

Participation of indigenous peoples of the Arctic at the crossroads of natural habitat destruction and economic prosperity

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Abstract: Indigenous peoples' issues have been discussed not only for decades but centuries. Even if their rights have improved for the last 25 years, they can still be enhanced. Moreover, they are now at a crossroads in the Arctic region because of the impacts of global warming and climate change. The increased ice-melting gives access to natural resources. Consequently, international petroleum and mining companies see now this region as the new frontier.

Using a comparative approach, the purpose of this study is to demonstrate that, by using their right to consultation and participation in the decision-making processes, Arctic indigenous peoples could solve the existence of a dilemma due to these new socio-economic and development opportunities. Indeed, a sustainable balance between these opportunities of economic prosperity and their natural habitat and traditional livelihood need to be found. The existence of different levels and techniques of participation is also highlighted in this thesis.

Through international legal instruments, cases, academic literatures and reports and various documents, developments demonstrated that the implementation of these indigenous peoples' rights, illustrated through the concept of free, prior and informed consent can solve such dilemma of participation. This study could impact, if successful, on how international petroleum and mining companies and States implement these concepts and rights, taking into consideration the existence of this dilemma.

Keywords: Arctic, Indigenous peoples, Indigenous peoples' rights, Free prior and informed consent, FPIC, Consultation, Participation, Consent, Decision making process, exploration, exploitation, natural resources, Sami, Inuits, Dilemma of indigenous peoples, Global warming, Climate change, Consequences, natural habitat destruction, economic prosperity.

"In other words the power to say no is the most important bargaining chip that an Aboriginal group has. If you don't have that fundamental power then the terms and conditions of any agreement you get are likely to be considerably less."¹

– Stuart McGill (1986).

I. Introduction

A. Arctic voices: the example of the dilemma of the Inupiat

Impacts of climate change and recent developments of exploration and exploitation of natural resources by international petroleum and mining companies (IPMCs) have dramatic consequences on indigenous peoples (IPs) and more precisely on lands traditionally belonging to them or close to them. This puts forward the necessity to study the issue of participation of IPs in the decision-making processes.

The case of the Inupiat people, in the Northwest part of Alaska,² is a relevant illustration of the situation of Arctic IPs and their participation relating to the exploitation of natural resources.

In 2012, the energy company Royal Dutch Shell (Shell) announced their intention to drill for oil in the Chukchi Sea, in the Arctic Ocean and in the Beaufort Sea.³ In July 2012, the first new offshore drilling project since

¹ Garth Nettheim, 'Indigenous Resource Rights: Interview with Stuart McGill' (1986) 4. He interviewed McGill who was one of the authors of a report entitled 'Indigenous Resource Rights and Mining Companies in North America and Australia' for the Department of Aboriginal Affairs. In this interview, Nettheim explains that the veto power is not used to say "no" to mining but rather as a guarantee that companies will treat fairly IPs and that these peoples will get fair terms. McGill answers him with these quoted lines.

² They live in North Slope boroughs and in the Bering Straits region. They subsist on hunting and fishing.

the 2010 BP's Deepwater Horizon disaster in the Gulf of Mexico was approved by the U.S. government. It is believed that 27 billion barrels of recoverable oil lie some 100 miles offshore from Barrow, the northernmost borough of Alaska. If estimations are correct, it would be a crucial discovery for the United States.⁴

The exploitation of natural resources on their traditional lands by IPMCs has been beneficial for the Inupiat people to the highest degree.⁵ Nevertheless, many of the Inupiat peoples are concerned about the future consequences of this mining activity. They wonder what their future will be once there is no more oil and gas to drill. They are aware of the risk of drilling accidents and the dramatic consequences they would have on the environment but also on their own existence.

Indeed, the Inupiat peoples are an illustration of the consequences of climate change on indigenous human rights and of the dilemma that Arctic IPs face. As a matter of fact, when a case against Shell was brought before the local court by environmental organisations, the indigenous cooperatives of Barrow, Wainwright and Kaktovik wrote a joint letter to legally support Shell. They affirmed that offshore drilling reinforces their economic development.⁶ It shows that sometimes Arctic IPs can foresee interest in the development of oil, gas and mining industries.

Consequently, because of this dilemma and the fact that the indigenous livelihood and worldview is their special relationship with the land and its resources, they must take part in decision-making processes concerning development projects and laws that affect them, the land where they live in and the territories next to them.⁷

B. Climate change: implications for natural resources in the Arctic

The Arctic is considered as one of the most vulnerable environments on this planet.⁸ Even if a few academics maintain that the phenomenon of climate change does not exist, this thesis will not go into the debates concerning the actual existence of global warming and climate change, but will consider that climate change does exist as a global phenomenon.⁹

³ Shell US relayed on its website an article of CNN.com explaining "Why Shell is betting billions to drill for oil in Alaska". See: Jon Birger, 'Why Shell is betting billions to drill for oil in Alaska' (24 May 2012).

⁴ According to the International Energy Agency, the worldwide oil consumption is nowadays running at 89 million barrels a day.

⁵ Persson explained that the mining activity has benefited these indigenous villages; first through the property taxes on oil stocks and second through local companies (indigenous cooperatives) from the creation of jobs in the oil industry. These cooperatives are now realising revenues up to several hundred million to a few billion. All profits go to the IPs which bring them between 5,000 and 10,000 dollars per year for the indigenous community. See: Persson, 'Arctique: Le dilemme des Inupiks' *Courrier International*, translated from an article published in *De Volkskrant*, (16 August 2012). On the practical side, this gain of money has financed their boats, snow motorbikes and "harpoon-bazookas". But it is important to keep in mind that situations are different between peoples, parts of the region and countries in the Arctic.

⁶ Persson, 'Arctique: Le dilemme des Inupiks' *Courrier International*, translated from an article published in *De Volkskrant*, (16 August 2012). As a matter of fact, Shell announced in February 2013 its intention to "pause" its project of oil drilling in Beaufort and Chukchi Seas for the year 2013, officially in order to "prepare equipment and resume exploratory drilling at a large stage". See: *Environment News Service*, 'Shell Oil Cancels Offshore Alaska Drilling for 2013' (27 February 2013) and *Le Nouvel Observateur* 'Shell renonce à forer en Alaska cette année' (27 February 2013). Statoil has also declared renouncing to drill in the Arctic.

⁷ Deborah M. I. Szatylo, 'Recognition and Reconciliation: An Alberta Fact or Fiction? The Duty to Consult in Alberta and the Impact on the Oil and Gas Industry' (2002) 202.

⁸ Heinämäki (2004) 231.

⁹ To the sceptical people about climate change, one could answer that even if temperatures on earth are indeed a cyclical phenomenon, records show that temperatures are higher than they used to be and that the increase has taken place during a shorter period than ever after the last ice-age. As Al Gore reminded in his book and film *An Inconvenient Truth* (2006): "In 650,000 years, the CO₂ level has never gone above 300 parts per million (ppm). The temperature curve always fits with the CO₂ level. The relationship between the two is complicated but when there are more carbon dioxides the temperature gets warmer but it traps more heat. Today, the CO₂ concentration is way above the previous measures. (...) In less than 50 years, it will continue to go up, really up". Additionally, according to the 1997 evaluation by the Intergovernmental Panel on Climate Change (IPPC), "the Arctic is perhaps the region in the world where climate change is seen as occurring the most rapidly and clearly". See: Tennberg (2004) 43. But why do the Arctic ice packs melt so quickly? The phenomenon can easily be explained as the following: the Arctic ice ocean can be seen as a mirror. When the sunray hits it, more than 90 % of it bounces back in the space. However, when there is no ice, more than 90 % of these sun-rays are absorbed and they warm up the water which speeds up the melting. Thanks to the Arctic ice, the earth

Crucial changes are taking place in this region.¹⁰ Moreover, these changes do not only affect the Arctic today, they will also impact the rest of the globe in turn.¹¹ Authors continue by saying that “what is happening in the region right now will take place elsewhere in the next 25 years”.¹² If so, a proper governance of these challenges in this region would set a precedence that could be followed elsewhere on the globe for the future changes. Lessons could be learnt from the mistakes done in monitoring the region.¹³

Because of existing uncertainties concerning climate change and global warming (such as if it is a natural cyclic phenomenon or the responsibility of humankind on this phenomenon), the impact of this uncertainty on policy and decision-making processes is however certain: IPs, governments and companies cannot rely on the existing models for representing all concerns and expectations. Therefore, it is a serious obstacle for addressing environmental dilemmas.¹⁴ Also, climate change is not an uncertainty for IPs. It is, for them, a reality all over the world and especially for Arctic IPs.¹⁵ Climate change affects IPs’ human rights and so it is a human right issue throughout the world.¹⁶

Apart from being a major ecological catastrophe, the reduction of the ice is a bargain for resource exploitation of ores and hydrocarbons by IPMCs, not to mention that the melting of the ice pack gives way to new waterways and therefore whets international conflicts for territories.¹⁷

Here is the paradox: mankind is responsible for global warming and yet it will make profit from it.¹⁸ Indeed ice melting will give the opportunity for a lot of people to enrich themselves.¹⁹ This is the first major consequence of climate change in the Arctic region: apart from becoming workable, the Arctic region overflows with resources of ores and hydrocarbons, and very likely gas and oil, and these resources are becoming accessible for exploitation. As James Astill pointed out, these new industries will not be created overnight – but it is, according to him, unavoidable and the figures and the investments made by the energy companies show it.²⁰

These changes contribute to the development of the region and bring economic prosperity to the local populations, governments and States. As the Kingdom of Denmark has expressed it in its Kingdom of Denmark Strategy for the Arctic 2011-2020, climate change and technological developments are opening new possibili-

stays cooler than an open ocean. Astill said that the Arctic is warming twice as fast as the rest of the planet. In fact, Lovell emphasises that a warning event occurred 55 million years ago and the phenomenon is nowadays repeating itself again. See: Bryan Lovell, *Challenged By Carbon: The Oil Industry and Climate Change* (2010) xi: “Comparison of the volume of carbon released to the atmosphere 55 million years ago and the volume we are now releasing ourselves strongly suggests that we are indeed facing a major global challenge. We are in danger of repeating that 55 million-year-old global warming event, which disrupted Earth for over 100,000 years”.

¹⁰ Of course, the fauna and the flora suffer from global warming, but nowadays new threats weigh upon the Arctic.

¹¹ ‘Arctic Pollution Issues: A State of the Arctic Environment Report’ (1997) 6-7, 14 and 68-69. See also: Mark Nuttall, ‘Editorial’ (2008a) 4: “As Clift and Plumb argue in their book ‘The Asian Monsoon’, the continued melting of Greenland’s vast ice sheet and the cooling of the North Atlantic could result in drought in central Asia, and in rising sea levels and increased risks of severe flooding in coastal south and southeast Asia”.

¹² Tennberg (2004) 43. See also: Nuttall, ‘Editorial’ (2008a) 4: “[R]egional and global scientific assessments (most notably, the Arctic Council’s Arctic Climate Impact Assessment, the Intergovernmental Panel on Climate Change (IPCC) Fourth Assessment, and the national Canadian assessment of climate change) confirm that the Earth’s climate is changing in ways that may have irreversible impacts that will affect ecosystems, societies and economies on scales that require urgent global action”.

¹³ Al Gore concludes by saying: “40 % of all the people in the world drink water from rivers and springs that are fed by more than half by the water coming up from glaciers of the Himalaya. (...) 45 % of the world population is going to face a very serious issue because of this melting”. (...) This is really not a political issue not so much as a moral issue. If we allow that to happen, it is deeply unethical”.

¹⁴ Mark Nuttall, ‘Editorial’ (2008a) 4.

¹⁵ Mark Nuttall, ‘Editorial’ (2008a) 4: “Wherever they live, and whatever the diversity of ecosystems they inhabit, they are witness to local manifestations of global phenomenon”.

¹⁶ IPs consider that climate change is a threat to their livelihoods, economy and resource use, and to their traditional culture. Nilsson emphasises that climate change brings “additional vulnerabilities to IPs, which add to existing challenges, including political and economic marginalisation, land and resource encroachments, human rights violations and discrimination”. See: Christina Nilsson, ‘Climate change from an indigenous perspective: key issues and challenges’ (2008) 10.

¹⁷ James Astill, ‘The melting north’ (16 June 2012).

¹⁸ James Astill, ‘The melting north’ (16 June 2012).

¹⁹ James Astill, ‘The melting north’ (16 June 2012).

²⁰ James Astill, ‘The melting north’ (16 June 2012).

ties for the region such as the "increased access to the exploitations of oil, gas and minerals, but also new shipping routes which can reduce costs and CO₂ emissions by freight between the continents".²¹

The second major consequence of climate change in the region is that the melting of the Arctic will have geostrategic consequences. As the records of the American National Snow and Ice Data Centre (NSIDC), two possible shipping routes could soon open up during the summer months: the North-East passage and the North-west Passage.²² These two passages could surely save a lot of money for shipping companies and exporters.²³ Moreover, as the newspaper *The Economist* wrote: "It seems that, for summer at least, even global warming has its advantages".²⁴

Such changes and developments deepen the issue of IPs' rights to land and sea and their participation in decision-making processes as partners in the elaboration of new activities affecting their territories.

C. Research questions

Like all the other indigenous populations on the globe, the indigenous peoples of the Arctic region have a real connection with the land and the sea that compose their natural habitat. In the name of economic prosperity, States deliver permits to explore, drill and exploit these resources now accessible that lie in this habitat. However, the intentions of indigenous communities are usually not listened to or even asked for. Natural resources are crucial for Arctic IPs because their economic and cultural survival rely on them.

Because of the increased demand for renewable energy, some IPs have expressed optimism. They think that their lands could be an important resource for such energy.²⁵ However before expressing such optimism, and in lights of the previous developments and description of the situation, for instance, of the Inupiat in Alaska, many additional questions arise and guide developments and thoughts throughout this thesis.

Such findings lead to address the following problematic: how can IPs participate in decision-making processes concerning exploration and exploitation of natural resources? What are the different existing levels and techniques of participation? How can a balance be found between the positive and the negative socio-economic opportunities and impacts raised by the phenomenon of ice-melting on the natural habitat and traditional livelihood of Arctic IPs?

D. Delimitations, methods and materials, structure

The question of IPs' rights deals with a very broad range of issues. A clear delimitation of the topic seems to stand out here. This thesis aims at studying the participation of IPs in the Arctic in decision-making processes concerning natural resources by petroleum and mining companies. It also intends to demonstrate the dilemma they face regarding the necessity to find a proper balance between the protection of their natural habitat from destruction and economic prosperity, relying on these rights to consultation and participation.²⁶

Therefore, even if it is indeed a serious issue in the Arctic region, this thesis does not seek to deal with issues such as the new shipping routes of the North-West Passage and the North-East Passage²⁷ and the dispute regarding their international status or the territorial claims in the region, which are always a sensitive issue.²⁸

²¹ Kingdom of Denmark Strategy for the Arctic 2011-2020, 9.

²² A Russian super tanker did successfully cross the Northern sea route using the help of nuclear ice breakers in only eight days in August 2011. See: *The American Polar Society*, 'Speed record on Northern Sea Route' (19 August 2011).

²³ President of Iceland Grimsson stated that these new passages between Asia, America and Europe will be as revolutionary as the opening of the Suez Canal was in 1869 which had mere consequences on the development of European trade. See: Johan Nylander, 'Arctic Council meeting opens in Kiruna' *The Swedish Wire* (14 May 2013).

²⁴ Martin Frobisher, 'Melting Arctic sea-ice and shipping routes. Northern exposure' (22 September 2011).

²⁵ Christina Nilsson, 'Climate change from an indigenous perspective: key issues and challenges' (2008) 10.

²⁶ The topic of this thesis is limited to the right of IPs to be consulted and to participate in the context of decision for traditional territories and the natural resources. However, one must remember that arctic environmental issues also concern also other rights. See: Heinämäki (2004) 232: "(...) such as cultural rights, especially the right to traditional livelihoods, the right to health and a healthy life, the right to an adequate standard of living and the right to development".

²⁷ Also called by the Russian the Northern Sea Route.

Moreover, for each and every environmental issue and human rights issue, the problem is the struggle for accountability. As environmental catastrophes and drilling accidents do not necessarily involve violations of human rights, this thesis neither intends to deal with the question of how such a case can be brought before a court by IPs, nor with the struggle for accountability including the issue of cleanup, compensation and recovery.²⁹ In addition, this thesis does not deal with the issue of offshore spill prevention and environmental protection. Also, this thesis will not try to present possible answers to what can be done to reduce global warming.³⁰

This thesis is written using various data-collection methods and sources. Even if all IPs do not have the same political recognition from States, it is fortunately not the case,³¹ for almost all Arctic IPs. Moreover, this thesis makes use of a legal and political approach.

Thus, a legal and political method is mainly used in order to provide the framework and rules that are needed to give IPs the opportunity, and more importantly the right to participate and to get involved in the decision-making process regarding the exploitation of natural resources by the states and the energy companies. Original materials such as treaties, conventions, declarations, agreements, laws, and of course cases and other binding legal documents, are used to support such legal method through primary sources found in data bases and official websites listed below in the bibliography. Moreover, a legal comparative method is also used to draw a comparison between relevant countries. A vertical comparison is established between international and national instruments to highlight the relationship between them.

To obtain comments and analysis of these original sources, existing secondary sources concerning the research topic were read and analysed. They include academic literature that is books and articles. Tertiary sources such as newspapers are also used. Printed media, such as English-speaking and French-speaking newspapers, are followed in order to have short up-to-date analysis and comments on the debates concerning climate change, global warming, Arctic discourses, State conflicts over the Arctic region, and exploitation of natural resources by energy companies. To do so, popular media are mainly followed, using magazines giving translations of articles published in throughout the world. It is also a way to get public opinion on these issues and recent developments that cannot be obtained so quickly through academic literature.

In addition to the legal method, the research approach also includes a political approach and an economic aspect due to the fact that indigenous communities face an evolution in time. This is deeply linked to an anthropological, environmental and cultural impact since climate change gives energy companies the access to natural resources. Information and critical analysis are also acquired through documents and reports from non-governmental organisations.

Finally, to get a better understanding of the situation and satisfactory answers to the research questions, meetings and additional informal and sometimes short conversations have been conducted as theory needs to be supported by concrete facts and analysis of reality. One field trip to Finnish Lapland was also conducted in April 2012.

²⁸ It can be said that these territorial claims are an obstacle to create an international regime in the region and these territorial claims frighten the stability of the region and the economic prosperity of the region for the States involved. Examples of sensitive territorial disputes in the Arctic region: disputes over Hans Island and the Kennedy Channel, the Beaufort Sea Border issue, the Barents Sea, and the Lomonosov Ridge.

²⁹ In fact, this issue is currently raised before a court in New Orleans, Louisiana with a civil trial against BP that has began on February 25th, 2013.

³⁰ Greenhouse gas have reached 400 ppm for the first time in human history. According to Bob Ward, policy director at the Grantham Research Institute on Climate Change at the London School of Economics, "we are creating a prehistoric climate in which human societies will face huge and potentially catastrophic risks. Only by urgently reducing global emissions will we be able to avoid the full consequences of turning back the climate clock by 3 million years." See: Damian Carrington, 'Global carbon dioxide in atmosphere passes milestone level' (10 May 2013): "The last time so much greenhouse gas was in the air was several million years ago, when the Arctic was ice-free, savannah spread across the Sahara desert and sea level was up to 40 metres higher than today". See also: Bryan Lovell, *Challenged By Carbon: The Oil Industry and Climate Change*, Cambridge University Press (2010) xii: Lovell wonders if developing countries can be helped to achieve their aspirations for rapid development while maintaining a low per-capita output of fossil carbon and how emissions of greenhouse by oil companies could be reduced.

³¹ Some are recognised in national constitutions while others are only recognised in international treaties. Actually, the majority of IPs worldwide are not recognised and face rejection or policies of assimilation that promote unity, indivisibility of the State and its population.

The following chapter gives a short presentation of IPs with the existing definitions of IPs and then presents the different indigenous communities living in the Arctic region, with relevant national legislations. It also describes the dilemma they face. Then, chapter 3 provides the legal and political framework related to their rights to consultation and participation, using relevant instruments through a systemic approach. It highlights the different levels and techniques of participation. Chapter 4 presents the concept of free, prior and informed consent and develops the issues it raises. Further on, chapter 5 focuses on how IPMCs use this concept and other developments concerning IPs' rights to establish guidelines and codes of conduct. Finally, chapter 6 contains some recommendations towards the issue and the general conclusion.

II. Economic and Social impacts of Arctic resources exploitation: indigenous peoples and their necessity to participate

A. Who are the indigenous peoples

1. The premise of the recognition of indigenous peoples' rights: the ILO Conventions

According to estimations, there are about 300 to 370 million persons belonging to IPs in the world, divided into about 5,000 peoples in the world.³² However, it is not clear who is indigenous and who is not. The UN Charter contains no reference to IPs. Nevertheless, they were progressively the subject of specific consideration in the United Nations (UN) institutions.³³ But it was only during the 1960s that the UN really started to study their situation.

It is the International Labour Organisation (ILO) that took a step further for IPs' rights.³⁴ In 1957, the ILO tried in a first attempt to codify international obligations of States concerning indigenous and tribal populations through the Indigenous and Tribal Populations Convention, also known as Convention No. 107 (the ILO C107).³⁵ It was ratified by 27 countries³⁶ but no Arctic States ratified it. It regulated the relationship between the indigenous and tribal peoples, states and employers but with an approach of integration and assimilation.³⁷ It was at that time the only international legal instrument concerning IPs.

However, as UN Special Rapporteur James Anaya and the ILO itself highlight it, the studies and the expert meetings used for drafting this convention were taking place without the participation of IPs' representatives³⁸ following an integrationist approach and of assimilation.³⁹

³² Website of the OHCHR, 'Combattre la discrimination contre les peuples autochtones' accessed 12 July 2013. See also: Website of the IWGIA, 'Who are the indigenous peoples' accessed 12 July 2013.

³³ Françoise Morin, 'Vers une déclaration universelle des droits des peuples autochtones' (1992) 11. For instance, in 1948 during the 3rd session of the General Assembly, the Bolivian delegation advocated for the creation of a sub-commission with a mandate to study the social issues that IPs faced. François Morin explains that "many anthropologists then denounced the massacres of Indian groups in various Latin American countries, wild colonisation of their territories and ethnocide resulting of missionary activities. Humanitarian organisations working to defend the IPs, such as IWGIA, were created at that time and were pressing governments, in particular the five Nordic states, to intervene in the UN to promote the protection of indigenous rights". See also: Russell Barsh, 'Indigenous Peoples: An Emerging Object of International Law' (1986).

³⁴ Website of the ILO, 'Origins and history' accessed 12 July 2013. See also: Encyclopedia of the Nations. The ILO was established by the League of Nations as one of its agencies after World War I and became the first specialised agency of the UN in 1946 after World War II.

³⁵ About the ILO Convention No. 107, see: Website of the ILO, 'Convention No. 107' accessed 12 July 2013.

³⁶ Still in force: Angola, Bangladesh, Belgium, Cuba, Dominican Republic, Egypt, El Salvador, Ghana, Guinea - Bissau, Haiti, India, Iraq, Malawi, Pakistan, Panama, Syria, Tunisia. Denunciation: Argentina, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, Mexico, Paraguay, Peru, Portugal.

³⁷ Françoise Morin, 'Vers une déclaration universelle des droits des peuples autochtones' (1992) 13.

³⁸ Anaya (2004) 54.

³⁹ Anaya (2004) 54. Also: Website of the ILO, 'Convention No. 107' accessed 12 July 2013. Later on, this integrationist approach was put into question during the 1970s and a Committee of Experts appointed by the Governing body of the ILO came to the conclusion that this approach was "obsolete and that its application was detrimental in the modern world". See: Report of the Meeting of Experts, para. 46: "(...) the integrationist language of the ILO C107 is outdated, and the application of this principle application of this principle is destructive in the modern world. In 1956 and 1957, when the C107 was being discussed, it was felt that integration into the dominant national society offered the best chance for these groups to be part of the development process of the countries in which they live. This had, however, resulted in a number of undesirable consequenc-

Also, in Martínez-Cobo's report, it was proposed that the ILO C107 should be revised to reflect the will of IPs and that the changes should be made in the sense of techno-development, autonomy and self-determination rather than integration and protection.⁴⁰

That is why the ILO C107 was revised in 1989 through the adoption of the Indigenous and Tribal Peoples Convention, also known as Convention No. 169 (the ILO C169). This convention is a legally binding international instrument and has been currently ratified by 22 States.⁴¹ Among Arctic states, only Norway and Denmark have ratified it.⁴²

In other words, whereas the ILO C107 was based on the supposition that indigenous populations were "temporary societies destined to disappear with 'modernisation'". For this reason, the ILO C107 encouraged integration. Whereas, the ILO 169 is based on the conviction that IPs are "permanent societies" and aims for their recognition and respect for their ethnic and cultural diversity within the States.⁴³

2. Conflicting terms

Several terms have been employed for IPs such as *aboriginal, native, original, first, tribal*.⁴⁴

Irène Bellier explains that the most powerful States in the world are opposed to use a clear and wide-accepted definition of IPs in a normative instrument because it would entail to recognise the legal personality of the concerned entities. To name someone is already forging a reality.⁴⁵ She argues that the term of *indigenous peoples* is related to a political class that indigenous representatives at the UN seek because it would allow the peoples to decide for themselves and to defend their social, legal, cultural, political and economic systems.⁴⁶ It is for this same reason that this thesis uses both a political and a legal approach.

First, in some cases, IPs were and still are considered by the state as *minorities*. However, they should be considered as *peoples* because the term IPs emphasises a difference with the term minorities and reflects the commitment of these peoples to a particular land or/and to a way of life "threatened by government policies and the narrowing of the base their traditional resources".⁴⁷

es. It had become a destructive concept, in part at least because of the way it was understood by governments. (...) the policies of pluralism, self-sufficiency, self-management and ethno-development appeared to be those which would give indigenous populations the best possibilities and means of participating directly in the formulation and implementation of official policies".

⁴⁰ Françoise Morin, 'Vers une déclaration universelle des droits des peuples autochtones' (1992) 15. Subsequently, during the 1st International Conference of NGOs in the UN "discrimination against indigenous peoples of Americas" in 1977 in Geneva, more than 60 American IPs were represented and they required a revision of the ILO C107. The creation of a working group at the UN with a mandate to specifically deal with IPs' issues was called for. The idea of the creation of a working group was raised again in 1981 during the new conference on IPs and their relationship to the land. It is at this period that the idea of a declaration of principles for the protection of IPs and nations of the Western world was also raised.

⁴¹ Argentina, Bolivia, Brazil, Central African Republic, Chile, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, Mexico, Nepal, Netherlands, Nicaragua, Norway, Paraguay, Peru, Spain, Venezuela. Once ratified, State parties to the convention have one year "to align [their] legislation, policies and programmes to the convention before it becomes legally binding". Nowadays, the ILO C107 is not open to ratification anymore, only the ILO C169 is. However, the ILO C107 is still in force for 18 which have not ratified the ILO C169.

⁴² Respectively in 1996 for Norway and in 1990 for Denmark.

⁴³ Website of the ILO, 'Convention No. 169' accessed 12 July 2013.

⁴⁴ Irène Bellier 'Le projet de Déclaration des droits des peuples autochtones et les Etats américains : avancées et clivages' (2006b) 99: Following the example of a Peruvian society in the Amazonia, in the 1980s, there were no *indigenous peoples* but only *natives* persons (*nativos*, in Spanish), suffering from various discriminations. Their lives were anchored in a relationship of exclusion with the State.

⁴⁵ Irène Bellier 'Le projet de Déclaration des droits des peuples autochtones et les Etats américains : avancées et clivages' (2006b) 101.

⁴⁶ Irène Bellier, 'Dernières nouvelles du Groupe de travail sur le projet de déclaration des droits des peuples autochtones à l'ONU'. And Irène Bellier 'Le projet de Déclaration des droits des peuples autochtones et les Etats américains : avancées et clivages' (2006b) 103. See also: Françoise Morin, 'Vers une déclaration universelle des droits des peuples autochtones' (1992) 11-16.

⁴⁷ Irène Bellier 'Le projet de Déclaration des droits des peuples autochtones et les Etats américains : avancées et clivages' (2006b) 102. See also: Cadhp-IWGIA, 'Rapport du Groupe de travail d'experts de la Commission Africaine des Droits de l'Homme et des peuples sur les populations/communautés autochtones' (2005) 112. As a matter of facts, Native Americans represent 70 % of the total population of Guatemala whereas they only represent 1 % of the total population of Brazil. So, IPs are not always the minority.

Moreover, IPs refused to be considered only as ethnic minorities and did not want to be treated as populations because this term, in their opinion, bears a degrading connotation as it was generally used to describe biological species. Therefore, their claim was guided by the desire to be recognised as peoples. Nonetheless, as explained by Françoise Morin, they were contentiously careful not to fall “into the trap of definitions and they denied to governments the right to decide who was indigenous and who was not”.⁴⁸

Second, when criticising the ILO C107 and drafting the ILO C169, there was a controversy concerning the use of the term *populations* in the ILO C107 over the term *peoples* which was finally adopted in the ILO C169.⁴⁹ Anaya explained that the term *populations* is considered to imply “a greater and more positive recognition of group identity and corresponding attributes of community” whereas States are more reluctant to accept the use of the term *peoples* because of its “association with the term *self-determination*. In the UN Charter “self-determination and equal rights of peoples” can be associated with the idea of independent statehood.⁵⁰ In other words, the term *peoples* reflects the idea of a group and add to the word *rights* it gives the idea of collective rights. Anaya added that the term *peoples* holds a large amount of indigenous groups such as the Nenets, the Inuit and the Sami to name only a few.⁵¹

As a matter of fact, in 1989, comments of the IPs’ Working Group of Canada in the ILO for the Partial Revision of the ILO C107 explained: “Indigenous and tribal peoples are distinct societies that must be referred to in a precise and acceptable manner. Continued use of the term *populations* would unfairly deny them their true status and identify as indigenous peoples.”⁵² The same year, the Inuit Circumpolar Conference presented to the 1989 session of the UN Working Group on Indigenous Populations (hereafter UNWGIP)⁵³ a statement claiming that “Inuit and other indigenous peoples worldwide are not and have never been mere *populations*”.⁵⁴

For all these reasons, this thesis will use the widely established term of indigenous *peoples*.⁵⁵

3. Definitions of indigenous peoples

There is no universal, single, accepted definition of IPs.⁵⁶ The establishment of a definition of IPs is complex because it must reflect the problems posed by the approaches of assimilation, development and integration,

⁴⁸ Françoise Morin, ‘Vers une déclaration universelle des droits des peuples autochtones’ (1992) 18.

⁴⁹ Anaya (2004) 59. See also: Website of the ILO, ‘Convention No. 107’ accessed 12 July 2013.

⁵⁰ Anaya (2004) 60. In fact, the issue of self-determination is crucial regarding this matter of terminology. Anaya concluded the debate concerning the use of the term *peoples* over *populations* by emphasising the compromise reached by the drafters of the ILO C169; the term *peoples* was used in the Convention but the provision of Article 1(3) of the ILO C169 clarified the situation.

⁵¹ Anaya (2004) 100.

⁵² Anaya (2004), footnote no. 66: Comments of the Indigenous Peoples’ Working Group of Canada, in International Labour Office, Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), Report 4(2A), International Labour Conference, 76th Sess. at 9, (1989).

⁵³ The Working Group on Indigenous Populations was one of the charter-based UN bodies. It was established in 1982 as a subsidiary organ to the Sub-Commission on the Promotion and Protection of Human Rights, main body of the UN Commission on Human Rights. Finally the WGIP was replaced by the Expert Mechanism on the Rights of Indigenous Peoples in 2008 when the UN Commission on Human Rights was replaced by the UN Human Rights Council. For more information, see: Website of the IWGIA, “The Working Group on Indigenous Populations” accessed 12 July 2013.

⁵⁴ Anaya (2004), footnote no. 66: Comments of the Indigenous Peoples’ Working Group of Canada, in International Labour Office, Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), Report 4(2A), International Labour Conference, 76th Sess. at 9, (1989).

⁵⁵ For the identification of peoples, the UN uses the so-called Kirby definition. For more information about it, see: John B. Henriksen, ‘Oil and gas operations in Indigenous peoples lands and territories in the Arctic: a Human rights perspective’ (2006) 26-27.

⁵⁶ In fact, during its workshop on data collection and disaggregation for IPs in January 2004, the Secretariat of the Permanent Forum on Indigenous Issues explained: “During the many years of debate at the UN WGIP, the observers from indigenous organisations developed a common position and rejected the idea of a formal definition of IPs that would be adopted by States. Similarly governmental delegations expressed the view that it was neither desirable nor necessary to elaborate a universal definition of IPs. Finally, at its fifteenth session, in 1997, the WGIP concluded that a definition of IPs at the global level was not possible at that time, and certainly not necessary for the adoption of the UNDRIP”. See: UNPFII, PFII/2004/WS.1/3, para. 3. See also: John B. Henriksen, ‘Oil and gas operations in Indigenous peoples lands and territories in the Arctic: a Human rights perspective’ (2006) 25.

and sometimes violence, IPs face.⁵⁷ A definition should reflect the efforts and the cooperation of the international community on these matters while illustrating the reflection made on existing resources to improve the situation of these peoples.

First, in 1971, the UN Economic and Social Council (hereafter ECOSOC) gave permission to the Sub-commission to undertake a study concerning the discrimination indigenous populations were facing. This study lasted twelve years under the direction of former Special Rapporteur José Martínez-Cobo.⁵⁸ In its final report of the WGIP's Study on the Problem of Discrimination against Indigenous Populations, Martínez-Cobo gave a working definition of IPs. This definition is today widely used.⁵⁹

Like in the ILO C169, the criterion of self-identification is also a fundamental element.⁶⁰ Martínez-Cobo's report notes that the respect of the right to self-determination is one of the fundamental conditions allowing IPs to determine their future, "and to preserve, develop and transmit ethnic specificity to future generations".⁶¹

Additionally, this definition emphasises the relationship of IPs with the lands as the source and the means of their subsistence.⁶² Bellier highlights that the issue of historical continuity of existing peoples with societies before the colonisation. This recognition entails a work of recovery of collective memory and communication at the regional level.⁶³

Second, concerning existing definition in legal instruments, one should start from the letter of the ILO C169 as it is an international legally binding instrument.⁶⁴ The ILO C169 does not give a general definition of who are indigenous and tribal peoples, it only gives a definition for the purpose of the convention. The ILO claims to take "a practical approach" and thus only gives "criteria for describing the peoples it aims to protect" which can be considered as a definition.⁶⁵ Similarly, the Martínez-Cobo's working definition, self-identification is a fundamental criterion⁶⁶ and the ILO gives elements of tribal peoples: traditional life styles; culture and way of life different from the other segments of the national population; and own social organisation and traditional cus-

⁵⁷ Irène Bellier (2006b) 'Identité globalise et droits collectives : les enjeux des peuples autochtones dans la constellation onusienne' 104.

⁵⁸ Françoise Morin, 'Vers une déclaration universelle des droits des peuples autochtones' (1992) 12.

⁵⁹ One could say this definition can be considered as official, at least in the UN system. Indeed, it has been broadly used by the Secretariat of the Permanent Forum on Indigenous Issues, for example in its workshop on data collection and disaggregation for IPs on January 2004. See also: John B. Henriksen, 'Oil and gas operations in Indigenous peoples lands and territories in the Arctic: a Human rights perspective' (2006) 25. The definition is the following: Jose R. Martínez-Cobo, 'Study of the problem of discrimination against indigenous populations' (1986): "Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system. / This historical continuity may consist of the continuation, for an extended period reaching into the present of one or more of the following factors: (a) Occupation of ancestral lands, or at least of part of them; (b) Common ancestry with the original occupants of these lands; (c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.); (d) Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language); (e) Residence on certain parts of the country, or in certain regions of the world; (f) Other relevant factors".

⁶⁰ Jose R. Martínez-Cobo, 'Study of the problem of discrimination against indigenous populations' (1986): "On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group)".

⁶¹ Martínez-Cobo's report also considers that the right to self-determination allow IPs to pursue a worthy existence with their historical right of free people.

⁶² Irène Bellier, 'Le projet de Déclaration des droits des peuples autochtones et les Etats américains : avancées et clivages' (2006a) 4.

⁶³ Irène Bellier, 'Identité globalise et droits collectives : les enjeux des peuples autochtones dans la constellation onusienne' (2006b) 102. And Irène Bellier, 'Le projet de Déclaration des droits des peuples autochtones et les Etats américains : avancées et clivages' (2006a) 4.

⁶⁴ Website of the ILO, 'Convention No. 169' accessed 12 July 2013.

⁶⁵ Website of the ILO, 'Convention No. 169' accessed 12 July 2013.

⁶⁶ ILO C169 Art. 1.2. See also: Website of the ILO, 'Convention No. 169' accessed 12 July 2013. And: Website of the IWGIA, 'Who are the indigenous peoples' accessed 12 July 2013.

toms and laws.⁶⁷ Then, the ILO adds a fourth element for IPs: living in historical continuity in a certain area, or before others “invaded” or came to the area.⁶⁸

The preamble of the ILO C169 recognises the desire of IPs to “exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live”.⁶⁹

The NGO IWGIA has suggested that under the definition given by ILO C169, “a people are considered indigenous either: because they are descendants of those who lived in the area before colonisation; or because they have maintained their own social, economic, cultural and political institutions since colonisation and the establishment of new states”.⁷⁰

Third, the Chairperson of the WGIP and Special Rapporteur to the UN on IPs, Erica-Irene Daes, also gave a definition to identify IPs.⁷¹ Other definitions have also been given through other international legal instruments or through academic doctrine. Thus, besides the letter of the ILO C169, the IWGIA notes that the four most often invoked elements are the right to self-determination, the intention to perpetuate a distinctive culture, a priority in time, and the experience of conquest, marginalisation and loss of possession”.⁷²

Another possible definition of IPs can be found with the UN Human Rights Office of the High Commissioner for Human rights (OHCHR): “They are the descendants of those who inhabited a country or a geographical region at the time when people of different cultures or ethnic origins arrived, the new arrivals later becoming dominant through conquest, occupation, settlement or other means”.⁷³

Historically speaking, they were the inhabitants of lands before colonists/settlers came to those lands.⁷⁴ Most of them have kept their traditional, social, cultural, economic and political characteristics which distinguished them from other groups that compose the national populations.⁷⁵ The International Fund for Agricultural Development (IFAD) considers that they represent 5 % of the world’s population and about 15 % of the poorest persons on the planet.⁷⁶ Also, the OHCHR believes that indigenous populations face multiple challenges and violations of their human rights; indeed they do not have control over their own development based on their values, needs and priorities, they are politically under-represented and they do not have full access to social services and other rights.⁷⁷ These violations create marginalisation of these populations and they are victims of forcible relocations because of the exploitation of natural resources.⁷⁸

Fourth, early into the fight against racial discrimination between 1973 and 1982, the UN highlighted the problem of discrimination against IPs.⁷⁹ In 1982, the WGIP has clearly exposed the needs and expectations of IPs in a draft declaration on the rights of IPs whose historic adoption by the General Assembly of the UN held in September 2007. Quickly, this declaration has become an essential tool for the promotion and protection of IPs and their rights.⁸⁰

The provisions of UN Declaration on the Rights of indigenous peoples (the UNDRIP) and the ILO C169 are considered compatible and mutually reinforcing. While the UNDRIP gives no specific mechanism for its applica-

⁶⁷ ILO C169 Art. 1(a). See also: Website of the ILO, ‘Convention No. 169’ accessed 12 July 2013.

⁶⁸ ILO C169 Art. 1(b). See also: Website of the ILO, ‘Convention No. 169’ accessed 12 July 2013.

⁶⁹ ILO C169, preamble, fifth para.

⁷⁰ Website of the IWGIA, ‘Who are the indigenous peoples’ accessed 12 July 2013.

⁷¹ For her, they are “the descendants of groups which were in the territory of the country at the time when other groups of different cultures or ethnic origins arrived there; because of their isolation from other segments of the country’s population they have preserved almost intact the customs and traditions of their ancestors which are similar to those characterised as indigenous; and because they are, even if only formally, placed under a State structure which incorporates national, social and cultural characteristics alien to theirs”. See: Website of the IWGIA, ‘Who are the indigenous peoples?’ accessed 12 July 2013.

⁷² Robert Hitchcock and Diana Vinding, ‘Indigenous Peoples’ Rights in Southern Africa’ (2004) 8.

⁷³ OHCHR, Fact Sheet No.9 (Rev.1), ‘The Rights of Indigenous Peoples’.

⁷⁴ OHCHR, Fact Sheet No.9 (Rev.1), ‘The Rights of Indigenous Peoples’.

⁷⁵ OHCHR, Fact Sheet No.9 (Rev.1), ‘The Rights of Indigenous Peoples’.

⁷⁶ International Fund for Agricultural Development, ‘“IFAD’s Engagement with Indigenous Peoples” (2006) 1.

⁷⁷ Website of the OHCHR, ‘Combattre la discrimination contre les peuples autochtones’ accessed 12 July 2013.

⁷⁸ Website of the OHCHR, ‘Combattre la discrimination contre les peuples autochtones’ accessed 12 July 2013.

⁷⁹ See Article 1 of the UN Declaration on Elimination of All Forms of Racial Discrimination gives an international protection against racial discrimination.

⁸⁰ Website of the OHCHR, ‘Combattre la discrimination contre les peuples autochtones’ accessed 12 July 2013.

tion, it provides under Article 41 and 42 a specific role for the UN agencies in the implementation of its provisions. On the ILO, it is responsible for monitoring the implementation of ILO C169.⁸¹

The UNDRIP lacks a clear definition of IPs. Furthermore, it is not legally binding because it is a General Assembly declaration. As a sensitive issue, incorporating a definition would have created the risk that States refuse to adopt the declaration. However, through the articles and the annex of the declaration, it is recognised that IPs have the right to self-determination⁸², that they faced "colonisation and dispossession of their lands, territories and resources"⁸³, that they have their own "political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies"⁸⁴ and their own languages⁸⁵. Moreover, Article 33 of the UNDRIP recognises to IPs the right to determine their own identity or membership in accordance with their customs and traditions.⁸⁶

In this thesis, the term "indigenous peoples" is used in harmony with Martínez-Cobo's working definition.⁸⁷

4. Issues raised by the establishment of a definition

Besides the issue itself of setting up a universal definition, the establishment of a definition raises other issues.

First, IPs base their recognition on the concept of self-identification. The IWGIA explains that self-identification and acceptance of an individual as indigenous is an essential criterion of IPs' sense of identity.⁸⁸ Bellier reported that an individual must identify itself as part of a people and be recognised by the indigenous authorities to be part of the people in question.⁸⁹ She says that this is one of the elements of the indigenous points of view of citizenship.⁹⁰

During the drafting of the UNDRIP, the issue of self-identification was a problem. Bellier found two major explanations. On the one hand, States feared that it would create secessionist movements that are harmful to the legal and political systems of the dominant society order (the State itself). On the other hand, at the international level, the recognition of *peoples* is linked to the right to self-determination which is of course a threat for the sovereignty of the State.⁹¹

Second, the recognition of IPs and of a definition is closely related with self-determination. The concept of self-determination is established as a principle under the UN Charter and as a right under the Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic and Social and Cultural Rights (ICESCR).⁹² In Anaya's opinion, "IPs are seen and, [he] think[s] it is fair to say for the most part, see themselves as different from, but not inferior to, states".⁹³ Moreover, the right to self-determination is also considered under the UNDRIP and its preamble.⁹⁴

⁸¹ Website of the ILO, 'Conventions' accessed 12 July 2013. It shows that the ILO C169 itself can be considered as "old-fashioned".

⁸² UNDRIP, annex, para. 17 and Article 3.

⁸³ UNDRIP, annex, para. 6.

⁸⁴ UNDRIP, annex, para. 7.

⁸⁵ UNDRIP, Article 16.

⁸⁶ UNDRIP, Article 33.

⁸⁷ The definition provided by Martínez-Cobo's study is the commonly accepted definition at the UN. See: UN-PFII, PFII/2004/WS.1/3, para. 8.

⁸⁸ Website of IWGIA accessed 12 July 2013.

⁸⁹ Irène Bellier, 'Identité globalisée et droits collectifs : les enjeux des peuples autochtones dans la constellation onusienne' (2006b) 103.

⁹⁰ Bellier tells for example that in Rwanda, still today, the authorities distinguish "citizens" from Pygmies.

⁹¹ Irène Bellier, 'Le projet de Déclaration des droits des peuples autochtones et les Etats américains : avancées et clivages' (2006b) 103.

⁹² James Anaya, 'Indigenous Law and Its Contribution to Global Pluralism' (2007) 8.

⁹³ James Anaya, 'Indigenous Law and Its Contribution to Global Pluralism' (2007) 9.

⁹⁴ Articles 3 and 4 of the UNDRIP. James Anaya explains that the UNDRIP "clearly presupposes that IPs, having been denied self-determination historically, will recover or now develop it within the frameworks of the states within which they live through contextually defined arrangements that accommodate the diverse realities". However, the provisions of Article 46(1) of the UNDRIP gives attention to an internal self-determination. Thus the declaration guarantees "the territorial integrity or political unity of sovereign and independent States". See also William H. Meyer, 'Indigenous Rights, Global Governance, and State Sovereignty' (2012) 330: "Article 46 clearly prohibits indigenous secessionist movements".

Third, it is important to stress that the term *peoples* claims the collective nature of the IPs' rights. This is linked to the issue of terms and the difference between the term *minorities* and the term *peoples*. Thus, Bellier explains that the term *people* refers to every level, whether it is local, regional or transnational, that concerned indigenous individuals create a whole, an identity that creates a brotherhood among its members, who all carry the same claims related to non-individualistic worldview.⁹⁵ As a matter of facts, the collective rights of IPs are recognised under the UNDRIP.

Last but not least, as the concept of self-identification is linked to self-determination which recognises the existence of collective rights, such a definition raises the issue of land rights and rights to natural resources.

The issue of land rights and rights over minerals and natural resources is the main focus of this thesis. By reason of colonisation of their ancestral lands by the new majority, most of the IPs have lost their rights over these lands. Sometimes, threatened in order to relocate and facing threats on their lives, the lack of recognition of their local institutions and the cultural, social and legal discriminations they face have created crucial difficulties for their claims. For this reason, the implementation of their rights of consultation and participation is crucial.

During colonisation, the principle of *terra nullius* legitimised the distribution of lands among the conquerors. In fact, the disputed territory is often considered free of ownership even if the concerned lands were seasonally or permanently occupied by IPs, who were not able to produce written documents as a legitimised deed for Western customs.⁹⁶

This issue of right to lands has been dealt by former Special Rapporteur Martínez-Cobo in its report of the "study of the problem of discrimination against indigenous peoples" in 1987. Indeed, its report does not only contain a definition of IPs; it also contains a number of principles that IPs will then claim.⁹⁷ Thus, the report addresses the issue of land rights and says that they have a natural and inalienable right to retain the territories they have and claim the land they have been deprived. He adds that they have the right to freely decide on the use of and action on these lands.

Nonetheless, the issue of establishing a definition for Arctic IPs is not really a sensitive one. Certainly, some argue on the definition of a Sami person for instance but more generally defining who are the IPs does not raise too much controversy in the Arctic region.

B. Arctic indigenous peoples

According to estimations, there are over 3.5 million Arctic IPs.⁹⁸ For all of them, the main concerns are the lands, territories and natural resources which include whales, fish and other marine resources.⁹⁹

In the Russian Federation, IPs are listed under the List of Numerically Small IPs, previously named the List of IPs.¹⁰⁰ In fact, there is no definition of *indigenous* without the numerical aspect in Russian legislation.¹⁰¹ Natalya Novikova explained that this status is constricted to the obligation that peoples do not exceed 50,000 members. It must also maintain a traditional livelihood, reside in specific remote regions of the Russian Federation and identify itself as a different ethnic group.¹⁰² It currently recognises 45 IPs from all regions of Russia. The small-numbered IPs represent about 0.2 % of the Russian population and would represent up to 1 % if all peoples were included. In 2010, 47 ethnic groups were included in the List of Indigenous Numerically Small Peoples of the Russian Federation.

⁹⁵ Irène Bellier, 'Le projet de Déclaration des droits des peuples autochtones et les Etats américains : avancées et clivages' (2006a) 105.

⁹⁶ Irène Bellier, 'Identité globalisée et droits collectives : les enjeux des peuples autochtones dans la constellation onusienne' (2006b) 102.

⁹⁷ Françoise Morin, 'Vers une déclaration universelle des droits des peuples autochtones' (1992) 14.

⁹⁸ Eunjung Park, 'Searching for a Voice: the Indigenous People in Polar Regions' (2008) 1.

⁹⁹ Report of the Arctic Regional Workshop (26-27 March 2007) 5.

¹⁰⁰ The list was revised in 1991 and 2001. See: Tamara Semenova, 'Political mobilisation of northern indigenous peoples in Russia' (2005). For more information about the recognition of IPs before the revision of the list in 1991, see: IWGIA, *Indigenous Peoples of the Soviet Union* (1990).

¹⁰¹ Olga Murashko, 'Russian Federation' (2009) 41. Also: Murashko and Rohr (2013) 26.

¹⁰² Novikova (2010), p. 85.

These IPs have been “hunters, gatherers, fisherfolk and reindeer and horse breeders” and these traditional activities are still important parts of their livelihoods.¹⁰³ Novikova also added that they have adapted to many legal and cultural concepts of the majority population although giving them their own interpretations. For this reason, many of IPs during the 20th century received a university education after usually been educated in boarding schools and they now live in the Russian cities. Nonetheless, Novikova underlines that they still pursue their traditional society’s norms.¹⁰⁴

According to Tamara Semenova, this list creates issues relating to the recognition of IPs.¹⁰⁵ Moreover, Russia has not ratified the ILO C169. In 2009, IWGIA stated that even if the indigenous small-numbered peoples are recognised and protected under provisions of the Russian Constitution and laws, these protections are mostly theoretical due to the lack of implementation of monitoring, and their land rights do not exist.¹⁰⁶

For instance, one of the peoples in Russia is the Nenets. According to the 2010 census, there are more than 44,640 Nenets.¹⁰⁷ They have lived on the tundra for centuries and today “the future of the Nenets culture depends on the future of the Arctic”.¹⁰⁸ Indeed, the exploitation of natural resources, especially gas and oil, in the traditional lands of the Nenets is a threat to their culture.¹⁰⁹

Secondly, there are, according to estimations, about 100,000 Sami (also spelled Saami or Sámi) persons in Kola Peninsula and Northern Fennoscandia.¹¹⁰ Divided by borders, the Sami area lies in four different States, e.g. Norway, Sweden, Finland and Russia. This territory is known as Sápmi where they have traditionally relied on fishing, small-scale agriculture hunting and reindeer herding.¹¹¹

The Sami peoples have representative bodies with advisory status in Norway, Sweden and Finland: the Sami parliaments.¹¹² These three parliaments, which do not have significant powers, have jointly created the Sami Parliamentary Council which is a joint council of representatives.¹¹³ In Russia, they are organised into NGOs.¹¹⁴ The Sami are recognised as IPs under the constitution of Norway, which has also recognised Sami as IPs when ratifying the C169 of the International Labour Organisation. In Finland, the status of Sami was written in the constitution in 1995.¹¹⁵ As an indigenous people, they have the right to develop their traditional livelihood, their own culture and language.¹¹⁶ In the Finnish constitution, they are called “groups” not “minorities” and have cultural autonomy.¹¹⁷ Also, the Sami Parliament Act of Finland does not give to the Sami Parliament significant legislative powers. It has special participatory rights and cultural autonomy.¹¹⁸

¹⁰³ Olga Murashko, ‘Russian Federation’ (2009) 41.

¹⁰⁴ Natalya Novikova, ‘The status of indigenous peoples of the Russian north, in the context of legal pluralism’ (2010) 85.

¹⁰⁵ Tamara Semenova, ‘Political mobilisation of northern indigenous peoples in Russia’ (2005).

¹⁰⁶ Olga Murashko, ‘Russian Federation’ (2009) 42.

¹⁰⁷ SIIDA, ‘A people of the Tundra – Nenets Culture’.

¹⁰⁸ SIIDA, ‘A people of the Tundra – Nenets Culture’.

¹⁰⁹ SIIDA, ‘A people of the Tundra – Nenets Culture’.

¹¹⁰ James Anaya (2011) 4. There are “about 40,000-60,000 [Sami persons] in Norway, about 15,000-20,000 in Sweden, about 9,000 in Finland and about 2,000 in Russia”. See also: Conversation with Dr. Kristian Myntti on the Sami people, Sami Educational Centre (Inari, 9 April 2013): “There are between 75,000 and 100,000 Sami in four countries. And some 1,700 Sami have registered a Sami language as their official language”.

¹¹¹ James Anaya (2011) 4. Reindeer herding “is of central importance to the Sami people”. See also: Pamphlet ‘The Sami in Finland’, from the Finnish Sami Parliament, obtained in April 2013, 2: “Some of the Sami are engaged in traditional livelihoods, but many have a modern job”.

¹¹² An individual can vote for the elections to the Sami parliaments if he/she considers himself/herself as a Sami and have learnt one of the fourth Sami languages as their mother tongue or if at least one of his/her parents or grandparent have learnt one of these languages. For more information concerning the Sami institutions, see: John B. Henriksen, ‘Saami Parliamentary Co-operation’ (1999) 26-49. The Finnish Sami Parliament, created in 1996, replaced the Sami Delegation, established in 1973. The Norwegian one was established in 1989 and the Swedish one in 1993. See: Pamphlet from the Finnish Sami Parliament, obtained in April 2013, 4.

¹¹³ Johan Strömgren, ‘Sapmi Sweden’ (2009) 29.

¹¹⁴ Johan Strömgren, ‘Sapmi Sweden’ (2009) 29.

¹¹⁵ They are recognised as IPs under para. 17 section 2 of the Finnish Constitution.

¹¹⁶ Pamphlet from the Finnish Sami Parliament, obtained in April 2013, 1: “There is also a law regarding the right to use the Sami language when dealing with the authorities”.

¹¹⁷ Section 17(3) and section 121(4). See also: Pauliina Feodoroff and Rebecca Lawrence, ‘Sapmi – Finland’ (2009) 35

¹¹⁸ Conversation with Dr. Kristian Myntti on the Sami people, Sami Educational Centre (Inari, 9 April 2013)

They have also created the Sami Council, established in 1956, which is a liaison body between the Sami of Norway, Sweden, Finland and Russia. It maintains their interests as one people and promotes cohesion and cooperation across borders.¹¹⁹ The Sami Conference, its highest organ, meets every four years.

In 2005, a group of experts was appointed by the three governments of Finland, Sweden and Norway together with the Sami Parliaments to draft a Nordic Sami Convention. This regional instrument has not been adopted yet but it is still a proof of the improvement of Sami rights at the regional level.¹²⁰ It recognises the Sami as a trans-border people and emphasises that it is possible to observe four States collaborating for the IPs.¹²¹

In 2011, Special Rapporteur Anaya emphasised the efforts and the initiatives in these three States to develop this convention.¹²² It shows the high level of consideration given to indigenous issues in Finland, Sweden and Norway. Because they are among the most developed countries in the world and the wealthiest, Sami people do not face many socio-economic concerns in comparison to other IPs.¹²³ For this reason, these countries should set examples concerning IPs rights in the Arctic region and throughout the world.

Thirdly, Greenland was a Danish colony under the first Danish colonial settlement in 1721. Then, in 1953, it became part of Denmark. Later, in 1979, Home Rule or autonomy has been established and Greenland has had its own parliament and its own government which is responsible for several internal matters; for instance, it aims to set up a sustainable economy. Also, it has two representatives in the Danish parliament who are elected by the Greenlanders and represent Greenlandic political parties. Therefore, Greenland is a self-governing part of the Danish realm.¹²⁴ In 2009, the new Act on Self-Government gave Greenland further self-determination.

In Greenland, the total population reaches about 57,000 inhabitants and 50,000 of them are Inuit which is about 88 % of the Greenlandic population.¹²⁵ In the south, they live thanks to sheep farming and agriculture and traditional hunting in the North. The IWGIA highlights that the country is always searching for new ways to sustainability, "for example by developing the use of renewable resources such as hydroelectricity".¹²⁶ Furthermore, Greenlandic peoples live also of commercial fisheries and emerging developments of oil and mining industries.¹²⁷

Fourthly, there are according to estimations about 43,000 inhabitants in the Northwest Territories of Canada (hereafter NWT) and more than half of them are IPs.¹²⁸ They are mostly Dene, Inuvialuit and Metis. There are also about 55,000 people representing 4.3 % of the indigenous population in Canada who are Inuit.¹²⁹ They claim several regions of Canada such as Inuvialuit, Nunavik in Quebec, Nunavut, and Nunatsiavut in Labrador.¹³⁰ Their rights of lands, resources and economic issues have been recognised. In Canada, they are called Aboriginal rights.¹³¹ The Aboriginal and Treaty rights of Aboriginal Peoples in Canada are recognised under Section 35 of the 1982 Constitution Act.¹³²

Fifthly, there are several Alaska Natives in this part of the United States. Steve J. Langdon identified five major groupings: the Inupiat (Northern Eskimos), the Yuit (Southern Eskimos), the Aleuts, the Tlingit and Hai-

¹¹⁹ Pamphlet from the Finnish Sami Parliament, obtained in April 2013, 4.

¹²⁰ Pauliina Feodoroff and Rebecca Lawrence, 'Sapmi – Finland' (2009) 38-39

¹²¹ Nigel Bankes and Timo Koivurova, *The Proposed Nordic Saami Convention: National and International Dimensions of indigenous Property Rights* (2013) 399

¹²² James Anaya (2011) 1.

¹²³ James Anaya (2011) 5. Anaya emphasises that, "in 2001, Norway ranked first, Sweden ninth and Finland sixteenth in the UN Development Programmes human development index".

¹²⁴ Sara Olsvig, 'Greenland' (2009) 20. See also: Frank Sejersen, 'Greenland' (2013) 20.

¹²⁵ Sara Olsvig, 'Greenland' (2009) 20.

¹²⁶ Sara Olsvig, 'Greenland' (2009) 20.

¹²⁷ Frank Sejersen, 'Greenland' (2013) 20.

¹²⁸ Alice Legat, 'Northern Canada: The Northwest Territories' (2009) 52.

¹²⁹ Stephen Hendrie, 'Inuit Regions of Canada' (2013) 37.

¹³⁰ Stephen Hendrie, 'Inuit Regions of Canada' (2013) 37.

¹³¹ For more information on Aboriginal rights in Nunavut, see: André Légaré, 'Canada's Experiment with Aboriginal Self-Determination in Nunavut: From Vision to Illusion' (2005) 3-10.

¹³² Pierre-Christian Labeau, 'Canada: Global CSR Monitor - Free, Prior and Informed Consent of Indigenous Peoples' (2010) 2.

da, and the Athabascans.¹³³ As previously explained in Chapter 1, several of them have been in contact with the government petroleum and mining companies concerning natural resources on their territories and next to them.

In 1968, oil was discovered on Alaska's North Slope. This case of Alaska native peoples shows the difficulty for indigenous peoples in the Arctic to claim for their traditional lands and to use their right to development and to self-determination. In this case, their rights to be consulted and to participation were not respected. Their participation was reduced to the minimum.¹³⁴ According to IWGIA, the Alaska Native Claims Settlement Act in 1971 provided for roughly 10% of the original Indigenous territory and \$962.5 million for lands lost. From 1971 to 1991, there was no transfer of land, nor taxation or alienation of shares. IWGIA denounced it resulted in a subjugation of their customs, values, institutions and practices.¹³⁵ The ANCSA also ignored hunting and fishing rights and rights to lost lands.

C. The dilemma of Arctic indigenous peoples

As it has been previously said, global warming has crucial impacts in the Arctic region. IPs living in this part of the world face a dilemma. Indeed, as stated above, their lifestyles are closely linked to their traditional lands. Nevertheless, they are frightened by new socio-economic opportunities from the exploitation of newly-accessible natural resources. Along with these opportunities, there are claims and disputes over "ownership, utilisation, management and conservation of traditional indigenous lands and resources".¹³⁶ The following explains the dilemma that Arctic IPs face, as the impacts on them can be both positive and negative.¹³⁷

On the one hand, the exploitation of natural resources by the international petroleum and mining companies can of course be a good opportunity for Arctic indigenous communities. The presence in the region of these companies bring with it economic prosperity. Indeed, international petroleum companies provide job opportunities in the region and particularly for IPs since the energy companies need labour and they are the far majority of inhabitants in the region.¹³⁸ Moreover, oil exploration and exploitation represent a huge investment from these companies and require infrastructures.¹³⁹ By becoming full members of indigenous corporatives of the local and regional economies, the role of IPs is upgraded which gives them the opportunity to also be more easily integrated in decision-making processes. Moreover, following the establishment of oil and gas companies, the development of industry gives access to IPs to better means of transport and subsistence. For instance, a few years ago, they paddled to hunt and fish whereas nowadays they use diesel-driven vehicles to go ever further out on the Ocean.¹⁴⁰ In addition, the money they earn can give them better access to higher education and health conditions, and improve public services in general.¹⁴¹

On the other hand, it is important not to deny the negative impacts of the exploration and exploitation of these resources. There is a serious risk for their cultural heritage and for their traditional ways of life.¹⁴² Some

¹³³ Steve J. Langdon, 'The Native People of Alaska' (1978), reference and excerpt found on the website of the Harriman Expedition Retraced 1899.

¹³⁴ Dalee Sambo Dorough, 'The Indigenous Human Right to Development' (2010) 78.

¹³⁵ Dalee Sambo Dorough, 'The Indigenous Human Right to Development' (2010) 79. Dorough explained that "the ANCSA has been regarded by many as an act of social engineering and assimilation and, ultimately, termination".

¹³⁶ Rune S. Fjellheim and John B. Henriksen, 'Oil and Gas Exploitation on Arctic Indigenous Peoples' (2006) 5. Magne Ove Varsi, who wrote the preface, said: "this situation represents an enormous challenge, and in some cases threatens indigenous societies and their economies, cultures and ways of life".

¹³⁷ Arctic Monitoring and Assessment Programme (AMAP), 'Arctic Oil and Gas 2007' (2007) vi.

¹³⁸ Conversation with representatives of the Sami Parliament of Finland, Sami Parliament of Finland (Inari, 10 April 2013): "We need job, it is the big problem". And: "If we had the power to decide how the resources are taken and used, we could develop jobs and a sustainable development". Also: "The reality is that people are scared of these mining companies".

¹³⁹ As a matter of fact, last year, Shell announced they would invest \$33 billion in 2013, which includes projects in the Arctic. See: *Le Monde* (1 February 2013).

¹⁴⁰ Persson, 'Arctique: Le dilemme des Inupiks' *Courrier International*, translated from an article published in *De Volkskrant*, (16 August 2012).

¹⁴¹ Arctic Monitoring and Assessment Programme (AMAP), 'Arctic Oil and Gas 2007' (2007) 26.

¹⁴² Mikkelsen and Garcia-Alíx (2013) 10: The IWGIA emphasises that "Extractive activities not only threaten the livelihoods of millions of IPs by means of environmental degradation and loss of biological diversity, but also

of them observe evidence of development and improvement of living conditions, others see it rather as a gradual destruction of their traditional livelihoods. For instance, their habitat may be affected by fragmentation.¹⁴³ Also, these industrial activities have an impact on whaling and fishing. Indeed, because of offshore operations, hunters and fishermen need to always go further to find the animals they need for their survival. Some scientific studies suggest that these offshore activities are scaring off whales and other marine animals because of the noise they produce and movements around them, which can also affect their migration paths.¹⁴⁴ Activities may also bring persistent hydrocarbons in the Arctic environment.¹⁴⁵ Then, regarding the onshore activities, they may interfere with the reindeer, for example through the construction of pipelines. Also, impacts on human health must be considered, because of the spreading of chemicals and hydrocarbons that can affect the nervous system.¹⁴⁶

Additionally, IPs know that the energy companies will not stay forever. When the resources of oil and gas will dry up, they are aware that they will not have the money to pay for their boats and the fuel they need. Here is the dilemma for the IPs in the Arctic: they need the energy companies for the economic development and better standards of life of the villages but a proper balance is necessary to preserve their cultural heritage, their way of life and culture, and their natural habitat. The tundra itself can be affected by extraction activities because of infrastructure constructions and travel movements.¹⁴⁷

Indigenous economies and especially those based on subsistence activities (fishing, hunting, reindeer herding) suffer in a disproportionate manner from negative environmental impact of the installation of industrial infrastructure projects in the areas where they reside or next to them.¹⁴⁸ For this reason, it is necessary for IPs to have a say and decide on the realisation of these projects in order for them to be able to control their future once energy companies would have left the areas. Indeed, if indigenous economies disappear because of the presence of companies, they will have nothing left in the future.

The creation of "dual" economy can also be highlighted.¹⁴⁹ Certain regions become "enclaves of prosperity" with the support of mining and oil developments and financial resources, whereas others stay poor.

Moreover, the stakeholders must be aware of the risks of drilling in the Arctic. For instance, the Lloyd's of London is concerned about the risk of escape of oil, with "multiple complications".¹⁵⁰ However, one should keep in mind that drilling accidents are not necessary human rights problems. Mads Flarup Christensen, head of Nordic Region for Greenpeace, acknowledged that the industrial exploitation of the Arctic may provide short-term economic growth and employment for local populations. However, he emphasises that there is no guarantee that the ecosystem will not be destroyed which of course would significantly impact Arctic IPs.¹⁵¹

For several years, claims have highlighted the issues of state deregulation and privatisation of natural resources (such as water and oil). Bellier notes that IPs face stakeholders who are more powerful than they are. For instance, these companies want to install infrastructures on "ancestral" territories where IPs seek recognition. Such recognition would avoid the installation of such projects on these lands.¹⁵²

all too often lead to violations of these peoples' land rights, including, in many cases, gross human rights violations".

¹⁴³ Arctic Monitoring and Assessment Programme (AMAP), 'Arctic Oil and Gas 2007' (2007) xi: "Habitat fragmentation can affect wildlife, disrupt traditional migration or herding routes (...) [it] may adversely affect many species, particularly large predators".

¹⁴⁴ Arctic Monitoring and Assessment Programme (AMAP), 'Arctic Oil and Gas 2007' (2007) xi. For more information on the impacts of man-made noise on Arctic marine mammals, see: Mary Engel (07/06/2013).

¹⁴⁵ Arctic Monitoring and Assessment Programme (AMAP), 'Arctic Oil and Gas 2007' (2007) xi.

¹⁴⁶ Arctic Monitoring and Assessment Programme (AMAP), 'Arctic Oil and Gas 2007' (2007) 28. The AMAP even mentions risks of cancers and death.

¹⁴⁷ Arctic Monitoring and Assessment Programme (AMAP), 'Arctic Oil and Gas 2007' (2007) vi.

¹⁴⁸ Report of the Arctic Regional Workshop (26-27 March 2007) 5.

¹⁴⁹ Tamara Semenova, 'Political mobilisation of northern indigenous peoples in Russia' (2005) 23.

¹⁵⁰ That is why the insurance market such as the director of the Lloyd's of London, Richard Ward, said it was necessary to wait and to consciously think of the consequences of the actions" in the region. Julia Kollwe (16 August 2012).

¹⁵¹ Helene Toutchkov 'Arctique : Greenpeace demande un moratoire sur les activités industrielles' (27 January 2010).

¹⁵² Irène Bellier, 'Identité globalisée et droits collectifs : les enjeux des peuples autochtones dans la constellation onusienne' (2006b) 111.

In addition, oil and mining companies have favourable conditions since there is a strong attraction for foreign direct investments to Arctic states. Thus, Christian Gros highlights the conflicting demands that these States have to face. According to him, there is a paradox between, on the one hand, the intention to territorialise cultural groups and establishing internal ethnic borders whereas, on the other hand, national borders have never been so porous due to the movement of capital, goods, and obviously people and cultures.¹⁵³

Thus, it is understandable that the majority of protests expressed by IPs concern violation of internally recognised rights set up in international legal instruments (see Chapter 3) and their application. They also concern the impacts of their participation in the decision-making processes and the implementation thereof.¹⁵⁴

However, some argue that the interests of business development currently prevail over IPs' interests and rights; "despite the fact that the survival of IPs as distinct peoples depends on their possibility to manage their own traditional lands and resources in a manner and mode appropriate to their specific circumstances".¹⁵⁵ Mark Nuttall and Kathrin Wessendorf affirm that, even though the Arctic Council has released an Assessment of Oil and Gas Activities in the Arctic, IPs in this region feel like they have been left alone to face the problems and challenges resulting from development projects, which have become easier to achieve because of climate change.¹⁵⁶

Nuttall and Wessendorf also highlight that less than 5 % of the Arctic was affected by infrastructure development, whereas by 2050, between 50 % and 80 % of the Arctic region is expected to be affected by such disturbance. Concretely for IPs, it means that part of their lands will be affected by infrastructure development in the following decades. Moreover, these projects must be sustainable for the environment otherwise they will result in pollution that will also affect IPs.¹⁵⁷ Projects such as the creation of pipelines and other onshore activities disrupt the traditional way of life of Arctic IPs. For instance, they are obstacle to the free movement of reindeer herds and the destruction of flora affects the traditional hunting of the peoples.

Another example illustrating the consequences of oil and gas industries can be the disruption that occurs offshore. The establishment of offshore activities can result in noise pollution that impact the migration of bow-head whales, which consequently affects indigenous hunters who need the whales for their survival.¹⁵⁸

In other words, indigenous communities have been subsisting for centuries on the resources of the land and the sea and for this reason they must to be consulted and participation in decision-making processes. This legitimacy comes from the fact that lands and land rights (access to land, control over it and over its resources) are central to IPs. They depend on them for their material and cultural survival.¹⁵⁹

However, their participation faces a dilemma. All peoples are not equally affected by these activities: some might receive more benefits than drawbacks, while others might have to face serious challenges. In fact, their cultures and livelihoods may depend on the ability to adapt to climate change and on their participation in the establishment of new forms of economy in the region. Nonetheless, because of the pressure relating to the development of new industry and governments' projects, Arctic IPs have the feeling that "they are losing control over their homelands and over their livelihoods".¹⁶⁰ For this reason, it is also necessary for them to establish an adequate system of governance and to adapt their livelihoods in order to meet the challenge of climate change.¹⁶¹

¹⁵³ Christian Gros, 'Des territoires multiculturels ? Migrations, territoires et multiculturalisme' (2005) 41.

¹⁵⁴ Christina Nilsson, 'Climate change from an indigenous perspective: key issues and challenges' (2008) 12.

¹⁵⁵ Magne Ove Varsi, 'Preface' (2006) 5.

¹⁵⁶ Mark Nuttall and Kathrin Wessendorf, 'Editorial' (2006) 4.

¹⁵⁷ For example, Nuttall and Wessendorf affirm that the oil and gas industries are the biggest sources of pollution in Russia and that they affect reindeer pasture and marine and freshwater environments. See: Mark Nuttall and Kathrin Wessendorf, 'Editorial' (2006) 5. It is without taking into account the threat of oil spill in case of accident.

¹⁵⁸ Mark Nuttall and Kathrin Wessendorf, 'Editorial' (2006) 5.

¹⁵⁹ Report of the Arctic Regional Workshop (26-27 March 2007) 5.

¹⁶⁰ Mark Nuttall and Kathrin Wessendorf, 'Editorial' (2006). 4.

¹⁶¹ Nuttall (2001) 28.

III. Legal and political framework and systematisation of participation rights

A. A systemic approach of these rights

Since the end of World War II, the instruments of indigenous populations' rights are diverse, from the Universal Declaration of 1948, the two International Covenants of 1966 protecting civil and political, economic, and social, to the ILO C169 concerning their human development.

Throughout the evolution of norms of international law, legal areas have been divided from each other to be addressed through various human rights, such as the rights of citizens, migrants, refugees, women and children, the environmental rights and the rights to land and natural resources, and also labour and health rights and language, media, cultural and educational rights.

In this context, indigenous representatives have sought to emphasize their uniqueness, claiming their voices based on their recognition as peoples and not as populations. Setting a targeted policy on IPs may be an approach that could divide the universality of human rights. Instead, indigenous perspectives should be taken into account in all policies developed.¹⁶²

For this reason, this thesis does not expose the legal framework setting out the provisions of one legal instrument after another, but rather by directly addressing the subject of the consultation and participation of IPs in decision-making processes through a thematic and systemic approach.

The right to development is established under Article 1 of the UN Declaration on the Right to Development. Henriksen explained that this protection is fundamental for IPs who regularly suffer from the negative effects of development projects. He has said that development is often at the IPs' disadvantage.¹⁶³ Additionally, the right to development does not only concern economic development since it also includes the right to cultural, political and social development.¹⁶⁴

Anaya said the following in his report on the extractive industries operating within or near indigenous territories: "The lack of a minimum common ground for understanding the key issues by all actors concerned entails a major barrier for the effective protection and realisation of IPs' rights in the context of extractive development projects".¹⁶⁵

As Anaya emphasised, an international concern relating to IPs developed in parallel to the decolonisation process supported by the UN.¹⁶⁶ Thus, the international community and institutions, governments, NGOs and progressive multinational companies have increasingly started to recognise that IPs must be included in decision-making processes regarding lands and resources.¹⁶⁷ Such a legal framework can be presented and developed following a scale going from a low level of participation to a high level. It can be illustrated as following:

¹⁶² Irène Bellier, 'Identité globalisée et droits collectives : les enjeux des peuples autochtones dans la constellation onusienne' (2006b) 113.

¹⁶³ John B. Henriksen, 'Saami Parliamentary Co-operation' (1999) 56.

¹⁶⁴ John B. Henriksen, 'Saami Parliamentary Co-operation' (1999) 56.

¹⁶⁵ James Anaya Report of the Special Rapporteur on the rights of indigenous peoples, 'Extractive industries operating within or near indigenous territories (11 July 2011) para. 66.

¹⁶⁶ James Anaya (2004) 54.

¹⁶⁷ Viviane Weitzner, 'Indigenous Peoples and Free, Prior and Informed Consent: Probing the Issues at Stake' 1.

Levels of participation	Techniques of participation
HIGH	
Autonomous law-making	Greenland
Compulsory consent	Veto power
Forming/agreeing to decisions	Joint decision-making Consultation/mediation
Having an influence on decisions	Assisted negotiation Collaborative problem-solving
Being heard before decisions	Facilitation/interactive workshops Task forces/advisory groups Sami parliaments
Knowing about decisions	Conferences Public hearings
LOW	Public information

Figure – Systematisation of participation right, as developed by Ernest Enobun.¹⁶⁸

B. Information to indigenous peoples and hearings

Like it has been developed in the previous chapter, informing IPs before decisions is crucial. Their livelihood is deeply linked with the lands where they live on or the lands next to them. For this same reason, dialogue between IPs, state officials and companies must kept after decisions have been made and not only during decision-making processes. Such dialogue allows all of them to adapt to new challenges and impacts occurring because of petroleum and mining exploitation. It also allows them to take measures if necessary for concrete adaptation.

According to Enobun, information is given on the nature, duration and impact of the project through public hearings, public participation and conferences.¹⁶⁹ It must contain “pre-feasibility studies, resettlement and compensation plans, development plans, allocation of benefits, and means of seeking complaints”.¹⁷⁰

Chapter 10 of the UN Declaration and Programme of Action from the Conference on Environment and Development in Rio de Janeiro in 1992 (Agenda 21) recognises that the use and management of lands and resources at that time was not sustainable and that the use and the management of these resources must be changed. Together with Chapter 26 of the Agenda 21, which recognises the role of IPs through their knowledge about nature, the use and the management of resources, the provisions of the Agenda 21 established that IPs should have a greater role in decision-making processes. Therefore, simple hearings and public information

¹⁶⁸ Ernest Enobun, ‘The concept of free, prior, informed consent as a mechanism for the right of veto: is there a realistic appeal for right of veto in the Niger delta?’ (2009) 9. This figure is a reproduction of “Operationalisation of Free Prior Informed Consent” developed by Enobun, and was modified for this thesis to include the level of compulsory consent and its veto power, and the level of autonomous law-making powers that exists in Greenland.

¹⁶⁹ Ernest Enobun, ‘The concept of free, prior, informed consent as a mechanism for the right of veto: is there a realistic appeal for right of veto in the Niger delta?’ (2009) 8.

¹⁷⁰ Ernest Enobun, ‘The concept of free, prior, informed consent as a mechanism for the right of veto: is there a realistic appeal for right of veto in the Niger delta?’ (2009) 8-9.

should be only the first step toward a greater influence of IPs in these processes and alone information is not enough to guarantee a sustainable development of natural resources.

C. Negotiation with indigenous peoples

Negotiation is about being heard before the decision. Collaborative problem-solving and assisted negotiation are techniques that can be used to guarantee the negotiation between IPs, companies and governments.

The concept of negotiation is enshrined in the UNDRIP and should be considered as the cornerstone of this new generation of rights for IPs.

Bellier thinks that the issue concerning negotiation is to determine if the right of self-determination guaranteed under Articles 3, 31 and 36 of the UNDRIP is a right for peoples and a right for States.¹⁷¹ On the one hand, it concerns the issue of the full recognition of the status of *peoples* for IPs previously developed in this thesis, where the term *populations* does not reflect the sovereignty claimed by indigenous organisations. On the other hand, it deals with the relationship between the principle of self-determination and the right to succession and the territorial sovereignty of States. Hence, Bellier presented two different conceptions of the right to self-determination: the right to external self-determination which is a full determination considered by the States to be secession, and the right to internal self-determination, which is a type of autonomy within the territory of the states.¹⁷²

Articles 25 to 30 of the UNDRIP are contentious because they deal with the lands, the territories and the natural resources, which are, as previously stated, a sensitive issue concerning IPs' rights. The implementation of these provisions requires a strong political engagement from States. Biller thinks that these articles of the UNDRIP are contentious because this will is "clearly non-existent" among the states of Western colonisation such as the USA, Canada, Australia or New Zealand.¹⁷³ It raises the issues of definition of the concept of territory, delimitation of this territory, restitution, rehabilitation of the lands that have been conquered, looted or destroyed for example because of the extraction and exploitation of natural resources or the storage of waste, or condemned by the militarisation of the zone. It also concerns the issue of property ownership, the status of land owned under customary law or by treaties or other arrangements. It is also related to the problems of compatibility of a spiritual relationship with the process of business and sharing the resources between IPs, companies and the state, and the question of compensation, royalties and other compensation paid to the IPs.¹⁷⁴

In 2007, participants to the Arctic Regional Workshop on indigenous peoples' Territories, Lands and Natural Resources (Arctic Regional Workshop) recognised that States must cooperate with IPs to establish transparent procedures in order to allow IPs and the States themselves to negotiate "fair and equitable benefit sharing arrangements with regard to the utilisation of non-traditional natural resources" found in territories belonging to IPs.¹⁷⁵

D. Consultation of indigenous peoples

Consultation is about influencing on the decision. To do so, IPs can participate in advisory groups and workshops. The right to consultation is defined under Article 6(1) of the ILO C169. Moreover, the principle of consultation concerning natural resources and lands is established under Article 15.¹⁷⁶

¹⁷¹ Irène Bellier, 'Le projet de Déclaration des droits des peuples autochtones et les Etats américains : avancées et clivages' (2006a) 7.

¹⁷² Irène Bellier, 'Le projet de Déclaration des droits des peuples autochtones et les Etats américains : avancées et clivages' (2006a) 7.

¹⁷³ Irène Bellier, 'Le projet de Déclaration des droits des peuples autochtones et les Etats américains : avancées et clivages' (2006a) 8.

¹⁷⁴ Irène Bellier, 'Le projet de Déclaration des droits des peuples autochtones et les Etats américains : avancées et clivages' (2006a) 8. . See also, Irène Bellier, 'Le projet de Déclaration des droits des peuples autochtones et les Etats américains : avancées et clivages' (2006a) 4, footnote no. 5.

¹⁷⁵ Report of the Arctic Regional Workshop (26-27 March 2007) 8.

¹⁷⁶ James Anaya (2004) 143.

Furthermore, under Article 7(1), indigenous institutions and initiatives should be developed and the government must support with resources in order for IPs to exercise control over and decide their priorities for development.¹⁷⁷

The ILO has explained that appropriate procedures should be undertaken, always in good faith "with the objective of achieving agreement", mutual respect, giving them the opportunity to "participate freely at all levels" of the formulation, implementation and evaluation of measures and programmes that affect them directly.¹⁷⁸ The representative institutions of the peoples and also other institutions and organisations that represent them should be used; otherwise the consultation would not comply with the provisions of the ILO C169.

The ILO distinguishes between information to IPs and consultation as consultation is not only an information meeting and requires more time than a simple hearing.

The conduct of consultation is under the responsibility of governments. They have the duty to reinforce IPs' representative institutions.¹⁷⁹ The ILO goes further by saying that governments have also the responsibility to develop systematic and organised action for the protection of IPs' rights under Article 3, and for insuring that "appropriate mechanisms and means are available" under Article 33.¹⁸⁰ For this reason, the ILO C169 is often seen as a powerful tool for conflict prevention, conflict resolution and of course for development processes. Moreover, it is crucial for the government to control that consultation is conducted by companies and not simply trust companies to do so.

Canada is a good case study to illustrate in practice the use of consultation. Institutions called claims boards have been created, aiming to assure that the voices of IPs are heard and that they have influence. Graham White emphasises that these claims boards are "a compromise between, on the one hand, the desire of IPs to maximize their control over vital land and wildlife issues and, on the other hand, the insistence of government that the public interest in these issues across the vast areas covered by the claims".¹⁸¹

Each members of these claims boards acts "in the public interest", autonomously from the governments and organisations. Furthermore, White explained that the government frequently accept board recommendations which shows the quality of these boards.¹⁸² Indeed, in their decisions, boards take into consideration indigenous knowledge. They hold public hearings and consultations. These claims boards are an example of using consultation of IPs in order to increase their influence and their voices in decision-making processes.

Additionally, the IWGIA notices that, in practice, governments tend to interpret the principle of consultation as processes after that decisions have been taken simply to inform IPs. The IWGIA considers that consultation is more than simple information sharing processes and is about seeking free, prior and informed consent.¹⁸³

The ICCPR and the case law of the monitoring body established under this international instrument e.g. the Human Rights Committee (HRC) identify two principles concerning IPs' rights: the right to self-determination for all peoples under its Article 1 and the protection of IPs' rights related to resources and lands under Article 27.¹⁸⁴ It also protects minority rights. It defines individual rights for a person but also for the minority collec-

¹⁷⁷ Dalee Sambo Dorough, 'The Indigenous Human Right to Development' (2010) 82.

¹⁷⁸ Website of the ILO, 'Convention 169' accessed 12 July 2013.

¹⁷⁹ Viviane Weitzner, 'Indigenous Peoples and Free, Prior and Informed Consent: Probing the Issues at Stake' 3

¹⁸⁰ Website of the ILO accessed 22 May 2013. See also: Article 3 of the ILO C169.

¹⁸¹ Graham White, 'Strengthening indigenous peoples' influence: 'claims boards' in northern Canada' (2004) 26. "Claims boards fall into four broad categories. One group deals with wildlife management. [...] A second major set of boards is responsible for land use planning [...]. A third group, which is involved in licensing projects that might disturb or damage the environment, [...] issues licences and permits to projects ranging from small gravel pits to oil and gas pipelines [...] [and] conducts environmental impact assessments on proposed projects [...] A final group [...] serve[s] as dispute resolution bodies for claims-related issues".

¹⁸² Graham White indicates that "governments can and do reject board decisions, but only rarely. Otherwise put, claims boards wield real power. Without their approval, major development projects such as pipelines or mines are unlikely to go ahead. Where wildlife is concerned, to all intents and purposes, the wild-life management boards have the final say on most issues that come before them". See: Graham White, 'Strengthening indigenous peoples' influence: 'claims boards' in northern Canada' (2004) 29.

¹⁸³ Mikkelsen & Garcia-Alix (2013) 10-11.

¹⁸⁴ Martin Scheinin, 'Indigenous Peoples' (2004) 2. Scheinin claims that the protection of rights related to lands and resources is afforded under the notions of culture and minority in Article 27 of the ICCPR. This concept can also be found in the Report of the Arctic Regional Workshop (26-27 March 2007): "Arctic indigenous peoples' economies, in particular economies which are largely based on subsistence activities, [...] and other traditional or typical means of livelihood constitute 'culture'".

tively.¹⁸⁵ Carsten Smith analysed this provision as the right for minorities to live without suffering from an assimilation policy of the State where they live in.¹⁸⁶

These two provisions do not include reference to IPs. But, they are entitled to the right of self-determination and to their rights related to resources and lands because of the fact that they are in a situation of minority in comparison to the population of the State. However, this consideration raises the question of IPs that would be *a contrario* the majority in the population of a State, like it is the case in Guatemala or in Greenland.¹⁸⁷ The concept of majority/minority should not be understood numerically but should in fact be understood as a group being "subject to a (...) degree of dispossession or subordination by another now dominant group".¹⁸⁸

Article 27 establishes a negative obligation for a State not to deny members of these minorities their rights relating to their own language, religion and culture. Martin Scheinin explained that this negative obligation is recognition in itself of the existence of a right that should not be denied.¹⁸⁹

IPs' rights related to lands and resources, recognised by the negative obligation for a State not to deny the rights of these 'minorities' and under the notion of 'culture', should not therefore be denied by the State.

In *Lubicon Lake Band v Canada*,¹⁹⁰ the HRC acknowledged a violation of Article 27. In this case, the exploitation of natural resources (gas and oil) in lands traditionally used by IPs for fishing and hunting had destroyed the resource. Moreover, in *Länsman v Finland No. 1*,¹⁹¹ the HRC recognised that Article 27 "does not protect only traditional means of livelihood but even their adaptation to modern times" and that exploitation of resources must be approved through consultation and be sustainable for indigenous economy.¹⁹²

Concerning the right to self-determination, Paragraph 2 of Article 1 of the ICCPR proclaims the right of all peoples to dispose of their natural resources. Scheinin considered that the provision elaborates a resource dimension for the right to self-determination.¹⁹³

Also, the European Union, through its Second Northern Dimension Action Plan, recognised the necessity to take into consideration IPs' interests in decision-making at all levels of the processes in relation with economic activities.¹⁹⁴

¹⁸⁵ John B. Henriksen, 'Saami Parliamentary Co-operation' (1999) 52.

¹⁸⁶ Carsten Smith, 'The Sami Rights Committee: an Exposition' (1987) 25.

¹⁸⁷ Scheinin says that, on the basis of the practice of the HRC, "groups identifying themselves as IPs generally fall under the protection of Article 27 as 'minorities'. In addition, at least some of them constitute 'peoples' for the purposes of Article 1 and are beneficiaries of the right of self-determination. Hence, the ICCPR does not give support to a position according to which IPs are a specific category between minorities and peoples, not entitled to the right of self-determination".

¹⁸⁸ Martin Scheinin, 'Indigenous Peoples' (2004) 3.

¹⁸⁹ Martin Scheinin, 'Indigenous Peoples' (2004) 3.

¹⁹⁰ *Lubicon Lake Band v. Canada*, Communication No. 167/1984 (1990). See also: Martin Scheinin, 'Indigenous Peoples' (2004) 6. See also: *Gillot v. France*, Communication No. 932/2000 (2002).

¹⁹¹ *Ilmari Länsman et al. v. Finland*, Communication No. 511/1992 (1994).

¹⁹² Martin Scheinin, 'Indigenous Peoples' (2004) 6. Later, according to Martin Scheinin, these principles have been confirmed in *Länsman v Finland No. 2* in 1995 and in *Apirana Mahuika et al. v New Zealand* in 1993. See also: Paragraph 9.3 of the Committee's Views: "The right to enjoy one's culture cannot be determined in abstracto but has to be placed in context. In this connection, the Committee observes that article 27 does not only protect traditional means of livelihood of national minorities, as indicated in the State party's submission. Therefore, that the authors may have adapted their methods of reindeer herding over the years and practice it with the help of modern technology does not prevent them from invoking article 27 of the Covenant". Paragraph 9.6 of the Committee's Views: "(...) the authors were consulted during the proceedings, and that reindeer herding in the area does not appear to have been adversely affected by such quarrying as has occurred". Paragraph 9.8 of the Committee's Views: "With regard to the authors' concerns about future activities, the Committee notes that economic activities must, in order to comply with article 27, be carried out in a way that the authors continue to benefit from reindeer husbandry. Furthermore, if mining activities in the Angeli area were to be approved on a large scale and significantly expanded by those companies to which exploitation permits have been issued, then this may constitute a violation of the authors' rights under article 27, in particular of their right to enjoy their own culture. The State party is under a duty to bear this in mind when either extending existing contracts or granting new ones".

¹⁹³ Martin Scheinin, 'Indigenous Peoples' (2004) 10.

¹⁹⁴ John B. Henriksen, 'Saami Parliamentary Co-operation' (2006) 37.

E. Actual participation in decision-making processes

By using joint decisions, conciliation and mediation, IPs, governments and companies can have actual common participation in decision-making processes, as it is all about forming and agreeing on decisions.

This conception is actually the fundamental principle of ILO C169 where the consultation and full participation at each level of decision-making processes should be respected.¹⁹⁵ Full participation is guaranteed under Article 6(1)(b). Under this provision, governments have to establish means in order to ensure full participation of IPs. However, what does “at all levels of decision-making” really mean? Enobun wondered if it means also the moment of deciding when the project will start.¹⁹⁶ Also, a full and free participation was recognised during the World Conference on Human Rights in Vienna in 1993, where it was repeated that it should be ensured by governments.

Article 31 of the UNDRIP provides that IPs have the right to autonomy and self-determination regarding matters related to their internal and local affairs, such as culture, religion, education, information, media, health, housing, employment, and social protection activities, but also the management of land and resources, environment and entry by non-members into their territory and the means of financing these autonomous functions.¹⁹⁷ In other words, the right to self-determination includes the right for IPs to decide on their development.¹⁹⁸

Then, Article 36 deals with the right to expect that treaties, conventions and other international agreements concluded by the States or their successors will be honoured, respected and applied by the States. Bellier adds that these international instruments must be applied according to their original spirit and purpose.¹⁹⁹

Another distinction must be made between the concept of consultation and the concept of consent. The latter is linked with the idea of a right to veto given to IPs during the decision-making process of a project. However, it is interesting to notice that not all international institutions and organisations understand the concept of free, prior, and informed consent (FPIC) in the same way; for instance, BRS highlights that “whereas Oxfam Australia interprets FPIC as a right to veto, other institutions, such as the World Bank, suggest that it is not”.²⁰⁰

Labeau explains that the concept of FPIC has to be distinguished from the right to be consulted and involved in the decision-making processes of development projects that will impact IPs.²⁰¹ This concept will be discussed in the next chapter (chapter 4).

Moreover, in Canada, Nunavut has signed in 1993 the biggest Canadian land rights agreement.²⁰² Under this agreement, Inuit of Nunavut have obtained several rights such as for instance the right to negotiation with international petroleum companies for impact mitigation and for benefits (economic and social) from non-renewable resource development when Inuit own title to lands. In 1999, the Nunavut Act entered into force and this territory became a new member of the provincial and territorial club of Canada.²⁰³ The population of Nunavut is composed of about 85 % of Inuit. This land agreement and the recognition as a new territory will help Inuit peoples to reach economic self-sufficiency. Jose Kusugak emphasised the opportunity for IPs in this part of Canada to “safeguard fundamental conservation and environmental values while encouraging responsible de-

¹⁹⁵ Website of the ILO accessed 12 July 2013.

¹⁹⁶ Ernest Enobun, ‘The concept of free, prior, informed consent as a mechanism for the right of veto: is there a realistic appeal for right of veto in the Niger delta?’ (2009) 4.

¹⁹⁷ Irène Bellier, *Le projet de Déclaration des droits des peuples autochtones et les Etats américains : avancées et clivages* (2006a) 7, footnote No 3.

¹⁹⁸ Cathal Doyle and Jill Cariño, *Report ‘Making Free Prior & Informed Consent a Reality, Indigenous Peoples and the Extractive Sector’* (2013) 3

¹⁹⁹ Irène Bellier, *Le projet de Déclaration des droits des peuples autochtones et les Etats américains : avancées et clivages* (2006a) 7, footnote No 3.

²⁰⁰ Jasmine Campbell, ‘Engaging With Free, Prior and Informed Consent’ (2012) 6

²⁰¹ Pierre-Christian Labeau, ‘Canada: Global CSR Monitor - Free, Prior and Informed Consent of Indigenous Peoples’ (2010) 2.

²⁰² Jose Kusugak, ‘The tide has shifted: Nunavut works for us, and it offers a lesson to the broader global community’ (2000) 20.

²⁰³ Jose Kusugak, ‘The tide has shifted: Nunavut works for us, and it offers a lesson to the broader global community’ (2000) 21.

velopment proposals; and to convince resource developers that successful projects require having Inuit 'on side'.²⁰⁴

The establishment of a local governmental for Nunavut, as new member of the provincial and territorial club, can also be interpreted as a territorial autonomy for Inuit peoples – after all, they represent a large majority of the Nunavut population. Jose Kusugak explained that the land agreement proves that it is possible for Inuit peoples to conclude an agreement with the Crown in order to give real powers to IPs.²⁰⁵

F. Autonomous law-making powers: the case study of Greenland

Such territorial autonomy has been reached by Greenland which has now autonomous law-making powers. The colonisation of Greenland started in 1791. The administration of the island by the Danish Government started this date to the middle of the 19th century. Then, different local councils were created. Then, in 1973, the Greenland Home Rule Committee was established to study the possibility of establishing a Home Rule Arrangement within the unity of the Realm.²⁰⁶ A proposal was presented for negotiation two years later, followed by the establishment of the Home Rule Commission. Then, the Commission presented the Greenland Home Rule Arrangement, which was adopted by the Danish Parliament (Folketing) and then the Greenland population.²⁰⁷

In May 1979, the Greenland Home Rule Arrangement entered into force. It gave the possibility for Greenland to exercise executive and legislative powers within the Home Rule matters. The Commission presented a report in 2003 with the recommendation to create the joint Greenland-Danish Self-Government Commission, which was established in 2004.²⁰⁸ One of the working groups of the Commission considered the specific topic of mineral resources.

The main role for the Self-Government Commission has been to propose a draft for a new arrangement that would give more fields to authorities "than those already taken over under the Home Rule Arrangement".²⁰⁹ After starting talks and negotiation with IPCs and mining companies, the Home Rule authorities have started to grant mineral exploration permits.²¹⁰ Indeed, Greenland is thought to have a significant potential for the international resources community.²¹¹

In 2008, the Greenlandic-Danish Self-Government Commission drafted its White Paper No. 1497. It was used as a base for drafting the Act on Greenland Self-Government (hereafter Self-Government Act) that came later into force on 21 June 2009. Before, on 25 November 2008, a referendum was held in Greenland concerning the Self-Government Act. 75.5% voted in favour, 23.6% were against it.²¹² Under this new status, Greenland has obtained the right to declare its independence from the State of Denmark and Greenlanders are recognised as "a people" according to international law.²¹³

²⁰⁴ Jose Kusugak, 'The tide has shifted: Nunavut works for us, and it offers a lesson to the broader global community' (2000) 26.

²⁰⁵ Jose Kusugak, 'The tide has shifted: Nunavut works for us, and it offers a lesson to the broader global community' (2000) 27. Kusugak also explains that it shows to IPs in other parts of Canada that it is important to find and secure relationships with supporters of IPs' rights at the federal level, persons that can work with law-makers in the provincial capitals and in the federal institutions.

²⁰⁶ The Greenland-Danish Self-Government Commission's Report on Self-Government in Greenland, Executive Summary (2008) 2.

²⁰⁷ The Greenland-Danish Self-Government Commission's Report on Self-Government in Greenland, Executive Summary (2008) 2.

²⁰⁸ The Greenland-Danish Self-Government Commission's Report on Self-Government in Greenland, Executive Summary (2008) 3.

²⁰⁹ The Greenland-Danish Self-Government Commission's Report on Self-Government in Greenland, Executive Summary (2008) 4. "(...) with the exemption of the constitution, foreign affairs, defence and security policy, the Supreme Court, nationality, and exchange rate and monetary policy".

²¹⁰ Rasmus Rasmussen, 'Oil exploration in Greenland' (2006) 26-31.

²¹¹ Nuttall emphasises that "some politicians are confident that mining will eventually overtake the fishing industry as Greenland's main source of income". See: Nuttall (2008) 48.

²¹² Website of the Statsministeriet, 'The Greenland Self-Government Arrangement'. The referendum was non-binding for the Danish parliament; however it promised to respect the results.

²¹³ Sara Olsvig, 'Greenland' (2009) 24-28.

In December 2008, the parliament adopted the Act No. 6 on Greenland's Mineral Resources Fund. Then, in December 2009, it adopted the Act No. 7 on mineral resources and activities concerning mineral resources sector. The sector was later taken over by the Greenland Self-Government in January 2010.

Most of all, it is regularly emphasised that the relations between Denmark and Greenland regarding mineral resource activities have fundamentally changed with the adoption of the Self-Government Act.²¹⁴ The responsibility has been taken over by the Greenland Self-Government authorities. They have the right to exploit the mineral resources. Its authorities decide on exploration, exploitation and development of these resources. Nevertheless, according to the Self-Government Act for Greenland, revenues gained from mining activities will benefit both Danish and Greenland people.²¹⁵ The right to self-determination of the people of Greenland is recognised in the preamble to the Self-Government Act. In other words, unlike Sami Parliaments, which simply have an advisory role, Greenland has autonomous law-making powers.

The extraction of these minerals in Greenland is an issue that has a major impact on the world population. Indeed, its soil contains rare minerals that are used for the production of electronic devices for example. In addition, it is estimated that another 31 billion barrels of oil and gas offshore and 17 billion barrels of oil and gas onshore could be discovered.²¹⁶

The case of Greenland shows the importance of politics in issues of participation concerning the exploitation of natural resources. The main outcome of the 2013 General Elections of Greenland concerned this issue. It is for this reason that the outcome of last Greenland's general election on March 12th 2013 was important. The social democratic Siumut party won the election (43%) against the ruling socialist Inuit Ataqutigiit party (34%).²¹⁷ The social democratic Siumut party based its campaign on a pro-digging speech,²¹⁸ with a lift of the uranium extraction ban (extraction of uranium is currently banned in Greenland) and so an easier access to rare-earth metals. Moreover, the party also proposed to increase the royalties paid by mining companies. With the increase of Greenland's influence on the mining market, on the current high-value materials, China could lose its large influence on the market.²¹⁹

Such extraction of minerals, both offshore and onshore, could allow Greenland to emancipate from the Kingdom of Denmark which still has a great influence on the economy of the island. In addition, such a vote can be interpreted as a warning to the leaders from voters, saying that they do not want to see their country's resources to be extracted by foreign companies without high royalties and taxes.²²⁰

The Kingdom of Denmark, considers itself as being "centrally located in the Arctic" and to be responsible in and for the region²²¹ and having rights over the region.²²² While the development in this region has gone through several sectors such as education, health and environment²²³, the Kingdom of Denmark believes that climate change and technological development make "vast economic potential more accessible" and therefore a new economic potential of the region.²²⁴ That is why in its 'Strategy for the Arctic 2011-2020', the Kingdom has presented the promotion of sustainable growth and social sustainability" as a common objective for Denmark, Greenland and the Faroe Islands but also with the other countries within the region.²²⁵ A development that

²¹⁴ Website of Statsministeriet, 'The Greenland Self-Government Arrangement'.

²¹⁵ According to the economic arrangement: Self-Government Act, Chap. 3, Para. 7.

²¹⁶ Kingdom of Denmark's Strategy for the Arctic 2011-2020, 24.

²¹⁷ The Economist (31 May 2013): "Siumut's leader, 47-year-old Aleqa Hammond (...) became Greenland's first female prime minister".

²¹⁸ *The Economist*, 'Below the ice: How the island's politics could change the world economy' (16 May 2013): it highlights that both parties are pro-mining "but in different ways".

²¹⁹ The Economist (31 May 2013): "Polar politics therefore matter to many more than 57,000 people who live in Greenland".

²²⁰ The leader of Siumut party said: "We are welcoming companies and countries that are interested in investing in Greenland. (...) At the same time we have to be aware of the consequences as a people. Greenland should work with countries that have the same values as we have, on how human rights should be respected. We are not giving up our values for investors' sake." See: Terry Macalister, 'Greenland government falls as voters send warning to mining companies' (15 March 2013).

²²¹ Kingdom of Denmark, 'Strategy for the Arctic 2011-2020' 7.

²²² Kingdom of Denmark, 'Strategy for the Arctic 2011-2020' 10.

²²³ Kingdom of Denmark, 'Strategy for the Arctic 2011-2020' 7.

²²⁴ Kingdom of Denmark, 'Strategy for the Arctic 2011-2020' 9.

²²⁵ Kingdom of Denmark, 'Strategy for the Arctic 2011-2020' 7.

"must take place firstly to the benefit of the inhabitants of the Arctic and go hand in hand in safeguarding the Arctic's environment".²²⁶

The interest of the case of Greenland, with its autonomous law-making powers, lies in the fact that the majority of the population of Greenland is indigenous (Inuit). Such demographic similarity can also be found in Nunavut in Canada and in the northern part of Alaska.²²⁷

Today, Greenland attracts investments and functions more or less like a State for this matter. The geopolitical position of the island is widely discussed.²²⁸

IV. Indigenous peoples' right to free, prior, informed consent

A. Concept of consent and terms of FPIC

The concept of FPIC is developed here, separated from the legal and political framework of participation's rights exposed in the previous chapter. It is so, not because it is believed that FPIC is not related to the previous developments (they are, indeed, deeply linked one to another), but because arguments in this chapter aim to demonstrate that the implementation and the respect of this concept is, probably, the key for solving participation issues for IPs.²²⁹

The concept of FPIC incorporates all the other concepts previously explained in this thesis, such as the concept of consultation, representation and good faith. FPIC is also strongly related to the concept of consent and right to veto. In other words, FPIC should be obtained from IPs by extractive industries through cooperation, good-faith consultation and participation.

The concept of FPIC can be found in many international instruments. Various academics consider that FPIC give a veto power to IPs in decision-making concerning development projects relating to energy companies. FPIC is moving from consultation to consent. The principle of FPIC was established with the ILO C169.²³⁰ Later, FPIC has been incorporated into other international legal instruments such as the UNDRIP.

The terms *free*, *prior* and *informed* should be clarified. In 2007, an advisory body to the Economic and Social Council (hereafter ECOSOC), the UN Permanent Forum on Indigenous Issues (UNPFII) has given a definition of FPIC.²³¹

In other words, *free* requires that the consent is obtained without forcing by intimidation, duress or pressure, or manipulation and lies from the States or advocates; *prior* entails that the consent had been sought satisfactorily in advance in time before any beginning of activities has started or authorisations have been given, thus respecting time requirements for indigenous consultation processes. *Informed* means that the information is precise and expressed in a comprehensible and accessible way.²³² The language and the format used are crucial factors that have to be considered.²³³ Campbell clarifies that giving or withholding one's consent is a collective right. She specifies that, when directly impacting livelihoods, territories and lands, and resources of

²²⁶ Kingdom of Denmark, 'Strategy for the Arctic 2011-2020' 7.

²²⁷ 85% of the Nunavut population is Inuit. See: Website of the Government of Nunavut accessed 12 July 2013.

²²⁸ For more information on the international position of Greenland, see: Frank Sejersen, 'Greenland' in *The Indigenous World 2013* (2013) 22-23. See also: IWGIA, *The Indigenous World 2013* (2013) 23. The international position of Greenland has increased with the development of foreign representation as part of the exercise of its self-determination. This is how Greenland authorities have interpreted

²²⁹ The AMAP considers that, in marine environments, oil spills are the largest threat. Thus FPIC is necessary to give the opportunity to Arctic IPs to know if they are willing to consider this risk for economic prosperity. See: Arctic Monitoring and Assessment Programme (AMAP), 'Arctic Oil and Gas 2007' (2007) 24.

²³⁰ Article 16 of the ILO C169.

²³¹ UN-REDD Programme, Guidelines on Free, Prior, and Informed Consent, Draft, 12/2011.

²³² Pierre-Christian Labeau, 'Canada: Global CSR Monitor - Free, Prior and Informed Consent of Indigenous Peoples' (2010) 2. He adds that the information must cover the following aspects: "the nature, size, pace reversibility and scope of any proposed project or activity; the duration of the project or activity; a preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks and fair and equitable benefit sharing in a context that respects the precautionary principle. See also: Fjillheim (2006) 13-14.

²³³ Jasmine Campbell, 'Engaging With Free, Prior and Informed Consent' (2012) 18 et 9: The consent should be expressed "according to the unique format, or informal political-administrative dynamic of each community".

IPs, all projects, policies, activities, measures are concerned no matter if they are legislative or administrative.²³⁴

Labeau considers that "consultation and participation are crucial components of a consent process". That is why it must be undertaken in good faith and requires time. Respective parties must go through a dialogue. Consent could be understood as a "social licence to operate" which would be verifiable, documented but also formalised.²³⁵

As a matter of fact, in Russia, lands and *de facto* natural resources are mainly owned by the Russian government. Therefore, after obtaining the agreement to use land and resources, companies do not need consent from the IPs in order to conduct projects.

B. Concept of consent and international legal framework of FPIC

The concepts of consent and FPIC are established under Article 16 of the ILO C169. Their implementation is limited because only twenty countries have ratified this convention and when they have, the affected legislation varies from one country to another. Finally, as the business network BSR noticed it, there is still a "remaining lack of clarity on what constitutes adequate consultation and achievement of consent and differences between the two concepts".²³⁶

Under Article 7 of the ILO C169, IPs have the right to decide their development priorities and therefore can participate in "the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly". They have the power to exercise control "to the extent possible". Enobun says that the letter of the Convention gives IPs the power to collectively agree on their future "as a peculiar minority".²³⁷ However, this provision seems to have limitations as it is applicable "to the extent possible". He also explains this control is limited when the development project involves external activities for the benefit of the state, for instance when extracting minerals. So, according to him, FPIC does not give veto power to IPs concerning development projects.

Moreover, under Article 15 of ILO C169, governments must consult (and it can be noticed that it is only a question of consultation) IPs when it "retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands (...) before undertaking or permitting any programmes for the exploration or exploitation of such resources". Once again, this must be done in good faith.²³⁸

As previously stated in this thesis, Martínez-Cobo's report recognised the right for IPs to decide on the use of and action on their lands. Therefore, it could be recognised in the letter of the report a veto power.

On 19 April 2002, during the Closing Declaration of the Sixth Conference on the Parties of the Convention on Biological Diversity at the International indigenous Forum on Biodiversity in The Hague, it was said that "[FPIC] is related to [the] territorial, social and cultural rights [of IPs] and [it] is part of the right to self-determination".²³⁹ It was expressed that it is believed FPIC encourages the effective and full participation of IPs in decision-making processes and the respect of their rights.

Viviane Weitzner highlights that IPs have been claimed that they cannot entirely and successfully participate in decision-making processes concerning their lands and resources if their right to FPIC is not acknowledged and realised.²⁴⁰

²³⁴ Jasmine Campbell, 'Engaging With Free, Prior and Informed Consent' (2012) 9. She claims it also concerns "their associated processes and phases".

²³⁵ Pierre-Christian Labeau, 'Canada: Global CSR Monitor - Free, Prior and Informed Consent of Indigenous Peoples' (2010) 2.

²³⁶ Jasmine Campbell, 'Engaging With Free, Prior and Informed Consent' (2012) 7.

²³⁷ Ernest Enobun, 'The concept of free, prior, informed consent as a mechanism for the right of veto: is there a realistic appeal for right of veto in the Niger delta?' (2009) 15.

²³⁸ Report of Arctic Regional Workshop (26-27 March 2007): the participants to the workshop recognised that "adequate time and financial resources must be allocated for the impact assessment so that it can be performed in good faith".

²³⁹ International Indigenous Forum on Biodiversity, Sixth Conference of the Parties of the Convention on Biological Diversity, Closing Declaration (The Hague, 19 April 2002).

²⁴⁰ Viviane Weitzner, 'Indigenous Peoples and Free, Prior and Informed Consent: Probing the Issues at Stake' 1. In addition, "as the quote [from the Closing Declaration of the Sixth Conference of the Parties of the Convention

FPIC can be seen as a response to a history of exclusion of IPs from decision-making processes regarding their territories.²⁴¹ The concept of FPIC is part of a consultative and participatory process, where all the positions are heard, where negotiation takes place, and therefore guarantees an actual influence in the decision-making process throughout the entire cycle of the project. It is an open and informed dialogue among potentially affected communities and "consent-seekers".²⁴² The UNDRIP gives guidance for the conduct of dialogue and partnership.²⁴³

Does FPIC give veto power to IPs? Enobun sees such a right as a mechanism for the right of veto that gives the possibility for IPs to reject any legislation or grant of access for international petroleum companies to carry out extractive operations on their lands.²⁴⁴ This is why it is a controversial issue. Nowadays, IPs are considered to be key stakeholders in decision and policy-making processes. However, Enobun presents the following arguments: "(a) the right of veto is hinged on right to native title; (b) right to native title accords the right to participation in decision making; (c) right to participation does not necessarily mean right to veto operations; (d) the right to veto is peculiar to different jurisdictions, and so, is not universal".²⁴⁵

FPIC is also recognised under Article 32(2) of the UNDRIP. Labeau recognises that this provision could give a veto to IPs.²⁴⁶ However, because of its status of declaration as a soft law instrument, it is not legally binding on States. Therefore it does not have the same influence as the ILO C169. Against this argument, Labeau highlights that "the standards that it recognises could, if they become part of the consistent conduct of States acting out of the belief that the law requires them to act that way, become customary law".²⁴⁷ This argument will be developed further in this chapter.

BSR analyses that the vulnerabilities of IPs are nevertheless acknowledged and the declaration reaffirms their rights "with somewhat stronger language concerning projects affecting their land and resources" in comparison to the provisions of the ILO C169.²⁴⁸ Moreover, certain States were unwilling to vote in favour of the UNDRIP because they fear that the provisions of the declaration give a right to veto to IPs, which would later be linked to the right to self-determination.²⁴⁹ In fact, the right to self-determination is a challenge for the traditional conception of the notion of state-sovereignty, as it can allow IPs to manage their development independent from the State's authorities.

Nonetheless, the UNDRIP has been adopted by the UN General Assembly, which gives to the declaration legal significance as it demonstrates the collective perception of the UN members concerning IPs' rights.²⁵⁰ BSR explains that because of this adoption by a UN organ, "members are expected to take into account this declaration in good faith; as such, this may reflect obligations of states under other sources of international law, including customary laws".²⁵¹

on Biological Diversity] underscores, FPIC is perhaps one of the most pivotal in the "bundle of rights" claimed by IPs".

²⁴¹ Shannah Metz, 'Indigenous Peoples' Right to Free Prior Informed Consent (FPIC) and Project Governance' (17 May 2006).

²⁴² Shannah Metz, 'Indigenous Peoples' Right to Free Prior Informed Consent (FPIC) and Project Governance' (17 May 2006). Based on a voluntary basis, IPs have the right to refuse to give consent at every decision-making points and that is why "discussions should occur prior and continue through the time the activity is conducted".

²⁴³ Report of Arctic Regional Workshop, p. 9: participants recognised that "dialogue, partnership and negotiations between States and IPs concerning land and resource rights are of vital importance for the resolution of problems related to the implementation of such rights".

²⁴⁴ Ernest Enobun, 'The concept of free, prior, informed consent as a mechanism for the right of veto: is there a realistic appeal for right of veto in the Niger delta?' (2009) 1.

²⁴⁵ Ernest Enobun, 'The concept of free, prior, informed consent as a mechanism for the right of veto: is there a realistic appeal for right of veto in the Niger delta?' (2009) 4.

²⁴⁶ Pierre-Christian Labeau, 'Canada: Global CSR Monitor - Free, Prior and Informed Consent of Indigenous Peoples' (2010) 1.

²⁴⁷ Pierre-Christian Labeau, 'Canada: Global CSR Monitor - Free, Prior and Informed Consent of Indigenous Peoples' (2010) 1.

²⁴⁸ Jasmine Campbell, 'Engaging With Free, Prior and Informed Consent' (2012) 8.

²⁴⁹ Jasmine Campbell, 'Engaging With Free, Prior and Informed Consent' (2012) 9.

²⁵⁰ Jasmine Campbell, 'Engaging With Free, Prior and Informed Consent' (2012) 9.

²⁵¹ Jasmine Campbell, 'Engaging With Free, Prior and Informed Consent' (2012) 9. See also: Website of the ILO accessed 12 July 2013.

In order to facilitate the implementation and respect of FPIC, Viviane Weitzner reminds the five main fundamental rights related to FPIC and protected by the different instruments.²⁵² Since they are already established under legal provisions, FPIC is somehow an umbrella concept.

First, there is the right to consultation that has been already developed. Second, as to the right to protection of traditional knowledge and genetic resources, it is recognised under Article 26(d) of the Convention on Biological Diversity.²⁵³

Third, concerning the rights to land and territories, IPs have the right to ownership, control and management of their traditional territories under the provisions of the ILO C169 and the Article 26 of the UNDRIP. Indeed, such a right to veto is conditioned with the right of ownership. Nevertheless, Article 10 of the UNDRPI recognises the concept of FPIC and therefore their consent is a precondition to any action on their lands.²⁵⁴ The reason behind this veto power is explained by the IWGIA that states: "It is the social coherence and mere survival of their communities that is at stake when access to their traditional land and resources is threatened".²⁵⁵

Fourth, the rights to relocation are protected under the ILO C169.²⁵⁶ A "free and informed consent" is necessary under Article 16 of the ILO C169. The ILO C169 entails that if the consent cannot be obtained from IPs, relocation should be conducted following appropriate procedures established by national laws and regulations. These exceptions do not exist under other instruments. Actually, under Article XVIII of the Draft Inter-American Declaration on the Rights of IPs and under Article 10 of the UNDRIP, IPs who are relocated because of onshore activities must gain compensation and must be able to return to their original lands when possible.

Fifth, relating to the right to self-determination, it is also recognised under the ILO C169. In addition, Article 7 recognises the right of IPs to "decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development". In other words, Weitzner analyses it as, to a certain extent, the recognition of their autonomy within nation-states, such as Greenland.²⁵⁷

Moreover, the rights to share in profits from the exploitation of oil and gas for instance can be an important tool for the realisation of rights to self-determination.²⁵⁸

C. Opposition to FPIC: state sovereignty versus FPIC

Nowadays, the dominant point of view is that the last decision-making power concerning projects of development and rights to resources lies in the hands of States.²⁵⁹ In other words, the decision-making process is centralised because decisions are not taken locally but rather in the states' capital. As Weitzner underlines it, this conception is put into question with the consent of FPIC which transfers the centralisation of the decision-making to the local level.²⁶⁰ Of course, it is not in the nature of States to give up their sovereignty and their power to local institutions. For this reason, FPIC can be seen as being in complete opposition with the idea of state sovereignty and calls into question the role of State as guardian of the national public good.²⁶¹ Therefore, the question is to know what should prevail over the other: the notion of state sovereignty or the concept of FPIC?

²⁵² Viviane Weitzner, 'Indigenous Peoples and Free, Prior and Informed Consent: Probing the Issues at Stake' 2.

²⁵³ Viviane Weitzner, 'Indigenous Peoples and Free, Prior and Informed Consent: Probing the Issues at Stake' 4.

²⁵⁴ Ernest Enobun, 'The concept of free, prior, informed consent as a mechanism for the right of veto: is there a realistic appeal for right of veto in the Niger delta?' (2009) 8.

²⁵⁵ Sille Stidsen, 'Editorial' (2009) 6.

²⁵⁶ Viviane Weitzner, 'Indigenous Peoples and Free, Prior and Informed Consent: Probing the Issues at Stake' 2: She highlights the different approaches of on one hand the ILO C169 and the ILO C107 and the UNDRIP on the other hand. Under Article 12 of the ILO C107, the "free consent" of IPs is required to relocate them. Furthermore, under the provisions of the ILO C107, exceptions exist for instance in case of reasons motivated by national security or national economic development interests or the health of the IPs.

²⁵⁷ Viviane Weitzner, 'Indigenous Peoples and Free, Prior and Informed Consent: Probing the Issues at Stake' 2.

²⁵⁸ Report of Arctic Regional Workshop (26-27 March 2007) 8.

²⁵⁹ Viviane Weitzner, 'Indigenous Peoples and Free, Prior and Informed Consent: Probing the Issues at Stake' 6.

²⁶⁰ Viviane Weitzner, 'Indigenous Peoples and Free, Prior and Informed Consent: Probing the Issues at Stake' 6.

²⁶¹ Viviane Weitzner, 'Indigenous Peoples and Free, Prior and Informed Consent: Probing the Issues at Stake' 6.

From the State's point of view, authorities must guarantee the national and public good and wellbeing of the State. It is for this exact reason that the idea of a veto power given to IPs is contrary to the notion of state sovereignty.²⁶² *A contrario*, from the IPs' point of view, the notion and the concept are not incompatible as they consider themselves to be a nation and therefore to conduct a relationship that Weitzner qualifies to be based on a "nation-to-nation" nature.²⁶³ They consider that the lands concerned are still theirs and that the lands are part of their identity and their survival. They actually have to live with the consequences of the development projects and the mining extraction of natural resources contained on their traditional lands. This is why they try to maintain their own institutions and systems of representations. In fact, these institutions of decision-making and self-governance are recognised in the ILO C169 and the State has the duty to give resources to strengthen them in order to guarantee a full participation of IPs in the decision-making processes.²⁶⁴ Similarly, under Article 3 of the UNDRIP, IPs have the right to decide their economic, social and cultural development.

Several international organisations did not wait for the adoption of the UNDRIP and already widely base their actions and projects on the concept of FPIC. For example, the International Fund for Agricultural Development (IFAD) seeks the consent of IPs in relevant projects after gaining the authorisation from the States concerned and tries to consider FPIC has a principle for its actions.²⁶⁵

Unfortunately, FPIC has not been recognised by the World Bank despite dialogues and negotiation between IPs and this international institution.²⁶⁶ Labeau estimates that FPIC is an emerging trend in international law.²⁶⁷ It could explain why some international organisations have not recognised FPIC.

D. Interpretation of FPIC and national legal framework

Concerning state and national legal framework, the BSR considers that States must be the primary drivers of FPIC.²⁶⁸ Moreover, even if IPs have not been officially recognised by the State, it seems companies should make sure that they are contacted and consulted through the decision-making process of the mining project. To do so, a number of interrogations must be raised such as either the project concerned affects IPs or if there is a customary structure representing the IPs concerned.²⁶⁹

In Australia, the notion of *terra nullius* was the base to deny the indigenous identity to IPs in this country.²⁷⁰ However the Australian model of IPs' rights went from an anti-Aboriginal racism of *terra nullius* in colonial era to a representation of IPs in different institutions.²⁷¹ In *Mabo v Queensland*,²⁷² the High Court of Australia rec-

²⁶² In Canada, the idea of FPIC and of the region of Nunavut is seen by right-wing politicians as a threat to the unity of Canada. See: Jens Dahl, Jack Hicks and Peter Jull, *Nunavut: Inuit Regain Control Of Their Lands And Their Lives* (2000) 12.

²⁶³ Viviane Weitzner, 'Indigenous Peoples and Free, Prior and Informed Consent: Probing the Issues at Stake' 7.

²⁶⁴ Viviane Weitzner, 'Indigenous Peoples and Free, Prior and Informed Consent: Probing the Issues at Stake' 9.

²⁶⁵ See Report of the Africa Regional Workshop in preparation of the first global meeting of the Indigenous Peoples' Forum at IFAD 7-8.

²⁶⁶ Viviane Weitzner, 'Indigenous Peoples and Free, Prior and Informed Consent: Probing the Issues at Stake' 3.

²⁶⁷ Pierre-Christian Labeau, 'Canada: Global CSR Monitor - Free, Prior and Informed Consent of Indigenous Peoples' (2010) 2.

²⁶⁸ Jasmine Campbell, 'Engaging With Free, Prior and Informed Consent' (2012) 12. "The existence of a right as national law requires all companies (...) to apply the concept when conducting business affairs in the national jurisdiction".

²⁶⁹ Jasmine Campbell, 'Engaging With Free, Prior and Informed Consent' (2012) 17.

²⁷⁰ Ernest Enobun, 'The concept of free, prior, informed consent as a mechanism for the right of veto: is there a realistic appeal for right of veto in the Niger delta?' (2009) 9. In Australia, IPs are "commonly referred to as Aboriginals".

²⁷¹ The indigenous representation advocated for the ratification of the ILO C169 and changes in Australian domestic laws.

²⁷² *Mabo and Others v the State of Queensland (No. 2)* (1992) 175 CLR 1. See: Ernest Enobun, 'The concept of free, prior, informed consent as a mechanism for the right of veto: is there a realistic appeal for right of veto in the Niger delta?' (2009) 10: He underlines that Justine Brennan said "the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands", and Justices Deane and Gaudron said that the dispossession, degradation and devastation of the Aboriginal peoples were "a national legacy of unutterable shame... the nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from, those injurious past". Furthermore, "the Mabo Judgment recognised the absolute right of veto over religious and sacred lands in the region", see: Ernest Enobun, 'The concept of free, prior, informed consent as a mechanism for the right of veto: is there a realistic appeal for right of veto in the Niger delta?' (2009) 14.

ognised for the first time native title in Australia which later led to the Native Title Act of 1993.²⁷³ Nonetheless, sovereign legislative acts could still extinguish this native title.²⁷⁴

Furthermore, in Canada, in *Delgamuukw v British Columbia*,²⁷⁵ the Canadian Supreme Court indirectly recognised the existence of a right to veto for IPs by ruling that under certain circumstances the provincial or Federal governments “may have to obtain the consent of an aboriginal nation if there is an infringement on an establish aboriginal title”.²⁷⁶ Indeed, Enobun thinks that the Court “suggested that in the circumstance where deeper rather than mere consultation is required, as in relation to title to land and resources, full consent of the aboriginal nation must be effected”.²⁷⁷ In *R. v Sparrow*,²⁷⁸ the Supreme Court of Canada has established the legal principle that aboriginal rights or titles are not absolute. However, such infringement of these rights must be justified by the provincial or federal government.

Nevertheless, in recent judgements, the Canadian Supreme Court has decided that governments (provincial and Federal) have a duty to consult IPs when the Crown suspects potentially exists an aboriginal right or title, and that its conduct that could possibly affect it.²⁷⁹ In *Haida Nation v British Columbia and Weyerhaeuser*,²⁸⁰ the Canadian Supreme Court ruled that the Crown was required to recognise IPs’ rights by its duty to consult IPs.²⁸¹ Additionally, in *Taku River Tlingit First Nation (TRTFN) v British Columbia*,²⁸² the Supreme Court of Canada established that full consent is required and has full effect.²⁸³

The Inter-American Court of Human Rights had given a similar judgement. In *Saramaka people v Suriname*,²⁸⁴ the Court ruled that “large-scale exploitation of and interference with the lands of [IPs] require the [FPIC] of the community in question”.²⁸⁵ As for the HRC, it ruled that FPIC is required when exploitation has substantial negative impacts on IPs’ rights to their culture in *Poma Poma v Peru*.²⁸⁶

Moreover, even if it seems that such judicial decisions recognised right to veto for IPs, Enobun recognises that “significant points can be deciphered: right of native title is not akin to ownership right of natural resources; right of veto is not automatic, but subject to judicial interpretation; in conflicts between title granted by the crown and native title, the former prevails”.²⁸⁷ Labeau follows the same opinion stating that even if the Crown has the duty to consult in good faith IPs, they do not have a veto right “over government decisions

²⁷³ According to the National Native Title Tribunal, native title is “the recognition by Australian law that some Indigenous people have rights and interests to their land that come from their traditional laws and customs”. See: Website of the National Native Title Tribunal accessed 12 July 2013.

²⁷⁴ Ernest Enobun, ‘The concept of free, prior, informed consent as a mechanism for the right of veto: is there a realistic appeal for right of veto in the Niger delta?’ (2009) 10.

²⁷⁵ *Delgamuukw v British Columbia* (1997) S.C.R. 1010.

²⁷⁶ Labeau (2010). See also, Viviane Weitzner, ‘Indigenous Peoples and Free, Prior and Informed Consent: Probing the Issues at Stake’ 4.

²⁷⁷ Ernest Enobun, ‘The concept of free, prior, informed consent as a mechanism for the right of veto: is there a realistic appeal for right of veto in the Niger delta?’ (2009) 12.

²⁷⁸ *R. v Sparrow* (1990) 1 S.C.R. 1075, 1109. See also: Pierre-Christian Labeau, ‘Canada: Global CSR Monitor - Free, Prior and Informed Consent of Indigenous Peoples’ (2010) 2.

²⁷⁹ Pierre-Christian Labeau, ‘Canada: Global CSR Monitor - Free, Prior and Informed Consent of Indigenous Peoples’ (2010) 2. He adds that “the scope is proportionate to a preliminary assessment of the strength of the asserted right or title, and the seriousness of the potential impact on it. That means that a deep consultation may be required where there is a strong claim to the Aboriginal right or title, or where the risk of non-compensable damage to the right or title is high”.

²⁸⁰ *Haida Nation v British Columbia and Weyerhaeuser* (2004) SCC 73.

²⁸¹ Ernest Enobun, ‘The concept of free, prior, informed consent as a mechanism for the right of veto: is there a realistic appeal for right of veto in the Niger delta?’ (2009) 11.

²⁸² *Taku River Tlingit First Nation (TRTFN) v British Columbia* (2004) 3 S.C.R. 550, 2004 SCC 74.

²⁸³ Ernest Enobun, ‘The concept of free, prior, informed consent as a mechanism for the right of veto: is there a realistic appeal for right of veto in the Niger delta?’ (2009) 13. In this case, “a mining company sought permission from the British Columbia government to re-open an old mine. The TRTFN was consulted, and participated in the environmental assessment process under the Environmental Assessment Act, but objected to the company’s plan to build a road through a portion of the TRTFN’s traditional territory. The Province granted the project approval certificate. In bringing a petition, the TRTFN argued that although it participated in the assessment process, the rapid conclusion of it towards granting the license denied it meaningful consultation. See also another decision: *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* (2005) 3 S.C.R. 388.

²⁸⁴ *Saramaka People v. Suriname* (28 November 2007) Inter-American Court of Human Rights.

²⁸⁵ Heinämäki (2013) 139.

²⁸⁶ *Poma Poma v Peru*, Communication No 1457/2006 (2009).

²⁸⁷ Ernest Enobun, ‘The concept of free, prior, informed consent as a mechanism for the right of veto: is there a realistic appeal for right of veto in the Niger delta?’ (2009) 14.

made pending final proof of their asserted rights or title".²⁸⁸ In order to conduct a proper consultation of IPs, guidelines released in March 2011 by the Government of Canada must be followed.²⁸⁹

The notion of *title* and *ownership* are still debatable and sometimes yet to be clearly defined under all circumstances to properly take into account all type of ownership of lands. Moreover, such right is perceived differently in different countries.²⁹⁰ FPIC reflects a new global socio-political reality where IPs are given political force and technical capacities with standards for sustainability.²⁹¹ Indeed, the interests of the States are not incompatible with the interests of IPs, especially because they need to face dilemmas that include developments projects while safeguarding their traditional way of living. As Weitzner underlines it, they are interested in the national public good and they want to see a reduction of poverty on the long term.²⁹² This is why projects must be conducted through consultation and participation of IPs, taking into account the cultural, economic and ecological costs of such projects of development.

Even more recently, the Supreme Court of India gave a judgement concerning the triangular relationship between States, IPMCs and indigenous peoples' rights in *Orissa Mining Corporation v Ministry of Environment and Forests & others*.²⁹³ The case concerned a mining project of Vedanta Group in the State of Orissa which would have involved the eviction of the Dongria Kondh from their traditional land.

At first, in 2007, the Supreme Court allowed the project but evidences were brought that the plans did not respect "the environmental planning and were potentially harmful to the local tribal population".²⁹⁴ Therefore, the Ministry of Environment and forests rejected the permission. The Supreme Court refused to over-rule the decision of the Ministry. The Court stressed that consultation and participation were crucial, and that even though the IPs concerned were not living on this specific land but next to it, judges recognised that this land was important for the IPs' culture because of spiritual value.²⁹⁵ The IPs' right to practice their religion was therefore emphasised.²⁹⁶

Through this decision, the Supreme Court of India ruled that consultation but also consent are a requirement for IPMCs before obtained the permit from governments.

By respecting the concept of FPIC, the State and companies are guaranteeing to respect the right to self-determination of IPs and their right to consultation and participation through the processes, using good faith dialogues. "While the question of sovereignty and ownership over resources on Indigenous lands is the thorniest, there are ways of moving forward respecting both points of view".²⁹⁷

E. FPIC as international customary law?

Apart from being recognised under conventions, it is relevant to wonder whether the concept of FPIC is customary law.²⁹⁸ The Statute of the International Court of Justice recognised in its Article 38(1)(b) customary law

²⁸⁸ Pierre-Christian Labeau, 'Canada: Global CSR Monitor - Free, Prior and Informed Consent of Indigenous Peoples' (2010) 3.

²⁸⁹ Kevin O'Callaghan, 'Canada Finalizes Its Consultation And Accommodation Guidelines' (2011) 1-3. He gives a step by step guide to consultation and accommodation.

²⁹⁰ Ernest Enobun, 'The concept of free, prior, informed consent as a mechanism for the right of veto: is there a realistic appeal for right of veto in the Niger delta?' (2009) 19.

²⁹¹ Shannah Metz, 'Indigenous Peoples' Right to Free Prior Informed Consent (FPIC) and Project Governance' (17 May 2006).

²⁹² Viviane Weitzner, 'Indigenous Peoples and Free, Prior and Informed Consent: Probing the Issues at Stake' 9.

²⁹³ *Orissa Mining Corporation v Ministry of Environment and Forests & others* (2013) Supreme Court of India.

²⁹⁴ Nadia Bernaz, 'Indigenous Peoples, Consultation and Mining: Lessons from the Supreme Court of India', Rights As Usual (Blog) (23 April 2013).

²⁹⁵ Nadia Bernaz, 'Indigenous Peoples, Consultation and Mining: Lessons from the Supreme Court of India', Rights As Usual (Blog) (23 April 2013). See also: Amnesty International, 'India: Landmark Supreme Court ruling a great victory for indigenous rights' (18 April 2013).

²⁹⁶ Greenpeace Magazine, 'India: Landmark Supreme Court ruling a great victory for indigenous rights' (18 April 2013). See also: Andrew Buncombe, 'Indian supreme court rules to protect sacred hills against UK mine operation Vedanta Resources' (18 April 2013).

²⁹⁷ Viviane Weitzner, 'Indigenous Peoples and Free, Prior and Informed Consent: Probing the Issues at Stake' 9.

²⁹⁸ Customary law is an important source of law for IPs throughout the world as their customs are traditionally an important pillar of indigenous societies. See: Dahl & Rose (2010) 4: "The indigenous cultures contain strong collective traditions such as sharing, solidarity and community-owned land. IPs need to control their own future

as one of the sources of public international law, along with international conventions,²⁹⁹ the general principles of law recognised by civilised nations (*jus cogens*),³⁰⁰ and judicial decisions and teachings of most highly qualified publicists.³⁰¹ Furthermore, the Statute of the International Court of Justice was incorporated into the Article 92 of the UN Charter.

Since it is not a written source, it is necessary to examine the elements of a rule to determine whether it is customary international law. Thus, it is necessary that this practice is particularly wide-spread among States and it is consistently practiced and accepted as a rule of law. In other words, customary international law is defined by state practice, *opinio juris* e.g. the States act this way before they think they have to do so, and this practice must be taken under a consensus meaning that a large number of states follow it.

There must be a material element which is a uniform behaviour and a psychological element (*opinio juris*) which means that states do so because it is the law.³⁰² There is also an idea of morality. States would follow the principle of FPIC because it is morally good to do so. It is the same when they apply a customary rule because it is morally correct.

Anaya explains that we can estimate that the rights of IPs must be protected because it is a matter of morality. Thus, he believes that States may consider it is a matter of "identifying standards of conduct that are required to uphold widely shared values of human dignity".³⁰³ In Miguel D'Estéfano's point of view, there is state practice as an element of customary law when the states acts that way because of an "idea of justice and humanity".³⁰⁴

In *Mayagna Awas Tingni Community v Nicaragua*, the Inter-American Court held that the State of Nicaragua had violated the property rights of IPs by virtue of the fact that "as a matter of international customary law, IPs have property rights in conformity with their traditional land tenure".³⁰⁵

Such a development for the concept of FPIC (which as previously said has no precise definition in an international legal instrument) seems possible. Thus, FPIC could be protected by international customary law. After all, many states and even companies are using it to establish guidelines. In the same vein, in *Mayagna Awas Tingni Community v Nicaragua*, the Inter-American Court of Human Rights ruled that IPs had property rights under customary law.³⁰⁶ Moreover, in that case, the judge Sergio Ramirez recognised several rights established in several instruments and therefore it was a broad consensus.

If property rights of IPs are protected under customary law, one could estimate that obtaining their consent concerning their lands, when they are their property, could also be protected under customary law. FPIC could be an emerging customary law norm and such an interpretation could be a possible solution and the subject of a future decision of a Court in the following years. However, customary law is supposed to be clearer than these

and development and, to do so, they need to have their customs and traditions recognised. In this respect, customary law is primordial for IPs' development".

²⁹⁹ Statute of the International Court of Justice, Article 38(1)(a).

³⁰⁰ Statute of the International Court of Justice, Article 38(1)(c).

³⁰¹ Statute of the International Court of Justice, Article 38(1)(d).

³⁰² James Anaya (2004) 61.

³⁰³ James Anaya (2004) 69.

³⁰⁴ James Anaya (2004) 69. He explains that this idea is supported by others authors like Prof. McDougal, Lasswell and Chen who say that « subjectivities of oughtness (*opinio juris*) required to attend Uniformities of behaviour may relate to many different systems of norms, such as prior authority, natural law, reason, morality, or religion".

³⁰⁵ *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (31 August 2001). See also: Anaya (2004) 70. For facts of the case, see William H. Meyer (2001) 335: "The Awas Tingni community claimed that its rights had been violated by the Nicaraguan government's contracts with a Korean logging company. The Awas Tingni tribes charged that Nicaragua had failed to properly demarcate their traditional lands and demanded that the Korean company be prohibited from logging in Awas Tingni territories. In its 2001 decision, the IACHR found that Nicaragua had violated Article 25 (right to judicial protection) and Article 21 (right to private property) of the American Convention on Human Rights. The government of Nicaragua violated Awas Tingni property rights by failing to demarcate indigenous lands and by granting logging concessions to the Korean company without prior consultation and consent from the tribe."

³⁰⁶ Nicaragua had violated the property rights of the Awas Tingni people because it did not protect their land tenure.

mere suppositions.³⁰⁷ Furthermore, the Lubicon Lake Band case and the Alta case³⁰⁸ go against such suppositions of customary outcomes.

F. The difficult realisation of FPIC: the case study of the Russia

Throughout the years, IPs have been trying to gather and adopt a joint and common agenda to promote both their social and economic interests. In 1990, IWGIA reported that IPs in Russia were suffering from hydroelectric projects and sickness due to radiation from nuclear testing done during the 1950s and the 1960s.³⁰⁹ Moreover, their rights were violated because of state construction companies and oil, gas and mining companies that did not respect the vulnerability of the Arctic region and its ecology.³¹⁰ For this reason, there were crucial needs for IPs of Russia to gain control of lands and that land management to be returned to them.³¹¹ Thus, during his opening speech at the Congress of Small Indigenous Peoples of the Soviet North, in 1990, Chuner Taksami said: "The peoples of the North must be in charge of all the resources providing them with the necessities of their way of life".³¹²

As Semenova underlines it, the creation of partnerships with IPs using recognised organisations "that have become new political actors" goes along with this process.³¹³ This goes through the recognition of their organisations as equal partners in decision-making processes, the distribution of resources to give them the possibility to fully participate, the incorporation of traditional knowledge and the establishment of common and joint actions.³¹⁴ Thus, a typical example of such collaboration between governments and IPs is the Arctic Council. Indeed, Semenova says IPs organisations participate in the regional decision-making process and in international organisation and events; and by doing so, they build up a collective identity,³¹⁵ that is necessary to guarantee a full participation.

In fact, participation is not only essential for the promotion of social and economic interests of IPs, it is crucial to face what Semenova calls "the most serious threat to these peoples": the commercial development of strategically important reserves of resources.³¹⁶ She highlights that the current global development goes together with a mutation of national economic systems which are destroying traditional economic forms and are a threat to traditional livelihoods of IPs in general.³¹⁷

As an example of the lack of FPIC in Russia, IWGIA has enlightened the case of the IPs of Taimyr. The NGO affirms that Norilsk Nickel, large industrial conglomerates in Russia, has not contributed to the economic and social development of the peoples in this part of the Federation.³¹⁸

Contrary to human rights organisations in 'the West', civil society in Russia can be considered as emerging and therefore weak since civil awareness is still at a low level.³¹⁹ The main Russian non-governmental organisation for the protection of the rights and interests of IPs of the North, Siberia and the Far East of the Russian Federation is the Russian Association of Indigenous Peoples of the North (RAIPON).

³⁰⁷ Anaya explained that: "Even though imprecise and still evolving, common understandings about the rights of IPs – understandings that can be characterised as customary international law – are sufficiently crystallised to mark the parameters of any discussion or decision in the international arena in response to the demands of IPs". Anaya (2004) 72.

³⁰⁸ E. v. Norway (Alta case) App no 11701/85 (ECtHR, 29 August 1990).

³⁰⁹ Jen Dahl (July 1990) 15.

³¹⁰ Jen Dahl (July 1990) 15. Similar facts can be found in the Alta case. See also: E. v. Norway (Alta case) App no 11701/85 (ECtHR, 29 August 1990).

³¹¹ Jen Dahl (July 1990) 16.

³¹² IWGIA, *Indigenous Peoples of the Soviet Union* (July 1990) 33. For more information concerning history, see: Tamara Semenova, 'Political mobilisation of northern indigenous peoples in Russia' (2005) 24.

³¹³ Tamara Semenova, 'Political mobilisation of northern indigenous peoples in Russia' (2005) 23.

³¹⁴ Tamara Semenova, 'Political mobilisation of northern indigenous peoples in Russia' (2005) 23.

³¹⁵ Tamara Semenova, 'Political mobilisation of northern indigenous peoples in Russia' (2005) 23.

³¹⁶ Tamara Semenova, 'Political mobilisation of northern indigenous peoples in Russia' (2005) 23.

³¹⁷ Tamara Semenova, 'Political mobilisation of northern indigenous peoples in Russia' (2005) 23.

³¹⁸ IWGIA, *The Indigenous World 2013* (2013) 30.

³¹⁹ Tamara Semenova, 'Political mobilisation of northern indigenous peoples in Russia' (2005) 24.

RAIPON was established in 1990 as a non-governmental umbrella organisation,³²⁰ and represents the 41 indigenous small-numbered peoples of the North, Siberia and the Far East, about approximately 300,000 individuals in total.³²¹

In November 2012, the Russian Ministry of Justice decided to stop all activities of the organisation due to the statutes of the organisation where considered to not be in line with federal law.³²² RAIPON was closed for six months, until the statutes of the association were modified according to Russian federal law.³²³ According to Anja Salo, the end of the organisation would have a serious impact on IPs' rights in the Arctic region:

"If RAIPON as an organization is shut down it will have serious impact on the [IPs] in the Barents Region. They represent both the Nenets people, the Veps people and the Saami people on the Russian side in important forums such as the Arctic Council and the UN. The [IPs] in Russia will lack a common political voice in order to influence on the decision making process on the federal level, and it will also restrict the activity of international cooperation in the field of indigenous affairs. RAIPON has a unique knowledge about the indigenous situation in Russia and has an enormous network around the world".³²⁴

On March 14, 2013, RAIPON informed in an open letter that the association received two documents from the Ministry of Justice, allowing it to resume its activities.³²⁵ Later, on March 28-29, 2013, during the 7th Congress of IPs of the North, Siberia and Far East, representatives of more than 600 IPs from 35 regions of the Russia Federation elected the new president for RAIPON. As reported by IWGIA, "the election was tarnished by representatives voting under pressure from Russian officials, with open voting replacing the secret ballot after two rounds of voting where the Government's favoured candidate was defeated".³²⁶ Issuing the third round the election, Gregory Ledkov, an indigenous Nenets, was elected. Moreover, IWGIA highlights that he is a member of Putin's party and the national parliament and according to this NGO, Pavel Sulyandziga won the two first rounds of the election but "was forced to step down due to pressure from official sources and a clear indication that his election would harm the organisation".³²⁷ A coalition between new president Ledkov and still vice-president Sulyandziga has been established.

IWGIA declared that they hope "to continue [their] partnership built on respect and trust", considers that these irregularities of the election could be due to the "considerable conflict" between RAIPON and the Russian Ministry of Justice that occurred before the election of the new president of the organisation.³²⁸

What happened during the election is not only the concern of IWGIA as every IPs' organisation and NGO are concerned by this issue.³²⁹ One can only find regrettable the current situation of human rights in Russia and the

³²⁰ Tamara Semenova, 'Political mobilisation of northern indigenous peoples in Russia' (2005) 25. It was founded in 1990 during its first Congress, it promotes IPs' right to self governance and protects IPs' rights and their interests. Each of these 41 IPs have individual and collective membership within RAIPON.

³²¹ Atle Staalesen and Thomas Nilsen, 'Moscow orders closure of indigenous peoples organisation' (12 November 2012). See also: Tamara Semenova, 'Political mobilisation of northern indigenous peoples in Russia' (2005).

³²² Atle Staalesen and Thomas Nilsen, 'Moscow orders closure of indigenous peoples organisation' (12 November 2012). Indeed, BarentsObserver (an open internet news service run by the Norwegian Barents Secretariat) considers that "federal legislation passed over the last years has made it increasingly easy for Russian authorities to crunch bothersome non-governmental entities". This position is notably also denounced by Human Rights Watch, Amnesty International and IWGIA. See: Russian Agency of Social Information.

³²³ See: Mikkelsen and Garcia-Alix (2013) 13: "As a consequence, RAIPON was restricted in all its international and human rights activities and was not able to participate in Arctic Council meetings, where it has the status of permanent participant". IWGIA declares that RAIPON is "a key partner in Russia for IWGIA over the past 20 years". The case of RAIPON is mainly represented according to sources found from IWGIA's newsletters and website. IWGIA has broadly criticised the pressure faced by RAIPON.

³²⁴ Atle Staalesen and Thomas Nilsen, 'Moscow orders closure of indigenous peoples organisation' (12 November 2012).

³²⁵ Website of IWGIA, 'Russia: RAIPON can officially resume its activities' (15 March 2013) accessed 12 July 2013. To read the open letter from RAIPON and the documents from the Russian Ministry of Justice, see the Website of IWGIA. Former first vice-president of RAIPON until 2010 and member of the UN Permanent Forum on IPs, Sulyandziga is currently a member of the UN Working Group on Business and Human Rights.

³²⁶ IWGIA, newsletter 'Staged RAIPON election taints 7th Congress' (16 April 2013).

³²⁷ IWGIA, newsletter 'Staged RAIPON election taints 7th Congress' (16 April 2013).

³²⁸ IWGIA, newsletter 'Staged RAIPON election taints 7th Congress' (16 April 2013).

³²⁹ During my field trip to Lapland in April 2013, this issue was raised during a meeting with Leena Heinamaki and some of her colleagues, when visiting the Northern Institute for Environmental and Minority Law at the Arctic Centre at the University of Lapland (Rovaniemi, Finland), on Monday 8 April, 2013. They explained that

governmental pressure applied on non-governmental organisations in the federation. Furthermore, it also shows the difficulties of IPs to assert their human rights in the region. In fact, holding an ECOSOC Consultative Status, RAIPON is also one of the six indigenous Permanent Participants of the Arctic Council through its membership of IWGIA. As the BarentsObserver underlines it:

“RAIPON is far from an ordinary NGO operating in a specific field of interest, but an organization representing a wide range of interests and serving a significant part of Russia’s Arctic population. Furthermore, the association has been heavily engaged in a number of legislative processes involving Russian Arctic territories and represents Russian indigenous interests in a number of international fora”.³³⁰

Furthermore, as previously said, RAIPON was created in 1990, whereas other IPs’ organisations in the Arctic region were created in the 1970s. Semenova highlights that these 20 years of difference explains the gap “in the strategies of the IPs’ survival and development in the Russian north”.³³¹ This is also why cooperation between organisations is so important: with dialogue and help coming from other organisation, Russian local and national organisations will catch up this interval in a shorter time and are already capable of being a part of the global processes and of participating in regional, national and international policy-making processes.³³²

Furthermore, IWGIA stresses out that “IPs continue to suffer from low life-expectancies and are among the poorest of the poor in the country”.³³³ Besides, IWGIA also denounces that in its reply to the Committee, no information on the state of implementation of the law on IPs’ territories of traditional nature use have been given, nor about a recent census.³³⁴

On April 29, 2013, the Universal Periodic Review (UPR)³³⁵ will assess the Russian Federation. IWGIA and RAIPON have jointly pointed out serious human rights violations of the IPs in Russia and that the Russian Federation has not implemented the recommendations contained in its first review in 2009.³³⁶

With the creation of information centres in different regions of the Russian Federation, RAIPON has been working to provide a local and adapted solution to the different IPs concerned within a region of the State. RAIPON has been showing that IPs in Russia “are able to work successfully for the solution of their problems and, regrettable, [that] the potential of IPs in most cases is not properly used”.³³⁷

This short case study of the Russian Federation and RAIPON show the situation of repression against civil society and indigenous organisations.³³⁸ IWGIA interprets it as a violation of the provisions of Article 9 of the UNDRIP which establishes the principle by which IPs have the right “to have access to financial and technical assistance from states and through international cooperation, for the enjoyment of the rights contained in this Declaration”.³³⁹ Yet, consultation and participation can be done by organisations such as RAIPON, which affects FPIC.³⁴⁰ It also shows the conflicting relationship between FPIC and the notion of state sovereignty, already previously discussed.

they were concerned for the future cooperation and representation of IPs in Russia. They also emphasised the pressure that Russian government puts on NGOs.

³³⁰ Atle Staalesen and Thomas Nilsen, ‘Moscow orders closure of indigenous peoples organisation’ (12 November 2012).

³³¹ Tamara Semenova, ‘Political mobilisation of northern indigenous peoples in Russia’ (2005).

³³² Tamara Semenova, ‘Political mobilisation of northern indigenous peoples in Russia’ (2005).

³³³ IWGIA, newsletter ‘Staged RAIPON election taints 7th Congress’ (16 April 2013).

³³⁴ IWGIA, newsletter ‘Staged RAIPON election taints 7th Congress’ (16 April 2013).

³³⁵ Website of the OHCHR, ‘Universal Periodic Review’, accessed 12 July 2013.

³³⁶ Russian Universal Period Review 2009. See also: IWGIA, newsletter ‘Staged RAIPON election taints 7th Congress’ (16 April 2013).

³³⁷ Tamara Semenova, ‘Political mobilisation of northern indigenous peoples in Russia’ (2005).

³³⁸ Mikklesen & García-Alix (2013) 13. Also, “this year, [the Russian Federation] passed a law to the effect that any NGO working with foreign donors would henceforward be required to register as a “foreign agent”.

³³⁹ Mikklesen & García-Alix (2013) 13.

³⁴⁰ IWGIA, *The Indigenous World 2013* (2013) 32: “RAIPON’s ability to work and uphold IPs’ rights is vital to the ability of Russia’s IPs to participation in decision-making, as established in Art. 18 of the [UNDRIP]”.

V. Implementation of participation rights by energy and mining companies and Corporate Social Responsibility

A. A future with more renewable energies?

In addition to the participation dilemma that Arctic IPs face, Fjellheim shows another one: there is an increase in resources exploration in this more accessible and warmer Arctic, whereas it is exactly the use of fossil fuel that warms up the region.³⁴¹

The discovery of fossil fuels made possible industrial revolutions and large-scale trade between States and continents, leading to unprecedented economic growth. It seemed obvious that they were more effective than the renewable ones. Nevertheless, nowadays, there is a tendency to come back to renewable energies.

Between 1825 and 1975, the share of renewable energies in the global energetic mix was divided by 6, from 97% to 15%.³⁴² However, coal, oil and gas have two major problems since they damage the planet and they are declining. Due to the exhaustion of fossil fuels and the impacts of their exploitation and consumption on the environment and global warming, lobbying has been conducted to persuade to begin an energy transition. Advocates claim that renewable energies are the key to more sustainable energy consumption.³⁴³

Therefore, for thirty years, the world takes once again renewable energies into consideration, using new methods such as wind turbines, solar panels and tidal-power plants. But there are currently more expensive than fossil fuels. One kilowatt produced with a solar panel costs almost four times more than one kilowatt produced with coal.³⁴⁴ In order to develop renewable energies, governments must heavily subsidise them which increases customer's bills.³⁴⁵ Rich countries are often willing to pay but the future of energy in the world is no longer in their hands. Most of the energy needs come from the so-called developing countries, such as China, India and Brazil,³⁴⁶ which cannot afford renewable energies.³⁴⁷

So, before being able to have more renewable energies, demand for oil and gas continues to increase, following the curve of development of these countries.³⁴⁸ Therefore, the exploration and exploitation of natural resources in the Arctic region represent a major economic opportunity.

B. What resources in the Arctic?

As a consequence of global warming, natural resources are now accessible and available to petroleum and mining companies in the Arctic region. The region is considered by the international petroleum companies (hereafter the IPCs) to be one of the last energy frontiers.³⁴⁹

³⁴¹ Rune S. Fjellheim, 'Arctic Oil and Gas: Corporate Social Responsibility' (2006) 9.

³⁴² Canal+, 'Le Chiffroscope du 22/06/2013' (video) accessed 12 July 2013. Furthermore, such data can be put into perspective due to the fact that energy needs were lower in the previous two centuries.

³⁴³ Sustainability must also be obtained by questioning energy needs and their development created by consumers in order to gain a better comfort. Thus, the solution does not seem to be necessarily to produce more renewable energy but also to better manage our energy needs and to produce new technologies less energy-consuming.

³⁴⁴ International Energy Agency, Projected cost of generating electricity, pp. 90-97. See also: International Energy Agency, World Energy Outlook 2009, 633. And: Canal+, 'Le Chiffroscope du 22/06/2013' (video) accessed 12 July 2013.

³⁴⁵ Thus, after Germany has chosen to invest in renewable energies, its population has seen its electricity bills increasing by 30%. Federal Ministry for the Environment, Nature Conservation and Nuclear Safety, Press Release No. 129/11 (14 October 2011). See also: Canal+, 'Le Chiffroscope du 22/06/2013' (video) accessed 12 July 2013. And: *Atlantico*, 'Hausse de 30% de l'électricité d'ici 2017 : la vérité sur ce que nous coûtent les énergies renouvelables' (19 February 2013).

³⁴⁶ International Energy Agency, World Energy Outlook 2012 (2012) 187.

³⁴⁷ Between 2011 and 2035, related to the economic problems that so-called developed countries are currently experiencing, the share of renewable energy is expected to increase very slowly, from 15% to 18%. International Energy Agency, World Energy Outlook 2012 (2012) 155-177. See also: Canal+, 'Le Chiffroscope du 22/06/2013' (video) accessed 12 July 2013.

³⁴⁸ Rune S. Fjellheim, 'Arctic Oil and Gas: Corporate Social Responsibility' (2006) 9: In September 2005, the price of oil was \$70/barrel. The Arctic region has become an "attractive region in terms of new fields for exploration".

³⁴⁹ Mark Nuttall and Kathrin Wessendorf, 'Editorial' (2006) 4.

However, the exploitation of these natural resources has existed for several decades. For instance, the small field of Bent Horn, on Canadian islands, had produced oil for more than ten years before exhaustion.³⁵⁰ Alaska and Russia have also expanded their exploration and exploitation offshore, and Norway has been exploiting reserves and oil and gas in the Barents Sea, where significant reserves which still today are the reasons for territorial disputes between Arctic States. Finally, since the 2000s, Russia and Alaska have been considering the developments of pipelines on long distances.³⁵¹

Nowadays, the AMAP considers that "the Arctic is known to contain large petroleum hydrocarbon reserves, and is believed to contain (undiscovered) resources that constitute a significant part of the World's remaining resource base".³⁵² According to the U.S. Geological Survey, the Arctic could contain 90 billion barrels of oil (25% of the untapped reserves of oil) and 30% of the assumed gas reserves in the world.³⁵³ This is considerable windfall made available by the retreating ice. Shell CEO Peter Voser said that drilling in the Arctic is necessary to satisfy the increasing oil demand from emerging countries.³⁵⁴

Nowadays, Canada, Norway and, in particular, Russia produce large volumes of oil and gas. Alaska also produces large amounts of oil. It is believed Russia holds over 90% of known Arctic gas and 75% of known oil resources, which makes it the dominant Arctic producer.³⁵⁵ Finally, in its resolution on Arctic Governance, the European Parliament considers that the Arctic may contain around 20% of the world's remaining undiscovered oil and gas resources.³⁵⁶

The problem with the exploitation of natural resources is that IPMCs do not seem to develop exploitation projects on the long term. So they exploit natural resources to depletion, and then retreat to find other untapped reserves.³⁵⁷

C. The 'Seven Sisters'

For a couple of decades and due to external pressures for reinforcing consultation and participation, IPMCs have undertaken an internal "shift" concerning their thinking towards a sustainable practice.

In the Arctic, like around the rest of the globe, disputes concerning to ownership, use, management and conservation of traditional lands and resources raise after an attempt or a decision to use them for industrial purposes, for instance for oil and gas exploitation.³⁵⁸ The enthusiasm in energy industry and governments since the melting ice and the increasing ease of access to new resources show their willingness to continue the development of exploitation in this region.³⁵⁹ Dorough highlights that even if it is crucial to establish international commitments and international legal instruments, "the real test is political will on the part of states to uphold and operationalise their international commitments as enshrined in all of the existing international instruments".³⁶⁰ In such circumstances, one can only wonder about the likely introduction of energy lobbies in the corridors of political institutions.

³⁵⁰ Arctic Monitoring and Assessment Programme (AMAP), 'Arctic Oil and Gas 2007' (2007) 16.

³⁵¹ Arctic Monitoring and Assessment Programme (AMAP), 'Arctic Oil and Gas 2007' (2007) 16: for example, through the Mackenzie River Valley for Russia.

³⁵² Arctic Monitoring and Assessment Programme (AMAP), 'Arctic Oil and Gas 2007' (2007) ix.

³⁵³ Mark Nuttall and Kathrin Wessendorf, 'Editorial' (2006) 4. Similar estimations can be found in Kingdom of Denmark, 'Strategy for the Arctic 2011-2020' 9: "It is estimated that the Arctic may contain up to 30% of the world's undiscovered gas resources and about 10% of undiscovered oil resources, and that ships sailing between east Asia and Western Europe could save more than 40% in transportation time and fuel costs by navigating the northern sea lanes north of Siberia rather than the southern route through the Suez Canal".

³⁵⁴ Grégoire Allix, 'L'appel de deux proches pour arrêter les forages en Arctique' (21 January 2013).

³⁵⁵ Arctic Monitoring and Assessment Programme (AMAP), 'Arctic Oil and Gas 2007' (2007) ix.

³⁵⁶ European Parliament resolution of 9 October 2008 on Arctic governance (9 October 2008). Moreover, the European Parliament proposed to open negotiations on the drafting of a treaty to protect the Arctic.

³⁵⁷ Anne Valette, from Greenpeace, believes that the oil industry, including Shell, lie to themselves by also thinking on the very short term. She says that the Arctic oil reserves correspond to only three years of our current consumption. See: Greenpeace, 'Greenpeace lance la champagne "Sauvons l'Arctique": le défi du 21ème siècle' (21 June 2012).

³⁵⁸ Ove Varsi, 'Preface' (2006) 5, in Rune S. Fjellheim and John B. Henriksen, 'Oil and Gas Exploitation on Arctic Indigenous Peoples' Territories: Human Rights, International Law and Corporate Social Responsibility' (2006).

³⁵⁹ Mark Nuttall and Kathrin Wessendorf, 'Editorial' (2006) 4.

³⁶⁰ Dalee Sambo Dorough, 'The Indigenous Human Right to Development' (2010) 83.

The term of the 'Seven Sisters' was used by Enrico Mattei, who became the head of the Italian energy company Eni, to describe the "Anglo-Saxon companies that controlled the Middle East's oil after the second world war".³⁶¹ They were Royal Dutch Shell, Standard Oil of New Jersey (Esso) and Standard Oil Company of New York (Socony) (both merged to form ExxonMobil), Texaco (then called Chevron), Anglo-Persian Oil Company (later called British Petroleum, and then BP), Standard Oil of California (SoCal) and Gulf Oil.³⁶²

Later, the Financial Times has identified the 'New Seven Sisters' which are "the most influential energy companies from countries outside the Organisation for Economic Co-operation and Development".³⁶³ They are Aramco (Saudi Arabia), Gazprom (Russia), CNPC (China), NIOC (Iran), PDVSA (Venezuela), Petrobras (Brazil) and Petronas (Malaysia).³⁶⁴

D. Ruggie principles and UN Guiding Principles on Business and Human Rights

In 2005, a Special Representative on the issue of human rights and transnational corporations and other business enterprises was appointed by the UN Commission on Human Rights. In 2008, John Ruggie released his final report to the UN Human Rights Council. In the report, he argues that it exists independently from States' duties a duty for companies to respect human rights.³⁶⁵

The Ruggie Framework is based on complementary responsibilities and relies on the three following pillars. Here is how the energy company Total presents them: "(1) The State has the duty to protect its citizens against human rights violations by third parties including corporations; (2) Companies must respect human rights; (3) Effective access to remedies is implemented by both companies and States."³⁶⁶ The Framework was approved by the UN after the first term of Prof. John Ruggie in 2008.

Moreover, it can be noticed that in term of company activities, there are two levels of law: the law of the home State and the law of the host State. Extraterritorial application is applicable when the company violates human rights somewhere else than the home State territory. However, it is an issue when the host State does not have similar legislation in comparison to the home State. This issue is related to the concept of sovereignty.

Finally, an increasing number of multinational companies self-regulate on human rights, by adopting corporate codes of conduct, or by subscribing to sectoral private codes.

Additionally, in 2011, Special Representative John Ruggie proposed the UN Guiding Principles on Business and Human Rights. They were approved by unanimous vote of the UN Human Rights Council in June 2011.

The Ruggie guiding principles and the UN Guiding Principles are two tools that should be used by IPMCs and States. However, Nadia Bernaz highlights that they "depend on state action and corporate good will for their implementation".³⁶⁷

E. Voluntary Guidelines of energy and mining companies: the example of Total

The example of Total is an interesting one because this energy company has, for now, stopped its drilling projects in the Arctic.³⁶⁸ When studying this region and the relations between corporations, Arctic states and Arctic IPs, discussions quickly turn to Shell's activities. The latter often shows its commitments to human rights

³⁶¹ Carola Hoyos, 'The new Seven Sisters: oil and gas giants dwarf western rivals' Financial Times (12 March 2007).

³⁶² Steve Thomas, 'The Seven Brothers' (2003) 1. See also: *Time Magazine*, 'Italy: Two-Timing the Seven Sisters' (14 June 1963), and *Time Magazine*, 'The Seven Sisters Still Rule' (11 November 1978).

³⁶³ Carola Hoyos, 'The new Seven Sisters: oil and gas giants dwarf western rivals' Financial Times (12 March 2007).

³⁶⁴ Carola Hoyos, 'The new Seven Sisters: oil and gas giants dwarf western rivals' Financial Times (12 March 2007): Robin West, chairman of PFC Energy, said: "The reason the original seven sisters were so important was that they were the rule makers; they controlled the industry and the markets. Now, these new seven sisters are the rule makers and the international oil companies are the rule takers."

³⁶⁵ D. De Feyter, 'Globalisation and Human Rights', in *International Human Rights Law in Global Context* (2009) 51-96.

³⁶⁶ Website of Total, 'Ethical Business Conduct: Initiatives to promote human rights' accessed 3 June 2013.

³⁶⁷ Nadia Bernaz, 'Business and Human Rights: Is Extraterritoriality the Magic Potion?', Rights As Usual (Blog) (13 November 11 2012a).

³⁶⁸ *Le Monde*, 'Le PDG de Total alerte sur les risques des forages en Arctique' (Paris, 26 September 2012).

and its code of conduct. Yet, the case of Nigeria and the many lawsuits against this company come quickly tarnish its reputation, especially with the frequent attacks from Greenpeace. Therefore, it seemed interesting to study another major energy company, Total, and see if they implement the same tools for human rights within the framework of their activities.

The French multinational company Total recognises that “human rights are universal and play a fundamental role in development”.³⁶⁹ In the same time, the company highlights the fact that their conduct must be exemplary. The corporation says any dialogue with all persons, groups or entities affected by their activities is a basic tool since it allows them to build positive projects for the development of their activities and for IPs in the host country. Thus, Total highlights this dialogue to identify all issues and stakeholder expectations, to arise common interests and priorities as to jointly define the emerging roles and responsibilities.³⁷⁰

To facilitate the dialogue which may be, as pointed by Total, difficult because of the diversity of cultural and operational environments, the company has implemented several practical guides, and especially a “Code of Conduct” and a “Ethics Charter”.

First, in its ‘Ethics Charter’,³⁷¹ Total said it respects the culture, the values and the livelihoods of IPs within their sphere of activity, and contributes to their economic development.³⁷² Thus, the company recognises the principles of the ILO, the UN Development Programme (UNDP) and the World Bank.³⁷³ Still in their charter, the company affirms that it strives to know and understand the legitimate needs of IPs while respecting the principle of sovereignty of the nations. The company insists on the need to maintain an ongoing dialogue with the authorities and representatives of IPs. Recognising the principle of consultation, Total sets up a dialogue with communities, communicates their operational plans through the organisation of presentations and local meetings, and informs the IPs of the evolution of the project. Finally, in this charter, Total hopes that the development of a project is perceived as positive because, according to them, it implements a socio-economic programme respecting indigenous livelihood. They affirm encouraging employment of indigenous staff and meeting the specific needs of indigenous children to protect from every forms of economic exploitation.³⁷⁴

However, the charter developed by Total does not mention the concept of FPIC or even a notion of consent obtained from IPs. The concept of FPIC is neither mentioned in the “Policy Regarding IPs” in which the group claims to support development in emerging countries.³⁷⁵ Though, the company agrees to be “a guest in the homeland of these communities and it respects their culture and lifestyle while carrying out its business”.³⁷⁶ The company also recognises the sensitivity of the economic development in indigenous territories and agrees to comply with the principles and follow the guidelines established in the ILO C169 and the UNDRIP. Therefore, one may wonder if the corporation applies only the principle of consultation or also a real participation of IPs.

The Group says their goal is to help IPs to become “drivers” of their development and their future and enable sustainable coexistence between the industrial activities of the company and local residents of their operations.³⁷⁷ The company highlights the example of public hearings that were held in Alberta (Canada) and illustrate five years of consultation and dialogue with local authorities and residents, including IPs.³⁷⁸ Total says that despite initial hostility during the beginning of consultation, public hearings led to the signing of economic and social development that engages the corporation on the long term with the main communities.

³⁶⁹ Website of Total, ‘Ethical Business Conduct: Our position and commitments’, accessed 3 June 2013.

³⁷⁰ Website of Total, ‘Agir pour un développement partagé: Instaurer et entretenir le dialogue’, accessed 3 April 2013.

³⁷¹ Total Ethics Charter.

³⁷² Total, ‘Charte des principes et lignes directrices concernant les peuples autochtones et tribaux’.

³⁷³ Total also recognises these principles in its ‘Code of Ethics’.

³⁷⁴ Total, ‘Charte des principes et lignes directrices concernant les peuples autochtones et tribaux’.

³⁷⁵ Total Policy regarding IPs. It is rather surprising that Total focuses their policies regarding IPs only on emerging countries where there are several IPs in countries that are not emerging. This is the case of the Arctic IPs. The implementation of policy dedicated to IPs should not only be limited to emerging countries.

³⁷⁶ Total, Policy regarding IPs, ‘Supporting development in emerging countries’.

³⁷⁷ Website of Total, ‘Renforcer le dialogue’ accessed 3 June 2013.

³⁷⁸ Website of Total, ‘Renforcer le dialogue’ accessed 3 June 2013.

Second, the establishment of codes of conduct has been encouraged by several NGOs and various institutions.³⁷⁹ Total presents its 'Code of Conduct' as a reference for decision-making and the development of its reports. Through this document, the company confirms its adherence to the principles of the Universal Declaration of Human Rights of 1948, the core conventions of the ILO, the OECD guidelines and principles of the UN Global Compact (UNGC).³⁸⁰ Total has become adherent to the UNGC in 2002. Member companies to the Global Compact are encouraged to describe in their annual report the progress made in the integration of the ten principles of the UNGC. Such a description allows to see which companies make real efforts and which do not. Total is committed to the first two principles of the UNGC, e.g. "(1) Businesses should support and respect the protection of internationally proclaimed human rights; and (2) make sure that they are not complicit in human rights abuses".³⁸¹ Moreover, in its 'Internal Guide and Human Rights On a Day-to-Day Basis'³⁸², Total is aware that the activities of a company positively and negatively impact IPs.³⁸³

The control of the practices of Total is performed by three external partners. The evaluation methodology was developed in 2002 with the British company specialised in the evaluation of socially responsible companies GoodCorporation.³⁸⁴ Total claims of between 2002 and 2011, more than 85 assessments were made. In addition, Total also uses a self-assessment tool to monitor corporate compliance with human rights - the Human Rights Compliance Assessment - developed by the Danish Institute for Human Rights.

Besides, Total has also set up a campaign with the publication of the handbook on human rights and the distribution of explanatory brochures. However, one may question the effectiveness of brochures in the fight for human rights.

Finally, Total was one of the founders of the Global Business Initiative on Human Rights All which is a global community of corporations aiming to advance human rights in a business context throughout the world.³⁸⁵ The companies share examples of good leads and tools in the field of human rights. In addition, Total said that GBI also works in partnership with specialized agencies in this area, including the Danish Institute for Human Rights and former team training Special Representative John Ruggie.³⁸⁶

The company affirms that industrial and economic performances are compatible with environmental performance and one should not be opposed to another. Thus, economic development should be done by integrating environmental and social dimensions.³⁸⁷ In its CSR Report 2012, Total says that the company has focused its activities on offshore development to date and has excluded any exploration in areas of ice so far.

F. Arctic Council and its meeting in Kiruna

The Arctic Council (AC) is an inter-governmental organisation. On May 15, 2013, the AC held the 8th session of the Arctic Council in Kiruna, in Swedish Lapland. Composed of eight States, the Arctic Council is an international organisation aiming to protect the Arctic region through cooperation between its members.³⁸⁸ This biennial Ministerial meeting was an opportunity to assess the performance of the Swedish two-year chairmanship and approve new missions to the region. However, it was also the opportunity to sign the "Marine Oil Pollution Pre-

³⁷⁹ See for instance, the "Ilebs" Declaration on coexistence of oil and gas activities and indigenous communities on Nenets and other territories in the Russian North of the Arctic Centre.

³⁸⁰ Total Internal Guide, 24: The UNGC was created in 2000 and aims to establish cooperation between companies and the UN in partnership with trade unions and NGOs. This negotiation is conducted in order to develop responsible business practices.

³⁸¹ Website of the UNGC, 'The Ten Principles' accessed 12 July 2013.

³⁸² Total, 'Human Rights Internal Guide'.

³⁸³ Total Internal Guide 3.

³⁸⁴ Website of Total, 'Evaluation éthiques' accessed 12 July 2013.

³⁸⁵ Website of the Global Business Initiative on Human Rights accessed 12 July 2013.

³⁸⁶ Website of Total, 'Garantir l'éthique dans nos activités: Initiatives pour la promotion des droits de l'homme', accessed 12 July 2013.

³⁸⁷ Total CSR Report 2012 (2012) 8.

³⁸⁸ Created in 1996 under the 1996 Declaration on the Establishment of the Arctic Council, the Arctic Council (Ottawa Declaration) is composed of eight permanent members e.g. the USA, Canada, Sweden, Norway, Finland, Denmark, Iceland and Russia. France, Germany, the UK, Spain, the Netherlands, Poland have an observatory status. During the last meeting, China, India, Italy, Japon, Singapore and South Korea were also granted the status of observer states. European Union and Turkey have ad-hoc observer status. See: US Department of State.

paredness and Response” agreement. It is the second legally binding agreement between the Arctic States.³⁸⁹ This agreement sets a cooperation agreement in the field of preparedness and response to oil pollution in the Arctic Ocean. Climate change requires negotiating a whole new set of relationships and actions that affect the economy, health, security and interests of Arctic states.

Among several assessments that were presented during this meeting,³⁹⁰ a study entitled the Arctic Resilience report has been issued. The study examines how Arctic communities deal with transformation in the region brought by climate change and economic and social developments. This AC meeting also covered the adoption of the Kiruna Statement, showing that the cooperation within the AC. The organisation also adopted the Vision for the Arctic Region, which is an outline for member states and permanent participants for the coming years.

On April 15, 2013, six States have been granted permanent observer status at the AC during the ministerial meeting of the intergovernmental organisation in Kiruna, Sweden: China, India, Italy, Japan, South Korea and Singapore. Six other countries have already permanent observer status at the AC. According to Sweden’s Minister of Foreign Affairs Carl Bildt, this enlargement of the list of permanent observer states shows that the world must accept that the Arctic Council is a forum for international cooperation on Arctic issues.³⁹¹ Moreover, one can notice that Greenland was not part of the meeting in order to protest against the removal of its seat by Swedish presidency of the AC.

Canada holds since May 15, 2013, the chairmanship of the AC and for a period of two years. Leona Agluk-kaq, who was the first woman appointed to the Canadian Inuit and the Department of Aboriginal Affairs and Northern Development Government is now the president of AC. She wants to expand the role of the Council to more economic issues and also wants the organisation to dedicate itself to improve the lives of IPs. She also noted that the AC is working with IPMCs because they are the ones who operate the north and, for now, it does not exist mechanisms for cooperation between the AC and the companies themselves.³⁹² Given this desire for economic development, Greenpeace has called again for a moratorium on oil and gas development in the Arctic.³⁹³

This is why Canada wants to see the creation of a working group which will examine best practices of the industry in the Arctic. This determination is based on Joel Plouffe, in the same line as the Harper administration – Harper is Prime Minister of Canada – which seeks to make every effort to promote economic development within Canada.³⁹⁴ It is for this reason that Kristofer Bergh said several observers were worried about Canada’s accession to the presidency of AC. They fear that Canada is politicising the AC to promote its own national interests.³⁹⁵

The status of the European Union (EU) is still under reservation. However, according to member of the Norwegian delegation Veslemoey Salvesen, the EU will have a temporary observer status until all conditions are met.³⁹⁶ Greenpeace also attempts to obtain observer status.

³⁸⁹ *IceNews*, ‘Arctic Council Ministerial Meeting to take place in Kiruna’ (2 May 2013). The first agreement was adopted in Greenland, two years ago, to coordinate search and rescue operations. As a matter of facts, the ministers also welcomed “the release of several important scientific reports and approve policy recommendations from: the Arctic Biodiversity Assessment, the best available science informed by traditional ecological knowledge on the status and trends of Arctic biodiversity and accompanying policy recommendations for biodiversity conservation; the Arctic Ocean Review; and the Arctic Ocean Acidification assessment. These reports provide new benchmarks and knowledge about the state of the Arctic environment”.

³⁹⁰ The Arctic Biodiversity Assessment, the Arctic Ocean Review and the Arctic Ocean Acidification Assessment.

³⁹¹ *Le Monde*, ‘La Chine devient observateur au Conseil de l’Arctique’ (Paris, 15 May 2013).

³⁹² Martin Croteau, ‘Conseil de l’Arctique : le Canada prône un virage économique’ *La Presse* (13 May 2013).

³⁹³ Camille Carlier, ‘Le Canada, une nomination à la présidence du Conseil de l’Arctique qui inquiète’ *Gentside Découvertes* (22 May 2013): Greenpeace has released a statement saying that the AC should be a forum dedicated to sustainability and environmental protection of the region but “the Harper government has indicated that it will use the forum to advance industrial development in the Arctic”.

³⁹⁴ Martin Croteau, ‘Conseil de l’Arctique : le Canada prône un virage économique’ *La Presse* (13 May 2013).

³⁹⁵ Martin Croteau, ‘Conseil de l’Arctique : le Canada prône un virage économique’ *La Presse* (13 May 2013).

³⁹⁶ *Le Monde*, ‘La Chine devient observateur au Conseil de l’Arctique’ (Paris, 15 May 2013): These conditions concern the current European boycott on manufactured seal products; indeed the EU authorities consider that the hunting conditions of seals are cruel.

The agreement on preparedness and response to marine oil pollution in the Arctic, which was signed in Kiruna, provides a framework for cooperation in the event of an oil spill in the region. "Just as we need to prepare the enormous challenge of climate change, we must also be ready today for tomorrow's crises."³⁹⁷

In the council's final declaration, it was recognised "the central role of business in the development of the Arctic". It also called for a development that would be sustainable for indigenous peoples and the environment.³⁹⁸ The next meeting of the AC will be held in 2015 in Canada.

VI. Conclusions & Recommendations

In the current world, global business development, exchange of goods and capitals are guided by the extraction of natural resources.³⁹⁹ The study of the Arctic region is particularly interesting because the area is more affected by global warming, and so lessons can be learned to solve similar situations in other parts of the globe.

Oil and gas development and mining extraction create significant impacts and challenges that generate a fragile balance between socio-cultural and economic effects and environmental and habitat destruction.⁴⁰⁰ There is no doubt concerning these negative impacts on IPs.⁴⁰¹ This thesis however does not advocate the view that there should not be such activities.

Nevertheless, when affecting IPs' cultures and livelihoods, and their lands and territories next to them, States must respect and fully apply their duties established under international legal instruments and respect and protect IPs' human rights. Throughout this thesis, arguments have showed IPs are in need of influence in decision making-processes.

In the introductory chapter, the impacts of climate change and global warming and the dilemma that Arctic IPs face were illustrated with the case of the Inupiat people in the Northwest part of Alaska. This people – like other IPs in the Arctic region – tries to find a good balance between the threats of the economic opportunities raised by the phenomenon of ice-melting and their natural habitat. They show that this balance cannot be found without their full involvement in decision-making processes through the respect of their rights to consultation and participation. Arguments in Chapter 2 went in the same direction.

Developments in Chapters 3 and 4 presented various international legal instruments dealing with IPs' rights to be consulted and to participation in decision-making processes concerning exploration and exploitation of natural resources. It was also demonstrated that it can exist on different levels and techniques of participation. Particular attention was given on the concept of FPIC which is an efficient way of incorporating IPs' voices in processes.

The promotion and the protection of human rights is the responsibility of the States. Nonetheless, companies have an "ethical obligations" to respect international standards and the legal obligation to respect national laws.⁴⁰² It is because they do not work under one single jurisdiction that they are encouraged to establish their own guidelines. The efforts made by IPMCs to respect IPs' rights and implement the concept of FPIC were illustrated through concrete examples in Chapter 5. The establishment of codes of conduct and voluntary guidelines is a good example of the ethical and legal obligations of these IPMCs. Another possible outcome to this issue would be the establishment of an international duty for States to control and regulate the behaviour of companies in domestic law in term of sustainable development.⁴⁰³

Before reaching any final conclusions, a few recommendations and personal thoughts should be expressed. These international instruments imply that petroleum and mining companies should not be able to conduct their

³⁹⁷ *Continental News*, 'Le changement climatique et l'avenir de l'Arctique', 16/05/2013).

³⁹⁸ Myers, Steven Lee, 'Arctic Council Adds 6 Nations as Observer States, Including China' *The New York Times* (15 May 2013).

³⁹⁹ Mikkelsen and Garcia-Alix (2013) 10.

⁴⁰⁰ Arctic Monitoring and Assessment Programme (AMAP), 'Arctic Oil and Gas 2007' (2007) v.

⁴⁰¹ John B. Henriksen, 'Saami Parliamentary Co-operation' (2006) 39.

⁴⁰² John B. Henriksen, 'Oil and gas operations in Indigenous peoples lands and territories in the Arctic: a Human rights perspective' (2006) 39. He also says that they must "behave in a socially and environmentally responsible manner".

⁴⁰³ Fred Higgs, 'Le développement durable mondial : la responsabilité des entreprises. Une idée qui a fait son chemin', *Chronique ONU*.

activities without FPIC, which is sought after good faith consultation of the IPs' concerns. Their full and effective participation must be included in decision-making processes from the beginning and throughout all activities, which means in the conception, the design and the implementation of the projects. At a smallest degree, States have a positive obligation to fulfil the following rights: IPs have the right to be consulted through their representative institutions; they must obtain fair shares of the benefits and, if necessary, compensations.⁴⁰⁴

Like all IPs throughout the globe, for Arctic IPs, it is crucial to guarantee their rights over natural resources and lands. This guarantee is fundamental to allow them to exist as a distinct people and to exercise their right to self-determination. For the same reason and to recognise their collective rights of distinct peoples, States should not consider them as minorities but as peoples.

Additionally, they should establish clear and defined legal norms concerning IPs' rights to consultation and participation in decision-making when national norms are not clear.⁴⁰⁵ Thus, Russia, Canada, the USA, Finland and Sweden should ratify the ILO C169. Also, the international community should also agree upon a common definition of CSR and a method for assessing compliance of CSR by petroleum and mining companies.⁴⁰⁶ Also, the Russian government must stop interfering in RAIPON's activities and passing new laws and regulations that go against NGO activities.

As a matter of fact, the effects of global warming are felt by IPs in a particular and concrete way; therefore, their knowledge, observations and expertise have their importance for decision-making.⁴⁰⁷ It is for this reason that institutions, like for instance the Arctic Council, include IPs in the discussions. The inter-governmental cooperation is crucial and must be carried on within the Arctic Council.

Moreover, clear legal norms should be adopted in order to ensure that IPMCs respect IPs where they develop their activities. Hence, it is important that governments put in place rules that encourage energy companies to conduct their activities abroad in a responsible manner that is socially and environmentally in accordance with international standards.⁴⁰⁸ States should also make binding commitments to promote FPIC. Moreover, States must refrain from supporting projects that lead to forced eviction of IPs.⁴⁰⁹

When drafting campaigns and conducting lobbying, NGOs should keep in mind the existence of IPs' participation dilemma in decision-making processes concerning the exploitation of natural resources. Exploration is not only bad and allows economic development when respecting IPs' voices.

IPMCs should adopt, when it has not already been done, a code of conduct. Independent monitoring bodies should be created to control the implementation of these guidelines. Also, projects should not be done without obtaining FPIC from IPs. Similarly, companies must accept that a negative answer is indeed equivalent to an outright rejection of the project. Economic interests should not prevail over the respect of indigenous human rights. In contrast, when the project has been approved, companies must systematically provide full-time job opportunities to IPs.

These companies also need to think on the long term. Routine cleaning of waste material resulting from these activities must be orchestrated. In addition, it is important that they do not only exploit perishable natural resources but also drive their focus on finding non-polluting ways of exploiting renewable resources. The future does not lie in the exploitation of oil and gas. It lies in a sustainable energy transition.

Finally, even though there are still a lot to be done to improve IPs rights' of consultation and participation concerning development projects of natural resources – and by extent to improve IPs' rights in general – this

⁴⁰⁴ Report of the Arctic Regional Workshop (26-27 March 2007) 8.

⁴⁰⁵ IP's rights to consultation and participation in decision-making processes do exist in Finland without the ILO 167 ratified by this country.

⁴⁰⁶ This necessity has been recognised, for example, by the Canadian Government in its response to the 14th report of the Standing Committee on Foreign Affairs and International Trade on mining in developing countries and corporate social responsibility.

⁴⁰⁷ Mark Nuttall, 'Editorial' (2008a) 5-6: He added that "perhaps the question should not be posed in terms of how people can adapt to climate change, but in terms of what prevents them from responding and adapting to climate change".

⁴⁰⁸ For instance, the Standing Committee on Foreign Affairs and International Trade of Canada has proposed that the financial support from Canadian government should be subject to compliance by companies to CSR and human rights standards. See: 14th report of the Canadian Standing Committee on Foreign Affairs and International Trade, 2.

⁴⁰⁹ Christina Nilsson, 'Climate change from an indigenous perspective: key issues and challenges' (2008) 14.

thesis shows that many battles have been won. The development of IPs' rights on this issue is progressing in a positive way.

Although this thesis was concentrated on the Arctic region, the achievements of Arctic IPs demonstrate to other IPs throughout the world that it can change and that they can be optimistic: one day, IPs' rights will be fully recognised and respected at every level of the societies; locally, nationally, regionally and internationally. The issue of IPs' rights is a universal issue and concerns every members of the international community because indigenous societies are part of human history and humanity.

United Nations Special Rapporteur on the rights of IPs recalled a conversation he had:

"Indigenous peoples [...] are helping to bring about change that might just be beneficial to humanity more broadly and generally. As I say this, I am reminded that such optimism must always be tempered by an awareness of the harsh realities. The other night at dinner with a few colleagues, I was asked what I was going to talk about. I mentioned a few of my key points and the person sitting next to me said, "I know you've written about that, but do you still really believe it?" I think so. Once you write something you become committed to it. More importantly, I believe optimism of this kind can't or shouldn't be extinguished. Certainly optimism has been an animating force in the international Indigenous rights movement and that movement has made a difference".⁴¹⁰

How each individual respects the human rights of others says a lot about them. How States and companies respect IPs' rights says also to a great extend about the world and societies they want to have. Let's be optimistic.

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