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The Strength of Flexibility: The Arctic Council in the Arctic Norm-Setting Process

Camille Escudé

In the Arctic, the thaw of East-West relations in the 1990s led to deeper regional and sub-regional cooperation, and a strengthening of the stability of the region through the establishment of standards. This led in turn to the formation of a patchwork of standards that overlap and intersect: the proliferation of soft law standards was then the only way to put the states and other stakeholders around the table, in a region that has not yet been cleared of past tensions.

Few observers would have predicted that a body which so many limitations would have reached such results in terms of norm-making, considering that the Arctic Council (AC) is only 20 years old. The AC has often been viewed as politically ineffective, with lots of talk but little action on issues relating to its mandates of environmental protection and sustainable development. The AC is very far from being a perfect forum but despite or thanks to its “soft” structure, it offers a large place for local voices, which ensures its legitimacy, and it can better adapt over time by facilitating compromise.

This paper explores the central role of the AC in Arctic norm setting, stressing the specificities of the Council among the wide range of Arctic-norm producers, and demonstrating how its successes are linked to its soft law structure, as a major factor of legitimacy and socialization, and finally of normative power in the Arctic. It is the flexibility of the AC that contributes to its strength. Thus, despite the absence of any ‘hard’ power, the AC is the major norm setting instrument in the Arctic.

Introduction

It has become a cliché to describe the changes that the Arctic region¹ has been facing for thirty years now, both physically (Jakobsson, Ingólfsson, Long & Spielhagen, 2014), and politically (Stokke, 2011, 2013; Underdal, 2013; Young, 2009). The environmental challenges, economic changes, and geopolitical disruptions created a functional need, serving as a catalyst for the creation of standards in the Arctic to prevent the struggle for economic and political worldwide interests. But unlike the Antarctic, there is no comprehensive legal regime governing the Arctic region. The thaw of East-West relations in the 1990s, however, led to a strengthening of regional and sub-regional cooperation in the Arctic, as well as increased stability of the region through the development process of dialogue and joint establishment of standards.

Norm production in the Arctic is still in its infancy and has not yet established a coherent body of social practices for the stakeholders in the region. In fact, the profusion of standards and the

variety of norm producers is striking in the Arctic. A wide variety of circumpolar and external actors in the region communicate, influence or participate in the process of standards making. Different level of stakeholders and therefore levels of standards coexist: international standards that apply in the region but also national or regional standards created on different levels, in forums or parliaments, which explains their low binding nature in general. In the profusion of standards created over the last thirty years, the importance of soft law compared to hard law is clear. But in this special area, could the creation of standards be set up differently? Without going into the debate, we can broadly agree that soft law is soft in nature, flexible in function and free from strict formalities (Hasanat, 2007). That is, soft law creates non-treaty agreements – such as the Ottawa Declaration (1996) - while protecting states from internationally legally binding obligations. Soft law is therefore in many ways a facilitator of norm-making.²

More importantly, the establishment of standards, even those non-binding as soft law, legitimates the standards producer in the Arctic – a region where symbols take up much space in the debates.³ This is particularly the case when the producer of standards lacks the ability, or willingness, to produce hard law. The profusion of soft law in the Arctic reflects this search for legitimacy - the central issue in this region - which is at the heart of the concerns of internal and external actors: states and organizations but also companies, epistemic communities, civil societies. Moreover, the production of ever-increasing standards, even “soft” ones, limit the actors’ room for maneuver.

The Arctic is governed by an internationally recognized regime resting on the Arctic Council (AC) intergovernmental cooperation and the UN Convention on the Law of the Sea (UNCLOS). The AC has taken over from the Arctic Environmental Protection Strategy (the AEPS) (Nord, 2015) in 1996 as a “high-level forum” (AC, 1996). The AC has no legal personality or authority to develop regulatory arrangements: it is only the place for Arctic countries, as well as for other countries aspiring to legitimacy in the region to express diplomatic and political positions. The AC is quite a unique cooperation model in terms of political representation, including both representatives of the eight sovereign states in the Arctic as well as six indigenous peoples’ organizations, who have to be “consulted” on all matters (Graczyk, 2011; Koivurova & Heinämäki, 2006). Other states and stakeholders such as international organizations and NGOs may apply as Observers. The mandate of the AC is focused on the concept of environmental protection and sustainable development as stated in the First Article of its Establishment Declaration (AC, 1996). Although its agreements have no binding force, the Council is at the heart of standards production in the Arctic. Yet, the Council has a lot of limits and a low level of normativity. It is a place of social practices much more than articulation of norms, a place where one reduces uncertainty rather than a place where decisions are actually made, a facilitating body much more than a regulatory one.

The traditional theoretical frameworks often offer explanations of the strength of the Arctic based on realistic theories of international relations and “power politics” wherein a traditional concept of power-struggle ensures the stability of the region. As Ingrid Medby (2015) underlines:

“However, adherence to the present regime of governance is not just a matter of material or strategic importance for the eight Arctic states (A8). Rather, regime adherence in the Arctic is also a matter of status, pride, and identity. (...)”

Accordingly, the regime's strength lies not so much in provisions per se, nor in any ability to bind and govern actors in a top-down manner, but in its discursive power."

The AC intergovernmental cooperation is very far from being a perfect forum but despite or thanks to its "soft" structure, it offers a large platform for local voices and can better adapt over time by facilitating compromise. This paper explores the central role of the AC in Arctic norm setting, stressing the specificities of the Council among the wide range of Arctic-norm producers, and demonstrating how its successes are linked to its soft law structure, as a major factor of legitimacy and socialization, and finally of normative power in the Arctic. In this paper, we would like to stress the political and symbolic dimension of the AC's legal production, following in the footsteps of scholars who are emphasizing the importance of the discourse on normative and discursive power in the Arctic (e.g. Medby, 2015): it is the flexibility of the AC that contributes to its strength. Thus, despite the absence of any 'hard' power, the AC is a major instrument of norm setting in the Arctic.

The paper mainly follows the documentary analysis method, which examines the instruments of and documents produced under the AC, along with some international agreements formed under the auspices of the AC. The study also covers a review of existing literature, including the writings of leading scholars. Finally, this paper is based on knowledge gained by (anonymously) interviewing members of the AC, Working Groups of the AC and individuals working at the Secretariat of the AC in Tromsø, Norway in 2015.

First, we will see how the AC cooperation process has reached a central place in the mosaic of the norm-making process in the Arctic for about thirty years, and the ways the AC builds standards. We will then observe the political vision that underlines the norm production in the Arctic, and how this is deeply linked to the soft law concept. This will allow us to see how the production of standards reflects the normative influence, and finally the strength of the AC in its "soft" legal structure.

The Arctic Council at the Heart of the Arctic Norm-Making Process

A Multitude of Norm-Producers in Search of an Arctic Legitimacy

The Westphalian approach of sovereignty, according to which no state recognizes an authority beyond her own, has long prevailed in the Arctic. But it gave way over time to cooperation and obligation initiatives. In the twentieth century, the standards established in the region were set up by associations of states in order to answer very specific questions. However, no standard on the general scheme of the area of protection was established in the Arctic during this period, while, the South Pole has been protected by the Antarctic Treaty since 1959: the Arctic did not seem to be a fertile breeding ground for international cooperation.

However, with the thaw of East-West relations, the Arctic experienced a sudden change in status. Indeed, the 'Détente' period of the early 1970s was conducive to standards production between opposing blocks, parallel to the increased exploitation of oil and gas in the 1960s and 1970s, the rise of environmental mobilization and interest of the epistemic community, and intensification of indigenous peoples' claims. Bilateral and multilateral gradual regional cooperation initiatives culminated in the Arctic in the 1980s, mainly due to growing environmental concerns which were

then on the world's agenda (World Commission on Environment, 1987; Meadows, 1972).

Today, the emerging picture of standards in the Arctic is characterized by a patchwork of regulatory mechanisms, placed within a jurisdictional framework of international law (Dodds, 2013) thanks to the UNCLOS. There are many domestic regulations for the protection of the Arctic, but there is no single comprehensive and integrated regime covering an array of issues that constitute the region's policy agenda. Most of these plans are based on soft law, taking essentially preventive measures. Besides, most of the goals remain unclear, leaving much space for legal interpretation (Gladun, 2015).

As a matter of fact, sub-state, inter-state, multi-state, trans-state, and supra-state actors interact with one another in a highly multilateral system of governance. The Arctic has become a region whose governance is complex, and where the powers of the bilateral and multilateral agreements, forums and councils, tend to overlap (Dittmer, Moisiso, Ingram & Dodds 2011; Young, 2005). In many ways, the production of standards in the Arctic can be celebrated as a symbol of the emergence of the Arctic as an international political region. This period is that of region-building (Keskitalo, 2007: 194) where the Arctic is no longer the center of a security paradigm but becomes a place of low politics (Nilsson, 2012), where cooperation prevails and the establishment of standards becomes possible. The scientific work of the epistemic community (Haas, 1992) in the region is central, being an indirect standards designer. Conceptualizing the region through the normative and scientific work makes it possible to build and strengthen the legitimacy of Arctic actors.

The Arctic Council at the Heart of Arctic Norm Setting

Although it is far from the only institution of political significance in the Arctic, the AC is the political pillar of Arctic governance and pre-eminent forum in the region (Keskitalo, 2004; Pedersen, 2012; Dodds, 2013). The standards in the AC are established by consensus, which requires slow decision-making, when rapid economic and political changes sometimes call for a firmer approach. Moreover, the consensus seems to be established at the cost of the eviction of security issues (AC, 1996). Some authors stressed the importance of the concept of stewardship (Wilson, 2016) in order to analyze the AC. From this perspective, stewardship is political, because it aims to 'shape norms' (Griffiths, 2012: 4).

Several researchers have tried to measure the effectiveness of the AC (Ronson, 2011; Kankaanpää & Young, 2012). We rather want to look at the evolution of the way the Council is implementing its standards and how successful that evolution is. Primarily dedicated to the publication of high-level scientific reports without real normative value, the Council has seen its prerogatives evolve over time. The comprehensive scientific reports of the AC make up the most of its achievements; the use of science reports in the Council helps highlight important issues and places them on top of the political agenda of the countries of the Arctic region, but also worldwide. As a soft-law body, the AC could contribute little in terms of mitigating climate change. But the AC's reports have had some influence on the international scene, and in general the Council has greatly contributed to the overall science of climate change by generating high quality reports, drawing the attention of researchers and politicians on certain issues, and highlighting the close links between the Arctic environment and the global system.⁴

Few observers would have predicted that a body with so many limitations would have reached

such results in terms of norm-making, at the young age of 20. The production of scientific reports has undoubtedly strengthened the role of the AC as a standards producer by bridging the gap between science and politics (Gladun, 2015). Research on climate change intensified through expert groups that have carried out an inventory of protected natural areas, and studied environmental problems. International cooperation in the Arctic has indeed played a role in the protection of the Arctic and the global environment by influencing at once the measures in response to a global pollution problem and the way national and international standards apply the specific conditions of the Arctic – such as the “Arctic Offshore Oil and Gas Guidelines” in 2009 (PAME, 2009).

In addition, the ministerial meetings of the Council offered a discussion platform for the Arctic future including a wide range of participants. The Council has enabled increased Arctic cooperation and influenced the coordination of national and international policies, in order to become the main cooperative platform in the Arctic. Even from the perspective of actors outside the region, the importance of the AC is growing. This trend is highlighted by the recent wave of applicant countries and actors for observer status, such as Asian countries (Su & Lanteigne, 2015; Leiv Lunde, Yang & Stensdal, 2016). Levels of interest and responsibility in the Arctic concern the global civil society as well as non-Arctic states and indigenous peoples organizations. Since the creation of the AEPS, “Observer” states are present in regional Arctic fora. However, within the AC, the arrival of six new countries in 2013 (China, India, Italy, Japan, South Korea and Singapore), a symbol of the globalization of Arctic issues, has met with strong resistance from some member states who feared an increased influx of external actors and a dilution of their historical authority. As regional cooperation increases and the range of stakeholders have expanded worldwide (Bennett, 2014), the maintenance of state sovereignty is a key priority for the Arctic states (Heininen, 2012; Knecht & Keil, 2013; Steinberg & Dodds, 2013).

Many Shades of Norm Making in the Arctic Council

The AC has managed to establish treaties and standards with diverse degrees of obligation. Before the launch of its first hard law agreements, the AC published an important number of soft law agreement lacking formal legal rigor, yet with a certain political impact (Hough, 2013). But slowly policy-making is emerging from Arctic cooperation, even if all observers point at the difficulty of this development. Timo Koivurova and David VanderZwaag did a balance sheet of the Council’s achievements after ten years of existence (2007: 191), in the light of the Council’s limited role as a discussional and catalytic forum. The adoption of the first legally binding agreements under the auspices of the Ministerial meetings of Nuuk (2011) and Kiruna (2013) changed the picture. The first agreement concerns Search and Rescue (SAR) in marine and air spaces (AC, 2011), the second tackles the fight against marine pollution by hydrocarbons (AC, 2013). These texts are intergovernmental agreements negotiated and adopted within the framework of this forum.

The Arctic Search and Rescue Agreement (SAR) was the first legally-binding instrument negotiated and adopted under the auspices of the AC. The agreement plans and organizes the conditions for sea, land and aviation rescue in the polar region, which requires a coordination of rescue means, including military, and cooperation among Arctic states. Its objective is to strengthen search and rescue cooperation and coordination in the Arctic (Rottem, 2014). As Anton Vasiliev – Co-Chair of the Task Force on Search and Rescue between 2010 and 2011 –

explained in his article “The agreement on cooperation on aeronautical and maritime search and rescue in the Arctic – A new chapter in polar law” (2013: 64), mandatory status agreements had been actively debated for the first three sessions before Member States decided that it should be legally binding and not purely political. It is a political document above all, still an opportunity for collaboration between Arctic coast guards and all authors and observers agree in emphasizing the importance of this pioneering agreement (Koivurova & VanderZwaag, 2007; Kao, Pearre & Firestone, 2011; Vasiliev, 2013). In addition to being a major contribution to polar law, the agreement demonstrates a new level of trust and cooperation between the Arctic states and illustrates their increasing ability to come to an agreement. In this sense, the SAR agreement paved the way for binding agreements to come in other areas where the AC could establish itself as the leading institution.

A second binding agreement was set up following the work of the EPPR in 2013: the “Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic”, which aims at promoting cooperation, coordination and assistance relating preparation and response in case of oil spill leaks. The objective of this Agreement is to strengthen cooperation, coordination and mutual assistance among the Parties on oil pollution preparedness and response in the Arctic in order to protect the marine environment from pollution by oil (Arctic Council, 2013). It provides a mechanism for information of the parties in case of serious leakage and an obligation to provide assistance to countries that ask for advice, provision of equipment and personnel.

The signing of these agreements is a step forward in the transformation of the AC towards a more formal cooperation, and demonstrates the surprise of many that the Council should have been to create a new form of governance, with a soft law status that can adapt to emerging problems through legal instruments to produce effective governance. These recent significant advances show that even if the Council is not an international organization, political means were strengthened, which many observers describe as the passage from a policy shaping to policy making body.

The Strength of Flexibility: Soft Law as a Norm-Making Facilitator

A Short History of Soft Law and Norm-Making in the Arctic

Soft law has been a very controversial concept for at least four decades, parallel to its growing usage in international law in order to respond to new forms of cooperation. In the case of the AC, soft law created the governance regime: the AC as permanent cooperation forum was created thanks to a soft law process. But the provisions of soft law instruments are legally non-binding even though they are politically or morally binding.

Most of international law is characterized by low intensity and only a few international institutions approaching the idea of legalizing “hard”. The hard law is associated with the ability to implement mechanisms capable of imposing sanctions if the law is not respected (Hasanat, 2009). But in the soft law process, legalization is not completely absent. The panorama of norms goes from binding rules to a simple forum for negotiations. Soft law therefore corresponds to a process where actors try to create standards, even if these standards do not correspond to a legally binding treaty. The word “standard” therefore, covers a very fluid and flexible reality.

Besides, the notions of soft law and hard law do not preclude a binary approach, but rather provides a gradual spectrum of possibilities, where the cursor can be placed according to different variables. In this regard, one could imagine in the Arctic a spectrum of standards that would range purely political statements that do not have the force of law (such as the Copenhagen agreement in 2009 on climate change), to codes of conduct, down to ministerial statements and formal agreements and treaties.

It is important to observe that most legally binding international agreements formed under the auspices of the AC, such as the SAR and the Oil Spill agreements are fairly open-ended and do not establish any strict regulation (Hasanat, 2007). Since the Council was formed by a declaration, it cannot operate separately from the eight Arctic states or require states to take specific measures: even the SAR agreement, which was celebrated as the first binding agreement signed in the Council, could only be set up from the goodwill of the states. The Council's recommendations in terms of environmental protection therefore have very little chance to influence national governance systems. Facing climate change, the collective response of the Council members was more to produce a number of scientific reports related to the problem, rather than implement binding measures, while the eight Arctic countries are responsible for almost half of global greenhouse gas emissions, and the Arctic region is surely one of the most visibly affected by the problem.

Nevertheless, with no decision-making abilities, but only 'soft' power, concerns have been raised that the AC remains a weak institution, severely lacking power to influence national governments (Heininen & Nicol, 2007; Koivurova, 2010; Koivurova & VanderZwaag, 2007; Young, 2012). The AC structure of soft law makes it unable to take formal decisions that would be legally binding for Member States in order to react to the climate urgency in the Arctic. The AC is in thus far more a decision shaper than a decision maker (Hasanat, 2009). The Council has also not been conceived as an operational tool, and while many guidelines are produced by the Working Groups of the Council, the impacts of these are difficult to determine, since the Council has no mechanisms to assess the monitoring of the recommendations. As such, the AC has been repeatedly criticized (see e.g. Huebert & Yeager, 2008; Koivurova, 2010; Koivurova & Molenaar, 2010). Only the signatory states are able to implement the standards and there is no sanction for non-compliance, which begs the question of the norm implementation (Dingman, 2015). The AC does not and cannot enforce and implement guidelines, assessments or recommendations: that responsibility belongs to each Arctic individual state.

In the current discussion about the form that standards should take in the Arctic, most of the reform proposals recommend a formal legal instrument (Pharand, 1991; Koivurova, 2000; Hasanat, 2013). The European Parliament had thus proposed the creation of an Arctic Treaty in 2008, which was an anathema to the circumpolar governments. On the contrary, Oran Young supports the development of arrangements on specific topics (Young 2009; Young, 2011: 331), which appears to be the most pragmatic solution, as establishing hard law standards does not seem to be politically feasible. The British researcher and diplomat Alyson Bailes stressed, "trying to force it [the AC] into a "stronger" mould (...) would most likely undermine these positive qualities while guaranteeing no useful results" (2013: 17).

The strong sides of soft-law

Soft law is often viewed as a step in the development of the standard that would evolve in time into hard law. On the contrary, our approach considers soft law as a particularly effective method to implement standards. It is the “soft” structure that allows the legalization of social cohesion, in particular by including a wide variety of players at the heart of negotiations. The main advantage to establish a framework for international governance without a harder structure is that it offers more room to include non-state actors. In particular, local voices need to be included in the governance process. Those bottom-up initiatives bring the additional legitimacy, expertise, and other resources required for making and enforcing new norms and standards, and provide an effective means for direct civil society participation in global governance. Because of its soft law structure, the AC can’t develop regulatory arrangements but includes indigenous peoples in the cooperation process.

Soft law is a product of state practice when conducting an international treaty is not possible at all. The actors can then have confidence in the agreement and know that it will not be used to impose policies with which they disagree, and they are assured that there will be no limitation in their ability to act in their national interest. Soft law provides much more ways to manage uncertainty, and can better adapt over time by facilitating compromise and mutual effects of the cooperation between the different values and interests of the actors, with different degrees of power and different time scales. In this perspective, Ingrid Medby stresses the importance of the normative influence of the AC: the AC does not conduct state’s political practices, since it has no binding power. Nonetheless, the AC lead the Arctic stakeholders to conduct themselves in certain ways: “The major successes of the AC may be the sheer interaction of states and other actors on an equal playing-field; in particular states whose officials are otherwise prone to bilateral dialogue-aversion.” (2015: 331). Although it holds no hard power to force the states in the region to any behavior, the AC is a powerful instrument to oblige them politically by setting soft-law norms.

It is a complex balance to achieve for the AC, between efficiency, that is promoting “harder” agreements, and legitimacy, that is offering a larger place for locals in the decision process. The AC is not a perfect forum, but despite, or perhaps *thanks* to its internal limitations, the AC has scored a lot of successes, primarily by placing non-state actors at the heart of the negotiations. The AC binds players just a bit, *thus* it binds them together. It is this ability to bend without breaking, this strength of the flexibility that seems particularly valuable in the operation of the AC.

Conclusion

The key to the success of the Council lies in its generative role. Over the years the AC’s intergovernmental cooperation has built a foundation of shared norms and values, and it has significantly increased the level of socialization and interaction between the Arctic states, even for the most reluctant to cooperate.

For some authors, the soft law nature and restricted mandates of the AC have limited its capacity to respond to new issues emerging from climate change, particularly those related to the exploitation of oil and gas reserves, commercial shipping through the region, effects on wildlife, and impacts on indigenous peoples’ homelands and culture. (see e.g. Kao, Pearre & Firestone,

2011). In the face of the criticism often directed at soft law, it must be repeated that it is always preferable to a total lack of cooperation structure or even control, and one wonders what such a fragile region as the Arctic would look like if it were delivered to the national interests of power politics.

The British researcher and diplomat Alyson Bailes rightly stressed the importance of not criticizing the AC by comparing it to an ideal type (2013). For her, it is unfair to evaluate the AC's strengths and weaknesses by the standards of institutions of fundamentally different types – for instance by comparison with the Antarctic regime, when it resembles more closely the sub-regional organizations of Europe. By their standards, the AC has no unusual major weaknesses, and it shares all their typical strengths, which are especially relevant for handling the Arctic in a time of rapid evolution and architectural ambiguity.

Despite its many imperfections in the norm-making process, the AC is the source of many successes: the first indigenous participation in the cooperation process, or the interactions between politics and science that produced innovative and influential research reports. The Council played a pioneering role in the field of environmental protection against organic pollutants, and by analyzing the consequences of climate change in particular. But non-binding standards do not imply a much less robust system. The AC is not based on hard-law standards and agreements but it has built a foundation of shared norms and values. Regional standards around environmental protection and the inclusion and respect of local and indigenous perspectives have been institutionalized in the AC and beyond. For us it is the flexibility of the current system of emerging standards that contributes to its robustness.

Yet, the Council is a place of social practices much more than articulation of norms, a place where one reduces uncertainty and not where the decisions are made, a facilitating body much more than a regulatory one. But facilitating cooperation, social practices and thus the establishment of standards, is already a lot especially in the Arctic. The strength of the AC is to have managed to remain flexible with its flexible structure and organization of soft law, which could be a visionary and promising medium to cooperate in the global field of environment, given the relative failure of current environmental international negotiations. Ironically, the AC's greatest weaknesses are also its greatest strengths.

Notes

1. The Arctic is a region with a large number of definitions. In this paper, we will use the AC's reliance on the Arctic Circle's latitude (66° 33' north) the most widely accepted definition, where the eight states with territories north thereof are recognized as Arctic states: Canada, Denmark/Greenland, Finland, Iceland, Norway, Russia, Sweden, and the United States.
2. We are aware that the dichotomy of soft/hard law is challenged by some legal experts (Trubek et al., 2006). Without going into the details of these discussions, we consider these concepts as useful tools in our demonstration.
3. The high-profile event of the Russian flag planted in 2007 in the Arctic Ocean has essentially a symbolic value, but reminds the international community the submissions in

the CLCS and then demarcation negotiations over areas where these coastal states have fairly limited rights. Canada has made similar statements, although more discreet for the Northwest Passage.

4. While the Intergovernmental Panel on Climate Change (IPCC) had already noted in 2001 that the effects of climate change tended to be more noticeable in the Arctic is the ACIA that sets up the flagship of Arctic as a witness of global warming, as that region is warming twice as fast as the rest of the world. In addition, an important element that the ACIA has highlighted in a new way is the impact of climate change on Arctic inhabitants, particularly on indigenous peoples. This report illustrates the scientific cooperation at the highest level, given the number of scientists involved, from eleven countries.

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