

Participation of non–state actors in Arctic environmental governance

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Abstract: This legal paper considers procedures and formal opportunities offered to various groups of non-state actors to participate in international environmental decision-making in the Arctic Region.

The current regime of Arctic governance, with the Arctic Council playing a central role, offers a unique status to indigenous people as a key group of rights-holders in the region. While this particularity of Arctic governance has been well covered by academic work, the participation of other groups of stakeholders – including non-governmental organizations, the private sector or local governments – has been the focus of fewer studies.

The first section of the paper presents in a more general context the rights and roles attributed to stakeholders in international environmental decision-making. The second section introduces a descriptive analysis of the rules and practices formally offering an opportunity for various groups of stakeholders to take part in the work of the Arctic Council, while the third section considers rights and procedures allowing participation in other regional processes involving environmental decision-making.

Introduction

In the perspective of the “Rio Plus 20” UN Conference on Sustainable Development, the international community is once again debating the role of non-state actors in environmental governance. In the context of this broader discussion, the Arctic is often highlighted as an example of a best practice in reference to the status of “permanent participants” granted to the representatives of Indigenous People Organizations (IPOs) at the Arctic Council. Oran Young identified the Council as a “*pioneer in providing opportunities for non-state actors to participate in efforts to address policy issues*” (Young 2009). Considering the important role and

recognition of local indigenous people, and the distance separating national political centers to the region, the Arctic, indeed, presents a unique set of opportunities for the development of a more inclusive model of regional governance, which would take into consideration other voices besides those of national governments.

This article aims at assessing whether the Arctic can indeed be identified as a model of inclusive environmental decision-making, as the previous quote suggests. Rooted in the context of the ongoing discussions on the reform of the institutional framework for sustainable development, the present study will take a legal approach to this question, taking into consideration the formal status

and rights granted to non-state actors in intergovernmental processes, while elements related to the effective influence of these actors will fall beyond the scope of this study.

The first section will set the general context, highlighting the progressive recognition of the importance of the participation of non-state actors in sustainable development governance, as well as the particular challenges relating to the inclusion of stakeholders in intergovernmental forums. The second section will consider the case of the Arctic Council, considering the different status granted, not only to representatives of indigenous people, but also to other categories of actors. Finally, the procedures for the inclusion of non-state actors in the work of other regional intergovernmental institutions, such as regional fisheries management organizations (RFMOs), will be considered in the third section.

Non-state participation in the proceedings of environmental intergovernmental organizations

Progressive recognition of the importance of public participation for sustainable development

The participation of non-state actors has been recognized repeatedly as a key element of sustainable development. Already in 1987, the report of the World Commission on Environment and Development noted the importance of providing non-governmental organizations (NGOs) with

access to information, opportunities to participate in decision-making processes on environmental matters, and access to legal remedies (Our Common Future, 1987).

This acknowledgment was later incorporated in the Rio Declaration on Environment and Development that recognized public participation as a principle of sustainable development.

Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities
 –(Rio Declaration 1992, Principle 10).

The “Agenda 21” adopted during the same conference as the implementation plan of this declaration dedicates a full section to the critical role of the “*commitment and genuine involvement of all social groups*”. The document identifies altogether nine Major Groups representing various groups of stakeholders, from trade unions and local government to women and farmers, thus going beyond the traditional definition of civil society. Agenda 21 provides that rules and policies affecting the access and participation of stakeholders in the work of any institutions contributing to the implementation of sustainable development shall apply equally to each of these groups.

In the pan-European context, the UN Economic Commission for Europe (UNECE) adopted in 1998 the Aarhus Convention on Access to Information,

Public Participation in Decision-making and Access to Justice in Environmental Matters. This convention constitutes an additional landmark in the international recognition of the participatory rights of stakeholders in environmental decision-making as a legal principle, as it is enforced through a compliance mechanism hearing individual applications.

Public participation in intergovernmental forums

Despite this growing recognition of the role of civil society, international cooperation remains nevertheless framed to a large extent, by a Westphalian vision of international affairs governed solely by sovereign states. The participation of non-states actors in international decision-making thus remains marginal, civil society invited mainly to play the role of *observer* rather than *participant*.

The report of the Brundtland Commission already noted in 1987 that improvements to the participatory rights of civil society should not only take place at the domestic level, as it called for the “*establish[ment] or strengthen[ing] of procedures for official consultation and more meaningful participation by NGOs in all relevant intergovernmental organizations*”. The report justified this need by the crucial role played by NGOs and private and community groups in supporting the delivery of public policies and programs. Building on the report, both declarations adopted at the Rio Conference and at the Johannesburg Summit referred to the importance of increasing the role of civil society at all levels of decision-making, thus including participation at the international level.

Under the frame of the Aarhus Convention, pan-European countries adopted in 2005 the Almaty Guidelines on Promoting the Application of the Principles of the Aarhus Convention in International Forums. These guidelines constitute the first international document providing a detailed set of principles regarding the procedural rights of civil society in intergovernmental processes. The UNECE also established a Task Force on Public Participation in International Forums mandated to review existing practices and regulations and to highlight best practices and challenges faced by specific intergovernmental organizations.

Arguments supporting the inclusion of some forms of participation of NGOs refer to several added values for the intergovernmental process. Stakeholders are in a position to provide unique expertise and information, both technical and practical, thus contributing to the quality of the outputs of the process. At the meetings themselves, observers might also facilitate positive outcomes, acting as bridge builders between various national positions or by researching and proposing political options. Finally, NGOs provide an additional link between different levels of governance by monitoring and reporting on domestic implementation or by building public support for policies in their national context (Raustiala 1997).

The role of cooperation among intergovernmental organizations

While references to the role of non-state actors in international governance mainly relate to civil society, cooperation among intergovernmental organizations (IGOs) also amounts to non-state actors participation. Considering the large number of IGOs currently established and the important areas of overlap in both geographical and material scope, the capacity of these organizations to cooperate and provide input in the work of similar bodies is key in ensuring a minimum amount of duplication of resources. For instance, the importance of cooperation among international institutions is highlighted by the 2007 pilot initiative of the UN Development Group “delivering as one” through which UN agencies, involved in projects related to development, attempt to increase the effectiveness of their work through the streamlining of their intervention in target countries. This necessity is particularly relevant to the field of environmental cooperation as the UN currently estimates the number of international environmental agreements at over 500. The mutual recognition of intergovernmental organizations through the granting of observer status also reinforces the legitimacy of each organization (Willettts 2001).

The rights and roles of non-state actors in the work of the Arctic Council

Specific recognition of the status of Indigenous People Organizations

In the process leading to the creation of the Arctic Council, Indigenous People’s Organizations (IPOs) were originally included under the traditional status of observers, a status shared with other NGOs, as well as with non-Arctic states. The role of IPOs was enhanced with the adoption of the Ottawa Declaration on the Establishment of the Arctic Council, which creates a specific category for the participation of IPOs. According to Article 2, the three organizations already recognized as observers under the Arctic Environmental Protection Strategy were granted the status of *Permanent Participants*, a status potentially open for other organizations representing indigenous people. According to the provisions of the Declaration, “[t]he category of *Permanent Participation* is created to provide for active participation and full consultation with the Arctic indigenous representatives within the Arctic Council”. The Arctic Council’s rules of procedure further stipulate that “[t]his principle applies to all meetings and activities of the Arctic Council”.

According to the rules of procedure, Permanent Participants have almost equal participatory rights as the state members to the Council, with an exception in regard to decision-making. This status has been described as “close to a *de facto* power of veto should they all reject a particular proposal” (Koivurova and Heinämäki 2006). Permanent Participants are also to be

consulted through the preparations of any official meetings, as they can raise issues to be added to the agenda or can propose collaborative activities. In addition to their participation in the Senior Arctic Officials' meetings and the bi-annual ministerial meetings, Permanent Participants have also actively taken part in the activities of each of the six working groups established under the Arctic Council and have contributed to other ad-hoc initiatives, such as the 2004 Arctic Climate Impact Assessment. Consequently, the Arctic Council approach to the participation of indigenous people constitutes an example of a best practice that other international forums could consider adopting (Heinämäki 2009).

More limited formal access for other categories of observers

While the Ottawa Declaration establishing the Arctic Council led to a strong recognition of the role of indigenous people, the establishment of the Arctic Council did not lead to a similar acknowledgment of other segments of civil society. The Ottawa Declaration does indeed refer to the desire to “*ensure full consultation with and the full involvement of indigenous people and their communities and other inhabitants of the Arctic in such activities* (emphasis added)”.

This emphasis on the need to include both indigenous and local communities in governance of the Arctic was also highlighted in the proceedings of the Task Force on Sustainable Development and Utilization (TFSDU), which contributed to the preparatory work leading to the establishment of the Arctic Council

(Keskitalo 2004). The TFSDU recognized for instance that “*the inclusion of the indigenous people and local communities in the decision-making process will enhance the legitimacy of the decisions made and will facilitate compliance*”.

The Ottawa Declaration, however, created a third category of stakeholders with limited rights to participate in the work of the Arctic Council. This “observers” category is open for non-Arctic States, intergovernmental and interparliamentarian organizations, and non-governmental organizations. The main criteria conditioning the approval of the observer status is the determination by the Council that the applicant can “*contribute to its work*”. While the interpretation of this rule is at the core of the current debate related to the role of non-Arctic states, diverging interpretations of the implications of this provision have also been used to refuse the recognition of the status to NGOs when some Arctic states considered that the activities of a particular applicant were not consistent with their vision of sustainable development for the Arctic (Keskitalo 2004).

The rules of procedure provide a more limited role for observers, mainly restricted to the attendance of the meetings of the Council, as well as to the submission of relevant documents and possibly to short interventions. Thus non-state actors other than IPOs have a more restricted capacity to participate effectively to the proceedings of the Arctic Council. Where observers have specific expertise, their contribution is in practice welcome to a larger extent in the various projects launched by the Working Groups. In practice, nine IGOs have obtained the status of permanent observer to the Arctic Council, as well as eleven

NGOs representing the interests of five out of the nine major groups identified in the Agenda 21: environmental organizations, research institutions, regional governments, indigenous people, and members of the primary sector of the economy.

Interestingly, the formal status granted to NGOs is nonetheless similar to the one given to non-Arctic states. Hence, despite the fact that the rules of procedure are not particularly inclusive for NGOs, they do not differentiate between state observers and non-governmental observers. In recent years, some of the Arctic Council members have expressed concerns with the role played by non-Arctic states in their proceedings and have refused to grant the status of observer to any new applicant until the reach of a consensus on their role. This ongoing political discussion has led to the freezing of the recognition of the observer status of new applicants, hence leading to a situation in which some non-state actors, already recognized as observers, exercise more participatory rights in the work of the Council than the four sovereign states and the EU, which have submitted their applications more recently.

Recent evolutions: institutionalization vs. inclusiveness

The Search And Rescue Agreement: a purely intergovernmental process

At the 2011 Ministerial Meeting held in Nuuk, the Arctic Council announced the adoption of the first legally binding instrument negotiated under its auspices: the Agreement on Cooperation in Aeronautical and Maritime Search and Rescue. The

provisions of the agreement do not contain references to the role of non-state actors in relation to the implementation of the agreement or as observers during the decision-making processes established in the new regime.

The presence of local government representatives or members of the shipping and aeronautical industries could for instance have brought added value to the functioning of this agreement. While the agreement do not relate directly to environmental protection, it is relevant to this study as it might well indicate a general trend for the future of Arctic governance. Considering their experience with regard to the recognition of non-state actors, the Arctic Council members had the opportunity to build on their inclusive approach to governance rather than ignore the role that such actors can play.

Increasing reliance on Task Force and implications for non-state actors

The adoption of the Search And Rescue Agreement was the result of a two-year long drafting process that took place under a task force especially created by the Arctic Council in 2009. The terms of reference for the task force did not provide for any participation of non-state actors. The two other task forces established recently on Short-Lived Climate Forcers and for Institutional Issues are based on more participatory terms of references. As ad-hoc bodies, task forces can possibly depart from the formal rules of procedure applying both to the meetings of the Arctic Council and the proceedings of its working groups.

The 2011 Senior Arctic Officials' report refers to the growing use of task forces in the substantive work of the Arctic Council. The report further mentions that the mode of operation of the task force will be determined in a case-by-case basis, thus implying that the Arctic states reserve the right to establish such bodies on a less participatory basis than provided under the 1996 rules of procedure.

The challenge of retaining inclusiveness while strengthening institutional elements

These developments might reinforce concerns over the fact that a further institutionalization of the Arctic Council could lead to a questioning of the special status of the Permanent Participants. The willingness of the eight Arctic States to accept this strengthened participation of indigenous people's organizations might indeed diminish if the Arctic Council adopts more formal and legal structures. International law does not create any obstacle to a similar level of participation of indigenous people in a more formalized institution. However, the increased institutionalization of the Council is likely to involve a more conservative approach to intergovernmental cooperation and a restriction of the role that non-state actors, including indigenous people, could be expected to play (Koivurova 2008).

Non-state actors in other regional forums for environmental governance

While the Arctic Council provides a unique model for the inclusion of non-state actors, this section seeks to assess whether this inclusiveness can be considered as a general trend in the region or if the status of the Permanent Participants at the Council remains an exception.

Sustainable use and conservation of marine mammals

The main international organization related to whaling, the International Whaling Commission (IWC), abandoned its regulatory approach to marine mammals exploitation for a policy of prohibition justified by moral arguments. This decision motivated traditional whaling nations of the North Atlantic to withdraw from the IWC and form their own regional organization to create a legal framework within which the sustainable exploitation of marine mammals could take place. In 1992, Iceland, Norway, Greenland and the Faroe Islands adopted the Agreement on Cooperation in Research, Conservation and Management of Marine Mammals in the North Atlantic, establishing the Northern Atlantic Marine Mammal Commission (NAMMCO), with the purpose of contributing to the conservation and rational management of marine mammals in the North Atlantic through consultation and cooperation.

The 1992 agreement provides that the Council, the main body of policy-making at the Commission, which reaches decision

by unanimity, could consider opening meetings of the Commission to observers when such participation might contribute to the objective of the Commission. The rules of procedure of NAMMCO further regulate the status of observer. NGOs, as well as global and regional intergovernmental and interparliamentary organizations, can apply for observer status by providing information relative to their role, functions and operations. The Council thus decides whether to grant observer status to the applicant on the basis of the criteria discussed previously. Once granted, observer status applies for any upcoming meeting, unless a party to the agreement raises an objection. The chairman of any given meeting has the discretion to allow observers to make statements or submit documents. The role of observer organizations was raised in the 2006 meeting of the Council, which reiterated that observer status should be granted to organizations contributing to the purpose of NAMMCO. The Council also decided to clarify that the admission of observers requires a unanimity decision.

So far, the majority of observer organizations attending NAMMCO meetings consists of Regional Fisheries Management Organizations (RFMOs) such as North East Atlantic Fisheries Commission (NEAFC), the North Atlantic Fisheries Organization (NAFO) and the IWC, and other IGOs such as the FAO and the International Council for the Exploration of the Seas (ICES). In addition, a few NGOs have also obtained observer status. In practice, those organizations include only NGOs defending the interests of fishing communities (including the Inuit Circumpolar Council)

and whalers. Finally, the participation of observers to the meetings of the various committees established by the commission differs from one committee to another. The rules of procedures of the Management Committee state that the committee may decide over the participation by observers to its meetings, while other committees – the Scientific Committee and the Committee on Hunting Methods – refuse participation by observers as a default rule, unless the parties unanimously decide otherwise. In this respect, the procedures allowing for participation by observers in the proceedings of the NAMMCO are slightly more restrictive than those applied at the IWC – the organization with the closest material scope. Indeed observers can attend all meetings of the subsidiary bodies of the IWC to the exception of the financial and administrative commission.

North Atlantic fisheries commissions

The Northwest Atlantic Fisheries Organization

The Northwest Atlantic Fisheries Organization (NAFO) was established in 1979 as a regional fisheries commission managing most of the fisheries along the coasts of Canada and Greenland. The rules of procedure specific to each of the Governing Council, the Scientific Council and the Fisheries Commission also provide a right for observers to attend meetings and to address both plenary and subsidiary bodies – however, without any voting right. Observers shall also have access to all non-confidential documentations shared by the secretariat to the parties and can submit

written documents, A written version of the main statements delivered by observers is made available by the secretariat on its website. The NAFO Convention also provides that the Scientific Council might invite cooperation by “public and private organizations”, which have objectives related to fisheries conservation. Finally, NGOs can apply for the observer status, provided that they justify a particular interest in the conservation of a species specifically addressed by NAFO.

Representatives from research institutions, environmental NGOs, and IGOs have attended the past meetings of these bodies with observer status. In relation to the transparency of its meetings, the media policy of NAFO was highlighted as an example of good practice in the 2011 UNECE report on “Good practice and challenges for public participation in international forums”. The same report also took note of the fact that the NAFO secretariat faces challenges in ensuring a balance between the diverging interests of stakeholders involved in fisheries management.

The Northeast Atlantic Fisheries Commission

A similar RFMO, the North-East Atlantic Fisheries Commission (NEAFC), regulates fisheries in the waters located between the archipelagoes of the Azores and Svalbard. Its rules of procedure contain similar provisions related to the participation of observers as those of NAFO. Provided that they support the main objective of the Commission and that they prove a specific interest in some of the species under

purview by the commission, NGOs and IGOs can obtain observer status allowing them to attend and address meetings at the discretion of the president of the meeting. Such statements are included in the reports of the meetings. However, observers are not allowed to take part in committees and working groups meetings, except for the ICES, due to a specific provision in the memorandum of understanding established between the two organizations. Consequently, the capacity to contribute to work of NEAFC of other IGOs working on marine conservation is constrained, which leads to a lack of communication, thus potentially increasing the risk of a duplication of efforts (Kvalvik 2011).

Regional cooperation in the Barents Region

The model of regional cooperation adopted in the Barents region is particularly enriching with regard to the role attributed to non-state actors in regional cooperation. This cooperation is articulated on the basis of a double institutional layer with regional sustainable development as its main objective. At the national level, states take part in the Barents Euro-Arctic Council (BEAC) gathering at a ministerial level on a bi-annual basis. At the regional level, the Barents Regional Council (BRC) was established to foster cooperation among the representatives of regional governments. Due to the political, rather than legal, nature of the Barents cooperation, most of the cooperation takes place through the activities of the working groups established at both international and interregional levels.

At the international cooperation level, the 1993 terms of references provide that the BEAC could invite participation of observers to the meetings of the Council and of its working bodies. The participation of youth groups and the business community has been particularly emphasized in the two working groups most related to their interests, with a specific stakeholder advisory body established in both cases. However, the working group most relevant to our study – the WG on Environment – involves primarily the participation of national administrations.

At the level of regional cooperation, each of the 13 regions involved in the Barents Cooperation participate, together with representatives of three indigenous people's organizations, in the annual meetings of the BRC. One of the five working groups established at the interregional level focuses on environmental cooperation and gathers only representatives from the member regions.

Indigenous people are currently participating in the Barents cooperation through their membership in the Working Group on Indigenous Peoples that provides input both to the BEAC and the BRC. Representatives of IPOs have, however, recently expressed their wish to see the status of their organizations elevated in the Barents Cooperation to a level similar to the status of the Permanent Participant at the Arctic Council. Interestingly, the 1993 Kirkenes Declaration referred explicitly to the chapter of Agenda 21 related to the importance of the participation of indigenous people in decision-making, without further references to the other eight

chapters that acknowledged other groups of relevant stakeholders.

The BEAR thus represents a model of regional governance regarding the participation of different layers of public authority. In this cooperation, a large role is foreseen for the representatives of regional administrations that do not require the mediation of their national governments to engage in joint projects across borders. However the participation of civil society appears to be relatively low in the work of the BEAR. The relative absence on the BEAR's webpage of information and guidance on the observer status and related advantages might contribute to explain the lack of participation by NGOs (Sellheim 2011).

Concluding observations

Over the past decades, the international community has progressively recognized the importance of the participation of non-state actors in the governance of sustainable development. The involvement of stakeholders in international decision-making helps build public support for the projects of, and contributes to the legitimacy of these intergovernmental processes. Cooperation and mutual recognition among intergovernmental organizations reduce costs and increase effectiveness by avoiding duplication of efforts. Intergovernmental cooperation, however, remains largely framed at the global level by a vision of the international realm involving mainly sovereign states as actors.

In this context, several forums for Arctic regional cooperation provide interesting

examples of innovative approaches to the role of non-state actors. In particular, the status of IPOs at the Arctic Council is often highlighted as a best practice. Oran Young noted that non-state actors have been successful in the past in securing for themselves opportunities to participate in Arctic governance by framing the issues they work on in a way that resonated with the agenda of the Arctic states (Young 2009). The author highlighted however that there are reasons to question whether these actors would be able to maintain this high level of engagement in the context of a growing interest by non-Arctic actors to play their part in regional governance.

Among the other Arctic institutions dealing with environmental protection, the Barents Cooperation has explored a different approach relying on projects implemented jointly among regional authorities. Other groups of stakeholders have, however, failed to play an active role in the decision-making processes of this platform. Besides these two highly visible experiences, Arctic intergovernmental cooperation on environmental matters remains mainly based on the participation of states, whereas other actors are confined at best to an observer position.

With the acceleration of the impacts of climate change in the region, new challenges and new opportunities emerge rapidly in the Arctic, necessitating improvements or adjustments of the existing forums of regional governance. In this context, the states involved are facing a choice regarding the role that they perceive for other stakeholders in Arctic cooperation. These rapid changes might offer a unique opportunity to build on and further develop

the innovative and inclusive approaches upon which they have relied when establishing some of the key existing regional institutions. Considering the increasing pressure by external actors to become involved in the activities proliferating in the region, the empowerment of local actors would certainly have an added value from the perspective of the eight Arctic states.

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