DON’T LEAVE THE SÁMI OUT IN THE COLD: THE ARCTIC REGION NEEDS A BINDING TREATY THAT RECOGNIZES ITS INDIGENOUS PEOPLES’ RIGHT TO SELF-DETERMINATION AND FREE, PRIOR AND INFORMED CONSENT

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Introduction

Climate change is causing global temperature to rise at an unprecedented rate.1 Unfortunately for the Arctic region and its inhabitants, this warming is occurring at a rate faster than the rest of the world.2 Melting sea ice and permafrost, loss of snowfall, alterations in animal behavior and unpredictable weather patterns are all evidence of climate change in this region.3 Sea ice has decreased as much as ten percent over the past few decades.4 In the summer of 2007, the shipping lane between the Pacific and Atlantic Ocean, known as the Northwest Passage, was ice-free for the first time in recorded history.5 The impacts of these changes will be felt not only

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2 Id.
4 The Arctic Climate Impact Assessment is an international project of the Arctic Council and the International Arctic Science Committee (IASC), that was conducted in order to evaluate and synthesize knowledge on climate variability, climate change, and increased ultraviolet radiation and their consequences. The results of the assessment were released at the ACIA International Scientific Symposium held in Reykjavik, Iceland in November 2004. See, Arctic Climate Impact Assessment scientific report, 184 (Cambridge University Press 2005), available at http://www.acia.uaf.edu/ [hereinafter ACIA scientific report].
5 See, James Graff, Fight for the Top of the World, Time, Oct. 1, 2007, http://www.time.com/time/magazine/article/0,9171,1663848,00; and MICHAEL BYERS, UNDERSTANDING SOVEREIGNTY DISPUTES IN THE NORTH, WHO OWNS THE ARCTIC? 11-12 (2010) (The Northwest Passage is a roughly 4,000 mile shortcut between East Asia and the Atlantic Seaboard that Canada claims jurisdiction over. The Passage would cut travel time from East Asia to Europe in half making the Arctic region more accessible to non-Arctic states).
by those who inhabit this polar region, but also by those worldwide because the Arctic serves as the “world’s most important barometer of global change and amplifier of global warming.”\textsuperscript{6}

These changes are also sparking a global “race to the Arctic.”\textsuperscript{7} The melting ice will potentially expose vast amounts of sea beds rich with natural resources that were once inaccessible, and the newly opened shipping lanes will allow distant countries easier access to these newly accessible resources.\textsuperscript{8} Of these potential natural resources, oil and gas will be the most sought after due to their high demand in the world market.\textsuperscript{9} In addition to increased interest from distant countries, the newly accessible resources and sea routes will most likely result in an increase in competing sovereignty claims between states claiming to possess territory in the Arctic region.\textsuperscript{10}

Currently eight nations claim to possess territory within this region: Norway, Sweden, Finland, Denmark, Iceland, Canada, Russia and the United States (“Arctic states”). Of the eight, five have coastlines that border the Arctic Ocean: Canada, Denmark, Norway, Russia and the United States (“Arctic coastal states”).\textsuperscript{11} Competing claims to sovereignty and tension among the Arctic states and the Arctic coastal states has already begun. In 2007, Russia rushed to plant its flag in the Arctic seabed, and the United States and Canada continue to disagree over how the Northwest Passage should be treated. Tensions were further intensified in 2008 when the Arctic coastal states strategically left out Sweden, Finland, Iceland and the indigenous peoples’ groups from the Arctic Ocean Conference (AOC) held in Greenland, which resulted in the creation of the Ilulissat Declaration.\textsuperscript{12} The competing sovereignty claims between the Arctic states, the increased accessibility for ships from non-Arctic states, and the possibility of extracting newly discovered natural riches from the Arctic Ocean seabed all pose serious threats to the indigenous peoples of this region.\textsuperscript{13}

Part I of this paper provides some background on the effects climate change is having on the Arctic region’s environment and on the indigenous peoples of the Sápmi, who call this region home. Part II describes the existing hard and soft international law governing the Arctic, focusing on the role of the Arctic Council and the 1982 United Nations Convention on the Law of the Sea (UNCLOS). Part III explores the recent evolution of international, regional and domestic law on indigenous peoples’ rights from a state-centric approach to a more modern acceptance of the indigenous peoples’ right to self-determination. While this right to self-determination is still evolving, it is becoming somewhat of a right for indigenous peoples’ to exercise some degree of sovereignty over their economic, social and cultural development without seceding from their respective states (the right to be “sovereign within a sovereign state”).

\textsuperscript{7} See generally, NORTH AND SOUTH POLES (Diane Andrews Henningfeld, ed., 2010).
\textsuperscript{9} BYERS, supra note 5 at 9-11.
\textsuperscript{10} Sophie Theriault, “Northern Frontier, Northern Homeland”: Inuit People’s Food Security in the Age of Climate Change and Arctic Melting, 15 Sw J. Int’l L. 223, 225 (2009).
\textsuperscript{11} BYERS, supra note 5 at 90.
\textsuperscript{12} See infra note 117.
\textsuperscript{13} See Theriault, supra note 10 at 226.
Part IV proposes a comprehensive, binding Arctic treaty to address the challenges facing this region and its indigenous peoples. The current mix of hard and soft international law governing the Arctic fails to adequately protect this unique region and its inhabitants. The proposed treaty must address indigenous peoples’ rights, potential party structure, jurisdiction, and environmental protection. To ensure cooperation among party states and to effectively protect the indigenous peoples’ rights, the provisions on party structure, jurisdiction and environmental protection must be drafted in a way that balances states’ interests and indigenous peoples’ rights. Convincing the Arctic states to cooperate in the drafting and implementation of a binding treaty could prove to be the biggest challenge and potentially the biggest downfall. Action must be taken soon to combat the effects of climate change, or the failure to promote cooperation and begin the process of drafting this binding Arctic treaty will have devastating effects on this region and its people.

I. How Climate Change is Affecting the Arctic and the Sámi Population

A. Background on the Melting Arctic Region

“[T]he Arctic is one of the last remote areas remaining on earth, and one of the most threatened.”14 The Arctic region consists of a vast ice-covered ocean located at the northern-most part of the world that is surrounded by eight nations claiming territory.15 It spans over five million square miles and twenty-four time zones, and is home to nearly four million people, including dozens of indigenous peoples groups.16 Sea ice, permafrost, glaciers, and ice sheets are all characteristics of this northern region, and its frozen topography and remote location make it unique.17

Until recently, the Arctic region has been generally ignored due to its harsh environment and inaccessibility. However, recent changes in the Arctic’s climate have made this region more desirable to both Arctic and non-Arctic states looking to cash in on the vast resources that lie hidden under the ice.18 In a 2008 U.S. Geological Survey, an assessment of undiscovered oil and gas resources in the Arctic Circle estimated that 90 billion barrels of oil, 1,669 trillion cubic feet of natural gas, and 44 billion barrels of natural gas liquids may be extracted from the Arctic.19 These resources account for nearly 22 percent of the world’s undiscovered and technically recoverable resources, and approximately 84 percent of these undiscovered resources are expected to lie offshore.20 As interested states scramble to secure a position in the rush to exploit these

14 DAVID HUNTER, JAMES SALZMAN & DURWOOD ZAELKE, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 1150 (3d ed. 2007) [hereinafter INTERNATIONAL ENVIRONMENTAL LAW].
17 ARCTIC THEME PAGE, supra note 15.
18 THE NORTH AND SOUTH POLES, supra note 7 at 19.
natural resources, the Arctic indigenous peoples face the devastating loss and destruction of their ancestral lands as a result.

Climate change is largely responsible for the recent changes in the Arctic’s environment. In the 2007 Climate Change Synthesis Report, the Intergovernmental Panel on Climate Change (IPCC) defined climate change as “a change in the state of climate that can be identified... by changes in the mean and/or the variability of its properties that persists for an extended period, typically decades or longer.” Human induced greenhouse gas emissions (GHG), such as carbon dioxide, are largely to blame for these changes. There is a consensus among scientists that human activity is responsible for the majority of warming that has been observed over the past 50 years.

While the IPCC does not differentiate between climate change that is the result of natural variability or human activity, it is clear that “warming of the climate system is unequivocal.” This warming is evidenced by its effects which include: increases in global average air and ocean temperatures, widespread melting of snow and ice, and a rising average sea level. Whether the changes in the Arctic environment are a result of natural causes, human activity, or both, the earth's climate is changing and global temperatures are increasing at an unprecedented rate. If GHG emissions continue “at or above current rates,” future warming is inevitable and global climate changes are “very likely to be larger than those observed in the 20th century.”

Climate change is also impacting the Arctic more severely than any other part of the world. In November 2004, the Arctic Council released the Arctic Climate Impact Assessment (ACIA) which reported that the impacts of climate change in the Arctic are severe and occurring more rapidly than previously reported. Annual average temperatures are increasing at a rate twice as fast as the rest of the world, due to the thinner atmosphere and vast amounts of ice covered land and sea encompassing this frozen region. This rapid increase in temperature is resulting in a decrease in the quantity and quality of snowfall, the melting of ice and permafrost, and unpredictable changes in the weather patterns. Satellite data taken over the past three decades further proves that the area of ice covering the Arctic has been considerably reduced.

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21 The Intergovernmental Panel on Climate Change (IPCC) was established by the United Nations Environment Programme (UNEP) and the World Meteorological Organization (WMO) to serve as a scientific body that reviews and assesses the most recent scientific, technical and socio-economic information produced worldwide relevant to the understanding of climate change. See, Intergovernmental Panel on Climate Change, Climate Change 2007: Synthesis Report, 30, available at http://www.ipcc.ch/publications_and_data/ar4/syr/en/main.html [hereinafter IPCC Synthesis Report].

22 ACIA EXECUTIVE SUMMARY, supra note 1 at 2.
23 IPCC Synthesis Report, supra note 21 at 72.
24 Id.
25 ACIA EXECUTIVE SUMMARY, supra note 1 at 8.
26 IPCC Synthesis Report, supra note 21 at 45.
27 ACIA EXECUTIVE SUMMARY, supra note 1 at 8.
28 See generally, ACIA scientific report, supra note 4.
30 Inuit Petition, supra note 3 at 2.
31 ACIA EXECUTIVE SUMMARY, supra note 1 at 12.
This ice is melting 20 percent faster than before, and may be completely gone by the end of this century.32

Unfortunately the impacts of these changes are not isolated to the Arctic region, but are felt worldwide.33 The melting ice is a major contributor to the rising sea level that is threatening the low-lying island nations.34 The melting could also further accelerate global climate change since the bright white ice acts as a reflector of the sun’s rays.35 Without the ice, the dark Arctic Ocean is able to absorb more of the heat from the sun. This absorption serves as a heater for the entire planet by increasing the earth’s global temperatures.36 Along with serving as a global barometer, the Arctic also provides the rest of the world with critical natural resources such as gas, oil and fish.37

These changes in the Arctic’s environment are also making this once inaccessible region more accessible.38 The ACIA predicts that the Northwest Passage and the Northern Sea Route will be ice-free during summer months by the end of the century.39 This could eliminate roughly 8,000 nautical miles from shipping company’s routes, resulting in substantial money and time savings during these months.40 An increase in accessibility and economic feasibility will only fuel the race to the Arctic’s vast untouched resources, resources that are often concentrated on indigenous peoples’ traditional territories. More navigable waters and oil exploration pose serious threats to the Arctic’s fragile environment and its indigenous inhabitants.41 This potential race to resources has also sparked the eight Arctic states’ interest in sovereignty rights. As climate change continues to take its toll on this region, these competing interests will exacerbate over time.

While increased accessibility may be beneficial to those nations seeking sovereignty and natural resources, it is posing serious risks to the indigenous peoples of the Arctic. Of the four million inhabitants of the Arctic, 10% of them are indigenous peoples.42 The warming of the Arctic is forcing these indigenous groups to adapt quickly to their new surroundings. The changing climate is altering and destroying their availability of food sources, shelter, and travel.43 These losses result in both physical and psychological consequences due to Arctic indigenous peoples’ close ties to the land.44 Indigenous peoples rely on the land not only for food

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33 ACIA EXECUTIVE SUMMARY, supra note 1 at 14.
34 Abate, supra note 29 at 4.
37 ACIA EXECUTIVE SUMMARY, supra note 1 at 14.
38 See generally, supra note 36.
39 ACIA scientific report, supra note 4 at 476-478.
41 Adam Wolfe, *Territorial Claims Threaten the Arctic, in NORTH AND SOUTH POLES*, supra note 7 at 56.
42 Mirjam Macchi, *Polar Indigenous Peoples Have Adapted to Climate Change in the Past, in NORTH AND SOUTH POLES*, supra note 7 at 103.
43 ACIA scientific report, supra note 4 at 652-656.
44 See Theriault, supra note 10.
and shelter, but also for cultural identity. These ties are so strong that being disconnected from their land could result in “cultural genocide.”

The majority of the Arctic indigenous peoples’ rely on the unique frozen environment for their survival. They are able to become a product of their environment by adapting quickly to changes in the Arctic climate. Their resilience is the result of fine-tuning their knowledge over thousands of years. As a close relationship to the land is central to the indigenous peoples’ way of life, they have developed a culturally and spiritually based way of relating to their ecosystems known as “traditional ecological knowledge.” Indigenous peoples are able to study weather patterns, record their traditional ecological knowledge, and pass it down through generations. This evolution of traditional knowledge has allowed them to thrive on scarce resources, and use the ice and snow to their advantage. Unfortunately, due to the harsh effects of climate change, the rapid melting of ice and snow is occurring faster than the indigenous peoples can compete with, and their livelihood is being seriously threatened.

B. Background on the Sámi of Sápmi

The Sámi are the indigenous peoples of Sápmi (Lapland-Sámi Land), which encompasses the northern parts of Norway, Sweden, Finland, and the Koala Peninsula in Russia. “Sápmi is a nation without state or state borders, but with a common history, culture and language and with common traditional livelihoods.” The Sámi population is estimated to be between 70,000 and 100,000, with the majority of them living in Norway. They are the second largest Arctic indigenous group after the Inuit, and they consist of a mix of coastal and river Sámi, mountain Sámi, forest Sámi, and eastern Sámi. While they inhabit four countries in the Arctic and sub-
The Sámi continue to exist as one people. This unity is paramount to the Sámi background. The Sámi rely on hunting, fishing, gathering, trapping, and reindeer herding as central activities of their culture. The mountain, forest, and eastern Sámi have traditionally relied on a mainly nomadic lifestyle, moving reindeer among the mountains and coastal areas, depending on the season. Today all of the Sámi are able to pursue a variety of occupations outside of hunting, fishing, and trapping. However, reindeer herding still remains an integral part of the Sámi lifestyle.

The Sámi have their own traditional ecological knowledge of the land evolving from long-term observations and experiences that have been accumulated over time and passed down through generations. Like most indigenous peoples, the Sámi culture is so intertwined with the environment that the two are practically indissoluble. They view themselves as belonging to the land, rather than owning the land. Harm to one is sure to cause harm to the other.

The environment not only provides a source of food for the Sámi, it also plays an important cultural and social role in their communities as well. The sharing of food fosters social bonds, and their religious beliefs are centered around the earth’s land and water. Loss of their ancestral lands will have both physical and psychological effects on the Sámi as well. They have a traditional sense of duty to preserve their environment for the use of future generations that has existed since time immemorial. However, this concept of sustainable development is becoming increasingly difficult in the face of a changing Arctic.

Today climate change and recent developments in the Arctic are threatening the culture and overall existence of the Sámi. The impacts of climate change have the most adverse effects on these indigenous peoples who depend on the land for their survival. While in the past the Sámi have been able to adapt quickly to the changing environment, the changes are occurring at a pace much faster than once expected. Adaptation is also more difficult because many of them now live in permanent communities. Indigenous peoples, including the Sámi, are finding it nearly impossible to “keep up” with the pace of the rapidly changing environment. Melting sea
ice, permafrost and unpredictable weather conditions are making travel, fishing, and hunting more difficult.\textsuperscript{72}

For the Sámi who rely on reindeer herding, the sea ice is considered an extension of their land.\textsuperscript{73} They use the sea ice as hunting grounds. As these hunting grounds begin to melt away, the Sámi who rely on reindeer herding for their survival will be forced to move onto new ice sheets, ice sheets that may be subject to the jurisdiction of a neighboring country with more restrictions on hunting and fishing.\textsuperscript{74} These restrictions could have devastating impacts on the Sámi peoples’ ability to hunt freely for the animals they depend on for their survival.\textsuperscript{75} Their inability to hunt freely may force them to travel greater distances to secure food sources. This would be a great economic hardship not only for the Sámi who rely on the ice sheets for hunting, but also for the Sámi who depend mainly on the marine environment.\textsuperscript{76}

The number of healthy plants and animals is also decreasing as a result of the changing climate. The population of marine species dependent on sea ice is likely to decline and possibly become extinct according to the Arctic Climate Impact Assessment.\textsuperscript{77} There is also an increased risk of health problems for the Sámi such as skin cancer, cataracts, and immune system disorders due to the abnormally high temperatures and increased sun intensity.\textsuperscript{78}

The Arctic Climate Impact Assessment included an excerpt of a case study carried out as part of the SnowChange program organized by the Environmental Engineering Department at Tampere Plytechnic in two locations in Finland.\textsuperscript{79} The study illustrates the effects of climate change from the perspective of the Sámi people. When interviewed as part of this study, Veikko Magga, a reindeer herder for over 50 years and a member of the reindeer herders association of Lapin Paliskunta stated the following:

\textit{“Traditional knowledge has changed like reindeer herding in a negative direction…. But traditional weather reading skills cannot be trusted anymore. In the olden times we could see beforehand the kind of weather it will be. These signs and skills hold true no more. Old makers do not hold true, the world has changed too much now. We can say nature is mixed up now… Difficulties are real. A way of living that used to support everything is now changing and people do not find employment enough.”}\textsuperscript{80}

The Sámi have begun to develop adaptation strategies using their traditional ecological knowledge, and they have also begun to play an active role in the development of indigenous peoples’ rights in both international and domestic law.\textsuperscript{81} They have made the right to self-

\textsuperscript{72} Inuit Petition, supra note 3 at 2.
\textsuperscript{73} Robert Snyder, \textit{International Legal Regimes to Manage Indigenous Rights and Arctic Disputes from Climate Change}, 22 \textit{COLO. J. INT’L ENVTL. L. & POL’Y} 1, 10 (2011).
\textsuperscript{74} Id.
\textsuperscript{75} Id.
\textsuperscript{76} Id.
\textsuperscript{77} ACIA scientific report, supra note 4 at 487-497.
\textsuperscript{78} Inuit Petition, supra note 3 at 3.
\textsuperscript{79} ACIA scientific report, supra note 4 at 85.
\textsuperscript{80} ACIA scientific report, supra note 4 at 85.
\textsuperscript{81} See infra note 193.
determination a primary goal. They view self-determination as the means to achieving full control over their destiny and lives. In an effort to promote this goal they have successfully established the Sámi Council and Sámi Parliaments in three of the Arctic states.

Despite these efforts, state regulations, increased development, and the harsh effects of climate change continue to pose serious threats to the Sámi and other indigenous groups inhabiting the Arctic. There will be severe consequences if international action is not taken soon. In an attempt to address these shortcomings, the Sámi people of Norway, Sweden and Finland have collaborated with their respective state governments to create the draft Nordic Sámi Convention which will be discussed in Part IV of this paper.

II. International Law Governing the Arctic Fails to Adequately Protect the Sámi from the Effects Climate Change is Having on the Arctic Region.

The international community has considered the Arctic region to be an ocean under international law. Currently there is no binding international law specifically addressing the Arctic. This is most likely a result of the Arctic states’ desire to retain sovereignty over this region. While a handful of soft law agreements have been established in an effort to protect the Arctic environment, they lack an enforcement mandate, making them inadequate means of protection for this severely threatened region. The Arctic Environmental Protection Strategy (AEPS) and the Arctic Council are two examples of soft-law mechanisms created in an effort to protect and govern the region.

Given its international status as an ocean, states currently rely on the United Nations Convention on the Law of the Sea (UNCLOS) as a binding source of law for the Arctic. While UNCLOS may serve as a good starting point for addressing the sovereignty concerns of the Arctic coastal states, it fails to provide any protection for those who stand to lose the most in the face of climate change -- the indigenous peoples.

A. The Arctic Environmental Protection Strategy and the Arctic Council

Prior to the formation of the Arctic Council, the eight Arctic states worked together to create the Arctic Environmental Protection Strategy (AEPS) in 1989. The primary objectives of the AEPS include: (1) protecting the Arctic’s ecosystem, (2) the sustainable use of natural resources, (3) the recognition and accommodation of the traditional and cultural needs of the indigenous peoples in the Arctic and (4) the identification, reduction, and elimination of pollution. The AEPS is a non-binding international document that was created at a time when the Arctic was generally inaccessible and isolated, and its potential for undiscovered natural

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83 Id.
84 Id.
85 Nordic Sámi Convention, supra note 54.
87 Bradley L. Roth, A Call For Mediated Solutions to Arctic Region Disputes, 19 CARDOZO J. INT’L & COMP. L. 851, 876 (2011).
88 Malloy, supra note 69 at 481-482; and UNCLOS, infra note 100.
resources was unknown. At the time of its creation, the drafters could not, and did not, anticipate that rapidly melting ice would result in an increased interest in Arctic resources.

Following the creation of the AEPS, the same eight states established the Arctic Council by the Ottawa Declaration of 1996. The Arctic Council is an intergovernmental forum consisting of the eight member states (Canada, Denmark, Finland, Iceland, Norway, United States and Russia) that was created to “provide a means for promoting cooperation, coordination and interaction among the Arctic states, with the involvement of the Arctic indigenous communities and other Arctic inhabitants on common Arctic issues, in particular issues of sustainable development and environmental protection.” The Arctic Council is also responsible for the creation of the Arctic Climate Impact Assessment, which has provided valuable insight into the effects of climate change in the Arctic, especially insight on how those effects are impacting the indigenous peoples of the region.

The Arctic Council also promotes the indigenous peoples of this region by recognizing the Inuit Circumpolar Council, the Sámi Council, and the Russian Association of Indigenous Peoples of the North, Siberia and Far East (in some translations referred to as the Association of Indigenous Numerically Small Peoples of the North, Siberia and Far East) as permanent participants, along with any other Arctic organization of indigenous peoples that wish to participate in the Ottawa Declaration. “Permanent participation is created to provide for active participation and full consultation with the Arctic indigenous representatives within the Arctic Council.” This status as permanent participants is better than the observer status given to the non-Arctic states interested in involvement with the Arctic Council. This “special treatment” of the Arctic indigenous peoples is a good example of the emergence of indigenous peoples’ rights in international law, and the growing acceptance that they are entitled to some degree of sovereignty.

As permanent participants, however, the Sámi and other indigenous peoples do not possess any voting power. While the Ottawa Declaration seeks to “ensure full consultation with and the full involvement of the indigenous peoples” of the Arctic, it is non-binding and marginalizes the power of the indigenous peoples.


As an ocean surrounded by continents, UNCLOS has been the primary source of binding international law used to govern the Arctic region. UNCLOS is a comprehensive international treaty that regulates all aspects of the sea and uses of the ocean. It is often referred to as “the constitution for ocean governance,” because it provides the framework for governing maritime

90 Casper, supra note 36 at 839.
93 Id. at art. 2.
zones, navigation, pollution, conservation, resource exploitation and dispute resolution.\textsuperscript{95} There are 162 parties to UNCLOS, and of the five Arctic coastal states, only the United States has failed to ratify UNCLOS.\textsuperscript{96} Although the United States has failed to ratify the “constitution for ocean governance,” it agreed to exercise the sovereign and jurisdictional rights concerning the exclusive economic zone in accordance with the treaty’s provisions.\textsuperscript{97}

UNCLOS established four jurisdictional zones with varying degrees of state control: the territorial sea, the contiguous zone, the exclusive economic zone (“EEZ”), and the high seas.\textsuperscript{98} The Arctic states rely on these zones for issues regarding sovereignty.\textsuperscript{99} States retain the most control in their territorial sea, which extends 12 nautical miles offshore.\textsuperscript{100} However, coastal states still retain “sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living” in their EEZ.\textsuperscript{101} A coastal state’s EEZ extends 200 nautical miles offshore.\textsuperscript{102} Along with the exclusive right to engage in activities for economic gain, coastal states have the power to enact and enforce laws protecting the marine environment in their EEZ.\textsuperscript{103}

As countries continue to exercise their rights in their respective EEZs, indigenous peoples face the possibility of having their ability to hunt and fish restricted because UNCLOS does not account for their rights anywhere in its text.\textsuperscript{104} EEZ hunting and fishing rights may vary from state to state, frustrating the Sámi peoples’ ability to hunt freely.\textsuperscript{105} Hunting and fishing are critical aspects of all indigenous peoples’ way of life, and without them they face serious threats to their survival.

Along with the designated zones, Article 76 of UNLCOS allows States wishing to extend the boundaries of their continental shelf beyond their 200-nautical mile EEZ to submit a petition to the Commission on the Limits of the Continental Shelf (CLCS) pursuant to the requirements found in Annex II of UNCLOS.\textsuperscript{106} The continental shelf of a coastal state is defined as “the sea-

\textsuperscript{95}INTERNATIONAL ENVIRONMENTAL LAW, supra note 14 at 667.
\textsuperscript{97} See, INTERNATIONAL ENVIRONMENTAL LAW, supra note 14 at 667 (U.S. has regarded parts of UNCLOS as customary law and complied with those provisions despite ratification); and Proclamation No. 5030, 48 Fed. Reg. 10605 (March 10, 1983) (a statement by President Ronald Reagan establishing the zone and a fact sheet on U.S. ocean policy).
\textsuperscript{98} INTERNATIONAL ENVIRONMENTAL LAW, supra note 14 at 660.
\textsuperscript{99} For a brief discussion on Arctic governance, see INTERNATIONAL ENVIRONMENTAL LAW, supra note 14 at 1070.
\textsuperscript{101} Id. at art. 56(1)(a).
\textsuperscript{102} Id. at art. 57.
\textsuperscript{103} Kathryn Isted, Sovereignty in the Arctic: An Analysis of Territorial Disputes & Environmental Policy Considerations, 18 J. TRANSNAT’L & POL’Y 343, 350 (2009).
\textsuperscript{104} See Snyder, supra note 73 at 8; and UNCLOS, supra note 100.
\textsuperscript{105} Snyder, supra note 73 at 8.
\textsuperscript{106} UNCLOS, supra note 100 at ann. II and art. 76(8); and Convention on the Continental Shelf, Apr. 29, 1958, 499 U.N.T.S. 7302.
bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin.”

The potential sovereignty rights for the five Arctic coastal states are significant under Article 76. As the melting ice unveils more access to the Arctic Ocean’s seabed, and in turn a state’s continental shelf, the CLCS faces a large influx of claims on which it must make recommendations. Along with these claims come potential disputes between the states making them. There are already ongoing disputes between Canada and the US in the Beaufort Sea, and between Russia and Norway in the Barents Sea. This is likely not a task the drafters of UNCLOS considered when they included Article 76 in the text. Therefore, the CLCS is likely to be ill equipped to handle the competing claims of such a unique region. These disputes will also further marginalize the power of the indigenous peoples by pushing their sovereignty rights to the back of the line.

Of the 320 Articles in UNCLOS, only one is tailored to the Arctic waters. Article 234 provides a good starting point for governance of the Arctic’s unique ice covered waters. Article 234 extends the environmental protection powers of coastal states by giving them “the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice covered areas” that are within their EEZ. The Arctic Council used Article 243 as a guideline when it developed the non-binding International Maritime Organization Guidelines for Ships Operating in Ice-Covered Waters.

While UNCLOS may provide a good benchmark for issues relating to sovereignty and environmental protection in the Arctic, it fails to address the rights of the indigenous peoples, fails to provide adequate environmental protection for this unique region, and lacks the enforcement power needed to fully address all of the issues. Indigenous peoples are not mentioned anywhere in the 320 Articles, or nine annexes of the “constitution for ocean governance”. Further, the United States has failed to ratify UNCLOS, and the states that have ratified it are able to opt out of the dispute resolution procedures.

Without proper enforcement power and protection for indigenous peoples and the Arctic environment, UNCLOS fails to provide an adequate solution to the problems facing this region. Many of the indigenous peoples of the Arctic rely heavily on the sea for their survival, especially those groups who purposely live close to the coast to have easy access to their main source of livelihood. Even the Sámi, who are known for their reliance on reindeer herding, use the sea as a source of food.

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107 UNCLOS, supra note 100 at art. 76(1).
108 Roth, supra note 87 at 873.
111 Koivurova, supra note 109 at 19.
112 The Guidelines were established to promote safe navigation in the unique Arctic waters, prevent pollution from ships and recognize the need for specific attention to human factors including training and operational procedures. International Maritime Organization [IMO], International Maritime Organization Guidelines for Ships Operating in Ice-Covered Waters, IMO MSC/Cir. 1056, MEPC/Cir. 399 (Dec. 23, 2002).
113 Farrens, supra note 8 at 670.
114 Snyder, supra note 73 at 6.
If the Arctic continues to be governed by a treaty that makes no mention of indigenous peoples, then states adhering to treaty guidelines are unlikely to consider the rights of these unique groups when it comes time to exploit newly discovered resources. A potential “shut out” has already been witnessed at the Arctic Ocean Conference (AOC) in May 2008. The Arctic five have been criticized for excluding the three other Arctic states and the indigenous peoples’ groups from actively participating in the discussions regarding Arctic governance.115 The meeting resulted in the Ilulissat Declaration which states the Arctic coastal states’ belief that there is “no need to develop a new comprehensive international regime to govern the Arctic Ocean” because UNCLOS is a sufficient legal framework to address this region.116 This is not surprising since UNCLOS provides Arctic coastal states the explicit right to exploit the natural resources that lie within their jurisdictional zones, and leaves open the possibility for increased sovereignty under Article 76.

The Arctic Council and UNCLOS do not provide enough protection for this ecologically fragile and internationally significant region. While UNCLOS has proved to be a successful “constitution for ocean governance” it is not a viable “constitution for Arctic governance.” It fails to address an important characteristic of the Arctic -- its indigenous peoples-- and it is not well equipped to handle the disputes that are likely to arise with the changing environment. Likewise, the Arctic Council is not well equipped to handle any disputes because it is a non-binding inter-governmental forum consisting of soft-law documents.

III. International, Regional and Domestic Law on Indigenous Peoples’ Right to Self-Determination and Free, Prior and Informed Consent

Historically, international law has taken a state-centered approach.117 Under this approach, only sovereign states can enter into and be bound by treaties, and little if no concern is given to the rights of indigenous peoples.118 Groups of indigenous peoples are not considered states in the international community, despite their state-like characteristics of accurately described territorial boundaries, and their ability to self-govern.119 Without state status, indigenous peoples have been unable to actively participate in the development of international law. Therefore, states have been able to create instruments that protect their sovereign rights over the rights of indigenous peoples.120

Despite their marginalized status in international law, indigenous peoples have continued to fight for recognition of their identity, way of life and right to traditional lands, territories, and natural resources.121 Central to this recognition is the principle of self-determination.122 Article 1

115 Roth, supra note 87 at 862.
116 The Ilulissat Declaration, Arctic Ocean Conference, Greenland, May 27-29, 2008, available at http://arctic-council.org/filearchive/Ilulissat-declaration.pdf (the five coastal Arctic states declared the law of the sea provides “a solid foundation for responsible management by the five coastal states and other users of this Ocean through national implementation and application of relevant provisions”) [hereinafter Ilulissat Declaration].
118 Id.
119 ANAYA, supra note 45 at 24–27.
120 Id.
of the International Covenant on Civil and Political Rights states, “[a]ll peoples have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social, and cultural development.”\(^{123}\) The traditional state-centric approach to international law accorded the right of self-determination solely to territories, and not people. International human rights law has given rise to the principle of self-determination as a human right, emphasizing the term “peoples.” This principle of self-determination is now widely recognized in international law.\(^ {124} \)

The indigenous peoples’ right to self-determination has been challenged in international law. This is due to the fact that they are considered neither “people” nor “states.” Rather, they continue to fall somewhere in between as a community of peoples united by their common culture, tradition, and language. As a result, the indigenous peoples’ right to self-determination does not include the right to secede from a state, but it may include something more than the individual’s right to self-determination. It has become more of a blend of the right to participate in State governance of traditional lands, the right to some autonomy, and the right to self-governance.\(^ {125} \) This is best described as a right to be “sovereign within a sovereign state.” Therefore, indigenous peoples maintain the ability to govern themselves, and to define and exploit their traditional lands without seceding from their respective states. In order to protect the indigenous peoples’ right to self-determination, the right to free, prior and informed consent must be included.

The right to free, prior and informed consent is the right of indigenous peoples to make free and informed decisions about the development of their land and resources.\(^ {126} \) The recent transformation of international law has begun to acknowledge and articulate this right, allowing indigenous peoples to protect and manage their traditional lands and advance their desires.\(^ {127} \) This transformation is the result of the recent global, regional and domestic development of the law on indigenous peoples’ rights.

A. International and Regional Law on the Rights of Indigenous Peoples

There has been “rapid development of international law on indigenous [peoples] rights.”\(^ {128} \) There are now a variety of international instruments and decisions available for indigenous peoples to use as a means of protecting, empowering, and promoting their rights.\(^ {129} \) The following sections examine some of these instruments in more detail, and demonstrate how they have aided in the evolution of indigenous peoples’ rights.

\(^{122}\) ANAYA, supra note 45 at 98-115.  
\(^{124}\) ANAYA, supra note 45 at 7.  
\(^{126}\) Id.  
\(^{127}\) ANAYA, supra note 45 at 5-6.  
\(^{128}\) Parrish, supra note 117 at 307.  
1. U.N. Charter and the International Covenant on Civil and Political Rights

The United Nations Charter (UN Charter) provides the foundation for the indigenous peoples’ right to self-determination.\(^{130}\) Article 1 states the purposes of the UN include, “respect for the principle of equal rights and self-determination of Peoples”, as well as, “respect for human rights and fundamental freedoms for all.”\(^{131}\) While the UN Charter still maintains a state-centric approach to international law, its humanistic precepts have provided the grounds for the development of human rights in international law.\(^{132}\)

The International Covenant on Civil and Political Rights (ICCPR) and its Optional Protocol reaffirmed the UN’s commitment to human rights and the right of self-determination in the form of hard law. Neither the ICCPR, nor its Protocol, uses the term “indigenous peoples,” but they do provide protection to members of minorities.\(^{133}\)

The Optional Protocol designates the Human Rights Committee as its enforcement mechanism, and has served as a vehicle for indigenous peoples to file complaints of violations of their rights.\(^{134}\) Numerous complaints have been brought to the Human Rights Committee by indigenous peoples since the Protocol’s creation.\(^{135}\) The majority of these claims have been brought under Article 27 of the ICCPR.\(^{136}\) These complaints have helped further develop the indigenous peoples’ right to protection of their land through their right to enjoyment of their culture.

Indigenous peoples’ ties to their traditional lands puts them in a unique position. This position has enabled them to use Article 27 as a means to gain rights to their traditional land and its resources. In *Ivon Kitok v. Sweden* the Human Rights Committee found Article 27 may apply to economic activities, such as reindeer herding, if the activities are an “essential element in the culture of the ethnic community.”\(^{137}\) This case is especially helpful for the arctic Sámi who rely heavily on reindeer herding as a central element of their ethnic community. Indigenous peoples’, and especially the Sámi’s, cultural survival relies almost entirely on community economic and

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132 *AÑAYA, supra* note 45 at 51-52.


134 See ICCPR, *supra* note 123 at art. 28; and Optional Protocol, *supra* note 133 at preamble.


136 See *HUMAN RIGHTS AND THE ENVIRONMENT, supra* note 129 at 149; and ICCPR, *supra* note 123 at art. 27 (“In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of the group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”).

137 *Kitok, supra* note 135 at para. 9.2.
social activities. Therefore, indigenous peoples’ rights under the ICCPR may be considered stronger than other minorities whose cultures do not rely as heavily on these types of community activities.

*Kitok* is a landmark case for indigenous peoples’ rights. In this case, Mr. Kitok challenged Sweden’s Reindeer Husbandry Act. The Act reserved reindeer herding rights exclusively for members of Sámi villages. Mr. Kitok was born to a Sámi family, but had subsequently lost his membership in the Sámi village. Therefore, he had lost his rights to herd reindeer under the Reindeer Husbandry Act. The Human Rights Committee chose to recognize reindeer herding as an essential element of the Sámi culture, and to further favor the community rights of the Sámi over Mr. Kitok’s individual rights when they concluded the Act was a justified means of protecting the Sámi culture as a whole.138

Although neither the ICCPR, nor its Optional Protocol, expressly mentions indigenous peoples or the right to self-determination, these cases have contributed to the evolution of indigenous peoples’ rights by their express recognition of indigenous peoples’ community rights to land and right to enjoyment of their culture. They serve as an affirmation that indigenous peoples’ rights to land and culture are so closely intertwined that they are practically indivisible.

2. The International Labor Organization Convention 169

The International Labor Organization (ILO) Convention 169 serves as a further indication of the increased recognition of indigenous peoples’ rights in international law. In 1989, the ILO revised its earlier Convention No. 107 and adopted Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169).

ILO Convention 169 addressed concerns regarding indigenous peoples forced assimilation into local societies with provisions that propose a contemporary treatment of indigenous peoples’ rights that does not involve assimilation.139 Not only was the ILO Convention No. 169 the first legally binding recognition of many indigenous peoples’ rights, it also “broke new ground” by allowing indigenous peoples to take part in the negotiations. This was the first time non-state actors were given the opportunity to directly influence the text of an international treaty.140

The preamble sets the tone of the ILO Convention 169 by recognizing, “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.” Surprisingly, the ILO Convention 169 makes no mention of the right to self-determination, and also prevents its use of the term “peoples” from being “construed as having any implications as regards the rights which may attach to the term under international law.”141 This provision was added as a compromise for the party states with an aversion to the term “peoples” because of its association with the principle of self-determination, which implies independent statehood.

138 *Kitok, supra* note 135 at para. 4.2, 4.3.
139 *ANAYA, supra* note 45 at 58.
140 *HUMAN RIGHTS AND THE ENVIRONMENT, supra* note 129 at 161.
Even without the inclusion of an express right to self-determination, the ILO Convention 169 succeeds as a manifestation of the transformation of indigenous peoples’ rights in international law. ILO Convention 169 includes provisions that advance self-governance, cultural integrity, land and resource rights, and respect for the overall rights and aspirations of indigenous peoples. Therefore, the ILO Convention 169 seemingly promotes the modern view of indigenous peoples right to self-determination as a right to be “sovereign within a sovereign state.”

Article 6 of the ILO Convention 169 further advances these rights by requiring state governments to consult with indigenous peoples “through appropriate procedures and in particular through their representative institutions” when legislative or administrative programs are being considered that may affect those peoples directly.142 “Article 6 has been called the ‘heart of the Convention.’”143 States are required to create procedures that enable consultation to be done in a meaningful way.144

Article 7 strengthens the rights protected in Article 6 by giving indigenous peoples the right to “participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.”145 Article 7 also states that “Governments shall ensure that, whenever appropriate, studies are carried out, in cooperation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.”146

This right to free, prior, and informed consent, and the duty of states to cooperate with the indigenous peoples found in the ILO Convention 169, further strengthens indigenous peoples’ status in international law as being “sovereign within a sovereign state.” However, as of 2011, only 20 countries have ratified the ILO Convention 169, and of the eight Arctic states, only Norway and Denmark are parties.147


In 2007, the United Nations Human Rights Council adopted the Declaration on the Rights of Indigenous Peoples (UNDRIP).148 Unlike the ILO Convention 169, UNDRIP includes the indigenous peoples’ right to self-determination.149 Article 3 provides, “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.”150 This right is expanded in Article 4, which gives indigenous peoples exercising their right to self-determination the

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142 Id. at art. 6.
143 Id. at art. 6.
144 HUMAN RIGHTS AND THE ENVIRONMENT, supra note 129 at 163.
145 Id.
146 ILO Convention 169, supra note 141 at art. 7, para.1.
147 Id. at art. 7, para.3.
148 Id.
150 UNDRIP, supra note 148 at art. 3.
corresponding right to autonomy and “ways and means for financing their autonomous functions.”

UNDRIP also provides some of the best articulations of the right to free, prior and informed consent. Article 18 gives indigenous peoples the right to participate in the decision-making of matters that may affect their rights by appointing a representative or establishing their own decision-making institution. Article 19 explicitly states “states shall consult and cooperate in good faith with the indigenous peoples” to obtain free, prior and informed consent before implementing any administrative or legislative matters that may affect them. Article 32 echoes this duty to consult with indigenous peoples in order to gain free, prior and informed consent on matters relating to the development, utilization or exploitation of minerals, water or other resources.

While UNDRIP is a non-binding declaration, it may provide a useful guide for interpreting the scope of other international human rights treaties as they relate to indigenous peoples’ rights. This may help consolidate and enhance indigenous peoples’ rights universally, regionally and domestically.

4. The Inter-American Human Rights System

Regional human rights instruments do not contain explicit provisions for indigenous peoples’ rights. However, indigenous peoples have prevailed by using other provisions of these instruments to defend their rights. Human rights of indigenous peoples are practically synonymous with land rights because of their traditional economic, social, and spiritual ties to their ancestral territory. This connection has resulted in numerous successful claims by indigenous peoples in regional human rights courts and an evolving body of case law that applies concepts of self-determination, cultural integrity, and land rights in ways that protect and strengthen the rights of indigenous peoples in international law.

The Inter-American Human Rights System (IAHRS) functions as a part of the Organization of American States in an effort to protect and promote human rights in the American Hemisphere. The IAHRS uses both the Inter-American Commission on Human Rights and the Inter-American Court on Human Rights to promote its goals.

While the Inter-American Court has limited jurisdiction to hear complaints, the decisions are binding on those states that have accepted jurisdiction. Since its creation, the Inter-

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151 Id. at art. 4.
152 Id. at art. 18.
153 Id. at art. 19.
154 Id. at art. 32.
155 Id.
156 Human Rights and the Environment, supra note 129 at 172.
157 Id. at 1311.
159 Anaya, supra note 45 at 232.
160 International Environmental Law, supra note 14 at 1328.
161 Anaya, supra note 45 at 259.
American Court has decided a series of landmark cases addressing indigenous peoples’ rights to land and resources.163

The most notable of these decisions is the Mayagna (Sumo) Awas Tingni Community v. Nicaragua case that was decided in 2001.164 The Awas Tingni Community’s petition to the Inter-American Commission claimed Nicaragua violated their right to property granted under Article 21 of the American Convention on Human Rights. The Awas Tingni claimed this right was violated when Nicaragua granted concessions to a private company for logging and road building on the Community’s traditional lands without the Community’s consent.165

The Court ruled in favor of the Awas Tingni, recognizing that Article 21 of the American Convention “protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property.”166 The court further noted, “indigenous peoples’ customary law must be especially taken into account for the purpose of this analysis. As a result of customary practice, possession of the land should suffice for indigenous communities lacking real title to property of the land.”167

This was the first time the Inter-American Court decided a case centered on the assertion of the collective rights of indigenous peoples.168 The court accepted and upheld the indigenous peoples’ traditional recognition of property rights as being separate and distinct from formal state law recognition.169 This case is a strong example of how indigenous peoples are gradually moving up the food chain in international law and further solidifies the indigenous peoples’ right to remain “sovereign within a sovereign state.”

The Inter-American Court has continued to uphold and affirm indigenous peoples’ rights in subsequent cases. In 2007, the Inter-American Court further defined indigenous peoples’ property rights in Saramaka People v. Suriname.170 In Saramaka, the Court reiterated the indigenous peoples’ right to communal ownership of their ancestral land and its natural resources based on their traditional ties to the land. The Court went a step further in expanding the rights of indigenous peoples by stating that Suriname has a duty to consult with the Saramaka people and

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164 Sumo, supra note 159.
165 Id. at para. 2.
166 Id. at para. 148.
167 Id. at 151.
168 ANAYA, supra note 45 at 277.
169 Mayagna (Sumo) Community of Awas Tingni v. Nicaragua is a landmark decision for indigenous peoples rights because it is the first judgment by an international tribunal to recognize the communal property rights of indigenous peoples and to also mandate a state to protect those rights. Since the decision in this case, “indigenous peoples are increasingly using international human rights institutions to defend their lands, territories, and cultures, and for their survival.” Unfortunately since the landmark 2001 decision, the Awas Tingni have faced the challenge of implementing the ruling. They have struggled to implement the most important aspect of the decision -- demarcation and titling of their lands. Despite the struggles regarding implementation, this decision still remains an important step in the right direction for indigenous peoples’ rights. Leonardo J. Alvarado, Prospects and Challenges in the Implementation of Indigenous Peoples’ Human Rights in International Law: Lessons from the Case of Awas Tingni v. Nicaragua, 24 ARIZ. J. INT’L & COMP. L. 610 (2007).
170 Saramaka, supra note 159.
gain free, prior, and informed consent before undertaking any large-scale developments that may have major impacts on the Saramaka territory.¹⁷¹

These cases illustrate the increasing recognition of indigenous peoples’ rights in international law. Although none of the Arctic states are members of the Inter-American System of Human Rights, these decisions can serve as influential guidelines on how indigenous peoples’ rights should be approached in the Arctic.

### B. Arctic States’ Domestic and Regional Law on the Rights of Indigenous Peoples

The evolution of indigenous peoples’ rights is occurring at the domestic level as well. Many states have recognized indigenous peoples’ claims under common law. Some of those decisions relied explicitly on international law, while others do not directly reference it. Either way, states are participating in multi-level dialogue.

However, it is still difficult for the indigenous peoples of the Arctic to reconcile domestic law in a way that allows them to fully exercise their right to “maintain and develop contacts, relations and cooperation” across borders as stated in Article 36 of the U.N. Declaration on the Rights of Indigenous Peoples.¹⁷² The majority of indigenous peoples’ communities in the Arctic span several different nations. The Sámi, who are spread across four states, continue to exist as one community and rely on the ability to cross borders easily for reindeer herding, hunting, and fishing.¹⁷³ Restrictions on border crossing significantly hinder their ability to remain united as one community.¹⁷⁴ This unity is tantamount to their survival.

Even more important than the Sámi peoples desire to cross borders easily, is their desire to exercise their right to self-determination.¹⁷⁵ Inherent in this right to self-determination is the right to self-government of matters relating to their ancestral lands and resources.¹⁷⁶

In an effort to protect their rights at the domestic level, the Sámi have successfully set up Sámi Parliaments in Norway, Sweden and Finland, as well as the Sámi Parliamentary Council. The Sámi Parliamentary Council was formed in 2000 and includes the individual Sámi parliaments, as well as the permanent participation from the Sámi located in Russia.¹⁷⁷ Today, the Sámi Parliamentary Council works in cooperation with the Sámi Council established in 1956 to ensure cross-border promotion of their communities’ human rights.¹⁷⁸

However, even with Sámi parliaments in Norway, Sweden and Finland, the Sámi have not been able to be involved in the development of laws and policies to the extent necessary to provide sufficient protection.¹⁷⁹ The majority of the parliaments have granted them mere cultural

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¹⁷¹ Saramaka, supra note 159.
¹⁷² UNDRIP, supra note 148 at art. 36.
¹⁷⁴ Id. at 5.
¹⁷⁵ ANAYA, supra note 45 at 97-98.
¹⁷⁶ REPARATIONS FOR INDIGENOUS PEOPLES, supra note 83 at 378.
¹⁷⁷ Prior to the establishment of the Sámi parliaments in Norway, Sweden and Finland, the Sámi Council was the first pan-Sámi institution created in 1956 as a coalition of Sámi national organizations in the various countries. “Today, the Sámi Council serves as a non-governmental organization that promotes the human rights of Sámi people across borders, in cooperation with the Sámi parliaments and the Sámi Parliamentary Council.” Report of the Special Rapporteur, supra note 55 at 5.
¹⁷⁸ Id.
¹⁷⁹ Id. at 10.
autonomy and protection in the form of advisory functions.\textsuperscript{180} These advisory functions give them a right to raise and express any concerns they may have before their respective states, but they do not obligate their respective states to do much more than attempt to promote and protect the Sámi culture.\textsuperscript{181} Further, the cultural autonomy granted falls short of the territorial autonomy many indigenous peoples’ groups are striving to attain.\textsuperscript{182}

Despite their ongoing struggle with the state governments, the Sámi Parliaments in Norway, Sweden, and Finland have been able to work with their respective states to form a group consisting of one member from each Sámi Parliament and one member from each state.\textsuperscript{183} The group proposed a draft Nordic Sámi Convention in 2005 that greatly enhances the Sámi populations’ right to self-determination.\textsuperscript{184} While the draft Nordic Sámi Convention follows the modern restrictions on indigenous peoples’ right to self-determination, the Sámi played a significant role in drafting its provisions implying for the time being that they may be accepting of their status as a community that is “sovereign within a sovereign state.”

IV. The Arctic Needs a Binding Treaty that Recognizes the Sámi peoples’ right to Self-Determination and Free, Prior and Informed Consent

The melting ice, recent interest in hidden resources, and threats to the indigenous peoples’ survival make the need for a binding treaty governing the Arctic region more important than ever. As globalization increases rapidly, treaties are the most effective way to protect the earth’s interdependent environment and its people from further degradation and devastation.\textsuperscript{185}

The Arctic is becoming more vulnerable as the melting ice reveals valuable resources, and the Arctic and non-Arctic states begin to position themselves for the extraction of those resources.\textsuperscript{186} The Arctic Coastal States have already taken steps to better position themselves with the Arctic Ocean Conference and the creation of the Ilulissat Declaration.\textsuperscript{187} This decision continues to raise concerns and criticism of the Arctic costal states attempt to stake their claim in potential resources without involving key stakeholders in the decision.\textsuperscript{188}

Denmark’s foreign minister, Per Stig Moeller, claimed the purpose of the meeting was to “send a signal to local populations and the rest of the world that the [Arctic coastal states] will act responsibly.” He further stated, “Hopefully we will once and for all kill the myth that there’s a ‘race for the North Pole’ going on.”\textsuperscript{189} However, this purpose seems disingenuous given

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\textsuperscript{180} Reparations for Indigenous Peoples, \textit{supra} note 83 at 379.
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\textsuperscript{181} Id.
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\textsuperscript{182} Id. at 378.
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\textsuperscript{184} Id.
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\textsuperscript{186} Farrens, \textit{supra} note 8 at 658.
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\textsuperscript{187} Ilulissat Declaration, \textit{supra} note 116.
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\textsuperscript{188} Roth, \textit{supra} note 87 at 856.
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\textsuperscript{189} Paul Reynolds, Trying to head off an Arctic 'gold rush', BBC News (last updated, May 29, 2008 at 3:42 PM), http://news.bbc.co.uk/2/hi/7423787.stm (quoting Denmark’s Foreign Minister Per Stig Moeller’s comments on the Arctic Ocean Conference in May 2008).
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Russia’s placement of its flag on the seabed of the North Pole less than a year earlier in 2007, and the five Arctic coastal states’ strategic decision to exclude the other three Arctic states and indigenous peoples from staking claims in the region.190 The Arctic coastal states’ actions give light to the need for global governance of the Arctic by highlighting this region’s political, environmental, and moral importance.191

The “race to the Arctic” will only be exacerbated by the effects of climate change still to come. The Arctic states, as well as non-Arctic states need to take a precautionary approach and begin negotiations of a binding treaty to ensure mass devastation to the environment and its people does not occur. The precautionary principle applies a preventative approach to problems. The precautionary approach is articulated in Principle 15 of the Rio Declaration which states, “where there are threats of serious or irreversible damage, lack of scientific uncertainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”192

There is no excuse for the lack of action in the Arctic. The science behind the threats to the Arctic environment is clear and widely accepted. The Arctic states, as well as the global community, must become proactive and begin drafting a binding treaty.193 “Approaching the Arctic in a way that places short-term interests of individual states before the long-term health and benefit of the larger world community may increase global warming, militarization, environmental hazards, and other threats, endangering the security of all states and peoples, including the Arctic five. Global survival requires that we expand our loyalty to include not just our family, city state or province, and country, but to humanity and the planet as well.”194

Cooperation among party states is a necessary component of any treaty negotiation. In order to gain cooperation, the Arctic states need to feel as though developing a binding treaty is in their best interest.195 Treaties are essentially contracts between states; therefore, states generally negotiate treaties that provide them with the maximum benefit.196 These benefits may include the protection of public goods, such as the Arctic environment. In order for a binding Arctic treaty to be successful, the overall benefits must outweigh the costs associated with signing the treaty.

Regardless of how cooperation is achieved, the Arctic and its indigenous peoples need a comprehensive and tailored regime that is fully equipped to handle this threatened environment. The treaty must address the rights of indigenous peoples’ living in the region, party structure, jurisdiction, and environmental issues.197 Most importantly, indigenous peoples’ rights must be addressed separately, as well as, considered throughout all provisions of a binding treaty.

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190 Casper, supra note 36 at 860.
191 Roth, supra note 87 at 856.
193 See generally, ACIA EXECUTIVE SUMMARY, supra note 1.
197 Farrens, supra note 8 at 676.
A. Indigenous Peoples’ Rights

Arctic indigenous peoples deserve the right to be sovereign within their respective Arctic States. They should be given free reign to determine their own economic, social and cultural development, along with the right to exploit their own resources. Achieving this status will require increased cooperation between Arctic states and indigenous peoples.

The Sámi Parliaments in Norway, Sweden and Finland, as well as the draft Nordic Sámi Convention, provide excellent examples of states’ and indigenous peoples’ ability to cooperate. The Sámi Parliaments successfully joined forces with the governments of their respective states to draft the Nordic Sámi Convention. The draft Nordic Sámi Convention recognizes that as one people spanning across several states, the Sámi need to have continued access to cross borders in order to preserve their culture.198 It also acknowledges a right to self-determination in Article 3, which expressly gives the Sámi the right to determine their own economic, social and cultural development and the right to exploit their own resources.

Necessary to this right of self-determination is the right of free, prior and informed consent. Arctic states must consult with, and gain the consent of, indigenous peoples prior to implementing any projects that would have effects on the indigenous peoples’ traditional land.

Several international agreements, regional court decisions and domestic laws have recognized this right to free, prior and informed consent. The Saramaka case before the Inter-American Court most clearly articulates this right.199 In that case, the Court stated that the Suriname government has a duty to consult with the Saramaka people, and gain prior, informed consent before undertaking any large-scale developments that may have major impacts on the Saramaka territory.200 UNDRIP, although non-binding, provides explicit recognition of this right to free, prior and informed consent throughout its text.201 Domestically, the Finnish Sámi Parliament Act affirms this right by obliging Finnish authorities to negotiate with the Sámi Parliament in regards to any measures that may directly and specifically affect the Sámi.202

The right to self-determination, and more specifically, the preservative right of free, prior and informed consent must be included in the draft of a binding Arctic treaty. Indigenous peoples’ rights need to be specifically addressed in a provision, as well as, considered when drafting all of the remaining components of the binding treaty. This can be achieved through more active participation in respective state governments, as well as, through required consultation with indigenous groups likely to be affected by any state action. Consultation should be done in a way that fully involves the indigenous peoples’ groups likely to be affected. Indigenous peoples’ should also retain the right to prohibit any state activities that have a substantial likelihood of causing harm to indigenous peoples’ territorial lands.

B. Party Structure

1. Regional Treaty

A regional agreement would be the most realistic option for the Arctic region. It would help protect the fragile environment and resources of the Arctic from being over-exploited by

198 Nordic Sámi Convention, supra note 54 at 20-22.
199 Saramaka, supra note 159.
200 Saramaka, supra note 159 at para.134.
201 See UNDRIP, supra note 156.
202 Finnish Sámi Parliament Act, s. 9 (Act No. 1279/2002) (Fin.).
Arctic and non-Arctic states to the detriment of indigenous peoples. To date, the Arctic states have been reluctant to enter into a binding agreement because of their fear of losing sovereignty rights. Therefore, the Arctic states would likely be more amenable to negotiating amongst themselves to determine how the region they view as their own should be governed.

The Arctic Council may provide the political framework needed to bring together the Arctic States and indigenous peoples for a regional Arctic treaty. The Ottawa Declaration states the Arctic Council was established to “provide a means for promoting cooperation, coordination and interaction among the Arctic States, with the involvement of the Arctic indigenous communities and other arctic inhabitants on common arctic issues.” Currently, the Arctic Council serves only as an inter-governmental forum that has created non-binding documents. However, this political framework may serve as a good starting point for binding treaty negotiations. With the party structure already in place, the transition to negotiation of a binding treaty would be smoother than it would be without a pre-existing structure.

Important to this party structure is the status of indigenous peoples. The indigenous peoples have enjoyed a higher status than non-Arctic states in the Arctic Council as permanent participants. Nothing in the customary law of treaties prevents indigenous peoples from maintaining this status in a binding international treaty. States are free to require full consultation and consent from indigenous peoples prior to making any decisions. Therefore, their status as permanent participants should be maintained in a binding Arctic treaty.

2. Global Treaty

“The Arctic… is a weather station of the world and, as such, has a uniquely valuable ecosystem and resources that create need for protection.” As a “weather station of the world,” the Arctic could be considered a common concern for humankind. This gives non-Arctic states a strong interest in preserving the fragile environment. The best way to preserve that interest may be through a global treaty governing the Arctic. A global treaty would require a balancing of the interests of Arctic states, Arctic indigenous peoples, and non-Arctic States.

Some guidance on how to develop a global treaty governing the Arctic could possibly be derived from the Antarctic Treaty System (ATS). Like the Arctic, Antarctica’s ice sheets play a significant role in regulating global temperatures by reflecting the sun’s rays. Antarctica is also a remote region that faces serious effects of climate change on its environment, and is considered a global commons. The ATS recognizes that “it is in the interest of mankind” to forever use Antarctica for peaceful purposes. In an effort to protect those interests, the ATS froze all state

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203 Casper, supra note 36 at 868.
205 ARCTIC COUNCIL, supra note 91.
206 Ottawa Declaration, supra note 92 at art. 2.
207 Koivurova, supra note 109 at 25.
208 Malloy, supra note 69 at 510.
209 See generally INTERNATIONAL ENVIRONMENTAL LAW, supra note 14 at 1045-1066 (provides background on the Antarctic region and the events that led up to the creation of the Antarctic Treaty System, which includes the Antarctic Treaty, the Convention on the Conservation of Antarctic Marine Living Resources, the Convention on the Regulation of Antarctic Mineral Resource Activities, and the Protocol on Environmental Protection to the Antarctic Treaty).
210 Id. at 1050.
211 Molly Watson, An Arctic Treaty: A Solution to the International Dispute Over the Polar Region, 14 OCEAN &
claims to sovereignty and banned all aspects of mineral extraction except for scientific purposes.\footnote{212}{Antarctic Treaty, June 23, 1961, 12 U.S.T. 794, 402 U.N.T.S. 71, available at http://www.scar.org/treaty/at_text.html.} Given the Arctic’s potential to have dramatic impacts on the rest of the world, one possibility would be to consider the region a common concern to all humankind and protect it as a global commons similar to Antarctica.\footnote{213}{The concept of a common concern of humankind recognizes that humanity may have a collective interest in certain resources or activities that are found wholly within state boundaries because of the planet’s ecological interdependence. \textit{INTERNATIONAL ENVIRONMENTAL LAW}, supra note 14 at 396.}

While the Arctic and Antarctica have similar environmental and sovereignty concerns, they are also vastly different regions. The Antarctic is land covered with ice and has no inhabitants, while the Arctic is considered an ocean that is surrounded by states with inhabitants that number nearly four million. Freezing sovereignty claims and mineral extraction is unlikely to gain the approval of the Arctic states given their position alongside the Arctic Ocean. Rather than permanently freezing territorial claims, an Arctic treaty may define and then freeze the territorial boundaries of the Arctic states to prevent future conflicts. While the ATS is not entirely suitable for the Arctic region, its common concern approach, binding enforcement, inspection rights, environmental protection procedures and recognition of the need for ongoing research provide useful guidelines for an Arctic treaty.\footnote{214}{Malloy, \textit{supra} note 69 at 495.}

Like Antarctica, the Arctic region should be treated as a “natural reserve.” Activities in the Arctic should be done in a way that has limited adverse effects on the environment. As a “weather station of the world”, the Arctic should be protected and preserved to ensure future sustainability.\footnote{215}{Malloy, \textit{supra} note 69 at 510.} Unfortunately, even without the potential resistance from Arctic states, global treaties are much more difficult to accomplish than regional agreements. UNCLOS negotiations took more than ten years to complete, and another ten years passed before the treaty entered into force.\footnote{216}{\textit{INTERNATIONAL ENVIRONMENTAL LAW}, supra note 14 at 313.} Arctic treaty negotiations are likely to be further delayed due to the Arctic states’ reluctance to join. Without their cooperation, an Arctic Treaty would be practically useless. The Arctic region and its people do not have the luxury of waiting for cooperation to develop. Climate change is rapidly altering this region, and action needs to be taken soon. A regional agreement would be the fastest and most effective way to ensure some protection of this fragile environment before it is too late.

\textbf{C. Jurisdiction}

Soeverignty claims must be addressed in order to gain the cooperation of the Arctic states. UNCLOS is the source of law currently being used by the Arctic states to address issue of sovereignty in this region. The Arctic did not receive much consideration during negotiations of UNCLOS; therefore, UNCLOS is an inadequate means to fully address all of the challenges facing this region.\footnote{217}{A \textit{New Sea}, \textit{supra} note 40 at 21.} However, pieces of the comprehensive “constitution for ocean governance” may provide a good framework for issues regarding sovereignty over the Arctic Ocean.
The states may choose to maintain the jurisdictional boundaries established by UNCLOS. These boundaries will require some fine-tuning as disputes between the Arctic states have already occurred. Once jurisdictional lines are drawn, the Arctic treaty may take an approach similar to the ATS by freezing these lines. While the ATS froze all potential claims to sovereignty, the Arctic treaty would be better off freezing jurisdictional boundaries once they are determined. This would ensure cooperation of the Arctic states who desire to retain sovereignty, while eliminating the potential for future claims to territory through submissions to the Commission on the Limits of the Continental Shelf under Article 76 of UNCLOS, as well as further conflicts between Arctic states regarding overlapping territories. Given the United States failure to accede to UNCLOS, a freeze on jurisdictional boundaries is likely to be seen as being in their best interest. As of this writing, the United States is unable to make a claim under Article 76 of UNCLOS to extend its EEZ. The United States is likely to be more willing to join the Arctic treaty if it sees it as an opportunity to foreclose other states’ ability to extend their sovereignty in the Arctic region. Gaining cooperation from the United States would be extremely promising given their historical aversion to ratifying international agreements.

The unique position of indigenous peoples, which is ignored by UNCLOS, should also be considered when jurisdictional lines are being drawn. The indigenous peoples’ communities typically span several different states. State boundaries should not frustrate the indigenous peoples’ ability to cross borders easily, as this is an important element of their cultural survival. Further, indigenous peoples’ territorial lands should be defined with specificity in a binding Arctic treaty. This definition should recognize the indigenous peoples’ right to remain “sovereign within a sovereign state.”

Territorial boundaries could be defined by requiring Indigenous peoples’ groups their proposed territorial boundaries to a committee established by an Arctic treaty for approval, similar to claims made under Article 76 if UNCLOS to the Commission on the Limits of the Continental Shelf. In order to ensure compliance with the states’ frozen jurisdictional boundaries and the indigenous peoples’ territorial lands, the Arctic treaty should provide for an effective dispute resolution procedure that is compulsory and promotes peaceful negotiations over territory disputes.

D. Environmental Protection

The complexity of the Arctic ecosystem makes it more vulnerable to environmental degradation. The melting sea ice is only the tip of the iceberg for environmental problems facing this region. Increased navigation and exploration will have devastating impacts on the fragile environment. These devastating impacts include overfishing, harm to vulnerable species, and potential threats of oil spills. Environmental issues need to be addressed in an Arctic treaty in order to protect the Sámi and other indigenous peoples’ who rely on the land and its resources for their survival. It would also be in the best interest of party states to protect the

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218 INTERNATIONAL ENVIRONMENTAL LAW, supra note 14 at 660.
219 INTERNATIONAL ENVIRONMENTAL LAW, supra note 14 at 1047-1048.
220 INTERNATIONAL ENVIRONMENTAL LAW, supra note 14 at 667.
221 ANAYA, supra note 45 at 2-3.
222 Farrens, supra note 8 at 659.
223 Kathryn Isted, Sovereignty in the Arctic: An Analysis of Territorial Disputes & Environmental Policy Considerations, 18 J. TRANSNAT’L L. & POL’Y 343, 369 (2009).
224 Id.
environment because exploitation of land and resources is important to both the indigenous peoples and the Arctic states. Transboundary pollution and over-exploitation will not only have devastating effects on the Sámi, but will also have devastating effects on the Arctic states as a whole, who rely on the land and its resources as well.  

Under Article 192 of UNCLOS, states have the “obligation to protect and preserve the marine environment.” This duty should be incorporated into a binding Arctic treaty. This duty should also include management of the Arctic’s resources, including gas, oil and marine life, as well as, the recognition of the indigenous peoples’ right to enjoyment of their land, which includes the right to enjoy the land’s resources. Management of State resources should not infringe on this right. Further protection may be drawn from Article 234 on ice-covered waters. Article 234 provides useful guidelines on the prevention and reduction of marine pollution from vessels in ice-covered areas of the Arctic Ocean.

Along with UNCLOS, the ATS may provide useful insight for provisions on environmental protection. The ATS was created at a time when states were looking to “carve up” the fragile Antarctic. Included in the ATS, is the Protocol on Environmental Protection to the Antarctic Treaty (Antarctic Protocol). The Antarctic Protocol designated Antarctica as a “natural reserve” and requires that all activities in the Antarctic Treaty be “planned and conducted on the basis of information sufficient to allow prior assessments of, and informed judgments about, their possible impacts on the Antarctic environment.” For the past 50 years, the ATS has successfully protected Antarctica’s fragile environment. Environmental impact assessments, similar to those required under the Antarctic Protocol, should be included in an Arctic treaty to ensure protection of the Arctic’s fragile environment for years to come. Moreover, monitoring procedures such as environmental impact assessments, also help increase the credibility and compliance of international agreements.

While the lack of sovereignty rights in the Antarctic make it easier to preserve its status as a “natural reserve”, an Arctic treaty would be the most effective way to ensure Arctic and non-Arctic states proceed with caution before conducting activities that may harm the fragile environment. There must be a sense of duty to conduct environmental impact assessments that is derived from fear of retaliation to ensure this process is effective. Inspection rights and environmental protection procedures similar to those found in the ATS would help to ensure state activities are being done in a way that has the least adverse effect on the environment. The ATS contains specific assessment procedures that must be applied in the planning processes leading to decisions about any activities undertaken in Antarctica. An effective Arctic treaty

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225 Transboundary pollution occurs when one states’ environmental degradation causes harm to another state outside of its borders/national jurisdiction. See generally, INTERNATIONAL ENVIRONMENTAL LAW, supra note 14 at 504; and Rio Declaration, supra note 213 at pr. 2.
226 UNCLOS, supra note 100 at art.192.
227 UNCLOS, supra note 100 at art. 234.
228 See generally INTERNATIONAL ENVIRONMENTAL LAW, supra note 14 at 1045-1066.
230 Id. at arts. 2, 3(a).
231 INTERNATIONAL ENVIRONMENTAL LAW, supra note 14 at 1066.
232 Guzman, supra note 217 at 585.
should create assessments procedures that are tailored to the region, and that must be adhered to when states are conducting environmental impact assessments on future activities that may have an adverse effect on the environment. The treaty should create a committee that is in charge of accepting the environmental impact assessments, and determining whether or not the activity may take place. The committee should also maintain the right to conduct its own assessment and/or request additional information regarding the activity before approval.

While states generally enter into treaties to further their self-interests, environmental problems are interdependent and require cooperation from everyone involved. Pollution does not recognize state jurisdiction, and harm caused by one state is likely to spill over into neighboring states. Therefore, self-interest must be weighed against the costs associated with non-compliance of other states. Arctic states are more likely to comply with environmental provisions when they fear their own non-compliance could result in non-compliance from neighboring countries and potential transboundary pollution.

**Conclusion**

It is undisputed that climate change is impacting the Arctic region at a rate faster than the rest of the world. As the ice continues to melt, new resources are becoming more accessible. This new accessibility is sparking a “race to the Arctic” that could have potentially devastating impacts on the unique region’s environment and inhabitants. The melting ice will open up new navigable waters for both the Arctic and non-arctic states to utilize in their efforts to extract natural resources. These extraction efforts are likely to have devastating effects on the indigenous peoples’ that rely on the land and its resources for their survival.

The recent increase in global warming has affected the indigenous peoples’ ability to adapt to their surroundings. Like the majority of indigenous groups, the Sámi rely on the land for food, shelter, and cultural identity. Loss of their ancestral lands could result in both physical and psychological damage. A disconnect from the land could result in cultural genocide of the Sámi. This inability to adapt increases their risk of total demise. They are currently facing increased degradation of their land from both the effects of climate change and increased exploitation of resources.

The Arctic is in need of a comprehensive and tailored regime equipped to handle the issues facing the unique region. A regional treaty would be the most practical and effective way to address these issues, and protect this fragile environment and its inhabitants, especially the Sámi. The current mix of soft and hard law governing this region fails to adequately address all of the challenges facing the Arctic. Ensuring the Arctic states cooperation is necessary to the success of this treaty. A failure to gain cooperation would be both grossly negligent and extremely devastating.

In order to be effective, a binding Arctic treaty must address the indigenous peoples’ right to self-determination and free, prior and informed consent. The evolution of indigenous

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235 INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 14 at 504.

236 ACIA EXECUTIVE SUMMARY, *supra* note 1 at 8.
peoples’ rights in international law is an affirmation that these rights must be included in a binding treaty. The indigenous peoples’ need to be considered as a “sovereign within and sovereign state”, giving them the ability to determine their own economic, social and cultural development. Further, the Arctic states should be required to consult with, and gain the consent of indigenous peoples, prior to implementing projects that may have an effect on their traditional lands. Along with indigenous peoples’ rights, the binding treaty must include provisions regarding jurisdiction and environmental protection. These provisions should be drafted in a manner that balances state interest with the indigenous peoples’ rights to their traditional lands.