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## Polarizing Impact: Indigenous Consultation Under International Labor Organization Convention 169 and the Emerging Polar Shipping Industry

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# POLARIZING IMPACT: INDIGENOUS CONSULTATION UNDER INTERNATIONAL LABOR ORGANIZATION CONVENTION 169 AND THE EMERGING POLAR SHIPPING INDUSTRY

Danika Elizabeth Watson\*

*Where I live, the sea ice never stops. It's a living thing.*  
—Jayko Oweetaluktuk, Inukjuak, Nunavik<sup>1</sup>

*The foundation, projection, and enjoyment of Arctic sovereignty and sovereign rights all require healthy and sustainable communities in the Arctic. In this sense, "sovereignty begins at home."*  
—Circumpolar Inuit Declaration on Arctic Sovereignty (2009)<sup>2</sup>

*The whole situation is surreal because the long-time mariners like myself are not effectively consulted when it comes to marine shipping lanes, or even if there should be increased shipping . . . . The political jockeying for the Arctic, the political jockeying for increasing the marine traffic through a transarctic route—it makes me feel powerless . . . . This whole economic drive, these economic incentives to do a faster route through the Arctic, in my mind, is going to leave people like myself with less say about what goes on up here because it will involve all of these countries throughout the world because international maritime law doesn't just involve the two bordering countries, US and Russia, it involves every country of the world!*  
—Austin Ahmasuk (Iñupiaq), Nome, Alaska<sup>3</sup>

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\* J.D. Candidate, 2022, Fordham University School of Law; M.M., 2017, The Juilliard School; B.M., 2015, Northwestern University. I live and work on Dena'ina elnena, the beautiful ancestral lands stewarded by the Dena'ina people and occupied as unceded territory. Thanks to Professor James Brudney for his support in creating this paper and for all my classmates in his seminar, Labor Law in the International Context. Thanks especially to Ed McLaughlin, Becca Spendley, and the *Fordham Law Review* Volumes 90 and 91 boards for their careful work.

1. INUIT CIRCUMPOLAR COUNCIL, THE SEA ICE NEVER STOPS: CIRCUMPOLAR INUIT REFLECTIONS ON SEA ICE USE AND SHIPPING IN INUIT NUNAAT I (2014), <https://secureservercdn.net/45.40.145.201/hh3.0e7.myftpupload.com/wp-content/uploads/Sea-Ice-Never-Stops-Final.pdf> [<https://perma.cc/RJ4E-SKY7>].

2. *Id.* at 24.

3. *Id.* at 37 (alterations in original).

## I. SEA CHANGE

The coastal Arctic in 2020 saw near-record warming, shrinking ice and snow cover, the second-lowest sea ice extent on record, forest fires and heat waves, and thawing permafrost as the region continued its shift from a frozen climate toward one characterized by open water and rain.<sup>4</sup> As the world heads ever-faster toward an ice-free Arctic, circumpolar nations and other powerful states are preparing to take advantage of the Far North's growing economic potential, including polar shipping routes which would revolutionize nonrenewable resource extraction delivery and global trade alike.<sup>5</sup> Melting sea ice and less predictable weather also bring new challenges to Indigenous people tied to the Arctic environment for millennia practicing traditional lifeways and to the health of Indigenous people, the health of their Arctic homeland, and the wellbeing of future generations.<sup>6</sup> With one thousand miles of Arctic coastline in Alaska, the United States is one of the world's eight Arctic nations,<sup>7</sup> but it lags far behind in its adoption and ratification of international law governing the Arctic and its Indigenous people.

This Article analyzes U.S. ratification of International Labour Organization (ILO) Convention 169, Indigenous and Tribal Peoples Convention ("Convention 169" or "C. 169"),<sup>8</sup> by evaluating the impact in terms of its ability to solidify its protections of the land and lifeways of Arctic Indigenous people and strengthen the United States's position as an international leader in Arctic life, development, and policy. Part I presents the issues. Part II introduces the growth of a polar shipping industry in the context of a rapidly melting Arctic. Part III provides a brief gloss on the complex and shifting international legal framework governing Arctic sovereignty and the Arctic Indigenous people, and then outlines, in detail, the consultation and participation norms of Articles 6 and 7 of Convention 169.

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4. See Henry Fountain, *Arctic Sea Ice Reaches a Low, Just Missing Record*, N.Y. TIMES (Sept. 21, 2020), <https://www.nytimes.com/2020/09/21/climate/arctic-sea-ice-climate-change.html?searchResultPosition=15> [<https://perma.cc/VV5L-62MB>]; Henry Fountain, *The Arctic Is Shifting to a New Climate Because of Global Warming*, N.Y. TIMES (Sept. 14, 2020), <https://www.nytimes.com/2020/09/14/climate/arctic-changing-climate.html?searchResultPosition=17> [<https://perma.cc/SDZ7-XQNK>]; Henry Fountain, *Shift to a Not-So-Frozen North Is Well Underway, Scientists Warn*, N.Y. TIMES (Dec. 8, 2020), <https://www.nytimes.com/2020/12/08/climate/arctic-climate-change.html?searchResultPosition=3> [<https://perma.cc/3E54-36SM>]; Kate Ramsayer, *2020 Arctic Sea Ice Minimum at Second Lowest on Record*, NASA (Sept. 21, 2020), <https://climate.nasa.gov/news/3023/2020-arctic-sea-ice-minimum-at-second-lowest-on-record/> [<https://perma.cc/NXS8-93B2>].

5. See, e.g., Ed Struzik, *As Arctic Melts, Inuit Face Tensions with Outside World*, YALE ENV'T 360 (Oct. 1, 2012), [https://e360.yale.edu/features/as\\_arctic\\_melts\\_inuit\\_face\\_tensions\\_with\\_outside\\_world](https://e360.yale.edu/features/as_arctic_melts_inuit_face_tensions_with_outside_world) [<https://perma.cc/46MC-2AJ5>].

6. See INUIT CIRCUMPOLAR COUNCIL, *supra* note 1, at ii, 4–6.

7. See generally Laura Neilson Bonikowsky, *The Arctic, Country by Country*, DIPLOMAT & INT'L CAN. (Oct. 4, 2012), <https://diplomatonline.com/mag/2012/10/the-arctic-country-by-country/> [<https://perma.cc/LAP2-VCVL>].

8. See Indigenous and Tribal Peoples Convention ILO, 1989 (ILO No. 169), [https://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100\\_ILO\\_CODE:C169](https://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C169) [<https://perma.cc/UKV3-EJBU>] [hereinafter "C. 169"].

Part IV evaluates Convention 169's ability to protect and promote Arctic Indigenous rights to self-determination and its potential application in an ice-free Arctic shipping industry. Finally, Part V concludes that the United States should ratify Convention 169 and implement consultation under Articles 6 and 7 as an imperfect, yet worthwhile, modality for promoting the interests of Indigenous people in the rapidly growing polar shipping industry.

## II. POLAR MELT: CHANGE IN ARCTIC LANDS AND WATERS

This part briefly introduces the relevant background regarding climate change affecting the Arctic, the emerging Arctic shipping industry, and the Indigenous peoples and governments directly affected.

### *a. Climate Change and the Arctic Ocean*

The once-icebound Arctic region is warming at nearly three times the rate of the rest of the world, largely the result of increased emissions of greenhouse gases from burning fossil fuels like coal, oil, and natural gas.<sup>9</sup> These changes present serious challenges to traditional lifeways of coastal Indigenous communities.<sup>10</sup> Changes underway in the Arctic have wide-ranging consequences for world commerce; a recent economic analysis of global costs of Arctic climate change over the ninety-year period between 2010 and 2100 estimated the cumulative cost as between \$7 trillion and \$90 trillion.<sup>11</sup>

### *b. Arctic Shipping: An Emerging Polar Industry*

As the polar ice cap melts and Far North routes open in the once-impassable oceans, the large-scale polar marine shipping industry will emerge.<sup>12</sup> Climate models project that late-summer sea ice extent in the

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9. See Andrew Freedman, *Global Warming Has Profoundly Transformed Arctic in Just 15 Years, Report Warns*, ANCHORAGE DAILY NEWS (Dec. 8, 2020), <https://www.adn.com/nation-world/2020/12/08/global-warming-has-profoundly-transformed-arctic-in-just-15-years-report-warns/> [<https://perma.cc/T2B4-B3C6>].

10. See Natan Obed, President, Inuit Tapiriit Kanatami, Remarks at the Meeting of First Ministers and First Nations, Inuit and Metis Leaders (Mar. 5, 2016), <https://www.itk.ca/remarks-by-natan-obed-at-the-meeting-of-first-ministers-and-first-nations-inuit-and-metis-leaders> [<https://perma.cc/78EV-WR4U>] (“Unprecedented rates of summer sea ice loss, reduced sea ice in winter, ocean acidification, temperature and sea level rise, melting permafrost, extreme weather events and severe coastal erosion undermine our ability to thrive in our environment.”); see also JACQUELINE RICHTER-MENGE ET AL., ARCTIC REPORT CARD 2020: A 15-YEAR RETROSPECTIVE, NAT’L OCEANIC & ATMOSPHERIC ADMIN. 9–10 (2020), [https://arctic.noaa.gov/Portals/7/ArcticReportCard/Documents/ArcticReportCard\\_full\\_report2020.pdf](https://arctic.noaa.gov/Portals/7/ArcticReportCard/Documents/ArcticReportCard_full_report2020.pdf) [<https://perma.cc/J8J9-EUHT>].

11. See ARCTIC MONITORING & ASSESSMENT PROGRAMME, SNOW, WATER, ICE AND PERMAFROST IN THE ARCTIC: SUMMARY FOR POLICY-MAKERS 13 (2017), <https://www.amap.no/documents/download/2888/inline> [<https://perma.cc/Q6YY-PJCB>].

12. See James Astill, *The Melting North*, ECONOMIST (June 16, 2012), <https://www.economist.com/special-report/2012/06/16/the-melting-north> [<https://perma.cc/7R6A-5NN5>] (“[T]he great melt is going to make a lot of people rich . . . . An obvious [geostrategic consequence] is the potentially disruptive effect of new trade routes. Asia’s big exporters, China, Japan and South Korea, are already investing in ice-capable

Arctic will continue to decrease rapidly, leading to a seasonally ice-free Arctic Ocean later this century. These projections have fueled abundant discussion about possibly new and geographically-shorter international shipping routes linking the Atlantic and Pacific Oceans by the Northern Sea Route or Northwest Passage. Where these passages used to be clear of sea ice and become passable only occasionally and for a short time during the summer, projections indicate that these passages may no longer remain frozen by as early as 2035.<sup>13</sup> Many countries are already establishing significant footholds through expanded territory claims far out into the coastal shelf and investing in icebreakers, port facilities, navigation and charting, and other infrastructure measures necessary to develop the Arctic.<sup>14</sup>

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vessels, or planning to do so. For Russia, which has big plans to develop the sea lane with trans-shipment hubs and other infrastructure, this is a double boon. It will help it get Arctic resources to market faster and also, as the NSR becomes increasingly viable, diversify its hydrocarbon-addicted economy.”); Tim Ellis, *Warming Opens Polar Shipping Route: “Ice-Free Arctic Ocean” by Summer 2035?*, KUAC (Aug. 14, 2015, 11:15 AM), <https://fm.kuac.org/post/warming-opens-polar-shipping-route-ice-free-arctic-ocean-summer-2035> [<https://perma.cc/Q73A-VCDQ>]; *Satellite Observations of Arctic Change: Human Activities*, NAT’L SNOW & ICE DATA CTR., <http://nsidc.org/soac/cascading-impacts> [<https://perma.cc/NV29-SK2E>] (last visited Apr. 14, 2022) (“Declining summer sea ice opens the prospect of . . . increased marine traffic.”); Lawrence C. Smith & Scott R. Stephenson, *New Trans-Arctic Shipping Routes Navigable By Midcentury*, PROC. NAT’L ACAD. SCI. U.S. (Mar. 26, 2013), <https://doi.org/10.1073/pnas.1214212110> [<https://perma.cc/JJ72-SRZL>] (“Climate model projections indicate that [an] overall trend [of decreasing late-summer sea ice extent in the Arctic] will continue, leading to a seasonally ice-free . . . Arctic Ocean later this century.”).

13. See, e.g., Jennifer Hansler, *Pompeo: Melting Sea Ice Presents “New Opportunities for Trade”*, CNN (May 7, 2019, 4:44 AM), <https://www.cnn.com/2019/05/06/politics/pompeo-sea-ice-arctic-council/index.html> [<https://perma.cc/N82W-9LJT>]. U.S. Secretary of State Mike Pompeo presented an Arctic policy speech in Finland that emphasized security threats in the Arctic from Russia and China and praised the Arctic region for its economic opportunities, noting that “[s]teady reductions in sea ice are opening new passageways and new opportunities for trade . . . This could potentially slash the time it takes to travel between Asia and the West by as much as 20 days . . . Arctic sea lanes could become the 21st century Suez and Panama Canals.” *Id.* Secretary Pompeo also stated that “America is the world’s leader in caring for the environment.” *Id.* In response, the Arctic Institute’s President and Managing Director Dr. Victoria Hermann stated: “America’s Arctic ambivalence is a far greater threat than the ambitions of Russia and China combined. With no strong fleet of icebreakers, no Arctic Ambassador, and no climate change policy, America is arguably the weakest circumpolar nation, and shows no signs of correcting course . . . . At a time where the region is undergoing abrupt and dangerous climate changes, . . . [t]he Trump Administration should be more concerned about the imminent threat it is posing to Americans through climate inaction than Chinese and Russian ambitions.” *The Arctic Institute’s Reaction to Secretary of State Mike Pompeo’s Speech in Rovaniemi Ahead of the AC Ministerial Meeting*, ARCTIC INST. (May 6, 2019), <https://www.thearcticinstitute.org/reaction-secretary-state-mike-pompeos-speech-rovaniemi-finland-arctic-council-ministerial-meeting/> [<https://perma.cc/9FCG-ET5Q>].

14. See *Arctic Competition, Part One: Resource Competition in the Arctic*, FOREIGN POL’Y (Oct. 13, 2020), <https://foreignpolicy.com/2020/10/13/arctic-competition-resources-governance-critical-minerals-shipping-climate-change-power-map/> [<https://perma.cc/8G8D-CC3Y>]; Scott Borgerson et al., *The Emerging Arctic*, COUNCIL ON FOREIGN REL., <https://www.cfr.org/interactives/emerging-arctic#!/emerging-arctic> [<https://perma.cc/5PSU-8VMU>] (last visited Apr. 14, 2022); *China to Develop Arctic Shipping Routes Opened by Global Warming*, BBC NEWS (Jan. 26, 2018), <https://www.bbc.com/news/world-asia-china-42833178> [<https://perma.cc/47UL-UVFA>]; Xie Wenwen & Caixin Globus, *For Chinese*

The shipping industry presents a potential source of stable long-term and seasonal employment for Arctic Indigenous peoples, for whom resource-extraction industries are among the primary employment opportunities as their communities have undergone a 200-year shift from subsistence to cash-and-trade and waged employment.<sup>15</sup> Increased ship traffic may also present further danger to local communities, including icebreakers disrupting sea ice and causing early breakup and damage to Inuit transportation corridors and subsistence patterns—as well as heightened pollution, oil spills, contamination, and need for disaster response far beyond small Indigenous communities' capacities.<sup>16</sup> Moreover, Arctic-dwelling Indigenous people already have seen impacts on marine mammal behavior as vessel noise rises, threatening the livelihood of whale hunters by injuring and driving whales away from their hunting grounds, issues which will be exacerbated by increased marine ship traffic.<sup>17</sup>

*c. People and Nations Involved*

Arctic industries—notably, resource-extraction activities including exploration and the development of nonrenewable resources—demonstrate varying relationships with local residents.<sup>18</sup> In some cases, local residents glean meaningful financial and employment benefits, but in others, they bear the burden of responding to the direct and indirect social and environmental impacts on northern residents.<sup>19</sup> Since the 1970s and 1980s, various power-sharing strategies have been implemented in Arctic resource governance.<sup>20</sup> These strategies include formal “co-management” arrangements that share power between governments and resource users to reduce conflicts over common resources.<sup>21</sup> Co-management arrangements can also work toward achieving sustainability by providing Indigenous peoples with increased authority in resource decision-making,

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*Companies, Investment in Arctic Infrastructure Offers Both Opportunities and Challenges*, ARCTIC TODAY (June 17, 2019), <https://www.arctictoday.com/for-chinese-companies-investment-in-arctic-infrastructure-offers-both-opportunities-and-challenges/> [<https://perma.cc/G7W5-YCEL>].

15. See John Downing, *An Evaluation of the Impact of Shipping on Arctic Indigenous Peoples*, U. WASH. HENRY M. JACKSON SCH. INT'L STUD. (June 27, 2019), <https://jsis.washington.edu/news/an-evaluation-of-the-impact-of-shipping-on-arctic-indigenous-peoples/> [<https://perma.cc/K4B9-ZWMS>].

16. See INUIT CIRCUMPOLAR COUNCIL, *supra* note 1, at 27–30.

17. See *id.* at 30.

18. See STEFANSSON ARCTIC INST. & ARCTIC COUNCIL SUSTAINABLE DEV. WORKING GROUP, ARCTIC HUMAN DEVELOPMENT REPORT (AHDR): REGIONAL PROCESSES AND GLOBAL LINKAGES 255–59 (2014), <http://norden.diva-portal.org/smash/get/diva2:788965/FULLTEXT03.pdf> [<https://perma.cc/GR9V-RJQD>] (describing resource governance strategies and outcomes in the Arctic, focusing on the nonrenewable resource extraction industries).

19. *Id.*

20. See, e.g., *id.* at 258–59.

21. *Id.*

while improving governments' compliance with regulations and policies.<sup>22</sup>

i. Indigenous Peoples in the Arctic

Arctic Indigenous communities include the Sámi (Finland, Sweden, Norway, and Northwest Russia), Nenets, Khanty, Evenk, and Chuckchi (Russia), Aleut and Yupik (Alaska), and Inuit (Alaska, Canada, and Greenland).<sup>23</sup> These communities have a unique connection to Arctic landscapes and seascapes, as marine people dependent on the Arctic Ocean for transportation, its marine resources for food security, and free movement on land, sea ice, and the Arctic ocean.<sup>24</sup>

Several of these communities have already begun the immense work of advocating and regulating the emerging industry. For example, Inuit of Alaska, Canada, Greenland, and Chukotka (Russia) came together and established the 2018 Utqiagvik Declaration during the Thirteenth General Assembly of the Inuit Circumpolar Council (ICC) which outlined specific, sustainable development goals. These goals include directing the ICC “to advocate for policies that facilitate cross-boundary Inuit trade, employment, and travel, across our circumpolar homeland” and urging the ICC “to promote sustainable economic and business development through the Arctic Council and its working groups, the United Nations agencies, and collaborate with other economic development fora and networks focusing on the Arctic, including the Arctic Economic Council.”<sup>25</sup> In November 2020, the ICC participated in the International Maritime Organization (IMO) Marine Environment Protection Committee virtual meetings, calling on its direct and strong interest in IMO’s discussions on Arctic shipping.<sup>26</sup> After the meetings, the ICC released a statement calling for stronger protections for safe Arctic shipping, after what it considered a “weak” regulation passed during the meetings.<sup>27</sup> The ICC has been working with the industry and regulators to ensure safe Arctic shipping protocols and states that Arctic marine traffic is “vital to the region’s economic base, resupplying

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22. *See id.*

23. *See* Downing, *supra* note 15.

24. *See* Okalik Eegeesiak, *The Arctic Ocean and the Sea Ice Is Our Nuna*, U.N. CHRON. (May 2017), <https://www.un.org/en/chronicle/article/arctic-ocean-and-sea-ice-our-nuna> [<https://perma.cc/6SVB-DX3K>].

25. Utqiagvik Declaration 2018 As Declared by the Inuit of Alaska, Canada, Greenland, and Chukotka on the Occasion of the 13th General Assembly of the Inuit Circumpolar Council (ICC) from 16–19 July 2018 in Utqiagvik, Alaska, and in the context of the Assembly Theme: Inuit—The Arctic We Want (July 19, 2018), <https://www.arctictoday.com/wp-content/uploads/2018/07/2018-Utigavik-Declaration.pdf> [<https://perma.cc/X3FA-WYX7>].

26. *See* Press Release, Inuit Circumpolar Council, Inuit Call for Stronger Protections for Safe Arctic Shipping Considering Weak HFO Ban Passed at IMO (Nov. 24, 2020), <https://www.inuitcircumpolar.com/news/inuit-call-for-stronger-protections-for-safe-arctic-shipping-considering-weak-hfo-ban-passed-at-imo/> [<https://perma.cc/JN7V-MXPW>].

27. *Id.*

communities and providing goods and services to remote locations.”<sup>28</sup> Dr. Dalee Sambo Dorough (Inuk), International Chair of the ICC, stated that “protection of Arctic marine environment will accompany safe shipping guidelines that protect Inuit food security, the crew members, as well as the economic interests of those who are using the Arctic marine region.”<sup>29</sup> In an Arctic policy report to Canada’s Special Senate Committee on the Arctic, the ICC has also urged that the governments must recognize the use and occupation of the Northwest Passage as an important historical contribution of the Inuit people.<sup>30</sup> In addition, the ICC has requested that governments must work closely and collaboratively with Inuit to establish a proactive and diplomatic response to the emerging questions shipping raises for Arctic sovereignty, including limits on foreign shipping, ship noise, heavy fuel oil use, foreign owned- or operated-cruise ships and small vessels, and China’s growing interest in commercial shipping.<sup>31</sup>

## ii. Arctic States

The eight Arctic nations are Canada, Denmark, Finland, Iceland, Norway, Sweden, Russia, and the United States.<sup>32</sup> These nations comprise the Arctic Council, the preeminent governmental forum for addressing issues related to the Arctic Region, and which focuses on matters related to sustainable development and environmental protection.<sup>33</sup>

Several nations have already begun engaging with Indigenous communities in the polar shipping industry, but serious sovereignty problems have begun to emerge. For example, Canada responded to major outcry over its design for a network of “low impact shipping corridors” across the Canadian Arctic, which would provide better access to infrastructure,

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28. *Id.*; see also Kelly Eningowuk & Carole Simon, *Inuit Circumpolar Council Calls for Safe Arctic Shipping to Protect Inuit Rights and the Marine Environment—ICC Applies for IMO Consultative Status*, INUIT CIRCUMPOLAR COUNCIL (Feb. 25, 2020), <https://www.inuitcircumpolar.com/news/inuit-circumpolar-council-calls-for-safe-arctic-shipping-to-protect-inuit-rights-and-the-marine-environment-icc-applies-for-imo-consultative-status/> [<https://perma.cc/UP39-C3Q6>] (“Modern day remote Arctic communities depend on markets in the south for many of our goods. With this comes the need for safe and economically sound shipping and transportation routes to move people and goods to and from this region, which is becoming more accessible, as ice recedes. ICC’s position is clear, we must take measures to ensure safe Arctic shipping in a manner which does not further burden remote Inuit communities.”).

29. *Id.*

30. *See* SUBMISSION OF THE INUIT CIRCUMPOLAR COUNCIL CANADA TO THE SPECIAL SENATE COMMITTEE ON THE ARCTIC REGARDING THE ARCTIC POLICY FRAMEWORK AND INTERNATIONAL PRIORITIES 4–6 (Mar. 2019), [https://sencanada.ca/content/sen/committee/421/ARCT/Briefs/InuitCircumpolarCouncilCanada\\_e.pdf](https://sencanada.ca/content/sen/committee/421/ARCT/Briefs/InuitCircumpolarCouncilCanada_e.pdf) [<https://perma.cc/TH66-VDZK>].

31. *Id.*

32. *See Arctic Region*, OFF. OF OCEAN AND POLAR AFFS., U.S. DEP’T OF STATE, <https://www.state.gov/key-topics-office-of-ocean-and-polar-affairs/arctic/> [<https://perma.cc/RVG3-JJGD>] (last visited Apr. 14, 2022).

33. *See id.* The Arctic Council’s mandate specifically excludes military security and is an international forum that “operates on the basis of consensus, echoing the peaceful and cooperative nature of the Arctic Region.” *Id.*



navigational support, and emergency response services, because they failed to consult Indigenous voices in their design.<sup>34</sup> In response, a team of researchers from the University of Ottawa began Arctic Corridors Research, a research team consulting First Nations' voices, while building relationships with partner Indigenous communities. Arctic Corridors Research aims to build policy on shipping guidance in Arctic Canada which outlines shipping trends, identifies culturally significant marine areas, and provides recommendations for low-impact corridors.<sup>35</sup> While the government has mapped Arctic Corridors' suggested changes to low-impact shipping routes and shared with Canadian federal agencies, the Canadian government has not yet implemented the plans and anticipates that the final outcomes will take years to implement.<sup>36</sup> The well-documented failures of Canada's low-impact shipping corridor design—not to mention the absence and inadequacies of formal avenues for Indigenous voices in the design process—signal a clear need for a well-structured and obligatory Indigenous consultation process as the Arctic nations continue to develop the polar shipping industry.

### III. CONSULTATION AND SELF-DETERMINATION: INTERNATIONAL LAW IN THE ARCTIC

This part provides the international law context of applying Convention 169 in the Arctic region.

#### *a. International Law in the Arctic*

The central demand for international law made by Indigenous peoples is the claim to control and own their territories and their resources, as Indigenous relationships with land is a key pillar of self-determination.<sup>37</sup> Convention 169 represents one of two distinct legal approaches to developing international human rights law to protect the rights of Indigenous peoples—to elaborate on specific norms recognizing the rights of Indigenous peoples, which is also taken in the U.N. Declaration on the Rights of Indigenous

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34. See Sophie Yeo, *Indigenous People Help Develop Better Arctic Shipping Routes*, HILL (Feb. 17, 2020), <https://thehill.com/changing-america/sustainability/climate-change/482927-indigenous-people-help-develop-better-arctic> [<https://perma.cc/4LB3-MZU7>].

35. See generally Jack Dawson et al., *Arctic corridors and northern voices project: Methods for community-based participatory mapping for low impact shipping corridors in Arctic Canada*, 7 METHODSX 1, 1–4 (2020), <https://www.sciencedirect.com/science/article/pii/S2215016120302843> [<https://perma.cc/ZZ8U-9UND>] (presenting the Arctic Corridors research details, design, and methodological approach); *Arctic Corridors: Research for Policy on Shipping Governance in Arctic Canada*, ARCTIC CORRIDORS RSCH., <https://www.arcticcorridors.ca/reports/> [<https://perma.cc/DWD6-PJZ8>] (last visited May 16, 2022) (collecting representative Arctic Corridors reports).

36. See Yeo, *supra* note 34.

37. See S.J. Rombouts, *The Evolution of Indigenous Peoples' Consultation Rights Under the ILO and U.N. Regimes: A Comparative Assessment of Participation, Consultation, and Consent Norms Incorporated in ILO Convention No. 169 and the U.N. Declaration on the Rights of Indigenous Peoples and Their Application by the Inter-American Court of Human Rights in the Saramaka and Sarayaku Judgments*, 53 STAN. J. INT'L L. 169, 173–75 (2017).

Peoples (UNDRIP). The other approach is to recognize that the rights of Indigenous peoples may be protected through the application of general human rights norms, including the application of minorities' provisions and human rights treaty monitoring bodies associated with the International Covenant on Economic, Social and Cultural Rights (ICESR) and the International Covenant on Civil and Political Rights (ICCPR), and the property rights protections offered by regional human rights instruments.<sup>38</sup> Both approaches increasingly address the rights of Arctic Indigenous peoples. Although international law clearly presents a trend of consolidating Indigenous rights, this trend has only limited penetration in the domestic legal systems of the Arctic states, particularly in the three large federal Arctic states of the United States, Canada, and Russia.<sup>39</sup> The Nordic states are more receptive to the influences and developments of international law.<sup>40</sup> Norway and Denmark are both parties to Convention 169, Denmark has enacted a new self-governance act which recognizes the right to self-determination of Inuit of Greenland, and all four Nordic states are parties to the two international covenants.<sup>41</sup>

*b. Convention 169*

The ILO adopted Convention 169 on June 27, 1989 as a means of developing and supporting new ways to enhance the protection of human rights for aboriginal peoples.<sup>42</sup> At least twenty-four countries have ratified

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38. See STEFANSSON ARCTIC INST. & ARCTIC COUNCIL SUSTAINABLE DEV. WORKING GROUP, *supra* note 18, at 234–35, 237–38.

39. *See id.*

40. *See id.*

41. *See id.* Norway implemented Convention 169 through the Finnmark Act, which accorded an equal number of representatives from the Sámi Parliament and other residents of 95 percent of the northernmost county of Norway. Finnmark Act (Act No. 85 of June 17, 2005 relating to Legal Relations and Management of Land and Natural Resources in the County of Finnmark), <https://lovdata.no/dokument/NLE/lov/2005-06-17-85> [<https://perma.cc/SV7Q-X545>]; *see also* STEFANSSON ARCTIC INST. & ARCTIC COUNCIL SUSTAINABLE DEV. WORKING GROUP, *supra* note 18, at 240. However, the Finnmark Act has been criticized for not implementing Convention 169 properly in marine and other Sámi regions. *See* STEFANSSON ARCTIC INST. & ARCTIC COUNCIL SUSTAINABLE DEV. WORKING GROUP, *supra* note 18, at 240–41.

42. *See* C. 169, *supra* note 8; UNDERSTANDING THE INDIGENOUS AND TRIBAL PEOPLES CONVENTION, 1989 (NO. 169): HANDBOOK FOR ILO TRIPARTITE CONSTITUENTS, INT'L LABOUR ORG. 1–5 (2013), [https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---normes/documents/publication/wcms\\_205225.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_205225.pdf) [<https://perma.cc/D9CK-SWKM>] [hereinafter Understanding C. 169 Handbook]. The ILO has concerned itself with Indigenous peoples since the early twentieth century and recognizes that labor conditions of Indigenous peoples are consequences of deep-rooted injustice and intrinsically linked to issues of identity, culture, language, customs, and land. *See* Understanding C. 169 Handbook, *supra* at 4. The ILO Forced Labor Convention, Convention 29, was “directly inspired” by the discrimination and exploitation of Indigenous and tribal workers. *Id.* Convention 169 is the ILO’s second Convention targeted at the labor conditions of Indigenous and tribal peoples and was drafted to be responsive to the problems raised by the inherently assimilationist 1957 Indigenous and Tribal Peoples Convention (C. 107). *See id.*

Convention 169, including Arctic nations Denmark and Norway.<sup>43</sup> Convention 169 aims to overcome discriminatory practices affecting Indigenous and tribal peoples, covering a wide range of issues including employment and vocational training, education, health and social security, customary law, traditional institutions, languages, religious beliefs, and cross-border cooperation.<sup>44</sup> Its preamble contextualizes Convention 169 in light of “the developments which have taken place in international law since 1957, as well as developments in the situations of indigenous and tribal peoples in all regions of the world.” The preamble also sets out aims, including “recognising the aspirations of these peoples 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.”<sup>45</sup> Convention 169 applies to all Indigenous and tribal peoples, who constitute more than 370 million people in seventy countries worldwide, as defined by a set of subjective and objective criteria which capture both people’s self-identification as “Indigenous” or “tribal,” as well as factors including descent from populations who inhabited a region at the time of conquest, colonization, or establishment of state boundaries.<sup>46</sup> They constitute approximately 5 percent of the world’s population, but 15 percent of the world’s poor.<sup>47</sup>

Convention 169 is the cornerstone of the ILO strategy for Indigenous peoples’ rights for inclusive and sustainable development, which aims to strengthen ILO action concerning Indigenous and tribal peoples, address inequality and discrimination, and improve Indigenous livelihoods and working conditions, while building capacity for effective application of Convention 169.<sup>48</sup> The ILO insists that Indigenous and tribal peoples do not retain “special” rights under Convention 169, but rather it provides special measures to respond to the particular challenges that Indigenous and tribal peoples face to enjoying “the same human rights and fundamental freedoms as all human beings.”<sup>49</sup> Further, the ILO situates Convention 169’s broad concern for Indigenous rights with several provisions beyond the traditional scope of labor issues.<sup>50</sup> It recognizes that Indigenous people’s generalized

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43. *Ratifications of C169—Indigenous and Tribal Peoples Convention, 1989 (No. 169)*, INT’L LABOUR ORG., [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300\\_INSTRUMENT\\_ID:312314](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312314) [https://perma.cc/PSD9-QBY5] (last visited Apr. 14, 2022). Ratifying countries include Argentina, Bolivia, Brazil, Central African Republic, Chile, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, Luxembourg, Mexico, Nepal, Netherlands, Nicaragua, Norway, Paraguay, Peru, Spain, and Venezuela. *See id.*

44. *See Understanding C. 169 Handbook*, *supra* note 42, at 1–3.

45. C. 169, *supra* note 8, at Preamble.

46. *See Understanding C. 169 Handbook*, *supra* note 42, at 2–3.

47. *See id.* at 2.

48. *See* INDIGENOUS PEOPLES’ RIGHTS FOR INCLUSIVE AND SUSTAINABLE DEVELOPMENT, INT’L LABOUR OFF. POL’Y DEV. SESSION 1–5 (Oct. 7, 2015), [https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_412809.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_412809.pdf) [https://perma.cc/VR95-86MQ].

49. *Understanding C. 169 Handbook*, *supra* note 42, at 3.

50. *See id.* at 4–5.

marginalization leaves them vulnerable to exploitative labor practices.<sup>51</sup> It also recognizes that Indigenous people still suffer disproportionately from the worst forms of labor exploitation, and that the combined effect of undervalued traditional lifeways and limited access to education and vocational training leaves them seriously disadvantaged in the international labor market.<sup>52</sup> A key principle of the ILO is that “poverty anywhere constitutes a danger to prosperity everywhere,” and the ILO has concerned itself with large, systemic problems involving the living and working conditions of Indigenous peoples since its inception.<sup>53</sup>

Indigenous peoples were not formally involved in the drafting of the ILO instrument.<sup>54</sup> The ILO’s gesture towards including and providing substantial, wide-reaching access to Indigenous people during the drafting phase consisted of developing a questionnaire and initiating a special appeal to governments to consult representative organizations of Indigenous and tribal peoples.<sup>55</sup>

#### i. Article 6, Consultation

Consultation under Convention 169 is a fundamental right of Indigenous peoples and a fundamental principle of inclusive development.<sup>56</sup> Article 6(1) stipulates a general requirement to consult Indigenous peoples whenever legislative or administrative measures directly affect them.<sup>57</sup> Consultation takes place prior to decision-making, while participation (under the related Article 7) is an ongoing dialogue that takes place throughout the decision-making process.<sup>58</sup> Convention 169 also provides specific circumstances which raise an additional obligation to consult, including exploration of mineral and subsurface resources,<sup>59</sup> alienation or transmission of Indigenous peoples’ lands outside their own communities,<sup>60</sup> vocational training programs,<sup>61</sup> and educational programs.<sup>62</sup> The ILO Committee of Experts on Application of Conventions and Recommendations’s (CEACR) 2011 General Observation clarified the standards for consultation under Convention 169, which must: (1) be “formal, full and exercised in good faith” in a “genuine dialogue between governments and indigenous and tribal

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51. *See id.*

52. *See id.*

53. *Id.*; *see also ILO Declaration of Philadelphia*, INT’L LABOUR ORG. (MAY 10, 1944), <https://www.ilo.org/legacy/english/inwork/cb-policy-guide/declarationofPhiladelphia1944.pdf> [<https://perma.cc/B83Z-X233>] (asserting the ILO’s core aims and purposes including that “poverty anywhere constitutes a danger to prosperity everywhere”); Rombouts, *supra* note 37, at 178–79.

54. *See Rombouts, supra* note 37, at 181.

55. *See id.*

56. *See Understanding C. 169 Handbook, supra* note 42, at 11.

57. *See C. 169, supra* note 8, art. 6(1).

58. *Id.* arts. 6(1), 7.

59. *See id.* arts. 15–16.

60. *See id.* art. 17.

61. *Id.* art. 22.

62. *Id.*; *see also id.* art. 27.

peoples characterized by communication and understanding, mutual respect, good faith and the sincere wish to reach a common accord;” (2) put “appropriate procedural mechanisms” in place at the national level and “in a form appropriate to the circumstances;” (3) involve “indigenous and tribal peoples’ representative institutions” where considering “legislative and administrative measures;” and (4) “be undertaken with the objective of reaching agreement or consent to the proposed measures.”<sup>63</sup> Governments are responsible for ensuring that Indigenous participants have all relevant information provided in an intelligible form and manner, providing sufficient time for Indigenous parties to engage in internal decision-making processes, and making real effort to understand how the Indigenous parties’ decision-making processes function, such that they may adapt the form and timing of consultation to the Indigenous parties.<sup>64</sup>

Further, the ILO sets out strict standards for what individuals or organizations truly represent Indigenous peoples, stating that “[t]he important criterion is that representativeness should be determined through a process of the indigenous peoples themselves.”<sup>65</sup> The Indigenous representative must be able to clearly identify its constituents and its accountability toward these constituents.<sup>66</sup> If organizations are not truly representative of the communities, the resulting consultations are not in compliance with Convention 169.<sup>67</sup> Finally, Article 6(1)(c) specifically provides that governments are responsible for establishing means and providing resources for developing Indigenous peoples’ own institutions and initiatives for building ongoing dialogue.<sup>68</sup>

The ILO established the consultation process in order to safeguard the rights of Indigenous people to participate in the general civic life and to participate in the adoption of any measures which may affect them directly.<sup>69</sup> The CEACR urges that, without meaningful Indigenous consultation and participation in matters that directly affect Indigenous people, economic development is unlikely to reflect the aspirations and needs of Indigenous people and implicates serious repercussions for the success and implementation of development programs.<sup>70</sup>

The ILO’s tripartite structure, built upon a principle of equal representation of government, employer, and workers, provides no dedicated avenue for representation of Indigenous people.<sup>71</sup> This shortcoming has been criticized by Indigenous peoples.<sup>72</sup> However, the ILO maintains that “it has not been

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63. Understanding C. 169 Handbook, *supra* note 42, at 13 (quoting the CEACR 2011 General Observation).

64. *See id.* at 15.

65. *Id.* at 14.

66. *See id.* The ILO also notes that courts and ILO supervisory bodies alike have seen contests over failure to meet standards of representativeness. *Id.*

67. *See id.* at 15.

68. *See id.*; C. 169, *supra* note 8, art. 6(1)(c).

69. Understanding C. 169 Handbook, *supra* note 42, at 13.

70. *See id.*

71. *See id.* at 8.

72. *See id.* at 9.

an obstacle in practice” to Indigenous access to the ILO’s supervisory mechanisms, pointing to several cases of Indigenous people forming specific workers’ and employers’ organizations, or chapters within broader organizations.<sup>73</sup> The ILO further notes that in some countries, workers’ and employers’ organizations form alliances with Indigenous people to address labor violations affecting Indigenous individuals or communities and to support Indigenous economic development and enterprise growth.<sup>74</sup> Finally, the ILO points to the Program to Promote ILO Convention No. 169 (PRO 169)—its comprehensive technical assistance program that educates and promotes application of Convention 169—that supports tripartite constituents and Indigenous and tribal peoples in more than twenty-five countries.<sup>75</sup>

Overall, the ILO presents a positive-minded position on the lack of a direct access channel for Indigenous representation in applying and reporting on Convention 169, touting the strength of the tripartite model for leading to “greater cooperation among the social partners, ensur[ing] stronger awareness and participation in matters relating to international labour standards and eventually lead[ing] to better governance.”<sup>76</sup>

#### IV. CONSULTATION UNDER CONVENTION 169 IN ARCTIC SHIPPING

This part outlines the primary issues in consultation in practice and in the potential application in the United States, including issues, proposed resolutions, and remaining open questions.

##### *a. Lessons and Issues in Consultation*

The Committee of Experts’s (“the Committee”) commentary on Convention 169, in particular Article 6, reveals several clear, common, and interrelated issues in implementing consultation. These include:

- failure to consult Indigenous and tribal peoples in the development of the consultation process,<sup>77</sup>
- failure to develop sufficient consultation procedures before undertaking decision-making that directly affects the Indigenous and tribal peoples,<sup>78</sup>
- failure to implement those procedures appropriately such that they create favorable conditions for achieving agreement or consent to the

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73. *Id.*

74. *See id.* at 8.

75. *See id.* at 9.

76. *Id.* at 8.

77. *See* EXCERPTS FROM REPORTS AND COMMENTS OF THE ILO SUPERVISORY BODIES: APPLYING THE INDIGENOUS AND TRIBAL PEOPLES CONVENTION, 1989 (No. 169), INT’L LABOUR ORG. 13–15 (2019), [https://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---ilo\\_aids/documents/publication/wcms\\_714341.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/publication/wcms_714341.pdf) [<https://perma.cc/65CW-3H3D>].

78. *See id.* at 15–17.

proposed measures (though actually achieving agreement or consent is not required),<sup>79</sup>

- failure to establish a climate of mutual trust where Indigenous and tribal peoples are historically marginalized and mistrust state institutions,<sup>80</sup> and
- failure to establish genuine dialogue that goes beyond mere informational meetings as required.<sup>81</sup>

Regarding consultation and participation on natural resources, the Committee observed special difficulties in establishing a solutions-oriented dialogue where economic and development industry interests differ from the cultural, social, and economic interests of the Indigenous people of the region.<sup>82</sup>

The next subsection illustrates how the Sámi consultation process in Norway demonstrates examples of notable successes in outlining a rigorous consultation process and the challenges to that process that arose when implementing an Arctic development scheme.

#### i. Sámi Consultation in Norway

The ILO produced a document detailing the challenges and successes Norway faced while pursuing the consultation process with the Sámi, a population whose land Sápmi (ancestral territory) lies across national borders of the four countries now called Finland, Norway, Russia, and Sweden.<sup>83</sup> Norway became the first country to ratify Convention 169 in 1990.<sup>84</sup> In 2003, Norway sought to implement the consultation procedures with the Sámediggi (Sámi Parliament) via the highly contested Finnmark Act.<sup>85</sup> Sámi institutions and legal experts asserted the Finnmark Act did not meet Convention 169's standards, and a debate ensued over whether the Finnmark Act's process and substance sufficiently protected Sámi land, natural resource rights, and the consultation requirement.<sup>86</sup> With significant

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79. *See id.* at 17–18.

80. *See id.* at 18–20.

81. *See id.* at 20.

82. *See id.* at 23.

83. *See* PROCEDURES FOR CONSULTATIONS WITH INDIGENOUS PEOPLES: EXPERIENCES FROM NORWAY, INT'L LABOUR ORG. 9 (2016), [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms\\_534668.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_534668.pdf) [https://perma.cc/6LRT-ABC9].

84. *See id.* at 10.

85. *See id.* at 10–11.

86. *Id.* In a 2003 report, the Committee of Experts emphasized:

The process and the substance are inextricably intertwined in the requirements of the Convention, and in the present conflict. It appears to the Committee that if the Sámediggi, as the acknowledged representative of the Sami people of Norway, were to agree to the proposal, they could accept this solution as a resolution of the claims of land rights which have long been the subject of negotiation between the Sami and the Government. The adoption of the Finnmark Estate without such agreement amounts, however, to an expropriation of rights recognized in judicial decisions in Norway and under the Convention.

*Id.* (quoting a 2003 CEACR Report).

guidance and commentary from the CEACR, the Norwegian government renewed its efforts to consult the Sámediggi and developed a dialogue process that resulted in (1) the successful adoption of a revised and amended Finnmark Act in 2005 and (2) the formation of a joint working group with representatives of the Sámediggi and the Norwegian government pursuing clarification of the legal standards for Norway's duty to consult and development of a proposal for mutually agreeable consultation procedures and guidelines.<sup>87</sup>

The joint working group produced a report which identified Norway's various legal obligations to the Sámi under international law and found Convention 169 to be Norway's most explicit commitment to Indigenous peoples' rights.<sup>88</sup> One key aspect to the strength of Convention 169 is that it foregrounds the participation requirement for the Indigenous peoples concerned, realized through the provisions establishing the state's responsibility to develop a collaborative relationship with the Sámi, such that the Indigenous community has the opportunity to participate in the protection of its rights in an active, systematic, and culturally responsive manner.<sup>89</sup>

Reflecting this ideal, the 2006 guidelines outlined a "dual approach" to consultation and participation: Sámi participation in the legislative process alone does not constitute consultation, and Sámi consultation does not preclude participation in the legislative process for issues of significance to them.<sup>90</sup> The guidelines aimed to establish an ongoing communication pattern by which the Sámi's interests are considered from the outset of the legislative process through participation, and, simultaneously, the Sámi are supported in acting independently and making autonomous decisions through exercising their traditional decision-making authorities through consultation.<sup>91</sup>

Critically, the working group's 2005 procedures also specify the geographical and substantive scope of the duty to consult. The Norwegian government's obligation to consult the Sámediggi under Convention 169 covers seven counties that are traditional Sámi areas, all land dispositions, land interventions, and land rights within traditional Sámi areas, and may include all material and immaterial forms of Sámi culture.<sup>92</sup>

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87. *See id.*

88. *See id.* at 13. The working group also identified legal frameworks and duties underpinning the adoption of Convention 169, including the UN ICCPR (1966), which Norway incorporated in its legislation through its 1999 Human Rights Act. *See id.*

89. *See id.* at 15.

90. *See id.*

91. *See id.*

92. *See id.* at 20 (quoting the 2005 procedures) (noting that material and immaterial forms of Sámi culture include music, theatre, literature, art, media, language, religion, cultural heritage, immaterial property rights and traditional knowledge, place names, health and social welfare, day care facilities for children, education, research, land ownership rights and rights to use lands, matters concerning land administration and competing land utilization, business development, reindeer husbandry, fisheries, agriculture, mineral exploration and extraction activities, wind power, hydroelectric power, sustainable development, preservation of cultural heritage, biodiversity and nature conservation).



The procedures also recognize the difficulty of determining precisely the traditional borders of Sápmi and give special consideration to Sámi interests in those areas, even where Sámi culture today is weak and its visibility has been diminished by decades of erasure and assimilationist policies.<sup>93</sup>

After several years of biannual meetings between Sámediggi and Norwegian state representatives, the ILO produced a report reflecting optimism that a mutually agreeable consultation procedure can be developed.<sup>94</sup> The Sámediggi urged that the consultation process produced positive experiences and outcomes that could serve as a model.<sup>95</sup> Further, after the Sámediggi identified and cited a number of specific inadequacies that could be addressed—including inadequate scope in the administrative and political leadership representing the state, inadequate information and background material, and procedural backlog and deferral—Norwegian state authorities took steps to conduct an internal evaluation of the processes and both parties came to an agreement on heightened standards for meetings, communications, and procedures throughout the consultation process.<sup>96</sup>

However, some issues remained highly contentious. The parties failed to reach agreement on the 2009 Norwegian Minerals Act (the “Minerals Act”), a plan to explore and exploit minerals owned by the state that directly affected Sámi land and reindeer management.<sup>97</sup> The Minerals Act provided that an exploring party in Finnmark must “take reasonable steps to obtain information about directly affected Sami interests in the area,” and that the exploration permit application might be refused if it would be contrary to Sámi interests, providing an opportunity to comment for the Sámediggi, local authorities, and reindeer management boards, but leaving ultimate decision-making capacity to the Norwegian state authority.<sup>98</sup>

The Sámediggi expressed serious concern that the Minerals Act did not provide adequate consultations on mineral exploration permits in Finnmark and other traditional Sámi lands, and in response, developed its own draft guide for mineral resource exploration and development that it adopted in 2010.<sup>99</sup> The mineral guide was aimed at transparency and predictability, intended to ensure that the Sámi could negotiate about exploratory activities and operations, so that they would share in the benefits of the business involving their land and continue their strong relationships with businesses that benefit, strengthen, and develop Sámi culture to coexist with traditional Sámi lifeways.<sup>100</sup> The Sámediggi urged that its mineral guide was an attempt to overcome a situation in which the Sámediggi could not provide consent to

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93. *See id.*

94. *Id.*

95. *Id.* at 30.

96. *See id.*

97. *See id.* at 31–32.

98. *See id.*

99. *See id.* at 32.

100. *See id.* at 33–34.

all mineral activities, recalling that the Sámediggi had refused the Minerals Act and any activities regulated by it twice.<sup>101</sup>

Further, the Sámediggi reminded the Norwegian state government of the real consequences of proceeding with legislation that ran counter to Sámi interests and to which the Sámi had not given their consent: the Sámediggi held powerful sway with the private companies engaged in the mineral business, and, historically, these mineral companies would stay activity whenever the Sámediggi refused their consent.<sup>102</sup> Ultimately, the Sámediggi called for the Minerals Act to be clarified and revised with respect to Sámi rights, and, as predicted, they were joined in this call by the Norwegian Mineral Industry, the trade association for the entire Norwegian mineral and mining industry that represents approximately 160 member-companies and works in cooperation with the Norwegian national industry association and industry suppliers of goods and services.<sup>103</sup>

#### *b. Consultation Applied in Arctic Shipping*

If the United States ratifies Convention 169, it can take advantage of the lessons and warnings from other nations when developing and implementing its consultation procedures. The United States could follow the model pursued by Norway and the Sámediggi, building its consultation procedures with the Indigenous peoples of the Alaskan Arctic before developing its shipping routes and infrastructure to support the industry. In terms of representation, the United States could begin to reach out to groups like the international ICC and the local Alaska Native Corporations, including village and regional corporations, which would demonstrate their representation and responsiveness to their constituents per Convention 169's requirements. Building the consultation process before the polar shipping industry fully emerges would provide a proactive response to the concerns expressed by Arctic Alaska Native people and establish ongoing dialogue about a growing industry that directly affects these marine peoples' land and lifeways. The development of the consultation process also presents an expanded opportunity for Arctic Alaska Native peoples to participate in shaping the industry such that it comports with the goal of coexisting with—rather than supplanting—the traditional livelihoods. This further aligns with the principles of Indigenous self-determination outlined in the UNDRIP.

#### *c. Remaining Open Questions Under C. 169*

Convention 169's encouragement for "cross-border cooperation" and an inter-governmental cooperative approach to facilitate consultation inevitably

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101. *See id.* at 32–33.

102. *See id.*

103. *See, e.g., About Us*, NORSK BERGINDUSTRI, <https://www.norskbergindustri.no/about-us---info-in-english/> [<https://perma.cc/U84F-H3VG>] (last visited Apr. 14, 2022); *Land, Resource Rights Key to Sami People's Self-Determination, Says UN Expert*, UN NEWS (Aug. 31, 2015), <https://news.un.org/en/story/2015/08/507642-land-resource-rights-key-sami-peoples-self-determination-says-un-expert> [<https://perma.cc/9P5D-BBR7>].

raises the appropriateness of supporting (and perhaps imposing) pan-Indigeneity or a unifying “Arctic identity” among circumpolar Arctic Indigenous peoples.<sup>104</sup> Groups like the ICC, a major international non-government organization representing around 180,000 Inuit of Alaska, Canada, Greenland, and Chukotka (Russia), formed when Inuit sought to speak with a united voice on issues of common concern and to strengthen unity, promote rights, and encourage policies that would safeguard Inuit and their Arctic environment.<sup>105</sup> However, as not every Arctic Indigenous group is represented by such an institution, this returns to the significant unanswered question that Convention 169 presents about whether the ILO structure sufficiently provides access for Indigenous participation and representation.

Further, Convention 169 faces a significant obstacle to successful implementation in many states where histories of state-sponsored and colonial violence, exclusion, and mistrust of Indigenous communities contribute to a climate of confrontation and lack of mutual trust.<sup>106</sup> Finally, Convention 169 leaves open the complex interaction with private sector actors, which may struggle with standard-setting and balk at the risk of being caught between the standards of a given non-ratifying nation and the standards of an enforceable legally binding instrument.<sup>107</sup>

## V. CONCLUSION

This Article urges U.S. ratification of ILO Convention 169, the Indigenous and Tribal Peoples Convention, in light of the rapidly changing Arctic landscape and the burgeoning industry emerging in the region. Convention 169 is an imperfect but meaningful tool with the capacity to strengthen dialogue between Arctic Indigenous people and the key governments, worker organizations, and employers represented in the ILO’s tripartite structure. As

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104. *See, e.g.*, STEFANSSON ARCTIC INST. & ARCTIC COUNCIL SUSTAINABLE DEV. WORKING GROUP, *supra* note 18, at 131–33 (“There are reasons to wonder if an Arctic identity exists at the individual level, and whether such an identity is similarly understood in all eight Arctic Council countries. Still, sometimes a broader and more general definition of an Arctic identity—stretching over nations and regions—is used[,] . . . draw[ing] on and stress[ing] valued characteristics that include resourcefulness and hard work in using nature to secure material wealth and prosperity, resilience and adaptability in thriving in a cold climate, closeness with nature and the desire to explore it, and commitment to protecting the Arctic and its natural beauty. Nevertheless, . . . a general Arctic identity is still weak, while regional, local and Indigenous identities have developed.”)

105. *See About ICC: Our Story*, INUIT CIRCUMPOLAR COUNCIL, [www.inuitcircumpolar.com/about-icc/](http://www.inuitcircumpolar.com/about-icc/) [<https://perma.cc/22G7-KCMB>] (last visited Apr. 14, 2022). ICC holds a General Assembly every four years at which delegates from across the circumpolar region elect a new Chair and an executive council, develop policies, and adopt resolutions that will guide the activities of the organization for the coming term. *See id.* The General Assembly is the heart of the organization, providing an opportunity for sharing information, discussing common concerns, debating issues, and strengthening the bonds between all Inuit. *See id.* The group maintains and builds affiliation with organizations such as the Inuit Circumpolar Youth Council and the International Elders Council, including representatives from these organizations at the General Assembly. *See id.*

106. *See* Understanding C. 169 Handbook, *supra* note 42, at 17.

107. *See id.* at 25.

the polar shipping industry develops in a changing climate, Convention 169's consultation process offers a strong avenue to protect the land, autonomy, and lifeways of Arctic Indigenous people and establish a stronger position for the United States, its workers, and its corporations as global players in the Arctic.