

RISK, RIGHTS AND RESPONSIBILITY:
NAVIGATING CORPORATE
RESPONSIBILITY AND INDIGENOUS
RIGHTS IN GREENLANDIC EXTRACTIVE
INDUSTRY DEVELOPMENT

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INTRODUCTION

It is no small irony the climate change caused by the exploitation of natural resources, has exposed a wealth of these

resources in the Arctic, ripe for exploitation.¹ As sea ice recedes, permafrost melts and shipping channels stay open longer, resources long considered too expensive to extract have become economically viable.² This process is triggering an explosion of exploitation, throughout the Arctic generally and in Greenland specifically. While lucrative, this sudden rush for resources creates significant problems for Greenland's indigenous peoples, regulators, and those corporate actors who seek to ensure positive economic results, while protecting human rights and complying with international standards.³

For the more than one hundred extractive corporations that have already invested some 1.1 billion USD in onshore and offshore exploration in Greenland, the problems faced by indigenous people have had little impact on their business practices.⁴ However, in March 2013, these indigenous voices were suddenly heard loud and clear; Aleqa Hammond and the opposition Siumut Party, swept to a stunning victory on a platform of increased extractives royalty payments, greater oversight of extractive industry, and stronger participation of local communities in development planning and implementation.⁵

¹ See generally Rebecca M. Bratspies, *Human Rights and Arctic Resources*, 15 Sw. J. INT'L L. 251, 261 (2009); Torleiv Bilstad, *Climate change and consequences for the Arctic*, in ARCTIC OIL & GAS 47 (Auslag Mikkelsen & Oluf Langhelle eds., 2008); Cultural and Social Research in Greenland, Selected Essays, 1992-2010 361 (University of Greenland, 2011).

² See generally Bratspies, *supra* note 1, at 271.

³ See YVON CSONKA & PETER SCHWEITZER, ARCTIC HUMAN DEVELOPMENT REPORT: SOCIETIES AND CULTURES: CHANGE AND PERSISTENCE 57 (2004).

⁴ Companies spent roughly \$100 million in 2012 on exploration on land, while off-shore exploration costs ran beyond \$1 billion. Alistair Scrutton, *Greenland Warns EU May Miss Out on Its Mineral Wealth*, REUTERS (Mar. 7, 2013), <http://www.reuters.com/article/2013/03/07/us-greenland-pm-idUSBRE92617120130307> [hereinafter Scrutton].

⁵ 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://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

This victory may mark a sea change in Greenlandic extractive development, promising major changes to extractive industry regulation and practice in Greenland. As a result, extractive corporations in Greenland have entered an emergency holding pattern, as the long term effects of this sudden explosion of indigenous resistance to unfettered exploration and exploitation of Greenland's tremendous natural resource wealth.⁶

In Greenland, the primary driver of opposition to extractive industry has been the lack of consultation and control over development. In the words of newly victorious Prime Minister Aleqa Hammond "[t]he central issue here is who will run the country?"⁷ Speaking with reporters, she continued, "[p]eople feel that it is foreign companies who have too much say here."⁸ Other objections center on the threat of environmental degradation, which could impact culturally important indigenous uses of natural resources, as well as traditional "livelihoods."⁹ All these concerns reflect specific indigenous rights which are guaranteed to Greenland's indigenous population under the International Labor Organization Convention 169.¹⁰

(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>.

⁶ Even before the election results were in, numerous businesses suspended operations in anticipation of an opposition victory. *Voters Deliver Backlash*, *supra*, note 5. "‘Everything is on hold for us with the election,’ said Ib Laursen, operations manager at Greenland Minerals and Energy." Alistair Scrutton, *Mining, China Central Issues in Greenland Election*, NBCNEWS (Mar. 11, 2013), http://www.nbcnews.com/id/51140500/ns/business-stocks_and_economy/t/mining-china-central-issues-greenland-election/#.Uiel4GQa-AM.

⁷ *Voters Deliver Backlash*, *supra* note 5.

⁸ *Voters Deliver Backlash*, *supra* note 5.

⁹ See Ghosh, *supra* note 5; Alistair Scrutton, *In Vote, Resource-rich Greenland Debates New Global Role*, REUTERS (Mar. 10, 2013), <http://www.reuters.com/article/2013/03/10/us-greenland-election-idUSBRE92907F20130310>.

¹⁰ See Ghosh, *supra* note 5; Macalister, *supra* note 5. Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, I.L.O. No. 169, 1650 U.N.T.S. 383 [hereinafter ILO 169]. Greenland acceded to ILO 169 when Denmark became a signatory state. While international law would appear to bind Greenland regardless, it has been made

This paper applies the rights-based approach to look critically at the human rights risk in Greenland within the context of the reality that human rights risks have already dealt a substantial blow to extractive industry in Greenland. Using the Right to Respect Framework and Guiding Principles developed by U.N. Special Representative John Ruggie specifically, the paper seeks to provide specific guidance to business enterprises entering the Greenlandic extractives market, on how to identify, prevent and mitigate human rights risk.

The rights-based approach is an analytical technique that allows for a constructive, integrative, and inclusive discussion of issues that are marked by power imbalances and/or significant ontological differences between relevant parties.¹¹ By applying this approach in Greenland, this paper seeks to bridge the divide between the indigenous rights and corporate perspectives, instead of forming a contentious and unproductive dichotomy between the two.¹²

Part I of the paper provides a review of the current extractive industry development environment in Greenland touching on the legal and cultural realities that shape the operation of extractive industries in this Arctic nation. Part II discusses how the new R2R Framework and corresponding U.N. Guiding Principles can be applied to analyze human rights risks in Greenland and work towards managing the current wave of anti-extractive sentiment. Part III applies this framework to the Greenland, through the tool of human rights due diligence, in order to understand the rights environment and identify specific rights at risk. Part IV completes the application of the R2R Framework by identifying possible Policy Commitments that business enterprises should take in Greenland, to minimize their

clear by Greenland that it considers itself to be bound to the Convention regardless.

¹¹ 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 [hereinafter *Guiding Principles*].

¹² "Indeed, such an approach is both efficient and equitable." A. Nigam & S. Resheed, *Financing of Fresh Water for All: A rights Based Approach*, available at <http://ideas.repec.org/p/fth/callaa/98-003.html>.

human rights impact and lessen the resistance of Greenlanders to foreign investment in extractive industry.

I. EXTRACTIVE INDUSTRIES AND INDIGENOUS CULTURE IN GREENLAND

A. Greenland; an Introduction

1. *Basic Information*

Greenland stands to be the country most affected, in relative terms, by the explosion of extractive industry development in the Arctic.¹³ With a current GDP of around 2 Billion (USD) and a population of less than 60,000 people, Greenland has a deceptively high GDP per capita.¹⁴ The reality is that Greenlanders face some of the highest prices for basic necessities in the world.¹⁵ They suffer poor, uneven economic development and unsustainable levels of government subsidy.¹⁶ Furthermore, there are sharp distinctions between residents of towns and settlements, the latter averaging only 2/3 the income of the former.¹⁷ In such a small, economically marginalized country, the potential infusion of billions of dollars in extractive industry investment can and will create fundamental changes for Greenland and its majority indigenous population. Whether this

¹³ Any discussion of extractive industries, indigenous rights or economic development in Greenland must begin with a caveat that is more of a promise. Today, Greenland is an extraordinary, dynamic country, in which everything from law, to governance to climate and culture are in a state of flux. What is written here reflects the author's fieldwork and desk review conducted between May and October of 2012 and should be read as such. There is a potential for significant changes in the regulatory framework during the fall sitting of the Parliament occurring immediately after the completion of this paper.

¹⁴ See generally STATISTICS GREENLAND, GREENLAND IN FIGURES: 2012 (David Michelsen ed., 9th ed. 2012) [hereinafter GREENLAND].

¹⁵ See generally *Greenland, All Areas*, XPATULATOR, http://www.xpatulator.com/cost-of-living-review/Greenland-All-Areas_403.cfm (last visited Oct. 6, 2012). See also Joan Nymand Larsen, *Climate change, natural resource dependency and supply shocks: The Case of Greenland*, in THE POLITICAL ECONOMY OF NORTHERN REGIONAL DEVELOPMENT 206 (Gorm Winther et al. eds., 2008).

¹⁶ Mark Nuttall, *Self-Rule in Greenland: Towards the World's First Independent Inuit State?*, 3-4/08 INDIGENOUS AFFAIRS 64, 65 (2009).

¹⁷ GREENLAND, *supra* note 14.

change is positive or not, depends to a large extent on the choices made by the business enterprises leading the development process.

Greenland is both the world's largest island and its least densely populated state.¹⁸ Most of Greenland is an uninhabited ice sheet with the population living in towns and settlements dotting the coast. These isolated communities are connected only by sea and air.¹⁹

From the early 1700's Greenland was a colony of Norway and then Denmark, who retained possession until the twentieth century.²⁰ Colonial status became Danish county status in 1953, although Greenlanders remained politically marginalized within Denmark.²¹ A strong push from civil society resulted in the Home Rule Act of 1979, which granted partial autonomy.²² However, it was not till 2008 that Greenland finally gained "Self-Rule," a kind of de-facto independence.²³ Yet, Denmark retains control over key functions, as well as foreign affairs.²⁴

Today, Greenland is an economically marginalized country with high underemployment and a very high cost of living.²⁵ With little industry, fragmented infrastructure, and a poor

¹⁸ Joshua Calder, *World Island Info Blog*, 2010-09-06; *The 2008 Revision Population Database*, Esa.un.org. 2009-03-11. Retrieved 2010-09-06.

¹⁹ See generally *The World Factbook*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/gl.html> (last visited Sep. 16, 2013); *Programming Document for the Sustainable Development of Greenland*, available at http://ec.europa.eu/europeaid/where/octs_and_greenland/documents/pdsd_and_annexes_greenland_en.pdf.

²⁰ See generally *History of Greenland*, THE OFFICIAL TOURISM SITE OF GREENLAND, <http://www.greenland.com/en/about-greenland/kultur-sjael/historie.aspx>.

²¹ For a strong review of modern political history in Greenland see NATALIA LOUKACHEVA, *THE ARCTIC PROMISE: LEGAL AND POLITICAL AUTONOMY OF GREENLAND AND NUNAVUT* (2007).

²² *Id.*

²³ *The World Factbook*, *supra* note 19.

²⁴ Nuttall, *supra* note 16, at 65.

²⁵ Greenland's purchase power parity ranks 191st out of 229 worldwide. *Country Comparison: GDP (Purchasing Power Parity)*, *The World Factbook*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2001rank.html?countryName=Greenland&countryCode=gl®ionCode=noa&rank=191#gl> (last visited Sep. 16, 2013).

educational system, Greenlanders are highly dependent on their government for employment, housing, and other support.²⁶ The Government in turn is highly dependent on subsidies from Denmark, which currently total \$600 million USD, or roughly one third of the total annual budget.²⁷

2. Extractive Industry Development

There is no question that extractive industry development is simultaneously the engine, promise, and anathema of Greenland's future. Within the context of this marginalized indigenous state, the potential impact of extractive industry development is nothing short of monumental.²⁸ Reserves of iron, gold, uranium, rubies, and rare earths have inspired roughly 90 mining projects to enter the approval pipeline.²⁹ Extraction of oil and gas is further off, but the Bureau of Minerals and Petroleum

²⁶ Org. for Econ. Cooperation and Dev. [OECD], *OECD TERRITORIAL REVIEWS: NORA REGION 2011: THE FAROE ISLANDS, GREENLAND, ICELAND AND COASTAL NORWAY 44 (2011)*, available at <http://dx.doi.org/10.1787/9789264097629-en>. At least 44% of the work force is directly employed by the government, while countless others depend indirectly on the public sector indirectly for their jobs. *Id.*

²⁷ CENTRAL INTELLIGENCE AGENCY, *The World Factbook: North America: Greenland*, CENTRAL INTELLIGENCE AGENCY (Dec. 13, 2012), <https://www.cia.gov/library/publications/the-world-factbook/geos/gl.html>.

²⁸ Interview by Rutherford Hubbard with Anonymous Source, Representative of London Mining, in Green. (Aug. 27, 2012).

²⁹ Interview by Rutherford Hubbard with Anonymous Source, Representative of BMP, in Green. (Aug. 20, 2012); *see also* Naalakkersuisut, *Bureau of Minerals and Petroleum*, Naalakkersuisut: Government of Greenland (Sep. 8, 2013, 10:45AM), <http://www.bmp.gl/> (referencing promotional materials from the BMP). Greenland does, however, have a historical legacy of mining, including a now-depleted cryolite mine near Ivigtut that was a major contributor to Greenland's economy before 1973. Lise Lyck & Jorgen Taagholt, *Greenland—Its Economy and Resources*, 40 ARCTIC 50, 57 (1987). 3.5 million tons of cryolite, which aids in aluminum production, was extracted before depletion. *Id.* Between 1956-1962, 130,000 tons of lead and zinc were extracted from the Mesters Vig site in East Greenland. *Id.* “600[,],000 ton[s] of coal were mined at Qutdliqssad[,] on the island of Disko” between 1924-1972. *Id.* at 58.

is currently selling off exploration rights, and nearly all the major international petroleum companies are buying.³⁰

Most importantly, extractive industry could fund Greenland's full and final independence. Currently, the Government of Denmark's \$600 million subsidy to the Government of Greenland allows the Government of Greenland to function, but also creates a dependency on Denmark that precludes full autonomy and statehood. Taxes and revenue sharing from extractive industries could easily generate enough income for the government to refuse the Danish subsidy, thereby opening an opportunity for Greenland's long sought recognition as a fully independent state.³¹ Furthermore, large scale development of mineral resources and the potential for massive oil and gas resources could potentially, if properly managed, transform Greenland into a wealthy, social democratic state on the Scandinavian model, improving weak education and health systems and solving unemployment.³²

Political and financial independence mean even more when it is remembered that Greenland is a rare example of a majority indigenous state.³³ Retaining a strong connection to its indigenous identity through traditional livelihoods, cultural values and social systems, Greenland has a great deal to gain

³⁰ Nuttall, *supra* note 16, at 65-66. "In 2007, using northeast Greenland as a prototype for its circum-Arctic oil and gas appraisal, the United States Geological Survey (USGS) estimated that the East Greenland Rift Basins Province could hold over 31 billion barrels of oil, gas and natural gas liquids (Gautier 2007). USGS estimates that the waters off Greenland's west coast could contain more than 110 billion barrels of oil (roughly 42% of Saudi Arabia's reserves)." *Id.*

³¹ *Id.* at 65. Greenland's Premier Hans Enoksen has expressed a desire for independence in 2021, a date marking three hundred years since Danish colonization. *Id.*

³² The obvious example would be Norway, which claims more than 90% of petroleum profits as taxes, places graduated knowledge and technology transfer requirements on foreign extractive companies, and reinvests petroleum revenues in social programs and long term state investment. *See infra.* note 92.

³³ While the definitions in this area can become contentious, other examples of majority indigenous states include, Bolivia, Fiji, Guatemala, Papua New Guinea and Tonga. Even among this group it could be argued that the indigenous population of Greenland is more homogenous and retains a stronger connection to a sustainable resource based lifestyle.

through full independence, economically, culturally and politically.

3. *Cultural Context and the Mixed Economy*

To fully understand the potential effect of extractive industry development in Greenland, it is necessary have an at least cursory understanding of the Greenlandic people.³⁴ Greenlanders make up a part of the larger Inuit ethnic group, which encompasses indigenous peoples in Arctic Canada, Russia, and the United States. Speaking an Eskimo Aleut language known (in English) as Greenlandic, their culture is closely tied to the Arctic's natural resources, relying on marine mammals, fishing, hunting and foraged plants.³⁵

These "subsistence activities" embody the definition of indigenous subsistence offered by the Inuit Circumpolar Council; "a highly complex notion that includes vital economic, social, cultural and spiritual dimensions."³⁶ As such, the economic (subsistence) activities practiced by Greenlanders exert far more cultural influence than purely providing actual subsistence, or even economic benefit.³⁷

Modern Greenlanders exhibit what Wolfe and Walker have called the "mixed economy."³⁸ That is, they participate in both

³⁴ The Author is neither an anthropologist, nor does he aspire to be one. The purpose of this review is merely to highlight some common generalizations about this complex society, and help others to understand how this culture may impact and be impacted by extractive development. The author would like to thank the many Greenlanders who provided guidance on this subject and take full credit for any mistakes.

³⁵ See generally George W. Wenzel, *Canadian Inuit Subsistence and Ecological Instability - If the Climate Changes, Must the Inuit?*, POLAR RESEARCH, 28, 89-99 (2009).

³⁶ See generally Birger Poppel, *Are subsistence activities in the Arctic part of the market economic reality or - is the market economy a part of a subsistence based mixed economy?*, in CULTURAL AND SOCIAL RESEARCH IN GREENLAND, SELECTED ESSAYS 1992-2010 349, 349-65.

³⁷ *Id.* Interviews by Rutherford Hubbard with Anonymous Source, Civil Society Representatives, in Green. (Aug. 16, 17, 27, 2012).

³⁸ *Id.* at 350. Wolfe and Walker were noting that after WWII, it was expected that indigenous communities in the Arctic would rapidly integrate into the market economies of the 'West.' However, the reality that emerged was far

traditional subsistence activities as well as participating in the market economy, without any intention of engaging in one to the exclusion of the other. Greenlanders generally participate in far fewer “subsistence activities” than other indigenous societies in the Arctic.³⁹ Yet, in a clear indication of the cultural/social/political importance of the subsistence economy, 90% of Greenlanders have received gifts of traditional fish and meat products and fully 95% said that food was important to maintaining cultural identity.⁴⁰ A surprising 67% of Greenlanders get half or more of their nutritional content from these traditional foods.⁴¹

This is hardly an example of resistance to change and ‘modernity.’ Rather, it may surprise many readers to learn that there is a positive correlation between increased income and the participation in subsistence activities in Greenland.⁴² Given that 82% of Greenlanders are either somewhat or very satisfied with their business activities, this mixed economy appears in fact to be an outcome of an alternative economic model than a confrontation between economic systems.⁴³

This does not mean that Greenlanders have achieved a level of economic security that completely addresses their needs, however. With nearly 30% of the labor force not working, extremely low levels of education and a serious competency gap in core areas like law, medicine and public administration, Greenland is a country in transition with a long way to go before achieving the economic and social robustness of its Western European neighbors.⁴⁴ In addition to these problems, climate

different, and this resistance to fully integrating, or rather being subsumed into, the market economy continues to dominate Greenlandic society. *Id.*

³⁹ *Id.* at 354.

⁴⁰ *Id.* at 356-57.

⁴¹ *Id.* at 357. See also *Survey of Living Conditions in the Arctic, Inuit, Saami, and the Indigenous Peoples of Chukotka*, SURVEY OF LIVING CONDITIONS IN THE ARCTIC, <http://www.arcticlivingconditions.org> (Last visited Sept. 20, 2013) (providing full set of relevant data on living conditions in the Arctic with extensive resources).

⁴² *Id.* at 358. For sure, the highest income bracket practices the most subsistence activities, while the lowest practices the least. *Id.*

⁴³ *Id.* at 359.

⁴⁴ *Annex: Programming Document for the Sustainable Development of Greenland*, ch. 2 (2007), available at <http://ec.europa.eu/europeaid/where/>

change has already created serious problems for indigenous communities in far northern Greenland, problems they are neither technologically nor economically prepared to solve.⁴⁵

What Greenland's mixed economy does demonstrate is the fact that Greenlanders do not operate under that traditional state/market binary, as discussed by Lawrence and Gibson.⁴⁶ Therefore, extractive industry business enterprises should be aware that many Greenlanders are operating with a different fundamental understanding of the role of the free market, the role of the state, and even the fundamental goals of development and free enterprise. For an easily cognizable example, Greenland's sharing of traditional foods remains highly relevant as a way of preserving cultural identity even for college educated Greenlandic professionals living in Nuuk. Considering Greenland's fragile Arctic environment, this suggests that even limited environmental damage hundreds of miles away may have a meaningful impact on the indigenous rights of all Greenlanders.

A further cultural challenge facing would-be extractive industry developers is the cultural relationship to authority and decision making. As a newly post-colonial or even slightly still-colonial society, Greenlanders have a self-identified, troubled relationship with external authority.⁴⁷ On the one hand, Greenlanders feel subject to intensive international pressure, from environmentalists, capitalists, international organizations,

octs_and_greenland/documents/pdsd_and_annexes_greenland_en.pdf.

⁴⁵See, e.g., James D. Ford & Chris Furgal, *Foreword* to the special issue: *climate change impacts, adaptation and vulnerability in the Arctic*. 28 POLAR RESEARCH 1.1 (2008); James D. Ford & Christina Goldhar, *Climate change vulnerability and adaptation in resource dependent communities: a case study from West Greenland*, 54 CLIM. RES. 181 (2012).

⁴⁶See generally Rebecca Lawrence & Chris Gibson, *Obliging Indigenous Citizens? Shared Responsibility Agreements in Australia Aboriginal Communities*, 21 CULTURAL STUDIES 650 (2007); Rebecca Lawrence, *Corporate Social Responsibility, Supply-Chains and Saami Claims: Tracing the Political in the Finnish Forestry Industry*, 45 GEO. RESEARCH 167 (2007).

⁴⁷Interview by Rutherford Hubbard with Anonymous Source, Member of Parliament, in Green. (Aug. 26, 2012); Interview by Rutherford Hubbard with Anonymous Source, Civil Society Representative, in Green. (Aug. 16, 2012); Interview by Rutherford Hubbard with Anonymous Sources, Impact Assessment Professionals, in Green. (Aug. 27, 2012).

and foreign governments alike.⁴⁸ The response to this pressure is often to simply shut down.⁴⁹ Given the importance placed on indigenous consultation and participation during the recent elections, this poses a significant challenge.⁵⁰

B. Legal Frameworks

1. *Legal Protection for Indigenous Rights*

Greenland does not have a coordinated and systematic approach to the protection of indigenous rights. In fact, there are no indigenous-specific legal protections at all.⁵¹ As a majority indigenous country, indigenous specific legal protections have not been at the forefront of the government agenda.⁵² Instead, it is argued here that the Government of Greenland relies on the participatory democratic process and mandatory consultation frameworks for the protection of indigenous rights. Whether or not this approach has proven effective will be discussed at length below.⁵³

From the perspective of extractive industry business enterprise, “Greenland is a remote extractive periphery where the regulatory process and less than stringent legal requirements for environmental hearings make it an attractive place to invest.”⁵⁴

⁴⁸ Interview by Rutherford Hubbard with Anonymous Source, Member of Parliament, in Green. (Aug. 26, 2012). An oft-cited example of just this problem was the strong negative response Greenpeace received when they sent representatives to Greenland. *Id.* While ostensibly trying to help the Greenlandic population to protect its marine resources, Greenpeace’s strong, often militant opposition to whaling is perceived by Greenlander’s as an imposition and as a result, Greenpeace was met by protest and dismissal. *Id.*

⁴⁹ *Id.*

⁵⁰ See *infra* note 6.

⁵¹ Inuit Circumpolar Council: Greenland, *Universal Periodic Review-Denmark 2011: Joint Submission-Greenland NGOs* (2010).

⁵² *Id.*

⁵³ The deeper questions of where Greenland ought to stand in regards to ILO 169 and what it means to have a majority indigenous state are beyond the scope of this paper. None-the-less, these questions deserve significant study, which, to this author’s knowledge, has not been conducted.

⁵⁴ Nuttall, *supra* note 16, at 68. See also Interview by Rutherford Hubbard with Anonymous Source, representative of BMP, in Green. (Aug. 20, 2012).

With government “ownership” of 100% of land and natural resources, and an obvious fiscal incentive to expand resource exploitation, Greenland appears a very promising partner indeed.⁵⁵

This dissonance regarding land ownership and indigenous rights raises a core question: As an indigenous majority country, are the actions of a democratically elected government *de facto* in compliance with ILO 169 requirements and the fundamental rights of indigenous peoples? It is this question that lies at the crux of Greenland’s complex relationship with ILO 169 and extractive industry development generally. This question is also a key source of potential risk for extractive industry business enterprises, as discussed below.

2. *Extractive Industry Regulation*

The Greenlandic Parliament is the primary legislative body in Greenland and oversees extractive industries, among its many functions. However, through the Mineral Resources Act of 2009, the Parliament granted the Government of Greenland all administrative responsibility and authority over the development of mineral and hydrocarbon resources.⁵⁶ In practice, these functions are executed solely by the Bureau of Minerals and Petroleum (BMP), a government agency established by the Parliament.⁵⁷

Of the approximately 90 mineral extraction projects currently at some level of development in Greenland, all but a few remain in the exploration stage.⁵⁸ Thus far, the process has

⁵⁵ See also The Mineral Resources Act (Act No. 7/2009) (Green.). “The Greenland Self-Government has the right to control and use mineral resources in the subsoil in Greenland.” *Id.* at pt. 1 ¶2(1).

⁵⁶ The Mineral Resources Act (Act No. 7/2009).

⁵⁷ The Mineral Resources Act (Act No. 7/2009) pt. I (Green.); In addition to the Minerals Act, there is similar legislation regulating environmental and labor that impacts extractive industry enterprises and indigenous rights. However, the Mineral Resources Act, appears to override all other relevant legislation in case of conflict and as such has become the primary, if not sole relevant piece of legislation. Whether this is in fact the case has yet to come before the courts.

⁵⁸ The most advanced mega project currently in the approval process is that of the ISUA Mine, proposed by the London Mining Corporation. This

been slowed by the unique challenges faced by beginning projects in a new and challenging locale.⁵⁹ However, one project, the Isua Mine, is currently in the final stages of the application process.⁶⁰ If the project is approved, it is expected to result in a flurry of activity and the rapid issuance of prospecting and extraction licenses, although the March elections cast some doubt on this prediction.⁶¹

The BMP is currently operating under the assumption, supported by the Mineral Resources Act, that all resources are government property and therefore has the authority to grant exclusive extraction rights to minerals.⁶² However, as the President of the Inuit Circumpolar Conference Aqqaluk Lyngé, points out, the government *does not* own the land and resources.⁶³ Under the Constitution of Greenland, the Greenlandic people own the land and resources, and the Greenlandic people may not be as willing a development partner

large scale mining operation is located north of Nuuk at the end of Nuuk Fjord. It will require the construction of a refinery as well as living accommodations for workers, as the site is too far from any existing settlements; Information on the current status of mineral and petroleum licensing, as well as the ISUA project specifically, refer to the official Bureau of Minerals and Petroleum licensing map, available at http://geuskort.geus.dk/greenlandPortalMap/gis_greenlandPortal.jsp?map_size=999%20497. A list of current licenses is also available at http://www.bmp.gl/images/stories/minerals/list_of_licences/list_of_licences.pdf.

⁵⁹ The majority is being undertaken by junior corporations that rely on regular injections of fresh capital, which has further slowed the process; Interview by Rutherford Hubbard with Anonymous Source, private sector representative, in Green. (Aug. 27, 2012). *See generally* Larsen, *supra* note 15.

⁶⁰ Presentations by London Mining and the Bureau of Minerals and Petroleum (August 27, 2012).

⁶¹ Interview by Rutherford Hubbard with Anonymous Source, representative from BMP, in Green. (Aug. 29, 2012); Interview by Rutherford Hubbard with Anonymous Source, private sector representative, in Green. (Aug. 29, 2012).

⁶² Interview by Rutherford Hubbard with Anonymous Source, representative from BMP, in Green. (Aug. 29, 2012).

⁶³ Interview with Aqqalaq Lyngé, Chair, Inuit Circumpolar Council, Greenland the Association Hingitaaq 1953 (The Outcasts 1953), Thule, Green. (August 27, 2012).

as the Bureau of Minerals and Petroleum.⁶⁴ The Self-Rule Agreements of 2009 make clear that Greenland and not Denmark, has control over natural resources.⁶⁵ However, a translation problem between Greenlandic and Danish texts of the Self Rule Government agreement make the interpretation of this provision difficult.⁶⁶

3. *The Extractive Industry Licensing Process*

The Act establishes a “one door policy” which grants the BMP exclusive control over all extractive industry development licensing and management from prospecting to decommissioning.⁶⁷ The principle is that potential resource developers need to visit only “one door” during the entirety of the resource exploitation process. The BMP is in charge of licensing, monitoring and all other aspects of the extractive industry process. The Parliament does not have veto authority regarding the issuance of licenses, but the BMP does have the responsibility to report to the Parliament on a yearly basis.⁶⁸

Extractive industry enterprises pay significant, although far from unusual tax rates of 30% and 37% respectively for non-

⁶⁴ Interview with Aqqaluk Lyngé, Chair, Inuit Circumpolar Council, Greenland the Association Hingitaq 1953 (The Outcasts 1953), Thule, Green. (August 28, 2012).

⁶⁵ Slim Allagui, *Greenland to take greater control of natural resources*, THE AGE, (June 20, 2009), <http://www.theage.com.au/environment/greenland-to-take-greater-control-of-natural-resources-20090619-cr6g.html#ixzz2TKqg6fhU>.

⁶⁶ Interview with Aqqalaq Lyngé (August 27, 2012).

⁶⁷ *See generally* The Mineral Resources Act (Act No. 7/2009) (Green.); The BMP actively advertises the one-door policy, which it sees (quite accurately) as a strong selling point for foreign investment. *See* BUREAU OF MINERALS AND PETROLEUM, WEST GREENLAND, <http://www.geus.dk/ghexis/pdf/AAPG03-A3.pdf>. The one-door policy was also mentioned by the Director of London Mining as a key advantage to doing business in Greenland. Public Consultation with Director of London Mining (August 27, 2012).

⁶⁸ “(1) Each year the Greenland Government presents to the Greenland Parliament an account of licences granted, applications for licences and implemented and planned invitations to apply for licenses. (2) Each year the Greenland Government prepares a public report on the matters mentioned in subsection (1) above. The Greenland Government submits the report to the Greenland Parliament.” The Mineral Resources Act (Act No. 7/2009) pt. 4 (Green.).

licensed and Greenland licensed business enterprise respectively.⁶⁹ This is in addition to a standard corporate tax rate. Given that the Greenlandic Government does not charge for the right to engage in resource extraction, these rates are relatively low. This fact has not been lost on some indigenous activists who are actively opposing what they consider to be a natural resource give-away.⁷⁰ Given the fundamental disagreement as to natural resource ownership in Greenland, this remains a very contentious issue and a potential legal challenge to extractive industry development.

Petroleum rights are likewise subject to 100% state ownership under the Act. Through the administration of the BMP, petroleum rights are granted exclusively through joint operations agreements and are subject to significant taxation.⁷¹ The application approval process for hydrocarbon extraction remains undefined, as currently no licensee has gone beyond the exploration stage.⁷² That being said, business enterprises seeking to conduct seismic studies are required to hold consultations with

⁶⁹ For an accessibly comprehensive review of extractives taxation regimes, particularly in developing nations, see Bryan Land, *Capturing a Fair Share of Fiscal Benefits in the Extractive Industry*, 18 TRANSNATIONAL CORPORATIONS, no. 1, 2009 at 157, available at http://unctad.org/en/docs/diaeiia20097a7_en.pdf.

⁷⁰ Author's personal notes taken during the Public Consultation August 27, 2012.

⁷¹ Foreign corporations are required to partner with the state oil company Nunaoil, which is a 15% quiet, risk free partner. So far two licensing rounds have been completed and 27 prospecting licenses have been issued. In the majority of cases, licenses are purchased by consortium of extractive enterprises, with one business enterprise acting as the operator, others providing money and consulting and NunaOil as the silent partner. This consortium approach reflects the current reality that petroleum extraction in Greenland, while very promising, still presents a great deal of risk; Interview by Rutherford Hubbard with Anonymous Source, representative from BMP, in Green. (Aug. 20, 2012); Interview by Rutherford Hubbard with Anonymous Source, Civil Society Representative, in Green. (Aug. 21, 2012); Note that while NunaOil bears no risk during the exploration phase, it must become an active partner, including providing a relative share of financing, from the moment petroleum is first extracted. For more information refer to the BMP website, BUREAU OF MINERALS AND PETROLEUM, <http://www.bmp.gl/>.

⁷² Interview by Rutherford Hubbard with Anonymous Source, representative from BMP, in Green. (Aug. 20, 2012).

affected communities.⁷³ In the minerals area, the process is more defined, especially as the first mega-project under the new regulatory system is currently in the final stages of approval.⁷⁴ Under the Act, potential licensees are required to submit an application to the BMP, containing a Strategic Impact assessment, (SIA), including an Environmental Impact Assessment, Social Impact Assessment and Economic Impact Assessment as well as an Impact Benefit Agreement (IBA).⁷⁵

In addition to the requirements described above, potential licensees are required to submit detailed plans for the full extent of the exploitation process, including extractive operations, expected revenues, expected employment requirements and staffing strategy, and proof of financing.⁷⁶ Taken together the application process has proven time consuming, although perhaps not greatly so given the size of proposed projects.⁷⁷

Following the submission of the Impact Assessments, public consultations must be held in all affected communities.⁷⁸

⁷³ See BUREAU OF MINERALS AND PETROLEUM, BMP GUIDELINES FOR PREPARING AN ENVIRONMENTAL IMPACT ASSESSMENT (EIA) REPORT FOR MINERAL EXPLOITATION IN GREENLAND 8 (2nd ed. 2011), available at http://www.bmp.gl/images/stories/minerals/EIA_guidelines_mining.pdf; see BUREAU OF MINERALS AND PETROLEUM, GUIDELINES FOR SOCIAL IMPACT ASSESSMENTS FOR MINING PROJECTS IN GREENLAND ¶ 1.1, 2.2, Appendix 5 (2009), available at http://www.bmp.gl/images/stories/minerals/sia_guideline/sia_guidelines.pdf. See generally The Mineral Resources Act (Act No. 7/2009) (Green.), pts. 15-16.

⁷⁴ The Isua Mine Project, an initiative of London Mining Corporation is publicly considered to be a test-case for the licensing system, a fact supported by informal conversations with both government and civil society representatives.

⁷⁵ The Mineral Resources Act (Act No. 7/2009) (Green.). The IBAs are a three way contract between the government, the municipality and the company. They are dynamic contracts which are required to be revisited each year for re-negotiation and evaluation. It appears possible for the BMP to revoke a license for failure to engage in the re-negotiation process, but the reality remains unclear. *Id.* at 19, 43, 86.

⁷⁶ See The Mineral Resources Act (Act No. 7/2009) (Green.). Additional license application information, available at BUREAU OF MINERALS AND PETROLEUM, <http://www.bmp.gl/>.

⁷⁷ To give some context, London Mining has spent the past seven years preparing their application, and approval is not expected until next year. Author's personal notes taken during the Public Consultation August 27, 2012.

⁷⁸ See generally *supra* Part I.B.iii.

The content and procedure of these consultations is not defined. Until recently, and still by law, the Business enterprises are solely responsible for conducting these consultations, a process generally outsourced.⁷⁹ However, in the recent London Mining Ltd. case, the BMP has implemented a series of four public consultations, in response to concerns repeatedly expressed regarding the efficacy of the corporate-led consultation process.⁸⁰

The outcome of the consultation process should be revisions to the application. There is currently no requirement that the consultation process directly affects the application or approval process, nor is there a requirement that the applicant state why it has not made changes based on specific recommendations from the consultation process.⁸¹

C. Recent Developments

The integration of extractive development, legal regulation and indigenous culture can be devastating for local communities, as demonstrated time and time again in Nigeria, the Amazon basin and in Southeast Asia.⁸² In Greenland, tensions between indigenous cultural realities and rapid extractive development have been steadily increasing, culminating with the opposition victory in March, 2013.

The Parliamentary Elections in Greenland were a real game-changer for Greenlandic extractive industry. Broad support for foreign investment in extractive industry remains in Greenland,

⁷⁹ Interview with Ole Kjaer, Bureau of Minerals and Petroleum, in Nuuk (Aug. 20, 2012).

⁸⁰ *Id.* For more information on concerns regarding the consultation process see *supra* Part I.B.i.

⁸¹ Interview by Rutherford Hubbard with Anonymous Source, Representative of London Mining, in Green. (Aug. 27, 2012). Prior to the 2013 Elections, the BMP had already suggested that changes in the consultation process were likely. Interview with Ole Kjaer, *supra* note 79. With the elections however, it is all but guaranteed that this legal framework will be fundamentally changed. The nature and extent of that change remains unclear. As will be discussed later in this paper, business enterprises may have a role to play in improving the regulatory framework while still maintaining a favorable environment for investment. *Id.*

⁸² See *infra*. Note 69.

but the parameters of that investment are set to change significantly.⁸³ Outgoing Prime Minister Kupik Kleist explained this sudden change with the eloquence of the songwriter he is, "[i]t has been a slap in the face."⁸⁴

While not entirely unexpected, the results of the election were all but unimaginable just a few months before. Last year, EU Vice President Antonio Tajani was in Greenland to sign a Memorandum of Understanding regarding raw material exploitation to Europe.⁸⁵ Now, Greenlanders have clearly rejected a policy of free exploitation, in favor of a measured approach that takes into account traditionally Inuit hunting and fishing activities.⁸⁶

The primary concern that drove the 2013 election result was the demonstrated lack of participation and oversight from Greenlanders themselves. Prime Minister-elect Hammond ran on a platform that maintained, "[t]he most important thing for us is to work with someone who also views citizen involvement as the most important thing."⁸⁷ She further insisted that "[d]evelopment must be fair to all Greenlanders – both those in villages and those in cities."⁸⁸ If this sounds like anti-capitalist or anti-imperialist rhetoric, it is, but not necessarily in a negative way. Rather, in her first interview following the election, Hammond made clear:

We are welcoming companies and countries that are interested in investing in Greenland At the same time we have to be aware of the consequences as a people. Greenland should work with countries that have the same values as we have, on how human rights should be respected. We are not giving up our values for investors' sake.⁸⁹

⁸³ See *Voters Deliver Backlash*, *supra* note 5.

⁸⁴ *Id.*

⁸⁵ Scrutton, *supra* note 4.

⁸⁶ Macalister, *supra* note 5.

⁸⁷ Ghosh, *supra* note 5.

⁸⁸ *Id.*

⁸⁹ Macalister, *supra* note 5.

In practice, this means that certain projects, like the controversial Isua Mine project near Nuuk, may see their operating space restricted. Hammond has already promised to revise a law that was targeted to allow the Isua developer, London Mining PLC, to import some 2,000 Chinese workers, willing to take far lower wages than local laborers.⁹⁰ Increased oversight is also part of the plan. Secrecy over mining contracts and the degree of control wielded by foreign investors within the Bureau of Minerals and Petroleum were also contentious electoral issues.⁹¹

The second major concern that led to electoral change was the common (and largely justified) perception that Greenland was getting a raw deal.⁹² Under the current regulatory framework, Greenland only received tax income when extractive corporations turned their first profit.⁹³ Given the lengthy and difficult process of extracting resources in the Arctic, it is difficult to say when this would actually occur. As a result, many Greenlanders felt that this amounted to a give-away of natural resources, and Hammond has pledged to enforce royalty payments based on access to extractable resources and not just corporate profits.⁹⁴

The third concern that propelled Hammond to victory was concern regarding the environmental impact of mining. Greenland's indigenous population continues to significantly rely on renewable resources, including hunting, fishing and gathering.⁹⁵ Given the skepticism of many Greenlanders regarding the current oversight and management of extractable

⁹⁰ *Voters Deliver Backlash Over Greenland's Minerals Rush*, *supra* note 5.

⁹¹ Ghosh, *supra* note 5.

⁹² In contrast, a country like Norway claims more than 78% of petroleum profits through taxes, while royalties can raise this percentage to over 90%. Ministry of Finance of the Government of Norway, Taxation on Petroleum Services, available at <http://www.regjeringen.no/en/dep/fin/Selected-topics/taxes-and-duties/bedriftsbeskatning/Taxation-of-petroleum-activities.html?id=417318>. Accessed on 28/09/2013.

⁹³ Interview with Ole Kjaer, *supra* note 79.

⁹⁴ *Voters Deliver Backlash*, *supra* note 5; *Greenland's Elections: Below the Ice*, ECONOMIST, Mar. 16, 2013, <http://www.economist.com/news/europe/21573597-how-islands-politics-could-change-world-economy-below-ice>.

⁹⁵ See *supra* Part I.B.iii; See also Ghosh, *supra* note 5.

resources, as well as the massive size of the proposed projects, such fears are well founded.

Not all signs are negative for foreign investors however. In addition to a broadly pro-mining stance (with caveats), Hammond and her Siumut party also sparred with the outgoing government on the issue of uranium extraction. Hammond wants to see the ban on this practice lifted, providing increased access to Greenland's deposits of rare earths, which are often intertwined with uranium.⁹⁶ This is no small issue, with just one of the identified rare earth deposits in southern Greenland already predicted to be the world's largest source of rare earths outside of China.⁹⁷

Lastly, there is an undercurrent of nationalism and xenophobia that negatively impacted Kleists Inuit Ataqatigiit party. Partii Inuit, a protest party that is opposed to foreign influence from Denmark and China particularly, took 6.4% of the vote.⁹⁸ Opposition to possible Chinese guest workers in the mines and refineries was one cause, as was the impression that the BMP is largely staffed by young, pro-industry Danish bureaucrats, with little knowledge or admiration for Greenland's indigenous community.⁹⁹ Although these allegations are at least partly true, it is not yet clear if this nationalist sentiment is actually reasoned critique or merely an expression of Greenlandic indigenous pride.

What will happen next in Greenland is difficult to determine. While some see a major transformation of the country in the near future, others feel that this election marks only superficial change.¹⁰⁰ What is clear is that extractive industries operating in Greenland must take indigenous rights seriously if they are to avoid economic and ethical risk going forward.

⁹⁶ *Greenland's Elections: Below the Ice*, *supra* note 94.

⁹⁷ Alistair Scrutton, *Mining, China Central Issues in Greenland Election*, REUTERS, Mar. 11, 2013, <http://www.reuters.com/article/2013/03/11/us-greenland-election-idUSBRE92907F2013031>. See also *In Vote, Resource-rich Greenland Debates New Global Role*, *supra* note 9.

⁹⁸ *Greenland's Elections: Below the Ice*, *supra* note 94.

⁹⁹ See generally Interviews, *supra* notes 77, 79; See also *In Vote, Resource-rich Greenland Debates New Global Role*, *supra* note 9.

¹⁰⁰ Personal correspondence with the Inuit Circumpolar Conference, Greenland Office, April-May, 2013.

II. THE R2R FRAMEWORK AND GUIDING PRINCIPLES

The preceding section has identified a fragile and contentious legal environment for indigenous rights in Greenland. Recent political changes are discouraging for foreign investment and the regulatory system is likely to be in flux. These political changes constitute significant risk and have already had tangible and substantial economic impacts on extractive industry corporations operating in Greenland. This leaves business enterprises in a challenging position. The benefits of investing in Greenland remain high, but the risk is also significant. Because this risk is based on indigenous rights, it moves beyond typical political and legal risk assessment frameworks.

A. Background to the Right to Respect Framework and U.N. Guiding Principles

Fortunately, there is some guidance available for such business enterprises, in the form of the Protect, Respect and Remedy (PRR) Framework generally, and the Responsibility to Respect (R2R) Framework and the corresponding U.N. Guiding Principles on Business and Human Rights (GPs) specifically.¹⁰¹ Developed by Harvard Professor John Ruggie acting as Special Representative of the Secretary-General, the PRR Framework and the GPs are the product of six years of “research and consultations with governments, business and civil society on five continents.”¹⁰² The PRR Framework is built on three pillars; the State Responsibility to Protect, the Corporate Responsibility to Respect and the right of victims of human rights abuses to an effective Remedy.¹⁰³ The resulting Guiding Principles (GPs) and

¹⁰¹ See *infra* notes 103 and 104.

¹⁰² United Nations, The U.N. "Protect, Respect and Remedy" Framework for Business and Human Rights, (Sept. 2010), *available at* <http://www.business-humanrights.org/SpecialRepPortal/Home>.

¹⁰³ Special Rep. of the Secretary-General on the Issue of Hum. Rts. and Transnat'l Corp. and Other Bus. Enter., Protect, Respect and Remedy: A Framework for Business and Human Rights, U.N. Hum. Rts. Council, U.N.

accompanying commentary provide a road map for human rights protection.¹⁰⁴

There is an admittedly vast panoply of international corporate responsibility and human rights standards that are to some extent relevant to the challenge of understanding corporate responsibility vis-à-vis indigenous rights in Greenland.¹⁰⁵ From that wide selection of options, including codes of conduct tailored to extractive industry, the R2R Framework and the GPs have been chosen deliberately for this paper for three reasons.

First, the R2R Framework actively seeks to bring a new level of consensus to the relationship between business and human rights. To borrow the words of the High Commissioner for Human Rights, the PRR Framework sets: “both a new and clear benchmark and represents an important milestone in the evolving understanding of human rights in our societies. Clarity about the baseline expectations of business with regards to human rights is [the] first important step towards developing appropriate and effective responses to such problems.”¹⁰⁶ The Guiding Principles are new, but they are already being described

Doc. A/HRC/8/5 (Apr. 7, 2008) (by John Ruggie), *available at* http://www.unglobalcompact.org/docs/issues_doc/human_rights/Human_Rights_Working_Group/29Apr08_7_Reprt_of_SRSG_to_HRC.pdf [hereinafter Ruggie]. The PRR Framework was completed in 2008, and the Human Rights Council requested Special Representative Ruggie to expand his mandate and provide implementation guidance to the Framework. *See also* Contribution of the United Nations system as a whole to the advancement of the business and human rights agenda and the dissemination and implementation of the Guiding Principles on Business and Human Rights, U.N. Hum. Rts. Council, U.N. Doc. A/HRC/21/L.14/Rev.1, 21st. Sess. (Sept. 25, 2012) [hereinafter Contribution of the United Nations].

¹⁰⁴ *See* Contribution of the United Nations, *supra* note 103.

¹⁰⁵ *See generally* U.N. Econ. & Soc. Council, Economic, Social and Cultural Rights Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2, 55th Sess. (Aug. 26, 2003); OECD, OECD GUIDELINES FOR MULTI-NATIONAL ENTERPRISES (2011), *available at* <http://www.oecd.org/daf/inv/mne/oecdguidelinesformultinationalenterprises.htm>; INTERNATIONAL LABOR OFFICE, TRIPARTITE DECLARATION OF PRINCIPLES CONCERNING MULTINATIONAL ENTERPRISES AND SOCIAL POLICY, (3rd ed. 2001).

¹⁰⁶ U.N. Office of the High Comm’r for Human Rights, The Corporate Responsibility to Respect Human Rights: An Interpretive Guide, P 1, HR/PUB/12/02 (2012) [hereinafter the Corporate Responsibility to Respect Human Rights].

as “a turning point in the debate on the responsibilities of business to society.”¹⁰⁷

Second, the R2R Framework has received widespread support from a diverse set of stakeholders. The Office of the High Commissioner of Human Rights has wholeheartedly endorsed the GPs as a unifying approach to corporate responsibility, stating:

The Guiding Principles have gained extensive support from businesses and civil society as well as States. A number of other international and regional organizations have reflected them in their own standards, and more are expected to do so in the months and years to come. Many businesses around the world are already looking at how they can implement the Guiding Principles in their operations.¹⁰⁸

Third, the R2R Framework explicitly seeks to provide the foundation for social compliance on a global scale.¹⁰⁹ In

¹⁰⁷ Jim Baker, *The U.N. Guiding Principles – Opportunities, Challenges - One Year Later*, INSTITUTES FOR HUMAN RIGHTS AND BUSINESS (June 19, 2012), <http://www.ihrb.org/commentary/guest/un-guiding-principles-one-year-later.html>, Special Representative Ruggie himself referred to the Principles in the following terms: “[c]ouncil endorsement of the Guiding Principles, by itself, will not bring business and human rights challenges to an end. But it will mark the end of the beginning: by establishing a common global platform for action, on which cumulative progress can be built, step-by-step, without foreclosing any other promising longer-term developments.” *Guiding Principles*, *supra* note 11, ¶ 13, at 5.

¹⁰⁸ The Corporate Responsibility to Respect Human Rights, *supra* note 106, at 2. “Over the past year, for example, the Organization for Economic Cooperation and Development’s (OECD) Guidelines for Multinational Enterprises have been updated to reflect the Guiding Principles.” Jonathan Bonnitca, *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.

¹⁰⁹ There are numerous other guidelines for business enterprises seeking to demonstrate effective social compliance in the extractive sector. The most notable of these are ISO Standard 26000, the International Center for Mining and Minerals Guidelines and the IFC Guidelines. These standards are interesting in their own right and may prove useful to extractive industries operating in Greenland. However, as the purpose of this paper is to introduce

Ruggie's own words, the Guiding Principles are "a global standard of expected conduct for all business enterprises wherever they operate . . . [that] exists over and above compliance with national laws and regulations protecting human rights."¹¹⁰

However, it also important to recognize the limitations of the Guiding Principles. First, the Guiding Principles are not a manual providing precise guidance on steps business enterprises should take.¹¹¹ While providing guidance, the principles can only provide a framework upon which analysis can be constructed. Therefore this paper seeks to operationalize the Guiding Principles in the specific and narrow context of foreign extractive industry business enterprises entering the Greenlandic market.¹¹² Second, the Guiding Principles are by no means the last word on business and human rights. Rather, the Guiding Principles "mark the end of the beginning: by establishing a common global platform for action, on which cumulative progress can be built, step-by-step, without foreclosing any other promising longer-term developments."¹¹³ Therefore, while the Guiding Principles provide an excellent framework for developing a rights protection strategy in Greenlandic extractive industry, it should be remembered that such a strategy must be dynamic, responsive, and willing to engage in the changing environment of the responsibility to respect as it evolves over time.¹¹⁴

potential risks and risk management tools, there is not space to address them here.

¹¹⁰ Bonniticha, *supra* note 108, at 15.

¹¹¹ The Corporate Responsibility to Respect Human Rights, *supra* note 106, at 3.

¹¹² Ruggie, *supra* note 103, ¶ 51.

¹¹³ *Guiding Principles*, *supra* note 11, ¶ 13.

¹¹⁴ *Guiding Principles*, *supra* note 11, Annex, at 6. Because human rights situations are dynamic, assessments of human rights impacts should be undertaken at regular intervals: prior to a new activity or relationship; prior to major decisions or changes in the operation (e.g. market entry, product launch, policy change, or wider changes to the business); in response to or anticipation of changes in the operating environment (e.g. rising social tensions); and periodically throughout the life of an activity or relationship. *Guiding Principles*, *supra* note 11, ¶ 18.

B. Understanding the R2R Framework and the Guiding Principles

The Corporate Responsibility to Respect, read together with the U.N. Guiding Principles on Business and Human Rights, describe the Responsibility to Respect as a process that leads to prevention and/or mitigation of the adverse human right impacts associated with business enterprises.¹¹⁵

1. Fundamentals

The Responsibility to Respect is built on two assumptions that are interwoven into the specific guidance laid out in the GPs. These assumptions are that the goal and purpose of corporate engagement with the GPs is to mitigate to the greatest extent possible adverse human rights impacts associated with their enterprise and that the responsibility to mitigate these impacts will depend significantly on the context in which and by which these impacts may occur.¹¹⁶

GP 11 anchors the Corporate Responsibility to Respect.¹¹⁷ It directly invokes business enterprises to respect human rights and avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

GP 13 specifically identifies the two core goals of corporate human rights compliance: Avoid causing or contributing to adverse human impacts and seek to prevent or mitigate adverse human rights impacts.¹¹⁸ The language used is interesting in that it is not absolute, using “avoid” rather than a more concrete prohibitory terminology. Furthermore, GP 13(b) recognizes that

¹¹⁵ See generally *Guiding Principles*, *supra* note 11; The Corporate Responsibility to Respect Human Rights, *supra* note 106.

¹¹⁶ Mitigation is defined in the R2R Interpretive Guide, Definitions Section as “actions taken to reduce [the] extent [of an impact], with any residual impact then requiring remediation. The mitigation of human rights risks refers to actions taken to reduce the likelihood of a certain adverse impact occurring.” The Corporate Responsibility to Respect Human Rights, *supra* note 106, at 7.

¹¹⁷ *Guiding Principles*, *supra* note 11, ¶ 17.

¹¹⁸ *Guiding Principles*, *supra* note 11, ¶ 13.

a certain number of human rights impacts are likely to occur.¹¹⁹ Such language as follows: “[s]tates must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises.”¹²⁰ This choice of weak language reflects the understanding that corporate responsibilities are highly contextual.

2. *Parameters of the Responsibility to Respect*

The R2R Framework highlights four parameters of the corporate responsibility to respect that are necessary to understand corporate responsibilities in a specific case. These parameters address the core questions of: What rights should be respected?; How responsible is a business enterprise for adverse human rights impacts caused by other parties? (complicity); How responsible is a business enterprise for indirect adverse human rights impacts? (sphere of influence); and, How does the responsibility change within different contexts? Each of these parameters is discussed below.

i. What rights should be respected?

GP 12 defines the minimum scope of human rights included within the responsibility of business enterprises to respect human rights as “internationally recognized human rights—understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.”¹²¹ However, a careful reading of the Guiding Principles Commentary, taken together with the Framework, make clear that in some contexts, numerous other international definitions are also relevant.

In the past much of the corporate-human rights debate has centered on establishing a limited list of rights and identifying

¹¹⁹ *Guiding Principles*, *supra* note 11, ¶ 13(b).

¹²⁰ *See infra* Part II.B.4; *Guiding Principles*, *supra* note 11, § I.A.i.

¹²¹ *See Guiding Principles*, *supra* note 11, ¶ 12.

primary and secondary responsibilities accordingly.¹²² The PRR Framework views this as counterproductive and instead focuses on “specific responsibilities of companies with regard to all rights.”¹²³ As a result, the sphere of relevant rights is deliberately left open-ended.¹²⁴

ii. How responsible is a business enterprise for adverse human rights impacts caused by other parties?

Complicity answers the question of to what extent a business enterprise is responsible for contributing to the actions of other parties.¹²⁵ Such parties would include joint venture partners, upstream and downstream suppliers, contractors, sub-contractors and others. With both legal and non-legal meanings, the principle of complicity allows business enterprises to consider their risk factors regarding a variety of indirect adverse rights impacts with which they might be associated.¹²⁶ Perhaps the most common example of complicity in this context is raised in the garment industry, where high-end garment producers are held morally liable (if not legally responsible) for the labor conditions in their overseas factories.

iii. How responsible is a business enterprise for indirect adverse human rights impacts?

The concept of Sphere of Influence answers the question of how far a business enterprises responsibility extends over the indirect impact they have on the overall human rights environment in the country in which they are active. This emphasis on Sphere of Influence reflects the unusual position of many multinationals vis-à-vis human rights, relative economic strength and political influence, especially in the developing

¹²² See Ruggie, *supra* note 103, ¶ 51.

¹²³ *Id.*

¹²⁴ See *infra* Part III.B.i for a discussion on the applicability to Indigenous Rights Specifically.

¹²⁵ See *Guiding Principles*, *supra* note 11, ¶ 18-19. See also The Corporate Responsibility to Respect Human Rights, *supra* note 106, at 5.

¹²⁶ *Id.*

world.¹²⁷ The Right to Respect framework argues that such business enterprises may have a responsibility to promote rights protection as the primary actor with the capacity to protect human rights, even if their specific operations are not actively linked to adverse human rights impacts.¹²⁸

iv. How does the responsibility change within different contexts?

Context is an elusive concept to define. The Framework leaves this question open-ended, but does provide three parameters to assist business enterprises in identifying their operational context: circumstances of the enterprise, the level of risk of severe human rights impacts and nature and context of operations.¹²⁹ This presents a complex analytical challenge, which can be understood to overlap with, but not necessarily be fully contained in the human rights due diligence process. Much like the responsibility to respect process overall, there is an implied necessity for feedback between identifying the context, shaping the due diligence process and then integrating the due diligence process back into identifying the context. This concept is captured in GP 17(c), which notes that human rights due diligence “[s]hould be on-going, recognizing that the human rights risks may change over time as the business enterprise’s operations and operating context evolve.”¹³⁰

The corporate responsibility process is highly contextual and the GP’s make clear that this context will define the parameters of actual responsibilities.¹³¹ Contextualization of requirements can be seen explicitly in GPs 14, 17, 18 and 21. In regards to the process of meeting the responsibility to respect provided in the graphic below, context is an underlying principle that is identified by the initial due diligence process and used to define a more expansive due diligence process, as well as the policy

¹²⁷ See generally, Beth Stevens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT’L L. 45 (2002).

¹²⁸ Ruggie, *supra* note 103, ¶ 23-24.

¹²⁹ See *Guiding Principles*, *supra* note 11, ¶ 17(b), at 18.

¹³⁰ *Id.* ¶ 17.

¹³¹ The Corporate Responsibility to Respect Human Rights, *supra* note 106, at 20-21.

requirement and remediation process.

GP 14 explains this contextual element specifically, noting that “the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise’s adverse human rights impacts.”¹³² This emphasis on context runs throughout the Responsibility to Respect and indeed could be considered an important contribution of the Framework and GPs to the larger discourse on corporate responsibility.

In regards to the specific measures to be taken by business enterprises, the policies and procedures should be “appropriate to their size and circumstances.”¹³³ The importance of context is even noted in the definition of due diligence, provided in the Interpretive Guide.¹³⁴ GP 17 detailing the human rights due diligence provisions highlights how due diligence itself “[w]ill vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations.”¹³⁵ When discussing the importance of consulting with affected partners also identifies the importance of context in structuring the consultation process.¹³⁶

¹³² See *Guiding Principles*, *supra* note 11, ¶ 14.

¹³³ See *Guiding Principles*, *supra* note 11, ¶ 15.

¹³⁴ The Corporate Responsibility to Respect Human Rights, *supra* note 106, at 6 (quoting *Black’s Law Dictionary*, 6th ed. (St. Paul, Minn., West 1990)) (stating “such a measure of prudence, activity, or assiduity, as is properly to be expected from, and in ordinarily exercised by, a reasonable and prudent [person] under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case”).

¹³⁵ *Guiding Principles*, *supra* note 11, ¶ 18.

¹³⁶ *Guiding Principles*, *supra* note 11, ¶ 19-20. It should be noted that in this mode of analysis, the Framework differs from a more typical risk assessment model, which would focus on severity and probability. The reason for this is the Framework holds the position that human rights risk are not subject to simple cost benefit analysis, and even a highly unlikely human rights impact, if severe enough, is unacceptable, regardless of its probability. The Corporate Responsibility to Respect Human Rights, *supra* note 106, at 39-40. Standard approaches to risk assessment may suggest that the *probability* of an adverse human rights impact is as important as its *severity*. However, if a potential human rights impact has low probability but high severity, the former consideration does not balance the latter. The severity of the impact is paramount, understood as the “scale, scope and irremediable character” of the impact. *Guiding Principles*, *supra* note 11, ¶ 15. Equally, human rights risks

C. Applying Implementing the R2R Framework through the Guiding Principles

The R2R Framework, together with the GPs, present a series of interrelated steps that are both independent stages of action and reflexive process that provide the foundation for future iterations of the process of respecting rights. Referred to colloquially as “know and show,” human rights due diligence leads to the establishment of a human rights policy, which in turn will include human rights due diligence, leading to specific steps to prevent adverse impacts, mitigate the effect of adverse impacts that have already occurred, and improve the human rights policy. This relationship is demonstrated in Figure 1, below.

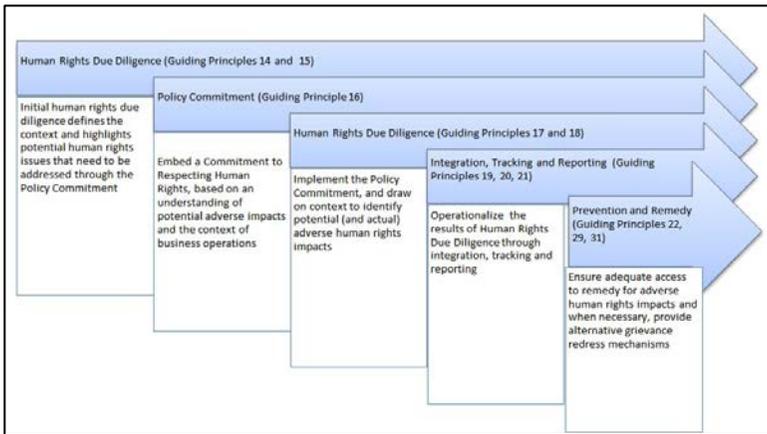


Figure 1

1. Human Rights Due Diligence

Human Rights Due Diligence is a complex, reflexive process that undergirds the corporate responsibility to respect. The GPs state that human rights due diligence “should cover adverse

cannot be the subject of a simple cost-benefit analysis, whereby the costs to the enterprise of preventing or mitigating an adverse impact on human rights are weighed against the costs to the enterprise of being responsible for that harm.

human rights impacts that the enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships.”¹³⁷ Ideally, due diligence should commence as “early as possible in the lifetime of a particular activity or relationship.”¹³⁸ However, initial due diligence is just a small part of the overall due diligence requirement. The GPs also call for human rights due diligence to be “on going,” especially when the business enterprise is engaged in a dynamic enterprise.¹³⁹ In addition, due diligence forms the basis for the policy commitment and appropriate actions required of business enterprises.

The process of human rights due diligence entails “assessing the human rights context prior to a proposed business activity, where possible; identifying who may be affected; cataloguing the relevant human rights standards and issues; and projecting how the proposed activity and associated business relationships could have adverse human rights impacts on those identified.”¹⁴⁰ However, there is no single prescriptive formula for human rights due diligence.¹⁴¹

As with the other elements of the R2R Framework and the Guiding Principles, context plays a key role in identifying the scope and parameters of human rights due diligence. Broadly, the Identification of adverse human rights impacts has two elements, established in GP 18.¹⁴² These are accessing internal/external expertise and involving “meaningful consultation with potentially affected groups and other relevant

¹³⁷ The Corporate Responsibility to Respect Human Rights, *supra* note 106, at 6.2.

¹³⁸ *Guiding Principles*, *supra* note 11, ¶ 18.

¹³⁹ *Id.* ¶ 17(c), at 18. “Human rights due diligence” is intended to help the enterprise know and show that it is respecting human rights throughout its operations and over time, including when there are changes in its operations or operating contexts. Except where those operations and contexts do not significantly change, this therefore requires on-going or iterative processes, rather than a one-off undertaking. *Id.* at 18.

¹⁴⁰ The Corporate Responsibility to Respect Human Rights, *supra* note 106, at 40.

¹⁴¹ *Id.* at 32.

¹⁴² *Guiding Principles*, *supra* note 11, ¶ 18.

stakeholders.”¹⁴³

Firstly, business enterprises are expected to engage in self-standing assessments of adverse human rights impacts and/or participate in larger scale social and environmental impact assessment processes.¹⁴⁴ Which specific tools are used will depend on context, but in general it is likely that some elements of many different kinds of assessments will be used, including drawing on external expertise.¹⁴⁵ The Implementation Guide notes that numerous tools and methodologies for completing human rights due diligence have been and continue to be developed for this purpose.¹⁴⁶

The second element of due diligence consists of consulting with stakeholders.¹⁴⁷ Consultation, also known as stakeholder engagement, is defined by the Human Rights Commission as “an on-going process of interaction and dialogue between an enterprise and its potentially affected stakeholders that enables the enterprise to hear, understand and respond, including through collaborative approaches to their interests and concerns.”¹⁴⁸ The consultation requirements are set out in GP 18 (b), which calls for “[m]eaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.”¹⁴⁹ The Commentary is unequivocal regarding the importance of consultation with those potentially affected by adverse human rights impacts, and further stresses the importance when impacts are expected to be potentially severe.¹⁵⁰

It is important to note that whenever possible, consultations

¹⁴³ *Id.* at 18(b).

¹⁴⁴ *Id.* at 40.

¹⁴⁵ *Id.* at 43.

¹⁴⁶ *Id.* at 40.

¹⁴⁷ *Guiding Principles, supra* note 11, ¶¶ 18(b) and 19; *see also* The Corporate Responsibility to Respect Human Rights, *supra* note 106, at 31.

¹⁴⁸ The Corporate Responsibility to Respect Human Rights, *supra* note 106, at 8.

¹⁴⁹ *Guiding Principles, supra* note 11, ¶ 18(b).

¹⁵⁰ *Id.* ¶¶ 19-20.

should include the business enterprise itself.¹⁵¹ This reflects the emphasis of human rights due diligence on relationships and promotes an ongoing and responsive due diligence process. As noted specifically, “[i]t is also ill-advised for an enterprise to delegate engagement with its potentially affected stakeholders entirely to external experts, since this undermines its capacity to truly understand the perspectives of those it may impact and to build trusting and productive relationships with them.”¹⁵²

2. *Policy Commitment and Integration*

The second element of the responsibility to respect process is to establish a Policy Commitment. Defined by GP 16, the Policy Commitment is a way of embedding a commitment to respect human rights “from the top of the business enterprise through all of its functions.”¹⁵³ The Policy Commitment should be approved at the highest level, be well informed, clearly elucidate expectations, be publicly available and be reflected in operational policies and procedures.¹⁵⁴

The purpose of the policy commitment is two-fold. The first is to “clearly communicate the expectation of top management as to how all personnel should act.”¹⁵⁵ The second is to lay the groundwork for more substantial due diligence and appropriate preventative and remedial measures regarding potential and actual adverse human rights impacts.¹⁵⁶

In developing the Policy Commitment business enterprises should start with an understanding of the local context as defined in GP 14, achieved through a minimal due diligence process. Ideally, due diligence at this stage should include consultation with “individuals who are representative of those stakeholder

¹⁵¹ See *id.* See also The Corporate Responsibility to Respect Human Rights, *supra* note 106, at 8.

¹⁵² The Corporate Responsibility to Respect Human Rights, *supra* note 106, at 35.

¹⁵³ *Guiding Principles*, *supra* note 11, ¶ 17.

¹⁵⁴ *Id.* ¶ 16; see also The Corporate Responsibility to Respect Human Rights, *supra* note 106, at 26-27.

¹⁵⁵ The Corporate Responsibility to Respect Human Rights, *supra* note 106, at 27.

¹⁵⁶ See Figure 1 above.

groups most likely to be affected by the enterprise's operations."¹⁵⁷ In practice however, this due diligence process is likely to be less expansive than the comprehensive due diligence process laid out in GP 17, and described above.

Having identified potential or actual human rights impact, appropriate action is required.¹⁵⁸ Mitigation of adverse impacts requires appropriate action, which is the third element of the R2R process.¹⁵⁹ Once again, the Responsibility to Respect Framework relies heavily on contextual analysis and varies significantly. The nature of "appropriate action" will be determined by the adverse rights impact, the degree of corporate responsibility for the impact, and the leverage of the business enterprise. Specifically, the human rights due diligence process should inform and shape a series of three actions designed to prevent and/or mitigate adverse human rights impacts.¹⁶⁰

Integration, defined in GP 19 is the process applying the results of due diligence, including impact assessments, consultations, and expert inputs to the actual operations of the business enterprise. GP 19 calls for "appropriate action" regarding budget allocations, decision making processes and oversight processes.¹⁶¹ As to be expected, the parameters of this process are defined by context, including the leverage that the business enterprise can wield.¹⁶²

Integration is only effective if the policy commitment has been fully embedded in the business enterprise's operations.¹⁶³ In this way, the reflexive nature of the R2R Framework is clearly visible. Due diligence results in a policy commitment that calls

¹⁵⁷ The Corporate Responsibility to Respect Human Rights, *supra* note 106, at 29.

¹⁵⁸ *Guiding Principles*, *supra* note 11, ¶ 19. The Guiding Principles emphasize prevention of human rights impacts as the result of due diligence, leaving mitigation to the remediation sphere. However, in certain rights context, including indigenous rights, this emphasis may be misguided. When the adversely impacted rights are procedural, mitigation may be possible through the "appropriate action" described.

¹⁵⁹ *Id.* ¶ 19(b).

¹⁶⁰ *Id.* ¶ 19-20.

¹⁶¹ *Id.* ¶ 19.

¹⁶² *Id.* ¶ 19.a.ii.

¹⁶³ *Id.* ¶ 21.

for due diligence that in turn leads to the integration of certain procedures, which in turn draws on the policy commitment.¹⁶⁴

Accepting the inherent vagueness in establishing human rights due diligence standards, the Guiding Principles attempt to strengthen these standards by requiring the tracking the effectiveness of corporate response to potential and actual adverse human rights impacts, as detailed in GP 20.¹⁶⁵ Based on the principle of “what gets measured gets managed,” the tracking process should be comprehensive and transparent.¹⁶⁶

GP 21 addresses the need to develop tracking process with external stakeholders as part of the policy commitment. This is for two reasons: increasing accountability and facilitating communication with those potentially affected, in order to improve performance. As noted in the Interpretive Guide, “human rights due diligence is about people.”¹⁶⁷ Therefore, tracking and external communication should be centered on actual communication and dialogue, not on merely making certain information available.

3. Remediation

The GPs also recognize the need for remediation procedures when adverse human rights do occur, which is the fourth element of the R2R process. GP 22 highlights the responsibility to provide or contribute to adequate and legitimate remediation processes.¹⁶⁸ GP 29 identifies the value of independent grievance mechanisms that are made available outside of more formal court proceedings, providing adequate remedies when appropriate.¹⁶⁹ GP 31 lays out in great detail how such grievance mechanisms should function.¹⁷⁰ These specific remediation processes, while of crucial importance to the Responsibility to

¹⁶⁴ See Figure 1 above.

¹⁶⁵ *Guiding Principles*, *supra* note 11, ¶ 20.

¹⁶⁶ The Corporate Responsibility to Respect Human Rights, *supra* note 106, at 9.

¹⁶⁷ The Corporate Responsibility to Respect Human Rights, *supra* note 106, at 33.

¹⁶⁸ *Guiding Principles*, *supra* note 11, ¶ 22.

¹⁶⁹ *Id.* ¶ 29.

¹⁷⁰ *Id.* ¶ 31.

Respect framework, reach a level of technical specificity that is beyond the scope of the question at hand.

III. INDIGENOUS RIGHTS DUE DILIGENCE IN GREENLAND

A. Initial Due Diligence

In Part III, the framework detailed in Part II is applied to the specific question of indigenous rights protection in Greenland. By walking through the framework, step-by-step, it is possible to identify the specific rights-based issues faced by extractive industries entering the Greenlandic market. As described above, the first step in conducting due diligence for extractive industry business enterprises in Greenland is to define the four parameters of the corporate responsibility to respect, as identified below.

1. What rights should be respected? Understanding the Scope of the R2R Framework

This paper deliberately focuses on the issue of indigenous rights. However, for the R2R Framework to be applicable in this case, it is necessary to ensure that these rights do fall within the parameters of the R2R Framework. The expansive understanding of rights within the R2R Framework does in fact allow for the possibility of including indigenous rights within the definition of human rights under the Framework.

The definition includes the following: “[d]epending on the circumstances of their operations, enterprises may need to consider additional standards beyond the International Bill of Human Rights and core ILO conventions, in order to ensure that they act with respect for human rights.”¹⁷¹ This is to include cases when corporate activities “could pose a risk to the human rights of individuals belonging to specific groups or populations that require special attention.”¹⁷²

Indigenous groups certainly fall into that definition. The Office of the High Commissioner for Human Rights identifies ILO 169 specifically as one of the Conventions that would be

¹⁷¹ *Id.* ¶ 11.

¹⁷² *Id.*

applicable in “certain circumstances.”¹⁷³ This conclusion is drawn from the Commentary to GP 12, which states that other human rights instruments may apply on a case-by-case basis, including the “United Nations instruments [that] have elaborated further on the rights of indigenous peoples.”¹⁷⁴

Furthermore, it is clear that in Greenland, corporate activities “could pose a risk to the human rights of individuals belonging to specific groups or populations that require special attention.”¹⁷⁵ It is also clear that in a context where indigeneity is a core element of the business-human rights relationship, it would be necessary to refer to the additional human rights instruments, including ILO 169 and UNDRIP.¹⁷⁶

2. *How does the responsibility change within different contexts? Understanding the Greenlandic Context*

The Corporate context refers to the process of “projecting how the proposed activity and associated business relationships could have adverse human rights impacts on those identified.”¹⁷⁷ The Guiding Principles do not adopt any specific methodology for completing this assessment, but rather call for “an ongoing process of assessing impact that will draw on various sources.”¹⁷⁸ As discussed above, context can generally be defined along three parameters, the circumstances of the enterprise, the level of risk of severe human rights impacts and nature and context of operations.

In Greenland, foreign extractive industry business enterprises exert significant influence.¹⁷⁹ Although not all business enterprises entering the extractive market would be

¹⁷³ *Id.* ¶ 12.

¹⁷⁴ *Guiding Principles*, *supra* note 11, ¶ 14.

¹⁷⁵ Corporate Responsibility to Respect Human Rights, *supra* note 106, at 11.

¹⁷⁶ For an in-depth explanation on the role of the FPIC Framework and UNDRIP generally, *see infra* note 197.

¹⁷⁷ *Guiding Principles*, *supra* note 11, ¶ 19.

¹⁷⁸ Corporate Responsibility to Respect Human Rights, *supra* note 106, at 40.

¹⁷⁹ Nuttall, *supra* note 16, at 70; *see supra* notes 24, 26.

considered large firms in an international context, relative to scale of the economy in Greenland, they are truly massive. Likewise, the potential indigenous rights impacts are severe and affect a broad swath of stakeholders.¹⁸⁰ Lastly, the nature and context of operations raise numerous red flags for enterprises operating in Greenland. The relationship between business enterprises and the government is potentially problematic as is the potential of business enterprises to fundamentally restructure the economic and political landscape.¹⁸¹ Furthermore, the untested implications of operating in a frontier market like Greenland on culture and the environment are a great concern.¹⁸² If one considers the responsibility to respect as a spectrum, the contextual analysis suggests extractive development in Greenland generates the very highest levels of corporate responsibility.

3. *How responsible is a business enterprise for direct and indirect adverse human rights impacts caused by other parties? Understanding the Extent of Responsibility.*

The realities of extractive industry development in Greenland suggest that although the concepts of Sphere of Influence and Complicity are relevant, they take on a slightly different meaning. In Greenland, the primary partner for extractive industries is the government itself. While several local consulting firms have sprung up to service extractive industry, and more supporting business are sure to arise, private enterprise in Greenland does not currently have the capacity to be a significant partner in extractive industry development.¹⁸³ Therefore, Complicity and Sphere of Influence can, and in this

¹⁸⁰ See generally Part I.

¹⁸¹ See *supra* note 97.

¹⁸² See *supra* note 36.

¹⁸³ See Nuttall, *supra* note 16, at 68; CIA World Factbook, *supra* note 24; see generally Annex: Programming Document for the Sustainable Development of Greenland, ch. 2 (2007), available at http://ec.europa.eu/europeaid/where/octs_and_greenland/documents/pdsd_and_annexes_greenland_en.pdf.

case should be understood in terms of public private-public partnerships.¹⁸⁴

From this conclusion, it is only a small step to recognize that in primarily public economies, the responsibility of business enterprises for their complicity in government action is worth consideration. Furthermore, the failure of a business enterprise to exert leverage on public “partners” within their sphere of influence should be recognized as a failure under the Responsibility to Respect Framework and the Guiding Principles.

Under ILO 169, it is in fact a government responsibility to ensure both procedural and substantive rights for indigenous populations. When the government has failed to ensure procedural rights or substantive rights, the concepts of Complicity and Sphere of Influence suggest that the corporation may in fact be, to the extent possible, responsible for ensuring these rights.

In the context of indigenous rights, this conclusion is significantly strengthened. The Special Representative surveyed allegations of the worst cases of corporate-related human rights harm in a 2006 report, and determined that such harms occurred “predictably where governance challenges were greatest.”¹⁸⁵ This conclusion suggests that the shortcomings of the Greenlandic government in regards to protecting indigenous rights within the extractive industry context point to a real need for corporate responsibility to respect indigenous rights.

Admittedly, this claim lies slightly outside the general discourse surrounding the Framework and Guiding Principles. However, in the case of Greenland, this responsibility is a logical

¹⁸⁴ Ruggie, *supra* note 103, at 6. While this understanding of these provisions does not appear to be an understanding intended by the Special Representative Ruggie, there are indications that this understanding is not outside of the meaning and purpose of the Framework. First off, the Framework conducted a 2006 survey of allegations of human rights abuses and explicitly recognized that “the worst cases of corporate-related human rights harm . . . occurred predictably where governance challenges were greatest.” *Id.* The Framework also recognizes that the primary driver of human rights abuses in the corporate context is the institutional misalignment between business and governance in regards to respecting and protecting human rights. *Id.*

¹⁸⁵ *Id.*

conclusion in regards to preventing and mitigating adverse indigenous rights impacts.

The irony of this conclusion is that the Government of Greenland, through the BMP, has promoted the close cooperation with the government as a major incentive for investment.¹⁸⁶ However, the Framework suggests the relative failure of the government to ensure procedural and substantive indigenous rights may in fact shift significant responsibility and risk to the business enterprises themselves.

B. Due Diligence: Identifying Rights at Risk

The 2013 Election provides a useful jumping off point for the due diligence process, already having identified the three key indigenous rights concerns in Greenland. Given that these concerns parallel exactly the requirements of ILO Convention 169, the due diligence process can focus on these rights, specifically:

1) *Lack of opportunities for meaningful Indigenous Consultation and Participation in the extractives regulatory process;* (The Right to Consultation and Participation);

2) *The growing impression that Greenland's natural resources were being exploited and privatized for the benefit of foreign investors, and* (The Right to Land and Natural Resources)

3) *The lack of a clear, inclusive and democratically determined development plan for Greenland.* (The Right to Exercise Control Over Development).¹⁸⁷

¹⁸⁶ Interview with Ole Kjaer, Bureau of Minerals and Petroleum, in Nuuk (Aug. 20, 2012).

¹⁸⁷ ILO 169, *supra*, note 10. At its core, ILO 169 burdens governments with the responsibility for developing, with the participation of the peoples concerned, “co-ordinated and systematic action to protect the rights of indigenous peoples and to guarantee respect for their integrity.” *Id.* at 385-86. This includes guaranteeing an equality of treatment and opportunities in regards to non-indigenous peoples and requires governments to “promot[e] the full realisation of the social, economic and cultural rights of these peoples with

1. *The Right to Consultation and Participation*

The Right to Consultation and Participation lies at the very foundation of ILO 169 and, in practice, is the primary mechanism for guaranteeing the other rights.¹⁸⁸ This requirement should be understood within the framework of “coordinated and systematic action to implement indigenous peoples’ rights.”¹⁸⁹

i. *Legal Basis*

This consultation requirement has perhaps become the single most influential part of ILO 169 and appears to have been a cornerstone principle for Greenland’s Mineral Resources Act of 2009.¹⁹⁰ Furthermore, Article Fifteen regarding indigenous rights to natural resources is clearly a procedural right and not a substantive right to ownership.¹⁹¹ As such, it can be concluded that procedural rights that are most relevant to extractive industry business enterprises are within the context of indigenous rights protection. This is in marked contrast to the Right to Consultation and Participation as it appears in numerous forms in the Convention, but it is based in Article Six, which calls on Governments to:

respect for their social and cultural identity, their customs and traditions and their institutions.” *Id.* at 386. The Convention goes on to elucidate the specific nature of the rights to be protected as well as the process by which such protection is to occur. *Id.*

¹⁸⁸ INT’L LABOUR OFFICE, *INDIGENOUS AND TRIBAL PEOPLES’ RIGHTS IN PRACTICE: A GUIDE TO ILO CONVENTION NO. 169*, at 59 (2009). As the ILO itself puts plainly, “Articles 6 and 7 on consultation and participation are key provisions of Convention No. 169 and the ‘basis for applying all the others.’” *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ The Mineral Resources Act also applies to hydrocarbons and there is not a separate act of hydrocarbon regulation. The Mineral Resources Act (Act No. 7/2009).

¹⁹¹ ILO-169, *supra* note 10, at 389. Article 15 points exclusively to procedural rights. *Id.* “These rights include the right of these peoples to participate in the use, management and conservation of these resources.” *Id.* And “governments shall establish or maintain procedures through which they shall consult these peoples . . .” as well as “[t]he peoples concerned shall wherever possible participate in the benefits of such activities.” *Id.*

- (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; and
- (b) Establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them.

The latter further states that:

1. The 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.¹⁹²

In regards to extractive industry development, the consultation process is absolutely central to the relationship with indigenous communities. “[R]elevant ILO institutions have emphasized that, when . . . natural resource development activities . . . may affect indigenous communities, a process of consultation with the communities, prior to commencement of the development activities, is at minimum required.”¹⁹³ Furthermore, Article 14. 3 makes clear that indigenous peoples may have a right to share in benefits from the development of state-owned resources on their lands.¹⁹⁴

Article 15 summarizes the rights of indigenous peoples to “participate in the use, management and conservation of these resources.”¹⁹⁵ This statement implies that extractive industry business enterprises will come into direct or indirect contact with

¹⁹² ILO-169, *supra* note 10, art. 6.

¹⁹³ S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 143 (2d ed. 2004).

¹⁹⁴ ILO-169 *supra* note 10, art. 14.3.

¹⁹⁵ ILO-169, *supra*, note 10, at 389.

governments when engaged in exploration and extraction of natural resources.

While ILO 169 only technically requires “procedurally appropriate” consultation and/or ‘free’ participation, the reality is that following the adoption of the U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP), the Free Prior and Informed Consent (FPIC) framework has come to define expectations.¹⁹⁶ The FPIC as outlined in UNDRIP provides specific guidance on how consent of indigenous peoples should be obtained in such situations that impact them directly.¹⁹⁷ Even the ILO Guide to Convention 169 refers to “free and informed consent,” and repeatedly references the FPIC framework as interpreted both by the UNDRIP and the U.N. Development Guidelines.¹⁹⁸

ii. Potential Adverse Impacts

As a majority indigenous state and a signatory state to ILO 169, the Right to Consultation and Participation is particularly complex in Greenland. At a national level, Greenland’s status as a majority indigenous nation should in theory allow for seamless integration between the democratic process and indigenous consultation and participation. On the other hand, the current regulatory framework calls for independent consultation and participation as part of the licensing process.

a. Democratic Consultation

The recent election makes a strong case that the independent consultation process failed to provide an adequate voice for all Greenlanders, who then felt compelled to make themselves heard at the ballot box. However, this breakdown was easily predictable. The informal consultation process encompasses

¹⁹⁶ See INT’L LABOUR OFFICE, *supra* note 188, at 59-79 (discussing participation, consultation, consent, and the ILO 169 Convention).

¹⁹⁷ See U. N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, pmbl., arts. 15, 17, 30, 36, 38, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter UNDRIP].

¹⁹⁸ INT’L LABOUR OFFICE, *supra* note 188, at 61, 63-64.

three informal mechanisms: interaction with the regulatory body, public consultations as required under the Minerals and Petroleum Act, and public debate.¹⁹⁹ In fact not one of these processes provided sufficient participation and consultation for indigenous Greenlanders to impact the decision-making process, as required by ILO 169 Article 6.

b. The Government of Greenland

In regards to extractive industry, the Government of Greenland is represented solely and exclusively by the Bureau of Minerals and Petroleum. With exclusive control over the project development process the BMP has outsized influence on the crucial national question of extractive industry development. As Parliamentarians rely on the administrative bodies for knowledge, especially regarding technical issues, the BMP has almost complete control.²⁰⁰

One of the most significant concerns raised during the 2013 Elections was that the majority indigenous population of Greenland has functionally no role in BMP decision-making. Instead, the BMP has been largely divorced from public oversight in the extractives licensing process and does not ensure effective mechanisms for consultation.²⁰¹ Operating independently and in close collaboration with extractive enterprises, the BMP is openly pursuing an agenda, which while

¹⁹⁹ Author's personal notes taken during the Public Consultation August 27, 2012; Interview with by Rutherford Hubbard with Anonymous Source, Consulting Professionals, in Green. (Aug. 23, 2012).²⁰⁰ See 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).

²⁰⁰ See 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).

²⁰¹ This conclusion was drawn by from strong agreement amongst respondents in the civil society, business, academic and non-administrative government sectors.

not intrinsically problematic, does not reflect a consultative process that includes indigenous concerns. There is a strong push at BMP to approve extractive projects as quickly as possible, a push that is not being counteracted by a strong civil society, informed Parliament or even the media.²⁰² As one respondent noted, “it’s not that they [the BMP] are evil, they just have their ideas on how things should happen and they implement those ideas.”²⁰³

c. Public Consultation Process

The newly implemented consultation processes were implemented as part of the SIA framework and designed to alleviate many of the concerns later manifested during the 2013 Elections. Unfortunately, this process has been plagued by problems from the beginning.²⁰⁴ Largely an informal process,

²⁰² See Interview by Rutherford Hubbard with Anonymous Source, Civil Society Representative, *supra* note 37; Interview by Rutherford Hubbard with Anonymous Source, Member of Parliament, *supra* note 47; Interview with Aqqaluk Lyngé, *supra* note 63; Interview by Rutherford Hubbard with Anonymous Source, Civil Society Representative, in Green. (Aug. 16, 2012); Interview by Rutherford Hubbard with Anonymous Source, Indigenous Rights Activist, in Green. (Aug. 15, 2012). It appears that the culture of the civil service in Greenland was essentially transplanted from Denmark about 30 years ago and, with high turnover, has not changed.

²⁰³ Interview by Rutherford Hubbard with Anonymous Source, Civil Society Representative, *supra* note 37. 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.*

²⁰⁴ See Interview by Rutherford Hubbard with Anonymous Source, Indigenous Rights Activist, *supra* note 202; Interview with Aqqaluk Lyngé, *supra* note 63. To provide context, following a sales pitch for the project, there was a consultation period of 30 minutes, but no documents were released and the Strategic Environmental Assessment was not released in time. Interview by Rutherford Hubbard with Anonymous Source, Civil Society Representative, *supra* note 37. Regarding the BMP, complaints by respondents were numerous. BMP staff turnover is very high and there is a limited institutional knowledge base. Denmark has precious little mining experience. Yet, the BMP is staffed primarily by young Danish lawyers, who are responsible for approving projects more than ten times the largest public works project ever completed in Denmark. Interview by Rutherford Hubbard with Anonymous Source,

contractors have used a variety of tools, including phone interviews, personal networks and public meetings to generate information on community concerns regarding the proposed project.²⁰⁵

The problems with the implementation of the approach include a general resistance by corporations to sufficiently fund the process, limitations on the time needed to complete the process, language difficulties and a lack of accessible information for communities, a lack of follow up and general consultation fatigue in effected communities.²⁰⁶ One MP who has attended meetings in the settlements noted that the participants just stared blankly, not understanding what was being talked about.²⁰⁷ Another concern is that the corporations have a great deal of control over the information, particularly what is generated and what is shared, which further reduces the consultative nature of the process.²⁰⁸ This should not imply that the process is deliberately malignant. Several respondents noted

representative from BMP, *supra* note 29. The Alcoa aluminum smelter near Maniitsoq was the first large scale-project under the new system that directly impacted communities and the first consultation as well. The consultations that accompanied this project have been described as “stunning,” for their lack of content, obvious bias, and almost non-existent opportunity for consultation. A lack of translation excluded large numbers of ethnic Greenlanders, while obvious support from the government and media depicted the project as a fore-gone conclusion. The whole experience created strong negative impressions and has been described as colonialist. As a result, the project remains stalled and the consultation process has been overhauled. Interview by Rutherford Hubbard with Anonymous Sources, Impact Assessment Professionals, in Green. (Aug. 17, 2012).

²⁰⁵ Interview by Rutherford Hubbard with Anonymous Sources, Impact Assessment Professionals, in Green. (Aug. 27, 2012).

²⁰⁶ *Id.*

²⁰⁷ Interview by Rutherford Hubbard with Anonymous Source, Member of Parliament, *supra* note 47.

²⁰⁸ *See* Interview by Rutherford Hubbard with Anonymous Source, Member of Parliament, *supra* note 47; Interview by Rutherford Hubbard with Anonymous Source, Indigenous Rights Activist, *supra* note 203; Interview by Rutherford Hubbard with Anonymous Source, Indigenous Rights Activist, in Green. (Aug. 16, 2012); Interview by Rutherford Hubbard with Anonymous Source, Indigenous Rights Activist, in Green. (Aug. 22, 2012).

that proper government oversight is needed yet the government does not have the resources to fulfill this function.²⁰⁹

The challenge of effective consultation in Greenland is exacerbated by the cultural approach to decision-making and authority. There is a great belief in authority in Greenland, no one wants to question authority or will believe that they are being misled.²¹⁰ At the same time, Greenlanders like to internalize information and discuss it with family and close relations.²¹¹ It is a relationship culture, that is how they make decisions. It takes time and is a slow measured process. However, once a decision has been reached, it is final.²¹² As a result, a time-limited public consultation wherein the relevant corporate actor and/or BMP representative is present is the culturally least effective way to reach a consensus on project development.

An important complicating element is language. Greenland is officially bilingual, Danish and Greenlandic. However, many people in the settlements do not speak Danish, while corporate actors usually operate in English and the BMP primarily operates in Danish. In addition, regional dialects can require a local translator, well versed in the technical terminology of extractive industries.²¹³

In an attempt to rectify some of these problems, the government has taken an active role in organizing public consultations in regards to the Isua Mining Project. As the affected community is Nuuk, the consultations are taking place there. Managed by a local contractor, the four consultations are attempting to establish a culturally sensitive, tri-lingual forum for discussing and improving the project.²¹⁴ Unfortunately, in

²⁰⁹ Interview by Rutherford Hubbard with Anonymous Source, Civil Society Representative, *supra* note 37.

²¹⁰ *Id.*

²¹¹ Interview by Rutherford Hubbard with Anonymous Source, Consulting Professionals, in Green. (Aug. 23, 2012).

²¹² *Id.*

²¹³ Interview by Rutherford Hubbard with Anonymous Source, Impact Assessment Professionals, *supra* note 47.

²¹⁴ Interview with by Rutherford Hubbard with Anonymous Source, Consulting Professionals, in Green. (Aug. 23, 2012); The consultations include formal presentations, question and answer periods, informal small group

practice, these consultations have exhibited many of the problems seen before.²¹⁵

d. Civil Society and Media

One specific reason for the disconnect between the BMP's licensing process and the Greenlandic public has been the lack of a well-developed civil society and robust independent media. In a healthy democratic system, a powerful administrative body like the BMP would be countered by a strong civil society, supported by free media. In the context of indigenous participation in governmental decision-making, a strong civil society and information distribution through the media is essential to guaranteeing indigenous participation.

In Greenland, free media exists, but is woefully underfunded because of the small market size.²¹⁶ Unfortunately, the civil society is even weaker. There are precious few civil society organizations in Greenland and even the most effective ones suffer from limited resources and chronic shortages of staff.²¹⁷

discussions and a final public discussion. *Id.* Everyone who participates does so as a citizen, although specific invitations were made to those already involved in the process. *Id.* The consultation facilitators are not responsible for providing information, but are seeking to facilitate the flow of information by telling people where to find it for themselves. *Id.* The outcome of the meetings are a kind of condensed minutes, are submitted to BMP and also placed on the website. *Id.* In addition, each subsequent meeting starts with a review of the past meetings. Ideally, this process will be incorporated into the final SIA and EIA, but there is no mechanism to ensure this integration. *Id.* Citizens and civil society remain responsible for holding the BMP and the Corporate actor responsible for applying the results of the consultations to the final project proposal. *Id.* This new consultation process is itself a test case, and it is hoped that the process will be successful enough to replicate throughout the country. *Id.*

²¹⁵ *See id.*

²¹⁶ *See* Interview by Rutherford Hubbard with Anonymous Source, Civil Society Representative, in Green. (Aug. 15, 2012); Interview by Rutherford Hubbard with Anonymous Source, Civil Society Representative, Civil Society Representative note 169; Interview by Rutherford Hubbard with Anonymous Source, Civil Society Representative, in Green. (Aug. 22, 2012); Interview by Rutherford Hubbard with Anonymous Source, Civil Society Representative, in Green. (Aug. 27, 2012); Interview by Rutherford Hubbard with Anonymous Source, Indigenous Rights Activist, *supra* note 169.

²¹⁷ *Id.*

As a result, the BMP, together with extractive industry enterprises, have a near monopoly on information. This information deficit can be seen clearly in the consultation process which has developed as a mandatory part of the licensing process, as noted above.

2. *The Right to Land and Resources*

i. *Legal Basis*

Part II of the Convention recognizes the “special importance” between indigenous peoples and the lands or territories that they “occupy or otherwise use,” collectively.²¹⁸ When read in the context of Article Fourteen, it becomes clear that land rights, constructive, collective, prescriptive or otherwise, are the responsibility of the government.

The Convention goes beyond land rights to include specific provisions regarding natural resource management. Article Fifteen, creates an obligation on States to safeguard indigenous peoples’ right to the natural resources located on their lands. Importantly, Article 15 does not call for indigenous ownership over natural resources on their lands, but does highlight the right of “[indigenous] peoples to participate in the use, management and conservation of . . . resources.”²¹⁹ Article 15 also requires a consultation process, to apply when ownership of the resources are vested in the state.²²⁰

In Greenland, natural resource ownership and the collection of revenue have serious ILO 169 implications. To begin with, ownership over Greenlandic natural resources is not clearly defined, as noted above.²²¹

ii. *Potential Adverse Impacts*

The BMP currently administers ownership of natural resources; therefore, indigenous land rights are not recognized

²¹⁸ Guiding Principles, *supra* note 11, ¶ 13.

²¹⁹ *Id.* ¶ 15.1.

²²⁰ *Id.* ¶ 15.2.

²²¹ *See supra* notes 53-55.

outside of democratic processes. The Danish lawyers at the BMP are not well educated in Greenlandic collective ownership principles or cultural relationships to land and resources.²²² As a result, it can be said that Greenland falls far short of ILO 169 requirements regarding a coordinated and systematic approach to indigenous land rights.

Therefore, two questions are raised. First, does Greenland recognize indigenous land rights? And second, does Greenland have an adequate system in place to ensure consultation and participation regarding the allocation of natural resources and benefit sharing? To the first question, the answer has to be no. To the second question, the consultation process does appear to satisfy the requirements of Convention Article 6, in form. However, in function the answer again is no.²²³

The recent election highlighted this relative failure in a big way. Prime Minister elect Hammond has promised to increase indigenous participation in natural resource exploitation, as well as significantly increase royalty payments.²²⁴ She also seeks to legalize the extraction of uranium, and the precious rare earths with which it is intertwined.²²⁵ It

²²² Interview with Aqqaluk Lynge, Chair, Inuit Circumpolar Counsel, in Thule, Greenland (August 28, 2012).

²²³ 1. The 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.

2. The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement.

3. Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.

4. Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.

ILO 169, *supra* note 10, at 387.

²²⁴ See sources cited *supra* note 5.

²²⁵ *Id.*

appears that the government was ousted, in part, because of the general failure to address these issues of extraction and royalties, as required by ILO 169.

3. *The Right to Exercise Control Over Development*

i. *Legal Basis*

The ILO 169 Right to Exercise Control over Development is found in Article 7. It reserves for indigenous persons “the right to decide their own priorities for the process of development.” including in regards to the preservation of the “environment and territories they inhabit.”²²⁶ ILO 169 also calls on governments to ensure that studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities.²²⁷

There is a close link between the Right to Exercise Control over Development and the Right Consultation and Participation. While it could easily be said that the latter supports the integrity of the former, this is perhaps too simplistic. Rather, the Right Exercise Control over Development is perhaps better understood as a specific manifestation of the Right to Consultation and Participation, which the ILO highlights because of its specific importance.

ii. *Potential Adverse Impacts*

The failure to establish an effective development plan for Greenland that included all relevant stakeholders and specifically recognized the concerns of indigenous people was a key issue in the March election. Prime Minister-elect Hammond herself emphasized that ““Greenland should work with countries that have the same values as we have, on how human rights should be respected. We are not giving up our values for investors’

²²⁶ Guiding Principles, *supra* note 11, ¶¶ 7.1, 7.4.

²²⁷ *Id.* ¶ 7.3.

sake.’”²²⁸ This deliberate reference to international human rights is important. So too is the concept of equitable and participatory development. On this subject, Ms. Hammond’s words echo ILO 169 Article 7: “[d]evelopment must be fair to all Greenlanders . . . both those in villages and those in cities.”²²⁹

Prime Minister-elect Hammond’s views were generally expressed by interviewees a full seven months before the election.²³⁰ Even the BMP has noted that potential licensees should by law present alternative development plans and, in an ideal world, would present non-extractive development alternatives, as unlikely as this is.²³¹

Greenland is changing rapidly, and given its fragile environment, unique culture and reliance on natural resources, this change appears to many to be running out of control. What is clear is that the current extractive industry development strategy does not have a substantial indigenous element, nor has it been subject to public scrutiny. In the rush for economic strength and the political independence that it buys, Greenland is proceeding with extractive industry development before addressing the more fundamental question of what kind of socio-political-economic state Greenland wants to be. As the Director of the ICC puts it, “[w]ould you take the people hostage just to gain independence? What kind of independence will you get?”²³²

In terms of indigenous rights, this means that decisions are being made now, that may impact the possibility of protecting

²²⁸ Macalister, *supra* note 5 (quoting Siumut Party chief Aleqa Hammond).

²²⁹ Ghosh, *supra* note 5 (quoting Siumut Party chief Aleqa Hammond).

²³⁰ In August of 2012, the author travelled to Greenland to conduct the research that resulted in this paper. Applying the R2R Framework and Guiding Principles as a framework for research, the conclusion was drawn that indigenous rights concerns were undermining extractive industry in Greenland and had the potential to destabilize the entire industry. These findings were shared with at the Michigan State University Law School Symposium, “The Battle for the Far North” less than three weeks before Greenland Parliamentary Election. That this prediction was proved correct, and far more quickly than anticipated, is a powerful argument for the effectiveness of the U.N. Framework.

²³¹ Interview by Rutherford Hubbard with Anonymous Source, Representative of BMP, in Green. (Aug. 20, 2012).

²³² Interview with Aqqaluk Lynge *supra* note 63.

indigenous rights in the future. Extractive industry development is a trade-off and one that, according to several respondents, Greenlanders are willing to accept, provided that they have some say in what it looks like.

The barriers to establishing a real vision that accounts for indigenous rights in Greenland faces several hurdles. The obvious ones are resources, the lack of an effective political opposition, and a lack of competency within both the government and civil society to undertake such a unique and challenging initiative.²³³ The more complex challenges include cultural barriers to large-scale decision-making, general education levels, and a strong understanding of Greenland's potential place in the world.²³⁴

Some have called on the Premier of Greenland to organize a national dialogue on development and values.²³⁵ This may be a much more achievable goal now that political change has occurred. Others hope that the civil society will fulfill this role, although it currently does not have the resources or competencies to do so. While the consultation process is moving in a positive direction and indigenous rights are getting an ever larger hearing in regards to mega-project development, there has yet to be indigenous input on the choice to pursue mega-projects in the first place.²³⁶ As Aqqaluk Lyngé noted, “[t]he Inuit of Greenland survived 5000 years as a people, but [mega-projects] could destroy that culture.”²³⁷

IV. TOWARDS A POLICY COMMITMENT AND STEPS FORWARD

²³³ *Id.*; Interview by Rutherford Hubbard with Anonymous Source, Civil Society Representative (Aug. 21, 2012) *see supra* note 37.

Interview by Rutherford Hubbard with Anonymous Source, Consultation Consulting Professionals (Aug. 23, 2012).

²³⁴ Interview by Rutherford Hubbard with Anonymous Source, Member of Parliament (Aug. 26, 2012); Interview by Rutherford Hubbard with Anonymous Source, Impact Assessment Professionals (Aug. 27, 2012).

²³⁵ Interview by Rutherford Hubbard with Anonymous Source, Civil Society Representative (Aug. 21, 2012) *see supra* note 37.

Interview by Rutherford Hubbard with Anonymous Source, Consultation Consulting Professionals (Aug. 23, 2012).

²³⁶ Interview with Aqqaluk Lyngé, *supra* note 63.

²³⁷ *Id.*

A. Why Due Diligence?

The 2013 Parliamentary Elections in Greenland served as a clear and unequivocal warning to extractive industry enterprises. Indigenous rights risk had become direct and measurable harm to business enterprises in Greenland. While this should be a sufficient reason to embrace a rights-based approach to Greenlandic operations, it must be recognized that business enterprises will remain unwilling to do so, as there are currently no direct legal ramifications for failure to abide by the R2R Framework or Guiding Principles.²³⁸ Furthermore, unlike human rights violations of physical integrity defined under the International Bill of Rights or violations of labor rights defined under the 8 Core Conventions of the ILO, violations of indigenous rights under ILO 169 are unlikely to fall under domestic or international criminal legislation.²³⁹ There are however four key reasons that enterprises should seek to achieve human rights compliance.

First, the Guiding Principles are likely to affect the development of laws and regulatory frameworks that will directly impact business enterprises in the future.²⁴⁰ This danger has already been realized in Greenland.²⁴¹

Second, banks, institutional investors, and counter-parties are increasingly demanding human rights compliance.²⁴² Extractive industries require substantial investments and NGOs have successfully targeted banks and other institutional investors

²³⁸ See Guiding Principles, *supra* note 11, Introduction.

²³⁹ Contribution of the United Nations, *supra* note 103, at 13. The Guiding Principles make clear that the responsibility to respect is absolute and independent of legal compliance with domestic or international law. *Id.*

²⁴⁰ Bonniticha, *supra* note 108, at 15.

²⁴¹ Rutherford Hubbard, Risk, Rights and Responsibility: Navigating Corporate Responsibility and Indigenous Rights in Greenlandic Extractive Industry Development (Feb. 26, 2013) (unpublished manuscript). For purposes of perspective, the original statement in this paper as drafter prior to the March Elections read, “[i]n Greenland, where extractive industry regulation comes up for debate at each new sitting of the Parliament, this is a substantial risk if a long-term investment is being considered.” *Id.*

²⁴² Bonniticha, *supra* note 108.

regarding extractive industry investments in several countries.²⁴³ As indigenous rights become a higher profile issue internationally, this risk increases significantly.

Third is the issue of reputational risk.²⁴⁴ Considering the attention generated by Greenland's strong democratic statement on extractive development and indigenous rights, reputational risk is a serious concern indeed.²⁴⁵ This risk is compounded by the strength of international indigenous networks of which some Greenlanders are a part.²⁴⁶

Lastly, protecting human rights is the generally accepted "right thing to do."²⁴⁷ While this argument may not always carry much water in comparison to the bottom line, Greenland's unique indigenous culture and unique environmental landscape certainly raise profound moral arguments against the abuse of human rights in Greenland.

B. Why a Policy Commitment?

Following the completion of Initial Due Diligence, the next step in applying the R2R Framework and Guiding Principles is to develop a policy commitment. The nature and scope of the Policy Commitment will depend on the likelihood that the business enterprises' activities will generate severe adverse impacts. In Greenland, it has already been made clear that these impacts are real, and are being felt by the local indigenous population.

The paper has further argued that the weak regulatory framework for protecting certain indigenous rights in Greenland is likely to be changed and therefore extractive business enterprises may seek to be involved in that process either

²⁴³ 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).

²⁴⁴ Bonnitcha, *supra* note 108, at 16.

²⁴⁵ See generally *supra* Part I.C.

²⁴⁶ See, e.g., INUIT CIRCUMPOLAR CONF., <http://www.inuitcircumpolar.com> (last visited Sept. 9, 2013); TRANSPARENCY GREEN., <http://www.transparency.gl/> (last visited Sept. 9, 2013); UNIV. ARCTIC, <http://www.uarctic.org> (last visited Sept. 9, 2013).

²⁴⁷ Bonnitcha, *supra* note 108.

directly, or by demonstrating best practices independently. In this context, the Policy Commitment is a crucial tool in minimizing risk, reducing current and potential regulatory burdens, and ensuring long-term business viability.

The Guiding Principles emphasize that corporate Policy Commitment should be based on the salience of the impacted rights.²⁴⁸ Salience of impacted rights is determined by two parameters, the severity/ probability of the impact occurring, and the corporate relationship to the adverse impact (the context), on the other.²⁴⁹

Business enterprises should consider the size of the impact, the number of people impacted both immediately and in the future, and the possibility of effective redress. In the indigenous rights context, irremediability is of particular relevance, as cultural and environmental impacts are often permanent and may not be adequately addressed though financial compensation.²⁵⁰

Salient and severe human rights risks have already manifested themselves in Greenland. The resulting political changes have already created tangible economic impacts for extractive industry enterprises. This final part of the paper offers ways forward for extractive industry business enterprises in the face of this growing opposition and increased emphasis on indigenous rights in Greenland.

The problems identified by this research, as well as the dynamic emerging political realities of Greenland indicate that

²⁴⁸ Corporate Responsibility to Respect Human Rights, *supra* note 106, at 8. “The Guiding Principles make clear that an enterprise should not focus exclusively on the most salient human rights issues and ignore others that might arise. But the most salient rights will logically be the ones on which it concentrates its primary efforts.” *Id.*

²⁴⁹ See Guiding Principles, *supra* note 11, Key Concepts.

²⁵⁰ See *id.* Presentation on Business and Human Rights at U.N. Office of the High Commissioner of Human Rights in Phnom Penh (Jan. 24, 2013) (discussing the differences between CSR and human rights compliance, noting that human rights compliance is less likely to be remediable through financial compensation). Also, the Alta Hydropower Project in Alta Norway as well as the case of the Thule Cases originating in Northwestern Greenland. To paraphrase the words of Aqqalaq Lyngé, the current president of the Inuit Circumpolar Conference and expert on the Thule cases, “[s]how me one country where extractive industries have not destroyed the local indigenous culture.” Interview with Aqqaluk Lyngé, *supra* note 63.

business entities seeking to operate in Greenland will have to take independent steps to ensure indigenous rights compliance, but also work with the Government of Greenland to establish a rights friendly environment. Therefore, these recommendations have been divided into two categories: Unilateral Initiatives and Collaborative Initiatives, which include the Government of Greenland as well as other relevant stakeholders.

C. Specific Recommendations

1. *Unilateral Initiatives*

At the very minimum, the informal consultation process as required under Greenlandic Law, must be improved in practice. Individual business enterprises can take the lead in this area by designing consultations for their projects to exceed the existing legal framework. This can be accomplished by focusing on four parameters of the consultation process; access to information, language of interaction, incorporation of cultural norms and extended consultation periods.²⁵¹

The first area of improvement is access to information. Relevant information should be prepared in an easily accessible format that can be read and understood by a non-expert. The kind of detailed technical information that has been released for previous consultations does have a role to play in the consultation process, but it greatly reduces accessibility to the consultation process.²⁵² Information sharing should also take place in a timely fashion. While improvements have been made over the past two years, even recent consultation processes, have not provided sufficient time to review available information prior to the consultation.²⁵³

²⁵¹ See generally *supra* Part II.B.

²⁵² Interview by Rutherford Hubbard with Anonymous Source, Member of Parliament (Aug. 26, 2012); Interview by Rutherford Hubbard with Anonymous Source, Civil Society Representative (Aug. 16, 2012); 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).

²⁵³ *Id.*

Second is the issue of language. The language of discourse in a bilingual society is always a challenge. While efforts have been made to meet this challenge, further issues are raised regarding local dialects and technical terminology.²⁵⁴ Increased effort must be paid to ensure that consultations are conducted in such a way as not to exclude stakeholders by means of language.

Third, it is necessary to ensure that consultations reflect cultural norms of decision-making. While some efforts have been made in this direction recently, they remain far from sufficient.²⁵⁵ Culturally, Greenlanders prefer a longer decision making process that highlights dialogue and consensus. However, decisions reached in this manner are binding.²⁵⁶ Business enterprises should take advantage of the sustainability created by adopting culturally sensitive consultation processes.

Fourth, engaging in consultation earlier in the project development process will allow for meaningful participation as required by ILO 169.²⁵⁷ Consultations implemented in Greenland up to now appear to have already accepted the inevitability of the proposed project, with the consultation merely serving to potentially modify minor details of the project.²⁵⁸ This process is in fact not a consultation at all and does not satisfy ILO 169's consultation and participation requirements.

In order to improve the indigenous land and resource rights protections in Greenland, business enterprises should seek to conduct careful due diligence on historical land use, usufruct rights and potential environmental impacts on surrounding lands.²⁵⁹ Greenland is a vast landmass, but it is not always

²⁵⁴ Interview by Rutherford Hubbard with Anonymous Source, Impact Assessment Professionals (Aug. 27, 2012); Interview by Rutherford Hubbard with Anonymous Source, Consulting Professionals (Aug. 23, 2012).

²⁵⁵ See generally *supra* Part II.B.

²⁵⁶ Interview by Rutherford Hubbard with Anonymous Source, Consulting Professionals (Aug. 23, 2012).

²⁵⁷ ILO 169, *supra* note 10, at 386-87.

²⁵⁸ See *supra* note 79.

²⁵⁹ See generally Christina Allard, *The Nordic Countries' Law on Sámi Territorial Rights*, 2 ARCTIC REV. L. & POL., 159 (2011); Elina Helander, *The Nature of Sami Customary Law*, in ARCTIC GOVERNANCE (JURIDICA LAPPONICA) 29, 88-96, (Timo Koivurova et al. eds., 2004) (referencing interesting discussions on traditional land use rights in the arctic); Birger Poppel, *Subsistence Activities in the Arctic*, in CULTURAL AND SOCIAL

apparent which specific areas may have significant resource, cultural or religious value to surrounding communities. A good faith effort to avoid operations in such lands should reduce the potential risk of lawsuits and negative publicity.

Furthermore, extractive industries have environmental impacts. In the Arctic these environmental impacts are greatly magnified, both by the fragility of the ecosystem and on the extent to which indigenous peoples depend on that ecosystem. Given the current lack of clarity regarding land and resource ownership, environmental impacts may have significant long-term consequences. GP 24 recognizes the need to identify the most serious and/or irredeemable impacts and address them first.

Therefore, special attention must be paid to understanding, isolating and minimizing environmental degradation. This may mean choosing sustainable energy sources to limit infrastructure, as has been suggested in Greenland.²⁶⁰ It is also important to consider the location of projects, gaining a careful understanding of migration and breeding habits, as well as indigenous land claims before proceeding. While the Arctic may appear to be a vast wasteland to some, the careful placement of extractive infrastructure may significantly lessen the overall impact on indigenous rights.

The Right to Exercise Control over Development can be significantly strengthened by improved reporting procedures. Greenlandic law lacks the requirement, or even the mention of the reporting of human rights impacts. Such reporting improves the overall understanding of extractive industries, strengthens ties with civil society and demonstrates corporate commitment to indigenous rights. Voluntary or mandatory reporting should be done in coordination with other business enterprises and with civil society groups. This kind of peer monitoring process has been applied with some success in regards to the U.N. Convention against Corruption and in the CSR field.²⁶¹ Despite

RESEARCH IN GREENLAND: SELECTED ESSAYS, 1992-2010 (Karen Langgård ed., Univ. of Green., 2011) (referencing discussions pertaining to Greenlandic traditional land usage patterns).

²⁶⁰ Author's personal notes taken during the Public Consultation August 27, 2012.

²⁶¹ On Common Ground Consultants, Inc., *From Theory to Practice: Corporate Social Responsibility and Sustainable Development in Mineral*

the lack of a legal requirement, business enterprises operating in Greenland should seek to actively report on their adverse and positive impacts in Greenland.

The relatively small size of Greenlandic society really facilitates effective communication and supports the recommendation of increasing information availability. As Greenland is still in the beginning of large-scale extractive development, effective reporting on projects will facilitate an improved regulatory structure and stronger community-corporate relationships in the long term.

2. Collaborative Initiatives

Meaningful consultation processes require that stakeholders are “informed.”²⁶² The research for this paper found a recurring and significant lack of accurate, non-partisan knowledge that draws on both scientific and indigenous sources. In terms of cost-benefit analysis, there is perhaps no one thing that extractive industry business enterprises can do that would be of greater benefit than funding extensive knowledge generation and dissemination projects. However, it is not possible for a single business enterprise to achieve this goal independently.

Increased factual understandings of the ecosystems and societies of the Arctic, effectively distributed to communities, government agents and corporate actors greatly strengthens the consultation process, limits rights violations, improves community relations, increases project stability, and facilitates compliance with the U.N. Guiding Principles overall.²⁶³

At the most basic level, business enterprises should also pursue basic background training regarding the environment and culture of the country. Greenland is an exciting frontier for extractive industries and a willing partner in extractive industry

Exploration, (Mar. 2-3, 2007), <http://www.pdac.ca/docs/default-source/public-affairs/csr-course-report.pdf?sfvrsn=4>.

²⁶² See *supra* notes 197-98.

²⁶³ See generally *supra* Part I. The Impact Assessment Process and the Impact Benefit Agreements are largely driven by the investing entity and only require limited governmental oversight and approval. These are just two more formalized examples of the potential direct role that can be played by business entities themselves in regards to community engagement. *Id.*

development. Yet, many Greenlandic respondents expressed disappointment in how little their corporate partners knew about the country. Even a cursory understanding of the country, its culture, politics, and environment, would greatly strengthen rights protection and improve relations between business enterprises and local partners.

As a majority indigenous state with a primarily publicly owned economy, Greenland finds itself in unusual position. Public private partnerships could be an engine for indigenous control over development, but the reality has been quite different. Although extractive business enterprises in Greenland have little say over the relationship between the government and its citizens, they do have a control over how they interact with communities directly affected by economic development.²⁶⁴ Failure to respect this right could potentially undermine the Greenland's indigenous community, effectively denying them of a role in shaping their own economy and consequently, socio-political system.

In order to ensure fundamental respect for the indigenous right to land and natural resources, as well as mitigate corporate risk, it will be necessary to resolve questions of land and resources rights, the sooner the better. It is therefore strongly encouraged that business enterprises apply their leverage to advocate for a clarification of land rights in Greenland. This is simply good sense as such clarification is inevitable and the later it is completed, the greater risk of land seizure, damages, or operational restrictions.²⁶⁵ ILO Convention 169 is very clear on the procedural requirements for clarifying land rights and these procedures should be carefully followed.²⁶⁶

²⁶⁴ As noted in Part I, the Impact Assessment Process and the Impact Benefit Agreements are largely driven by the investing entity and only require limited governmental oversight and approval. These are just two more formalized examples of the potential direct role that can be played by business entities themselves in regards to community engagement. *Id.*

²⁶⁵ Interview with Aqqalaq Lynge, President, Inuit Circumpolar Council (Aug. 27, 2012) (noting that the potential for lawsuits in the near future is very high); *see also* (Hingitaq 53 and Others v. Denmark, 2006-I Eur. Ct. H.R. 345) (highlighting Greenlanders past experiences before the Inuit Circumpolar Council).

²⁶⁶ ILO 169, *supra* note 10, at 388-89.

One specific and immediate area where Government and business enterprises could improve the land and resource rights framework is in regards to IBAs. The current system relies on the BMP to initiate the monitoring and renegotiation of IBAs.²⁶⁷ It would both strengthen corporate compliance and improve corporate-community relations if an annual impact and benefit audit were prepared that recognizes concerns, but also publishes the benefits of extractive industry development.

By engaging directly with communities through the IBA process, it would be possible for business enterprises to become actual partners with affected stakeholders in the extractive development process. This would significantly minimize risk in the area of the right to exercise control over development as well as improving consultation and participation and potentially reduce the risks associated with land and resource rights.

Meaningful protection of the Right to Exercise Control Over Development in Greenland is impossible until a comprehensive development plan for Greenland, which incorporates the perspective of all Greenlanders, has been established. Until this time, it has not been possible to state the indigenous right to exercise control over development has been satisfied. An overwhelming number of respondents noted that until a development vision for Greenland is established, any extractive industry project has potential adverse impacts on indigenous rights. This lack of vision essentially denies the efficacy of the consultation and participation process and precludes corporate attempts to respect indigenous rights in a meaningful way.

Specifically, the creation of a fund to work towards a comprehensive extractive industry development plan for Greenland may be advisable. Such an initiative would carry its own risk, however, potentially narrowing the space for extracting industry development.

This final recommendation therefore presents business enterprises with a balance of risks. Pushing forward now is almost certain to result in rights violations and potential economic, political, reputational, and legal risk. On the other hand, active engagement in improving the rights environment

²⁶⁷ Interview with Ole Kjaer, Bureau of Minerals and Petroleum, in Nuuk (Aug. 20, 2012).

may potentially reduce operation space for extractive industry business enterprises. However, in consideration of the U.N. Guiding Principles, it appears that the balance is shifting in favor increased rights protection and risk mitigation.

CONCLUSION

In closing, this paper has first demonstrated that the substantial political risk generated during Greenland's 2013 Parliamentary Election was a direct result of insufficient indigenous rights protection in Greenland. Second, it has identified the ways in which the Responsibility to Respect Framework and corresponding U.N. Guiding Principles on Business and Human Rights can and should be used to identify and analyze these specific areas of indigenous rights risk. Lastly, this paper has used the Framework to recommend specific independent and collaborative initiatives, which can help business enterprises, navigate the dynamic and challenging new reality of extractives development and rights protection in Greenland.

Greenland is home to a unique arctic environment, fostering a unique indigenous culture. Extractive industries have the potential to preserve both, while raising socio-economic levels and demonstrating that cultural and environmentally sustainable development is a real possibility for indigenous peoples. At the same time, recent history and international experience suggest that Greenland runs a very substantial risk of environmental, social, and cultural catastrophe.

The uncomfortable reality highlighted by the March Elections, is that extractive industry development in Greenland needs to slow down. This is not to say that there should be a moratorium on extractive industry development, but it does indicate that certain protections of fundamental indigenous rights must be in place before large-scale projects should move forward.

As Greenland's new government changes the regulatory framework for extractive industry, there is a great opportunity. Greenland is positioned to be a leader in sustainable, human rights friendly extractive development, but it will require

collaboration of the Government, civil society, *and* business enterprises to realize this vision. It is hoped therefore that this paper will contribute to a much larger debate on the role of extractive development in Greenland and assist business enterprises in making a positive contribution to Greenland's development.