
Articles

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

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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.¹ Canada's main priorities have been made resoundingly clear: "development for the people of the North."²

The Arctic is a region increasingly acknowledged as being rich in many resources.³ 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.⁴ Activities throughout the exploration and exploitation processes⁵ of the hydrocarbon industry can have a deleterious effect on indigenous peoples' environment, livelihood, food sources, and cultural activities.⁶ Furthermore, an oil spill could have a devastating effect upon these northern communities.

1. See *Canadian Chairmanship Program 2013–2015*, ARCTIC COUNCIL (May 15, 2013), <http://www.arctic-council.org/index.php/en/about-us/arctic-council/canadian-chairmanship/735-canadian-chairmanship-program-2013-2015>.

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).

3. Including minerals, heavy metals, and fish. See Lars Lindholt, *Arctic Natural Resources in a Global Perspective*, in *THE ECONOMY OF THE NORTH* (Solvieg Glomsrød & Ijule Aslaksen eds., 2006). See also RICHARD SALE & EUGENE POTAPOV, *THE SCRAMBLE FOR THE ARCTIC: OWNERSHIP, EXPLOITATION AND CONFLICT IN THE FAR NORTH* (2010).

4. Robert Snyder, *International Legal Regimes to Manage Indigenous Rights and Arctic Disputes from Climate Change*, 22 *COLO. J. INT'L ENVTL. L. & POL'Y* 1, 6 (2011); *Kiruna Ministerial Meeting*, ARCTIC COUNCIL (May 15, 2013), <http://www.arctic-council.org/index.php/en/events/meetings-overview/kiruna-ministerial-2013> (states that the well-being of the Aleutian people in the United States and the Russian Federation have been tied to the marine environment for millennia). See also LAURA WESTRA, *ENVIRONMENTAL JUSTICE & THE RIGHTS OF INDIGENOUS PEOPLES* 197–200 (2008).

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 Koivuvrova,

There have been various recent advancements in the international law, policy, and information-generation focusing on the offshore oil industry.⁷ 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.⁸ 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

The Importance of International Environmental Law in the Arctic, ARCTIC CENTER, <http://www.arcticcentre.org/InEnglish/SCIENCE-COMMUNICATIONS/Arctic-region/Articles/Environmental-law> (last visited Nov. 2011); Timo Koivurova, *Governance of Protected Areas in the Arctic*, 5 *UTRECHT L. REV.* 44 (2009); *Oil Spill Response Challenges in Arctic Waters*, WORLD WILDLIFE FOUND. (Jan. 22, 2008), <http://wwf.panda.org/?uNewsID=122240>; Sarah R. Hamilton, *Toxic Contamination of the Arctic: Thinking Globally and Acting Locally to Protect Arctic Ecosystems and People*, 15 *COLO. J. INT'L ENVTL L. & POL'Y* 71, 85–86 (2004). See also PROTECTION OF THE ARCTIC MARINE ENVIRONMENT (“PAME”), THE ARCTIC OCEAN REVIEW PROJECT—PHASE 1 REPORT 2009–2011, 30 (2011); TIMO KOIVUROVA & KAMRUL HOSSAIN, ARCTIC TRANSFORM, OFFSHORE HYDROCARBON: CURRENT POLICY CONTEXT IN THE MARINE ARCTIC 44 (2008), available at <http://arctic-transform.org/download/OffHydBP.pdf>.

7. See, e.g., Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic, May 15, 2013, DEP'T STATE BULL. (signed by eight Arctic states); *Task Force on Arctic Marine Oil Pollution Prevention*, ARCTIC COUNCIL (Jan. 30, 2014), <http://www.arctic-council.org/index.php/en/tfopp>; ARCTIC MONITORING AND ASSESSMENT PROGRAMME, ARCTIC OIL AND GAS 2007 (2007); ARCTIC COUNCIL, EMERGENCY PREVENTION PREPAREDNESS AND RESPONSE (“EPPR”), GUIDELINES AND STRATEGIES FOR OILY WASTE MANAGEMENT IN THE ARCTIC REGIONS (2009); ARCTIC COUNCIL, OFFSHORE OIL AND GAS GUIDELINES 2009 (2009) (updated guidelines); SUSTAINABLE DEVELOPMENT WORKING GROUP, REPORT ON ARCTIC ENERGY (2008); IVAR SINGSAAS & ALUN LEWIS, BEHAVIOUR OF OIL AND OTHER HAZARDOUS AND NOXIOUS SUBSTANCES SPILLED IN ARCTIC WATERS (2011), available at http://www.arctic-council.org/eppr/wp-content/uploads/2012/07/Final-Report-BoHaSA_23-02-20111.pdf; PAME, ANNEX 4—PROJECT PLAN ON ARCTIC OIL AND GAS MANAGEMENT, REGULATION AND ENFORCEMENT A LEGAL REGIME WEB-BASED INFORMATION RESOURCE (2011); ARCTIC COUNCIL, EPPR, RECOMMENDED PRACTICES FOR ARCTIC OIL SPILL PREVENTION (2012); *EPPR Workshop Observing an Oil Spill Response Exercise in Kirkenes*, ARCTIC COUNCIL (June 15, 2012), <http://www.arctic-council.org/index.php/en/environment-and-people/oceans/emergency-preparedness/552-eppr-workshop-observing-an-oil-spill-response-exercise-in-kirkenes-2>.

8. Relevant international law in this field includes: ARCTIC COUNCIL-PAME, ARCTIC OFFSHORE OIL AND GAS GUIDELINES (2009); FINNISH ENV'T INST., GUIDELINES FOR ENVIRONMENTAL IMPACT ASSESSMENT (EIA) IN THE ARCTIC (1997) [hereinafter EIA Guidelines]; Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 25, 1991, 1989 U.N.T.S. 309 [hereinafter Espoo Convention]; Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context, May 21, 2003, U.N. Doc. ECE/MP.EIA/2003/2 [hereinafter SEA Protocol]; Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 447 [hereinafter Aarhus Convention].

rights law and policy and at international forums.⁹ Furthermore, there is also growing non-binding guidance and policy on the relationship between indigenous peoples and the offshore oil companies.¹⁰

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."¹¹ They eat and utilize many marine animals including various types of fish, whales, seals, polar

9. *E.g.*, Indigenous and Tribal Peoples Convention, Feb. 2, 1994, 1650 U.N.T.S. 664 [hereinafter ILO 169]; Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/47/1 (2007) [hereinafter UNDRIP]; *Committee on the Elimination of Racial Discrimination*, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, <http://www2.ohchr.org/english/bodies/cerd> (last visited Feb. 2, 2014) [hereinafter CERD]; ECOSOC Res. 1985/17 of 28 May 1985 (establishing the Committee on Economic, Social and Cultural Rights); *Permanent Participants of the Arctic Council*, ARCTIC COUNCIL (Apr. 27, 2011), <http://www.arctic-council.org/index.php/en/about-us/permanent-participants>.

10. *E.g.*, INT'L FIN. CORP., SUSTAINABILITY FRAMEWORK (2012); IRENE SOSA, LICENSE TO OPERATE: INDIGENOUS RELATIONS AND FREE PRIOR AND INFORMED CONSENT IN THE MINING INDUSTRY (2011); *Extractive Industries Review Reports*, WORLD BANK, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTOGMC/0,,contentMDK:20306686~menuPK:336936~pagePK:148956~piPK:216618~theSitePK:336930,00.html> (last visited Feb. 6, 2014); INDIGENOUS PEOPLES (OP 4.10), WORLD BANK (2013) [hereinafter OP 4.10], available at <http://go.worldbank.org/UBJJIRUDP0>; ORG. FOR ECON. CO-OPERATION & DEV., GUIDELINES FOR MULTINATIONAL ENTERPRISES (2008); *Overview of the UN Global Compact*, UNITED NATIONS, <http://www.unglobalcompact.org/AboutTheGC/index.html> (last visited Feb. 6, 2014).

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-subsistent 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.¹² The need to include indigenous peoples in environmental assessments and the benefits from doing so are identified widely in international law.¹³ Such inclusion can eradicate what Erica-Irene Daes identifies as “development aggression.”¹⁴

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.¹⁵ 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.¹⁶

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.¹⁷ It is this “simple,” short food chain and the cold conditions that make the Arctic Ocean highly vulnerable to oil pollution.¹⁸ Ocean currents continually transport billions of tons of

12. See Snyder, *supra* note 4, at 6–7; TIMO KOIVUROVA, HENNA TERVO & ADAM STEPIEN, *INDIGENOUS PEOPLES IN THE ARCTIC* (2008). See also BERNARD STONEHOUSE, *ANIMALS OF THE ARCTIC: THE ECOLOGY OF THE FAR NORTH* 154–61 (1971).

13. International agreements and legislation include: U.N. GAOR, 46th Sess., Agenda Item 21, UN Doc A/Conf.151/26 (1992) [hereinafter Agenda 21]; EIA Guidelines, *supra* note 8; ARCTIC COUNCIL-PAME, *supra* note 8. Domestic agreements include: *Inuvialuit Final Agreement*, INUVIALUIT REGIONAL CORP., <http://www.irc.inuvialuit.com/about/finalagreement.html> (last visited Feb. 10, 2014) (prescribing decision-making rights and including the Beaufort Sea being within the settlement region); Marc G. Stevenson, *Indigenous Knowledge in Environmental Assessment*, 49 *ARCTIC* 276 (2006); Manley-Casimir, *supra* note 10.

14. Erica-Irene Daes talks about “development aggression” whereby extractive industries impose their development upon indigenous peoples without consent. Jeremie Gilbert & Cathal Doyle, *A New Dawn Over the Land*, in *REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLE* 304 (Stephen Allen & Alexandra Xanthaki eds., 2011) [hereinafter *REFLECTIONS ON THE UN DECLARATION*].

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.

17. ARCTIC COUNCIL, *ARCTIC CLIMATE IMPACT ASSESSMENT 12* (2010) [hereinafter *ACIA Report*].

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.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.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.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,²² the Espoo Convention,²³ the SEA Protocol,²⁴ the Aarhus Convention,²⁵ and the Convention on Biological Diversity.²⁶

1 (2007), available at http://awsassets.panda.org/downloads/nuka_oil_spill_response_report_final_jan_08.pdf; ARCTIC ENVTL. PROTECTION STRATEGY, DECLARATION ON THE PROTECTION OF THE ARCTIC ENVIRONMENT (1991), available at <http://www.arctic-council.org/index.php/en/document-archive/category/4-founding-documents>; Hamilton, *supra* note 6, at 74–75.

19. R.V. TAIT & F.A. DIPPER, ELEMENTS OF MARINE ECOLOGY 14–17 (1998); ACIA Report, *supra* note 17, at 454; PHILIP'S WORLD ATLAS AND GAZETTEER 8–9 (2003).

20. See generally ASLAUG MIKKELSEN & OLUF LANGHELLE, ARCTIC OIL & GAS—SUSTAINABILITY AT RISK (2008); KEES BASTMEIJER & TIMO KOIVUROVA, THEORY AND PRACTICE OF TRANSBOUNDARY ENVIRONMENTAL IMPACT ASSESSMENT (2008). See also *Information and links regarding EIA from Arctic States*, PAME, <http://www.pame.is/information-and-links-regarding-eia-from-arctic-states> (last visited May 15, 2014).

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.

22. EIA Guidelines, *supra* note 8.

23. Espoo Convention, *supra* note 8.

24. SEA Protocol, *supra* note 8.

25. Aarhus Convention, *supra* note 8.

26. Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79.

The EIA Guidelines²⁷ provide non-directive, Arctic-specific guidance for relevant stakeholders, particularly “local authorities, developers and local people.”²⁸ They encourage the use of baseline information and herald the importance of indigenous knowledge.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.”³⁰ The Guidelines also state that this participation should be ongoing throughout the life of the project.³¹ This ongoing approach to EIAs sets an important premise and could potentially prevent public involvement from being a brief and tokenistic occurrence.³²

The EIA Guidelines were heavily anticipated and “warmly welcomed” when they were created in 1997.³³ Unfortunately, research indicates that those who initiate Arctic EIAs “rarely know that the Guidelines exist.”³⁴ The reasons cited for this lack of knowledge include a lack of follow-up mechanisms, implementation problems,³⁵ and a need for capacity building. While these are not insurmountable problems, little appears to have been done to address them.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

27. EIA Guidelines, *supra* note 8.

28. *Id.* at 5–6.

29. *Id.* at 16–17, 37–38.

30. *Id.* at 32.

31. *Id.* at 33–34.

32. *See infra* notes 109–11 and accompanying text.

33. BASTMEIJER & KOIVUROVA, *supra* note 20, at 164–65. *See also* NEIL CRAIK, THE INTERNATIONAL LAW OF EIA: PROCESS, SUBSTANCE & INTEGRATION 161 (2008).

34. Research was carried out at the Arctic Centre’s Northern Institute for Environmental and Minority, for the Finnish Ministry of the Environment. BASTMEIJER & KOIVUROVA, *supra* note 20, at 165.

35. BASTMEIJER & KOIVUROVA, *supra* note 20, at 166; Emma Barry-Pheby, *The Growth of Environmental Justice and Environmental Protection in International Law: In the Context of Regulation of the Arctic’s Offshore Oil Industry*, 8 SUSTAINABLE DEV. L. & POL’Y 48 (2012–2013).

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.”

widely acknowledged since their creation sixteen years ago.³⁷ It is disappointing that there has been, and continues to be, a concerted reluctance to update the EIA Guidelines.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.³⁹

The Arctic Offshore Oil and Gas Guidelines (“AOGG 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.⁴⁰ These Guidelines, which are the culmination of the work of several Arctic Council working groups, provide detailed guidance for Arctic states.⁴¹ While they are not legally binding, the AOGG 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.”⁴²

The AOGG 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.”⁴³ Yet, the AOGG 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”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.”⁴⁵ It is disappointing that the AOGG

37. CRAIK, *supra* note 33, at 107; Timo Koivurova & David L. Vanderzwaag, *The Arctic Council at 10 Years: Retrospect and Prospects*, 40 U.B.C. L. REV. 121, 157–58 (2007); POLAR LAW 39 (Natalia Loukacheva ed., 2010).

38. See Barry-Pheby, *supra* note 35.

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).

40. ARCTIC COUNCIL, SENIOR ARCTIC OFFICIALS REPORT TO MINISTERS 10 (2013).

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).

42. *Id.* at 4.

43. *Id.* at 11–12.

44. *Id.* at 19 (emphasis added).

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.”⁴⁶ 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.⁴⁷ 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.⁴⁸

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.⁴⁹ 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.

51. WORLD WILDLIFE FOUND., CANADA WESTERN ARCTIC OIL SPILL RESPONSE GAPS 7 (2011).

52. JO TREWEEK, ECOLOGICAL IMPACT ASSESSMENT 30 (2009); CRAIK, *supra* note 33.

53. WORLD WILDLIFE FOUND., *supra* note 51, at 6.

54. See ARCTIC COUNCIL, *supra* note 4. See, e.g., *Document Archive*, ARCTIC COUNCIL, <http://www.arctic-council.org/index.php/en/document-archive/category/440-deliverables> (Archive of the Council’s scientific reports).

55. JO TREWEEK, ECOLOGICAL IMPACT ASSESSMENT 25 (2009).

56. SEA Protocol, *supra* note 8.

57. Convention on Biological Diversity, *supra* note 26 (opened for signature June 5, 1992).

58. See *List of Parties*, CONVENTION ON BIOLOGICAL DIVERSITY, <http://www.cbd.int/convention/parties/list/> (last visited Feb. 9, 2014).

59. See *History of the Convention*, CONVENTION ON BIOLOGICAL DIVERSITY, <http://www.cbd.int/history/default.shtml> (last visited Feb. 9, 2014).

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).⁶⁰ 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."⁶¹ Article 6(8) then stipulates that the result of public participation should be given "due account."⁶² Unfortunately, given that it only binds the Arctic coastal state of Norway, the Aarhus Convention is of limited effect.⁶³

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")⁶⁴ 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.⁶⁵ Conversely, the ratification of ILO 169 by

60. Aarhus Convention, *supra* note 8; *Status of Aarhus Convention*, UNITED NATIONS, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-13&chapter=27&lang=en (last updated Feb. 9, 2014).

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.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 sub-surface resources or rights to other resources pertaining to lands.”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.”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.”⁶⁹

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

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

(Claire Charters & Rodolfo Stavenhagen eds., 2009) [hereinafter MAKING THE DECLARATION WORK].

66. Matt Berg, Kiruna Sami Representative, Arctic Indigenous Peoples’ Conference (May 12–13, 2013) (on file with author).

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)).

68. *Id.*

69. *Id.*

70. UNDRIP, *supra* note 9.

71. See *infra* pp. 15–17 for a discussion of the unprecedented role of indigenous peoples in the creation of UNDRIP.

72. *Information Page on the Declaration on the Rights of Indigenous Peoples*, UNITED NATIONS PERMANENT FORUM ON INDIGENOUS ISSUES, <http://undesadspd.org/IndigenousPeoples/DeclarationontheRightsofIndigenousPeoples.aspx> (last visited Feb. 10, 2014).

73. *Id.* The other two countries to vote against UNDRIP were Australia and New Zealand.

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.

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.”⁷⁵ 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.”⁷⁶ Burger⁷⁷ explains that, as some states have set lower national and regional standards for resources extraction, UNDRIP is therefore not *opinio juris*.⁷⁸ Furthermore, the Canadian government emphatically stated that the Declaration has “no legal effect in Canada and its provisions do not represent customary international law.”⁷⁹ 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.⁸⁰

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.

75. Clive Baldwin & Cynthia Morel, *Using the United Nations Declaration on the Rights of Indigenous Peoples in Litigation*, in REFLECTIONS ON THE UN DECLARATION, *supra* note 14, at 121, 124.

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.

79. U.N. GAOR, 61st Sess., 107th plen. mtg., U.N. Doc. A/61/PV.107, at 13 [hereinafter McKee Statement]; *see also* Dorough, *supra* note 78, at 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).⁸¹ The idea of seeking “consent” is important to many indigenous peoples⁸² 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.⁸³ Increasingly, international fora⁸⁴ 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”⁸⁵ states that, “few mining or oil and gas companies have adopted a formal policy committing to FPIC.”⁸⁶ Others, it states, have adhered to the ethos of FPIC by walking away from certain projects.⁸⁷ 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.”⁸⁸ 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

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).

82. Asbjørn Eide, *The Indigenous Peoples, The Working Group on The Working Group on Indigenous Populations and the Adoption of the UN Declaration on the Rights of Indigenous Peoples*, in MAKING THE DECLARATION WORK, *supra* note 65, at 32, 44.

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 statement⁹⁰ 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.

91. J  r  mie Gilbert & Cathal Doyle, *A New Dawn over the Land: Shedding Light on Collective Ownership and Consent*, in REFLECTIONS ON THE UN DECLARATION, *supra* note 14, at 289, 316–17.

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* Jędrzej 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*, 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.”⁹⁶ 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.⁹⁷ 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.⁹⁸ These are only a couple of examples of a more widespread lack of opportunities for meaningful public participation.⁹⁹

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

www.nunatsiaqonline.ca/stories/article/65674russia_stomps_on_human_rights_of_its_arctic_indigenous_citizens_report; Louie Porta & Nigel Bankes, *Becoming Arctic Ready: Policy Recommendations for Reforming Canada's Approach to Licensing and Regulating Offshore Oil and Gas in the Arctic*, OCEANS NORTH (Sept. 2011); MIKKELSEN & LANGHELLE, *supra* note 20, at 163–66; House of Commons (Environmental Audit Committee), UK Government Paper 7/24, *Protecting the Arctic* at n.376 (Sept. 2012) [hereinafter House of Commons]; Letter from Christopher Debicki, Nunavut Projects Director, to Nunavut Impact Review Board re: “Part 4 screening for the Geological Survey of Canada’s “Eastern Canadian Arctic Seismic Experiment,” ECASE, available at http://oceansnorth.org/sites/default/files/attachments/ONC_NIRB_Comments_Final_0_0.pdf; see also Gail Fondahl & Anna Sirina, *Oil Pipeline Development and Indigenous Rights in Eastern Siberia*, in INDIGENOUS AFFAIRS 2-3/06 ARCTIC OIL AND GAS DEVELOPMENT (2006), http://www.iwgia.org/publications/search-pubs?publication_id=46; Alex Boyd, *The Worst Predator' is Mining: Arctic Side-conference in Sweden*, NUNATSIAQ ONLINE (May 13, 2013), www.nunatsiaqonline.ca/stories/article/65674worst_predator_is_mining_arctic_side-conference_in_sweden/. Frynas discusses just one project that he identified in over a decade of research on Nigeria’s oil industry that illustrates best practice. See Frynas, *supra*, at 589–90; but see MIKKELSEN & LANGHELLE, *supra* note 20, at 166.

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. *Qikiqtani 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.¹⁰⁰ 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.¹⁰¹ 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.¹⁰²

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.¹⁰³ Furthermore, international law must provide a more robust EIA system to prevent tokenistic practices.¹⁰⁴ 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).

102. For a discussion of indigenous peoples views on resource development, *see* Chief Joe Linklater, *The Arctic and Energy: Exploration and Exploitation—Indigenous Peoples & Industry*, 30 CAN-US L.J. 301 (2004); Arctic Indigenous Peoples' Conference (May 12–13, 2013) (on file with author).

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.¹⁰⁵ A movement to acknowledge that black Americans were being subjected to environmental hazards significantly more than their Caucasian counterparts followed this.¹⁰⁶ Although it is generally accepted that environmental justice is a multi-dimensional concept,¹⁰⁷ this Article’s focus is on the elements of distributive and procedural justice.¹⁰⁸

B. Distributive Justice

The concept of distributive justice considers the risks incurred against the benefits received to assess whether they are equitably distributed.¹⁰⁹ 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.”¹¹⁰

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.

106. Mike Ewall, *Legal Tools for Environmental Equity vs. Environmental Justice*, 4 SUSTAINABLE DEV. L. & POL’Y XIII, 4 (2012–2013); WESTRA, *supra* note 4.

107. Barry-Pheby, *supra* note 35.

108. See C.J. Alexander & Mallory Crew, *Willful Blindness about Indigenous Peoples: The Democratic Deficit and Canadian Public Policy Making*, 17 ASIAN J. OF CAN. STUDIES 47 (2011); WESTRA, *supra* note 4; NGOC HO, JSIS TASK FORCE, HONORING OTTAWA’S PROMISES TO NUNAVUT (2013).

109. Ewall, *supra* note 106.

110. Lynda M. Collins & Meghan Murtha, *Indigenous Environmental Rights in Canada: Right to Conservation Implicit in Treaty and Aboriginal Rights to Hunt, Fish and Trap*, 47 ALBERTA L. REV. 959, 961 (2010).

sufficient reparation for these losses.¹¹¹ Scholarly works note that, when factoring in economic costs, the value of subsistence living should be duly considered.¹¹² 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.’”¹¹³

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.”¹¹⁴ Mikkelsen and Langhelle state that onshore Alaskan hydrocarbon development is seen to have benefited communities by providing “new infrastructure, modern equipment and lifestyle.”¹¹⁵ 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.”¹¹⁶ 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.”¹¹⁷

The domestic benefits from an Arctic offshore industry include increased employment, revenues, and business opportunities.¹¹⁸ Over eighty percent of the state income of Alaska comes from the oil industry; some counties have borrowed substantially against this predicted income.¹¹⁹ Some Greenlanders, desiring independence from Denmark,

111. R.J. Grover et al., *Indigenous Peoples’ Interests and the Oil-Gas Industry*, 20th Annual European Real Estate Society Conference (July 3–6, 2013), available at http://eres.scix.net/data/works/att/eres2013_143.content.06546.pdf.

112. MIKKELSEN & LANGHELLE, *supra* note 20, at 321 (citing Poppel’s study).

113. *Id.*

114. *Our Commitment to the Community*, SHELL US, www.shell.us/aboutshell/projects-locations/alaska/community.html (last visited Feb. 9, 2014).

115. MIKKELSEN & LANGHELLE, *supra* note 20, at 139.

116. Alice Ukoko, CEO Women of Africa, Arctic Indigenous Peoples’ Conference (May 12–13, 2013) (on file with author).

117. Kumi Naidoo, Greenpeace Executive Director, Arctic Indigenous Peoples’ Conference (May 12–13, 2013) (on file with author).

118. W. Spicer & T. Bath, *The Canadian Arctic: The Changing Seascape of Offshore Oil and Gas Exploration Issues*, 48 ALTA L. REV. 255, 288 (2010–2011); PAME, BEST PRACTICES IN ECOSYSTEM BASED OCEANS MANAGEMENT IN THE ARCTIC (2009); MIKKELSEN & LANGHELLE, *supra* note 20.

119. N. Flanders & R.V. Brown, *Justifying Public Decisions in Arctic Oil and Gas Development: American and Russian Approaches*, 51 ARCTIC 264 (1998).

support the oil industry.¹²⁰ 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.¹²¹ The United States implemented a grant program to encourage local support for outer continental-shelf leasing.¹²² 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,¹²³ 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.¹²⁴ 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.¹²⁵ 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 particularly noticeable in Nunavut.¹²⁶

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.

124. MIKKELSEN & LANGHELLE, *supra* note 20, at 323–25, 173–74. *See also* Frynas, *supra* note 95; Nicholas E. Flanders et al., *Justifying Public Decisions in Arctic Oil and Gas Development: American and Russian Approaches*, 51 ARCTIC 262, 264 (1998); *see generally* BARRY ZELLEN, ON THIN ICE—THE INUIT, THE STATE AND THE CHALLENGE OF ARCTIC SOVEREIGNTY (2009).

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.¹²⁷ 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.”¹²⁸

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.¹²⁹ It also resulted in a huge number of marine mammal and bird mortalities.¹³⁰ 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.¹³¹ 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.¹³² 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.¹³³

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.

128. MIKKELSEN & LANGHELLE, *supra* note 20, at 139; see also Stanley D. Rice, *Persistence, Toxicity and Long-Term Environmental Impact of the Exxon Valdez Oil Spill*, 7 U. ST. THOMAS L.J. 55 (2009); *Oil Spill Facts*, EXXON VALDEZ OIL SPILL TRUSTEE COUNCIL, www.evostc.state.ak.us/facts/qanda.cfm (last visited May 15, 2014).

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 ASSOCS., 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 reconstitute 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 Council¹³⁴ and with other international law-making processes.¹³⁵ Consideration is given to the increasing inclusion of outside influences¹³⁶ 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”¹³⁷ set a new precedent in international lawmaking

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).

134. *See Sustainable Development Working Group*, ARCTIC COUNCIL, <http://portal.sdwg.org> (acknowledging that indigenous peoples often have difficulty 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).

135. Such as indigenous peoples role in the creation of UNDRIP and ILO 169.

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.

137. Erica-Irene Daes, *The U.N. Declaration On The Rights Of Indigenous Peoples: Background and Appraisal*, in REFLECTIONS ON THE UN DECLARATION, *supra* note 14, at 38–39; *see* MAKING THE DECLARATION WORK, *supra* note 65; WESTRA, *supra* note 4; Lillian Aponte Miranda, *Indigenous Peoples as International Lawmakers*, 32 *U. PA. J. INT’L L.* 203 (2010).

that produced a powerful Declaration with the “potential for driving cultural and political transformations.”¹³⁸

Six indigenous groups are permanent participants in the Arctic Council.¹³⁹ 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.¹⁴⁰ 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.¹⁴¹

In May of 2013, the Arctic Council accepted six applications for new state observers. There are now twelve observer states,¹⁴² eleven NGOs, and nine inter-governmental and inter-parliamentary organizations.¹⁴³ 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.”¹⁴⁴ With the increasing input of non-Arctic states all lobbying for their own

138. Daes, *supra* note 137, at 38.

139. The six permanent participants are: Arctic Athabaskan Council, Aleut International Association, Gwich’in Council International, Inuit Circumpolar Council, Russian Association of Indigenous Peoples of the North, and Saami Council; *see Permanent Participants*, ARCTIC COUNCIL (Apr. 27, 2011), <http://www.arctic-council.org/index.php/en/about-us/permanent-participants/123-resources/about/permanent-participants>.

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.

142. The twelve state observers are: France, Germany, The Netherlands, Poland, Spain, United Kingdom, People’s Republic of China, Italian Republic, State of Japan, Republic of Korea, Republic of Singapore and Republic of India. *Observers*, ARCTIC COUNCIL (Apr. 27, 2011), <http://www.arctic-council.org/index.php/en/about-us/arctic-council/observers>.

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.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.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.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.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.

145. *Arctic Athabaskan Council*, ARCTIC COUNCIL, *supra* note 4.

146. *RAIPON Representative*, ARCTIC COUNCIL, *supra* note 4.

147. Kamrul Hossain, *The EU ban on the Import of Seal Products and the WTO Regulations: Neglected Human Rights of the Arctic Indigenous Peoples*, 49 POLAR RECORD 154 (2013), available at <http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=8855093>; Sandra Cavalieri et al, *EU Arctic Footprint & Policy Assessment*, ECOLOGIC INST. (2010), available at http://www.ecologic.eu/download/vortrag/2010/Cavalieri_ESA_Dec8_2010.pdf.

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.¹⁴⁹ 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.”¹⁵⁰ Fora around the globe are increasingly considering CSR in an environmental context.¹⁵¹ Additionally, some commentators exert that human rights law should provide obligations on corporations.¹⁵²

Unfortunately, indigenous people often feel that the offshore oil industry does not deal with them in a socially responsible way.¹⁵³ 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. Frynas¹⁵⁴ identifies the profound inability of such “social investments” to benefit local communities.¹⁵⁵ Frynas also notes that oil companies often lack the capacity to address some of the complex social problems that they encounter.¹⁵⁶

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).

151. *E.g.* Report of the World Commission on Environment and Development; Our Common Future, U.N. Doc. A/42/427 (Aug. 4, 1987), *available at* <http://www.un-documents.net/wced-ocf.htm>; *Corporate Responsibility*, WORLD BANK, www.crinfo.worldbank.org/wbcrinfo/node/4 (last visited Feb. 9, 2014); Additionally, many other organizations, including Ceres, The EU, and The Arctic Council, have also considered CSR in the environmental context.

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.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.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."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

157. See David B. Spence, *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.

158. See Teresa Meadows, *The Canadian EIA Process: The Purpose, the Process, The Players and the Pitfalls*, MILLER THOMSON, <http://www.ualberta.ca/~jbb/files/422-2012-Lec%2006-Environmental%20Assessment.pdf> (last visited May 15, 2014).

159. ARCTIC COUNCIL, *supra* note 4. See also Bjørn-Tore Blindheim, *Towards a Convergent Institutional Perspective on Corporate Social Responsibility*, available at <http://brage.bibsys.no/xmlui/bitstream/id/181988/Blindheim,%20Bj%C3%B8rn-Tore%20PhD.pdf>; MIKKELSEN & LANGHELLE, *supra* note 20; WESTRA, *supra* note 4, at 118–19.

web of existing guidelines and frameworks.¹⁶⁰ 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.¹⁶¹

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.”¹⁶² It sets an objective to apply FPIC to affected indigenous peoples in prescribed circumstances. It then elaborates on these circumstances¹⁶³ 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.”¹⁶⁴ 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.”¹⁶⁵

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

160. See generally INT’L FIN. CORP., IFC SUSTAINABILITY FRAMEWORK—POLICY AND PERFORMANCE STANDARDS ON ENVIRONMENTAL AND SOCIAL SUSTAINABILITY (2012), available at http://www.ifc.org/wps/wcm/connect/b9dadb004a73e7a8a273fff998895a12/IFC_Sustainability_+Framework.pdf?MOD=AJPERES; SOSA, *supra* note 10; *Extractive Industries Review*, WORLD BANK, http://www.ifc.org/wps/wcm/connect/Industry_EXT_Content/IFC_External_Corporate_Site/Industries/Oil,+Gas+and+Mining/Development_Impact/Development_Impact_Extractive_Industries_Review/ (last visited May 15, 2014); OP 4.10, *supra* note 10; ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 10; UNITED NATIONS GLOBAL COMPACT, <http://www.unglobalcompact.org/> (last visited May 15, 2014); *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration)*, INT’L LABOUR ORG. (Jan. 1, 2006), http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm.

161. *CSR in the Arctic—Way Forward*, ARCTIC COUNCIL (Nov. 2012), <http://www.arctic-council.org/index.php/en/document-archive/category/393-5-human-development?download=1422:csr-in-the-arctic-non-paper>.

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.¹⁶⁶

The “Licence to Operate–Indigenous Relations and Free Prior and Informed Consent in the Mining Industry”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.”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.¹⁶⁹

The World Bank’s Indigenous Peoples Policy¹⁷⁰ states that for a project to gain financing¹⁷¹ it must allow “free, prior and informed consultation in broad community support to the project by the affected indigenous peoples.”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.”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.”¹⁷⁴ The

166. ARCTIC COUNCIL, *supra* note 4.

167. SOSA, *supra* note 10, at 2.

168. *Id.* at 5.

169. *Id.*

170. OP 4.10, *supra* note 10.

171. World Bank funding for the hydrocarbon industry is primarily, although not exclusively, in Africa. Some funding has been given to Russia, for example.

172. OP 4.10, *supra* note 10, ¶ 1.

173. *Id.*

174. *Id.* ¶ 18.

Policy also stipulates that indigenous peoples should share equitably in profits.¹⁷⁵ 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."¹⁷⁶ 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.¹⁷⁷

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.*

176. *The Ten Principles*, UNITED NATIONS GLOBAL COMPACT, <http://www.unglobalcompact.org/abouttheGC/TheTenPrinciples/index.html> (last visited Feb. 10, 2014).

177. ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 10, annex 6.A4.

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.