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*Background Document on Engagement with Indigenous Peoples
For MEMA workshop (September 17, 2016)*

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Table of Contents

Forward	3
I. What is Indigenous engagement?	4
II. What are the Purposes and Benefits of Engagement?.....	6
III. Sources of the Obligation to Engage.....	8
A. <u>National legal requirements</u>	8
B. <u>International requirements</u>	9
C. <u>The obligations for companies</u>	9
D. <u>Researchers, NGOs, financial institutions, and development organizations</u>	11
E. <u>Indigenous Peoples' authority on the obligation of engagement</u>	12
IV. Common Good Practices for Engagement in Arctic Marine Activities	14
A. <u>Timeliness</u>	14
1. Early stage of decision-making and planning	15
2. Sufficient time before decisions about the activity are made	19
B. <u>Adequate preparation</u>	20
C. <u>Careful evaluation of the parties who will participate in the process</u>	23
D. <u>Identification of the activities that require engagement and of the degree of engagement that is necessary</u>	26
E. <u>Comprehensive, culturally appropriate information sharing</u>	28
1. Culturally appropriate and accessible	29
2. Transparent and adequately funded	30
3. Indigenous Knowledge and community based monitoring.....	32
F. <u>Ongoing communication focused on relationship-building</u>	35
G. <u>A good faith intent to reach consensus</u>	38
H. <u>Consent in some cases</u>	40
I. <u>Accountability</u>	43
J. <u>Shared benefits</u>	45
K. <u>Shared decision-making</u>	49
L. <u>Honoring of the autonomy and human rights of Indigenous Peoples</u>	52
V. The Arctic Council and Indigenous Engagement	55

Forward

The purpose of this document is to provide an overview of good practices of engagement in the Arctic as reviewed by the Arctic Council’s Meaningful Engagement of Indigenous Peoples and Communities in Marine Activities (“MEMA”) project. This overview is intended to support discussions at the PAME workshop about meaningful engagement with Indigenous Peoples in Portland, Maine on September 17, 2016.

This document will also help to form the basis of Chapter 3 of the final MEMA project report. The final report will incorporate discussions and outcomes that may arise from the workshop. It is also intended to assist the Arctic Council in assessing how its own recommendations and practices compare to current standards, identifying future areas of research, and determining the potential need for additional recommendations regarding engagement with Indigenous Peoples.

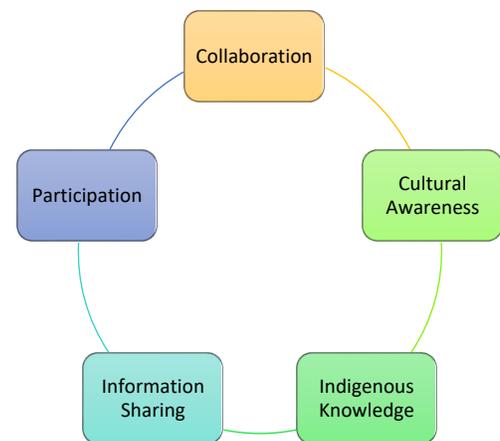
The two-row wampum, given to early European settlers by the Iroquois, provides a model of co-management that some might wish to follow. This device embodies the principles of mutual respect, recognition, and partnership, and is based on a nation-to-nation relationship that acknowledges the autonomy, authority, and jurisdiction of each nation. The two rows symbolize the courses on the river of life for canoes of each great nation to navigate down, each with its own laws, customs and traditions, neither trying to steer the others' vessel - Marc Stevenson.

I. What is Indigenous engagement?

In the Arctic, Indigenous Peoples have a specific connection to land and natural resources, which are an important part of their culture and traditional livelihoods. Many cultural, historical and economic backgrounds exist among the over 40 different ethnic groups living across the coastal zones of the eight Arctic States represented in the Arctic Council. Arctic Indigenous groups are represented by the Permanent Participants of the Arctic Council and include the Inuit, Aleut, Saami, Gwich'in, Athabaskan and over 56 Indigenous groups in Russia, such as the Nenets, Yup'ik, Chukchi, Even, and Evenk. Although the term "Indigenous" is not a common term for all Arctic countries, this report will use the terms "Indigenous Peoples," "Indigenous groups" and "Indigenous community" interchangeably and without regard to their particular legal status.¹

"Indigenous engagement" refers to a range of relationships with Indigenous Peoples. Engagement may apply to research activities, government decision making, economic activities, or any other interaction that will bring people into an Indigenous community. Thus, meaningful engagement is about a partnership between groups. This paper will focus on the relationships that develop between Indigenous Peoples and governments, researchers, non-governmental organizations (NGOs), and companies conducting activities in the Arctic.

This paper reviews various good practices for meaningful engagement. Underlying all of the practices are certain qualities of the nature of communication and interaction that form the basis of meaningful relationships between Indigenous Peoples and others.² These qualities include cultural appropriateness, trust, and respect.³ They improve participation, collaboration,



Key Elements of Engagement, Elizabeth Edmondson

¹ There are various definitions of "Indigenous Peoples." The Indigenous and Tribal Peoples Convention, 1989 refers to indigenous peoples as those who "on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions." International Labour Organization Convention No. 169. 72 ILO Official Bull. 59; 28 ILM 1382 (1989) [hereinafter ILO No. 169].

² See, e.g., Bartley, K., et al, Understanding and Improving Collaborative Management of Fish and Wildlife in Western Alaska, Submitted to the U.S. Fish and Wildlife Service, Office of Subsistence Management (Sept. 2014).

³ Trust can be understood as the perception of shared values, direction, goals, perspectives, and beliefs. Brooks, J. et al, *Relationship-Scale Conservation*, 39(1) Wildlife Society Bulletin 147–158 (2015).

information sharing, and involvement.⁴ Logistics (including when and where meetings take place) and funding (to support participation and involvement) are also key factors for successful engagement.⁵ By developing engagement approaches that focus on these essential qualities, Indigenous Peoples and other parties will be more likely to engage and to perceive the engagement process as meaningful.

One aspect of engagement is formal consultation, which is a process put forth by governments as a way to engage with Indigenous Peoples. As the government of Canada explains, “the objective of consultation is, first and foremost, to protect the land, the culture, traditions, values and spirituality” of Indigenous Peoples.⁶ The legal requirements for consultation vary among governments, but generally, formal consultation represents a narrow portion of the full range of approaches to meaningful engagement.

Beyond formal consultation, engagement by and with Indigenous Peoples embodies a broader framework of everything from informal communication to participatory and shared governance, which can include co-management or complete delegations of decision-making authority and self-governance to Indigenous governments.

To be meaningful, engagement must be rooted in an acknowledgement and respect for the autonomous nature of Indigenous Peoples.⁷ Engagement must also begin at an early enough stage to inform decision-making, be an accountable, transparent, on-going process of interaction and information exchange based on shared responsibility, and seek to reach mutually agreeable solutions.⁸

⁴ Jacobs and Brooks, Alaska Native Peoples and Conservation Planning: A Recipe for Meaningful Participation, 2 Native Studies Review 20, no. 2, 91-135 (2011).

⁵ *Id.*

⁶ Indigenous and Northern Affairs Canada. Summary of Input from Aboriginal Communities and Organizations on Consultation and Accommodation (August 2010) [hereinafter INAC Aboriginal Input].

⁷ Exec. Order 13175, 65 Fed. Reg. 67249 (Nov. 9, 2000) [hereinafter Exec. Order 13175].

⁸ *Id.*, U.N. Office of the High Comm’r for Human Rights, The Corporate Responsibility to Respect Human Rights, HR/PUB/12/02 (2012) at 8 [hereinafter The Corporate Responsibility to Respect Human Rights].

II. What are the Purposes and Benefits of Engagement?

Meaningful engagement can benefit all parties in the relationship as well as create benefits that extend beyond the relationship itself. Engagement can protect Indigenous rights, help outsiders achieve their objectives, strengthen knowledge and decision making for all parties, and lead to the discovery of new information, activities, and management approaches that benefit the entire region.

One of the fundamental purposes of Indigenous engagement is to acknowledge, respect, and support Indigenous human rights, including the right self-determination, culture, land, and development.⁹ Engagement enables outsiders to gain an understanding of these rights and how proposed activities may affect Indigenous Peoples. Thus, engagement can help outsiders to understand how to work with Indigenous Peoples so that they, too, can benefit from the activities that take place in their lands and waters. If there are potential negative impacts to Indigenous Peoples from a proposed activity, engagement can broaden the range of solutions considered, help outsiders to understand how to modify their activities to eliminate or minimize the negative impacts, and increase the chance that a mutually satisfactory outcome will be achieved.

Engagement can help governments to meet their obligation to protect, respect, and fulfill Indigenous rights. A government's obligation of engagement in part stems from the fiduciary or "trust" relationship that was created when Indigenous Peoples ceded land and resources to federal governments. Where Indigenous human rights have been diminished through colonial and neo-colonial relationships with Arctic governments, engagement acknowledges the importance of establishing equitable platforms and relationships, leading to greater equity and autonomy of Indigenous Peoples. Thus, it is part of the process of reconciliation between Indigenous Peoples and national governments.¹⁰ Companies can similarly use engagement to fulfill their duties to respect Indigenous human rights.¹¹

To achieve their right to self-determination within existing political and legal systems, Indigenous Peoples must seek to work with the non-Indigenous entities whose decisions affect them. This influence can be achieved through meaningful engagement, supporting and enhancing Indigenous Peoples to establish fate control.¹²

Engagement can also aid outsiders build mutual respect with Indigenous Peoples and understand their beliefs, knowledge system, management practices, and political processes. This can result

⁹ Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. GAOR, 61st Sess., U.N. Doc. A/RES/61/295 (2007) [hereinafter UNDRIP].

¹⁰ INAC Aboriginal Input, *supra* n. 6.

¹¹ United Nations. Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework ¶ 18(b) (2011) [hereinafter Guiding Principles].

¹² "Fate control" is the ability of communities and individuals to "control their own destiny, whether political, economic or along other axes." Nordic Council of Ministers, Arctic Social Indicators at 16 (Joan N. Larson et al. eds., 2010) [hereinafter ASI 2010].

in information sharing and knowledge that leads to better decision making. For example, the information gained from Indigenous Peoples through engagement can help to limit a project's impacts to the environment, thereby contributing to sustainable management.¹³ Information gained from engagement can similarly help outsiders to operate more effectively or efficiently, resulting in direct benefits to those who are conducting the activities. For example, engagement can help an organization learn what time of year will most be conducive to carrying out activities or improve the safety of its operations.¹⁴

For outside entities, engagement can also support the integrity and legitimacy of decision-making.¹⁵ This is because a decision to allow or conduct an activity in the Arctic will be stronger if it is based on the input of people who have the best knowledge of the Arctic and if it takes into account the preferences of those who will be most affected by the proposed activities.

Comprehensive, ongoing engagement will also help to build long-term partnerships, which could result in mutual benefits such as co-produced research, jointly operated activities, and co-management. Beyond the benefits that each party derives separately and together, however, meaningful engagement can have positive effects that go far beyond the relationships between those parties. For example, engagement of Permanent Participants at the Arctic Council can result in the sharing of knowledge between local and international scales. Similarly, relationships developed in one forum, such as the Arctic Council, can support information and management approaches in other forums, such as the International Maritime Organization. The co-production of knowledge and co-management that results from meaningful engagement can benefit people and living resources throughout the Arctic.

In sum, the purpose of engagement is to share benefits with and minimize negative impacts to Indigenous Peoples; support safer, smarter, and more successful activities; develop and share knowledge, information, and management approaches across a broad range of scales and forums; and provide a basis for better decision making. Whether engagement is meaningful will depend on whether it achieves these underlying purposes.¹⁶

¹³ Convention on Biological Diversity Secretariat, *Akwé Kon: Voluntary Guidelines*. CBD Guidelines Series, CBD, Montreal, Canada at 1 (2004) (noting contribution that Indigenous Knowledge can make to both the conservation and the sustainable use of biological diversity) [hereinafter *Akwé Kon: Voluntary Guidelines*]; Stevenson, M., "Decolonizing co-management in northern Canada." 28.1 *Cultural Survival Quarterly* 68-72 (2004) (noting "the knowledge of Aboriginal peoples may have much to contribute to understanding and developing sustainable relationships with the natural world").

¹⁴ Protection of the Marine Environment Working Group, *Systems Safety Management and Safety Culture: Avoiding Major Disasters in Arctic, Offshore Oil & Gas Operations* (2014).

¹⁵ Udofina et al, *Community Engagement in Environmental Assessment for Resource Development: Benefits, Enduring Concerns, Opportunities for Improvement* 39 *The Northern Review* 100 (2015).

¹⁶ Newman, D., et al, *Arctic Energy Development and Best Practices on Consultation with Indigenous Peoples*, 32 *Boston University International Law Journal* 449, 482-83 (2014).

III. Sources of the Obligation to Engage

A wide range of laws, policies, and practices create standards for engagement with Arctic Indigenous Peoples. Generally, these standards are articulated with respect to a particular kind of entity or a specific type of activity. For example, many are focused on engagement by governments, resource extraction companies, and researchers, while less guidance exists for other entities operating in the Arctic, such as tourist operators, ships, and NGOs. Yet, as discussed in more detail in the next section, the good practices identified by these diverse sources share many common themes.

A. National legal requirements

The legal requirements for engagement with Indigenous Peoples mostly apply to governments, and are generally prescribed by a formal consultation process. All of the Arctic states have embraced their obligation to consult with Indigenous Peoples, although each has varying approaches to implementing this requirement. The national legal obligations to engage Indigenous Peoples come from a variety of authorities.¹⁷ For example, in Russia, Norway and Canada, the requirement for Indigenous engagement has constitutional roots.¹⁸ In Norway, Russia, Canada and the U.S., national legislative measures provide for engagement,¹⁹ while additional regional laws also provide for engagement in Russia.²⁰ In the U.S., consultation is also required by regulations.²¹ In Canada, comprehensive land claim agreements and treaties between governments and Indigenous Peoples provide the foundation for Indigenous engagement²² and judicial decisions are another important legal source of this obligation.²³ Even where national laws protect Indigenous rights and require Indigenous engagement, however, there may be a significant “implementation gap” between the laws and their effective implementation at the local level.²⁴ However, the legal requirements for engagement create an important basis for fostering relationships between Indigenous Peoples and government.²⁵ From these legal requirements, governments often create policies detailing how engagement should occur,

¹⁷ See generally, *id.*

¹⁸ The Constitution of the Russian Federation, art. 69; Canada Constitution Act, 1982, art. 35; Norway Constitution, art. 108.

¹⁹ See, e.g., National Historic Preservation Act, 16 U.S.C. § 470 et seq.; Federal Law on the rights of the small-numbered Indigenous Peoples of the Russian Federation; Finnmark Act No. 85 (June 17, 2005).

²⁰ See, e.g., Executive Order 53 by ChAD Governor - On the Indigenous Small Peoples Board under ChAD Governor (2013).

²¹ See, e.g., 40 C.F.R. §1501.2(d)(2) (requiring Federal agencies consult with Indian tribes early in the NEPA process).

²² See, e.g., Gwich'in Comprehensive Land Claim Agreement, Apr. 22, 1992, § 21.1.3.

²³ See, e.g., *Haida; Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, (2010) 3 S.C.R. 103 [hereinafter *Haida*].

²⁴ Hansen, K. and Bankes, N., *Human Rights and Indigenous Peoples in the Arctic: What are the Implications for the Oil and Gas Industry?*, in *Arctic Oil and Gas, Sustainability at Risk?* 310 (Mikkelsen, A. and Langhelle, O., eds., 2008).

²⁵ Slepstov, A. *Ethnological Expertise in Yakutia*, 39 *The Northern Review* 88, 95 (2015).

providing a framework and baseline obligation for Indigenous engagement.²⁶ The highest levels of government can direct agencies and departments to create these policies.²⁷ Arctic-specific policies also emphasize the importance of engagement with Indigenous Peoples. For example, the U.S. Implementation Plan for the National Strategy for the Arctic Region identifies consultation and coordination with Alaska Natives as one of its key principles.²⁸

B. International requirements

Internationally, the standards for government engagement with Indigenous Peoples comes from various sources, including international instruments such as the United Nations Declaration on the Rights of Indigenous People (UNDRIP),²⁹ the International Labour Organization's Indigenous and Tribal Peoples' Convention (ILO No. 169),³⁰ the United Nations Convention on Biological Diversity,³¹ Agenda 21,³² and decisions by international tribunals.³³ Regionally, the Arctic Council has provided various recommendations for Indigenous engagement by Arctic states.³⁴ The obligation of governments to consult with Indigenous Peoples is widely considered customary international law and a general principle of international law.³⁵

C. The obligations for companies

Some governments place obligations on companies to participate in formal consultation. Companies, while obligated to comply with national laws, also have an independent obligation to ensure their activities comport with human rights obligations, including Indigenous human rights.³⁶ In addition to the international legal standards, various other regional and international organizations and instruments set out societal expectations for corporate behavior with respect to human rights³⁷ such as the Arctic Council,³⁸ Northern Forum,³⁹ the UN Global Compact,⁴⁰ the

²⁶ See, e.g., Department of Aboriginal Affairs and Northern Development Canada, Aboriginal Consultation and Accommodation Updated Guidelines (2011) [hereinafter INAC Guidelines]; Exec. Order No. 13175, *supra* n. 7; U.S. EPA, Policy on Consultation and Coordination with Indian Tribes (2011); Procedures for Consultations between State Authorities and The Saami Parliament (2005).

²⁷ See, e.g., Memorandum for the Heads of Executive Departments and Agencies, Memorandum on Tribal Consultation, 74 Fed. Reg. 57879 (Barak Obama, November 5, 2009).

²⁸ U.S. Government, Implementation Plan for the National Strategy for the Arctic Region (2014).

²⁹ UNDRIP arts. 10, 18, 19, 26, 28, 29, 32.

³⁰ ILO No. 169 arts. 6, 15, 17.

³¹ Convention on Biological Diversity, art. 8(j), 1760 UNTS 79; 31 ILM 818 (1992).

³² Agenda 21: Programme of Action for Sustainable Development, U.N. GAOR, 46th Sess., Agenda Item 21, UN Doc A/Conf.151/26 (1992), § 26.

³³ See, e.g., *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 242, ¶ 164 (June 27, 2012).

³⁴ Edmonson, E.

³⁵ See also Anaya, J., *Indigenous Peoples' Participatory Rights in Relation to Decisions About Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources*, 22 Arizona Journal of International and Comparative Law 7, 7 (2005).

³⁶ U.N. Human Rights Council, Report of the Special Rapporteur on the Rights of Indigenous Peoples, U.N. Doc A/HRC/21/47, ¶ 59 (July 6, 2012) [hereinafter UNHRC 2012].

³⁷ 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).

UN Guiding Principles for Business and Human Rights,⁴¹ and the Organization for Economic Cooperation and Development (OECD) Guidelines for Multi-National Enterprises.⁴² Some national or regional laws and policies also impose an obligation on corporations to engage with Indigenous Peoples.⁴³

Many companies recognize that communities may not accept compliance with legal requirements as sufficient, and that further work by the company is required to ensure that projects have a broad, ongoing approval and acceptance.⁴⁴ Companies may therefore be required to “fill in the gaps” identified in governmental processes.⁴⁵ The most effective way to do this is for outsider entities to ascertain the potentially affected Indigenous Peoples’ expectations for engagement and consultation, including potential Access and Benefit Agreements.⁴⁶

In many industries, engagement is a standard practice, incorporating legal and societal expectations. Such engagement is often a part of corporate social responsibility (CSR) through which companies seek to achieve a “social license to operate.” The process has emerged out of a response to Indigenous community demands that companies behave within the community’s “well-set political, social, economic, traditional, and cultural space.”⁴⁷ As a result CSR-driven engagement can be more meaningful than formal consultation required by law. On the other hand, CSR can also be used to stifle communication that is critical of proposed development and

³⁸ See, e.g., Arctic Council Sustainable Development Working Group, Circumpolar Information Guide on Mining for Indigenous People and Northern Communities (2011) [hereinafter SDWG Mining Guide].

³⁹ The Northern forum recommends “resource development and business activities” to respect “cultural and traditional values and ways of life” and consult with Indigenous Peoples in resource decision-making process. Garipova, L., *Corporate Social Responsibility in the Arctic*, 104 Georgetown Law Journal 973, 984 (2015).

⁴⁰ The United Nations Global Compact, Principle 1. See also, Lehr, A., Indigenous Peoples’ Rights and the Role of Free, Prior and Informed Consent: A Good Practice Note endorsed by the United Nations Global Compact Human Rights and Labour Working Group (Feb. 20, 2014) [hereinafter Global Compact Good Practice].

⁴¹ Guiding Principles, *supra* n. 11. The Guiding Principles were endorsed by the UN Human Rights Council in Resolution 17/4 on human rights and transnational corporations and other business enterprises, UN Doc. A/HEC/17/L.17/Rev.1 (June 16, 2011).

⁴² OECD Guidelines for Multi-National Enterprises, OECD Publishing (2011).

⁴³ See, e.g., Mackenzie Valley Land and Water Board, Engagement and Consultation Policy at 10-11 (2013). [hereinafter MVLWB Policy]; 50 C.F.R. §§ 216.104(a)(12) & 18.124 (U.S. regulations requiring “plan of cooperation.”)

⁴⁴ Poelzer, G., *A Stake in Mining: Participatory Elements in Swedish Mine Development*, 39 The Northern Review 39, 43 (2015) [hereinafter Poelzer 2015].

⁴⁵ U.N. Human Rights Council, Report of the Special Rapporteur on the Rights of Indigenous Peoples, Extractive Industries and Indigenous Peoples, ¶ 54, U.N. Doc A/HRC/24/41 (July 1, 2013); Global Compact Good Practice, *supra* n. 40 at 13.

⁴⁶ Ginoogaming First Nation, Resource Development Office, Consultation and Accommodation Protocol at 5 (2014) [hereinafter Ginoogaming Consultation Protocol].

⁴⁷ Espiritu, A., *Kautokeino and Kvaslund Compared: Rejection and Acceptance of Mining in Communities in Northern Norway*, 39 The Northern Review 53, 60 (2015).

neutralize opposition.⁴⁸ Additionally, by their very nature, corporations cannot replace government in ensuring social welfare (including Indigenous rights).⁴⁹

These corporate commitments are often identified in Indigenous engagement policies.⁵⁰ This type of policy is a way of embedding a commitment to respect human rights, including Indigenous engagement, “from the top of the business enterprise through all of its functions.”⁵¹ The policy will typically articulate a minimum standard that the company will meet, even if national law does not require it.”⁵² The policy commitment is most meaningful when it is approved at the highest level, well informed, clearly elucidates expectations, is publicly available and is reflected in operational policies and procedures.⁵³

D. Researchers, NGOs, financial institutions, and development organizations

Although existing laws, policies, and procedures are primarily focused on engagement between Indigenous Peoples and governments and/or companies, guidance also exists for other entities operating in the Arctic. For example, the Global Environmental Facility,⁵⁴ the International Finance Corporation,⁵⁵ the World Bank,⁵⁶ and the International Funders for Indigenous Peoples⁵⁷ each have identified good practices for Indigenous engagement by financial institutions or foundations funding activities that may affect Indigenous Peoples. Within the Arctic, Alaska’s North Pacific Research Board requires Indigenous engagement for any research funded by the organization.⁵⁸ There are guidelines for researchers as well.⁵⁹ Some conservation groups, such as WWF (formerly known as the World Wildlife Fund and World Wide Fund for Nature),⁶⁰ the International Union for the Conservation of Nature (IUCN),⁶¹ and Conservation International (CI)⁶² have created policies for engagement with Indigenous Peoples that can provide guidance

⁴⁸ See, e.g., Parsons, R. *We are all stakeholders now: the influence of western discourses of “community engagement” in an Australian Aboriginal community*. *Critical Perspectives on International Business* 399-126 (2008).

⁴⁹ See, e.g. Banerjee, S. *Corporate social responsibility: The good, the bad and the ugly*. 34.1 *Critical sociology* 51-79(2008).

⁵⁰ Guiding Principles, *supra* n. 11, ¶ 16; Global Compact Good Practices, *supra* n. 40 at 10-11.

⁵¹ Guiding Principles, *supra* n. 11, ¶ 16.

⁵² Global Compact Good Practices, *supra* n. 40 at 11.

⁵³ *Id.*; see also *The Corporate Responsibility to Respect Human Rights supra* n. 8 at 26-27.

⁵⁴ Global Environment Facility, *Principles and Guidelines for Engagement with Indigenous Peoples*. (n.d.) [hereinafter GEF Principles].

⁵⁵ International Finance Corporation, *Stakeholder Engagement: A Good Practice Handbook for Companies Doing Business in Emerging Markets* (2007) [hereinafter IFC Good Practice Handbook].

⁵⁶ World Bank Operations Manual, OP 4.10 Indigenous Peoples (April 2013).

⁵⁷ International Funders for Indigenous Peoples, *Funding Indigenous Peoples: Strategies for Support* (2015) [hereinafter IFIP Strategies for Support].

⁵⁸ North Pacific Research Board, *2014 Request For Proposals* (2013).

⁵⁹ U.S. Interagency Arctic Research Policy Committee, *Principles for the Conduct of Research in the Arctic* [hereinafter IARPC Principles].

⁶⁰ *Indigenous Peoples and Conservation: WWF Statement of Principles* (2008) [hereinafter WWF Principles].

⁶¹ IUCN Environmental and Social Management Systems Standard on Indigenous Peoples (2016) [hereinafter IUCN Standard].

⁶² CI, *Indigenous Peoples And Conservation International: Principles For Partnerships* (n.d.) [hereinafter CI Principles].

to non-governmental organizations (NGOs) working in the Arctic. Policies also exist for international development projects, which can serve as a useful reference for entities operating in the Arctic.⁶³

E. Indigenous Peoples' authority on the obligation of engagement

A fundamental principle of Indigenous engagement is that Indigenous Peoples should be equal partners in the development of institutional structures, laws, and policies that address Indigenous rights and issues.⁶⁴ Government, researchers, and other organizations can take steps to include Indigenous Peoples in the formation of their engagement standards. In Norway, for example, the Parliament engaged with Indigenous Peoples when drafting the legislation that implemented some of Norway's international obligations towards Indigenous Peoples.⁶⁵ In Canada, the federal government engaged with Indigenous Peoples before creating its federal policy on consultation and accommodation, documented the views expressed by Indigenous Peoples, and then sought additional feedback on its summary of the input provided.⁶⁶ Similarly, Indigenous Peoples had significant input into the creation of the UNDRIP. Indigenous engagement on laws and policies which address Indigenous rights can "help to build a continuum of communication" between various organizations and Indigenous Peoples.⁶⁷

Many Indigenous Peoples support their role in the development of engagement standards by creating their own engagement policies and identifying how engagement with their community should take place. Some of the existing protocols are grounded in Indigenous laws, worldviews, and values.⁶⁸ For example, the Hul'qumi'num consultation policy provides a detailed explanation of the six First Nations forming the Treaty Group, including their rights, history, and culture.⁶⁹ The Hul'qumi'num consultation policy is explained in terms of their own traditional principles, providing an Indigenous-centered view of meaningful engagement.⁷⁰ The majority of these protocols are aimed at engagement with companies and governments.⁷¹ Other protocols are designed for specific industries, such as the Innu Nation guidelines for mining companies.⁷² Fewer are aimed specifically at research projects⁷³ or at outside entities generally.⁷⁴ Some

⁶³ Akwé Kon: Voluntary Guidelines, *supra* n. 13; UNDP and Indigenous Peoples: A Policy of Engagement (n.d.).

⁶⁴ Exec. Order No. 13175, *supra* n. 7 (stating "federal agencies should defer to Alaska Native tribes to establish standards for consultation"); Anaya, *supra* n. 35 at 11; A Circumpolar Inuit Declaration on Resource Development Principles in Inuit Nunaat [hereinafter ICC Resource Development Declaration].

⁶⁵ Broderstad, E., *The Finnmark Estate*, 39 *The Northern Review* 8, 12 (2015).

⁶⁶ INAC Aboriginal Input, *supra* n. 6.

⁶⁷ National Association of Tribal Historic Preservation Officers, *Tribal Consultation: Best Practices in Historic Preservation* (2005) at 11 [hereinafter *Best Practices in Historic Preservation*].

⁶⁸ *Advancing an Indigenous Framework for Consultation and Accommodation in BC, Report On Key Findings Of The BC First Nations Consultation And Accommodation Working Group at 20* (The First Nations Leadership Council, 2013).

⁶⁹ Hul'qumi'num Member First Nations and Hul'qumi'num Treaty Group Consultation Policy (2006) [hereinafter *Hul'qumi'num Consultation Policy*].

⁷⁰ *Id.*

⁷¹ *See, e.g.*, Ginoogaming Consultation Protocol, *supra* n. 46; Taykwa Tagamou Nation Community Consultation Protocol (2011).

⁷² *Exploration in Nitassinan: A Matter of Respect: Innu Nation Guidelines for the Mining Industry* (n.d.).

⁷³ *Alaska Federation of Natives Guidelines for Research* (1993) [hereinafter *AFN Guidelines*].

guidelines are for use by outsiders, while others are created by Indigenous Peoples for internal use.⁷⁵ Indigenous Peoples can promote the uptake of their engagement protocols by following up with government and other organizations to discuss how their engagement protocols should be incorporated into those entities' engagement practices.⁷⁶

⁷⁴ In This Place: A Guide for those who work in the Country of Kaktovikmiut (n.d.) [hereinafter In This Place].

⁷⁵ See, e.g., Inuit Tapiriit Kanatami, *Negotiating Research Relationships: A Guide for Communities* (1998) [hereinafter ITK Guide for Communities].

⁷⁶ Manitoba Metis Federation, *Understanding Resolution 8. Tripartite Government Negotiations* (n.d.).

IV. Common Good Practices for Engagement in Arctic Marine Activities

In the Arctic, many common practices of Indigenous engagement that were developed in the context of land-based activities have been applied to marine activities as those activities have increased. In addition, some obligations for Indigenous engagement are now reflected in laws, policies, and practices specifically related to marine activities.⁷⁷ All of the examples provided below are practices that occur in Arctic Council nations, although some have taken place in non-Arctic regions of those countries. However, these practices are included because they serve as insightful guidance to address new activities that are occurring in adjacent Arctic territory. The common themes that these standards share, regardless of their source or the entity to which they apply, suggest that good practices for engagement can be applied to a broad range of activities in the Arctic.

These practices include:

- A. Timeliness: engagement is early in the process and prior to any decisions
- B. Adequate preparation: all parties prepare in advance
- C. Identification of who will participate in engagement and the design of authority to those individuals
- D. Identification of the activities that require engagement and of the degree of engagement that is necessary
- E. Comprehensive, culturally appropriate information sharing
- F. Ongoing communication focused on relationship-building
- G. A good faith intent to reach consensus and mitigate impacts
- H. Consent in some cases may be required by Indigenous Peoples before activities can proceed
- I. Accountability: measures to ensure accountability are built into the engagement process
- J. Shared economic and other benefits
- K. Shared decision-making and management authority
- L. Honoring the autonomy and human rights of Indigenous Peoples

The following sections discuss each of these aspects of meaningful engagement in more detail. Each section begins with a description of the best practice, then provides an overview of relevant Arctic Council's recommendations, and finally presents specific examples of these practices and recommendations from Indigenous Peoples, the Arctic Council, businesses, NGOs, researchers and academics.

A. Timeliness

Engagement must begin at the earliest possible time, so that there are “real opportunities to

⁷⁷ See, e.g., Eeyou Marine Region Land Claims Agreement Act, S.C. 2011.

inform and influence decisions before they are made.”⁷⁸ Sometimes referred to as “prior,” this concept is a cornerstone of engagement in national and international law and a key component of successful engagement.⁷⁹ “Prior” means initiating engagement well in advance of proposed activities and providing Indigenous Peoples and communities with the time they need to develop and build relations, consider all relevant information, and make decisions.

The Arctic Council has made various recommendations for prior, timely engagement.⁸⁰ The Arctic Council has noted the need for this practice in planning its own projects⁸¹ and has recommended the same for other entities engaged in Arctic activities.⁸² These recommendations emphasize the importance of allowing adequate time for engagement to allow relationships to develop, to improve broad, strategic planning as well as specific project plans, and to ensure the legitimacy of the decision-making process.

1. Early stage of decision-making and planning

Engagement between Indigenous Peoples and others must begin as early as possible. When Indigenous Peoples and communities are engaged at an early, strategic or high level of decision-making, they have more influence, or fate control, over the decisions that affect their interests, rights, and ultimately their future. The ability to exercise this influence is a fundamental aspect of well-being and human development in the Arctic.⁸³ Another advantage is that, at this stage, all parties involved can have a better understanding of cumulative effects at broader regional scales and there is a higher likelihood that those effects can be adequately mitigated. Finally, Indigenous engagement for strategic-level planning can help to ensure that engagement itself is more effective and efficient, reducing the burden on Indigenous communities.

The Arctic Council involves Permanent Participants at an early stage of conducting its assessments. For example, in preparation for the Arctic Marine Shipping Assessment, Canada prepared an analysis of the impacts of increased shipping on Indigenous Peoples, and consulted with Permanent Participants while conducting this research.⁸⁴ The Sustainable Development Working Group has recommended that for Arctic Council projects, Indigenous Knowledge considerations should be incorporated at the outset, so that every project proposal or outline described how it will use Indigenous Knowledge in the project or explain why Indigenous Knowledge is not relevant.⁸⁵

⁷⁸ INAC Guidelines, *supra* n. 26 at 44.

⁷⁹ Best Practices in Historic Preservation, *supra* n.67 at 22.

⁸⁰ Arctic Council Sustainable Development Working Group, Recommendations for the Integration of Traditional and Local Knowledge into the Work of the Arctic Council (2015) [hereinafter SDWG IK]; SDWG Mining Guide, *supra* n. 38; Arctic Council Arctic Monitoring and Assessment Programme, Arctic Oil and Gas at vi (2007) [hereinafter AMAP Oil and Gas]; Arctic Council Protection of the Arctic Marine Environment Working Group, Arctic Offshore Oil and Gas Guidelines at 19 (2009) [hereinafter PAME Offshore Oil and Gas].

⁸¹ See, e.g., AMAP Meeting Report 2013:2, Agenda item 4.1.

⁸² See, e.g., Creating a Roadmap Forward: the Arctic Marine Shipping Assessment. Workshop Report For October 22-24, 2009, University of Alaska Fairbanks and the University of the Arctic Institute for Applied Circumpolar Policy at 9 (Brigham, L. and M. Sfraga Eds., 2010) [hereinafter AMSA Roadmap Workshop Report].

⁸³ ASI 2010, *supra* n. 12 at 12.

⁸⁴ Social and Economic Considerations for AMSA (Integrated Environments, 2008).

⁸⁵ SDWG IK, *supra* n. 80.

Indigenous protocols for consultation specifically identify strategic and long-term planning as stages during which consultation is expected.⁸⁶ Other organizations also support the need for timely engagement. For research, development, and conservation projects, the earliest opportunity for engagement is before a project is planned, and certainly before activities start.⁸⁷ Some researchers seek consent before submitting applications for funding a project in an Indigenous community.⁸⁸ Companies can also begin engagement, as well as an assessment of the project's potential impacts and benefits, as early as possible.⁸⁹ Engagement during the project-planning stage by companies is important for establishing good will. In a study about the engagement practices of mining companies in Sweden, much of the trust established between the community and the mining company developed out of the significant work done by company owners and executives early in the process.⁹⁰ As the Sustainable Development Working Group recommends, "companies are encouraged to consult with community leaders and to work with them to communicate with the local population early in the planning stages of the project."⁹¹

For government decision-making, the earliest opportunity for engagement is often through processes that relate to broad and strategic decisions about how an area will be used and managed. It is at this stage when fundamental decisions are made, such as whether and what kind of development is appropriate. Governments may make these decisions through regional strategic environmental assessments, which are a process designed to systematically assess the potential environmental and socioeconomic effects, including cumulative effects, of alternative strategic initiatives, policies, plans, or programs for a particular region.⁹² The Arctic Council recommends the use of Indigenous Knowledge and meaningful stakeholder and public involvement at the SEA stage.⁹³ Government decision-making related to policies at the circum-Arctic level, such as at the Arctic Council or in other forums for international cooperation on Arctic issues, is also an important early opportunity to involve Indigenous Peoples.⁹⁴ Certain global policy-making processes, such as those related to climate change, also have direct implications for Indigenous Peoples in the Arctic and engagement at these levels is also warranted.⁹⁵

⁸⁶ Ginoogaming Consultation Protocol, *supra* n. 46 at 6.

⁸⁷ IARPC Principles, *supra* n. 59; IFIP Strategies for Support, *supra* n. 57 at 7; WWF Principles, *supra* n. 60 at 7.

⁸⁸ Raymond-Yakoubian, J. et al, Indigenous Knowledge and Use of Bering Strait Region Currents at 5 (2014).

⁸⁹ Good Practices in Community Engagement and Readiness at 17 (Energy and Mines Ministers' Conference, Aug. 2014); Guiding Principles, *supra* n. 11 ¶ 18.

⁹⁰ Poelzer 2015, *supra* n. 44 at 47.

⁹¹ SDWG Mining Guide, *supra* n. 38.

⁹² Canadian Council of Ministers of the Environment, Regional Strategic Environmental Assessment in Canada, Principles and Guidance at 6 (2009).

⁹³ PAME Offshore Oil and Gas, *supra* n. 80 at 17.

⁹⁴ See, e.g., Arctic Council Kiruna Declaration (2013) ("recognizing the rights of the Indigenous Peoples and interests of all Arctic inhabitants, and emphasizing that a fundamental strength of the Council is the unique role played by Arctic Indigenous Peoples"); Inuit Circumpolar Council, Inuit Arctic Policy (n.d.) [hereinafter ICC Arctic Policy]; See also U.S. Government Accountability Office, Better Direction and Management of Voluntary Recommendations Could Enhance U.S. Arctic Council Participation, #14-435 at 28 (2014) (noting the challenge that agencies have in incorporating Alaska Native input into Arctic policymaking process).

⁹⁵ Anchorage Declaration, Indigenous Peoples' Global Summit on Climate Change (2009) [hereinafter Anchorage Declaration].

Not all Arctic governments have frameworks providing for Indigenous engagement at these broad, strategic levels. Even so, inclusion of Indigenous Peoples and communities at this stage is good practice because, as the U.S. National Association of Tribal Historic Preservation Officers explains, it helps to ensure that the government's plans will be realistic, comprehensive and durable.⁹⁶ Additionally the ILO points out that if Indigenous Peoples' rights are reflected in broader policies, "it will likely be easier to reach agreement and consent on specific measures or projects affecting their lands and territories."⁹⁷

Some governments do not require consultation at the earliest stage, such as before tendering concessions or approving exploration for extractive activities. When, exactly, a proposed activity may affect Indigenous Peoples and therefore require engagement might vary substantially by activity and context.⁹⁸ However, "to consistently meet the minimum standards that regional human rights courts, national courts, and U.N. treaty bodies might impose, companies would be well-advised to ensure that consent has been obtained before exploration begins. Such an approach also provides a solid footing for long-term relations with the affected communities."⁹⁹ The ILO handbook advises, "Indigenous Peoples must be informed, consulted and participate from the very outset of a planned intervention, including before concessions or licenses are granted to operators."¹⁰⁰ The Arctic Council Arctic Monitoring and Assessment Programme (AMAP) similarly recommends that Indigenous communities be consulted prior to opening new geographical areas for oil and gas exploration and development.¹⁰¹

Some Indigenous engagement policies explicitly require consultation at the exploration stage.¹⁰² Consultation at this stage may also be required directly by an agreement between the Indigenous Peoples and the government. For example, in Canada, the Sahtu Dene and Métis Comprehensive Land Claim Agreement requires the government to consult prior to opening any lands for oil and gas exploration.¹⁰³

Although meaningful engagement can begin at a much earlier stage, formal consultation by governments is often concurrently required with environmental impact assessments (EIA). These assessments must be performed early enough to influence decisions and help formulate alternative approaches.¹⁰⁴ Early engagement at this stage includes input from Indigenous Peoples about the scope of environmental studies that will support the EIA.¹⁰⁵ Engagement in the EIA

⁹⁶ Best Practices in Historic Preservation, *supra* n. 67 at 11.

⁹⁷ ILO, Understanding the Indigenous and Tribal Peoples Convention (2013) at 16 [hereinafter ILO Handbook].

⁹⁸ Global Compact Good Practices, *supra* n. 40 at 15.

⁹⁹ *Id.*

¹⁰⁰ ILO Handbook at 23.

¹⁰¹ AMAP Oil and Gas, *supra* n. 80 at vi.

¹⁰² See, e.g., Temagami First Nation, Community Consultation Protocol, Step 3: Consultation at Exploration Stage (2013) [hereinafter Temagami Protocol].

¹⁰³ Sahtu Dene and Métis Comprehensive Land Claim Agreement, Aug. 27, 1993, §22.1.2. Once the exploration right is granted, the grantee must first consult with the Sahtu Tribal Council to set out the parameters of that exploration. See *id.* § 22.1.3.

¹⁰⁴ ICC Arctic Policy, *supra* n. 94.

¹⁰⁵ Ginoogaming Consultation Protocol, *supra* n. 46 at 7 (explaining that a meaningful role in environmental assessment includes establishing the scope and terms of reference for the assessment).

process helps to support evidence based decision making, as Indigenous Peoples can provide essential context and information. Early engagement can also include input from Indigenous Peoples about the stipulations that will be imposed on the activity. For example, during Canada's Labrador Shelf environmental assessment, the Inuit regional Nunatsiavut Government jointly determined with the regulatory agency what mitigation measures and restrictions would be applied to future offshore development.¹⁰⁶ The participation of Indigenous Peoples in EIAs "should be facilitated through adequate training and funding."¹⁰⁷

Management plans and formal policies guiding Indigenous engagement do not exist for all sectors. To support timely engagement for those activities, these sectors can prioritize the development of policies applicable to their activities, and governments can provide additional guidance for a broader range of activities. For example cruise ship tourism policies could be developed in collaboration with Indigenous Peoples for meaningful engagement.¹⁰⁸

Indigenous Peoples and communities should not only respond and be able to influence externally initiated proposals, but should actively propose measures, programs and activities that shape their development.¹⁰⁹ For example, Indigenous Peoples and communities can strengthen their ability to influence the activities that take place in their communities by creating a community development or management plan that meets their desires for future economic development and the protection of cultural heritage and environmental resources.¹¹⁰ One early example is the Nuiqsut Cultural Plan, which in 1979 defined the cultural landscape and community land use and identified development objectives including the establishment of the historical, cultural, and subsistence resources and values as major considerations in land-use planning, development, and operations.¹¹¹ A more recent example of a community development plan is the Gambell Local Economic Development Plan, which, among other things, identifies the community's vision, values, and top priority development projects.¹¹² Another example is the Gwich'in Land Use Plan, which mapped areas of significant value and use, ranked the natural and cultural values of the area with the potential for development, and created three zones (general use, special management, and conservation and heritage).

The Arctic Marine Shipping Assessment recommends surveys of marine use by Indigenous communities.¹¹³ The Aleut International Association, an Arctic Council Permanent Participant, is working on a project to enable communities to map their own use of marine waters. In the Bering Sea, Indigenous Peoples have created guidance to help ensure maps identifying Indigenous

¹⁰⁶ Fidler, C. and Noble, B., *Advancing strategic environmental assessment in the offshore oil and gas sector: Lessons from Norway, Canada, and the United Kingdom*, 34 *Env'tl Impact Assessment Rev.* 12, 15 (2012).

¹⁰⁷ ICC Arctic Policy, *supra* n. 94.

¹⁰⁸ Marquez, J. and Eagles, P., *Working Towards Policy Creation For Cruise Ship Tourism In Parks And Protected Areas Of Nunavut*, 4:2 *Tourism in Marine Environments*, 6-8 (2007).

¹⁰⁹ ILO Handbook, *supra* n. 97 at 19.

¹¹⁰ Akwé Kon: Voluntary Guidelines, *supra* n. 13 at 22, 24.

¹¹¹ Nuiqsut Heritage - A Cultural Plan at 41(1979).

¹¹² Gambell Local Economic Development Plan 2012-2017.

¹¹³ Arctic Council, Arctic Marine Shipping Assessment at 6 (2009) [hereinafter AMSA].

values and containing Indigenous Knowledge are not misused.¹¹⁴ Indigenous use mapping can help communities to define a vision for future use of their marine waters.

Indigenous Peoples can also seek to influence management policies by articulating their own methods of natural resource management. For example, Bering Sea communities documented traditional forms of marine mammal management.¹¹⁵ Similarly, the Alaska Nanuuq Commission catalogued Indigenous Knowledge about polar bear behavior, abundance, and habitat and described traditional hunting regulations and cultural values.¹¹⁶

Governments and other parties can provide the necessary support and capacity for Indigenous Peoples and communities to create these broad-based plans and take them into account. For example, Canadian law requires the government to abide by the Gwich'in plan.¹¹⁷ More generally, in the U.S., departments are required to “give deference” to Indigenous conservation and management plans.¹¹⁸

Indigenous Peoples can also pro-actively seek engagement by forming Indigenous-led associations to develop relationships with outside entities. For example, the Canadian Aboriginal Minerals Association “seeks to increase the understanding of the minerals industry, Aboriginal mining and Aboriginal communities' paramount interests in lands and resources.”¹¹⁹

2. Sufficient time before decisions about the activity are made

Another aspect of “prior” engagement and consultation is that Indigenous Peoples and communities are able to provide their view on the potential impacts of proposed activities sufficiently in advance of start up.¹²⁰ Indigenous Peoples needs time to get to know the issues involved in a proposed activity, develop trust and build relationships with the people involved, discuss proposed activities among themselves and with others, and plan and assess the potential opportunities and impacts of an activity. Sufficient time is also necessary before meetings that constitute formal consultations.¹²¹

¹¹⁴ Kawerak, Inc., *Qualitative Participatory Mapping of Seal and Walrus Harvest and Habitat Areas: Documenting Indigenous Knowledge, Preserving Local Values, and Discouraging Map Misuse*, 6:1 Int'l J. Applied Geospatial Research 76-93 (Jan-Mar. 2015).

¹¹⁵ Kawerak, Inc., *Traditions of Respect* (2013).

¹¹⁶ Alaska Nanuuq Commission, *Nanuuq: Local and Traditional Ecological Knowledge of Polar Bears in the Bering and Chukchi Seas* (2012).

¹¹⁷ Mackenzie Valley Resource Management Act - S.C. 1998, c. 25 (Section 46).

¹¹⁸ American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act, Secretarial Order 3206 (June 5, 1997) [hereinafter Sec. Order 3206].

¹¹⁹ Canadian Aboriginal Minerals Association.

¹²⁰ *See, e.g.*, 16 U.S.C. § 3120(a) (2012); *See also*, Procedures for Consultations between State Authorities and The Saami Parliament (2005).

¹²¹ The National Congress of American Indians recommends that this information be provided a minimum of two month before the first meeting. Testimony of the of American Indians Before the House Natural Resources Committee^{SEP} on HR 5608^{SEP} “Consultation and Coordination with Indian Tribal Governments Act” April 9, 2008, Proposed minimum requirements of a valid consultation prior to taking federal action [hereinafter NCAI Testimony].

According to the U.N. Guidelines on Free, Prior and Informed Consent (FPIC), “free” refers to a process without externally imposed timelines and “prior” includes respect for time requirements of Indigenous consultation or consensus processes.”¹²² The time that an Indigenous group requires to determine whether proposed activities may affect their rights or interests will depend on the project, the capacity of the Indigenous group, their prior experience reviewing similar projects, and their cultural traditions. As explained by one Canadian tribal council, “it can take at least 180 days and often much longer for a First Nation to understand how a project under review might impact Aboriginal rights and title.”¹²³ Although outside entities may accrue financial costs from a protracted engagement process, this price “is likely to be small compared to those stemming from an inadequate engagement process.”¹²⁴ Indeed, as some companies recognize, “Engagement and relationship-building are an investment, not a cost.”¹²⁵ Laws and policies that provide for project approval timelines can explicitly incorporating adequate time for Indigenous engagement.

B. Adequate preparation

Engagement is more effective when all parties are adequately prepared. Preparation can include having engagement policies and MOUs in place, being informed about the scope of proposed activities through the sharing of information among parties, and ensuring a clear understanding of any legal requirements for consultation.

Although engagement recommendations exist in various Arctic Council reports and assessments, the Arctic Council has not created its own Indigenous engagement policy. However, the SDWG has provided recommendations for incorporating Indigenous Knowledge into Arctic Council projects. The Permanent Participants provide a clear entry point for Indigenous engagement within the Council. A follow-up workshop to AMSA recommended that the Permanent Participants monitor progress and mechanisms for Indigenous engagement.¹²⁶ The Arctic Council has made few, if any, recommendations for other entities to create Indigenous engagement policies or to create MOUs or agreements to govern engagement processes.

Indigenous groups can be prepared for engagement by creating internal and external protocols. An internal protocol can identify community objectives, a description of the community’s decision making process throughout engagement, staff responsibilities, and a process for tracking engagement. The internal protocol can also identify a process for receiving and responding to requests for engagement. This process can include an initial screening of the request for engagement to determine if engagement may be warranted and a method of responding to the request within a defined timeframe.¹²⁷ The process can also include a broader decision-making

¹²² Report of the International Workshop on Methodologies Regarding Free Prior and Informed Consent, E/C.19/2005/3 (Feb. 17, 2005) [hereinafter FPIC Methodologies Report].

¹²³ Carrier Sekani Tribal Council, First Nations Perspectives on the BC Environmental Assessment Process For Discussion Purposes at 9 (2007) [hereinafter Carrier Sekani Tribal Council Perspectives].

¹²⁴ Global Compact Good Practice, *supra* n. 40 at 14.

¹²⁵ Good Practices in Community Engagement and Readiness, *supra* n. 89 at 30.

¹²⁶ AMSA Roadmap Workshop Report, *supra* n. 82 at 9.

¹²⁷ *See, e.g.*, ITK Guide for Communities, *supra* n. 75; Temagami Protocol, *supra* n. 102, Step 2: Screening (2013).

framework to guide a comprehensive evaluation of proposed projects against a community's development plans and cultural and environmental protection policies.¹²⁸

External engagement protocols can specify the community's expectations with respect to consultation and engagement processes.¹²⁹ Some of these protocols are accompanied by descriptions of traditional territory.¹³⁰

Resource development committees can provide a clear entry point into communities for outsiders, facilitate a coordinated response to project proposals, provide a vehicle for the development of guidelines and protocols, and foster the development of expertise needed to negotiate favorable Impact Benefit Agreements (IBAs).¹³¹

Indigenous organizations need a consistent baseline level of resources to meet even the most basic administrative responsibilities related to engagement.¹³² Governments can work with Indigenous Peoples and communities to determine how to support these needs.¹³³ Beyond securing adequate resources to cover operational expenses related to engagement, Indigenous Peoples also face the difficult challenge of determining how much of their lives and traditions to sacrifice in meeting the demands of engagement. As the Alaskan community of Nuiqsut articulated nearly 40 years ago:

The new system involves indirect communications with strangers and few measurable results. This would be bad enough if there were basic agreement on desired results. But often the two cultures are far apart on both ends and means because of profoundly different cultural ideals. Nuiqsut's dilemma stems from these cultural cross-purposes. If, in the attempt to save their heritage, village people become immersed in the meeting-paperwork-telephone world of the new culture, they may be indirectly co-opted. If, in frustration, they withdraw to pursue traditional activities, they may forfeit their heritage by inaction.¹³⁴

For Indigenous Peoples, having adequate time and resources to adequately prepare for engagement is particularly important because it facilitates their ability to weigh trade-offs in both the engagement process itself as well as with the proposed activity. This preparation better enables Indigenous Peoples to make decisions based on their knowledge, internal decision-making processes, cultural norms, and traditional management. Increased cooperation among

¹²⁸ See, e.g., Assembly of Alaska Native Educators, Guidelines for Respect Cultural Knowledge at 20 (2000) (recommending that each community and region establish a process for reviewing and approving research proposals that may impact their area) [hereinafter AANE Guidelines].

¹²⁹ See generally, Environmental Law Institute, Handbook: Model Alaska Native Consultation Procedures for guidance in creating an Indigenous Consultation Policy (2016) [hereinafter ELI Consultation Handbook].

¹³⁰ See, e.g., Beaver Lake Cree Nation Process for Consultation (2012); Policy for Consultation on the Referrals for Resource Development Activities within the Traditional Lands of the Frog Lake First Nation (2007).

¹³¹ Hipwell, W. et al, Aboriginal Peoples and Mining in Canada: Consultation, Participation and Prospects for Change at 19 (2002).

¹³² Marine Mammal Commission, Review of Co-Management Efforts in Alaska at 10 (2008) [hereinafter MMC Report].

¹³³ *Id.* at 15.

¹³⁴ Nuiqsut Cultural Plan at 44 (1979).

Indigenous communities across the Arctic on engagement issues is an important aspect of advanced planning and ongoing engagement for Indigenous Peoples because it enables them to better advocate and argue for their rights.¹³⁵

Inuit Tapiriit Kanatami has provided guidance to researchers about how they can be adequately prepared for engagement.¹³⁶ For governments seeking to fulfill the legal requirements of formal consultation, department or agency-level Indigenous consultation procedures and communications protocols can be helpful by providing a more detailed explanation of how a particular government office should prepare for engagement.¹³⁷ Similarly, corporate communications or engagement plans can help guide a project proponent's preparation for engagement.¹³⁸ These types of plans often build off the broader principles identified in the corporation's Indigenous engagement policy.¹³⁹ For companies, engagement is most successful when managed like any other business function – with a well-defined strategy and systemic approach.¹⁴⁰ It is equally important that this approach includes flexibility.

An MOU or joint consultation or engagement plan among the parties can help to clarify mutual expectations as to how the engagement process will occur.¹⁴¹ The process of creating a plan helps relationship building and creates an equitable platform. Trust and respect are also developed as engagement proceeds in accordance with the protocol over time. In Canada, Indigenous Peoples have emphasized the importance of these protocols or plans. For example, Inuit Tapiriit Kanatami recommends that researchers negotiate a research relationship to ensure responsible, reciprocal, and mutually beneficial research.¹⁴² An example of an MOU for a development project is that between the government of Canada and the Dene Tha' First Nation for the MacKenzie Gas Project, which includes guiding principles, the specific representatives that should be contacted, and a process and timetable for identifying and discussing concerns and information, as well as potential impacts, mitigation and accommodation. The protocol also addresses funding and dispute resolution.¹⁴³ In Norway, government authorities and the Saami

¹³⁵ ICC Arctic Policy, *supra* n. 94; Langhelle, O. and Hansen, K., *Perceptions of Arctic challenges: Alaska, Canada, Norway and Russia Compared*, in Arctic Oil and Gas, Sustainability at Risk? at 340 (Mikkelsen, A. and Langhelle, O., eds, 2008); Bering Strait Alliance, Arctic Summit Framework Agreement among Indigenous Peoples for the Bering Strait Region (2015).

¹³⁶ Inuit Tapiriit Kanatami and Nunavut Research Institute, *Negotiating Research Relationships with Inuit Communities: A Guide for Researchers* (2007) [hereinafter ITK Guide for Researchers].

¹³⁷ *See, e.g.*, U.S. Army Corps of Engineers, Tribal Consultation Policy (Nov. 1, 2012); U.S. EPA Region 10, North Slope Communications Protocol (2009).

¹³⁸ *See, e.g.*, IFC Good Practice Handbook, *supra* n. 55, Appendix 3.

¹³⁹ *See, e.g.*, Canadian Association of Petroleum Producers, *Developing Effective Working Relationships with Aboriginal Communities* at 6-8 (2006).

¹⁴⁰ IFC Good Practice Handbook, *supra* n. 55 at 8.

¹⁴¹ Aboriginal Engagement Task Group of the Intergovernmental Working Group on the Mineral Industry, *Aboriginal Engagement in the Mining and Energy Sectors: Case Studies and Lessons Learned. 2008 Report to Energy and Mines Ministers* at 7; Akwé Kon: Voluntary Guidelines, *supra* n. 13 at 12; NOAA Procedures for Government-to-Government Consultation With Federally Recognized Indian Tribes and Alaska Native Corporations at 7 (Nov. 12, 2013) [hereinafter NOAA 13175 Policy].

¹⁴² ITK Guide for Researchers, *supra* n. 136.

¹⁴³ Annex One To Settlement Agreement, The Mackenzie Gas Project And Connecting Facilities Consultation Protocol Between Her Majesty The Queen In Right Of Canada, As Represented By The Minister Of Indian Affairs And Northern Development And The Dene Tha' First Nation, As Represented By Its Chief And Council.

Parliament also make use of a jointly created consultation plan.¹⁴⁴

Similarly, a collaborative research agreement can identify the objectives and process for conducting scientific research.¹⁴⁵ Environmental groups and others conducting activities in the Arctic can propose analogous MOUs with Indigenous Peoples to govern their relationships generally or on specific projects.

C. Careful evaluation of the parties who will participate in the process

A meaningful process of engagement must respect the structure of Indigenous communities and their forms of governance; thus, Indigenous Peoples should be engaged through their representative institutions.

Within the Arctic Council, the Permanent Participants represent the Indigenous governance structure through which engagement with Indigenous Peoples takes place and are the first to advise and provide guidance on appropriate organizations and individuals to engage.¹⁴⁶ The Arctic Council recommends that States “consult and cooperate with the indigenous peoples concerned through their own representative institutions in order to understand and integrate their needs and concerns with any project affecting their lands or territories and other resources.”¹⁴⁷

For successful engagement, it is necessary for each entity to designate a representative and to know who has authority to represent the other entities. The designated representative should have decision-making authority. One of the most important factors of a successful engagement process is the level of leadership of those who participate in the process. For example, when the government representative is a high level person with authority to develop accommodations for the Indigenous interests at stake and the Indigenous representative is the leader of that Indigenous group, engagement is more likely to be viewed as successful.¹⁴⁸ Thus, for governments the representative should be an authorized official.¹⁴⁹ For companies, the representative should be from the enterprise itself, not an externally hired consultant.¹⁵⁰ The same principle could be reasonably applied to conservation organizations, researchers, and others who conduct activities in the Arctic.

For national governments, the legal requirements for consultation generally identify and define the Indigenous entity governments must engage with by law.¹⁵¹ Yet, these definitions omit the

¹⁴⁴ Procedures for Consultations between State Authorities and The Saami Parliament (2005).

¹⁴⁵ Collaborative Research Agreement between Shell and the North Slope Borough (2010).

¹⁴⁶ See, e.g., Arctic Council Permanent Participants, Ottawa Traditional Knowledge Principles (2015) [hereinafter Ottawa Principles].

¹⁴⁷ PAME Offshore Oil and Gas, *supra*, n. 80 at 19.

¹⁴⁸ Best Practices in Historic Preservation, *supra* n. 67 at 39; Newman, *supra* n. 16 at 483.

¹⁴⁹ Department of Interior Department Manual Part 512: American Indian and Alaska Native Programs, Chapter 4: Department of the Interior Policy on Consultation with Indian Tribes and Alaska Native Corporations (Nov. 9, 2015).

¹⁵⁰ The Corporate Responsibility to Respect Human Rights, *supra* n. 8 at 35.

¹⁵¹ See, e.g., Exec. Order No. 13175, *supra* n. 7 (consultation must occur with tribes on the Federally Recognized Indian Tribe List Act of 1994), Common List of Numerically Small Indigenous Peoples of Russia, N255 of 2000, and N760 of 2008.

concept of self-identification specified in international law.¹⁵² Thus, although national legal requirements may specify clearly with whom to engage, these requirements may not meet broader societal standards of Indigenous engagement. Organizations may therefore conduct their own determination as to whether a group is an Indigenous Peoples.¹⁵³ Another alternative, adopted by IUCN, is to adopt the ILO definition, which includes self-identification.¹⁵⁴ International organizations, such as the UN, have created guidance for identifying Indigenous Peoples, as well.¹⁵⁵ Using these methods and resources to identify with whom to engage, entities conducting Arctic marine activities can ensure that their engagement comports with international standards.

Even with legal definitions specifying the appropriate entity to contact, government agencies and other entities conducting activities in the Arctic face challenges keeping track of whom the actual people are who hold the relevant positions. Indigenous Peoples and communities can provide, such as through their engagement protocols, the names of Indigenous representatives who should be addressed in consultation or engagement requests.¹⁵⁶ Maintaining strong community connections can help an organization know the proper people to contact.¹⁵⁷

One way that strong community connections can be maintained is through the designation of community liaisons. The personal relationships and knowledge about the community that these liaisons develop can help organizations better understand not only how and with whom to consult, but also the broader context of engagement.¹⁵⁸ Government agencies are frequently required to establish liaisons.¹⁵⁹ For example, in the U.S., a “Community or Tribal Liaison Officer” maintains relationships with the community.¹⁶⁰ Often these are federal officials based outside the community, although sometimes they are based within the community, which is likely to be more effective.¹⁶¹ In Russia, local laws provide for governmental agencies, councils, and ombudspersons to maintain relations with and protect the interests of Indigenous Peoples.¹⁶²

¹⁵² See, e.g., ILO No. 169 art. 1(2) (stating “self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.”); UNDRIP art. 33 (referring to the rights of Indigenous Peoples to decide their own identifies).

¹⁵³ IFC Performance Standards, Performance Standard 7: Indigenous Peoples (2012); CI Principles, *supra* n. 62.

¹⁵⁴ IUCN Standard, *supra* n. 61.

¹⁵⁵ Laughlin, J. et al., UN-REDD Programme, Guidelines on Free, Prior and Informed Consent at 18–19 (Jan. 2013) [hereinafter UN-REDD Guidelines on FPIC]; UN Resource Kit on Indigenous Peoples Issues (2008).

¹⁵⁶ Ginoogaming Consultation Protocol, *supra* n. 46 at 13.

¹⁵⁷ Environmental Law Institute, Strengthening Government-to-Government Consultation Related to Marine Subsistence Resources at 13 (2015) [hereinafter ELI Government to Government Consultation].

¹⁵⁸ Dawson, J., et al, Cruise Tourism in Arctic Canada, Final Report (2012).

¹⁵⁹ For example, Exec. Order No. 13175 and the OMB Guidance require each department or agency to have a tribal consultation official, and some departmental/agency policies require and have tribal liaisons at the sub-agency level and/or at the regional level.

¹⁶⁰ U.S. Department of the Interior Secretarial Order 3317, Policy on Consultation with Indian Tribes (Dec. 2011).

¹⁶¹ See, e.g., ELI Government to Government Consultation, *supra* n. 157 at 27 (noting FWS and BLM offices in Barrow).

¹⁶² On Approval of Regulation on the State Committee of the Republic of Sakha (Yakutia) Decree No. 1896 (2013), art. 1.1; On the Ombudsperson for Rights of Indigenous Peoples in the Republic of Sakha (Yakutia) N 1220-H 1327-IV (2013); Executive Order 53 by ChAD Governor - On the Indigenous Small Peoples Board under ChAD Governor (2013).

Governments, companies, NGOs, and researchers can also hire Indigenous community members to act as liaisons between the Indigenous Peoples and the outside entity. Another alternative is to create community-led teams that include expertise on specific issues. For example, the AACA(a) report recommends the creation of a community led expert group, team, or network to address issues of climate vulnerability and adaptation.¹⁶³ Indigenous Peoples and communities can also benefit from designating liaisons. For example, an Indigenous community's liaison to cruise ship companies could help the community identify ways to benefit from cruise ship visits.¹⁶⁴

Beyond satisfying legal requirements for consultation, it can be much more challenging to identify the range of people who should be engaged with to achieve a social license to operate or meet broader societal standards for engagement.¹⁶⁵ In part this is because there are complex Indigenous social and governance structures in the Arctic, and they are continually evolving.¹⁶⁶ In any particular Arctic location there is likely to be a range of Indigenous corporations, governments, governmental forums, and non-governmental organizations at the local, regional, national and international levels that play a role in the administration, decision-making and governance of that location.¹⁶⁷ Arctic Indigenous Peoples are associated with these various governance structures and organizations and therefore have multiple political allegiances. Some of these different affiliations have common objectives but sometimes they are at odds with one another.¹⁶⁸ Proposed activities can affect a variety of these Indigenous bodies. Where there is a diversity of competing institutions, the identification of a single representative institution may not be possible, and it may be best to “take an inclusive approach, allowing for participation of the diversity of organizational expressions.”¹⁶⁹

Failing to engage with the appropriate leaders can create tension within Indigenous communities. The engagement process can therefore run more smoothly if a party has fully explored the dynamics governance and power structures within the community where it hopes to conduct activities. “Such an investigation should consider whether the government recognizes certain Indigenous organizations to be official representatives of the communities, and examine whether those communities indeed perceive them to be legitimate representatives.”¹⁷⁰

It is important that engagement be conducted with women as well as men.¹⁷¹ Proposed activities will affect both men and women, but are likely to affect each differently. For example, when

¹⁶³ Arctic Council Arctic Monitoring and Assessment Programme, *Adaptation Actions for a Changing Arctic (a)*: Draft Synthesis Report at 17 (2013) [hereinafter AACA (a)].

¹⁶⁴ Johnston et al, *Perspectives of Decision Makers and Regulators on Climate Change and Adaptation in Expedition Cruise Ship Tourism in Nunavut*, 35 *The Northern Review* 69, 80 (2012).

¹⁶⁵ ELI Government to Government Consultation, *supra* n. 157 at 15 (noting that the question of who represents a community for purposes of consultation is related to the issue of how consultation fits within the context of the broader engagement framework).

¹⁶⁶ Poelzer, G. et al, *Governance in the Arctic: Political Systems and Geopolitics*, in *Arctic Human Development Report II* at 183 (Larsen, J. and Fondahl, G., eds., 2014).

¹⁶⁷ *Id.* at 184.

¹⁶⁸ *Id.*

¹⁶⁹ ILO 169 Handbook, *supra* n. 97 at 14.

¹⁷⁰ Global Compact Good Practice, *supra* n. 40 at 12.

¹⁷¹ Akwé Kon: Voluntary Guidelines, *supra* n. 13 at 21.

researching food security, researchers will often focus on the role of men in hunting and fail to adequately understand the equally important role that women play. Without a complete picture of how food security is achieved in a community, research addressing this issue is likely to be inaccurate. Similarly, without complete information, it is challenging to properly assess how potential activities may affect food security. Thus, parties should disaggregate data about social impacts and ensure representative samples in interviews and surveys. All parties can also take proactive steps to engage women, including structuring engagement opportunities that actively seek women’s input, focusing on issues that are important to women, and scheduling meetings in times and places that are convenient for women.¹⁷² Youth should similarly be included in the engagement process.

D. Identification of the activities that require engagement and of the degree of engagement that is necessary

Parties must determine not only whether engagement is necessary but also what depth of engagement should occur. Both questions are in part related to the potential impacts and benefits that an activity may have on Indigenous Peoples.

Engagement approaches, including with whom and at what stage engagement is being conducted may be influenced by:

- *Complexity of the action,*
- *Scope, scale and degree of the impact,*
- *Nature of the rights being affected,*
- *Preference of those being engaged,*
- *Capacity/resources of those being engaged,*
- *Technological, legal, and human capacities of communities.*

Elizabeth Edmondson

Within the Arctic Council, most activities affect Indigenous Peoples and Permanent Participants determine whether and to what degree engagement is necessary. As the Arctic Environmental Protection Strategy notes, Indigenous Peoples themselves are to define the traditional and cultural needs, values and practices that should be protected.¹⁷³

Engagement is typically recommended if the activity could affect Indigenous Peoples or rights. For example, the ILO specifically requires engagement when governments consider legislative or administrative

measures that may affect Indigenous Peoples directly, before undertaking or permitting any programs for the exploration or exploitation of resources pertaining to their lands, in advance of the transfer of Indigenous lands, and in the organization and operation of training programs for Indigenous Peoples.¹⁷⁴ Under U.S. policy, formal consultation is required when “regulations, legislative comments or proposed legislation, and other policy statements or actions” have “substantial direct effects” on Indigenous Peoples.¹⁷⁵ In Norway, consultation is required for any activity that may directly affect Indigenous Peoples.¹⁷⁶

Non-governmental organizations have similar definitions. For example, IUCN requires engagement whenever Indigenous Peoples are present in the organization’s proposed project

¹⁷² IFC Good Practice Handbook, *supra* n. 55 at 57-60; Hipwell, *supra* n. 131 (discussing recommendations of Tongamiut Inuit Annait Ad Hoc Committee on Aboriginal Women and Mining in Labrador).

¹⁷³ Declaration on the Protection of Arctic Environment (June 14, 1991) [hereinafter AEPS Declaration].

¹⁷⁴ ILO No. 169 arts. 6(1)(a), 15(2), and 22(3).

¹⁷⁵ Exec. Order 13175, *supra* n. 7.

¹⁷⁶ Procedures for Consultations between State Authorities and The Saami Parliament (2005).

area, Indigenous Peoples have a connection to the area, or Indigenous Peoples could be affected negatively by the research or conservation project.¹⁷⁷ Research related to social science, especially if it involves the study of human subjects, “requires special consideration, as do studies of resources of economic, cultural, and social value to Native people.”¹⁷⁸ The GEF requires engagement whenever a GEF-financed project is “anticipated to adversely affect” Indigenous Peoples.¹⁷⁹ Many activities have the potential to affect Indigenous rights, including but not limited to land management and disposition, environmental protection, cultural and historical preservation, protected area rules, and proposed economic development.¹⁸⁰

Once a party determines that engagement is necessary, it must consider to what depth engagement is warranted. Engagement can occur in different degrees.¹⁸¹ The appropriate amount of engagement in consultations can be determined according to a spectrum analysis, which links the depth of engagement to the anticipated degree of impacts.¹⁸² The severity of impact, including the scale, scope and irremediable character of the impact, is a central issue in this assessment.¹⁸³ Even in cases where impacts will be minor, some amount of consultation is required.¹⁸⁴ The interests of and relevance to the community also determine the degree of appropriate engagement.¹⁸⁵ To be meaningful, engagement with Indigenous Peoples should go well beyond minimal levels required by formal consultation.

Prior to initiating engagement, organizations can assess whether Indigenous Peoples will be affected by proposed activities and if so, to what degree. However, during the process of engagement, information may change this analysis. To assess the degree of potential impacts, gathering information from Indigenous Peoples and communities is important because they are the primary authority for determining whether a particular activity will have impacts on their interests. As the Beaver Lake Cree Nation consultation policy states, the First Nation “must be involved in scoping, prioritizing, and determining the level of engagement, consultation and accommodation required.”¹⁸⁶ The Carrier Sekani Tribal Council states even more forcefully, “Only an Aboriginal group affected by a proposed project can measure how a project will impact its cultural heritage.”¹⁸⁷ While laws will determine the required minimal levels of engagement, deeper levels of engagement often result in response to societal norms and Indigenous, research,

¹⁷⁷ IUCN Standard, *supra* n. 61 at 6.

¹⁷⁸ IARPC Principles, *supra* n. 59.

¹⁷⁹ GEF Principles, *supra* n. 54 at 18.

¹⁸⁰ Ginoogaming Consultation Protocol, *supra* n. 46 at 6.

¹⁸¹ ELI Consultation Handbook, *supra* n. 129 at 6.

¹⁸² Newman, *supra* n. 16 at 481; U.N. Human Rights Council, Report of the Special Rapporteur on the Rights of Indigenous Peoples, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, U.N. Doc A/HRC/12/34 (July 15, 2009) [hereinafter UNHRC 2009]; Temagami Protocol, *supra* n. 102, Step 5: Consultation Matrix.

¹⁸³ INAC Guidelines, *supra* n. 26 at 43; *Haida*, *supra* n. 23, ¶¶ 43-45; Guiding Principles, *supra* n. 11 ¶ 17(b) (“due diligence will 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.”); IFC Good Practice Handbook, *supra* n. 55 at 7.

¹⁸⁴ See, e.g. *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388, 2005 SCC 69 [hereinafter *Mikisew*].

¹⁸⁵ ITK Guide for Researchers, *supra* n. 136.

¹⁸⁶ Beaver Lake Cree Nation Process for Consultation at 6 (2012).

¹⁸⁷ Carrier Sekani Tribal Council Perspectives, *supra* n. 123 at 3.

NGO, and corporate policies.

E. Comprehensive, culturally appropriate information sharing

One of the fundamental tenants of engagement is that it be informed. The quantitative analysis conducted for the MEMA project identified information sharing as a key element of engagement.¹⁸⁸ Information sharing during engagement should be a balanced and reciprocal process that allows groups to make informed input on activities, supports mutual understanding, and ensures all parties have the same level of knowledge.¹⁸⁹ Indigenous Peoples must have adequate knowledge and resources to participate in the engagement process.¹⁹⁰ Outside entities must also have adequate information about Indigenous Peoples and Indigenous Knowledge to conduct successful activities in the Arctic.

Many recommendations from the Arctic Council addressed the importance and process of information sharing, emphasizing the need for the information to be culturally appropriate, accessible, transparent, and adequately funded.¹⁹¹ The Arctic Council has developed numerous recommendations on the use of Indigenous Knowledge, including for research, assessments, development, resource management and decision-making.¹⁹² The Arctic Climate Impact Assessment was one of the first major scientific reports to involve information from Indigenous Knowledge holders through engagement of social scientists. Additionally the report stresses the importance and great value of Indigenous Knowledge.¹⁹³ Also, the Permanent Participants have issued guidance on the use of Indigenous Knowledge in the work of the Arctic Council.¹⁹⁴ In addition to following the guidelines, Arctic Council project leads and proponents should contact the appropriate Permanent Participant organization to seek further detailed advice on the gathering and application of Indigenous Knowledge from a particular community, group or region.

Contributions by Permanent Participants provide an Indigenous worldview to Arctic Council assessments and projects. For example, a report from the ICC about Indigenous use of sea ice provided the Arctic Marine Shipping Assessment project with an Inuit perspective on the human

¹⁸⁸ Edmonson, E.

¹⁸⁹ Edmonson, E.

¹⁹⁰ See, e.g., Annex Two To Settlement Agreement Federal Authorizations Consultation Protocol Her Majesty The Queen In Right Of Canada, As Represented By The Minister Of Indian Affairs And Northern Development and; SEP, The Dene Tha' First Nation, As Represented By Its Chief And Council (Requiring "Relevant And sufficient information that is reasonably required to assess potential adverse impacts.")

¹⁹¹ Arctic Council Arctic Marine Strategic Plan (2004), Strategic Action 7.6.3 [hereinafter AMSP 2004]; AACCA(a), *supra* n. 163 at 18, 9; PAME Offshore Oil and Gas, *supra* n.80 at 10, 12, 19; Ottawa Principles, *supra* n. 146.

¹⁹² AMSP 2004, *supra* n. 191, Strategic Action 7.1.2; Arctic Council Arctic Marine Strategic Plan 2015, Strategic Actions 7.1.1 (encouraging scientific cooperation and joint monitoring for those involved in research or Indigenous Knowledge), 7.1.2 (encouraging improved, strengthened, and response to various forms of information including Indigenous Knowledge), and 7.4.4 (encouraging engagement with Indigenous Peoples with Indigenous Knowledge to inform the work of the Arctic Council) [hereinafter AMSP 2015]; Arctic Council Arctic Ocean Review Project at 3 (2013) [hereinafter AOR]; PAME Offshore Oil and Gas, *supra* n. 80 at 12.

¹⁹³ Gofman, V., Community based monitoring handbook: lessons from the Arctic, CAFF CBMP Report No. 21 at 4 (2010).

¹⁹⁴ Ottawa Principles, *supra* n. 146.

dimensions of shipping.¹⁹⁵ Another report from ICC gives voice to Inuit perspectives and concerns regarding the impact of changes in the Arctic.¹⁹⁶ CAFF's report on Indigenous Knowledge provides explanations of how Indigenous ways of knowing can be applied to understand biodiversity change and recommendations to strengthen the use of Indigenous Knowledge.¹⁹⁷ Many Arctic Council recommendations also address community based monitoring.¹⁹⁸

1. Culturally appropriate and accessible

Information must be culturally appropriate and accessible. Arctic Council recommendations stress the importance of ensuring, for example, that scientific, human development, economic, and health information is accessible to communities.¹⁹⁹ As the Arctic Offshore Oil and Gas Guidelines point out, one way to improve the accessibility of information is to communicate in culturally appropriate ways and in local languages.²⁰⁰ UN recommendations and guidelines for researchers echo this advice.²⁰¹ In addition, efforts to engage with Indigenous Peoples should take into account the community's other activities that could impact participation and engagement, such as other meetings of importance, special community events and gatherings, and local communities' harvesting, hunting and fishing schedules.²⁰²

Cultural awareness underlies the understanding of how to communicate in culturally appropriate ways. Cultural awareness can also provide a basis for more equitable relationships and guide the development of activities. For example, the Alaskan Inuit Food Security Conceptual Framework provides a platform for understanding food security from an Indigenous Peoples' perspective and can help outsiders understand how to develop activities in partnership with Inuit to achieve mutual benefits.²⁰³ As noted by the quantitative analysis accompanying this report, cultural awareness is one of the most often referenced concepts in the documents analyzed in the assessment.²⁰⁴

Training programs and manuals can provide companies, researchers, and government officials with information about cross-cultural communication and sensitivity.²⁰⁵ Outside organizations

¹⁹⁵ The Sea is Our Highway An Inuit Perspective on Transportation in the Arctic, A Contribution to the Arctic Marine Shipping Assessment (Inuit Circumpolar Council - Canada March 2008).

¹⁹⁶ The Sea Ice Never Stops: Circumpolar Inuit Reflections on Sea Ice Use and Shipping in Inuit Nunaat (Inuit Circumpolar Council - Canada, December 2014).

¹⁹⁷ Arctic Council, CAFF, Arctic Traditional Knowledge and Wisdom.

¹⁹⁸ See, e.g., Gofman, V., Community based monitoring handbook: lessons from the Arctic, CAFF CBMP Report No. 21 at 4 (2010); AACA (a), *supra* n. 163 at 7; AMSP 2004, *supra* n. 191, Strategic Action 7.6.2; AMSP 2015, *supra* n. 192, Strategic Action 7.1.5.

¹⁹⁹ AMSP 2004, *supra* n. 191, Action 7.6.3; AACA(a), *supra* n. 163 at 18, 9.

²⁰⁰ PAME Offshore Oil and Gas, *supra* n. 80 at 12.

²⁰¹ UN-REDD Guidelines on FPIC, *supra* n. 155 at 39 (quoting Rep. of the Economic and Social Council, Jan. 17, 2005– Jan. 19, 2005, U.N. Doc. E/C.19/2005/3); IARPC Principles, *supra* n. 59.

²⁰² PAME Offshore Oil and Gas, *supra* n. 80 at 10.

²⁰³ Inuit Circumpolar Council-Alaska, Alaskan Inuit Food Security Conceptual Framework: How To Assess The Arctic From An Inuit Perspective Summary And Recommendations Report (2015).

²⁰⁴ Edmonson, E.

²⁰⁵ Environmental Law Institute, Climate & Communities: Conducting Marine Research in a Changing Arctic at 52 (2014) [hereinafter ELI Marine Research].

can also gain cultural awareness by spending time in the community and reviewing information about it, especially information that is created by the Indigenous Peoples themselves.²⁰⁶ The Assembly of Alaska Native Educators has created guidelines for respecting cultural knowledge, which apply to native elders, authors and illustrators, curriculum developers and administrators, educators, editors and publishers, document reviewers, researchers, native language specialists, native community organizations, and the general public.²⁰⁷ Indigenous Peoples also offer cultural workshops to educate outsiders.²⁰⁸ Government policies can recommend that decision-makers become familiar with the Indigenous Peoples they will be working with, including their culture and history.²⁰⁹ Bridging the divide between cultural differences can be challenging, because of the different approaches that cultures have to appropriate ways to communicate, collaborate, gain knowledge, and become a meaningful contributor.²¹⁰ “These differences exacerbate the more visible challenges for stakeholders such as flow of information; outcomes of collaborations at meetings; value and legitimacy of stakeholders’ knowledge; and when, where, and how meetings operate. Furthermore, divergent worldviews . . . and lack of understanding for each other’s epistemologies present substantial challenges for effective collaborations.”²¹¹ Education, frequent, ongoing, and informal interaction, and co-produced research can help to bridge these divides.²¹²

Information can also be made more accessible by developing web-based databases that can include material about laws related to Indigenous rights, territory, and culture. In Canada, for example, the Aboriginal and Treaty Rights Information System (ATRIS) database has information organized by GIS and subject, and contains extensive information on national laws, treaties, Indigenous policies and other information that is essential for engagement.

2. Transparent and adequately funded

When an organization proposes to conduct activities in the Arctic, it will typically provide Indigenous Peoples with, at a minimum, a description of the activity, the purpose, the location and people likely to be affected, the potential environmental, economic social, and cultural benefits and impacts, and the proposed timeline for the project.²¹³ In addition to this information, researchers can also provide data-gathering techniques, funding sources, and institutional affiliations.²¹⁴ The objective is to ensure that the information provided is “in sufficient form and detail to allow that party to prepare its views on the matter.”²¹⁵

As PAME emphasizes, consultation should be open and transparent.²¹⁶ Transparency includes candid disclosures. Thus, for example, Indigenous Peoples have requested that the government

²⁰⁶ See, e.g., *In This Place*, *supra* n. 74.

²⁰⁷ AANE Guidelines, *supra* n. 128.

²⁰⁸ See, e.g., Alaska Native Heritage Center Understanding Culture Workshop Series.

²⁰⁹ See, e.g., NOAA 13175 Policy, *supra* n. 141 at 8.

²¹⁰ Bartley, K., et al, *supra* n. 2 at 36 .

²¹¹ *Id.*

²¹² *Id.* at 36-37.

²¹³ Akwé Kon: Voluntary Guidelines, *supra* n. 13 at 10.

²¹⁴ AANE Guidelines, *supra* n. 128 at 15; IARPC Principles, *supra* n. 59; ITK Guide for Communities, *supra* n. 75.

²¹⁵ Yukon Umbrella Final Agreement (1993).

²¹⁶ PAME Offshore Oil and Gas, *supra* n. 80 at 19.

provide all the information it has that both supports and questions the basis for granting approval for a proposed project.²¹⁷ When organizations provide full disclosures about the proposed activities and anticipated benefits and impacts, this mitigates the risk of misleading Indigenous Peoples and communities, which could damage long-term relationships.²¹⁸ Although few, if any, guidelines exist for environmental organizations operating in the Arctic, these entities can consider the commitments made by other parties as well as by environmental organizations in more general contexts. For example, Conservation International has committed to engage Indigenous communities in a transparent, honest way and to directly inform others of its mission and primary emphasis on biodiversity conservation, so that there is “no misunderstanding about motives.”²¹⁹ Additional information an organization can include is whether there is any funding available to support the Indigenous group’s participation.²²⁰

Upon receiving this initial information about a proposed project, Indigenous Peoples and communities can identify any additional information that will be needed to assess the full impacts and potential benefits. Indigenous Peoples face ever-increasing demands to become engaged in activities that range significantly in size, scope and comprehensiveness of required review.²²¹ For the engagement to be meaningful, Indigenous Peoples and communities must have sufficient capacity, including time, staff, and an ability to develop or assess information about the proposed activities.²²² Thus, some Indigenous Peoples and communities specifically identify their capacity needs for the proposed project by creating a budget and plan for developing information, including the time it will take for the Indigenous organization to provide a complete assessment of potential impacts to its interests or rights and possible benefits and opportunities.²²³ The budget will sometimes also address additional costs, such as participation in environmental impact studies. Alternatively, budgets for other costs of engagement are developed at a later point in time.²²⁴ It is important for all parties to understand that these costs are not related to compensation for impacts nor are they access fees for permission to conduct activities on Indigenous lands.

Parties should ensure that adequate funding is available for Indigenous Peoples to participate fully.²²⁵ As the Hul’qumi’num First Nation explains, “the duty to consult and accommodate necessarily includes an obligation to ensure adequate and sustained funding” for Indigenous Peoples to meaningfully participate.²²⁶ However, the reality is that nearly everywhere, including at the Arctic Council, adequate funding is not always available for meaningful engagement.²²⁷

²¹⁷ NCAI Testimony, *supra* n. 121.

²¹⁸ Global Compact Best Practices, *supra* n. 40 at 16.

²¹⁹ CI Principles, *supra* n. 62 at 2.

²²⁰ *Id.*

²²¹ Carrier Sekani Tribal Council Perspectives, *supra* n. 123 at 4.

²²² Akwé Kon: Voluntary Guidelines, *supra* n. 13 at 11, 25.

²²³ See, e.g., Alderville First Nation Consultation Protocol, Appendix B, Working Budget (April 2015).

²²⁴ See, e.g., Policy for Consultation on Referrals of Resource Development Activities within the Traditional Lands of the Frog Lake First Nation, Schedule of Capacity Contributions (2007).

²²⁵ Ginoogaming Consultation Protocol, *supra* n. 46 at 8.

²²⁶ Hul’qumi’num Consultation Policy, *supra* n. 69 at 25.

²²⁷ See, e.g., Arctic Council, AMAP, Taking Stock of Adaptation Programs in the Arctic at 5 (2013) [hereinafter Taking Stock of Adaptation].

Outside entities and Indigenous Peoples can work together to identify how to meet Indigenous Peoples' financial costs of engagement.²²⁸ For example, to make capacity building and technical advice as unbiased as possible, companies have placed funds in escrow accounts that communities can use to hire advisors of their choosing.²²⁹ Once their assessment is complete, Indigenous Peoples and communities can contribute to informed engagement by clearly outlining their views about the potential adverse impacts on Indigenous rights or interests as well as the potential benefits and opportunities.²³⁰

Various legal obligations require government and companies to assess the potential impacts of proposed activities to Indigenous Peoples. International standards also impose this obligation on companies.²³¹ These analyses may occur, for example, through Social Impact Assessments (SIAs). In Sweden, SIAs have emerged as part of the EIA process, in particular for projects that affect reindeer husbandry and Saami communities.²³² In Greenland, the Bureau of Mines and Petroleum has developed SIA guidelines for mining projects.²³³ In Canada, the government conducted a socio-economic assessment for proposed marine protected areas in the Beaufort Sea.²³⁴ Organizations, governments, and Indigenous Peoples can refer to guidelines for Indigenous engagement in the EIA process.²³⁵

3. Indigenous Knowledge and community based monitoring

Indigenous Peoples and communities can strengthen self-governance and contribute significantly to information gathering and sharing by providing Indigenous Knowledge, participating in the co-production of knowledge, and conducting community based monitoring.

Indigenous Knowledge is “a systematic way of thinking and knowing that is elaborated and applied to phenomena across biological, physical, cultural and linguistic systems. It is owned by the holders of that knowledge, often collectively, and is uniquely expressed and transmitted through Indigenous languages. It is a body of knowledge generated through cultural practices, lived experiences including extensive and multigenerational observations, lessons and skills. It has been developed and verified over millennia and is still developing in a living process,

²²⁸ MMC Report, *supra* n. 132 at 15.

²²⁹ Global Compact Good Practice, *supra* n. 40 at 16.

²³⁰ See, e.g., INAC Guidelines, *supra* n. 26 at 18 (noting “The Crown may reasonably expect Aboriginal groups to: make their concerns known to the Crown and share any other relevant information that can assist in assessing the strength of their claim or the seriousness of any impacts on their potential or established Aboriginal or Treaty rights and related interests”); *Mikisew*, ¶¶ 9, 13, 65.

²³¹ Companies have an obligation to ensure that engagement is informed, through a process of “due diligence.” This process 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.” The Corporate Responsibility to Respect Human Rights, *supra* n. 8 at 40.

²³² Poelzer 2015, *supra* n. 44 at 46.

²³³ Bureau of Minerals and Petroleum, Greenland, Guidelines for Social Impact Assessments for Mining Projects in Greenland (Nov. 2009).

²³⁴ Socio-Economic Assessment of Proposed Beaufort Sea MPA – Final Report (Fisheries and Oceans, Canada, 2003).

²³⁵ Emery, A., Guidelines for Environmental Assessment with Indigenous Peoples, Centre for Traditional Knowledge (1997).

including knowledge acquired today and in the future, and it is passed on from generation to generation.”²³⁶

Indigenous Knowledge is valuable to resource management and science, and is increasingly included in impact assessments or other research and monitoring activities through law, policy, and research.²³⁷ The importance of Indigenous Knowledge in Indigenous engagement is demonstrated by the finding - in the quantitative analysis performed for the MEMA project - that Indigenous Knowledge was one of the most often cited elements addressed in the documents analyzed.²³⁸

In Norway, scientific assessment must include experienced-based knowledge.²³⁹ Similarly, in the U.S., legislation related to fisheries management in the North Pacific requires the consideration of Indigenous Knowledge in management of the area.²⁴⁰ Department or agency-level consultation policies can also include specific guidance on how to incorporate Indigenous Knowledge.²⁴¹ Conservation groups have committed to recognizing both Indigenous Knowledge and the inappropriate uses of it, and to recognizing, respecting and protecting it.²⁴² Guidelines for research address the use and protection of Indigenous Knowledge as well, advising researchers to use Indigenous Knowledge, respect confidentiality, and protect cultural and intellectual property.²⁴³

It is important for outside entities to understand that Indigenous Knowledge is not a “data source.”²⁴⁴ Treating it as such takes it out of context and undermines its value.²⁴⁵ Outside entities must “use caution in applying external frames of reference” in the analysis and interpretation of Indigenous Knowledge.²⁴⁶ Indeed, through true partnership and co-production of knowledge, parties’ external frames of reference can be expanded and modified to limit bias and misunderstanding throughout the engagement process.

Studies that are based on the co-production of knowledge, such as those that combine qualitative and quantitative research methods, can be a successful way of including Indigenous Knowledge.²⁴⁷ To this end, EIAs and SIAs can be undertaken in cooperation with Indigenous

²³⁶ Ottawa Principles, *supra* n. 146.

²³⁷ Eythórsson, E. and Brattland, C. *New Challenges to Research on Local Ecological Knowledge: Cross-Disciplinarity and Partnership*, in *Fishing People of the North: Cultures, Economies, and Management Responding to Change* 131 (Carothers, C et al, eds., 2012); *See also* Kawerak, *The World has Changed: Injalit Traditional Knowledge of Walrus in the Bering Strait* at 47 (emphasizing the relevance of Indigenous Knowledge to management, policy, and science).

²³⁸ Edmonson, E.

²³⁹ Eythórsson and Brattland, *supra* n. 237 at 132.

²⁴⁰ 16 U.S.C. §1855(j)(2)(E).

²⁴¹ NOAA 13175 Policy, *supra* n. 141 at 14-15.

²⁴² CI Principles, *supra* n. 62 at 2; IUCN Standard, *supra* n. 61 at 7.

²⁴³ IARPC Principles, *supra* n. 59; AFN Guidelines, *supra* n. 73.

²⁴⁴ Fenge, T. and Funston, B., *Arctic Governance: Traditional Knowledge of Arctic Indigenous Peoples from an International Policy Perspective* at 8 (2009).

²⁴⁵ *Id.* at 9.

²⁴⁶ AANE Guidelines, *supra* n. 128 at 15.

²⁴⁷ Knopp, J. et al., *Arctic Char Growth* in *Fishing People of the North: Cultures, Economies, and Management*

Peoples.²⁴⁸ For example, in the U.S., Indigenous Peoples can act as “cooperating agencies” in the environmental assessment process.²⁴⁹ This status allows the Indigenous entity the ability to provide input into the issues that will be assessed by the EIA, for developing information that will be included, and performing parts of the analysis.²⁵⁰ Similarly, in Sakha, Russia, Indigenous representatives are included in the group who is responsible for collecting and reviewing information and preparing a report on potential effects.²⁵¹ By incorporating Indigenous Peoples and communities at all stages of the EIA process, Indigenous Knowledge can form part of the fabric of the analysis, rather than simply be incorporated into the analysis. More generally, Indigenous Knowledge is used in management through co-management organizations.²⁵² The co-production of knowledge can also take place through the collaborative design and execution by scientists and Indigenous Peoples of research studies.

Community based monitoring (CBM), which often draws on both Indigenous Knowledge and conventional scientific approaches, can inform government decision processes.²⁵³ For example, Yukon River Inter-Tribal Watershed Council operates the largest Indigenous international monitoring network in the world, collecting water quality data at over fifty sites along the River.²⁵⁴ Although the Watershed Council does not have statutory authority to help manage the watershed, they possess the majority of information about water quality, which provides them “capacity to become critical governance partners.”²⁵⁵ The AACA(a) notes that community based monitoring can encourage people to use Indigenous knowledge, “which helps to promote a sense of ownership and control over consequences of the use of their environment.”²⁵⁶ CBM also provides a long-term approach to monitoring that can provide cost effective, consistent and seasonal time-series data. Arctic Indigenous Peoples’ understanding of environmental dynamics over time, ability to observe subtle environmental indicators, and familiarity with animal behavior and population dynamics provide an important basis for successful CBM efforts.²⁵⁷ Manuals and pilot projects can support Indigenous Peoples’ efforts to engage in community based monitoring.²⁵⁸ The Arctic Council Arctic Marine Strategic Plans (2004 and 2015)

Responding to Change 180 (Carothers, C et al, eds., 2012).

²⁴⁸ ILO No. 169 art 7(3).

²⁴⁹ 42 U.S.C. §§ 4331-4335.

²⁵⁰ 40 C.F.R. §§ 1501.6(b)(2), 1501.7(a), 1501.6(b)(3).

²⁵¹ Law of the Sakha (Yakutia) Republic Dated as of 14 April 2010 820-3N 537-IV “On Ethnological Review in the Areas Traditionally Occupied and Utilized by Indigenous Small-numbered People of the Republic Sakha’s (Yakutia) North,” art. 3, 2015; Akwé Kon: Voluntary Guidelines, *supra* n. 13 at 10-11; Agreement between the Inuit of the Nunavut Settlement Area and her Majesty the Queen in Right of Canada, 1993 §§ 12.2.1-12.2.5, 12.4.1-12.4.7 (creating Nunavut Impact Review Board) [hereinafter Nunavut Land Claims Agreement]; Guiding Principles, *supra* n. 11, ¶ 18(b).

²⁵² Armitage, D. et al., Co-Management and the co-production of knowledge: Learning to Adapt in Canada’s Arctic, 21 *Global Environmental Change* 995, 996 (2011).

²⁵³ Johnson, N., et al, Community-Based Monitoring and Indigenous Knowledge in a Changing Arctic: A Review for the Sustaining Arctic Observing Networks at x (Inuit Circumpolar Council, 2016).

²⁵⁴ Kimmel, M., Fate Control and Human Rights, 31:2 *Alaska Law Review* 179, 206 (2014).

²⁵⁵ *Id.* at 208.

²⁵⁶ AACA (a), *supra* n. 163 at 7.

²⁵⁷ Johnson, N., et al, *supra* n. 253.

²⁵⁸ *See, e.g.*, Danielsen, F. et al, Counting What Counts: Using Local Knowledge to Improve Arctic Resource Management, 37 *Polar Geography* 69-91 (2014); Opening Doors to Native Knowledge, Nordic Council of Ministers Arctic Cooperation Programme (2013).

recommend that the Arctic Council enhance local involvement in the collection of information and monitoring.²⁵⁹

Community mapping is another way Indigenous Peoples can participate in decision-making. In Norway, the Coastal Saami Resource Centre manages a database and maps containing social and environmental information about the coastal fiords. Saami control of this information helps to support “a real knowledge exchange instead of assimilation of local knowledge by science.”²⁶⁰ Similar to AMSA’s recommendation, the Arctic Ocean Review recommends that “The Arctic states in cooperation with the Arctic Council should assist, as appropriate, the Permanent Participants with the documentation of current and historical a) timing and geographical extent of local uses of the marine environment, and b) levels of traditional marine resources harvests, taking into account the differing documentation needs and capacities of Arctic states.”²⁶¹

Although consultation must be informed, information sharing alone is not sufficient for meaningful engagement. As discussed in more detail below, consultation is a two-way, on-going process. It is important for outside entities to understand that engagement is much more than, for example, a presentation followed by the opportunity for questions and comments.²⁶²

F. Ongoing communication focused on relationship-building

Meaningful engagement is an ongoing, iterative process focused on relationships, trust, and respect. As tribes in the Bering Straits observed, engagement should be focused on the development of a relationship rather than discussion about a specific issue, and the relationship “should be maintained even during periods when there are no major issues of contention.”²⁶³

As a forum for cooperation between Arctic States that includes participation by Indigenous Peoples, the Arctic Council supports the development of ongoing relationships and partnerships with Indigenous Peoples. Arctic Council recommendations also stress the importance of building ongoing relationships and engaging at all stages of activities.²⁶⁴ For example, the AACA (a) report notes, “building relationships with community leaders, organizations, and spending time in the community allows for greater success.”²⁶⁵

When communication and relationships occur outside the formal consultation process, the consultation process itself is strengthened.²⁶⁶ For example, in a study about successful consultations in Sweden, the authors noted that the community could raise concerns and ask

²⁵⁹ AMSP 2004, *supra* n. 191, Strategic Action 7.6.2; AMSP 2015, *supra* n. 192, Strategic Action 7.1.5.

²⁶⁰ Eythorsson and Brattland, *supra* n. 237 at 148.

²⁶¹ AOR, *supra* n. 192 at 3.

²⁶² ELI Government to Government Consultation, *supra* n. 157 at 16.

²⁶³ Raymond-Yakoubian, J., *Tribal Involvement in Fisheries Management*, in *Fishing People of the North: Cultures, Economies, and Management Responding to Change* 120 (Carothers, C. et al, eds., 2012).

²⁶⁴ Ottawa Principles, *supra* n. 146; AMSP 2004, *supra* n. 191, Strategic Action 7.5.1; AMSP 2015, *supra* n. 192, Strategic Action 7.3.12;

²⁶⁵ AACA (a), *supra* n. 163 at 7.

²⁶⁶ Best Practices in Historic Preservation, *supra* n. 67; Guiding Principles, *supra* n. 11, ¶ 17(c); ELI Government to Government Consultation, *supra* n. 157 at 9.

questions at any time. The company established permanent information centers in the community, corporate representatives lived in the community and were always available, and weekly meetings were held at the town hall to provide project updates. This “helped establish a very personal relationship between this manager and residents of the municipality, to the extent that the individual communicates with locals through text messages.”²⁶⁷ Similarly, the U.S. Coast Guard engages with Arctic communities by providing safety services, such as gold dredge inspections, and education, such as information about the need for children to wear personal flotation devices.²⁶⁸ In Norway, the government and the Saami Parliament have regularly scheduled meetings to maintain strong communications.²⁶⁹ For researchers, developing long-term relationships with communities can foster the identification of studies that are of mutual interest.²⁷⁰

When engagement is driven primarily by the objective of legal compliance, it is often reduced to discrete consultation meetings related to environmental and social assessment. “This type of consultation rarely extends in any meaningful way beyond the project planning phase, and is seldom integrated into core business activities or measured in terms of its effectiveness in building constructive working relationships.”²⁷¹

Partnerships to advance mutual goals can also support ongoing engagement. Within the Arctic Council, these partnerships can be developed with Permanent Participants. The Arctic Council Arctic Marine Strategic Plan (2004) recommends that the Arctic Council foster partnerships among governments and Indigenous Peoples’ organizations, communities, companies, international bodies, NGOs and academia to advance the goals of the strategic plan.²⁷² Similarly, the U.S. Arctic Strategy commits to fostering partnerships with Indigenous Peoples and recommends that governments, tribal communities, NGOs, researchers, and companies to work together to address challenges and opportunities in the Arctic.²⁷³ The AACA project found that partnerships, including with Indigenous Peoples, were an “overwhelming component” of adaptation activities in the Arctic.²⁷⁴

Engagement should occur at all stages of an activity. Thus, successful engagement continues even after activities have begun. As the Sustainable Development Working Group notes with respect to mining, “It is important that communication is maintained throughout the fieldwork.”²⁷⁵ Providing and requesting feedback on whether activities and projects are following the agreed upon plan, and on the effectiveness of the engagement process being used,

²⁶⁷ Poelzer 2015, *supra* n. 44 at 47.

²⁶⁸ U.S. Coast Guard in the Arctic: Arctic Shield 2016.

²⁶⁹ Procedures for Consultations between State Authorities and The Saami Parliament (2005).

²⁷⁰ Raymond-Yakoubian, J. et al, *supra* n. 88 at 55.

²⁷¹ IFC Good Practice Handbook, *supra* n. 55 at 12.

²⁷² AMSP 2004 *supra* n. 191, Strategic Action 7.5.1; *see also* AMSP 2015, *supra* n. 192, Strategic Action 7.3.12 (encouraging better communication between Arctic inhabitants and outside stakeholders).

²⁷³ U.S. Government, Implementation Plan for the National Strategy for the Arctic Region (2014).

²⁷⁴ Taking Stock of Adaptation, *supra* n. 227.

²⁷⁵ SDWG Mining Guide, *supra* n. 38.

can help parties to identify where modifications should be made and reinforce accessibility of participation for Indigenous Peoples.²⁷⁶

In addition to reporting regularly on the project, outside entities can engage Indigenous Peoples in a collaborative development of performance indicators as well as monitoring and reporting on the impacts of the activity.²⁷⁷ For instance, in the Sakhalin Oblast, when industrial development takes place on the traditional lands of Indigenous Peoples, Indigenous representatives participate in the monitoring of the industrial activity.²⁷⁸ Similarly, WWF commits to “assist Indigenous Peoples’ organizations in the design, implementation [and] monitoring.”²⁷⁹

Follow up after an activity takes place can include evaluation of the activity and of the effectiveness of mitigation measures.²⁸⁰ For example, the SDWG advises follow up meetings to explain results of the project.²⁸¹ Prior to finalization, Indigenous Peoples can be given the opportunity to comment on research results.²⁸² Upon completion of a project, researchers can provide copies of the report, data, and non-technical summaries, as well as indicate how informed consent was obtained and the extent of community participation.²⁸³ This information should be provided to the local library, villages, agencies and other affected organizations.²⁸⁴ Community-based workshops, in which the findings from reports are communicated to Inuit communities, can be used to seek their guidance on follow-up work.²⁸⁵

Ongoing engagement is more likely if finances are dedicated to supporting it. For example, the U.S. North Pacific Research Board grants provide a specific amount of money that is to be used for community engagement during research projects.²⁸⁶ Funding could also be made contingent on the development of the research project in partnership with Indigenous Peoples. Some consultation MOUs between Indigenous Peoples and governments include a provision for regular funding of consultation by the government.²⁸⁷

An important aspect of ongoing engagement includes the use of Indigenous Knowledge on an ongoing basis, as well. Although Indigenous Knowledge is most often considered during impact assessment, it is best utilized in collaboration with science through a participatory approach. Such an approach requires a partnership between a given Indigenous community and researchers which continues through all stages of decision-making.²⁸⁸ For example, as the Arctic Biodiversity Assessment recommends that the Arctic Council “Recognize the value of traditional

²⁷⁶ See, e.g., MVLWB Policy, *supra* n. 43.

²⁷⁷ Guiding Principles, *supra* n. 11, ¶¶ 19, 20, 21; Global Compact Good Practice, *supra* n. 40 at 18.

²⁷⁸ Kryazhkov, V., *Legal Regulation re Indigenous Peoples and Subsoil Users in Russia*, 39 *The Northern Review* 66, 74 (2015).

²⁷⁹ WWF Principles, *supra* n. 60 at 5.

²⁸⁰ INAC Guidelines *supra* n. 26.

²⁸¹ SDWG Mining Guide, *supra* n. 38.

²⁸² ICC Arctic Policy, *supra* n. 94; Bristol Bay Native Association Policy Guidelines For Research In Bristol Bay.

²⁸³ IARPC Principles, *supra* n. 59; ICC Arctic Policy, *supra* n. 94.

²⁸⁴ Bristol Bay Native Association Policy Guidelines For Research In Bristol Bay.

²⁸⁵ AOR, *supra* n. 192 at 19 (discussing ICC and SDWG Circumpolar-Wide Inuit Response to AMSA).

²⁸⁶ ELI Marine Research, *supra* n. 205 at 43.

²⁸⁷ Interim Tripartite Agreement on Mi’gmaq Consultation and Accommodation ¶¶ 26-28 (2013).

²⁸⁸ Fenge and Funston, *supra* n. 244 at 5.

ecological knowledge and work to further integrate it into the assessment, planning and management of Arctic biodiversity.”²⁸⁹ To facilitate a more systematic inclusion of Indigenous Knowledge, the Sustainable Development Working Group recommends that Permanent Participants could develop consensus-based guidelines and processes.²⁹⁰

G. A good faith intent to reach consensus

Engagement is “more than sitting there and listening.”²⁹¹ Rather, meaningful engagement includes taking action in response to the information learned during engagement.²⁹² Thus, the engagement process is successful if it affects the ultimate decision. Engagement is also more meaningful if all parties engage with the intent of finding a mutually agreeable resolution to concerns.²⁹³ From the perspective of all parties, this can be understood as collaboration, which is a key element identified in the quantitative analysis conducted for the MEMA project.²⁹⁴ From the perspective of the entity desiring to conduct activities in the Arctic, this is also understood as engagement with the objective of seeking consent, which is aimed at “avoiding the imposition of the will of one party over the other, and at instead striving for mutual understanding and consensual decision-making.”²⁹⁵ ILO No. 169 specifies that engagement should take place “with the objective of achieving agreement or consent to the proposed measures.”²⁹⁶ Some national policies also emphasize the importance of consensus.²⁹⁷

The Arctic Council supports consensus based decision-making and takes the views of Permanent Participants into account, though they do not have a formal vote. Arctic Council recommendations emphasize the need to accommodate the traditional and cultural needs, values and practices of Indigenous Peoples.²⁹⁸ For example, the Arctic Offshore Oil and Gas Guidelines advises States to consult and cooperate with the Indigenous Peoples “to understand and integrate their needs and concerns with any project affecting their lands or territories and other resources. . .”²⁹⁹ Arctic Council recommendations also emphasize the importance of mitigating negative impacts to Indigenous Peoples.³⁰⁰

For Indigenous Peoples and communities, good faith engagement includes agreeing to participate

²⁸⁹ Arctic Biodiversity Assessment: Report for Policymakers at 22 (2013).

²⁹⁰ SDWG IK, *supra* n. 80.

²⁹¹ National Congress of American Indians, Consultation with Tribal Nations: An Update on Implementation of Executive Order 13175 at 6-9 (Jan. 2012).

²⁹² Hul’qumi’num Consultation Policy, *supra* n.69 at 26.

²⁹³ INAC Guidelines, *supra* n. 26; U.S. Dep’t Of Health & Human Servs., Tribal Consultation Policy (Dec. 12, 2010) (noting that consultation has the “ultimate goal of reaching consensus on issues”).

²⁹⁴ Edmonson, E.

²⁹⁵ UNHRC 2009, *supra* n. 182, ¶ 49; 36 C.F.R. § 800.16(f).

²⁹⁶ ILO No. 169 art. 6(2).

²⁹⁷ Secretarial Order, American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act (June 5, 1997); Procedures for Consultations between State Authorities and The Saami Parliament (2005).

²⁹⁸ AEPS Declaration, *supra* n. 173.

²⁹⁹ PAME Offshore Oil and Gas, *supra* n. 80 at 19.

³⁰⁰ *See e.g.*, AMAP, Oil and Gas Activities in the Arctic at 7-15 (2007); PAME Offshore Oil and Gas, *supra* n. 80 at 9.

in discussions, identifying the mitigation they seek, and making an effort to reconcile competing interests.³⁰¹ The obligation to reach consensus is complicated by the power dynamics that often exist in Indigenous engagement. When Indigenous Peoples are at a disadvantage, for example because of legal, capacity, vulnerability or other factors, the unequal positions of power may result in Indigenous Peoples placing less emphasis on consensus. In all cases, the objective of reconciling competing interests should be subjugated to the need to protect Indigenous rights. For governments, the objective of reaching consensus is complicated by the government's responsibility to take broader societal interests into account.³⁰² Although most rights are not absolute, it is unlikely that even a "compelling and substantial public interest" can justify a significant infringement of Indigenous land rights.³⁰³

One way to reconcile Indigenous Peoples' concerns is through mitigation and accommodation.³⁰⁴ Mitigation is more likely to be successful if it is built into the initial project design, rather than added as a reaction to impacts that have already occurred. Addressing a priority issue identified by the Indigenous Peoples or community provides an incentive for Indigenous Peoples to engage. In addition, a mutually agreeable solution can best be achieved when information provided by Indigenous Peoples and communities is utilized through a collaborative process throughout all stages of the activity, including the design, development, implementation, and revision of activities.³⁰⁵ The Arctic Council Arctic Marine Strategic Plan (2015) recommends that the Arctic Council improve meaningful engagement by using Indigenous Knowledge to avoid or mitigate negative impacts and maintain or increase well being and socioeconomic opportunities.³⁰⁶ Similarly, the Arctic Offshore Oil and Gas Guidelines recommend that States consider Indigenous Knowledge when developing mitigation and "recognize and accommodate the cultural heritage, values, practices, rights and resource use of indigenous residents."³⁰⁷

When an outside entity is responsive to community concerns, it not only helps the entity to fulfill its obligations towards Indigenous Peoples but also helps to establish trust and build relationships with Indigenous Peoples. Some companies set up working groups to provide a structured forum for designing mitigation. For example, the Sakhalin Energy Investment Company formed working groups of representatives of the company, the local government, and Indigenous Peoples to provide feedback on its oil drilling plan and mitigation.³⁰⁸

If impacts cannot be mitigated, companies may decide to forgo the proposed project. For example, in Russia, an ethnologic study conducted with the help of academic experts commissioned by the Russian Association of Indigenous Peoples of the North (RAIPON) determined that a Gazprom gas exploration project in the Yamal-Nenets autonomous district

³⁰¹ See, e.g., INAC Guidelines, *supra* n. 26, Ginoogaming Consultation Protocol, *supra* n. 46 at 8.

³⁰² INAC Guidelines, *supra* n. 26; See also Métis Nation Of Alberta Policy Guidelines Regarding The Duty To Consult And Accommodate, ¶ B (5) (2009) (noting "Accommodation must seek to reconcile asserted Métis Aboriginal rights and interests with the interests of other stakeholders and the general public interest in such a way as to minimize adverse effects on Alberta's Métis people.")

³⁰³ *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, para. 88.

³⁰⁴ See, e.g., INAC Guidelines, *supra* n. 26 Alaska Native Interest in Lands Act, §810(a)(3)(C).

³⁰⁵ ELI Consultation Handbook, *supra* n. 129 at 6.

³⁰⁶ AMSP 2015, *supra* n. 192, Strategic Action 7.4.1.

³⁰⁷ PAME Offshore Oil and Gas, *supra* n. 80 at 9, 11.

³⁰⁸ IFC Good Practice Handbook, *supra* n. 55 at 54.

would have negative effects on the community. As a result, Gazprom stopped exploration.³⁰⁹

When impacts cannot be mitigated but a project proceeds, international law require Indigenous Peoples to be compensated.³¹⁰ Some countries have implemented this measure at a national level. In Russia, compensation must be paid for damage to Indigenous Peoples use of natural resources.³¹¹ In Canada, under the Nunavut Land Claim Agreement, developers are liable for damage to wildlife harvesting of Indigenous Peoples, to water quality or quantity, and expropriation of land, and must pay compensation for these damages.³¹² The ICC has identified factors to be considered for compensation to Indigenous Peoples for loss of natural resources and habitat.³¹³

When an entity ensures that Indigenous Peoples have consented to the activity, the appropriate compensation will likely be included as part of the granting of consent. Where entities do not ensure consent before proceeding with their activities, the issue of determining whether and how much compensation is warranted remains in the hands of the government or the corporation. Thus, as discussed in more detail below, consent is a key aspect of engagement.

H. Consent in some cases

The right to free, prior, and informed consent is rooted in and is intended to protect a number of international human rights, including the right to self-determination, property, health, development, and cultural life.³¹⁴ Among governments in the Arctic, “the language and cultural rights of Indigenous Peoples are increasingly recognized while a question of land rights remains the subject of a debate.”³¹⁵ Thus, the issue of consent, which is based in the interconnection of these rights, is also the subject of debate in the region. Under a spectrum analysis, where the proposed activity implicates rights that are essential to the survival of the Indigenous Peoples or where the impacts on Indigenous rights are significant, consent is necessary.³¹⁶

The Arctic Council decision-making process does not require consent by Permanent Participants. However, as a matter of practice, few if any Arctic Council projects proceed with Permanent Participant opposition. Arctic Council recommendations have not address the issue of consent.

Consent is a cornerstone of the UN Declaration on the Rights of Indigenous Peoples and ILO No. 169. Under these instruments, consent is required if the proposed activity involves removing

³⁰⁹ FPIC Methodologies Report, *supra* n. 122 ¶ 36.

³¹⁰ *Id.*; ILO No. 169 art. 15(2).

³¹¹ Russia, “On Guarantees of Rights,” 1999, art. 8; Federal Law 225-FZ, On Production Sharing Agreements, art. 6 (1995); Administrative Order 565 by Ministry of Regional Development, on the Approved Guidance for Calculating Loss Caused to Indigenous Small Peoples in Far North, Siberia and Far East by Company/Individual Economic and Other Activity in Areas of Traditional Indigenous Small Peoples Settlement and Economic Activity (2009).

³¹² Nunavut Land Claims Agreement, §§ 6.3.1, 20.3.1, 21.9.4,

³¹³ ICC Arctic Policy, *supra* n. 94.

³¹⁴ UNHRC 2009, *supra* n. 182 ¶ 41; Global Compact Good Practice, *supra* n. 40 at 4.

³¹⁵ Koivurova, T. et al. Background Paper Indigenous Peoples in the Arctic (2008).

³¹⁶ UNHRC 2012, *supra* n. 36 ¶ 84.

Indigenous Peoples from their land.³¹⁷ National governments have incorporated this requirement. In Russia, for example, lands designated as “territories of traditional use” cannot be developed without Indigenous Peoples’ consent.³¹⁸ Other regional laws require consent for specific activities. For example, the Nenets regional law requires consent before land can be seized for industrial purposes.³¹⁹ The Nenets can refuse consent if the proposed use creates a direct threat to the health and safety of the population and environment, to the preservation and development of a traditional way of life, or to the economy of small-numbered Indigenous Peoples of the North.³²⁰ UNDRIP also requires consent if hazardous materials will be stored or disposed of on their land.³²¹

In addition, Indigenous Peoples have the right to their cultural, intellectual, religious and spiritual property, which may not be taken without their consent.³²² Thus, before conducting research that directly involves Indigenous Peoples, consent is necessary.³²³ This includes the collection or use of Indigenous Knowledge.³²⁴ The Permanent Participants have explained that they should determine the appropriate use of Indigenous Knowledge in the work of the Arctic Council.³²⁵ IUCN has committed to receiving consent before it promotes the development and generation of benefits from Indigenous Peoples’ cultural heritage sites.³²⁶

It is less clear whether the UNDRIP and ILO No. 169 require consent prior to exploration or exploitation of mineral and sub-surface resources on Indigenous lands.³²⁷ Some experts emphasize that the convention “should not be regarded as according Indigenous Peoples a general ‘veto power’ over decisions that may affect them, but rather as establishing consent as the objective of consultations.”³²⁸ Some Arctic governments have asserted a similar interpretation.³²⁹ However, many organizations and Indigenous Peoples assert that consent should be required.³³⁰ For example, the International Finance Corporation requires consent for projects with “potential significant adverse impacts on indigenous peoples.”³³¹ The U.N. Development Programme requires consent “on any matters that may affect the rights and

³¹⁷ ILO No. 169 art. 16, UNDRIP art. 10.

³¹⁸ Presidential Ukase No. 397 of 1992; On Territories of Traditional Use of Natural Resources by Indigenous Minority People of the North, Siberia and the Far East of the Russian Federation’ (2001).

³¹⁹ “On regulation of land relations in the territory of Nenets Autonomous District” arts. 19 and 21 (2005)).

³²⁰ *Id.*, art. 22.

³²¹ UNDRIP art. 29(2).

³²² UNDRIP art. 11(2); ICCPR art. 27.

³²³ IARPC Principles, *supra* n. 59; IUCN Standard, *supra* n. 61 at 4.

³²⁴ Sigman, M., Community Based Monitoring of Alaska’s Coastal and Ocean Environment: Best Practices for Linking Alaska’s Citizens with Science at 30 (2015).

³²⁵ Ottawa Principles, *supra* n. 146.

³²⁶ IUCN Standard, *supra* n. 61 at 4.

³²⁷ UNDRIP arts. 19 and 32(2); ILO No. 169 art. 15(2); IUCN Standard, *supra* n. 61 at 4.

³²⁸ UNHRC 2009, *supra* n. 182 ¶ 46; *See also Haida*, ¶ 48.

³²⁹ INAC Guidelines, *supra* n. 26 at 102 (noting that that consultation may not always lead to accommodation or that there may not always be agreement on what accommodation measures may be appropriate).

³³⁰ Akwé Kon: Voluntary Guidelines, *supra* n. 13 at 9 (advising that a process whereby indigenous communities may have the option to accept or oppose a proposed development that may impact on their community).

³³¹ International Finance Corporation, IFC Updates Environmental and Social Standards, Strengthening Commitment to Sustainability and Transparency (May 2011); IFC Performance Standards, Performance Standard 7: Indigenous Peoples (2012).

interests, lands, resources, territories (whether titled or untitled to the people in question) and traditional livelihoods of the indigenous peoples concerned.”³³² The International Council on Mining and Metals states, “Indigenous Peoples can give or withhold their consent to a project, through a process that strives to be consistent with their traditional decision-making processes while respecting internationally recognized human rights and is based on good faith negotiation.”³³³

Some governments have also provided support for consent. In Canada, courts have identified the need for consent in certain cases.³³⁴ In the U.S., for example, consensus-based decision-making is required “where appropriate.”³³⁵ However, it is not clear how this determination is made. Agencies can provide more guidance about the situations where consensus is appropriate by explicitly addressing the issue of consensus in their policies. The Arctic Offshore Oil and Gas Guidelines do not mention consent but do emphasize the significance of affecting Indigenous lands and resources, advising States to consult and cooperate with Indigenous Peoples “particularly in connection with the development, utilization or exploitation of mineral, water or other resources, including oil and gas.”³³⁶ With respect to Indigenous lands and resources, IUCN has committed to receiving consent before it engages in any projects that take place on Indigenous lands or waters or which may have negative impact on Indigenous rights, resources, or livelihoods.³³⁷ The Inuit have declared, “No matter what level or form of self-determination the Inuit of any particular region have achieved, resource development in Inuit Nunaat must proceed only with the free, prior, and informed consent of the Inuit of that region.”³³⁸

Fundamental to the view that consent is required is the fact that, as a UN Commission explains, “for Indigenous populations, land does not represent simply a possession or means of production. . . . the special and profoundly spiritual relationship of Indigenous Peoples with Mother Earth [is] basic to their existence and to all their beliefs, customs, traditions and culture.”³³⁹ Indigenous rights to land and natural resources are also “fundamental to securing the broader set of rights related to self-management and the right to determine their own priorities for development.”³⁴⁰ In addition, Indigenous Peoples often face discrimination and a lack of representation in host state legal systems.³⁴¹ Thus, Indigenous Peoples are particularly likely to experience infringements of their rights from activities that affect their lands and waters.³⁴² As a result some argue, “Where

³³² United Nations Development Programme, UNDP Social and Environmental Standards at 34, para. 9 (July 2014).

³³³ International Council on Mining and Metals, “Indigenous Peoples and Mining”, Position Statement at 3 (May 2013).

³³⁴ *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44; Haida Nation, *supra* n. X para. 24; Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, para. 168).

³³⁵ Exec. Order No. 13175, *supra* n. 7 § 5(d).

³³⁶ PAME Arctic Offshore Oil and Gas, *supra* n. 80 at 19.

³³⁷ IUCN Standard, *supra* n. 61 at 4.

³³⁸ ICC Declaration on Resource Development, *supra* n. 64; *see also* ICC Arctic Policy, *supra* n. 94 (requiring FPIC for offshore drilling).

³³⁹ Anaya, *supra* n. 35 at FN 5, *quoting* Cobo, J., special rapporteur. U.N. Sub-Commission On Prevention Of Discrimination & Protection Of Minorities, Study Of The Problem Of Discrimination Against Indigenous Populations 39, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4 (1986).

³⁴⁰ ILO Handbook, *supra* n. 97 at 21.

³⁴¹ Global Compact Good Practice, *supra* n. 40 at 4.

³⁴² *Id.*

property rights are affected by natural resource extraction, the international norm is developing to also require actual consent by the Indigenous Peoples concerned.”³⁴³ If there is likely to be a significant and direct impact on Indigenous Peoples’ lives or territories, there is a strong presumption that international standards require consent.³⁴⁴ As States address climate change mitigation strategies, these activities are likely to affect fundamental Indigenous rights, as well.³⁴⁵

Agreements between Indigenous Peoples and the government can also establish the requirement for consent. For example, in Canada the Tlicho land claims agreement requires project proponents to conclude an agreement with the Tlicho government in advance of beginning a project.³⁴⁶ Similarly, an agreement between the Voisey Bay Nickel Company, the Innu Nation and the Labrador Inuit Association (now the Nunatsiavut Government) specified that mining could only proceed with the consent of the Innu and Inuit.³⁴⁷

Regardless of its legal status, consent is important for entities engaging in Arctic activities because it is increasingly becoming a society expectation.³⁴⁸ Consent can help an entity to gain the social license to operate, avoid reputational risk, avoid legal risk, and improve their ability to conduct future projects.³⁴⁹ Addressing community concerns before a project begins is likely to be more cost-effective than facing opposition later on, and engagement that does not resolve a community’s reasons for opposition “provides little assurance against potentially costly and disruptive conflict.”³⁵⁰

However, in a study of Indigenous and government views on successful consultation throughout the U.S. (including non Arctic regions), all parties agreed that coming to consensus was not critical. Although consensus is one of the products of successful consultation, most of the people surveyed stressed that “fundamental success lay in incrementally building open communication, and mutual respect and understanding.”³⁵¹

I. Accountability

Transparency and accountability enhance the overall credibility and encourage trust in the planning and decision making process. An objective definition of trust is related to predictability, and can be characterized as “knowing when your expectations are met.”³⁵² In many cases, transparency and predictability are more important than the ultimate outcome of decision-

³⁴³ Anaya, *supra* n. 35 at 11.

³⁴⁴ UNHRC 2009, *supra* n. 182 ¶ 47.

³⁴⁵ Anchorage Declaration, *supra* n. 95 ¶ 11.

³⁴⁶ Tlicho Agreement, § 23.4.1 (Aug. 25, 2003).

³⁴⁷ FPIC Methodologies Report, *supra* n. 122 ¶ 35.

³⁴⁸ Global Compact Good Practice, *supra* n. 40 at 3.

³⁴⁹ *Id.* at 7-9.

³⁵⁰ UN-REDD Guidelines on FPIC, *supra* n. 155 at 16.

³⁵¹ National Park Service & Advisory Council on Historic Preservation, The Secretary of the Interior’s Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act at 30 (1998).

³⁵² IFC Good Practice Handbook, *supra* n. 55 at 39.

making. Accountability can include policies that describe how Indigenous impacts will be assessed and how Indigenous consultation will be meaningful and timely.³⁵³ Clear records of the consultation process can support accountability.

The Arctic Council does not have an overarching policy that describes how engagement with Permanent Participants will be meaningful. However, meeting minutes and records of decisions identify input by all participants, including Permanent Participants. The Sustainable Development Working group recommends a record-keeping system for identifying how Indigenous Knowledge will be used and reporting at the completion of a project describing how it was used and how it may be better incorporated in the future.³⁵⁴ The Arctic Council has made few, if any, recommendations regarding accountability in Indigenous engagement.

Transparency is strongest when Indigenous Peoples and communities are involved in establishing an agreed upon process for recording the views they've expressed.³⁵⁵ The records of each meeting can include a list of the consultation participants, draft minutes of the meeting to be reviewed and revised by the parties to the consultation, a list of action items and their timeline for completion, a description of how input received during the meeting may influence the proposed action, and direct responses to each concern raised discussing how the concern was addressed or why it cannot be addressed.³⁵⁶

Transparency is strengthened when similar records accompany a government's final decision about a proposed project. The report can describe the steps in the consultation process including how it was reasonable and meaningful, identify the Indigenous Peoples' concerns and recommended accommodation or mitigation measures, explain how each concern and proposed measure was addressed or why it could not be addressed, identify how the Indigenous Peoples' input has influenced the design of the studies and the project, cite the evidence and reasoning that supports the final decision and the mitigation measures chosen, identify the roles and responsibilities of all parties involved in implementing the accommodation or mitigation measures, and describe how the final decisions will be communicated to all parties.³⁵⁷

To ensure accountability, some companies use a "commitments register" to record and follow up on commitments the company has made.³⁵⁸ A wider range of companies operating in the Arctic could adopt this process. In addition, outside entities can model their reporting procedures on existing international standards for reporting on stakeholder engagement. Although these standards are not tailored specifically to Indigenous engagement, they provide useful concepts that can be applied in the Indigenous engagement context. Outside entities can also hire external

³⁵³ Executive Office of the President, Office of Management and Budget, Memorandum for the Heads of Executive Departments and Agencies, and Independent Regulatory Agencies, Guidance for Implementing E.O. 13175, Consultation and Coordination with Indian Tribal Governments § 8 (July 30, 2010).

³⁵⁴ SDWG IK, *supra* n. 80.

³⁵⁵ Akwé Kon: Voluntary Guidelines, *supra* n. 13 at 11.

³⁵⁶ INAC Guidelines, *supra* n. 26; EPA Region 10 Tribal Consultation and Coordination Procedures, EPA 910-K-12-002 at 14-15 (Oct. 2012); NOAA 13175 Policy, *supra* n. 141 at 13.

³⁵⁷ INAC Guidelines, *supra* n. 26; Sec. Order 3206, *supra* n. 118; ELI Consultation Handbook, *supra* n. 129 at 6; Exec. Order No. 13175, *supra* n. 7.

³⁵⁸ IFC Good Practice Handbook, *supra* n. 55 at 104.

auditors to assess their current reporting practices.³⁵⁹

Creating a system to track input also improves engagement. The system provides a written record of input or suggested mitigation measures that have been made at various meetings as well as the response and helps to eliminate the need for Indigenous Peoples to repeat themselves. People can confirm that their input was received if the information publicly available.³⁶⁰

J. Shared benefits

As the Circumpolar Inuit Declaration on Resource Development explains, “those who face the greatest and longest-lasting impacts must have the greatest opportunities.”³⁶¹ These opportunities include sharing in the benefits of activities that take place in the Arctic, including, among other things, holding shares in or being sole owners of the activity, financial payments, training, employment, and infrastructure. Benefit sharing is particularly important because “the lack of economic opportunities and developments have critical implications for the future” of Indigenous Peoples’ societies and cultures.³⁶²

The Arctic Council had made numerous recommendations about ensuring that Indigenous Peoples benefit from the activities taking place in the Arctic.³⁶³ These recommendations address a variety of ways in which training, employment, infrastructure, health care and financial benefits to Indigenous Peoples can be increased, including through better governance, agreements between Indigenous Peoples and companies, and decisions by outside entities to share project benefits with Indigenous Peoples.

One important form of engagement is the economic participation of Indigenous Peoples and communities in the activities taking place in their traditional lands and waters. This form of engagement is based on Indigenous rights to the economic value of development activities on their traditional lands, and it is distinct from compensation for damages to traditional Indigenous use of that land that cannot be mitigated.³⁶⁴ For example, AMAP recommends that Indigenous communities be consulted to ensure, among other things, that “advantage is taken of opportunities afforded by the activity.”³⁶⁵ The Arctic Ocean Review sets out necessary steps to realizing the potential local benefit of economic activity, “including local involvement in (1) determining local needs and interests to set appropriate goals, (2) establishing appropriate governance mechanisms to ensure local needs and interests are considered, (3) participating effectively in those governance mechanisms and related instruments, and (4) identifying other

³⁵⁹ *Id.* at 91-92.

³⁶⁰ *See, e.g.*, BOEM mitigation tracking table, Alternatives, Deferrals, Mitigations, and Other Areal Concerns Suggested From Public Involvement Opportunities 2012-2017 OCS Oil and Gas Leasing Program (Last Updated July 2014).

³⁶¹ ICC Declaration on Resource Development, *supra* n. 64.

³⁶² ICC Arctic Policy, *supra* n. 94.

³⁶³ AMAP Arctic Oil and Gas, *supra* n. 80 at vi; AOR *supra* n. 192 at 17; AACA(a), *supra* n. 163 at 7; Arctic Council Emergency, Prevention, Preparedness and Response Working Group, Recommended Practices for Arctic Oil Spill Prevention at 36 (2013) [hereinafter EPPR Recommended Prevention Practices].

³⁶⁴ INAC Guidelines, *supra* n. 26.

³⁶⁵ AMAP Arctic Oil and Gas, *supra* n. 80 at vi.

relevant opportunities for such involvement.”³⁶⁶

The right of Indigenous Peoples to the economic value of activities in the Arctic is recognized in international and national law. For example, international law provides that when a state retains ownership of mineral or subsurface resources, Indigenous Peoples have rights to participation in the benefits from these resources.³⁶⁷

As the Convention on Biological Diversity explains, Indigenous Peoples also have a right to the equitably sharing of benefits arising from the use of Indigenous Knowledge.³⁶⁸ In addition, benefits from commercial development of genetic resources should be “shared fairly and equitably with all those who have been identified as having contributed to the resource management, scientific and/or commercial process,” including Indigenous Peoples.³⁶⁹

Indigenous businesses can provide a direct and meaningful avenue for benefits to Indigenous Peoples.³⁷⁰ To support the creation of Indigenous businesses, materials can be developed to provide Indigenous Peoples with information about business development.³⁷¹ Governments can also support benefit sharing by helping local business development through legislation granting certain benefits to Indigenous businesses.³⁷² Land claim agreements also support Indigenous businesses. For example, the Nunavut Land Claims Agreement provides support for Inuit businesses and organizations to become competitive for government contracts.³⁷³ The Nunavummi Nangminiqqtunik Ikajuuti (NNI Policy) provides detailed procedures for fulfilling this obligation.³⁷⁴

In cases where activities are not solely owned and operated by Indigenous Peoples, arrangements that provide for an on-going share in the economic profits of the activity, or for direct participation in the activity, are more likely to genuinely support the development and self-determination of the affected Indigenous Peoples, as opposed to one-time payouts.³⁷⁵ For example, in Alaska, the government must pay a percentage of royalties and revenues from minerals produced from leases on specified Indigenous lands.³⁷⁶ Similarly, in Canada, the Inuvialuit Final Agreement creates four corporations that receive profits from development on

³⁶⁶ AOR *supra* n. 192 at 17.

³⁶⁷ ILO No. 169 art. 15(2).

³⁶⁸ CBD art. 8(j).

³⁶⁹ CBD, Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization, ¶ 48 (COP Decision VI/24).

³⁷⁰ *See, e.g.*, Nunavut Sealink and Supply Inc. (March 2013) (noting that its shareholders are co-operatives and Indigenous corporations which represent the interests of Inuit members, provide direct employment and financial opportunities for Inuit, and purchase Inuit arts and crafts, furs and local foods.)

³⁷¹ *See, e.g.*, Alaska Native Knowledge Network, Tribal Tourism Development: Supporting Community Involvement: Supporting Community Involvement.

³⁷² *See, e.g.*, U.S. Small Business Act, 15 U.S.C. § 637 and 13 C.F.R. § 124.506(b) (providing exemptions for Alaska Native Corporations from contracting requirements with the U.S. government).

³⁷³ Nunavut Land Claims Agreement, § 24.2.1.

³⁷⁴ Nunavummi Nangminiqqtunik Ikajuuti (NNI Policy) (May 2005).

³⁷⁵ U.N. Human Rights Council, *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, ¶ 79, A/HRC/15/37 (July 19, 2010) [hereinafter UNHRC 2010].

³⁷⁶ 43 U.S.C. § 1608(1)(b).

Inuvialuit lands and distributes it to beneficiaries.³⁷⁷ The Nunavut Land Claims Agreement also provides for annual resource royalties.³⁷⁸ Indigenous Peoples are also shareholders in many oil and gas projects in Northern Canada and Alaska. In Russia, under the Law of the Republic of Sakha, industrial development is permissible in subsurface areas on the traditional lands of Indigenous Peoples so long as payments are made to the local budget in support and socio-economic development for use of the area.³⁷⁹ Tax revenues from development activities are another important source of economic benefits.

Training and employment are additional means of benefit sharing. Inuit policies state that companies should provide Inuit training and management development programs, and that Inuit must derive direct and substantial employment income benefits and the maximization of Inuit employment in resource development activities.³⁸⁰ Policy guidelines by Indigenous Peoples also advise that Indigenous Peoples be trained and employed in research activities.³⁸¹ The AACA (a) report recommends training and employing Indigenous Peoples in climate change adaptation activities.³⁸²

Benefit sharing can be provided through agreements between Indigenous Peoples and developers. As noted by the Sustainable Development Working Group, these agreements establish formal relationships to reduce the predicted impacts and secure economic benefit for affected communities.³⁸³ For example, under the Nunavut Land Claims Agreement in Canada, an Impact and Benefit Agreement (IBAs) is required by any project on Inuit-owned land.³⁸⁴ Agreements between developers and indigenous peoples must be negotiated in “clear and unequivocal terms, so as to ensure them of direct and adequate participation and benefits such as equity participation, revenue sharing and resource taxation benefits.”³⁸⁵ These agreements can also outline the terms for preferred access to business opportunities and for employment and training opportunities for the Indigenous entity.³⁸⁶

Governments can stress the importance of or require these agreements.³⁸⁷ Some Indigenous engagement protocols require the negotiation of IBAs.³⁸⁸ Even without formal agreements to provide benefits, organizations conducting activities in the Arctic can promote benefit-sharing,

³⁷⁷ Inuvialuit Final Agreement, July 21, 1984, § (6)(4)(a).

³⁷⁸ Nunavut Land Claims Agreement, § 25.1.1.

³⁷⁹ Article 39.

³⁸⁰ ICC Declaration on Resource Development, *supra* n. 64; ICC Arctic Policy, *supra* n. 94.

³⁸¹ *See, e.g.*, Bristol Bay Native Association Policy Guidelines For Research In Bristol Bay.

³⁸² AACA (a) report, *supra* n. 163.

³⁸³ SDWG Mining Guide, *supra* n. 38.

³⁸⁴ Nunavut Land Claims Agreement, § 26.3.3.

³⁸⁵ ICC Arctic Policy, *supra* n. 94.

³⁸⁶ Wilson, P. and Hiller, C. Drafting Impact Benefit Agreements. Continuing Legal Education Society of British Columbia (November 2011).

³⁸⁷ Bureau of Minerals and Petroleum, Greenland, Guidelines for Social Impact Assessments for mining projects in Greenland (Nov. 2009).

³⁸⁸ *See, e.g.*, Temagami Protocol, *supra* n. 102, Step 4: Consultation at Advanced Exploration Stage and Mine Development.

for example, through codes of conduct that endorse Indigenous economic engagement.³⁸⁹ Similarly, organizations can support local hire. In Nunavik, for example, Inuit are hired as staff for cruise ships.³⁹⁰

Another form of engagement is employment in public government jobs in regions with Indigenous Peoples. For example, the Nunavut Land Claims Agreement aims to achieve Inuit participation in the territorial government at a representative level, through elimination of discrimination, and using recruitment and training programs.³⁹¹

Projects can also provide meaningful experience, training, and employment for Indigenous Peoples.³⁹² For example, the AACA(a) recommends that climate change adaptation activities “include training of local Arctic leaders, based on the best available adaptation knowledge, drawing from scientific and traditional and experience-based knowledge.”³⁹³ Similarly, the Arctic Council’s Recommended Practices for Arctic Oil Spill Prevention recommends training communities in oil spill response.³⁹⁴ Aboriginal Mining Funds in Canada supports the involvement of Indigenous Peoples in the development of mining through training and other activities.³⁹⁵ Educational and training opportunities for youth are additional benefits that organizations can consider. For example, in Nunavut, a high school geoscience program provides students with an understanding of geology-related careers and the opportunities that exist for their future employment.³⁹⁶

Benefit sharing can be contrary to Indigenous self-determination if it is viewed as merely a charitable award to secure social license for the project. When the transfer of money to Indigenous groups is akin to a bribe or a reward, the nature of “free” consent is undermined. Instead, the sharing of economic benefits should be implemented as a means of complying with Indigenous rights.³⁹⁷

In addition to financial payments and economic and employment opportunities, engagement can include other non-monetary benefits, as well. As AMAP recommends, “consideration should be given to securing lasting benefits from oil and gas activities for Arctic residents, for example through the establishment of infrastructure and health-care facilities, so that northern economies and people benefit over the longer-term and so that infrastructure and services are maintained in the period after the activity has declined or ceased.”³⁹⁸

³⁸⁹ See, e.g., WWF Code of Conduct for Operators in the Arctic (counseling tourism operators to hire local staff, contract with local business, and operate in ways that benefit the local communities).

³⁹⁰ Lemelin, R. et al., From Hunting and Fishing to Cultural Tourism and Ecotourism: Examining the Transitioning Tourism Industry in Nunavik, 2:1 Polar Journal 39, 50 (2012).

³⁹¹ Nunavut Land Claims Agreement, §§ 23.2.1, 23.4.2, 23.5.1,

³⁹² IARPC Principles, *supra* n. 59; Raymond-Yakoubian, J. et al, *supra* n. 88 at 56.

³⁹³ AACA(a), *supra* n. 163 at 7.

³⁹⁴ EPPR Recommended Prevention Practices, *supra* n. 363 at 36.

³⁹⁵ Good Practices in Community Engagement and Readiness, *supra* n. 89 at 30.

³⁹⁶ *Id.* at 23.

³⁹⁷ UNHRC 2010, *supra* n. 375 ¶ 79.

³⁹⁷ 43 U.S.C. § 1608(1)(b).

³⁹⁸ AMAP Arctic Oil and Gas, *supra* n. 80 at vi. See also AMAP, Oil and Gas Activities in the Arctic at 7-15 (2007) (encouraging consultations to harness economic and other opportunities).

K. Shared decision-making

Shared decision-making or management authority can help to ensure meaningful engagement. Full and equal participation by Indigenous Peoples in decision-making can also make management more effective by reducing conflict, increasing the use of Indigenous Knowledge, supporting sustainable use, and providing benefits to the community.³⁹⁹ Shared decision-making institutions also facilitate adaptive learning and management, which is particularly important in the Arctic.⁴⁰⁰

The Arctic Council does not exercise decision-making or management authority. However, the Arctic Council and Permanent Participants cooperate as equal partners in various projects. Arctic Council guidelines emphasized the importance of partnership and participation of Indigenous Peoples, but do not focus explicitly on the importance of shared decision-making and management.

Various national and international laws recognize a right to Indigenous engagement through participation in decision-making. For example, UNDRIP recognizes Indigenous Peoples' rights to "participate in the use, management, and conservation" of natural resources "pertaining to their lands."⁴⁰¹ The Rio Declaration highlights the "vital role" that Indigenous Peoples have in environmental management and development and the importance of their "effective participation in the achievement of sustainable development."⁴⁰²

National laws and agreements with Indigenous Peoples also provide for shared decision-making. For example, the Nunavut Land Claims Agreement in Canada specifies that Inuit will participate in decision-making concerning the use, management and conservation of land, water and resources, including the offshore and in decision-making concerning wildlife harvesting.⁴⁰³

MOUs between Indigenous Peoples and national governments can also support shared decision-making. For example, an MOU between the U.S. government and Indigenous Peoples who use marine mammals for subsistence states that the Indigenous Peoples should have "full and equal participation" in decision-making related to "the subsistence management of marine mammals."⁴⁰⁴ The Arctic Council Offshore Oil and Gas Guidelines recommend that states "pursue regulatory and political structures that allow for participation of Indigenous people and other local residents in the decision making process."⁴⁰⁵ Shared decision-making can also occur in the context of scientific research. For example, an agreement between Shell Oil and the North

³⁹⁹ Peters, E. Organizational Design for Co-Management: Comparing Four Committees in Nunavik, 44 *Les Cahiers de Droit* 4, 667, 669 (2003).

⁴⁰⁰ Armitage, *supra* n. 252 at 1002.

⁴⁰¹ UNDRIP art. 15.

⁴⁰² UNEP, Rio Declaration on Environment and Development, Principle 22 (1992).

⁴⁰³ Nunavut Land Claims Agreement.

⁴⁰⁴ Memorandum of Agreement for Negotiation of Marine Mammal Protection Act § 119 Agreements Among the U.S. Department of Commerce, National Marine Fisheries Service, U.S. Department of Interior, Fish and Wildlife Service, and the Indigenous Peoples' Council for Marine Mammals (2006).

⁴⁰⁵ PAME Offshore Oil and Gas, *supra* n. 80 at 12.

Slope Borough established a steering committee to review research proposals.⁴⁰⁶

Shared decision-making is often implemented through co-management. Co-management involves the sharing of power and responsibility between government and local resource users.⁴⁰⁷ Co-management includes a variety of arrangements in which there is a range of shared responsibility and authority between government and Indigenous Peoples. Co-management bodies that are established pursuant to a legal process that is rooted in the acknowledgement of Indigenous Peoples' sovereignty may be more likely to achieve meaningful power-sharing in management. For example, co-management institutions that develop out of Canadian comprehensive land claims agreements have particularly strong potential to support meaningful engagement because of the treaty and constitutionally based underlying support.⁴⁰⁸ Similarly, the creation of co-management bodies through legislation can help to support the power and credibility of the co-management organization.⁴⁰⁹ In Alaska, for example, the Marine Mammal Protection Act allows federal agencies to enter into co-management agreements with Alaska Native organizations for marine mammal subsistence management.⁴¹⁰ The MMPA also provides a subsistence priority for Indigenous Peoples, which guides management practices.⁴¹¹ For co-management institutions to be effective, they generally require a clear place in government decision-making structures.⁴¹² When Indigenous Peoples co-operate at a regional level, they are more likely to be successful in negotiating the terms for shared decision-making.⁴¹³ Adequate funding for Indigenous Peoples to participate in co-management is also essential.⁴¹⁴

One of the ways co-management can be implemented is through the creation of bodies that have both Indigenous and government representatives. For example, in northern Canada, around 40 different co-management boards have responsibilities including wildlife, water and land management, environmental protection, impact assessment, and non-renewable natural resources.⁴¹⁵ These boards have different roles, jurisdictions, and degrees of influence, but some are the primary mechanism for resource management in their jurisdiction.

Typically, at least half of the positions in these shared representation bodies are Indigenous. For example, the Nunavik Hunting, Fishing and Trapping Coordinating Committee (HFTCC) consists of half federal and provincial government representatives and half Indigenous Peoples. To be representative, however, these bodies must also have community support and regular

⁴⁰⁶ Collaborative Research Agreement between the North Slope Borough and Shell Exploration & Production Company (2010).

⁴⁰⁷ Berkes, F., et al, *The Canadian Arctic and the Oceans Act: the Development of Participatory Environmental Research and Management*, 44 *Ocean & Coastal Management* 451, 452 (2001).

⁴⁰⁸ Scott, C. *Co-Management and the Politics of Aboriginal Consent to Resource Development: The Agreement Concerning a New Relationship between Le Gouvernement du Québec and the Crees of Québec* (2002) in, Canada: The State of the Federation: Reconfiguring Aboriginal- State Relations at 134 (Murphy, M., ed. 2005).

⁴⁰⁹ Peters, *supra* n. 399 at 673.

⁴¹⁰ 16 U.S.C. § 1388.

⁴¹¹ Kimmel, *supra* n. 254 at 193.

⁴¹² Peters, *supra* n. 399 at 685.

⁴¹³ Scott, *supra* n. 408 at 139.

⁴¹⁴ Alaska Federation of Natives, 2011 Federal Priorities.

⁴¹⁵ Natcher, D., Gender and Resource Co-Management in Northern Canada, 66:2 *Arctic* 218 (June 2013).

communication with community members.⁴¹⁶ Some co-management boards strive also to include women, which is “necessary to the overall effectiveness of board decision making.”⁴¹⁷ A study of boards in Canada found that board members believed that women’s representation positively influenced decision-making processes and that women brought a unique set of perspectives, knowledge, and experiences to the table.⁴¹⁸ In addition, the presence of women within natural resource management groups improved collaboration, solidarity, and conflict resolution.⁴¹⁹ In particular, when women constitute at least one quarter to one third of board membership decision-making by the body is strengthened.⁴²⁰

Policies and laws require diversity on boards and committees. For example, Yukon Government’s policy on boards and committees states that the Yukon Government is committed to and will make its best efforts to ensure that nominations and membership on boards and committees “is representative of Yukon society, including gender, age, First Nations people, youth, visible minorities and people with disabilities.”⁴²¹ In addition to operationalizing engagement through representation in their membership, these boards can also form Indigenous engagement policies.⁴²²

Co-management is also implemented through the creation of entirely Indigenous bodies or institutions. These bodies may share the decision-making process with a government decision-making entity. For example, in Norway, 95 percent of the land areas in Finnmark, previously managed by the state-owned enterprise Statskog, was transferred to the independent entity, the Finnmark Estate, and thus to local ownership. A board consisting of six persons governs the Finnmark Estate. The Sami Parliament appoints three of the members and the Finnmark County Council appoints the other three.⁴²³ csr

Co-management also occurs through the delegation of specific management authority to Indigenous institutions. For example, in Canada, protocol agreements for cooperation in fisheries enforcement provide jurisdiction to community justice forums, rather than the Canadian government court system.⁴²⁴

Governments provide capacity-building services that are aimed at strengthening Indigenous Peoples’ ability to participate in co-management. For example, the Canadian Aboriginal Aquatic Resources and Oceans Management Program assists aboriginal organizations in developing

⁴¹⁶ Peters, *supra* n. 399 at 675.

⁴¹⁷ Staples, K. and Natcher, D., Gender, Critical Mass and Resource Co-Management, 41 Northern Review 139 (2015).

⁴¹⁸ *Id.* at 146.

⁴¹⁹ *Id.* at 141.

⁴²⁰ *Id.*

⁴²¹ *Id.* at 151.

⁴²² See, e.g. MVLWB Policy, *supra* n. 43.

⁴²³ Act No. 85 of June 17, 2005 relating to Legal Relations and Management of Land and Natural Resources in the County of Finnmark.

⁴²⁴ Wiber, M. and Milley, C. After *Marshall*: Implementation Of Aboriginal Fishing Rights In Atlantic Canada, 55 Journal of Legal Pluralism 163, 177 (2007).

administrative capacity and scientific expertise to participate in oceans management.⁴²⁵

The principle of free, prior and informed consent can help foster the evolution of co-management and decision-making authority.⁴²⁶

L. Honoring of the autonomy and human rights of Indigenous Peoples

Under international law, Indigenous Peoples have a right to traditional lands and waters and to the resources on those lands and waters. For example, ILO No. 169 recognizes Indigenous Peoples' rights to lands "which they traditionally occupy" and requires states to identify these lands and guarantee protection of Indigenous Peoples' rights of ownership and possession.⁴²⁷ Similarly, UNDRIP recognizes Indigenous Peoples' rights to "own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership."⁴²⁸ The protection of Indigenous territorial interests is an important aspect of Indigenous economic development, self-government, self-sufficiency, and self-determination, which are also fundamental rights of Indigenous Peoples.⁴²⁹

Various Arctic Council reports focus on the importance of Indigenous self-government.⁴³⁰ Arctic Council recommendations do not address self-government or self-determination, and they do not emphasize Indigenous human rights.

In the Arctic, a common trend "is the empowerment of Indigenous Peoples through new structures of governance as well as through devolution of legislative powers."⁴³¹ This occurs mainly through decentralization of decision-making through public government and through forms of ethnic self-government, which operate in parallel to public government.⁴³² In Greenland, for example, the Self-Rule Agreements of 2009 provided Greenland, a public government, with control over its mineral and oil resources. The fulfillment of Indigenous rights and engagement is thus dependent on participatory democratic process and mandatory consultation frameworks.⁴³³ Similarly, in other cases, public governments of Indigenous majorities exist at the local level and have jurisdiction over specific areas as determined by the relationship between federal and local government. For example, in Alaska, the North Slope Borough has jurisdiction over various issues affecting its Indigenous inhabitants, including the ability to tax oil and gas production and pipeline property within the Borough limits. Similarly, in Canada, Nunavut and the Northwest Territories have public forms of government with

⁴²⁵ *Id.* at 178.

⁴²⁶ FPIC Methodologies Report, *supra* n. 122 ¶ 42.

⁴²⁷ ILO No. 169 art. 14.

⁴²⁸ UNDRIP art. 26.

⁴²⁹ UNDRIP arts. 3, 21; *See also* ICC, Declaration on Resource Development, *supra* n. 64; ICC Inuit Arctic Policy, *supra* n. 94.

⁴³⁰ *See, e.g.*, Arctic Social Indicators – a Follow-up to the Arctic Human Development Report at 129 (Larsen, et al, eds, 2010); Arctic Social Indicators II – Implementation (Larsen, et al, eds, 2012).

⁴³¹ Koivurova, T. et al., *supra* n. 315.

⁴³² Broderstad, E. et al, *Political Systems*, in Arctic Human Development Report at 93-97 (2004).

⁴³³ Hubbard, R., *Risk, Rights and Responsibility: Navigating Corporate Responsibility and Indigenous Rights in Greenlandic Extractive Industry Development*, 22 Michigan State Int'l Law Review 101, 113 (2013).

jurisdiction over a range of issues. Devolving governance so that northerners have greater control over their destinies is one of the main pillars of Canada's Integrated Northern Strategy.

In Russia, both public government and Indigenous rights address the issue of self-determination. For example, the Constitution of the Republic of Sakha (Yakutia) provides for local self-government and the right of Indigenous Peoples to own and use tribal agricultural, hunting, and fishing grounds.⁴³⁴ While either approach (ethnic or non-ethnic self government) can provide a basis for self-determination, adequate safeguards for the rights and interests of Indigenous Peoples are necessary and the proper implementation and consistent enforcement of these laws is fundamental to their success in supporting meaningful engagement.

Arrangements for Indigenous self-government also support Indigenous rights. For example, in Alaska, tribal governments operate in parallel to public government. Thus, tribal governments have jurisdiction over specified issues while the public government maintains jurisdiction over other issues.⁴³⁵ The Saami Parliaments in Norway, Sweden, and Finland are also forms of Indigenous self-government. Some land claims agreements in Canada provide self governance, including the transfer of land to Indigenous Peoples. For example, the Tlicho land claims agreement transferred land to the Tlicho government, which has the authority to grant leases, licenses, and rights to remove natural resources on the land, as well as receive the full economic benefits of resources removed from their land.⁴³⁶ These self-governance arrangements, because they operate in parallel with public governments, can be viewed as an extension of co-management.

Adequate sources of funding to operate these forms of government are essential, and an imbalance of limited revenue and expanded governance responsibilities will undermine efforts to promote Indigenous autonomy. The Saami Parliament submits an annual budget to and receives funds from the central government.⁴³⁷ Arrangements that provide Indigenous self-government institutions the same fiscal conditions enjoyed by regional or local level public governments can help to address this challenge.⁴³⁸ The principle of equalization, whereby local government receive federal transfers public services and programs that are on par with those comparable to those in other areas, at comparable levels of taxation, is a key aspect of federal fiscal policy to consider in the Indigenous governance context.⁴³⁹ Current social and economic conditions for Indigenous Peoples can be improved through stronger implementation of the principle of equalization.

Indigenous autonomy is also supported through business development. For example, tourism

⁴³⁴ The Constitution of the Republic of Sakha (Yakutia), N 908-XII, arts. 42 and 97 (1992).

⁴³⁵ The Indian Reorganization Act (1936 amendments) allows tribes to create tribal constitutions for self-governance, which gives tribes a government-to-government relationship with the US government.

⁴³⁶ Tlicho Agreement, Aug. 25, 2003, § 18.1.1 (transferring property in fee simple).

⁴³⁷ Implementing^[1]the UN Declaration on the Rights of Indigenous Peoples Handbook for Parliamentarians N° 23 at 45 (Inter-Parliamentary Union, 2014).

⁴³⁸ Prince, M. and Abele, F., *Paying for Self-Determination: Aboriginal Peoples, Self-Government, and Fiscal Relations in Canada*, sin, Canada: The State of the Federation: Reconfiguring Aboriginal- State Relations at 256 (Murphy, M., ed. 2005).

⁴³⁹ *Id.* at 252.

companies may provide some Indigenous Peoples and communities important opportunities to gain control of additional aspect of their social and economic life by creating and independently managing businesses that preserve and transmit their cultural heritage.⁴⁴⁰

⁴⁴⁰ Lemelin et al., *supra* n. 390 at 54.

V. The Arctic Council and Indigenous Engagement

As this paper demonstrates, parties' understanding of what meaningful engagement is may differ, but there are similar elements and principles of meaningful engagement throughout the good practices and recommendations. Yet, there are no generally applicable guidelines for entities conducting activities in the Arctic; instead, there is only a patchwork of recommendations and practices aimed mostly at specific types of organizations. Additionally, there are significant gaps in guidance for organizations whose Arctic activities are not regulated, such as NGOs. The Arctic Council could consider recommending that entities conducting activities in the Arctic

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Elizabeth Edmondson*

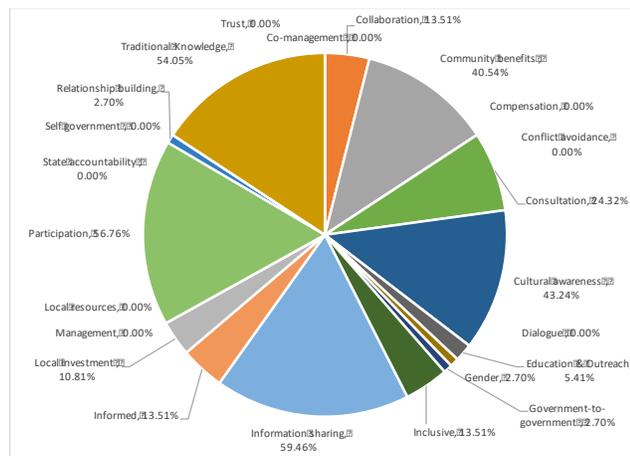
review their Indigenous engagement practices to identify how these practices can be strengthened and ensure that they have adopted and abide by good practices of Indigenous engagement. The Arctic Council could also consider promoting a widely applicable set of good practices for engagement all entities conducting activities in the Arctic.

Compared to good practices of engagement by and with Indigenous Peoples reviewed in this paper, the Arctic Council recommendations focus less on: adequately preparing for engagement; identifying the individuals who will participate in engagement (including the issue of gender); identifying the activities that require engagement and the degree of engagement that is necessary; determining the role of

consent in engagement; strengthening accountability by all parties; and shared decision-making, self-government or other mechanisms to support the autonomy and human rights of Indigenous Peoples. These could be topics for future Arctic Council research or recommendations to consider.

The quantitative assessment conducted as part of the MEMA project reviewed approaches and practices put forward by the Arctic Council in light of recommendations by a variety of other sources, including national governments, academics, researchers, Indigenous Peoples, NGOs, and companies.

The assessment found that the majority of recommendations or good practices in engagement with and by Indigenous



Keywords of engagement highlighted by the Arctic Council, Elizabeth Edmondson

Peoples fell into three broad categories: relationship building, information sharing, and capacity building.⁴⁴¹ With respect to relationship building, the assessment found that the Arctic Council recommendations emphasized the need to foster relationships among governments, Indigenous Peoples and organizations, and other parties through consultation, partnerships, and effective communication. In the area of information sharing, the study found that the Arctic Council placed significant emphasis on the inclusion of Indigenous Knowledge and community-based research. The Arctic Council recommendations generally emphasized information gathering more than the recommendations and practices from other entities. The Arctic Council's recommendations promoting capacity building and benefit sharing focused on long-term benefits and economic development opportunities.

The quantitative assessment examined recommendations as they related to different stages of engagement, which involves the issue of timeliness (engaging at higher, strategic-level decision-making) as well as the issue of ongoing engagement. The Arctic Council's recommendations with respect to the various stages of engagement were in line with the other sources in many respects. However, as compared to all the recommendations and practices reviewed, the assessment found that the Arctic Council recommendations placed less emphasis on engagement that takes place in advance of applications for development project and less emphasis on the need for engagement to be ongoing. Yet, given the connection between relationship building (which the Arctic Council recommendations clearly emphasize) and ongoing engagement, the lower emphasis for ongoing engagement noted in the assessment may be a reflection of how the assessment was structured, rather than a reflection of Arctic Council views of ongoing engagement. In contrast, as compared to all recommendations reviewed, the study found that the Arctic Council recommendations placed greater emphasis on monitoring.

Dispute resolution about the adequacy of engagement is not addressed by this report and was not thoroughly discussed in the recommendations analyzed by the quantitative assessment. The ability for Indigenous Peoples to hold entities accountable for meaningful engagement and to have access to a fair and transparent process for resolving disputes about engagement is an essential aspect of ensuring that engagement is truly meaningful. The issue of resolving disputes related to engagement by and with Indigenous Peoples is therefore an area that deserves greater investigation and consideration.

The quantitative assessment also looked at good practices as they were reflected in different types of activities taking place in the Arctic and in adjacent sub-Arctic regions. Among the documents reviewed, a high proportion related to engagement practices in resource management and development. Very few addressed best practices in shipping and tourism. This is likely a reflection of the fact that resource management and development have been taking place for some time, while tourism and shipping are newer activities in the Arctic. Future Arctic Council work to support generally applicable good practices for all entities would be particularly beneficial for activities such as these, where there is less guidance.

The assessment identified documents according to their authorship. The greatest number of documents came from national governments. Relatively few documents were from NGOs,

⁴⁴¹ Elizabeth Edmondson, Appendix 1, at 12.

Indigenous Peoples, or companies. An expanded database including more input from these sources could confirm the commonality of good practices across activities and could emphasize new or different perspectives on Indigenous engagement.