Examining the Priorities of the Canadian Chairmanship of the Arctic Council: Current Obstacles in International Law, Policy, and Governance

Emma Barry-Pheby*

Table of Contents

I. INTRODUCTION ................................................................. 261
II. ENVIRONMENTAL ASSESSMENTS ........................................... 263
   A) Introduction ............................................................... 263
   B) Environmental Assessments—International Law .......... 265
   C) International Human Rights Law & Environmental Assessments ........................................... 270
   D) FPIC in Environmental Assessment ............................ 273
   E) Environmental Assessments – In Practice..................... 274
III. ENVIRONMENTAL JUSTICE ............................................... 277
   A) Introduction ............................................................... 277
   B) Distributive Justice ..................................................... 277
   C) Procedural Justice—Indigenous Peoples in Law Making.... 281
IV. CORPORATE SOCIAL RESPONSIBILITY (“CSR”) .................. 284
   A) Introduction ............................................................... 284
   B) CSR & International Law, Policy & Guidance ............... 285

* Barry-Pheby has worked for many years in advice, legal research and advocacy roles within the legal and charity sectors. She studied the LLB, then the Legal Practice Course at the College of Law, London and most recently an LLM in Legal Practice at the Manchester School of Law, Manchester Metropolitan University. She will shortly begin her doctorate at Brunel University’s School of Law. Barry-Pheby has recently published several academic papers in this field.
V. CONCLUSION ................................................................. 289
I. INTRODUCTION

At the Arctic Council’s Ministerial Meeting in May 2013, Carl Bildt, the Swedish Minister for Foreign Affairs, passed the gavel, and hence the rotating chairmanship, to Canada’s Minister for the Arctic Council, to Leona Aglukkaq. Canada’s main priorities have been made resoundingly clear: “development for the people of the North.”

The Arctic is a region increasingly acknowledged as being rich in many resources. This Article, however, will focus on the pertinent issue of development by the offshore oil industry. Indigenous communities still heavily use the marine environment, and most northern residents live in coastal communities. Activities throughout the exploration and exploitation processes of the hydrocarbon industry can have a deleterious effect on indigenous peoples’ environment, livelihood, food sources, and cultural activities. Furthermore, an oil spill could have a devastating effect upon these northern communities.


2. See id. (follow “download the brochure here” hyperlink). This priority arises out of two independent priorities that have been melded into one aim: firstly, that of empowering indigenous and other northern communities with greater rights over resource development and sustainability, and secondly, that of forwarding economic development. See also Chris Plecash, Climate Drifts into Uncharted Global Warming Territory, Feds Still Pushing Fossil Fuels, HILL TIMES (May 20, 2013), http://www.hilltimes.com/news/news/2013/05/20/climate-drifts-into-uncharted-global-warming-territory-feds-still-pushing-fossil/34759; Canada, House of Commons, Official Report of Debates (Hansard), 41st Parl., 1st Sess., No. 202 (Feb. 1, 2013) (brief discussion of Canada’s focus on development by the offshore hydrocarbon industry illustrating the political rhetoric).


5. Including initial exploration activities (e.g. seismic testing), discharge of waste products, transportation, and off-loading.

6. Henry Huntington & Gunter Weller, An Introduction to the Arctic Climate Impact Assessment, in ARCTIC CLIMATE IMPACT ASSESSMENT (2005); Timo Koivurova,
There have been various recent advancements in the international law, policy, and information-generation focusing on the offshore oil industry. Yet, there has been less growth and development of the international law that regulates the relationship between indigenous peoples and states with regard to offshore oil development. In addition to the laws directly regulating the relationship between indigenous peoples and states, the rights of indigenous peoples with regard to hydrocarbon development are also addressed by international human


Examining the Priorities of the Canadian Chairmanship

rights law and policy and at international forums. Furthermore, there is also growing non-binding guidance and policy on the relationship between indigenous peoples and the offshore oil companies.

This Article scrutinizes the extent to which this web of international instruments provides comprehensive protection of, and prescribes rights to, indigenous peoples with regard to offshore oil development in the Arctic. In short, are Canada’s priorities achievable during their two-year chairmanship? The focus of this analysis will be upon three main themes: public participation in environmental assessments, environmental justice, and corporate social responsibility.

II. ENVIRONMENTAL ASSESSMENTS

A. Introduction

The marine environment is particularly crucial to indigenous peoples of the Arctic as “very few tribes live away from the coast, and of these still fewer are really independent of the sea.” They eat and utilize many marine animals including various types of fish, whales, seals, polar


11. See Snyder, supra note 4, at 6–7. For example, the Inuvialuit of northern Canada use the Beaufort Sea for subsistence hunting of bowhead and beluga whales, which of great cultural and social significance, as well as being an important part of semi-subsist living. See also Kirsten Manley-Casimir, Reconciliation, Indigenous Rights and the Offshore Oil and Gas Development in the Canadian Arctic, 20 REV. EUROPEAN COMMUNITY & INT’L ENVTL. L. 29 (2011).
bears, and walruses. The need to include indigenous peoples in environmental assessments and the benefits from doing so are identified widely in international law. Such inclusion can eradicate what Erica-Irene Daes identifies as “development aggression.”

Environmental Impact Assessments (“EIAs”) are a crucial way of assessing the likely impact of proposed developments on the environment and the people who live in and utilize that environment. Strategic Environmental Assessments (“SEAs”) provide a wider evaluation of a geographical area, often considering the impact of cross-sectorial industry developments. SEAs often assist governments in policymaking and are usually conducted prior to licensing.

The Arctic Ocean is often described as a productive yet “simple” ecosystem because it has a low level of biological diversity, but the species within it have a relatively greater longevity and have adapted to the ocean’s low temperatures. It is this “simple,” short food chain and the cold conditions that make the Arctic Ocean highly vulnerable to oil pollution. Ocean currents continually transport billions of tons of

---


15. Espoo Convention, supra note 8, art. 1(vi).

16. See generally Riki Therivel, Strategic Environmental Assessment in Action (2010); Thomas B. Fischer, Theory and Practice of Strategic Environmental Assessment: Towards a More Systemic Approach (2007). See also SEA Protocol, supra note 8 (governments conduct SEAs to inform their decision-making, policy-making and planning. SEAs will therefore broadly address environmental, social and health impacts). EIAs are carried out at a later stage, when a licensee is planning, and then implementing a specific project.


18. Id.; Koivurova, Importance, supra note 6; Koivurova, Governance, supra note 6, at 46; World Wildlife Found., Oil Spill Response Challenges in Arctic Waters
water, carrying with it pollution that is not contained within the artificial boundaries of states.\textsuperscript{19}

Arctic states have adopted different procedures for carrying out EIAs and SEAs. For example, in Norway an assessment (similar to an SEA) must be carried out prior to licensing, and afterwards oil companies must carry out a regional EIA.\textsuperscript{20} In Greenland, areas may be licensed without an SEA, but an EIA must be carried out before exploration or production activities begin. Canada requires neither an EIA nor an SEA before calls for nominations.\textsuperscript{21} International law is particularly important in implementing a high standard for EIAs and SEAs in order to circumvent the limitations of artificial state boundaries and to protect the marine environment for indigenous peoples and other northerners.

**B. Environmental Assessments—International Law**

There are a number of relevant international instruments regarding EIAs and SEAs and the issue of public participation: the EIA Guidelines,\textsuperscript{22} the Espoo Convention,\textsuperscript{23} the SEA Protocol,\textsuperscript{24} the Aarhus Convention,\textsuperscript{25} and the Convention on Biological Diversity.\textsuperscript{26}

---


\textsuperscript{21} See generally Mikkelsen & Langhelle, supra note 20; Bastmeijer & Koivurova, supra note 20. At this nomination stage, SEAs have commonly been conducted in other jurisdictions to ensure the wider environmental and social impacts (including any accumulative impact) of licensing particular projects have been considered.

\textsuperscript{22} EIA Guidelines, supra note 8.

\textsuperscript{23} Espoo Convention, supra note 8.

\textsuperscript{24} SEA Protocol, supra note 8.

\textsuperscript{25} Aarhus Convention, supra note 8.

\textsuperscript{26} Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79.
The EIA Guidelines\textsuperscript{27} provide non-directive, Arctic-specific guidance for relevant stakeholders, particularly “local authorities, developers and local people.”\textsuperscript{28} They encourage the use of baseline information and herald the importance of indigenous knowledge.\textsuperscript{29} In the “Public Participation” section, the Guidelines acknowledge the active role that relevant parties can, and should, play in affecting outcomes. They subsequently identify that “public participation provides the affected and interested public an opportunity to influence planning, assessment and monitoring of projects.”\textsuperscript{30} The Guidelines also state that this participation should be ongoing throughout the life of the project.\textsuperscript{31} This ongoing approach to EIAs sets an important premise and could potentially prevent public involvement from being a brief and tokenistic occurrence.\textsuperscript{32}

The EIA Guidelines were heavily anticipated and “warmly welcomed” when they were created in 1997.\textsuperscript{33} Unfortunately, research indicates that those who initiate Arctic EIAs “rarely know that the Guidelines exist.”\textsuperscript{34} The reasons cited for this lack of knowledge include a lack of follow-up mechanisms, implementation problems,\textsuperscript{35} and a need for capacity building. While these are not insurmountable problems, little appears to have been done to address them.\textsuperscript{36} The EIA Guidelines crucially incorporate both the needs of indigenous peoples and the salient features of the Arctic, yet the ineffectiveness of the Guidelines has been

\begin{itemize}
  \item[27.] EIA Guidelines, supra note 8.
  \item[28.] \textit{Id.} at 5–6.
  \item[29.] \textit{Id.} at 16–17, 37–38.
  \item[30.] \textit{Id.} at 32.
  \item[31.] \textit{Id.} at 33–34.
  \item[32.] \textit{See infra} notes 109–11 and accompanying text.
  \item[33.] \textsc{Bastmeijer} \& \textsc{Koivurova}, supra note 20, at 164–65. \textit{See also \textsc{Neil Craik}, \textsc{The International Law of EIA: Process, Substance \& Integration} 161 (2008).
  \item[34.] Research was carried out at the Arctic Centre’s Northern Institute for Environmental and Minority, for the Finnish Ministry of the Environment. \textsc{Bastmeijer} \& \textsc{Koivurova}, supra note 20, at 165.
  \item[35.] \textsc{Bastmeijer} \& \textsc{Koivurova}, supra note 20, at 166; \textsc{Emma Barry-Pheby}, \textsc{The Growth of Environmental Justice and Environmental Protection in International Law: In the Context of Regulation of the Arctic’s Offshore Oil Industry}, \textsc{Sustainable Dev. L. \& Pol’y} 48 (2012–2013).
  \item[36.] Bastmeijer \& Koivurova, supra note 20, states that “(s)adly, most of the officials who were designated as contact persons for the group in charge of updating and running the ARIA website were unaware that they were members of such a group. Where the designated contact person did not know about his/her role he/she was notably to specify how the instrument had been taken into account in the Arctic EIAs.”
\end{itemize}
widely acknowledged since their creation sixteen years ago.\textsuperscript{37} It is disappointing that there has been, and continues to be, a concerted reluctance to update the EIA Guidelines.\textsuperscript{38} To fulfill the priorities of the Canadian government to further development for northerners, these Guidelines must be updated and the endemic problems must be addressed.\textsuperscript{39}

The Arctic Offshore Oil and Gas Guidelines (“AOOG Guidelines”) were created in 1997 and have since been reviewed and updated in 2002 and 2009. They are set to be reviewed again by the Protection of the Marine Environment Working Group during the 2013–2015 period.\textsuperscript{40} These Guidelines, which are the culmination of the work of several Arctic Council working groups, provide detailed guidance for Arctic states.\textsuperscript{41} While they are not legally binding, the AOOG Guidelines make up a comprehensive regional document that is “intended to be of use to the Arctic nations in offshore oil and gas activities during planning, exploration, development production, and decommissioning.”\textsuperscript{42}

The AOOG Guidelines state that Arctic states should “pursue regulatory and political structures that allow for participation of indigenous peoples and other local residents in the decision-making process as well as the public at large.”\textsuperscript{43} Yet, the AOOG Guidelines are nonbinding and weak with regard to the form and timing of consultations; “[i]n general, consultation should commence at the planning stage and continue throughout the lifetime of a project”\textsuperscript{44} and “[c]onsultation is generally thought of in terms of public hearings, but it can also work effectively through informal discussions, focus groups and key interviews and questionnaires.”\textsuperscript{45} It is disappointing that the AOOG


\textsuperscript{38} See Barry-Pheby, supra note 35.

\textsuperscript{39} For a wider discussion on the Arctic Council’s decision not to update the EIA Guidelines, see E.A. Barry-Pheby, International Law and Governance Relating to the Arctic’s Offshore Oil Industry: Inert or Altered?, 12 OIL, GAS & ENERGY L. (SPECIAL ISSUE) 1 (2013).

\textsuperscript{40} ARCTIC COUNCIL, SENIOR ARCTIC OFFICIALS REPORT TO MINISTERS 10 (2013).

\textsuperscript{41} The working groups involved were PAME, the Conservation of Arctic Flora and Fauna, the Arctic Monitoring, and Assessment Programme, and the Emergency Prevention Preparedness and Response Working Groups. See ARCTIC COUNCIL, ARCTIC OFFSHORE OIL AND GAS GUIDELINES 1 (2009).

\textsuperscript{42} Id. at 4.

\textsuperscript{43} Id. at 11–12.

\textsuperscript{44} Id. at 19 (emphasis added).

\textsuperscript{45} Id.
Guidelines do not seek to clarify or explore public participation in more detail. The outcome of the review of these Guidelines is awaited with anticipation.

The Espoo Convention requires an EIA before any decision is made on whether to authorize or carry out a project if the project is “likely to cause a significant adverse transboundary impact.” In Appendix II, the Espoo Convention sets out minimum details that should be included in an EIA. Article 2(6) states that the “Party of Origin” will provide an opportunity for participation in EIAs relating to proposed activities. Two of the five Arctic coastal states have not ratified the Espoo Convention: Russia and the United States. Yet to effectively regulate transboundary EIAs in the Arctic region, all Arctic states must ratify this piece of international law. The need for these two states to ratify the Espoo Convention is exacerbated by the fact that these two countries possess the largest Arctic offshore oil reserves.

The Espoo Convention has had some positive impact. A 2002 review assessing implementation found that most of the states party to the Espoo Convention have implemented their obligations into domestic law and have increased their application of the Convention. Despite the worth of the Espoo Convention, its effect in preventing transboundary harm will continue to be severely limited unless all the Arctic states become signatories.

46. Espoo Convention, supra note 8, arts. 2(3), 3(1); see also PHILIPPE SANDS & JACQUELINE PEEL, PRINCIPLES OF ENVIRONMENTAL LAW (2012); Timo Koivurova, The Transnational EIA Procedure Of The Espoo Convention, in THE FINNISH YEARBOOK OF INTERNATIONAL LAW 173–74 (Jan Klabbers et al. eds., 1997).

47. As of June 2011, there are 45 parties to the Convention (and 22 to the Protocol); Canada signed in 1998, Denmark in 1997, Norway in 1993. See Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 12, 1991, 1989 U.N.T.S. 309 (It should be noted Canada made “a reservation in respect of proposed activities... that fall outside of federal legislative jurisdiction exercised in respect of environmental assessment.” The Norwegian government objected to this reservation, as it does not “sufficiently clarify to which extent the reserving state party is bound by the provisions of the Convention.”).

48. For details of hydrocarbon reserves, see Arnfinn Jørgensen-Dahl, Arctic Oil and Gas, ARCTIS (Jan. 15, 2013, 11:17 AM), www.arctis-search.com/Arctic+Oil+and+Gas&structure=Arctic+Energy+and+Mineral+Resources; Dennis K. Thurston, Offshore Oil and Gas Activities in the Arctic (PAME October 2003); MIKKELSEN & LANGHELLE, supra note 20.

49. CRAIK, supra note 33, at 159. Note a fourth review of implementation of the Convention of EIA in Transboundary Context: Review of implementation, is currently being undertaken.
EIAs are often carried out after governments have granted licenses to hydrocarbon companies.50 Once licenses are granted, however, it is cumbersome and costly to get them revoked.51 In contrast, the early timing of SEAs provides policy makers with key information, which they can use to determine development plans.52 SEAs can play a crucial role in planning offshore hydrocarbon activities by identifying data gaps and by gathering and utilizing in-depth scientific and socio-economic research to aid efficient decision-making.53 SEAs conducted in the Arctic region provide an excellent opportunity for the incorporation of the many detailed and highly revered scientific reports of the Arctic Council.54 Furthermore, given the cumulative effects of increasing development and the potential negative impact upon indigenous and other northern peoples, SEAs can consider wider cumulative effects.55 The SEA Protocol56 has only been ratified by the Arctic states of Norway and Denmark. The effect of the SEA Protocol on offshore Arctic practices is very limited and certainly not relevant in a transboundary context, given that Norway and Denmark are the only Arctic coastal states bound by this Protocol.

In Article 14, the Convention on Biological Diversity57 states that Contracting Parties should “as far as possible and as appropriate” introduce EIA procedures for “proposed projects that are likely to have significant effects on biological diversity” and allow public participation “where appropriate.” The United States is the only Arctic coastal state that has not ratified this framework convention.58 The Convention sets a global agenda for biological diversity and delineates the need for EIAs.59 What is now needed in the Arctic are improved regional guidelines.

50. As identified in the EIA Guidelines, EIAs will generally be carried out from the initial exploration stages and throughout the exploitation process.
52. Jo Treweek, Ecological Impact Assessment 30 (2009); Craik, supra note 33.
56. SEA Protocol, supra note 8.
Whilst the Aarhus Convention is open to ratification by all states, it was created by the United Nations Economic Commission for Europe and is European-centric. Denmark and Norway are the only Arctic coastal states to have ratified this Convention (with a Danish Declaration pronouncing Greenland’s exclusion). The Aarhus Convention is a rights based piece of international law, which stipulates minimum standards for public authorities. Article 6(2) directs that the public should be included in the EIA process early on and “in an adequate, timely and effective manner.” Article 6(8) then stipulates that the result of public participation should be given “due account.” Unfortunately, given that it only binds the Arctic coastal state of Norway, the Aarhus Convention is of limited effect.

Although there is a comprehensive collection of relevant international law, it is clear that there continues to be many gaps and limitations: the implementation and follow-up problems of the EIA Guidelines, the soft law status and non-binding wording of the AOOG, and the non-ratification of the Espoo and Aarhus Conventions by some Arctic coastal states.

C. International Human Rights Law & Environmental Assessments

In addition to the international law outlined above, many other instruments provide international human rights law, policy, and guidance regarding public participation.

The Indigenous and Tribal Peoples Convention ("ILO 169") is an important piece of binding international law affording indigenous peoples concrete rights. However, the Arctic coastal states of the United States, Russia, and Canada have not ratified ILO 169. This has caused notable anger and fuelled a feeling from many quarters that it illustrates a lack of commitment on the part of Arctic governments to uphold the rights of indigenous peoples. Conversely, the ratification of ILO 169 by

61. Aarhus Convention, supra note 8, at 457.
62. Id. at 458.
63. See also JANE HOLDER & MARIA LEE, ENVIRONMENTAL PROTECTION LAW AND POLICY 99, 130–31 (2007). It is noted that this Convention may allow governments an easy way to show prima facie involvement of the public.
64. ILO 169, supra note 9.
65. See generally REFLECTIONS ON THE UN DECLARATION, supra note 14; MAKING THE DECLARATION WORK: THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES...
all Arctic states would show an important political message and provide an important legal tool with which indigenous peoples could work.\textsuperscript{66}

Article 15(2) of ILO 169 prescribes that governments have a duty to “establish or maintain procedures through which they shall consult” indigenous peoples where the state has ownership of “mineral or subsurface resources or rights to other resources pertaining to lands.”\textsuperscript{67} It goes on to establish that these peoples should “wherever possible participate in the benefits of such activities and receive fair compensation for any damages.”\textsuperscript{68} Furthermore, Articles 6(1) and 6(2) direct that the involvement of indigenous peoples in the decision-making process should be undertaken with “the objective of achieving agreement or consent to the proposed measures.”\textsuperscript{69}

The United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”),\textsuperscript{70} although not legally binding, heralds another important step in providing rights in international law to indigenous peoples.\textsuperscript{71} Four of the five Arctic coastal states, with the exception of Russia, are signatories to this declaration.\textsuperscript{72} Initially Canada and the United States voted against UNDRIP’s adoption,\textsuperscript{73} until 2010 when they both signed the Declaration.

Whilst the majority of commentators would readily accept that UNDRIP is soft law,\textsuperscript{74} some exert that it is customary international law

\begin{footnotesize}
\begin{enumerate}
\item [\textsuperscript{66}] Matt Berg, Kiruna Sami Representative, Arctic Indigenous Peoples’ Conference (May 12–13, 2013) (on file with author).
\item [\textsuperscript{67}] ILO 169, supra note 9. Article 15(2) is in reference to indigenous peoples’ lands that they “occupy or otherwise use” (Article 13(1)). This term applies to indigenous peoples’ territories (Article 13(2)).
\item [\textsuperscript{68}] Id.
\item [\textsuperscript{69}] Id.
\item [\textsuperscript{70}] UNDRIP, supra note 9.
\item [\textsuperscript{71}] See infra pp. 15–17 for a discussion of the unprecedented role of indigenous peoples in the creation of UNDRIP.
\item [\textsuperscript{73}] Id. The other two countries to vote against UNDRIP were Australia and New Zealand.
\item [\textsuperscript{74}] Luis Rodríguez-Piñero Royo, “Where Appropriate”: Monitoring/Implementing of Indigenous Peoples’ Rights under the Declaration, in Making the Declaration Work, supra note 65, at 314, 315; see also Stephen Allen, The UN Declaration on the Rights of Indigenous Peoples and the Limits of the International Legal Project, in Reflections on the UN Declaration, supra note 14, at 225, 229.
\end{enumerate}
\end{footnotesize}
because it is rights based rather than providing exhortation, and its creation required decades of negotiation so states expected it to have “at least some legal effect.”

Furthermore, the most persuasive argument that it is state practice is that national courts “in Japan, Bolivia and Belize have already perceived the Declaration as establishing requirements for action.” Burger explains that, as some states have set lower national and regional standards for resources extraction, UNDRIP is therefore not opinio juris. Furthermore, the Canadian government emphatically stated that the Declaration has “no legal effect in Canada and its provisions do not represent customary international law.”

Thus, while the debate has some persuasion on either side, UNDRIP is clearly not currently customary international law and is not accepted as such by Arctic coastal states given the frequent exclusions (or only partial inclusion) of Arctic indigenous peoples in decision-making processes with regard to development.

Although the effect of ILO 169 is limited by the lack of ratification by all coastal states and UNDRIP is limited by its soft law status, both certainly add to the body of international human rights law that afford rights to indigenous peoples with respect to decision-making relating to hydrocarbon development.


76. Id. at 124–25 (arguing that rather than being binding, it is, as soft law, influential in decision-making); see also Saramaka People v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 131 (Nov. 28, 2007); Maya Village of Conejo v. Belize, 2007 S.C. ¶¶ 131–34 (Belize); see also Stefania Errico, The Controversial Issue of Natural Resources: Balancing States’ Sovereignty with Indigenous Peoples’ Rights, in Reflections on the UN Declaration, supra note 14, at 329, 337–38; Royo, supra note 74, at 315.

77. Professor Burger is a former long-standing head of the UN Human Rights Commission’s Indigenous and Minorities Unit.

78. Julian Burger, The UN Declaration on the Rights of Indigenous Peoples: From Advocacy to Implementation, in Reflections on the UN Declaration, supra note 14, at 41, 49–50; but see Dalee Sambo Dorough, The Significance on the Declaration of Rights of Indigenous Peoples and its Future Implementation, in Making the Declaration Work, supra note 65, 264, 269–70. See also Royo, supra note 74, at 315.


80. See infra notes 105–11 and accompanying text.
D. FPIC in Environmental Assessment

Free, Prior, and Informed Consent ("FPIC") is a fundamentally important concept for indigenous peoples. It replaces a potentially passive participation, or consultation, process with one that prevents coercion and demands active involvement, alongside the provision of timely comprehensive information, ultimately leading to development consent (or denial). The idea of seeking “consent” is important to many indigenous peoples because it allows for the potential to veto or alter projects. However, it is contentious to many states that are keen to preserve the fundamental principles of state sovereignty. Increasingly, international fora deliberate on the use and meaning of FPIC.

The introduction to the report “License to Operate—Indigenous Relations and Free Prior and Informed Consent in the Mining Industry” states that, “few mining or oil and gas companies have adopted a formal policy committing to FPIC.” Others, it states, have adhered to the ethos of FPIC by walking away from certain projects. Certainly, with regard to development by the offshore oil industry in the Arctic, there is little to suggest that FPIC is being adhered to by the hydrocarbon industry. Yet, this report illustrates a changing tide in the rebalancing of power between corporations and indigenous peoples.

UNDRIP and ILO 169 both address FPIC. Article 26 of UNDRIP prescribes indigenous peoples “the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise use or acquired.” Article 32(2) directs states to “consult and cooperate in good faith with indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent.”

---

81. Westra, supra note 4, at 88–89; Sosa, supra note 10; see also Tendai Zvobgo, Free Prior and Informed Consent: Implications for Transnational Enterprises, 13 Sustainable Dev. L. & Pol'y 27 (2012).


83. See infra note 101 and accompanying text.

84. Burger, supra note 78, at 55 (noting that cases about the meaning of the FPIC have appeared before the Inter-American Court on HR, the Inter-American Commission on HR, the Committee on Elimination of Racial Discrimination, Committee on Economic Social and Cultural Rights, and the UN Special Rapporteurs).

85. Sosa, supra note 10, at 7.

86. Id. It should be noted that the report goes on to state that some use the “language of FPIC in their sustainability reports but have not formally adopted a policy.”

87. Id.

88. UNDRIP, supra note 8, art. 26
consent prior to the approval of any project affecting their lands or territories." 89 After signing UNDRIP, the United States submitted a statement 90 asserting that "it is our firm position that there can be no absolute right of free, prior, informed consent that is applicable uniquely to indigenous peoples and that would apply regardless of circumstances." 91 Furthermore, both the United States and Canada have "voiced, on record, their disagreement with the interpretation of FPIC as a right to veto." 92

The question of when, and if, indigenous peoples’ FPIC should be acquired when the offshore hydrocarbon industry carries out activities is complex and unsettled, leaving many indigenous peoples unsure of their rights. 93 States are required under UNDRIP to seek FPIC, but UNDRIP is neither a binding treaty nor customary international law. ILO 169 identifies FPIC as "the objective" rather than an absolute right of indigenous peoples. Furthermore, ILO 169 has not been ratified by the three Arctic coastal states with the largest indigenous populations of the Arctic. 94 Certainly, to make Arctic development truly for the people of the north, as the Arctic Chair Canada has prioritized, this issue will need to be revisited and enhanced in international law.

E. Environmental Assessments—In Practice

Unfortunately, there are many examples within the Arctic and beyond, of public participation being "superficial and grossly inadequate" because it was tokenistic, poorly publicized, provided incomplete information, did not consider all of the community, recorded public meetings poorly, and was inadequately short. 95 The Russian

89. Id. art. 32(2).
90. Jointly with New Zealand and Australia.
92. Sosa, supra note 10, at 11; see also McKee Statement, supra note 79, at 12.
93. See Arctic Indigenous Peoples’ Conference (May 12–13, 2013) (on file with author); Reflections on the UN Declaration, supra note 14, at 55.
94. Although, as discussed above, some commentators have also argued that it codifies customary law.
95. See Jedrzej George Frynas, The False Development Promise of Corporate Social Responsibility: Evidence from Multinational Oil Companies, 81 Int’l Aff. 581, 589–90 (2005) (stating that “where oil companies have consulted local communities, the consultation exercises have usually been superficial and grossly inadequate” and he provides examples from Niger Delta); Barry-Pheby, supra note 35; see also Russia Stomps on Human Rights of its Arctic Indigenous Citizens: Report, Nunatsiav Nunatsiaq Online (Nov. 26, 2012),
Association of Indigenous Peoples of the North identified that EIAs in Russia are “often poorly publicized, held in places inaccessible to the indigenous communities affected and held in such a way that the information provided is incomplete and objections are not duly registered.” In another instance, Canadian Inuits protested that the hydrocarbon industry did not enter into “meaningful consultations” regarding seismic testing. The affected community was not consulted until after the applicant had received positive affirmation that their license would be granted. The Inuit argued that the consultations did not consider many of the issues that were raised, such as concerns regarding the deleterious effect upon whale migratory routes and calving areas. These are only a couple of examples of a more widespread lack of opportunities for meaningful public participation.

There are also many practical obstacles that can prevent indigenous peoples from objecting to inadequate environmental assessments, including cultural and logistical barriers, lack of awareness of their rights, financial barriers, language barriers, geographical limitations, and

---

96. Russia Stomps, NUNATSIAQ ONLINE, supra note 95; see infra notes 161–64 and accompanying text.

97. Subject to terms and conditions, including that Natural Resources Canada carry out “meaningful consultation” with affected communities. Although there were no follow-up procedures put in place to check whether or not such a duty had been discharged.

98. Qikiqtaani Inuit Association v. Canada (Minister of Natural Resources), 2010 NUCJ 12 (Can. LII).

99. See Barry-Pheby, supra note 35; Porta & Bankes, supra note 95.
unequal bargaining positions. There is a need to build the capacity of indigenous peoples so they are aware of their rights, able to collectively self-advocate, and—what is potentially even more difficult to achieve—have the financial ability to pursue legal action where appropriate. If international law is improved to afford greater decision-making powers to indigenous and northern peoples with respect to offshore oil development, it does not ipso facto mean that they will support such hydrocarbon development.

There must be enhanced international regulation of SEAs because, as a tool, their impact has the potential to be very positive and important prior to leasing. Furthermore, international law must provide a more robust EIA system to prevent tokenistic practices. The inadequacies and weaknesses of current international laws regulating environmental assessments of the Arctic’s offshore oil industry must be addressed. Also, the role of indigenous and other northern peoples as public participants considering offshore developments must be strengthened within international law. If these steps are not taken to centralize northern Arctic people in the development process, the results will fall far short of Canada’s aims of forwarding development for northerners.

100. Fondahl & Sirinia, supra note 92, at 67–68; Arctic Indigenous Peoples’ Conference (May 12–13, 2013) (on file with author); Westra, supra note 4; Barry-Pheby, supra note 35; see also House of Commons, supra note 95, at 7 n.376 (noting “the general public is asked to review and comment on an overwhelming stream of technically complex”).

101. See Laila Vars, Vice President of Sami Parliament, Arctic Indigenous Peoples’ Conference (May 12–13, 2013) (on file with author) (with regard to issue of resource capacity and unequal bargaining powers).


103. WORLD WILDLIFE FOUND., supra note 51, at 7.

104. For examples of tokenistic EIA practices, see Porta & Bankes, supra note 95; Mikkelsen & Langhelle, supra note 20, at 163–66; House of Commons, supra note 95, at 7 n.376; Nunatsiaq Online, supra note 95; Timo Koivurova & Erik J. Molenaar, International Governance and Regulation of the Marine Arctic, in WWF INTERNATIONAL ARCTIC PROGRAMME (2008). See also Barry-Pheby, supra note 35.
III. ENVIRONMENTAL JUSTICE

A. Introduction

Environmental justice is a concept that identifies that certain groups of people are subject to particularly onerous environmental risk. Its history is rooted in what was called “environmental racism” whereby African-Americans in North Carolina were exposed to environmental hazards from a waste incinerating plant placed in their community. A movement to acknowledge that black Americans were being subjected to environmental hazards significantly more than their Caucasian counterparts followed this. Although it is generally accepted that environmental justice is a multi-dimensional concept, this Article’s focus is on the elements of distributive and procedural justice.

B. Distributive Justice

The concept of distributive justice considers the risks incurred against the benefits received to assess whether they are equitably distributed. This is particularly relevant in the Arctic because indigenous peoples use the land and ocean to maintain their primarily subsistent lifestyle. They will potentially suffer profound damage to their livelihood, food sources, cultural integrity, and environment if there is an offshore oil spill. In short, indigenous peoples “bear a disproportionate share of environmental burdens compared to their non-indigenous counterparts.”

Academics acknowledge that the main challenge when one considers indigenous peoples’ potential losses is that their lifestyles may be forever damaged or lost and that financial compensation cannot make

105. Westra, supra note 4.
107. Barry-Pheby, supra note 35.
109. Ewall, supra note 106.
sufficient reparation for these losses. Scholarly works note that, when factoring in economic costs, the value of subsistence living should be duly considered. They also point out that “[f]or the Inuit, for example, subsistence ‘means much more than mere survival or minimum standards of living. . . . It enriches and sustains Inuit communities in a manner that promotes cohesiveness, pride and sharing.’ “

Shell US, states that one of the ways in which they deliver benefits in Alaska “is through social investment—voluntary contributions to local social and environmental programs.” Mikkelsen and Langhelle state that onshore Alaskan hydrocarbon development is seen to have benefited communities by providing “new infrastructure, modern equipment and lifestyle.” Yet, Alice Ukoko, founder and CEO of Women of Africa spoke at the Peoples Arctic Conference of the disruption that oil exploration has caused to her community in the Niger Delta. She also talked about the rhetoric of the oil companies. She explained that “they come in a very crafty way and will tell you they come to make your life better.” Kumi Naidoo, Greenpeace’s Executive Director, also talks of the framing of oil development as offering “a better quality of life for all indigenous peoples,” but he says that it has been “learnt time and time again that access to resources (including oil) does not mean growth for the indigenous communities.”

The domestic benefits from an Arctic offshore industry include increased employment, revenues, and business opportunities. Over eighty percent of the state income of Alaska comes from the oil industry; some counties have borrowed substantially against this predicted income. Some Greenlanders, desiring independence from Denmark,

112. MIKKELSEN & LANGHELLE, supra note 20, at 321 (citing Poppel’s study).
113. Id.
115. MIKKELSEN & LANGHELLE, supra note 20, at 139.
support the oil industry. Some Yukon people, supporting devolution, also support an increased hydrocarbon industry. In Alaska, the federal United States government administers leases for activities beyond three miles offshore, thus giving little regulatory power or fiscal benefits to Alaska itself. The United States implemented a grant program to encourage local support for outer continental-shelf leasing. Whilst this mitigation program gives indigenous peoples and local communities some benefits, in the form of payments of dividends somewhere between $845–$1964 per annum, it is unlikely to fully provide reparation for potential losses to indigenous peoples’ primarily subsistence lifestyles. Also, employment in the oil industry is notably low in Alaska’s northern slope, something that is commonly found throughout the Arctic, which is in contrast to the frequently perpetuated myth that increased development will offer substantial employment opportunities for local populations. In many of these coastal areas, high levels of socio-economic deprivation and unemployment persist while skilled, experienced oil company employees are brought into these areas to fill the newly created employment opportunities. The Canadian Arctic has high levels of unemployment and social disadvantage with little sign that this is positively affected by offshore development. This phenomenon is particular noticeable in Nunavut.

Despite the minimal benefits to indigenous people from having an offshore oil industry, there would be profound economic disadvantages to local communities if a large oil spill occurred. There are also many other potentially negative effects that offshore oil activities could cause, such as seismic testing interfering with whale migratory routes and

---

120. Polar Law, supra note 37, at 101.
121. Mikkelsen & Langhelle, supra note 20, at 144–45.
122. See id. at 147 (regarding the coastal impact assistance program).
123. Polar Law, supra note 37; Mikkelsen & Langhelle, supra note 20, at 147.
125. Mikkelsen & Langhelle, supra note 20, at 323–25, 173–74 (“Indigenous peoples job venture business corporations with leading oil and gas companies” largely appear to have not been). See also Frynas, supra note 95; Flanders, supra note 124; Zellen, supra note 124.
126. Mikkelsen & Langhelle, supra note 20, at 173, 179 (noting that indigenous peoples have a 25 percent higher unemployment rate, a 65 percent higher proportion of indigenous people have poor housing, and 42 percent more live on social welfare than other Canadians).
calving areas. Offshore Alaskan development “face[s] nearly universal opposition from Inupiat people and local and regional authorities who fear that oil spills will harm marine resources and that industrial noise will disturb and deflect migrating whales and other marine mammals.”

After the Exxon Valdez oil tanker accident, the cleanup costs ran to over $2 billion. Despite these huge monetary costs, the cleanup was inadequate because it left the vast majority of the oil unrecovered from the ocean or seashore. It also resulted in a huge number of marine mammal and bird mortalities. Furthermore, after a decade, the long-term effect of the oil spill to killer whales was found to be deleterious with large losses to the killer whale population and a continuing decline of the population. Unweathered oil (identifiable as from the Exxon Valdez spill) continues to linger beneath the surface of the Prince William Sound beaches, often with high levels of the toxic polycyclic aromatic hydrocarbons persisting. While the potentially devastating effects of an oil spill are apparent, the risk of such an oil spill occurring and the ability—or inability—to clean them up are highly contested.

127. See International Arctic Science Committee, An Introduction to the Arctic Climate Impact Assessment (February 2010); Koivurova, Importance, supra note 6; Koivurova, Governance, supra note 6; World Wildlife Found., supra note 6; Hamilton, supra note 6, at 85–86; see also PAME, supra note 6, at 30; Koivurova & Hossain, supra note 6.


129. See Barry-Pheby, supra note 35; Rice, supra note 128; Exxon Valdez Oil Spill Trustee Council, supra note 128; Mikkelsen & Langhelle, supra note 20, at 56.

130. Rice, supra note 128 (noting that there was an estimated animal mortality of 250,000–700,000 seabirds, 2,800–5,000 sea otters, 300 harbor seals, 250 bald eagles, 22 killer whales and billions of herring/salmon eggs); Exxon Valdez Oil Spill Trustee Council, supra note 128; Mikkelsen & Langhelle, supra note 20, at 57 (noting the estimated ranges are rather large as there is disagreement as to how many species actually died as carcasses sink uncounted but this is the general range, with over 35,000 seabird and 1,000 sea otters carcasses actually retrieved); see also D.F Dickens Assoc., Beaufort Sea Oil Spills State of Knowledge Review and Identification of Key Issues (2010); Barry-Pheby, supra note 35.

131. Exxon Valdez Oil Spill Trustee Council, supra note 128; see also Anne E. Gore, The Wilderness Society, Broken Promises—The Reality of Oil Development in America’s Arctic (2009); Rice, supra note 128.

132. Rice, supra note 128; Exxon Valdez Oil Spill Trustee Council, supra note 128; Mikkelsen & Langhelle, supra note 20.

133. See Arctic Indigenous Peoples’ Conference (May 12–13, 2013) (on file with author) (discussing risks in oil spills in sea ice); World Wildlife Found., supra note 6;
Although indigenous peoples may receive some benefits from offshore oil development, these benefits often appear wholly inequitable. There are multiple risks incurred from offshore hydrocarbon development and the inability to restitute some of the potential damages is profound.

C. Procedural Justice—Indigenous Peoples in Law Making

The element of procedural justice examines the extent to which indigenous people are involved in decision-making procedures. Whilst the participation of indigenous peoples in environmental assessments is discussed above, this Part focuses on the role of indigenous peoples in the law-making process by examining both their role within the Arctic Council and with other international law-making processes.

Consideration is given to the increasing inclusion of outside influences and the effect of this upon the voice of indigenous and northern peoples. Leona Aglukkaq, an Inuk from Nunavut, is the first indigenous person to be appointed as Arctic Council chair, but whether this will pave the way to empower and protect the interests of indigenous Arctic communities remains to be seen.

In the decades of debate on UNDRIP, the inclusion of “hundreds of indigenous peoples” set a new precedent in international lawmaking.

\[\text{see generally Pew Environmental Group, Oil Spill Prevention and Response in the U.S. Arctic Ocean—Unexamined Risks, Unacceptable Consequences (2010); D.F. Dickins Assocs., supra note 130; see also Oil Spills in Sea Ice—Past Present & Future Conference (Sept. 20–23, 2011) (on file with author); Arne Jernelov, Threats from Oil Spills: Now, Then & in the Future, 39 AMBIO 353 (2010).}\]

\[\text{134. See Sustainable Development Working Group, Arctic Council, http://portal.sdwg.org (acknowledging that indigenous peoples often have difficult attending discussions due to funding); C. de Roo et al., Background Paper: Environmental Governance in the Marine Arctic (2008), available at arctic-transform.org/download/EnvGovBP.pdf, see also Arctic Council, supra note 4 (calling for greater involvement in the Arctic Council).}\]

\[\text{135. Such as indigenous peoples role in the creation of UNDRIP and ILO 169.}\]

\[\text{136. Outside influences include the prior and new observers of the Arctic Council, the potential inclusion of the EU and the other pending applications, alongside the increasing interaction and involvement of the hydrocarbon industry by the Arctic Council.}\]

that produced a powerful Declaration with the “potential for driving cultural and political transformations.”

Six indigenous groups are permanent participants in the Arctic Council. Whilst these permanent participants do not have voting rights, they are included in Arctic Council and working group meetings and are in a good position to lobby stakeholders. Permanent participants’ role within the Arctic Council is, however, limited by practical difficulties such as funding and geographical restraints. Because of this, indigenous peoples often struggle to attend Arctic Council meetings.

In May of 2013, the Arctic Council accepted six applications for new state observers. There are now twelve observer states, eleven NGOs, and nine inter-governmental and inter-parliamentary organizations. There is a divided opinion on the inclusion of these new observers. The Aleut International Association welcomes the new observers but notes that the uniqueness of the Arctic Council is the “inclusion of the voice of indigenous peoples of the Arctic sitting at the same table as the Arctic states” and that “without full and meaningful participation it will become just another international forum.” With the increasing input of non-Arctic states all lobbying for their own

138. Daes, supra note 137, at 38.
140. Bill Erasmus, ARCTIC COUNCIL, supra note 4.
141. The SDWG acknowledged that although, prima facie indigenous peoples, are included in discussions, in reality they struggle to have sufficient funding to attend meetings. About Us, SDWG, http://www.sdwg.org/content.php?sec=0 (last updated Aug. 27, 2013). See also Barry-Pheby, supra note 35.
143. See id. There are also eight deferred decisions that were deferred from the last Arctic Council Ministerial Meeting, May 2013 (reasons for the deferral were not given). The EU’s application was announced as having been received “affirmatively” but deferred whilst concerns raised (it is suggested by Canada) are addressed.
144. Aleut International Association Representative, ARCTIC COUNCIL, supra note 4.
agendas, the potential for tailoring development to northerners will become even harder to advocate.

The Arctic Athabaskan Council points out that much of the pollution entering the Arctic is caused by states outside the Arctic and that therefore it is very useful to welcome outside states to engage in discussions and ultimately to “seek reductions” in pollution.\textsuperscript{145} On the other hand, Russian Association of Indigenous Peoples of the North, another permanent participant group, acknowledged that they would like the Arctic Council to fully consider the opinions of the permanent participants when accepting new observers.\textsuperscript{146} Some permanent participants expressed particular concern about the European Union becoming an observer to the Arctic Council given that the European Union instigated a seal ban that caused widespread anger amongst indigenous peoples.\textsuperscript{147}

Whilst Arctic Council observers do not have voting rights, they do have the ability to influence procedures not only through an increased ability to lobby but also through their inclusion in many meetings, and their ability to fund certain projects.\textsuperscript{148} The impact of the new observers and the decisions on the deferred applications is, as of yet, unknown but could potentially cause a shift in power that is deleterious to indigenous peoples.

Thus, prima facie, there have been some seminal moves to involve and consider indigenous peoples in international law, but these moves are met with many limitations as well. The economic and social benefits for indigenous and northern peoples must be rebalanced in order to offset the losses and potential risks if the goals of environmental justice and Canada’s aims are to be implemented.

\textsuperscript{145} Arctic Athabaskan Council, Arctic Council, supra note 4.

\textsuperscript{146} RAIPON Representative, Arctic Council, supra note 4.


\textsuperscript{148} Observers, Arctic Council, supra note 142.
IV. CORPORATE SOCIAL RESPONSIBILITY ("CSR")

A. Introduction

As international human rights and international environmental law places duties on states, rather than corporations, CSR is an important mechanism for examining the discourse between companies and the public.

Discussions on CSR oscillate between a belief that senior managers have a singular fiduciary duty to an alternate viewpoint that in fact human interests preside over corporate interests. A third, and more holistic, definition of CSR integrates both fiduciary and human concerns to consider "the economic, legal, ethical and philanthropic expectation placed on organizations by society at a given point in time." Fora around the globe are increasingly considering CSR in an environmental context. Additionally, some commentators exert that human rights law should provide obligations on corporations.

Unfortunately, indigenous people often feel that the offshore oil industry does not deal with them in a socially responsible way. Furthermore, many social initiatives that corporations pursue are perceived as nominal philanthropic motions that appear to be little more than short-term "bribes" to facilitate uninterrupted development, leaving indigenous peoples with long-term problems. Frynas identifies the profound inability of such "social investments" to benefit local communities. Frynas also notes that oil companies often lack the capacity to address some of the complex social problems that they encounter.

149. MIKKELSEN & LANGHELLE, supra note 20, at 57–58.
150. Id. at 58; see also CORPORATE SOCIAL RESPONSIBILITY, ACCOUNTABILITY AND GOVERNANCE—GLOBAL PERSPECTIVES (Istemi Demirag ed., 2005); Frynas, supra note 95; CAROL PADGETT, CORPORATE GOVERNANCE—THEORY & PRACTICE (2012).
152. See WESTRA, supra note 4, at 118–22.
153. See supra text accompanying notes 101–08.
154. Professor Frynas is an academic who has conducted extensive field research into the CSR of the hydrocarbon industry.
155. Frynas, supra note 95.
156. Id.
Where a classical approach to CSR is assumed, companies’ senior managers are viewed as having a primary, perhaps singular, fiduciary duty to increase profits and benefit shareholders.\textsuperscript{157} If this classical approach is accepted, the responsibility to limit development and protect indigenous peoples’ ethical, cultural, and legal rights once more reverts to legal mechanisms that must be made adequate for this task. Even if one approaches CSR from this classical viewpoint, there are still benefits of engaging with indigenous people in a way that does not conflict with a corporation’s fiduciary duty. Engaging with indigenous groups may minimize litigation, which can be both costly and cause substantial/indefinite delays, and it may also prevent blockades and protests, which can undermine a company’s reputation and result in losses.\textsuperscript{158} Minimizing such protests and blockades may create a less contentious workplace for employees, which can help maintain a good work environment for employees, retain employees, and minimize human resource costs. Yet this requires that corporations participate with indigenous peoples in a meaningful way.

**B. CSR & International Law, Policy & Guidance**

There is some concern that the tension between state and private sector responsibility allows both to circumvent full responsibility. As the Sami Council Representative at the Arctic Council Ministerial Meeting recently stated, “corporate responsibility can be a two-edged sword” with the government relying on industry to act responsibly and the mining company, in turn, simply stating that they follow Swedish law, concluding that “here in Kiruna corporate responsibility equals no responsibility.”\textsuperscript{159}

The Sustainable Development Working Group (“SDWG”) at the Arctic Council’s workshop in January 2012 concluded in its report that there was no need to produce Arctic-specific CSR guidelines due to the

\textsuperscript{157} See David B. Spence, \textit{Corporate Social Responsibility in the Oil Industry: The Importance of Reputational Risk}, 86 CHI.-KENT L. REV. 59 (2011); Frynas, supra note 95; Mikkelsen & Langhelle, supra note 20, at 58; see also Demirag, supra note 150.


\textsuperscript{159} ARCTIC COUNCIL, supra note 4. See also Bjørn-Tore Blindheim, \textit{Towards a Convergent Institutional Perspective on Corporate Social Responsibility}, available at http://brage.bibsys.no/xmlui/bitstream/id/181988/Blindheim,%20Bj%F8rn-Tore%20PhD.pdf; Mikkelsen & Langhelle, supra note 20; Westra, supra note 4, at 118–19.
web of existing guidelines and frameworks. Instead, it concluded that Arctic relevant CSR problems derived from insufficient communication and implementation. SDWG, therefore, plans to produce a draft information tool regarding CSR in the Arctic.

The International Finance Corporation (“IFC”) Sustainability Framework, Performance Standard Seven focuses on indigenous peoples. It acknowledges the many sufferings that indigenous peoples can experience from development, including “loss of identity, culture and natural resource-based livelihoods, as well as exposure to impoverishment and disease.” It sets an objective to apply FPIC to affected indigenous peoples in prescribed circumstances. It then elaborates on these circumstances by providing a broad definition of indigenous peoples’ lands, to encapsulate those not just owned under national or customary law but also those lands used “for their livelihoods, or cultural, ceremonial, and spiritual purposes.” It also states that corporations should carry out a number of steps, including ensuring that indigenous peoples are informed of their rights, offered compensation, and provided “equitable sharing of benefits.”

The IFC Sustainability Framework provides indigenous people with another benchmark that illustrates growing recognition of the need to redress the inequitable balance between corporate development and indigenous peoples’ rights and needs. Furthermore, it is part of a growing


162. OP 4.10, supra note 10, ¶ 2.

163. Id. ¶¶ 13–17.

164. Id. ¶ 13.

165. See Int’l Fin. Corp., supra note 160 (the IFC’s Sustainability Framework is applicable to “all investment and advisory clients whose projects go through IFC’s initial credit review process after January 1, 2012”).
number of initiatives that indigenous peoples can use to negotiate their position and that can be used to direct corporations to change and develop policies and new strategies to deal with these issues. However, as Laila Vars, Vice President of the Sami Parliament, noted, the problem is often one of capacity and unequal bargaining powers.\textsuperscript{166}

The “Licence to Operate–Indigenous Relations and Free Prior and Informed Consent in the Mining Industry”\textsuperscript{167} identifies that the IFC’s Sustainability Framework illustrates a growing credence among “responsible investors” and NGOs of indigenous peoples’ “right[s] to participate in decisions affecting their land and resources, including the right to say ‘no’ to natural resource development projects.”\textsuperscript{168} The Report goes on to cite both financial and ethical imperatives for mining companies to consider indigenous peoples, including potential deleterious and extensive long-term effects from development, historical discriminatory practices, financial issues restraining some indigenous peoples’ ability to assert legal rights, undue delays to development caused by actual or legal blockades, potential cost of conflicts, lawsuits from companies that have previously used excessive force, and damage to companies’ reputation through controversies.\textsuperscript{169}

The World Bank’s Indigenous Peoples Policy\textsuperscript{170} states that for a project to gain financing\textsuperscript{171} it must allow “free, prior and informed consultation in broad community support to the project by the affected indigenous peoples.”\textsuperscript{172} Whilst the notable use of the word “consultation” as opposed to “consent” lowers the standard required, “consultation” still provides an important standard. Paragraph eighteen elaborates on the form that this free, prior, and informed consultation should take, specifically in relation to resource development on lands or territories that indigenous peoples “traditionally owned, or customarily used or occupied.”\textsuperscript{173} It goes on to acknowledge that indigenous peoples must be made aware of their legal rights, the “scope and nature” of the planned development, and the possible effect of the proposed development on their “livelihoods, environments and use of such resources.”\textsuperscript{174} The

\begin{thebibliography}{99}
\bibitem{arctic} {\textsuperscript{166.}} Arctic Council, \textit{supra} note 4.
\bibitem{sosa} {\textsuperscript{167.}} Sosa, \textit{supra} note 10, at 2.
\bibitem{id} {\textsuperscript{168.}} \textit{Id.} at 5.
\bibitem{id1} {\textsuperscript{169.}} \textit{Id.}
\bibitem{op} {\textsuperscript{170.}} OP 4.10, \textit{supra} note 10.
\bibitem{world} {\textsuperscript{171.}} World Bank funding for the hydrocarbon industry is primarily, although not exclusively, in Africa. Some funding has been given to Russia, for example.
\bibitem{op1} {\textsuperscript{172.}} OP 4.10, \textit{supra} note 10, ¶ 1.
\bibitem{id2} {\textsuperscript{173.}} \textit{Id.}
\bibitem{id3} {\textsuperscript{174.}} \textit{Id.}, ¶ 18.
\end{thebibliography}
Policy also stipulates that indigenous peoples should share equitably in profits. This Policy document shows that CSR is increasingly focusing on indigenous peoples, even though the policy is only of limited applicability because there is limited funding by the World Bank for hydrocarbon projects in this region.

The Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises provide good practice guidance for multinational enterprises conduct. Chapter V, paragraph fifty-eight recommends that multinational enterprises should employ some local workers and incorporate equal opportunities for indigenous peoples and other groups identified as vulnerable. And the Organisation’s research suggests that “a significant proportion” of the CSR policies of multinational enterprises refer specifically to these Guidelines.

There are two other policies and initiatives that should be mentioned as they add to the growing international corpus of initiatives on CSR. The first is the UN Global Compact, which sets out ten succinct core values in a voluntary code of conduct, including the principle that “[b]usinesses should make sure they are not complicit in human rights abuses.” The second is the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy which aids MNEs in minimizing issues that arise from their operations. Clearly, there is a body of international guidance, policy, and law that draws on the CSR of businesses, but they are not Arctic specific and do not provide in-depth detail on how to increase CSR when interacting with indigenous peoples. In short, they do not go far enough. It is therefore disappointing and surprising that the SDWG decided that there was already enough international guidance on CSR when clearly more still needs to be done to regulate this region’s growing offshore hydrocarbon industry. Indigenous peoples, and other local Arctic communities, do not feel that corporations are conducting their activities with sufficient social responsibility. There plainly needs to be Arctic-specific CSR guidance. The Arctic Council actively involves indigenous groups, Arctic and non-Arctic states, industry (increasingly the hydrocarbon industry), and environmental NGOs. Thus, the Arctic Council would have been in a unique position to provide a forum for constructive and productive dialogue between these stakeholders and

175. Id.
produce further guidance on CSR (perhaps through a multi-stakeholder initiative).

As discussed above, there are many instances where indigenous peoples feel that offshore oil companies are not adequately considering indigenous subsistence lifestyles or their ethical, social, and cultural needs. This is despite an apparent growth in international guidance relating to CSR and despite a growing web of guidance, policy, and international law affording growing protection and increased rights to indigenous peoples. Offshore oil exploration in the Arctic is increasing and CSR must develop in tandem to protect this region and its indigenous communities.

V. CONCLUSION

Environmental assessments are a key way of ensuring indigenous peoples’ involvement in decision-making regarding offshore oil developments. Currently, indigenous peoples’ involvement in these processes is often inadequate. If Canada wishes to drive forward its priorities, it will need to review and update the EIA Guidelines and strengthen the international law regulating EIAs and SEAs. Transboundary EIAs and SEAs will continue to be of limited effect in this region until all Arctic coastal states ratify the Espoo Convention and the SEA Protocol. The Arctic Council is well placed to raise SEA and EIA issues given its ability to create dialogue between states, industry, and indigenous peoples. It should do so, rather than decide that the EIA Guidelines do not need updating.

Furthermore, if development is truly for indigenous and northern peoples, the inclusion of FPIC in consultations appears crucial, given that the right to veto or get a project altered is a fundamental concept. Unfortunately, there is little to suggest indigenous and northern communities are asked for their FPIC to these developments. Canada and the United States have both reserved exception to the FPIC concept’s inclusion in UNDRIP, which illustrates that indigenous and northern peoples are not at the heart of decision-making regarding Arctic offshore oil developments.

Indigenous peoples carry an inequitable share of the burdens while receiving inadequate benefits when it comes to offshore hydrocarbon development. This issue must be revisited to prevent environmental injustice and to further the Canadian priorities.

Given the Arctic Council’s ability to involve many different stakeholders in dialogue, it is disappointing that they decided against
creating an Arctic-specific Corporate Social Responsibility policy—it is clearly an opportunity missed.

To make offshore oil development beneficial for northern and indigenous communities, all of these issues need to be addressed. Otherwise, there is a high probability that corporations and states will continue to benefit from the large profits made by offshore hydrocarbon development while the indigenous peoples and other northern communities who bear the risks once again lose out. There are obstacles in international law, policy, and governance that prevent development from being for northern and indigenous peoples. If Canada wishes to actualize its priorities, these shortcomings and gaps must be revisited during their two-year chairmanship.