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TITLE: Public Participation in Environmental Impact Assessments for Foreign Investment Projects: A Canadian Perspective

ABSTRACT:

This chapter considers the status of Environmental Impact Assessments (EIAs) under international law and as obligations based on foreign investors completing projects which may have an environmental impact. It explores the specific component of public participation in EIAs, which are also very common across the world, although the precise nature of this involvement differs from state to state. Noting some of the goals and justifications of public participation in EIAs as understood by the academic literature, this chapter goes on to explore the specific example of Canada and its Canadian Environmental Assessment Act, which calls for meaningful public consultation in conjunction with EIAs. The failure of a number of project proponents to fulfil this requirement has led to the proposal of a new regime for EIAs under Canadian law contemplating enhanced public participation, in particular from Indigenous groups. The chapter concludes by suggesting that express reference to EIAs, including public participation, in the text of international investment agreements (IIAs) might help foreign investor better prepare for this requirement in their future projects.

KEYWORDS: environmental impact assessment, public participation, public consultation, international investment agreement, investor-state dispute settlement, Indigenous peoples

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I Introduction

The business activities of international firms may have an impact on the physical environment where they are conducted, particularly where these involve the extractive industries such as mining or forestry. Such adverse outcomes can in turn lead to social harms, especially in the context of Indigenous peoples who may rely heavily on the land for their livelihoods and for whom a close relationship to the natural environment is a vital aspect of their cultural identities. Many states around the world consequently require the completion of Environmental Impact Assessments (EIAs) as a condition for the approval of the project, obligations which apply equally to domestic firms. Increasingly these require an element of public participation.

The aim of this chapter is to present and analyze the legal foundations for EIAs and associated public participation in the context of foreign investment. It will do this by considering the international materials from which EIAs and public participation have been derived including international treaties and decisions of international courts, notably international investment arbitration tribunals created under international investment agreements (IIAs). This chapter will also consider the goals and justifications behind public consultation in EIAs as referenced in the literature as a key to understanding the motivation behind placing these, often quite burdensome obligations on foreign (and local) firms. The chapter will examine the Canadian regime for public participation in EIAs, noting how this has been assessed by courts and how a new proposal aims to address deficiencies in the current system. This process reflects some of the issues identified by the literature regarding the advantages engendered by meaningful consultations which are sensitive to the particular cultural contexts in which environmentally-impactful projects are located.

II Environmental Impact Assessments (EIA)

This section is intended to introduce EIAs as legal processes and to explain their legal basis under international law. Although EIAs are imposed by states under their domestic legal systems, the fact that they are also enshrined in international law suggests that there is an understanding on the part of foreign investors that such processes may be expected as a matter of course throughout the world where environmental issues may be raised.

i)Overview

Protection of the natural environment is a material factor which should be taken into consideration in relation to international investment. One of the legal measures that the host states adopt in order to reduce or eliminate environmental risks related to foreign investment projects is to set the implementation and submission of an EIA as a condition precedent to the commencement of a commercial activity by a foreign investor. This is seen as a vital component of a host state's policy in terms of the protection of the environment and in relation to foreign investment generally.[1] It is thought that the stronger the commitment of a jurisdiction regarding the environmental protection, the greater the relevance of the EIA in terms of the

[1] DP Lawrence, 'Designing and Adapting the EIA Planning Process' The Environmental Professional (1994) at 16

decision-making process in relation to the approval of the investment project or the imposition of any related conditions.[2]

As their name implies, EIAs assess the impact that is likely to be caused by the implementation of a material project on the natural or cultural environment. In accordance with typical EIA procedure, governmental decision-makers should be furnished with the most probable environmental and social repercussions derived from the proposed project along with the respective economic benefits.[3] EIAs thereby constitute an instrument for the prevention of excessive environmental damage by furnishing decision-makers with the evidence necessary basis for approving or objecting a proposed investment plan.[4] EIAs have consequently been described as 'instrument of environmental governance' and further 'as an integral component of sound decision making.'[5] Even though suggestions arising from an EIA normally do not constitute binding obligations upon the decision-makers, an EIAs are highly influential in that they can also form the basis of additional binding regulations designed to protect the environment.

ii) Legal Basis for EIAs under International Law

Some consider EIAs to constitute a principle of international law,[6] although others are more circumspect.[7] Strengthening the former claim, which is probably more indicative of the majority view, there are a significant number of international treaties that recognize the importance of EIAs. Under the Rio Declaration in Environment and Development,[8] it is stated that 'environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact in the environment and are subject to a decision of a competent national authority.'[9] Similarly, the Convention of

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[2] C Wood, *Environmental Impact Assessment, A Comparative Review* (Routledge, 2003) at 2
[3] J. Glasson, 'Environmental Impact Assessment- Impact on Decisions' in J Petts ed. *Handbook of Environmental Impact Assessment*, (Blackwell, 1999)
[4] R. Pavoni, 'Environmental Rights, Sustainable Development, and Investor-State Case-Law: A Critical Appraisal' in PM Dupuy, F Francioni and EU Petersman eds., *Human Rights in International Investment Law and Arbitration,* (Oxford University Press, 2009) at 476
[5] V Vadi, 'Environmental Impact Assessment in Investment Disputes: Method, Governance and Jurisprudence' 30 Polish Yearbook of International Law 169 [2010]
[6] O McIntyre and T Mosedale, 'The Precautionary Principle as a Norm of Customary International Law' [1997] Journal of Environmental Law 221
[7] JH Knox, 'The Myth and Reality of Transboundary Environmental Impact Assessment' [2002] American Journal of International Law 291
[8] Rio Declaration on Environment and Development 1992 31 ILM 874
[9] ibid

Environmental Impact Assessment in a Transboundary Context (the ESPOO Convention), sets the completion of EIAs as a prerequisite for states that have created pollution which crosses international borders.[10] Furthermore, under the Convention on Biological Diversity contracting parties are required to:

> introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures.[11]

Under the United Nations Convention on the Law of the Sea 1994, it is provided that:

> .. When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments.[12]

Under Article 202 of the UNCLOS parties are required to render technical assistance to developing countries in respect of the drafting and preparing an EIA when the latter is required to be provided.[13] Furthermore, the United Nations Framework Convention on Climate Change 1992 requires signatory states to:

> take climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions, and employ appropriate methods, for example impact assessments, formulated and determined nationally, with a view to minimizing adverse effects on the economy, on public health and on the quality of the environment, of projects or measures undertaken by them to mitigate or adapt to climate change.[14]

In accordance with the Protocol on Environmental Protection to the Antarctic Treaty 1991 (also known as the Madrid Protocol) it is provided that: 'activities in the Antarctic Treaty area shall be planned and conducted on the basis of information sufficient to allow prior assessments of,

[10] Article 5
[11] Article 14(1)(a)
[12] Article 206
[13] Article 165(1)d)
[14] Article 4 (1)(f)

and informed judgements about, their possible impacts on the Antarctic environment.'[15] Annex I of the Protocol contains an express reference to the conducting of an EIA.

In addition to these international environmental treaties, there are various references to EIAs under international Soft Law, meaning non-binding, instruments. For example, the UN Norms on the Responsibility of Transnational Corporations specify in relation to environmental decision-making that:

> in decision- making processes and on a periodic basis (preferably annually or in biannually), transnational corporations and other business enterprises shall assess the impact of their activities on the environment and human health including impacts from (….) natural resource extraction activities, the production and sale of products or services and the generation, storage, transport and disposal of hazardous and toxic substances.[16]

In a similar vein the highly-regarded OECD Guidelines for Multinational Enterprises state that:

> Enterprises should, within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives and standards, take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development. In particular, enterprises should: (…) assess and address in decision-making, the foreseeable environmental, health and safety-related impacts associated with the processes, goods and services of the enterprise over their full life cycle. Where these proposed activities may have significant environmental, health or safety impacts, and where they are subject to a decision of a competent authority, prepare an appropriate environmental impact assessment'[17]

Likewise, the World Bank's International Finance Corporation (IFC), of which more below, requires foreign investment projects which it supports to take into consideration the environmental repercussions of the investment, which may result in the requirement to perform an EIA.[18]

Turning to international courts, the International Court of Justice (ICJ) famously held in *Pulp Mills on the River of Uruguay*[19] that an EIA is:

> ..a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in transboundary context, in particular, on a shared resource. Moreover, due diligence, and the duty of vigilance and prevention which it

[15] Article 3(2)c)
[16] Commentary to the UN Norm 14 at (c)
[17] Article VI.3
[18] D Collins, 'Environmental Impact Statements and Public Participation in International Investment Law' [2010] 7:2 Manchester Journal of International Economic Law 4 at 10
[19] Pulp Mills on the River Uruguay (Argentina v. Uruguay), International Court of Justice (20 April 2010)

implies, would not be considered to have been exercised, if a party planning works liable to affect the regime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works...[20]

It has been held by the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS) that 'the obligation to conduct an environmental impact assessment is a direct obligation under the Convention and a general obligation under customary international law. '[21] With regards to international investment law in particular, Investor-State Dispute Settlement (ISDS) arbitration tribunals have also declared that EIAs are increasingly viewed as a component of international law.[22]

To be sure, there is no specific format for an EIA as prescribed by general international law, much as the environmental treaties noted above do not provide much guidance as to their content and structure. This has the potential to create uncertainty for foreign investors regarding compliance with an EIA obligation. The fulfilment of an EIA requirement under an international treaty is therefore based on the interpretation of the relevant treaty provision by international courts. In the *Pulp Mills Case*, for example, the ICJ held that scope and content of an environmental impact assessment are not specified under the general international law. It went on to declare:

It is the view of the Court that it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such assessment.[23]

EIA requirements vary from setting to setting, incorporating different cultural, social, scientific features. Still, as they appear to have become part of customary international law, the majority of states require EIAs where environmental issues are raised by infrastructure projects. As note earlier this obligation applies regardless of whether the investor is domestic or foreign.[24] The possible requirement to complete an EIA is not normally mentioned in the text of an IIA.

[20] Ibid at [204]

[21] Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion, International Tribunal of the Law of the Sea (1 February 2011) at VI

[22] Maffezini v Spain ICSID Case no. ARB 97/7 at [64] and Corona Materials v Dominican Republic , ICSID Case No. ARB(AF)/14/3 (Award) (31 May 2016) at [104]

[23] Above n 19 at [205]

[24] J Holder, *Environmental Assessment – The Regulation of Decision Making* (Oxford University Press, 2004) Ch 1

Rather, since EIAs tend to be required by operation of the domestic law of host states, the obligation on foreign investors to complete them may be inferred from the requirement, found in most IIAs, that investments be conducted in accordance with the law of the host state.

III Public Participation in EIAs

This section will turn to the main focus of this book – public participation and foreign investment law – specifically how public participation is incorporated into EIAs. It will begin by reviewing some of the literature on the justifications for including public participation in the EIA process.

i) Definitions and Justifications

Public participation in EIAs is sometimes viewed as a goal in itself, meaning that the very act of public participation is inherently valuable, apart from the improvements that it is believed to engender in the outcome of the decision-making in relation to environmental matters.[25] Moreover, it is widely held that public participation is essential to effective EIAs in terms of outcomes which are welfare maximizing both economically and socially. Commentators are divided over the precise meaning of public participation in the context of EIAs, and likely in other contexts, although these are beyond the scope of this chapter. Moreover, it is not clear what public participation in EIA involves or who should be allowed to participate. The International Association for Impact Assessment (IAIA), defines public participation in the context of environmental assessment as 'the involvement of individuals and groups that are positively or negatively affected, or that are interested in, a proposed project, programme, plan or policy that is subject to a decision-making process.'[26] Participation in EIA is accurately described as a process which enables individuals or organisations affected by a proposed project to influence decision-making significantly.[27] As such, it has been viewed as an instrument of empowering formerly marginalised individuals in the sense that the outcome itself does not matter. The mere act of being involved is its own reward. Public participation in

[25] A Gluckera, PJ Driessena, A Kolhoffb, H Runhaara, 'Public participation in environmental impact assessment: why, who and how?' 43 Environmental Impact Assessment Review 104 (2013)
[26] P André, 'Public Participation: International Best Practice Principles', Special Publication Series No. 4 (August 2006) at 1
[27] R Hughes, 'Environmental Impact Assessment and stakeholder involvement' 11 Environmental Planning Issues (1998)

the context of EIA is therefore directly linked to the objectives that the participatory process itself is supposed to fulfil.[28]

Regarding who should be involved in 'public' participation in EIAs, some believe that the public should be defined broadly with anyone who may have something to contribute being be permitted to participate.[29] The 'public' is itself a misleadingly homogenous concept. Different individuals and groups within the public will have very different interests and arguably should have commensurate entitlements to participate in EIAs. Accordingly, some commentators suggest that differentiating between different segments of the public, noting the difference between 'the general public' (broad collective of people who may not be directly affected but have views) and 'stakeholders' (affected groups who have a strong interest in the outcome).[30] The dichotomy between directly and indirectly affected is a compelling one but would likely lead to complications in terms of legal challenges. Clearly it would be wasteful of time and resources to include a very broad understanding of public in an EIA. However in the age of the internet, receiving the views of thousands of interested parties would be feasible. Accommodating them into the decision-making process in a meaningful way, as suggested in the arbitral and Canadian caselaw below, would be less so.

It is common practice in EIAs that everyone interested in a given project is invited to participate. Again, the more people and groups are allowed to participate, the harder it will be to meet their various expectations in terms of level of involvement or capacity to influence outcomes. Undermining expectations could lead to frustration and resentment, followed by disengagement in the EIA process. Empirical evidence suggests that members of the public may have different expectations on participation in EIA.[31] These problems are exacerbated by the fact that in some developing countries the agencies responsible for the management of an EIA will have insufficient resources to handle contributions from numerous individuals or groups. Having project proponents supply the funding may address these concerns, although it would represent an added cost that could discourage a foreign investor from choosing a particular location.

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[28] Above n 25 at 104

[29] M Doelle and J Sinclair 'Time for a new approach to public participation in EA: promoting cooperation and consensus for sustainability' 26 Environmental Impact Assessment Review (2006) at 185-205

[30] T Dietz and P Stern, 'Public Participation in Environmental Impact Assessment and Decision Making' The National Academies Press, (Washington DC, 2008) at 15

[31] Above n 25 at 104

With respect to the content of public participation in the context of an EIA, it has been suggested that the phrase ‘participation’ is appropriate only in cases where participants have significant control of the decision-making process and are thus able to influence it.[32] This is different from consultation, where an opinion may be sought but it may not form part of the ultimate decision. In that sense it is more of a case of information gathering, or the issuing of recommendations. EIA practice indicates that less active forms of participation, such as information provision, may ultimately yield more genuine forms of public participation such as shared decision-making.[33] Public participation is not normally viewed as requiring consent, with the latter implying that the public has the capacity to reject a project, essentially acting as the decision-maker. Some have argued that prior informed consent is required where there is a risk to human rights resulting from environmental harms.[34] An effective degree of involvement may depend on the characteristics of the environmental issue at hand, including its urgency and the level of scientific complexity. More involvement with stakeholders may be especially important where ‘norms and values diverge’ and where there is uncertainty regarding the impacts of alternatives.[35]

Some commentators emphasize the importance of informal forms of participation in EIAs in order to open up decision-making processes, suggesting that this may the way to achieve greater transparency, even if the decision-making is ultimately left to bureaucrats.[36] The Las Crucitas gold mine in Costa Rica may be a good example of this phenomenon, where protests led to the shut-down of a mine which had received permission to operate following an EIA. Indeed, protesting is sometimes considered to be an informal variety of participation. Stakeholders involved in EIAs appear to have different under-standings of ‘public participation’ and, consequently, varying expectations on the participatory process. Those involved need to be aware of the range of views of stakeholders as to what constitutes

[32] Hughes, above n 27

[33] C O'Faircheallaigh, ‘Public participation and environmental impact assessment: purposes, implications, and lessons for public policy making’ Environmental Impact Assessment Review 30 (2010) at 19-27

[34] M Satterwhite and D Hurwitz, ‘The Right of Indigenous Peoples to Meaningful Consent in Extractive Industry Projects’ (2005) 22 Arizona Journal of International and Comparative Law 1 at 1-2

[35] H Runhaar and P Driessen, ‘What makes strategic environmental assessment successful environmental assessment? The role of context in the contribution of SEA to decision-making’ 25:1 Impact Assess Project Appraisal 25 (2007) at 2-14

[36] JF Devlin and N Yap, ‘Contentious politics in environmental assessment: blocked projects and winning coalitions’ 26:1 Impact Assessment Project Appraisal (2008) at 17-27

participation in order to develop successful public engagement programmes.[37] If this is not done, then the effectiveness of the EIA itself may be undermined.

There seems to be significant disagreement regarding the goals of public participation in EIAs. A normative rationale has been ascribed to public participation which is linked to notions of democracy and to the safeguarding of minority rights. These are in turn grounded in the aim of empowering the disempowered, itself based on the largely uncontested assumption that power is not equally distributed across society.[38] Flowing from these objectives is the improvement of the sense of good citizenship that is engendered in situations when an individual recognizes that they are an integral part of the society in which they live. This should thereby foster a greater sense of responsibility and lawfulness. In the context of an international investment project, this issue resonates with emerging scholarship on the notion of universal, global or transnational versions of citizenship. It also recalls the Aristotelian ideal of civic participation as a key virtue.[39] On somewhat more moralistic grounds, public participation in EIA is valuable because it enables those that are affected by a decision to influence that decision. Tied to this there may be human rights-oriented justifications – where environmental harm impinges on a human right such as health or life, the rightsholder is entitled to have their opinion heard.[40] There are also due-process oriented rights justifications for public participation in EIAs. Allowing those affected by an administrative decision of the state to present their views against the action is understood as part of natural law, as is the right to be given reasons for the decision and to challenge it. Taking on a role in policy development may be seen to rebalance the unequal distribution of power in a given society, as suggested earlier. This view fails to take into consideration that the most marginalized groups are the least likely to become involved in an EIA either because they lack the resources, they find the process intimidating or there are convinced that their views will have no effect on the outcome. Commentators sensibly observe the practical impact of having citizens decide the outcome of any state action which affects their rights. Where NIMBYism is in operation, there would be

[37] M Robinson and A Bond, 'Investigation of different stakeholder views of local resident involvement during environmental impact assessments in the UK' 5:1 Journal of Environmental Assessment Policy Management 45 (2003) at 45

[38] E.g. M Barelli, *Seeking Justice in International Law: The Significance and Implications of the UN Declaration on the Rights of Indigenous Peoples* (Routledge, 2016)

[39] P Kivisto and T Faist, *Citizenship: Discourse, Theory and Transnational Prospects* (Wiley-Blackwell, 2009)

[40] J Petts, 'Public participation and Environmental Impact Assessment' in J Petts ed, *Handbook of Environmental Impact Assessment*, vol. 1, (Blackwell Science, 2003)

policy deadlock – no projects presenting environmental risks would ever go ahead and there would be a welfare loss to society.[41]

Public participation in EIA may also be seen to fulfil an educative function, allowing participants to develop their ability to articulate their interests and giving them insights into their system of government.[42] Through participation in EIAs, citizens identify how their interests relate to and depend on those of others, teaching them to compromise, which is an essential aspect of citizenship as well as collective decision-making.[43] Such an outcome is achievable more so where there are a larger number of participants with different viewpoints and may be more relevant in the context of marginalized groups for whom the capacity to articulate and assert one's interests is less widely entrenched. Participating in an EIA may represent an opportunity to foster 'social learning' which facilitates the 'identifying effective, socially acceptable strategies to mitigate impacts and identify opportunities.'[44] This process encourages openness to different views, rational argument, discovery of common values and again compromise.

With regards to the substantive rationale behind public participation in EIAs, it is often argued that public participation improves the quality of the decision's outcome.[45] Indeed public participation is designed to ensure that all relevant information, including input from those affected, is available so that the decision-makers can render the most informed and well-reasoned decision, which one would expect would yield the best outcome, however that might be measured. Public participation in EIA is thought to enhance the quality of the decision output by providing decision-makers with socially relevant information and knowledge which may not be discerned from scientific analysis by experts. Decision-makers often seek to fill information gaps through accessing this quantitative or qualitative material as provided by local stakeholders.[46] For example, public participation may be used to obtain more accurate demographic data on a population that would be affected by a construction project. Local residents may be more familiar with the types of plants and animals which inhabit a region affected by a given project. Relatedly, some believe that one of the main purposes of public participation in EIA is to improve the outcome of the EIA process by providing decision-

[41] O'Faircheallaigh above n 33 at 19-27
[42] Ibid. at 19-27
[43] Dietz and Stern, above n 30
[44] O'Faircheallaigh above n 33 at 21
[45] Dietz and Stern, above n 30
[46] A Morrison-Saunders, G Early, 'What is necessary to ensure natural justice in environmental impact assessment decision-making' 26:1 Impact Assessment Project Appraisals 29 (2008)

makers with 'value-based knowledge.' Value-based knowledge is 'moral or normative… derived from social interests and is based on perceptions of social value. Such knowledge engenders debates about the "goodness" of activities.'[47] This appears to be based on the rationale that subjective experiences of affected people can supplement objective or empirical determinations rooted in science, but which may not capture the emotive side of the social acceptance of environmental matters. The only way to come to terms with the values underpinning environmentally sensitive projects is to receive numerous opinions, reflecting the feelings and apprehensions of as much of society as is feasible. This is even in the unusual case where scientific elements of the EIA are themselves uncontested.[48] Even where risks are fully quantifiable, the level of risk acceptability will likely be subjective, tied to the perceptions of individuals or in some cases cultural preferences. One commentator writes that 'the choice of the optimal level of risk will normally be tied to deep and complex social preferences on the degree of risk aversion acceptable.'[49] It is often presumed that citizens' input into EIAs will reflect a standpoint of environmental protection, which may be missing from the values held by other stakeholders such as private companies (seeking profit) and public authorities (seeking legitimacy).[50] Public involvement in EIAs is thought to enhance the quality of the decision outcome by testing the robustness of information obtained by public officials from other sources, including scientific reports in the EIA which may have been prepared by the project leader pursuant to legislative requirements. This is important because proponents are believed to be more likely to ignore or minimize negative impacts or risks and to exaggerate potential project benefits with a view to having the project approved. Public participation may play a crucial role in situations where such evidence is contested.[51]

Commentators also refer to an 'instrumental rationale' for public participation in EIAs.[52] These are linked to the improvements in the process legitimacy of the environmental decision-making as well as means of resolving conflict. Public participation in EIA is thought to legitimise the decision-making process thus strengthening the credibility of the EIA

[47] J Glicken, 'Getting stakeholding participation "right": a discussion of participatory processes and possible pitfalls' 3:6 Environmental Science and Policy (2000) 305 at 307
[48] O Bina, 'Context and systems: thinking more broadly about effectiveness in strategic environmental assessment in China' 42 Environmental Management 717 (2008)
[49] J Kurtz, *The WTO and International Investment Law: Converging Systems*, (Cambridge University Press, 2016) at 146
[50] B Elling, *Rationality and the Environment. Decision-making in Environmental Politics and Assessment* (Earthscan, 2008)
[51] O'Faircheallaigh above n 33 at 21
[52] Above n 25 at 104

authority in the eyes of citizens, and private sector project proponents. This should in turn foster the implementation of the project and ultimately its acceptance by the community. This facet of public participation may be particularly important in the context of ISDS which already suffers from accusations of illegitimacy due in part to its lack of transparency. It is crucial that there is perceived legitimacy in the EIA process because democratically-elected governments depend on the support of the electorate.[53] It has become normal practice for most governments to engage in consultations with the public in conjunction with decision-making of all kinds. As such, a degree of public involvement in EIAs is to be expected as a matter of course. This is reflected in the understanding of transparency as a norm of international law, as well as common to most domestic legal systems.[54]

Public policy-making processes which fail to incorporate public consultations may be perceived as illegitimate, risking subsequent challenge or protest. In contrast, through participation, citizens may develop a sense of 'ownership' over the process and its outcome and thus consider it deserving of their compliance. It may be insufficient simply to provide participants with an opportunity to express their ideas and values. Their participation needs to be taken into account by decision-makers meaningfully, as reflected in some of the cases mentioned below. In other words, they need to be able to influence the outcome.[55] If the beliefs or values of affected individuals or groups are not sufficiently represented in the EIA, there is a chance that opposition will be provoked and the decision may not be implemented as planned.[56] With these eventualities in mind, public participation may contribute to the identification and resolution of conflict before final decisions are issued and the project is implemented.[57] Given the sensitivities of environmental matters, as well as the lucrative nature of many projects which have an environmental element, it is quite likely that there will be a range of diverse views, many of which will be deeply entrenched. In this regard, public participation in EIA is believed to provide mechanisms for the identification and resolution of conflicts before a final decision is taken.[58] The aim of public participation in EIAs may not necessarily be to avoid conflict but rather to provide a means by which it can be mitigated. This

[53] Above n 26 at 29-42
[54] A Bianchi and A Peters eds. *Transparency in International Law* (Cambridge University Press, 2013)
[55] Above n 25 at 104
[56] H Runhaar, 'Putting SEA in context: a discourse perspective on how SEA contributes to decision-making' 29 Environ Impact Assess Rev, 200 (2009)
[57] Devlin and Yap above n 36 at 17-27
[58] A Shepherd and C Bowler, 'Beyond the requirements: improving public participation in EIA' 40:6 Journal of Environmental Planning Management 725 (1997)

might forestall further formal costly dispute resolution procedures, such as civil litigation, or ISDS.

ii) Under International Law

The US National Environmental Policy Act (NEPA) is normally viewed as the origin of the EIA and with it, the understanding that public participation should be viewed as an important aspect of the EIA process. The majority of EIAs in operation around the world are thought to incorporate a process of public participation and public consultation.[59] The importance of public participation for environmental decision-making through EIAs has been further recognized under international law, adding to its legitimacy and in so doing shaping the expectations of foreign investors.

For example, Principle 10 of the United Nations (UN) 1992 Rio Conference on Environment and Development states that 'environmental issues are best handled with the participation of all concerned citizens at the relevant level.' Principle 17 of the Declaration, which requires EIAs, is seen as one of the primary mechanisms by which Principle 10 can be achieved.[60] The 1998 Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (also known as the Aarhus Convention) further enshrines public participation as an aspect of EIAs. The Convention sets out minimum requirements for public participation in various categories of environmental decision-making, requires its signatory states to 'guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters.' The Convention further provides that signatory states must take all necessary legislative, regulatory and judicial steps to ensure that the public is able to exercise its right to public participation in environmental decision-making. Citizens have the right to readily-accessible information regarding environmental decisions. The public should be made aware of the nature of the activity and its potential environmental impacts and be given a reasonable opportunity to engage in effective participation in the decision-making process, which involves timely notifications of meetings and the right to submit comments. Parties are required to take the results of the public participation into account as far as possible.[61] The 1991 Convention on

[59] N. Craik, *International Law of Environmental Impact Statements*, (Cambridge University Press,2008) at 31
[60] Craik, ibid
[61] Collins above n 18

Environmental Impact Assessment in a Transboundary Context (also known as the Espoo Convention) contains extensive provisions for public participation.[62] The International Law Commission's Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities require that state parties provide any states likely to be affected by an environmentally hazardous activity with relevant information regarding the risk involved and the harm which might result, however it there is no requirement that it be provided to affected citizens themselves.[63]

Turning to the caselaw of international tribunals, in *Saramaka People v Suriname,*[64] the Inter-American Court of Human Rights held that the state of Suriname was entitled to grant concession rights to the land provided that the Saramaka's survival would not be threatened or put at risk. Crucially the court also insisted that effective and fully informed consultations undertaken prior to the extraction activity with a view to ascertaining impacts on the environment. It stated: 'these safeguards are intended to preserve, protect and guarantee the special relationship that the members of the Saramaka community have with their territory, which in turn ensures their survival as a tribal people.'[65]

Likewise, it was held by the European Court of Human Rights (ECtHR) that violation of the right to private life as well as to life itself (as found in Articles 8 and 2 of the European Convention on Human Rights), could result from an inadequate public participation during an EIA procedure as well as from the absence of conduct of an EIA, recognizing that environmental harm may also be construed as a danger to life.[66] Another ECtHR case, *Taskin v Turkey,*[67] concerned harm to the health of citizens related to leaching of chemicals into the water supply from a gold mine. In this dispute the importance of public participation was underlined by the court in situations 'where a state must determine complex issues of environmental and economic policy.'[68] The ECtHR resolved that Turkey had breached the right to private life of the applicants by cancelling the protective measures that were available to the applicants during the authorizations process regarding the mine. The public was also invited to give comments on an EIA the contents of which they were granted full access.

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[62] Art II.2
[63] Principle 5
[64] *Saramaka People v Suriname Case* [2007] Inter-American Court of Human Rights, Series C, No. 72 (28 November 2007)
[65] Ibid at [129]
[66] *Giacomelli v Italy* (2006) Judgment ECHR 2 (59909/00) para. 83-94
[67] *Taskin and Others v Turkey* (46117/99), Judgement, ECHR [2004] 119-25
[68] Ibid at [119]

ISDS tribunals have also examined public participation issues in the context of environmental matters. For example, the EIA process which formed part of the dispute in *Maffezini v Spain* involved a component of public consultation.[69] The integrity of the EIA process was also at issue in *Corona Materials v Dominican Republic*, with the respondent state asserting a lack of transparency, in this case the right of the public to receive information regarding the project.[70] In *Crystallex v Venezuela*,[71] a dispute relating to a gold mine in an environmentally sensitive area with abundant biodiversity, the investor claimed that it had engaged in extensive consultations with the local communities and indigenous population over the course of several years as part of its submitted EIA. Venezuela ultimately denied the mining permit and seized control of the mine contending that, during the four-year environmental review process, the investor had failed to convince the government that the project's environmental impacts would be sufficiently mitigated, corrected or prevented. Siding with the investor, the tribunal held that Venezuela's denial of an environmental permit following the investor's detailed EIA, which included public participation, was arbitrary and unjustified. In *Pac Rim v El Salvador,*[72] the investing mining company submitted an EIA which included public consultations, as required by the law of the host state. Despite having done so, the ICSID tribunal sided with the respondent El Salvador holding that the underground mining activities might pose environmental risks to surface landowners which had not been fully addressed. Therefore the investor's interpretation of the risks, as outlined in their EIA, was disproportionate to reality. Consequently the investor had not complied with the requirement under El Salvadoran mining law to be granted an exploitation permit. The government therefore did not have any obligation to grant such permit to the investor. While there were no comments regarding the adequacy of the public consultation element of the EIA, it may be inferred that the investors did not take into the account the interests of all groups potentially impacted by the investment project.

In *Bear Creek Mining v Peru*, which also involved a mining project, the respondent state was held to have breached its obligations to the foreign investor under various parts of the relevant investment treaty. Yet a compelling dissent opinion indicated that the investor had not discharged its obligation to engage in meaningful consultations with the affected indigenous community (the Aymara). The arbitrator wrote of the 'right to be consulted' in conjunction

[69] Maffezini v Spain, Award, ICSID Case No ARB/97/7 (25 January 2000) at [69]
[70] ICSID Case No. ARB(AF)/14/3), Award (31 May 2016) at [105]
[71] ICSID Case No. ARB(AF)/11/2, Award (4 April 2016) at [289]
[72] ICSID CASE NO. ARB/09/12) Award (14 October 2016)

with the completion of an EIA.[73] He went on to assert that this requires 'real or sufficient steps to address….concerns and grievances and to engage the trust of *all* potentially affected communities.'[74] The investor had engaged in consultations with affected communities, as required under the law of Peru (the Right to Prior Consultation to Indigenous Peoples) and in keeping with the International Labour Organization Convention on Indigenous and Tribal Peoples 1989.[75] Consequently the majority of the tribunal believed that there was no indication that the investor's failure to do so more meaningfully did not justify the harm which it suffered as a result of the related community's protests nor the state's ensuing expropriation of its assets. It was noted in the *Bear Creek* award that the requirement for consultations regarding environmental and social impacts, at least under Peruvian law, is a serious one. The tribunal stated:

> Merely meeting the formalistic requirements of the law is not an indication of meeting the law's objective: consensus and a social license from the affected communities. Any bare minimum steps - such as the CPP, engaging in workshops, conducting a public hearing - exist in service of the consultation law's objectives of promoting dialogue and consensus building.[76]

In this instance the investor's outreach activities had not been effective in placating the indigenous people's uprising; however, this did not preclude the investor from receiving compensation for expropriation.

In *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italy*,[77] a case concerning a solar energy project, the tribunal considered the respondent's allegation that the investor had failed to fulfil the requirements of the EIA which it had tendered in conjunction with the project. While the alleged failure did not relate specifically to issues of public participation, it is nevertheless instructive to consider the tribunal's statements regarding the nature of EIAs:

> it is for each Contracting Party [of the Energy Charter Treaty] to decide the extent to which the assessment and monitoring of Environmental Impacts should be subject to legal requirements, the authorities competent to take decisions in relation to such requirements, and the appropriate procedures to be followed.[78]

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[73] ICSID Case No. ARB/14/21, Partially Dissenting Opinion of Professor Philippe Sands (30 November 2017) at [14]

[74] At [19]

[75] Convention concerning Indigenous and Tribal Peoples in Independent Countries (Entry into force: 05 Sep 1991)Adoption: Geneva, 76th ILC session (27 Jun 1989)

[76] At [260]

[77] ICSID Case No. ARB/14/3 (Award) (27 December 2016)

[78] At [275]

In this case, there was no requirement in under Italian law for EIAs in small scale solar energy projects. The tribunal ultimately ruled in favour of Italy, holding that the investor's legitimate expectations in regulatory stability had not been violated.

One of the ways in which international investment law has sought to project a requirement of public participation for EIAs is through the guidelines imposed by the development banks, which play a considerable role in many investment projects in the developing world. The World Bank's Multilateral Investment Guarantee Agency (MIGA) provides political risk insurance to foreign investments with a developmental purpose in developing countries. MIGA's Policy on Environmental and Social Responsibility forms part of Annex B of the agency's Operational Regulations. The policy requires that all projects which receive MIGA's political risk insurance must engage in an EIA, the scope of which will depend on the nature, scale and environmental impact of the proposed project. Public consultation and disclosure are required for all Category A (the most environmentally risky) projects as a component of the EIA. Contact with locally affected groups, including non-governmental organizations, should be initiated as soon as possible after the guarantee is sought. Such consultations must be 'meaningful' and as such MIGA requires that any information transmitted to the public must be done in a timely manner and in a language that is understood.[79]

Another branch of the World Bank, the International Finance Corporation (IFC), mentioned earlier, imposes EIAs on the projects which it funds through its Environmental and Social Review Procedures ('EFSR'). The IFC's procedures are framed in such a way that they validate various stages of an investment project – rather than simply the concluding stage. A key component of the IFC's Review Procedures is Stakeholder Identification and Analysis, which involves the assessment of the environmental impact of the project on local households and communities. This process should involve some form of public consultation, although the precise method of achieving this is not specified, other than the fact that it should be 'free', (which means at no cost to the public participants and was not coerced), and that it be 'informed', (which means that it must be presented in understandable language). In addition to consultations, the IFC identifies a need to achieve Broad Community Support for the project which is defined as 'a collective expression by the affected communities, through individuals

[79] Policy on Environmental and Social Sustainability, Multilateral Investment Guarantee Agency, (Washington, DC, US) (1 October 2013)

and/or their recognized representatives, in support of the project. There may be broad community support even if some individuals or groups object to the project.' The affected communities are a subset of a broader group of project stakeholders located within the project's area of influence, in the region, host country, or elsewhere. Public consultation and broad community support will be required as condition of financing only in situations where there is a significant adverse impact on an affected community or if indigenous people are involved. In order to assess whether such consultation has occurred, the IFC will consider whether affected communities have been engaged in identifying potential environmental impacts and assessing the consequences of these impacts on their lives. The IFC will also evaluate whether the affected communities have provided input into proposed mitigation measures. The extent to which impacts have been fully disclosed to affected groups, such as the nature and scale of the project, is of high importance, as is the requirement that such consultations be 'understandable and meaningful.' This may mean that the responses elicited are not coerced through threat or reward and that they are delivered in an understandable language. Evidence that good faith consultations with the public have occurred will include one-to-one interviews and documentation of agreements with leaders of communities or households, as well as records of contact with vulnerable groups. The need for public consultation is further seen in the IFC's preparation of an Environmental and Social Review Summary, a publicly available document which is intended to be understood by members of the local community. This document identifies how a project was reviewed and the rationale for IFC deciding to invest. It includes a description of the main social and environmental risks and impacts of the project, as well as the key measures identified to mitigate those risks and impacts. The Review Procedures state that the 'IFC will also take into account the project context including the development benefits of the investment project as well as public policy and the local, regional and national political considerations.'[80]

The Asian Infrastructure Investment Bank (AIIB), which is a multilateral development agency with headquarters in Beijing, operates an Environmental and Social Framework in relation to the projects which it funds. The AIIB emphasizes environmental sustainability as one of its foundational principles. One of the objectives of the Framework is to 'Provide a framework for public consultation and disclosure of environmental and social information in

[80] Environmental and Social Review Procedures Manual, International Finance Corporation, Environmental, Social and Governance Department (Washington DC, US) (31 May 2012)

relation to Projects.'[81] Furthermore, under the heading Stakeholder Engagement, the Framework states that 'meaningful consultation is essential for the design and implementation of a Project.' Meaningful consultation, a phrase which appears time and again in the context of public participation in EIAs, is described as 'a process that begins early and is ongoing throughout the Project. It is inclusive, accessible, timely and undertaken in an open manner. It conveys adequate information that is understandable and readily accessible to stakeholders in a culturally appropriate manner and in turn, enables the consideration of stakeholders' views as part of decision-making.'[82] The Framework refers to meaningful inputs from the public on several other occasions, including in relation to the preparation of EIAs.[83]

Taken together, these various sources of international law appear to reflect an understanding of the normative and instrumental values associated with 'meaningful' or genuine public participation in EIAs discussed above. EIAs tend to be legislatively structured and judicially assessed on the basis of the integrity of the process of public involvement in this manner. This aspect of EIAs is further illustrated in the approach taken by Canada.

IV The Canadian Experience

It was mentioned above that most states which use EIAs incorporate some role for public participation as essential to the legitimacy and effectiveness of the process. This section will consider the approach taken by Canada which offers a rather extensive element of public participation into its EIA processes. There is insufficient space here to explore the Canadian EIA process in depth – some of the main features relating to public participation will be mentioned for the purpose of illustrating the importance placed on the genuine effort to engage in two-way communication between the proponent and affected parties, Indigenous groups. In Canada as in most countries, EIAs grew out of a need for governments to resolve conflicts over the risks, costs and benefits associated with major projects with an environmental element in a way that is viewed seen as legitimate by those affected. The possibility of a decision not to proceed if the risks of a project are found to be unacceptable is essential to the legitimacy of

[81] Environmental and Social Framework, Asian Infrastructure Investment Bank, (Beijing, China) (approved February 2016) at 2
[82] Environmental and Social Framework, Asian Infrastructure Investment Bank (approved February 2016)At 4
[83] Ibid at 20

the process. In Canada the vast majority of projects are allowed to proceed provided that environmental risks are mitigated through the imposition of various conditions.[84]

The requirements of EIAs for projects undertaken in Canada by either foreign or local investors are outlined in the Canadian Environmental Assessment Act of 2012 (CEAA).[85] The purpose of the CEAA is to protect aspects of the environment that are within federal governmental authority (typically which cross provincial or international boundaries or which engage Indigenous groups) from significant adverse environmental effects caused by a designated project. Crucially for the purposes of this chapter, the CEAA is designed to promote communication and cooperation with Indigenous peoples and to ensure that opportunities are provided for meaningful public participation.[86] In that regard, the CEAA specifies that one of the factors to be considered in an EIA are 'comments from the public.'[87] It further notes the relevance of 'community knowledge and Aboriginal traditional knowledge.'[88] Public participation is specifically guaranteed in Article 24, which states: 'the responsible authority must ensure that the public is provided with an opportunity to participate in the environmental assessment of a designated project.' This is important in that the obligation to ensure that there has been public participation is born by the government, not by the project's proponent. Public participation is contemplated at several points during the EIA process. Once the Canadian Environmental Assessment Agency receives a complete project description from the proponent, it must consider whether an EIA is required. During this determination, the public is given an opportunity to comment on the proposed project and its potential for causing adverse environmental effects. When it has been decided that an EIA is required, the public is given another opportunity to comment on which aspects of the environment may be affected by the project and what should be examined in the EIA. Once the proponent submits its EIA, the public is again invited to comment on the identified potential environmental effects of the project and the measures needed to prevent or mitigate those effects as proposed by the proponent. At this stage, additional opportunities to participate may include open houses or public meetings. Lastly, the public may comment on the draft EIA. This document includes the agency's conclusions regarding the potential environmental effects of the project, the mitigation measures that were considered and the significance of the remaining adverse

[84] M Winfield, D Curran and M Olszynski, 'Cooling the Rhetoric on Canada's Environmental Assessment Efforts' The Conversation [undated]
[85] SC 2012, c 19, s 52
[86] Art 4(1) e
[87] Art 19(1) c
[88] Art 19 (3)

environmental effects. These features of the Canadian law on EIAs reflect many of the goals outlined above in relation to public consultations in the context of EIAs, notably the normative values of being involved in the process and the instrumental values of outcomes which are less harmful to affected communities as may be understood in a more qualitative manner.

The adequacy of the public consultation requirement under Canadian EIA laws was assessed in a number of Canadian court cases. For example, *MiningWatch Canada v Attorney General of Canada*[89] dealt with challenges to an open-pit copper and gold mine application located in an Indigenous community. The court ruled that once public consultation is required under s. 21 of the CEAA it is not possible to avoid the entire public consultation process by subsequently narrowing the scope of project to reduce it to level of screening. This down-grading of a project in order to escape public consultations in an EIA is provided for in the statute. To allow the project proponent to do so would 'violate not only the plain meaning of the legislation in question, but also the spirit of the entire legislative scheme, as amended, which is designed to foster public participation for projects with significant potential environmental repercussions.'[90] Project applicants are under a legal duty to conduct a comprehensive study and to consult the public prior to taking further steps in the project's development. In other words, an initial consultation must be followed up at a later stage as the project expands and the potential if new risks become evident. This decision was affirmed by the Supreme Court of Canada.[91]

In *Vancouver (City) v British Columbia (Environment)*[92], a case heard before the Supreme Court of the province of British Columbia, the adequacy of the public participation element of an EIA was questioned with respect to the degree of consultation afforded affected communities other than aboriginal ones. The City had argued that the consultation had failed to adequately involve all groups, constituting a breach of procedural fairness. The court concluded that the applicant was not required to open the public consultation more broadly than it did, although this may have been appropriate – it was not a legal expectation. This ruling suggests a degree of discretion on the part of the applicant with respect to public participation in EIAs.

[89] 2007 FC 955 (25 September 2007)
[90] At [284]
[91] MiningWatch Canada (Appellant) v. Minister of Fisheries and Oceans, Minister of Natural Resources and Attorney General of Canada (Respondents) 2010 SCC 2 (16 October 2009)
[92] 2018 BCSC 843 (14 May 2018)

In perhaps the most high profile Canadian case concerning EIAs, the Federal Court of Appeal overturned the Government of Canada's approval of US infrastructure company Kinder Morgan's proposal to triple the capacity of the Trans Mountain pipeline system that runs from the province of Alberta to the province of British Columbia's Pacific coast.[93] The court ruled that the federal government did not fulfil its duty (enshrined in section 35 of the Constitution Act 1982, which recognizes the rights of Indigenous people), to meaningfully consult Indigenous communities and to accommodate their concerns about the project. Regarding the public consultation process, the court stated:

> …missing was a genuine and sustained effort to pursue meaningful, two-way dialogue. Very few responses were provided by Canada's representatives in the consultation meetings. When a response was provided it was brief, and did not further two-way dialogue. Too often the response was that the consultation team would put the concerns before the decision-makers for consideration…Where responses were provided in writing, either in letters or in the Crown Consultation Report or its appendices, the responses were generic. There was no indication that serious consideration was given to whether any of the Board's findings were unreasonable or wrong. Nor was there any indication that serious consideration was given to amending or supplementing the Board's recommended conditions.[94]

The reference to a 'genuine and sustained effort' and later 'a duty of deep consultation'[95] appears to imply some kind of an obligation of good faith on the part of the party conducting the EIA. In the absence of this element, public participation becomes a merely a perfunctory or formal step in a what is essentially an administrative exercise. This is not in keeping with the normative objectives noted earlier in this chapter which are grounded in the empowerment of the public group and the ensuing sense of 'owning' of the project as a consequence of having their views heard rather than simply spoken. The Kinder Morgan pipeline case is further interesting from the perspective of international investment law as the main proponent, Kinder Morgan, is a US company, based in Texas. This raises the concern that the Canadian government's refusal to approve the project could be challenged under the investment chapter of the new United States Mexico Canada (USMCA) free trade agreement on the basis of a regulatory expropriation or potentially a breach of the fair and equitable treatment standard.[96] Since the new USMCA lacks ISDS between the US and Canada (unlike its predecessor NAFTA) it would likely fall to that instruments state-to-state dispute settlement features to

[93] *Tsleil-Waututh Nation v. Canada (Attorney General) 2018 FCA 153 (30 August 2018)*
[94] At [756]-[757]
[95] At [758]
[96] T Corcoran, 'Ottawa's next big pipeline problem? Kinder Morgan suing us through NAFTA' The Financial Post (13 April 2018)

resolve the matter, potentially resulting in a situation in which the project could be approved against Canada's will under international law.

As of the time of writing, Canada is proposing new federal legislation to cover EIAs, replacing the CEAA. The proposed Canadian Impact Assessment Act (the CIAA, currently properly identified as Bill C-69) is designed to provide greater clarity and consistency in review outcomes through various changes, notably by including even more avenues for public participation. The new system's development was the subject of two years of extensive engagement with industry, government and the public, including expert reports and a parliamentary committee which heard testimony from more than 100 witnesses. The proposed new legislation for EIAs has been exceptionally controversial, with many commentators, especially in the province of Alberta, arguing that it was designed by the federal government to suppress activity in the petroleum sector (on which the Alberta economy relies heavily) in order to satisfy environmentalists in the vote-rich eastern Canada (the provinces of Ontario and Quebec). Indeed it has been referred to as the 'no more pipelines bill.'[97]

The proposed system is intended to deal with some of the problems associated with weak or perfunctory public consultation, such as occurred during the Kinder Morgan pipeline approval process. If it achieves parliamentary approval, the CIAA will include greater commitments to early, inclusive and meaningful public engagement, in particular that which involves Indigenous peoples. The expanded public participation consists of an early planning and engagement phase for all projects with a view to building trust, increasing efficiency, improving project design, and providing companies certainty about the next steps in the review process.[98] The new legislation will create an Indigenous Advisory Committee within the new Impact Assessment Agency (replacing the Environmental Assessment Agency) in order improve the EIA process by contributing 'Indigenous knowledge,' a phrase which is not defined in the explanatory material for the new system but which may contemplate the contextualized understanding of public involvement referenced in the literature discussed earlier. Most interestingly the explanatory material on the new law makes reference to 'the aim of securing consent' through the recognition of Indigenous rights and interests from from the

[97] R Neufeld, 'I'm on the Bill C-69 committee — and I'm hearing a lot of angry Canadians' The National Post (26 April 2019)
[98] https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes.html (last accessed May 2019)

beginning.[99] The statute does not require that public consultations in EIAs lead to actual consent, although it appears to encourage it. In other words, projects may still go ahead if the indigenous groups do not approve of it, but it would be viewed more favourably if there was actual agreement. The new act allows the Impact Assessment Agency to enter into arrangements with any Indigenous organization to establish 'collaborative processes,' which are also not defined but likely envision the duty of deep consultations expected by the court in the Kinder Morgan case.

Proponents of the proposed legislation have observed the paradox that some Indigenous representatives and environmental advocates feel the proposed EIA regime falls short of what is needed, both in terms of advancing environmental sustainability and meeting the requirements of the United Nations Declaration of the Rights of Indigenous Peoples.[100] It is thought that these groups do not appreciate that the new statute was designed to incorporate better decision-making processes around projects to ensure that the full range of their economic, environmental and social impacts and risks were understood before they are allowed to proceed, as did not occur in the Kinder Morgan project. Whether the new statute will actually do so has been questioned by commentators.[101] It remains to be seen whether Bill-C9 will be approved by the parliament of Canada.

V Conclusion

The imposition of an EIA as a requirement to an infrastructure project which has the potential to cause environmental or social harms is now well-established within international law, as is arguably the requirement that such processes incorporate public participation. While the need to complete EIAs tends not to appear in the text of IIAs, most states require EIAs to be conducted by both domestic and foreign investors. A good example of a comprehensive EIA process incorporating public participation is that which is adopted by the federal government of Canada under the CEAA. The fulfilment of these legal obligations by project proponents has been challenged in a number of cases, most notably the high profile Kinder Morgan pipeline

[99] 'Better rules to protect Canada's environment and grow the economy: Current System and Proposed Impact Assessment System Comparison', Government of Canada [undated] https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes/current-new-system.html (last accessed May 2019)
[100] (A/RES/61/295), adopted by the UN General Assembly (13 September 2007)
[101] R Lindgren, Canadian Environmental Association Blog, (14 September 2018)

case where the court held that public consultations must be meaningful rather than superficial. The legitimacy of EIAs with public consultation elements has been evaluated by international investment arbitral tribunals to ensure transparency and public participation in the process of conducting an EIA report, again emphasizing the genuineness of this process.

The specific requirements for EIAs will be different in each context, as will the degree of public involvement necessary. For the most part, EIAs have been structured in such a way to incorporate environmental and social aspects of large scale projects through a collaborative structure where public consultation and participation assume a significant role.[102] Although there is some disagreement regarding the specific purposes of EIAs, there is a broad consensus among commentators that public participation is key to effective EIAs. As a process, public participation in EIA may be viewed as a goal in itself. It may further be a means to achieve objectives that go beyond those of the EIA, such as the empowering of marginalized groups. Perhaps most importantly, public consultation and participation can improve the quality of the EIA by providing assistance in the decision-making process and adding legality in the respective process.[103]

While there are clearly benefits associated with the inclusion of mandatory meaningful public participation in the context of IIAs, they also impose costs on proponent companies and can lead to political conflict, as is currently taking place in Canada. In the case of foreign investors, such costs may not be fully appreciated given that EIAs are not referenced in IIAs, nor do they appear regularly in domestic foreign investment statutes. The fact that EIAs are correctly viewed as features of international law may go some way to addressing this knowledge gap, but greater awareness regarding the precise nature of the EIA obligation (and associated public participation) is essential because of the highly contextualized way in which these are performed in each country. The lack of transparency regarding the full extent of the obligation in each host state may lead to unnecessary costs and delays, potentially derailing economically beneficial investment projects from coming to fruition. While foreign investors are of course expected to familiarize themselves with the legal regime of the countries in which they are locating, the inclusion of explicit provision for EIAs in IIAs could be useful. Alternatively, they could appear in domestic foreign investment laws, such as the Investment

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[102] J. Freeman, *Collaborative Governance in the Administrative State* [1997] University of California Los Angeles Law Review, 33-4

[103] Above n 25

Canada Act, which contains no reference to EIAs.[104] Such provisions could further specify that there is a requirement that EIAs conducted by foreign investors will incorporate meaningful public participation,[105] in some relevant cases with Indigenous communities. Putting foreign investors on notice in this manner is important in order to satisfy the need for transparency in the laws of host states and in international investment law generally. It should allow foreign investors to calibrate their expectations in terms of the administrative preparations required for their entry into a given jurisdiction in advance of the commitment of additional resources.

[104] RSC, 1985, c 28 (1st Supp)
[105] Knox above n 7