

The Yearbook of Polar Law

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The Status and Role of Indigenous Peoples in Arctic International Governance

Timo Koivuvuori*

1. Introduction

The status of Arctic indigenous peoples' organizations has been considered unique: they are permanent participants in the Arctic Council, an inter-governmental forum dedicated to advancing environmental protection and sustainable development in the region. The Council's member states must consult the indigenous peoples before any decision-making and the peoples' status is higher in the Arctic Council than that of some very powerful states, such as Germany or China, who can be only observers.

The article explores two main questions. The first is how the indigenous peoples' organizations have been able to obtain the status of permanent participants (PPs) in Arctic wide-cooperation and what they have achieved with that status. The second is what future challenges lie ahead for PP status in the Arctic Council, in other words, what the chances are that PP status will be upheld in light of the various short- and long-term challenges that Arctic soft-law organizations face. On the other hand, certain interesting developments in the Barents Euro-Arctic Region (BEAR) regarding the status of indigenous peoples urge one to determine whether PP status might even spread from the Arctic Council to other inter-governmental bodies.

The article proceeds as follows. First, in order to contextualize the argument fully, background information is provided on the evolution of multi-level governance, in particular soft-law governance, and how that governance can be characterized in international law. Special emphasis will naturally be placed on two forms of soft-law cooperation in the Arctic: the Arctic Council and the Barents Euro-Arctic Region, with its two levels of governance. Another important issue is the evolution of the law related to indigenous

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peoples, given the pronounced trend in general international law whereby they are gaining more rights, a development evident in the Arctic as well.

Thereafter, the core issue – the status of Arctic indigenous peoples in Arctic international cooperation – is examined. First, it is important to look back and study how the Arctic indigenous peoples' organizations have been able to obtain a position as strong as that of PP in the Arctic-wide cooperation, first in the Arctic Environmental Protection Strategy (AEPS)¹ and then in the Arctic Council.² It is also important to provide an overview of whether Arctic cooperation in general, and the PPs in particular, have been able to contribute to the goals of the cooperation – environmental protection and sustainable development – and how the PPs have been able to function in general in Arctic cooperation.

After looking at the past and at the present, it will be useful to examine whether the institution of PP has characteristics that might be transferable to other frameworks of governance. The closest attention will be given to the BEAR, since via its two levels of governance the region's indigenous peoples have been able to contribute through a working group on indigenous peoples and have started to demand a status similar to that of PP in the Arctic Council.

Thereafter, the article takes up one near-term and one long-term challenge for the institution of PP. The first is the incipient coastal state cooperation, which has provoked consternation not only among member states of the Arctic Council, but also – and particularly – among the Council's PPs. The longer-term challenge is the question of how the institution of PP could be accommodated in a new governance structure for the region laid out in a legally binding treaty for the region – if one is ever concluded. Finally, concluding observations will be put forward to clarify how the institution of PP has fared in the past and present and how it can meet the enormous challenges facing the Arctic region in the future.

2. Preliminary Questions

2.1. Multilevel Governance as a Real Challenge to International Law

International relations have been developing rapidly since the end of the Cold War. There are various new ways of cooperation that are difficult to fit in

¹ Declaration on the Protection of the Arctic Environment, Rovaniemi, Finland, 14 June 1991, *International Legal Materials* 30 (1991):1624, <http://arctic-council.org/filearchive/Rovaniemi%20Declaration.pdf> (accessed 9 November 2010).

² Declaration on the Establishment of the Arctic Council, Ottawa, Canada, 19 September 1996, *International Legal Materials* 35 (1996):1382, <http://www.arctic-council.org/en/main/infopage/73/> (accessed 9 November 2010). [Ottawa Declaration].

with the traditional concepts and rules of international law. Good examples are the numerous treaty regimes, complexes of principles, rules, decision-making procedures and institutions by which the states parties develop the regime with the help of both hard and soft law. Some scholars have argued that these institutions could be equated to inter-governmental organizations (with consequent applicability of the law governing inter-governmental organizations),³ yet most view them as governed by the customary law of treaties. International law cannot fully accommodate these new forms of international governance; the main approach is to try to strike an analogy with the meta-rules in customary international law that are applicable to regular inter-governmental organizations and international treaties,⁴ although some schools of thought have gone further.⁵

The northern international governance structures – in particular the Arctic Council and the Barents Euro-Arctic Region (BEAR) – also exhibit features that make it difficult to categorize them in terms of international law. Both are types of soft-law organizations, and are presented briefly in what follows.

The initial idea of Arctic-wide cooperation was launched in 1987 in Murmansk by former Soviet Secretary-General Mikhail Gorbachev. The Soviet leader proposed that the Arctic states could initiate cooperation in various fields, one being protection of the Arctic environment.⁶ This idea was concretized in part when Finland convened a conference of the eight Arctic states – Canada, Denmark, Finland, Iceland, Norway, Sweden, the Russian Federation and the United States – in Rovaniemi in 1989 to discuss the issue. After two additional preparatory meetings – in Yellowknife, Canada, and Kiruna,

³ Robin Churchill and Geir Ulfstein, "Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law", 94 *American Journal of International Law* (2000): 623–659.

⁴ See: e.g. Hartmut Hillgenberg, "A Fresh Look at Soft Law", *European Journal of International Law* 10 (1999): 499–515.

⁵ One interesting school of thought studying these new forms of international cooperation that do not fit in with traditional concepts of international law is Global Administrative Law. Its particular insight is that the starting-point is not to begin by examining the formal status of a legal instrument but rather by analyzing it in terms of its functional attributes; if there is an international governance regime that falls outside of the concepts of international law, it is important to focus on attributes such as accountability and legitimacy. See Nico Krisch and Benedict Kingsbury, "Symposium on Global Governance and Global Administrative Law in the International Legal Order", 17 *European Journal of International Law* (2006): 1–13.

⁶ Gorbachev proposed that a nuclear-weapon-free zone be declared in northern Europe; naval activity be limited in the seas adjacent to northern Europe; peaceful cooperation be the basis for utilizing the resources of the Arctic; scientific study of the Arctic has great significance for all humankind; the countries of the North cooperate in matters of environmental protection; and the Northern Sea Route be opened by the Soviet Union to ice-breaker-escorted passage.

Sweden – the eight Arctic states, as well as other actors, met again in Rovaniemi in 1991 to sign the Rovaniemi Declaration, by which they adopted the Arctic Environmental Protection Strategy (AEPS).⁷

The AEPS identified six priority environmental problems facing the Arctic (persistent organic contaminants, radioactivity, heavy metals, noise, acidification and oil pollution). It also specified the international environmental protection treaties that apply in the region and, finally, set out actions to counter the environmental threats. The eight Arctic states established four environmental protection working groups: Conservation of Arctic Flora and Fauna (CAFF),⁸ Protection of the Arctic Marine Environment (PAME),⁹ Emergency Prevention, Preparedness and Response (EPPR),¹⁰ and the Arctic Monitoring and Assessment Programme (AMAP).¹¹ Three ministerial meetings (after the signing of the Declaration and the Strategy) were held in this first phase of Arctic cooperation, generally referred to as the AEPS process. The meetings were held in 1993 (Nuuk, Greenland), 1996 (Inuvik, Canada) and 1997 (Alta, Norway). Senior Arctic Officials, normally officials from the environmental and foreign ministries of the eight Arctic states, guided the cooperation in between the ministerial meetings. The last ministerial of the AEPS was held after the establishment of the Arctic Council and thus focused on integrating the AEPS into the structure of the Council.

The Arctic Council was established in September 1996 in Ottawa, Canada, with the Arctic states signing a declaration creating the Council and issuing a joint communiqué to explain the newly created body.¹² With the founding of the Council came changes in the forms of Arctic cooperation that had been based on the AEPS document, changes that clearly extended the terms of reference beyond the previous focus on environmental protection. The Council was empowered to deal with “common Arctic issues, in particular issues of sustainable development and environmental protection in the Arctic.”¹³ This yielded a very broad mandate, since “common issues” can include almost any international policy issue; however, in a footnote, the Declaration provides that “the Arctic Council should not deal with matters related to military security.”¹⁴ Environmental cooperation is now included as a principal focus

⁷ The history of the negotiation process is studied in Monica Tennberg, *The Arctic Council: A Study in Governmentality* (Rovaniemi: University of Lapland Press, 1998), 53–61.

⁸ CAFF, <http://www.caff.is/> (accessed 9 November 2010).

⁹ PAME, <http://www.pame.is/> (accessed 9 November 2010).

¹⁰ EPPR, <http://eppr.arctic-council.org/> (accessed 9 November 2010).

¹¹ AMAP, <http://www.amap.no/> (accessed 9 November 2010).

¹² Ottawa Declaration, *supra* note 2.

¹³ *Ibid.*, Article 1 (a).

¹⁴ *Ibid.*, footnote at p. 3.

within the mandate of the Council,¹⁵ with the four environmental protection working groups that had already started up as part of the AEPS cooperation continuing under the umbrella of the Council.¹⁶ The second “pillar” of the Council’s mandate is cooperation on sustainable development,¹⁷ the terms of reference for this cooperation were adopted in the second ministerial meeting of the Council, held in 2000 in Barrow, Alaska, and the work is managed by the Arctic Council’s Sustainable Development Working Group (SDWG).¹⁸

The declaration establishing the Arctic Council amends and elaborates the rules on participation set out in the AEPS. It provides for three categories of participants: members, permanent participants and observers. The eight Arctic states are members and the three organizations representing the indigenous peoples of the Arctic are permanent participants.¹⁹ The declaration also lays down the criteria for observers,²⁰ as well as the criteria for the status of permanent participant and the decision-making procedure for determining that status.²¹

The decision-making procedure of the Arctic Council, which had developed in the course of AEPS cooperation, is made more explicit in the Declaration. Article 7 provides: “Decisions of the Arctic Council are to be by consensus of the Members”. In Article 2, “member” is defined as including

¹⁵ *Ibid.*, Article 1 (b).

¹⁶ *Ibid.*, Article 1 (b) reads: “The Arctic Council is established as a high level forum to... b. oversee and coordinate the programs established under the AEPS on the Arctic Monitoring and Assessment Program (AMAP); Conservation of Arctic Flora and Fauna (CAFF); Protection of the Arctic Marine Environment (PAME); and Emergency Prevention, Preparedness and Response (EPPR)”.

¹⁷ *Ibid.*, Article 1 (c) reads: “The Arctic Council is established as a high level forum to... c. adopt terms of reference for, and oversee and coordinate a sustainable development program”.

¹⁸ SDWG, <http://portal.sdwg.org/> (accessed 9 November 2010).

¹⁹ Article 2 of the Declaration enumerates the following as permanent participants: “The Inuit Circumpolar Conference, the Sami Council and the Association of Indigenous Minorities of the North, Siberia and the Far East of the Russian Federation”. Three other organizations have since been accepted as permanent participants: the Aleut International Association, the Gwich’in Council International and the Arctic Athabaskan Council.

²⁰ *Ibid.*, Article 3 of the Declaration reads: “Observer status in the Arctic Council is open to: a) non-Arctic states; b) inter-governmental and inter-parliamentary organizations, global and regional; and c) non-governmental organizations that the Council determines can contribute to its work”.

²¹ *Ibid.*, Article 2 (2) reads: “Permanent participation is equally open to other Arctic organizations of indigenous peoples with majority Arctic indigenous constituency, representing: a. a single indigenous people resident in more than one Arctic State; or b. more than one Arctic indigenous people resident in a single Arctic state. Decisions by the Arctic states on whether this criterion is fulfilled must be unanimous”. Article 2 also states: “the number of Permanent Participants should at any time be less than the number of members”.

only the eight Arctic states. Decision-making by consensus is to be undertaken only after 'full consultation'²² with the permanent participants, i.e., the organizations of the Arctic indigenous peoples. Although these permanent participants do not have formal decision-making power, they are clearly in a position to exert much influence in practice on the decision-making of the Council.

The work of the Arctic Council is dictated to a considerable extent by its chair states. The first chair was Canada (1996–1998), followed by the United States (1998–2000), Finland (2000–2002), Iceland (2002–2004), and Russia (2004–2006), and Norway (2007–2009); the current chair at the time of writing is Denmark. Since the Council has no permanent secretariat, the chair state has a great deal of freedom to choose its priorities during its tenure, which hinders the formation of long-term policies (although the three Scandinavian states created a semi-permanent secretariat that will operate in Troms, Norway, until 2012). The Arctic Council has also created certain programs of its own, such as the Arctic Council Action Plan to Eliminate Pollution in the Arctic (ACAP),²³ which was recently turned into the sixth working group, and the Arctic Climate Impact Assessment (ACIA).²⁴ The Council has carried out many ambitious scientific assessments in addition to the ACIA, the most recent ones being the oil and gas assessment released in 2008,²⁵ the Arctic Marine Shipping Assessment (AMSA)²⁶ published in 2009, and the Arctic Biodiversity Assessment,²⁷ due out in 2013. Both the AEPs and the Arctic Council have been established via declarations, both forms of cooperation thus being based on soft-law from their very inception.

Cooperation in the Barents Euro-Arctic Region began in 1993 with the establishment of two separate forms of cooperation: the Barents Euro-Arctic Council (BEAC) and the Barents Regional Council (BRC). The Kirkenes Declaration²⁸ established the Council of the Barents Euro-Arctic Region, widely known as the Barents Euro-Arctic Council (BEAC), in 1993 as an intergovernmental cooperative forum to support and promote regional coop-

²² *Ibid.*, Article 2.

²³ ACAP, <http://www.ac-ap.org/> (accessed 10 November 2010).

²⁴ ACIA, <http://www.acia.nat.edu/> (accessed 10 November 2010).

²⁵ Arctic Oil and Gas 2007, OGA Overview Report (final May 2008), AMAP, <http://www.amap.no/> (accessed 10 November 2010).

²⁶ http://arcticportal.org/uploads/L9/LP/L9LPqHz/Z88Zp4EOdasTca/AMSA_Scenarios_NEW.pdf (accessed 10 November 2010).

²⁷ <http://arcticportal.org/uploads/L1/LP/L1LPqHz/Z88Zp4EOdasTca/ABA-Workplan-and-Financial-Strategy.pdf> (accessed 10 November 2010).

²⁸ For a brief history of the BEAC, see: Finnish Barents Group Oy and Others, *Barents: The Barents Euro Arctic Council* (Helsinki: Finnish Ministry of Foreign Affairs, 1996), 1–18.

eration in the Barents Region. The organizational framework of the BEAC encompasses members, observers and the Committee of Senior Officials. The regional county governments of the Barents Region and the Saami Council established the Barents Regional Council (BRC) by signing a cooperation protocol²⁹ (hereinafter the Protocol Agreement). The BRC was in effect – and quite naturally – established at the same place and on the same day as the BEAC; the two have similar aims and objectives, although they are formally separate. Since the beginning of the cooperation, both forums have been working closely together in the fields of environmental protection, economic cooperation and search and rescue, among others. Over time, both have become interlinked in the effort to address the challenges faced by the inhabitants of the region, a good example of this being the working group on indigenous peoples that serves both the BEAC and BRC (together called here 'Barents Euro-Arctic Region (BEAR)').³⁰

The establishment of both the Arctic Council and the BEAR were clearly made possible by the end of the Cold War, established as they were in its immediate aftermath, in 1991 and 1993, respectively. There are also many reasons why such soft-law inter-governmental forums were chosen. Such structures can be established flexibly, especially because no domestic structures (e.g. procedures within national Parliaments) are involved and they can also be steered flexibly to meet the changing demands of governance. In contrast, if a treaty is amended, all the states parties need to give their consent to the amendment in one way or another; this often leads to fragmentation of the treaty regime, with one group of states being party to one amendment, and another to a second. Soft-law instruments can be amended without such formalities and, importantly, these forms of international cooperation allow for flexible participation: the region's indigenous peoples have a unique status as permanent participants in the Arctic Council – a status that elevates them above non-Arctic states such as China, which can only be observers. In the BEAR, cooperation at county level has made it possible to conduct international relations in parallel with the governments.

²⁹ The Protocol Agreement from the Statutory Meeting of the Regional Council of the Barents Region (the Euro-Arctic Region) adopted by the Regional Council of the Barents Region, Kirkenes, 11 January 1993. see: http://www.barentsinfo.fi/beac/docs/501_doc-StatutoryMeetingRegionalCouncil.pdf (accessed 11 November 2010).

³⁰ For a comprehensive study, see: Walid Hasanat, 'Cooperation in the Barents Euro-Arctic Region in the Light of International Law', *The Yearbook of Polar Law* 2 (2010), 279–309. See also: S. G. Sreejith, 'Subjective Environmentalism: The Barents Euro-Arctic Council and Its Climate Policy,' in *Climate Governance in the Arctic*, eds. Timo Koivurova et al., (United Kingdom: Springer, 2009), 383–402.

It is also important to keep in mind the downside of soft-law intergovernmental cooperation, given that the cooperation should be able to respond to monumental challenges such as those facing the Arctic. Ambitious international governance is very difficult – if not altogether impossible – with soft-law instruments. States use soft-law mostly when they are still testing whether a certain commitment to cooperation or level of ambition in regulation can be achieved; only when that proves viable will they move forward with international treaties.

2.2. *Evolution of Indigenous Peoples Law – Brief Introduction*

The development of international law relating to indigenous peoples has been rapid, in particular if one considers the advances at the universal level since the 1980s. In 1989, the International Labour Organization (ILO) adopted the Convention on Indigenous and Tribal Peoples in Independent Countries (No. 169, hereinafter “the ILO Convention”),³¹ which replaced its largely assimilationist predecessor, the 1957 ILO Convention No. 107 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries.³² Although not granting indigenous peoples self-determination, the 1989 Convention guarantees them many rights related to political participation, land, and the like, and is built on the idea of the importance of indigenous cultures. Even more important is the UN General Assembly of the United Nations Declaration on the Rights of Indigenous Peoples (hereinafter “the UN Declaration”),³³ adopted in September 2007, for this marks the culmination of over 20 years of direct negotiations between states and indigenous peoples and identifies a comprehensive set of rights for improving their situation.

At the root of this legal development has been the right to self-determination, which the indigenous peoples had been claiming as their most fundamental right and managed to have inserted in the UN Declaration:

³¹ ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, 27 June 1989, in force 5 September 1991, *International Legal Materials* 28 (1989): 1382. For a recent overview, see: Athanasios Ypsanis, “ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989–2009: An Overview”, 79 *Nordic Journal of International Law* (2010): 433–456.

³² ILO Convention No. 107 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, 26 June 1957, <http://www.ilo.org/ilolex/english/convdisp1.htm> (accessed 11 November 2010).

³³ See: <http://www.un.org/esa/socdev/unpfi/en/declaration.html> (accessed 5 January 2011).

Article 3

Indigenous 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.

Article 4

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

Even if there are various views on what exactly the scope and content of the self-determination of indigenous peoples are,³⁴ what is important from the viewpoint of this article is that the policy and legal discussion now centers on the contours of the peoples' right to self-determination, no longer on whether they possess that right or not. This shift in focus also means that indigenous peoples can legitimately invoke the concept, as Arctic indigenous peoples have done in a number of claims, to be discussed below.

3. *Arctic Indigenous Peoples in Arctic International Governance – Past, Present and Future*

3.1. *Arctic Indigenous Peoples receive Factual Permanent Participant Status in the Arctic Environmental Protection Strategy*

When the AEPS was concluded in 1991, three indigenous peoples' organizations were acknowledged as having assisted in preparing the AEPS.³⁵ The eight Arctic countries stated: “In order to facilitate the participation of Arctic indigenous peoples the following organizations will be invited as observers: the Inuit Circumpolar Conference, the Nordic Saami Council and the U.S.S.R. Association of Small Peoples of the North.”³⁶ This observer status started to gradually change and the culmination was reached in the ministerial meeting of the AEPS, in Nuuk in 1993, which placed considerable emphasis on indigenous issues. One important reason for this was the UN Rio Conference on Environment and Development that had taken place a short while before, a factor evident in the preamble to the Nuuk Declaration:

³⁴ See: Timo Koivurova, “From High Hopes to Disillusionment: Indigenous Peoples' Struggle to (Re)gain Their Right to Self-Determination”, *International Journal on Minority and Group Rights* 15 (2008): 1–26.

³⁵ See: Chapter 10 of the AEPS, http://arctic-council.org/filearchive/artic_environment.pdf (accessed 11 November 2010).

³⁶ *Ibid.*

Further affirming Principle 22 of the Rio Declaration, which states that: "indigenous people and their communities ... have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development".³⁷

With the help of the momentum from the Rio Conference, the indigenous leaders were able to persuade the Senior Arctic Affairs Officials (SAAO) to allow indigenous peoples to attend and intervene in meetings of the SAAOs, a development that led to the three indigenous groups being deemed AEPS permanent participants.³⁸ This emphasis on indigenous participation clearly cuts across the Nuuk Declaration and is captured well in paragraph 7: "We recognize the special role of the indigenous peoples in environmental management and development in the Arctic, and of the significance of their knowledge and traditional practices, and will promote their effective participation in the achievement of sustainable development in the Arctic". It was also important that the Danish government ensured funding for this participation by establishing the Indigenous Peoples Secretariat (IPS).³⁹

By the time of the next AEPS ministerial meeting, on 21 March 1996, the institution of permanent participant had already matured sufficiently to be referred to as such:

³⁷ It is interesting that the preamble deletes the part of principle 22 referring to "local communities" in parallel to indigenous ones, <http://arctic-council.org/filearchive/The%20Nuuk%20Declaration.pdf> (accessed 11 November 2010).

³⁸ This was already, to some extent, reflected in the text of the Nuuk SAAO report: "Taking into account that it is of great importance for the success of the Arctic Environmental Protection Strategy that the ecological and environmental knowledge of circumpolar indigenous peoples is effectively incorporated into the process, the Ministers agreed to continue to promote cooperation with the Arctic indigenous peoples, including representatives of the Inuit Circumpolar Conference, the Saami Council and the Russian Association of Peoples of the North". See: http://arctic-council.apolar.no/Archives/AEPS%20Docs/Arctic%20Council%20AQ_%20%20Nuuk%20Report.html (accessed 11 November 2010).

³⁹ This was notified in Annex A to the SAAO Report of Nuuk (*ibid.*), which stated: "... The Government of Denmark, in cooperation with the Greenland Home Rule Government, is pleased to announce that we can support this recommendation not only verbally, but also by offering to establish a small Secretariat for this purpose in Denmark. The aim of the Secretariat would be to allow indigenous peoples' organizations to participate in the AEPS process, e.g. - by facilitating meetings among indigenous peoples' organizations to assist them in how to best make contributions to the AEPS process, - by facilitating timely distribution of AEPS documentation to the indigenous inhabitants of the Arctic, - by facilitating on-going work on indigenous knowledge, - by facilitating the dialogue among indigenous peoples' organizations...."

We recognize and affirm the right of all Arctic indigenous peoples to be represented in the AEPS. We acknowledge the contributions of the AEPS Permanent Participants, and encourage them and other indigenous peoples' organizations to participate actively in the work of the AEPS. We emphasize the importance of indigenous peoples and their knowledge to the AEPS and its programmes.⁴⁰ (my emphasis)

Even though these three indigenous organizations were already AEPS permanent participants, it was by no means clear that they would be able to retain their position in the negotiations for the Arctic Council that were in progress when the Inuvik ministerial was held. The transition from the AEPS to the Arctic Council took place between 1996 and 1998, although the Council was established in Ottawa in September 1996. During this time, the working groups of the AEPS were merged into the Arctic Council as its core activity. Yet, the US in particular found it difficult to accept indigenous peoples gaining an influential status as permanent participants in the founding document of a new high-level inter-governmental forum - the Arctic Council - and the country's policy remained unchanged until the very last stages of the negotiations.⁴¹

The importance of indigenous peoples is seen already in the preamble to the Declaration, where it is provided: "The Arctic Council is established as a high level forum 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...". Paragraph 2 states: "The category of Permanent Participation is created to provide for active participation and full consultation with the Arctic indigenous representatives within the Arctic Council". There are also specific rules on how many PPs there can be altogether, as well as the procedure for determining the types of indigenous organizations eligible for PP status.⁴²

The US resistance to the unique position given to the region's indigenous peoples' organizations also became apparent with the country's insistence that the Ottawa Declaration contain a footnote, which survived to the final text, providing: "The use of the term 'peoples' in this declaration shall not be construed as having any implications as regard the rights which may attach

⁴⁰ See: <http://arctic-council.org/filearchive/The%20Inuvik%20Declaration.pdf> (accessed 5 January 2011).

⁴¹ David Scrivener, "Arctic Environmental Cooperation in Transition", 35 *Polar Record* (1999): 1-58.

⁴² Currently, these organizations are the Arctic Athabaskan Council, the Gwich'in Council International, the Aleut International Association, the Inuit Circumpolar Council, the Saami Council, and the Russian Association of Indigenous Peoples of the North.

to the term under international law". The Indigenous Peoples Secretariat was also to continue under the AC.

3.2. *What Has Been the Impact of Permanent Participants?*

Arctic-wide cooperation would be significantly different if the region's indigenous peoples had not been involved in it since the time when the AEPS was negotiated. It is of interest to emphasize that it is not the local governance bodies of the region's indigenous peoples that participate in the work of the Arctic Council, but their international umbrella organizations, which represent either one indigenous people living in more than one Arctic country (such as the Inuit Circumpolar Council) or several indigenous peoples in a single country (such as the Russian Association of Indigenous Peoples of the North). The section to follow examines briefly what indigenous peoples have been able to do with PP status, that is, what they themselves have gained from it; what Arctic cooperation has gained from it; and, finally, what the role of the PPs has been in the Arctic Council, where they may even influence global environmental protection processes.

Indigenous peoples have certainly been able to benefit in many ways from their unique status in the Arctic Council. They have been able to form better coalitions with all the policy actors in the Arctic, but, most importantly, they have succeeded in creating strong coalitions with other Arctic indigenous peoples' organizations, supported by the IPS. This enabled them to issue joint statements in international forums and, in particular, to have a strong Arctic voice in the extensive meetings of the world's indigenous peoples.⁴³ Evidently, the clearest benefit for indigenous peoples has been that they have been able to influence what type of projects are conducted in the six working groups of the Arctic Council, as they always have representation in each of those groups. They have been able to influence the content of the projects in a way that serves their needs, values and interests. Good examples are the two documents adopted at the April 2009 ministerial meeting of the Arctic Council: the Arctic Offshore Oil and Gas Guidelines (the Guidelines Document) and the Arctic Marine Shipping Assessment (AMSA), both of which deal with the marine environment, a policy environment where indigenous peoples have traditionally had problems in influencing decision-making.

The Guidelines document applies to "offshore oil and gas activities during planning, exploration, development, production and decommissioning"⁴⁴ and

⁴³ Marjo Lindroth, "Indigenous-state relations in the UN: Establishing the indigenous forum", *42 Polar Record* (2006): 239–248.

⁴⁴ See: Chapter 1.2. of the Guidelines document, at <http://arctic-council.org/filearchive/Arctic%20Offshore%20Oil%20and%20Gas%20Guidelines%202009.pdf> (accessed 5 January 2011).

has already been revised twice (2002 and 2009). Throughout the document, there is a lot of emphasis on using the traditional knowledge of the Arctic indigenous peoples and protecting their traditional way of life. Importantly, the document even contains a separate chapter titled "Arctic Communities, Indigenous Peoples, Sustainability and Conservation of Flora and Fauna" where the prior consultation and effective participation of indigenous peoples are strongly recommended for the Arctic states.⁴⁵ AMSA contains strong negotiated recommendations for policy-makers. Section 2 of the Assessment addresses protection of the Arctic people and the environment. The section's recommendations urge engagement with coastal communities – particularly during the planning stage of a new marine activity – and exhort the Arctic states to survey indigenous marine uses to establish baseline data for assessing impacts on Arctic shipping activities on those uses.⁴⁶

As was mentioned above, one important factor contributing to legitimacy for the Arctic Council is that it can argue that it represents the values and interests of the original occupants of the region – indigenous peoples – in giving them such a strong position in an inter-governmental forum. This is powerfully conveyed by the decision-making process in the Council. The member states are to make decisions by consensus, but only after full consulting with permanent participants, who sit at the same table even during the ministerial meetings. It is important to recall that non-Arctic states such as China (ad hoc) or Germany (permanent) are only observers on the Council.

The primary task of the Arctic Council today – sponsoring major scientific assessments – can be carried out much better by incorporating traditional knowledge of the region's indigenous peoples. Arctic indigenous peoples' traditional knowledge and perceptions of the environment can be included in Arctic environmental protection mainly because the indigenous peoples' organizations have such a strong status in the Council; accordingly, their views and traditional knowledge manifest themselves in essentially all the scientific documents produced under the auspices of the Arctic Council.

It can also be argued that the indigenous peoples' presence in the Council further legitimizes the Council's work in the field of environmental protection. One reason is the importance of these organizations in the environmental and sustainable development work carried out in the Council, where their contribution has been important as they have conveyed their views on how environmental protection should be carried out in an area in which indigenous peoples have lived sustainably for ages. Another reason is that

⁴⁵ *Ibid.*, Chapter 2.

⁴⁶ See: page 5 of the AMSA report, at <http://arctic-council.org/filearchive/amsa2009report.pdf> (accessed 5 January 2011).

indigenous organizations have also made a distinct contribution in providing their above-mentioned traditional knowledge to make the Arctic Council's scientific assessments even more compelling for the general public and decision-makers.

This is evident not only in the work of the Council that focuses on the Arctic, but perhaps more importantly in the way in which the Council's assessments have influenced international, even global, environmental protection processes.⁴⁷ This was most evident in the negotiations leading up to the 2001 Stockholm Convention on Persistent Organic Pollutants (POP), for the Arctic indigenous peoples, in particular the Inuit, could give a "human face" to the scientific facts, shown by AMAP-produced information, that POPs end up in the Arctic because of prevailing wind patterns. The AMAP finding was made more compelling when the ICC and other permanent participants could point out that since they still eat traditional Arctic foods – fauna as well as flora – they end up having dangerous levels of POPs in their body. This was most powerfully conveyed by the fact that future generations were being directly affected since the scientific studies showed that Inuit women had very high concentrations of PCBs that directly affect the fetus. All this resulted in the Arctic indigenous peoples and the Arctic being mentioned in the preamble to the global POP convention in the following terms:

The Parties to this Convention...
Acknowledging that the Arctic ecosystems and indigenous communities are particularly at risk because of the biomagnification of persistent organic pollutants and that contamination of their traditional foods is a public health issue.⁴⁸

Finally, irrespective of whether all Arctic indigenous peoples still live in a sustainable way in a close relationship with their environment, this popular

⁴⁷ For an analysis, see e.g., Lars-Otto Reiersen et al., "Circumpolar Perspectives on Persistent Organic Pollutants: The Arctic Monitoring and Assessment Programme", in *Northern Lights Against POPs: Combating Toxic Threats in the Arctic*, eds. David Leonard Downie and Terry Fenge (Montreal, Kingston: McGill-Queen's University Press, 2003). As argued by Selin and Eckley Selin, "Participation by indigenous groups on hazardous substance work was facilitated by their position as permanent participants in the Arctic Council and the UN observer status of the ICC. Circumpolar activism also helped to build important connections and interests and to build identity among the indigenous peoples of the Arctic. At the same time, the active support for their involvement on POPs and heavy metals from Arctic States has been critical". Henrik Selin and Noelle Eckley Selin, "Indigenous Peoples in International Environmental Cooperation: Arctic Management of Hazardous Substances", *17 Review of European Community & International Law* (2008): 72–83, at 82.

⁴⁸ Stockholm Convention on Persistent Organic Pollutants, Stockholm, 22 May 2001, in force 17 May 2004, 40 *International Legal Materials* (2001): 532.

image is conveyed in international forums and in the public eye.⁴⁹ This has a vast significance from the perspective of legitimizing the environmental protection mandate of the Arctic Council, as it can present itself as safeguarding the special relationship of the Arctic indigenous peoples to the region's still relatively undisturbed environment.

What have been the problems in exercising fully the status of permanent participation where the Arctic indigenous peoples are concerned? As the former chair of the ICC, Patricia Cochran, mentioned at the NATO Advanced Research Workshop held in Cambridge, England, from 13 to 15 October 2010, funding remains a problem even with the IPS. Moreover, she said that one of the major problems is lack of capacity: the work in the Arctic Council on large scientific assessments requires extensive expertise, which the Arctic indigenous peoples' organizations many times lack, making their contribution to the work more difficult.⁵⁰

4. *Could the Status of Permanent Participant be Adopted in Other Forums?*

Researcher Leena Heinämäki and the present author suggested in 2006 in the Polar Record that the institution of permanent participation might be used in other areas of the world in addition to the Arctic.⁵¹ In fact, there is a process in motion in the BEAR to borrow from the Arctic Council's experience with the PP institution. Currently, there is a working group on indigenous peoples, which serves as an advisory body in both governmental and county-level cooperation in the BEAR. In practice, the chair of the working group has been able to participate in almost all of the different types of meetings of the BEAC and the BRC.⁵²

The Working Group organized the first Barents Indigenous Peoples' Congress on 4 February 2010, with a total of 60 representatives of the indigenous peoples from the Saami, Nenets and Vepsians located in the BEAR region. The resolution from the 1st Barents Indigenous Peoples' Congress provided interesting ideas as how to develop the participation of indigenous peoples in the two tiers of BEAR cooperation. The region's indigenous peoples first emphasized that "developments in international law affirming indigenous

⁴⁹ Leena Heinämäki, *The Right to be a Part of Nature: Indigenous Peoples and the Environment* (Rovaniemi: University of Lapland Press, 2010).

⁵⁰ Observations by the present author (15 October 2010).

⁵¹ See Timo Koivurova and Leena Heinämäki, "The Participation of Indigenous Peoples in International Norm-making in the Arctic", 42 *Polar Record* (2006): 101–109.

⁵² E-mail received from the Barents International Secretariat (3 September 2010).

peoples' rights to represent themselves in all matters of relevance to them" and proceeded with fairly strong statements on their rights in the first three paragraphs of the operative part of the resolution:

1. As indigenous peoples, the Nenets, Saami and Vepsian peoples are entitled to the right to self-determination.
2. By virtue of the right to self-determination, the Nenets, Saami and Vepsian peoples have the right to represent themselves in international affairs, which includes participatory rights in international bodies that address issues of relevance to them.
3. At the very least, this participatory right amounts to the level of participation indigenous peoples enjoy as Permanent Participants to the Arctic Council.⁵³ (my emphasis)

The region's indigenous peoples also provide ideas as to what this means in the practice of the BEAC and BRC, the two tiers of BEAR. According to paragraph 4, each of the peoples (Nenets, Saami and Vepsian) must be "granted status as Permanent Participants to the BEAC and the BRC."⁵⁴ The peoples feel that implementing their self-determination means that each of three groups is entitled to full and active participation in the BEAC and BRC as permanent participants, a status which they see as applicable across all "meetings and activities of the BEAC and the BRC, from ministerial meetings to regional meetings".⁵⁵ They also argue in the resolution that they should be represented directly by their own heads of delegations, and be provided with ample time to exercise their right to speak at each meeting.

It is as yet unclear whether the indigenous peoples can be granted status as PPs. The issue was discussed in the Committee of Senior Officials, held in Kiruna, Sweden, in October 2010, and the region's indigenous peoples submit that they should be granted this status in the next BEAC foreign ministers meeting, to be held in 2011.

5. *Future Challenges to the Institution of Permanent Participant*

5.1. *Arctic Ocean Coastal State Meetings*

There is one clear short-term challenge to the institution of permanent participant, and that is the new form of cooperation that has emerged between

the five Arctic Ocean coastal states – the United States, the Russian Federation, Denmark–Greenland, Norway and Canada. In May 2008, these countries organized a political meeting in Greenland (preceded by a senior level official meeting in Norway in October 2007), at which they issued what has become known as the Ilulissat Declaration.⁵⁶ The coastal states' main motive for the meeting was to clarify to the media that there is no scramble for the resources in the Arctic Ocean sea-bed, but rather an orderly development regulated by the law of the sea. Still, the fact that Denmark deliberately refused to convene a special meeting of the predominant inter-governmental Arctic cooperation forum, the Arctic Council, met with a great deal of resistance. Of the Arctic Council member states, Finland, Sweden and Iceland were not invited, an issue that Iceland in particular was concerned about.⁵⁷

For the region's indigenous peoples, the Greenland meeting was also a concern. Given that the Arctic Ocean coastal state meeting involved the four states where Inuit people live and that they were not invited (as they are to all Arctic Council meetings), it was to be expected that Inuit and, in particular, the ICC, the organization representing all the Inuit in four states, would react negatively to the Ilulissat meeting. What is interesting in this development is that both the Arctic Ocean coastal states and the Inuit issued a declaration defining their presence in the region in terms of the concepts of sovereignty and self-determination.

The Arctic Ocean coastal states observed that the Arctic Ocean stands at the threshold of significant changes because of climate change, which will impact the vulnerable ecosystems and livelihoods of local inhabitants and indigenous communities. The coastal states then argued:

By virtue of their sovereignty, sovereign rights and jurisdiction in large areas of the Arctic Ocean the five coastal states are in a unique position to address these possibilities and challenges... The Arctic Ocean is a unique ecosystem, which the five coastal states have a stewardship role in protecting. Experience has shown how shipping disasters and subsequent pollution of the marine environment

⁵⁶ See: <http://arctic-council.org/filearchive/Ilulissat-declaration.pdf/> (accessed 11 November 2010).

⁵⁷ In the discussion at the Narvik meeting of Senior Arctic Officials, "Iceland expressed concerns that separate meetings of the five Arctic states, Denmark, Norway, U.S., Russia and Canada, on Arctic issues without the participation of the members of the Arctic Council, Sweden, Finland and Iceland, could create a new process that competes with the objectives of the Arctic Council. If issues of broad concern to all of the Arctic Council Member States, including the effect of climate change, shipping in the Arctic, etc. are to be discussed, Iceland requested that Denmark invite the other Arctic Council states to participate in the ministerial meeting. Permanent participants also requested to participate in the meeting. Denmark responded that the capacity of the venue may be an issue". Meeting of Senior Arctic Officials Final Report Narvik, Norway 28–29 November 2007, <http://arctic-council.org/filearchive/Narvik%20FINAL%20Report-%2023Apr08.doc/> (accessed 11 November 2010).

⁵³ See: http://www.barentsinfo.fi/beac/docs/Adopted_resolution_BIPC_Feb2010.pdf/ (accessed 11 November 2010).

⁵⁴ *Ibid.*, Para. 4.

⁵⁵ *Ibid.*

may cause irreversible disturbance of the ecological balance and major harm to the livelihoods of local inhabitants and indigenous communities.⁵⁸

As is readily clear from the Ilulissat Declaration, the coastal states defined themselves as sovereign states with a stewardship role over the "livelihoods of local inhabitants and indigenous communities". This was a difficult issue for the Inuit, as they were not given any active role in the meeting and were, in effect, seen as under the stewardship – together with the region's ecosystem – of the coastal states. Hence, very soon after the Greenland meeting, on 6–7 November 2008, the ICC and Inuit leaders issued the "Inuit Leaders' Statement on Arctic Sovereignty", in which they noted that the Ilulissat Declaration on Arctic sovereignty by ministers representing the five coastal Arctic states did not go far enough in affirming the rights that Inuit have gained through international law, land claims and self-government processes. They even noted:

...the meaningful and direct role that indigenous peoples have at the Arctic Council, while at the same time expressing concern that the Council leaves many issues considered sensitive by member states off the table, including security, sovereignty, national legislation relating to marine mammal protection, and commercial fishing.⁵⁹

This was then further refined for the Arctic Council ministerial meeting at the end of April 2009, when the Inuit issued the Circumpolar Inuit Declaration on Arctic Sovereignty.⁶⁰

The Declaration is a lengthy document which cannot be reviewed in full detail here. The basic legal architecture of the Declaration is this: "The Arctic and the world at large do not consist of sovereign states and their territories, but are governed by a very complex system in which authority and power is exercised at various levels and with various mandates and legal or non-legal bases".⁶¹ And this is undoubtedly true. For a long time, we have not only spoken of "government", but, increasingly, have had to refer to forms of authority that escape the nation-states, that is, forms of "governance" or "international governance".

With such a highly complex multi-level governance framework, the Declaration also advances Inuit agency in a multilayered manner: as a people,

⁵⁸ See: Ilulissat Declaration Arctic Ocean Conference Ilulissat, Greenland, 27–29 May 2008, 48 *International Legal Materials* (2009): 372.

⁵⁹ See: <http://www.sikunews.com/News/International/Arctic-Sovereignty-Begins-with-Inuit-5567/> (accessed 11 November 2010).

⁶⁰ See: <http://www.itk.ca/circumpolar-inuit-declaration-arctic-sovereignty/> (accessed 11 November 2010).

⁶¹ *Ibid.*, see especially, Para. 4.2. of the Declaration.

indigenous people, indigenous people of the Arctic, citizens of the Arctic States, indigenous citizens of the Arctic States and even indigenous citizens of each of the major political sub-units of the Arctic States.⁶² Various parts of the Declaration highlight the various governance forms in which the Inuit act in these legally relevant positions, from the international level to the domestic and even sub-unit level.

Overall, in the Declaration the Inuit set out to find a way to reconcile their self-determination rights as a people and indigenous people vis-à-vis state sovereignty. Partly this can be done via soft-law forums such as the Arctic Council and partly via other multi-level governance forums. From the Inuit perspective, even though the Arctic Council cannot enact legally binding decisions, it does make politically influential decisions, conduct scientific studies and issue guidelines on good practice. It has the eight sovereign Arctic States as its members and the region's indigenous peoples' international organizations as its permanent participants, a status conferring substantial influence on how the sovereign states make their decisions.

What the Inuit reject are forms of cooperation that exclude them. This problem is clearly emerging now with the meetings of the coastal states, the first being that in Greenland, the second in Canada in March 2010. Even though it is the ICC that has played a leading role here, no doubt because four out of the five coastal states have an Inuit population, the other permanent participants clearly support it. Indeed, vigilance is required, for if a new form of cooperation threatens to weaken the Arctic Council, such a development will also reduce the range of issues which the permanent participants can influence. By invoking self-determination – which, according to the indigenous peoples, is guaranteed in international law and implies a role in international policy – the ICC also makes a case that future coastal state meetings ought to include them as well. During the second meeting, in Chelsea, Canada, US Secretary of State, Hillary Clinton, noted that in the future permanent participants, among other actors, need to be included in coastal state meetings.⁶³

5.2. *An International Treaty to Govern the Arctic Region*

What would happen to the status of PP if at some point in time the Arctic eight or five Arctic Ocean coastal states decided to negotiate a treaty covering the Arctic or some of its component regions? The European Parliament has urged the EU Commission to contemplate initiating action towards

⁶² *Ibid.*, see: Paras 1.3–1.8. of the Declaration.

⁶³ See: <http://www.canada.com/news/Clinton+blasts+Canada+exclusivity+Arctic+talks/2740399/story.html> (accessed 11 November 2010).

concluding an Arctic treaty. The wording of the Parliament's October 2008 resolution is as follows (15):

[The Parliament] suggests that the Commission should be prepared to pursue the opening of international negotiations designed to lead to the adoption of an international treaty for the protection of the Arctic, having as its inspiration the Antarctic Treaty, as supplemented by the Madrid Protocol signed in 1991, but respecting the fundamental difference represented by the populated nature of the Arctic and the consequent rights and needs of the peoples and nations of the Arctic region; believes, however, that as a minimum starting-point such a treaty could at least cover the unpopulated and unclaimed area at the centre of the Arctic Ocean.

Neither The European Commission nor the Council saw this goal as worth pursuing.⁶⁴ WWF Arctic International, the most active observer in the Arctic Council, has called for an Arctic Convention, which could bring at least the possibility of maintaining sustainability in a region that is undergoing a dramatic change, and ensure opportunities to engage in a range of new economic activities.⁶⁵

Thus far, a treaty has been ruled out by the five coastal states in a position made clear in the Ilulissat Declaration. They provided that there is already a comprehensive regime in place to govern the Arctic waters – the law of the sea – and that it is this body of law that “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. We therefore see no need to develop a new comprehensive international legal regime to govern the Arctic Ocean.”⁶⁶

Even if the idea of a comprehensive international treaty for the Arctic is currently rejected, things may change very quickly. One need only look at how events have unfolded after two nearly simultaneous developments in 2007: In August, the Russians planted their flag underneath the North Pole in the Lomonosov ridge; in September, the news arrived that there had been an immense drop in the summer sea ice coverage of the Arctic Ocean. These two events triggered a very rapid development from the viewpoint of Arctic

governance. Before these developments, international treaty discussions were mainly an exchange of views between scholars and occasional outbursts from NGOs; thereafter, however, treaty discussions entered the halls of power. We can only predict that the next time the summer coverage of sea ice drops, political events will likely follow apace. The reasons why governance issues arise time and again are also clear. The soft-law approach in the current Arctic governance – mainly the Arctic Council – has its limits, and the challenges in governing the region in the future will be immense. The Arctic Council and Arctic-wide cooperation more generally, although slightly modified throughout its almost 20-year existence, has very much retained its same basic foundation with respect to funding, institutional structure and legal status.⁶⁷ It is difficult to foresee that substantial changes can be effected without any amendment to the legal foundation.

If an international Arctic treaty is negotiated at some point in the future, can PP status be retained for Arctic indigenous people? The region's indigenous peoples' organizations are not NGOs in the work of the Arctic Council, but participate as PPs on an almost equal footing in the work of the Council, from ministerial meetings down to individual working groups. Even though decisions are to be made by the Arctic states, these can only be made after full consultation with the six Arctic indigenous peoples' organizations. In practice, this has meant that if all six permanent participants object to a certain project or decision, it will not proceed to the decision-making stage.⁶⁸ It is questionable whether the status of the indigenous peoples' organizations can be retained if a treaty such as that outlined above is negotiated, since in almost all other inter-governmental organizations, regimes and negotiation processes, the status of indigenous peoples is only that of an NGO, with concomitant observer status.

It should be emphasized that the putative downgrading of the status of the indigenous peoples' organizations and the lessening their general influence in decision-making is not due to constraints laid down by the customary law of treaties.⁶⁹ According to that body of law, states are perfectly free to create

⁶⁷ See Timo Koivurova, “Limits and possibilities of the Arctic Council in a rapidly changing scene of Arctic governance”, 46 *Polar Record* (2010): 146–156.

⁶⁸ See *supra* note 51.

⁶⁹ See the 1969 Vienna Convention on the Law of Treaties, Vienna, 22 May 1969, in force 27 January 1980 *International Legal Materials* 8 (1969): 679; and can be found at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (accessed 5 January 2011). The great majority of the rules of the 1969 Vienna Convention can be regarded as part of customary international law. As Aust argues, “For most practical purposes treaty questions are resolved by applying the rules of the Convention. To attempt to determine whether a particular provision of the Convention represents customary international law

⁶⁴ European Parliament resolution of 9 October 2008 on Arctic governance, <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2008-0474&language=EN/> (accessed 11 November 2010); and the European Parliament resolution on the opening of international negotiations with a view to adopting an international treaty for the protection of the Arctic, <http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B6-2009-0163&language=EN/> (accessed 11 November 2010).

⁶⁵ See: http://wwf.panda.org/what_we_do/where_we_work/arctic/what_we_do/reforming_arctic_marine_governance/ (accessed 11 November 2010).

⁶⁶ See *supra* note 58.

a treaty which permits the participation of indigenous peoples as permanent participants; the peoples are not accorded actual decision-making power, but must only be fully consulted before decisions are made by the member states. Indeed, the biggest obstacle to establishing participatory rights for indigenous peoples in an Arctic treaty would arise from practical exigencies. When an international treaty is concluded, different officials are involved than in the creation of a soft-law instrument. Foreign ministries and their legal offices would be involved, and their views might result in indigenous peoples' being given the status they normally have in international treaty negotiations or inter-governmental organizations, that of NGO. Another possible challenge to the position of indigenous peoples would be the involvement of national parliaments, which in some countries have powers over treaty-making.

6. Conclusions

It is appropriate to draw conclusions on all the questions that have been dealt with in this article, starting with the question how PP status has emerged and evolved in the AC, and what its future is if things remain the same. PP status seems a perfect fit for a "gray zone" soft-law multilevel governance architecture in the Arctic. Since the institution is titled "permanent" participant, we can also presume that it is a very tenacious institution, one which has good chances of surviving if things remain the same in the Council. It is, however, important to note that non-Arctic states have already asked why they have a worse position than small indigenous peoples who are normally only NGOs in inter-governmental cooperation.⁷⁰ And the line is growing to become an observer to the Arctic Council. There are six permanent non-Arctic state observers on the Council – all Member States of the EU, China, South Korea, the European Commission and Italy are queuing to become permanent observers, and Japan, India and Brazil are preparing their applications as well. It does seem to be a challenge for the permanent participants to retain their position when such powerful countries want to have – at least at some point in the future – a better position in the Council.

⁷⁰ is now usually a rather futile task". Anthony Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2000) 11–17.

⁷¹ Most outspoken has been, according to the media, Italian foreign minister Franco Frattini, who in 2008 argued that his country needs to become a member of the Council because of "the geopolitical and strategic importance of the Arctic region", see: <http://www.barentsoobserver.com/index.php?id=4516094&forcedir=1&noredit=1> (accessed January 5 2011).

Are there then possibilities for the PP as an institution to spread, as the present author and Leena Heinämäki argued in 2006? As noted above, the three indigenous peoples in the BEAR are pressing for this status in the two levels of governance within the BEAR and at least preliminary signals indicate that they have good chances of receiving such a position. And, since these indigenous peoples take the view that their permanent participant status follows from their self-determination, guaranteed under international law, there would seem to be a tentative basis for other indigenous peoples to pursue the same line of argument. Yet, at least for the moment, there does not seem to be such discussion in other parts of the world. The risk which the indigenous peoples in the Barents region run in advancing their claim for PP status on the basis of self-determination is that this may weaken the willingness of states to accord them that status.

How then can the institution of PP survive the short- and long-term challenges that these Arctic soft-law organizations may be facing? Many thought after the May 2008 Ilulissat meeting of the Arctic Ocean coastal states that it was the last of such meetings, even though the Declaration seems to carry a different message. When one reads the Declaration, it clearly identifies a program of action for shared practical cooperation between the Arctic Ocean coastal states. This is why it seems fairly easy to predict that as the sea ice melts further, cooperation among the Arctic Ocean coastal states will intensify. And if this means that many of the issues previously dealt with in the Arctic Council are taken up in meetings of the coastal states, it means that permanent participants will not be able to influence these issues. Yet, as noted above, US Secretary of State Hillary Clinton has identified the lack of participation as a problem and submitted that permanent participants be invited to the Arctic Ocean coastal state meetings. It is also of interest that the ICC reacted so swiftly and strongly with its declarations to the Ilulissat meeting as well as to the second meeting in Canada; this is a signal that the permanent participants are willing to defend their position strongly if need be.

As mentioned in the last section, if an international treaty for the Arctic were negotiated, the region's indigenous peoples' organizations would face challenges, although not from the customary law of treaties. Foreign ministries would be heavily engaged in negotiating such a treaty, easily perceiving indigenous peoples organizations as NGOs. In a similar vein, it was pointed out that national parliaments might consider such a status for the region's indigenous peoples problematic. On the other hand, it is also the case that PP status has become densely institutionalized in Arctic cooperation, a fact that is reflected in its use now being considered in BEAR cooperation. It may well be that with the organizations having established themselves as international policy actors in the Arctic it would be difficult to treat them as NGOs even if an international treaty were negotiated. And if they were to be considered

full-fledged policy actors, they could influence much higher-level issues than have now been dealt with through the Arctic Council. Moreover, if that were to happen, it would also create an important precedent for indigenous peoples world-wide on how to organize their relations with nation-states: they are also peoples – not interest based non-governmental organizations – and thus their international policy status should be different from that of NGOs and closer to that of states. This is also well reflected in the main United Nations body dealing with indigenous issues, the UN Permanent Forum on Indigenous Issues, which has equal numbers of representatives from state and indigenous constituencies.

Towards an Equal Partnership between Indigenous Peoples and States: Learning from Arctic Experiences?

Leena Heinämäki*

1. Introduction

The aim of this article is to look at the developments that indicate a shift in the approach concerning indigenous peoples from merely objects of protection towards the legal subjectivity – or at least towards the recognition of indigenous peoples as equal partners with the state governments. "International Conference on Engaging Communities" in August 2005 identified key components that the equal partnership between indigenous peoples, governments and civil society should include: the full and effective participation of indigenous peoples; the opportunity for indigenous peoples to identify the concerns, prioritize them and propose solutions that are community driven; and respect, and support indigenous peoples' chosen forms of representation, including traditional or customary authority structures.¹ This article aims to see how this partnership-idea is explicitly or implicitly reflected in international legal or semi-legal standards concerning indigenous peoples.

As will be seen in this article, indigenous peoples' special relationship with their lands and environments has often been seen as the basis of the need to strengthen the legal status of these peoples. Traditional, nature-based livelihoods and the way of life of indigenous peoples are considered to be an inherent part of their right to culture.² Thus the cultural and environmental

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¹ "Engaging the marginalized: Partnerships between indigenous peoples, governments and civil society", Guidelines for engagement with indigenous peoples, United Nations Workshop – 2005, International Conference on Engaging Communities – Brisbane, http://www.un.org/esa/socdev/unpfii/documents/engagement_en.pdf (accessed 18 November 2010).

² See for instance, *Lubicon Lake Band v. Canada*, Communication No. 167/1984, CCPR/C/38/D/167/1984; *Kitok v. Sweden*, Communication No. 197/1985, CCPR/C/33/D/167/1985