
Mining in Greenland and Free, Prior and Informed Consent: a Role for Corporations?

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Abstract

This paper argues that the Free, Prior and Informed Consent (FPIC) element of fundamental indigenous rights does apply to extractive industry projects in Greenland. Unfortunately, specific projects and the industry as a whole in Greenland have fallen short of meeting this requirement. This paper further argues that the ongoing failure of FPIC principles in Greenland is a source of significant corporate risk, in the form of legislative changes, retracted licenses, restricted access to project financing and reputational damages. In light these concerns, this paper sets forth the argument that a proactive corporate led approach to FPIC compliance would reduce or even eliminate this risk. While corporate-led FPIC compliance may not address the need for an improved FPIC policy on a national level, the paper concludes that corporate-led FPIC compliance would effectively counteract the direct corporate risk of non-consensual project development in Greenland.

Extractive resource projects have huge potential in Greenland, but the ongoing failure to obtain free, prior and informed consent (FPIC) from affected indigenous communities is creating significant risk for investors. This kind of “non-consensual” development can have extreme negative impacts on indigenous culture, the natural environment and the corporate bottom line. In Greenland, where indigenous peoples constitute 89% of the popu-

lation, these negative impacts are substantially magnified.¹ For extractive industries in Greenland, the nexus between project development and indigenous rights is therefore extremely relevant.

The purpose of this paper is to lay out the case for an increased role for corporations in Greenland to improve FPIC compliance in regards to the exploitation of natural resources and protect indigenous rights in practice.

To this purpose the paper identifies the specific FPIC requirements that pertain to extractive resource exploitation in Greenland, demonstrates the risk that non-consensual development creates for corporations, and discusses whether there is a legal space for corporations themselves to take on an increased role in upholding FPIC principles in Greenland.

The argument is made in four parts. Part I presents the background of extractive development in Greenland and identifies challenges in the extractive sector. Part II provides an introduction to the concept of FPIC, including the legal foundations and the role of FPIC in ensuring substantive indigenous rights in practice. Part II also identifies the enforcement of FPIC requirements as a source of

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¹ CIA Factbook; Regarding the legal recognition of the indigenous identity of the Greenlandic Peoples, refer generally and specifically to Article 33 of the Report of the Committee set up to examine the representation alleging non-observance by Denmark of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the National Confederation of Trade Unions of Greenland (Sulinermik Inuussutissarsiuqartut Kattuffiat-SIK) (SIK). Available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50012:0::NO::P50012_COMPLAINT_PROCEDURE_ID,P500.2_LANG_CODE:2507219,en

corporate risk. In Part III, the paper explores the current status of FPIC in the Greenlandic extractive industry from the perspectives of regulatory and political consultation mechanisms, determining that FPIC is not being met in regards to certain indigenous rights. Part III further identifies the specific risks that extractive industry corporation in Greenland face, as a result of non-consensual development projects. The Paper concludes in Part IV, which lays out the legal basis for an increased role for corporations in obtaining FPIC in regards to substantive indigenous rights, as well as the practical ways in which such role would mitigate corporate risk.

I. Background

a. Greenland in 2013: The year of extractive resources

Cumulative foreign investment in Greenland's extractives sector has exceeded US\$1.7 billion as prospectors have arrived from the US, Europe, China and Australia in pursuit of iron, oil, nickel, rubies, gold, uranium and rare earths.² Since 2002, exploration licenses for Greenland's resources have grown six-fold.³ While Greenland's mineral and oil annual production remains at precisely zero, 2013 saw four developments that point towards Greenland emerging as a key player in the worldwide extractives industry, but also suggest growing discontent.

The first key development in 2013 was the surprise victory of the opposition Siumut Party in the parliamentary election, on a platform with increased participation of Greenland's indigenous community in the extractive sector.⁴

Despite promises to reign in extractive development, numerous mining mega-projects continue to move forward, while contentious new legislation has opened the country to mining for rare earths and uranium.⁵ To quote the Prime Minister, "Mining will come to Greenland."⁶

The second key development was the issuing of the first extraction permit approval under the Mineral Resources Act, which was granted to London Mining Co in October. The Isua Mine, London Mining's iron mining project, is expected to produce 15M dry metric tons of iron pellet feed concentrate. The Mine includes a processing facility and dedicated deep-water port.⁷ Following the 2013 elections, London Mining negotiated terms with the government, which provide an escalating royalty payment that rises to 5%.⁸ Despite these minimal royalties, it is still expected that the Government of Greenland will receive over US \$5 billion over the lifetime of the project.⁹

The third key development in 2013 was the narrow passage of a proposal to overturn the existing ban on mining rare earths and uranium.¹⁰ Greenland's potential rare earth deposits

www.reuters.com/article/2013/03/13/us-greenland-election-idUSBRE92907F20130313 [hereinafter *Voters Deliver Backlash*]; Palash R. Ghosh, *Greenland Election: Autonomy Comes At What Price?*, IBTIMES.COM (Mar. 13, 2013), <http://www.ibtimes.com/greenland-election-autonomy-comes-what-price-1123789>; Terry Macalister, *Greenland Government Falls as Voters Send Warning to Mining Companies*, THE GUARDIAN (Mar. 15, 2013), <http://www.theguardian.com/world/2013/mar/15/greenland-government-oil-mining-resources>.

⁵ *Greenland votes to allow uranium, rare earths mining*. Reuters, Oct 25, 2013 1:58am.

⁶ Areddy, Wall Street Journal, 2013.

⁷ Michael Allan McCrae, *Greenland iron ore mine gets green light*. Mining.com. October 26, 2013.

⁸ *Id.*

⁹ *Id.*; Leandi Kolver, *Miningweekly.com* 24th October 2013.

¹⁰ Hammond's government won the heated debate by 15-14 vote. *Greenland votes to allow uranium, rare earths mining*. Reuters, Oct 25, 2013 1:58am.

² James T. Areddy, Wall Street Journal. August 22, 2103.

³ Richard Mills, *Greenland offers exploration homerun potential*, Mining.com. August 10, 2013.

⁴ See generally Jan M. Olsen, *Mining proponents win Greenland election*, AP (Mar. 13, 2013), <http://news.yahoo.com/mining-proponents-win-greenland-election-085902372--finance.html>; Alistair Scrutton, *Voters Deliver Backlash Over Greenland's Minerals Rush*, REUTERS (Mar. 13, 2013), <http://>

are projected to vault the country into a leading position worldwide in terms of rare earth's production.¹¹ With China currently dominating the world's rare earths market, Greenland's deposits could shift the worldwide balance of trade for these essential manufacturing inputs.¹²

This bill raised opposition from indigenous and environmental activists within Greenland, and from the Government of Denmark, which maintains a ban on mining uranium and retains a role in the governance of Greenland.¹³

The fourth key development was the opening of dialogue to revise the existing Mineral Resources Act. Specifically, provisions have been proposed that would limit the authority that is currently granted to projects valued at more than US\$1 billion.¹⁴ Another proposal would allow companies to conclude agreements with foreign labor unions, thereby opening the country to cheap foreign labor. This would effectively bypass Greenland's high labor costs in exchange for inexpensive workers, potentially from China.¹⁵ Although no legislation has been formerly proposed, this is clearly the next issue set to divide

indigenous rights and environmental advocates from Greenland's pro mining and industry bureaucracy.

b. FPIC: No place at the table?

While the developments in Greenland's nascent extractive industry sector have come thick and fast, steadily increasing investment in Greenland's extractives has generated significant hostility. Despite the opposition party's victory in March, the promised reforms have not been sufficient to quiet the concerns of a significant segment of Greenland's indigenous population.¹⁶

At the core of this discontent is the persistent perception that Greenland's indigenous population, constituting 89% of the population, has not been properly consulted regarding the use of the country's non-renewable resources.¹⁷

This issue extends beyond politics. Despite constituting a majority of the population, Greenland's indigenous population is entitled to certain fundamental indigenous rights under UNDRIP and enforceable under the International Labour Organization Convention 169 on the Rights of Indigenous Peoples, (ILO 169), to which and Greenland is a signatory. These fundamental rights may require that extractive industry projects in indigenous lands obtain FPIC from the affected communities. Yet, in practice these rights are not available.¹⁸

¹¹ Id.

¹² According to European Commission data, Greenland has "especially strong potential in six of the fourteen elements on the EU critical raw materials list." *Cecilia Jamasmie, Greenland to revise polemic mining law*. Mining.com. October 16, 2013.

¹³ Id. Esmarie Swanepoel, *Greenland cuts Kvanefjeld cost to \$810m*. Miningweekly.com. 26th March 2013; "Polls suggest a majority of Greenlanders agree with Mrs. Hammond that mining offers the best chance to spur the economy and ultimately wean Greenland from Danish economic support. But in the lead-up to Thursday's vote on the 25-year-old prohibition on uranium, Mrs. Hammond and other legislators, wearing colorful traditional dress, faced rare protests in the capital Nuuk from anti-mining demonstrators", James T. Areddy & Clemens Bomsdorf. *Greenland Opens Door to Mining*. Wall Street Journal Online. Oct. 25, 2013.

¹⁴ Id.

¹⁵ Jamasmie, Mining.com. October 16, 2013.

¹⁶ Nunavummiut Makitaganarningit, *Greenlanders Protest Uranium Mining*. September 13, 2013; Greenland's green light for uranium extraction sparks environmental concerns. Euronews, October 2013, Available at: <http://www.euronews.com/2013/10/25/greenland-s-green-light-for-uranium-extraction-sparks-environmental-concerns/>.

¹⁷ *Supra*, Note 4.

¹⁸ *See generally*, *Infra*, Part III.

II. Fpic, Indigenous Rights and Extractive Resources

a. Legal Foundation

(i) Underlying foundation

The concept of FPIC itself is an element of two legal principles: the fundamental right to self-determination of indigenous peoples and the property rights of indigenous peoples.¹⁹

The right to self-determination of indigenous peoples is based in the International Convention on Civil and Political Rights (ICCPR) and the International Convention on Economic, Social and Cultural Rights (ICESCR) through common Article 1.²⁰

The property rights of indigenous peoples are also derived from the ICCPR and ICESCR particularly through common Article 1, which states all peoples have the right to "...for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law."²¹

Despite deriving from the same fundamental principles, the indigenous right to FPIC regarding self-determination is fundamentally different from the indigenous right to FPIC to the alienation of indigenous property. While the former is harder to enforce in practice, the latter is more likely to be enforceable in court.²²

For example, the Committee on the ICESCR has explicitly recognized the right to FPIC concerning indigenous property rights. In a 2001 report, the Committee noted that FPIC principles should be applied when dealing with indigenous claims over timber, soil or subsoil mining projects and on any public policy affecting them."²³ In 2002, the Committee called on Colombia to achieve prior and informed consent from indigenous peoples affected by resource extraction.²⁴ A 2004 statement from the Committee expressed "deep[ly] concern[ed] that natural extracting concessions have been granted to international companies without the full consent of the concerned communities."²⁵

(ii) FPIC and fundamental indigenous rights

FPIC is key element of the fundamental and universally recognized right to self-determination and the indigenous right to property, as expressed in the non-binding UNDRIP and the binding right to consultation found in ILO 169.

The right to FPIC as a derivative of the right to self-determination is expressed in UNDRIP as the right to "freely determine... political status and freely pursue... economic, social and cultural development," and the right to autonomy or self-government in matters relating to their internal and local affairs..."²⁶ FPIC applies specifically to the right "to maintain, protect and develop the past, present and future manifestations of their cultures," as well as in regards to

¹⁹ McGee, *Berkeley Journal of International Law*, Vol. 27, Iss. 2, 2009.

²⁰ International Convention on Civil and Political Rights, *United Nations Treaty Series* at 999 U.N.T.S. 171. Article 1; UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, Article 1.

²¹ *Id.*

²² For a detailed discussion on the connection between the right to self-determination and the indigenous right to FPIC, see *infra*, section II.a.ii.

²³ The UN Committee on Economic, Social and Cultural Rights on report of Columbia in relation to traditional lands (E/C.12/1/Add. 74, para. 12).

²⁴ N. High Comm'r. for Human Rights, Committee on Economic, Social and Cultural Rights [CESCR], Concluding observations of the Committee on Economic, Social and Cultural Rights: Colombia, ¶ 12 and 33, U.N. Doc. E/C.12/1/Add.74 (Dec. 6, 2007); McGee, *Berkeley Journal of International Law*, Vol. 27, Iss. 2, 2009

²⁵ E/C.12/1/Add.100, (para. 12).

²⁶ UNDRIP, Articles 3 and 4.

legislation and administrative measures affecting indigenous peoples.²⁷

These rights are clearly influenced by Article 7.1 of ILO 169, which reads in the pertinent part,

The [indigenous] peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development, which may affect them directly.

These rights are referred to hereafter as the fundamental indigenous right to self-determination, although it is a limited fundamental right, as described above.

UNDRIP address the issue of FPIC and natural resources directly in Articles 10 and 29.²⁸ In addition to specific FPIC references, UNDRIP's emphasis on self-determination in regards to control over land and resources, in UNDRIP Articles 26 and 27. This can be understood as reinforcing the value of FPIC in regards to the core human rights of indigenous peoples.

The right to FPIC over the alienation of property is based in UNDRIP Article 10 and 29, which guarantee the right to FPIC regarding forced relocation and the conservation of natural resources. In regards to proposed mining activi-

ties, Articles 10 and 29 are not directly equivalent to a right to FPIC over the use of indigenous resources and land.²⁹ In practice however, the right to FPIC in regards to forced relocation and conservation is likely to form an effective check on any proposed exploitation of natural resources.

UNDRIP is a soft law declaration and as such is non-binding and cannot be enforced, even against signatory members, let alone corporations.³⁰ However, for those who promote and endorse the rights of indigenous peoples under international law, FPIC is now viewed as a derivative of the right to self-determination, and as such is both binding and enforceable as customary international law.³¹ This conclusion however, remains contested.

ILO 169 predates UNDRIP by nearly two decades and reflects a slightly older consensus on the scope of indigenous rights. However, unlike UNDRIP, ILO 169 is enforceable against all signatory states, including Greenland.³²

As a further precursor to UNDRIP, the ILO169 also embraces FPIC, but limits FPIC requirements to matters of forced relocation.³³ However, ILO 169 does emphasize the role of consultation as a bedrock principle, particularly in regards to the exploitation of natural resources on lands traditionally associated with indigenous peoples.³⁴

²⁷ UNDRIP, Articles 11 and 19.

²⁸ UNDRIP; Parshuram Tamang, "An Overview of the Principle of Free, Prior and Informed Consent and Indigenous Peoples in International and Domestic Law and Practices." Department of Economic and Social Affairs, Division for Social Policy and Development, Secretariat of the Permanent Forum on Indigenous Issues. Workshop on Free, Prior and Informed Consent, January 2005.

²⁹ This right is found in UNDRIP Articles 8 and 26, neither of which provide a right to FPIC.

³⁰ UNDRIP, Preamble.

³¹ Tara Ward, 'The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law', 10 *Nw. J. Int'l Hum. Rts.* 54 (2011).

³² Greenland acceded to ILO 169 when Denmark became a signatory state. See, International Labour Organization NormLex on ratifications by Denmark. Available at: http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102609

³³ ILO 169, Article 16.

³⁴ International Labour Organization (ILO), *Indigenous and Tribal Peoples Convention, C169*, 27 June 1989, C169, at Article 6.1.

ILO 169 does not provide detailed guidance regarding the procedural definition of consultation. However, Article 6.2 does state that consultation should be “in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures,” the key elements of which feature properly in the judicial interpretations of FPIC.³⁵

(iii) Other International recognition of FPIC requirements

The emerging international customary law consensus of FPIC as an element of the rights to self-determination and indigenous lands and resources is buttressed by other intra-national bodies. The Organization of American States (OAS) has demonstrated a strong commitment to the role of FPIC as an element of fundamental indigenous rights.³⁶

The UN Committee on the Elimination of Racial Discrimination (CERD) has embraced FPIC in regards to indigenous land and resource claims. CERD “calls upon the States Parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories, and resources and where they have been deprived of their lands ... or used without their free and informed

consent, to take steps to return those lands and territories.”³⁷

In 1998, the Council of Ministers of European Union passed the Resolution on Indigenous Peoples within the Framework of the Development Cooperation of the Community and Member States. This Resolution confirmed that “*indigenous have the right to choose their own development paths, which includes the right to objects, in particular in their traditional areas.*”³⁸ The Resolution was reaffirmed in 2002 by the European Commission, which stated that the EU interprets the language of the resolution to be the equivalent to the FPIC requirement.³⁹

Likewise, a non-binding obligation, the Rio Declaration calls on states to ensure that indigenous peoples have the right to “effective participation in the achievement of sustainable development.”⁴⁰

³⁵ ILO 169, Article 6.2. Part II.c.i.

³⁶ The proposed American declaration on the rights of indigenous people of the Organization of American States (OAS) states that there is an enforceable right to be protected from the alienation of land and resources, as well as consent regarding relocation, and decisions regarding any plan, program or proposal affecting the rights or living conditions of indigenous peoples. Proposed American Declaration on the Rights of Indigenous Peoples (Approved by the IACHR on February 26, 1997) Available at <http://www.cidh.oas.org/Indigenas/Indigenas.en.01/Preamble.htm>. Articles 18 and 21; In addition, lands that have been placed in conservation and that are subject to indigenous land claims may not be exploited for resources without first obtaining FPIC from the claimants. *Id.* See also, E/CN.4/Sub.2/AC.4/2005/WP.1 13;

³⁷ UN Committee on the Elimination of Racial Discrimination (CERD), *UN Committee on the Elimination of Racial Discrimination: Concluding Observations, Canada*, 25 May 2007, CERD/C/CAN/CO/18.

³⁸ Council of Ministers of European Union, Resolution on Indigenous peoples within the framework of the development cooperation of the Community and the Member States. 30 November 1998.

³⁹ Tom Giffiths, *A Failure of Accountability: Indigenous Peoples, Human Rights, and Development Agency Standards* 28, 29 (2003), http://www.forestpeoples.org/documents/lawhr/ipjdevtstdsfailure_accountability-dec03_eng.pdf; Brent McGee: *The Community Referendum: Participatory Democracy and the Right to FPIC*. Published by Berkeley Law Scholarship Repository, Vol. 27:2 19, 2009; E/CN.4/Sub.2/AC.4/2005/WP.1 23; However, it should be noted that the European Convention on Human Rights has remained silent on the issue of indigenous rights and FPIC, and as such, the resolution of the Council of Ministers has yet to influence the jurisprudence of the European Court of Human Rights. *Indigenous Peoples Guidebook, Working Draft*. Indigenous Peoples Worldwide ©2012.

⁴⁰ Rio Declaration on Environment and Development The United Nations Conference on Environment and Development, Having met at Rio de Janeiro from 3 to 14 June 1992; Numerous UN agencies have also embraced FPIC, with at least 10 of 19 agencies formally incorporating FPIC into their policies. These agencies include the UN Development Program (UNDP), the Committee

b. Obtaining FPIC in extractive projects

There is a clear trend towards recognizing affected indigenous communities' right to FPIC for extractive projects.⁴¹ This reflects the growing recognition that abuses of the extractive industry sector are "one of the major problems faced by [indigenous people] in recent decades."⁴² As a result, FPIC was become recognized as an essential element of the indigenous right lands and resources.⁴³

In practice, the obligation of FPIC is based on the principle of good faith and in recognition that the consultation "must not only serve as a mere formality, but rather it must be conceived as "a true instrument for participation."⁴⁴ Within these overarching principles, FPIC consists of four ele-

on the Elimination of Racial Discrimination, and the UN Office of the High Commissioner for Human Rights. Tamang, at 12, 18.

⁴¹ McGee, Berkeley Journal of International, Law, Vol. 27, Iss. 2, 2009.

⁴² Id, quoting the U.N. Commission on Human Rights' Special Rapporteur; See also the Preamble to UNDRIP, "Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests."

⁴³ The Kichwa Peoples of the Sarayaku community and its members v. Ecuador, Case 167/03, Report No. 62/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 308 (2004); Inter-American Court, Case of the Mayagna (Sumo) Awas Tingni Community vs. Nicaragua, Judgment of August 31, 2001; "In 2001, in its concluding observation, noted "with regret that the traditional lands of indigenous peoples have been reduced or occupied, without their consent, by timber, mining and oil companies, at the expense of the exercise of their culture and the equilibrium of the ecosystem." Tamang at 12.

⁴⁴ Sarayaku vs. Ecuador 186, 243.

The Forest Peoples Programme, a leading indigenous rights organization identifies the elements of FPIC as follows:

- Free refers to the right to approve or decline a project without coercion or implied retaliation.
- Prior refers to the right to have sufficient time for information gathering and discussion, including the translation of materials into local languages.

ments (free, prior, informed and consent), which must all be met individually and collectively for the FPIC element to be satisfied.

– Free

Free means that the consultation process must be conducted in such way that allows the indigenous community to act independently. Therefore, it must be free of coercion, pressure and intimidation.⁴⁵

The Commission in Sarayaku vs. Ecuador held that the consultation process must be more than a mere formality, rather it must be conceived as "a true instrument for participation... which should respond to the ultimate purpose of establishing a dialogue between the parties based on principles of trust and mutual respect, and aimed at reaching a consensus between the parties."⁴⁶

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- *Informed* refers to the right to have all relevant information available, reflecting all views and positions and including balanced information on project risks and benefits.
 - *Consent* refers to the right to reach agreement with the full participation of authorized leaders, representatives, or decision-makers as decided by the Indigenous Peoples themselves.

Available at; <http://www.forestpeoples.org/guiding-principles/free-prior-and-informed-consent-fpic>; The UN Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights Working Group on Indigenous Populations, Twenty-third session 18–22 July 2005 (E/CN.4/Sub.2/AC.4/2005/WP.1) states:

- In relation to development projects affecting indigenous peoples' lands and natural resources, the respect for the principle of free, prior and informed consent is important so that:
- Indigenous peoples are not coerced, pressured or intimidated in their choices of development;
- Their consent is sought and freely given prior to the authorization and start of development activities;
- indigenous peoples have full information about the scope and impacts of the proposed development activities on their lands, resources and well-being;
- Their choice to give or withhold consent over developments affecting them is respected and upheld.

⁴⁵ Tamang at 48.

⁴⁶ Sarayaku vs. Ecuador 186. 239, 240.

– Prior

Prior refers to the principle that consultation must take place throughout the project development process and ensure that the affected communities actually have the opportunity not to grant consent.⁴⁷ This also means that consent must be granted prior to development activities in order to avoid compelling consent in violation of the principle of free consent discussed above.⁴⁸

Article 15(2) of ILO Convention No. 169 clarifies the purpose of prior consultation as follows: “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 program for the exploration or exploitation of such resources on their lands.”⁴⁹ In practice, this means that consultation should occur during the earliest stages of development.⁵⁰

– Informed

Access to information is often a substantial challenge for the effective implementation of FPIC requirements. Required information must go beyond a description of the project and include the potential social and economic impacts.⁵¹

In *Sarayaku*, the Commission described this information requirement as “clear, sufficient and timely information on the nature and impact of the activities to be carried out and on the prior consultation process.”⁵² The Commission stressed the importance of information so that indigenous peoples understand “potential risks of

the proposed development or investment plan, including the environmental and health risks.”⁵³

– Consent

Consent and effective consultation are distinct, but interrelated concepts within the context of FPIC. While consultation is the process by which consent is achieved, right of consent is defined as the “choice... [of indigenous communities]... to give or withhold consent over developments affecting them.”⁵⁴ A detailed analysis of consent is beyond the scope of this article, but the following is a list of some of the key issues that must be addressed for consent to be effective:

- Scope of the proposed activity consented to;
- The parameters of the affected community;
- The mechanism by which the community grants consent;
- The time horizon for which consent will be effective, and
- Any mechanisms by which consent can be revoked if the project has unanticipated impacts.⁵⁵

In *Sarayaku*, the Commission emphasized the importance of respecting the “particular consultation system of each people or community,” taking into account, “culturally appropriate procedures.”⁵⁶

c. Enforcement of FPIC as a source of Corporate Risk

In practice, the judicial enforcement of FPIC principles remains inconsistent. However, for extractive industry corporations, the risk of *ef-*

⁴⁷ *Sarayaku vs. Ecuador* 178.

⁴⁸ *Tamang* at 48.

⁴⁹ *Sarayaku vs. Ecuador*, 236.

⁵⁰ *Sarayaku vs. Ecuador* 237.

⁵¹ *Tamang* at 48.

⁵² *Sarayaku vs. Ecuador* 126.

⁵³ *Sarayaku vs. Ecuador* 208.

⁵⁴ *Tamang*, at 46.

⁵⁵ It is useful to compare these issues to the Guiding Principles and R2R Framework. If the Guiding Principles have been properly implemented, these issues will likewise be addressed as part of the consultation process, thereby ensuring effective implementation of FPIC.

⁵⁶ *Sarayaku vs. Ecuador* 165, 263.

fective enforcement is very real. Specifically, the FPIC requirement in regards to the exploitation of natural resources is enforced through specific international and domestic courts, the lending conditions of international financial institutions, responsive changes to regulatory frameworks and the reputation effects of public and private pressure groups.

(i) *Court enforcement*

The judicial enforcement of FPIC requirements has remained primarily a matter of international courts, and as such primarily concerns the states against which it can be enforced. However, enforcement against states does have significant implications for corporate entities as well, in terms of project cancellations, sanctions and fines.

The Inter-American Court of Human Rights has led the way by repeatedly enforcing the FPIC element of fundamental indigenous rights.⁵⁷ In three key decisions, the Inter-American Commission has repeatedly emphasized the link between consultation and the right of indigenous communities to FPIC over the use of their lands and resources.⁵⁸

The Mayagna Sumo Awas Tingni Community Case, decided in 2001, found for the Awas Tingni Community, citing the right to property in Article 21 of the Inter-American Convention on Human Rights. (IACHR).⁵⁹ The Commission re-

⁵⁷ E/CN.4/Sub.2/AC.4/2005/WP.1 17; James Anaya, "Indigenous Peoples' Participatory Rights in Relation to Decisions About Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Land and Resources", paper presented at American Association of Law Schools Conference, January 2005; *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001). Available at, <http://www1.umn.edu/humanrts/iachr/AwasTingnicase.html>; See also, *Supra*. Note 43.

⁵⁸ *Id.*

⁵⁹ *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001, Inter-Am. Ct.

jected the idea of tacit consent, thereby endorsing a positive consent requirement on the alienation of indigenous lands and resources.⁶⁰

In the case of *Sarayaku vs. Ecuador*, the Commission strengthened the legal position of FPIC by identifying the criteria by which indigenous land and resources claims should be measured.⁶¹ It also identified the connection between UNDRIP and ILO 169 regarding the property rights of indigenous peoples protected by Article 21 of the IACHR.⁶² In addition, the decision clearly established the right to free, prior and informed consultation and confirmed the link between the protection of natural resources and the right to use territory.⁶³

The African Commission on Human and People's Rights has also upheld the right of indigenous peoples to consent to the use of resources in their territories. In the *Ogoni Case*, the Commission concluded that the Government had not met its responsibility to "involve the Ogoni communities in the decisions that affected the development of Ogoniland," nor did it enforce the right of the Ogoni communities to "freely dispose of [their] natural wealth."⁶⁴

FPIC has also begun to make its way into the courts of a limited number of states. For exam-

H.R., (Ser. C) No. 79 (2001). Available at, <http://www1.umn.edu/humanrts/iachr/AwasTingnicase.html>

⁶⁰ *Id.*

⁶¹ *Sarayaku vs. Ecuador*, 148; In this regard, the Committee further referenced the *Case of the Yakye Axa Indigenous Community v. Paraguay*, *Merits, reparations and costs*, para. 154, and *Case of the Xákmok Kásek Indigenous People v. Paraguay*, para. 113.163; *Cf. Case of the Sawhoyamaya Indigenous Community v. Paraguay*, para. 132, and *Case of the Xákmok Kásek Indigenous People v. Paraguay*, para. 113.

⁶² *Sarayaku vs. Ecuador*, 215, 282-3, 161; In this regard, the Committee further referenced *Case of the Yakye Axa Indigenous Community v. Paraguay*, *Merits, reparations and costs*, paras. 125 to 130; *Case of the Saramaka People v. Suriname*, *Preliminary objections, merits, reparations and costs*, paras. 93 and 94, and *Case of the Sawhoyamaya Indigenous Community v. Paraguay*, paras. 117.

⁶³ *Sarayaku vs. Ecuador* 146.

⁶⁴ E/CN.4/Sub.2/AC.4/2005/WP.1 18.

ple in Belize, the Supreme Court has recognized UNDRIP as binding in requiring informed consent from indigenous peoples for any acts that “might affect the indigenous peoples’ enjoyment of their land.”⁶⁵

(ii) *Lending policies of financial institutions*

Unlike the state-centric focus of international court enforcement, international financial institutions have begun to enforce FPIC requirements through lending policies, which apply directly to the private sector.⁶⁶ Most importantly, some international financial institutions include FPIC principles in their loan conditions.⁶⁷ Therefore, projects that do not obtain FPIC from affected indigenous communities may not be able to obtain project funding.

For example, the International Finance Corporation (IFC) has identified the need to recognize the rights and needs of indigenous communities in its Performance Standards.⁶⁸ The IFC also requires “broad community support” for projects that are likely to have significant impacts on those communities.⁶⁹

The Asian Development Bank (ADB) requires informed consent for any resettlement of indigenous peoples, prior to approving any project funding.⁷⁰ Likewise, the European Bank

for Reconstruction and Development (EBRD) requires that all companies obtain free, prior and informed consent from any indigenous peoples affected by EBRD funded projects.⁷¹

The World Bank (WB) has taken a more cautious approach to requiring FPIC, although the Bank’s Safeguard Policies include an FPIC requirement for all WB and IFC supported projects.⁷² However, for requisite environmental assessments, affected indigenous and non-indigenous communities need to be consulted, but it is not necessary to obtain consent.⁷³

(iii) *Responsive changes to the regulatory frameworks*

The mounting opposition to non-consensual development is likely to affect the development of laws and regulatory frameworks that will directly affect business enterprises in the future.⁷⁴ In Greenland, this link has been clearly estab-

⁶⁵ *Coy v. Belize*, Claim No. 171, Supreme Court of Belize (18. Oct. 2007), available at http://www.law.arizona.edu/depts/iplp/advocacy/maya_belize/documents/ClaimsNos171and172of2007.pdf.

⁶⁶ Amy K. Lehr and Gare A. Smith, *Implementing a Corporate Free, Prior, and Informed Consent Policy: Benefits and Challenges*, a Lehr and Smith e-book, July 2010.

⁶⁷ Lehr and Smith.

⁶⁸ “IFC’s Performance Standards on Social & Environmental Sustainability Performance,” IFC (2006), p. 28. ¶ 1, available at [http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_full/\\$FILE/IFC+Performance+Standards.pdf](http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_full/$FILE/IFC+Performance+Standards.pdf)

⁶⁹ Lehr and Smith, at 31.

⁷⁰ “Involuntary Resettlement: Operation Policy and Background Paper,” IADB (October 1998.), p. 2, avail-

able at <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=362109>; “Operational Policy on Indigenous Peoples,” IADB (22 Feb. 2006), ¶ 4.4 (iii), available at <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=691261>.

⁷¹ Lehr and Smith, “The Policy’s Performance Requirement 7,” recognizes the principle, outlined in the U.N. Declaration on the Rights of Indigenous Peoples, that the prior informed consent of affected Indigenous Peoples is required [for specified project-related activities], given the specific vulnerability of Indigenous Peoples to the adverse impacts of such projects.” at 35.

⁷² Lehr and Smith, at 30; Tamang, at 38.

⁷³ World Bank Safeguard Policies, OP 4.01 – Environmental Assessment, The World Bank Group (January 1999), available at: <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20064724~menuPK:64701637~pagePK:64709096~piPK:64709108~theSitePK:50218.4,00.html>; This split highlights concerns expressed by WB management that FPIC has not yet reached the status of international customary law and may be viewed as infringing on sovereign rights of governments. Tamang, at 38.

⁷⁴ Jonathan Bonnitcha, *The U.N. Guiding Principles on Business and Human Rights: The Implications for Enterprises and Their Lawyers*, *BUS. & HUM. RTS. REV.*, Autumn 2012, at 15.

lished.⁷⁵ A public debate on revising the mining law to reduce the influence of corporations on the licensing process is actively ongoing and points towards a more restrictive licensing process in the near future.⁷⁶ Although the final outcome of that process is unclear, the lack of community consent to development projects could easily influence legislation in Greenland, as it already has in Mongolia and Bolivia.⁷⁷

(iv) Reputational Risk and Emerging Private Sector Standards

Over the past decade, an evolving standard of corporate behavior vis-à-vis human rights has emerged.⁷⁸ In the context of these evolving standards, reputational risk has taken on new importance. Socially responsible investors use an investment target's FPIC compliance record as an investment criterion, while activists and advocates use FPIC non-compliance to name and shame violators.⁷⁹ In addition, banks, institution-

al investors, and counter-parties are increasingly demanding human rights compliance in their terms and conditions.⁸⁰ Internationally, NGOs have successfully targeted banks and other institutional investors regarding extractive industry investments in several countries.⁸¹

III. The Status of FPIC in Greenland

Having established that the FPIC is emerging as an element of fundamental indigenous rights recognized in customary international law and that the failure to comply with the defined FPIC requirements poses substantial risk to corporations, it is now possible to discuss the issue of FPIC compliance in Greenland. This section describes the current consultation framework in the Greenlandic extractive sector and compares this framework to the FPIC requirements. It further addresses the question of whether or not the democratic process in Greenland, as a majority indigenous state, is sufficient to satisfy FPIC requirements.

⁷⁵ *Supra*, Note 12.

⁷⁶ *Id.*

⁷⁷ See e.g. Jeffrey Reeves, *Resources, Sovereignty, and Governance: Can Mongolia Avoid the 'Resource Curse'?* *Asian Journal of Political Science*. Volume 19, Issue 2, 2011; John L. Hammond, *Indigenous Community Justice in the Bolivian Constitution of 2009*. *Human Rights Quarterly*, 33 (2011) 649–681.

⁷⁸ See e.g. E/CN.4/Sub.2/AC.4/2005/WP.1 27: "The Final Report of the World Bank's Extractive Industries Review concluded that "indigenous peoples and other affected parties do have the right to participate in decision-making and to give their free, prior and informed consent throughout each phase of a project cycle. FPIC should be seen as the principal determinant of whether there is a 'social license to operate' and hence is a major tool for deciding whether to support an operation."; The Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the Norms) identified numerous examples of an emerging consensus on FPIC regarding indigenous rights, expressly recognized that the right to consultation in ILO 169 is to be interpreted as a right to FCIP regarding to development projects.

⁷⁹ Lehr and Smith, See also, U.N.G.A., Human Rights Council, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and

Transnational Corporations and Other Business Enterprises: Mapping International Standards of Responsibility and Accountability for Corporate Acts, U.N. Doc. A/HRC/4/035 (9 Feb. 2007). See also John Ruggie, "Treaty Road Not Traveled," *Ethical Corporation* (May 2008.), available at http://www.hks.harvard.edu/mrcbg/news/ruggie/Pages%20from%20ECM%20May_FINAL_JohnRuggie_may%2010.pdf.

⁸⁰ Jonathan Bonnitcha, *The U.N. Guiding Principles on Business and Human Rights: The Implications for Enterprises and Their Lawyers*, *BUS. & HUM. RTS. REV.*, Fall 2012, at 14, 15.

⁸¹ See generally Rebecca Lawrence, *Hidden Hands in the Market: Ethnographies of Fair Trade, Ethical Consumption, and Corporate Social Responsibility*, 28 *RES. ECON. ANTHROPOLOGY* 241 (2008); For example, The International Council on Mining and Metals (ICMM), has not adopted the FPIC element of fundamental indigenous rights, but has adopted a Position Statement that has strong consultation requirements. It also identifies the possibility that a strong negative response from the consultation process may lead to the cancellation of otherwise legal projects, "ICCM Position Statement on Mining and Indigenous Peoples," ICMM (May 2008.), ¶ 9, available at <http://www.icmm.com/document/293>

a. Consultation framework in Greenland

Extractive industries in Greenland are regulated by the Mineral Resources Act of 2009 (MRA).⁸² The MRA states that the Government of Greenland, represented by the Bureau of Minerals and Petroleum (BMP) is the “overall administrative authority for mineral resources.”⁸³ The BMP must submit an annual report regarding new licenses issued to the Parliament of Greenland. This is the full extent of the Greenlandic Parliament’s role in the licensing process.⁸⁴

With regards to the consultation process, the MRA contains an assumption that any extractive project will have a significant impact on nature and therefore requires consultation with the “public and authorities and organizations affected.”⁸⁵ This consultation process is not defined and does not extend rights to stakeholders beyond the “opportunity to express their opinion.”⁸⁶

The MRA explicitly calls for a consultation process in association with the issuance of exploration and extraction permits, as part of the mandatory Social Impact Assessment (SIA) and Environmental Impact Assessment (EIA) processes.⁸⁷ Both of these assessments require consultation with affected groups and the public at large.⁸⁸

⁸² Greenland Parliament Act of 7 December 2009 on mineral resource and mineral resource activities (Mineral Resources Act).

⁸³ Mineral Resources Act Article 3.1.

⁸⁴ Mineral Resources Act Article 4.

⁸⁵ Mineral Resources Act Article 61.1.

⁸⁶ Mineral Resources Act Article 61.1.

⁸⁷ BMP guidelines – for preparing an Environmental Impact Assessment (EIA), Report for Mineral Exploitation in Greenland, Bureau of Minerals and Petroleum 2nd Edition January 2011; Guidelines for Social Impact Assessments Mining projects in Greenland. November 2009, Bureau of Minerals and Petroleum, Greenland; In practice, the BMP has required some applicants to enter into an impact benefit agreement prior to receiving a license. However, the agreement is entered into by the applicant and the BMP, not the affected community(ies). Mineral Resources Act Article 61.3–5.

⁸⁸ Mineral Resources Act Art. 61.

b. Effectiveness of Consultation Framework in Greenland

The lack of an effective mechanism by which indigenous peoples could express their right to consent to extractive industry development was the driving issue in the 2013 Parliamentary election.⁸⁹ Ongoing protests against the recent approval of the Isua mining project in Nuuk by the BMP and the narrow passage of the law permitting uranium and rare earths mining would indicate that this problem has not gone away. However, such evidence while indicative, does not conclusively demonstrate the lack of FPIC in Greenland. Rather, it is necessary to consider the existing consultation framework in Greenland and determine if it complies with FPIC obligations.

The Social Impact Assessment

The Guidelines to the SIA state, “The process of preparing a Social Impact Assessment is characterized by having a high degree of public participation. The aim is that all relevant stakeholders shall be heard in the process.”⁹⁰ The SIA Guidelines identify key contextual issues for the assessment and provide specific, if limited instructions for performing the consultations.⁹¹

While the Guidelines call for further participation in a “timely manner” with the provision of information for non-experts, the reality is that the participation process is far from satisfying the FPIC requirements.⁹²

⁸⁹ *Supra*, Note 4.

⁹⁰ SIA Guidelines.

⁹¹ SIA Guidelines 2.1. In this way, the SIA Guidelines comply with the Guiding Principles, which emphasize context as a key pre-requisite for an effective consultation process. U.N. Special Representative of the Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, 13, U.N. Doc. A/HRC/17/31; SIA Guidelines, Appendix 2: Public Participation.

⁹² SIA Guidelines.

While the responsibility consultation under the SIA lies with the applicant, the government has taken an active role in organizing public consultations in conjunction with potential licensees, albeit with the applicant bears the cost.⁹³ Despite these changes, the consultation process under SIA has been problematic from a FPIC perspective.⁹⁴

In practice, the SIA consultation process is generally conducted in a **free** manner. However, it is not always possible for all affected communities to participate, let alone to grant consent.⁹⁵ Often, more distant communities, if consulted at all, are only consulted once and such consultation is primarily to distribute information.⁹⁶

There is also a lack of cultural context and allowance for cultural decision-making mechanisms.⁹⁷ A short-term public consultation wherein the applicant and/or BMP are present is not a culturally effective way to reach a consensus on project development.⁹⁸

There is also an underlying issue with the lack of funding for effective consultation by the applicants. A culturally sensitive consultation

requires significant investment.⁹⁹ In practice, consultations are underfunded, short term and do not have the budget to connect with affected communities in a meaningful way.¹⁰⁰

Prior consent has not been built in to the consultation process. Consultation is required before the submission of the SIA, but there is no legal requirement to demonstrate that the consultation process actually affected the resulting SIA report. As a result, consultations are generally conducted near the end of the project approval process.¹⁰¹ In practice, consultations with affected communities have not had a substantial impact on project design¹⁰².

Access to **information** has proven to be a significant barrier to effective consultation. Given the isolated and unique project development process in Greenland, the applicant has near total control over information regarding the project.¹⁰³ There is little incentive to provide accessible, comprehensive and balanced information to affected communities. In practice, information has been provided in impossibly long and complex reports that affected communities cannot comprehend. When information is accessible, it cannot be guaranteed that it accurately portrays all perspectives.¹⁰⁴

⁹³ Anonymous Sources, Impact Assessment Professionals, in Green. (Aug. 17, 2012).

⁹⁴ Interview by Rutherford Hubbard with Anonymous Source, Indigenous Rights Activist, in Green. (Aug. 15, 2012); Interview with Aqqalaq Lyngé, Chair, Inuit Circumpolar Council, Greenland the Association Hingitaaq 1953 (The Outcasts 1953), Thule, Green. (August 27, 2012). Interview by Rutherford Hubbard with Anonymous Sources, Impact Assessment Professionals, in Green. (Aug. 17, 2012).

⁹⁵ Author's personal notes taken during the Public Consultation August 27, 2012; Anonymous Sources, Impact Assessment Professionals, in Green. (Aug. 17, 2012).

⁹⁶ Interview by Rutherford Hubbard with Anonymous Source, Consulting Professionals, in Green. (Aug. 23, 2012); Anonymous Sources, Impact Assessment Professionals, in Green. (Aug. 17, 2012).

⁹⁷ Id.; Interview by Rutherford Hubbard with Anonymous Source, Member of Parliament (Aug. 26, 2012).

⁹⁸ Id.

⁹⁹ Anonymous Sources, Impact Assessment Professionals, in Green. (Aug. 17, 2012).

¹⁰⁰ Interview by Rutherford Hubbard with Anonymous Source, Member of Parliament, (Aug. 26, 2012).

¹⁰¹ Anonymous Sources, Impact Assessment Professionals, in Green. (Aug. 17, 2012).

¹⁰² Id.; Interview by Rutherford Hubbard with Anonymous Source, Indigenous Rights Activist (Aug. 15, 2012); Interview by Rutherford Hubbard with Anonymous Source, Civil Society Representative (Aug. 21, 2012).

¹⁰³ Id.; Interview by Rutherford Hubbard with Anonymous Source, Indigenous Rights Activist, in Green. (Aug. 16, 2012); 172.

¹⁰⁴ Interview by Rutherford Hubbard with Anonymous Source, Member of Parliament (Aug. 26, 2012); Anonymous Sources, Impact Assessment Professionals, in Green. (Aug. 17, 2012).

The language also poses a barrier to a free consultation process. Although Greenland is officially bilingual, the language of business is Danish. Yet, affected communities primarily speak Greenlandic and regional dialects, which require a local translator, well versed in the technical terminology of extractive industries.¹⁰⁵ This requirement is not regularly addressed in practice.¹⁰⁶

The SIA process does not contemplate **consent**. Rather it is purely a consultation process whereby affected stakeholders, including communities, may comment on potential impacts. The project developer then decides how to apply this information, by either amending the project strategy or reaching an agreement with the BMP regarding cost allocation of the harm.

The Environmental Impact Assessment

The EIA consultation process is likewise not in conformity with FPIC requirements. The EIA process is nearly identical to the SIA process and the preceding analysis applies. However, there are key differences regarding the timing and the information requirements.

The Guidelines for the EIA consultation process provide for two consultations at a minimum.¹⁰⁷ The first, **prior** consultation is intended to identify relevant issues and concerns and publicize them in a report. The second consultation provides stakeholders with the opportunity to comment on the draft report.¹⁰⁸ In this regard, the EIA consultation is more in line with FPIC requirements than the SIA consultation.

In practice however, the affected communities are rarely contacted more than one time, due to the logistical costs of consultations in remote areas. Therefore, the legal framework is close to

being in line with FPIC, although in practice this goal has yet to be achieved.

Conversely, Access to **information** is a specific challenge because of the nature of the EIA. Given that the EIA is strictly limited to environmental impacts, it can be the case that there is even less information available, particularly in regards to alternative project development strategies and long term implications.¹⁰⁹ In fact, given the recent technological advances in Arctic resource extraction, there are key issues like oil spill cleanup, for which crucial information is not available.

c. Democratic Processes as FPIC Compliance

The foregoing makes clear that the existing consultation process in Greenland does not satisfy the FPIC requirements of the fundamental indigenous rights of self-determination and property. However, it must still be considered whether democratic process in majority indigenous Greenland, are sufficient to satisfy FPIC requirements independently.

It could be argued that as a majority indigenous state, a valid democratic process would satisfy the FPIC element of the indigenous rights to self-determination and property. However, there is an inherent assumption in both UNDRIP and ILO 169 that democratic processes do not satisfy FPIC obligations, because FPIC principles only contemplate indigenous peoples who appear to be assumed a minority. For example, Article 18 of ILO 169 reads as follows:

Indigenous peoples have the right to participate in decision-making in matters, which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to

¹⁰⁵ Id.

¹⁰⁶ Id.

¹⁰⁷ EIA Guidelines, at 7.

¹⁰⁸ EIA Guidelines, at 7.

¹⁰⁹ Id.

maintain and develop their own indigenous decision-making institutions.

In addition, ILO 169 uses distinctly indigenous political institutions as one of the criteria by which indigenous peoples should be defined under the convention.¹¹⁰ The convention also grant indigenous persons the “right to retain their own customs and institutions,” explicitly distinguishing indigenous institutions from national institutions.¹¹¹

Analysis of UNDRIP leads to the same conclusion. Article 3 provides that indigenous peoples have the right to “freely determine their political status,” “...maintain and strengthen their distinct political, ... institutions” and “promote, develop and maintain their institutional structures.”¹¹² Furthermore, Article 4 provides that in exercising their right to self-determination, “[indigenous peoples] have the right to autonomy or self-government in matters relating to their internal and local affairs.”¹¹³

The Inter-American Commission has tacitly recognized this distinction, by discussing state obligations to structure laws and institutions in such a way that allows for consultation with indigenous peoples.¹¹⁴

Therefore, it appears that a majority indigenous, democratic state like Greenland is not anticipated by the most relevant international standards. As such, it is necessary to consider whether the current democratic institutions in Greenland in fact satisfy the FPIC requirements in regards to the indigenous rights of self-determination and property.

¹¹⁰ ILO 169, Article 1.b.

¹¹¹ ILO 169, Article 8.

¹¹² UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295* Articles 3, 4, 20, 34. (hereinafter, UNDRIP).

¹¹³ UNDRIP Article 3, Article 4.

¹¹⁴ *Sarayaku v. Ecuador*.126, 217.

Overview of Democratic Processes in extractive regulation

Elected officials are not directly involved in the extractive industry regulatory framework in Greenland. Rather, the BMP has exclusive control over the project development process.¹¹⁵ Although this authority is granted to the BMP by the democratically elected Parliament, the BMP has complete control over licensing, and therefore over the consultation process as well.¹¹⁶

The extent of Parliamentary control over the licensing process is limited to annual oversight. The BMP is required to submit annual reports regarding extractive licensing, but the Parliament has no role in the actual licensing process.¹¹⁷ Therefore, other than changing the Minerals Act, the Parliament cannot intervene in individual licensing decisions. This has created a system whereby FPIC requirements are not implemented through direct control over licensing.

In practice, this lack of electoral oversight has divorced the licensing process from popular opinion.¹¹⁸ Operating independently and in close collaboration with extractive enterprises, the BMP has openly promoted extractive industry.¹¹⁹

¹¹⁵ See generally, Mineral Resources Act. See also, Interview by Rutherford Hubbard with Anonymous Source, Civil Society Representative, in Green. (Aug. 21, 2012); Interview with Aqqaluk Lyngé, Chair, Inuit Circumpolar Counsel, in Thule, Greenland (August 28, 2012); Interview by Rutherford Hubbard with Anonymous Source, Member of Parliament, in Green. (Aug. 26, 2012).

¹¹⁶ This conclusion was drawn by from strong agreement amongst respondents in the civil society, business, academic and non-administrative government sectors.

¹¹⁷ *Infra*. Note 115.

¹¹⁸ See for example, the responses to the 2013 election. *Supra*. Note 4.

¹¹⁹ See also, Interview by Rutherford Hubbard with Anonymous Source, Civil Society Representative, in Green. (Aug. 21, 2012); Interview with Aqqaluk Lyngé, Chair, Inuit Circumpolar Counsel, in Thule, Greenland (August 28, 2012); Interview by Rutherford Hubbard with Anonymous Source, Member of Parliament, in Green. (Aug. 26, 2012); As one respondent noted, “it’s not that they [the BMP] are evil, they just have their ideas on how things

Democratic processes, FPIC and Self-determination

UNDRIP makes clear that the indigenous communities enjoy the right to FPIC in regards to numerous aspects of self-determination, including legislative and administrative measures and cultural expression.¹²⁰ In Greenland, the nexus of the democratic process and the permitting scheme implemented by the BMP does not appear to be based on culturally relevant indigenous decision-making processes.¹²¹ Taking into consideration Articles 18 and 27 of UNDRIP, the disconnected relationship between the democratic process and the BMP is not equivalent to the “right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.”¹²²

From a rights perspective, this raises concerns. However, it is difficult, if not impossible, to conclude that the democratic system in Greenland fails to satisfy the indigenous right to self-determination. It is therefore useful to turn to the issue of FPIC and the indigenous right to property. Specifically, it is necessary to explore the circumstances related to extractive licensing in Greenland and the indigenous right to FPIC regarding the exploitation of natural resources.

should happen and they implement those ideas.” Interview by Rutherford Hubbard with Anonymous Source, Civil Society Representatives, (Aug. 21, 2012). Several respondents noted that the new government is a substantial improvement over the old government, which was becoming corrupt after 30 years in power. *Id.* However, the new government has not made significant changes to the civil service so the problems just discussed remain as serious as before. *Id.*

¹²⁰ See *supra*, Section II.a.ii.

¹²¹ *Id.*

¹²² UNDRIP, Article 18.

1. Consent to natural resource exploitation is not connected to specific projects

As discussed above FPIC is required regarding decisions to exploit natural resources on indigenous lands. The licensing of extractive industry projects itself therefore should require FPIC.

However, the structure of the licensing process only provides for democratic input in two ways. First, elected officials determine the regulatory framework and license approval process. Second, elected officials conduct post-fact monitoring.¹²³ The democratic mechanism does not apply on a license-by-license basis. Therefore, affected communities do not have the opportunity, through elected officials or otherwise, to grant consent to the specific extractive projects that affect them. In this way, it can be determined that a centralized political structure as is the case in Greenland, cannot satisfy FPIC requirements in regards to specific projects.¹²⁴

2. Consent to natural resource exploitation is not obtained from directly affected communities

FPIC is based on the principle that indigenous communities should have the right to consent to projects that directly affect the disposition of indigenous property.¹²⁵ Parliamentary democracy is based on the principle that the majority of nation has the right to make decisions that affect the

¹²³ *Supra*, Note 84.

¹²⁴ Following the adoption of Home Rule, Greenland was administratively centralized four regions. While intended to reduce administrative costs and increase effective governance, in fact, this centralization has reduced the influence of marginal and peripheral communities regarding decisions that affect them generally. See, Frank Sejersen, *Acta Borealia: A Nordic Journal of Circumpolar Societies*. Volume 27, Issue 2, 2010.

¹²⁵ *Supra*, Note 12.

nation. This rule of the majority over projects affecting a specific community is in direct contradiction to FPIC principles.

The regulatory framework implicitly recognizes this contradiction when it requires a consultation process prior to licensing, but as discussed above, such consultation processes are insufficient.

3. The licensing process does not address the question of the right to FPIC in regards to indigenous property rights generally

The final weakness of Greenland's democratic system vis-à-vis the FPIC principles is that the BMP does not recognize the ownership of land and resources by indigenous communities generally. While there is an ongoing debate regarding the interpretation of the Constitution of Greenland, for now, there are no legal grounds for indigenous community ownership over traditionally held or used lands and resources.¹²⁶ This directly contravenes the customary international law on indigenous ownership of land and resources.¹²⁷

In conclusion, the democratic system in Greenland, regardless of its efficacy, does not satisfy the FPIC element of the indigenous right to property on a project-by-project basis. Therefore, it should be concluded that legal compliance in Greenland, whether with existing regulation or as defined by the democratic processes in Greenland, is not equivalent to FPIC compliance.

IV. A role for Corporations

a. Corporate Risk of FPIC non-compliance in Greenland

For corporations seeking to invest in Greenlandic extractives, the FPIC related risk generated by non-consensual project development is not hypothetical. Considering the risk parameters defined above, the following are all significant FPIC related risks in Greenland

i. Court Enforcement

This risk remains extremely limited. Greenland is not a member of any international courts. It is the only country to affirmatively vote to leave the European Community (in 1985).¹²⁸

ii. Lending policies of financial institutions

Because of its remote location, extreme weather and the near total lack of infrastructure, extractive development in Greenland requires massive investments.¹²⁹ Non-compliance with FPIC may reduce access to capital from the international financial institutions.¹³⁰ Opposition from affected indigenous communities in Greenland that have not been consulted can undermine large scale investments, increase the cost of project financing, reduced profit margins and potentially derail projects completely. Therefore, it is necessary for corporations to address this risk parameter directly. In this final section, the paper suggests that both legally and commercially, there is a role for corporations to take on greater responsibility in obtaining free, prior and informed consent

¹²⁶ Interview with Aqqaluk Lynge, Chair, Inuit Circumpolar Counsel, Greenland the Association Hingitaq 1953 (The Outcasts 1953), Thule, Green. (August 28, 2012).

¹²⁷ *Sarayaku vs. Ecuador* 145; Cf. *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, para. 140, and *Case of the Xákmok Kásek Indigenous Community v. Paraguay* paras. 85 to 87.

¹²⁸ "In the referendum in Greenland on 23 February 1982 voter participation was 74.9%. To the question whether Greenland should be in the EC, 47% voted yes and 53% voted no." See, http://www.eu-oplysningen.dk/euo_en/spsv/all/17/

¹²⁹ Mark Nuttall, *Self-Rule in Greenland: Towards the World's First Independent Inuit State?*, 3-4/08 INDIGENOUS AFFAIRS 64 (2009).

¹³⁰ See generally, *Supra* Part II.c.ii & iv.

from indigenous communities affected by their projects.

iii. Responsive changes to regulatory frameworks

The surprise 2013 victory for the opposition Siumut Party demonstrated national support for stronger participation of local communities in development planning and implementation, slowing down the licensing cost and possibly increasing royalty payments in the future.¹³¹ The highly contentious vote to allow uranium and rare earths mining in 2013 may be a boon for investors, but its razor thin victory suggests that it could be reversed at any time.¹³²

With Greenland's indigenous population expressing serious reservations about the current extractives development strategy, the future of the industry is far from clear.¹³³ Discussions about revising the mining law, increasing the royalty payments, and even pulling the plug on some projects already into the application process, are all a direct result of non-consensual development in the extractives sector.¹³⁴

iv. Reputational Risk and Emerging Private Sector Standards

Extractive industries are generally insulated from reputational risk, to the extent the production of minerals, petroleum and similar are difficult to trace through to the final consumer.¹³⁵ In Greenland however, reputational risk remains relevant, for two reasons. First, as noted above in regards to international finance, the high-risk investment environment in Greenland already

places limitations on project finance.¹³⁶ With highly visible human rights and environmental concerns resulting from a lack of FPIC, the opportunities for project finance are further reduced.

Second, despite its small population Greenland is a high profile investment market internationally. Serious rights violations, public protests and similar, are likely to gather significant international attention and opposition. This has been demonstrated by the extent of international press coverage of recent political and regulatory developments in Greenland over the past year.¹³⁷

b. Legal basis for a corporate role in FPIC compliance

Before recommending that corporations take on an increased burden of achieving FPIC from affected communities, it must first be clarified that such increased responsibility will in fact satisfy FPIC element of the indigenous rights to self-determination and property.

The Inter American Commission on Human Rights, in the Sarayaku decision emphasized that FPIC obligations belonged with the state and could not be delegated to private companies, especially when the delegate is the company conducting the project.¹³⁸ The Commission has distinguished between cases wherein the delegation of authority absolves the state from responsibility from those cases whereby the delegation of authority absolves the corporate entity implementing the project.

FPIC is a substantive element of certain fundamental indigenous rights that can only be satisfied by meaningful implementation in practice.¹³⁹ FPIC is not satisfied simply by providing

¹³¹ *Supra*, 4.

¹³² *Supra*, Note 10.

¹³³ *Infra*, Note 131.

¹³⁴ See generally, Part I.a-b.

¹³⁵ Rebecca Lawrence, *Hidden Hands in the Market: Ethnographies of Fair Trade, Ethical Consumption, and Corporate Social Responsibility*, 28 RES. ECON. ANTHROPOLOGY 241 (2008).

¹³⁶ *Supra*, Note 122.

¹³⁷ For example, see *Supra*, Note 4.

¹³⁸ *Sarayaku vs. Ecuador* 187. 248-9.

¹³⁹ *Supra*, Note 53.

a procedural element without underlying substance.¹⁴⁰

Therefore, the key elements of free, prior and informed consent are not required to be obtained by any specific party, provided that FPIC is obtained in fact.¹⁴¹ Indeed, the Commission in Sarayaku explicitly contemplates the possibility that a corporation could obtain meaningful FPIC, when it critiques the consultation process spearheaded by the company in question, in order to determine the liability of the state which is responsible for ensuring that the standard is met.¹⁴²

Therefore, it is clear that the substantive quality of the consultation process as it regards the underlying fundamental right is the core issue. The Commission states that the consultation process must be a “good faith... genuine dialogue to guarantee the Sarayaku People’s right to participation, but it also discouraged a climate of respect among the indigenous communities of the area by promoting the execution of an oil exploration contract.”¹⁴³

This reading of the Commission’s decisions is clearly supported by UNDRIP and ILO 169, both of which emphasize the content of the consultation process over the procedure.¹⁴⁴ While it is clear that post-fact enforcement would only be available against the state (or in Greenland’s case, not at all), the risk created by failing to obtain FPIC is likewise based on the substantive quality of the consultation process and resulting FPIC of the affected indigenous community(ies), not the procedural obligations of the state.

In fact, it would appear that where relevant, the state is not required to obtain FPIC as an element of the underlying rights, but it is required to guarantee that FPIC is obtained so that those

rights are guaranteed in fact. The Commission clarifies that the state bears responsibility to “observe, supervise, monitor or participate in the process and thereby safeguard the rights of the Sarayaku People.”¹⁴⁵ The Commission admittedly prevaricates as to the permissibility of delegating responsibility over FPIC, but it follows logically that delegation of the process must be permissible, otherwise communities that have granted truly free prior and informed consent would otherwise be able to raise a valid claim based on the fact that the consent was obtained by another party.

If consent is free prior and informed, it should not matter that such consent was obtained by a third party (in this case the corporation). To focus on the party obtaining the consent, would undermine the substantive nature of FPIC and replace it with a procedural requirement and undermine the central importance of the substantive nature of the consent. This approach has been repeatedly disavowed in international instruments and jurisprudence.

c. Towards a role for Corporations in FPIC implementation in Greenland

This paper has argued that there is a growing consensus that the FPIC element of fundamental indigenous rights does apply to extractive industry projects that affect indigenous communities and that Greenland falls far short of meeting the FPIC requirement. It has further been argued that the ongoing failure of FPIC principles in Greenland points towards significant corporate risk, in the form of legislative changes, retracted licenses, restricted access to project financing and reputational damages. Corporations in Greenland therefore must seek to mitigate this risk.

For corporations seeking a pro-active risk mitigation strategy, this paper has demonstrated

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Sarayaku vs. Ecuador 194.

¹⁴³ Sarayaku vs. Ecuador 200.

¹⁴⁴ *See Generally*, Part II.a

¹⁴⁵ Sarayaku vs. Ecuador 189.

that it is possible to delegate responsibility for FPIC implementation.¹⁴⁶ It is further clear that good faith FPIC implementation, spearheaded by corporate actors, can satisfy FPIC requirements.

Therefore, in consideration of the specific Greenlandic risk parameters described herein, it should be concluded that a proactive corporate approach to FPIC compliance would reduce or even eliminate the risk generated by (ii) international lenders, (iii) responsive changes to regulatory frameworks and (iv) the reputation risk from public and private pressure groups.

While corporate-led FPIC compliance may not address the need for an improved FPIC policy on a national level, at the corporate level, it would effectively counteract the risk of non-consensual project development in Greenland.

¹⁴⁶ See generally, Part IV.b.