Chapter 17

Indigenous Self-determination and the Regulation of Navigation and Shipping in Canadian Arctic Waters

Suzanne Lalonde and Nigel Bankes

Abstract

Rapidly shrinking sea ice and changing socioeconomic factors have encouraged an increase in Arctic shipping traffic. This reality is testing Canada’s marine safety and security regime and creating profound challenges for northern Indigenous communities that rely on the marine environment for their food, transport and way of life. This chapter explores the legal and policy opportunities available to Inuit communities in the Canadian Arctic, under both international and domestic law, to achieve self-determination with respect to navigation and shipping activities in the Arctic.

Keywords


1 Introduction

Rapidly shrinking sea ice and changing socioeconomic factors have encouraged an increase in Arctic shipping traffic. According to the lead researcher of the Arctic Corridors and Northern Voices project, “the total kilometers travelled by ships in Inuit Nunangat has more than tripled since 1990 and most of this increase has occurred in Nunavut waters.”¹ This reality is testing Canada’s

marine safety and security regime and creating profound challenges for northern Indigenous communities that rely on the marine environment for their food, transport and way of life.2 “Inuit are a marine people; ... the sea is integral to the Inuit way of life.”3

This chapter explores the legal and policy opportunities available to Inuit communities in the Canadian Arctic to achieve self-determination with respect to navigation and shipping activities in the Arctic. The chapter first canvasses the opportunities available under international law and then considers domestic law. The first section of Part 1 identifies the principal international law instruments which comprise a specially tailored Indigenous human rights regime and briefly considers their legal status and scope of application. The second section focuses on four of the most important rights that afford Indigenous peoples a say in the management of marine spaces and highlights some examples of Indigenous agency in the Canadian and international contexts.

Within domestic law and under Part 2, the chapter first examines Canada’s constitutional order both as a matter of text and as a matter of constitutional principles. The second section examines how the terms of the Nunavut Agreement create opportunities for Indigenous communities to assert their influence over navigation and shipping within their seascapes. The commentary focuses on how the planning and project review processes established under the Nunavut Agreement, including commitments made by proponents in the course of those reviews (e.g., speed restrictions, vessel capabilities and flag status), can enhance the influence and effective participation of Indigenous communities with respect to navigation and shipping matters.

2 Part 1: International Law

The first part of this chapter considers international human rights norms that guarantee Indigenous communities a right to participate in and influence the governance of navigational activities in Canada’s Arctic waters.4 The first

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section broaches two preliminary matters of vital importance: the status of the principal international instruments and their scope of application. The second section then briefly considers four fundamental rights guaranteed to Indigenous peoples under international law as they relate to the marine environment: the right to self-determination; the right of ownership and possession of traditional territories; the right to culture; and the right to consultation and free, prior and informed consent.

2.1 Preliminary Issues of Status and Scope

Inuit are a marine people. Our culture and way of life is inextricably linked to the ocean. The marine environment is central to our identity, the way that we perceive the world, and the way that we think of ourselves.5

It is this collective spiritual relationship between Indigenous peoples and their natural environment, explains Wiessner, which separates Indigenous peoples from other groups or minorities, and created a need for a special legal regime.6 “To accommodate indigenous peoples’ aspirations ... traditional human rights concepts had to be adjusted and redefined.”7

2.1.1 The Status of International Human Rights Instruments

Human rights specifically tailored to Indigenous peoples are recognized in international customary law and also in general and Indigenous-specific human rights instruments. Among the most important general international legal texts are the United Nations Charter,8 the International Convention on the Elimination of All Forms of Racial Discrimination (CERD Convention),9 the International Covenant on Civil and Political Rights (ICCPR)10 and the International Covenant on Economic, Social and Cultural Rights (ICESCR).11

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7 Id., 122.
8 Charter of the United Nations, 26 June 1945 (in force 24 October 1945), 1 UNTS XVI.
10 16 December 1966 (in force 23 March 1976), 999 UNTS 171 [ICCPR].
11 16 December 1966 (in force 3 January 1976), 993 UNTS 3 [ICESCR]. Among regional instruments of a general nature, there are the European Convention on Human Rights,
Canada is a party to all four treaties\textsuperscript{12} and is therefore legally bound to respect them in good faith.\textsuperscript{13}

The Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169),\textsuperscript{14} adopted by the International Labour Organization (ILO) in 1989, is the most important legally-binding international instrument exclusively dedicated to the rights of Indigenous and tribal peoples. Described as an “unprecedented and visionary instrument,”\textsuperscript{15} the Convention ensures Indigenous peoples’ control over their “legal status, internal structures, and environment” and guarantees their rights to ownership and possession “of the total environment they occupy or use.”\textsuperscript{16} Unfortunately, the Convention has to date only been ratified by 24 countries, and Canada does not feature among its parties.

The Swedish Supreme Court recently assessed the impact of ILO Convention 169 in the context of a case on the rights of the Girjas reindeer herding community.\textsuperscript{17} Though Sweden is also not a party to the Convention, the Court referred to Article 8(1)\textsuperscript{18} and declared that it reflected a “general principle of international law.”\textsuperscript{19} Thus in applying Swedish law, due regard had to be taken of the Sami people’s customs and customary law.

Nearly 15 years before the Girjas decision, Chief Justice A.O. Conteh of the Belize Supreme Court had already declared: “Treaty obligations aside, it is my considered view that both customary international law and general international law would require that Belize respect the rights of its indigenous people

\textsuperscript{12} Canada is a founding member of the United Nations. It adhered to the CERD Convention in 1970 and to the ICCPR in 1976, and ratified the ICESCR in 1976.


\textsuperscript{15} Weissner (n 6), pp. 134–135.

\textsuperscript{16} Swedish Supreme Court Case No. T 853-18, decided 23 January 2020.

\textsuperscript{17} Article 8(1) states: “In applying national laws and regulations to the [Indigenous] peoples concerned, due regard shall be had to their customs or customary law.” ILO Convention 169 (n 14).

to their lands and resources." These judicial findings on the legal status of the core principles defined in ILO Convention 169 are of real import when assessing the governance regime in Canadian Arctic waters.

While recognizing the vital role of ILO Convention 169 for the advancement of Indigenous rights, Wiessner asserts that "[t]he most comprehensive effort to safeguard indigenous peoples' cultures" was the adoption of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) on 13 September 2007. Noting that the Declaration was adopted by 143 affirmative votes with only four votes against and eleven abstentions, Wiessner emphasizes that all of the opposing States (Australia, Canada, New Zealand and the United States) have since reversed their position and endorsed the Declaration, "making its support virtually universal." Coulter concurs, declaring that the Declaration testifies to a "nearly world-wide consensus among nations that indigenous peoples ... have a right to maintain their cultures, societies, customs, and languages, and have a right to self-governance."

Although the Declaration is a non-binding instrument, many of the rights proclaimed in the Declaration are binding as rules of customary international law. In his 2008 report, UN Special Rapporteur S. James Anaya noted how the UNDRIP embodied "to some extent general principles of international law" and that insofar as they connected with a pattern of consistent international and State practice, "some aspects of the provisions of the Declaration can also be considered as a reflection of norms of customary international law."
Canadian courts take direct judicial notice of customary international law, a rule most recently confirmed in *Nevsun Resources Ltd. v. Araya*.\(^{28}\)

Furthermore, the Declaration is an official statement by most member countries of the United Nations of the legal rights afforded Indigenous peoples under international law. The Declaration thus has “considerable political and moral force,”\(^{29}\) such that “no country can ultimately escape its obligation to respect these rights, regardless of whether or not they are formally binding.”\(^{30}\) This was also the conclusion of the ILA Committee on the Rights of Indigenous Peoples in its final 2012 report.\(^{31}\) The preamble to Canada’s implementation act recognizes that the *UNDRIP* is “a source for the interpretation of Canadian law.”\(^{32}\) The very purpose of the federal act, as British Columbia’s Supreme Court recently emphasized, was “to affirm the Declaration as a universal international human rights instrument with application in Canadian law.”\(^{33}\)

### 2.1.2 The Scope of International Human Rights Instruments

The spatial scope of application of a treaty is determined by the parties themselves. For example, Article 2(1) of the *ICCPR* stipulates that “[e]ach State Party … undertakes to respect and to ensure to all individuals within *its territory and subject to its jurisdiction* the rights recognized in the … Covenant.”\(^{34}\) With respect to treaties that do not contain a territorial scope clause, like the *CERD Convention*, the *ICESCR* or *ILO Convention 169*, Article 29 of the Vienna Convention on the Law of Treaties (*VCLT*) provides as a general rule that “unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its *entire territory*.”\(^{35}\)

The territory of a coastal State includes its internal waters and territorial sea. Consequently, human rights instruments apply within these maritime zones in the same manner as on land. A more sensitive issue is whether human rights norms apply within maritime zones beyond a State’s territorial limits. Enyew argues that the concept of jurisdiction has a broad meaning and includes

\(^{28}\) 2020 SCC 5, para 90.

\(^{29}\) Coulter (n 25), p. 546.

\(^{30}\) Id., 552.


\(^{32}\) UNDRIPA (n 23).


\(^{34}\) ICCPR (n 10). Emphasis added.

\(^{35}\) VCLT (n 13). Emphasis added.
the exercise of authority or effective control over an area (e.g., the exclusive economic zone) or persons. This interpretation is supported by the Human Rights Committee’s (HRC) analysis of the scope of the ICCPR: “a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within the territory of the State Party.” It also accords with the International Court of Justice’s (ICJ) finding in its 2004 Advisory Opinion that “the ICCPR is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.”

While the HRC and the ICJ were commenting specifically on the ICCPR, there is a growing consensus that human rights law applies within a State’s territory and to persons over whom a State has control or responsibility. As Enyew underlines, this view is consistent with the universal character of human rights, “whereby all states are bound ‘to promote universal respect for, and observance of, human rights and freedoms.’” Thus Canada is duty bound to respect the human rights of Indigenous peoples within its territory or under its jurisdiction.

2.2 **International Human Rights Law**

It is beyond the scope of this chapter to provide a comprehensive analysis of all the rights and guarantees conferred upon Indigenous peoples under international law. The next section therefore focuses on some of the more important rights that guarantee Indigenous peoples a say in the management of marine spaces.

2.2.1 **The Right to Ownership and Possession of Traditional Territories**

Article 14(1) of ILO Convention 169 asserts that the “rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised.” The same paragraph also provides that measures must be taken in appropriate cases to safeguard the rights of the peoples

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36 Enyew (n 4), p. 47.
37 Human Rights Committee (HRC), General Comment No. 31 (80) – The Nature of the General Legal Obligation Imposed on State Parties to the Covenant, UN Doc CCPR/C/21/Rev1/Add. 13 (26 May 2004), para 10.
38 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, 136, para 111.
39 Enyew (n 4), p. 47, citing the language of Article 1(3) of the UN Charter, recital 4 in the preamble to both the ICCPR and ICESCR, and recital 2 in the preamble to the European Convention on Human Rights.
40 ILO Convention 169 (n 14).
concerned to use land not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Article 15 further mandates that the rights of Indigenous peoples to the natural resources of their lands must also be specially safeguarded. These resource rights are defined as including the right to participate in "the use, management and conservation of these resources." Article 16(1), for its part, declares that "the peoples concerned shall not be removed from the lands which they occupy" save in very limited, exceptional circumstances.

A vital question is whether the rights defined in Articles 14, 15 and 16 by reference to Indigenous "lands" include marine spaces. An affirmative answer is provided, in part, by Article 13(2) which offers a broad definition of the key concept of 'land': "The use of the term lands in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use." It is regrettable, however, that the principal right, as defined in Article 14, is not explicitly captured by the comprehensive definition provided in Article 13(2).

The ILO Secretariat's guide to Convention 169, in the section devoted to the land rights provisions, begins with a discussion of the "concept of land": "[t]he concept of land usually embraces the whole territory [Indigenous peoples] use, including forests, rivers, mountains and sea, the surface as well as the sub-surface." The guide also emphasizes that "the concept of land encompasses the land which a community or people uses and cares for as a whole." This all-encompassing understanding of the concept of land, according to the Secretariat, underpins all of the Convention's provisions.

This broader interpretation is reinforced by the UNDRIP with its explicit recognition under Article 25 that Indigenous peoples have the right "to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used land, territories, waters and coastal seas and other resources." The rights that flow from this special relationship are fleshed out under Article 26: "Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired." Paragraph 2 of Article 26

41 Id.
42 Id. See Part I of ILO Convention 169 entitled "Land" which covers Articles 13–19 and establishes several other land-related rights.
43 Id. Emphasis added.
46 UNDRIP (n 22), Article 25. Emphasis added.
specifies that this right includes the “right to own, use, develop and control the land, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.” The last paragraph obliges States to give legal recognition and protection to these lands, territories and resources.

Enyew spells out the importance of this broad concept of traditional Indigenous ‘lands’:

[T]he meaning of ‘land’ when applied to Indigenous peoples covers the marine space, where Indigenous peoples occupy or use as part of their traditional territories, or traditionally had access to satisfy their subsistence needs or to conduct their spiritual, customary or traditional activities. These marine areas may include internal waters (such as foreshores and fjords), archipelagic waters, the territorial sea and the EEZ to the extent that Indigenous peoples have traditionally used them. The actual extent of Indigenous peoples’ occupation or traditional use determines the areal extent of ‘land’ or territory out in the sea.  

Referencing practice at the international and domestic levels, the ILA Committee on the Rights of Indigenous Peoples concluded in their 2012 Final Report that “indigenous peoples’ land rights – grounded on the special, in many cases spiritual, relationship of indigenous communities with their traditional territories typically considered their motherland – have attained the status of customary international law.” This finding echoed an earlier assertion by Anaya and Wiessner that “indigenous peoples have a right under customary international law to ‘demarcation, ownership, development, control and use of the lands they have traditionally owned or otherwise occupied and used.’” Thus, Indigenous communities in the Canadian Arctic have recognized legal rights of ownership and possession in all marine areas they have traditionally occupied or used.

2.2.2 The Right to Self-determination

The right to self-determination, a collective right of peoples, has the highest normative value in international law as a peremptory norm or jus cogens.  

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48 ILA Committee on the Rights of Indigenous Peoples (n 31), p. 23.
49 Anaya and Wiessner (n 27).
50 There is an enormous literature on self-determination, including with respect to Indigenous peoples. For a small sample, see S. James Anaya, Indigenous Peoples in International Law, 2nd ed. (Oxford: University Press, 2004); James Youngblood Henderson, Indigenous
It is recognised in various global and regional human rights instruments\(^51\) and in recent decades, treaty-monitoring bodies and human rights courts have accepted Indigenous peoples as ‘peoples’ entitled to the right of self-determination.\(^52\) This determination has been incontrovertibly confirmed in Article 3 of the UNDRIP:

> Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

As a companion to this “historic and much sought after advance,”\(^53\) Article 4 establishes the right to self-government:

> Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Enyew in his study emphasizes the economic dimension of the right of self-determination, which is of critical importance in the context of this chapter.\(^54\) He refers to common Article 1(2) of the ICCPR and ICESCR which provide that “[a]ll peoples may, for their own ends, freely dispose of their natural wealth and resources... In no case may a people be deprived of its own means of subsistence.” Referencing the practice of treaty-monitoring bodies (e.g., the Human Rights Committee and the Committee on Economic Social and Cultural Rights), Enyew asserts that these bodies “clearly recognise the right of Indigenous peoples to freely dispose of their natural resources ‘for their own ends’, including to fulfil their means of subsistence, as their inherent right.”\(^55\)

\(^{51}\) See for example Article 1 of the ICCPR (n 10) and the ICESCR (n 11) and Articles 2021 of the African Charter on Human and Peoples’ Rights (n 11).

\(^{52}\) For example, the Committee on Economic, Social and Cultural Rights, United Nations Economic and Social Council, Concluding Observations on the Fourth Periodic Report of Chile, UN Doc E/C.12/CHL/CO/4 (7 July 2015), para 8.

\(^{53}\) Coulter (n 25), p. 548.

\(^{54}\) Enyew (n 4), pp. 49–50.

\(^{55}\) Id., 50. In his comprehensive canvassing of international human rights law, Enyew also analyses the “right to marine space and resources as a proprietary right.” In the interest of
In this way, the general right of economic self-determination has been adapted to reflect Indigenous peoples’ symbiotic relationship with their traditional lands and resources.

While none of the instruments cited define the term ‘natural resources,’ Enyew, Fitzmaurice and Woker argue that the term is broad and its ordinary meaning must extend to marine areas and marine living resources. Thus, the right of economic self-determination entitles Indigenous peoples to occupy or use certain traditional maritime territories to harvest marine mammals to satisfy their subsistence needs. This right also necessarily entitles Indigenous peoples to actively participate in decisions relating to the conservation and management of marine resources.

The right of Indigenous self-determination is explicitly acknowledged in recent federal marine governance initiatives. For example, one of the four priority areas for Canada’s ambitious Oceans Protection Plan (OPP) announced in November 2016 was to strengthen partnerships and launch co-management practices with Indigenous communities. An important project under the OPP has been the Northern Low-Impact Shipping Corridors Initiative, which seeks to minimize the impacts of shipping in Canadian Arctic waters through the creation of voluntary, incentive-based shipping routes that will guide future decision-making and enhance safe navigation that respects local communities, wildlife and the environment. Inuit perspectives and knowledge have been integrated in the designation of the corridors and any applicable measures (e.g., maximum speeds, seasonal restrictions) and mechanisms to allow for the effective participation of local communities in the monitoring and management of the corridors are currently being explored.

One of us (Bankes) has also highlighted that in the exercise of their right to self-determination, Canada’s northern Indigenous peoples have also developed their own agenda “to meet their own values and needs rather than simply...
responding to the policies and programs of the State.”62 He cites as an important example, the establishment of the Pikialasorsuaq Commission by the Inuit Circumpolar Council (ICC) in 2016, tasked with consulting Inuit in Canada and Greenland on the best way to safeguard and monitor the waters between Ellesmere Island and Greenland. Known to Greenlandic Inuit as Pikialasorsuaq and to Canadian Inuit as Sarvarjuaq (the Great Upwelling),63 the polynya is one of the most productive marine areas north of the Arctic Circle and is an area of special interest to Inuit.64 The first of three recommendations formulated by the Commission is to establish an Inuit Management Authority (IMA) for the Pikialasorsuaq. The IMA would have the authority to oversee monitoring and research and “promote the conservation of living resources within and adjacent to the Pikialasorsuaq, and the related wellbeing of communities that depend on these resources.”65

2.2.3 The Right to Culture

The right to culture is a widely recognised human right incorporated in various instruments. Article 27 of the ICCPR provides that persons belonging to minorities “shall not be denied the right, in community with the other members of their group, to enjoy their own culture.” Enyew confirms that these and other provisions in general regional human rights instruments have been evolutively interpreted and applied by their respective treaty-monitoring bodies and human rights courts to recognise and protect the cultures of Indigenous peoples.66

The HRC has emphasized that Article 27 of the ICCPR guarantees the material manifestations of Indigenous culture:

62 Bankes (n 59), p. 118.
64 “This polynya provides food security for regional communities and it remains an enduring cultural and spiritual cornerstone linking Inuit across borders to each other and their shared history.” Id., A-9. The polynya is also known as the North Water Polynya. See also Fisheries and Oceans Canada, Identification of Ecological Significance, Knowledge Gaps and Stressors for the North Water and Adjacent Areas, Canadian Science Advisory Secretariat, Science Advisory Report 2021/052 (December 2021).
65 Pikialasorsuaq Commission (n 63), p. A-20. See Bankes (n 59), p. 118 where he explains that while the Pikialasorsuaq proposal “is still very much at the proposal and discussion stage,” there are “some signs that at least some elements of the proposal are gaining traction.” For further evidence of this progress, see Pikialasorsuaq Leaders Statement, Ottawa, 4 April 2019, https://pm.gc.ca/en/news/backgrounders/2019/04/04/pikialasorsuaq-leaders-statement.
66 Enyew (n 4), p. 51. See footnote 40 for specific examples.
Culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of Indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law.67

The protection of the right to culture under Article 27 extends not only to traditional practices but also to those that have adapted to modern technologies.68 In Apirana Mahuika, the HRC observed:

The right to enjoy one's culture cannot be determined in abstracto but has to be placed in context. In particular, Article 27 does not only protect traditional means of livelihood of minorities, but allows also for the adaptation of those means to the modern way of life and ensuing technology.69

In line with this broad interpretation of culture, the Norwegian Supreme Court recently ruled that the Sami people are a minority within the meaning of Article 27, “and that reindeer husbandry is a form of protected cultural practice.”70 ILO Convention 169 also recognizes the special connection between Indigenous peoples and their traditional territories, and the importance of this connection for the survival and development of their culture. Article 13, for example, obligates States to “respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands and territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.”71

The UNDRIP also recognises the right to culture of Indigenous peoples in all its manifestations, including the “right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expression.”72 The Declaration also protects in various articles, Indigenous peoples’ right to natural resources as an integral part of their culture:

67 HRC, General Comment No. 23 (59), UN Doc CCPR/C/21/Rev.1/Add.5 (1994), para 7. Emphasis added.
68 Enyew (n 4), p. 54.
71 See also ILO Convention 169 (n 14), Article 23(1).
72 UNDRIP (n 22), Articles 15, 31.
Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.\(^{73}\)

Beveridge argues that this broad interpretation of culture is beginning to have an impact upon the international regulatory framework governing Arctic shipping.\(^{74}\) She cites as an example the “Methodology to Analyse Impacts of a Ban on the Use and Carriage of Heavy Fuel Oil as Fuel by Ships in Arctic Waters” developed by the Prevention, Preparedness and Response Subcommittee of the International Maritime Organization (IMO) and its recommendation that the “subsistence culture and lifestyle of Arctic indigenous and local communities” be taken into consideration when evaluating the potential impacts of banning the use of heavy fuel oil by ships in the Arctic.\(^{75}\) The Methodology interprets ‘subsistence’ not only as a monetary matter or one of food security, but also acknowledges that “subsistence activities are integrated more broadly in a cultural sense as an aspect of the underpinnings of social cohesion, language, public health and identity.”\(^{76}\)

International law provides special safeguards against interference with the right to culture of Indigenous peoples. Those safeguards were considered by Norway’s Supreme Court in its recent decision on whether wind power developments had ‘denied’ the Sami their right to enjoy their culture as guaranteed by Article 27 of the ICCPR. The Court made a critical determination, finding that an interference that does not constitute a total denial may nevertheless violate the right to cultural enjoyment.\(^ {77}\) Referring to the ruling of the HRC in \(Ángela Poma Poma v. Peru\),\(^ {78}\) the Norwegian Supreme Court defined the test as whether “a substantive negative impact” results from a given measure. “The term ‘substantive’ in this context means ‘considerable’ or ‘significant.’”\(^ {79}\)

\(^{73}\) Id., Article 25. Emphasis added. See also UNDRIP Articles 11, 12, 15, 31.

\(^{74}\) Leah Beveridge, “Chapter 7 – Inuit Nunangat and the Northwest Passage” in Governance of Arctic Shipping, eds., A. Chircop et al. (Cham: Springer, 2020) EBOOK, 137–149, at 141.


\(^{76}\) Id., para 14.

\(^{77}\) Supreme Court of Norway (n 70), para 111.


\(^{79}\) Supreme Court of Norway (n 70), para 118.
Norway’s Supreme Court also ruled that there is no margin of appreciation granted under Article 27 and that it does not allow for a proportionality assessment balancing other interests of society against the minority’s or Indigenous people’s interests. “This is a natural consequence of the reason for the provision, as the protection of the minority population would be ineffective, if the majority population were to be able to limit it based on its legitimate needs.”

In support of this conclusion, the Court again referred to the HRC in Ángela Poma Poma and its ruling that “economic development may not undermine the rights protected by Article 27.”

Finally, the Norwegian Supreme Court also declared that while the consequences of a given measure largely dictate whether the rights in Article 27 have been violated, “it is also essential whether the minority has been consulted in the process.”

It appears from the Human Rights Committee’s decision and the mentioned [Norwegian] Supreme Court judgments that whether and to which extent the minority has been consulted cannot be decisive. This is rather an aspect to be included in the assessment of whether the right to cultural enjoyment has been violated ... If the consequences of the interference are sufficiently serious, consultation does not prevent violation. On the other hand, it is not an absolute requirement under the Convention that the minority’s participation has contributed to the decision, although that, too, may be essential in the overall assessment.

As discussed below, the right to consultation is an essential procedural right under international law in its own right, independently of the provisions on the right to culture.

2.2.4 The Right to Consultation and Free, Prior and Informed Consent

Tauli-Corpuz, UN Special Rapporteur on the rights of Indigenous Peoples has described the right to be consulted (and the correlative duty to consult) as essential safeguards of the substantive human rights afforded Indigenous

80 Id., para 129.
81 Id., para 126, referring to para 7.4 in the Ángela Poma Poma ruling. The Norwegian Supreme Court does acknowledge that a balancing of rights might be needed where the rights in Article 27 conflict with other “basic rights.” Id., para 130.
82 Id., para 120.
83 Id., para 121.
peoples under international legal sources and instruments. Article 6(1)(a) of ILO Convention 169 stipulates that governments “shall consult the [Indigenous] peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly.” Paragraph 2 of the same article commands that such consultations “shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.” Similarly, Article 19 of the UNDRIP obliges States to “consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.” Tauli-Corpuz has stressed that State obligations to consult Indigenous peoples also derive from universal and regional instruments of general application and the interpretative jurisprudence of supervisory mechanisms under these instruments. These instruments include, for instance, the ICCPR and the CERD Convention.

These provisions, Enyew emphasizes, are general and apply to a wide range of matters.

In the present context, this might require consultation before the adoption of any fishery conservation and management measures having a negative impact on Indigenous communities, such as prohibition of fishing and hunting, processes to determine quotas, restrictions on fishing and hunting methods, or the establishment of MPAs within traditional fishing grounds.

More specifically, Article 15(2) of ILO Convention 169 and Article 32(2) of the UNDRIP require consultation in the context of resource exploitation projects on the traditional lands and territories of Indigenous peoples. Both Enyew and Tauli-Corpuz insist that this obligation requires that coastal States consult the affected communities before the approval of any project affecting their traditionally used marine areas, particularly with respect to projects involving “the
development, utilization or exploitation of ... resources,” and involve them in impact assessment studies. Enyew’s assessment of what this duty entails, in concrete terms, bears repeating:

"Good faith" requires that coastal states must be open to hear, and be influenced by, the views of the coastal Indigenous communities concerned, and be prepared to abandon or modify the proposed measure or marine-related project in a manner that minimises its potential impacts. Consultation undertaken solely as a symbolic gesture or to provide information without follow-up action does not constitute good faith consultation.

The duty to consult does not apply solely in a domestic context and appears to have been recognized in some important Arctic regional mechanisms. For example, the Arctic Council, while clearly intended to represent the interests of the eight Arctic States, also boasts a unique feature in having granted Permanent Participant status to six Indigenous peoples’ organizations, including the ICC. Permanent Participants have full consultation rights and sit at the table alongside member State delegations at ministerial, working group and task force meetings. Though they do not formally vote, it has become standard practice among the Arctic States to refrain from adopting any decision, recommendation or programme in the face of opposition from them.

In 2009, the ICC adopted “A Circumpolar Inuit Declaration on Sovereignty in the Arctic” which demanded the inclusion of Inuit as active partners in all national and international deliberations on Arctic matters. This demand was further fleshed out in the 2014 Kitigaaryuit Declaration, which advocates for, among other rights, the “inclusion of Inuit representatives on all councils, committees,

88 UNDRIP (n 22), Article 32(2).
89 ILO Convention 169 (n 14), Article 7. See Enyew (n 4), p. 66; Tauli-Corpuz (n 84), p. 5.
90 The author refers to the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), General Observation on the Right of Indigenous and Tribal Peoples to Consultation (Observation 2010/81), 8–9. Enyew (n 4), p. 66. Emphasis in original. See the similar discussion in the Clyde River case (n 116) below.
91 The status of Permanent Participant is open to Arctic organizations of Indigenous peoples with a majority of Arctic Indigenous constituency representing either “a single Indigenous people resident in more than one Arctic State” or “more than one Arctic Indigenous people resident in a single Arctic State.” “Permanent Participants,” Arctic Council, https://arctic-council.org/index.php/en/about-us/permanent-participants.
and commissions formed to address Arctic fishing issues.\textsuperscript{93} In response to those calls, some Arctic States included representatives from Indigenous organizations in their delegations for the negotiation of a fisheries agreement for the Central Arctic Ocean.\textsuperscript{94} As Schatz underlines, their participation resulted in the incorporation of novel provisions concerning the interests and knowledge of Indigenous communities.\textsuperscript{95} The preamble to the Agreement, for instance, recalls the UNDRIP and recognizes “the interests of Arctic residents, including Arctic indigenous peoples, in the long-term conservation and sustainable use of living marine resources and in healthy marine ecosystems in the Arctic Ocean” and underlines “the importance of involving them and their communities.”\textsuperscript{96}

The call articulated at paragraph 18 of the Kitigaaryuit Declaration for Inuit leadership “to assert Inuit rights and responsibilities in relation to Inuit waters, seas and passages used from time immemorial” and to do so through active participation in the work of the IMO and other relevant bodies, seems also to have resonated. On the 8 November 2021, the ICC became the first Indigenous organization to receive provisional consultative status at the IMO. As articulated in the IMO’s rules and guidelines, consultative status serves two fundamental purposes: (1) to enable the IMO to obtain information and expert advice from organizations with special knowledge; and (2) to enable such organizations to express their point of view.\textsuperscript{97} The IMO’s Sub-Committee on Ship Design and Construction recently acknowledged the need for Inuit involvement in reviewing its existing Guidelines for Reducing Underwater Noise Caused by Commercial Shipping and in formulating recommendations for future action.\textsuperscript{98}

Procedural rights guaranteed under international law may go beyond good faith consultation and may require, in the domestic context, that States


\textsuperscript{94} Canada, Denmark and the United States included Indigenous representatives in their delegations.


obtain the free, prior and informed consent (FPIC) of an affected Indigenous community. The UNDRIP and ILO 169 identify two situations where FPIC is expressly required: (1) where a project involves the storage or disposal of hazardous materials in the territories of the Indigenous peoples; and (2) where a project requires the forcible removal of Indigenous peoples from their territories. The concept of territory in this context, as discussed above, clearly encompasses traditionally used marine areas and traditional fishing grounds.

In other situations, explains Enyew, the question of whether FPIC is required will depend “on the nature of the proposed measure and the extent of its impact” and will be assessed on a case-by-case basis. The Expert Mechanism on the Rights of Indigenous Peoples, created to provide expertise and advice to the UN Human Rights Council, has had occasion to consider the critical question of FPIC. It concluded in 2011 that the consent of Indigenous peoples is mandatory with respect to “matters of fundamental importance for their rights, survival, dignity and well-being.” The Inter-American Court of Human Rights (IACtHR) and the HRC have similarly adopted “a major impact” and “substantial interference” test to determine whether a State has a duty to obtain the FPIC of the Indigenous peoples concerned. As Enyew concludes, the rights to consultation and FPIC serve as important procedural safeguards against all measures, including resource development projects, which involve the re-allocation of rights to access, control or use of the marine space and the associated resources away from the traditional user coastal Indigenous communities.

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99 UNDRIP (n 22), Article 29(2).
100 Id., Article 10; ILO Convention 169 (n 14), Article 16.
101 Enyew (n 4), p. 66.
103 Saramaka People v. Suriname, Case No. 172 (IACtHR, 28 November 2007), paras 134, 137.
104 Ángela Poma Poma (n 78), paras 7.2, 7.3.
3 Part 2: Domestic Law

Part 2 of this chapter examines the tools available to Indigenous communities under domestic law to influence and participate in the regulation of navigation and shipping in Canada's Arctic waters. We begin by considering constitutional law issues and then consider the terms of the Nunavut Agreement as an example of a modern claims agreement that applies within Canada's Arctic waters.

3.1 Constitutional Law

Canada's constitutional order recognizes the rights of Indigenous communities both as a matter of text and as a matter of constitutional principles.

3.1.1 Constitutional Text

Canada's constitution was amended in 1982 to recognize Indigenous rights. As subsequently amended in 1983 to recognize the ongoing nature of land claims negotiations, section 35 now provides:

(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, 'aboriginal peoples of Canada' includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

For present purposes, the principal significance of section 35 is that it provides constitutional protection to the terms of modern land claims agreements, including those land claims agreements with relevance to Canada's Arctic waters, principally the Inuvialuit Final Agreement (1984), the Nunavut Land Claims Agreement (1993), the Nunavik Inuit Land Claims Agreement (2006) and the Labrador Inuit Land Claims Agreement (2005). As a result, government action that is inconsistent with such agreements, or that fails to

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107 These agreements (organized by province and territory) can be accessed at Crown-Indigenous Relations and Northern Affairs Canada, “Final Agreements and Related Implementation Matters,” Government of Canada, last modified 18 June 2018, https://www.rcaanc-cirnac.gc.ca/eng/1100100030583/1529420498359. A fifth agreement, the Eeyou Marine Region Land Claims Agreement (2011) is also relevant insofar as it includes areas of interest to both the Crees of Eeyou Istchee and Nunavik Inuit.
fulfill government’s obligations under those agreements, will be sanctioned as unconstitutional.\textsuperscript{108} These agreements serve to particularize the obligations of other orders of government, and establish co-management or co-jurisdictional arrangements, but they do not represent a complete code as to the legal relationship between the Crown and the particular Indigenous community. This means that general constitutional obligations, including the duty to consult and accommodate, may still operate where the land claims agreement is silent.\textsuperscript{109}

3.1.2 Constitutional Principles

In the Quebec Secession Reference,\textsuperscript{110} the Supreme Court of Canada identified four foundational constitutional principles that were relevant to the issue at hand (self-determination of the people of Quebec) including respect for (or protection of) minority rights as “an independent principle underlying our constitutional order.”\textsuperscript{111} The Court recognized that the inclusion of section 35 in the Constitution Act of 1982 was consistent with a “long tradition” of respect for minorities.\textsuperscript{112}

The Supreme Court has also recognized that “the Crown’s assertion of sovereignty over an Aboriginal people and \textit{de facto} control of land and resources that were formerly in the control of that people” engages the honour of the Crown which in turn supports the Crown’s duty to consult and accommodate.\textsuperscript{113} The duty to consult and accommodate is engaged in the context of treaty rights when the Crown “contemplates conduct that might adversely affect” those treaty rights.\textsuperscript{114} A serious limitation on the duty to consult and

\begin{thebibliography}{114}
\bibitem{109} \textit{Beckman v. Little Salmon/Carmacks First Nation}, 2010 SCC 53 (CanLII), [2010] 3 SCR 103.
\bibitem{111} Id., para 80.
\bibitem{112} Id., para 81.
\bibitem{114} \textit{Haida Nation} (n 113), para 35, with respect to Aboriginal rights, but with respect to treaty rights, see \textit{Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)}, 2005 SCC 69 (CanLII), [2005] 3 SCR 388.
\end{thebibliography}
accommodate in the present context is that the parliamentary process does not engage the duty to consult and accommodate.\(^{115}\)

While it is not possible to point to any decided case dealing with the duty to consult and accommodate in the context of navigation and shipping in Canadian Arctic waters, there is one important decision that engages with the duty to consult and accommodate in the context of marine seismic operations. In *Clyde River (Hamlet) v. Petroleum GeoServices Inc.*,\(^{116}\) the Supreme Court of Canada concluded that the National Energy Board (NEB) had breached the Crown’s constitutional obligations to the Indigenous community of Clyde River when the Board failed to adequately consult and accommodate the community before issuing an authorization to PGS to engage in seismic testing activities in Baffin Bay and Davis Strait, “adjacent to the area where the Inuit have treaty rights to harvest marine mammals.”\(^{117}\)

The court summarized its conclusions as follows:

> The consultation process here was, in view of the Inuit’s established treaty rights and the risk posed by the proposed testing to those rights, significantly flawed. Had the appellants had the resources to submit their own scientific evidence, and the opportunity to test the evidence of the proponents, the result of the environmental assessment could have been very different. Nor were the Inuit given meaningful responses to their questions regarding the impact of the testing on marine life. While the NEB considered potential impacts of the project on marine mammals and on Inuit traditional resource use, its report does not acknowledge, or even mention, the Inuit treaty rights to harvest wildlife in the Nunavut Settlement Area, or that deep consultation was required.\(^{118}\)

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115 *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 49 (CanLII), [2018] 2 SCR 765. On the face of it, this is inconsistent with Article 19 of the UNDRIP, and see UNDRIPA (n 23).


117 *Clyde River* (n 116), para 7.

118 Id., para 51.
The duties associated with the honour of the Crown include the duty of diligent implementation of treaty promises and the duty to implement treaties in a manner that gives effect to their purpose.

3.2 *How Do the Terms of Modern Land Claims Agreements Address Navigation and Shipping Issues in Canada’s Arctic Waters?*

Modern land claims agreements are not homogenous. They are complex and detailed and while the more general provisions follow a common template, this is not the case for many of the more detailed provisions. Our commentary focuses on the Nunavut Agreement on the grounds that this agreement embraces by far the largest part of Canada’s Arctic waters.

The Nunavut Agreement principally applies to the Nunavut Settlement Area (NSA) as defined in Article 3 of the Agreement, including an area surrounding the Belcher Islands in the south east of Hudson Bay. Article 3 of the Nunavut Agreement indicates that the NSA “includes all those lands, water and marine areas” within the prescribed metes and bounds description of the NSA. ‘Marine areas’ are defined as “that part of Canada’s internal waters or territorial sea, whether open or ice-covered” lying with the NSA. Inuit also enjoy constitutionally protected harvesting and management rights in marine areas beyond the NSA, in particular within a zone known as the Outer Land Fast Ice Zone.

Article 15 of the Nunavut Agreement, entitled “Marine Areas”, comprises five parts. Part 1 articulates a set of principles that inform the article. Part 2 is perhaps the most important for present purposes insofar as it specifies those articles of the Agreement that apply to marine areas. These are listed as: Articles 5 (wildlife), 6 (wildlife compensation), 8 (parks), 9 (conservation...
areas), 11 (land use planning), 12 (development impact), 23 (Inuit employment within government), 24 (government contracts), 25 (resource royalty sharing), 27 (natural resource development), 33 (archaeology) and 34 (ethnographic objects and archival materials). Even if this list were exhaustive (which it cannot be\textsuperscript{126}) it is evident from the breadth of the topics covered that the parties intended that the Agreement would have much to say about the planning for, and management of, marine spaces within the NSA.

Part 3 of Article 15 is principally concerned with wildlife management and harvesting in marine areas beyond the NSA facilitated by appropriate institutional structures.\textsuperscript{127} Allocation of commercial fisheries licences in these adjacent areas is to be informed by the principles of adjacency and economic dependence of communities in the NSA on marine resources.\textsuperscript{128} The Federal Court of Appeal considers that these provisions must inform and constrain the exercise of the otherwise highly discretionary powers of the Minister of Fisheries and Oceans to grant fishing licences under the terms of the \textit{Fisheries Act}\textsuperscript{129} and regulations.\textsuperscript{130}

Part 4 of Article 15 contemplates that each of the Nunavut Impact Review Board (NIRB), the Nunavut Water Board, the Nunavut Planning Commission (NPC) and the Nunavut Wildlife Management Board might severally, or jointly as a Nunavut Marine Council (NMC), “advise and make recommendations to other government agencies regarding the marine areas, and Government shall consider such advice and recommendations in making decisions which affect marine areas.”\textsuperscript{131} It may be inferred that the honour of the Crown would require Government (depending on the context) to offer reasoned responses to such advice and recommendations.\textsuperscript{132} The NMC has not been particularly active, but in recent years it has offered advice and recommendations with respect to such matters as marine noise,\textsuperscript{133} and draft MARPOL (International Convention
for the Prevention of Pollution from Ships) amendments prohibiting the use and carriage for use as fuel of heavy fuel oil by ships in Arctic waters. Subject to budgetary constraints, the Council could take a more proactive role.

Finally, Part 5 contains a savings clause indicating that Article 15 must be “interpreted in a manner consistent with Canada’s sovereignty, sovereign rights and jurisdiction, and with Canada’s international obligations.” The same idea is repeated in Article 16 dealing with Inuit harvesting rights in the Outer Land Fast Ice Zone.

3.2.1 The Land Use Planning and Development Impact Provisions of the Nunavut Agreement

We now turn to examine the land use planning and impact assessment provisions of the Nunavut Agreement. In our view, it is these provisions, Articles 11 and 12 of the Nunavut Agreement, that are most likely to afford Inuit a measure of influence and control over navigation and shipping in Canadian Arctic waters. Both Articles “apply” to the marine areas of the NSA. Section 12.12.2 is even more specific insofar as it provides that Article 12 shall apply to “both land and marine areas within the Nunavut Settlement Area and to the Outer Land Fast Ice Zone” and that “[s]hipping associated with project proposals” in the NSA “shall be subject to this Article” except for “normal community resupply or individual ship movements not associated with project proposals.”

Similarly, section 11.1.4 makes it clear that the land use planning provisions apply to marine areas within the NSA and the Outer Land Fast Ice Zone.

While the impact review provisions of Article 12 are triggered by project proposals, the land use planning provisions are not so contingent and seek to establish “planning policies, priorities and objectives regarding the conservation, development, management and use of land” (and, by virtue of section 12.1.1).
11.1.4, marine areas in the NSA) and “to prepare land use plans which guide and direct resource use and development” in the NSA. As such, the Nunavut land use planning process has the potential to establish relevant ground rules not only for destination-based shipping in Canadian Arctic waters, but also for shipping transiting Canadian Arctic waters (to the extent permitted by the United Nations Convention on the Law of the Sea and discussed elsewhere in this volume). While the planning provisions set the ground rules within which development may occur, they also inform the project review provisions insofar as (and subject to some exceptions) a project cannot proceed through the project review process unless the NPC has determined that a project proposal is in conformity with an applicable land use plan.

In what follows we will use the example of the Mary River iron ore project to discuss an example of non-conformity under the terms of one of the existing land use plans and show how the draft Nunavut land use plan might have an impact on navigation and shipping issues. The Mary River expansion project also shows how navigation and shipping issues might lead the NIRB to reject a project. There are currently two approved land use plans: the North Baffin Regional Land Use Plan (North Baffin Plan) and the Keewatin Regional Land Use Plan. The NPC has been working to develop a new Nunavut-wide land use plan since approximately 2007. Once adopted and approved, that plan will replace the two regional plans.

3.2.2 The North Baffin Plan and the Mary River Iron Ore Mine

Baffinland’s Mary River iron ore project was approved for conformity by the NPC and by NIRB in 2012. The project is located on northern Baffin Island

140 Nunavut Agreement (n 121), Article 11.2.2.
141 See chapters by Bartenstein and Bankes in this volume. See also Nunavut Planning Commission, Leading the Way Through Land Use Planning, Nunavut Land Use Plan, Draft, July 2021 [Nunavut Draft Plan], 10:

The Plan should be interpreted and applied in a way that respects Canada’s international rights and obligations, including those under the 1982 United Nations Convention on the Law of the Sea, customary international law and any other binding international instrument.

142 Nunavut Agreement (n 121), Article 11.5.11.
144 Nunavut Draft Plan (n 141).
145 The plan was approved in 2010. The approved plan is available on the NPC’s website. For further commentary see Dylan (n 143), pp. 215–225.
with possible marine access to the south at Steensby Inlet and to the north at Milne Inlet, Eclispe Sound and Pond Inlet. The project was originally approved to use the Steensby Inlet port with year-round shipping. In 2014, the NPC and NIRB approved a second phase of the project (the early revenue phase) to add shipping from Milne Inlet, but only during the open water season.

Baffinland subsequently proposed a Phase II of the project to include shipping from Milne Inlet for ten months of the year with associated icebreaking activities. The NPC concluded that the project as proposed was not in conformity with the North Baffin Plan. This was the first negative conformity decision of the NPC under either of the two approved plans. The NPC reached its conclusion largely on the basis that the regular icebreaking activities required by Phase II would interfere with community access and travel routes to areas that were essential for hunting, fishing and trapping and which the Plan sought to protect. While the proponent subsequently secured a ministerial exemption for Phase II as originally formulated, the point for present purposes is simply that the terms of approved land use plans, even those that operate at a high level of generality (which is certainly the case for the provisions of the North Baffin Plan that were invoked in this case) may make the shipping and navigational aspects of proposed projects non-conforming uses. Such projects will not be able to proceed absent a plan amendment or a ministerial exemption. And, insofar as the principal purpose of planning in the NSA is to protect and promote the existing and future well being of residents of Nunavut, such plans do afford a means to further the choices and values of Nunavummiut.

Baffinland subsequently revised its Phase II project on several occasions leading to further screening by the NPC before the Phase II project was ultimately referred to NIRB for its assessment in May 2018. In May 2022, NIRB, for reasons discussed below, ultimately recommended against Phase II.

3.2.3 Nunavut Land Use Plan (Draft July 2021)
In July 2021 the NPC released the proposed land use plan for the entire NSA preparatory to public hearings on the draft. The draft plan is all encompassing

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146 NPC, Conformity Determination, Mary River Project Phase II, 8 April 2015.
147 Id., para 39.
148 See Nunavut Agreement (n 121), Article 11.5.11.
149 The availability of a ministerial exemption also confirms a significant limitation on Inuit influence over land and sea use decision-making.
150 NIRB, Reconsideration Report and Recommendations for Baffinland’s Phase 2 Development Proposal, May 2022, NIRB File No. 08MN053.
151 The Nunavut Draft Plan (n 141), along with related documents, is available online https://www.nunavut.ca/land-use-plans/draft-nunavut-land-use-plan. The NPC currently anticipates
in the sense that it proposes to apply one of three land use designations to all areas covered by the plan. The three designations are: (1) limited use (year-round prohibitions of one or more types of land use), (2) conditional use (use permitted but subject to seasonal prohibitions or setback requirements), or (3) mixed use (all uses are considered to conform to the plan).

It is not possible within the compass of this chapter to provide an exhaustive account of the proposed land use plan, but we can give some examples of how the requirements of the plan may have an impact on shipping and navigation. These include:

- Conditional use measures to protect known caribou sea ice crossings.
- Measures to protect walrus terrestrial haul outs as limited use areas, including an obligation on vessels of different sizes to remain at prescribed distances from a walrus haul out.
- Conditional use measures to protect whale (beluga) calving areas.
- Measures to protect the North Water (Sarvarjuaq) Polynya as a conditional use area.

While the plan recognizes the need for seasonal restrictions or set back requirements for navigation, it also recognizes the importance of marine shipping to the current and future development of Nunavut, and, in particular, the "heavy lift capacity of marine transport" for the resources sector. Furthermore, most if not all of the more specific restrictions do not apply to vessels engaged in community resupply or emergency response.
3.2.4 Development Impact Review

As noted above, the NIRB provisions are triggered by the existence of a project proposal which is defined in terms of a physical work or a physical activity.\footnote{Nunavut Agreement (n 121), Article 11, as amended (2015).} As such, the definition includes not only physical projects such as a mine, but also marine-based activities such as marine science projects\footnote{For example, see the NIRB website https://www.nirb.ca/ under public registry, project type and select ‘marine based activities’ category.} and ship-based tourism activities.\footnote{See note 139 re MV Crystal Serenity.} Any such project must be in conformity with the terms of an applicable plan. For example, if the draft land use plan were to be approved as it stands, it would follow that a marine science project that involved a vessel transit in a limited or conditional use area in conflict with the types of restrictions described above would not be a conforming use.

In common with other impact assessment authorities, the NIRB will routinely examine the impact of activities directly related to the particular project that is the subject of an application. Hence, in the case of an application for the approval of a new mine such as Baffinland’s Mary River iron ore project, the Board examines the impact of the marine transportation activities associated with the mine, including those activities associated with construction, fuel supply for the mine and the shipment of the produced ore. Such considerations may factor into whether or not the NIRB is prepared to recommend that the project should proceed or not,\footnote{Nunavut Agreement (n 121), Article 12.5.6.} but may also result in the imposition of terms or conditions to help achieve the objective of Article 12, namely, “to protect and promote the existing and future well-being of the residents and communities of the [NSA], and to protect the ecosystemic integrity of the [NSA].”\footnote{Id., Article 12.2.5.}

This affords intervenors in project applications the opportunity to explore with the proponent and the Board the types of undertakings that a proponent is prepared to make, and the terms and conditions the Board might impose in relation to the marine shipping aspects of a project. While the proponent may not own or charter the ships that will provide services to the project, the proponent will typically own and control the marine terminal and thus will be in a position to determine the types and age of vessels that may be accepted for docking,\footnote{For example, in both the initial and reconsideration proceedings related to the TransMountain Expansion (TMX) project before the National Energy Board (NEB), TMX made commitments to use tankers of particular age classes (National Energy Board,} and impose terms and conditions on vessels as part of that process.
For example, the NIRB project certificate for the original Baffinland’s Mary River project included a condition that “the Proponent shall require project vessels to maintain a route to the south of Mill Island to prevent disturbance to walrus and walrus habitat on the northern shore of Mill Island.” A further condition deals with scheduling of vessels, vessel speed and vessel routing (and not just in the immediate vicinity of the marine terminal). Other conditions relate to such matters as shipboard observers and ship noise.

While proponents may argue that project vessels should only be subject to international standards established by the IMO and domestic laws of general application, and not more stringent standards that may impose increased costs, reduce the number of vessels available to provide project services, and affect the competitiveness of the project, there is at least some, albeit limited, practice that suggests that the provision of marine terminal services provides both the leverage and the opportunity to impose terms and conditions (and/or accept proponent undertakings) to address community concerns. However, this will be subject to the consideration that the proposed terms and conditions...
may also need to respond to commercial realities and the availability of vessels that can meet the terms and conditions.\textsuperscript{173}

In the end, NIRB recommended rejection of the Phase II expansion project. It did so on a number of grounds, including the potential for the expansion to have significant and lasting adverse effects on marine mammals and fish, and that this in turn would have significant adverse socioeconomic effects on Inuit harvesting, culture, land use and food security.\textsuperscript{174} Under section 106 of the \textit{Nunavut Planning and Project Assessment Act}, the Minister must, within 150 days of the receipt of a negative report, either accept the report or reject it “if, in the opinion of the responsible Minister, the project is in the national or regional interest.”\textsuperscript{175} After taking additional time, the Minister ultimately decided to accept NIRB’s decision.\textsuperscript{176}

4 Conclusion

What emerges from our brief canvass of international law is that human rights instruments (both general and specific) afford Indigenous peoples rights of ownership and possession over the lands, territories and resources they have traditionally owned, occupied or otherwise used. Critically, these fundamental rights—which are an integral part of the right to self-determination and the right to culture of Indigenous peoples and which trigger the right to consultation and FPIC—are now recognized as customary norms. As such, Canada has a legal obligation to respect and protect those rights, including in its Arctic waters. Indeed the second preambular paragraph of the federal implementation act recognizes that “the rights and principles affirmed in the Declaration constitute the \textit{minimum standards} for the survival, dignity and well-being of the Indigenous

\textsuperscript{173} For example, in its decision on Phase II, NIRB (n 150), pp. 194–195 and 208, ultimately rejected submissions that would have required the proponent to immediately eliminate the use of heavy fuel oil in all vessels using the Milne Port. This would have exceeded current regulatory requirements, which do not impose a ban until 2025. NIRB seems to have accepted Baffinland’s submissions (p. 194) to the effect that an immediate ban would have affected its ability to source vessels.

\textsuperscript{174} Id., IX, XI, 177–185 (detailing potential effects on marine mammals, acoustic disturbance, ballast water and invasive species), 195–196 (covering shipping and marine spill response capacity).

\textsuperscript{175} NPPAA (n 137).

peoples of the world, and must be implemented in Canada.” 177 This is a strong commitment. The territorial and resource rights proclaimed in the UNDRIP are very broad in scope and include, for example, the right to “own, use, develop and control” the land, territories and resources that Indigenous peoples possess by reason of traditional ownership or other traditional occupation or use. 178

With the coming into force of the United Nations Declaration on the Rights of Indigenous Peoples Act in June of 2021, one would therefore expect that Indigenous human rights norms will henceforth have a greater impact in Canadian judicial decisions. For while Canadian courts have progressively become more receptive to international law, this practice has not been reflected in cases dealing with Indigenous rights. The Supreme Court’s decision in the 2018 Mikisew Cree First Nation case, 179 for instance, contrasts unfavourably with the more recent decisions of its Swedish 180 and Norwegian 181 counterparts. In reaching its conclusion in that case, that the duty to consult Indigenous peoples does not apply to the law-making process, a determination of great import for Indigenous communities, the Supreme Court of Canada did not refer to the UNDRIP or any other international human rights instrument. 182

Our investigation into examples of Indigenous agency has revealed a modest trend in favour of meaningful and active Indigenous involvement in Arctic regional governance mechanisms. While Permanent Participant status at the Arctic Council has been an important vehicle for Indigenous self-determination since 1996, other key institutions and processes are only slowly responding to the legal imperative of consulting with and involving the region’s Indigenous peoples. The participation of Indigenous representatives on State delegations tasked with negotiating the new Central Arctic Ocean Fisheries Agreement and the granting of provisional consultative status to the ICC by the IMO are positive steps forward. However, it is perhaps time for other agencies or bodies with important mandates and responsibilities for the Arctic marine environment to follow suit.

The Northwest Atlantic Fisheries Organization (NAFO) and the North East Atlantic Fisheries Commission (NEAFC), the most important sub-Arctic regional fisheries management organizations (RFMOs), could be interesting candidates. The two RFMOs are tasked with ensuring the long-term

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177 UNDRIPA (n 23).
178 UNDRIP (n 22), Article 26(2). Emphasis added.
179 Mikisew Cree First Nation (n 115).
180 Swedish Supreme Court (n 17).
181 Supreme Court of Norway (n 70).
Indigenous Self-Determination and the Regulation of Shipping

conservation and optimum utilisation of the fishery resources in their respective areas (which stretch into the Arctic), as well as providing sustainable economic, environmental and social benefits. To this end, the two organizations have the power to adopt management measures for various fish stocks (e.g., quotas) and control/enforcement mechanisms (e.g., vessel inspections). Both organizations can also adopt measures to protect other parts of the marine ecosystem from potential negative impacts of fisheries. As Schatz notes, neither the **NAFO Convention** nor the **NEAFC Convention** contains provisions mandating the incorporation of Arctic Indigenous knowledge.\(^\text{183}\) Nor are Indigenous organizations or communities afforded a formal status or role.

It is of course possible to include Indigenous voices and knowledge in the work and decision making process of **NAFO**, **NEAFC** and other relevant bodies by integrating Indigenous representatives within State delegations. Canada is a contracting party to **NAFO** and a ‘cooperating non-contracting party’ to **NEAFC**. However, whatever form Indigenous involvement takes, Enyew’s *mise en garde* bears repeating: Good faith consultation only occurs if States are open to hear, and *be influenced by*, the views of the coastal Indigenous communities concerned.\(^\text{184}\) Furthermore, the focus cannot solely be on securing a right of participation for Indigenous peoples and communities in different fora. There must be an equal emphasis on the correlative duty of governments to support and adequately resource their involvement.

Over time the domestic implementation of **UNDRIP** should secure a greater convergence between domestic law and international law. Within the domestic legal system, the duty to consult and accommodate offers the principal opportunity for Indigenous communities to engage with government initiatives and decisions relating to navigation and shipping but only if, as the *Clyde River* decision demonstrates, that consultation is meaningful. Beyond that, the terms of modern land claims agreements also provide opportunities for influence and engagement where those agreements cover marine areas. Absent specific provisions dealing with navigation and shipping, the most important provisions of those agreements are likely to be the land and marine use planning provisions and impact assessment provisions of such agreements. Our analysis of the practice under the Nunavut Agreement shows how these provisions can be used to address at least some community concerns. But this practice also points up the weaknesses of these provisions to the extent that ministerial overrides may undercut the planning provisions of the agreement or to the extent that the impact review board proves reluctant to make full use of its powers to add terms and conditions.

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\(^\text{183}\) Schatz (n 95), p. 130.

\(^\text{184}\) Enyew (n 4), p. 66.