ARCTIC ENERGY DEVELOPMENT AND BEST PRACTICES ON CONSULTATION WITH INDIGENOUS PEOPLES

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ABSTRACT

Arctic energy development has massive potential to help meet world energy needs and promote sustainable Arctic development. At the same time, the Arctic is largely inhabited by Indigenous peoples and has special environmental vulnerabilities that can impact them. Norms of consultation with Indigenous peoples are, thus, particularly important in Arctic contexts. This Article examines this very much under-studied issue. It seeks to make an innovative contribution to understanding best practices on consultation appropriate to Arctic-specific contexts, considering evolving national and international law norms of consultation. Part II of this Article carries out a comparison of existing implementations of international norms of consultation in countries across the Arctic region. Part III distils best practices on consultation from both evolving national and international law in the Arctic states, as well as in other states whose practices can shed light. Part IV examines unique Arctic circumstances and develops a set of categories for Arctic-specific consideration of consultation. Part V ties together the best practices and impact categories of Part IV, and comments on the existing state practices discussed in Part II, signaling directions in which different states might consider shifting so as to best respect consultation norms. The underlying aim of this Article is to offer practical recommendations that facilitate Arctic energy development in responsible ways, thereby furthering its long-term acceptability and potential.

I. INTRODUCTION

Energy development in the Arctic has enormous potential to meet world energy needs and promote sustainable development in the Arctic.[1] At the

[1] *See, e.g.*, The Brookings Institution, The Arctic: Energy, Indigenous Communities and the Arctic Council 44 (Apr. 17, 2013) (uncorrected transcript), *available at* http://www.brookings.edu/~/media/events/2013/4/17%20energy%20arctic/20130417_arctic_energy_transcript. Alaska Lieutenant Governor Mead Treadwell reported that the Arctic holds an estimated 13% of the world's oil and 30% of the world's natural gas. *Id.*

same time, evolving norms of international law on consultation with Indigenous peoples highlight a significant area of responsibility for states and industry actors operating in the region.[2] These norms on consultation, thus, pose an important set of boundaries in relation to energy development and are worthy of careful and detailed study. This Article seeks to analyze the under-examined, but important, topic of consultation norms with Indigenous peoples in the specific context of Arctic energy development. This Article will also describe, more generally, the evolving modes of participation by Indigenous peoples in Arctic energy development and argue that it may represent a means of further attaining the purposes of consultation while making Arctic energy development something that can contribute to the prospects and opportunities for all communities. In doing so, this Article adds significantly to the body of knowledge on these policies, while developing novel arguments concerning the implications of different policies.

Consultation with Indigenous peoples on decisions that affect them is a concept present in a number of provisions of the United Nations Declaration on the Rights of Indigenous Peoples[3] adopted by the General Assembly in 2007.[4] There are, however, ongoing debates on the legal status of that Declaration,[5] so it is worth noting that there are other bases altogether for affirming an international law status for consultation with Indigenous peoples. There have been both briefer assertions[6] and larger

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[2] *See id; see also* DWIGHT G. NEWMAN, THE DUTY TO CONSULT: NEW RELATIONSHIPS WITH ABORIGINAL PEOPLES c. 5 (2009) (referring to developing international law on consultation and discussing the duty to consult in Canada). *See generally* Special Rapporteur on the Situation of Hum. Rts. and Fundamental Freedoms of Indigenous People, Hum. Rts. Council, U.N. Doc. A/HRC/12/34 (July 15, 2009) (focusing on the duty to consult); Int'l Law Ass'n Res. 5/2012, Rights of Indigenous People, para. 5 (Aug. 26-30, 2012) (describing generally a "right [of Indigenous peoples] to be consulted with respect to any project that may affect them and the related right that projects significantly impacting their rights and ways of life are not carried out without their prior, free and informed consent"); Dwight G. Newman, *Norms of Consultation with Indigenous Peoples: Decentralization of International Law Formation or Reinforcement of States' Role?*, *in* INTERNATIONAL LAW IN THE NEW AGE OF GLOBALIZATION (Andrew Byrnes et al. eds., 2013) (discussing the development of norms of consultation, particularly in terms of the interpretive methods within the Special Rapporteur's report).

[3] Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/47/1 (Sept. 13, 2007).

[4] *See generally* REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (Stephen Allen & Alexandra Xanthaki eds., 2011) (offering detailed commentary in a series of essays on the history and status of the Declaration).

[5] *See generally id.* (addressing the legal status of Declaration from different perspectives).

[6] *See, e.g.*, JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 155-56 (2d ed. 2004); Int'l Law Ass'n, *supra* note 2, para. 6.

arguments[7] that a duty of consultation with Indigenous peoples has status as customary international law. Taking a different approach, the Inter-American Court of Human Rights has noted the widespread presence of consultation provisions in national law and has recently stated that "the obligation to consult, in addition to being a treaty-based provision, is also a general principle of international law."[8] The exact nature of the international law norm of consultation with Indigenous peoples may be subject to further interpretation and analysis, but this Article in many respects begins with the premise that meaningful consultation is indeed required on actions that significantly affect Indigenous peoples. Further, the more interesting questions concern the nature of best consultation practices.

Arctic states that wish to undertake oil and gas development would be well advised from a number of perspectives to act as if consultation has become a norm and to undertake appropriate policy in this context.[9] Indeed, the issue of whether to undertake consultation is not in question since all of the Arctic states at issue accept the obligations and are actually developing larger frameworks for such matters as Indigenous participation in energy development.[10] There is no evasion of responsibility among Arctic states, but, sometimes, there are some difficulties that can benefit from further information on the practices of other states and from developing best practices on consultation geared to the challenges in the Arctic.[11]

The Arctic context, while offering particularly rich untapped development potential,[12] presents various specialized challenges for energy development.[13] These include features of the Arctic environment that make development physically challenging.[14] Other challenges relate to an underdeveloped infrastructure and legal environment in complex contexts,

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[7] *See* Dwight G. Newman, Toward a New Positivist Analysis of International Law Norms from Heterogeneous State Practice: An Application to Norms of Consultation with Indigenous Peoples, Speaker Series Presentation to Lewis & Clark Law School Faculty (Feb. 19, 2013).

[8] Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 242, para. 164 (June 27, 2012), *available at* http://corteidh.or.cr/docs/casos/articulos/seriec_245_ing.pdf [hereinafter Sarayaku].

[9] *See* Dwight G. Newman, Corporate Stakeholder Effects on International Law Norms of Consultation with Indigenous Communities, Presentation to World Mining Congress (WMC) (Aug. 12, 2013) (forthcoming in WMC2013 Proceedings) (discussing the value of staying ahead of the regulatory curve of international law).

[10] *See infra* Part II.

[11] *See infra* Part II.

[12] *See* The Brookings Institution, *supra* note 1.

[13] *See infra* Part IV.

[14] *See infra* Part IV.

such as Arctic marine shipping and its ability to move product to market.[15] In at least some Arctic states, governance mechanisms affecting Arctic regions have been adapted to focus on the needs of the region.[16] However, at least some of these various challenges will potentially be shifting in the years ahead, and Arctic development will cross over the threshold of possibility in ways far beyond what some have expected in the past.[17]

However, among the challenges is the ongoing development of relationships with the Indigenous peoples of the Arctic.[18] Aside from any legal norms on consultation, as referenced above, there are several reasons for giving careful attention to the relationships as part of Arctic energy development. First, if there were a gamble on underdeveloped law, any course would present risks of future legal determinations against the development initiatives with possibly worse consequences.[19] Such legal risks are not entirely conducive to corporate stakeholder involvement in development.[20] Second, apart from the outright legal requirements,

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[15] *See generally* ARCTIC COUNCIL, ARCTIC MARINE SHIPPING ASSESSMENT 2009 REPORT (2009), *available at* http://www.arctic.noaa.gov/detect/documents/AMSA_2009_Report_2nd_print.pdf (providing a comprehensive overview of the technical, infrastructural, governance, and legal issues related to marine shipping).

[16] *See, e.g.*, DWIGHT NEWMAN, NATURAL RESOURCE JURISDICTION IN CANADA 23-30 (2013) (discussing the ongoing jurisdiction devolution over natural resource development from the federal government to Canada's northern territorial governments). *But see* NATALIA LOUKACHOVA, THE ARCTIC PROMISE: LEGAL AND POLITICAL AUTONOMY IN GREENLAND AND NUNAVUT (2007) (comparing the development of Inuit governmental autonomy in Greenland and the new Canadian territory of Nunavut).

[17] *See generally* FRÉDÉRIC BEAUREGARD-TELLIER, THE ARCTIC: HYDROCARBON RESOURCES (2008) (discussing the potential of hydrocarbon development in the Arctic, with some focus on Canada); KEN COATES ET AL., ARCTIC FRONT: DEFENDING CANADA IN THE FAR NORTH 137-87 (2008) (discussing implicitly how changes in technology, climate, politics, and law increase the accessibility of Canadian Arctic resources).

[18] *See generally* BILL GALLAGHER, RESOURCE RULERS: FORTUNE AND FOLLY ON CANADA'S ROAD TO RESOURCES (2012).

[19] *See, e.g.*, Dene Tha' First Nation v. Canada (Minister of Env't), 2006 F.C. 1354, *aff'd* 2008 F.C.A. 20 (Can.) (failing to consult adequately or at an appropriate stage of major northern pipeline development lead to adverse duty to consult decision and significant delays for project); *see also* Ian Keay & Cherie Metcalf, *Property Rights, Resource Access and Long-Run Growth*, 8 J. EMPIRICAL LEGAL STUD. 792 (2011); Cherie Metcalf, *Compensation as Discipline in the Justified Limitation of Aboriginal Rights: The Case of Forest Exploitation*, 33 QUEEN'S L.J. 385 (2008) (examining the significant impact of unexpected changes in Indigenous rights doctrine on company share prices).

[20] NEWMAN, NATURAL RESOURCE JURISDICTION IN CANADA, *supra* note 16, at 94 (arguing that "[j]urisdictions with settled arrangements with their Aboriginal [Indigenous] communities may thus be particularly attractive for resource development projects, with one additional element of business risk removed").

corporate stakeholders that are involved in energy development likely wish to have a "social licen[s]e" for development.[21] This social approval is similar to the ethical business practices and long-term reputational advantages for the types of corporations likely to be involved in Arctic energy development.[22] Third, there are win-win possibilities available through Indigenous peoples' participation in Arctic energy development, particularly with longer-term development that enables Indigenous individuals to become part of the workforce and Indigenous businesses to become suppliers; the remoteness of many Arctic regions means that the involvement of local populations can often reduce the costs and challenges of importing everything from outside the region.[23]

Taking the general need for Indigenous consultation — and potentially participation — in Arctic energy development, this Article discusses the appropriate forms for that consultation and participation, taking into account the special context of the Arctic. The Arctic environment has certain vulnerabilities in its oil and gas development beyond those in other

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[21] *See, e.g.*, Neil Gunningham, Robert A. Kagan & Dorothy Thornton, *Social License and Environmental Protection: Why Businesses Go Beyond Compliance*, 29 L. & SOC. INQUIRY 307 (2004) (examining social license within the pulp and paper industry, arguing that social license helps explain why companies go beyond strict legal requirements to attempt to meet expectations from communities); Jason Prno & D. Scott Slocombe, *Exploring the Origins of 'Social License to Operate' in the Mining Sector: Perspectives from Governance and Sustainability Theories*, 37 RESOURCES POL'Y 346, 354 (2012) (seeking to "conceptualize the emergence of SLO in the mining sector in order to better understand its complex origins and implications for resource developers," while fulfilling the legal requirements exposing companies to ongoing risk of social holdups). *See generally* DEFENDING THE SOCIAL LICENCE OF FARMING: ISSUES, CHALLENGES AND NEW DIRECTIONS FOR AGRICULTURE (Jacqueline Williams & Paul Martin eds., 2011) (constituting one of the few collections offering serious scholarly attention to the concept of social license).

[22] *See* Gary Lynch-Wood & David Williamson, *The Social Licence as a Form of Regulation for Small and Medium Enterprises*, 34 J.L. & SOC'Y 321, 325-26, 328-29 (2007) (identifying the reputational impacts on firms as one of three key elements of social license considerations, while arguing that pressures are greater on large firms). *But see generally* Alyson Warhurst, *Corporate Citizenship and Corporate Social Investment: Drivers of Tri-Sector Partnerships*, 1 J. CORP. CITIZENSHIP 57 (2001) (advocating the need for formalization of social license to make it fully effective).

[23] *See, e.g.*, NEWMAN, NATURAL RESOURCE JURISDICTION IN CANADA, *supra* note 16, at 99 (stating that "[a]n appropriately constructed impact benefit agreement (IBA) or similar instrument can achieve win-win results for an Aboriginal community and for a mining company. The latter may benefit particularly through the removal of legal and thus business risks that otherwise exist. But it may derive other benefits as well, such as arrangements to bolster a trained labour force in the remote region in which particular mining operations occur."); ROCKY MOUNTAIN MINERAL LAW FOUNDATION, AMERICAN LAW OF MINING § 214.04[4] (2d ed. 2012) (discussing the value of impact benefit agreements to corporations in making available a longer-term labor force and service in remote regions which are otherwise difficult to recruit and sustain).

geographic regions.[24] Partly because of these vulnerabilities, oil and gas development in certain Arctic regions has already been politically controversial.[25] Many Arctic Indigenous communities welcome the economic development that comes with energy development.[26] At the same time, possible impacts on them and their traditional way of life can be significant and sometimes unexpectedly arise due to players without past Arctic involvement.[27]

This Article innovatively analyzes the best and most appropriate consultation practices by drawing from evolving national and international law norms of consultation and applying them to the particular circumstances of Arctic environments and cultures. To do so, this Article (1) surveys key features of existing legal frameworks specific to the region; (2) sets out key features of evolving norms on consultation and implied best practices; (3) categorizes the variety of typical Arctic circumstances to which these norms must be applied; and (4) goes on to apply the best practices to offer recommendations for each of these categories and legal and policy frameworks in the region. Developing appropriate responsiveness to these responsibilities can multiply the potential of energy development in the region. The best practices can do so in ways that promote efficiency and sustainability.

To accomplish these aims, Part II of this Article surveys key features of major existing legal frameworks already providing for consultation with and participation by Indigenous peoples of the Arctic in resource development projects. These frameworks have a wide range of modalities and levels of implementation. Part III distils a number of key best practices on consultation based on the evolving national and international law, including those within the Arctic states discussed in Part II, but also other states whose practices can shed light on evolving best practices for states and industry.[28]

Part IV categorizes the Arctic circumstances to which these norms must apply, considering both vulnerable Arctic environments and cultural practices amongst Indigenous peoples of the Arctic that could be disrupted. As discussed in various past works, including some by the Arctic

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[24] *See infra* Part IV.

[25] *See generally* Nicholas J. Monaghan, *"Drill, Baby, Drill!": The Arctic National Wildlife Refuge and America's Energy Reckoning,* 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 649 (2009) (describing some of the competing perspectives concerning energy exploration and development in the Arctic National Wildlife Refuge).

[26] *See* ARCTIC COUNCIL SUSTAINABLE DEV. WORKING GRP, SDWG REPORT ON ARCTIC ENERGY 13-15 (2009); *see also infra* Part IV.

[27] *See infra* Part IV.

[28] *Cf.* Sarayaku, *supra* note 8, para. 164 (discussing the value of looking to other states beyond a particular region in articulating broader best approaches to consultation).

Monitoring and Assessment Programme,[29] certain key characteristics of the Arctic affect oil and gas activities and their potential impacts on Arctic environments. In addition, different Indigenous cultural activities in the Arctic are vulnerable to these impacts.[30] Developing a set of categories for the application of norms enables the development of context-specific applications of the best practices.

Finally, Part V shows the best practices described in Part III, as applied to the different categories of circumstances and impacts identified, can lead to specific recommendations in the Arctic context and for broader legal and policy frameworks in the region. Further, Part V comments on the existing policies in Part II. The underlying aim of this Article is to offer practical recommendations that facilitate Arctic energy development in responsible ways, thereby furthering its long-term acceptability and potential.

II. LEGAL FRAMEWORKS FOR CONSULTATION

This Part offers a preliminary assessment of the various legal frameworks in place for Indigenous consultation in resource-rich Arctic states, with some of these frameworks amounting not simply to consultation frameworks, but also to participation frameworks. This Part focuses on five Arctic states: (1) the United States (Alaska); (2) Canada; (3) Russia; (4) Denmark/Greenland; and (5) Norway.[31] In each of the five Arctic states surveyed, there is some kind of legal framework in place for consultation and, in some cases, participation. In Canada, this legal framework is quite unified under modern land claims agreements and the constitutional duty to consult.[32] Norway has a similar unified system of consultation under the Finnmark Act, though its provisions for Indigenous participation in resource extraction activities are not as extensive as Canada's provisions.[33] The United States' system is less unified, but it provides extensive opportunities for Indigenous participation in the resource extraction industry, as well as consultation opportunities with government departments

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[29] *See, e.g.*, ARCTIC MONITORING AND ASSESSMENT PROGRAMME, ARCTIC OIL AND GAS 2007 (2007) [hereinafter AMAP OIL AND GAS] (discussing some of these challenges in broad terms); s*ee also infra* Part IV.

[30] *See* AMAP OIL AND GAS, *supra* note 29, at 26, 28; *see also infra* Part IV.

[31] The other three Arctic states of Sweden, Finland, and Iceland, while still facing many of the same challenges in terms of economic and social development as the other five states, either do not have strong Arctic resource extraction industries (Sweden and Finland), or do not have substantial Indigenous populations (Iceland). TIMO KOIVUROVA ET AL., BACKGROUND PAPER: INDIGENOUS PEOPLES IN THE ARCTIC 7 fig.2 (2008), *available at* http://arctic-transform.org/download/IndigPeoBP.pdf.

[32] *See infra* Part II.B (detailing Canada's legal framework).

[33] *See infra* Part II.E (detailing Norway's legal framework).

and agencies.[34] Since Greenland itself is primarily an Indigenous territory, Greenlandic control over many aspects of natural resource industries under the Home Rule arrangement provides for extensive Indigenous control over resource extraction on their traditional lands.[35] Finally, while Russia provides numerous consultation rights in its legislation, the economic benefits from resource extraction are prioritized above these rights, which means that the consultation rights are weakly enforced.[36]

A. The United States

The United States was one of the first Arctic states to recognize and grant Indigenous land rights and participation rights in resource development through the 1971 Alaska Native Claims Settlement Act ("ANCSA").[37] This Act extinguished Indigenous claims to approximately 365 million acres of land in Alaska, instead transferring ownership of approximately forty-five million acres to ANCSA-created Native corporations.[38] Because ANCSA lands consist of only a small portion of Alaska lands, the state and federal governments also provided various legal mechanisms for indigenous participation in natural resource decision-making through environmental and land use statutes.[39] Additionally, Indigenous groups particularly affected by oil and gas activities established their own local governments beyond the ANCSA corporations, in order to take advantages of the benefits accruing from resource extraction on their traditional territories.[40]

i. Alaska Native Claims Settlement Act

ANCSA is principally a land claims statute, but it has two major aspects relating to natural resource development: the royalty payment provision,[41] and the creation of regional and village corporations.[42] The royalty payment provision requires the State of Alaska to pay to the Alaska Native Fund (the "Fund") a royalty of 2% of the gross value of minerals produced

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[34] *See infra* Part II.A (detailing the United States' legal framework).

[35] *See infra* Part II.D (detailing Denmark/Greenland's legal framework).

[36] *See infra* Part II.C (detailing Russia's legal framework).

[37] Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1629h (2006 & Supp. 2012); *see* MICHAEL BYERS, INTERNATIONAL LAW AND THE ARCTIC 220 (2013) (describing the Act as "adopted by the US Congress to provide greater certainty for the oil industry as well as a degree of self-government for the indigenous peoples of that US state").

[38] DAVID S. CASE & DAVID A. VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 157 (2d ed. 2002).

[39] *See infra* Part II.A.ii (detailing these legal mechanisms).

[40] *See infra* Part II.A.iii (detailing these local governments).

[41] Alaska Native Claims Settlement Act, 43 U.S.C. § 1608 (2006 & Supp. 2012).

[42] *Id.* § 1606.

from leases within the settlement area, as well as 2% of the revenues derived from the state from rentals and bonuses from those minerals.[43] These payments continue until the State has paid $500 million into the Fund.[44] The Fund's revenues are paid annually to the regional corporations, and the amount that each corporation receives is dependent on the number of Natives enrolled in each region.[45]

ANCSA also created thirteen regional corporations:[46] the Arctic Slope Regional Corporation, Bering Strait Natives Corporation, NANA Regional Corporation, Calista Corporation, Doyon Ltd., Cook Inlet Region Inc., Bristol Bay Native Corporation, The Aleut Corporation, Chugach Alaska Corporation, Sealaska Corporation, Koniag Inc., Ahtna Inc.,[47] and The 13th Regional Corporation.[48] Under the terms of ANCSA, each corporation must issue one hundred shares of stock to each enrolled Native in the region for no consideration.[49] These shares are presumed to be common voting shares[50] and are generally inalienable,[51] though they can be inherited by the heirs of the shareholder.[52]

Of the forty-five million acres transferred under the terms of ANCSA, twenty-two million acres were transferred to village corporations.[53] The title transferred to the village corporations was for the surface estate only.[54] The subsurface estates in those lands were transferred to the regional corporations.[55] The remainder of the land was transferred to the regional corporations,[56] including both surface and subsurface estates.[57]

Because the thirteen regional corporations have subsurface title to the lands conveyed to them by ANCSA, and because resource wealth distribution is not equal among the various regions of Alaska, ANCSA

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[43] *Id.* § 1608(1)(b).

[44] *Id.* § 1608(g).

[45] *Id.* § 1605(c).

[46] Alaska Native Claims Settlement Act, 43 U.S.C. § 1606 (2006 & Supp. 2012).

[47] For a list of the regional corporations, see *Search Page for Alaska Native Region – Village – Corporation Index*, ALASKA DEP'T OF NATURAL RES., http://dnr.alaska.gov/mlw/trails/17b/corpindex.cfm (last visited Feb. 9, 2014).

[48] *See* Alaska Native Claims Settlement Act, 43 U.S.C. § 1606(c) (2006 & Supp. 2012).

[49] *Id.* § 1606(g)(1)(A).

[50] *Id.* § 1606 (h)(1)(A).

[51] *Id.* § 1606 (h)(1)(B).

[52] *Id.* § 1606 (h)(2)(A).

[53] Alaska Native Claims Settlement Act, 43 U.S.C. § 1611b (2006 & Supp. 2012); CASE & VOLUCK, *supra* note 38, at 161.

[54] Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(a) (2006 & Supp. 2012).

[55] *Id.* § 1613(f).

[56] *Id.* § 1611(c).

[57] *Id.* § 1613(e).

requires mandatory revenue sharing between the regional corporations.[58] Each of the thirteen regional corporations must divide 70% of its revenue from timber and subsurface resources among the other regional corporations, excluding the 13th Regional Corporation.[59]

The thirteen corporations participate in the Alaskan natural resource industry.[60] Because all thirteen have subsurface rights to the land

[58] *See* CASE & VOLUCK, *supra* note 38, at 166.

[59] Alaska Native Claims Settlement Act, 43 U.S.C. § 1606(i)(1)(A) (2006 & Supp. 2012).

[60] The Arctic Slope Regional Corporation is heavily involved in the oil industry on the North Slope through two of its subsidiary corporations: ASRC Energy Services (engaged in various oilfield engineering activities) and Petro Star Inc. (a refinery corporation operating two refineries along the Trans-Alaska Pipeline). *See Our Companies*, ARCTIC SLOPE REG'L CORP. (2013), http://www.asrc.com/companies/Pages/Companies.aspx. The Bering Straits Native Corporation is involved in metal mining and quarrying through its subsidiaries. *See Mining Support Services*, BERING STRAITS NATIVE CORP. (2013), http://beringstraits.com/northriver/wb/pages/company/mining.php. The NANA Corporation has approximately ten subsidiary corporations involved in the oil and gas industry — both in Alaska and around the world, as well as seven subsidiary corporations involved in the Alaskan mining industry. *See Company Directory*, NANA DEV. CORP. (2013), http://nana-dev.com/companies/. The Calista Corporation has sixteen subsidiaries, though its main involvement in the energy industry is through its construction and engineering services. *See Industries and Services*, CALISTA CORP. (2012), http://www.calistacorp.com/business/industries-services. The Doyon Corporation has six subsidiaries engaged in oil and gas services. *See Oil Field Services*, DOYON CORP., http://www.doyon.com/business_operations/oil_gas_overview.aspx. Cook Inlet Regional, Inc. ("CIRI") is a majority shareholder in a number of oil and gas corporations operating in Alaska, and operates various partnerships with other oil and gas companies in the region. *See Oilfield and Construction Services*, CIRI, http://www.ciri.com/content/company/oil.aspx. Bristol Bay Native Corporation has two main subsidiaries engaged in oil and gas activities: Petrocard Inc. (providing cardlock fuel services) and CCI Industrial Services (providing construction and engineering-related services to the oil and gas and mining sectors). *See Our Companies*, BRISTOL BAY NATIVE CORP. (2012), http://www.bbnc.net/index.php/our-companies. The Aleut Corporation is mainly involved in government contracting and fuel provision services through its subsidiaries. *See Corporation*, ALEUT CORP. (2012), http://www.aleutcorp.com/index.php/corporation. Chugach Alaska Corporation was heavily involved in the construction of the Trans-Alaska Pipeline, now providing services in oil and gas construction and engineering, as well as environmental response and clean-up. *See Oil and Gas Services*, CHUGACH ALASKA CORP. (2012), http://www.chugach-ak.com/business/Pages/OilGasServices.aspx. Sealaska is mainly involved in the forest and timber industries. *See Natural Resource Businesses*, SEALASKA (2013), http://www.sealaska.com/page/resource_based_businesses.html. Koniag Inc. has three subsidiaries involved in the oil and gas and natural resource industries. *See Family of Companies*, KONIAG INC. (2011), http://www.koniag.com/business-subsidiaries/. Ahtna Corporation provides a variety of services to the oil and gas industry, notably pipeline construction services. *See Corporate Profile*, AHTNA INC. (2013), http://www.ahtna-

transferred to them under ANCSA,[61] the corporations also grant leases and exploration permits for their land. For example, the Arctic Slope Regional Corporation — which owns a large portion of the Alpine Oil Field, where much of the recent oil and gas exploration in Alaska has been occurring — grants leases and exploratory rights to various oil companies on its land.[62] The annual dividends paid to shareholders by the regional corporations vary rather dramatically. In 2010, the lowest dividend paid was $2.35 per share (the Bering Straits Native Corporation), while the highest dividend paid was $64.26 per share (the Arctic Slope Regional Corporation).[63] The corporations that paid the highest dividends were those that were most directly involved in resource extraction. For example, the Arctic Slope Regional Corporation owns a large portion of energy-rich land in the North Slope region,[64] while Chugach Alaska Corporation, which paid a 2010 dividend of $41.92 per share,[65] is involved in mineral exploration, mining, and pipeline construction in its region.[66]

Since ANCSA came into force, per capita incomes of Indigenous peoples in Alaska have almost doubled, to approximately 80% of the per capita income of urban Alaskan residents.[67] However, ANCSA only covers a small portion of Alaskan lands; the Alaskan Department of Natural Resources is still responsible for all onshore state-owned lands, while the federal Bureau of Land Management administers all onshore federally-owned lands.[68] Offshore activities beyond the three-mile limit are regulated federally by the Bureau of Ocean Energy Management, Regulation, and Enforcement (formerly the "Minerals Management Services").[69] In practical terms, the U.S. federal government owns approximately 60% of

inc.com/cpp.html.

[61] *See* Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(f) (2006 & Supp. 2012).

[62] *See Oil*, ARCTIC SLOPE REG'L CORP. (2013), http://www.asrc.com/Lands/Pages/Oil.aspx.

[63] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-121, REGIONAL ALASKA NATIVE CORPORATIONS: STATUS 40 YEARS AFTER ESTABLISHMENT, AND FUTURE CONSIDERATIONS 39 (2012).

[64] *See We Are ASRC*, ARCTIC SLOPE REG'L CORP. (2013), http://www.asrc.com/Pages/We%20are%20ASRC.aspx.

[65] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-121, REGIONAL ALASKA NATIVE CORPORATIONS: STATUS 40 YEARS AFTER ESTABLISHMENT, AND FUTURE CONSIDERATIONS 39 (2012).

[66] *See Land Resources*, CHUGACH ALASKA CORP. (2012), http://www.chugach-ak.com/lands/Pages/LandResources.aspx.

[67] Alsaug Mikkelsen, Sharman Haley & Olaug Øygarden, *Expanding Oil and Gas Activities on the North Slope of Alaska*, *in* ARCTIC OIL AND GAS: SUSTAINABILITY AT RISK? 139, 142 (Aslaug Mikkelsen & Oluf Langhelle eds., 2008).

[68] *Id*. at 145.

[69] *Id*.

the land in Alaska, the State of Alaska owns 28%, ANCSA corporations own 12%, and other private landowners own 2%.[70] Since Alaskan territory is still predominantly state-owned ("state" in this sense refers to both the federal government and the State of Alaska),[71] one must look for Indigenous participation and consultation rights in state and federal statutes beyond the terms of ANCSA.

ii. Environmental Statutes

While there are numerous state and federal statutes that provide special exemptions or benefits for Indigenous peoples in Alaska, only a few are relevant to the Arctic energy industry: the Alaska National Interest Lands Conservation Act ("ANILCA"),[72] the Outer Continental Shelf Lands Act ("OCSLA"),[73] and various Alaskan state statutes relating to oil and gas and mining.[74]

Under the terms of ANILCA, any head of a federal agency attempting to withdraw, reserve, lease, or permit the use, occupancy, or disposition of any federally-owned lands must evaluate the effect of such uses on local subsistence needs.[75] Action may only be taken after a public hearing has been held in the affected area, by which the federal agency then concludes that the proposed activity is necessary and that reasonable steps will be taken to mitigate any adverse impacts on local subsistence uses and resources.[76] This provides a weak form of participatory rights for local Indigenous groups. While they have a right to attend public hearings and voice their concerns, federal agencies have no duty to consult with or obtain consent from Indigenous communities prior to permitting potentially harmful activities on federally-owned lands in Alaska.

Pursuant to the OCSLA, the Secretary must establish a leasing program for oil and gas development on the outer continental shelf.[77] Several regulations require the Secretary to periodically consult with state and local governments, oil and gas lessees and permit-holders, and representatives of any organization engaged in activities on the continental shelf (e.g. Indigenous fishers and whalers).[78]

Finally, Alaskan state law provides that any contract for the sale, lease, or

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[70] RICHARD A. CAULFIELD, *Resource Governance*, *in* ARCTIC HUMAN DEVELOPMENT REPORT 121, 123 (2004).

[71] *See id.*

[72] 16 U.S.C. §§ 3101-3233 (2012).

[73] 43 U.S.C. §§ 1331-1356a (2006 & Supp. 2012).

[74] *See* ALASKA STAT. §§ 38.05.005-38.05.945 (2012).

[75] 16 U.S.C. § 3120(a) (2012).

[76] *Id*.

[77] 43 U.S.C. § 1344(f) (2006 & Supp. 2012).

[78] Oil and Gas Leasing Program, 30 C.F.R. §556.19 (2013).

other disposal of available land, property, resources, or interests in them cannot be approved until the director makes a written finding that the proposed contract is in the best interests of the state.[79] This "best interest finding" is a lengthy process consisting of evaluating the potential impacts of oil and gas exploration and development, and involves a number of public workshops and hearings in local communities.[80] This specifically applies to licenses for oil and gas exploration,[81] as well as state land included in annual lease sales.[82] Thus, prior to permitting oil and gas exploration or the development of traditional Indigenous land owned by the state, the state is required to ensure that such exploration and development is in the best interest of the state and local communities.

President Barack Obama recently issued an executive order to coordinate the efforts of federal agencies responsible for developing onshore and offshore resources.[83] The executive order's main goal is to promote oil and gas resources development while protecting human health, the environment, and Indigenous populations.[84] Although there is no requirement to include any Indigenous groups as full members, the working group's functions include the coordination of federal engagement with localities and tribal governments, as well as collaborative stakeholder outreach.[85]

iii. North Slope Borough

The next participatory mechanism for Indigenous peoples in Alaska's energy development is through local government — specifically the North Slope Borough. This Borough was created in 1972 to take advantage of the oil wealth created by the Prudhoe Bay oil field by taxing oil activity on local state-owned land.[86] The Alaskan Constitution allows for the creation of boroughs — both organized and unorganized — as forms of local government in Alaska.[87] Under the terms of the Alaskan statute (now repealed), incorporation of a borough required a petition signed by 25% of eligible voters within the region.[88] A public hearing was then held in

[79] ALASKA STAT. § 38.05.035(e)(1) (2012).

[80] *See* Nigel Bankes, *Legal and Institutional Framework: A Comparative Analysis*, *in* ARCTIC OIL AND GAS: SUSTAINABILITY AT RISK? 111, 122 (Aslaug Mikkelsen & Oluf Langhelle eds., 2008).

[81] ALASKA STAT. § 38.05.133(f) (2012).

[82] ALASKA STAT. § 38.05.180(2)(B)(i) (2012).

[83] Exec. Order No. 13,580, 76 Fed. Reg. 41989 (July 15, 2011).

[84] *Id.*

[85] *Id*.

[86] Lee Husky, *Globalization and the Economies of the North*, *in* GLOBALIZATION AND THE CIRCUMPOLAR NORTH 57, 74 (Lassi Heininen & Chris Southcott eds., 2010).

[87] ALASKA CONST., art. X, § 3.

[88] *See* David H. Getches, *North Slope Borough, Oil, and the Future of Local*

Barrow, Alaska, where overwhelming support for the Borough was expressed by local residents.[89] The Borough was incorporated with jurisdiction over a variety of local matters, the most relevant being its ability to levy property taxes on oil and gas production and pipeline property within the Borough limits.[90] Since the Borough's population is largely Indigenous,[91] the incorporation of the North Slope Borough provides additional control over local activities by oil and gas companies within the Borough, as well as increased revenue flowing directly to the Indigenous population of the Borough from resource extraction.

iv. Consultation Policies

On November 5, 2009, President Obama signed a memorandum on tribal consultation policies to the relevant government departments.[92] This memorandum emphasized the unique relationship between the U.S. government and Indigenous tribes, and prioritized consultation between all government agencies and affected tribes.[93] In May 2011, the Environmental Protection Agency ("EPA") released its policy on consultation with Indian tribes,[94] which also applied to Alaskan Natives.[95] Tribal governments can request consultation with the EPA on any of the EPA's activities, or the EPA will determine itself whether consultation is necessary.[96] The Department of the Interior,[97] the Department of Energy,[98] and other government departments have similar policies.[99] These policies

Government in Alaska, 3 UCLA ALASKA L. REV. 55, 60-61 (1973) (describing the incorporation process for the North Slope Borough).

[89] *Id.* at 61.

[90] *See* ALASKA STAT. § 29.45.080 (2012) (providing that a municipality may levy and collect taxes on taxable property under §43.56, which covers taxation of oil and gas production); NORTH SLOPE BOROUGH CODE OF ORDINANCES § 3.27.050 (2005) (setting out the ability of the North Slope Borough to tax oil and gas production).

[91] *See North Slope Borough: Economic Profile and Census Report 2010*, NORTH SLOPE BOROUGH (2010), http://www.north-slope.org/departments/mayorsoffice/2010_census/North%20Slope%20Borough.pdf.

[92] Memorandum for the Heads of Executive Departments and Agencies: Tribal Consultation, 74 Fed. Reg. 57,881 (Nov. 5, 2009).

[93] *See id.*

[94] U.S. ENVTL. PROT. AGENCY, EPA POLICY ON CONSULTATION AND COORDINATION WITH INDIAN TRIBES 3 (2011).

[95] U.S. ENVTL. PROTECTION AGENCY, EPA POLICY ON CONSULTATION AND COORDINATION WITH INDIAN TRIBES 3 (2011).

[96] *Id.* at 6.

[97] U.S. DEP'T OF THE INTERIOR, DEP'T OF THE INTERIOR POLICY ON CONSULTATION WITH INDIAN TRIBES (2011).

[98] U.S. DEP'T OF ENERGY, AM. INDIAN & ALASKAN NATIVE TRIBAL GOV'T POL. (2009).

[99] *See* WHITE HOUSE INDIAN AFF. EXEC. WORKING GRP., LIST OF FED. TRIBAL

impose an obligation on the relevant government agency to consult with affected Indian tribes where an action or proposed action by that department will have a "substantial direct effect on an Indian Tribe."[100] These underlying consultation obligations provide an additional layer of participatory rights for Indigenous groups in Alaska vis-à-vis the federal government.

B. Canada

In Canada, Indigenous participation in Arctic resource development is guaranteed through two primary legal mechanisms: modern land claims agreements,[101] and the constitutional duty to consult.[102] Land claims agreements are comprehensive agreements signed by the Government of Canada and Indigenous groups, which grant the Indigenous groups extensive land rights in a specified territory along with some governance rights over the territory's resource development.[103] The duty to consult is a constitutional duty owed by the Crown[104] to Indigenous groups whenever the Crown contemplates action that will, or potentially will, adversely affect a claimed or recognized Aboriginal right or title.[105] Land claims agreements work together with the underlying constitutional duty to consult to ensure that whenever resource extraction is contemplated on traditional indigenous Arctic lands, the affected Indigenous groups may influence decisions that will affect those lands.

i. Land Claims Agreements

Canada has three northern territories: Nunavut, the Northwest Territories,

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CONSULTATION STATES, ORDERS, REG., RULES, POLICIES, MANUALS, PROTOCOLS, AND GUIDANCE 5-16 (2009) (listing the relevant departmental rules and policies).

[100] *See, e.g.*, U.S. DEP'T OF THE INTERIOR, *supra* note 97, at 3 (other policies have similar wording).

[101] *See* Frank Duerden, *Land Allocation in Comprehensive Land Claim Agreements: The Case of the Yukon Land Claim*, 16 APPLIED GEOGRAPHY 279, 279 (1996).

[102] *See generally* NEWMAN, THE DUTY TO CONSULT, *supra* note 2 (a leading treatise on the duty to consult in Canadian constitutional law).

[103] *See* Duerden, *supra* note 101, at 279.

[104] In Canada, the Queen is the head of state. Her executive authority is delegated to the Governor General in Canada and that authority, which is in turn exercised by the executive within the democratically-elected legislatures. Thus, references to the Crown within Canadian legislation and legal doctrines are, in effect, references to the governments of Canada, as well as the governments of the provinces and territories which exercise the executive power assigned to the Queen under the terms of the Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.), *reprinted in* R.S.C. 1985, app. II, no. 5 (Can.).

[105] *See generally* NEWMAN, THE DUTY TO CONSULT, *supra* note 2 (a leading treatise on the duty to consult in Canadian constitutional law).

and the Yukon.[106] Canada has concluded one land claim agreement in Nunavut,[107] four agreements in the Northwest Territories,[108] and eleven agreements in the Yukon (though all of the Yukon agreements are subject to an overarching Umbrella Final Agreement).[109] Each of these agreements was negotiated by Canada with the relevant First Nations group, and, thus, each has their respective provisions for Indigenous participation in resource development. For ease of reference, this Article summarizes the main relevant provision of the land claims agreements by territory.

a. Northwest Territories

In the Northwest Territories, four land claim agreements have been concluded: the Gwich'in Comprehensive Land Claim Agreement,[110] the Inuvialuit Final Agreement,[111] the Sahtu Dene and Métis Comprehensive Land Claim Agreement,[112] and the Tlicho Agreement.[113] Additionally, the Canadian government recently signed a devolution agreement with the Northwest Territories, which transferred authority over land, water, and subsurface resources to the territorial government.[114]

Under the terms of the Gwich'in Agreement, the Gwich'in received grants of land in fee simple from Canada.[115] The Gwich'in are prohibited from alienating the land granted to them under the agreement.[116] The government is obligated by the agreement to notify and consult the Gwich'in Tribal Council prior to opening any lands for oil and gas exploration.[117] Once exploration rights are granted, the rights-holder must

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[106] Stefan Matiation, *Impact Benefit Agreements between Mining Companies and Aboriginal Communities in Canada: A Model for Natural Resource Developments Affecting Indigenous Groups in Latin America?,* 7 GREAT PLAINS NAT. RESOURCES J. 204, 207 (2002).

[107] Nunavut Land Claims Agreement, July 9, 1993.

[108] *See infra* Subsection a (detailing the four agreements in the Northwest Territories).

[109] Umbrella Final Agreement, Mar. 31, 1990.

[110] Gwich'in Comprehensive Land Claim Agreement, Apr. 22, 1992.

[111] Inuvialuit Final Agreement, July 21, 1984.

[112] Sahtu Dene and Métis Comprehensive Land Claim Agreement, Aug. 27, 1993.

[113] Tlicho Agreement, Aug. 25, 2003.

[114] *See Canada, N.W.T. Sign Historic Devolution Deal*, CBC NEWS (June 25, 2013), http://www.cbc.ca/news/canada/north/story/2013/06/25/north-nwt-devolution-signing.html.

[115] Gwich'in Comprehensive Land Claim Agreement, Apr. 22, 1992, § 18.1.2. The Gwich'in received 16,264 km^2 of land in fee simple with Canada reserving all mining and mineral rights and 4,299km^2 of land in fee simple with all mining and mineral rights included. *Id.*

[116] *Id.* § 18.1.5. The Gwich'in, however, can grant leases and licenses to third-parties to use their lands, including oil and gas leases and licenses for the lands to which the Gwich'in possess those rights. *Id.*

[117] *Id.* § 21.1.2.

consult with the Gwich'in Tribal Council on a number of matters, including the environmental impacts of the activity, plans for maintaining public order, Gwich'in employment, business opportunities and contracts, and a process for future consultation.[118] The Agreement also created a Planning Board,[119] an Environmental Impact Review Board,[120] and a Surface Rights Board.[121] The Planning and the Environmental Impact Review Board must have equal membership of nominees from aboriginal groups and from government (not including the chairperson),[122] while members of the Surface Rights Board need only be Northwest Territories residents.[123]

The Inuvialuit Final Agreement takes a different approach from the Gwich'in Land Claims Agreement by utilizing a framework that more closely resembles the terms of ANCSA in Alaska. It creates four corporations and one trust: the Inuvialuit Regional Corporation ("IRC"),[124] the Inuvialuit Land Corporation ("ILC"),[125] the Inuvialuit Development Corporation ("IDC"),[126] the Inuvialuit Investment Corporation ("IIC"),[127] and the Inuvialuit Trust.[128] Each enrolled Inuvialuit receives a non-transferable life interest in the Inuvialuit Trust, which is required to distribute all profits derived from any development of Inuvialuit lands to the

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[118] *Id.* § 21.1.3.

[119] *Id.* § 24.2.1. The Planning Board's main mandate is to develop, review, and propose land use plans for the settlement area. *Id.*

[120] Gwich'in Comprehensive Land Claim Agreement, Apr. 22, 1992, § 24.3.1-24.3.2. The Environmental Impact Review Board does initial assessments in the Gwich'in area and conducts environmental impact reviews where necessary. *Id.*

[121] *Id.* § 26.1.1. The Surface Rights Board has jurisdiction over matters relating to surface entry and compensation, including surface entry that is incidental to subsurface resource extraction. *Id.*

[122] *Id.* §§ 24.2.2, 24.3.2.

[123] *Id.* § 26.1.2. The only exception is that a Gwich'in must be a member of the Surface Rights Board when the board is dealing with settlement land. *Id.*

[124] Inuvialuit Final Agreement, July 21, 1984, § 6(1)(a). The corporation has no share capital, administers all of the Inuvialuit lands, and holds 100% of the voting common shares in each of the other three corporations. Each community within the settlement region has an Inuvialuit community corporation without share capital, all of which together control the Inuvialuit Regional Corporation. *See id.* § 6(1)(b).

[125] *Id.* § 6(1)(c). The ILC holds title to the lands received in the settlement. *Id.*

[126] *Id.* § 6(1)(d). The IDC receives a portion of the financial compensation paid under the terms of the agreement and carries on business in the region either through participation in or ventures with other businesses. *Id.*

[127] *Id.* § 6(1)(e). The IIC receives a portion of the financial compensation and invests it in portfolio securities.

[128] *Id.* § 6(1)(f). The Inuvialuit Trust owns 100% of the non-voting preferred shares of the IRC, IDC, and IIC. The capital and income beneficiaries of the trust are the IRC and any eligible Inuvialuit members who hold trust unit certificates. *Id.*

beneficiaries.[129] Any developers who are granted rights of access to Inuvialuit lands must conclude a valid Participation Agreement with the Inuvialuit Land Administration ("ILA") regarding the nature of the land use prior to exercising those rights.[130] Like the Gwich'in Land Claims Agreement, similar grants of land[131] and rights of participation in decision-making[132] are granted under the Inuvialuit Agreement.

The Sahtu Dene and Métis Comprehensive Land Claim Agreement is similar to the Gwich'in Agreement, including the consultation requirements imposed on the government prior to opening any lands for oil and gas exploration.[133] It also establishes a Land Use Planning Board,[134] an Environmental Impact Review Board,[135] a Land and Water Use Board,[136] and a Surface Rights Board.[137]

The Tlicho Agreement is the most recent land claims agreement in the Northwest Territory.[138] It provides for a transfer of land in fee simple from

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[129] Inuvialuit Final Agreement, July 21, 1984, § 6(4)(a).

[130] *Id.* §§ 10(2)-10(3).

[131] The Inuvialuit are granted title to (1) 4,200 square miles of land in fee simple, including all surface and subsurface mineral rights; (2) 800 square miles of land in Cape Bathurst in the western Arctic in fee simple, including all surface and subsurface mineral rights; and (3) 30,000 square miles of land in fee simple without surface or subsurface mineral rights. *See id.* §§ 7(1)(a)(i)-7(1)(b).

[132] The Agreement establishes an Environmental Impact Screening Committee (50% appointed by the Inuvialuit) and an Environmental Impact Review Board (50% appointed by the Inuvialuit), which together conduct environmental assessments and determine whether development of resources in the settlement area should proceed. *See id.* §§ 11(1)-11(3), 11(18), 11(24).

[133] Sahtu Dene and Métis Comprehensive Land Claim Agreement, Aug. 27, 1993, § 22.1.2. Once the exploration right is granted, the grantee must first consult with the Sahtu Tribal Council to set out the parameters of that exploration. *See id.* § 22.1.3.

[134] *Id.* § 25.2.1. The Land Use Planning Board has equal membership of Sahtu nominees and government nominees. *Id.* § 25.2.2.

[135] The Sahtu Dene use the same board that was established in the Gwich'in Agreement. *See id.* § 25.3.2.

[136] *Id.* §§ 25.4.1, 25.4.5. The Land and Water Use Board has the power to issue, amend, and renew licences, permits, and authorizations for all uses of land and water (including uses necessary for the exercise of subsurface rights). The Land and Water Use Board has equal membership of Sahtu nominees and government nominees. *See id.* § 25.4.7(a).

[137] *Id.* §§ 27.1.1, 27.2.1. The Surface Rights Board has jurisdiction to resolve disputes between holders of surface and subsurface commercial interests, and to govern various other aspects of surface and right-of-entry matters.

[138] Indian and Northern Affairs Canada, *Negotiations About Land, Resources and Self-Government in the NWT* 5, *available at* http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-NWT/STAGING/texte-text/ntr_pubs_pflr_1331055548925_eng.pdf.

Canada to the Tlicho,[139] which means that the Tlicho government has the sole authority to grant leases, licenses, and rights to remove natural resources on the land, and to own the removed resources on that land.[140] The Tlicho Agreement uses the same Environmental Impact Review Board established in the Gwich'in Agreement,[141] but the Board must consult the Tlicho government prior to completing any assessment of a project that is wholly or partially on Tlicho lands.[142] A Land and Water Use Board is also established in the Agreement.[143] Finally, any person who proposes to explore, produce, or conduct an activity related to the development of minerals or oil and gas is required to consult the Tlicho government.[144] Any proponents of major mining projects on Tlicho lands must enter into negotiations with the Tlicho government for the purpose of concluding an agreement related to the project.[145]

b. Nunavut

In 1999, Nunavut became Canada's newest territory, which emerged from the eastern part of the Northwest Territories.[146] Prior to becoming a territory, however, Canada concluded an extensive land claim agreement with the Inuit in Nunavut, titled the Nunavut Land Claim Agreement ("NLCA").[147] Two distinct aspects of the Nunavut Land Claim Agreement are worth mentioning: the Nunavut Impact Review Board ("NIRB") and the mandatory Inuit Impact and Benefit Agreement ("IBA"). The NIRB conducts environmental impact assessments of proposed projects in the Nunavut settlement region.[148] It conducts public hearings as part of this process and, then, makes recommendations regarding the future of the project to the relevant federal Minister.[149] A federal environmental review

[139] Tlicho Agreement, Aug. 25, 2003, § 18.1.1 (transferring 39,000km^2 in fee simple, including title to the mines and minerals).

[140] *Id.* § 18.1.11.

[141] *Id.* § 22.2.2.

[142] *Id.* § 22.2.11.

[143] *Id.* § 22.3.2. The Land and Water Use Board must be comprised of 50% Tlicho nominees and 50% government nominees. The Land and Water Use Board has the power to issue, amend, and renew all authorizations for land and water uses, though it is obligated to consult with the Tlicho government prior to doing so. *See id.* §§ 22.3.3, 22.3.14, 22.3.19.

[144] Tlicho Agreement, Aug. 25, 2003, § 23.2.1.

[145] *Id.* § 23.4.1.

[146] *See* Nunavut Act, S.C. 1993, c. 28, § 79 (Can.) (stating that this Act which created the territory of Nunavut would come into force on April 1, 1999).

[147] Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada, 1992 (Can.).

[148] *Id*. §§ 12.2.1-12.2.5, 12.4.1-12.4.7, art. 26.

[149] *Id.* §§ 12.5.3-12.5.7.

board must conduct any federal environmental reviews of the project. At least one quarter of the members of the federal environmental review board must be nominated by a Designated Inuit Organization ("DIO")[150] and an additional quarter from a list provided by the Nunavut government.[151] This ensures that the Inuit in Nunavut are guaranteed participation rights in federal environmental decisions impacting Nunavut lands.

The second interesting aspect of the NLCA is the IBA requirement. The NLCA Agreement provides that any project involving development or exploitation of resources wholly or partially under Inuit-owned land requires an IBA.[152] The negotiated benefits under the IBA are guided by several principles: (1) they must be consistent with Inuit cultural goals; (2) they must contribute to achieving and maintaining a standard of living among the Inuit comparable to Canadians generally; (3) they must be related to the nature, scale, and cost of the project; (4) they must not be unduly burdensome on the proponent; and (5) they must not prejudice the ability of other Nunavut residents to obtain benefits from major development projects.[153] A DIO and the project proponent generally negotiate the IBA.[154]

While the Nunavut Land Claims Agreement is the main legal mechanism providing for indigenous participation in resource development issues, there has been significant discussion in Canada of the possibility of devolving all resource development jurisdictions to Nunavut itself. As a territory, the federal government administers Nunavut[155] — Nunavut does not inherently possess any of the constitutional powers allocated to the provinces.[156] The creation of Nunavut itself was an act of devolution. Canada and Nunavut have together made it a priority to further devolve land and resource

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[150] *See id.* § 1.1.1 ("Designated Inuit Organization" (DIO) means (a) the Tungavik, or (b) in respect of a function under the Agreement, any of the Organizations that has been designated under Section 39.1.3 as responsible for that function."). The Tungavik is also defined in § 1.1.1: "'Tungavik' means the corporation without share capital incorporated under the Canada Corporations Act by letters patent dated April 3, 1990 and supplementary letters patent dated December 16, 1992 and named the Tungavik Incorporated, or any successor." *Id.* § 1.1.1.

[151] *Id.* § 12.6.2.

[152] *Id.* § 26.6.1.

[153] Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada, 1992, § 26.3.3 (Can.).

[154] *Id.* § 26.4.1.

[155] *See* Yukon Act, S.C. 2002, c. 7 (Can.); Nunavut Act, S.C. 1993, c. 28, § 79 (Can.); Northwest Territories Act, R.S.C. 1985, c. N-27 (Can.) (federal statutes that created the three territories).

[156] *See* Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.), *reprinted in* R.S.C. 1985, app. II, no. 5 (Can.), § 92 (setting out the exclusive powers assigned to the legislatures of the provinces, but makes no mention of the territories).

management authority to Nunavut, granting it resource management rights on par with those that the provinces constitutionally possess.[157] Negotiations have been slow and frequently stalled, although another round began in May 2012.[158]

c. Yukon

The final Canadian territory is the Yukon. Canada has concluded a devolution agreement with the territory, granting it extensive control over its own lands and resources. Canada has also concluded an Umbrella Final Agreement, which functions as a template for the eleven land claims agreements concluded with Yukon First Nations. The devolution agreement grants the Yukon government jurisdiction over public lands, water, and mining,[159] as well as oil and gas.[160] These are similar to the land and resource rights granted to the provinces under the Constitution Act, 1867.[161]

The Umbrella Final Agreement established three main administrative bodies: a Surface Rights Board,[162] a Yukon Land Use Planning Council,[163]

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[157] *See Government of Canada, Government of Nunavut, and Nunavut Tunngavik Incorporated Set Path for Nunavut Devolution*, ABORIGINAL AFF. AND N. DEV, CANADA (Sept. 5, 2008), http://www.aadnc-aandc.gc.ca/aiarch/mr/nr/s-d2008/2-3088-eng.asp.

[158] *See, e.g.*, *Nunavut to Begin Devolution Talks*, CBC NEWS (May 23, 2012, 6:05 AM), http://www.cbc.ca/news/canada/north/story/2012/05/23/north-nunavut-devolution-negotiator.html.

[159] Yukon Northern Affairs Program Devolution Transfer Agreement, 2001, §§ 2.1-2.4, (Can.); *see also* NEWMAN, NATURAL RESOURCE JURISDICTION IN CANADA, *supra* note 16, at 24-28 (2013) (discussing the Yukon devolution agreement in the context of jurisdiction over natural resources).

[160] *See* Oil and Gas Act, R.S.Y. 2002, c. 162 (Can.) (covering oil and gas operations within the territory).

[161] *See* Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.), *reprinted in* R.S.C. 1985, app. II, no. 5 (Can.), §§ 92(5), 92A. Section 92(5) states that provinces have exclusive legislative jurisdiction over "[t]he Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon," and § 92A states, "(1) In each province, the legislature may exclusively make laws in relation to (*a*) exploration for non-renewable natural resources in the province; (*b*) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and (*c*) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy." *Id.*

[162] Umbrella Final Agreement, Mar. 31, 1990, §§ 8.1.1, 8.1.2, 8.3.1-8.3.11. For the Surface Rights Board, 50% of the members must be nominees of the Council for Yukon Indians. The Surface Rights Board establishes terms and conditions for rights of access, awards compensation for use of a right of access, and designates routes of access, among other responsibilities. *Id.*

[163] *Id.* §§ 11.3.2-11.3.3.5. The Yukon Land Use Planning Council includes one

and a Yukon Development Assessment Board.[164] If a project is located wholly on Yukon First Nation land where a land claim agreement is in place, a so-called "decision document" is required to approve the project.[165] The government retains the authority to issue decision documents for projects located on Category B settlement land – land on which the government has reserved the rights to mines and minerals – and for other decisions that mandate government approval.[166]

ii. Duty to Consult

Section 35(1) of the Constitution Act, 1982 states, "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."[167] Canadian courts have interpreted this provision to impose a constitutional duty on the Crown to consult Indigenous communities "when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it."[168] It requires the government to act in a manner consistent with the honor of the Crown, which includes meaningful discussion, the provision of adequate information, and, in some circumstances, the accommodation of Aboriginal interests.[169] Where a particular Aboriginal group without a land claims agreement claims title to land, the government still has a duty to consult

nominee of the Council for Yukon Indians and two nominees of the government, and makes recommendations to the government and each affected Yukon First Nation on land use planning, the identification of planning regions and priorities for the preparation of regional land use plans, general terms of reference for each Regional Land Use Planning Commission established in the individual agreements with First Nations, the boundaries of each planning region, and other relevant matters. *Id.*

[164] *Id.* §§ 12.10.1-12.12.2. The Yukon Development Assessment Board reviews any projects which will have an adverse effect on settlement lands. If the primary adverse effect will be on settlement lands, then at least two-thirds of the panel reviewing the project must be comprised of nominees of the Council for Yukon Indians. If the primary adverse effect is on non-settlement land, then two-thirds of the panel must be nominated by government, with the Council for Yukon Indians nominating the other one-third. *Id.*

[165] *Id.* § 12.13.1. While the Umbrella Final Agreement does not provide a clear definition of a decision document—its rather unhelpful definition in §1 simply stating that a decision document is "the document issued by the Decision Body pursuant to 12.6.3 or 12.12.1" — in practical terms this means that the First Nation will have the final decision on whether a project goes ahead on its land. *Id.*

[166] *Id.* § 12.13.1.

[167] Constitution Act, 1982, c. 11 (U.K.), *reprinted in* R.S.C. 1985, app. II, no. 44, § 35 (Can.).

[168] Haida Nation v. B.C. (Minister of Forests), 2004 SCC 73, paras. 35 (Can.).

[169] *See* NEWMAN, THE DUTY TO CONSULT, *supra* note 2, at 47 (discussing the content of the Canadian duty to consult).

that Aboriginal group prior to taking any action that would adversely affect the claimed title.[170] While this duty may not provide consultation and participation rights as extensive as those afforded by the terms of the land claims agreements, it does ensure that Aboriginal groups with more inchoate claims to Arctic lands still have the opportunity to participate in decisions affecting those lands. It also ensures that, on lands covered by land claims agreements, the government will still consult the relevant Indigenous group, even if the contemplated action is not covered by the terms of the land claim agreement.[171]

C. Russia

Russia's legal framework for Indigenous participation and consultation in resource development is unclear. Russia has enacted several federal laws providing for Indigenous rights: the federal law "on the rights of the small-numbered Indigenous peoples of the Russian Federation,"[172] the federal law on the "general principles of the organization of communities of Indigenous peoples of the North, Siberia, and the Far East,"[173] and the federal law "on the Territories of Traditional Nature Use by Indigenous Numerically Small Peoples of the North, Siberia, and the Far East."[174] The first law provides Indigenous peoples with general rights to their traditional territories and traditional economic activities.[175] The second law provides a mechanism

[170] *See, e.g.*, Qikiqtani Inuit Ass'n v. Canada (Minister of Natural Res.), 2010 NUCJ 12 (Can.) (affirming the application of the duty to consult doctrine in the context of unresolved Inuit title claims).

[171] *See also* Beckman v. Little Salmon/Carmacks First Nation, 2010 SCC 53, [2010] 3 S.C.R. 103 (Can.) (analyzing situations where the constitutional duty to consult applies even where land claim agreements contain consultation-related provisions).

[172] O Garantyakh Prav Korennii Malochislennii Naradov Rossiiskoi Federatsii [On the Guarantees of the Rights of the Small-numbered Peoples of the Russian Federation], SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 1999, No. 82, Item 3.

[173] Federal'nyi Zakon RF ob Obschikh Printsipakh Organizatsii Obshchin Korennikh Malochislenennikh Narodov Severa, Sibiri, i Dal'nevo Vostoka Rossiiskoi Federatsii [On General Principles of the Organization of Communities of Indigenous Peoples of the North, Siberia, and the Far East], ROSSIISKAIA GAZETA [ROS. GAZ.] July 20, 2000.

[174] Federal'nyi Zakon RF o Territoriakh Traditsionnovo Prirodopol'zovania Korennikh Malochislennikh Narodov Severa, Sibiri, i Dal'nevo Vostoka Rossiiskoi Federatsii [On the Territories of Traditional Nature Use by Indigenous Numerically Small Peoples of the North, Siberia and the Far East], ROSSIISKAIA GAZETA [ROS. GAZ.] May 7, 2001.

[175] *See, e.g.*, O Garantyakh Prav Korennii Malochislennii Naradov Rossiiskoi Federatsii [On the Guarantees of the Rights of the Small-numbered Peoples of the Russian Federation], SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 1999, No. 82, Item 3, art. 8 (granting rights to the protection of traditional habitats and ways of life, including the right to participate in

for the incorporation of Indigenous communities, which are guaranteed the right to subsistence use of traditional resources, called an *obshchina*.[176] The third law allows the federal government to establish territories of traditional nature use, where industrial resource extraction activity is generally prohibited.[177] Russian environmental laws also require government agencies to conduct both ecological and socio-economic impact assessments of proposed natural resource projects prior to approval.[178] There is no general legal requirement for the Russian government to consult with Indigenous peoples on important decisions, but, in practice, most government agencies still do.[179]

However, the mere fact that these rights are recognized in Russian law does not always mean that they exist in practice. The first law lacks a realistic enforcement mechanism.[180] The federal government created a few

monitoring the compliance of natural resource extraction with federal environmental laws, and to participate in developing federal and regional natural resource programs on their traditional lands, and the right to recover damages for damage to the natural habitat caused by industrial activity); *id.* art. 11 (granting the right to self-government).

[176] *See* Federal'nyi Zakon RF ob Obschikh Printsipakh Organizatsii Obshchin Korennikh Malochislenennikh Narodov Severa, Sibiri, i Dal'nevo Vostoka Rossiiskoi Federatsii [On General Principles of the Organization of Communities of Indigenous Peoples of the North, Siberia, and the Far East], ROSSIISKAIA GAZETA [ROS. GAZ.] July 20, 2000, art. 8 (the process of incorporation); *id.* art. 11 (membership in the organization); *id.* art. 12 (rights of indigenous peoples in the organizations).

[177] *See* Federal'nyi Zakon RF o Territoriakh Traditsionnovo Prirodopol'zovania Korennikh Malochislennikh Narodov Severa, Sibiri, i Dal'nevo Vostoka Rossiiskoi Federatsii [On the Territories of Traditional Nature Use by Indigenous Numerically Small Peoples of the North, Siberia and the Far East], ROSSIISKAIA GAZETA [ROS. GAZ.] May 7, 2001, art. 13.

[178] *See* Federal'nyi Zakon RF ob Ekologicheskoi Expertise [Law of the Russian Federation on Ecological Expert Review], ROSSIISKAIA GAZETA [ROS. GAZ.] Nov. 23, 1995, p. 3. This is, however, just a general requirement – there is no legislative provision requiring any full-scale assessment of the impact of proposed project on local indigenous communities. *See also* Anna A. Sirina, *Oil and Gas Development in Russia and Northern Indigenous Peoples*, *in* RUSSIA AND THE NORTH 187, 194 (Elana Wilson Rowe ed., 2009).

[179] *See* Special Rapporteur on the Rts. of Indigenous Peoples, *Situation of Indigenous Peoples in the Russian Federation*, Hum. Rts. Council, para. 54, UN DOC. A/HRC/15/37/Add.5 (June 23, 2010) [hereinafter Special Rapporteur, *Russian Federation*].

[180] *See, e.g.*, CAULFIELD, *supra* note 70, at 125 (stating that mechanisms in Russia for implementing the three indigenous rights laws are weak); Florian Stammler & Bruce C. Forbes, *Oil and Gas Development in Western Siberia and Timan-Pechora,* 2 INDIGENOUS AFF. 48, 54 (2006) (contending that there has been little practical implementation of the three indigenous rights laws); *see also* Alexandra Xanthaki, *Indigenous Rights in the Russian Federation: The Case of Numerically Small Peoples of the Russian North, Siberia, and Far East,* 26 HUM. R. Q. 74, 98-99 (2004) (stating that, contrary to the provisions of the law, there has been no consultation with or compensation for indigenous groups under the law, the government provides no funds to implement its provisions, and indigenous groups

obshchiny – the plural of *obshchina* – under the second law, but title to the land granted to the Indigenous community remains vested in the state,[181] and the grant of land was often for only a few years, rather than in perpetuity.[182] The government has refused to register any territories of traditional nature use – "TTNUs" – under the third law.[183] In one instance, one of the most active indigenous, non-governmental organizations in the Russian North, the Russian Association of Indigenous Peoples of the North ("RAIPON") was temporarily shut down by the Russian government, though it was recently given permission to reopen.[184]

In one of the most indicative examples of the Russian federal approach to Arctic energy development, President Medvedev signed a policy document in 2008 setting out the Russian strategy for Arctic development through

receive no benefits from resource extraction activities on their traditional lands).

[181] *See* BANKES, *supra* note 80, at 121 (stating that, while Russia does recognize indigenous usufractory rights through its *obshchina* legislation, title to land granted under that legislation remains vested in the state).

[182] *See, e.g.*, Ukazy RF Presidenta No. 397 o Neotlozhnikh Merakh po Zashchite Mest Prozhivania i Hozyaistvennoi Deyatel'nosti Malocheslennikh Narodov Severa [Presidential Decree on Urgent Measures to Protect the Habitat and Economic Activities of Indigenous Peoples of the North], ROSSIISKAIA GAZETA [ROS. GAZ] Apr. 22, 1992 (Russ.) (stating that the grant of land to indigenous groups should be in perpetuity and inalienable); Gail Fondahl, *Autonomous Regions and Indigenous Rights in Transition in Northern Russia*, *in* DEPENDENCY, AUTONOMY, SUSTAINABILITY IN THE ARCTIC 55, 59 (Hanne Peterson & Birger Poppel eds., 1999) (stating that the grant of land under *obshchiny* has only been for one to three years). *But see* ZEMELNYI KODEKS ROSSIISKOI FEDERATSII [ZK RF] [Federal Land Code] art. 3 (Russ.) (prohibiting the transfer of land in perpetuity for no consideration, which throws the *obshchina* model into doubt).

[183] Elena N. Andreyeva & Valery A. Kryukov, *The Russian Model: Merging Profit and Sustainability*, *in* ARCTIC OIL AND GAS: SUSTAINABILITY AT RISK? 240, 271 (Aslaug Mikkelsen & Oluf Langhelle eds., 2008). Although their data covers only until 2008, no TTNUs have been registered federally since then. The UN Special Rapporteur on the Rights of Indigenous Peoples has recognized that this law lacks the bylaws or procedures necessary to give it direct implementation. *See* Special Rapporteur, *Russian Federation*, *supra* note 178, para. 33.

[184] *See, e.g.*, Atle Staalesen & Thomas Nilson, *Moscow Orders Closure of Indigenous Peoples Organization*, BARENTS OBSERVER (Nov. 12, 2012), http://barentsobserver.com/en/arctic/moscow-orders-closure-indigenous-peoples-organization-12-11; Bob Weber, *Russia Stuns Arctic Council by Suspending Aboriginal Groups from Meetings*, THE GLOBE AND MAIL (Nov. 15, 2012, 9:05PM), http://www.theglobeandmail.com/news/politics/russia-stuns-arctic-council-by-suspending-aboriginal-group-from-meetings/article5360638/. *But see Success: Russia's Indigenous Organization Reopens,* SURVIVAL INT'L (Mar. 25, 2013), http://www.survivalinternational.org/news/9069; *see also* MICHAEL BYERS, INT'L LAW AND THE ARCTIC 222 (2013) (discussing the temporary suspension of RAIPON and suggesting that there was no agreement on the policy throughout the Russian government).

2020.[185] The policy emphasizes the vital importance of Arctic resources to Russian energy security and development, but makes only passing reference to the policy goal of improving the Indigenous population's quality of life in the Arctic.[186] The main strategy for implementing this goal would be to improve education systems for Indigenous children in the Arctic to better prepare them for life in modern society.[187] Given the strong prioritization of Arctic resource development, Russia's current and future policy in the Arctic appears to minimize the participation and protection of Indigenous peoples. Combined with a recent oil deal signed with China of "unprecedented" value,[188] the federal government seems to prioritize its resource extraction objectives in the oil-rich Russian Arctic, at least for the foreseeable future.

However, the legal situation of Indigenous peoples in the Russian Arctic is not entirely bleak. Under the terms of the Russian Constitution, the federal government and the subjects of the federation (the various sub-federal entities) share jurisdiction over the rights of Indigenous peoples,[189] as well as jurisdiction over natural resources.[190] Various regions have enacted more stringent Indigenous rights protection mechanisms than those guaranteed by the federal government. For example, the Khabarovsk Krai – a region in the Far East, bordering the Pacific Ocean – has issued about eighteen laws on Indigenous rights,[191] including a 2001 law establishing representative organizations for local Indigenous groups.[192] The councils established by this law may recommend the creation of regional TTNUs and recommend or block commercial activities on these TTNUs.[193] The

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[185] Osnovi Gosudarstvennoi Politiki Rossiiskoi Federatsii v Arktike na Period do 2020 Goda i Dal'neyshoyu Perspektivu [Basics of the State Policy of the Russian Federation in the Arctic for the Period Until 2020 and for a Further Perspective], ROSSIISKAIA GAZETA [ROS. GAZ.] Mar. 27, 2009 (Russ.).

[186] *Id.*

[187] *Id*.

[188] *See Russia, China Sign 'Unprecedented' $270 Billion Oil Deal*, THE TIMES OF INDIA (June 21, 2013, 9:21PM), http://articles.timesofindia.indiatimes.com/2013-06-21/europe/40117955_1_sechin-cnpc-oil-giant.

[189] KONSTITUTSIIA ROSSIISKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 72(1)(b) (Russ.).

[190] *Id.* art. 72(1)(c).

[191] *See* Vadim A. Turaev, *The Examples of Amur and Khabarovsk*, *in* AN INDIGENOUS PARLIAMENT? REALITIES AND PERSPECTIVES IN RUSSIA AND THE CIRCUMPOLAR NORTH 74, 77-78 (Kathrin Wessendorf ed., 2005) (summarizing the indigenous rights protections in Khabarovsk).

[192] Zakon Khabarovsky Krai ob Upolnomochennikh Predctavitelei Korennikh Malochislennikh Narodov Severa, ZAKON NA KHABAROSKOVO KRAYA [Laws of the Khabarovsk Krai] Nov. 27, 2001 (Russ.).

[193] *Id.* arts. 3-4.

autonomous okrug of Khanty-Mansiisk has forty-one pieces of legislation and eleven laws dedicated solely to the rights of Indigenous minorities,[194] and prior to 2001 had recognized 447 TTNUs in the region.[195]

These regional developments are encouraging signs for Indigenous rights protection in Arctic regions. However, the federal government often does not recognize regional TTNUs and grants resource extraction licenses in regional TTNU territory under federal law without regard for state law protections.[196] Because of jurisdictional uncertainty and weak regional power vis-à-vis the federal government, the federal government is generally able to dominate the regions in areas of shared jurisdiction – land use, natural resources, and Indigenous peoples – with federal laws and priorities taking precedence over regional ones.

D. Denmark/Greenland

When Home Rule was established in Greenland in 1979, significant powers were devolved from Denmark to the local government of Greenland. Section 8 of the Home Rule Act affirms the fundamental right of Greenland residents to Greenland's natural resources.[197] However, both Denmark and Greenland retained a veto over all matters relating to exploiting and prospecting subsurface resources.[198] Any permission to prospect or exploit natural resources required the approval of both the Danish and Greenlandic governments.[199] Greenland and Denmark entered into an agreement for the sharing of profits from the development of non-living resources: the first 500 million DKK in royalty income from these activities accrues to Greenland, and any additional revenue must be divided according to the agreement.[200]

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[194] *Cf.* Sirina, *supra* note 178, at 191. This oil and gas rich region has granted 673 extraction licenses to sixty-one companies, but has attempted to ensure that resource extraction is not adverse to indigenous interests in the region. *Id.*

[195] Stammler & Forbes, *supra* note 180, at 54. There are approximately 6700 km^2 in these TTNUs subject to resource extraction licenses. Under the terms of Khanty-Mantiisk legislation, compensation must be paid to indigenous groups and social investments must be made by extraction corporations in exchange for the right to engage in extraction activities on TTNUs. *Id.*

[196] Andreyeva & Kryukov, *supra* note 183, at 271. The federal government frequently sells licenses for oil and gas production in regional TTNUs. *Id.*

[197] Home Rule Act, 1978 § 8 (Den.).

[198] *Id.*; Turaev, *supra* note 191, at 77-78.

[199] BANKES, *supra* note 80, at 113.

[200] *Cf.* Greenland Parliament Act on Mineral Resources and Mineral Resource Activities (The Mineral Resource Act), 2009, § 22 (Green.); Jens Dahl, *The Greenlandic Version of Self Government, in* ARCTIC OIL AND GAS: SUSTAINABILITY AT RISK? 150, 169 (Aslaug Mikkelsen & Oluf Langhelle eds., 2008); CAULFIELD, *supra* note 70, at 124.

In 2009, significant additional self-government powers were devolved to Greenland under the Self-Government Act.[201] Sole jurisdiction over mineral resource development was transferred to Greenland, modifying the shared veto structure of the Home Rule Act.[202] Under the terms of this transfer, all revenues from mineral resource development in Greenland now accrue solely to the government of Greenland.[203] This revenue is tied to the subsidy provided annually from Denmark to Greenland: where the revenue from mineral resource development that accrues to Greenland exceeds 75 million kroner in a year, the subsidy for that year will be reduced by one-half of the total revenue.[204]

While resource extraction has not yet been a significant part of Greenland's economy, Greenland has high potential for wind, solar, and hydrogen energy projects, hydroelectric projects, and vast offshore oil reserves.[205] In 1985, the Home Rule government, the government of Denmark, and the Danish oil and gas company Dansk Olie og Natrgas A/S founded Nunaoil A/S for the purpose of encouraging oil and gas development in Greenland.[206] Nunaoil A/S has since had a share in all hydrocarbon licenses issued in Greenland and has acted as a non-paying partner in all license arrangements.[207] As there has not yet been significant development in Greenland's energy industry, Greenlandic or Indigenous participation rights in resource development issues have not significantly developed. Greenland has expressed reluctance in issuing new offshore oil exploration licenses due to environmental concerns.[208] However, approximately twenty licenses have been granted to date,[209] and interest still remains in offshore oil extraction in Greenland.[210] Whether Greenland's new government continues the previous government's strategy

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[201] Act on Greenland Self-Government, No. 473, 2009 (Den.).

[202] *See id*. § 3(2), Schedule List II.

[203] *Id*. § 7.

[204] *Id*. § 8.

[205] LOUKACHEVA, *supra* note 16, at 76.

[206] *Id.* at 44.

[207] *Id*.

[208] *See, e.g.*, Terry Macalister, *Greenland Halts New Oil Drilling Licenses*, THE GUARDIAN, May 27, 2013, http://www.guardian.co.uk/world/2013/mar/27/greenland-halts-oil-drilling-licenses.

[209] *See List of Licenses*, GREENLAND BUREAU OF MINERALS AND PETROLEUM (June 16, 2013), http://bmp.gl/petroleum/approval-of-activities/images/stories/minerals/list_of_licenses/list_of_licenses.pdf.

[210] *See, e.g.*, *Hydrocarbon Strategy*, GREENLAND BUREAU OF MINERALS AND PETROLEUM (2009), http://www.bmp.gl/fokusbokse-og-publikationsbokse/publikation (summarizing hydrocarbon activity in Greenland and Greenlandic priorities in promoting further sustainable development of its hydrocarbon resources).

of opening Greenland's offshore areas for drilling remains to be seen.[211] However, in October 2013, Greenland's Parliament voted to end a decades-old ban on uranium mining in Greenland, seemingly as part of a larger plan to pursue financial independence through furthering the development of Greenland's resource economy.[212]

E. Norway

Norway has huge offshore gas reserves located off the coast of Finnmark, a province that contains Norway's largest proportion of Saami people.[213] While it has implemented legislation to guarantee the Saami the rights set out in International Labor Organization Convention No. 169 ("ILO Convention No. 169"),[214] Norway considers all natural resources to be publicly-owned by the state.[215] Norwegian law requires that all interests involved be evaluated before any new production licenses can be granted in an area — requiring environmental, social, and economic impact assessments and consultations with local groups — but there is no specific requirement to take unique Indigenous interests and perspectives into account.[216]

Under the terms of the 2005 Finnmark Act, the Saami Parliament has the power to issue guidelines regarding any matters that may involve changes in uncultivated lands, which the Minister is required to assess in accordance with the purposes of the Finnmark Act – i.e. the balanced and ecologically sustainable development of Finnmark's resources.[217] The Finmark Act establishes a separate legal organization, Finnmarkseindommen, to manage

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[211] Greenland elected a new government in March 2013 with Aleqa Hammond as its Prime Minister. This has sparked some debate over the future of resource extraction in Greenland, especially by foreign corporations. *See* Alistair Scrutton, *Voters Deliver Backlash Over Greenland's Minerals Rush*, REUTERS (Mar. 31, 2013, 6:53AM), http://uk.reuters.com/article/2013/03/13/uk-greenland-election-idUKBRE92C05O20130313.

[212] *See Greenland Votes to Allow Uranium, Rare Earths Mining,* REUTERS (Oct. 24, 2013, 5:42AM), http://www.reuters.com/article/2013/10/24/greenland-uranium-idUSL5N0IE4MJ20131024.

[213] *See, e.g.*, Ove Heitmann Hansen & Mette Ravn Midtgard, *Going North: The New Petroleum Province of Norway*, *in* ARCTIC OIL AND GAS: SUSTAINABILITY AT RISK? 200, 223 (Aslaug Mikkelsen & Oluf Langhelle eds., 2008); *Greenland 'Reluctant' to Offer New Licences for Offshore Drilling*, CBC NEWS (Mar, 30, 2013), http://www.cbc.ca/news/canada/north/story/2013/03/30/north-greenland-offshore-drilling.html.

[214] Finnmark Act No. 85, June 17, 2005 (Nor.).

[215] BANKES, *supra* note 80, at 120.

[216] *Id.* at 122.

[217] Finnmark Act No. 85, June 17, 2005, § 4.

the lands vested in it.[218] This organization manages renewable natural resources on its land, even though there is no provision in the Act granting it similar management rights over non-renewable resources.[219]

A recent development in the Norwegian Arctic energy sector is the proposed Nordic Saami Convention.[220] This is an international document to be signed by the governments of Norway, Sweden, and Finland.[221] Among other things, it recognizes that the Saami are an Indigenous people,[222] requires that Saami parliaments in all three states be given a mandate that effectively allows them to pursue self-determination,[223] and obligates the public authorities to negotiate with the Saami Parliaments before making any major decisions that will affect the Saami or their rights.[224] The states are prohibited from adopting any measures that will damage basic conditions for Saami culture, livelihood, or traditions without the consent of the relevant Saami Parliament.[225] It guarantees Saami rights to land and water for traditional uses,[226] and requires public authorities to consult the Saami prior to granting any permits for prospecting or resource extraction on Saami territory.[227] However, these land rights do not extend to offshore subsurface resource rights,[228] where most energy development in Norway occurs.

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[218] *Id.* § 6.

[219] *Id.* § 21. The closest it comes to affording management rights over natural resources to the Saami is by granting the Commissioner for Mines the power to refuse applications for prospecting for minerals in the Finnmark region on the basis of interference with traditional Saami activities. *See id.* § 22a. The Finnmark Act does not extend to offshore resources; the Act extends only as far as private ownership can extend on the sea. *See id.* § 2.

[220] Nordic Saami Convention, Fin.-Nor.-Swed., 2007.

[221] *Id.*

[222] *Id.* art. 2; *see also* Leena Heinämäki, *Right of a People to Control Issues of Importance*, *in* THE PROPOSED NORDIC SAAMI CONVENTION: NAT'L AND INT'L DIMENSIONS OF INDIGENOUS PROP. RTS. 125, 134-40 (Nigel Bankes & Timo Koivurova eds., 2013) (summarizing the provisions of the Saami Convention that apply to Saami self-determination, and providing the Finnish government's perception of and reaction to those provisions).

[223] Nordic Saami Convention, Fin.-Nor.-Swed., art. 15, 2007.

[224] *Id.* art. 16.

[225] *Id*.

[226] *Id.* art. 34-35.

[227] *Id.* art. 36, 38.

[228] *Id.* art. 38. The guaranteed rights only extend to the coastal seas and are mainly concerned with fishing rights. *Id.*

III. BEST PRACTICES ON CONSULTATION WITH INDIGENOUS PEOPLES

The frameworks discussed in Part II illustrate a range of practices in different Arctic states. The range of practices on consultation with Indigenous peoples and their participation in resource development is even broader when considered at a more international level. A number of Latin American and European states are parties to ILO Convention No. 169,[229] which provides for prior consultation on state decisions affecting Indigenous peoples as a basic norm.[230] Some of those states have taken different kinds of steps to implement that treaty provision.[231] However, practices related to consultation and participation of Indigenous peoples in resource development extend beyond the states within that treaty framework and encompass different approaches.[232]

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[229] Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 28 I.L.M. 1382.

[230] *Id.* art. 6(1) ("In applying the provisions of this Convention, Governments shall: (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly"); *id.* art. 15(2) ("In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.").

[231] *See, e.g.*, Constitution of Bolivia (2009), art. 30.II.15 (providing constitutional protection for the right of Indigenous peoples to be consulted "through appropriate procedures, and in particular through their representative institutions, whenever legislative or administrative measures are considered that may affect them. In this context, the right to compulsory prior consultation conducted by the State, in good faith and with consensus, with regard to the exploitation of non-renewable natural resources in the territory they inhabit shall be respected and guaranteed."); Ley de Derecho a la Consulta Previa a los Pueblos Indígenas u Originarios Reconocido en el Convenio 169 de la Organización Internacional del Trabajo (OIT), Ley N° 29785 (Aug. 23, 2011) (Peru), *available at* http://dgffs.minag.gob.pe/rlffs/pdf/ley/ley_consulta_previa_ley_29785.pdf (legislation implementing consultation mechanisms in Peru, applied in conjunction with Reglamento de la Ley N° 29785, Ley de Derecho a la Consulta Previa a los Pueblos Indígenas u Originarios Reconocido en el Convenio 169 de la Organización Internacional del Trabajo (OIT), Decreto Supremo N° 001-2012-MC, Norms Legales, El Peruano, Apr. 3, 2012, 463587).

[232] *See, e.g.*, NEWMAN, THE DUTY TO CONSULT, *supra* note 2, at ch. 5 (discussing Canadian case law in comparative context with Australian legislative measures). *Cf.* MINING LAW: JURISDICTIONAL COMPARISONS 126 (Stewart Sutcliffe & Stikeman Elliot eds., 1st ed. 2012) (describing the consultation-like requirements in the domestic law in Argentina, Australia, Brazil, Canada, Colombia, Finland, Mexico, Namibia, Venezuela, and discussing

Nonetheless, it is possible to identify a number of unifying dimensions to the practice of consultation. First, this Part discusses the idea of a spectrum analysis present within the depth of consultation required in particular circumstances and the approach taken to that consultation more generally. Second, this Part discusses the importance of meaningful consultation and steps that facilitate more meaningful consultation. In doing so, this Part argues that circumstantial differences in various states may make different approaches permissible or even mandatory, but that there are nonetheless some commonalities that can be identified around the types of institutions involved in consultation. Third, this Part discusses the place of economic participation by Indigenous communities in resource development. Despite broader uncertainties regarding the moral bases for resource revenue allocations, this Part argues that such participation will at least tend to be appropriate in the circumstances of Indigenous communities in remote regions with resource wealth, making such economic participation appropriate in the context of most Arctic energy development. Fourth, this Part argues that some models of economic participation have likely supported culturally appropriate Indigenous governance structures while others have inadvertently harmed these structures (which is obviously not an ideal practice of implementation). Fifth, this Part argues that the most successful models of consultation and participation allow industry involvement in negotiations, which can sometimes achieve objectives other than those defined purely in terms of technical law.

First, the evolving norm of consultation has moved relatively clearly toward the idea of a spectrum analysis,[233] with the depth of consultation required (ranging from respectful notification of a project prior to its commencement to full-fledged free, prior, and informed consent[234]) being scaled to the potential impact of the project on an Indigenous community.[235] Spectrum analysis has been present in some domestic legal orders, including in an especially developed form in Canada.[236] The UN

these regimes in the context of mining development).

[233] *Cf.* Haida Nation v. B.C. (Minister of Forests), 2004 SCC 73, paras. 43-45 (Can.) (pioneering the concept in its seminal duty to consult decision); NEWMAN, THE DUTY TO CONSULT, *supra* note 2, at 53-55 (discussing this terminology in the Canadian context).

[234] *See generally* Special Rapporteur on the Situation of Hum. Rts. and Fundamental Freedoms of Indigenous People, *supra* note 2. *Cf.* Haida Nation v. B.C. (Minister of Forests), 2004 SCC 73 (Can.).

[235] Special Rapporteur on the Situation of Hum. Rts. and Fundamental Freedoms of Indigenous People, *supra* note 2, at 16. *Cf.* Mauro Berelli, *Free, Prior, and Informed Consent in The Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead,* 16 INT'L J. HUM. RTS. 1, 13 (2012).

[236] *Cf.* NEWMAN, THE DUTY TO CONSULT, *supra* note 2 (offering the leading scholarly discussion of the Canadian doctrine as developed at all levels of courts).

Special Rapporteur on Indigenous People adopted such an analysis in the 2009 Annual Report, which focused on the duty to consult, and used it there to explain the array of differently phrased provisions within the UN Declaration on the Rights of Indigenous Peoples.[237] One of this Article's authors has argued previously that several coincidences between the Canadian approach and the 2009 Special Rapporteur's approach are suggestive of an influence from Canada, but that the Special Rapporteur could not acknowledge this at the time due to Canada's then-recent vote against the Declaration.[238] Eventually, Canada offered a qualified endorsement of the Declaration.[239] Regardless, some states and pertinent international entities have both endorsed the idea of a spectrum analysis applicable to norms of consultation.

There is reason to consider spectrum analysis as a best practice on consultation. Although assessment of where a particular issue falls on the spectrum can present a further complicating element in decisions where that matter is not clear,[240] such a spectrum offers an overall scheme to better align interests of states and of Indigenous peoples. Where a particular decision will have an especially severe impact on an Indigenous people, the spectrum analysis ensures that the decision will be subject to deep consultation, quite possibly including a requirement of consent from the Indigenous community.[241] Such a requirement also furthers the development of appropriate participation in order to obtain that consent.[242] However, where a decision could have a relatively trivial impact on an Indigenous people, it would be frankly inappropriate to stall that decision with an unwarranted consultation requirement.[243] As a result, approaches

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[237] Special Rapporteur on the Situation of Hum. Rts. and Fundamental Freedoms of Indigenous People, *supra* note 2, at 12.

[238] *See* NEWMAN, *Norms of Consultation with Indigenous Peoples: Decentralization of International Law Formation or Reinforcement of States' Role?, supra* note 2, at 276-77.

[239] CANADA'S STATEMENT OF SUPPORT ON THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (Nov. 12, 2010) (offering carefully nuanced statement of support, subject to some legal qualifications).

[240] In Canada, numerous cases have ended up being about where on the spectrum a particular case falls. *See, e.g.*, Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), 2003 SCC 74, [2004] 3. S.C.R. 550 (Supreme Court of Canada ruling on reasonableness of depth of consultation); Metlakatla Indian Band v. Canada (Minister of Transport), 2007 FC 553, 65 Admin. L.R. (4th) 152 at para. 29 (Crown's failure to assess underlying spectrum factors properly held to render consultation process unreasonable).

[241] Special Rapporteur on the Situation of Hum. Rts. and Fundamental Freedoms of Indigenous People, *supra* note 2, at 16.

[242] *Id.*

[243] *Cf.* PAUL COLLIER, THE PLUNDERED PLANET: WHY WE MUST- AND HOW WE CAN-MANAGE NATURE FOR GLOBAL PROSPERITY (2010) (arguing that the veto power is too much power in hands of local population).

to consultation that address the scope of different impacts on Indigenous communities are a best practice.

Second, any consultation procedures to be carried out must be meaningful – otherwise, there is no point of having them in the first place.[244] This principle, of course, is subject to the first principle concerning spectrum analysis, meaning that every consultation does not need to be as elaborate as every other. Each consultation must be meaningful compared to the standards that it aims to meet. Meaningful consultations will require good faith on both sides.[245] They will require Indigenous peoples to have easy access to adequate information enabling the community to offer its perspectives on the future potential impact on the community.[246] Further adequate timelines will be required to allow for thoughtful comments and genuine readiness to be responsive to issues.[247]

These dimensions of meaningful consultation can be achieved in different ways. Indeed, many of the elements referenced are deeply circumstantial. As just one example, the type of information accessible to a particular Indigenous people depends upon that community's capacities and past interaction with development projects. Thus, it is permissible and even mandatory for the type of information provided to vary in response to these dimensions. Although some of them could also change over time, there may be a role for the state or corporate project proponents to assist a community in developing capacities to better process certain types of information if there will be recurring needs to do so.[248]

However, these circumstantial differences should not obscure possible commonalities arising from the requirements of meaningful consultation. For example, although the exact type of institution involved in consultation will properly vary from one state to the next, the institution that is involved must be one that is capable of meeting the requirements of meaningful consultation and being responsive to what it hears. It must have the ability to alter the decision at issue or to develop accommodations of the Indigenous interests at stake.[249]

Third, there is a place for Indigenous economic participation in resource development, at least in circumstances like those in Arctic contexts. Surprisingly, although a new wave of writing in this area is beginning to

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[244] *See* NEWMAN, THE DUTY TO CONSULT, *supra* note 2, at 54-55.

[245] *Id.* at 63-64; *see also* Sarayaku, *supra* note 8, paras. 185-86 (discussing the value of good faith for a real consultation).

[246] *Id.* para 208 (referring to the value of informed consultation to achieves purposes).

[247] *See* NEWMAN, THE DUTY TO CONSULT, *supra* note 2, at 54-55.

[248] *Id.* at 38.

[249] *See generally* Rio Tinto Alcan v. Carrier Sekani Tribal Council, [2010] S.C.R. 650 (Can.) (examining when different kinds of administrative boards or tribunals might assist in carrying out consultation and developing principled framework for this question).

address the issues, there has been relatively little political theory work done on just allocations of resource ownership and resource proceeds.[250] Thus, there is still no consensus amongst political theorists on just allocations in relation to resources.[251]

At the same time, there is evidence that the perceived legitimacy of a resource allocation by potential stakeholders can significantly affect their acceptance of the allocation and, thus, the stability of that allocation in circumstances where those stakeholders have any form of power over it.[252] Therefore, as a practical matter, even in the face of deeper uncertainties, there could be arguments for developing interim arrangements that respect viable positions on resource allocations.[253]

Regardless, despite a broader lack of consensus, the circumstances of Arctic Indigenous communities may fit a special category of cases.[254] Where a geographic region is relatively unpopulated but for a particular community and where the impacts of resource development would fall on

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[250] *See, e.g.*, AVERY KOLERS, LAND, CONFLICT, AND JUSTICE: A POLITICAL THEORY OF TERRITORY (2011); CARA NINE, GLOBAL JUSTICE AND TERRITORY (2012); Avery Kolers, *Justice, Territory and Natural Resources*, 60 POL. STUD. REV. 269 (2012); Margaret Moore, *Natural Resources, Territorial Rights, and Global Distributive Justice*, 40 POL. THEORY 84 (2012); Cara Nine, *Resource Rights,* 61 POL. STUD. REV. 232 (2012). *But see* NICO SCHRIJVER, SOVEREIGNTY OVER NATURAL RESOURCES: BALANCING RIGHTS AND DUTIES (1997) (detailing a longer-term international law position on natural resources and states, thus, suggesting that positions on the question are not new); Ronald H. Coase, *The Problem of Social Cost*, 3. J.L. & ECON. 1 (1960) (supporting the classic law and economics position that resource allocation is ultimately unimportant except for distributive purposes, but this latter point of course being the one precisely at issue in our text).

[251] *Cf.* Kolers, *Justice, Territory and Natural Resources, supra* note 250 (exploring the raging battles between theorists evidenced in the critique of the claims offered by them).

[252] *See, e.g.*, Werner Güth, Rolf Schmittberger, & Bernd Schwarze, *An Experimental Analysis of Ultimatum Bargaining*, 3 J. ECON. BEHAV. & ORG. 367 (1982) (describing the seminal version of the so-called "ultimatum game" in which one party proposes a division of a gain and the other party accepts or not, finding that the other party often rejects the division where it is perceived as unfair). *Cf.* Thomas M. Franck, *The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium*, 100 AM. J. INT'L L. 88, 93 (2006) (discussing how the perceived legitimacy of international law induces compliance and thus makes it effective even without enforcement mechanisms, referring back to such work as THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990)).

[253] *Cf.* Cass Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995) (discussing the general methodology of agreeing on a result even in the absence of agreement on fundamental principles).

[254] *Cf.* Nine, *Resource Rights, supra* note 250, at 247 (noting that political legitimacy over resources is often based on a deep historical connection with a geographical region and, thus, no conflicts exist over resources where the region is unpopulated except by a particular group).

that community, there is a strong case for at least some measure of economic participation by that community in the development. At a minimum, there must be sufficient economic participation so as to provide something to offset the negative impacts on the community. However, there is also probably an argument for the only population of the region due to its connection with the resources in that area to receive some benefits that support its public governmental order. This last statement recognizes an inevitable public dimension to authorization of resource extraction. Where there is only one community in an area — with matters obviously being more complicated in the context of an existing Indigenous community along with a significant non-Indigenous community — then that community may properly benefit from the resource extraction that takes place in that area.[255]

Thus, when considering interim theory implementation, development of practical arrangements that meet legitimacy expectations, and recognition of a specialized category of case into which Arctic Indigenous communities will fit, there are reasons to include economic participation of Arctic Indigenous communities in resource development amongst the practices to be followed.

Fourth, this last point gives rise to one specific comment on some different Arctic states' practices detailed in Part II.[256] This Article also comments on these practices in Part V,[257] with the added context of the impact categories from Part IV.[258] The purpose of consultation and participation is to respect Indigenous communities rather than to force changes upon them, since any compelled changes actually undermine some of the purposes of consultation and participation.[259] It is preferable to achieve consultation and participation in ways that do not undermine culturally significant governance structures within Indigenous communities. Considering some of the practices in the different states examined in Part II, they show examples pertinent to this point and will help to lead toward the fifth principle.

Some of the states discussed in Part II — notably the United States in the

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[255] *Cf.* Sarayaku, *supra* note 2, para. 157 (suggesting that "to ensure that the exploration or extraction of natural resources in ancestral territories did not entail a negation of the survival of the indigenous people as such, the State must . . . as appropriate, reasonably share the benefits produced by the exploitation of natural resources [as a form of just compensation required by Article 21 of the Convention], with the community itself determining and deciding who the beneficiaries of this compensation should be, according to its customs and traditions."); Nine, *Resource Rights, supra* note 250, at 247.

[256] *See supra* Part II.

[257] *See infra* Part V.

[258] *See infra* Part IV.

[259] *See* NEWMAN, THE DUTY TO CONSULT, *supra* note 2, at 53-54.

Alaskan context[260] — would appear to have developed broader economic participation policies than a number of the other states without engaging in as much actual consultation with Indigenous communities.[261] This choice may partly reflect a value system of American free market capitalism, which is not necessarily at odds with the values of many American Indian communities.[262] Closer attention to consultation policies vis-à-vis Alaskan Indigenous communities might or might not reveal the same values in these communities.[263]

If such differences existed, it would raise the question of whether propelling cultural change in these communities is justified — some may respond that American liberalism advances universal values of freedom and rightly pushes cultural change on other systems of human governance.[264] However, if that is indeed the underlying policy, the United States has not been forthright about its policies and has instead seemingly operated in such a manner to respect Indigenous cultural choices, often rooted in Indigenous spirituality and religious values. If the United States is not going to respect Indigenous cultural choices then a larger debate should be had forthrightly rather than through half policies under the guise of respecting consultation principles.

What is crucial to realize is that an approach that has essentially imposed a particular structure of economic participation on Alaskan communities, with accompanying governance changes,[265] may have tended to achieve certain best practices in terms of Indigenous consultation and participation at the expense of others.[266] Looking to other Arctic states, there are of course less successful examples. For example, Russia, while clearly having

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[260] *See supra* Part II.A (detailing many of these features)*; see also* CASE & VOLUCK, *supra* note 38 (leading legal treatise on Alaskan interaction with Indigenous peoples).

[261] *See supra* Part II (detailing more economic participation opportunities as compared to consultation, at least until recently).

[262] *See* TOM FLANAGAN, CHRISTOPHER ALCANTARA & ANDRE LE DRESSAY, BEYOND THE INDIAN ACT: RESTORING ABORIGINAL PROPERTY RIGHTS 40-41, 160 (2011) (challenging many scholarly assumptions that Indigenous people are opposed to individual property rights and arguing for restoration of individual property rights to on-reserve Indigenous individuals); ROBERT J. MILLER, RESERVATION "CAPITALISM": ECONOMIC DEVELOPMENT IN INDIAN COUNTRY (2012) (discussing Indigenous views in many American tribal communities in line with free market system).

[263] *Cf.* Monroe E. Price, *Moment in History: The Alaska Native Claims Settlement Act*, 8 UCLA ALASKA L. REV. 89, 100 (1978-79) (discussing how Native American leaders have to some extent embraced "the gospel of capitalism").

[264] *See* KOK-CHOR TAN, TOLERATION, DIVERSITY, AND GLOBAL JUSTICE 59-64 (2000) (arguing that principled liberalism is ready to alter other systems).

[265] Price, *supra* note 263.

[266] *Id.*

informal consultation policies[267] and having attained success in some very particular contexts on economic participation,[268] has sufficiently informal policy as to be less successful than it presumably could be on both.[269]

However, other states have also appeared to pursue or achieve more harmonization between the consultation and economic participation dimensions. For example, Part II shows the Nordic Saami Convention to be at least partly on track to integrating both dimensions, at least with respect to resources on land,[270] although the entire discussion in Norway is certainly located within a discourse heavily prioritizing general public ownership of resources.[271] To the extent that general public ownership of resources has priority in the Norwegian system, there is not as much particularized economic participation available to the Saami as in a context where they would be uniquely positioned in relation to the natural resources. This notion may explain some of the distinction between marine-located and terrestrially-located resources in the Nordic Saami Convention.[272]

Canada presents an interesting example of a state with not only a generalized constitutional duty to consult,[273] but also with more specific provisions within its northern land-claims agreements.[274] A number of these agreements provide for both narrowly defined forms of consultation and economic participation.[275] One especially interesting provision in the Nunavut Land Claim Agreement,[276] now carried forward in the legislative framework for the Inuit-dominated Nunavut territory in the Eastern Arctic,[277] which requires an industry proponent seeking to pursue resource development projects to enter into an impact benefit agreement ("IBA")

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[267] *See* Special Rapporteur, *Russian Federation, supra* note 179, para. 54 ("Federal officials assured the Special Rapporteur that when federal executive bodies make critical decisions affecting the interests of indigenous people they seek the participation of indigenous representatives; they have further stated that the cooperation between federal governing authorities and indigenous associations is regarded as one of the priorities of the national policy of Russia.").

[268] *See id.* paras. 43, 45 (describing the law in Khanti-Mansiysky Autonomous Region and cooperative agreements on Sakhalin Island).

[269] *Cf.* Xanthaki, *supra* note 180 (providing background information on official Russian consultation policies that were never actually implemented).

[270] *See supra* Part II.

[271] *See supra* Part II.

[272] Nordic Saami Convention, arts. 38, 43, 2007.

[273] *See* Haida Nation v. B.C. (Minister of Forests), 2004 SCC 73 ¶ 35 (Can.); NEWMAN, THE DUTY TO CONSULT, *supra* note 2.

[274] *See supra* Part II.B (discussing some details of several of these agreements).

[275] *Id.*

[276] *See* Nunavut Land Claims Agreement, July 9, 1993.

[277] Nunavut Act, S.C. 1993, c. 28, s. 79 (Can.).

prior to doing so.[278] Such a policy aims explicitly at providing for both consultation and economic participation through negotiations, albeit with the involvement of industry.

In at least an ideal scenario, the negotiation of such an IBA would have no particular effects on the governance structure or culture of an Indigenous community, since a principle in the negotiation of such agreements would be respect for existing structures.[279] However, that scenario is ideal in the sense that any infusion of additional resources, and how these resources are controlled, will in fact shift power balances within an Indigenous community and thereby affect ongoing processes of change, just as that which takes place in any political or cultural community over time. Nonetheless, at least in principle, the requirement of industry-negotiated IBAs appears to have some potential to respect the principles of both consultation and economic participation.

This Article's fifth claim is that this last example related to the fourth principle of respect for existing cultural structures of Indigenous communities actually points toward a broader point concerning the flexibility and thus desirability of industry involvement. Meaningful consultation will sometimes require state involvement if some of the issues raised during consultation can only be addressed by the state.[280] However, to the extent that issues raised during consultation may involve matters of project design and economic dimensions that are not actually within the scope of state law, it may well be that an appropriate "institution" to be involved in terms of the principles concerning meaningful consultation set out above, will in fact be the non-state corporate project proponent.[281]

Although it is possible merely to sketch this argument in the absence of a detailed case study,[282] various strands of negotiation theory can actually

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[278] Nunavut Land Claims Agreement, July 9, 1993, s. 26.6.1.

[279] *Cf.* Sarayaku, *supra* note 8, para. 201 ("[C]onsultations with indigenous people must be undertaken using culturally appropriate procedures; in other words, in keeping with their own traditions."). *But see* ILO, *Report of the Committee Set Up to Examine the Representation Alleging Non-Observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), Made Under Article 24 of the ILO Constitution by the Authentic Workers Front (FAT)*, para. 109, GB.283/17/1 (2001) (requiring correspondence with Indigenous organization regarding procedures, provided that they respond to internal processes of Indigenous people).

[280] Special Rapporteur on the Situation of Hum. Rts. and Fundamental Freedoms of Indigenous People, *supra* note 2, paras. 53-55.

[281] *Contra* Sarayaku, *supra* note 8, para. 187 (implying that it is never appropriate to delegate consultation responsibilities to industry proponent). *But see id.* para. 203 (revealing that this concern may have originated from a sense that the oil company refused to respect Sarayaku People's form of political organization).

[282] *But see, e.g.*, Special Rapporteur, *Russian Federation, supra* note 178, para. 43 (describing a study of positive instances with certain Indigenous communities' negotiations

help to explain the claim that shifting the involved actor can further the purposes of consultation and economic participation in a way that respects the spectrum analysis, furthers meaningful consultation, and achieves more harmonized attainment of consultation and economic participation.[283] In particular, although the state actor in negotiations could ultimately pursue some matters arising from the consultation through business activity regulations, the state faces meaningful constraints in its regulation of business that affect its ability to do so on such a specific basis. Involving a corporate project proponent directly in negotiations effectively lifts certain bargaining constraints, thus better enabling an arrangement between the corporate proponent and the Indigenous community that achieves more objectives of both parties.

This sketched-out, ideal form may appear to skirt more problematic aspects, including inequalities of bargaining power or the need for a legal framework providing for, enabling, and guiding such negotiations.[284] Bargaining power is going to be a complex idea in these contexts. On the one hand, a large corporate project proponent may appear to have significant bargaining power out of having many different projects that it might alternatively pursue elsewhere in the world, and thus many alternatives to the negotiated agreement. On the other hand, a power to delay negotiations in the context of a large-scale resource development project helping many different communities, effectively held by the Indigenous community, may actually be very significant, and possibly more than appropriate in some circumstances.[285] The necessary legal framework will also have some complexities. Such a simple element as regulating the kind of information that must be offered in order for a subsequent agreement to be valid might be easily addressed through existing contract law. However, developing all the needs in terms of a legal framework that best facilitates such agreements would be a different (and valuable) project. Despite these complexities, what is quite interesting is that many of those writing about consultation from NGO-type perspectives have been quite laudatory of negotiated arrangements between corporate actors and

with industry).

[283] *See generally* ROBERT H. MNOOKIN, SCOTT R. PEPPET & ANDREW S. TULUMELLO, BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 93-128 (2000) (offering an account of negotiation applicable to legal contexts); ABHINAY MUTHOO, BARGAINING THEORY WITH APPLICATIONS 2-3 (1999) (offering state-of-the-art, detailed examination of value to be attained from bargained outcomes).

[284] *Cf.* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950 (1979) (explaining the role of the law in shaping dimensions of bargained outcomes).

[285] *See* COLLIER, *supra* note 243.

Indigenous peoples, citing them as examples of successful consultations.[286]

From a general perspective, the practices of Arctic states stand to be tested against these best practices or principles concerning consultation. However, to offer the most pertinent testing of them, it is also important to further contextualize their operation in Arctic conditions. Part IV adds on the particular circumstances of the Arctic that impact on energy development's implications. Afterwards Part V draws together some key lessons concerning these different states' existing practices and some key recommendations for ongoing development of Arctic legal frameworks to attain both the potential of Arctic development and respect of Arctic Indigenous peoples.

IV. IMPACT CATEGORIES FOR CONSULTATION ON ARCTIC ENERGY DEVELOPMENT

A. Introduction

Potentially fragile Arctic environments and easily disrupted cultural practices amongst Indigenous peoples of the Arctic together make consultation with Indigenous peoples — in some instances leading to their participation in resource development — an important means of mitigating impacts and maximizing gains from Arctic energy development. This Part shows that certain key characteristics of the Arctic have effects on oil and gas activities and their potential impacts on Arctic environments. In addition, this Part shows that different Indigenous cultural activities in the Arctic are vulnerable to these impacts in different ways. Developing a set of categories for the application of norms enables the development of context-specific applications of best practices on consultation. Because of the spectrum analysis developed on consultation, it is necessary to consider where on the spectrum different situations fall. Although environmental systems are fluid and although there are dynamic interactions between Indigenous peoples and their environment, it is nonetheless necessary for practical purposes to develop categories for the different impacts that may arise from development. Having categories for the impacts that may arise demands closer attention to the kind of consultation that becomes appropriate in different specific situations commonly encountered in the different Arctic states.

Conditions in the Arctic environment are extreme as compared to most

[286] *See, e.g.*, DUE PROCESS OF LAW FOUNDATION & OXFAM, EL DERECHO A LA CONSULTA PREVIA, LIBRE ET INFORMADA DE LOS PUEBLOS INDÍGENAS: LA SITUACÍON DE BOLIVIA, COLOMBIA, ECUADOR Y PERÚ 85-86 (2011) (describing various parts in a case study of successful consultation); *see also* Special Rapporteur, *Russian Federation, supra* note 179, paras. 43-45 (commending deals struck with particular communities).

other areas on Earth. During most of the year, the Arctic hosts extremely cold temperatures.[287] Extended periods of darkness in the winter alternate with 24-hour sunlight during the summer.[288] Most of the water and precipitation in the Arctic is locked in the form of ice and snow,[289] and there is a pervasive layer of permafrost.[290] The lack of moisture, nutrient-rich soil and heat means that the growing season in the Arctic is usually no more than several months long. This limits what plants are able to persist in the Arctic, and how fast they are able to grow.[291] The extreme environmental characteristics and limited vegetation makes the Arctic inhospitable to many species. Thus, the Arctic has limited biodiversity, and the species that live there are especially vulnerable to environmental disturbances that disrupt any portion of the food chain.[292]

These same characteristics, as well as others, also make the Arctic a very difficult place for resource development activities. There is currently little infrastructure and trained manpower for those sorts of jobs in the Arctic, so before development may proceed, workers must be flown in from other regions, and fuel and machinery must be imported.[293] Roads, landing strips, helicopter pads, pipelines, buildings, and drill pads must be constructed at elevated costs because, in addition to the aforementioned lack of manpower, materials, and energy in the Arctic, special precautions must be taken to avoid unnecessary disturbances to a slow-recovering and easily disturbed environment.[294]

For Indigenous peoples in the Arctic, finding and sharing food is often central to their cultures and to creating family and community ties.[295] The particular sensitivity of the Arctic environment to resource development has the possibility of disrupting traditional means of obtaining food. That reality would seem to imply that development poses risks to central cultural and social practices. However, it does not mean that Indigenous interests and resource development are incompatible. On the contrary, many Arctic Indigenous groups support resource development in the Arctic due to the potential economic benefits, as well as the necessity of access to affordable energy.[296] But it is important that such development takes place in a way

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[287] ARCTIC MONITORING AND ASSESSMENT PROGRAMME, ARCTIC POLLUTION ISSUES: A STATE OF THE ARCTIC ENVIRONMENT REPORT 14 (1997) [hereinafter POLLUTION ISSUES].

[288] *Id.*

[289] *Id.*

[290] *Id.* at 8.

[291] *Id.* at 36.

[292] *Id.* at 49.

[293] AMAP OIL AND GAS, *supra* note 29, at 4.

[294] *Id.* at 22.

[295] POLLUTION ISSUES, *supra* note 287, at 53.

[296] ARCTIC COUNCIL SUSTAINABLE DEV. WORKING GRP, *supra* note 26.

that respects Indigenous ways of life and does not permanently alter the landscape to the extent that traditional Indigenous activities become impossible. The developments should aim to maintain the sustainability of Arctic communities during times where the resource industry is not in operation. The resource industry is notoriously unstable and subject to "boom and bust cycles," which means that Indigenous peoples cannot rely permanently on the resource industry to sustain their communities.[297] Indigenous traditional activities must be maintained because local food sources are both cheaper and more nutritious for the Indigenous people than food imported from the South.[298]

Given the fundamental vulnerability of the Arctic environment and Indigenous peoples, consultation with Indigenous groups is important to preserve the Arctic environment and its ability to support Indigenous communities.[299] However, the geography of the Arctic varies considerably both between countries and within individual countries.[300] It is home to many different groups of Indigenous peoples — all with distinct and separate cultures and ways of life.[301] These peoples include, but are not limited to, the Saami of Fennoscandia (the region including the Scandinavia peninsula, Finland, and two peninsulas in northwestern Russia), the Inuit of northern Canada and Greenland (as well as other Indigenous peoples of northern Canada, such as the Athabaskans and Gwich'in, south of the High

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[297] *See id.* (explaining the detrimental effects of boom and bust projects on northern communities).

[298] *See* Mark Nuttall et al., *Hunting, Herding, Fishing and Gathering: Indigenous Peoples and Renewable Resource Use in the Arctic*, *in* ARCTIC CLIMATE IMPACT ASSESSMENT 651 (2005).

[299] *See generally* Special Rapporteur on the Situation of Hum. Rts. and Fundamental Freedoms of Indigenous People, *supra* note 2, at 17 (discussing the purposes of consultation); NEWMAN, THE DUTY TO CONSULT, *supra* note 2 (reviewing the purposes of consultation with Indigenous peoples). *Cf.* White River First Nation v. Yukon Government, 2013 YKSC 66, para. 20 (Can.) (quoting a witness describing the significance of development in the context of an Arctic people relying on caribou: "The Proposed Project is situated in a pristine wilderness area, which is rich with vegetation, water and animal life. I have learned from my elders that, since time immemorial, our people have extensively used the lands and waters in and around the Proposed Project area for resource harvesting and cultural practices. It is the home of the Chisana caribou herd, a herd that White River First Nation members have traditionally harvested, but have been unable to harvest, by a voluntary hunting ban, since 1994 due to a dramatic decline in the herd. The use of these lands provides us with more than subsistence. Our ongoing connection to the land, and the ability to go out on the land and pass on our knowledge to the younger generations is fundamental to the survival of our culture and our way of life as a people.").

[300] LEONID P. BOBYLEV, KIRILL YA. KONDRATYEV & OLA M. JOHANNESSEN, ARCTIC ENVIRONMENT VARIABILITY IN THE CONTEXT OF GLOBAL CHANGE xv, 1-8 (2003).

[301] Oran R. Young & Niels Einarsson, *Introduction: The Arctic Human Development Report*, *in* ARCTIC HUMAN DEVELOPMENT REPORT 1, 22 (2004).

Arctic), Alaskan Yupik, Alaskan Inupiat, and many different Indigenous communities in Arctic parts of Russia.[302]

Depending on where they live, Indigenous communities engage in a variety of activities to provide for their families and communities. Therefore, consultation of Indigenous peoples in the Arctic cannot be done by a one-size-fits-all formula, but must take into account the particular geography of the site and the particular cultures of the surrounding Indigenous peoples. In order to address the diversity, this Part suggests several distinct impact categories within which the Article will describe the interconnection between resource development, the Arctic environment, and Indigenous cultural activities. The impact categories, so named because resource development has the potential to impact each in a different way, are created by first dividing the physical Arctic environment into distinct categories that reflect the largest differences in climate and geography. The same thing is done with common Arctic Indigenous cultural practices. The physical groups and the cultural groups are then cross-multiplied to develop the series of impact categories. Identifying these categories is a tool that can be used in order to develop effective consultation practices with different Indigenous communities in different geographical locations.

B. Key Marine-Terrestrial Distinction

Both in terms of the physical geography and Indigenous cultures, the most obvious distinction to draw is between the marine and the terrestrial environment. The distinction between the marine and terrestrial environment is important for two reasons. First, the major environmental effects associated with development in the marine environment are associated with oil spills and blowouts, while on land, the largest effects are caused by disturbance to land related to the construction of infrastructure and the impact of having larger communities in certain areas.[303] Second, food sources and, therefore, hunting techniques will vary between coastal Indigenous communities and inland Indigenous communities. For example, fish and marine mammals are the most common foods for coastal communities, while caribou is the most common food for inland communities.[304]

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[302] *Id.; see also* Special Rapporteur, *Russian Federation, supra* note 179, para. 7 (June 23, 2010) (stating that "[t]he Russian Federation is one of the most ethnically diverse countries in the world and includes over 160 distinct peoples"). *Cf.* MICHAEL BYERS, INTERNATIONAL LAW AND THE ARCTIC 216ff. (2013) (offering a more simplified list of the Indigenous peoples of the Arctic).

[303] AMAP OIL AND GAS, *supra* note 29, at 22-25.

[304] POLLUTION ISSUES, at 54.

Each marine and terrestrial environment can then be subdivided into more specific geographical and cultural categories. This Article will address each in turn.

C. Impact Categories for Marine Development

The marine environment is composed of areas with high sea ice cover and the open ocean, and areas with low sea ice cover.[305] Important Indigenous cultural activities in the marine areas of the Arctic include fishing, as well as hunting for marine mammals, such as whales, seals and polar bears.[306] There are four impact categories in the Arctic marine environment:

Open marine waters/fishing	Waters with a high degree of ice coverage/fishing
Open marine waters/marine hunting	Waters with a high degree of ice coverage/marine hunting

Resource development activities have different effects on each of the categories. This Article illustrates this point by generally describing the potential impacts that the development may have on open marine waters and marine waters dominated by ice floes, and explaining the effect of such impacts on the Indigenous cultural activities of fishing and hunting marine mammals.

In the Arctic marine environment offshore drilling for oil and gas has the potential to significantly impact the environment.[307] Two pervasive effects of offshore development are (1) noise pollution from boats, icebreakers, low-flying planes, drilling, and seismic surveys,[308] and (2) the potential for oil spills and blowouts.[309] While the more devastating effect is an oil spill, it is also worth mentioning noise since it is an unavoidable, pervasive part of offshore oil and gas development and it could realistically have an effect on Indigenous communities and their ability to hunt for food.

Noise from oil and gas activity in the Arctic can have significant effects on marine wildlife because sound travels farther underwater than in air and

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[305] *Id.*

[306] *Id.*

[307] ARCTIC MONITORING AND ASSESSMENT PROGRAMME, ASSESSMENT 2007: OIL AND GAS ACTIVITIES IN THE ARCTIC- EFFECTS AND POTENTIAL EFFECTS 5_1 (2007) [hereinafter EFFECTS AND POTENTIAL EFFECTS].

[308] *Id.* at 5_48 (describing the effects of noise in the marine environment).

[309] *Id.* at 4_64 ("The biggest concern related to oil and gas activities in the Arctic remains a catastrophic oil spill in the marine environment.").

many marine animals rely on their hearing more than their sight.[310] Seismic shooting, which involves the generation of a loud noise by an airgun towed behind a ship, is the most disruptive source of noise in the Arctic marine environment, but it lasts only for the duration of the survey.[311] Other sources of noise, such as drilling and ships, are not as loud, but they may have longer durations.[312] Fish and marine mammals tend to avoid loud noises, which could mean a change in swimming patterns or behaviors.[313] This change in swimming patterns has the potential to disrupt Indigenous hunting. Generally, marine animal behavior quickly returns to normal after the source of the noise is removed, although it is possible that loud noises can inflict permanent damage on fish eggs.[314]

Oil spills in the ocean have the potential to be devastating. On land, an oil spill can be more easily contained and the harm can be constrained to a relatively small area. In the ocean, however, oil spreads as a thin layer on the surface of the water, which results in effects that can span huge areas, often reaching organism-rich shorelines.[315] There are ways to constrain oil spills in the ocean and each country is required to "maintain a national system for responding promptly and effectively to oil pollution incidents" – however those methods require immediate action, and many drill sites in the Arctic are difficult to reach and located far from the resources needed to adequately address a spill.[316]

In cases where it is not possible to clean up an oil spill because of remoteness, weather, or sea ice, the harm inflicted on the environment is a function of how long it takes for the spill to naturally disperse and degrade because oil is most harmful to living beings when it is present as a slick on top of the water. In this form, oil can coat birds and marine mammals. Oil increases the thermal conductance of fur, and an animal whose fur becomes oiled loses body heat to the environment more rapidly, putting that animal in danger of dying from hypothermia.[317] Oil may also be ingested by fish.

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[310] *Id.* at 5_48.

[311] *Id.; see also* Qikiqtani Inuit Association v. Canada (Minister of Natural Resources), 2010 NUCJ 12 (Can.) (ordering consultation concerning noise from seismic testing that potentially affected marine mammals).

[312] John Hildebrand, Sources of Anthropogenic Sound in the Marine Environment (2005) (Report of an International Workshop: Policy on Sound and Marine Animals).

[313] EFFECTS AND POTENTIAL EFFECTS, *supra* note 307, at 5_48-5_52.

[314] *See id.* at 5, 49.

[315] POLLUTION ISSUES, *supra* note 287, at 49.

[316] Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic, Can.-Den.-Fin.-Ice.-Nor.-Russ.-Swed.-U.S., May 15, 2013; AMAP OIL AND GAS, *supra* note 29, at 29; *see also* ARCTIC COUNCIL, *supra* note 15, at 50 (discussing the various dimensions of shipping-related issues, including access to drill sites).

[317] EFFECTS AND POTENTIAL EFFECTS, *supra* note 29, at 5_17.

While it may seldom kill them, hydrocarbons from the oil may remain in their body in sufficient concentrations to make them unfit for consumption.[318] Oil slicks can also kill plankton blooms, which are the food source for larval fish.[319] This factor could potentially have large effects on fish population.[320]

The processes that affect the speed of degradation of an oil slick involve a chain of causation that starts with the extreme Arctic conditions. The Arctic conditions affect the physical and chemical properties of oil, which, in turn, affect the processes that degrade the oil slick. The Arctic Ocean, compared with more temperate environments, reaches very cold temperatures and often contains varying amounts of sea ice. The cold temperatures increase the viscosity and density of oil and decrease its solubility and volatility.[321] Increased viscosity and density impede surface spreading of oil and cause the oil to weather slower.[322] The presence of ice floes can also impede surface spreading by trapping the oil in an enclosed space.[323] The decrease in volatility, combined with a decrease in surface area due to less surface spreading, leads to less evaporation and longer duration of the oil slick.[324]

In addition, sea ice has the effect of shielding areas of ocean from wind and wave action.[325] The loss of these physical processes hinders the break-down of oil as wind and wave action would otherwise help spread the slick, and help the dispersion and sedimentation of oil particles. However, sea ice may prevent water/oil emulsification caused by wind and wave action. Through water/oil emulsification oil takes up water to become a more viscous and chemically stable mousse. This emulsified oil is more resistant to both physical and chemical weathering.[326]

One of the more devastating environmental effects of oil spills in areas with high ice coverage occurs when the spill affects areas called polynyas. A polynya is normally a circular or oval area of open water within an area

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[318] AMAP OIL AND GAS, *supra* note 29, at 24.

[319] *Id.* at 10.

[320] *Id.* at 25.

[321] EFFECTS AND POTENTIAL EFFECTS, *supra* note 307, at 4_24 tbl.4.19 (describing how a change in temperature from 25 ^{o}C to 0 ^{o}C results in a 2- to 4-fold increase in viscosity, a 4-fold decrease in solubility, and a 10-fold decrease in vapor pressure of oil).

[322] *Id.* at 4_24.

[323] *Id.* at 4_24-25 (explaining that 30 m^3 of oil released into ice-free temperate water will be imperceptible after three days, but the same volume released into water with 70-90% ice coverage will remain relatively unchanged).

[324] *Id.* at 4_25.

[325] *Id.* at 4_26.

[326] *Id.* at 4_28.

of sea ice.[327] They are formed either because of a mechanism that displaces sea ice from the area as it is formed, called Latent Heat or Coastal Polynyas, or because of a process that prevents sea ice from forming in the first place, called Sensible Heat or Open-Ocean Polynyas.[328] The warmer waters typical of polynyas encourage phytoplankton growth, which constitutes a major part of the Arctic food chain.[329] The result of either type of polynya is an area of warmer, highly biologically productive water with access for animals between the ocean and the surface of the ice, making polynyas a popular location for penguins, seals, and other marine organisms.[330] An oil spill affecting a polynya would therefore impact a large number of organisms.

The high potential for harm caused by an oil spill to the Arctic marine environment and the animals within it has clear impacts on local Indigenous communities who fish and hunt those animals for food, either by reducing the populations of animals or by contaminating those animals with potentially harmful compounds.

D. Distinctions and Impact Categories for Terrestrial Areas

The terrestrial environment can be subdivided into the High Arctic, Low Arctic, and Subarctic.[331] These categories capture the largest difference in the Arctic environment, especially with respect to climate and vegetation. However, there is still much variation within each category, especially in the Low Arctic and Subarctic. For example, the geology of the Arctic varies from shield in much of Canada, Greenland, and Fennoscandia to landscapes dominated by sedimentary deposits in much of Russia and northern Canada's Mackenzie River Valley.[332] Additionally, Arctic geology varies from the mountain ranges caused by the folding of sedimentary deposits in the Ural Mountains, Alaska, the Canadian archipelago, and the Yukon Territory in Canada to volcanic islands, such as Iceland and the Aleutian Islands.[333] Features such as glaciers, rivers, permafrost, sea ice, and forests also contain many local variations.[334] Landforms include the highly glaciated and ice-dominated regions characteristic of Greenland and

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[327] *Sea Ice Features: Polynyas,* NAT'L SNOW & ICE DATA CTR., http://nsidc.org/cryosphere/seaice/characteristics/polynyas.html (last visited July 25, 2013).

[328] *Id.*

[329] *Id.*

[330] *Id.*

[331] POLLUTION ISSUES, *supra* note 287, at 36-38.

[332] *Id.* at 7

[333] *Id*.

[334] *Id.* at 7-19 (describing geographical and climactic features in different areas of the Arctic).

the Canadian archipelago,[335] the Arctic tundra – which is pervasive in Fennoscandia and western Canada,[336] and boreal forests, also known as taiga, which dominate at lower latitudes.[337]

Defining the exact lines between the High Arctic, Low Arctic, and Subarctic can be difficult. The boundary of the Arctic is not a precise line, and can vary quite significantly depending on what characteristics are used to define where the Arctic begins.[338] Different countries have different geopolitical conventions as to where the Arctic boundary lies. For example, in Canada it is popular to use 60°N as the boundary since it correlates across much of the country with the southern border of Canada's territories.[339] However, those conventions often do not transfer seamlessly from one country to another.[340] Other examples of criteria used to delineate the bounds of the Arctic are the Arctic Circle, which lies at 66°32 N, the 10°C July isotherm (the area north of where the mean temperature in July is 10°C), or the treeline.[341] None of these is an entirely useful delineation across all Arctic countries and, thus, there is no "official" boundary to the Arctic.[342] These difficulties in defining the Arctic manifest equally in the attempt to differentiate between the High Arctic, Low Arctic, and Subarctic. Therefore, there is no hard line between the groups, but rather general characteristics of each with some resulting areas displaying characteristics typical of more than one category. The climate and geography of the High Arctic, Low Arctic, and Subarctic are each able to support different kinds of plant and animal life,[343] and, thus, the biology of a region can be a good indicator of what geographical category it is in.

Normally the High Arctic, Low Arctic, and Subarctic regions are dependent on latitude, with the High Arctic at the northern-most latitudes, the Low Arctic just south of it, and the Subarctic further south.[344] In fact, depending on how the Arctic boundary is defined, the Subarctic may not even be considered the Arctic. For example, if the treeline defines the Arctic boundary, then the Subarctic would not be included in the Arctic since the dominating characteristic of the Subarctic is the presence of boreal forest. The conditions characteristic of the High Arctic, Low Arctic, and

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335 *Id.* at 16.

336 *Id.* at 18-19.

337 *Id.*

338 Young & Einarsson, *supra* note 301, at 17.

339 A POLLUTION ISSUES, *supra* note 287, at 6-7.

340 Young & Einarsson, *supra* note 301, at 17.

341 A POLLUTION ISSUES, *supra* note 287, at 6-7.

342 *Id*.

343 *Id.* at 36 (describing the limiting conditions that determine what types of life forms are able to survive in the Arctic).

344 *Id.* at 38.

Subarctic regions can also be separated by altitude as well as latitude, as would be common in mountainous regions.[345] High Arctic conditions can be found at high altitudes with Low or Subarctic conditions dominating at the base of the mountain.

As with the categories in the marine environment, the categories in the terrestrial Arctic are made by associating the more common Indigenous cultural practices with the different geographical environments in order to analyze the different effects that resource development would have on Indigenous populations. The goal is to facilitate more effective consultation practices. Indigenous peoples of the Arctic have lived off of natural resources for thousands of years, and, as such, these traditional ways of sustenance are central to their cultures.[346] Many communities do not have access to the oceans and survive off the resources that the Arctic land is able to support. The variety in Indigenous cultural practices is just as diverse as the terrestrial Arctic environment since Indigenous lifestyles reflect what resources are available to different Indigenous communities in their specific contexts, as well as the particular characteristics of the various Indigenous groups. As with the geographical categories, it would be impractical to define each individual Indigenous cultural practice, and so, it is necessary to generalize practices into broad categories. Examples of the main activities that Arctic Indigenous communities participate in that could be affected by oil and gas development include fishing in lakes or rivers, reindeer husbandry, gathering of berries and plants, and hunting of territorial animals, such as caribou, muskox, and Arctic hare.[347]

E. Delimiting the Terrestrial Impact Categories

There are potentially twelve impact categories in the terrestrial Arctic: three geographic categories and nine cultural categories.

High Arctic	**Low Arctic**	**Subarctic**
Fishing	Fishing	Fishing
Hunting	Hunting	Hunting
	Reindeer Husbandry	
	Gathering Plants and Berries	Gathering Plants and Berries

In order to analyze potential impacts on each of these impact categories,

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[345] *Id.*

[346] Irina L. Stoyanova, *The Saami Facing the Impacts of Global Climate Change*, *in* CLIMATE CHANGE AND INDIGENOUS PEOPLES 287 (Randall S. Abate & Elizabeth Ann Kronk eds., 2013).

[347] POLLUTION ISSUES, *supra* note 287, at 52-69.

this Article first describes the general characteristics of the High Arctic, Low Arctic, and Subarctic. This Article then describes how the environmental conditions associated with each of these categories influences the types of Indigenous food-gathering and cultural activities. Finally, this Article explores some of the ways in which resource development may impact the different categories in different ways.

The High Arctic is considered a polar desert.[348] Most of the time, water is locked up in the form of snow and ice and, thus, is unavailable for use by plants.[349] The only time fresh water is available is during snowmelt for a limited time during the summer and, even then, the High Arctic environment is not able to effectively utilize this source of water for plant growth. In order to create soil, there must be processes that weather the underlying bedrock.[350] Water is one of the most effective modes to physically weather rock in streams and rivers, as the water carries particles, which slowly chip away at bedrock in addition to the expansion of water freezing in cracks.[351] The paucity of liquid water in the High Arctic means that these physical weathering processes are much less common. In addition, many chemical reactions require energy and, thus, are catalyzed by warmer temperatures.[352] In the High Arctic, the mean air temperature during the warmest time of the year, July, is between four and eight degrees Celsius, and in the winter, the temperatures are much colder, so that any possible chemical weathering of the bedrock is drastically slowed.[353] The result of the inhibited physical and chemical weather processes is very minimal soil in which to hold moisture, even when it is available.[354]

The paucity of soil and water in the High Arctic, coupled with the fact that the growing season — the amount of time when the ground has no snow cover — is only one to two and a half months,[355] means that the only vegetation able to persist in the High Arctic are lichens and mosses.[356] This, in turn, limits the type and number of animals that are able to survive. Muskox and caribou can subsist, thereby supporting small carnivores like wolves and foxes.[357] The result, however, is short food chains and limited

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[348] *Id.* at 38.

[349] *Id.* at 36.

[350] Arjun M. Heimsath et al., *The Soil Production Function and Landscape Equilibrium,* 388 NATURE 358, 358 (1997) (describing the relationship between soil creation and erosion).

[351] *See id.*

[352] *See id.*

[353] POLLUTION ISSUES, *supra* note 287, at 38, 40.

[354] *Id.* at 40.

[355] *Id.* at 38.

[356] *Id.* at 40.

[357] *Id.*

diversity of species.[358]

The Low Arctic is characterized by tundra with pervasive permafrost. Although there is a soil base, the permafrost layer limits the potential for plant growth by constraining the area in which roots can grow.[359] "Tundra" refers to as an area that cannot support the growth of trees but is covered with other plants, such as shrubs, mosses, grasses, and lichens.[360] Compared with the High Arctic, the Low Arctic has a longer growing season that varies between three and four months, with a mean July air temperature between four and eleven degrees Celsius.[361] These climatic differences mean that the area is able to support a larger variety of plant life, and larger numbers of animal wildlife than the High Arctic,[362] but the diversity of species remains limited in the Low Arctic and the food chains remain short and noncomplex.[363] An important feature of the Low Arctic that has a large effect on the ecology of the region is the pervasiveness of wetlands.[364] Because of the pervasive permafrost layer, water drainage is inhibited, which creates waterlogged ground rich in organic matter.[365]

The Subarctic is characterized by boreal forests containing spruce, pine, and fir trees, as well as patchy permafrost.[366] In the Subarctic, conditions are significantly more mild compared to the High and Low Arctic, and the Subarctic contains fewer of the environmental limitations normally characteristic of the Arctic.

The four categories of Indigenous cultural/subsistence activities that this Article addresses are hunting, fishing, reindeer husbandry, and gathering plants and berries. Although these practices are not exhaustive of practices of interest, they cover many of the activities that would most likely be the subject of consultation in the context of Arctic resource development.

Hunting on land in the Arctic is more difficult than in more temperate regions due to the limited number and diversity of animals, as well as the short food chains. If something happens to one species, the entire biosphere is affected.[367] Animals that Indigenous peoples rely on for food can therefore fluctuate widely depending on the fate of other organisms in the Arctic. The population numbers and biodiversity tend to increase from north to south, so the High Arctic has a relatively low population and a low

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358 *Id.*

359 *Id.*

360 *Id.*

361 *Id* at 40.

362 *Id.*

363 *Id.*

364 *Id* at 42.

365 POLLUTION ISSUES, *supra* note 287, at 42.

366 *Id.* at 43.

367 *Id.* at 42.

number of species, while the Subarctic can support populations and ecosystems of a complexity that is similar to temperate regions of the globe.[368]

Another food-gathering activity that is affected by the low biodiversity in the Arctic is fishing. Arctic lakes are frozen for the majority of the year with ice covers typically between one and three meters, depending on the specific temperatures and conditions of the lake.[369] During the winter, no light can reach the water, no photosynthesis can occur by algae, and the lake, consequently, becomes depleted in oxygen, which can be lethal to any fish living in the lake. In North America, as in Fennoscandia and Russia, the diversity of lake-dwelling species increases from north to south.[370] In the High Arctic, the Arctic char is the dominant species of fish, but lakes in the Low Arctic also contain trout, sickleback, and grayling.[371] In general, biodiversity in lakes is greater in Fennoscandia and Russia than in North America, partly because many of the rivers and lakes are connected to more southern areas allowing more species to migrate into the Arctic, and partly because of slightly higher temperatures and less ice and snow coverage.[372]

Reindeer husbandry, or reindeer herding, is practiced extensively by the Saami, who are Indigenous peoples in northern Fennoscandia and the adjacent Kola Peninsula in Russia.[373] The Saami are the only officially recognized Indigenous people in Europe.[374] Their recognition is complicated by the fact that despite the fact that the Saami are one people, each of the Nordic Saami Acts contains different criteria for the right to be included in the Saami census.[375] Compared with many other Indigenous

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[368] *Id.* at 43.

[369] *Id.* at 44.

[370] *Id.*

[371] *Id.* at 46.

[372] *Id.* at 44.

[373] *But see* Special Rapporteur, *Russian Federation*, *supra* note 179, para. 7 (stating that "[t]he Russian Federation is one of the most ethnically diverse countries in the world and includes over 160 distinct peoples," thus, making the Saami one of a much larger number of Indigenous peoples in Russia, some of whom would also be west of the Urals and therefore within some definitions of Europe).

[374] Tanja Joona, *The Subjects of the Draft Nordic Saami Convention*, *in* THE PROPOSED NORDIC SAAMI CONVENTION: NATIONAL AND INTERNATIONAL DIMENSIONS OF INDIGENOUS PROPERTY RIGHTS 255 (Nigel Bankes & Timo Koivurova eds., 2013); Stoyanova, *supra* note 346, at 288; *see* Heinämäki, *supra* note 222, at 134-35 (explaining that while the Saami are not definitively recognized as Indigenous peoples under international law, the Saami are recognized as an Indigenous people in the legislations of the individual Nordic countries, as well as in the draft Nordic Saami Convention).

[375] Joona, *supra* note 374, at 257; JOHN B HENRIKSEN, SAAMI PARLIAMENTARY CO-OPERATION: AN ANALYSIS 23 (Nordic Sámi Institute IWGIA Document No 93, Guovdageaidnu and Copenhagen 1999).

groups, the Saami have a great deal of political power and organization, which empowers them to protect many of their Indigenous rights, including the right to herd reindeer.[376] Although many Saami have embraced more modern modes of lives, the practice of reindeer husbandry, which is a traditional means of subsistence living, remains important for cultural reasons.[377] Although not as widespread in other areas of the Arctic, reindeer husbandry is also important to certain Indigenous groups in Russia, Greenland, Alaska, and Canada.[378] The practice requires large tracts of undeveloped land in order to accommodate the migratory habits of reindeer.[379]

The final category of Indigenous cultural activity that this Article addresses is the practice of gathering plants and berries. This activity is limited to the Low Arctic and Subarctic since most plants are unable to grow in High Arctic conditions. As per the diversity of animals and fish, the availability and variety of plants increases further south.[380]

Just as the climate and geography of the Arctic has a strong effect on which practices are available to an Indigenous group, they also determine to what extent resource development can adversely impact the environment. Generally, the diversity in food gathering opportunities available to Indigenous communities decreases from south to north, while the potential impact from the resource industry increases from south to north.[381] It follows that the farther north an Indigenous group lives, the more vulnerable their traditional lifestyle is to the impacts of industry.

While there are many effects that the resource industry can inflict on an environment, the two most concerning for the Arctic environment are oil spills and surface development of infrastructure. Although both are harmful, oil spills are a lesser problem on land compared with in the ocean, and the most serious impacts come as a result of infrastructure development.[382] This Part describes how oil spills and infrastructure could possibly affect each of the impact groups.

Oil spills can be extremely devastating when they occur in a marine environment, but that is not to say they cannot also have serious effects on land. Although large oil spills do happen, it is more common to have small spills of a few liters of oil from leaky tanks, vehicles, and pipelines.[383] Oil

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376 Heinämäki, *supra* note 222, at 146-47; Stoyanova, *supra* note 346, at 288-89.

377 Stoyanova, *supra* note 346, at 290-92.

378 *Id.* at 290.

379 *Id.*

380 POLLUTION ISSUES, *supra* note 287, at 40.

381 OIL AND GAS 2007 *supra* note 29 at 5_80 – 5_85.

382 *Id.* at 22.

383 EFFECTS AND POTENTIAL EFFECTS, *supra* note 307, at 5_84.

spills can be particularly harmful to an ecosystem because oil is toxic to vegetation and kills plants upon contact.[384] Once the soil has been contaminated with oil, plant regrowth can take decades.[385] Although animals can be coated in oil when an oil spill on land occurs, this is generally a much lesser problem than it would be in the ocean.[386] Oil spilled in the summer spreads farther than oil spilled in the winter because it is able to permeate the soil layer and be transported within the soil for a considerable distance.[387]

The biggest threat to the environment is the physical disturbance brought on by the construction of infrastructure, such as roads, culverts, airstrips, gravel pads, drill rigs, pipelines, and communities to house the workers.[388] This infrastructure can be particularly damaging to plant life. Such effects are quite dramatic in the High Arctic since the extreme cold, lack of precipitation, and extended periods without sunlight inhibit biological processes, making regrowth painstakingly slow. It is no longer permissible to drive vehicles on unfrozen tundra in some areas of the Arctic because a single tire track can affect vegetation and soil.[389] In addition to the disruption that destroyed vegetation has on the animals that rely on plants as their food source, many of the activities associated with resource extraction can disrupt the movements of herds directly since animals try to avoid areas with a lot of human activity, and sometimes their physical paths are blocked by roads or pipelines.[390] Since the ability to hunt depends on the knowledge of animal behavior, activity that modifies animal behavior can impact Indigenous hunting. In summary, because of the particular harsh Arctic conditions, natural regrowth over areas disturbed by resource development is slowed, and, thus, impacts that might not be particularly devastating or long-term under moderate conditions could have a permanent or semi-permanent impact on the environment and Indigenous communities.[391] The conditions that inhibit plant growth and natural rehabilitation are more prevalent in the High Arctic than in the Low Arctic or Subarctic. A key result is that, the further north the development, the higher the risk of adverse and irreversible environmental and terrestrial effects.

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[384] *Id.* at 5_75.

[385] *Id.* at 5_78.

[386] *Id*.

[387] *Id.* at 5_76.

[388] OIL AND GAS, *supra* note 29, at 22.

[389] EFFECTS AND POTENTIAL EFFECTS, *supra* note 307, at 5.

[390] OIL AND GAS, *supra* note 29, at 22.

[391] *Id*. at 22-23.

V. APPLICATION OF IMPACT CATEGORIES ANALYSIS TO CONSULTATION IN ARCTIC CONTEXTS

Part IV has identified a number of different impact categories that are pertinent to the analysis of consultation with and participation by Arctic Indigenous communities in energy-related resource development. The diversity of the Arctic, a large region of the Earth, has rapidly multiplied the number of these impact categories such that it will not be possible to analyze the application of the Part III principles to each of the Part IV impact categories individually within this Article. However, Part IV impact categories nonetheless pattern the application of the Part III principles. They also allow for a more detailed comment on the practices of Arctic states described in Part II.[392]

One key division in Part IV was between marine and terrestrial contexts, with energy development posing much more significant issues in marine contexts.[393] Indeed, Indigenous rights in marine contexts have generally received relatively little attention.[394] Thus, one innovative point immediately arising from this Article is that the circumstances of Arctic Indigenous peoples point to a real need for detailed research on Indigenous rights in marine contexts, quite possibly drawing upon literatures in some states that have engaged more with those issues, such as Australia.[395]

In the meantime, Arctic states should continue to try to find ways of involving Indigenous communities in decisions affecting marine contexts pertinent to the particular Indigenous communities. Their differing relationships with various Indigenous communities may imply differences between states. For example, to the extent that Saami cultural practices relate much more to reindeer husbandry than to marine food sources or practices, it may be justifiable in certain respects that the Nordic Saami

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[392] *See supra* Part II.

[393] *See supra* Part IV.

[394] *See, e.g.*, Monica E. Mulrennan & Colin H. Scott, *Mare Nullius: Indigenous Rights in Saltwater Environments*, 31 DEV. & CHANGE 681, 681-82 (2000) (noting that Europeans tend to ignore terrestrial-marine connections, thereby ignoring Indigenous marine rights). *But see* Commonwealth v. Akiba [2012] FCAFC 25 (Austl.) (upholding a major marine title claim in the context of the much more developed Australian discourse on Indigenous marine claims); PAUL MCHUGH, ABORIGINAL TITLE: THE MODERN JURISPRUDENCE OF TRIBAL LAND RIGHTS 332 (2012) ("In the new century . . . aboriginal claims over sea country became particularly marked in Australia, New Zealand, and Canada's Pacific and, more recently, the Arctic coast."); Jim Reynolds & C. Rebecca Brown, *Aboriginal Title to Sea Spaces: A Comparative Study*, 37 U.B.C. L. REV. 449 (2004) (comparing Indigenous sea title claims in Australia, the United States, New Zealand, and Canada).

[395] *See* MCHUGH, *supra* note 394, at 114-16, 175-80 (2011); Jacinta Ruru, *What Could Have Been: The Common Law Doctrine of Native Title in Land Under Salt Water in Australia and Aotearoa/New Zealand*, 32 MONASH U. L. REV. 116, 117 (2006).

Convention does not seek to involve the Saami into offshore energy development issues.[396] On the other hand, where certain Inuit communities in Canada have very close relations to marine resources, Canada has even negotiated one marine "land claims" treaty.[397] But Canadian law on Indigenous rights in marine contexts is extremely underdeveloped, and the relation of Inuit communities to marine resources implies the need for further work in this area. Similar considerations would very likely apply to Alaskan communities that have whaling practices or make other uses of marine resources.[398]

The impact categories discussed in Part IV also serve as a (partial) set of categories to help identify possible general impacts on matters like marine impacts that might not have been first within contemplation.[399] Therefore, it is important, pursuant to the principles addressed in Part III, to consider how severe the potential impacts of a development project are on Indigenous interests. The categories can help to schematize different possible impacts with those matters of most pertinence varying in different parts of the Arctic.[400]

Therefore, Arctic states should pursue the ongoing development of consultation and participation frameworks that enable consideration of those impact categories that are most pertinent within their regions of the Arctic. Some of the differences between state frameworks are explicable in terms of these differing impact categories. However, an application of the principled framework of Part III to the impact categories of Part IV also highlights areas where there is room for improvement in particular state practices. For example, the Russian Federation, in grappling with a vast and differing geographic region of the Arctic,[401] as well as a vast number of different ethnic groups,[402] has developed only relatively informal consultation mechanisms.[403] While the circumstances of operating across

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[396] *See supra* Part II.

[397] *See* Eeyou Marine Region Land Claims Agreement Act, S.C. 2011, c. 20 (Can.).

[398] *But see* Oil and Gas Leasing Program, 30 C.F.R. § 556.19 (2013) (providing for consultation with those involved in whaling above the Continental Shelf).

[399] *See generally supra* Part IV.

[400] *Id.*

[401] *Id.* (referring to different geographic regions within the vast Russian Arctic region).

[402] Special Rapporteur, *Russian Federation, supra* note 178, para. 7 ("The Russian Federation is one of the most ethnically diverse countries in the world, [sic] and includes over 160 distinct peoples.").

[403] *See id.* para 54 ("Federal officials assured the Special Rapporteur that when federal executive bodies make critical decisions affecting the interests of indigenous people they seek the participation of indigenous representatives; they have further stated that the cooperation between federal governing authorities and indigenous associations is regarded as one of the priorities of the national policy of Russia.").

many different impact categories in a variety of different ways make the development of more formal frameworks obviously challenging, there are real dangers in an informal system. The key danger is that Russia may have positive intentions and good law on the books, but operationalization of this law in terms of actual consultation and participation outcomes for Indigenous communities will be lacking.[404]

Ongoing policy development is pertinent even in states with existing policies. Scandinavian states, like Norway, have different impact categories that are most pertinent to their Indigenous communities. The ongoing developments around the Nordic Saami Convention[405] present an opportunity to ensure respect for Saami communities. The developments take into account impacts of different sorts of development, which may not be as related to energy development as in the context of Arctic Indigenous peoples in other Arctic states.[406] The description of Greenland in Part II alluded to a place on the possible cusp of development, with possibly significant energy development ahead.[407] Greenland has the opportunity to ensure that appropriate policies are in place in advance of this development, and it should actively seek to develop appropriate policies for the impact categories most pertinent to its Indigenous communities.

Canada has established a number of different frameworks for its different Indigenous communities.[408] That may be a reasonable choice in the context of different Indigenous communities spread across a vast Arctic region with very different circumstances and with practices falling into different impact categories. As discussed, the need for further articulation and development of Indigenous marine rights issues has not received much attention in Canada thus far. As energy development continues, Canada should generally monitor closely whether its set of different arrangements is successful in addressing the issues associated with consultation and participation.

The United States, in the context of Alaska, should consider whether the participation aspects of its policy framework have left sufficient room for consultation on future energy development. The articulation in recent years of further consultation norms[409] certainly works in the direction of consultation, but there is further work to be done in this area. The impact

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404 *See* Xanthaki, *supra* note 180, at 75-76, 104.

405 *See supra* Part II (discussing these developments).

406 *See supra* Part II (discussing these developments).

407 *See supra* Part II (discussing these developments).

408 *See supra* Part II (detailing different treaty arrangements, along with more general constitutional norms).

409 *See, e.g.*, U.S. DEP'T OF THE INTERIOR, *supra* note 97, at 1-3; U.S. ENVTL. PROT. AGENCY, *supra* note 95, at 1; WHITE HOUSE INDIAN AFF. EXEC. WORKING GRP., *supra* note 99, Part I.B.

categories in this Article can help identify a number of areas in which there may be needs for consultation as Alaska further develops.

This Article shows the need for ongoing analysis of Arctic energy issues and its impacts on Arctic Indigenous peoples, without falling into the all-too-frequent scholarly trap of simply trying to block all energy development. Careful analysis of the actual energy development risks for Indigenous peoples in different regions can enable careful management of those risks and responsive participation arrangements. The vast energy potential of the Arctic,[410] which is gradually becoming more accessible,[411] can also be responsibly accessible with appropriate interactions with Arctic Indigenous peoples.

At the same time, while there is enormous benefit in Arctic cooperation in many different ways,[412] this Article also highlights the diversity of the Arctic, the different policy frameworks that already exist, and the different needs existing in different Arctic regions and different Indigenous communities. Those undertaking Arctic energy development must put aside any stereotypes of the Arctic (e.g. homogeneous) and be attentive to the vast diversity of the Arctic. The ongoing development of appropriate legal arrangements by both state actors and corporate actors, operating in cooperation with Indigenous peoples, offers a path forward on Arctic energy development. However, the legal arrangements must be nuanced and attentive to a wide variety of different circumstances. The work to be done in the Arctic to attain its resources is not just physical or technological. It also includes nuanced legal work to which both legal scholars and legal practitioners can make a real contribution. At the same time, it is also worth recognizing that best relationships sometimes emerge from rising above minimal legal requirements[413] and reach arrangements that best achieve respect for diverse places and human communities.

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[410] *See, e.g.*, The Brookings Institution, *supra* note 1, at 39.

[411] *See* COATES ET AL., *supra* note 17, at 137-87 (discussing the increasing accessibility of Arctic resources).

[412] *See, e.g.*, DEP'T OF ST., PRESS RELEASE NO. 2013/0566, KIRUNA DECLARATION: ON THE OCCASION OF THE EIGHTH MINISTERIAL MEETING OF THE ARCTIC COUNCIL (May 15, 2013) (noting the cooperation on range of different Arctic issues); Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic, *supra* note 316, art. 1 (adopting some cooperative procedures regarding oil spills, with plans to develop further such cooperative processes).

[413] *See* NEWMAN, THE DUTY TO CONSULT, *supra* note 2, at 46-47.