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An Examination of Indigenous Peoples' Right to Consultation and Free, Prior and Informed Consent

A Case Study of Sveaskog and the Swedish Forestry Industry

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Summary

Forests are vital for global biodiversity, environmental sustainability and are intrinsically linked to the cultural survival of Indigenous peoples. The Sámi traditional reindeer herding practices depend on forest ecosystems. However, the expansion of commercial forestry in Sweden has led to significant conflicts over land use, with the Sámi people's rights frequently being de-prioritised in favour of economic interests.

This thesis examines the challenges faced by the Indigenous Sámi people in Sweden regarding forestry management operations, with a particular focus on their right to consultation and Free, Prior and Informed Consent (FPIC). It addresses a critical gap in the implementation of Indigenous rights in the Global North, particularly in Sweden, a country known for its strong human rights record. Using Sveaskog, Sweden's largest state-owned forestry company, as a case study, the thesis explores the practical challenges of realising FPIC. The thesis explores the intersection of Indigenous rights, international environmental biodiversity, and corporate responsibility to respect human rights in the context of Swedish forestry practices. This research contributes to understanding how international human rights standards for Indigenous peoples are implemented, especially in the context of state-owned enterprises.

Findings indicate that the accepted international minimum norm is that Indigenous peoples' right to Free, Prior and Informed Consent (FPIC) should be understood as a sliding-scale framework. This means that the level of participation and consent required from Indigenous peoples varies depending on the potential impact of the proposed activity on their rights. While Sweden recognises the Indigenous peoples' right to consultation and FPIC, its practical application within domestic legislation does not fully align with the international minimum norm. Sámi reindeer herders often face challenges in meaningful participation in decision-making processes affecting their rights. Sveaskog's consultation practices, while somewhat aligned with international standards, fall short of best practices for implementing FPIC. The thesis concludes that effective implementation of Sámi rights requires more robust domestic legislation enforcing human rights due diligence in forestry management and adopting a sliding-scale approach to FPIC.

Sammanfattning

Skogen spelar en viktig roll för den globala biologiska mångfalden, klimatet och är kopplade till urfolks kulturella överlevnad. Samernas traditionella rennäring är beroende av skogens ekosystem. Expansionen av kommersiellt skogsbruk i Sverige har dock lett till betydande konflikter om markanvändning, där samernas rättigheter ofta nedprioriteras till förmån för andra ekonomiska intressen.

Denna uppsats undersöker de utmaningar som det samiska urfolket i Sverige möter gällande skogsbruksoperationer, med särskilt fokus på deras rätt till samråd och fritt och informerat förhandssamtycke (FPIC). Uppsatsen adresserar en kritisk lucka i implementeringen av urfolksrättigheter i det globala nord, särskilt i Sverige, ett land känt för sitt starka arbete för mänskliga rättigheter. Med Sveaskog, Sveriges största statligt ägda skogsbolag, som fallstudie, utforskar uppsatsen de praktiska utmaningarna med att förverkliga FPIC. Uppsatsen undersöker rättsliga överlappningen mellan urfolksrättigheter, internationell miljö rätt om biologisk mångfald och företagens ansvar att respektera mänskliga rättigheter inom ramen för svenskt skogsbruk.

Resultaten indikerar att den accepterade internationella miniminormen är att urfolks rätt till FPIC bör förstås utifrån ett 'sliding-scale' ramverk. Detta innebär att graden av deltagande och samtycke som krävs från urfolk varierar beroende på den potentiella påverkan som den föreslagna aktiviteten har på deras rättigheter. Medan Sverige erkänner urfolks rätt till samråd och FPIC, överensstämmer dess praktiska tillämpning av lagstiftningen inte helt med den internationella miniminormen. Samiska renskötare möter ofta utmaningar med deltagande i beslutsprocesser som påverkar deras renskötsel. Sveaskogs samrådsrutiner, även om de i viss mån är i linje med internationella standarder, når inte upp till bästa praxis för implementering av FPIC. Uppsatsen drar slutsatsen att ett effektivt genomförande av samiska rättigheter kräver mer robust svensk lagstiftning som verkställer företagens skyldighet att genomföra due diligence avseende mänskliga rättigheter inom skogsbruket och antar en 'sliding-scale approach' till FPIC.

Preface

Sometimes, life's journey takes you exactly where you hoped to be, even if the path isn't always straightforward. From my early years, I've admired human rights scholars and experts, dreaming of one day making my mark in this crucial field. Today, after years of studies, I find myself on the path I once envisioned, thanks to the invaluable opportunities provided by Lund University and the Raoul Wallenberg Institute.

Thank you to my teachers, who have challenged me to think critically and strive to ask the right questions. I would also like to thank my supervisor, Christine Evans, whose insights, support, and unwavering belief in my work have been a cornerstone of this thesis.

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Dilshodakhon Mustafaeva

Abbreviations

ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
BHR	Business and Human Rights
CCPR	Human Rights Committee
CBD	Convention on Biological Diversity
CERD	Committee on the Elimination of Racial Discrimination
CRD	Civil Rights Defenders
FPIC	Free, Prior, and Informed Consent
FSC	Forest Stewardship Council
HRDD	Human Rights Due Diligence
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social, and Cultural Rights
ILO	International Labour Organization
IWGIA	International Work Group for Indigenous Affairs
MNE	Multinational Enterprise
NCP	National Contact Point
NJA	Judgments from the Swedish High Court
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
Prop.	Swedish Government Bill (<i>Proposition</i>)
SOE	State-Owned Enterprise
SRIP	Special Rapporteur on the Rights of Indigenous Peoples

UDHR	Universal Declaration of Human Rights
UNDRIP	UN Declaration on the Rights of Indigenous Peoples
UNGA	UN General Assembly
UNGPs	UN Guiding Principles on Business and Human Rights

1. Introduction

1.1 Background

Forests, encompassing one-third of the earth's landmass, are indispensable to environmental sustainability and human welfare. These ecosystems host more than half of the world's terrestrial species, playing a vital role in maintaining biodiversity and mitigating climate change through carbon sequestration.¹ Additionally, forests are integral to national economies, providing essential resources such as timber, building materials, raw materials for industrial processing and fuel. Consequently, forests have increasingly become recognised as productive capital with immense environmental and financial value.²

Many of the world's productive and industrial forest areas are located on or overlap with Indigenous peoples' territories. This overlap often leads to conflicts over land use and distribution of natural resources. Consequently, the forestry sector has been criticised for its human rights impacts, and many forestry companies have been accused of violations of Indigenous peoples' rights.³

It is widely accepted in international law that respect for Indigenous peoples' rights to their lands and territories is vital for protecting Indigenous peoples' livelihoods and instrumental in sustainable development as well as forest management.⁴ Subsequently, the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP) affirms Indigenous peoples' rights to environmental conservation and the productive use of their lands.⁵ Furthermore, the UNDRIP grants Indigenous peoples the right to determine and implement development priorities for their lands and resources. Thus, States must engage in good-faith consultations with indigenous representatives to obtain Free, Prior, and Informed Consent (FPIC) before approving projects affecting their lands.⁶ However, there is an ongoing trend of diminishing resources for Indigenous people through a reduction in their land and territories, along with a rapid loss of control over their natural resources, particularly within forests.⁷ Subsequently, international environmental law recognises the obligation to protect Indigenous people's

¹ UN Environment Programme (2024). *Why do forests matter?* UNEP. <https://www.unep.org/topics/forests/why-do-forests-matter>.

² Food and Agriculture Organisation (FAO). *Part 2 Forests, economic development and the environment*. FAO. <https://www.fao.org/4/X6953E/X6953E02.htm>.

³ Forest Peoples Programme (2016). *Human Rights and Timber Supply Chains; A rights-based analysis of EU FLEGT VPAs*. Report by FPP staff members. https://www.forestpeoples.org/sites/fpp/files/publication/2016/02/fpplegalcomparativestudyforweb_0.pdf.

⁴ Dupuy, P.M. and Viñuales J. (2018). *International Environmental Law*. Cambridge University Press, (2nd edn), pp. 386–89.

⁵ UNGA (2007), *United Nations Declaration on the Rights of Indigenous peoples : resolution / adopted by the General Assembly*. A/RES/61/295. 2 October 2007. (UNDRIP) Art. 29.

⁶ *Ibid*, Art. 32.

⁷ Stavenhagen, R. (2007), *UN Human Rights Council: Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*. A/HRC/4/32. HRC. 27 February 2007, p. 2.

rights in biodiversity conservation and resource management. The participation of indigenous peoples in decision-making is further emphasised in the Convention on Biological Diversity (CBD)⁸ and the Post-2020 Global Biodiversity Framework⁹.

The issue of violations of Indigenous peoples' rights by the forestry sector is often discussed in the context of the Global South.¹⁰ However, not as much international attention has been brought to the Global North's forestry sector, particularly Sweden. Sweden's forestry practices are focused on maximising timber output, sometimes at the expense of biodiversity and long-term environmental sustainability.¹¹ Furthermore, Sweden has continuously received international criticism for inadequately protecting Sámi rights to land and resources, particularly failing to ensure meaningful consultations and to obtain FPIC in decision-making processes affecting the Sámi and their territories.¹²

Moreover, to address the conflicts between the forestry industry and Indigenous peoples, the international business and human rights (BHR) framework provides soft law mechanisms to ensure corporate respect for the human rights of Indigenous peoples through human rights due diligence.¹³ The United Nations Guiding Principles for Business and Human Rights (UNGPs) is the foundational BHR framework document based on pre-existing international norms and standards.¹⁴ Furthermore, the Organisation for Economic Cooperation and Development (OECD) has issued Guidelines for Multinational Enterprises (OECD MNE Guidelines) aligning with the UNGPs.¹⁵ Sweden has recognised the authority of these principles.

The Indigenous peoples of Sweden, the Sámi, have a nomadic lifestyle rooted in various traditional practices such as reindeer herding.¹⁶ Reindeer herding is not only vital for their

⁸ UN (1992). *Convention on Biological Diversity*. 31ILM818. 29 December 1993. (CBD).

⁹ Conference of the Parties to the Convention on Biological Diversity (2022). *Decision adopted by the Conference of the Parties to the Convention on Biological Diversity*. CBD/COP/DEC/15/4. Fifteenth meeting – Part II, Montreal, Canada. 19 December 2022 .

¹⁰ Global Canopy (2023). *Deforestation and human rights: too many companies and financial institutions ignoring the critical link*. Forest 500. <https://globalcanopy.org/wp-content/uploads/2023/07/F50>.

¹¹ Krause, D. et al. (2019). *Climate change adaptation: a missing piece in Swedish forestry*. InnoForSt Project. <https://innoforest.eu/>; Hertog, I.M, S. Brogaard and T. Krause (2019). *The Swedish forestry model: intensifying production for sustainability?* InnoForSt Project. <https://innoforest.eu/blog/the-swedish-forestry-model>

¹² CESR (2024). *Concluding observations on the seventh periodic report of Sweden**. E/C.12/SWE/CO/7. 22 March 2014, para. 14.

¹³ IWGIA (2024). *The Indigenous World 2024* (pp. 561-567). <https://www.iwgia.org>.

¹⁴ HRC (2011). *Guiding Principles on Business and Human Rights – Implementing the United Nations “Protect, Respect and Remedy Framework”*. UN Doc HR/PUB/11/04. (UNGPs); Lagoutte, S. (2017). The UN Guiding Principles on Business and Human Rights: A Confusing ‘Smart Mix’ of Soft and Hard International Human Rights Law. In Lagoutte, S., T. Gammeltoft-Hansen & J. Cerone (eds), *Tracing the Roles of Soft Law in Human Rights* (pp. 235-254, 237). Oxford Academic.

¹⁵ UNGP 1; HRC (2021), *Guiding Principles on Business and Human Rights At 10: Taking stock of the first decade*. Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises’(Working Group). UN Doc A/HRC/47/39. 22 April 2021, para. 1.

¹⁶ Sametinget (2022). *Kontaktuppgifter till Sveriges samebyar*. Sametinget. <https://www.sametinget.se/samebyar>.

sustenance but also serves as a significant spiritual and cultural practice. Thus, access to reindeer grazing lands in the forests is fundamental for Sámi culture.¹⁷ In the boreal forest areas where Sámi reindeer herding takes place, formal ownership is held by private landowners and forestry corporations. As a result, parallel property rights coexist on the same land: the Sámi hold the right to use the land for herding, while landowners retain the right to exploit the forest.¹⁸ Current management practices employed by forestry companies in the boreal forest have had adverse implications for reindeer husbandry, with critical grazing areas facing fragmentation. The joint use of the forest resources has led to conflicts between the profit-driven forestry companies and the reindeer herding Sámi.¹⁹

A state-owned Swedish forestry company, Sveaskog, has faced challenges in coexistence with the Sámi people.²⁰ In recent years, the company has been involved in several conflicts with Sámi reindeer herding communities due to accusations of failing to ensure the effective participation of Sámi people in decision-making processes. As the largest forest owner in Sweden, Sveaskog is an interesting company for a case study.

1.2 Purpose, Choice of Case and Research Questions

The primary purpose of this thesis is to contribute to a greater understanding of the scope and extent of Indigenous peoples' right to consultation and Free, Prior and Informed Consent (FPIC) in decision-making processes on issues that directly affect their lands, territories, and resources. More specifically, the aim is to investigate how the Sámi people's rights to consultation have been implemented within Swedish legislation and Swedish forestry management practices. To fulfil the aim of this thesis, I will analyse the scope of application of the FPIC. I will examine pillars I and II of the UNGPs to ascertain the applicability of Sweden's obligation to protect the Sámi people against forestry companies' human rights violations and Sveaskog's responsibility to respect Sámi indigenous rights.

Therefore, the following research questions will be answered:

1. What challenges have the Indigenous Sámi people experienced concerning forestry management operations in Sweden?
2. How does the principle of FPIC intersect with existing international legal frameworks protecting Indigenous peoples' rights to land, territories, and resources?
3. To what extent does the Swedish legal and regulatory framework incorporate the Sámi people's right to consultation and FPIC regarding forestry activities on their traditional lands?

¹⁷ Ibid.

¹⁸ Brännström, M. (2024). The implementation of Sámi land rights in the Swedish Forestry Act. in D. Cambou and Ø. Ravna (eds), *The significance of Sámi rights*, Routledge (2nd edn, Routledge: Taylor & Francis), pp. 101-115.

¹⁹ Strek, K. and J. Ekblom (2023). *Europe's Green Revolution Threatens Indigenous Culture*. Bloomberg. <https://www.bloomberg.com/features/2023-sweden-indigenous-sami-green-energy/>.

²⁰ Sveaskog (2023). *Annual and Sustainability Report 2023*, pp.1. <https://www.sveaskog.se>.

4. How does Sveaskog implement the human rights due diligence framework in their forestry management operations in Sápmi regarding the Sámi people's right to consultation and FPIC?

The motivation behind this research is that there remains a gap in the actual implementation of FPIC by forestry companies, especially in regions where domestic legal frameworks do not fully recognise Indigenous peoples' right to consultation and FPIC. Studies often highlight the challenges in implementation but lack depth in exploring the practical measures and strategies that companies can adopt to implement FPIC effectively.²¹ Moreover, the forestry industry, despite its global expansion, particularly in Sweden, has not received as much attention from legal scholars or on its corporate responsibility to respect indigenous peoples' right to consultation and FPIC, in comparison to the extractive industry.²² The choice to research the Swedish context is based on the country's reputation as a strong proponent of human rights and its long history of advocating for them domestically and through its foreign policy.²³ However, Sweden has attracted widespread criticism for its treatment of its Indigenous peoples, failing to secure their right to participate in matters affecting their traditional territories and culture.²⁴

1.3 Scope, Delimitation, and Definitions

This thesis focuses on the application and scope of FPIC within existing international legal frameworks protecting Indigenous peoples' rights to land, territories, and resources. Specifically, the thesis discusses Indigenous peoples' right to self-determination and the principle of FPIC within a broader context of environmental biodiversity law and business responsibility to conduct human rights due diligence. This thesis does not aim to comprehensively review the status of the rights of Indigenous peoples under international law, as the research is limited to provisions concerning participation and consultation. Moreover, this thesis provides a historical context of Sweden's colonisation of Sápmi to explain past and present challenges to recognising Sámi peoples' rights. Although the Swedish State has assigned a Truth Commission to investigate its abuse of the Sámi people, this thesis does not examine in greater detail the transitional justice mechanisms in the

²¹ IWGIA (2024). pp. 561-567; Colchester, M. (2010). *Free, Prior and Informed Consent; Making FPIC work for forests and peoples*. The Forests Dialogue. <https://www.forestpeoples.org>.

²² To read more about the extractive industry see Lawrence, R., & Moritz, S. (2019). Mining industry perspectives on indigenous rights: Corporate complacency and political uncertainty. *The Extractive Industries and Society*, Vol. 6(1), pp. 41-49.

²³ Brysk, A. (2011). *The Gold Standard: Sweden, Global Good Samaritans: Human Rights as Foreign Policy*. (online edn, pp. 42-65). Oxford Academic. <https://doi.org/10.1093/acprof:oso/9780195381573.003.0003>.

²⁴ See, for example, CERD (2008). *Consideration of Reports Submitted by States Parties Under Article 16 and 17 of the Covenant*. E/C.12/SWE/CO/5, 1 December 2008, para. 15; CERD (2013). *Concluding observations on the combined nineteenth to twenty-first periodic reports of Sweden, adopted by the Committee at its eighty-third session (12-30 August 2013)*. CERD/C/SWE/CO/19-21. 23 September 2013, para. 17; CCPR (2016). *Concluding Observations on the seventh periodic report of Sweden**. CCPR/C/SWE/CO/7. 28 April 2016, para. 39.

Swedish post-colonial setting.²⁵ Furthermore, this thesis focuses exclusively on the legal framework recognising the Sámi people as Indigenous, despite additionally being considered a national minority within Swedish and EU law.

The thesis also explores parts of international environmental law connected to forestry. However, due to time and space constraints, the primary discussion revolves around the intersection of indigenous rights and biodiversity conservation. Although Sweden is part of the EU, which has developed an EU forestry strategy and an EU biodiversity strategy for 2023, this thesis mainly focuses on international biodiversity frameworks.²⁶ In particular, the focus is on the Convention on Biological Diversity and the Post-2020 Biodiversity Framework to examine provisions related to conserving and protecting Indigenous peoples' traditional knowledge and access to natural resources within their territories.

Furthermore, this thesis outlines the responsibilities of businesses within the BHR framework, particularly the requirements of human rights due diligence within the UNGPs and the OECD Guidelines. Although the UNGPs are being developed into hard law instruments within the EU through the adopted Corporate Sustainability Due Diligence Directive (CSDDD)²⁷, those regulations are not covered by this thesis due to time and space constraints. Moreover, the thesis discusses the issues of state responsibility and sovereignty when discussing violations of human rights through corporate conduct. However, the thesis does not offer an in-depth discussion of sovereign immunity with regard to SOEs. Instead, the research operates under the assumption that the separation principle applies to SOEs.²⁸ Moreover, as Sveaskog is a fully owned Swedish SOE, this thesis does not examine different ownership structures and their influence on state responsibility.

Finally, regarding the scope, this thesis does not aim to cover all general forestry sector initiatives regarding human rights due diligence. Instead, it focuses on the initiatives specifically acknowledged and discussed in the literature reviewed. Furthermore, the analysis does not include a full case law review. The cases that are referenced are included as examples.

²⁵ Dir 2021:103, *Kartläggning och granskning av den politik som förts gentemot samerna och dess konsekvenser för det samiska*; Evans, C. (2023). *A Truth Commission in Sweden*. Raoul Wallenberg Institute. <https://rwi.lu.se/blog/a-truth-commission-in-sweden/>.

²⁶ European Commission (2021). *New EU Forest Strategy for 2030*. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Com (2021) 572 final. 16th September 2021; European Commission (2020). *EU Biodiversity Strategy for 2030*. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Com (2020) 380 final. 20th May 2021.

²⁷ European Commission (2022). *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence amending Directive (EU) 2019/1937*. COM/2022/71 final, preamble 12.

²⁸ For further reading on the applicability of the separation principle on state-owned enterprises, see for example Schönsteiner, J. (2019). Attribution of state responsibility for actions or omissions of state-owned enterprises in human rights matters. *University of Pennsylvania. Journal of International Law*, Vol. 40(4), pp. 895-936.

Some of the terminology used throughout this thesis must be clarified for consistency. The term ‘forestry’ refers to the development, caring for and managing of forests.²⁹ ‘Clear-cutting’ can be a tool for forestry management practice, which involves uniformly cutting down most or all of the trees in a forest or a section of forest. Clear-cutting can be done to clear land to provide timber and other wood products.³⁰ Furthermore, ‘human rights abuses’ refers to all adverse human rights impacts. In contrast, human rights due diligence (HRDD) is an umbrella term that includes risk assessment tools such as human rights impact assessment (HRIAs). However, this thesis does not engage in depth with HRIAs.

1.4 Method and Material

This thesis employs a mixed methodological approach consisting of a legal dogmatic method and a critical analysis of the law. Applying the legal dogmatic or ‘black-letter’ method, the thesis draws upon relevant, generally recognised legal sources.³¹ The ‘black-letter’ legal research method aims to clarify, systematise and explain the law. Article 38 (1) of the Statute of the International Court of Justice describes legal sources in international law. These legal sources consist of treaties, customary law (including jus cogens), general principles of law, and subsidiary means for determining the law (such as writings of jurists). Other legal sources that do not fit the abovementioned categories can have normative value and are considered ‘soft law’ sources. The normative weight of different soft law sources varies depending on whether they are underpinned by treaties or recognised as customary law.³² Furthermore, fundamental principles of human rights are grounded in international law and form a crucial part of customary international law and the general principles of law.³³ Thus, this thesis builds on hard and soft international legal sources and has an overarching human rights perspective. It integrates three fields within international law: international human rights law, international environmental law and business and human rights. The interdisciplinary approach of this research facilitates the examination of complex issues from multiple perspectives.³⁴

Furthermore, this thesis examines how the right to consultation and FPIC intersects with and impacts Indigenous peoples’ broader right to self-determination. This approach allows for a critical analysis of how these specific rights affect Indigenous peoples’ ability to control and manage their lands, traditional territories, and natural resources.

²⁹ Merriam-Webster. (n.d.). Forestry. *Merriam-Webster.com dictionary*. <https://www.merriam-webster.com/dictionary/forestry>.

³⁰ Sottosanti, K. (2023, November 22). Clear-cutting. *Encyclopedia Britannica*. <https://www.britannica.com/topic/clear-cutting>.

³¹ Kleineman, J. (2019). Rättsdogmatisk metod. In Nääv, M. & M. Zamboni (eds), *Juridisk Metodlära* (2nd edition, pp. 21–46). Lund: Studentlitteratur.

³² Åhrén, M. (2016). *Indigenous Peoples’ Status in the International Legal System* (1st edn, Oxford University Press), pp. 72 and 76.

³³ Crawford, J. (2019). *Brownlie’s Principles of Public International Law* (9th edition, Oxford University Press), pp. 613–614 and 618.

³⁴ Minna Gränd, ‘Allmänt om användningen av andra vetenskaper inom juridiken’ in Maria Nääv & Mauro Zamboni (eds), *Juridisk Metodlära* (2nd edn, Lund: Studentlitteratur) pp. 429–441, 436.

The field of BHR contains soft law instruments that, while not legally binding, compile and reflect existing human rights principles consistent with international law. Guiding principles from organisations like the UN restate these rights within the context of business operations and gain normative force through State and actor recognition.³⁵ The UNGPs, which applied throughout this thesis, embody binding State obligations under core human rights treaties and customary international law, thereby imparting a partial binding effect.³⁶

Whilst the legal dogmatic method seeks answers to questions concerning the meaning of applicable law, a critical analysis permeates this thesis. Critical analysis of law pursues contextualisation to domestic legal order, recognising the normative functions of laws, thus reviewing a legal order's legitimacy.³⁷ The research primarily relies on desk study using various primary and secondary sources. The primary sources include binding and non-binding international legal instruments, Swedish national legislation and jurisprudence, and official documents issued by the UN bodies, as well as other international organisations such as the OECD and sector-specific initiatives. This thesis also engages with reports from the UN Working Group, jurisprudence from UN treaty bodies, official documents and reports from the Sámi Parliament of Sweden, Sveaskog and the Swedish government.

The secondary sources used are academic sources such as books, articles, and blog posts published by scholars researching Indigenous peoples' rights, biodiversity preservation within the forestry sector, and business and human rights. The sourcing of these has been conducted through a literature review. For contextualisation, additional reports from NGOs, The Swedish Institute for Human Rights, and news articles are used as well. Due to limited time, I have not been able to perform interviews with the Sámi people personally or with Sveaskog; instead, to account for the Sámi people's experiences with Sveaskog and describe facts on the ground, this thesis will consult the book *Skogslandet-En Granskning*, a researched investigative report by Lisa Röstlund, a seasoned investigative journalist. The book, categorised under the genre reportage and journalistic collections, portrays the multifaceted conflict concerning the management and conservation of Sweden's forests, examining diverse perspectives and including first-hand interviews with stakeholders.³⁸

³⁵ HRC (2007). *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts' – Report of the Special Representative of the Secretary General (SRSG) on the issue of human rights and transnational corporations and other business enterprises, John Ruggie*. UN Doc. A/HRC/4/35. 19 February 2007, para. 45-52; HRC (2007). *Report of SRSG: Mapping International Standards*. A/HRC/4/35, para. 45.

³⁶ Cismas, I and S. Macrory (2018). The Business and Human Rights Regime under International Law: Remedy without Law? In Summers, J. and A. Gough (eds). *Non-state Actors and International Obligations* (Brill Nijhoff), pp. 222-259, 228-229.

³⁷ Dubber M. (2014). Critical Analysis of Law: Interdisciplinarity, Contextuality and the Future of Legal Studies. *Critical Analysis of Law: An International & Interdisciplinary Law Review*, Vol. 1(1).

³⁸ Röstlund, L. (2023). *Skogslandet : en granskning*. Bokförlaget Forum.

1.5 Outline

This thesis is outlined in six chapters. *Chapter 1* introduces the problem, purpose, choice of case, and research questions of this thesis. The chapter also discusses the scope, delimitations, and terminology and presents the choice of method and material.

Chapter 2 comprehensively explores the Sámi people in Sweden, focusing on their historical and contemporary challenges. This chapter examines colonisation's impacts on the Sámi people's land rights, culture and way of life, the central role of reindeer husbandry in Sámi culture, and the domestic legislation governing it. Furthermore, the chapter explores the complexities of parallel property rights and the conflicting interests of land use. Moreover, the chapter addresses the intersection of reindeer herding and forestry management, a significant source of conflict for the Sámi. The discussion highlights the adverse effects of logging and forest fragmentation on reindeer grazing lands. It examines the legislative framework, including the Swedish Forestry Act and the Act on Consultation in Matters of Special Importance to the Sámi People, and the opposing views on consultation procedures.

Chapter 3 introduces three legal frameworks. First, it will trace the evolution of Indigenous peoples' rights to effective participation and consultation within international human rights law. This exploration will encompass the development of indigenous collective rights, the affirmation of indigenous self-determination, and the emergence of the Free, Prior, and Informed Consent (FPIC). Subsequently, the chapter will explore the intersection of indigenous rights the international biodiversity framework presenting the intrinsic relationship between nature and the Indigenous peoples as recognised within the Convention on Biological Diversity and the Post-2020- Global Framework for Biodiversity. Thereafter, this chapter will introduce the BHR framework to elucidate the responsibilities of both states and corporations regarding human rights according to the UNGPs and the OECD MNE Guidelines. Lastly, Sweden's recognition of the aforementioned legal frameworks is assessed.

Chapter 4 introduces the particularities of human rights due diligence in the forestry sector. Additionally, it outlines international best practices for how corporations can implement the right to FPIC in their operations. Lastly, the chapter introduces Sweden's adoption of best practices and implementation of international forestry standards.

Chapter 5 analyses the Swedish legislative gap regarding the right to consultation and FPIC and how Sveaskog addresses their human rights responsibility to provide meaningful participation and facilitate good-faith consultations. The chapter concludes by examining the Sámi people's experience with consultation procedures with the forestry company.

Chapter 6 provides the conclusion.

2. The Sámi People of Sweden

2.1 Historical Colonisation of Sápmi

The Sámi are the oldest and largest indigenous population in Europe, inhabiting Sápmi.³⁹ The Sápmi territory encompasses the northern parts of present-day Norway, Sweden and Finland up to the Kola Peninsula of Russia.⁴⁰ The Sámi are characterised by their nomadic lifestyle, with a robust and distinctive culture intricately linked to their spiritual beliefs, ancestral territories, and a profound communion with nature.⁴¹

Until the middle of the 18th century, the forest areas in northern sections of Sweden's inland regions were primarily utilised by the nomadic Sámi for reindeer herding, fishing and hunting. The initial interactions between the Sámi and non-Sámi populations primarily revolved around barter trade. Subsequently, taxation was introduced in regions inhabited by the Sámi, initially as a voluntary measure offering protection against threats such as theft and dishonest practices. However, as taxes evolved into a significant revenue source for the neighbouring monarchies of Sweden, Finland and Norway, their vested interest in Sámi territories heightened.⁴² The Swedish State started to impose tax breaks to entice Swedish local communities to relocate to the northern Sámi areas from the coast and south of Sweden.⁴³

The process of settlement and delineation turned forestlands into private property. These procedures were used to divide state-governed territory from private land, resulting in the division of forests among private proprietors and their classification as private property.⁴⁴ Consequently, the Swedish settlers gradually displaced the Sámi during the 18th century.⁴⁵ The issue of land ownership over Sámi traditional territories gained prominence in the mid-19th century, coinciding with a shift in attitudes towards the Sámi population. Influenced by cultural hierarchies, ideologies and increasing interest in the forest and its resources, the Swedish State began asserting ownership over these territories. This transition marked a departure from previous practices, wherein Sámi customary laws regarding land, water and natural resources were respected by the State. Instead, a perception emerged that only

³⁹ Svensk information. (2005). *The Sami - an indigenous people in Sweden*. Sami Parliament, pp. 3-5.

⁴⁰ Errico, S. and Hocking, B. (2009). Reparations for Indigenous peoples in Europe: The Case of the Sámi People. In F. Lenzerini (Eds), *Reparations for Indigenous peoples: International and Comparative Law Perspectives* (2nd edn, Oxford; New York: Oxford University Press), pp. 363–388.

⁴¹ Svensk information (2005). *The Sami - an indigenous people in Sweden*, Sami Parliament.

⁴² Errico, S. and B. Hocking (2009).

⁴³ Nežirević, L. (2022). *Sweden's indigenous Sami community complain of human rights abuses*. Anadolu Ajansı. <https://www.aa.com.tr/en/europe/sweden-s-indigenous-sami-community-complain-of-human-rights-abuses/2710836> .

⁴⁴ Brännström, M. (2024).

⁴⁵ Nežirević, L. (2022).

permanent land utilisation for agriculture and forestry warranted land ownership, relegating Sámi customary rights to a secondary status.⁴⁶

From the 1800s until the 1970s, the Swedish government issued assimilation policies claiming that the Sámi people were an inferior and uncivilised race that had to be assimilated into Swedish society. The Sámi peoples' vast territories in the provinces of Jämtland, Härjedalen, Norrbotten, and Västerbotten were despoiled as a result of forced land dispossession. Furthermore, reindeer herders frequently had to pay a fee to access their own ancestral territories.⁴⁷ Moreover, the Swedish Parliament decreed in 1928 that Sámi peoples not engaged in reindeer husbandry fortified their rights to land use, cultural practices and legal recognition, curtailing their access to ancestral grounds. This discriminatory policy starkly differentiated reindeer-herding Sámi from those in other professions, which ultimately divided the Sámi community.⁴⁸

In recent decades, Sweden has implemented several measures to address its colonial history. The Sámi were Acknowledged as Indigenous in Sweden in 1977⁴⁹, and they constitute one of the nation's five national minorities.⁵⁰ In 2011 the Swedish constitution recognised the Sámi people as a distinct peoples committed to promoting their cultural and community way of life.⁵¹ Furthermore, Sweden established the Sámi parliament in 1993 to give the Sámi a voice in matters affecting their culture and livelihoods.⁵² However, the erosion of Sámi land rights and imposition of non-Sámi ownership over their ancestral territories resulted in the fragmentation of Sámi lands and the dilution of their cultural and spiritual practices. The legacy of Sweden's discriminatory policies continues to resonate today, as conflicts over land use and ownership remain a pressing issue.⁵³

2.2 Reindeer Husbandry and Parallel Property Rights

Sámi people have historically relied on traditional practices of hunting, fishing, duodji⁵⁴ and reindeer herding.⁵⁵ Among these, reindeer herding holds a particularly central role in Sámi

⁴⁶ Errico, S. and B. Hocking (2009).

⁴⁷ Malmberg, Å. (2021). *How the Sami were affected by research in "racial biology"*. Uppsala University. <https://www.uu.se/en/news/archive/2021-12-10-how-the-sami-were-affected-by-research-in-racial-biology> .

⁴⁸ Ibid.

⁴⁹ Prop. 1976/77:80.

⁵⁰ Prop. 1998/99:143, SFS 2009:724.

⁵¹ Prop. 2009/10:80, *Amended of Instrument of Government* (Regeringsformen), 1:2 6 clause; parliamentary decision 2010-10-24.

⁵² Sweden. (2024). *The Sami are one of the world's Indigenous peoples and one of Sweden's official national minorities*. <https://sweden.se/life/people/sami-in-sweden> .

⁵³ Allard, C., and M. Brännström (2021). *Girjas Reindeer Herding Community v. Sweden: Analysing the merits of the Girjas case*. *Arctic Review on Law and Politics*, Vol. 12(1), pp. 56-79.

⁵⁴ Duodji is a traditional practice of Sámi craftwork, see Sámi Duodji Same slöjd stiftelsen. *Vad är duodji?* <https://sameslojdstiftelsen.com/vad-ar-duodji/>.

⁵⁵ Sametinget (2022). *Kontaktuppgifter till Sveriges samebyar*. Sametinget. <https://www.sametinget.se/samebyar>.

culture. This practice extends beyond its economic importance, serving as a vital aspect of Sámi cultural and spiritual life.⁵⁶

The 1971 Reindeer Husbandry Act established that the Sámi people had an exclusive right to reindeer husbandry, grounded in the concept of ‘urminnes hävd’ or immemorial prescription. Immemorial prescription denotes a property entitlement acquired through prolonged uninterrupted use of land. This entitlement carries legal significance and is recognised as a usufructuary right to land; reindeer husbandry rights are thereby afforded protection under property laws. This means that reindeer can graze on land irrespective of formal ownership of the land.⁵⁷ The Reindeer Husbandry Act defines where reindeer husbandry can be conducted, restricting it to specific geographical areas and distinguishing between two kinds of grazing lands: year-round grazing land and winter grazing land.⁵⁸ The Sámi peoples’ right to winter grazing land is not based on immemorial prescription but rather customary law. Once established, this right persists until expressly relinquished by a Sámi village.⁵⁹ As a property right, reindeer husbandry is protected under the constitution in the Swedish Instrument of Government. However, this right can be limited to protect pressing public interests.⁶⁰ Moreover, the government may order the revocation of reindeer husbandry rights for an area of land when the area is needed for purposes mandated in the Expropriation Act. The Expropriation Act allows expropriation for several reasons, including expropriation for economic activities and development.⁶¹ While a decision for expropriation is issued by the government, measures may be prescribed to mitigate any damage or inconvenience to reindeer husbandry.⁶²

Furthermore, the Reindeer Husbandry Act granted the reindeer herding Sámi villages (Samebyar) legal personality, thus transforming these into economic and administrative associations with their own board.⁶³ Today, Sweden has 51 Sámi villages. The size of the areas varies greatly, as do the number of reindeer owners and professional reindeer herders in each Sámi village. Sámi villages are categorised into mountain, forest, and concession Sámi villages. Forest Sámi villages remain in forested areas year-round, while concession Sámi villages require a permit for a Sámi to engage in reindeer herding.⁶⁴ Membership in a Sámi village presupposes active participation in reindeer husbandry, encompassing all inherent natural rights such as fishing and hunting. The majority of Sámi individuals currently remain outside of Sámi villages, leading to a distinct separation of the Sámi population into reindeer herding and non-reindeer herding Sámi groups with vastly disparate rights.⁶⁵

⁵⁶ Ibid.

⁵⁷ SFS 1971:437 *Rennäringslag* (Reindeer Husbandry Act), Section 1.

⁵⁸ Ibid, Section 1, para. 3.

⁵⁹ NJA 2011 s. 109 (“Nordmalingsmålet”), ; Bengtsson i SvJT 2011, s. 527 ff.

⁶⁰ Instrument of Government, Chapter 2 Section 15.

⁶¹ Reindeer Husbandry Act, Section 26; SFS 1972; Expropriationslag (Expropriation Act), Chapter 2.

⁶² Reindeer Husbandry Act, Section 27.

⁶³ Kjellström, R.(2003). *Samernas liv* (2th edn, Carlsson), pp. 15-25.

⁶⁴ Sametinget (2022).

⁶⁵ Kjellström, R. (2003).

The establishment of the Sámi Parliament in 1993 aimed to address these issues.⁶⁶ The Sámi Parliament serves as a hybrid entity, blending elements of a democratically elected parliament with those of a State administrative agency with limited and legally regulated responsibilities. This duality often leads to conflict between the Sámi people's desire for increased autonomy and the Swedish government's tendency towards regulation and control. The elected Sámi politicians prioritise the Sámi Parliament as an independent, democratically elected body over its role as a State administrative agency.⁶⁷

2.2.1 Landmark Cases

The Reindeer Herding Act as well as other domestic legislation governing forestry and mining, is the primary foundation for managing reindeer herding. However, even if relevant legislation exists, the meaning of Sámi land rights has primarily evolved through landmark cases.⁶⁸ In 1981 the Swedish Supreme Court clarified in the *Taxed Mountain case* (*Skattefjälldomen*) that Sámi land rights are founded on the customary use of land through the concept of immemorial prescription and count for private property rights.⁶⁹ Furthermore, the Supreme Court confirmed in the 2011 *Nordmaling* case that the right to reindeer grazing on coastal land areas was founded on long-term usage of land as customary rights.⁷⁰ The case consisted of a lawsuit between several landowners and three Sámi villages in the province of Västerbotten during the winter. The landowners were claiming that the Sámi villages had no right to reindeer grazing for winter pasture on their lands. Thus, the legal question arose whether the Sámi villages had the right to winter pasture on the disputed properties. The Court adjudicated that there was in fact legal validity of Sámi land rights as private property rights.⁷¹

Additionally, in 2011 the Swedish Supreme Court established in the *Girjas* case, which concerned the right to small game hunting and fishing in the high mountains, that Sámi land rights include the ability to decide on land use, not recognised in the Reindeer Herding Act.⁷² Furthermore, the *Girjas* case elucidated that international indigenous law is of relevance in the decision making of Courts and authorities concerning Sámi land use.⁷³

These cases are considered landmark cases and have been a major achievement for the Sámi and indigenous rights, emphasising the important factors that should be considered when Sámi land rights are in dispute for future judicial proceedings. However, in the context of potential rupture proceedings, critical considerations include how the Swedish government

⁶⁶ Sametinget (2021). *The Sami Parliament*. Sametinget. <https://www.sametinget.se/english>.

⁶⁷ Sametinget (2019). *Background: The State and the Sami*. Sametinget. <https://www.sametinget.se/9688>.

⁶⁸ Brännström, M. (2024).

⁶⁹ NJA 1981, *Skattefjälldomen*, s 1.

⁷⁰ NJA 201, *Nordmalingsmålet* (Nordmaling case), s. 109, para.10.

⁷¹ Ibid.

⁷² NJA 2020, s. 3 *Girjas*, para. 130-131 and 162.

⁷³ Ibid, para. 91–94.

and parliament respond, specifically whether they choose to initiate dialogue and negotiations or establish an inquiry into the conditions affecting Sámi villages.⁷⁴

However, the recent *Gállok* case serves as an example of how this has failed. *Gállok* case involves a permit for extraction of iron ore in a deposit located in Gállok, an area with high conservation value where reindeer herding has been practised for decades. In 2022, the government granted Iron Mines AB a processing permit for the concession of Gállok for minerals extraction. The government determined that the area is of national interest for both reindeer husbandry and valuable mineral extraction concurrently within the concession area. Upon balancing the interests, the government concluded that the national interest in valuable minerals should be given priority. The government's decision drew strong criticism from the affected Sámi villages and environmental advocates, who appealed to the Swedish Supreme Administrative Court. Despite arguments highlighting the adverse impact the mine would have on reindeer husbandry, the Court upheld the government's decision.⁷⁵

2.3 Reindeer Herding and Forest Management

As the forestry industry undergoes substantial expansion, the Sámi encounter new challenges and infringements on their indigenous rights. Europe's shift to environmentally sustainable practices, known as the green transition, has heightened the demand for timber and plywood materials.⁷⁶ Consequently, there has been a notable increase in logging and clear-cutting practices within the forestry sector, raising concerns among the Sámi who fear that their lands and livelihoods are being exploited again. The management approaches employed by forestry companies in the boreal forest have had adverse implications for reindeer husbandry, with critical grazing areas facing destruction and exploitation. The challenges persist as the demand for raw materials increases, leading to further conflicts between the for-profit-driven forestry companies and the Sámi communities reliant on reindeer herding.⁷⁷

2.3.1 Forestry Industry Adversely Impacts Reindeer Herding

Sámi-owned reindeer graze the mountainous areas within the vast expanse of boreal forests spanning Sápmi. Key characteristics of reindeer herding include access to pastures, connection and diversity of pasture regions, and peaceful grazing free of human activity.⁷⁸ Researchers have found that approximately 50 % of Sweden's land surface is devoted to reindeer herding, with forestland accounting for a sizable portion of this.⁷⁹ In the county of Norrbotten, reindeer can feed in some parts of the boreal forest all year round migrating between several grazing patches inside the forest. Reindeer feed on various plant species

⁷⁴ Allard, C., and M. Brännström (2021).

⁷⁵ Swedish High Administrative Court (HFD), HFC 2893-22, Rättsprövning.

⁷⁶ Streck, K. and J. Ekblom (2023). *Europe's Green Revolution Threatens Indigenous Culture*. Bloomberg (<https://www.bloomberg.com/features/2023-sweden-indigenous-sami-green-energy/>).

⁷⁷ Ibid.

⁷⁸ Sámi Parliament (2021). *Rennäringspolitisk Strategi, Sápmi—en region som berikar Sverige*. Sámediggi. <https://www.sametinget.se/156607>.

⁷⁹ Brännström, M. (2024).

throughout the year. In the winter, most plant species lose a significant amount of nutritional value. Nevertheless, even in the winter, lichen contains many carbohydrates that reindeer can digest and feed on for substance. Thus, lichen makes up 80% of the forage-sustaining reindeer in the winter and early spring. Access to winter grazing grounds is usually the main restriction on reindeer herding in Sweden.⁸⁰

Despite being a country with large forest areas, Sweden's forestry industry has caused significant loss and fragmentation of reindeer grazing areas. Logging and forest management have increased in the last 100-150 years, changing the management methods of the forests considerably. This has resulted in changes in the ecosystem, such as fragmentation of older forests, loss of biodiversity due to monoculture of spruce plantations and an overall increase in productivity of logging.⁸¹ Due to clear-cutting, it has become difficult for reindeer to access and feed on lichen. In a study conducted by the Swedish University of Agricultural Sciences, researchers found that heavy forest management during the 20th century destroyed between 30% to 50% of the essential grazing grounds for reindeer and that the quality of the grazing grounds was significantly reduced. Additionally, logging of the old-growth forests diminishes the availability of arboreal lichen.⁸²

Moreover, the fragmentation of the forest landscape caused by roads and clear-cutting of trees has made it more difficult for herders to move and keep the reindeer herd together. In addition to the competing land uses, climate change has reduced the amount of land available for adaptation and grazing.⁸³ Overall the Sámi people continue to experience difficulty in asserting their rights as the legal framework in Sweden does not offer adequate support for the Sámi people. These issues have been raised by the UN human rights mechanisms, which highlight how the rights of the Sámi are restricted, especially in the face of commercial resource management on their traditional territories, which in turn leads to disputes over reindeer grazing rights.⁸⁴

2.3.2 Conflicting Interests between Sámi Reindeer Herders and the Forestry Industry

The majority of the forest lands in Sweden are owned by private landowners and large forest corporations. The forest serves as productive forest land, which boosts Sweden's economy by yielding pulpwood and timber. This juxtaposition entails that both the forestry industry and reindeer use the same land areas for opposite purposes, thus giving rise to conflicting interests. Many academics and Sámi representatives contend that the extraction and

⁸⁰ Berg, A., et al. (2008). A century of logging and forestry in a reindeer herding area in northern Sweden. *Forest Ecology & Management*, Vol. 256(5), pp. 1009–1020.

⁸¹ Linder, P. and L. Östlund (1998). Structural changes in three mid-boreal Swedish forest landscapes 1885–1996. *Biological Conservation*, Vol. 85(1-2), pp. 9-19.

⁸² Ibid.

⁸³ Brännström, M. (2024).

⁸⁴ HRC. (2016). *Report of the SRIP on the human rights situation of the Sami people in the Sápmi region of Norway, Sweden and Finland (A/HRC/33/42/Add.3)*. United Nations.

cultivation of timber have a detrimental effect on the quantity and availability of lichen, being a vital resource for reindeer, thus threatening the future of reindeer herding. On the other hand, forestry advocates argue that adaptation to the demands of reindeer husbandry is not economically justifiable.⁸⁵ These conflicting interests are further exacerbated by opposing land rights.⁸⁶

These conflicts are regulated by the Swedish Forestry Act, first enacted in 1903 and subsequently revised several times. The Forestry Act establishes a legal framework for managing the country's extensive forestry resources and promotes consultations with Sámi peoples to create possibilities for collective action and promote coexistence.⁸⁷

2.3.2.1 *The Swedish Forestry Act*

The Swedish Forestry Act outlines the obligations and expectations set on forestry owners.⁸⁸ According to the legislation, the forest is a renewable resource that must be managed sustainably to preserve biodiversity and generate profit.⁸⁹ This provision summarises the governmental requirements for the management of Sweden's forest, establishing two equally essential objectives: a production goal and an environmental goal. The production goal mandates that forest and woodland areas must be utilised efficiently and responsibly to yield a sustainable substitution return. The environmental goal requires the preservation of biodiversity and genetic resources within the forests. Forests must be managed to ensure that plants and animals native to the ecosystems can continue to thrive under natural conditions. Furthermore, the forest's cultural, ethical and social values must be preserved. Moreover, the concept of sustainability relates to substantial development which aims to meet present demands without compromising the ability to meet future needs. Good return entails not only high and valuable timber yields but also other forms of returns, such as reindeer husbandry.⁹⁰

Regarding reindeer husbandry, Forestry Act states that before logging takes place within a year-round reindeer herding area, the affected Sámi village must be given the opportunity for *consultation*. Consultation procedures should be conducted at least once a year for larger forest owners.⁹¹ Furthermore, in an area where reindeer husbandry is permitted throughout the year under the Reindeer Husbandry Act, logging is prohibited if it results in a substantial loss of reindeer grazing lands that affects the ability to maintain the allowed number of reindeer, or if it renders the customary gathering and migration of reindeer herd impossible.⁹² Additionally, in the management of forests, adjustments must be made with respect to the

⁸⁵ Sandström, C., et al. (2006). Progressing toward co-management through collaborative learning: forestry and reindeer husbandry in dialogue. *International Journal of Biodiversity Science & Management*, Vol 2(4), pp. 326–333.

⁸⁶ Sandström, C. et al. (2006).

⁸⁷ SFS 1979:429 *Skogsvårdslagen* (Forestry Act).

⁸⁸ Forestry Act, Section 1.

⁸⁹ *Ibid.*

⁹⁰ Öhman, C. (2024). *Skogsvårdslagen (1942:740)*. Commentary to Section 1. Karnov (JUNO).

⁹¹ Forestry Act, Section 20.

⁹² *Ibid.*, Section 13(b).

size and landscape of clear-cutting areas, as required by the needs of reindeer husbandry. When planning and implementing these measures, efforts must be made to ensure that the affected Sámi villages have annual access to continuous grazing areas and the vegetation necessary within areas designated for reindeer migration or resting.⁹³

2.3.2.2 The Act on Consultations in Matters of Special Importance to the Sámi People

In 2022 the Act on Consultations in Matters of Special Importance to the Sámi People (Consultation Act) came into effect. The Consultation Act was adopted as a result of the international critique Sweden had received concerning their treatment of the rights of the Sámi.⁹⁴ The law's objectives are to increase the Sámi people's power and mandate by requiring that state actors engage in meaningful dialogue with the Sámi before making decisions.⁹⁵

The government and public authorities are required by the Consultation Act to consult with Sámi representatives (The Sámi Parliament and Sámi Communities) before making decisions in matters that may have special significance for the Sámi. Additionally, as of March 1st 2024, this obligation will extend to regional authorities and municipalities. Moreover, Sámi communities, the Sámi Parliament, and Sámi organisations have the right to initiate consultations on matters that they consider to be of special importance.⁹⁶ The Act establishes that consultations are to be conducted in good faith and continued until an agreement or consent is reached. However, consultations can be cancelled if either party believes that no agreement or consent can be reached.⁹⁷ Regrettably, the Consultation Act does not state what level of influence the consultation process has on the final decisions. The Government Bill has clarified that a decision can be made despite opposition from Sámi representatives. It is emphasised that consultations are a way for the Sámi to share their knowledge and inform on a decision's potential adverse effects on their interests.⁹⁸ Nonetheless, participation suggests that when a decision has a detrimental effect on Sámi rights, Sámi interests should take precedence over opposing interests. This balance of interests takes into account the Sámi people's protection under the Swedish Constitution and international law.⁹⁹

Moreover, exceptions are made to the consultation obligation, if another public authority has previously consulted with the Sámi on similar matters. However, these exceptions are restricted.¹⁰⁰

⁹³ Ibid, Section 31.

⁹⁴ Prop. 2021/22:19 *En konsultationsordning i frågor som rör det samiska folket* (A Consultation Act in Matters of Special Importance to the Sámi People), pp. 20-21.

⁹⁵ Prop. 2021/22:19.

⁹⁶ Consultation Act, Sections 6-7.

⁹⁷ Ibid, Section 11.

⁹⁸ Prop. 2021/22:19, p.112.

⁹⁹ Ibid, p.114.

¹⁰⁰ Consultation Act, Sections 4 and 5; Prop. 2021/22:19, pp. 79-80.

2.3.3 Opposing View on the Meaning of Consultations and Increasing Conflict

The purpose of the consultation procedures established by the Swedish Forestry Act was to create possibilities for collective action and thus the two industries to coexist. Nonetheless, the consultation procedures did not seem to fulfil their purpose given that the conflict between the landowners, forestry companies and the Sámi continued. Instead, research has shown that the two industries have opposing views on the consultation procedures and their significance for each industry.¹⁰¹

Sandström and Widmark found that most of Sweden's 52 Sámi reindeer herding communities viewed consultation with the forestry industry as ineffective, highlighting inadequate legal protection for reindeer grazing areas and the uneven power dynamics, where the forestry industry benefits disproportionately, while Sámi herders lose vital grazing lands.¹⁰² The interviewed Sámi reindeer herders expressed a preference for earlier involvement in the decision-making process to genuinely influence its outcome. Sandström contends that Sweden's domestic legislation's deficiencies are evident in the unequal power distribution, which significantly limits the Sámi reindeer herder's ability to impact negotiation results. Consequently, it is arguable that the forestry sector disproportionately benefits from the current legal system, while reindeer herders incur losses, particularly through the reduction of grazing lands.¹⁰³

2.4 Conclusion

The Sámi peoples have faced long-standing marginalisation and dispossession of their lands due to the colonisation by the Swedish State. While there has been legal advancement in recognising Sámi indigenous rights, competing economic interests often undermine them. The power imbalance between the Sámi and the forestry industry exacerbates the challenges faced by the Sámi in maintaining their traditional practices of reindeer herding, thus adversely impacting their way of life. The Swedish legal framework has been criticised for failing to adequately protect Sámi rights, leading to ongoing conflicts and the erosion of Sámi culture and environmental stewardship of their forest lands.

Opposing views of the meaning of consultation processes, challenges in co-managing land, and conflicts continue. Therefore, it is crucial to delineate the international Indigenous rights of the Sámi, particularly concerning consultation and participation in decision-making processes. Additionally, it becomes essential to examine how these rights intersect with the environmental and ecological demands of forestry and to clarify the obligations of the Swedish State and forestry corporations, such as Sveaskog, concerning the Indigenous rights of the Sámi people.

¹⁰¹ Sandström, C. (2006).

¹⁰² Ibid.

¹⁰³ Ibid.

3. Converging Legal Currents: Indigenous Rights, Biodiversity, and Corporate Responsibility

This chapter will examine the intricate legal landscape governing the relationship between Sámi rights and Sveaskog's forestry operations in Sweden, analysing three key legal frameworks. First, it will trace the evolution of Indigenous peoples' rights to effective participation and consultation within international human rights law. This exploration will encompass the development of indigenous collective rights, the affirmation of indigenous self-determination, and the emergence of the Free, Prior, and Informed Consent (FPIC). Then, the second section of this chapter will delve into the intersection of indigenous rights with international environmental law, specifically in the context of biodiversity and resource benefit sharing. This legal framework will present the intrinsic relationship between nature and the Indigenous peoples as recognised within the Convention on Biological Diversity and the Post-2020- Global Framework for Biodiversity.

Thereafter, this chapter will introduce the BHR framework to elucidate the responsibilities of both states and corporations regarding human rights. This will involve exploring the scope and nature of corporate responsibility, its applicability to state-owned businesses, similar to Sveaskog, and the specific human rights that fall under the scope of responsibility.

3.1 International Human Rights Law Framework

Indigenous peoples' rights have been established on the recognition that they are colonised people in the economic, political and historical sense.¹⁰⁴ Due to the disposition of their traditional lands and discriminatory and racist assimilation policies, Indigenous peoples have suffered a loss of culture, traditions and their way of life.¹⁰⁵ Thus, the primary issue concerning indigenous people has been the preservation of their views and traditions as a group. According to the fundamental principles of universality, equality, and non-discrimination, Indigenous peoples are entitled to the full range of rights established under international law. However, similarly to minorities, Indigenous peoples have also been in a non-dominant position; Indigenous peoples, as collectives, have distinct and unique cultures and world views thus their current needs may differ from those of the mainstream population. Their equality and dignity can only be ensured by recognising and upholding both their individual and collective rights as distinct groups. These rights can only be meaningfully realised when they are collectively asserted. This has resulted in the development of a separate body of international instruments for the recognition and protection of the rights of

¹⁰⁴ SUBCOM (1996). *Report of the Working Group on Indigenous Populations- Working paper by the Chairperson-Rapporteur, Mrs. Erica- Irene A Daes, on the concept of 'indigenous people'*. UN Doc E/CN.4/Sub.2/AC.4/1996/2.

¹⁰⁵ Vrdoljak, AF, (2008). Reparations for Cultural Loss. In F. Lenzerini (Eds), *Reparations for Indigenous peoples: International and Comparative Law Perspectives* (2nd edn, Oxford University Press), pp. 363–388.

Indigenous peoples.¹⁰⁶

The indigenous rights regime is based on two key principles: 1) the right of Indigenous peoples to self-determination, allowing them to maintain and develop their distinctive cultures and societies; and ii) the rectification of historical and ongoing injustices from colonisation of their territories, emphasising land and resource rights through the right to equality. Thus, indigenous people's right to land and natural resources is based on the customary use of traditional land and not by States as such.¹⁰⁷

3.1.1 International Human Rights Instruments

The Universal Declaration of Human Rights (UDHR) is a foundational document that outlines fundamental human rights and freedoms to be universally protected. It serves as a common standard for all peoples and nations' rights to be universally protected. Although the UDHR itself does not impose legally binding obligations, the rights enshrined within it are extensively incorporated into two binding international treaties: the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR).¹⁰⁸

The ICCPR and ICESCR affirm in common Article 1 that all peoples have the right to self-determination, allowing them to determine their political status and pursue their economic, social and cultural development. They may freely use their natural resources, subject to international obligations, and cannot be deprived of their means of subsistence. State Parties are required to promote and respect the rights per the UDHR.¹⁰⁹ Furthermore, in its 23rd General Comment, the Human Rights Committee (HCR) asserted that culture, particularly for Indigenous peoples, encompasses a way of life associated with the use of land resources. Emphasising the necessity of affirmative legal measures to protect these rights and ensure that minority community members can effectively participate in decision-making processes on issues that affect them.¹¹⁰ Moreover, the CESCR has emphasised in its 21st General Comment that states must adhere to the principle of obtaining free, prior and informed consent from Indigenous peoples regarding all issues pertaining to their specific rights.¹¹¹ In summary, Indigenous peoples have the right to self-determination, according to two of the

¹⁰⁶ McCorquodale, R. (2023). Indigenous peoples. In D. Moeckli, S. Shah and S. Sivakumaran (eds.), *International human rights law* (3rd edn, Oxford University Press), pp. 361-364.

¹⁰⁷ Åhrén, M. (2016). *Indigenous peoples' status in the international legal system* (1th edn, Oxford University Press), pp. 72 and 76.

¹⁰⁸ UNGA (1948). *Universal Declaration of Human Rights*. 217 A (III), 10 December 1948, Article 27. (UDHR); UNGA (1966). *International Covenant on Economic, Social and Cultural Rights*, UNTS, vol. 993, p. 3, 16 December 1966, Art. 15. (ICESCR).

¹⁰⁹ ICCPR Art.1; ICESCR Art.1.

¹¹⁰ HRC (1994). *CCPR General Comment No. 23: Article 27 (Rights of Minorities)*. CCPR/C/21/Rev.1/Add.5. 8 April 1994, para.7.

¹¹¹ CESCR (2009). *General comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights)*. E/C.12/GC/21. 21 December 2009, para. 37.

central UN bodies tasked with monitoring the adherence to the most fundamental international self-determination provisions.¹¹²

The recognition of Indigenous peoples' rights is not confined to the right to self-determination. The Committee on the Elimination of Racial Discrimination (CERD) is the monitoring body of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).¹¹³ The ICERD does not itself have specific provisions on Indigenous peoples, however, the CERD Committee has in their 23rd Recommendation established that the ICERD applies to Indigenous peoples and that the rights within the convention have a collective dimension. The CERD Committee promotes the recognition and respect of Indigenous peoples' distinct cultures, ways of life and cultural identities. The Committee encourages States to ensure the participation and exercise of Indigenous peoples' cultural traditions and customs. Furthermore, the Committee requests that states recognise and protect Indigenous peoples' right to own, control and use their ancestral lands, territories and resources. Lastly, the CERD states that decisions that directly affect the rights and interests of indigenous people cannot be made without their consent.¹¹⁴

3.1.2 International Labour Organization (ILO) Convention No. 169

The International Labour Organization (ILO) is a UN agency committed to improving working conditions and promoting worker's rights ratified the first Indigenous and Tribal Population Convention No. 107, in 1957.¹¹⁵ Later, as international law progressed, the ILO adopted Convention No. 169 in 1989, to specifically address Indigenous peoples' rights.¹¹⁶ As the only binding international legal instrument on indigenous rights, the Convention recognises the obligation of States to respect indigenous peoples' rights, based on the recognition and respect of the ethnic and cultural diversity of Indigenous peoples as permanent societies. The ILO Convention No. 169 acknowledges the rights of Indigenous peoples to maintain their identity, territory, autonomy, cultural integrity and right to participation in the national political and social life.¹¹⁷ Unlike its predecessor, Convention No. 197, which emphasised individual rights, Convention No. 169 prioritises collective rights, as evidenced by the use of the term "peoples".¹¹⁸

Article 6(1)(a) of the ILO Convention No. 169, states that Member States shall "consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or

¹¹² Åhrén, M. (2016), p. 100.

¹¹³ UNGA (2005). *International Convention on the Elimination of All Forms of Racial Discrimination*, A/RES/59/176. 2 March 2005. (ICERD).

¹¹⁴ CERD (1997). *General Recommendation No. 23: Indigenous peoples*. A/52/18 Annex V. 18 August 1997, para. 1, 4(d) and 5. (CERD).

¹¹⁵ ILO (1957). *C107 - Indigenous and Tribal Populations Convention*. No.107. 26 June 1957.

¹¹⁶ ILO (1989). *C169 - Indigenous and Tribal Peoples Convention*. No.169. 27 June 1989. (ILO Convention No. 169).

¹¹⁷ Ibid.

¹¹⁸ Åhrén, M. (2016), p. 96.

administrative measures which may affect them directly’’. The Convention stipulates in article 6(2) that consultations under the Convention shall be carried out in good faith and in a manner suitable to the specific circumstances, aiming to reach an agreement or obtain consent for any proposed measures. Furthermore, Article 7(1) states that Indigenous peoples shall have the right to determine their development priorities, considering the impact on their lives, beliefs, institutions, spiritual well-being, and the lands that they use or occupy. These rights entail Indigenous peoples’ ability to exercise control over economic, social, and cultural development to the greatest extent possible. Moreover, Indigenous peoples shall participate in the creation, implementation and assessment of national and regional development plans and programmes that may directly affect them. Subsequently, Article 7(3) mandates States to conduct studies, in cooperation with Indigenous peoples, to assess the social, cultural, spiritual, and environmental impacts of proposed development activities.¹¹⁹

Furthermore, Article 13(1) recognises indigenous land rights, requiring States to respect the cultural and spiritual significance of Indigenous peoples’ relationship with the lands they occupy or use, particularly its collective nature. Subsequently, Article 14(1) mandates that States should recognise the Indigenous peoples’ rights of ownership and possession over the lands which they traditionally occupy. States shall take measures to safeguard this right to use lands that are not exclusively occupied by Indigenous peoples but that have been traditionally used to maintain their way of life and traditional livelihoods.¹²⁰

Moreover, Article 15(1) states that Indigenous peoples have the right to participate in the use, management and conservation of the natural resources on their lands. This article ensures that indigenous communities have a say in how their natural resource are managed and utilised. Furthermore, Article 15(2) requires States to consult Indigenous peoples before undertaking or allowing any programs for the exploration or exploitation of mineral resources on their lands. This guarantees that indigenous communities are allowed to effectively participate in decisions concerning resource extraction and are compensated for any negative impacts that occur. Consequently, Article 16 establishes that Indigenous peoples must give their Free, Prior and Informed Consent (FPIC) before any necessary relocation is imposed on them by States. Thus, protecting Indigenous peoples from forced displacement.¹²¹

Despite being the sole legally binding international instrument specifically addressing the rights of Indigenous peoples, the ILO Convention No.169 has, to date, only been ratified by 24 States. Among the Nordic countries, Norway, Denmark and Greenland are States Parties, however Sweden is not. The Convention is widely regarded as outdated due to the evolution of international human rights law and the changing circumstances of Indigenous peoples resulting from globalisation. This perception underscored the need for an updated framework that reflects contemporary challenges and the current state of indigenous rights, resulting in the UN Declaration on the Rights of Indigenous peoples (UNDRIP).¹²²

¹¹⁹ ILO Convention No. 169, Art. 6(1)(a), 6(2), 7(1) and 7(3).

¹²⁰ Ibid, Art. 13(1) and 14(1).

¹²¹ Ibid, Art. 15-16.

¹²² Åhrén, M. (2016), p. 96.

3.1.3 UN Declaration on the Rights of Indigenous Peoples

The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted by the UN General Assembly (UNGA) in 2007.¹²³ Upon its adoption, the UNDRIP received broad support from the UNGA, with 144 votes in favour, indicating a strong international consensus.¹²⁴ The only four States that voted against it have since reversed their position. Over the years, the UNDRIP has become the essential international legal instrument that must be taken into account in issues related to indigenous rights, underscoring its growing influence and significance in international human rights law.¹²⁵ The negotiation process culminating in the adoption of the UNDRIP was unparalleled, as it involved direct negotiations between States and representatives of Indigenous peoples.¹²⁶ Similarly to other UNGA resolutions, the UNDRIP is not formally a binding legal document. However, despite its non-binding status, the individual provisions contained in the UNDRIP can reflect, or at least be indicative of, binding legal norms. Scholars, including former UN Special Rapporteur James Anaya and Professor of Law Siegfried Wiessner, contend that while the UNDRIP's provisions do not create new rights, they elaborate on existing human rights and reaffirm established customary international law.¹²⁷

Furthermore, the Declaration has been influential and its provisions have been reflected in the decisions of the Inter-American Court of Human Rights as seen in the case of *Kichwa Indigenous People of Sarayaku v. Ecuador*¹²⁸ and the case of *Saramaka People v. Suriname*.¹²⁹ This robust support demonstrates the international community's commitment to protecting the rights enshrined in the Declaration and promoting compliance, which can be considered evidence of *opinio juris*, that, when accompanied by consistent State practice, may give rise to new rules of customary law. However, there has currently not been consistent State practice.¹³⁰ Moreover, the Declaration's legal status has been endorsed by various UN human rights treaty bodies and institutions which support its position in international law. Thus, the UNDRIP represents an international consensus on the interpretation of the rights of Indigenous peoples.¹³¹

¹²³ UNGA (2007), *United Nations Declaration on the Rights of Indigenous peoples : resolution / adopted by the General Assembly. A/RES/61/295. 2 October 2007. (UNDRIP).*

¹²⁴ Hanson, E. (2019). *UN Declaration on the Rights of Indigenous peoples*. Indigenousfoundations, https://indigenousfoundations.arts.ubc.ca/un_declaration_on_the_rights_of_indigenous_peoples/; Crawford, J. (2019), pp. 618-640.

¹²⁵ Åhrén, M. (2016), p. 86; Crawford, J. (2019).

¹²⁶ Åhrén, M. (2016), pp. 86-87.

¹²⁷ Anaya, S. J. and S. Wiessner (2007). The UN Declaration on the Rights of Indigenous peoples: Towards re-empowerment. *Faculty Articles*, (159). https://scholarship.stu.edu/faculty_articles/159.

¹²⁸ Inter-American Court of Human Rights in *Kichwa Indigenous People of Sarayaku v. Ecuador*, IACtHR Series C No. 245. 27 June 2012, para. 215.

¹²⁹ Inter-American Court of Human Rights in *Saramaka People v. Suriname*, Preliminary objections, merits, reparations and costs. 28 November 2007, para. 131 and 134.

¹³⁰ Gomez I.F. (2019). The UNDRIP: an increasingly robust legal parameter. *International Journal of Human Rights*, Vol. 23(1-2), pp. 7-21.

¹³¹ Åhrén, M. (2016), pp. 105-107.

The UNDRIP has introduced a comprehensive array of new rights, thus significantly expanding the scope of existing human rights.¹³² The primary conceptual innovation lies in the recognition of collective rights as complementary to classical individual rights, which can be seen in the use of the term ‘Indigenous peoples’. Subsequently, the UNDRIP advances the recognition of the right to self-determination in Articles 3 and 4, a central demand of the global indigenous movement. Article 3 of UNDRIP declares that ‘Indigenous peoples have the right to self-determination. By that right, they freely determine their political status and freely pursue their economic, social and cultural development.’ Moreover, Article 4 UNDRIP states that in exercising their rights to self-determination, Indigenous peoples ‘have the right to autonomous or self-government in matters relating to their internal and local affairs’. Article 8 UNDRIP establishes that Indigenous peoples have ‘the right not to be subjected to forced assimilation or destruction of their culture’.¹³³

Furthermore, according to Article 8(2) (a) and 8(2)(d) UNDRIP, States should provide redress for any action which has the aim or effect of depriving them of their cultural values or ethnic identities.¹³⁴ The UNDRIP takes a significant step forward by recognising the necessity of obtaining free, prior and informed consent (FPIC) of Indigenous peoples when States implement administrative or legislative measures that affect them. This right is affirmed in Article 19 UNDRIP, which sets out that States must consult and cooperate in good faith with Indigenous peoples through their representative institutions to obtain FPIC.¹³⁵ Moreover, Article 20(2), asserts that Indigenous peoples are entitled to just and fair redress through restitution if deprived of their means of subsistence and development. Article 28 specifies that Indigenous peoples have the right to redress through restitution, compensation, or other appropriate measures for lands, territories, and resources traditionally owned or used, which have been taken or damaged without their FPIC.¹³⁶

In the context of indigenous lands, territories, and natural resources, Article 29 of UNDRIP states that Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their traditional lands and resources. This Article clarifies that States should establish and implement assistance programmes for Indigenous peoples for such conservation and protection without discrimination and take effective measures to ensure that no hazardous materials shall be stored in their territories without their FPIC. Finally, Article 32 grants Indigenous peoples the right to determine and implement development priorities for their lands and resources. It states that States must engage in good-faith consultations with indigenous representatives to obtain FPIC before approving projects affecting their lands, particularly those involving minerals, water or other resources. States must also provide effective mechanisms for redress and take measures to mitigate adverse impacts on the environment, economy, society, culture, or spirituality.¹³⁷

¹³² Gomez I.F. (2019); Åhrén, M. (2016); McCorquodale, R. (2018).

¹³³ UNDRIP, Art. 3,4 and 8

¹³⁴ Ibid, Art. 8 and 11.

¹³⁵ Ibid, Art. 9.

¹³⁶ Ibid, Art. 19, 20(a) and 28.

¹³⁷ Ibid, Art. 29 and 32.

These provisions emphasise the importance of FPIC in decision-making affecting indigenous people's lands and resources, and the necessity for mechanisms to address and mitigate any negative consequences of such extractive projects.¹³⁸

3.1.3.1 Indigenous Right to Self-Determination

The right to self-determination was initially a principle of international law related to state sovereignty that has evolved to be understood as the right of peoples under colonial, foreign, or alien domination to self-government. The HRC has consistently applied the right to self-determination, as articulated in Article 1 of the ICCPR, to Indigenous peoples, albeit primarily in the context of assessing the collective aspect under Article 27.¹³⁹ In the context of Indigenous peoples, the internal aspect of self-determination is applied and thus it does not include the right to secede. Therefore, international law mandates that Indigenous peoples exercise their right to self-determination within the established borders of existing states.¹⁴⁰

Following the adoption of the UNDRIP, the scope and content of the right to self-determination for Indigenous peoples have been debated. Some States, such as Finland, Norway and Sweden, have argued that this right is narrow, and limited to internal affairs with no relevance to the majority population or the State. They contend that in broad matters, Indigenous peoples only have a right to consultation, not genuine decision-making power and that the State's position ultimately prevails if no agreement is reached. This view suggests that Article 4 UNDRIP's reference to "internal and local affairs" merely entails participation in decision-making processes without impacting the outcomes. However, this interpretation may be flawed, argues the scholar Åhren. Who contends that the State's argument conflates the right to self-determination with the right to consultation and implies a contradiction by restricting the right to instances of no conflict of interests.¹⁴¹

The secondary argument posits that the international dimension of the right to self-determination for Indigenous peoples is limited to a mere right to consultation. However, this interpretation is unsubstantiated and opposes treaty law and principles of reason. The right to self-determination and consultation, while overlapping, are fundamentally different. The right to consultation, well established in international law and central to ILO Convention No. 169, allows Indigenous peoples to participate in decision-making processes but does not ensure genuine influence over the outcome. The right to self-determination encompasses participatory rights, similar to the right to consultation, allowing Indigenous peoples to be involved in decision-making processes relevant to them. However, Åhren explains that the right to self-determination extends beyond mere participation, as it fundamentally includes the right to exercise genuine influence over the material outcomes in favour of Indigenous peoples, even without consensus. Thus, self-determination is primarily a material right with

¹³⁸ Åhrén, M. (2016), pp. 178-179.

¹³⁹ Ibid, p. 92.

¹⁴⁰ Crawford, J. (2019), p. 614

¹⁴¹ Åhren, M. (2004). Indigenous peoples' culture, customs, and traditions and customary law the sami people's perspective. *Arizona Journal of International and Comparative Law*, Vol. 21(1), pp. 63-112.

embedded process elements.¹⁴² As scholar Larsen has stated in his research on the ‘‘Impact assessment and indigenous self-determination: a scalar framework of participation options’’, indigenous self-determination is founded on the acknowledgement of group rights and the necessity to guarantee equal opportunities and proactive participation in decision-making.¹⁴³ From this understanding of the content and the true scope of the indigenous right to self-determination, the principle of FPIC emerged.¹⁴⁴

3.1.3.2 Principle of Free, Prior and Informed Consent

Under international law, Indigenous peoples hold property rights over land and natural resources based on their customary land tenure. These rights encompass collective ownership of their lands and are afforded the same protection as other property rights. Additionally, these rights are bolstered by the cultural significance of the Indigenous peoples’ relationship with their lands.¹⁴⁵ Considering the critical importance of traditional lands and resources to Indigenous peoples’ societies, cultures, and ways of life, their right to self-determination must be considered as a genuine material right. This right implies that Indigenous peoples’ consent must be a priority in the context of development projects related to land and natural resources on their territories. Under Article 32(2) UNDRIP, Indigenous peoples possess the right to grant or withhold FPIC before any state-approved projects that impact their lands, territories, or natural resources, particularly concerning resource exploitation take place.¹⁴⁶

FPIC reinforces indigenous self-determination by ensuring that indigenous communities can effectively participate in negotiations and decision-making processes on issues that affect their traditional lands and resources. Thus, FPIC is grounded on the contemporary conception of indigenous self-determination.¹⁴⁷ The goal of the contemporary definition of FPIC under international human rights law is to minimise the possibility of coercion, deception, and the use of force, while realigning relationships between Indigenous peoples and States as well as non-state actors, to ones based on equality, respect, and understanding.¹⁴⁸

The normative framework of Indigenous peoples’ collective rights, founded on the right to self-determination, is reinforced by indigenous law, treaties, and historical injustices tied to colonisation. Indigenous perspectives and consent are crucial for interpreting and implementing these rights. However, the transformative potential of self-determination,

¹⁴² Ibid.

¹⁴³ Larsen, R. K. (2017). Impact assessment and indigenous self-determination: a scalar framework of participation options. *Impact Assessment and Project Appraisal*, Vol. 36(3), pp. 208–219.

¹⁴⁴ Xanthaki, A. (2022). Chapter 6: Self-determination rights. In Newman D. (Eds). *Research Handbook on the International Law of Indigenous Rights* (1st edn, Edward Elgar Publishing), pp. 75-95.

¹⁴⁵ Anaya, J. (2005). Indigenous peoples’ Participatory Rights in Relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous peoples Have in Lands and Resources. *Arizona Journal of International and Comparative Law*, Vol. 22(1), pp. 7–18.

¹⁴⁶ Doyle, C. (2022). Chapter 7: Free prior and informed consent and Indigenous rights: a bulwark against discrimination and platform for self-determination. In Newman D. (Eds). *Research Handbook on the International Law of Indigenous Rights* (1st edn, Edward Elgar Publishing), pp. 96-128.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

especially regarding resource exploitation, remains unrealised. Despite extensive guidance on FPIC from human rights bodies, States and corporations often treat it merely as a procedural requirement rather than a substantive right. This reductionist view has led to increased violations and failures to obtain FPIC since the adoption of the UNDRIP, undermining Indigenous peoples' efforts to protect their territories and cultures.¹⁴⁹ Due to these opposing views, the requirements of the FPIC principle remain strongly debated.¹⁵⁰

FPIC is generally interpreted through three different approaches. One of these is the minimalist approach, which contends that FPIC should be interpreted as a requirement to consult with Indigenous peoples, rather than a requirement of consent. Åhren explains that the primary distinction between the two is that whereas consultations centre on the right to participate in the process, consent genuinely demands a true impact over the tangible outcome.¹⁵¹ The interpretation of FPIC as consultation, according to scholars Lawrence and Moritz is an outdated understanding of international law as it relates to Indigenous peoples, but it nevertheless finds political support when States and companies attempt to reject the consent requirement and defend the status quo.¹⁵² In 2022, the Swedish government adopted a consultation law with Sámi communities and organisations, which explicitly rejects any consent requirement, is a prime example of the minimalist approach.¹⁵³ Lawrence and Mortitz contend that consultation procedures, in this case, do not ensure that Indigenous peoples will have any significant influence over the decision. Consultation procedures in this case do not ensure that Indigenous peoples will have any significant influence over the decision.¹⁵⁴

The second approach to FPIC is the maximalist interpretation, which is described by Lawrence and Mortitz as a ‘carte blanche veto-right’. According to the maximalist approach Indigenous peoples have freedom under FPIC to refuse participation in any proposed activity, regardless of how big of an impact it would have on their way of life. Meaning that FPIC grants them the ability to refuse any development project on their territories. This is how FPIC has been defined by numerous States and corporations in their arguments against the implementation of the principle.¹⁵⁵ However, according to Lawrence and Moritz, this approach creates a straw-man argument to exaggerate the actual rights being claimed by Indigenous peoples. Wilson and Stammeler contend that this interpretation reinforces long-standing narratives that Indigenous peoples will impede progress and development and threaten the interests of nation governments that depend on the exploitation of natural

¹⁴⁹ Ibid.

¹⁵⁰ Lawrence, A., and S. Moritz (2019). Mining industry perspectives on indigenous rights: Corporate complacency and political uncertainty. *ELSEVIER*, Vol. 6(1), pp. 41-49.

¹⁵¹ Åhren, M. (2016), p. 135.

¹⁵² Lawrence, A., and S. Moritz (2019).

¹⁵³ CRD (2022). *Kommentar till ny lag om konsultationsordningen för det Samiska folket*. CRD. <https://crd.org/wp-content/uploads/2022/03/Kommentar-till-ny-lag-om-konsultationsordning-for-det-samiska-folket.pdf>.

¹⁵⁴ Gilbert, J. and C. Doyle (2011). A new dawn over the land: shedding light on collective ownership and consent. In Allen, S. and A. Xanthaki (Eds). *Reflections on the UN Declaration on the Rights of Indigenous peoples* (1st edn, Hart Publishing); Åhrén, M. (2016).

¹⁵⁵ Ibid.

resources.¹⁵⁶ These two arguments of the minimalist and maximalist approaches are related to one another and mutually reliant. They support one another in what appears to be opposing arguments, but they are incorrect interpretations of the FPIC principle since they both use straw-man arguments to uphold the status quo, explains Lawrence and Moritz. This leads us to the third approach, which is promoted by the aforementioned scholars, and that has been described as a ‘flexible’ or ‘sliding scale approach by the likes of Barelli and Åhren.¹⁵⁷

According to scholars Gilbert and Doyle, the sliding scale approach asserts that the necessity to secure consent correlates with the magnitude of the proposed activity’s impact. This interpretation is grounded in recent international law developments concerning Indigenous peoples. It permits mere consultation, as outlined in ILO No. 169, for minor impacts but mandates consent when the impact is substantial and endangers the Indigenous peoples’ survival.¹⁵⁸ The UN Special Rapporteur, James Anaya asserted that ‘the strength or importance of the objectives of achieving consent varies according to the circumstances and the indigenous interest involved’. According to Anaya, where there is a significant or direct impact on Indigenous peoples’ lives or territories, Anaya argues there is a strong presumption that the proposal requires the affected Indigenous peoples’ consent. In the absence of indigenous agreement, he further contends, that ‘in a certain context, the presumption may harden into a prohibition of the measure or project in the absence of indigenous consent.’¹⁵⁹ Furthermore, both the CERD and the CCPR, have asserted that in situations where indigenous rights might be significantly impacted by a proposed development, the consent of the Indigenous peoples should be obtained before proceeding.¹⁶⁰ However, there are some challenges to this approach. The threshold for triggering the State’s obligation to obtain Indigenous peoples’ consent for business activities on their traditional lands or to provide remediation remains unclear. This ambiguity creates uncertainty regarding who ultimately determines the impact of a development decision.¹⁶¹ Given that FPIC stems from the right to self-determination, Indigenous peoples should still have substantial influence over the final decision. Although FPIC’s legal status remains contentious, it is a well-established concept in international human rights law, that expands indigenous participatory rights.¹⁶²

¹⁵⁶ Wilson, E. and F. Stammer (2016). Beyond extractivism and alternative cosmologies: arctic communities and extractive industries in uncertain times. *Extr. Ind. Soc.*, Vol. 3(1), pp. 1-8

¹⁵⁷ Åhrén, M. (2016), pp. 139-140; Barelli, M. (2012). Free, prior and informed consent in the aftermath of the UN Declaration on the Rights of Indigenous peoples: developments and challenges ahead. *The International Journal of Human Rights*, Vol. 16(1), pp. 1–24.

¹⁵⁸ Gilbert, J. and C. Doyle (2011).

¹⁵⁹ Anaya, J. (2009). *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya*. A/HRC/12/34. HRC. 15 July 2009.

¹⁶⁰ HRC, *CCPR General Comment No. 23: Article 27 (Rights of Minorities)*. CCPR/C/21/Rev.1/Add.5. 8 April 1994, para. 7; OHCHR (1997). *CERD General Recommendation No. 23: Indigenous peoples : 08/18/1997.Gen. Rec. No. 23. (General Comments)*. A/52/18 Annex V, para. 4(d).

¹⁶¹ Yaffe ,N. (2018). Indigenous Consent: A Self-Determination Perspective. *Melbourne Journal of International Law*, Vol. 19(2), pp. 703-749.

¹⁶² Barelli, M. (2012).

3.2 International Biodiversity Framework

Indigenous peoples hold a unique and interdependent relationship with nature, that profoundly shapes their cultural, spiritual, and physical well-being. Their traditions, customs and spiritual beliefs are inextricably linked to the use of their ancestral lands, territories and natural resources. For many centuries, Indigenous peoples have derived their livelihoods from these lands while simultaneously serving as stewards, preserving and managing the balance of their ecosystems. This enduring relationship is evident through centuries of environmental custodianship, rooted in customary land tenure, and sustainable resource management.¹⁶³

However, despite the critical role Indigenous peoples play in environmental conservation, they continue to be dispossessed of their lands and resources at alarming rates. As former Special Rapporteur on the situation of indigenous people's human rights and fundamental freedoms, Rodolfo Stavenhagen noted in his report that progress has been made in recognising Indigenous peoples' rights, but a significant implementation gap persists. Stavenhagen noted an ongoing trend of diminishing resources for indigenous people, naked by a reduction in their land and territories, along with a rapid and increasing loss of control over their natural resources, particularly their forests.¹⁶⁴ The current Special Rapporteur on the rights of indigenous people, José Francisco Calí Tzay, reported that respecting and upholding Indigenous peoples' collective rights to their lands, territories and resources is not only a matter of justice but is also essential for effectively and sustainably achieving the international community's conservation goals. Despite the need for Indigenous peoples' effective participation in environmental conservation, they are continuously being dispossessed of their lands, territories and resources.¹⁶⁵

This ongoing dispossession has highlighted the urgent need to strengthen the recognition and protection of Indigenous peoples' rights within the international environmental legal framework governing biodiversity and find solutions to achieve global conservation goals.¹⁶⁶ This raises the question of how can existing biodiversity mechanisms, often negotiated without Indigenous peoples' full and effective participation, be leveraged to uphold Indigenous peoples' rights. As the Special Rapporteur Calí Tzay stated this would entail moving beyond mere consultation towards frameworks that recognise and respect Indigenous peoples' inherent right to provide or withhold their free, prior, and informed consent (FPIC).¹⁶⁷

¹⁶³ Calí Tzay, JF. (2022). *Report of the SRIP: note / by the Secretariat*. A/77/238. UNGA. 19 July 2022.

¹⁶⁴ Stavenhagen, R. (2007). *UN Human Rights Council: Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*. A/HRC/4/32. HRC. 27 February 2007, p. 2.

¹⁶⁵ Calí Tzay, JF. (2022). *Report of the SRIP note / by the Secretariat*. A/77/238. UNGA. 19 July 2022.

¹⁶⁶ *Ibid*, para 4-6.

¹⁶⁷ *Ibid*, para 66-71.

3.2.1 Convention on Biological Diversity

The Convention on Biological Diversity (CBD), which came into effect in December 1993, constitutes an international treaty dedicated to the conservation of biodiversity, the sustainable utilisation of its components, and the equitable distribution of benefits arising from the use of genetic resources and associated traditional knowledge. The CBD is one of the three Rio Conventions, adopted at the UN Earth Summit in Rio de Janeiro in 1992.¹⁶⁸

CBD aims to mitigate all threats to biodiversity and ecosystem services through scientific assessments, the development of tools, incentives, and processes, the transfer of best practices, and the full and active engagement of relevant stakeholders, including indigenous communities.¹⁶⁹ The Convention is a legally binding treaty with two protocols, the 2003 Cartagena Protocol on Biosafety which aims to ensure the safe handling of living modified organisms resulting from modern biotechnology, and the 2014 Nagoya Protocol which aims at sharing benefits arising from the use of genetic resources fairly and equitably.¹⁷⁰

According to Article 4, the Convention's provisions apply to each contracting party in case of components of biological diversity in areas within the limits of its national jurisdiction, as well as, in the case of process and activities, regardless of where their effects occur, carried out under its jurisdictional control including extraterritorially.¹⁷¹ The Convention has made essential conceptual and normative contributions to the relationship between human rights and the environment, specifically concerning Indigenous peoples' rights to natural resources.¹⁷²

The preamble of the convention recognises the role of indigenous and local communities in conserving biodiversity. It describes the importance of maintaining indigenous knowledge and practices relevant to the conservation of biodiversity and the sustainable use of its components, as well as the need to encourage equitable sharing of benefits derived from the use of their knowledge and innovations.¹⁷³ Article 8 (j) which addresses specific obligations to conserve biological diversity, states that each contracting party shall "Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of holders of such knowledge, innovations and practices and encourage equitable sharing of benefits arising from the utilisation of such knowledge,

¹⁶⁸ UN (1992). *Convention on Biological Diversity*. 31ILM818. 29 December 1993. (CBD).

¹⁶⁹ Ibid, preamble.

¹⁷⁰ Secretariat of the CBD (2011). *Nagoya Protocol on access to genetic resources and the fair and equitable sharing of benefits arising from their utilization to the convention on biological diversity: text and annex*. UN; Secretariat of the CBD (2000). *Cartagena Protocol on Biosafety to the Convention on Biological Diversity: text and annexes*. Secretariat of the Convention of Biological Diversity.

¹⁷¹ CBD, Art. 4.

¹⁷² Morgera, E. (2014). *Against All Odds: The Contribution of the Convention on Biological Diversity to International Human Rights Law*. In Alland, D. et al. (Eds), *Unité et diversité du droit international/Unity and Diversity of International Law* (1st edn. Brill Nijhoff), pp. 983-995).

¹⁷³ CBD, Preamble para. 12.

innovations and practices.’’. This Article recognises the importance of Indigenous peoples’ traditional knowledge and sustainable practices in managing natural resources.¹⁷⁴

While, Article 10(c), obligates States to ‘‘Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements’’. Such customary use of biological resources, in Article 10(c) can be considered synonyms with the practices referred to in Article 8(j) and should be read in conjunction.¹⁷⁵ To effectively implement Article 10(c), States must acknowledge the crucial interconnectedness between indigenous and local communities and their biological resources. Modern conservation approaches, exemplified by protected areas and resource nationalisation, often clash with the customary practices of indigenous communities. These approaches which often prioritise exclusion over inclusion, can disenfranchise communities by severing ties to lands and resources essential for their cultural identity and economic survival.¹⁷⁶

Furthermore, the Akwé: Kon Voluntary guidelines adopted in 2004 by the 7th Conference of the Parties to the CBD also express the need for States to ensure that no concession is issued over people’s lands and territories unless and until independent and technically capable organisations have performed a prior environmental and social impact assessment, supervised by said States. Aiming to protect marginalised groups such as Indigenous peoples from land dispossession and ensuring their access to natural resources. These voluntary guiding principles specifically concern the conducting of cultural, environmental and social impact assessments for developments proposed to take place on or are likely to affect sacred sites or lands traditionally occupied or used by indigenous and local communities.¹⁷⁷

However, despite these promising developments within the CBD framework, many Indigenous peoples have concerns over a new wave of development projects without the recognition of their land tenure, management and knowledge, as well as the need for expressed recognition of their right to free, prior and informed consent. The Special Rapporteur Calí Tzay has emphasised the need to address the real drivers of biodiversity decline such as industrialisation, over-consumption and climate change.¹⁷⁸

¹⁷⁴ Glowka, L. et al., (1994). *A guide to the Convention on Biological Diversity*. ICUN Environmental Policy paper No. 30. <https://portals.iucn.org>.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid, p. 60.

¹⁷⁷ Secretariat of the Convention on Biological Diversity. (2004). *Akwé Kon: Voluntary Guidelines for the Conduct of Cultural, Environmental, and Social Impact Assessments Regarding Developments Proposed to Take Place On, Or which are Likely to Impact On, Sacred Sites and on Lands and Waters Traditionally Occupied Or Used by Indigenous and Local Communities*. Secretariat of the Convention on Biological Diversity.

¹⁷⁸ Calí Tzay, J.F. (2022). *Report of the SRIP: note / by the Secretariat*. A/77/238. UNGA. 19 July 2022.

3.2.1.1 Post-2020 Global Biodiversity Framework

In 2022 during CBD's fifteenth Conference of Parties (COP15) an updated post-2020 Global Kunming-Montreal Global Biodiversity Framework was adopted. This framework replaced the 2011-2020 strategic plan, which included five strategic goals and 20 Aichi Biodiversity Targets. This plan serves as the overarching framework for biodiversity, extending its influence not only to biodiversity-related conventions but the entire UN system.¹⁷⁹

The Kunming-Montreal Global Biodiversity Framework builds on the Strategic Plan for Biodiversity 2011-2020, its achievements, gaps, lessons learned, and other relevant multilateral environment agreements. The Framework plans to implement broad-based action to bring a transformation in our society's relationship with biodiversity by 2030, in line with the 2030 Agenda for Sustainable Development and its goals. By 2050, the Framework envisions a harmonious coexistence with nature, emphasising biodiversity conservation, restoration, and sustainable use of resources.¹⁸⁰ The Framework also aims to urgently halt and reverse biodiversity loss, ensuring sustainable use and equitable sharing of genetic resources, with full implementation by 2030.¹⁸¹

The Kunming-Montreal Global Biodiversity Framework has addressed the concerns of indigenous peoples and stated in their consideration for implementation the contributions and rights of Indigenous peoples and local communities. The Framework acknowledges the important roles and contributions of Indigenous peoples as custodians of biodiversity and as partners in its conservation, restoration and sustainable use. For its implementation, it must be ensured that the rights knowledge, including traditional knowledge associated with biodiversity, innovations, worldviews, values and practices of Indigenous peoples, are respected, documented and preserved with their free, prior and informed consent. Including their full and effective participation in decision-making, per relevant national legislation, and international instruments including the UNDRIP and human rights law.¹⁸²

Moreover, the Framework included Indigenous peoples' needs in its goals and targets. A global target for 2030 is to ensure that Indigenous peoples' traditional knowledge, innovation, practices and technologies are accessed with their free, prior and informed consent, per national legislation. As well as a goal to ensure the full, equitable, inclusive, effective and gender-responsive representation and participation in decision-making, respecting the rights of Indigenous peoples over their lands, territories, resources and traditional knowledge.¹⁸³

¹⁷⁹ Glowka, L. et al., (1994).

¹⁸⁰ Conference of the Parties to the Convention on Biological Diversity (2022). *Decision adopted by the Conference of the Parties to the Convention on Biological Diversity*. CBD/COP/DEC/15/4. Fifteenth meeting – Part II, Montreal, Canada, 19 December 2022. para 6.

¹⁸¹ Ibid.

¹⁸² Ibid. Section C, para. 7(a).

¹⁸³ Ibid, Section H, Targets 3 and 21.

3.3 Business and Human Rights Framework

The international legal system operates on a state-centric framework. The principle of sovereignty, rooted in the Westphalian Peace in 1648 and reinforced during the era of the League of Nations, posits that States are primary actors in international law, responsible for creating and upholding its principles.¹⁸⁴ Consequently, the responsibility to uphold human rights has historically fallen on States. This is evident in international human rights law, which obligates States to respect, protect and fulfil human rights.¹⁸⁵

This state-centric approach is exemplified in the doctrine of State responsibility. Under customary international law reflected in the International Law Commission's (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)¹⁸⁶ States are responsible for wrongful acts attributed to them under international law.¹⁸⁷ According to ARSIWA, for a State to become responsible under international law, an internationally wrongful act or omission must have been committed attributable to the State.¹⁸⁸ However, it becomes less clear how to ascertain responsibility from States for wrongful acts attributed to non-state actors, such as private businesses.

Generally, only the conduct of State agents and government organs can be attributable, and the conduct of private entities or persons is outside of the scope of attribution.¹⁸⁹ Article 8 ARSIWA clarifies that attribution could be applied if a private non-state actor acts under instructions or direct control of a State. However, the Commentary on the draft articles establishes that ownership of the private entity does not qualify for direct control.¹⁹⁰ Besides international customary law, State responsibility can also be found in binding international treaties. State responsibility as articulated in conventions such as the ICCPR extends to a duty to protect individual's rights from abuses by third parties. According to Article 2(1) and Article 2(3) ICCPR, States have an obligation to prevent human rights violations, regulate and control private actors, investigate these violations, punish and provide effective remedies.¹⁹¹ Thus, binding instruments establish State responsibility when they fail to protect, respect, and fulfil human rights by inadequately preventing or remedying violations by third parties.

The globalisation of the world economy and advancements in communication have significantly increased the influence of non-state actors such as large corporations and their

¹⁸⁴ Åhrén, M. (2016), pp. 11-15.

¹⁸⁵ Crawford, J. (2019).

¹⁸⁶ International Law Commission (2001). *Draft Articles on Responsibility of States for Internationally Wrongful Acts*. Supplement No. 10 (A/56/10), chp.IV.E.1. November 2001. (ARSIWA).

¹⁸⁷ Ibid; Crawford, J. (2019), pp. 12-13.

¹⁸⁸ ARSIWA, Art. 1-2.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid, Art. 8.

¹⁹¹ ICCPR, Art. 2.

impact on human rights through their business activities.¹⁹² These developments have led to growing recognition that corporations, particularly those whose business conduct or operations impact the rights of marginalised groups such as Indigenous peoples, must also be held accountable for their role in human rights violations, and has exposed a gap in the State-centric framework.¹⁹³ The traditional international legal framework, as highlighted in ARSIWA, primarily attributes responsibility to States for actions directly controlled or instructed by them, creating an accountability gap for corporations. Furthermore, binding treaties such as the ICCPR apply only to State actors (duty bearers). Despite imposing a State duty to protect individuals from human rights abuse by third parties, it does not provide further accountability for human rights infringements caused by corporate conduct. In response to this accountability gap, the international legal landscape has evolved establishing the responsibilities of businesses in safeguarding human rights.¹⁹⁴

3.3.1 The UNGPs and The OECD Guidelines

The UN Guiding Principles of Business and Human Rights (UNGP) are a result of a lengthy process to establish corporate human rights responsibilities internationally.¹⁹⁵ The UNGPs are considered soft law instruments and are not formally legally binding. However, in 2011 the HRC unanimously endorsed the UNGPs, thereby granting them considerable normative authority.¹⁹⁶ The UNGPs encapsulate existing internationally binding obligations for States to protect human rights and outline the responsibilities of businesses to respect them.¹⁹⁷ The widespread acceptance and success of the UNGPs stems from their multiperspective framework, adherence to international social norms, and legitimate development process.¹⁹⁸ Because of their empirical foundation and broad stakeholder consultations, the UNGPs gained significant support from corporations, governments and civil society organisations, even before they were officially endorsed by the HRC in 2011.¹⁹⁹ The implementation of the guidelines predated the official HRC endorsement. The International Finance Corporation (IFC) integrated key elements of the UNGPs into its performance standards.²⁰⁰

In parallel to these developments, the Organisation for Economic Cooperation and Development (OECD) developed guidelines that set the standards for responsible business

¹⁹² Ruggie, J. (2020). The Paradox of Corporate Globalization: Disembedding and Reembedding Governing Norms. *M-RCBG Faculty Working Paper Series*, No. RWP20-023.

¹⁹³ Clapham, A. (2018). Non-State Actors. In Moeckli, D., S. Shah and S. Sivakumaran (Eds). *International human rights law* (3th edn, Oxford University Press), pp. 558-560.

¹⁹⁴ Deva, S. (2012). *Regulating Corporate Human Rights Violations: Humanizing Business*, (1th edn, Routledge), p. 92.

¹⁹⁵ Ibid.

¹⁹⁶ Sherman, J.F. (2020). Beyond CSR: The Story of the UN Guiding Principles on Business and Human Rights *Harvard Kennedy School Working Paper No. 71*, Corporate Responsibility Initiative. pp. 7-8.

¹⁹⁷ Deva, S. (2012), p. 4; Ruggie, J. (2020); Ruggie, J. (2017). The Social Construction of the UN Guiding Principles on Business & Human Rights. *HKS Faculty Research Working Paper Series*, No. RWP17-030, pp. 2-5.

¹⁹⁸ Ruggie, J. (2017), p. 12.

¹⁹⁹ Ibid, p.1.

²⁰⁰ Ibid, p. 18.

conduct across various issues, such as human rights, labour rights, and the environment. The first OECD Guidelines were adopted in 1976, and have been reviewed and re-negotiated several times to comply with the changing landscape of the global economy. The Guidelines were most recently updated in 2023.²⁰¹ The OECD MNE Guidelines are government-issued recommendations aimed at multinational enterprises (MNEs). They provide a legal framework to guide responsible business conduct globally, aligning with applicable laws and internationally recognised standards. Similarly to the UNGPs, these guidelines require businesses to respect human rights, conduct human rights due diligence (HRDD) appropriate to their operations' nature and risk severity, and establish or participate in effective remediation processes for human rights victims. Participating States commit to setting up National Contact Points (NCP) to oversee the implementation and compliance of these guidelines and act as dispute-resolution mechanisms.²⁰²

3.3.1.1 *Obligation of the State to Protect*

The UNGPs are founded on a three-pillar framework "Protect, Respect and Remedy". Firstly, "States have a *duty to protect* against human rights abuses by third parties, including businesses, through policies, regulations, legislation and effective enforcement". Secondly, "business enterprises have an independent *responsibility to respect* human rights, to avoid people's human rights being harmed through their activities or business relationships". Thirdly, where individuals' human rights are harmed, they should have access to *effective remedies* and both States and enterprises have a role to play in enabling this to occur".²⁰³ According to the UNGPs corporate conduct at the global level is shaped by three distinct governance systems: public governance (legislation), civil governance (stakeholder pressure), and corporate governance (strategy and risk management).²⁰⁴ The "Protect, Respect and Remedy" framework's three interrelated pillars engage the three distinct governance systems to improve critical functions, advocating for targeted international legal tools to address complex issues in business and human rights.²⁰⁵

According to the first pillar of the UNGP, States are legally obligated to protect against human rights abuse within their territory or jurisdiction by third parties, including business enterprises. This requires States to take appropriate measures to prevent, investigate and address such abuses. UNGP 1 clarifies that a State does not become directly responsible for the human rights abuse caused by a private actor. Rather, the State can be found in breach of its international human rights law obligations if it fails to take appropriate measures to

²⁰¹ OECD (2011). *OECD Guidelines for Multinational Enterprises*. OECD Publishing Paris. Chapter IV, para. 36. (OECD MNE Guidelines).

²⁰² OECD (2011), MNE Guidelines, Chapter 1, para. 11.

²⁰³ Ruggie, J. (2017).

²⁰⁴ *Ibid*, p. 12.

²⁰⁵ Ruggie, J. (2007). Business and human rights: the evolving international agenda. *American Journal of International Law*, Vol. 101(4), pp. 819-840.

prevent, investigate or address the private actors' abuse.²⁰⁶ UNGP 2 further explains that states should establish expectations that business enterprises domiciled within their territory and/or jurisdiction respect human rights in their business activities.²⁰⁷ According to UNGP 3(C), States should issue guidance to businesses that indicate expected outcomes, best practices, and practical approaches for addressing marginalisation to meet their obligation to protect. By doing this, the distinctive challenges that indigenous peoples may face should be especially recognised.²⁰⁸

3.3.1.2 *Corporate Responsibility to Respect*

The second pillar of the framework consists of the corporate responsibility to respect human rights. UNGP 11 states that "Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and (...) address adverse human rights impacts with which they are involved.". Respecting human rights means not violating them, not aiding in their infringement, and not participating in any way. Additionally, it involves having a corresponding obligation to remedy any harm that does occur.²⁰⁹ This responsibility is inherent and does not depend on the capacity or willingness of States to meet their own human rights duties as States. Moreover, this responsibility is supplementary to, and not a substitute for, adherence to domestic laws and regulations aimed at protecting human rights.²¹⁰

Thus, complying with a State's domestic law is insufficient for a business to be in compliance with the UNGPs. UNGP 23 indicates that when domestic legislation falls short of internationally recognised human rights standards, businesses are expected to "operate on a higher standard". This means that companies should seek to "honour" the principles of international human rights when they are in contradictory circumstances.²¹¹ Furthermore, UNGP14 clarifies that the responsibility to respect includes all enterprises regardless of their size, sector, operational context, ownership and structure.²¹²

UNGP 12 defines the scope of human rights for which businesses are responsible. This foundational principle of corporate responsibility states "The responsibility of business enterprises to respect human rights refers to internationally recognized human rights—understood, at a minimum, as those expressed in the International Bill of Human Rights."²¹³ The Commentary to UNGP 12 notes that due to the extensive impact businesses can have on

²⁰⁶ HRC (2011). *Guiding Principles on Business and Human Rights – Implementing the United Nations "Protect, Respect and Remedy Framework"*. UN Doc HR/PUB/11/04. Commentary to Pillar I UNGP 1. (UNGPs).

²⁰⁷ Ibid, ,Commentary to Pillar I UNGP 2.

²⁰⁸ Commentary to UNGP 3.

²⁰⁹ Ruggie, J. G. (2013). *Just Business: Multinational Corporations and Human Rights*. W.W. Norton & Co, p. 95.

²¹⁰ Commentary to UNGP 11.

²¹¹ Commentary to UNGP 23.

²¹² UNGP 14.

²¹³ UNGP 12.

the entire spectrum of internationally recognised rights, their respect applies to all such rights.²¹⁴ These internationally recognised rights include the UDHR, ICCPR and ICESCR. However, depending on the circumstances, UNGP 12 states that business enterprises might need to consider additional standards. Enterprises should respect the human rights of individuals belonging to specific groups that require specific attention, where they may have adverse human rights impact on them. In this connection, specific UN instruments have elaborated further on the rights of indigenous peoples.²¹⁵ As the UNDRIP has had widespread influence, indicating that parts of it might be reflective of international customary law, its standards should be considered jointly with the UNGP.²¹⁶

Moreover, UNGP 13 explains that the responsibility to respect requires businesses to avoid *causing* or *contributing* to adverse human rights impacts through their activities and address such impacts if they occur. As well as seek to prevent or mitigate adverse human rights impacts that are *directly linked* to their operations, products or services by their business relationships.²¹⁷ The UNGPs continue to afford guidance on how businesses can prevent and mitigate adverse human rights impacts within their business operations. This brings us to the concept of human rights due diligence (HRDD). According to UNGP 15 UNGPs, in order to fulfil their responsibility to respect human rights, businesses should have a policy commitment to human rights, HRDD procedures, and mechanisms for remediation in place.²¹⁸ Thus, HRDD is a critical requirement for businesses in fulfilling their responsibility to respect human rights, offering a structured framework to identify, prevent, mitigate, and account for human rights impacts.²¹⁹

3.3.1.2.1 Human Rights Due Diligence

Human rights due diligence (HRDD) constitutes a fundamental component of corporate responsibility in respecting human rights. It offers a systematic framework for businesses to identify, prevent, mitigate, and account for their impacts on human rights.²²⁰ HRDD is characterised by an ‘ongoing management process’. UNGP 17 UNGP, outlines the process and sets forth the key elements and expectations for businesses conducting HRDD. HRDD must encompass potential and actual adverse impacts, with complexity contingent upon the enterprise's size and the severity of the risks. Furthermore, the HRDD process must remain adaptive to the evolving operational context.²²¹

Pursuant to UNGP 18 the initial step of HRDD requires identifying and assessing potential adverse human rights impacts by conducting a human rights risk assessment. This process

²¹⁴ Commentary to UNGP 12.

²¹⁵ Commentary to UNGP 12.

²¹⁶ McCorquodale, R. (2018); IWGIA (2022).

²¹⁷ Commentary to UNGP 13

²¹⁸ Commentary to UNGP 15

²¹⁹ McCorquodale, R. (2018), p 103.

²²⁰ Ibid.

²²¹ Commentary to UNGP 17.

should be based on internal and/or independent external human rights expertise and include meaningful consultation with potentially affected groups and other relevant stakeholders. The human rights risk assessment aims to gain an understanding of the specific impacts on specific people, within a particular context of operations. This includes an assessment of the human rights context prior to a proposed business activity identifying who may be affected by the proposed activity. The assessment process should include all internationally recognised human rights. Due to the dynamic nature of human rights dynamics, human rights risk assessments should be undertaken at regular intervals prior to new business activity, in response to any changes in the operating environment and periodically throughout the life of an activity. Furthermore, for the assessments to be accurate, businesses should seek to understand the concerns of potentially affected stakeholders by consulting them directly and ensure effective engagement.²²²

In the second step of the HRDD UNGP 19, it is explained that the findings from the human rights risk assessment should be integrated across relevant functions and processes of the business to prevent and mitigate adverse human rights impacts.²²³ Where a business causes or may cause human rights impact, it should take the necessary steps to cease or prevent the impact.²²⁴ According to UNGP 20 to verify whether adverse human rights impacts are being addressed, corporations should track the effectiveness of the actions taken through internal and external feedback. To account for how a business has addressed its human rights impacts, UNGP 21 states that businesses should communicate the outcomes of the HRDD process externally. Furthermore, when a business's operations or operating context poses a risk of severe human rights impacts they should formally report on the way they address these.²²⁵ Finally according to UNGP 22 potential impacts should be addressed through preventative or mitigating measures, while impacts that have already occurred, should be subjected to remediation.²²⁶

In addition to the UNGPs, the OECD has produced guidance on HRDD, for responsible business conduct. In their guidelines, the OECD has extended HRDD to include environmental impacts.²²⁷ This extension establishes that business enterprises should, within the legal frameworks of the countries in which they conduct their operations, considering relevant international agreements and standards, take account of the need to protect the environment.²²⁸ This extension of HRDD, according to the OECD, recommends that enterprises align with internationally agreed goals on climate change and biodiversity, ensuring that their business products and services have no adverse environmental impact and that they are efficient in their consumption of land resources.²²⁹

²²² Commentary to UNGP 18.

²²³ UNGP 19.

²²⁴ Commentary to principle 19.

²²⁵ Commentary to UNGP 20 and 21.

²²⁶ Commentary to UNGP 22.

²²⁷ OECD MNE Guidelines, Chapter VI Environment.

²²⁸ Ibid, para. 6.

²²⁹ Ibid.

3.3.1.3 State-Owned Enterprises' Responsibility to Respect

The OECD describes State-owned enterprises (SOE) as the State exercises control either by being the ultimate beneficiary owner or the majority of voting sharing or through other means.²³⁰ Often, SOE's human rights implications, duties, and the States' duty to defend against abuses can be overlooked. Therefore the UN Working Group on Business and Human Rights conducted a report clarifying what States are expected to do in their role as owners of enterprises and why.²³¹ The Working group explained that the additional steps stipulated in UNGP 4 should be understood as measures in addition to those expressed in UNGPs 1 and 3 which apply to all companies.²³² The Working group declared that States are to lead by example to ensure that SOEs respect human rights and act as role models. The reasoning for setting such high expectations on States and SOEs is linked to the rationale that States exercise the ownership of SOEs in the interest of the general public.²³³ To act as role models and fully meet their responsibility to respect human rights, SOEs should adopt appropriate policies and processes to address abuse, including policy commitments, HRDD and remediation mechanisms when harm occurs, integrating these policies through their operations.²³⁴

Moreover, the OECD has issued specific Guidelines on the Corporate Governance of SOEs. The OECD promotes the principle of separation, designed to maintain a fair, competitive market by clearly delineating the roles of the State as both the owner and a regulator, ensuring that SOEs operate under the same conditions as private entities.²³⁵ The OECD SOE Guidelines and OECD MNE Guidelines promote efficient, transparent, and accountable SOE performance, emphasising 'active ownership' to exercise State intervention.²³⁶ Furthermore, SOEs should integrate sustainability considerations, including human rights, into their risk management and internal control systems, and conduct risk-based due diligence to identify, prevent, and mitigate actual and potential adverse impacts of their business operations.²³⁷ Consequently, the OECD Guidelines emphasise that SOEs must incorporate responsible business conduct and stakeholder engagement into their HRDD process. Where stakeholders' interests are protected by law, they should have the opportunity to obtain effective redress for violations of their rights.²³⁸

²³⁰ OECD (2015). *OECD Guidelines on Corporate Governance of State-Owned Enterprises*. OECD Publishing Paris, p. 3. (OECD SOE Guidelines).

²³¹ HRC (2016). *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*. UN Doc. A/HRC/32/45, para. 9-11.

²³² Ibid. para. 22-25

²³³ Ibid, para. 101-102.

²³⁴ Ibid.

²³⁵ OECD (2024). *Recommendation of the Council on Guidelines on Corporate Governance of State-Owned Enterprises*. OECD/LEGAL/0414. Annotations to Chapter III, p. 30.

²³⁶ Ibid.

²³⁷ Ibid, Annotations to Chapter VIII, VII.B.2- B.3, p. 59.

²³⁸ Ibid, VII.D- VII.D.2.

3.4 Sweden's Recognition of the Three Legal Frameworks

Firstly, we must review Sweden's recognition of the international Indigenous peoples' rights framework. Sweden ratified the ICCPR, ICESCR and ICERD in 1971. However, the ICCPR has yet to be incorporated into domestic law. Incorporation of an international convention is required in a dualistic legal system, such as Sweden's, for its provisions to be invoked in national courts. Despite this, national courts can interpret national rules following the aims of the ICCPR provisions.²³⁹ Furthermore, the ILO Convention No.169 has never been ratified by Sweden. However, Sweden has voted for the adoption of the UNDRIP and has proposed it during the negotiation process. However, the State voted under the qualification that consent be regarded as a right to consultation and not as a veto right, only applying to lands formally owned by Indigenous peoples, as well as not recognising the collective element of indigenous rights as part of international law.²⁴⁰ Despite developing domestic legislation for the protection of Sami rights in the Reindeer Husbandry Act and the Consultation Act, international instruments have had little influence on Swedish legislation regarding the rights of the indigenous Sámi people.²⁴¹

Secondly, it is crucial to understand Sweden's implementation of the International Biodiversity Framework. Sweden signed the CBD in 1993, the State has implemented the Convention to a great extent into its own environmental framework.²⁴² Additionally, Sweden has adopted the post-2020 global biodiversity framework, which it had contributed to the development of the new framework. Sweden has expressed its commitment to the framework and actively worked on various measures to protect, biodiversity such as restoring wetlands and enhancing sustainable forestry practices to meet the new global targets.²⁴³

Finally, it is necessary to understand Sweden's reception and recognition of the UNGPs and OECD Guidelines. Regarding the UNGPs, Sweden adopted a policy document developed to implement the UNGPs (NAP) in 2015. However, this process lacked consultations with stakeholders such as the indigenous Sámi people.²⁴⁴ Sweden established its NCP in 2001 as an OECD member State in the Swedish Ministry of Foreign Affairs. In 2022 Sweden was reviewed by the NCP Peer Review. The NCP Peer review found that despite demand from Swedish civil society organisations and academia for engagement in corporate social

²³⁹ Raitio, K., C. Allard and R. Lawrence (2020). Mineral extraction in Swedish Sápmi: The regulatory gap between Sami rights and Sweden's mining permitting practices. *Land Use Policy*, Vol. 99.

²⁴⁰ Doyle, C. (2014). *Indigenous peoples, title to territory, rights and resources: the transformative role of free prior and informed consent*, (1st edn, Taylor and Francis), p. 350.

²⁴¹ Bowers, I.R. (2015). *Preparatory Report from the Sami Parliament in Sweden/Sámediggi/Sámedigge/Saemiedigkie/Sametinget for the United Nations SRIP, Ms. Victoria Tauli-Corpuz, prior to her 2015 August visit to Sápmi and Sweden*. Sami Parliament in Sweden, pp. 2-3.

²⁴² Swedish Ministry of Climate and Energy Department (2016). *A Strategy for Biodiversity and Ecosystem Services*, pp. 1-2. <https://www.cbd.int>.

²⁴³ Government Office of Sweden (2022). *Government position concerning the Convention on Biological Diversity*. Ministry of Climate and Enterprise. <https://www.government.se>.

²⁴⁴ Government Offices of Sweden (2015). *Handlingsplan för företagande och mänskliga rättigheter*. Swedish Ministry of Foreign Affairs, pp. 3 and 6. <https://cdn.openaid.se/app/uploads/2021/03/09145428/Handlingsplan-for-foretagande-och-manskliga-rattigheter.pdf>

responsibility and responsible business conduct, these groups were not included in the NCP structure. Furthermore, there is an absence of an official document establishing the NPC and its structure. Due to these factors and the Swedish NCP's close relationship with the Ministry, it reduces its accessibility and transparency, questioning its impartiality.²⁴⁵ Moreover, according to an assessment by OECD Watch, there is no evidence to suggest that the Swedish NCP has committed to imposing consequences on companies that decline participation in the process. There appears to be an absence of follow-up mechanisms and monitoring to ensure compliance.²⁴⁶

Furthermore, SOEs are governed in the same way as Swedish privately owned corporations. This means that SOE shareholders are the highest decision-making body and in principle, SOEs are subject to the same laws and regulations as private companies. Moreover, the Swedish Government's State Ownership Policy requires SOEs to follow international principles and guidelines of the OECD MNE Guidelines and UNGP.²⁴⁷ Sweden has also adopted Government management principles for SOEs that mainly follow the OECD SOE and MNE guidelines, promoting SOEs to act as role models and take additional steps in respecting human rights.²⁴⁸

3.5 Conclusion

Indigenous peoples' right to self-determination and the right to give or withhold consent through the Principle of FPIC regarding activities in their traditional territories have crystallised into widely accepted international norms. Consent can be given or withheld on a sliding scale dependent on the level and effect of a planned activity. These consultations should be meaningful, done in good faith and strive to obtain approval before the commencement of a project. As Sweden has ratified ICCPR, ICESCR and the ICEDS, despite not being incorporated into domestic law the State is bound by its provisions. Furthermore, Sweden might not have ratified ILO Convention No. 169; however, the State voted for the UNGA to adopt the UNDRIP in 2007. However, there is an underlying question of whether the State has fully incorporated the standard of FPIC and how consultations are being implemented, especially regarding activities performed on their traditional lands.

Moreover, the biodiversity framework reveals Indigenous peoples' critical yet often overlooked role in environmental conservation. Indigenous communities possess deep-rooted connections to their ancestral lands, integral to their cultural and spiritual well-being. The CBD emphasises respecting and preserving Indigenous practices while encouraging equitable benefit-sharing derived from genetic resources. To remediate the lack of effective

²⁴⁵ OECD (2022). *OECD Guidelines for Multinational Enterprises National Contact Point Peer Reviews: Sweden*. <https://mneguidelines.oecd.org/ncppeerreviews.htm>.

²⁴⁶ Ibid, pp. 5 and 8.

²⁴⁷ Government Office of Sweden (2022). *Annual report for state-owned enterprises 2022*, pp. 15 and 17. <https://www.government.se>.

²⁴⁸ Ibid, pp. 16 and 29; Government Offices of Sweden (2020). *State Ownership Policy and principles for state-owned enterprises 2020*. Principle 1. <https://www.government.se>.

participation by Indigenous peoples in environmental decision-making processes, the Post-2020 Biodiversity Framework has set out new targets and goals to increase the full and effective participation of Indigenous peoples. Highlighting the necessity of obtaining FPIC for activities affecting their lands and resources. As a Member State of the CBD and the Post-2020 Biodiversity Framework, Sweden must incorporate this FPIC approach into its management practices of natural resources, including forestry. The integration of Indigenous peoples' perspectives into conservation strategies is essential for achieving sustainable outcomes in biodiversity conservation. It is therefore necessary to evaluate whether Sweden has adopted this approach in their forestry management practices.

Consequently, the scope of indigenous rights as defined in international instruments is addressed in the UNGPs which extends the responsibility for safeguarding indigenous rights to companies. The UNGPs require companies to consider vulnerable groups, including Indigenous peoples, and adhere to international standards such as those outlined in the UNDRIP. Furthermore, the effectiveness of the UNGPs and the OECD Guidelines hinges on the implementation of HRDD, which is mandated for all companies, including SOEs, who are expected to set an example. Although the UNGPs and the OECD Guidelines are soft laws and are not legally binding in Sweden, the country has adopted these standards within its State Ownership Policy, obligating SOEs to comply with them. Nevertheless, Sweden's NCP has significant shortcomings in stakeholder engagement and operational efficiency. While the governance of SOEs aligns with international guidelines, there remains a need for continuous assessment to ensure that SOEs uphold high human rights standards.

4. International Standards and Best Practices in Forestry Management

It is evident from chapter 3 of this thesis that Indigenous peoples, including the Sámi people of Sweden, possess the right to effective participation, consultation through FPIC, and self-determination. This recognition underscores the need to understand and assess the forestry industry's standards and best practices in upholding these rights. Recognising these rights necessitates a comprehensive examination of the forestry industry's standards and best practices to assess how they uphold these protections. Accordingly, this chapter will evaluate the practical application of these frameworks, with a specific focus on how forestry certification systems incorporate HRDD concerning Indigenous peoples' right to consultation and FPIC.

The chapter will outline the international standards set by the voluntary sustainability initiative Forest Stewardship Council (FSC), a leading voluntary sustainability initiative, examining how these standards align with FPIC and the protection of Indigenous peoples' rights. In Sweden, numerous forest owners have voluntarily subscribed to forestry certification systems, with the Programme for Endorsement of Forest Certification (PEFC) and the Forest Stewardship Council (FSC) being the most prominent. Sveaskog, as a member of both systems, has secured FSC and PEFC certifications. However, due to the scope and constraints of this thesis, the analysis will primarily focus on the standards adopted within the Swedish national FSC framework.

4.1 The Forest Stewardship Council

The Forest Stewardship Council (FSC), is an international membership organisation established in 1993 and has become a global certification system for forests and forest products. The organisation was founded in response to growing concerns about deforestation, illegal logging, and the environmental and social impacts of unsustainable forestry practices. The FSC's primary mission is to “promote environmentally appropriate, socially beneficial, and economically viable management of the world’s forests.”²⁴⁹ The FSC aligns diverse stakeholders, including forest owners, timber industries, managers, environmental groups and communities such as indigenous people.²⁵⁰ To achieve its goal, the FSC has developed core principles and criteria, which together serve as the foundation for its international standards and certifications for responsible stewardship.²⁵¹ These principles apply to forests managed for the production of wood products, as well as forests managed for non-timber products and

²⁴⁹ Forest Stewardship Council (FSC). *FSC Standards*. <https://fsc.org/en/fsc-standards>.

²⁵⁰ FSC (2019). *The Forest Stewardship Council's Approach to Respecting Human Rights*. June 2019. <https://fsc.org/sites/>.

²⁵¹ FSC (2023). *FSC Principles and Criteria for Forest Stewardship*. Version 5-3. 1 July 2023. [file:](#)

other services.²⁵² In addition to its global certification standards FSC has developed national standards in selected countries adapted to local context conditions, including Sweden.²⁵³

The FSC Principles and Criteria for Forest Stewardship (P&C) consists of ten principles²⁵⁴ In order to provide a consistent and globally applicable set of benchmarks for implementing the P&C, FSC International has developed International Generic Indicators.²⁵⁵ Certificate holders are then audited against the indicators in the standard. Despite becoming a global forest certification system and gaining support from governments, businesses, and environmental organisations, the FSC system has received criticism for its weak enforcement of regulations. Environmental organisations are increasingly abandoning the FSC both in Sweden and internationally.²⁵⁶

The FSC compares its requirements and implementation practices with the UNGPs, stating that they have aligned their requirements with those found in the UNGPs. Setting requirements for all certification holders, including governments and companies, and supporting the UNGPs through the ‘lens’ of UNGPs. FSC-certified forest operations prioritise social and economic advantages for workers, local communities and Indigenous peoples, in addition to preventing human rights violations. The FSC focuses specifically on pillar II the corporate responsibility to respect and III access to remedy of the UNGPs. However, the organisation has clarified that while it implicitly endorses the UNGPs, it cannot give instructions to States on legislation and enforcement.²⁵⁷ The FSC P&C sets out multiple requirements focused on affected stakeholders, including Indigenous peoples, which certification holders have obligations to respect, as well as consultations and agreements to avoid infringements of any rights. This precautionary approach in combination with FPIC obligation, is an essential element of the FSC P&C.²⁵⁸

Furthermore, there are three essential components of the due diligence that the FSC requires: 1) the obligation to comply with domestic law and ratified international agreements, 2) the specific rights outlined in the FSC P&C and the Indicators which include Indigenous peoples’ rights, benefits from the forests, environmental values and impacts, management planning, monitoring and assessment²⁵⁹, 3) the obligation for stakeholder engagement and consultation.²⁶⁰ Additionally, P&C 1 mandates that compliance with laws and international agreements extends beyond mere legal obligations. Certification holders are required to

²⁵² Ibid. pp. 12.

²⁵³ FSC (2020). *The FSC National Forest Stewardship Standard of Sweden*. 1 October 2020. Preamble, p. 5.

²⁵⁴ FSC (2023).

²⁵⁵ FSC (2023). *International Generic Indicators*. Version 2-1.1 July 2023.

²⁵⁶ SVT (2023). *Stark kritik från Naturskyddsföreningen mot FSC-certifieringen*. SVT News.

<https://www.svt.se/nyheter>.

²⁵⁷ FSC (2019), pp. 1-2.

²⁵⁸ Ibid, p. 6.

²⁵⁹ FSC (2019), p 8; FSC (2023), P&C 3, 5, 6-8.

²⁶⁰ FSC (2019), p. 7.

respect customary rights and adhere to the ILO Core Conventions, regardless of whether these have been ratified by the country in question.²⁶¹

4.1.1 Principle of Free, Prior and Informed Consent

A key aspect of the FSC Standards is the explicit recognition and protection of the rights of Indigenous peoples, as well as the promotion of the sustainable use of forest-derived benefits.²⁶² P&C 3 establishes that the certification holder ‘shall identify and uphold Indigenous peoples legal and customary rights of ownership, use and management of land, territories, and resources affected by management activities.’²⁶³ Moreover, P&C 3(1) establishes that certification holders shall identify the Indigenous peoples within the ‘Management Unit’ or those impacted by management activities. The certification holder then shall engage with the Indigenous peoples to establish their rights to tenure, access to and use of forest resources, customary rights and legal rights and obligations. Significantly, the P&C 3(4) explains that certification holders shall recognise and uphold the rights, customs and cultures of Indigenous peoples as defined by the UNDRIP as well as ILO No. 169.²⁶⁴

In addition to P&C 3, the FSC has developed Guidelines for the Implementation of the Right to Free, Prior and Informed Consent (FPIC). These guidelines aim to clarify the specific requirements of culturally appropriate engagement processes and functions as a general supportive normative framework.²⁶⁵ Moreover, the Guidelines describe FPIC as a process and an outcome, affirming the rights of Indigenous peoples to give or withhold consent.²⁶⁶ However, it is necessary to note that these guidelines are non-normative documents that cannot replace any FSC-developed national standards.²⁶⁷ In circumstances when the affected rights holders decide to withhold consent, with or without conditions, and an FPIC agreement is not reached, the certificate holder continues to respect and uphold the stakeholders decision.²⁶⁸

4.2 Forest Stewardship Council of Sweden

Swedish FSC has based its standards on the latest version of the FSC’s P&C, with adaptations specific to its country conditions. The Swedish FSC P&C has been adapted to align with the regulatory framework of Swedish forestry while maintaining the fundamental principles and criteria of the FSC.²⁶⁹

²⁶¹ FSC (2019), p. 8; FSC (2023), P&C 1.

²⁶² FSC (2023), P&C 3 and 5.

²⁶³ Ibid, P&C 3.

²⁶⁴ Ibid, P&C 3(1) and 3(4).

²⁶⁵ FSC. (2021). *FSC Guidelines for the Implementation of the Right to Free, Prior, and Informed Consent (FPIC)*. Version 2-0. 9 March 2021. Preamble, pp. 8-9. [file:///](#).

²⁶⁶ Ibid. Introduction, p. 13.

²⁶⁷ Ibid. Preamble, p. 9.

²⁶⁸ Ibid. PART II: 7-Step FPIC Process, pp. 44-46.

²⁶⁹ FSC (2020).

Swedish P&C 3 requires certification holders to identify and uphold the legal and customary rights of Indigenous peoples to own, use and manage land areas and resources affected by operations.²⁷⁰ The P&C 3(1) establishes that certificate holders accept and take into consideration the customary Sámi reindeer husbandry practices within landholding, including the activities that are essential for carrying out reindeer husbandry. These areas should be identified within landholding in collaboration with affected Sámi villages.²⁷¹ Furthermore, the certificate holder, according to P&C 3(2), shall recognise and uphold Indigenous peoples' legal and customary rights to maintain influence over the management activities on their lands.²⁷² Furthermore, the rights of Sámi Indigenous peoples must be respected in compliance with the UNDRIP as well as the ILO Convention No.169.²⁷³

For larger forest owners, P&C 3(2)(2) sets additional requirements, including joint planning processes with affected Sámi villages every 5-7 years. This process covers regeneration felling, soil preparation method, tree species selection, burning and fertilisation. No management measures can proceed until the joint planning process is completed.²⁷⁴ Furthermore, the joint planning process is described as a collaboration with Sámi reindeer herders based on the principle of FPIC. Within the framework of the process, the parties jointly seek solutions for implementing the proposed management measures. The initial premise is that the land must be useful to both parties.²⁷⁵ The Sámi representatives are allowed to consent to these measures, either by approving them with agreed-upon adjustments or withholding consent to the extent that it would no longer be feasible to conduct reindeer herding.²⁷⁶ However, the Swedish FSC Standards do allow certification holders to proceed without consent, if the certification holder has demonstrated that the Sámi village's objections impose a significant constraint on long-term forest management or that the consent has been withheld without adequate explanation of how measures would render reindeer husbandry impossible in the specific area.²⁷⁷

Moreover, it is essential to note that concession reindeer husbandry is regarded as equivalent to other economic activities within the concept of "local economy". Consequently, concession Sámi villages are defined as relevant stakeholders under P&C 4, with the opportunity to collaborate on and be consulted regarding forestry activities.²⁷⁸

The Swedish Society for Nature Conservation is highly critical of the FSC certification of forestry practices. Although FSC certifications could be an effective tool, the organisation argues that significant deficiencies exist in how the certification requirements are

²⁷⁰ Ibid, Swedish P&C 3.

²⁷¹ Ibid, Swedish P&C 3(1) and 3(1)(1).

²⁷² Ibid. Swedish P&C 3(2).

²⁷³ Ibid. Swedish P&C 3(4).

²⁷⁴ Ibid. Swedish P&C 3(2)(2).

²⁷⁵ Ibid. Swedish P&C 3(2)(2).

²⁷⁶ Ibid.Swedish P&C 3(2)(4).

²⁷⁷ Ibid.Swedish P&C 3(2)(4).

²⁷⁸ Ibid.Swedish P&C, Introduction, p. 8.

implemented in practice.²⁷⁹ Furthermore, the Swedish Society for Nature Conservation has questioned the adequacy of the FSC certification. Due to recurrent and substantial failures by companies to adhere to FSC standards, the Swedish Society for Nature Conservation has withdrawn from the Swedish FSC in protest.²⁸⁰

4.3 Conclusion

The FSC's core principles and criteria emphasise compliance with international human rights standards, including the recognition of indigenous rights and the implementation of FPIC. Forestry management should be conducted in compliance with the legal and customary rights of Indigenous peoples, reflecting a commitment to the principles found in the UNDRIP and the ILO Convention No. 169. Furthermore, the FSC standards have recognised the UNGPs and aligned their principles and criteria with the requirements of HRDD. FPIC is embedded within the HRDD process as a critical requirement for consultation and consent, aligning with the broader aim of preventing human rights violations. However, the relationship between HRDD and FPIC can be complex, especially when local adaptations allow operations to proceed without consent. In Sweden, the FSC standards are adapted to align with national forestry regulations while maintaining core FSC principles. These adaptations include specific provisions for Sámi reindeer husbandry, mandating that forest management practices respect Sámi customary rights and engage in joint planning processes. This process is intended to uphold FPIC, however, the Swedish FSC standards diverge from the recommendations outlined in the non-normative FSC's FPIC guidelines. The Swedish FSC allows certification holders to proceed with forestry operations without Sámi consent, provided that the certification holder can demonstrate objections that impose significantly on forest management.

Furthermore, as these are voluntary standards while FSC and Swedish FSC standards incorporate elements of HRDD and FPIC, there are limitations in their implementation and enforcement. Additionally, while the FSC framework aligns with international human rights and environmental standards, its effectiveness is undermined by the lack of enforcement mechanisms and competition with other forest certification systems. This leads us to question how sustainable Swedish forestry practises are and whether their SOE such as Sveaskog, complies with the international standard of FPIC and conducts their consultations in line with HRDD processes.

²⁷⁹ Sahlin, M. (2013). *Rapport- Trovärdighet på spel*. Swedish Society for Nature Conservation. <https://cdn.naturskyddsforeningen.se>.

²⁸⁰ Sveriges Natur (1999-2017). *Föreningen hoppar av märkning*. Archive for articles from the magazine Sveriges Natur 1999-2017. <https://www.sverigesnatur.org/arkiv/foreningen-hoppar-av-markning/>.

5. Case Study of Sweden and Sveaskog

Sweden is known for its strong commitment to promoting and preserving human rights globally.²⁸¹ However, the State has faced criticisms from international monitoring bodies for its inadequate protection of the indigenous rights of the Sámi peoples, particularly regarding the limited safeguards for their rights to land and resources.²⁸² Most recently the CESCR reviewed Sweden's compliance with the ICESCR. In their report the CESCR criticised Sweden for its insufficient influence and "lack of effective guarantees, both in law and in practice, to ensure effective consultations with the Sámi in the decision-making that affects them, as well as to ensure their free, prior and informed consent".²⁸³

5.1 Sweden's implementation of Sámi rights

Although Sámi rights have been acknowledged and incorporated into Sweden's forestry legislation, this has only been done to a limited extent. The implementation of Sámi land rights and obligation to grant Sámi genuine influence over decision-making processes has not been adequately reflected in either legislation or forestry practices. This insufficient protection has led to conflicts between the forestry industry and indigenous reindeer herding Sámi communities, creating a legislative gap in Swedish law. This gap undermines the effective protection of Sámi indigenous rights, particularly in ensuring the right to meaningful participation through FPIC.²⁸⁴

5.1.1 Sámi Usufructuary Rights and Land Use Conflicts

In Sweden, Indigenous peoples' land rights are interlinked with their ownership and management of reindeer. Under Swedish law, reindeer herding is recognised as a usufruct right, meaning it is a right to use the land rather than an exclusive property right. As a result, Sámi communities face growing challenges from competing land uses and the cumulative impact of activities such as forestry, mining, wind energy projects and infrastructure development.²⁸⁵

²⁸¹ UNA Sweden (2020). *Joint Submission for Sweden's third Universal Periodic Review in 2020*. <https://fn.se/wp-content/uploads/2022/06/Joint-NGO-submission-UPR-Sweden-2020.pdf>.

²⁸² See, for example, CERD (2008). *Consideration of Reports Submitted by States Parties Under Article 16 and 17 of the Covenant*. E/C.12/SWE/CO/5, 1 December 2008, para. 15; CERD (2013). *Concluding observations on the combined nineteenth to twenty-first periodic reports of Sweden, adopted by the Committee at its eighty-third session (12-30 August 2013)*. CERD/C/SWE/CO/19-21. 23 September 2013, para. 17; and CCPR (2016). *Concluding Observations on the seventh periodic report of Sweden**. CCPR/C/SWE/CO/7. 28 April 2016, para. 39.

²⁸³ CESR (2024). *Concluding observations on the seventh periodic report of Sweden**. E/C.12/SWE/CO/7. 22 March 2024, para. 14.

²⁸⁴ Brännström, M. (2024).

²⁸⁵ Larsen, R.K., K. Raito, M. Stinnerbom and J. Wik-Karlsson (2017). Sami-state collaboration in the governance of cumulative effects assessment: A critical action research approach. *Environmental Impact Assessment Review*, Vol 64, pp. 64-76.

Within the Sámi territory, reindeer husbandry is increasingly impacted by changes imposed by other land users. These gradual losses of land have consequences that extend beyond the immediate reduction in territory. As the landscape becomes more fractured, with remaining grazing areas becoming smaller and more isolated, and the practice of reindeer herding becomes increasingly more challenging. This fragmentation leads to higher costs, as the management of reindeer herds demands more intensive efforts such as transportation or supplemental feeding. The cumulative effects of these changes are particularly concerning as each additional loss of land progressively heightens the risk of reindeer husbandry reaching a critical point of becoming unsustainable.²⁸⁶

The indigenous rights of the Sámi peoples to their land and territories have been examined in several precedent-setting landmark cases in Sweden. It has been conclusively determined that the rights of reindeer herding Sámi to their land are established either through ‘time immemorial’ usage or through customary practices.²⁸⁷ In the *Nordmaling* case, Sámi representatives proved customary use founded on historical documentation. In the *Girjas* case, the Swedish Supreme Court based its judgment on international human rights including the ILO Convention No. 169, Article 26 of UNDRIP and Article 27 of ICCPR regarding the rights afforded to the Sámi peoples in place of the Reindeer Husbandry Act. This affirmed that the ILO Convention No. 169 is in parts binding on the State as customary international law.²⁸⁸ Scholar Brännström notes that despite the Swedish Supreme Court’s stance on Sámi reindeer herding rights being a strong usufruct right afforded the same level of constitutional protection as other property rights, the Forestry Act has not been amended to recognise it as a full property right.²⁸⁹ Moreover, bearing in mind the Court’s decision in the *Gállok* case²⁹⁰, Sámi land rights remain highly contested, particularly when they conflict with national interests for the extraction of minerals and natural resources.

While Swedish authorities and private companies recognise their obligations in supporting Sámi reindeer herding practices and associated cultural practices, they consistently act on the assumption that reindeer herding is incompatible with alternative land use, including forestry.²⁹¹ The Swedish government maintains its stance that indigenous land rights do not equate to land ownership. This approach emphasises that while the Sámi may have the right to use certain lands, these rights are not recognised as full ownership, limiting their control over traditional territories, particularly in the context of competing interests.²⁹²

²⁸⁶ Uboni, A., B. Åhman and J. Moen (2020). Can management buffer pasture loss and fragmentation for Sami reindeer herding in Sweden? *Pastoralism*, Vol. 10, pp. 1-13; Röstlund, L. (2023). *Skogslandet : en granskning*. Bokförlaget Forum, pp. 61-70.

²⁸⁷ NJA 2011, *Nordmalingsmålet* (Nordmaling case), s. 109, para. 10 ; NJA 2020, *Girjas*, p. 3, para. 130-131 and 162.

²⁸⁸ Allard, C., and M. Brännström (2021).

²⁸⁹ Brännström, M. (2024).

²⁹⁰ Swedish High Administrative Court (HFD), HFC 2893-22, Rättsprövning.

²⁹¹ MacNeil, K. (2015). Shafted: a case of cultural and structural violence in the power relations between a Sami community and a mining company in Northern Sweden. *Ethnologia Scandinavica*. Vol. 45, pp.73-88.

²⁹² Carstens, M. (2016). Sami Land Rights: The Anaya Report and the Nordic Sami Convention. *Journal on Ethnopolitics and Minority Issues in Europe*, Vol.15(1), pp. 75-116; Brännström, M. (2024).

Moreover, the intersecting property and land use regimes have resulted in ongoing conflicts between the forestry industry and the reindeer herding Sámi communities, as each negatively impacts the other. Despite implementing consultation mechanisms under domestic law and the voluntary consultation standards within the FSC, assessments indicated that these consultations have not successfully resolved disputes to the satisfaction of the reindeer herding Sámi. Furthermore, the ambiguity in the legal relationship stemming from unclear property rights extends to the consultations and creates an uneven power distribution. This imbalance arises because forestry companies hold formal ownership of the land and resources, whereas reindeer herding Sámi communities possess ‘only’ usufructuary rights. As a result, the reindeer herding communities are dependent on the discretion of the forestry industry and are often compelled to make greater compromises in land use conflicts. Therefore, the current Swedish regulatory framework governing consultation lacks the necessary clarity to adequately manage the relationship between the two stakeholders and effectively resolve their disputes.²⁹³

5.1.2 Sámi Consultations and Participation

In Sweden, the Forestry Act and Consultation Act regulate consultations on Sámi related issues.²⁹⁴ The Swedish Forestry Act requires that Sámi villages be consulted before logging activities occur within year-round reindeer herding areas. Specifically, larger forest owners are obligated to conduct consultation procedures at least once a year.²⁹⁵ However, the nature of this consultation raises questions about the degree of influence the Sámi community has over the final decision-making process.

While the Act mandates consultation, it does not explicitly require that the outcome of these consultations be binding on the forestry owners or that Sámi peoples have a decisive role in the final decision. Furthermore, it is delimited to year-round grazing areas and only applies to Sámi villages, not individual concerned Sámi. The consultation process appears to be more of a procedural requirement than a mechanism ensuring genuine influence or control over land use²⁹⁶. Furthermore, the Act emphasises sustainable forestry practices, aiming to balance production goals with environmental objectives, including the preservation of biodiversity.²⁹⁷ However, this balancing act is complicated by competing interests in forestry and reindeer herding. Although the Act does mention the need for consideration of forestry management, it does not provide strong protections against actions that might significantly impede reindeer herding.²⁹⁸ The Swedish Consultation Act, on the other hand, regulates the State’s duty to consult Sámi peoples as Indigenous peoples in matters of diverse significance. However,

²⁹³ Widmark, C. (2009). Forestry and reindeer husbandry in northern Sweden – the development of a land use conflict. *Rangifer*, Vol. 26(2), pp. 43–54.

²⁹⁴ Prop. 2021/22:19, p. 14.

²⁹⁵ Forestry Act, Section 20.

²⁹⁶ Brännström, M. (2024).

²⁹⁷ Forestry Act, Section 1.

²⁹⁸ Widmark, C. (2009); Brännström, M. (2024).

despite being considered a significant development towards formalising consultation requirements in legislation, the Act has received heavy criticism from Sámi organisations, human rights organisations and the Swedish Human Rights Institution. In a letter to the Swedish Government Office, the National Confederation of Swedish Sámi Organisations (SSR) criticised the government for inadequate consultations with the Sámi organisations in investigations affecting Sámi culture and industries. The SSR assert that, despite their desire for participation, they have been excluded from several ongoing investigations and directives, including those related to sustainable community building.²⁹⁹ The Act does not reference any international commitments made to Indigenous peoples, according to Civil Rights Defenders (CRD). Furthermore, the CRD argues that the Act lacks sufficient provisions for actual and meaningful Sámi influence in decision-making processes. There are no specific consequences or appeal mechanisms for authorities failing to fulfil their consultation obligations.³⁰⁰

Moreover, the Swedish Institute for Human Rights noted that the act is by design weaker than the right to consultation and FPIC of Indigenous peoples.³⁰¹ The Act establishes merely an obligation to consult and empowers the government to terminate consultations if consensus cannot be established. The obligation to consult does not apply in urgent instances when delays can result in a risk of considerable inconvenience or when it is apparent that the consultation is not needed or patently unsuitable.³⁰² Most significantly the Act fails to address the negative impacts of companies including SOEs, on Sámi indigenous rights, along with legal requirements to exercise HRDD.³⁰³

Sweden has clarified that their approach to FPIC does not entail a veto right.³⁰⁴ Thus, Sweden has not fully integrated the principle of FPIC into its domestic legal framework. The State has consistently adhered to a weaker interpretation of FPIC, emphasising a requirement for consultation with the Sámi people rather than obtaining their consent. Although Sweden has acknowledged certain aspects of Sámi rights, its legal provisions fall short of explicitly mandating FPIC in a manner consistent with international standards in UNDRIP.³⁰⁵ According to UN treaty bodies' interpretation and developments in international legal doctrine, it is insufficient for the State to solely engage in consultation with Indigenous peoples and should actively seek to obtain the consent of the affected Indigenous group.³⁰⁶

²⁹⁹ SVT (2024). *Regeringskansliet brister i konsultationsförfrågningar- SSR kritiska*. SVT News. <https://www.svt.se/nyheter/sapmi/>.

³⁰⁰ CRD (2022).

³⁰¹ Swedish Institute for Human Rights (2023). *Supplementary information to the UN Committee on Economic, Social and Cultural Rights- for consideration of the seventh periodic report of Sweden*. Report, p. 9, para 75.

³⁰² CRD (2022).

³⁰³ Swedish Institute for Human Rights (2023).

³⁰⁴ Government Offices of Sweden (2022). *Reply to OHCHR Communication from UN Special Procedures AL SWE 2/2022 (3 February 2022)*. UD2022/01693/FMR. 4 April 2022, para. 29. <https://spcommreports.ohchr.org>

³⁰⁵ Tarras-Wahlberg, H. and J. Southalan (2022). Mining and indigenous rights in Sweden: what is at stake and the role for legislation. *Miner Econ*, Vol. 35, pp. 239–252; Ward, T. (2011). The Right to Free, Prior, and Informed Consent: Indigenous peoples' Participation Rights within International Law. *Northwestern Journal of International Human Rights*, Vol. 10(1), pp. 54-84.

³⁰⁶ CERD (1997), *General Recommendation No. 23: Indigenous peoples*, A/52/18 Annex V, 18 August 1997, para. 4(d).

Despite the absence of a universally accepted definition of ‘‘consent’’, FPIC has been recognised as the international standard.³⁰⁷ FPIC offers a mechanism for Indigenous peoples to exercise their right to self-determination and extends beyond consultation by establishing a participatory right.³⁰⁸ The CCPR and the CERD have stated in their General Comments that in cases where Indigenous rights might be significantly impacted by a proposed development, the consent of the Indigenous peoples should be obtained before proceeding.³⁰⁹ Moreover, the UN Expert Mechanism on the Rights of Indigenous peoples has clarified that the level of participation required can vary depending on the nature and scale of the proposed activity.³¹⁰ The necessity to secure consent before the commencement of any development projects should correlate with the magnitude of the proposed activity’s impact (sliding-scale).³¹¹ Thus, consultation for minor impacts is permitted, but consent is required when the impact can substantially affect the Indigenous peoples’ survival.³¹²

5.1.3 Intensive Forest Management and Loss of Biodiversity

Sweden has long been recognised for its commitment to biodiversity and sustainable development, particularly within the CBD Framework. As part of its commitment, Sweden has emphasised the conservation of biodiversity, sustainable use of natural resources, and the preservation of indigenous cultures in the Forestry Act.³¹³ However, Sweden’s approach to sustainable forest management has been criticised by environmentalists, Sámi Indigenous peoples and researchers. Nature conservationists and journalists Westberg and Widstrand argue that the country’s forestry relies on clearcutting old-growth natural forests and replacing them with monoculture plantations, including non-native species. These practices have significant consequences, particularly for the indigenous Sámi peoples, whose traditional reindeer herding depends on lichen-rich old-growth forests that are rapidly disappearing. Despite Sweden’s green reputation, the country’s forestry practices are unsustainable, leading to the loss of biodiversity.³¹⁴ Furthermore, recent research suggests

³⁰⁷ Food and Agricultural Organisation (FAO) (2016). *Free Prior and Informed Consent. An Indigenous peoples’ right and a good practice for local communities. Manual For Project Practitioners*. FAO. <https://www.fao.org/3/i6190e/i6190e.pdf>.

³⁰⁸ Cambou, D. (2019). The UNDRIP and the legal significance of the right of Indigenous peoples to self-determination: a human rights approach with a multidimensional perspective. *Int. J. Hum. Rights*, Vol.23 (1–2), pp. 34–50.

³⁰⁹ HRC (1994). *CCPR General Comment No. 23: Article 27 (Rights of Minorities)*. CCPR/C/21/Rev.1/Add.5. 8 April 1994, para. 7; CERD (1997), *General Recommendation No. 23: Indigenous peoples*, A/52/18 Annex V, 18 August 1997, para. 4(d).

³¹⁰ UNGA (2011). *Final report of the study on Indigenous peoples and the rights to participation in decision making; Report of the Expert Mechanism on the Rights of Indigenous peoples*. A/HRC/18/42. 17 August 2011, para. 22.

³¹¹ Barelli, M. (2012).

³¹² Gilbert, J. and C. Doyle (2011).

³¹³ Swedish Ministry of Climate and Energy Department (2016).

³¹⁴ Hoffner, R. (2022). *How unsustainable is Sweden’s forestry? ‘Very.’ Q&A with Marcus Westberg and Staffan Widstrand*. Mongabay. <https://news.mongabay.com>.

that Sweden's current practices are leading to the rapid loss of old-growth forests, which have significant ecological and indigenous cultural values.³¹⁵

For several decades the Swedish industry has pursued intensive forest management through tree plantation and clear-cutting to maximize wood production. However, the country's forestry industry is increasingly under pressure to transition away from intensive clear-cut forestry management.³¹⁶ Naumov et al. have found that Sweden's long history of forest intensification created young and productive forests that are poor in structural habitats. In comparison to other boreal countries, Sweden stands out for its forest's limited ability to support biodiversity.³¹⁷ The Swedish Forestry Act and subsequent forestry strategies aim to balance the economic, ecological, and social objectives of forestry practices.³¹⁸ However, Lindhal et al. contend that these considerations have had a limited impact on the actual management of Swedish Forests.³¹⁹ Moreover, Naumov et al. identified a negative correlation between wood production levels and biodiversity conservation indicators.³²⁰ The growing concern regarding Swedish forestry management centres on the inability of intensive forestry plantations to meet biodiversity objectives and the ongoing concern over the negative impact that these practices have on traditional Sámi reindeer herding.³²¹ Furthermore, in a study conducted by researchers Lindhal et al. has found that consultation procedures between the forestry industry, State forest administrators and the Sámi reindeer herding community have been limited in scope, lacking resources for consultation, and have failed to ensure participation and meaningfully incorporate diverse local perspectives.³²²

5.2 Sveaskog and the Sámi People

Sveaskog is a state-owned limited liability company fully owned by the Swedish government. It is the largest forest owner in the country, with holdings of 3.9 million hectares of forest land, corresponding to 10 % of Sweden's surface areas and 3 million hectares of this land

³¹⁵ Ahlström, A., J. Canadell and D. Metcalfe (2022). Widespread unquantified conversion of old boreal forests to plantations. *Earth's Future*, Vol.10(11), e2022EF003221,

³¹⁶ Hertog, I., S. Brogaard and T. Krause (2022). Barriers to expanding continuous cover forestry in Sweden for delivering multiple ecosystem services. *Ecosystem services*, Vol. 53(1-3), pp. 101392.

³¹⁷ Naumov, V. et al. (2018). How to reconcile wood production and biodiversity conservation? The Pan-European boreal forest history gradient as an "experiment". *Journal of Environmental Management*, Vol. 218, pp. 1–13.

³¹⁸ Swedish Government Offices (2018). *Strategi för Sveriges nationella skogsprogram*. N2018.15. Annex to protocol IV 5. 17 May 2018. <https://www.regeringen.se/>.

³¹⁹ Lindahl, K.B. et al. (2017). The Swedish forestry model: More of everything?. *Forest Policy Econ*, Vol. 77, pp. 44–55.

³²⁰ Naumov, V. et al. (2018).

³²¹ Eggers, J., et al. (2019). Balancing different forest values: Evaluation of forest management scenarios in a multi-criteria decision analysis framework. *Forest Policy and Economics*, Vol.103, pp. 55–69; Sandström, P. et al. (2016). On the decline of ground lichen forests in the Swedish boreal landscape: Implications for reindeer husbandry and sustainable forest management. *Ambio*, Vol. 45(4), pp. 415–429.

³²² Lindahl, K.B, S. Baker and C. Waldenström (2013). Place Perceptions and Controversies over Forest Management: Exploring a Swedish Example. *Journal of Environmental Policy & Planning*, Vol. 15(2), pp. 201–223.

consisting of productive forest land.³²³ The company's primary business operations involve the management of forests and the provisions of timber, plywood, biofuels and other forestry services.³²⁴ As an SOE, Sveaskog is subjected to the same laws and regulations as private companies. Furthermore, according to the principle of separation outlined in the OECD SOE Guidelines, Sveaskog is subject to the responsibilities under Pillar II regarding corporate respect for human rights. Moreover, as the sole shareholder, the Swedish State bears the responsibility of ensuring that Sveaskog acts as a role model and exemplifies a strong commitment to upholding human rights in its operations.³²⁵

Approximately 70% of the company's land is used jointly with the reindeer herding Sámi community. According to the company, Sveaskog takes the necessary precautions and creates opportunities for the Sámi representatives to engage in meaningful dialogue and participate effectively in decision-making.³²⁶ The Consultation Act does not apply to Sveaskog due to the principle of separation, as the Act's scope is limited to State agencies. Instead, Sveaskog operates under the consultation obligation of sustainable stewardship under the Forestry Act as well as the FSC Certification standards.³²⁷ These consultation requirements, however, fall short of the international principle of FPIC, as previously described.³²⁸ Sveaskog maintains that it meets the FSC certifications standards, which include annual co-planning initiatives with a time perspective of 5-7 years with representatives of Sámi villages.³²⁹

Despite these claims, Sveaskog has faced severe criticism from environmental activists and indigenous Sámi communities concerning its logging and forest management practices. In the spring of 2021, activists from Skogsupprettet, a collaboration between Sami and non-Sami activists, staged blockades against Sveaskog. The company had chosen to fell land in sensitive and contested reindeer grazing areas, despite objections from reindeer herding communities during consultations. The affected reindeer herding villages were not informed of the forestry deals until logging commenced. In another instance, Sveaskog received a "serious deviation" complaint from an auditing firm regarding planned logging in a forest area crucial for the Maskuare Sámi community's reindeer grazing, an area recognised for its high ecological value.³³⁰

In response to the mounting criticism over its logging in Sámi reindeer herding areas and due to continuous disagreements with the Sámi representatives, Sveaskog faced pressure to reduce its logging activities in Northern Sweden. In its 2023 Annual and Sustainability

³²³ Sveaskog (2023). *Annual and Sustainability Report 2023*, pp.1. <https://www.sveaskog.se>.

³²⁴ Ibid, p. 4.

³²⁵ Ibid, Corporate Governance Report, p. 54.

³²⁶ Ibid.

³²⁷ Ibid, Operations, p. 20.

³²⁸ Sandström, C., et al. (2006).

³²⁹ Sveaskog (2023). *Samverkan med renskötsel*. Sveaskog. <https://www.sveaskog.se/vart-skogsbruk/renskotsel-och-samplanering/>.

³³⁰ Beckman, S. (2021). Statligt ägda Sveaskog kör över samernas rättigheter. Amnesty Sápmi. <https://amnestysapmi.se/statligt-agda-sveaskog-kor-over-samernas-rattigheter/>.

Report, Sveaskog's CEO expressed concerns regarding the growing polarisation between the Sámi community and the forestry company, emphasising significant challenges hindering *sustainable coexistence*.³³¹ This conflict underscores the ongoing land conflict between Sveaskog's business practices and the rights and sustainability concerns of the Sámi reindeer herding communities.

5.2.1 Sveaskog's Approach to Sustainable Coexistence

The 2023 Annual and Sustainability Report details the company's initiatives to integrate the perspectives and needs of the Sámi reindeer herding industry into its operations, with a focus on enhancing consultation and dialogue measures as well as preserving biological diversity and the growth of lichen.³³² While the report references the reindeer herding rights of the Sámi people, one can argue that it fails to fully align with the standards set forth in the UNDRIP.

The report discusses its decision to temporarily significantly reduce felling in Norrbotten due to the *locked position in the discussion of some Sámi villages*. The co-planning process between the company and the reindeer herding industry does not 'work out as planned'. This adjustment in operations involved a 45% reduction in regeneration felling in Norrbotten, however, the aim is to gradually return to originally planned felling levels within the timeframe of 2023-2027.³³³ Sveaskog did acknowledge their locked-position in the discussion with the Sámi villages over felling in the Northern Swedish areas, but the report does not analyse the reasons behind this opposition. Furthermore, despite current reductions, Sveaskog's aim to return to planned felling levels by 2027 raises concern about the sustainability of the company's commitments to Sámi rights and environmental forest stewardship.

According to its report, Sveaskog and the Sámi villages *share a joint responsibility to seek mutually acceptable solutions and to respect each other's perspectives and activities*. The co-planning process is offered to establish Sámi reindeer husbandry operations affected by management activities within Sveaskog's land holdings. This co-planning process encompasses all aspects of regeneration, felling, and reforestation, which are jointly used by Sveaskog and the Sámi reindeer herders. During these meetings, the focus is on discussing adaptation that allows both forestry and reindeer husbandry to coexist. Sveaskog claims that it has adopted a more targeted and proactive approach in these discussions to secure the continuation of operations. The company has adapted its forestry instructions and forest management measures, carrying out logging adapted to reindeer husbandry and promoting improved opportunities for natural grazing and soil lichen as well as arboreal lichen. However, the progress of dialogue with the Sámi villages has been slower than anticipated.³³⁴

³³¹ Sveaskog (2023), *Annual and Sustainability Report 2023*, p. 8.

³³² Ibid.

³³³ Ibid, *Surrounding World and Events*, pp.11 and 17.

³³⁴ Ibid, *Operations*, p. 20.

The report does clarify what concrete actions it plans to undertake to achieve sustainable coexistence, however, this focuses primarily on consultation and dialogue and does not mention consent under the principle of FPIC.³³⁵ Sveaskog has made efforts to increase internal knowledge of reindeer herding and Sámi issues. To improve coexistence, Sveaskog *endeavours* to function in multiple-use forestry. Thus, Sveaskog *wants to* establish joint landscape planning in *dialogue* with reindeer husbandry. To support integrated planning, tools like the digital platform samplanering.se and a reimbursement program for consultation participation have been introduced.³³⁶ Furthermore, Sveaskog acknowledges the potential risk of losing its FSC certification if there are deficiencies in its forest management practices, including insufficient attention to social responsibility and monitoring. Furthermore, the company has recognised how public opinion can impact its operations if it fails to obtain a social license to operate.³³⁷ Moreover, Sveaskog *supports* the OECD MNE Guidelines and *considers* that its business meets the requirements for minimum standards. In its Code of Conduct, the company commits to business activities that comply with laws and agreements.³³⁸

The governance of the company is based on its Articles and Association, the Swedish Company Act, the Swedish Corporate Governance Code, and the State's Ownership Policy and guidelines for State-owned enterprises, which include compliance with the OECD SOE Guidelines as well as the UNGPs.³³⁹ Additionally, Sveaskog is a member of the Swedish FSC. The company follows the updated 2021 Swedish FSC standards, especially regarding the standards for consultations with Sámi reindeer husbandry. Compliance with these adaptations is in turn monitored by the Swedish Forestry Agency and annually reviewed by the FSC.³⁴⁰

5.2.2 Sámi People's Experience of Consultations

The Sámi reindeer herding communities have reported that the consultation procedures facilitated by Sveaskog are quite limited. Oftentimes meetings held with the company are informatory and the concerns of the Sámi representatives are not taken into account when projects are implemented. Sámi individuals have explained how they can be excluded from meetings, have difficulties arranging consultation meetings when they have enquiries and cannot access the digital tools set up by Sveaskog to keep up to date on Sveaskog's plans.³⁴¹

Henrik Andersson, a Sámi reindeer herder and advocate for Sámi rights, has highlighted a significant issue regarding the lack of public awareness surrounding the unequal power

³³⁵ Ibid, Operations, p. 20.

³³⁶ Ibid, Strategy and Targets, p. 35.

³³⁷ Ibid, Operational and Legal Risks, pp. 48-52.

³³⁸ Sveaskog (n.d). Code of Conduct, pp. 3-4. <https://www.sveaskog.se>.

³³⁹ Sveaskog (2022). *Bolagsstyrning*. Sveaskog Website. <https://www.sveaskog.se/om-sveaskog>.

³⁴⁰ Sveaskog (2021). *Utveckling av dialog med rennäring med en ny FSC-standard och ny inriktning*. Sveaskog Website. <https://www.sveaskog.se/skogen>.

³⁴¹ Röstlund, L. (2023). *Skogslandet : en granskning*. Bokförlaget Forum.

dynamics between the Sámi people and large forestry corporations such as Sveaskog. Andersson notes that many Sámi individuals remain silent about the escalating conflict due to fears of losing their rights, as well as the potential for harassment and ostracisation by Sveaskog. Many Sámi activists have joined efforts with environmental groups to demonstrate against the intensified modern forestry practices. In April of 2021, Sámi and environmental activists organised blockades against Sveaskog in Gällivare and temporarily succeeded in halting Sveaskog's logging of old-growth forests with high conservation value. In an interview with investigative reporter Röstlund, Sveaskog's corporate management responded that their employees felt threatened by the activists and that the company intended to report them to the police. However, when Röstlund subsequently asked the activists if this was true, they firmly denied being threatening and stated that they had been polite and calm.³⁴²

Furthermore, representatives from various Sámi villages describe consultations with Sveaskog, to which the villages are legally entitled, as a facade. They explain that they have no leverage in the consultation process.³⁴³ In 2019, Muonio Sámi village, which Röstlund visited, was informed by Sveaskog that they no longer had the right to consultation.³⁴⁴ According to Greenpeace, due to its geographical location below the Sápmi land boundary, the Muonio Sámi village was incorrectly reclassified by the Swedish State in 1933 as a concession Sámi village, having previously been designated as a forest Sámi village. For decades, Sveaskog consistently treated Muonio Sámi village as a forest Sámi village, entitling it to consultation deemed equivalent to those provided to other Sámi villages. However, the company announced abruptly that no further co-planning consultations would occur. Sveaskog asserted that, in legal terms, Muonio Sámi village is classified as a concession Sámi village and, therefore, no longer to the same consultation procedures. This sudden policy shift occurred coincidentally with Muonio Sámi village's opposition to logging in central reindeer grazing areas, which were subsequently logged.³⁴⁵ Sveaskog continues to assert that Muonio Sámi village is a concession Sámi village and, thus, entitled to collaboration and consultation per the FSC standards. Still, it does not have the right to co-planning. Furthermore, Sveaskog states that their consultations with the Sámi village are ongoing..³⁴⁶

Furthermore, in June of 2021, Sveaskog issued a document to several Sámi villages, which urged the Sámi to sign an agreement prohibiting them from sharing information about Sveaskog's co-planning with external parties. Many Sámi representatives have stated that this was an attempt to silence dissent and pressure the Sámi not to voice their concerns about logging activities to the public. Those who refused have since had difficulties accessing the company's digital tool for consultation.³⁴⁷ Moreover, in the most recent 2022 FSC auditing

³⁴² Ibid, pp. 60-63.

³⁴³ Ibid, pp. 64-65.

³⁴⁴ Ibid.

³⁴⁵ Greenpeace (2021). *Konflikten mellan Sveaskog och Muonio sameby – det här behöver du veta*. Greenpeace Sweden. <https://www.greenpeace.org/sweden/artiklar/skog/konflikten-mellan-sveaskog-och-muonio>.

³⁴⁶ Sveaskog (2021). *Om avverkningar i Muonio sameby*. Press release. <https://www.sveaskog.se/press/2021/om-avverkningar-i-muonio-sameby/>.

³⁴⁷ Ibid.

report of Sveaskog, the company was criticised for failing to comply with FSC standards. The audit revealed a lack of documented procedures detailing how Sveaskog addresses opinions and complaints per FSC guidelines.³⁴⁸ However, the audit did not find any evidence of violations related to Sveaskog's consultation and co-planning in reindeer herding areas.³⁴⁹ Nonetheless, the FSC certification system itself has also faced criticism for being vague and inadequate.³⁵⁰

³⁴⁸ FSC(2021). *Forest Management Certification Audit Report*. 21 December 2021, p. 58. <https://www.sveaskog.se/globalassets/om-sveaskog/miljo>.

³⁴⁹ Ibid, pp. 48 and 57.

³⁵⁰ SVT (2023).

6. Conclusion

The Sámi people have long been marginalised and displaced from their traditional lands and territories as a result of Swedish colonialism. Although legal advancements have been made in recognising Sámi indigenous rights, competing economic interests often undermine these rights. The rapid expansion of the forestry industry and intensified forestry management practices have further exacerbated the challenges faced by the Sámi in maintaining their traditional reindeer herding practices, adversely impacting their way of life. Whilst international law broadly acknowledges the importance of Indigenous peoples' rights to participate in meaningful decision-making processes and influence outcomes, questions arise regarding the responsibilities of the Swedish State and Sveaskog to uphold the Sámi people's right to consultation and FPIC.

The research was conducted through a gap analysis. The research outlines Indigenous peoples' right to self-determination and to give or withhold their FPIC. The accepted international minimum norm is that Indigenous peoples' right to FPIC should be understood as a sliding-scale framework. The requirement for obtaining consent can be given or withheld on a sliding scale, depending on a planned activity's impact. These consultations should be meaningful, done in good faith and strive to obtain approval before the commencement of a project. However, Sweden rejects the interpretation of FPIC as a right to veto under any circumstances. Moreover, the biodiversity framework underscores the imperative of integrating biodiversity conservation with the respect for Indigenous peoples' rights as a crucial component for effective natural resource management. FPIC, as highlighted in both the CBD and Kunming-Montreal Framework, reflects an increasing recognition of the necessity for Indigenous peoples to exert control over decisions affecting their lands and way of life. Additionally, the UNGPs have stated that companies are required to pay particular attention to the rights of indigenous peoples.

Furthermore, research has shown that the BHR framework emphasises the dual responsibilities of States and corporations in upholding human rights. States must protect human rights through legislation and enforcement, while corporations, including SOEs, have an independent duty to respect human rights and avoid causing harm. Because companies owned by a State exercise active ownership of the SOE in the interests of the general public, they are expected to *lead by example*. To act as *role models* and fully meet their responsibility to respect human rights, SOEs should take *additional steps* and adopt appropriate policies and processes to address abuse, including policy commitments, HRDD, and remediation mechanisms when harm occurs. To ensure the SOEs compliance with human HRDD requirements, States should provide adequate guidance on how and when to conduct HRDD.

Moreover, the practical application of HRDD concerning Indigenous peoples' right to consultation and FPIC in forestry operations was reviewed. Due to growing concern over the environmental and social impact of unsustainable forestry practices, sector-specific initiatives have been developed to improve HRDD practices within the industry. The FSC forestry

certification system has aligned its standards with the language and principles of the UNGPs, aiming to ensure compliance with human rights. The FSC's approach to certification incorporates these principles, reinforcing its commitment to environmental sustainability and the protection of human rights in forestry operations. Furthermore, these international industry standards have implemented FPIC as a business standard and requirement for corporate responsibility. However, the Swedish FSC standards diverge from the recommendations outlined in the non-normative FSC's FPIC implementation guidelines, refusing to interpret FPIC as a veto right.

The Swedish legal framework incorporates elements of the right to consultation and FPIC but does not fully embody the international standards for FPIC. This gap between international obligations and domestic implementation underscores the challenges faced by the Sámi people in safeguarding their rights against infringements by the forestry industry. Sámi reindeer herders are often consulted in the late stages of a decision-making process, sometimes intentionally excluded or only invited to provide comments after a final decision on development plans has been reached. Compared to the minimum international norm for FPIC, the Swedish implementation of consultations does not uphold the obligation for good faith consultations in practice. Sweden lacks adequate legislation addressing the negative impacts that companies, including SOEs, have on reindeer herding. Furthermore, the ambiguity in the legal relationship caused by parallel property rights extends to consultations, resulting in an uneven power distribution. As a result, the reindeer herding Sámi depends on the forestry industry's discretion, and they are forced to defend their rights by participating in corporate consultation procedures.

In the case of Sveaskog, co-management consultation between Sámi villages and the forestry company primarily addresses mitigation of any adverse impacts that forestry operations may have without providing the Sámi with a genuine opportunity to give or withhold FPIC. Sveaskog's co-planning process aims to address reindeer husbandry impacts from Sveaskog's forestry activities. However, the effectiveness of this process is undermined by delays and a lack of concrete actions beyond dialogue. Sámi villages often find consultations to be superficial and unresponsive to their concerns. Furthermore, Sámi representatives have highlighted the power imbalance and intimidation techniques of Sveaskog, arguing that the company contributes to a climate of fear among Sámi, inhibiting open dissent. This is exemplified by Sveaskog's efforts to pressure Sámi villages to sign confidentiality agreements, which many interpreted as an attempt to limit external communication. Moreover, the 2021 blockades organised by the Sámi and environmental activists underscore the tension and mistrust between Sveaskog and the Sámi. Sveaskog's response to the blockades, including threats of police action, reflects an aggressive rather than conciliatory approach. Additionally, discrepancies in consultation practices are evident in the example of the reclassification of Muonio Sámi village, purportedly aligned with legal definitions and concise with significant local opposition. These practices reflect a broader issue within Sveaskog's HRDD process, where FPIC is not adequately integrated, resulting in ongoing conflicts. Despite these adverse outcomes of co-planning forestry management, international FSC standards have shown how this consultation model can be a crucial tool to ensure the

effective participation of Indigenous peoples in decision-making processes and safeguarding their right to self-determination.

While Sveaskog's operations, which incorporate FPIC as a business standard, are somewhat aligned with international standards, it is shown that the company fails to adhere to international best practices. However, due to a lack of public access to Sveaskog's internal documents on consultation and complaints, this conclusion is limited. Nonetheless, in order for Sweden and Sveaskog to fulfil its responsibility to ensure meaningful participation of Sámi people in decision-making processes, Swedish domestic legislation needs to enforce HRDD in forestry management operations, extending the scope of consultation to companies and implementing the sliding-scale approach to FPIC.

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