

The Political Life of a Human Rights Impact Assessment: Canadian Mining in the Philippines

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Impact assessments have a political dimension, as scholarship in this area explores. The political characteristics of one Human Rights Impact Assessment (HRIA) are examined in this article, using ethnographic analysis. The article examines the genesis, completion and outcomes of the HRIA of a Canadian mining investment in Zamboanga del Norte, in the Philippines. The mine operated from 1996 until 2014. The article analyzes the role that power and positionality play in constructing and producing this HRIA, and in shaping the events that followed its release. The article contends that understanding the political nature of a HRIA is an important part of understanding its potential to promote and protect human rights. The article briefly considers the political dimension of HRIAs that are undertaken to fulfill human rights due diligence requirements under the United Nations Guiding Principles on Business and Human Rights.

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Les études d'impact comportent une dimension politique, comme en fait foi la recherche dans ce domaine. Le présent article examine, au moyen de l'analyse ethnographique, les caractéristiques politiques d'une étude d'impact sur les droits de la personne (EIDP). Il examine la genèse, l'achèvement et les résultats de l'EIDP relative à un investissement minier canadien à Zamboanga del Norte, aux Philippines. Cette mine a été exploitée de 1996 à 2014. L'article analyse le rôle que jouent le pouvoir et le positionnement dans l'élaboration et la production de cette EIDP et dans la façon dont se sont déroulés les événements qui ont suivi sa publication. Les auteures soutiennent que la compréhension de la nature politique d'une EIDP est un facteur important pour appréhender son potentiel de promotion et de protection des droits de la personne. L'article examine brièvement la dimension politique des EIDP qui sont entreprises pour satisfaire aux exigences de diligence raisonnable en matière de droits de la personne conformément aux Principes directeurs de l'Organisation des Nations Unies relatifs aux entreprises et aux droits de l'homme.

I. Introduction

An impact assessment is an evaluation tool and a methodology that offers opportunities for public participation and consultation.¹ As Matthias Sant'Ana notes, "[a]ccording to the International Association for Impact Assessment (IAIA), impact assessment is defined as 'the process of identifying the future consequences of a current or proposed action.'"² One key dimension of an impact assessment, more generally, is its political nature.³ Impact assessments often happen in a context where parties are seeking to exert their power to influence policy.⁴ Cashmore et al indicate that:

[A]ctivities concerned with *the acquisition or exercise of power* can be considered political, including the processes through which collective societal decisions ... are taken and implemented. ... [P]olitics is not limited to the acts of sovereign governments and their administrations, but is also conducted in a multiplicity of arenas and international and local levels.⁵

Cashmore et al identify three ways in which an impact assessment is political.⁶ First, an impact assessment instrument is a political statement, drawing attention to the importance of policy issues.⁷ Second, impact assessment instruments solidify particular governance norms by setting parameters regarding "how knowledge is generated, codified and interpreted".⁸ In other words, impact assessments define criteria to determine what comprises knowledge *vis-à-vis* policy.⁹ Third, impact assessments focus on issues related to distributional justice and freedom.¹⁰

¹ See e.g. Paul Hunt & Gillian MacNaughton, "Impact Assessments, Poverty and Human Rights: A Case Study Using the Right to the Highest Attainable Standard of Health" (2006) WHO & UNESCO Health and Human Rights Working Paper No 6 at 33, online: <www.who.int/hhr/Series_6_Impact%20Assessments_Hunt_MacNaughton1.pdf>; Gauthier de Beco, "Human Rights Impact Assessments" (2009) 27:2 *Nethl QHR* 139 at 148. This article specifically talks about right-based assessments.

² Matthias Sant'Ana, "Foreign Direct Investment and Human Development: Two Approaches to Assessing Impacts on Human Rights" (2009) 3:2 *Human Rights & Intl Leg Discourse* 229 at 249.

³ See e.g. Ciaran O'Faircheallaigh, "Effectiveness in Social Impact Assessment: Aboriginal Peoples and Resource Development in Australia" (2009) 27:2 *Impact Assessment & Project Appraisal* 95 at 96: "[t]here is little consensus in the literature about how 'effectiveness' in [Social Impact Assessment] might be defined, or about how best to pursue it. This reflects the essentially contested and political character of SIA and of impact assessment (IA) generally." See also Bo Elling, "Rationality and Effectiveness: Do EIA/SEA Treat Them as Synonyms?" (2009) 27:2 *Impact Assessment & Project Appraisal* 121.

⁴ Matthew Cashmore, Tim Richardson, Tuija Hilding-Rydevik & Lars Emmelin, "Evaluating the Effectiveness of Impact Assessment Instruments: Theorising the Nature and Implications of Their Political Constitution" (2010) 30:6 *Environmental Impact Assessment Rev* 371 at 373.

⁵ *Ibid* [emphasis added]. This definition builds on Harold Lasswell's work. See *Politics: Who Gets What, When, How* (New York: McGraw-Hill, 1936).

⁶ Cashmore et al, *supra* note 4 at 373.

⁷ *Ibid*.

⁸ *Ibid*.

⁹ *Ibid*.

¹⁰ *Ibid*.

This article examines the political dimensions of a Human Rights Impact Assessment (HRIA) completed for a Canadian mining investment in the Philippines. It is foreseeable that all three political characteristics identified by Cashmore et al will be evident in the development of the HRIA for this mining investment.¹¹ Speaking to the first and third political characteristics for ease of explanation, a HRIA sends a message that human rights are worthy policy considerations, and it is concerned with the allocation of wealth and resources. HRIsAs are perhaps even more concerned with distributional justice than other types of impact assessments, because they draw attention to the importance of human rights in policy-making.¹² Human rights are often used as political instruments to protect human agency.¹³ A HRIA becomes increasingly political when it is conducted in a highly charged context.¹⁴ This increase stems from general disparity within a specific context, and a combination of various factors, including the nature of the industry (e.g. mining, oil), the type of foreign investment and investor, location and timing (e.g. conflict area during armed confrontations) and the host country's characteristics (e.g. weak state).¹⁵

Cashmore et al's second political characteristic relates to how a HRIA sets boundaries around what constitutes knowledge *vis-à-vis* policy.¹⁶ This might be evident in how the power exerted by involved parties affects why and how the impact assessment is conducted.¹⁷ Empirical research methodologies, like ethnography, can help researchers consider how parties' agendas and positionality influence not solely the broad logistical realization of the impact assessment, but the actual methodological choices made by the assessor and other parties.¹⁸ Power and positionality likely also shape parties' responses to the HRIA and the framing of its content.

¹¹ *Ibid.*

¹² de Beco, *supra* note 1 at 146: "HRIsAs can facilitate the mainstreaming of human rights".

¹³ Michael Ignatieff, "Human Rights as Politics and Idolatry" in Michael Ignatieff & Amy Gutmann, eds, *Human Rights as Politics and Idolatry* (Princeton, NJ: Princeton University Press, 2001) at 4.

¹⁴ There is now a vast amount of literature on the politics of foreign investment and the extractive sector in militarized and/or weak governance zones. See e.g. Ugo Mattei & Laura Nader, *Plunder: When the Rule of Law is Illegal* (Malden, Mass: Blackwell Publishing, 2008); Penelope Simons & Audrey Machlin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage* (New York: Routledge, 2014); Alain Deneault & William Sacher, *Imperial Canada Inc.: Legal Haven of Choice for the World's Mining Industries* (Vancouver: Talonbooks, 2012); Patricia I Vasquez, *Oil Sparks in the Amazon: Local Conflicts, Indigenous Populations, and Natural Resources* (Athens, Ga: University of Georgia Press, 2014); Evaristus Oshionebo, *Regulating Transnational Corporations in Domestic and International Regimes: An African Case Study* (Toronto: University of Toronto Press, 2009).

¹⁵ Sant'Ana, *supra* note 2 at 231, 248. See also *ibid.*

¹⁶ Cashmore, *supra* note 4 at 373.

¹⁷ See e.g. Claire A Dunlop et al, "The Many Uses of Regulatory Impact Assessment: A Meta-Analysis of EU and UK Cases" (2012) 6:1 Regulation & Governance 23 at 24: "[e]xisting empirical research demonstrates the malleability of [Regulatory Impact Assessments]: the appraisal process is molded and shaped by policy actors to serve a variety of different purposes."

¹⁸ *Ibid.*

Examination of a HRIA's political facets is both useful and timely. In the wake of the United Nations Human Rights Council's 2011 adoption of the United Nations Guiding Principles on Business and Human Rights (UNGPs)¹⁹, HRIAs are increasingly identified as a means by which businesses may meet their social obligation to perform their human rights due diligence.²⁰ Some note the risk, however, that not all of the HRIAs completed in this context will be necessarily "meaningful" in enhancing human rights performance.²¹ Scholars note that for HRIAs to be meaningful in addressing human rights impacts, the qualitative nature of a given HRIA must meet key requirements.²² For example, Harrison identifies "transparency; external participation and verification; and independent monitoring and review" as important requirements,²³ while Götzmann underscores several criteria including adherence to a human rights-based process that emphasizes participation and inclusion.²⁴ These authors explore how, if a HRIA does not meet certain requirements, it may be a meaningless exercise.²⁵ As a result, key stakeholders may be disillusioned with the process and the outcome of the assessment, and the HRIA may not actually enhance corporate human rights performance.²⁶

The political side of a HRIA is thus highly relevant to its potential contribution to human rights promotion and protection. This article builds on Harrison's observation that "far more important than the formalities of the adoption of the procedural elements prescribed is the manner in which each element of the process is actually conducted in each individual HRIA."²⁷ The authors seek to address a gap in HRIA scholarship, noted by Götzmann,

¹⁹ *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, Human Rights Council, 17th Sess, UN Doc A/HRC/17/31 (2011) at 15–16. Principle 15(b) states that business enterprises' (social) responsibility to respect human rights requires that enterprises put in place "[a] human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights"; Principle 17 also sets out that "business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integration and acting upon the findings, tracking responses, and communicating how impacts are addressed."

²⁰ James Harrison, "Establishing a Meaningful Human Rights Due Diligence Process for Corporations: Learning From Experience of Human Rights Impact Assessment" (2013) 31:2 *Impact Assessment & Project Appraisal* 107 at 111.

²¹ *Ibid* at 111. Nora Götzmann, "Human Rights Impact Assessment of Business Activities: Key Criteria for Establishing a Meaningful Practice" (2017) 2:1 *Business & Human Rights*] 87 at 107 [Götzmann, "HRIA"].

²² See e.g. Harrison, *supra* note 20; Götzmann, "HRIA", *supra* note 21.

²³ Harrison, *supra* note 20 at 108.

²⁴ Götzmann, "HRIA", *supra* note 21 at 99.

²⁵ *Ibid*; Harrison, *supra* note 20 at 108.

²⁶ Harrison, *supra* note 20 at 111. See also Peter Muchlinski, "Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation" (2012) 22 *Business Ethics* 145 at 156: "unless a corporate culture of concern for human rights is instilled into the officers, agents and employees of the company, due diligence could end up missing the very issues it is set up to discover. At worst it could degenerate into a 'tick-box' exercise designed for public relations purposes rather than a serious integral part of corporate decision-making."

²⁷ Harrison, *supra* note 20 at 109.

concerning “the careful consideration of the power-dynamics at play within communities, between rights-holders, companies and state actors, as well as with regard to the people who comprise the assessment team.”²⁸ This article aims to present a detailed qualitative analysis of the HRIA of a mining project, to expressly identify how power and party positionality shapes HRIAs in their processes, findings and outcomes. To do so, the analysis is framed within literature on power and positionality, particularly in the context of inter-organizational collaboration.

Collaboration is broadly defined by Phillips, Lawrence & Hardy as “a cooperative relationship among organizations that relies on neither market nor hierarchical mechanisms of control.”²⁹ Organizations including governments, corporations and non-governmental organizations (NGOs) collaborate “as a means of reducing uncertainty, acquiring resources, and solving problems”.³⁰ As Hardy and Phillips note, “it is often assumed that stakeholders collaborate voluntarily, sharing common goals and equal power.”³¹ In inter-organizational relationships, organizations perceive themselves to be connected to common issues.³² These relationships are not, however, set by objective, predetermined structures, but “by processes of negotiations, social construction and meaning creation”.³³ It is expected that those participants with more power and ability will be able to shape relationships to their advantage.³⁴ If they share a common goal, they may share power; but when goals are in conflict, power sharing is unlikely.³⁵

Power is conceptualized in various frameworks.³⁶ In the context of inter-organizational collaboration and conflict, this article uses Hardy and Phillips’ simplified framework on power.³⁷ This framework has three aspects, namely, “formal authority, the control of critical resources, and discursive legitimacy”.³⁸ Formal authority in inter-organizational collaboration manifests into one

²⁸ Götzmann “HRIA”, *supra* note 21 at 99.

²⁹ Nelson Phillips, Thomas B Lawrence & Cynthia Hardy, “Inter-Organizational Collaboration and the Dynamics of Institutional Fields” (2000) 37:1 J Management Studies 23 at 24.

³⁰ Cynthia Hardy & Nelson Phillips, “Strategies of Engagement: Lessons From the Critical Examination of Collaboration and Conflict in an Interorganizational Domain” (1998) 9:2 Organization Science 217 at 217.

³¹ *Ibid* at 217.

³² *Ibid* at 218.

³³ *Ibid*. See Maria L Nathan & Ian I Mitroff, “The Use of Negotiated Order Theory as a Tool for the Analysis and Development of an Interorganizational Field” (1991) 27:2 J Applied Behavioral Science 163 at 165 (discusses the process of negotiation). See Jean B McGuire, “A Dialectical Analysis of Interorganizational Networks” (1988) 14:1 J Management 113 at 122 (discusses the process of social construction). See David L Altheide, “Mediating Cutbacks in Human Services: A Case Study in the Negotiated Order” (1988) 29 Sociological Q 339 at 340–41 (discusses the process of meaning creation).

³⁴ Hardy & Phillips, *supra* note 30 at 219.

³⁵ *Ibid*.

³⁶ See e.g. Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977* (New York: Pantheon Books, 1980) at 109–45; Pierre Bourdieu, *Sociology in Question* (London: Sage Publication, 1993); Stewart R Clegg, *Frameworks of Power* (London: Sage Publications, 1989) at 189–239.

³⁷ Hardy & Phillips, *supra* note 30.

³⁸ *Ibid* at 219.

particular organization that has a “recognized, legitimate right to make a decision” (e.g. a government or donor agency).³⁹ Scarce or critical resources like “expertise, money, equipment, information, etc.” tilts power relations in favor of participants who are able to provide or supplement such resources.⁴⁰ Lastly, some organizations obtain influential power through discursive legitimacy.⁴¹ Discursive legitimacy refers to when participants appear to speak legitimately and genuinely for issues and organizations, rather than for their own underlying self-interests.⁴² As argued by Hardy and Phillips, those actors who have better access to authority, resources and discursive legitimacy will likely exert greater influence in inter-organizational relationships.⁴³ Thus, positionality is an important aspect of collaboration as it adds a particular complexity to the power relations among actors.

Positionality is both social and organizational.⁴⁴ Social positionality is defined as “the different levels of social standing afforded [to] individuals by broader societal inequities and asymmetrical relations of power”⁴⁵, and is associated with a reflective ethnographic approach.⁴⁶ Organizational positionality, however, is the “differing relations of authority embedded in organizational structures.”⁴⁷ This article focuses on organizational positionality, in the context of inter-organizational collaboration and conflict. In sum, we understand organizational positionality as an organization’s unique position, which reflects its institutional resources (e.g. expertise, money and equipment), political and ideological views, history and previous experiences in collaborative relationships, addressing issues that shape power dynamics and relationships. The social and organizational positionality of individuals who interact with other organizations due to vested authority is also at work during collaboration.⁴⁸ This adds to the power imbalance and complexity present within inter-organizational collaboration.⁴⁹

Building on previous understandings of collaboration, power and positionality, this article reviews the HRIA of a mining investment to identify

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ Nathan D Brubaker, “Negotiating Authority Through Cultivating a Classroom Community of Inquiry” (2012) 28:2 *Teaching & Teacher Education* 240 at 242. See also Joan Acker, “Hierarchies, Jobs, Bodies: A Theory of Gendered Organizations” (1990) 4:2 *Gender & Society* 139 at 146–47 (examines gender as a form of positionality in organizations).

⁴⁵ Brubaker, *supra* note 44 at 242.

⁴⁶ See e.g. Elizabeth Chiseri-Strater, “Turning in Upon Ourselves: Positionality, Subjectivity and Reflexivity in Case Study and Ethnographic Research” in Peter Mortensen & Gesa Kirsch, eds, *Ethics and Representation in Qualitative Studies of Literacy* (Urbana: National Council of Teachers of English, 1996) 115 at 115.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.* at 241–42.

⁴⁹ *Ibid.*

how the involved parties shaped that particular HRIA and its outcomes. This article relates to literature that argues impact assessments have a political dimension, including their relationships to involved parties and their exercise of power.⁵⁰ It also relates to emerging literature on HRIAs, which notes that a HRIA will not necessarily be “meaningful” in enhancing human rights performance unless it adheres to certain principles, such as transparency.⁵¹ This article thus seeks to connect several areas of scholarship. Specifically, the article contends that because a HRIA is political, similar to other forms of impact assessments, it must be subject to certain principles in order to be meaningful. For a HRIA to be more than a manifestation and re-enforcement of existing power relations, the power of involved parties must be effectively tempered by their adherence to common principles, namely a realized commitment to a transparent, comprehensive and accurate portrayal of human rights conditions.⁵² There does not appear to be scholarship to date that examines the political nature of a HRIA using a combined case study and ethnographic method; this is the contribution this article seeks to make.

This article is organized into five sections. Following the introduction, Part 2 introduces the HRIA case study, including the methodology and background of the HRIA. Part 3 qualitatively analyzes the political nature of the HRIA. Part 4 discusses the findings, and finally, Part 5 provides a brief conclusion.

II. HRIA Case Study

A. Methodology

Using ethnographic analysis, this article analyzes the lead-up, execution and outcomes of a HRIA completed for the Toronto Ventures Pacific Incorporated (TVI) mining project at Mount Sitio Canatuan in the Philippines. It makes use of field research methods, including participant observation, story-telling, key informant interviews, focus group interviews and the textual analysis of various materials. The textual materials that constitute data are: fact-finding reports, in-depth journalistic investigations, government reports, feasibility studies, audited financial statements, management discussion and analysis reports, company annual reports and reviews.

⁵⁰ Cashmore et al, *supra* note 4. See e.g. Leon Hempel & Hans Lammerant, “Impact Assessments as Negotiated Knowledge” in Serge Gutwirth, Ronald Leenes & Paul de Hert, eds, *Reforming European Data Protection Law* (Heidelberg: Springer Dordrecht, 2015) 125 at 133: “[i]n the context of impact assessment knowledge and power are inextricably linked. Impact assessments produce knowledge, but are also the object or site of a struggle between interests. ... Defining what knowledge is, is in itself an element of power.”

⁵¹ See e.g. Harrison, *supra* note 20 at 108.

⁵² See *ibid* at 108; Götzmann, “HRIA”, *supra* note 21 at 99.

Ethnography is a qualitative research method, one which Clifford Geertz notably termed a form of “thick description” in 1973.⁵³ Joseph G Ponterotto explains this form of research further:

Thick description refers to the researcher’s task of both describing *and interpreting* observed social action (or behavior) within *its particular context*. ... Thick description accurately describes observed social actions and assigns purpose and intentionality to these actions, by way of the researcher’s understanding and clear description of the context under which the social actions took place. Thick description captures ... the often complex web of relationships among [participants].⁵⁴

Field research was completed in Sitio Canatuan area, Siocon Poblacion and the immediate surrounding region over several periods while the HRIA was being conducted (spanning 7.5 months in 2006). The total time of fieldwork in the municipality spanned 41 months, commencing in December 2003 and concluding in September 2009. The analysis of textual sources related to the HRIA and the mine continued up to, and including, 2016.

B. Background to the HRIA Case Study

In 2005, community representatives from Siocon Municipality in Mindanao, Philippines and MiningWatch Canada’s (MWC) Catherine Coumans, gave testimony to the 38th Canadian Parliament’s Subcommittee on Human Rights and International Development.⁵⁵ Her testimony focused on the activities of TVI, a Canadian-owned junior mining company, and their alleged human rights abuses.⁵⁶ Alleged human rights abuses included those pertaining to forced relocation, security force violence and food insecurity.⁵⁷ Also appearing before the Sub-Committee was Diana Bronson of the Parliament-supported organization, Rights and Democracy (R&D).⁵⁸ Ms. Bronson testified that over the past 10 years, R&D had received credible complaints regarding Canadian mining practices that had a direct and negative impact on human rights in developing countries.⁵⁹

To address these human rights complaints against Canadian mining companies operating abroad, R&D proposed initiatives that aimed at

⁵³ Clifford Geertz, “Thick Description: Toward an Interpretive Theory of Culture” in Clifford Geertz, ed, *The Interpretation of Cultures: Selected Essays* (New York: Basic Books, 1973) at 6.

⁵⁴ Joseph G Ponterotto, “Brief Note on the Origins, Evolution, and Meaning of the Qualitative Research Concept Thick Description” (2006) 11:3 *Qualitative Report* 538 at 543 [emphasis added].

⁵⁵ House of Commons, Sub-Committee on Human Rights and International Development of the Standing Committee on Foreign Affairs and International Trade, *Evidence*, 38th Leg, 1st Sess, No 12 (23 March 2005) (Chair: David Kilgour) at 3–6 [House of Commons, “Human Rights Sub-Committee”], online: <www.parl.gc.ca/HousePublications/Publication>.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid* at 6–7.

⁵⁹ *Ibid.* See generally Sara Seck, “Home State Responsibility and Local Communities: The Case of Global Mining” (2008) 11:1 *Yale Human Rts & Dev LJ* 177 at 179–80 (describes the proceedings).

improving the integration of human rights into the actions of corporations to prevent similar human rights violations in the future.⁶⁰ R&D proposed the development of a HRIA tool to be used by states and intergovernmental bodies.⁶¹ It was envisioned that a comprehensive assessment of human rights would be conducted before agencies could provide financial, diplomatic and other means of support to companies.⁶² The HRIA would preempt abuses since stakeholders would be alerted to the “potential problem areas and benefits of any investment”.⁶³ The Parliamentary Committee on Foreign Affairs and International Trade ultimately adopted the Sub-Committee on Human Rights’ 2006 report recommendation, urging the Government of Canada to:

Put in place stronger incentives to encourage Canadian mining companies to conduct their activities outside of Canada in a socially and environmentally responsible manner and in conformity with international human rights standards. Measures in this area must include making Canadian government support ... conditional on companies meeting clearly defined corporate social responsibility and human rights standards, particularly through the mechanism of human rights impact assessments.⁶⁴

The 2005 hearing did not lead to any legislative change where HRIAs would be mandatory for mining companies to receive governmental support; R&D was dissolved by Parliament a few years later.⁶⁵ However, shortly after the hearing, R&D did use its resources to fund HRIAs in five jurisdictions: Argentina, Congo, Peru, Philippines and Tibet.⁶⁶ The pilot project conducted in the Philippines in 2006 is the focus of the current article. This article examines the politics underlying the beginning, execution and outcomes of this pilot project, until the mining operations were declared complete in 2014.⁶⁷ In 2007, the results of the five pilot R&D case studies were published.⁶⁸ A year later, R&D released its *Getting it Right: A Step by Step Guide to Assess the Impact of*

⁶⁰ House of Commons, “Human Rights Sub-Committee”, *supra* note 55 at 7.

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ House of Commons, Standing Committee on Foreign Affairs and International Trade, *Mining in Developing Countries: Corporate Social Responsibility* (Chair: Bernard Patry) at 2, online: <www.parl.gc.ca/committee/CommitteePublication>.

⁶⁵ Carys Mills, “Seeking ‘Clean Slate,’ Baird Pulls Plug on Rights & Democracy”, *The Globe and Mail* (3 April 2012), online: <www.theglobeandmail.com/news/politics/ottawa-notebook/seeking-clean-slate-baird-pulls-plug-on-rights-democracy/article2390896/>.

⁶⁶ Rights and Democracy, *Human Rights Impact Assessment for Foreign Investment Projects: Learning from Community Experiences in the Philippines, Tibet, the Democratic Republic of Congo, Argentina, and Peru* (Montréal: Rights and Democracy, 2007) [R&D, “HRIA”], online: <publications.gc.ca/collections/collection_2007/dd-rd/E84-21-2007E.pdf>.

⁶⁷ “TVI Pacific Closes Zamboanga Mine”, *ABS-CBN News* (21 January 2014), online: <news.abs-cbn.com/business/01/21/14/tvi-pacific-closes-zamboanga-mine>.

⁶⁸ See R&D, “HRIA”, *supra* note 66.

Foreign Investments on Human Rights.⁶⁹ Following this, several more HRIAs were conducted, including Oxfam America's pilot case studies.⁷⁰ Oxfam America and R&D (2010) also produced *Community-Based Human Rights Impact Assessment: Practical Lessons*, which captured the experiences of pilot assessments conducted in Latin America, United States and the Philippines.⁷¹ This report included guidelines on preparing for a Community-Based HRIA, understood as a community-centered assessment method and advocacy tool, as well as tips for creating an interdisciplinary team.⁷² These tips included how to understand and interact with the communities and stakeholders, how to write the report and finally how to ensure that a HRIA's results were influential.⁷³

Several extractive industry companies had already attempted to refine corporate practices *vis-à-vis* their community engagements.⁷⁴ However, the companies' methodologies were closer to that of an ESIA than a HRIA, because they did not follow "a broad human rights-based approach."⁷⁵ At that time, there was no HRIA model in existence.⁷⁶ R&D's HRIA was specific to foreign direct investment projects, and its methodology involved the community assessing the impact of the investment as to ensure participation.⁷⁷ After R&D's HRIA methodology was released, and prior to the completion of the HRIA in the Philippines, the mining company in the area used this methodology to perform its own HRIA of the Canatuan mining investment.⁷⁸ The results of this assessment were never released.⁷⁹

⁶⁹ Rights and Democracy, *Getting it Right: A Step by Step Guide to Assess the Impact of Foreign Investments on Human Rights* (Montréal: Rights and Democracy, 2008) [R&D, "Getting it Right"], online: <www.ideaspaz.org/tools/download/47402>.

⁷⁰ See e.g. Gabrielle Watson, Irit Tamir & Brianna Kemp, "Human Rights Impact Assessment in Practice: Oxfam's Application of a Community-Based Approach" (2013) 31:2 *Impact Assessment & Project Appraisal* 118 at 119.

⁷¹ Oxfam America & Rights and Democracy, *Community-Based Human Rights Impact Assessment: Practical Lessons: Report From an International Meeting, Canada 2010* (Rights and Democracy & Oxfam America, 2010), online: <oxfamamerica.org/static/media/files/community-based-human-rights-impact-assessments-practical-lessons.pdf>.

⁷² *Ibid* at 15: "[t]he methodology was also conceived as a tool for creating opportunities for communities to effectively voice their concerns."

⁷³ *Ibid*.

⁷⁴ Olga Lenzen & Marina d'Engelbronner, *Guide to Corporate Human Rights Impact Assessment Tools* (Utrecht: Aim for Human Rights, 2009) at 15, online: <<https://commdev.org/wp-content/uploads/2015/06/Human-Rights-in-Business-Guide-to-Corporate-Human-Rights.pdf>>. Such attempts included Anglo American's socio-economic toolbox; Rio Tinto's Community Relations Standard, which required community assessments related to risks and opportunities over the medium to long term; Shell's initiative to test Human Rights Compliance Assessment (HRCA) tools in several countries; and BP's Environmental and Socio-Economic Impact Assessment (ESIA) that included human rights issues in Georgia, Azerbaijan and Indonesia (*ibid*). Shell was the first company to test HRCA tools and advise the Danish Institute for Human Rights on their development (*ibid*).

⁷⁵ See generally *ibid*.

⁷⁶ UNESCO, 62nd Sess, UN Doc E/CN.4/2006/97 (2006) at para 35.

⁷⁷ R&D, "HRIA", *supra* note 66 at 18.

⁷⁸ *Ibid* at 44.

⁷⁹ *Ibid*.

C. The Mining Investment at Mount Sitio Canatuan

The HRIA was conducted at Sitio Canatuan in the Siocon Municipality, Zamboanga del Norte in the Southern Philippines. The site was located at the foothill of Mount Canatuan, a sacred mountain near the indigenous Subanons in the area. After artisanal miners found gold in the mid-1980s, Mount Canatuan was transformed into a small-scale mining community. The indigenous Subanons and small-scale miners were initially hostile to one another; however, when a mining company staked claims in Canatuan, both groups formed an alliance and opposed large-scale mining operations.⁸⁰

The mining company that invested in the project was Canadian-owned TVI (TSX-V:TVI), a publicly-listed junior resource company that was incorporated under the Alberta Business Corporation Act in 1987.⁸¹ Its initial mineral exploration activities were in British Columbia and Saskatchewan.⁸² Many of these activities were shortly abandoned to explore the company's business activities in the Philippines.⁸³ By 1997, TVI managed to assemble a property portfolio consisting of 21 projects that covered more than 1 million hectares including Canatuan.⁸⁴ In January 1994, TVI signed an exploration agreement with Benguet Corporation.⁸⁵ This agreement included an option to purchase a 100% interest in 486 hectares of the Canatuan property.⁸⁶ The property was subject to a 4% royalty.⁸⁷ TVI purchased a 3% royalty interest at a price of \$1.4 million USD.⁸⁸ TVI later exercised its option to purchase a 100% interest in the relevant property and in 1996, the Mineral Production Sharing Agreement with the Philippine government for TVI's Canatuan

⁸⁰ Penelope Sanz, "The Politics of Consent: The State, Multinational Capital and the Subanon of Canatuan" in Augusto B Gatmaytan, ed, *Negotiating Autonomy: Case Studies on Philippine Indigenous Peoples' Land Rights* (Copenhagen & Quezon: International Work Group for Indigenous Affairs & Legal Rights and Natural Resources Center - Kasama sa Kalikasan/Friends of the Earth-Philippines, 2007) 115 at 115-16 [Sanz, "Politics of Consent"].

⁸¹ Electronic filing of most securities-related information with the Canadian securities regulatory authorities started on January 1st, 1997. In that year, TVI Pacific's board of directors consisted of C Brian Cramm (Colorado), Jan R Horejsi (Alberta), Clifford M James (Alberta), Wilfrid A Loucks (Alberta), and Kishore K Sakharani (Hong Kong). Clifford James held the most number of shares of 689,746. See TVI Pacific Inc., "Information Circular for the Annual and Special Meeting of Shareholders to Be Held Wednesday, June 25, 1997" (23 May 1997) at 3-4, online: <sedar.com/DisplayCompanyDocuments.do?lang=EN&issuerNo=00001837>.

⁸² TVI Pacific Inc., "Management Discussion and Analysis" (20 May 1997) at 1, online: <sedar.com/DisplayCompanyDocuments.do?lang=EN&issuerNo=00001837>.

⁸³ *Ibid.*

⁸⁴ TVI Pacific Inc., "Annual Report: Isles of Gold" (20 May 1997) at 1 [TVI, "Isles of Gold"], online: <sedar.com/DisplayCompanyDocuments.do?lang=EN&issuerNo=00001837>.

⁸⁵ Founded in 1903, for much of the 20th century Benguet Corporation had the largest gold mining operation in the Philippines. Tina Grant, *International Directory of Company Histories*, vol 58 (Farmington Hills, Mich: St. James Press, 2003) at 21-23.

⁸⁶ TVI, "Isles of Gold", *supra* note 84 at 9; TVI Pacific Inc. *Annual Information Form* (2011) at 22, online: <s1.q4cdn.com/531881216/files/doc_financials/TVIAIFDraft19FINALVERSION.pdf>.

⁸⁷ TVI, "Isles of Gold", *supra* note 84 at 23.

⁸⁸ *Ibid.*

project was signed.⁸⁹ As of 2000, TVI's land holdings and applications in Canatuan totaled about 37,155 hectares.⁹⁰ These holdings included the Subanons' ancestral domain comprised of 8,213.5020 hectares.⁹¹ The mine reserves delineated area, covered under a mineral production sharing agreement, was 508 hectares.⁹²

In the mid-1990s, TVI was an exploration company that was transitioning into a mining company.⁹³ TVI initially lacked the operations to provide cash flow and investments to produce income.⁹⁴ In November 1996, the pilot plant started to operate as a "dry run" training and testing site.⁹⁵ TVI, like other junior mining companies, also turned to public equity markets but access to these opportunities were limited.⁹⁶ TVI's Canatuan project was the most advanced project to go into production.⁹⁷ It was described as a "low capital cost, high financial return" operation from which TVI would obtain a substantial cash flow.⁹⁸ Canatuan's mineable reserves were projected to sustain a mine life of seven years, at a mining rate of 1,850 tonnes per day in gossan ore and 850 tonnes per day in sulphide project.⁹⁹ It was projected to have a return of investment in less than two years for its first phase.¹⁰⁰

Despite the Canatuan project's robust mineral economics, TVI faced challenges in its operations due to various events, including Marcopper Philippines' tailings spill in Marinduque, a low gold metal price in the world market, the 1998 Asian financial crisis and the Calgary-based Bre-X Minerals Ltd fraud in 1996.¹⁰¹ More importantly, TVI failed to obtain adequate financing to proceed to commercial production.¹⁰² Despite receiving a joint offer of finance from Rothschild Australia Limited and Bayerische Veriensbank AG, neither one of these potential investors followed through with their offers.¹⁰³

⁸⁹ *Ibid* at 6.

⁹⁰ TVI Pacific Inc., "1999 Annual Report" (29 May 2000) at 1 [TVI, "1999 Annual Report"], online: <sedar.com/DisplayCompanyDocuments.do?lang=EN&issuerNo=00001837>.

⁹¹ See Land Registration Authority, *Certificate of Ancestral Domain Title No. R09-CADT-SIO-0403-0005* (Quexon City, Philippines: 2003).

⁹² TVI, "1999 Annual Report", *supra* note 90 at 1.

⁹³ TVI Pacific Inc., "Management Discussion and Analysis" (26 May 2000) at 1 [TVI, "2000 MD & A"], online: <sedar.com/DisplayCompanyDocuments.do?lang=EN&issuerNo=00001837>.

⁹⁴ *Ibid*.

⁹⁵ The plant's capacity was a 50 tonnes per day carbon-in-leach gold extraction. See TVI, "Isles of Gold" *supra* note 84 at 2.

⁹⁶ TVI Pacific Inc., "Annual Report" (20 May 1998) at 20 [TVI, "Annual Report"], online: <sedar.com/DisplayCompanyDocuments.do?lang=EN&issuerNo=00001837>.

⁹⁷ TVI, "2000 MD & A", *supra* note 93 at 1.

⁹⁸ *Ibid* at 5.

⁹⁹ *Ibid*.

¹⁰⁰ *Ibid* at 21.

¹⁰¹ *Ibid* at 1; TVI, "Isles of Gold", *supra* note 84 at 1-4.

¹⁰² TVI, "Annual Report", *supra* note 96 at 21.

¹⁰³ *Ibid*.

TVI explained that Rothschild Australia and Bayerische required more data from the company.¹⁰⁴

It is also possible that the Subanons in Canatuan and their supporters had succeeded in widely publicizing the company's lack of social acceptability. In 1999, a Japanese Group looking to finance the Canatuan project observed a deteriorating security situation in the region.¹⁰⁵ There had also been at one point a four-month long barricade and protests against TVI's operations by small-scale miners and the indigenous Subanons.¹⁰⁶ These protests resulted in violent dispersals and the arrest of 50 Subanon protestors.¹⁰⁷ The Japanese Group did not finalize the financing agreement and as a result, TVI reported the deteriorating security situation in the Southern Philippines.¹⁰⁸

Beginning in 1996, TVI was subject to several fact-finding missions by various government agencies, as well as national and international NGOs, in response to alleged human rights violations. A Philippine based NGO, Tri-People Concern for Peace, Progress and Development of Mindanao (TRICOM), conducted the first fact-finding mission.¹⁰⁹ TRICOM reported human rights abuses committed by the company's paramilitary security guards, including forced evictions, harassments and assaults.¹¹⁰ The government's Commission on Human Rights followed up these reports, and a connection was made between human rights abuses in the area and development aggression.¹¹¹ The government's Mines and Geosciences Bureau and Department of Environment and Natural Resources (DENR) conducted separate fact-finding missions that determined a lack of prior consent from the Subanons.¹¹² Nevertheless, despite these fact-finding mission reports, the company was never successfully charged with human rights abuses in court in spite of efforts by the indigenous Subanons to file a number of claims.¹¹³

¹⁰⁴ *Ibid.*

¹⁰⁵ TVI, "1999 Annual Report", *supra* note 90.

¹⁰⁶ Tri-People Concern for Peace, Progress and Development of Mindanao, *Report of the Fact-Finding Mission Conducted on April 2-7, 1997 and the Follow-up Missions Done in the Period of May to October 1997 in Canatuan* (Philippines, 1997) [Tri-People], cited in R&D, "HRIA", *supra* note 66 at 56, n 38.

¹⁰⁷ *Ibid.*

¹⁰⁸ TVI, "1999 Annual Report", *supra* note 90 at 2: "[u]nfortunately, the completion of financing has been delayed due to concern on the part of potential sources of finance over the security situation in the Southern Philippines."

¹⁰⁹ Tri-People, *supra* note 106.

¹¹⁰ *Ibid.* See also Christian Aid & Philippines Indigenous Peoples Link, *Breaking Promises, Making Profit: Mining in the Philippines* (London: Christian Aid and PIlinks, 2004) at 36-41.

¹¹¹ Memorandum from the Republic of the Philippines, Commission on Human Rights to the Legal Section (2 May 2002) at 4, cited in R&D, "HRIA", *supra* note 66 at 57, n 90 (the memorandum discusses the Final Investigation Report for Development Aggression Victims).

¹¹² Sanz, "Politics of Consent", *supra* note 80 at 117-18.

¹¹³ Apu Manglang Glupa' Pusaka et al, *Submission to the Committee on the Elimination of All Forms of Racial Discrimination Regarding Discrimination Against the Subanon of Mt Canatuan, Siocon, Zambonga del Norte, Philippines in the Context of Large-Scale Gold Mining on Their Ancestral Domain*, 71st Sess., (2007) at paras 65-68, online: <www.piplinks.org/system/files/Subanon_CERD.pdf>.

The company eventually established financing sufficient to enable it to move to the extraction and commercial production phase of its operations.¹¹⁴ By the time R&D's HRIA was conducted in 2006, the company was already in the extraction and commercial production stage. At this time, the Philippine and Canadian governments had both hailed TVI as a "responsible miner."¹¹⁵

III. Analysis: Political Dimensions of the HRIA

The following section analyzes the political dimensions of the HRIA in four sub-parts. First, it identifies the key actors. Second, it discusses how the positionality of involved parties shaped the HRIA's execution, broadly speaking. Third, it examines the HRIA's methodology, as initially proposed by R&D, and as eventually implemented. Finally, it discusses the HRIA's legacy, including responses to the assessment.

A. Actors Involved

The Philippine pilot project was proposed to R&D by a network of Philippine-based groups (the "consortium"), as well as international advocates who were engaged in human rights defense, mining monitoring and indigenous rights.¹¹⁶ In total the consortium was composed of two local peoples' organizations, three regional NGOs, one national NGO, and three international NGOs. These actors were situated in various locations, with different mandates, worldviews, expertise and agendas. What bound them together was their critical stance on mining, which impacted their way of life, culture, livelihood, environment, indigenous rights development perspectives and agenda; and that ultimately impelled them to contest the Philippine State's mineral liberalization.

The consortium was originally composed of two community-based organizations, including Apu Manglang Glupa' Pusaka (AMGP) and Save Siocon Paradise Movement (SSPM). AMGP was a Subanon indigenous group that saw its members as the legitimate and rightful traditional leaders of Canatuan, as opposed to the state- and TVI-invented and recognized

¹¹⁴ TVI Pacific Inc., "Interim Report to Shareholders for the Three Months Ended March 31, 2004" (14 May 2004) at 1-2, online: <sedar.com/DisplayCompanyDocuments.do?lang=EN&issuerNo=00001837>.

¹¹⁵ See TVI Resource Development Philippines Inc., News Release, "TVI A Success Story, Model of Best Practices Say RP Environment Secretary, Canadian Ambassador at Gossan Dam Rites" (16 May 2006), online: <<http://tvird.com.ph/tvi-a-success-story-model-of-best-practices-say-rp-environment-secretary-canadian-ambassador-at-gossan-dam-rites/>>. The Philippines' environmental secretary, Reyes, noted that TVI met three criteria of a responsible mining operation, including that TVI "contributes to economic growth, creates social equity, and participates in the protection and sustainable development of the country and its resources."

¹¹⁶ See Letter from the Philippines case study proponents to Diana Bronson, Coordinator of Globalization and Human Rights Programme, Rights and Democracy (31 March 2005).

leadership group, the Council of Elders.¹¹⁷ SSPM was an alliance of farmers, fish-farmers and fishing associations; its members were a mix of Christian migrant settlers, Muslims and indigenous peoples. SSPM was organized after leaders of the sectoral organizations and their members in Siocon staged a barricade at the foothills of Canatuan to prevent TVI's mining equipment from reaching the area in March 2004.¹¹⁸

The three regional organizations included Pigsalabukan Bansa Subanon (PBS), Zamboanga del Norte Peoples' Alliance Against Mining (ZAMPAAM) and Diocese of Dapitan, Iligan, Ozamis, Pagadian, Ipil and Marawi's (DIOPIM) Committee on Mining on Mining Issues (DCMI). PBS was an indigenous peoples' organization of Subanon tribes covering the Zamboanga Peninsula. Based in Pagadian City in Mindanao, in the Southern Philippines, PBS's main objective was to revive and restore customary laws and traditional Subanon practices. ZAMPAAM was a newly formed organization that was allegedly aligned with the Reaffirmists' line of national democracy ideology. ZAMPAAM's formation dovetailed with the public hearing held by Congressmen Satur Ocampo and Joel Virador in Siocon in October 2004.¹¹⁹ Finally, DCMI was a Roman Catholic Church led advocacy group, comprised of Social Action Directors, NGOs and Indigenous Peoples' groups that worked with mining affected communities. They helped organize the SSPM and were involved in organizing community events in Siocon Municipality and Sitio Canatuan.

The nationally-based organization was the Legal Rights and Natural Resources Center, Inc. - Kasama sa Kalikasan (LRC-KSK/Friends of the Earth-Philippines). LRC-KSK was a policy and legal research and advocacy institution that worked to empower marginalized indigenous peoples and rural communities who were directly dependent on natural resources. LRC-KSK worked closely with community partners and followed participatory principles in community engagement.

The three international group members of the consortium were the United Kingdom-based Philippine Indigenous Peoples Links (PIPLinks), Tebtebba (Indigenous Peoples' International Centre for Policy Research and Education) and MWC. PIPLinks was a network of individuals and organizations that "exist[ed] to uphold and promote the collective and individual human rights

¹¹⁷ Sanz, "Politics of Consent", *supra* note 80 at 119-20.

¹¹⁸ See Penelope Sanz, "Voices From the Pisawak Picket Line", *MindaNews* (30 March 2004) (provides a description of the protests at the foothills of Mt. Canatuan). See also Penelope Sanz, "Collision of Two Worlds", *News Break* (30 August 2004) at 3, online: <archives.newsbreak-knowledge.ph/2004/08/30/collision-of-two-worlds-2/>.

¹¹⁹ In the 2007 Philippine HRIA Report, only eight of the nine proponents were credited as authors. ZAMPAAM became inactive in research management concerns due to security threats against its leader and representative to the consortium.

of Indigenous Peoples and other land-based communities.”¹²⁰ Tebtebba was an indigenous peoples’ organization, based in the Philippines, with the mandate to promote a better understanding of the world’s indigenous peoples, their worldviews, as well as their issues and concerns. MWC was a pan-Canadian initiative that provided technical and strategic skills to communities and organizations, advocated for the reduction of risks in mineral development, as well as the use of appropriate terms and conditions in mining.¹²¹ These international organizations were instrumental in drawing international attention to the company’s human rights and indigenous rights’ abuses in Sitio Canatuan. Through their individual and collaborative efforts, the Subanons gained an audience with the United Nations Working Group on Indigenous Populations in 2001,¹²² followed by the Canadian Parliament in 2005,¹²³ and the United Nations Committee on the Elimination of all Forms of Racial Discrimination (UNCERD) in 2007.¹²⁴

Most members of the consortium were also a part of a bigger network called Task Force Canatuan (TFC). TFC was formed in 2004 to consolidate the various organizational strategies used “to resist TVI and advance a development framework that support[ed] the needs and aspirations of the local community.”¹²⁵ The HRIA process addressed several challenges that TFC identified in a strategizing workshop.¹²⁶ These challenges included gathering evidence and collecting existing documents that would eventually lead to a legal claim.¹²⁷ Using information and education campaigns, TFC aspired to alert the people in Siocon and Canatuan of their human rights, indigenous peoples’ rights, environmental rights and other important factors.¹²⁸ The consortium attempted to use the HRIA to inform, educate and organize community members and groups in various areas where TVI was expected to operate in the future; the consortium defined the HRIA as a citizen activism tool.¹²⁹

B. Party Positionality and the HRIA’s Broad Execution

A closer look at the HRIA’s initiative revealed problems with the agenda, positionality and dynamics of the different actors in the pilot study. Review of

¹²⁰ See online: <www.piplinks.org/>.

¹²¹ See online: <www.miningwatch.ca/about>.

¹²² Commission on Human Rights, *Prevention of Discrimination and Protection of Indigenous Peoples: Report of Working Group in Indigenous Populations on its Nineteenth Session*, UNESCOR, 53rd Sess, UN Doc E/CN.4/Sub.2/2001/17 (2001).

¹²³ See House of Commons, “Human Rights Sub-Committee”, *supra* note 55.

¹²⁴ See Apu Manglang, *supra* note 113.

¹²⁵ Penelope Sanz, “Summary of the Proceedings of the Canatuan Strategizing Workshop”, Field Notes (Dipolog, Zamboanga del Norte, 2004).

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ The consortium conducted human rights and paralegal training by LRC-KSK.

the HRIA's initiative showed the HRIA as a tool for assessment, advocacy and inciting activism; and it served various agendas of the consortium members, R&D and researchers. The agenda of R&D was to test this HRIA tool. This goal had clear political underpinnings, including seeking to effect change in Canadian companies' policies when operating abroad, and making the HRIA available to the Canadian Government to encourage governmental officials to examine their support of Canadian corporations. Internationally, R&D was also seeking to develop a Community-Based HRIA methodology.¹³⁰ At the community level, R&D presented that it "[sought] to promote the involvement of communities through the entire human rights impact assessment process in order to provide them with the means to become key players in the decision-making process."¹³¹

The consortium's overall agenda was to oppose TVI's operations through human rights advocacy, education and training, and to collate documents and gather new data. The HRIA output was perceived as crucial to structuring and filing a complaint against the company at the United Nations level; the Subanons, at this point, had already filed several cases in the local courts but had never been given a hearing.¹³² At the management level, an Executive Planning Group (EPG) was set up to oversee the HRIA's implementation, which included organizing focus group interviews, identifying environmental experts, organizing and conducting training on human rights and indigenous rights in identified areas, as well as financial management.¹³³ The Subanon tribal chieftain of Canatuan had the role of approving or rejecting the EPG's recommendations, including the recruitment of the Philippines-based HRIA Research Coordinator. The HRIA's implementation was delayed for several months, because of a disagreement on the choice of Research Coordinator. The Research Coordinator would carry out the task of ultimately drafting the HRIA.

The disagreement about the Philippines-based Research Coordinator was rooted in positionality and differing political lines.¹³⁴ Initially, the selected Research Coordinator declined the offer due to prior commitments and security issues; the investment was in a conflict area and the case was highly controversial. This politicization was amplified by the anti-mining advocacy of the Philippine's HRIA proponents. Upon learning that the tribal chieftain had repeatedly endorsed one candidate for the research position to the EPG,

¹³⁰ R&D, "Getting it Right", *supra* note 69 at 4.

¹³¹ *Ibid.*

¹³² Apu Manglang, *supra* note 113.

¹³³ The EPG was composed of representatives of the LRC-KSK, ZANPAAM, DCMI, SSPM and AMGP.

¹³⁴ See Nathan Gilbert Quimpo, "The Left, Elections, and the Political Party System in the Philippines" (2005) 37:1 *Critical Asian Studies* 3 at 25–26, n 36 (these differing political lines were between the rejectionist and reaffirmist approaches).

this endorsed candidate was chosen as the Research Coordinator.¹³⁵ The other EPG members considered the candidate to be acceptable, because although not a part of their organizations, the candidate was seen as one of their own. To the consortium, the selected Research Coordinator presented themselves as an academic and an independent, professional researcher. The Research Coordinator was someone who was independent of anti-mining groups; but who was also a social activist belonging to a university-based organization, focused on the creative and critical promotion of the rights, cultural identity, initiatives, assertions and social movements of indigenous peoples in Mindanao.

Upon the eventual implementation of the HRIA, there were two researchers, a Philippines-based Research Coordinator who was enlisted by the consortium, and a Canadian-based researcher who worked for R&D. Both researchers had their own agendas and research objectives. As noted by Elizabeth Chiseri-Strater “[a]ll researchers are positioned. ... by age, gender, race, class, nationality, institutional affiliation, historical-personal circumstance, and intellectual predisposition. ... whether they write about it explicitly, separately, or not at all.”¹³⁶

The consortium sought to produce a report that was “professionally credible” and that applied “technical and professional input”.¹³⁷ However, consortium members did not present themselves as a neutral body, and held that R&D was not expecting a neutral piece of research, expressing their apprehension and perception that social scientists would not produce a neutralized report.¹³⁸ The contract and terms of reference between the Philippine-based Research Coordinator’s institution, Mindanawon Initiatives and Cultural Dialogue (herein referred to as Mindanawon), and the consortium further revealed a hierarchy, where the consortium’s NGOs and activists perceived the social scientists as mere employees. It was framed as a contractual labour agreement rather than a research-partnership. As a member of Mindanawon’s Board of Directors commented, “these activists should have a more collegial respect for fellow-activists” and they further stated:

¹³⁵ The Research Coordinator had previously worked with the Subanons in charting their genealogy, and therefore in working in the area, she understood the context and security issues in the Siocon and Canatuan regions. The Moro Islamic Liberation Front, a secessionist rebel group, had attacked the Siocon Municipality in 2003, killing 22 people and taking 13 civilian hostages. See “Fierce Battle for Philippines Town”, *BBC News* (4 May 2003), online: <news.bbc.co.uk/2/hi/asia-pacific/2999867.stm>. TVI personnel and local residents of Canatuan were also killed in an ambush by the Moro Islamic Liberation Front. See Rebecca Keenan, “TVI to Continue Philippines Operation Despite Ambush”, *Mines and Communities* (14 January 2003), online: <www.minesandcommunities.org/article.php?a=1609>.

¹³⁶ Elizabeth Chiseri-Strater, “Turning In upon Ourselves: Positionality, Subjectivity and Reflexivity in Case Study and Ethnographic Research” in Peter Mortensen & Gesa Kirsch, eds, *Ethics and Representation in Qualitative Studies of Literacy* (Urbana: National Council of Teachers of English, 1996) 115 at 115.

¹³⁷ Penelope Sanz, Field Notes (15 March 2006).

¹³⁸ *Ibid.*

We – engaged social scientists working on Mindanaw issues – are not mercenaries or technicians, who don't care about the cause or the problem. We have invested ourselves in this and other issues, at times at risk to ourselves. It is disappointing that our fellow-activists seem to see us only as people-for-hire seeking employment, and not comrades-in-arms seeking justice. You work side-by-side with your comrades; you do not subordinate them by turning them into hirelings. Or are they saying that we do not, for some reason, qualify as their comrades?¹³⁹

Positionality and power also arose with respect to ownership of the HRIA's research data. The consortium was composed of various community actors and a supporting group. Therefore, there was an assumption that the consortium was a repository of knowledge, and the work carried out by the Research Coordinator would involve consolidating and conducting an inventory of existing data, including several reports about the Canatuan case that had already been published.¹⁴⁰ Mindanawon had to point out to the consortium that the HRIA methodology itself was still developing, suggesting that new knowledge, data and findings had yet to emerge.¹⁴¹

The contractual structuring and funding of the HRIA, as it was initially established, later affected issues of ownership, acknowledgement and the accountability of the report. The Research Coordinator's contractual responsibility included gathering data, analysis and writing the assessment report. The Research Coordinator also assisted with the oral translation of each element of the written report for the EPG, so that the report could be verified and validated by community-based members of the consortium. In R&D's final publication of the Philippine case study, the Research Coordinator's role was acknowledged with a statement that read, "[s]pecial thanks to: Ms. Penelope Sanz (Mindanawon Initiatives for Cultural Dialogue), research coordinator."¹⁴² This level of acknowledgement had resulted, in part, from how the contract with the Research Coordinator had been concluded with the supporting consortium, and not with R&D itself. Despite the consortium members being listed as the authors of the published report, the consortium members themselves were disappointed with the final product. Many details were deleted by an editor hired by R&D in Canada, who reduced the original 20,000 word report to 10,000 words.

Another political aspect that influenced the HRIA process was the presence of the "white" Canadian graduate student researcher who was working for R&D. Her presence opened doors and made the information gathering from government agencies and the company easier. It also facilitated access to the Canadian Embassy, including access to conduct interviews. Initially, the Embassy invited R&D's staff for a dinner to presumably disclose matters

¹³⁹ Letter from Mindanawon Board Member to Mindanawon Board (14 March 2006).

¹⁴⁰ See e.g. Tri-People, *supra* note 106; Christian Aid, *supra* note 110.

¹⁴¹ Penelope Sanz, Field Notes (17 March 2006).

¹⁴² R&D, "HRIA", *supra* note 66 at 54.

that were for Canadian researchers; however, when the Canadian researcher indicated that the Philippines Research Coordinator should also attend, the dinner never materialized. At the community level, the Canadian researcher's presence at focus group interviews raised expectations of a resolution (i.e. the stoppage of mining operations). In the field, the presence of a "white" researcher had the potential to be a serious security issue since the province was in a conflict area with "lost commands."¹⁴³

A review of this HRIA shows the complex dynamics and interactions of the positionality among involved actors. Each of the actors, including the proponents, the researchers, the company and R&D, were motivated by various agendas and backgrounds. All actors had power relationships amongst one another, influencing issues such as the selection of research personnel, the financing of the assessment, the form and content of the assessment, the editing of the assessment, the acknowledgement and ownership of the assessment, as well as access to sources and informants.

This case study supports the contention that positionality at the organizational and individual level must be addressed in the structuring and production of a HRIA. Abstract categorizations of an assessment as "impartial" or "independent" or "objective" must be tempered with the acknowledgement of factual relationships that involve funding, hierarchy and decision-making. Unlike judges who aim to safeguard impartiality, a HRIA researcher is ultimately a contractor, purposively hired by a party (or parties) involved in a given policy debate, whether by anti-project activists or by the company itself. As the article explores in the discussion section, the HRIA researcher can still produce reliable and credible evidence, despite the positionality inherent in a HRIA, by, for example, choosing a higher level of factual and methodological disclosure.

C. Positionality and the HRIA Assessment Methodology

This section analyzes methodological issues related to (i) information gathering, (ii) language use, (iii) researchers' interpretations of existing knowledge, (iv) the definition of community and (v) assessment timelines.

i. *Information Gathering: Selection of Informants, Survey Versus Fieldwork*

When it was introduced in 2006, R&D's HRIA methodology was not entirely new. It had some elements similar to a Social Impact Assessment (SIA), such as scoping and research on the country's legal framework.¹⁴⁴ R&D's HRIA

¹⁴³ Glenda M Gloria "The Road to Sirawai" *News Break* (8 July 2002), online: <archives.newsbreak-knowledge.ph/2002/07/08/the-road-to-sirawai/>.

¹⁴⁴ See e.g. Marco Consiglio et al, "A Guide to Social Impact Assessment in the Oil and Gas Industry" (Paper delivered at the Society of Petroleum Engineers, International Health, Safety & Environment Conference,

methodology also outlined ways to adapt the guide through the selection of applicable human rights. It also included phases of the investigation process, including: expert and key informant interviews, identification of contested issues, validation, analysis and report preparation, engagement, monitoring and follow-up, and selecting questions relevant to the community.

These were all standard phases of field research and raised common concerns, including the selection of key informants. The draft R&D methodology was initially conceived as a survey, yielding yes or no answers. This left the criteria for key informants loosely determined. However, in contrast to this approach, the Research Coordinator chose to employ an extended field dimension to the information gathering. The Research Coordinator chose this approach to have as much time as possible to ensure optimal selection of key informants and focus group interview participants, as well as to ensure cross-confirmation of findings using multiple data sources and iterative validation. The community-based peoples' organizations and networks identified the majority of key informants and organized the focus group interviews. Unfortunately, most of these organizations were male-dominated, and as a result, women's voices were subsumed on specific issues, e.g. topics related to fish-farmers and farmers.

Consistent with the analysis by Melish and Meidinger, community members may be more reluctant to speak openly, and even more so, when approached by foreign consultants.¹⁴⁵ Anticipating this, the Philippine case study used map-making, time-lining techniques and storytelling to capture community members' experiences and sense of place prior to the implementation of the foreign investment, at the time the company began extraction and after the presence of either small or large-scale mining in the area. From here, community members told their stories and narratives about their culture, way of life, perceptions, fears and experiences, in relation to geographical locations and meanings, and their sense of power or disempowerment. If R&D's HRIA had been designed as a survey, community members' notions about vulnerability and human frailty would not have been heard or understood. Secondary data was also used, as were intensive key informant interviews in the communities.

A further problem concerning data gathering arose when research proponents who wanted to resist the company had ideas on how to conduct research. The proponents asserted that focus group interviews that were conducted with company executives and employees were hostile. This

Abu Dhabi, United Arab Emirates, 2-4 April 2006) at 3.

¹⁴⁵Tara J Melish & Errol Meidinger, "Protect, Respect, Remedy and Participate: 'New Governance' Lessons for the Ruggie Framework" in Radu Mares, ed, *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Boston: Martinus Nijhoff, 2011) 303 at 312: "an overemphasis on individual mimicry of standardised global forms tends likewise to lead to decontextualised systems that are unresponsive to localised problems or particular community needs."

political agenda to resist TVI conflicted with the purpose of the HRIA (i.e. to create dialogue that encouraged the mining company to address its social impacts). These divergent approaches were a result of the way that human rights, as a political tool, provided both a discourse for adjudication of conflict (i.e. between competing rights) and a framework for cooperative negotiations.¹⁴⁶

Another issue involved the variety of motivations and expectations of informants who participated in the process. The focus group interviewees were informed that the HRIA was a human rights research project, funded by R&D, an organization funded by the Canadian Parliament. As a result, one of the often-repeated questions by key informants and participants was: how could the HRIA bring tangible solutions to existing problems related to mining? For example, the farmers downstream raised the issue of siltation, because the changes in the water quality had reduced their fish harvests. The indigenous anti-mining Subanon group aspired for a cease in mining operations, or as a better alternative, for TVI to retreat and leave their area. Inadvertently, there were high expectations concerning the impact of the HRIA among diverse community members, who were educated about their rights through human rights training.

ii. *Language of Assessment*

R&D's draft HRIA guide was in English and was not translated into the local vernacular. The Philippines has 171 languages. In the mining site alone, at least four languages were spoken in the community: Subanon, Cebuano, Tagalog and English. The lack of translation posed a challenge for the implementation of the HRIA, because the foreign language of the materials alienated local actors from the HRIA process. It was unclear who had the key responsibility of translating the guide into the relevant vernacular.

Further, thinking about the HRIA methodology and politics, human rights themselves were a *language* and a discourse. The HRIA developed new vocabularies in the communities that were necessary to address human rights terms that were not translatable into the local vernacular. For communities that had undergone militarization and armed conflicts, human rights were associated with the left; a group composed of social activists and the NGOs who oppose and expose state repression. The elite and the Philippine government usually labeled these human rights supporters as troublemakers and/or communists. People often fell into one of these opposition groups. This human rights discourse was politically charged, and as a result, could be used as a tool to empower the powerless.

¹⁴⁶ Ignatieff, *supra* note 13 at 20.

iii. *Status and Interpretation of Existing Knowledge*

Since the consortium members were community actors themselves, organizing focus group interviews and contacting key informants who were victims of the company's human rights abuses was easier to accomplish. These members were repositories of knowledge and history. However, there was an assumption that substantial research had been conducted prior to the implementation of the HRIA; and that the majority of this literature had been written against the company. This literature represented a biased interest that encouraged a careful and sensitive perspective in the use of these materials. These materials were created in a politicized, highly charged context, which undermined their reliability. Further, due to the company's high employment turnover rate, tapping into the company's institutional memory was quite challenging. Management personnel also tended to treat human rights violations as a figment of their imagination (or an "untruthful allegation") saying, "if it happened at all".¹⁴⁷

Both sides (i.e. for and against the investment) militantly deployed their respective rhetoric. The views of the majority might have been obscured because of the weak association with either side, along with the nuances in the positions of the various actors and non-actors. It was imperative not to take the existing literature as authoritative, and to subject it to validation throughout the HRIA research project. To do otherwise would distort the understanding of the issues and would be tantamount to rejecting any knowledge gleaned from the Canatuan experience, especially considering that TVI was expanding to other sites. The role of the extended fieldwork in investigating this highly politicized issue was useful since this allowed for a more nuanced approach to the report.

iv. *Defined Scope of Community*

What comprised "community" in this community-based HRIA? The community was heterogenous, with different narratives and perspectives, and possible conflicts and alliances in relation to mining. This drew attention to the horizontal relations and complexities involved in the project; complexities that insights from long extended fieldworks would have been able to unravel, but were not complications envisioned by the initial HRIA methodology. For instance, homogenizing the different groups of indigenous Subanons would lose the unique experiences of migrant Subanons who had relocated to Canatuan from other traditional territories and municipalities. The company used their presence to establish its social acceptability, when the original Subanons in the area were contesting its legitimacy. Due to the mining, family

¹⁴⁷ Penelope Sanz, Field Notes (5 April 2006).

members and relatives were divided. The tribal chieftain's older brother had issued a statement, which was signed with his thumb, stating in English that his younger brother was not Canatuan's legitimate traditional leader.¹⁴⁸ There were also migrant settlers who were former small-scale miners that had become farmers in the course of the mining cycle.

Additionally, mining has environmental impacts on downstream communities. In the Philippines, environmental impact assessments follow a project-based approach and stakeholders are accordingly identified within this scope.¹⁴⁹ The HRIA could go either way – by following a project-based scope it might exclude some stakeholders or it might expand in scope, which stresses the importance of locating multiple community voices that can speak about the foreign investment.

v. *Timelines Selected*

Assessment contexts change over time. Stakeholders may emerge, disappear or may not be considered at all as the mining life cycle progresses. As noted earlier, when R&D's methodology was initially released, TVI's consultants completed a HRIA using this methodology a month before the current project, and the results were never released.¹⁵⁰ This had an impact on the research process. For instance, in the focus group discussions, key company informants were well rehearsed in their answers, sounding like company public relation representatives. Six months later, however, the same key informants became critical, and even disclosed their misgivings about the company. Former small-scale miners formed a farming association to maintain their hold on the land and/or to negotiate better compensation from the company. Choices concerning the assessment timeline thus affected the content of the material gathered, and the relevant roles of the informants.¹⁵¹

vi. *Summary*

The HRIA methodology has stemmed from numerous decisions, shaped by various parties' positionality and power. For instance, the choices made

¹⁴⁸ The question 'Who is the rightful Subanon leader?' arose when the company working with the National Commission on Indigenous Peoples organized a Council of Elders. This scandalized Subanon traditional leaders in Zamboanga Peninsula since there was no such thing as Council of Elders in their customary laws and tradition. See Sanz, "Politics of Consent", *supra* note 80 at 120-21.

¹⁴⁹ The Department of Environment and Natural Resources (DENR), however, considers cumulative impacts. See Philippines, DENR, *Administrative Order No 30 (2003)*, online: <policy.denr.gov.ph/2003/dao2003-30.pdf>.

¹⁵⁰ R&D, "HRIA", *supra* note 66 at 44.

¹⁵¹ TVI Pacific criticized the HRIA report, pointed out that TVI's activities were a work-in-progress and said that the company was making significant advances in the areas of human rights, health, education, security, employment, standard of living, culture, housing and freedom of association since the time of the study. See TVI Pacific Inc., News Release, "TVI Disappointed With Rights and Democracy Report" (30 May 2007) [TVI, "TVI Disappointed"], online: <tvipacific.com/news/News-Release-Details/2007/TVIDisappointedWithRightsDemocracyReport>.

about information gathering (e.g. survey or fieldwork) affected the content and type of the information gathered. Choices concerning who was consulted as an informant and how the language of the HRIA was translated also shaped the data gathered. Another key choice involved addressing the motivations for informant participation. Other key choices were related to how the researcher approached the reliability of existing literature and knowledge, how the scope of community was defined and what timelines were selected for the assessment.

D. The HRIA's Legacy

The Philippine HRIA found that the mining investment had a negative impact on the Subanon's ability "to enjoy the human right to self-determination, to human security, to an adequate standard of living, to adequate housing, to work and to education."¹⁵² The HRIA assessed the foreign investment's impact on the human rights of indigenous peoples, as well as non-indigenous peoples living downstream. The report, however, focused more on indigenous rights. The Research Coordinator, as an indigenous rights advocate, positioned the report as an impact assessment on indigenous rights, because, at that time, the UN Declaration of the Rights of Indigenous Peoples was adopted by the Human Rights Council and was awaiting adoption by the UN General Assembly.¹⁵³ As a result, the report was packaged as "Mining a Sacred Mountain: Protecting the Human Rights of Indigenous Communities".¹⁵⁴

The HRIA provided opportunities to access information from various parties (e.g. the company, Canadian embassy and government agencies). R&D had extended their assistance in conveying the objectives of the HRIA to concerned parties, including meeting with government agencies prior to its implementation. The company also participated in the HRIA process, knowing that its credibility and legitimacy were at stake.

After the 2005 hearing at the 38th Canadian Parliament's Subcommittee on Human Rights and International Development of the Standing Committee on Foreign Affairs and International Trade, TVI began to hire personnel with a human rights background. This was during the extraction stage, when the company began generating income. Thomson and Joyce have noted that budgetary allocations for forward-looking activities, including building community relations and other expenses incurred outside exploration, were considered "non-essential" until the project was already well underway.¹⁵⁵

¹⁵² R&D, "HRIA", *supra* note 66 at 38.

¹⁵³ The UN Human Rights Council adopted the Declaration in 2006, but the UN General Assembly decided to defer its adoption until 2007. See UNGAOR, 61 Sess, 107th Mtg, UN Doc A/RES/61/295 (2007) at 1.

¹⁵⁴ See R&D, "HRIA", *supra* note 66 at 37-58.

¹⁵⁵ Ian Thomson, & Susan Joyce, "Changing Mineral Exploration Industry Approaches to Sustainability"

In addition, junior mining companies were also “fundamentally results driven, strongly oriented to the venture capital markets, and thus focused on the technical aspects of a project.”¹⁵⁶ In 2007, TVI’s Vice President for Social Commitments asked for forgiveness from the Subanon tribe for the human rights violations that were committed by the company.¹⁵⁷ Later on, TVI drafted a social commitment policy that looked to “promote transparency, responsible stewardship of the environment, the inalienable rights to life, dignity and sustainable development in [their] host communities”, and used the United Nations Millennium Development Goals to identify specific community projects.¹⁵⁸

TVI conducted human rights training in 2006 for its security force; the force had committed various human rights abuses against local community members who opposed the company’s mining operations.¹⁵⁹ While this demonstrated the positive outcomes of the HRIA in the Philippines, the mining project was already in progress, which suggested the assessment only “focus[ed] on remedies, not prevention.”¹⁶⁰ In fact, even at the height of the HRIA process in 2006, several human rights violations occurred that implicated the mining company, including the forced removal of the Galvez couple from the mining area,¹⁶¹ and the harassment of the anti-mining indigenous Subanons and former small-scale miners at checkpoints.¹⁶²

Using various qualitative techniques, the HRIA process generated new information. Community human rights abuse claims were verified, validated and consolidated with the new data. When R&D published the Philippine HRIA case findings, the company criticized its “flawed execution” due to an anti-mining research team and R&D’s failure to honor commitment to a consultative process.¹⁶³ The Philippine HRIA findings were later used to

in MD Doggett & JR Parry, eds, *Wealth Creation in the Minerals Industry: Integrating Science, Business, and Education* (Easton, Md: Cadmus Professional Communications, 2006) 149 at 158.

¹⁵⁶ *Ibid.*

¹⁵⁷ Ellen Red, “TVI Executive Ask Forgiveness for Human Rights Violations Committed by the Company to the Subanon Tribe”, *Inside Mindanao* (20 June 2007), online: <www.insidemindanao.com/j1.html>. It is also notable that in 2007 a lengthy fact-finding report was published by several UK-based organizations, and it included a foreword by British Member of Parliament, Clare Short. This report covered the TVI project in addition to other foreign mining projects in the Philippines. See Cathal Doyle, Clive Wicks & Frank Nally, *Mining in the Philippines: Concerns and Conflicts, Report of a Fact-finding Trip to the Philippines, July-August 2006* (Solihul: Columban Fathers, 2007), online: <www.piplinks.org/system/files/Mining+in+the+Philippines+-+Concerns+and+Conflicts.pdf>.

¹⁵⁸ TVI Pacific Inc. “Social Principles”, online: <www.tvipacific.com/corporate/social-principles>.

¹⁵⁹ Christian Aid, *supra* note 110 at 38.

¹⁶⁰ Oxfam America, *supra* note 71 at 5. An HRIA has a better chance to influence decision-making when it is conducted at the onset of a project.

¹⁶¹ R&D, “HRIA”, *supra* note 66 at 51-52.

¹⁶² Interview of Eduardo Cayabyab, George Colmo & Small-Scale Miners by Penelope Sanz (April 2006).

¹⁶³ TVI, “TVI Disappointed”, *supra* note 151.

file a complaint against the company and the Philippine government at the UNCERD in 2007.¹⁶⁴

The HRIA process informed several communities in the Zamboanga Peninsula where the company was staking its claim. As expected, new vocabularies were developed in the communities as a result of the human rights and paralegal training that the consortium conducted (e.g. on filing affidavits of abuses in the community). However, the consortium's common agenda to resist TVI and/or to stop mining operations was unsuccessful. In 2004, the members had already recognized that their goal of stopping the company's operation was unlikely to be successful. Nevertheless, the community actors persevered and continued to oppose the mining operation because of the high risk to their land and livelihood.

Towards the end of the company's oxide gossan mines, the indigenous Subanon leaders, key supporters of the Philippines anti-mining protest movement, made a deal with the company to protect the rest of their ancestral domain.¹⁶⁵ The Subanon's court petition to cancel TVI's mineral production sharing agreement was thus rendered moot. Beginning in 2010, TVI showcased the indigenous Subanons of Canatuan as a successful corporate social responsibility effort in the Philippine mining industry.¹⁶⁶ In 2011, TVI admitted its wrongdoings and submitted to the Subanon's tribal justice and cleansing ritual.¹⁶⁷

¹⁶⁴ Apu Manglang, *supra* note 113 (considered under the Committee's Early Warning Urgent Action procedure). A further submission was made in 2009, discussing TVI in Canatuan. See Alternative Law Groups Inc. et al, "Philippines Indigenous Peoples ICERD Shadow Report for the Consolidated Fifteenth, Sixteenth, Seventeenth, Eighteenth, Nineteenth and Twentieth Philippine ICERD Periodic Reports" (Submission delivered to UNCERDOR, 73rd Sess, 28 August 2009) at 38, 50, 56-57, 73, 90. During the Committee's consideration of the report, a representative from the Commission on Human Rights of the Philippines spoke regarding TVI. She noted that in 2002 teams from the Commission had travelled to the region following "reports that a military group that was providing security for Toronto Ventures Incorporated had employed acts of intimidation and violence to quell opposition to the project." Complaints were filed with the Commission, but ultimately the plaintiffs were unwilling to continue with the process. UNCERDOR, 75th Sess, 1957th Mtg, UN Doc CERD/C/SR.1957 (2010) at paras 21-23. See also Cathal M Doyle, "From Declaration to Implementation: The Experience of the Subanon in the Philippines with the Operationalization of the UN Declaration on the Rights of Indigenous Peoples" (2016) at 25, online: <<https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1311&StorageFileGuid=87724887-e02a-4632-afb9-529c7677334f>>. The Committee has yet to issue a final decision in this case.

¹⁶⁵ See TVI Resource Development Philippines Inc., "Tribal Leaders Reconcile the Past, Unite for the Future", (2 September 2009), online: <tvird.com.ph/tribal-leaders-reconcile-the-past-unite-for-the-future/>. See also Gulang Gukom, Press Release, "TVIRDI Admits Fault and Performs Cleansing Ritual in Canatuan" (18 May 2011), online: <www.minesandcommunities.org/article.php?a=10917>.

¹⁶⁶ TVI Resource Development Philippines Inc., News Release, "Timuoy Anoy Leads IP Sector in Thanking President Arroyo for Promoting Responsible Mining" (10 June 2010), online: <tvird.com.ph/timuoy-anoy-leads-ip-sector-in-thanking-president-arroyo-for-promoting-responsible-mining/>. See also TVI Pacific Inc., News Release, "In Pursuit of Profitability and Sustainability", (5 July 2010), online: <www.tvipacific.com/news/News-Release-Details/2010/Pursuit_of_Profitability_Sustainability>.

¹⁶⁷ The ritual called *Gompia nog Bonwa sog Konotuan* was for spiritual cleansing of the company's violations against the Subanons. It was meant to restore harmonious relationships, for the violator to change its ways and for the victim to extend forgiveness. The Subanon leaders clarified that it does not absolve the violators from all other responsibilities that resulted in personal or physical damages. Gukom, *supra* note 165.

Introducing the HRIA as a tool for evaluating foreign direct investment in the Philippines would have been a useful policy approach to protecting human rights, especially in response to the culture of impunity that exists in the Philippines.¹⁶⁸ However, after the Philippine HRIA report was published in 2007, the relationship between the consortium and R&D was not maintained. The Canadian Parliament dissolved R&D in 2012, ending an organization that had been in operation since 1988.¹⁶⁹

IV. Discussion

A HRIA, similar to the human rights regime it is a part of, is a political construct, necessarily calling for “disciplined partiality”¹⁷⁰ in its execution. To accomplish this, aside from respecting the rights of all parties, both the powerful and the powerless, one must be rigorous in reflecting and reporting the micropolitics and interactional ethics of such an assessment.¹⁷¹ Promoting this high level of scrutiny and evaluation of a HRIA will contribute to standardizing this type of practice in the field.¹⁷² It also clarifies the social, moral, and political processes upon which a HRIA is conducted.

Acknowledgement of a HRIA’s political nature, including its role in policy-making and the power dynamics among actors, is one step toward finessing the role of HRIAs in human rights promotion and protection. This acknowledgement is useful, for instance, in deepening an understanding of the types of HRIAs in existence (e.g. HRIAs can be classified according to what is being assessed and at which actor is encouraging the assessment), as well as the divergent uses and goals of different assessments.

Neglecting to acknowledge the politics of a HRIA, including its possible origins and forms, may put a HRIA into a role that it is ill-suited to fill, such as the role of an independent court, tasked with adjudication, allocating liability and remedies or upholding the rule of law. HRIAs have a semi-legal dimension because human rights themselves are legal standards. In addition, an assessor determines how legal principles apply to the facts on the ground, referencing international and domestic human rights law. Despite this, a HRIA is not a judicial determination. A human rights impact assessor has no power to compel evidence or witnesses, nor does the assessor have security of tenure. Indeed Matthias Sant’Ana has noted that judicial adjudication is incompatible and flawed as a HRIA methodology.¹⁷³ Considering its political

¹⁶⁸ See generally *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston*, UNGAOR, 8th Sess, Supp No 2, UN Doc A/HRC/8/3/Add.2 (2008) 1. This report offers a description of the impunity to kill that is afforded to both state and non-state actors in the Philippines.

¹⁶⁹ Mills, *supra* note 65.

¹⁷⁰ Ignatieff, *supra* note 13 at 10.

¹⁷¹ Harrison, *supra* note 20 at 111–12.

¹⁷² *Ibid.*

¹⁷³ Sant’Ana, *supra* note 2 at 248. Addressing the systemic societal effects of foreign mining on indigenous

character, the appropriate use of an HRIA may relate chiefly to stakeholder dialogue and public awareness in respect to policy-making. However, further work remains to be completed in this area.

Whether or not a HRIA is community-led or enterprise-led (such as to fulfill due diligence requirements under the UNGPs), the HRIA will still be political. The actual positionality of a business enterprise in deciding to pursue a HRIA will differ from that of a community organization. In this case study, the HRIA proponents' agendas involve stopping the project and/or changing the company's conduct with respect to its investment. An enterprise's positionality in pursuing a HRIA to fulfill its UNGP due diligence will likely relate to either (1) the desire to secure a social license to operate or (2) reduction of liability risk.¹⁷⁴ Under Canadian law, a HRIA is not required for overseas investments, including a company's eligibility for Export Development Canada support or other government agency assistance.¹⁷⁵ Therefore, a regulatory requirement to perform a HRIA will likely not cause a company to pursue such an assessment.

The first factor that could motivate a company to pursue a HRIA is an enterprise's social license to operate. The "court of public opinion", as Sally Wheeler examines, is a driver for human rights policies in a company and conducting a HRIA falls within this vein.¹⁷⁶ The implementation of a HRIA is likely related to a company's desire to manage its image and its relations with stakeholders and shareholders. Therefore, it is important that companies follow emerging standards to ensure a meaningful HRIA, because if not, the assessment may evolve into a sheer marketing strategy.¹⁷⁷ It is also important to commission an assessor who wants to be perceived as an individual governed by rigorous assessment standards. Similarly, an assessment should focus on

land rights is arguably not suited to the gradual resolution that is offered by HRIAs. See e.g. William Holden, Kathleen Nadeau & R Daniel Jacobson, "Exemplifying Accumulation by Dispossession: Mining and Indigenous Peoples in the Philippines" (2011) 93:2 *Geografiska Annaler* 141 at 154-55.

¹⁷⁴ *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UNGAOR, 11th Sess, UN Doc A/HRC/11/13 (2009) 1 at para 46 (provides a discussion on social licence); "Guiding Principles", *supra* note 19 at 17 (provides a discussion about liability risk). See also *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, John Ruggie, UNGAOR, 8th Sess, UN Doc A/HRC/8/5 (2008) 1 at para 73: "[t]he corporate responsibility to respect human rights includes avoiding complicity. The concept has legal and non-legal pedigrees, and the implications of both are important for companies ... Due diligence can help a company avoid complicity."

¹⁷⁵ *Export Development Act* RSC 1985, c E-20.

¹⁷⁶ "Global Production, CSR and Human Rights: The Courts of Public Opinion and the Social Licence to Operate" (2015) 19:6 *Intl JHR* 757 at 765: "Ruggie is pushing the CSR model much further than this by suggesting that what will hold the balance between respect or human rights and corporate indifference is a social licence granted or revoked by the courts of public opinion in line with social expectations and norms."

¹⁷⁷ See e.g. James Harrison, "Human Rights Measurement: Reflections on the Current Practice and Future Potential of Human Rights Impact Assessment" (2011) 3:1 *J Human Rights Practice* 162 at 171: "the multinational company Yahoo! is able to claim that they undertake HRIAs of their business while there are no public and accessible documents about the process or any completed assessments available."

adverse human rights impacts, instead of corporate social responsibility, since pursuing the latter could turn a HRIA into a public relations document.¹⁷⁸

Historically, in Canada, a reduction in liability risk has not pushed companies to pursue HRIs for their overseas investments. There are multiple barriers to finding corporate liability for negative human rights impacts abroad. There are issues relating to the plaintiffs' lack of resources, logistics and inability to pay for a lawyer. There are issues of private international law in Canada; where, if a tort is committed outside of Canada, Canadian courts will often lack a real and substantial connection to the litigation to adjudicate, unless a jurisdiction of necessity is found.¹⁷⁹ Even if a claim relates to actions in Canada or if a claim is directly against a Canadian defendant, a court still has the discretion to dismiss the case according to the doctrine of *forum non conveniens*.¹⁸⁰ There will also be the insulating effect of the corporate veil, which holds that, assuming subsidiaries are distinct legal persons, parent companies will generally not be liable for the conduct of their subsidiaries.¹⁸¹

Recent cases are moving in a new direction, however, that may make company personnel, shareholders and financiers reconsider past approaches to liability risk concerning operations abroad.¹⁸² Indeed, these recent civil cases are a remarkable development in Canadian law. In the past, Canadian courts have been reluctant to pursue lawsuits concerning corrupt corporate conduct abroad,¹⁸³ and Canada does not have an *Alien Tort Claims Statute*, like the United States, to facilitate claims.¹⁸⁴ In addition, while Canadian law

¹⁷⁸ Götzmann, "HRIA", *supra* note 21 at 98.

¹⁷⁹ *Club Reports Ltd. v Van Breda*, 2012 SCC 17 at para 90, [2012] 1 SCR 572 [*Van Breda*]. Saskatchewan, Nova Scotia and British Columbia govern adjudicative jurisdiction according to statute. See e.g. *The Court Jurisdiction and Proceedings Transfer Act*, SS 1997, c C-41.1, s 9, as amended by *The Miscellaneous Statutes (Bilingual) Amendment and Repeal Act*, SS 2009, c 4.

¹⁸⁰ *Van Breda*, *supra* note 179 at para 103. It is notable that *forum non conveniens* is not available to European companies when they are sued in their home country, pursuant to EU Regulations. See EC, *Commission Regulation (EC) 44/2001/EC of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*, [2001] OJ, L 12/1, art 2, online: <eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32001R0044>.

¹⁸¹ See e.g. Robin F Hansen, "Multinational Enterprise Pursuit of Minimized Liability: Law, International Business Theory and the Prestige Oil Spill" (2008) 26:2 BJIL 410 at 433.

¹⁸² See e.g. *Choc v Hudbay Mineral Inc.*, 2013 ONSC 1414, 116 OR (3d) 674 (allowed claims to proceed concerning gang rapes, a killing and a shooting, all allegedly committed by mine security personnel in Guatemala); *Araya v Nevsun Resources Ltd*, 2016 BCSC 1856, 408 D.L.R. (4th) 383 (permitted claims to proceed in concerning the construction of a mine in Eritrea that allegedly used forced labour); *Garcia v Tahoe Resources Inc.*, 2017 BCCA 39, 407 D.L.R. (4th) 651 (permitted claims to proceed concerning an alleged shooting by security personnel at a Guatemalan mine that injured seven people).

¹⁸³ See e.g. *Recherches Internationales Québec c Cambior Inc.* [1998] QJ no 2554 (QL), REJB 1998-08013 (QCCS) (dismissed a claim concerning a tailings dam breach at a Guyanese mine which released cyanide and other heavy metals into a river relied on by thousands of people for drinking water); *Piedra v Copper Mesa Mining Corporation*, 2011 ONCA 191, 332 DLR (4th) 118 (dismissed a claim concerning violence and intimidation alleged by mine security personnel against local inhabitants in Ecuador); *Anvil Mining Ltd. c Association canadienne contre l'impunité*, 2012 QCCA 117, [2012] RJQ 153 (dismissed a claim concerning the alleged used of mining company equipment by the Congolese army during human rights abuses in 2004 due to a lack of jurisdictional connection to Québec).

¹⁸⁴ *Alien Tort Claim Statute*, 28 USC § 1350 (1789).

can, in theory, provide a basis for criminal prosecutions of corporations and officers for serious human rights violations abroad, including those related to investments, this does not appear to have been applied to date.¹⁸⁵ Moreover, the rate of Canadian prosecutions under the *Corruption of Foreign Public Officials Act*¹⁸⁶ has been modest to date, with some recent improvements in this area.¹⁸⁷ The Canadian Parliament has hesitated to pass legislation involving mandatory processes relating to businesses operating abroad into Canadian law.¹⁸⁸ Despite extensive consultations and hearings, including the *National Roundtables on CSR and the Canadian Extractive Industry in Developing Countries: Advisory Group Report* in 2006,¹⁸⁹ Canadian legislation has remained largely static in this area in past years. Complaint processes have primarily relied on voluntary cooperation by businesses.¹⁹⁰ There is no Canadian legislation comparable to the Transparency in Supply Chain Clause of the UK's *Modern Slavery Act*¹⁹¹, the 2014 EU Directive on non-financial reporting obligations¹⁹², nor France's recently passed *Corporate Duty of Vigilance Law*.¹⁹³

¹⁸⁵ W Cory Wanless, "Corporate Liability for International Crimes under Canada's Crimes Against Humanity and War Crimes Act" (2009) 7:1 J Int Criminal Justice 201; Amissi Manirabona, *Entreprises multinationales et criminalité environnementale transnationale : Applicabilité du droit pénal canadien*, Cowansville, Yvon Blais, 2011.

¹⁸⁶ *Corruption of Foreign Public Officials*, SC 1998, c 34.

¹⁸⁷ Canada, OECW, Working Group on Bribery, *Canada: Follow-up to the Phase 3 Report & Recommendations* (Ottawa: WGB, May 2013), online: <oecc.org/daf/anti-bribery/CanadaP3writtenfollowupreportEN.pdf>.

¹⁸⁸ See e.g. Bill C-300, *An Act Respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries*, 2nd & 3rd Sess, 40th Parl, 2009-2011 (defeated by the House of Commons 27 October 2010); Bill C-474, *An Act Respecting the Promotion of Financial Transparency, Improved Accountability and Long-Term Economic Sustainability Through the Public Reporting of Payments Made by Mining, Oil and Gas Corporations to Foreign Governments*, 2nd Sess, 41st Parl, 2015 (defeated by the House of Commons 9 April 2014); Bill C-584, *An Act Respecting the Corporate Social Responsibility Inherent in the Activities of Canadian Extractive Corporations in Developing Countries*, 2nd Sess, 41st Parl, 2015 (defeated by the House of Commons 1 October 2014).

¹⁸⁹ Prospectors & Developers Association of Canada, "National Roundtables on CSR and the Canadian Extractive Industry in Developing Countries: Advisory Group Report" (Toronto: PDAC, 29 March 2007), online: <pdac.ca/docs/default-source/priorities/public-affairs/csr-national-roundtables-advisory-group-report1251d0089243442880e90c8679f762a6.pdf>.

¹⁹⁰ Canada, Global Affairs Canada, "Reviewing Corporate Social Responsibility Practices" (Ottawa: Office of the Extractive Sector Corporate Social Responsibility Counsellor, 31 March 2017), online: <international.gc.ca/csr_counsellor-conseiller_rse/Reviewing_CSR_Practices-Examen_Pratiques_RSE.aspx>; Canada, Global Affairs Canada, "Canada's National Contact Point for the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises" (Ottawa: GAC, 11 December 2017), online: <international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/index.aspx>.

¹⁹¹ *Modern Slavery Act, 2015* (UK), c 30, s 54, online: <www.legislation.gov.uk/ukpga/2015/30/section/54/enacted>. This Act establishes mandatory reporting for some companies regarding their efforts to ensure that slavery is not present in company supply chains.

¹⁹² EC, *Commission Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 Amending Directive 2013/34/EU Regards Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups* [2014] OJ, L 330/1, online: <eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32014L0095> (companies are required to report on non-financial issues regardless of their materiality to shareholders' interests).

¹⁹³ France, Assemblée nationale, "Proposition de Loi Relative au Devoir de Vigilance des Sociétés Mères et des Entreprises Donneuses D'ordre", *Compte rendu No 924* (1 February 2017) (President: Claude Bartolone) (adopté par le Assemblée nationale mais pas encore en force), online: <www.assemblee-nationale.fr/14/pdf/ta/ta0924.pdf>. The law will oblige large companies based in France to implement a vigilance plan

Motivated by social license or litigation risk, companies that commission HRIAs will do so in the context of a policy debate focused on how and if an investment should proceed. Under a legally binding fiduciary duty in Canada, the company's directors' duties subsume stakeholders' interests within the overall best interests of the corporation.¹⁹⁴ Company commissioned HRIAs, similar to community-led HRIAs, will be subject to scrutiny by all parties on how interests and power have shaped the content of the HRIA. For this scrutiny to be performed, there must be a high level of disclosure about how the HRIA was completed, including critical details concerning decision-making, hierarchy and methodology.

It is contended here that the value of a HRIA in improving human rights performance will likely increase by bringing clear and reliable information to be discussed and responded to by all parties. The extent to which a HRIA can provide this information, notwithstanding its political nature, is one possible contribution to improving the impact of business enterprises on human rights, consistent with UNGP business obligations. For reliable information to be provided, emerging principles concerning "meaningful"¹⁹⁵ HRIAs should be acknowledged and adhered to by the parties involved, notwithstanding their specific power levels and positionality *vis-à-vis* one another.

In other words, there is no magic in the words or title "Human Rights Impact Assessment" or in the descriptors of "independent" or "impartial." A HRIA is a document created by someone who is paid by someone else to do so. The paying party is someone with an interest in an investment scenario, regardless of whether they identify as a community ally, a stakeholder, a business enterprise or an investor. The paying party has objectives, power and an interest in shaping the investment in line with their position. This is not alleging bad faith; this is simply acknowledging that there are no neutral players in an investment scenario. Everyone has a particularized role. Even assessors have a particular role with their own specific positionality and interests.

When a HRIA is completed, its group of diverse readers will likely ask: are the people whose rights are being assessed the objects of the assessment (i.e. are they being objectified by an assessor), or are they the subject of the assessment (i.e. are they expressing themselves within the

in their operations aimed at preventing human rights abuses and environmental damage.

¹⁹⁴ *BCE Inc. v 1976 Debentureholders*, 2008 SCC 69 at para 24, [2008] 3 SCR 560; Edward J Waitzer and Johnny Jaswal, "Peoples, BCE, and the Good Corporate 'Citizen'" (2009) 47:3 *Osgoode Hall LJ* 439 at 442: "[p]ut another way, BCE can be read as stating that the best interests of the corporation are the interests of those stakeholders that a particular board deems most worthy of protection, provided that due process is adhered to in the selection of which stakeholder interests to favour." See also Aaron Dhir, "Shareholder Engagement in the Embedded Business Corporation: Investment Activism, Human Rights, and TWAIL Discourse" (2012) 22:1 *Business Ethics Q* 99 (discusses the role of shareholders in driving the assessment of Goldcorp's Marlin Mine in Guatemala).

¹⁹⁵ See e.g. Götzmann, "HRIA", *supra* note 21.

assessment)?¹⁹⁶ This may appear to be a seemingly illusory distinction, but there is a difference between an assessment that characterizes people and their rights as tasks to be completed and one that facilitates rights-holders' self-expression on their own terms, such that their input and experiences are respected in shaping future policy.¹⁹⁷

A HRIA is, at times, conducted in conditions where there are asymmetrical power relations among the parties, as well as a potential for violence and distrust. A HRIA is often completed in a scenario involving multiple power struggles and a diversity of opinions and histories. Navigating such waters is difficult; however, as contended here, those power differentials cannot and should not be ignored in HRIA practice. If power differentials were ignored, even where they dictate in favour of protecting human rights, the HRIA would risk being a mere instrument of power rather than a genuine tool to promote human rights.

For instance, a HRIA is a difficult document to develop, because one must gather and present information that is accurate, without implicating its sources in a way that compromises their security. Further, parties on all sides will want to distance themselves from parts of the completed report that are not favorable to them. Overall, many difficulties arise, but if the goal is gathering an accurate portrayal of events and conditions, the best that an assessor can do is gather the information and disclose *how* the report was produced. This approach will let all parties assess the report in the relevant context and foster dialogue and a sense of agency among all parties, while reducing the risk that particular parties will feel objectified and instrumentalized by the HRIA process.

The *how* of the report is thus just as important as the *what* of the report, since knowledge creation is a political process in itself.¹⁹⁸ This article has identified numerous points where the power and positionality of the involved parties shaped the HRIA and its outcomes. To provide the reader of a HRIA with a more fulsome political context for the report, it is suggested that an HRIA be as explicit as possible in disclosing its origination and execution. For instance, it should disclose why the assessment was commissioned and how the assessor was chosen. Regarding methodology, the HRIA report should explain the specific choices made concerning how information was gathered (e.g. the fieldwork dates and types of interviews). The HRIA should explain choices on

¹⁹⁶ See Melish & Meidinger, *supra* note 145 at 332: "[c]ommunity members are conceived principally as 'objects' of potential abuse, not as 'subjects' of decision-making processes and impact assessments concerning activities that may affect their lives."

¹⁹⁷ Dhir, *supra* note 194 at 105. Dhir discusses the controversy surrounding the Marlin Mine HRIA, in which the assessment Steering Committee did not include any community representatives, leaving the community without direct input regarding the assessment timelines, scope, assessors or any other elements of the process.

¹⁹⁸ Cashmore et al, *supra* note 4 at 372–73.

who was selected as informants and how translation into the local language was achieved. Other key discretionary choices that require disclosure include those related to addressing motivations for informant participation, the presumed reliability of existing literature and knowledge, the types of human rights considered, the defined scope of community and timelines for the assessment.

Contemporary HRIA guides, such as those produced by the Danish Centre for Human Rights¹⁹⁹ and NomoGaia²⁰⁰, address many of these topics, including the human rights to be assessed. It is beyond the scope of this article to comprehensively examine these methodologies. The central contention of this article is that, regardless of the formal methodology selected for a HRIA, the assessment should be explicit in the specific methodological choices made and how these choices shape that assessment.

V. Conclusion

In conclusion, this article has illustrated how actor positionality and power shaped the HRIA of a Philippine mining investment, including its methodology and overall outcomes. This argument was advanced through a qualitative examination of the political processes and products of a HRIA. The HRIA of the Philippine mining project was influenced by the involved parties' agendas and orientations throughout the project. These influences ranged from the selection of the assessor and the design and implementation of the methodology to the follow-up actions selected. An ethnographical analysis was used to examine the political nature of this particular HRIA, and it is beyond the scope of this article to fully compare it to other HRIAs completed in different contexts. This article built on the political characteristics identified by Cashmore et al, and argued that in the implementation of a HRIA, knowledge is created *vis-à-vis* policy; knowledge based in the interrelated function of the surrounding politics and context.²⁰¹

¹⁹⁹ Nora Götzmann et al, *Human Rights Impact Assessment Guidance and Toolbox* (Copenhagen: The Danish Institute for Human Rights, 2016), online: <https://www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/business/hria_toolbox/hria_guidance_and_toolbox_final_may22016.pdf_223795_1_1.pdf>.

²⁰⁰ NomoGaia, *Human Rights Impact Assessment: A Toolkit for Practitioners Conducting Corporate HRIAs* (Denver: NomoGaia, 2012), online: <nomogaia.org/tools/>.

²⁰¹ Cashmore, *supra* note 4 at 373.

