obligations, limitations of courts and national legislation to ensure protection of Indigenous rights	Kalvvatnan wind power case, Norway Pauträsk and Norrbäck wind power case, Sweden Matawa First Nations mine case, Ontario, Canada
Market governance	States and industries	Profit, time	Competition, effectiveness	Private, confidential contracts, lack of public information, closed, private interactions	Company-led interactions: IBAs, FPIC, also CSR, SLO	Rational and economic Indigenous agency, Indigenous stakeholders	State engagement in industry vs. state withdrawal from ownership, while promoting economic development by market	Unfair agreement-making processes, limited form of agency for Indigenous peoples	Tłįchǫ mining case, Canada Adani Carmichael mine, Queensland, Australia Stekenjokk wind power plant, Sweden

(*Continued*)

Table 10.1 (Continued)

	Central actor(s)	*Main values*	*Mode of governing*	*Conflict*	*Interactions*	*Indigenous agency*	*State role*	*Governance failures due to*	*Cases, including both positive and negative outcomes for Indigenous peoples*
Network governance	Governmental and non-governmental actors, state-led networking	Trust, consensus	Argumentation	State sovereignty vs. self-determination, local and regional politics	Local to national interactions, institutional and legal opportunities for voicing Indigenous concerns	Participation, influence, representation, deliberation	Discursive and structural constraints to Indigenous agency	Diverse opportunities for normative contestation by Indigenous peoples, lack of capacity and institutional opportunities, lack of common knowledge systems	Nezhda mine case, Sakha, Russia Vedbotn aquaculture case, Norway Aquaculture in Marlborough Sounds, New Zealand Kallak mine case, Sweden

national authorities' complacency about international law and human rights principles. Scientific advice and traditional knowledge are ignored, and inadequate intersectoral coordination and multilevel policy mismatches further add to governance failure. In the following table the case results are presented from the perspective of meta-governance.

Advocates of meta-governance propose that the answer lies in reaching a normative consensus and coordination. Normative clarity in meta-governance is emphasized by professor in public organizations and management Jan Kooiman and sociologist Svein Jentoft (2009), who claim that difficult choices between values, norms and principles are easier when substantive issues are formulated and the choices inherent in them are made clear. This also requires that the process be guided by an explicit set of meta-governance principles which are deliberated by and made explicit to all concerned, public and private, in an interactive governance context (Kooiman and Jentoft, 2009). The perspective of meta-governance is one of "meta-governors" or, in other words, of political leaders and decision-makers at different levels. Political scientists Jonna Gjaltema, Robbert Biesbroek and Katrien Termeer (2020, p. 177) crystallize meta-governance as "a practice by (mainly) public authorities that entails the coordination of one or more governance modes by using different instruments, methods, and strategies to overcome governance failures." The proposed solution for meta-governance is a combination of deliberate cultivation of a flexible repertoire of responses to governance failures, a reflexive orientation about what would be acceptable policy outcomes, and regular reassessment of whether actions are producing desired outcomes. Governors should recognize that failure is likely but still continue as if success is possible (Jessop, 2011).

From the Indigenous peoples' perspectives, the situation is considerably different. As argued by the political theorist Nicolas Pirsoul (2019, p. 256), the global human rights mechanisms such as the International Labour Organization's Indigenous and Tribal Peoples Convention (ILO 169) and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) favor the creation of deliberative spaces between key state (and sometimes non-state) actors and Indigenous communities that are consistent with theories of deliberative democracy. However, the consultations that do take place suffer from a deliberative deficit. Pirsoul uses New Zealand and Colombia as case studies, and argues that consultation would better help respect the rights of Indigenous peoples if they were consistent with the political ideals that inform deliberative democratic theory. This deliberative deficit is obvious in many of our cases, too.

Due to the governance failures stemming from the deliberative deficit, the Indigenous peoples' future seems to entail a continuous struggle to advance their rights and interests in natural resource governance. They will use hybrid strategies to promote Indigenous self-determination in national legal processes, company-led agreement-making and local networking. By providing alternative future imaginaries in contrast to often neoliberal, extractive economic development, Indigenous peoples will continue to contest the norms. To turn governance failures into successes requires most of all institutional sites for deliberation and normative contestation by Indigenous peoples in their interactions with states and extractive industries. This will take place one struggle at a time, and the states will still have a

central role in leveling the playing field for Indigenous peoples in the governance triangle of natural resources in the Arctic and beyond.

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