



Md Waliul Hasanat

Soft-law Cooperation in International Law

The Arctic Council's Efforts to Address Climate Change

Academic Dissertation
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To my parents...

TABLE OF CONTENTS

The page numbers in chapters 2-5 correspond with the numbering of published articles as appeared in scientific journals.

ACKNOWLEDGMENTS	VIII
LIST OF ACRONYMS.....	XI
1: INTRODUCTION.....	1
1. GENERAL BACKGROUND	1
<i>1.1. Introduction</i>	<i>1</i>
<i>1.2 Global Warming</i>	<i>10</i>
<i>1.3 Climate Change</i>	<i>12</i>
<i>1.4 Human Activity and Climate Change</i>	<i>14</i>
<i>1.5 Climate Change Regime</i>	<i>17</i>
<i>1.6 The Relevance of the Arctic With Respect to Climate Change</i>	<i>28</i>
<i>1.7 Arctic-Wide State Cooperation in Combating Climate Change.....</i>	<i>32</i>
2. APPROACH OF THE THESIS	35
3. SCOPE AND OBJECTIVES OF THE STUDY	41
4. METHODOLOGY OF THE STUDY.....	41
5. STRUCTURE OF THE THESIS.....	42
2: DEFINITIONAL CONSTRAINTS REGARDING SOFT LAW	45
‘DEFINITIONAL CONSTRAINTS REGARDING SOFT LAW’ 3 AALCO	
QUARTERLY BULLETIN (2007), PP. 8-32.	
1. INTRODUCTION	8
2. WHAT IS SOFT LAW?	10
A. Treaties.....	11
B. Customary International Law.....	12
3. IDENTIFICATION OF SOFT LAW.....	14
4. CONSEQUENCES OF SOFT LAW.....	16
5. PERMANENT COOPERATION CREATED BY SOFT-LAW PROCESS.....	19
A. The Arctic Council.....	19
B. The Barents Euro-Arctic Council	21
C. The Northern Forum	23
D. South Asian Association of Regional Cooperation	25
6. REASONS UNDERLYING THE CREATION OF SOFT LAW.....	29
7 CONCLUSION.....	31
3: TOWARDS MODEL ARCTIC-WIDE ENVIRONMENTAL COOPERATION	
COMBATING CLIMATE CHANGE	72

**‘TOWARDS MODEL ARCTIC-WIDE ENVIRONMENTAL COOPERATION
COMBATING CLIMATE CHANGE’, 20 YEARBOOK OF INTERNATIONAL
ENVIRONMENTAL LAW (2009), PP. 122-157.**

I. INTRODUCTION	122
II. HISTORY OF THE ARCTIC COOPERATION	124
1. The Cooperation of the AEPS	124
2. Formation of the Arctic Council.....	125
III. FUNCTIONING SYSTEM OF THE COOPERATION	127
1. Organizational Framework	127
A. Members	127
B. Permanent Participants.....	128
C. Observers	129
2. Operational Framework.....	130
A. SAOs.....	130
B. Working Groups.....	131
(i) AMAP	131
(ii) PAME	133
(iii) EPPR.....	134
(iv) CAFF.....	135
(v) SDWG.....	136
(vi) ACAP.....	137
C. The Secretariat	138
IV. THE ISSUE OF CLIMATE CHANGE IN ARCTIC COOPERATION	139
1. The Issue of Climate Change under the AEPS.....	139
2. The Issue of Climate Change under the Arctic Council.....	140
V. ACHIEVEMENTS OF THE COOPERATION WITH RESPECT TO CLIMATE CHANGE IN THE ARCTIC	144
VI. MAIN SHORTCOMINGS OF THE COOPERATION IN ADDRESSING ARCTIC CLIMATE CHANGE.....	147
1. Soft Law Character	147
2. Lack of Permanent Secretariat.....	147
3. Ineffective Funding Mechanism	148
4. Poor Coordination with Respect to Working Groups.....	148
5. Problems Concerning National Delegates	149
6. Lack of Realization of Arctic Needs at the National Level.....	149
7. Members’ Lack of Confidence in the Cooperation	149
8. Disagreements among the Members.....	150
9. Other Deficiencies of the Cooperation	150
VII. PROPOSAL FOR A MODEL COOPERATION ADDRESSING CLIMATE CHANGE IN THE ARCTIC	150
1. Introduction.....	150
2. Reasons of Reforming the Cooperation.....	151
3. Existing Proposals Regarding the Reform of the Cooperation.....	152
VIII. CONCLUSION	155

4: COOPERATION IN THE BARENTS EURO-ARCTIC REGION IN THE LIGHT OF INTERNATIONAL LAW111

‘COOPERATION IN THE BARENTS EURO-ARCTIC REGION IN THE LIGHT OF INTERNATIONAL LAW’, 2 *THE YEARBOOK OF POLAR LAW* (2010), PP. 279-309.

1. INTRODUCTION	279
2. THE ORGANISATIONAL FRAMEWORK OF THE COOPERATION	281
2.1. The Barents Euro-Arctic Council	282
2.1.1 . Members	282
2.1.2. Observers	284
2.1.3. Committee of Senior Officials	284
2.2. The Barents Regional Council	284
2.2.1 Members	285
2.2.2 The Executive Regional Committee	286
3. THE FUNCTIONAL FRAMEWORK	286
3.1. Subordinate Bodies	286
3.1.1 . Individual Subordinate Bodies under the BEAC	286
3.1.1.1. Working Group on Economic Cooperation	287
3.1.1.2. Working Group on Custom Cooperation	287
3.1.1.3. Working Group on Environment	288
3.1.1.4. Working Group on Youth Policy	288
3.1.1.5. Steering Committee for the Barents Euro-Arctic Pan-European Transport Area	289
3.1.1.6. Interim Joint Committee on Rescue Cooperation	290
3.1.2. Individual Subordinate Bodies under the BRC	290
3.1.2.1. Regional Working Group on Environment	291
3.1.2.2. Regional Working Group on Communication	291
3.1.2.3. Regional Working Group on Youth Issues	292
3.1.2.4. Regional Working Group on Investment and Economic Cooperation	292
3.1.3. Joint Subordinate Bodies	293
3.1.3.1. Joint Working Group on Health and Related Social Issues	293
3.1.3.2. Joint Working Group on Education and Research	294
3.1.3.3. Joint Working Group on Energy	296
3.1.3.4. Joint Working Group on Culture	296
3.2. The Secretariats	298
4. LEGAL ELEMENTS IN THE COOPERATION	299
5. CONCLUSION	307

5: INTERNATIONAL COOPERATION IN THE NORTHERN FORUM: EMERGING NEW NORMS IN INTERNATIONAL LAW?.....145

‘INTERNATIONAL COOPERATION IN THE NORTHERN FORUM: EMERGING NEW NORMS IN INTERNATIONAL LAW?’ *POLAR RECORD*, CAMBRIDGE UNIVERSITY PRESS (ONLINE PUBLISHED 31 OCTOBER 2011, DOI: 10.1017/S0032247411000404), PP. 1-15.

INTRODUCTION	1
HISTORY OF THE NORTHERN FORUM	1
EARLY MEETINGS OF THE INTERNATIONAL CONFERENCE ON HUMAN ENVIRONMENT IN NORTHERN REGIONS	2
COOPERATING IN A CHANGING WORLD: THE STATEMENT OF INTENT AND EVALUATION OF THE NORTHERN FORUM	2
THE FOUNDING MEETING OF THE NORTHERN FORUM	3
STRUCTURE OF THE FORUM	4
MEMBERSHIP IN THE NORTHERN FORUM	4
ORGANISATIONAL STRUCTURE OF THE NORTHERN FORUM	6
OPERATIONAL SYSTEMS OF THE NORTHERN FORUM	7
LEGAL ELEMENTS IN THE NORTHERN FORUM	8
THE LEGAL STATUS OF THE NORTHERN FORUM	10
THE NORTHERN FORUM'S IMPACT ON INTERNATIONAL LAW	11
THE FORUM'S INPUTS TO INTERNATIONAL LAW	12
CHALLENGES POSED BY THE FORUM TO INTERNATIONAL LAW	12
CONCLUSION	12
ACKNOWLEDGEMENT	13
REFERENCES	13

6: CONCLUSION 162

1. INTRODUCTION.....162

2. SOFT-LAW IN INTERNATIONAL LAW181

2.1. Why Soft-law has Emerged in International Law?..... 181

2.2. The Strong and Weak Sides of Soft-law..... 183

 2.2.1 Weak sides of soft-law..... 184

 2.2.2 Strong sides of soft-law 185

2.3. Conclusion on Soft-law in International Law..... 187

3. SOFT-LAW COOPERATION FORMS IN THE ARCTIC189

A. The Arctic Cooperation 190

B. The Barents Cooperation 194

C. Cooperation in the Northern Forum..... 198

3.1. Reasons for Creating Soft-law Cooperation Forms in the Arctic..... 200

 3.1.1. Issues of concern..... 201

 3.1.2. The inhabitants..... 202

 3.1.3. Historical reasons..... 206

 3.1.4. National resource interests..... 207

 3.1. 5. Member states prioritize Arctic co-operation in different ways..... 208

3.2. Interrelations among the Arctic, Barents, and Northern Forum forms of
Cooperation..... 209

3.3. Conclusion on Soft-law Cooperation in the Arctic..... 214

4. THE ARCTIC COUNCIL AND ITS CLIMATE CHANGE WORK216

4.1. Arctic Climate Impact Assessment..... 217

4.2. ACIA Policy Document..... 220

4.3. Arctic Council Focal Point 222

4.4. Snow, Water, Ice and Permafrost in the Arctic 226

4.5. Arctic Council Task Force on Short-lived Climate Forcers	230
4.6. Climate Change Related Projects	232
4.7. Involvement in the Global Climate Change Regime	233
5. CAN THE ARCTIC COUNCIL RESPOND TO THE CHALLENGES POSED BY ECONOMIC GLOBALISATION AND CLIMATE CHANGE?	235
6. CONCLUSION ON THE ARCTIC COUNCIL IN ADDRESSING CLIMATE CHANGE IN THE ARCTIC	239
BIBLIOGRAPHY	244

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Md Waliul Hasanat

LIST OF ACRONYMS

ABS	Arctic Biodiversity Assessment
AC	Arctic Council
ACAP	Arctic Contaminants Action Programme
ACAP	Arctic Council Action Plan to Eliminate Pollution of the Arctic (Task Force)
ACIA	Arctic Climate Impact Assessment
AEPS	Arctic Environmental Protection Strategy
AGORA	Access to Global Online Research in Agriculture
AHDR	Arctic Human Development Report
AJIL	American Journal of International Law
AMAP	Arctic Monitoring and Assessment Programme
AMEC	Arctic Military Environmental Cooperation
AMSA	Arctic Marine Shipping Assessment
AMSP	Arctic Marine Strategic Plan
AR4	Fourth Assessment Report of the IPCC
ASC	Assessment Steering Committee
ATS	Antarctica Treaty System
AWG-KP	Ad hoc Working Group on Kyoto Protocol
AWG-LCA	Ad hoc Working Group on Long Term Cooperative Action
BC	Black carbon
BEAC	Barents Euro-Arctic Council
BEAR	Barents Euro-Arctic Region
BEATA	Barents Euro-Arctic Pan-European Transport Area
BFSTF	Barents Forest Sector Task Force
BIPO	Barents Indigenous Peoples Office
BOG	Board of Governors
BRC	Barents Regional Council
CAFF	Conservation of Arctic Flora and Fauna

CAFF	Conservation of Arctic Flora and Fauna
CARC	Canadian Arctic Resource Committee
CBird	CAFF Seabird Group
CBMP	Circumpolar Biodiversity Monitoring Programme
CFG	CAFF Flora Group
CH ₄	Methane
CHM	Common Heritage of Mankind
CO ₂	Carbon dioxide
COP	Conference of Parties
CPAN	Circumpolar Protected Area Network
CPAR	Conference of Parliamentarians of the Arctic Region
CSO	Committee of Senior Officials
ED	Executive Director
EPPR	Emergency Prevention, Preparedness and Response
EU	European Union
EXCOM	Executive Committee
FOGAR	Forum of Global Associations of Regions
FP	Focal Point
GAL	Global Administrative Law
GCM	General Circulation Model
GEF	Global Environment Facility
GHG	Greenhouse Gases
GRIS	The Greenland Ice Sheet in a Changing Climate
H ₂ SO ₄	Sulphuric acid
IAS	International Arctic Secretariat
IASC	International Arctic Science Committee
IBS	International Barents Secretariat
ICAO	International Civil Aviation Organisation
ICJ	International Court of Justice
ICS	International Circumpolar Surveillance
IHWMS	Integrated Hazardous Waste Management Strategy
IJCRC	Interim Joint Committee on Rescue Cooperation

ILM	International Legal Materials
ILO	International Labour Organisation
IMO	International Maritime Organisation
INC/FCCC	Intergovernmental Negotiating Committee for a Framework Convention on Climate Change
IPCC	Intergovernmental Panel on Climate Change
IPS	Indigenous Peoples Secretariat
IPY	International Polar Year
IR	Infrared light
JEWG	Joint Working Group on Energy
JWGC	and the Joint Working Group on Culture
JWGER	Joint Working Group on Education and Research
JWGHS	Joint Working Group on Health and Related Social Issues
KP	Kyoto Protocol
MOU	Memorandum of Understanding
N ₂ O	Nitrous oxide
NCM	Nordic Council of Ministers
NEFCO	Nordic Environmental Finance Corporation
NF	Northern Forum
NGO	Non-Governmental Organisation
nrg4SD	Network of Regional Governments for Sustainable Development
NSIDC	National Snow and Ice Data Centre
PAME	Protection of Arctic Marine Environment
PLO	Palestine Liberation Organisation
POP	Persistent Organic Pollutant
PSI	Project Support Instrument
RAIPON	Russian Arctic Indigenous Peoples of the North
RC	Executive Regional Committee
RCC	Regional Coordinators Committee
RECIEL	Review of European Community and International Environmental Law
RWGC	Regional Working Group on Communication

RWGE	Regional Working Group on Environment
RWGIEC	Regional Working Group on Investment and Economic Cooperation
RWGYI	Regional Working Group on Youth Issues
SAARC	South Asian Association for Regional Cooperation
SAFTA	South Asian Free Trade Agreement
SAO	Senior Arctic Official
SAR	Search and Rescue
SCE	Snow cover extent
SCPAR	Standing Committee of Parliamentarians of the Arctic Region
SDAP	Arctic Council's Sustainable Development Action Plan
SDWG	Sustainable Development Working Group
SLCF	Short-Lived Climate Forcers
SME	Small and Medium Enterprises
SO ₂	Sulphur dioxide
SWIPA	Snow, Water, Ice and Permafrost in the Arctic
TAR	Third Assessment Report of the IPCC
TFSDU	Task Force on Sustainable Development and Utilization
TFSLCF	Task Force on Short-Lived Climate Forcers
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNCLOS	United Nations Convention on the Law of the Sea
UNEP	United Nations Environmental Programme
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNFCCC	United Nations Framework Convention on Climate Change
UNPF	United Nations Permanent Forum on Indigenous Peoples
UNTS	United Nations Treaty Series
VACCA	Vulnerability and Adaptation to Climate Change in the Arctic
WCED	World Commission on Environment and Development
WGCC	Working Group on Customs Cooperation
WGE	Working Group on Environment

WGEC	Working Group on Economic Cooperation
WGIP	Working Group of Indigenous Peoples
WGTB	Working Group on Trade Barriers
WGYP	Working Group on Youth Policy
WHO	World Health Organization
WMO	World Meteorological Organization
WWF	World Wide Fund for Nature

1: INTRODUCTION

1. GENERAL BACKGROUND

1.1. Introduction

The Arctic environment provides a distinctive livelihood to the inhabitants of the Arctic. The inhabitants of the region including various groups of indigenous peoples have found their way of life in the traditional Arctic environment, however increasing climate change has emerged as a big threat to this environment and early summers, late winters and an increased melting of ice and permafrost are reported as common phenomena. Arctic climate change and its consequences not only affect the Arctic people, flora and fauna, but are also of influence to the rest of the world.

There is no single definition of the Arctic. Generally the Arctic is known as the northernmost part of the globe which retains extreme climatic and geographical phenomena: extreme cold, snow and ice, permafrost, sunless days and mid-night Suns. However, it has not been possible to reach an agreed definition of the southernmost boundary of the Arctic due to different criteria being considered by natural and social scientists. Presently there are three main criteria¹:

¹ Some other proposals are those of warm-cold water, pack ice, and solar energy incident. The warm-cold principle considers a southern boundary where cold waters meet warm waters from further south. However, such an arctic convergence is defeated by land. According to the pack ice principle, the southern limit of pack ice is recognised as the southern boundary which has its limit due to seasonal changes, in particular when unpredictable annual variation occurs. Moreover, it is difficult to interpolate the position of the pack ice edge across land masses since the Arctic Ocean is virtually surrounded by land. The Solar energy incident principle, proposed from the 1960's, defines the arctic southern boundary where the incident energy is less than 15kcal/cm²/year. However, it seems difficult to locate the Arctic boundary based upon sun energy incidents, as these are not an easily recognisable unit or feature. See Sale, (2008), p. 17.

- a. Tree Line Principle
- b. Isotherm Principle
- c. Latitude Principle

The Tree Line Principle refers to the southern boundary of the Arctic as the northernmost border line where trees grow. In fact, it is not merely a line but a band of trees several kilometres wide. Crossing the width of the band, the trees become smaller and grow at a further spacing and finally they reach a point where the trees disappear.² This is the starting point of the tundra³ and is considered as an important boundary in terms of animal distributions and in separating the Arctic Inuit peoples from the forest Indians of North America.⁴

The Isotherm Principle indicates the southernmost location where the mean temperature of the warmest month of the year is below ten degrees Celsius (10°C). The isotherm boundary is closely aligned to the tree-line and has been adopted as a useful measure of the border between the Arctic and the sub-Arctic regions although

² The ground underneath the band is permanently frozen with just a thin layer of unfrozen soil on top. Only dwarf trees with short roots survive on top of the permafrost. Icy winds, lack of moisture, very thin layer of soil prevent trees from growing at further north of the tree line. Kalman, (1988), pp. 6-7. If the tree line is considered to form as the southern boundary of the Arctic, then it includes western and northern Alaska, a wedge of northern Canada (which progressively widens towards the east), the whole of Greenland, and a thin strip of the Russian Federation which also widens to the east. Sugden, (1982), p. 18.

³ Tundra is a barren land with no trees or tall plants.

⁴ Sugden, (1982)2, pp. 17-18.

there is disagreement among scientists about the standard temperature.⁵ Moreover, it is difficult to define the Arctic by strictly following isotherm principle.⁶

In general, the Latitude Principle considers the southern border as the ring line on the globe drawn at 66°34'03" (or 66.567°) North latitude, where at all points north the Sun is visible throughout the day at mid-summer and invisible at mid-winter.⁷ This ring is known as the Arctic Circle, yet, it may not be considered as the only southern border of the Arctic subject to the general Arctic characteristics of climatic significance and with an implication for either people or Arctic wildlife.⁸ For instance, the part of Norwegian territory (main land) located to the north of the Arctic Circle does not have the characteristics of an Arctic climate, due to warming by the Gulf Stream.⁹ Alternatively, there are some other areas located further

⁵ For instance, Morten Vahl, a Danish scientist, suggested that 10°C should be replaced by the temperature V , where $V < 9.5^\circ - (K/30)$, with V and K the mean temperature of the warmest and coldest months of the year; whereas, Otto Nordenskjöld, a Swedish scientist, suggested with $V < 9.5^\circ - (K/10)$. Sale, (2008), p. 19.

⁶ For instance, James Bay in North America does not fall into the Arctic when considering the southern border as a 10°C isotherm line. However, it is important to include James Bay in the Arctic from the Polar Bear context. The Pribilof Islands, the Aleutian Island chain, the Commander Islands, the Kamchatka peninsula and north-eastern coast of the Sea of Okhotsk are usually considered as within the Arctic, however the isotherm border does not include them.

⁷ Nuttall and Callaghan, (2000), p. xxix; Sale, (2008), pp. 15-21.

⁸ Baird has described the Arctic as “a semi-frozen sea surrounded by tundra lands several million square miles in extent” and as one part of the Polar Regions whose general characteristics are cold, ice and the paucity of vegetation. He defines the Arctic in high latitude with truly polar characteristics: long winter and short cool summer, low precipitation, permafrost, frozen lakes and sea and an absence of trees. See Baird, (1964), pp. 1-10. While, Armstrong, Roger and Rowley argued for Circumpolar North as a true abbreviation of Arctic and sub-Arctic. See, Armstrong et al., (1978). Sale has described the Arctic as an area of ice and snow where polar bears are hunted by native peoples who live in igloos. Sale, (2008), p. 15.

⁹ See also Baird, (1964), p. 2. More specifically, Longyearbyen is a town with hotels and shops along with an airport operating flights throughout the year, located on Spitsbergen Island at 78°N. At the same latitude in North America and Eurasia, in areas that do not receive any warming effect from the North Atlantic Drift, the land is unavoidably uninhabitable. Sale, (2008), p. 16.

below the Arctic Circle which have Arctic characteristics.¹⁰ Some Arctic states define their Arctic area based on different latitudes.¹¹

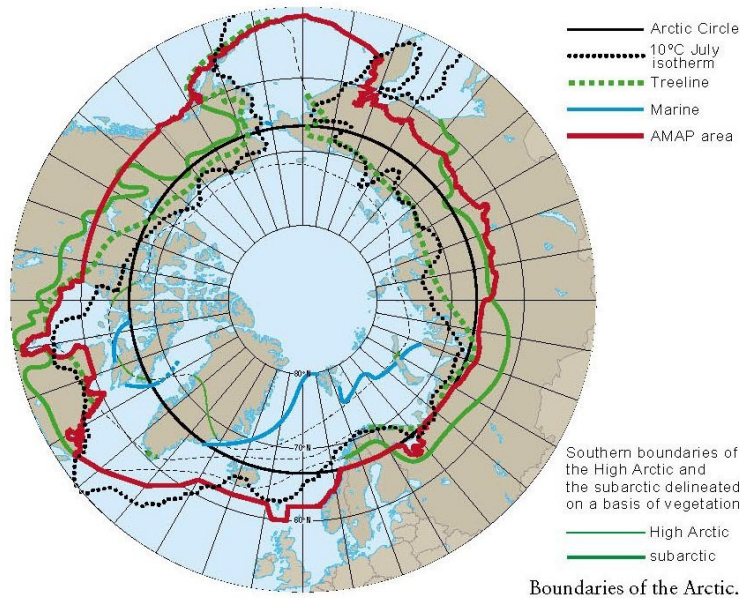


Fig 1. Projected Arctic southern boundary form different viewpoints along with Arctic and Subarctic. [Courtesy of Arctic Monitoring and Assessment Programme (AMAP) website, < <http://www.amap.no/AboutAMAP/GeoCov.htm>>].

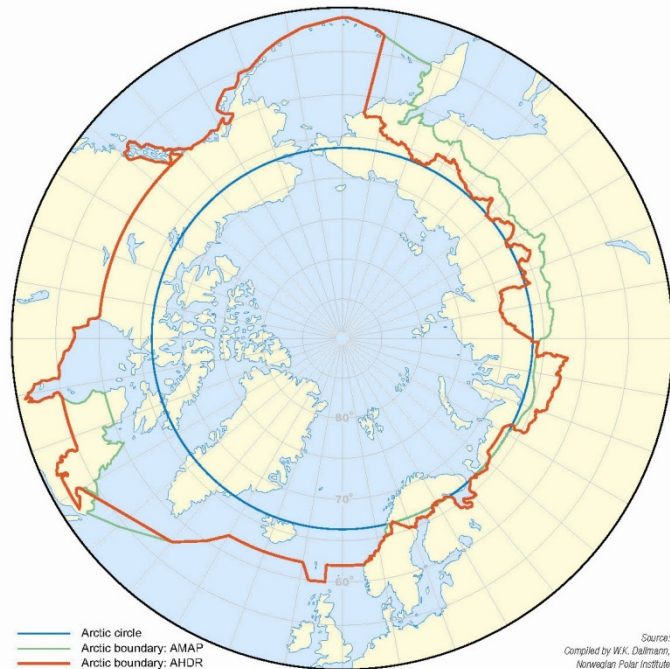
For reasons mainly concerning the location of jurisdictional or administrative boundaries and the availability of data; variation is apparent with respect to the specified Arctic area, covered in reports prepared by different groups.

¹⁰ For instance, in the Canadian Arctic, it seems reasonable to adopt 60°N as the southern boundary of the region. This convention separates the three northern territories from the southern provinces, although Nunavik (or northern Quebec) and Labrador, are areas that have arctic character and this extends to even below 60°N. In contrast, when applying the same convention to Fennoscandia (the combination of Norway, Sweden, Finland and the Kola Peninsula and that land immediately south of the White Sea in Russia), this would demarcate a region running as far south as Oslo and Helsinki, an outcome that makes little sense to those who think about Arctic issues in the Nordic countries. Arctic Human Development Report, (2004), p. 17.

¹¹ Canada includes the drainage area of the Yukon Territory, all lands north of 60°N latitude and the coastal zone areas of Hudson Bay and James Bay; while, Denmark specified the Faroe Islands and Greenland be treated as lying within the Arctic. Finland defines the territory as being north of the Arctic Circle. Iceland has defined the whole territory of Iceland as lying within the Arctic area. Norway determines 62°N as the southern border line of the Arctic in Norwegian territory. Sweden accepted the Arctic Circle as the southern borderline of the Arctic area, although it does not have any formal delimitation of the Arctic. The Russian Federation determines its Arctic areas as the ‘On Zoning of North Russia’, a law drafted by the Russian Federation. Arctic Council Arctic Offshore Oil and Gas Guideline (2009), pp. 77-78 (the part: Annex A – Definition of the Arctic).

For instance, there is dissimilarity between AMAP-Arctic¹² and AHDR-Arctic¹³, although, both are issued under the auspices of the Arctic Council.

Fig 2. Projected Arctic southern boundary from the viewpoint of the Arctic Circle, AMAP-Arctic and AHDR-Arctic. [Courtesy of Stofnun Vilhjálms Stefánssonar (SVS) website, <www.svs.is/AHDR/AHDR%20chapters/English%20version/AHDR_chp%201.pdf> page 18].



It may be possible to use biophysical criteria to determine the extent of the Arctic as a region. Aside from the fact that this approach has little to recommend in cultural, economic, or political terms, it seems that there is much to be said for bounding the Arctic in a manner that is broadly compatible with the studies of other Arctic issues, rather than adopting yet another approach to determining the extent of the region.

¹² See Arctic Pollution Issues: A State of the Arctic Environment Report, (1997), p. 6; Arctic Pollution 2002: Persistent Organic Pollutants, Heavy Metals, Radioactivity, Human Health, Changing Pathways, (2002), p. 3.

¹³ The AHDR Arctic includes Alaska, Canada North of 60°N together with northern Quebec and Labrador, Greenland, the Faroe Islands, Iceland, the northernmost counties of Norway, Sweden and Finland along with a large part of Russia: the Murmansk Oblast, the Nenets, Yamalo-Nenets, Taimyr, and Chukotka autonomus okrugs, Vorkuta City in the Komi Republic, Norilsk and Igarka in Krasnoyarsky Kray, and those parts of the Sakha Republic whose boundaries lie closest to the Arctic Circle. Arctic Human Development Report, (2004), p. 18.

The Arctic Circle has been considered in this manner. In Arctic wide political cooperation, states that possess areas of territorial sovereignty above the Arctic Circle consider themselves as Arctic states and are given membership of the Arctic Council (AC), the only inter-governmental Arctic-wide cooperation. It therefore includes Norway, Sweden, Finland, Denmark-Greenland, Iceland, Canada, Russia and the USA (in respect of Alaska). This encompasses an area of over 40 million square kilometres (or about 8% of the earth's surface), which is a sizable domain by any standards,¹⁴ yet the human residents of this vast area number only about 4 million, of whom almost half are located within the Russian Federation.¹⁵ This political consideration presents with the further problem of determining what specific parts of these states to include in a region designated as the Arctic.¹⁶

Thus, searching for an agreed definition of the Arctic seems complicated in many respects. David Sugden has advocated for a flexible boundary for the Polar Regions as some described boundaries seem appropriate for some purposes and other boundaries for others.¹⁷ One solution is to recognise the Arctic from the cultural, economic and political viewpoint of the inhabitants of the region, rather than considering only the biophysical criteria. The region is fairly dissimilar to more familiar regions of the world¹⁸, in that it consists mainly of portions of nation states

¹⁴ *Ibid.*, p. 18.

¹⁵ *Ibid.*

¹⁶ For a detailed treatment see Nuttall and Callaghan, (2000), pp. 1-160.

¹⁷ Sugden, (1982), p. 17.

¹⁸ E.g., South-East Asia, the Middle East, or South America.

whose political centres of value lie, for the most part,¹⁹ far to the south.²⁰ That being said however, some Arctic regions have achieved a level of power to deal with their own issues to some extent.²¹

Climate is an important element of the environment and commonly “weather averaged”²². The overall concept of “weather” is clear (the state of the atmosphere of a specific place at specific time with respect to its temperature, relative humidity, wind pattern, precipitation and cloud)²³ and implies the integrated circumstances of those phenomena. However, it arises with an attached multiplicity and its operating system, causes of change and the actions that surmount the change are subject to deep technical discourse. So, scientists often face difficulty when they deal with the longer term measurements of climate, for it involves the calculation of weather patterns of places, with all their attached variables.

Modern science is capable of forecasting weather with a high degree of accuracy, however, different definitions of weather exist. According to the World Meteorological Organisation (WMO), then reason for this is: The scope of what “weather” encompasses differs widely from country to country, language to language, and discipline to discipline; it seems appropriate to regard “weather” as including all those physical (and to some extent chemical) processes and phenomena that are manifest in the atmosphere; measured on time scales that range from

¹⁹ The exception is Iceland does fall into north-south debate in terms of political value.

²⁰ Arctic Human Development Report, (2004), p. 17.

²¹ E.g., Iqaluit shares power with Ottawa and Greenland Home-rule government shares with Copenhagen.

²² Climate Change 2007: The Physical Science Basis, (2007), p. 96.

²³ Guidelines on Capacity Building Strategies in Public Weather Services, (2007), p. 11.

seconds, up to days and weeks, weather is also considered on longer time scales which extend into the past and future and traditionally thought of as “climate”; it is also worth noting that in recent years, the concept of “weather” has been expanded to embrace the variability of the ionosphere and the space environment on “weather” time scales, under the title of “space weather”.²⁴ The timeframe used in scheming the weather grade of specific places also varies when the average results that represent the “climate” of that place are considered. There is opinion that climate might be represented over more or less ten years,²⁵ whilst the classical time period considered is 30 years.²⁶

Nature has its own system to operate the universe including planets such as the Earth. In fact, the universe is a vast area in comparison to that of the Earth and nature imparts a strong force, in regulating the earth’s climatic system. The World Commission on Environment and Development (WCED)²⁷ has stated in its report that:

“From space, we see a small and fragile ball dominated not by human activity and edifice, but by a pattern of clouds, oceans, greenery and soils. Humanity’s inability to fit its activities into that pattern is changing planetary systems fundamentally.”²⁸

²⁴ *Ibid.*, p. 5.

²⁵ Archer, (2007), pp. 1, 54-59.

²⁶ Climate Change 2007: The Physical Science Basis, (2007), p. 96.

²⁷ The United Nations General Assembly formed the World Commission on Environment and Development (WCED) in 1983 (known as the Brundtland Commission by the name of its chair, Gro Harlem Brundtland) to address the deterioration of the human environment and its natural resources. UNGA Resolution 38/161, (1983), sec.3. The General Assembly recognised environmental degradation as a global problem and the common concern of all nations (sec.8).

²⁸ World Commission on Environment and Development, (1987), p. 308.

Air temperature, pressure and humidity, water, water-current and vapour are the main variable influences on weather conditions.²⁹ Climate, in a wider sense, is the state of those components, including a statistical description which shows their measurement and arrangement in a way that is integrated, complex and interdependent. Different methods³⁰ are used by climate scientists to prove their hypothesis and they also achieve different results. It is impossible for natural scientists to carry out a fully-controlled experiment on the planet as a whole³¹ and there is no collection of similar planets on which scientists can experiment by assigning treatments, comparing responses, assessing causal relations, so this makes things difficult from an experimental perspective.³² Moreover, the climate system as a whole is too complex to achieve a complete understanding by only those investigations of a single discipline of science.³³

²⁹ Lemke, (2006), p. 37.

³⁰ Observation and physical modelling are the main sources of data regarding climate change. Climate scientists collect data establishing meteorological observing stations and via remote sensing. They apply radiosondes (using balloons) and rocketsondes methods in measuring air temperature beyond the surface. Satellite observation is a comparatively developed form. Wide numbers of research centres have developed their own climate models: Hadley Centre (U.K.), Canadian Climate Centre (Canada), National Centre for Atmospheric Research (U.S.A.), The Geophysical Fluid Dynamics Laboratory (USA), Max Planck Institute for Meteorology (Germany). However, those models show discrepancies and even controversies. Andrew R Solow has presented the controversies found in climate models. For instance, with respect to the behaviour of clouds, see Solow, (2003), pp. 423-424.

³¹ Climate Change 2007: The Physical Science Basis, (2007), p. 98.

³² Berliner, (2003), p. 431.

³³ Nychka, (2000), p. 975. Dough Nychka has described the difficulties in measuring climate change. He has explained *inter alia* the General Circulation Model (GCM). The GCM is an adaptation of the primordial equations to a spatial grid and separate steps in time. Long-term changes cannot be estimated without a large scale of modelling which is a huge task and involves the efforts of many scientists. The Community Climate Model maintains a spatial grid which collects information from 8000 (approximately) points in every 20 minutes. It has formed grid boxes, each of which are 300 km x 300 km (28° x 28°), however, there are some components involved that are smaller than this box size and have strong convection events associated with climate change, for example a thunderstorm.

In due course, scientists have found a more credible approach – to synthesize the results of a number of peer-reviewed publications and previous and recent researches, which may provide real information or the closest thing to it. An example of this is the practice of the Intergovernmental Panel on Climate Change (IPCC). The IPCC can be evaluated (even if it is not itself formally a part of the climate change regime) as the standard source of information among scientific agencies engaged in climate change. The reason for this is that the parties to the United Nations Framework Convention on Climate Change (UNFCCC) (which is the founding instrument in the climate change regime under international law), have come to rely on the IPCC’s findings regarding climate change to inform their activities. Unless otherwise indicated, this study uses the fourth assessment report of the IPCC (hereinafter “AR4”) as the most recent and authentic source.³⁴

1.2 Global Warming

The Sun continuously disperses energy and the Earth absorbs that energy which in turn warms the surface. A portion of the energy from the earth spreads over the planet by means of atmospheric and oceanic circulation, while some of the solar radiation is reflected back into space from the earth³⁵ and its atmosphere. However,

³⁴ Climate Change 2007: Synthesis Report (2007).

³⁵ The Earth is almost (though not fully) considered as a blackbody – in that it cannot absorb all the light/heat fallen onto it and some portion is reflected back into space. The heat carried through the reflected light of the Sun will bounce back into space with the reflected light. That part of total incoming visible light of a planet, that is reflected back to space is called *albedo* of the planet. In fact, the *albedo* shows the reflecting capacity of certain planet. This varies from planet to planet, as they have different amount of ice, snow and clouds surrounding each of them. These three components are very reflective to light and are likely to raise the *albedo* measurement of a planet. For instance, the Venus *albedo* is 0.70 yet that of Mars is 0.15. This is because there is a thick cloud layer of sulphuric acid in the Venus atmosphere whilst Mars lacks this degree of cloud in its atmosphere. The average of earth’s *albedo* is 0.30 which moves back and forth with the changing amount of its cloudiness and ice-covered areas. The incoming force of solar energy from the average distance to the Earth is

main portion of the reflected radiation cannot pass through the atmosphere. There are some gases (primarily carbon dioxide (CO₂), methane (CH₄) and nitrous oxide (N₂O)) which are transparent only to short-wave radiation.³⁶ Those gases as well as water vapour and aerosols³⁷ block outgoing long-wave radiation, which leads to an increase in surface radiation.³⁸ This results in increased temperatures on the earth's surface and in its lower atmosphere.³⁹ Natural science has named this warming process the “greenhouse effect”.⁴⁰

1350Wm⁻². If its *albedo* (α) is 0.30, then the intensity of solar energy absorbed by the Earth per square metre is calculated as, $1350 \text{ Wm}^{-2}(1 - \alpha) = 1050 \text{ Wm}^{-2}$. See Archer, (2007), p. 20.

³⁶ The scientific convention is that hot sources always radiate heat. The hotter the source is, the faster it radiates. The faster radiation takes place through short waves. The opposite finding is that less hot sources radiate slower and slower radiation takes place through long waves. The Sun is a hotter source than the Earth – the Sun's radiated heat to the Earth comes through shorter waves than those Earth radiates to space. Thus the lengths of heat radiation waves vary, dependant on the source. Another characteristic of atmospheric gasses is molecular vibration: in this, molecules move fast and create different sizes of waves which vary from gas to gas and in different temperatures. Infrared light (IR) is a longer wave-length light than the visible light which is emitted from objects at room temperature and can easily pass that spectrum where the wave length is around 1000 cycles/cm. This band is called the atmospheric window. Any other light can pass through a gas when the vibration frequency of the light is similar to that of the gas. However, CO₂ works as blackbody by absorbing the light radiated from the earth surface and radiating its own light to the atmosphere at about 700cycles/cm. *Ibid.*, p. 33.

³⁷ Primarily sulphate, organic carbon, black carbon, nitrate and dust.

³⁸ Another complexity comes from band saturation theory. It means every molecule has limited capacity to protect intensity of light. For instance, CO₂ work as blackbody when its vibration is between 600 and 800cycles/cm. It can protect light the best at 220K temperatures, which is more or less as cold as the atmosphere gets. Increasing the amount of CO₂ to the atmosphere cannot make the light's intensity lower. From such a view, the growing amount of CO₂ in the atmosphere has only a limited capacity in absorbing the Earth radiated light to the atmosphere change and an additional quantity of the gas cannot alter that limitation. However, it is important to know the degree of band saturation of all greenhouse gases in the atmosphere, in order to predict or observe: whether any vast climate change appears before reaching the saturated level. Archer, (2007), pp. 34-35.

³⁹ Arnell, (1996), p. 3.

⁴⁰ Berliner, (2003), p. 430. Those gases are known as greenhouse gases (GHG); so named because they are likely to act as the panes of glass in a greenhouse. See also Arnell,(1996), pp. 13-21.

1.3 Climate Change

The UNFCCC has provided the most authentic legal definition of climate change by modifying the definition of climate change given by the IPCC. The IPCC has defined climate change as: “any change in climate over time whether due to natural variability or as a result of human activity”.⁴¹ UNFCCC has modified the definition taking into account only the aspect of human activity, because the changes caused by natural variability cannot be controlled by human intervention. As such, states have established a climate change regime aiming to combat climate change by managing those human activities which are deemed significant to it. According to the UNFCCC:

“ ‘Climate change’ means a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods”.⁴²

Each environment has its own system that maintains its climate and has balanced components with respect to its climate, however human activities (along with other phenomena) can have a negative influence on the balanced components. Svante Arrhenius, a Swedish scientist, argued first in 1896, that there exists a physical limit in the atmosphere to the amount of emissions it can absorb without suffering serious damage,⁴³ and that crossing that limit results in global climate change.⁴⁴ Nowadays,

⁴¹Climate Change 2007: The Physical Science Basis, (2007), p. 2 (note 1).

⁴² United Nations Framework Convention on Climate Change 1992.

⁴³ Arrhenius, (1896), pp. 237-276.

⁴⁴ Rodhe et al., (1997), pp. 2-5.

scientists have constructed a detailed carbon flux model which is capable of measuring the amount of carbon stored and exchanged between the atmosphere, the ocean, the terrestrial reservoir and the geological reservoir.⁴⁵ There is however, still uncertainty and this prevails in climate change prediction due to its links to factors such as industrialisation, population growth and urbanisation. These factors lead to increased fossil fuel burning and deforestation are responsible for the increase of CO₂ in the atmosphere.⁴⁶ In light of this, it is impossible to assess the exact figure of future expansions in those factors for certain time scales.

Currently, climate scientists have found that the increased concentration of greenhouse gases is mainly responsible for global warming which in-turn causes climate change. This is consistent with related indicators such as snow and ice melting, sea-levels rising, physical and biological changes in regional levels.⁴⁷ Nevertheless, all these changes result in further changes to the overall climatic system. Again, the carbon cycle works globally rather than nationally, i.e., emissions from one part of the world can impact upon the climate of other regions. It does not follow however that emission management in a specific region can curb the climate change in that region; but that it requires emission control inputs from other parts of the world.

⁴⁵ Stripple, (2007), pp. 140-141.

⁴⁶ Berliner, (2003), p. 430.

⁴⁷ AR4 (Synthesis Report), pp. 30-36.

1.4 Human Activity and Climate Change

It was once unclear whether human activities interfered with the climate system or how those activities impacted both positively and negatively on a global scale. Scholars provided arguments in support as well as against those human efforts regarding climate change, however, there are still further difficulties entailed which can be addressed in two points: Firstly, the influence of human activities on the climate system is a small consideration when compared to the vast powers of natural sources which also are seen to contribute to the problem. These may include the seasonal changes of a region around the year, the temperature difference between the equator and the poles, or perhaps the night and day-time variations seen within the same day in certain places. Secondly, there are some elements which play both a positive and negative role in climate change. Water acts in different ways in global warming, representing commonly as water-vapour, cloud and rainfall. Water vapour acts like a greenhouse gas, in that it blocks the emitted radiation from Earth to space and also reflects solar radiation back into space. Cloud formations seem to be more reflective to incoming solar radiation, whilst at the same time acting as barricades to the Earth's natural radiation to space. Rainfall freshens the air by cleaning away floating aerosols which would otherwise have acted in both a warming (by protecting long wave radiation emitted from the Earth) and cooling (by reflecting solar radiation back to space) capacity, in the regulation of atmospheric temperature.

There are other natural phenomena that can also have an impact on the climate. El Niño events, volcanic eruptions and sunspots are three examples. There is a tendency for a large surface area of the oceans to become predictably warmer, every three to five years. This persists for up to a year or more and is known as an El Niño

event.⁴⁸ However, the temperature of the ocean surface influences the rainfall patterns that in-turn may lead to floods and droughts.⁴⁹ A sunspot is a region on the Sun's surface that is marked by a lower temperature than its surroundings and is visible as a dark spot. Sunspots have intense magnetic activity, which form areas of reduced surface temperature, and have a vast influence over the temperature variation in different places at the same time.⁵⁰ Extending this example further, a drought may even contribute to a forest fire which could then be responsible for a massive smog blanket over the earth.⁵¹

Volcanoes release massive quantities of dust and gases into the upper atmosphere including sulphur dioxide (SO₂). This is transformed into sulphuric acid (H₂SO₄) and sulphate particles, following a chemical reaction with the Sun's energy. These particles can remain present for several years (until they fall into the lower atmosphere and are washed out by rainfall). Whilst present in the atmosphere, they can cut out some solar radiation which in-turn cools the lower atmosphere and hence affects the observed climate.⁵²

⁴⁸ Houghton, (2009), p. 7. For a detailed description on variety of El Niño events, see Couiper-Johndton, (2000).

⁴⁹ By example, an El Niño event occurred in 1982-83 that increased up to 7°C, the temperature in a large part of the Pacific Ocean. It brought exceptional floods to central USA and the Andes as well as unusual droughts to Australia and Africa. Another El Niño took place in 1997-98, causing exceptional floods in China and the Indian Subcontinent and also drought in Indonesia. See Houghton, (2009), pp. 7-11.

⁵⁰ For a general treatment about sunspots, Climate Change 2007: The Physical Science Basis, (2007), pp. 188-195 (Chapter 2.7).

⁵¹ The 1997-98 El Niño precipitated an extensive forest fire that created an unusual blanket of thick smog that was experienced over 1000 miles away from the fires source. *Ibid.*, p. 9.

⁵² *Ibid.*, p. 10. Example: a volcano erupted in Mount Pinatubo in the Philippines on 12 June 1991, which injected about 20 million tons of sulphur dioxide and huge amount of dust into the stratosphere. It caused spectacular sunsets around the world for many months following the eruption,

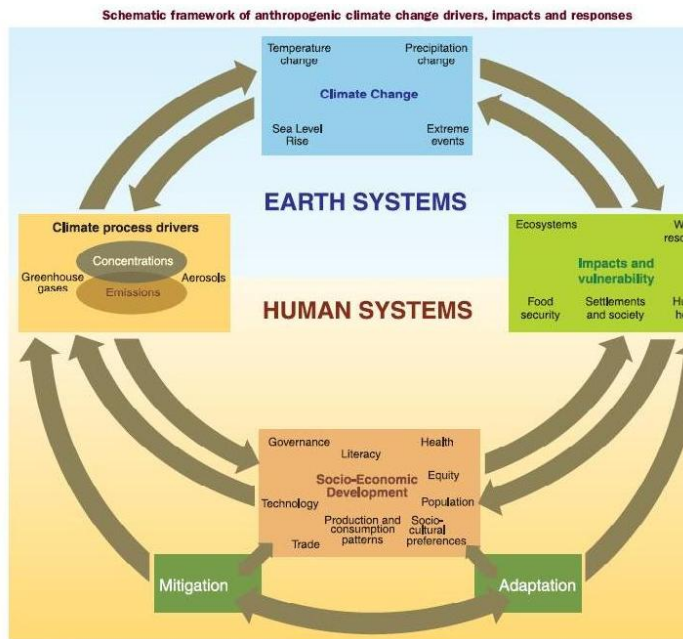


Fig.3. Projected natural and human contribution to the climatic system and their linkages.

[Courtesy of the IPCC website, <www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf>, page 26].

In the course of time, scientific innovations have proved that global warming is the main cause of climate change and this is primarily related to the levels of greenhouse gas concentrations in the atmosphere. However, human activities are responsible for these concentrations being ever-increasing.⁵³ 2007 was the first time that the IPCC confirmed that human activities contribute largely to climate change.⁵⁴

however the global average temperature decreased by about 0.25°C for the following two years and unusual weather patterns were also experienced in some parts of the world during 1991-92 (e.g., unusual cold in the Middle East and a notably mild winter in Western Europe).

⁵³ AR4 (Synthesis Report), p. 37. It reads: “Human activities result in emissions of four long-lived GHGs: CO₂, methane (CH₄), nitrous oxide (N₂O) and halocarbons (a group of gases containing fluorine, chlorine or bromine). Atmospheric concentrations of GHGs increase when emissions are larger than removal processes. **Global atmospheric concentrations of CO₂, CH₄ and N₂O have increased markedly as a result of human activities since 1750 and now far exceed pre-industrial values determined from ice cores spanning many thousands of years**”. [Original emphasis].

⁵⁴ Climate Change 2007: The Physical Science Basis, (2007), p.3 reads: “... very high confidence that the global average net effect of human activities since 1750 has been one of warming...” This Summary for the Policymakers also contains: “Global atmospheric concentrations of carbon dioxide, methane and nitrous oxide have increased markedly as a result of human activities since 1750 ... The global increases in carbon dioxide concentration are due primarily to fossil fuel use and land use change, while those of methane and nitrous oxide are primarily due to agriculture”. *Ibid.*, p. 2.

1.5 Climate Change Regime

As climate scientists have revealed, increasing human activities raise greenhouse gas concentrations in the atmosphere and this is mainly responsible for climate change.⁵⁵ One possible way to mitigate climate change is to control the greenhouse gas emissions from human activities. Addressing climate change by single party (actors) approaches cannot be successful.⁵⁶ For this reason, states have established a climate change regime⁵⁷ and try to manage their individual greenhouse gas emission in the light of scientific findings.⁵⁸

State sovereignty is an important consideration to make, with respect to establishing a climate change regime. Sovereign states (except for the European Union in respect of most multilateral environmental agreements) can only be members of an international regime although the contribution of non-state actors is also significant

⁵⁵ For instance, the burning of fossil fuels, deforestation, the application of fertilizers and particular types of agricultural production cause greenhouse gases. Water vapour (a greenhouse gas), does increase with temperature and tends to reinforce the effect of the other greenhouse gases. See Arnell, (1996), pp. 3, 13-21.

⁵⁶ Hilpert et al., (2007), pp. 15-17.

⁵⁷ Scholars in international law and international relations are in different positions to define the term “regime”. Stephen Krasner, an international relations scholar, has defined “regime” as “sets of implicit or explicit principles, norms, rules and decision-making procedures around which actors’ expectations converge in a given area of international relations”. He has explained “principles” as beliefs of fact, causation and rectitude; “norms” as standards of behaviour related to rights and obligations; “rules” as specific prescriptions or proscriptions for action; “decision-making procedures” as prevailing practices in making and implementing collective choice. Krasner, (1982), p. 186. While, international lawyers nowadays use the term as “to refer to the rules, regulations and institutions relevant to a particular subject area. Yamin and Depledge, (2004), pp. 6-7.

⁵⁸ Stripple, (2007), pp. 140-146. See Agarwal and Narain, (2003).

in establishing a regime or to continue the activities under a regime.⁵⁹ As Oran Young states:

“In formal terms, the members of international regimes are always sovereign states, though the parties carrying out the actions governed by international regimes are often private entities (for example, fishing companies, banks, or private airlines)”.⁶⁰

The concept of state sovereignty is a sign of the freedom of any states to participate (or not) in specific regimes. However, there are other regimes in which only certain states are entitled to participate or there exist different categories of member states participation.⁶¹ In fact, a state is unlikely to become involved in a regime where it may conflict with its own interests.⁶² A motivator for building regimes is that they become a way of facilitating specific agreements, by way of coordinating decisions among the actors involved and creating a setting for joint decision making.⁶³ If an issue emerges which involves the common interests or concerns of all the participant states, then membership of a regime that is collaboratively dealing with the issue may be viewed as beneficial.⁶⁴ Climate change is a common concern of humankind and the adoption of a climate change regime encourages all states to participate.

⁵⁹ Charnovitz, (2006), pp. 348-372.

⁶⁰ Oran R Young, (1982), p. 277 (277-297).

⁶¹ For instance, the Antarctica Treaty System permits states subject to their capability in conduction research in Antarctica to be parties to it; there are also different categories of membership – members and consultative members – only the consultative members can participate in policy related decision making other than all the members. Presently, there are 46 members among whom 28 can participate in decision making meetings. See Antarctic Treaty 1959.

⁶² Arthur A Stein, (1982), pp. 299-324.

⁶³ Nilsson, (2007), p. 17. There have to be political entrepreneurs for the establishment of a regime who find potential profit in organising such collaboration. Keohane, (1982), pp. 325-355.

⁶⁴ Conca, (2004), pp. 71-81.

Moreover, the issue is of such a nature that the participation of all states⁶⁵ of the regime is not only fundamental but also essential to ensure their contribution to the overall process. As previously mentioned, the impact of climate change is not restricted to an individual state's geo-political border. This participatory responsibility in a climate change regime has opened up a debate on state sovereignty.

To address the climate change issue under an international legal framework is really challenging.⁶⁶ The setting of an effective global standard for state behaviour is required for an efficient climate change regime,⁶⁷ however these may impose certain limitations to a state's autonomy in determining their development activities which are mainly responsible for climate change. Keohane and Levy do not envisage that the type of regime building involved in addressing climate change is a threat to state sovereignty. They argue for "collective state-based problem solving"⁶⁸, whilst Birnie refers to the concept of "responsible sovereignty".⁶⁹

Scholars have recognised the roles of non-state actors in global concerns.⁷⁰ These non-state actors (e.g. environmental NGO's) perform significant roles by keeping

⁶⁵ It can be explained also as a responsibility to participate climate change regime. As Birnie and Boyle explain 'global environmental responsibility' in four subsections: (i) the environment as a common concern; (ii) *erga omnes* status of global environmental responsibility; (iii) common but differentiated responsibility; (iv) the precautionary approach and global environmental responsibility. See Birnie and Boyle, (2002), pp. 97-104.

⁶⁶ Richardson, (1992), pp. 166-179.

⁶⁷ Conca, (2004), p. 72.

⁶⁸ Levy et al., (1993), pp. 415-417.

⁶⁹ Birnie, (1992), p. 84 (note1).

⁷⁰ Levy et al., (1993), p. 420.

states in a central position (as problem solvers) whilst addressing global problems which may weaken the concept of state sovereignty.⁷¹ However, it is somewhat impossible for states to limit climate change and its resultant effects, without the involvement of other entities (e.g., international organisations, NGOs and companies). Thus, narrowed autonomy and the increasing influence of non-state actors in the decision-making process are two concerns associated with state sovereignty, in regard to the climate change regime. It cannot be denied though, that the issue of climate change is a common concern for all states and refusal of responsibility in combating the issue by even single state, affects the entire climate change regime in achieving its goal. That said however, the numbers of non-state actors involved, may strengthen a state's position in addressing the new global challenges they face. Taking these facts into account and to promote problem solving, a soft-law approach has been adopted within the climate change regime.

In the course of time, climate scientists have discovered the main causes of climate change. There is though a lack of consensus among them and this is caused to some extent, due to the extraordinary complexity of the topic.⁷² Scientific assessments have proved that global warming is the main cause of climate change (primarily related to greenhouse gas concentrations in the atmosphere). Human activities however, are deemed mainly responsible for these increased concentrations.⁷³ The scientific assessments which have influenced policy makers in addressing climate

⁷¹ See Conca, (2004), pp. 72-79. Lapidoth has set a list as presupposition of sovereignty: equality among states, non-intervention, exclusive territorial jurisdiction, the presumption of state competence, restriction on binding adjudication without consent, exclusive rights to wield violence and an embeddedness of international law in the free will of states. Lapidoth, (1992), pp. 325-346. Jackson has argued for the need to understand sovereignty from the view points of "fact" and "norm". Jackson, (1990), pp. 50-78. Joel Migdal has pointed out of the notion of state capacity as the penetration of civil society, the regulation of social relations, the extraction of resources from civil society and the use of those resources for defined state purpose. Migdal, (1988).

⁷² Figdor and Cassady, (2006), p. 6.

⁷³ AR4 (Synthesis Report), p. 37.

have consequently generated a climate change regime which is currently at a nascent level due to a lack of consensus among member states. The main challenge faced by this regime is the participation of all states and also the inclusion of other actors.

A global turning point in regards to the emergence of an international environmental perspective can be seen when an Intergovernmental Conference for Rational Use and Conservation of Biosphere was held under the auspices of UNESCO in 1968.⁷⁴ Later on, the General Assembly of the United Nations authorised the Human Environmental Conference to be held in 1972, to establish an authority that could handle global environmental issues. This conference was held in Stockholm and formed the United Nations Environmental Programme (UNEP) to promote international and regional cooperation in the field of environmental protection. The General Assembly agreed with the Governing Council of the UNEP, that the programme should attach importance to the problem of global climate change.⁷⁵ It also recommended the UNEP to work jointly with the WMO and the International Council of Scientific Unions, so as to establish an effective world climate programme.⁷⁶ In 1988, the United Nations General Assembly recognised the consequences of climate change impact on the economic and social environment, and consequently endorsed the establishment of Intergovernmental Panel on Climate Change (IPCC).⁷⁷ This was established in the same year by the UNEP and the WMO.⁷⁸ The IPCC started research on global climate change as well as its impact

⁷⁴ See Doelle, (2005), pp. 23-67.

⁷⁵ UNGA Resolution 42/184, (1987).

⁷⁶ *Ibid.*

⁷⁷ UNGA Resolution 43/53, (1988), sec. 5.

⁷⁸ The IPCC incorporated climate scientists, economists, sociologists, biologists, health scientists etc; However, the IPCC does not conduct basic research; it analyzes the pre review data (which comes

on environmental and socio-economic issues. In 1989 the General Assembly identified adverse effects of climate change such as sea-level rise⁷⁹ and stressed the need for a new international regime to deal with climate change.⁸⁰ The first report of the IPCC was published in 1990 which pointed out that rising emissions of greenhouse gases warm the surface of the Earth, and warned that human activity was leading to increasing atmospheric concentrations of carbon dioxide (CO₂), although at the time, there were still many uncertainties.⁸¹

Following these General Assembly resolutions with respect to the preparation of a plan to face incoming climate change problems, an Intergovernmental Negotiating Committee for a Framework Convention on Climate Change (INC/FCCC) was established in December in 1990 as a single negotiating process.⁸² The negotiation process of INC/FCCC could be viewed as complex because of its connection with the different economic interests of many states, as well as with human activities. The use of energy was the main focus of the negotiating process,⁸³ whilst issues including transportation, industry, agriculture, and forestry were also considered. However, many states have different opinions on how best to limit global climate

from researches of other prominent scientists of many parts of the world) and prepares relevant information for the policy of governments.

⁷⁹ UNGA Resolution 44/206, (1989).

⁸⁰ UNGA Resolution 44/207, (1989).

⁸¹ The IPCC First Assessment Report consists of an overview, the Policymaker Summaries of the three IPCC Working Groups (concerned with assessment respectively of the science, impacts and response strategies), the IPCC Special Committee on the Participation of Developing Countries and the three reports of the Working Groups. The report indicated that if the emission of greenhouse gases are not controlled, the temperature of the atmosphere would rise 0.3 degree Celsius per decade; increasing temperature would melt the ice from Polar Regions with resulting raise in sea level of 20 centimetres by 2030 and 65 centimetres by the end of 21st century. It also indicated emissions would require more than a 60% reduction, if the standard natural climate were to be regained. See the IPCC Overview.

⁸² UNGA Resolution 45/212, (1990).

⁸³ Because the burning of fossil fuel is the main cause of creating carbon dioxide.

change. The least developed and developing countries were in position to assert their rights against those who were more developed since developed countries are mostly responsible for the emission of the major part of greenhouse gases. The small island and coastal low-lying states became concerned with rising sea levels whilst the oil producing states held concerns that any reduction of fossil fuel productions would harm their national economies. The developed countries agreed to support those less developed countries in their aims however they were not convinced of the new financial mechanism, by which these various aims could be achieved. As such, the Global Environment Facility (GEF) was established in 1991 to serve this purpose.

The overall climate change regime includes (amongst others): The United Nations Framework Convention on Climate Change (UNFCCC)⁸⁴, The Kyoto Protocol,⁸⁵ The Marrakesh Accords and The Marrakesh Ministerial Declaration,⁸⁶ although there are some further international agreements relating to climate change.⁸⁷

⁸⁴ The UNFCCC. The UN General Assembly recommended member states to start negotiation to establish a convention regulating anthropogenic greenhouse gas emission in 1991. The negotiation began in February 1991 and resulted to the adoption of the UNFCCC which was signed at the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro in June 1992.

⁸⁵ Kyoto Protocol to the United Nations Framework Convention on Climate Change. The protocol was opened for signature on 16 March 1998. It took seven years to obtain the required agreement for ratification (more than 55% of the total GHG emitting states) to enter into force.

⁸⁶ Marrakesh Accords and Marrakesh Ministerial Declaration, (2001).

⁸⁷ The parties to the Vienna Convention for the Protection of the Ozone Layer 1985 adopted the Montreal Protocol on Substances that Deplete the Ozone Layer 1987 (which came into force in 1989). This serves as a model in several respects (e.g., compliance procedure) and helps phase out ozone-depleting substances, that also potent GHGs. The United Nations Convention to Combat Desertification 1994 (which came into force in 1996) may benefit from the forestry activities promoted under the climate change regime that helps combat desertification. The Global Environment Facility (GEF) has agreed to operate the financial mechanism of the climate change regime. The EU Landfill Directive leads to a reduction in methane emissions which supports the climate change regime. The EU Renewable Energy Directive results in increased use of non-GHG emitting energy sources which helps in implementing the Kyoto Protocol. The EU GHG monitoring process responds to international reporting and monitoring requirements, outlined under the Kyoto Protocol. The EU Burden Sharing Agreement facilitates agreement on strengthened targets under the Kyoto Protocol and helps implementation of the Kyoto Protocol by strengthening the enforcement within the EU. The EU Regulation and Directive on Fluorinated Greenhouse Gases triggers a

International law however, permits certain international bodies or states within certain regional agreements, to carry out activities that can be seen as inconsistent with the regime.⁸⁸ Moreover, there are certain international legal instruments which play both positive and negative roles with respect to the pursuance of a climate change regime.⁸⁹

The UNFCCC was adopted on the 9th May 1992. 154 states and the European Community signed the convention at the 1992 Rio Conference on Environment and Development (The Earth Summit). The convention entered into force on the 21st March 1994, 90 days after its fiftieth ratification. Until 2011 the number of state parties of the UNFCCC was 194. However, the fact is that this UN climate change convention is in a promising state and there is debate with the stated main aim of the UNFCCC, to promote the “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system”.⁹⁰ The debate mainly relates to the implementation process and

reduction of fluorinated GHG emissions, whilst the EU Emission Trading Directive is expected to result in reductions in GHG emissions.

⁸⁸ EC Directive on Car Emission Standards requires cars to be equipped with a catalytic converter which leads to protect air from sulphate emissions. However, sulphate helps in cooling the atmosphere and thus implementation of the Directive results in an increasing air temperature as well as an increased greenhouse effect. The Convention on Biological Diversity may suffer from the establishment of mono-cultural tree plantations induced by the climate change regime. International Civil Aviation Organisation (ICAO) and International Maritime Organisation (IMO) both have their separate economic and transportation agendas as well as an interest to expand their own area, which can lead to the increased production of GHGs. Thus the climate change regime asks both organisations to act on GHG emission from their respective fields (international aviation and international shipping). Although the World Bank has greened its policies in response to climate change regime, many of its development projects destroy trees and wetlands which cannot be evaluated as friendly to the climate change regime. For a general treatise, see Oberthur, (London, 2006), pp. 53-77.

⁸⁹ The Convention on Wetlands of International Importance especially as Waterfowl Habitat 1971 (Ramsar Convention) may either benefit from the additional resources for wetland management or alternatively suffer from the conversion of wetlands for purposes of carbon sequestration, induced by the climate change regime.

⁹⁰ The UNFCCC, (1992), art. 2. It is the long term objective of the Convention. However, it is not clear in this Article about the point where anthropogenic greenhouse gas levels can be counted as

in particular, how to achieve the targets of greenhouse gas emission control at a national level. For instance, the UNFCCC included a political commitment from industrialised states to cut their emissions to the 1990 levels, recorded by each state during the 1990s.⁹¹ However, this commitment was phrased in such a manner, as not to impose binding obligations under the terms of international law.⁹² Moreover, the convention has not considered those emissions of greenhouse gases, as controlled by the Montreal Protocol on Substances that Deplete the Ozone Layer 1987.⁹³

One of the main challenges for the climate change regime is to manage states with different positions in terms of financial strength and technological capability as well as their vulnerability to climate change. The inclusion of terms such as “equity”, “common but differentiate responsibilities” and “respective capabilities” in the UNFCCC as principles of achieving the goal of the convention can be seen as a realistic move toward addressing climate change.⁹⁴ It also includes “precautionary measures”⁹⁵ and “sustainable development”⁹⁶ which are somewhat difficult to define

dangerous. Many questions, *inter alia* the point would consider as dangerous, way of distributing impacts be taken account, meaning of a target for a global quantity and way of responsibility attainment be apportioned and enforced, etc. remain unsolved. These difficult questions lead policy makers and others whether a near term policy need to be guided by Article 2. For a detailed treatment see Oppenheimer and Petsonk, (2005), pp. 195-226.

⁹¹ The UNFCCC (1992), art. 4.2 (b); Spence et al., (2008), p. 144. Altogether industrialised countries reduced their emissions by 3% between 1990 and 2000 but this is largely due to the “hot air” phenomenon. The emissions of highly industrialised countries raised by 8% over the same period: 5% in New Zealand, 11% in Japan, 14% in the United States, 18 % in Australia, and 20% in Canada.

⁹² It does not mean that the soft-commitment cannot be successful with respect to the UNFCCC. For instance, seven member states from the EU performed the commitment: Denmark, Finland, France, Germany (mainly because of “hot air” in East Germany), Luxemburg, Sweden and the UK. For exact figure of emission reduction of respective states, see Annual European Community Greenhouse Gas Inventory 1990–2000 and Inventory Report 2002 (Technical report No.75/2002), p. 16 (Table 5).

⁹³ Montreal Protocol on Substances that Deplete the Ozone Layer, (1989).

⁹⁴ art. 3(1).

⁹⁵ art. 3(3).

and adhere to as governed by any legally binding instruments. It has inserted a clause of “sustainable economic growth”⁹⁷ for all the parties that also poses an immense challenge because many of those actions suggested by climate change scientists are subject to the national economic development of individual states.

The Kyoto Protocol was adopted in 1997 and came into force in 2005. It sets commitments for developed states, with the first commitment period being 2008-2012 and an idea that future commitment periods will follow. However, the emission reduction target set forth in 1997 under the Kyoto Protocol does not include developing states (in general) or the United States (due to its non-ratification of the Protocol). Thus, one may see the Kyoto Protocol as “a wake-up call, a preliminary step - complex but important”.⁹⁸ Disagreements also prevailed among the states that have ratified the protocol and this has served to make the protocol uncertain. For instance, during its first commitment period, the protocol could not impose any binding obligations to the highest greenhouse gas emitter (China), so the regime lacks a means to impose strong enough legally binding obligations on signatories and this stands as a threat to its stable future.

After the adoption of the Kyoto Protocol, several negotiations ensued so as to develop its operational details although they were not elaborated on the specifics until 2001. After more than four years of negotiation, the Parties agreed at COP 7 (2001 in Marrakesh) to a comprehensive set of COP decisions enabling the

⁹⁶ art. 3(4).

⁹⁷ art. 3(5).

⁹⁸ Sands, (2005), p. 91.

practical implementation of the Kyoto Protocol.⁹⁹ Those rules are now applied. The Kyoto Protocol is currently being implemented and approaching the end of the first core commitment period (2008-2012),¹⁰⁰ however, there is no clear development concerning the running of its second commitment period.

There are number of proposals for an effective climate change regime. Most of these have a preference to be UN-based, although a wide fragmented regime based mainly on regional and sectoral arrangements may be seen to be emerging.¹⁰¹ In 2007, the parties of UNFCCC agreed to a roadmap that set obligations after 2012 (The Bali Agreement). This roadmap consists of a main convention pathway (considering all those issues related to the building of the new climate regime) and also the Kyoto track (which considers all those issues related to the future implementation of the Kyoto Protocol).¹⁰² There was much hope of concluding a set of agreements on the post Kyoto 2012 regime in Copenhagen 2009, during the COP 15. Unfortunately, the parties could not reach any final agreements other than a controversial document – The Copenhagen Accord,¹⁰³ which according to Barak Obama, the US president, is a “first step” towards a new era of international action.

⁹⁹ Online: <http://unfccc.int/cop7/documents/accords_draft.pdf> (accessed 9 November).

¹⁰⁰ See Biermann et al., (2010).

¹⁰¹ See Kuik et al., (2008), pp. 317-336.

¹⁰² For a detailed treatment of understanding climate negotiate process, see Spence et al., (2008), pp. 142-153.

¹⁰³ The Copenhagen Accord was negotiated by only a few states, while, another small group among the parties objected to it. Brazil, China, India, South Africa and the United States of America prepared the document and submitted it to the COP having the intention that as the document would be formulated within the COP, it would become operational as its own decision. However, Bolivia, Pakistan, Tuvalu and Venezuela objected to the document by indicating the non-involvement of mainstream parties during the negotiation of the document. They rather observed that the Accord settled down by only individual five states outside the UNFCCC, which did not serve for the interests of other member states, including themselves. However, as most of the parties had already left the meeting hall, this caused a strange situation for the COP dealing with the Accord. Then the COP

The negotiation process is still under way. Following a number of recent meetings, an intercessional meeting of the Ad hoc Working Group on Long Term Cooperative Action (AWG-LCA) (considering all issues related to the building of the new climate regime) and a meeting of the Ad hoc Working Group on Kyoto Protocol (AWG-KP) (which considers all issues related to the future implementation of the Kyoto Protocol), were held in Panama.¹⁰⁴ The main discussions under the Long Term Cooperative Action relate to the mitigation presented by developing countries and developed countries which are not willing to join a second commitment period of the Kyoto (US, Japan, Russia, Canada); to adaptation and technology and to the financial transfers involved. Under the KP, the discussions relate to both securing a second commitment period and improving the functioning of the Protocol.

1.6 The Relevance of the Arctic With Respect to Climate Change

The Arctic has a significant influence on global climate change and vice versa, due to its long distance from the Sun and its thin surface atmosphere.¹⁰⁵ The Arctic reacts faster to climate change when compared to any other parts of the globe and the average Arctic temperatures have increased at almost twice the global average

Chair decided to ‘take note’ of the Accord other than directly adopting the document although it was intended that member states would associate with the document subsequently by sending their names included in a chapeau to the document by the UNFCCC secretariat. It has thus induced quite considerable number of states to sign it.

¹⁰⁴ The third part of the sixteenth session of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP 16) and the third part of the fourteenth session of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention (AWG-LCA 14), (2011).

¹⁰⁵ The Sun cannot warm the Arctic, which keeps it cool and icy. It gets a higher degree of solar radiation due to its thin atmospheric layer, however the ice and snow of the Arctic reflect a good amount of sun radiation back to space in terms of whole earth.

rate, in the past 100 years.¹⁰⁶ Significant roles are played in the Arctic's climate change cycle by the ice and permafrost, so a change in the condition of these features has both a direct and indirect impact on climate change.¹⁰⁷

The large area of frozen oceanic and ice covered land is an important characteristic of the Arctic.¹⁰⁸ Ice can reflect the solar radiation that falls on it by up to ninety percent,¹⁰⁹ back to outer space meaning it does not linger in the earth's atmosphere,¹¹⁰ so the Arctic reflects back a major portion of the total solar radiation that falls to Earth. However, the ice covered area in the Arctic is decreasing¹¹¹ because of the melting of the ice. That results that a substantial quantity of solar radiation that cannot be reflected back and subsequently causes the atmosphere to become warmer.

¹⁰⁶ *Climate Change 2007: The Physical Science Basis*, (2007), p. 7. See also AR4 (Synthesis Report), p. 30.

¹⁰⁷ For instance, thin ice cannot reflect back solar radiation at the same amount that thicker ice can; growing economic activities cause more greenhouse gas emission; deforestation and changed crops cultivation also impacts on balanced climate. Evidently, the radiation from the Sun also has to travel longer to reach the Poles.

¹⁰⁸ The present assessment shows that the averaged snow cover extent (SCE) over the Northern Hemisphere (2007) was 24 million square kilometres. However, the SCE varies from time to time – in January the ice covered area ranged 45.3 million square kilometers; while, in August it became 2.0 million square kilometers. Robinson, (2007).

¹⁰⁹ National Snow and Ice Data Center (NSIDC), Online: <<http://nsidc.org/arcticmet/factors/radiation.html>> (accessed 9 November 2011).

¹¹⁰ However, water absorbs more than eighty percent of the heat added to the climate system. See *Climate Change 2007: The Physical Science Basis*, (2007), p. 5. A hypothetical example can be helpful to explain the importance of Arctic ice: if there is only one square meter of ice-melting in the Arctic, it impacts not only that the one m² which cannot reflect solar radiation but also causes an increase in sea water. In turn, the sea water absorbs more solar radiation and becomes heated, – which causes more further melting.

¹¹¹ Since 1978 the annual average Arctic sea ice extent has reduced in size by 2.7 % per decade, with larger decreases noted in summer months, recorded as 7.4 % per decade. AR4 (Synthesis Report), p. 30.

According to the IPCC:

“Average Northern Hemisphere temperatures during the second half of the 20th century were very likely higher than during any other 50-year period in the last 500 years and likely the highest in at least the past 1300 years.”¹¹²

Increasing warming is consistent with observed decreases in the extent of snow and ice.¹¹³ The prediction is that the Arctic late-summer sea ice will disappear almost entirely by the latter part of the 21st century,¹¹⁴ in the absence of effective actions which limit climate change.

The Arctic has permanently frozen land under its ice, known as permafrost. This helps to store reserved CH₄ gas inside the earth, which is more influential to global warming than any of the other greenhouse gases.¹¹⁵ CO₂ however stays in the atmosphere much longer period than CH₄. The permafrost works in such a way that the stored CH₄ cannot emerge from the frozen layer of permafrost. Increases in temperature will melt the permafrost¹¹⁶ and the stored CH₄ will be released to the atmosphere, so contributing to an increased greenhouse effect. However, the permafrost in the Arctic has been thawing due to temperature increases at the top of

¹¹² AR4 (Synthesis Report), p. 2.

¹¹³ *Ibid.*, p. 30.

¹¹⁴ *Ibid.*, p. 46.

¹¹⁵ Bubier et al., (1993), p. 2240. It reads: “Atmospheric methane (CH₄), an important green- house gas that is ≈ 21 times as radiatively effective as CO₂...”

¹¹⁶ The frozen ground has decreased by about 7% in the Northern Hemisphere since 1900, with decreases in spring of up to 15%. Temperatures at the top of the permafrost layer have generally increased since the 1980s in the Arctic by up to 3°C. Climate Change 2007: Synthesis Report (2007), p. 30. See Climate Change 2007: The Physical Science Basis, (2007), p. 7.

the permafrost layer and which lead to changes in the land surface and its drainage system.¹¹⁷ The Icecap in Greenland is another area of concern regarding climate change. If the Icecap melts then the situation is anticipated to raise the sea level by up to seven meters.¹¹⁸ This raise in sea levels is characteristic of the degradation of Arctic glaciers and icecaps in general.¹¹⁹

The scientific projection is that the changes in Arctic snow, ice and frozen ground conditions, will increase the number and size of glacial lakes and cause ground instability in mountain areas and other permafrost regions, which can lead to changes being seen in some Arctic ecosystems.¹²⁰ There are indirect impacts of ice melting in the Arctic Ocean as well – it will open the way for certain human activities responsible for the further production of greenhouse gas in the region; activities which are either not currently operational or rendered impossible by the ice-covered areas. An example may be the opening of a new sea route which will increase navigation, fishing, mining exploration and other economic activities which also have indirect impacts on climate change.

Climate change has a wide influence on the environment of certain places, for example there are many places where plants and animal species (including human livelihoods) depend on its climate. The Arctic is a region that has quite a unique

¹¹⁷ Temperature at the top of the permafrost layer in the Arctic has increased by up to 3°C since the 1980s. The permafrost base has been thawing at a rate ranging up to 0.04 m yr⁻¹ in Alaska since 1992 and 0.02 m yr⁻¹ on the Tibetan Plateau since the 1960s. *Climate Change 2007: The Physical Science Basis*, (2007), pp. 317, 339.

¹¹⁸ AR4 (Synthesis Report), p. 12.

¹¹⁹ Decreased glaciers and ice caps contributed about 28% to the total sea level rising since 1993. *Ibid.*, p. 30.

¹²⁰ AR4 (Synthesis Report), p. 2.

environment when compared to that of other parts of the globe. This is seen to provide a special livelihood to the people of the region, in particular the indigenous groups living in the Arctic, yet this is threatened as the environment of the Arctic is fragile and more vulnerable to climate change than the environment of other regions.¹²¹

1.7 Arctic-Wide State Cooperation in Combating Climate Change

As previously discussed, activities detrimental to the climate carried out in one area also contribute to climate change in other regions of the globe and no single state or region can limit its climate change by controlling only the activities undertaken on its own territory. As such, the need for a global effort to combat climate change is obvious. It is however, difficult to have all of the contributory states remaining fully functional within a broad-spectrum climate change regime that is established under international law. The Arctic is extremely vulnerable to climate change, and yet this issue tends to be addressed solely through regional arrangements, taken in tandem with the international community.¹²² This approach serves to keep the system outside the laws of the treaties or international organisations, since no formal state cooperation under international law has been established thus far in the region.¹²³

After the cold war, the eight Arctic states created a permanent cooperative forum: The Arctic Environmental Protection Strategy, which as merged with the AC in

¹²¹ *Ibid.*, pp. 52, 64-65, and 72.

¹²² For a detailed governance system dealing with climate change see Keskitalo, pp. 97-116.

¹²³ Nilsson, (2007), pp. 83-90. In this part the author argues that the cooperation mainly comes from the networks of western scientists, the political movements of indigenous peoples in the Arctic and from the foreign policy interests of Arctic states.

1996. Both groups were adopted via a signed declaration and not by an international treaty. The Ottawa Declaration of 1996 which established the AC,¹²⁴ promotes “environmental protection” and “sustainable development” in the Arctic. However, in the course of time, climate change has grown to be seen as an important issue under the consideration of the AC. Climate change has posed new challenges to the AC’s activities, although it has its own schemes and policy in dealing with the issue. The Council provides important information to the policy-makers and other actors so as to limit climate change and address its impacts on the Arctic ecosystems and its residents.

There are other permanent cooperation forums in the Arctic, e.g., the Barents cooperation and the Northern Forum (NF). The Barents cooperation was established in 1993 aiming to promote sustainable economic and social development in the Barents region on two platforms – the Barents Euro-Arctic Council (BEAC) and the Barents Regional Council (BRC). The Working Group on Environment (WGE), formed under the BEAC, and Regional Working Group on Environment, formed under the BRC, deal with climate change alongside other bodies. The NF was formally established in 1991 and represented by a number of regional governments from nine states, including three from Asia. The NF has mandated the “harsh climate and vulnerable ecosystem” as one of its six priority-concerns and runs a project under its environment programme entitled “Climate Change in the North”. However, these two forums are at either the sub-Arctic or sub-governmental level, and this study does not intend to cover their activities in the field of climate change.

¹²⁴ In fact, it was nothing quite a new cooperation but a natural outgrowth progression from its forerunner the Arctic Environmental Protection Strategy (AEPS) established in 1991.

In 2008, five coastal states¹²⁵ (also members of the AC), established a framework to address the increasing maritime activities in the Arctic Ocean that have resulted mainly from climate change and ice melting.¹²⁶ This scheme excludes three Arctic Council members from the aspects associated with Arctic Ocean management. It can be seen as posing a challenge for the AC although the five coastal states promise to continue their participation in the activities of the AC.¹²⁷

The challenges faced by the region require better governance with a proper mechanism for addressing those challenges as illustrated in the Arctic Human Development Report:

“Arctic societies have a well-deserved reputation for resilience in the face of change. But today they are facing an unprecedented combination of rapid and stressful changes involving environmental processes (e.g. the impacts of climate change), cultural developments (e.g. the erosion of indigenous languages), economic changes (e.g. the emergence of narrowly based mixed economies), industrial developments (e.g. the growing role of multinational corporations engaged in the extraction of natural resources), and political changes (e.g. the devolution of political authority).”¹²⁸

¹²⁵ Canada, Denmark, Norway, Russian Federation and United States of America.

¹²⁶ The Ilulissat Declaration, (2008).

¹²⁷ *Ibid.*, it reads: “The five coastal states of the Arctic Ocean will continue to contribute actively to the work of the Arctic Council and other relevant international fora.”

¹²⁸ Arctic Human Development Report, (2004), p. 10.

2. APPROACH OF THE THESIS

The general aim of the study is to analyse the present structure and modes of operation of the Arctic Council to determine whether it faces any problems in addressing climate change issues.¹²⁹ For this purpose, it is essential to study the Arctic Council's history and its present modes of operation to observe how the Council's climate policy started and how it is pursued at a local and international scale. The study will also examine the development of other Arctic international cooperative forums,¹³⁰ as part of a general pattern of increasing soft-law cooperation adopted in the Arctic, and the reasons behind the creation of such bodies in the Arctic. However, the main goal of the thesis is to examine the weaknesses and strengths of the Arctic Council as a form of soft-law cooperation and to put forward

¹²⁹ The AC began dealing with the issue of climate change within two years of its creation and incorporated the Arctic Climate Impact Assessment (ACIA) as an action programme by the year 2000. The AMAP and CAFF, two working groups of the AC, documented that the rising temperature of the Arctic over several decades has disturbed the flora and fauna of the region. Climate researchers have found changes in the temperature of the air, ocean and atmosphere; changes in ice distribution and thickness; ozone depletion; etc. yet have failed to reach consensus regarding the cause of those changes. The aims of the ACIA were to gather knowledge on climate change and ultraviolet radiation and provide authentic information to the governments and people of the Arctic states. See the Roundtable Discussion on Arctic Climate Impact Assessment at the Second Ministerial Meeting of the Arctic Council [Notes from the Second Ministerial Meeting of the Arctic Council (On file with the author)]. The temperature in the Arctic is projected as rising 7 degrees centigrade within a century; the present scenario of the amount of UV radiation per person in the Arctic is 30 percent higher than before; the infrastructure damage due to the thawing of permafrost in Siberia is projected at up to 90 percent; the abundance of sea lions has declined up to 80 percent over the last few decades in the seas adjacent to Chukotka, Alaska, and the Western Canadian Arctic; shrimp harvesting in the North would decline up to 70 percent; in summertime, the maximum northward retreat of ice is projected as increasing from the present 150-200 kilometers to 500-800 kilometers during this century; increasing glacial melt and river runoff will bring more fresh water into the oceans and may slow water circulation (which usually carries tropical heat to the Arctic) and rise sea levels; disturbances of insects and other non-native species may cause new diseases for Arctic populations and fauna; For details, see ACIA Synthesis Report, (2004).

¹³⁰ The Barents cooperation has established regional cooperation in the northernmost parts of Sweden, Norway, Finland and north-west Russia. Online: <www.beac.st> (accessed 9 November 2011). The NF established cooperation with different types of regional governments from three continents – Asia, Europe and North America – aiming to improve the quality of life of the people living in the north and support their sustainable development. Online: <www.northernforum.org> (accessed 9 November 2011).

proposals that might strengthen the Council and enable it to mitigate the problem of climate change and the consequences caused by it.

State commitments create binding obligations (political, moral or legal) regardless of the way in which such commitments are made and irrespective of whether they follow the prescribed formalities that are outlined in the law of the treaties. An increasing involvement of several states in non-treaty agreements to maintain international cooperation has caused extensive discussion¹³¹ and concern among traditional international lawyers (who recognise only legal obligations created by formal international treaties). The normative guidance of such non-treaty agreements encourages the respective states to fulfil the commitments they have made. The question is whether international law covers only formal agreements or should be extended to informal and less formal agreements also, and following this, in what manner.

A number of states have been practicing non-treaty agreements for more than three decades. Over this period, there has been a growing tendency for states to connect themselves to permanent cooperative forums which have not been created by the conclusion of formal international treaties. States engaged in such cooperation enjoy the freedom to decide on their own activities and courses of action, in a way that allows them to keep themselves free of the laws of treaties or international organisations.

According to a group of international lawyers, current international law permits other actors (e.g., intergovernmental organisations, nongovernmental organisations,

¹³¹ Abbott and Snidal, (2000), pp. 421-456. See also Young, (2011), pp. 327-334.

local communities, and regional governments) to participate in international policymaking in international cooperation along with other states.¹³²

The new structures of international cooperation are treaty bodies; a form of intergovernmental cooperation not created by international treaty, levels of sub-governmental cooperation and non-governmental organisations.¹³³ Of these, treaty bodies are created to oversee compliance with a respective treaty, but they do not follow either the law of treaty or the law of international organisations, when performing their functions. Some scholars opine that treaty bodies are similar to other international organisations and should, thus, be governed by the law of those organisations.¹³⁴ They are also of the opinion that the law of treaties could be applicable to, for example, the decisions reached in the meetings of these treaty bodies.¹³⁵ This lack of consensus between treaty bodies and international organisations has created a tension within international law.¹³⁶ The same problem is faced with respect to intergovernmental cooperation that is created by non-treaty agreements. In this context, one might ask whether the entities formed as a product of this cooperation should have assigned rights and responsibilities under international law; and if so, which principle would determine those rights and responsibilities and whether they are comparable to those of international

¹³² Some international lawyers see international law from a policy-oriented perspective. They allow various actors along with states, to participate in the international legal process. According to them, various actors in the global community clarify and implement their common interests, in accordance with their expectations of international law – a process of decision making. McDougal and Reisman, (1981), pp. 355-377. Some others give more emphasis to the contribution of non-state actors. They see the motives and activities of sovereign states as being no longer as useful to the legal process, which calls for the inclusion of new actors. These may include forms of trans-national cooperation and non-governmental organisations. Keohane and Nye, (2011), pp. 32-51; Lamy, (2001), pp. 124-141.

¹³³ Charnovitz, (2006), p. 352.

¹³⁴ Gaer, (2007), pp. 109-139.

¹³⁵ O'Flaherty and O'Brien, (2007), pp. 141-172.

¹³⁶ Bowman, (2007), pp. 225-249.

organisations. International law currently lacks the established principles which would answer these questions.

Inter-governmental cooperation appears in two forms: permanent/non-permanent cooperation and cooperation which is limited for either a certain or various purposes. States can conduct cooperation with each other in all these manners, however most soft-law cooperation is undertaken for limited policy purposes.¹³⁷ Soft law vis-à-vis the other new structures of international cooperation, plays an essential role in inter-governmental cooperation.

In the old structure of international law, there were two main types of inter-state cooperation, involving inter-governmental organisations and international treaties. However, establishing an international organisation or concluding a treaty is a lengthy process and both are somewhat complex (for example, the constitutional directions to the respective government for the ratification of a treaty, or perhaps its amendment procedures). In some cases, elastic or ambiguous words are used in the founding document of such organisations or within the provisions of a treaty. These allow scope for the parties involved, to slow down their compliance or even not to perform their obligations. There are also some other reasons that discourage states from entering into formal international treaties or participating in inter-governmental organisations and these will be explored.

Concluding a non-treaty agreement is comparatively easier for states than more formal arrangements, in that it is free from strict formality (e.g., signature and ratification) and some international lawyers are of the view that to a certain extent,

¹³⁷ Thürer, (2000), pp. 452–460.

such types of interactions are more effective. However, in the interpretation of Article 38 (1) of the Statute of the International Court of Justice (which is widely seen as codifying the sources of law in international law), such agreements do not constitute a source of international law. Differences of opinion also exist, as to whether bodies established by non-treaty agreements, are capable of creating international responsibilities. Some international lawyers believe that any form of commitment by states is binding under international law, regardless of the mode in which it is made.¹³⁸ Recently though, other scholars have expressed doubts concerning the continuing use of traditional methods of international lawmaking, at this present stage of globalisation.¹³⁹ Some international law experts have pointed out that although the decisions of soft-law bodies are legally non-binding,¹⁴⁰ they are binding in some other manner;¹⁴¹ an example being non-legal agreements which create moral or political obligations. Some scholars also see the soft-law bodies as being the preliminary stage of development in the creation of treaties or formal organisations.

On balance, soft law has created some challenges between the new and old structures of international law. This study will identify those challenges and consider the soft-law mechanism in order to better understand it. Investigation will be conducted as to what the status of soft-law cooperation should be, which general

¹³⁸ Brownlie, (1998), p. 610; Rosenne, (1989), p. 87; Fawcett, (1953), pp. 381-400.

¹³⁹ Charney, (1993), p. 543 (529-551); Bruun, (1993), pp. 216-217; Lillich, (1995-96), pp. 1-8.

¹⁴⁰ According to Schachter, "International lawyers generally agree that an international agreement is not legally binding unless the parties intend it to be. Put more formally, a treaty or international agreement is said to require an intention by the parties to create legal rights and obligations or to establish relations governed by international law. If that intention does not exist, an agreement is considered to be without legal effect (*sans portée juridique*). States are, of course, free to enter into such nonbinding agreements, whatever the subject matter of the agreement." Schachter, (1977), pp. 296-97.

¹⁴¹ See Raustiala, (2005), pp. 591-614; Koivurova, (2002), p. 96.

principles it should follow, which type(s) of law would be suitable for the establishment and steering of such cooperation and how soft law may be governed. It is also asked whether soft law could be given more freedom in fulfilling the needs of states. To aid these points, a suitable definition of the term “soft law” is also necessary.

The Arctic Council is one current and prominent forum, where states have maintained a soft-law approach. The structure chosen for the AC has attracted interest among scholars of international law, who would like to observe how informal forums carry out their work.¹⁴² The AC was established with the primary goal of promoting environmental protection and sustainable development of the Arctic region. The AC has launched a large number of programmes. These involve its member states, indigenous peoples’ organisations, non-Arctic states, and governmental and non-governmental organisations on international as well as regional levels.

As the Arctic Council enters the middle of its second decade, any constructive criticism or suggestion may help to further develop its functions and future progress. Despite the relatively large body of scholarly writings on the AC, its legal issues have received comparatively little attention.¹⁴³ By trying to examine how the AC may best function, this study can help the AC to do more effective work, particularly in its most challenging field: climate change. A legally-oriented study of the capability of the AC to address climate change and its consequences is anticipated as serving the needs of both the Arctic and the global community at large.

¹⁴² Bloom, (1999), p. 712.

¹⁴³ Koivurova and VanderZwaag, (2007), pp. 121-195. Keskitalo, (2004). Tennberg, (1998); Archer and Serivener, (2000), pp. 601-619; Nilsson, (2007); Bloom, (1999), pp. 712-722.

3. SCOPE AND OBJECTIVES OF THE STUDY

The challenges posed by the differences between the old and new structures of international law, with respect to soft-law cooperation, have opened up debates that are mainly theoretical in nature. The intent of the study, however, is to keep the theoretical analysis limited. The study of soft-law cooperation covers an extensive area of international law (e.g., the law of international organisations and law of the treaties). While a better understanding of soft law cooperation could be achieved by bringing into play as many soft-law bodies as possible, the study has chosen to limit its scope to three soft-law forms of cooperation in the Arctic region: the Arctic Council, the Barents cooperation and the Northern Forum. Studying only three soft-law forms of cooperation may not produce any conclusive results that could be generally applicable to all soft-law bodies, since there are variations among soft-law forum perspectives (e.g., their formation, mode of operation, and subject matter). The study will give special emphasis to the role of the Arctic Council (AC) in addressing climate change in the Arctic, although, as a soft-law body, the AC could contribute little in terms of mitigating climate change. Moreover, the climate change issue is a complex subject due, not only to remaining debates among climate scientists, but also to the unstable situation of the international climate change regime mainly caused from disagreements between actors involved in the regime. Thus, the issue of climate change creates diverse challenges to international environmental law.

4. METHODOLOGY OF THE STUDY

The study mainly follows the documentary analysis method, which examines the instruments of and documents produced under the three soft-law forms of

cooperation, along with select international agreements formed under the auspices of these soft-law forms. However, the study also covers a literature review, including the writings of leading scholars. The author has gathered knowledge by participating in a number of international seminars and conducting interviews with experts, senior government officials and the general public from Arctic states. The survey method has been followed in collecting and analysing data, including the use of survey reports, both self-conducted and from secondary sources. The study includes the publication of four articles in peer reviewed journals and has followed the style guidelines prescribed by each of the journal.

5. STRUCTURE OF THE THESIS

The thesis is an article based dissertation which includes four articles by the author and published in peer reviewed international journals, in addition to two individual thesis chapters – introduction and conclusion. Following the introductory chapter (Chapter One), Chapter Two includes the article ‘Definitional Constraints Regarding Soft Law’¹⁴⁴ which explores the conception of soft-law cooperation from the viewpoint of international law, including the address of issues such as: what is soft-law and its definition, the reasons for soft-law cooperation, distinctive characteristics of soft-law cooperation, limitations of soft-law cooperation and so on. This chapter briefly describes four different soft-law cooperation forms, to provide a general overview on soft-law cooperation: the AC, the BEAC, the NF and South Asian Association for Regional Cooperation (SAARC). Main consideration has been given however, to those three prevailing in the Arctic, namely: the AC, BEAC and the NF.

¹⁴⁴ Hasanat, (2007), pp. 8-32.

Chapter Three consists of an article titled ‘Towards Model Arctic-Wide Environmental Cooperation Combating Climate Change’.¹⁴⁵ This article explains the involvement of Arctic-wide cooperation and its functioning system and examines Arctic cooperation from the viewpoint of addressing the climate change issue, including how the climate change issue entered into the policies of the working-groups and other institutional parts of the AC. The chapter also analyses the achievements of the AC and its main shortcomings in addressing climate change in the Arctic. It analyses whether there is a need for reform in the AC system and examines a few existing proposals on how to improve the capability of the AC, as well as preparing a set of recommendations to achieve a stronger Arctic cooperation in general which may effectively addresses climate change and its consequences in the Arctic region.

Chapter Four contains an article entitled ‘Cooperation in the Barents Euro-Arctic Region in the Light of International Law’.¹⁴⁶ This analyses cooperation in the Barents Euro-Arctic Region (BEAR) in an international law context. The chapter provides a good understanding of BEAR cooperation system by explaining its two components – the BEAC and BRC. It examines both their operational and functional frameworks, including the different entities within the Barents cooperation and their interrelationships in maintaining a day-to-day cooperation for regional development. It explains the establishing documents and produced instruments of the BEAC and BRC and examines whether those have any legal value in international law, mainly in creating clear commitments (of members) to encounter common concerns. The chapter concludes in a determination of the legal

¹⁴⁵ Hasanat, (2009), pp. 122-157.

¹⁴⁶ Hasanat, (2010), pp. 279-309.

status of the BEAR under international law, as well as indicating the basic differences between the new and old systems of international law with respect to their potential to adapt to the new challenges posed by rapid changes occurring in Barents Region.

Chapter Five includes the article ‘International Cooperation in the Northern Forum: Emerging New Norms in International Law?’,¹⁴⁷ which looks to resolve some lines of legal inquiry regarding the NF. It examines the evolution of the NF and explains its administrative system. It searches for the legal status of the NF based on produced documents and its members’ commitments to follow its decisions; along with its contribution to the development of international law. The chapter also includes observations on how the NF (a unique of international regional co-operation forum), could be characterised under international law and whether this has any influence in creating new norms in international administrative and environmental law.

Chapter Six prepares some recommendations to suggest soft-law cooperation as a better functioning mechanism (in particular in relation to the AC) to fully address the challenges resulting from climate change in the Arctic. The chapter includes how selected soft-law bodies manage their individuality in participating in regional development and their connections to each other. It also explains the *raison d’être* of a number of soft-law forms of cooperation in the Arctic. Cumulatively, this chapter critically synthesizes all of the above mentioned published articles and examines any significant updates since the preparation of those articles, along with any relevant additional findings that were not conceived or remained inaccessible to the author during those times and which could constitute the outcome of the study.

¹⁴⁷ Hasanat, (2011), pp. 1–15.

2: DEFINITIONAL CONSTRAINTS REGARDING SOFT LAW

‘Definitional Constraints Regarding Soft Law’ 3 *AALCO Quarterly Bulletin* (2007), pp. 8-32.

CHAPTER 2: TABLE OF CONTENTS

1. INTRODUCTION	8
2. WHAT IS SOFT LAW?	10
A. Treaties.....	11
B. Customary International Law.....	12
3. IDENTIFICATION OF SOFT LAW.....	14
4. CONSEQUENCES OF SOFT LAW.....	16
5. PERMANENT COOPERATION CREATED BY SOFT-LAW PROCESS.....	19
A. The Arctic Council.....	19
B. The Barents Euro-Arctic Council	21
C. The Northern Forum	23
D. South Asian Association of Regional Cooperation	25
6. REASONS UNDERLYING THE CREATION OF SOFT LAW.....	29
7 CONCLUSION.....	31

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Definitional Constraints Regarding Soft Law

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Abstract

The article seeks a definition of soft law by focusing on relevant scholarly views. Conventional sources of international law appear to have certain shortcomings when it comes to the question of securing compliance. Soft law, however, creates only voluntary obligations on the parties and is comparatively unconcerned with legal formalities or compliance mechanisms. It may create permanent international cooperation amongst State and non-State actors. Despite its increasing popularity and application, there are certain theoretical difficulties in asserting that soft law is a 'source' of international law. However, the conceptual development of soft law has overcome most of the complexities and objections. The article concludes by providing a working definition of soft law and calls for a practical approach towards soft law mechanisms.

1 Introduction

Scholars of international law have been trying to resolve the soft law debate for the last three decades. Over the years, they have secured some consensus regarding the concept: soft law is soft in nature, flexible in function and free from strict formalities.¹ The normative guidance of soft law generally appears broad and vague and allows even non-State actors to participate in international cooperation. It reflects States' intention to keep themselves free from the auspices of

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¹ One distinctive feature of soft law is that it creates non-treaty agreements, e.g., declarations, memorandum of understanding, joint communiqués, minutes and action programmes, which may establish different forms of international cooperation, i.e., intergovernmental cooperation, sub-governmental cooperation and non-governmental cooperation.

international law.² Although the concept is fairly well established, when it comes to definition there is ambiguity.

Nowadays, the concept of soft law has gained importance in international cooperation, which has generated uncertainty in international law. Yet, none of the established sources of international law enshrined in Article 38 of the Statute of the International Court of Justice (ICJ) includes soft law. Traditional international lawyers, hesitate to acknowledge the concept. Other scholars, however, are sceptical about the continued utility of traditional methods of international law-making in the era of globalisation. Thus, jurists have taken different positions when it comes to accepting soft law mechanisms under international law, even when a large number of States are engaged in soft law cooperative arrangements. Scholarly articles increasingly focus on various aspects of soft law, yet none of the research attempts to define it.

This article aims to find a suitable definition for soft law. In this context, I refer to the writings of leading scholars in order to gain a comprehensive knowledge of the topic: the exact meaning of soft law; the circumstances where it appears; its distinctive nature; and its consequences on international law. This analysis may also yield a number of common characteristics of soft law. Subsequently, looking at some of the soft-law institutions – including the grounds for their creation and the norms that bind members in the cooperation – may provide specific insights helping to reach the goal of this article. In fact, many times States face difficulties in addressing some international situations, because they follow the traditional procedures of international law. Then they search for alternative ways to solve those problems and find a potential remedy in soft law. Hence, the necessity of soft-law mechanisms can be evaluated in concrete terms, which may provide a better understanding of soft law.

The subsequent section explains the idea of soft law in general. Section three deals with the identification of soft law, explaining its flexibility and major differences *vis-à-vis* conventional sources of international law. The fourth section goes on to discuss the consequences of soft-law mechanisms in the light of leading cases. Section five examines selected soft-law bodies in terms of their formation and structure. The following section goes on to articulate the

² In a strict sense, soft law does not keep States fully free from the auspices of international law. It may protect them from internationally legally binding obligations.

reasons behind the creation of soft law, focusing on the weakness of the international law-making process in addressing current international challenges. The concluding section tries to define the concept of soft law.

2 What is Soft Law?

In common parlance, soft laws are those which do not create a hard law obligation on the States. However, such a view cannot carry a legal scholar forward in defining the concept. Indeed, the idea seems somewhat impractical, since international law lacks hard legislation such as found in national legal systems. Although international law has punitive measures, they cannot be compared with those found in national laws. In a domestic system, the source of law is obvious. However, international law suffers from a lack of strong sources: international legal instruments do not always set out specific legal obligations; moreover, practices of the States affect the strictness of international law.³

Article 38(1) of the International Court of Justice (ICJ) specifies international conventions, international customs and general principles of law recognised by civilized States as the primary sources of international law, and judicial decisions and the writings of eminent scholars as subsidiary sources.⁴ However, it is not clear whether the Statute establishes any hierarchy among these sources. The mainstream

³ i) In general, States are free to choose whether or not they take their disputes before the ICJ. The ICJ can exercise its jurisdiction for States that have agreed to accept its jurisdiction. Article 36(2) of the Statute of ICJ gives States the option to come under compulsory jurisdiction by making a single declaration without further agreements in separate issues. As of May 2007, 65 States had brought themselves under *ipso facto* jurisdiction. These States are under the jurisdiction of the Court as regards their international obligations, subject to the reservations made by individual States. In fact, States have made both major and minor reservations. For instance, India has made a long list of reservations in this regard, while Finland has made almost none. Unfortunately, of the permanent members of the Security Council, only the UK has made such a declaration to date. Moreover, States are free to revoke their acceptance of the jurisdiction of the Court at any time under customary international law. For details, see the website of the ICJ, at <www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3> (accessed 7 May 2007).

ii) Another weakness of the ICJ is the enforcement of judgments. The judgments are executed by the Security Council, which quite often suffers from the influence of powerful States, who may use their veto as leverage to influence the enforcement of the judgment of the ICJ against particular States.

⁴ Available at, <www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0> (accessed 01 March 2007).

opinion is that treaties and customary law are the most important and equal hierarchically. These two sources are briefly discussed below.

A Treaties

Treaties are one of the most widely used sources of international law⁵. A treaty creates formal cooperation among States and specifies the parties' rights and obligations. The State parties are obligated to observe the agreements which they have reached in a treaty, as required by the doctrine of *pacta sunt servanda*. However, this principle faces certain complications when a treaty comes into force. The Vienna Convention on the Law of the Treaties ("hereinafter the Vienna Convention") allows States to make reservations⁶ on treaties.⁷ The parts in which a State has made a reservation create limited international obligations for that State; sometimes the reservation involves important issues and thus hampers attainment of the main object of the treaty. Ultimately, a State's obligation regarding a particular treaty provision depends on how it prefers to interpret the provision. Thus, compliance with the treaty becomes uncertain. Notwithstanding these problems, specific provisions of a treaty sometimes require a further understanding between or amongst parties to come into force, a practice known as *pacta de contrahendo*.⁸ Negotiations between the parties can then settle future activities through an agreement. However, there is no way in which the parties can be compelled to negotiate such an agreement.⁹ In fact, such treaty provisions become dead letters without further negotiations. In some cases, elastic or ambiguous words are used (also intentionally) in treaty provisions, reflecting the fact that the States parties have not really reached an

⁵ Geir Ulfstein, Thilo Marauhn and Andreas Zimmermann, 'Introduction', in Geir Ulfstein in collaboration with Thilo Marauhn and Andreas Zimmermann (eds.), *Making Treaties Work: Human Rights, Environment and Arms Control* (Cambridge University Press: UK, 2007) at p. 3.

⁶ Article (2) (d) of the Convention defines 'reservation' as: "Reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.'

⁷ See the Vienna Convention on the Law of Treaties, Vienna, 22 May 1969, in force 27 January 1980, 1155 *United Nations Treaty Series* 331; (1969) 8 *International Legal Materials* 679, Arts 19-23.

⁸ R. R. Baxter, 'International Law in Her Infinite Variety', *The International and Comparative Law Quarterly*, vol. 29 (1980), p. 552.

⁹ *Ibid.*

agreement. Thus, States' obligations created by treaties may lose their strictness.

B Customary International Law

International customs accepted as legally binding by States are known as international customary law. Frequent State practice is the evidence of a certain norm having become customary international law. In international law, however, there is no agreement on the exact length of time after which a State practice acquires the status of customary international law. The ICJ has opined that thirteen years could be considered enough in some cases.¹⁰ In contrast, Bin Cheng has argued that certain United Nations Declarations, when adopted unanimously, have the effect of 'instantaneous' customary international law¹¹. In addition to being supported by States' practice, a norm should also be perceived by States as a legal one, i.e., as *opinio juris*. However, it is somewhat difficult to have a standard to verify *opinio juris* in the case of a particular practice.

Traditional international law refers to treaties and customary international law as main sources of international law, although they suffer from certain deficiencies. However, it does not refer to promises made by States that are not full-scale treaties, although these play a positive role in international communications.¹² Non-treaty agreements are becoming popular and most States adopt them as part of maintaining their relationships nowadays. In the course of time, this type of cooperation increasingly connects them, often creating permanent cooperative forums.¹³ Non-treaty agreements do not use punitive measures (e.g., sanctions and countermeasures) to secure compliance, rather, incentives are considered to be more effective. Many international law scholars have opined that States create non-treaty agreements to design normative guidance without the intention of creating legally binding norms under international law. Such

¹⁰ The North Sea Continental Shelf Case, Judgment, I.C.J Report 1969, P.3 (*Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands*). The Case has been excerpted in *American Journal of International Law*, vol. 63 (1969) at pp. 591- 636.

¹¹ Bin Cheng, "United Nations Resolutions on Outer Space: Instant International Customary Law?", *Indian Journal of International Law*, vol. 5 (1965) at p. 23.

¹² E.g., an agreement pursuant to legislation, executive agreement, final communiqué, joint declaration, memoranda of understanding and non-binding treaty.

¹³ E.g., the Arctic Council, Euro Barents Arctic Council and Northern Forum.

agreements also allow the parties to definitively resolve ambiguities in the text or to fill in shortcomings of treaties.¹⁴

The commitments created by non-treaty agreements are softer; that is, they are less binding. Christine Chinkin uses the term 'legal soft law' where the notion of legality is fused with that of soft obligations.¹⁵ R. R. Baxter uses the term 'political treaties',¹⁶ whereas Timo Koivurova prefers 'legally relevant documents'.¹⁷ In fact, the nature of soft law is encouraging. Many a times compliance with soft law obligations is observed to be more effective than in the case of a formal treaty or legally binding instrument under international law. One example is the Basel Accord¹⁸, which was concluded in 1988 among the executives of the central banks (Basel Committee on Banking Supervision) of the G-10 countries, as well as Luxembourg and Spain, and set out a group of policies by the Committee regarding financial institutions. The Accord, never considered a treaty under international law, does not create binding obligations on the States involved. The Committee does not have the authority to enforce recommendations, but most of the States adhere to its policies in their financing system; they have enforced the Committee's recommendations by enacting the relevant national legislation. Surprisingly, the policies have been observed not only by the States that negotiated the original agreement but also States that were not involved.¹⁹

The discussion thus far has captured the conceptual details of the two main sources of international law and identified their drawbacks.

¹⁴ Dinah Shelton, "Law, Non-Law and the Problem of Soft-Law" in Dinah Shelton (ed.), *Commitment and Compliance: the Role of Non-binding Norms in the International Legal System* (Oxford University Press: New York, 2000) at p. 10.

¹⁵ Christian Chinkin, "Normative Development in the International Legal System" in Dinah Shelton (ed.), *Commitment and Compliance: the Role of Non-binding Norms in the International Legal System* (Oxford University Press: New York, 2000) at p. 26.

¹⁶ Baxter, note 8, at p. 550.

¹⁷ Timo Koivurova, *Environmental Impact Assessment in the Arctic: A Study of International legal Norms* (Ashgate Publishing Limited: England, 2002) at p. 125.

¹⁸ The Basel Committee on Banking Supervision was established in 1974 and comprises representatives of the central banks or other supervisory authorities of 12 States (Belgium, Canada, France, Germany, Italy, Japan, Luxembourg, the Netherlands, Spain, Sweden, Switzerland, the United Kingdom, and the United States). The Committee, in fact, has no formal authority. However, it developed a set of broad supervisory standards and practices in 1988 entitled 'The Basel Capital Accord'. The Accord and its amendments are available on the website of the Bank for International Settlements, at <www.bis.org/publ/bcbs04a.htm> (accessed 10 April 2007).

¹⁹ See Andrew T. Guzman, "A Compliance-Based Theory of International Law", *California Law Review*, vol. 90 (2002), pp. 1823-1887 at p. 1864.

In the following section, soft law is discussed as an alternative source of international law which is free from the drawbacks of the conventional sources – treaties and custom – yet has its own complexities.

3 Identification of Soft Law

The Vienna Convention applies to the written form of treaties.²⁰ However, international law does not mention any prescribed forms for concluding a treaty. Ian Brownlie states: ‘there are no substantive requirements of form, and thus, for example, an agreement may be recorded in an exchange of letters or the minutes of a conference.’²¹ In the soft-law process, agreements are flexible as regards the modes of their formation: they may be created using different approaches.

The nature of States’ commitments created by an instrument shows the hardness or softness of the instrument. If an instrument creates strong commitments for the States parties, it is generally considered hard law; one that fails to create strong commitments is considered soft law. The bindingness of the obligations created by an instrument describes whether it is hard or soft.

The wordings of an instrument reveal the intention of the parties regarding bindingness. The parties use certain elastic or ambiguous words that render an instrument weak in terms of commitment. If the parties’ intention is to create binding obligations, they use prescriptive terminology, e.g., ‘shall’, ‘agree’, ‘undertake’, ‘rights’, ‘obligations’ and ‘enter into force’. If the States do not intend to create binding obligations, they use less imperative terms, e.g., ‘will’ instead of ‘shall’, and terms such as ‘agree’ or ‘undertake’ are generally avoided.²² The States parties normally have the wordings in an instrument checked by their legal experts to be sure about their degree of obligation. In some cases, not even hard terminology (e.g., shall) expresses an intention by States to be bound; it may be qualified by additional phrases, such as, ‘as far as possible’, ‘to the extent appropriate’ and ‘as far as practicable’.

²⁰ *The Vienna Convention on the Law of Treaties*, 1969, Art. 2 (1)(a) reads: “treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.’

²¹ Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 1998) at 610.

²² See Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2000) at p. 27.

These types of phrases point out that the States have not committed themselves to implementing binding obligations but only obligations of attempt.²³ In some other cases, additional verbs precede the main verbs and convey the uncertainty of the obligations, examples being 'shall endeavour', 'shall promote' and 'shall seek'. In such situations it is difficult to specify the obligation of individual parties in respect to the instrument, which is an important requirement in raising the question of a breach of the instrument. Thus a treaty may suffer from a lack of commitment on the part of the States that have ratified it.

If the parties agree, 'we shall be good friends', the question may arise whether this type of agreement produces real commitment in a legal sense: does it create any legal obligations under international law? *The Oil Platforms* case,²⁴ in which the ICJ refused to base its jurisdiction on generally worded obligations, may be considered an appropriate example for answering the question. Iran and the United States of America (US) concluded a treaty in 1955 in which they agreed, *inter alia* that, 'There shall be firm and enduring peace and sincere friendship between the United States of America and Iran'²⁵ and '[b]etween the territories of the two High Contracting Parties there shall be freedom of commerce and navigation'.²⁶ Iran initiated proceedings against the US in the ICJ after the US had attacked the Iranian oil platforms in 1987 (Reshadat) and 1988 (Nasr and Salmam). Iran claimed that the US had breached the treaty of 1955 by attacking the platforms. The Court decided that it could not uphold the submission of the Islamic Republic of Iran that those actions constituted a breach of the US obligations under the 1955 treaty.²⁷ The Court did not find it to be a real agreement creating legally binding obligation among the parties. Thus, the most generally worded obligations lose their legal nature altogether.

In fact, many times it is difficult to identify soft law. However, Christine Chinkin identifies some useful elements to this end. She has characterised soft-law instruments as follows:²⁸

²³ Timo Koivurova, note 17, at p. 117.

²⁴ *The Oil Platforms Case, Preliminary Objection, Judgment, I.C.J. Reports 1996*, at 803 (*Islamic Republic of Iran v. United States of America*).

²⁵ The Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran, Tehran, 15 August 1955, in force 1957, 8 *United States Treaties and Other International Agreements* 899, Art. I.

²⁶ *Ibid.*, Art. X (1).

²⁷ In this Case, the ICJ also opined that the attacks of the USA on the Iranian oil platforms could not be justified.

²⁸ Chinkin, note 15 at p. 30.

- i) they have been articulated in non-binding form according to traditional modes of law-making;
- ii) they contain vague and imprecise terms;
- iii) they emanate from bodies lacking international law-making authority;
- iv) they are directed to non-States actors whose practice cannot constitute customary international law;
- v) they lack any corresponding theory of responsibility;
- vi) they are based solely upon voluntary adherence, or rely upon non-judicial means of enforcement.

4 Consequences of Soft Law

One may ask whether soft law triggers responsibility under international law and, if so, which types of responsibilities. In fact, there is still no clear answer to the question, due to the uncertainty in determining the obligations created by soft-law instruments and compliance with them. Scholarly writings on international law and the decisions of the ICJ may supply fruitful insights in addressing the issue.

The ICJ took a stance on a non-treaty agreement in the *Aegean Sea Continental Shelf* case.²⁹ At issue was the authority of an informal document. A communiqué, known as the Brussels Communiqué, was issued at a press conference of the Prime Ministers of Greece and Turkey without any signature or initials.³⁰ The Turkish Government argued that this Communiqué would not constitute an agreement under international law. Several judges in their separate opinions (and one judge in his dissenting opinion) stated that the Communiqué was a legally binding agreement, although the ICJ did not pronounce whether it was binding in international law.³¹ However, the Court issued a contradictory opinion in the case *India v. Pakistan*. Judge Dillard separately opined:

...multilateral treaties establishing functioning institutions frequently contain articles that represent ideals and aspirations

²⁹ *Aegean Sea Continental Shelf (Greece v. Turkey)* Judgment, I.C.J Reports (1978), at p. 3.

³⁰ The Brussels Communiqué was issued on 31 May 1975.

³¹ See the Separate Opinion of Vice-President Nagendra Singh in the Case, note 29 at p. 47.

which, being hortatory, are not considered to be legally binding except by those who seek to apply them to the other fellow.³²

Later, the Court clarified its position in the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*³³. The Foreign Ministers of Qatar, Bahrain and Saudi Arabia signed a minutes in 1990 to resolve the long-standing territorial dispute between Qatar and Bahrain. Both governments accepted the minutes. One of the points agreed upon in the document was the submission of the dispute to the ICJ after a time limit if no solution was forthcoming within the agreed period. When that period elapsed with no solution, Qatar instituted proceedings before the ICJ. However, Bahrain contended that the minute did not constitute a legally binding instrument. The ICJ held that there are number of forms of instruments that constitute international agreements and these have a variety of names. The Court concluded that the provisions of the minutes specified the commitments to which the parties had consented and that those commitments created rights and obligations in international law for the parties; they constituted an international agreement. Finally, the Court opined that whenever States enter into a commitment, it is a legal one. The Court focused on the wording of the instrument – on what had or had not been agreed on by the parties – rather than on the abstract legal nature of the informal instrument.

The ICJ's presumption regarding the instruments created by States is that they are binding, although the views of legal scholars vary. According to Jan Klabbbers, the Court presumes an informal instrument to be binding in international law unless shown otherwise.³⁴ Rudolf Bernhardt does not support the non-bindingness of a treaty where vague words have been documented. In his view, the entire treaty concluded by the parties is legally binding. The vague provisions of a treaty allow broad discretion to the parties but this does not mean that

³² *Appeal Relating to the Jurisdiction of the ICAO Council, I.C.J. Reports 1972*, p. 46 (*India v. Pakistan*), at p. 107.

³³ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Jurisdiction and Admissibility, Judgement, I.C.J Reports 1994*, at p. 112.

³⁴ Jan Klabbbers, 'Informal Agreement in International Law: Towards a Theoretical Framework', *Finnish Yearbook of International Law*, vol. 5 (1994), pp. 267-387. Klabbbers has argued that there are no judicial decisions in which the soft-law thesis has been accepted. See Jan Klabbbers, "The Redundancy of Soft Law", *Nordic Journal of International Law*, vol. 65 (1996), pp. 167-182.

the provisions are without legal significance.³⁵ The opinion of G. Schermers and M. Blokker is that if an international instrument contains some commitments between the States parties, then the instrument is binding in international law.³⁶

If the parties reach an agreement on some issues that is recorded in the minutes of the meeting but not subsequently ratified, this does not mean that there is an agreement. Yet, it does not mean that the recorded agreement is absolutely irrelevant either. Reaching such an agreement can be treated as part of the negotiation phase of the treaty process.³⁷ If such a negotiation produces only a draft agreement or some other informal instrument, it does not fully reflect the binding intention of the parties to the instrument. However, States have also certain obligations even before ratifying a treaty, as set out in Article 18 of the Vienna Convention. According to this Article, a State that has signed a treaty is obligated not to defeat the object and purpose of a treaty prior to the treaty's entry into force.

Very clear and strong evidence is needed to establish that an instrument is not binding.³⁸ A clear position on the part of the negotiators from the beginning of the negotiation process for the instrument can clarify its non-bindingness. Extensive publicity regarding the aims of the States can do the same. Sometimes an agreement may be declared as aiming at a formal convention with a ratification procedure. Such an agreement is a non-binding instrument until the ratification procedure has been concluded. If an instrument is designed as a declaration merely outlining the general future goals of the parties or describing the existence of certain States of affairs, it is also non-binding.

Some international law experts have pointed out that the provisions of soft law instruments are legally non-binding³⁹ even

³⁵ See Rudolf Bernhardt, 'Treaties' in Rudolf Bernhardt (ed.) *Encyclopedia of International Law* (Elsevier Science Publishers B.V., 1984) at pp. 459-464.

³⁶ Henry G. Schermers & Niels M. Blokker, *International Institutional Law* (Kluwer Law International, 1995) at p. 813.

³⁷ Timo Koivurova, note 17, at p. 111.

³⁸ *Ibid* at p. 124.

³⁹ According to Schachter, 'International lawyers generally agree that an international agreement is not legally binding unless the parties intend it to be. Put more formally, a treaty or international agreement is said to require an intention by the parties to create legal rights and obligations or to establish relations governed by international law. If that intention does not exist, an agreement is considered to be without legal effect ("*sans portée juridique*"). States are, of course, free to enter into such nonbinding agreements,

though they are binding in some other manner, examples being non-legal agreements creating moral or political obligations,⁴⁰ the breach of which has a strong impact on a State's reputation.⁴¹ Thus, some consequences of non observance of soft law obligations are recognised.

5 Permanent Cooperation Created by the Soft-Law Process

Sometimes soft law creates permanent international cooperation. Many such arrangements are on record at the present time. In the following part, I have selected for closer study, four representative cooperative bodies that have created permanent relations in international cooperation: the Arctic Council, the Northern Forum, the Barents Euro-Arctic Council and the South Asian Association for Regional Cooperation. The first three bodies represent industrial societies, the last developing States.

A The Arctic Council

The Arctic Council was established by the Ottawa Declaration⁴² of 1996 with the aim of providing a mechanism to address the common concerns and challenges faced by the Arctic governments and the people of the Arctic. The primary goal of the Arctic Council was the promotion of environmental protection and sustainable development in the region.⁴³ The Council has granted permanent participant status to the indigenous communities of the region, which is a comparatively new concept in international cooperation. The Council has launched a large number of programmes involving its member States, indigenous peoples' organisations, non-Arctic States, and governmental and non-governmental organisations on the international as well as regional levels.

whatever the subject matter of the agreement.' See Oscar Schachter, 'The Twilight Existence of International Agreements', *American Journal of International Law*, vol. 71 (1977), pp. 296-97.

⁴⁰ Koivurova, note 17 at 96.

⁴¹ Guzman, note 19 at 1829.

⁴² Declaration on the Establishment of the Arctic Council, Ottawa, 19 September 1996, (1996) 35 *International Legal Materials* 1382.

⁴³ The members of the Arctic Council are Canada, Denmark, Finland, Iceland, Norway, Russia, Sweden and the United States of America. The permanent participants are i) the Inuit Circumpolar Conference, ii) the Saami Council, iii) the Russian Association of Indigenous Peoples of the North, iv) the Aleut International Association, v) the Arctic Athabaskan Council and vi) the Gwich'in Council International. See the *Declaration on the Establishment of the Arctic Council*, note 42, Art. 2.

One may ask whether the instruments made by the Council and its working groups are binding on the member States. I prefer to examine the status of the Council to find the answer to this question. First, the constituent instrument of the Council is a 'declaration' rather than a 'treaty', which may indicate that it is non-binding.⁴⁴ The instrument includes the basis of the Council's political power and in the final part seeks to promote the Council's contribution, which does not involve binding commitments on the part of the members.

Secondly, the Arctic Council has its own Rules of Procedure⁴⁵, which give specific directions as to how the Council functions.⁴⁶ There is also the Terms of Reference for a Sustainable Development Program, a document dealing with project activities under the Council.⁴⁷ These show the Council's structure and working procedure to be as formal as that of an international organisation.

Thirdly, there is a key organ in the cooperation system known as the Senior Arctic Officials (SAOs),⁴⁸ which comprises officials from member States designated by each State. However, the SAO has limited scope in imposing control over the Council's Working Groups or implementation of projects by those groups or individual States,

⁴⁴ The Arctic States agreed to create the Council by a non-binding instrument. In fact, there was a long debate among the negotiators on this issue, which delayed the creation of the Arctic Council. The officials who prepared the draft were very keen to ensure that the instrument remained non-binding. For instance, the indigenous groups of the region preferred to use the traditional term 'indigenous peoples'. They ultimately included the following explanation to keep the members free from international law: 'The use of the term "peoples" in this declaration shall not be construed as having any implications as regard the rights which may attach to the term under international law, that the Council determines can contribute to its work.' See Article 2 of the Declaration on the Establishment of the Arctic Council; see also David VanderZwaag, Rob Huebert, and Stacey Ferrara, 'The Arctic Environmental Protection Strategy, Arctic Council and Multilateral Environmental Initiatives: Tinkering while the Arctic Marine Environment Totters', *Denver Journal of International Law and Policy*, vol. 30 (2003), p. 154.

⁴⁵ The Arctic Council Rules of Procedure as adopted by the Arctic Council at the First Arctic Council Ministerial Meeting, Iqaluit, Canada, 17-18 September, 1997. The document can be found on the website of the Arctic Council, at <[www.http://arctic-council.org](http://arctic-council.org)> (accessed 5 May 2007).

⁴⁶ Ministerial Meetings (Articles 15 - 20); SAOs Meetings (Articles 21 - 25) and Working Groups, Task Forces and other bodies (Articles 28 - 31).

⁴⁷ The Terms of Reference for a Sustainable Development Program as adopted by the Arctic Council at the First Arctic Council Ministerial Meeting, Iqaluit, Canada, September 17-18, 1997. The document is available on the website of the Arctic Council.

⁴⁸ For activities of the SAOs, see 'PART II: Arctic Council Meetings' of the Rules of Procedure.

whether they are members or non-members.⁴⁹ Thus, in practical terms, the Council does not have a separate independent organ (e.g., a permanent secretariat) to carry out its particular functions.

Fourthly, the Council or its subordinate bodies produce persuasive documents which have influence on member and non-member States. For example, the Protection of Arctic Marine Environment (PAME), a Working Group under the Council, prepared an International Code of Safety for Ships Operating in Polar Waters (Polar Code). The document was later adopted by the International Maritime Organisation (IMO), which changed the title to 'Guidelines of Ships Operating in Arctic Ice-Covered Waters'.⁵⁰ Further, the Arctic Council is not an international organisation under international law: it has developed using a soft-law approach, which keeps the Council outside the auspices of international law.⁵¹

B The Barents Euro-Arctic Council

The Council of the Barents Euro-Arctic Region, popularly known as the Barents Euro-Arctic Council (BEAC), is an intergovernmental cooperative forum established in 1993 by the Kirkenes Declaration⁵² with the aim of supporting and promoting cooperation in the Barents Region. Two special features of the BEAC are that membership is open to all interested States⁵³ and the chair of the Council does not rotate

⁴⁹ The SAOs have no control over financial allocation: the funding system under the Council is voluntary. The agencies that provide funds seem more influential than the SAOs. In fact, the SAOs submit reports to the ministerial on the basis of project proposals or reports submitted to them by the working groups, individual States or NGOs. They do not have a permanent working place; the SAOs' venue and chair are determined by the chair of the Council. See Article 21-25 of the Rules of Procedure.

⁵⁰ See Guidelines of Ships Operating in Arctic Ice-Covered Waters, International Maritime Organization, IMO doc. MSC/Circ. 1056, MEPC/Circ. 399, 23 December 2002.

⁵¹ See Evan Bloom, 'The Establishment of the Arctic Council', *American Journal of International Law*, vol. 93 (1999), pp. 712-722.

⁵² Declaration of Cooperation in the Barents Euro-Arctic Region, Conference of Foreign Ministers adopted in the First and Founding Session of the Barents Euro Arctic Council, Kirkenes Norway, 11 January 1993. The Kirkenes Declaration can be found on the website of the BEAC, at <www.beac.st/_upl/doc/459_doc_KirkenesDeclaration.doc> (accessed 7 May 2007). For a brief history of the BEAC, see Finnish Barents Group Oy and others, *Barents: The Barents Euro Arctic Council* (Finnish Ministry of Foreign Affairs: Helsinki 1996) at 1-18. See also Geir Ønneland, 'World's Further Apart? Identity Formation in the Barents Euro-Arctic Region', in Geir Flikke (ed.), *The Barents Region Revisited* (Norwegian Institute of International Affairs: Oslo, 1998) at pp. 79-92.

⁵³ Kirkenes Declaration, *supra* note 52, the part: 'Participation and area of application'. See also the Terms of Reference, *infra* note 59, Art.2.

among all the members.⁵⁴ The BEAC works together with the Barents Regional Council (BRC) – a forum of county governments in the Barents region established on the same date also in Kirkenes⁵⁵ to promote basic day-to-day cooperation in the region – and the Sami Council⁵⁶.

The Kirkenes Declaration is not a treaty: it cannot create international organisation under international law; rather, it binds the members of the BEAC through soft commitments. It has created intergovernmental cooperation (for friendship and cooperation). The Declaration states some of the common problems of the Barents region and general promises for possible cooperation.⁵⁷ The other BEAC meetings have adopted either joint statements or joint communiqués. The exception is the declaration adopted by the heads of the governments at a summit on the BEAC's tenth anniversary in 2003.⁵⁸ In fact, the constituent declaration, joint statements, joint communiqués and summit declaration create no legal obligations whatsoever on the

⁵⁴ The members of the BEAC are Denmark, Finland, Iceland, Norway, Russia, Sweden and the European Commission. However, the chair rotates among four members: Finland, Norway, the Russian Federation and Sweden. Canada, France, Germany, Italy, Japan, the Netherlands, Poland, the United Kingdom, and the United States of America have observer status. See the website of the BEAC, <www.beac.st> (accessed 24 March 2006); see also Article 6 of the Terms of Reference, *infra* note 59.

⁵⁵ See Article 11 of the Terms of Reference of the BEAC, *infra* note 59; and the Joint Statement of the Barents Euro-Arctic Council in the Second Session of the Barents Euro-Arctic Council, Tromsø, Norway 14-15 September 1994, part B: Regional Activities. For BRC, see 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. The agreement can be found on the website of the BEAC, at <www.beac.st/_upl/doc/501_doc_Statutory%20Meeting%20Regional%20Council.doc> (accessed 7 May 2007).

⁵⁶ Andrei Kozyrev, 'Visions of the Authors of the Barents Euro Arctic Region Cooperation – past and future', in L. Heininen and R. Langlais (eds.), *Europe's Northern Dimension: the BEAR meets the south* (University of Lapland Press, 1997) at 45; see also Johan Jorgen Holst, 'The Barents Region: Institutions, Cooperation and Prospects', in Olav Schram Stokke and Ola Tunander (eds.), *The Barents Region: Cooperation in Arctic Europe* (SAGE Publications Ltd.: London, 1994) at pp. 11-24.

⁵⁷ The Declaration starts with an introduction. It then has separate parts: the Barents Euro-Arctic Council and its objectives; participation and area of application, the environment; economic cooperation; scientific and technical cooperation; regional infrastructure; indigenous peoples; human contacts and cultural relations; and tourism. None of the parts has sufficient commitments to create legal obligations.

⁵⁸ Barents Summit Declaration on the occasion of the Barents Euro-Arctic 10 Year Anniversary, Kirkenes, Norway, 11 January 2003. The document is available on the website of the BEAC, at <www.beac.st/_upl/doc/568_doc_Joint%20Communiqué%20eng.doc> (accessed 7 May 2007).

members. However, the Terms of Reference⁵⁹ of the BEAC have created both positive and negative obligations to a limited extent. For example, the document imposes all financial responsibilities on the host in arranging a meeting of the BEAC.⁶⁰ It also contains a provision preventing the members infringing any international legal obligation in participating in the cooperation.⁶¹

The structures chosen by the BEAC and its operational modes revealed in the Terms of Reference have given its organisational shape.⁶² However, it cannot create binding obligation under international law. The presumption is that if the constituent instrument of an intergovernmental cooperative forum does not provide an express mandate to the organs for making binding decisions, the decisions of such organs are non-binding.⁶³

C The Northern Forum

The Northern Forum (NF) is an international sub-governmental cooperative body that links regional, sub-regional or municipal governments in a single platform.⁶⁴ Representatives of eleven regions from nine northern States created the body in 1991⁶⁵ to improve the

⁵⁹ The Terms of Reference for the Council of the Barents Euro-Arctic Region, adopted by the Cooperation in the Barents Euro-Arctic Region, Conference of Foreign Ministers, Kirkenes, Norway, 11 January 1993. The Terms of Reference was adopted as Annex of the Kirkenes Declaration, which can be found on the website of the BEAC, at <[www.beac.st/_upl/doc/460_doc_AnnextotheKirkenes Declaration.doc](http://www.beac.st/_upl/doc/460_doc_AnnextotheKirkenes%20Declaration.doc)> (accessed 7 May 2007).

⁶⁰ Article 7 of the Terms of Reference, *supra* note 59. It reads: 'The participant hosting a meeting of the Council will bear the costs related to conference services, premises and interpretation.'

⁶¹ *Ibid.*, Art. 13. It reads: 'Participation in the Council will not in any way infringe on any international obligation, be it of a legal or a political nature, undertaken by any of the participating States.'

⁶² They are the BEAC Meeting, Committee of Senior Officials, Working Groups, Task Forces and Steering Committee for the Barents Euro-Arctic Pan-European Transport Area.

⁶³ 'A rule of thumb is that, while States are free to act as long as this is in accordance with international law (which may prescribe or proscribe State activities), international organizations are competent to act only as far as powers have been attributed to them by the member States.' See Henry G. Schermers & Niels M. Blokker, *International Institutional Law* (Kluwer Law International, 1995) at p. 141.

⁶⁴ For an extensive treatment of the Northern Forum, visit its website, at <www.northernforum.org/servlet/content/membership.html> (accessed 6 May 2007).

⁶⁵ In fact, the history of the NF goes back to the mid-1970s. The First International Conference on Human Environment in Northern Region was convened in Japan in 1974. The Second and Third Meetings were then held in Canada and USA in 1979 and 1990. Finally, the cooperation was officially established in 1991 by The Northern Forum

quality of life by providing a means to share knowledge and experience in addressing common challenges in the region, supporting sustainable development and implementing socio-economic initiatives through proper international forums.⁶⁶ The legal status of the NF in terms of international law is somehow ambiguous. The constituent instrument is not a treaty, whereby it is clear that the NF is not an international organisation. The creators are mainly regional governments, not State representatives. The absence of State participation means that the NF is not an intergovernmental cooperative body either, since the term 'soft law' is related to cooperation that involves States. Two-fold membership in the Forum – as a member region and a business partner – is an innovative concept in international cooperation.⁶⁷

The Tromsø Declaration⁶⁸ adopted the goals and plans of the NF, including, *inter alia*, its sustainable development strategies in following the UN Agenda 21⁶⁹ and the Brundtland Commission Report.⁷⁰ The

Founding Meeting in Anchorage, Alaska, USA. The founding members of the Forum are Yukon Territory, Canada; Heilongjiang Province, Peoples' Republic of China; Lapland, Finland; Hokkaido, Japan; Dornod, Mongolia; Trondelag and Tromsø, Norway; Chukotka Autonomous Okrug, Kamchatka Oblast, Magadan Oblast, Russian Federation; Republic of Korea; and the State of Alaska, USA. For a brief history of the NF, see Richard Langlais, 'Arctic Co-operation Organisations: a status report', prepared for the Standing Committee of Parliamentarians of the Arctic Region, Canada (2000) at 26. The report is available on the website, at <www.arcticparl.org/resource/images/con_f4_langlais.pdf> (accessed 7 May 2007).

⁶⁶ See, <www.northernforum.org/servlet/content/mission.html> (accessed 7 May 2007).

⁶⁷ Member regions are heads of the regional, sub-regional or municipal governments. They have the right to participate in all NF meetings and the right to vote. Business partners can participate in all open NF meetings and can take part in the discussion; the member regions can grant a business partnership to interested agencies.

⁶⁸ Tromsø Declaration of the First General Assembly of the Northern Forum, Tromsø, Norway 3 October 1994, the preamble. The Declaration is available on the website of the NF, at <www.northernforum.org/servlet/download?id=452> (accessed 9 May 2007).

⁶⁹ The United Nations Conference on Environment and Development, Rio de Janeiro, 14 June 1992 adopted Agenda 21 (here 21 refers to the 21st century) regarding sustainable development. There are 40 Chapters in the Agenda, divided into four sections: Social and Economic Dimensions; Conservation and Management of Resources for Development; Strengthening the Role of Major Groups; and Means of Implementation. The full text of Agenda 21 is available on the website of UN, at <www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm> (accessed 7 May 2007).

⁷⁰ The UN General Assembly created The World Commission on Environment and Development (WCED), headed by Gro Harlem Brundtland in 1983 to address growing concern over human development and natural resources and the consequences of economic and social development for these. See GA Res. A/38/161, 19 December 1983. The General Assembly published the report (GA Res. A/42/187, 11 December 1987)

Declaration was made using a soft approach; it uses words like 'recognise', 'believe', 'pledge to promote', 'commit to cooperate', and so on, which create only political commitments for the regional governments.⁷¹ For instance, regarding the relationship between national and regional government, it states: 'We believe that national governments and regional governments should work together to improve decision making on environmental and development issues by strengthening the power of regional governments.'⁷² The effect of this kind of cooperation is to generate awareness among the members.

The NF endorsed the Rovaniemi Code of Conduct⁷³ for business cooperation, which is full of salutary advice. Investment strategies are one example: '... special efforts should be made by local, regional and State authorities ...'⁷⁴ All in all, the Code of Conduct lacks strong commitments which might create political commitments for the members.

The overall idea of the NF is that it should work for sub-governmental cooperation crossing national boundaries that provides mutual benefits. The NF has established relations with a good number of international organisations and engages in cooperation that may make its voice better heard regarding the global agenda.⁷⁵

D South Asian Association for Regional Cooperation

The South Asian Association for Regional Cooperation (SAARC) is an intergovernmental cooperative forum in south Asia. SAARC was created by a charter adopted by seven regional States in 1985⁷⁶ to

which is available in the UN website, at <www.un.org/documents/ga/res/42/ares42-187.htm> (accessed 7 May 2007).

⁷¹ See the Tromsø Declaration, note 68, the part: 'Ecology in the North'.

⁷² *Ibid.*, the part: 'National and Regional Government Relationships'.

⁷³ The Rovaniemi Code of Conduct: Principles related to the Conduct of Business Operations in the Circumpolar North adopted by the Board of Directors of The Northern Forum, 16 September, 1994.

⁷⁴ *Ibid.*, Art.1.

⁷⁵ E.g., the United Nations has recognised the NF as a non-governmental organisation; it has received observer status in the Arctic Council and become a member of the SDWG of the Arctic Council. See Richard Langlais, note 65, at 24.

⁷⁶ The foreign secretaries of seven south Asian countries (Bangladesh, Bhutan, India, the Maldives, Nepal, Pakistan and Sri Lanka) met four times between April 1981 to March 1983 to ascertain the areas of cooperation and the framework for it. The next development was a declaration signed by the foreign ministers on 2 August 1983 in New Delhi, India, which founded the forum as the South Asian Regional Cooperation (SARC). Subsequently, in 1985, the heads of governments met in Dhaka and concluded the Charter of the South Asian Association for Regional Cooperation (the SAARC Summit

advance mutual benefits and promote the well-being of the peoples of the region.⁷⁷ In the course of time, it has become effective in cooperation in certain areas⁷⁸ and has even established an economic partnership agreement for the region, the South Asian Free Trade Agreement (SAFTA).⁷⁹ Although the SAARC has operated for more than two decades, international lawyers are still confused in determining its legal status in light of international law, i.e., whether it creates legally binding obligations. I will analyse the issue briefly.

First, I would like to consider the nature of the constituent instrument. The constituent instrument of SAARC is called a charter. Usually, 'charter' is a term that denotes the most respected treaties, such as the UN Charter. In this sense, SAARC belongs to the group of international organisations, as international organisations are created by treaties. A similar presumption can be found in its structure: the structure chosen by SAARC indicates that it presents itself as an international organisation. The constituent instrument describes its organs as fulfilling particular functions: meeting of the heads of State or government,⁸⁰ council of ministers,⁸¹ standing

Charter), which established the South Asian Association for Regional Cooperation (SAARC) among the seven States. Afghanistan joined the cooperation as the eighth member when the Thirteenth Annual SAARC Summit approved its membership in November 2005. For the text of the SAARC Charter, see *Indian Journal of International Law*, vol. 26 (1986) at pp. 323-326.

⁷⁷ SAARC Summit Charter, para.4.

⁷⁸ The areas of cooperation are agriculture and rural development; health and population activities; women, youth and children; environment and forestry; science and technology and meteorology; human resources development; and transport.

⁷⁹ Islamabad Declaration adopted in the Twelfth SAARC Summit, Islamabad, 4-6 January 2004, para.2. The SAFTA was agreed upon among the SAARC members and came into force on 1 January 2006. Its aim is to reduce tariffs for international trade among the member States. Pakistan and India are to complete the implementation of the agreement by 2012, Sri Lanka 2013, and the other members by 2015. The full text of the SAFTA can be found on the website of SAARC, at <www.saarc-sec.org/main.php?id=12&t=7.1> (accessed 2 May 2007)..

⁸⁰ The SAARC Charter, *supra* note 77, at Art. III. The Article reads: 'The Heads of State or Government shall meet once a year or more often as and when considered necessary by the Member States.'

⁸¹ *Ibid.*, Art. IV. The Article reads: '1. A Council of Ministers consisting of the Foreign Ministers of the Member States shall be established with the following functions: a) formulation of the policies of the ASSOCIATION; b) review of the progress of cooperation under the ASSOCIATION; c) decision on new areas of cooperation; d) establishment of additional mechanism under the ASSOCIATION as deemed necessary; e) decision on other matters of general interest to the ASSOCIATION. 2. The Council of Ministers shall meet twice a year. Extraordinary session of the Council may be held by agreement among the Member States.'

committee,⁸² technical committees⁸³ and action committee.⁸⁴ The Charter has a provision for a secretariat (Article VIII). The SAARC Secretariat is located in Kathmandu, Nepal. It comprises of the Secretary General, seven directors and general services staff.⁸⁵ The Secretariat works as an independent body that takes forward the activities of SAARC and is separate from the control of individual member States, which is also a defining criterion for an international organisation. Although all these arguments go in favour of considering the SAARC an international organisation, the Charter does not mention whether it created an international organisation as per international law. Moreover, it maintains the idea of voluntary financial arrangements, which are a weak point for an organisation on the practical level.

The second enquiry could be the types of commitments the SAARC has created for its member States. Do the commitments compel

⁸² Ibid. Art. V. The Article articulates:

'1.The Standing Committee comprising the Foreign Secretaries shall have the following functions: a) overall monitoring and coordination of programme of cooperation; b) approval of projects and programmes, and the modalities of their financing; c) determination of inter-sectoral priorities; d) mobilisation of regional and external resources; e) identification of new areas of cooperation based on appropriate studies.

2. The Standing Committee shall meet as often as deemed necessary.

3. The Standing Committee shall submit periodic reports to the Council of Ministers and make reference to it as and when necessary for decisions on policy matters.'

⁸³ Ibid. Art. VI. It states:

'1.Technical Committees comprising representatives of Member States shall be responsible for the implementation, coordination and monitoring of the programmes in their respective areas of cooperation.

2. They shall have the following terms of reference: a) determination of the potential and the scope of regional cooperation in agreed areas; b) formulation of programmes and preparation of projects; c) determination of financial implications of sectoral programmes; d) formulation of recommendations regarding apportionment of costs; e) implementation and coordination of sectoral programmes; f) monitoring of progress in implementation.

3. The Technical Committees shall submit periodic reports to the Standing Committee.

4. The Chairmanship of the Technical Committees shall normally rotate among Member States in alphabetical order every two years.

5. The Technical Committees may, *inter alia*, use the following mechanisms and modalities, if and when considered necessary: a) meetings of heads of national technical agencies; b) meetings of experts in specific fields; c) contact amongst recognised centres of excellence in the region.'

⁸⁴ Ibid. Art.VII. It tells: 'The Standing Committee may set up Action Committees comprising Member States concerned with implementation of projects involving more than two but not all Member States.'

⁸⁵ See the SAARC website, at <www.saarc-sec.org/main.php?t=13> (accessed 12 May 2007).

members to do specific activities, or to refrain from doing the same? Are those commitments vague or very general, only encouraging certain actions and not creating obligations? The overall view is that the declarations adopted at the SAARC summits create commitments to take initiatives rather than impose binding obligations. Generally speaking, SAARC imposes fairly lax obligations.

The SAARC Social Charter⁸⁶ is one example of this flexible approach. The Social Charter was adopted in 2004 at the 12th Summit, which focused on the socio-economic development of the region. It describes many problematic issues prevailing in the region.⁸⁷ Its common concern is to resolve those problems. It seems to be a collective social movement with a general commitment that does not create specific obligation on the parties. In its implementation section, it sets out the creation of a separate national coordination committee for each State that would facilitate the implementation of the Charter.⁸⁸ The cooperation would consist of the exchange of information among the national coordination committees of the States. The Charter has made it binding to follow the approach of stakeholders in implementing and evaluating the Association's programmes. However, it is very difficult to determine the stakeholders in national perspective, because many of the problems affect several groups of people. It is also unclear how their approach is to be adopted. The Charter uses vague expressions like 'shall endeavour⁸⁹', 'necessary action'⁹⁰ 'appropriate measures⁹¹, which do not create specific obligations on the parties. Thus, the Charter does not create any binding obligations under international law.

The third and final point to evaluate is whether the violation of provisions of a SAARC document creates any consequences. SAFTA is an apt example to consider in this regard. The Agreement contains a

⁸⁶ The SAARC Social Charter concluded by the Twelfth SAARC Summit, Islamabad, 4 January 2004. The Charter can be found on the SAARC website, at <www.saarc-sec.org/main.php?id=13> (accessed 13 May 2007).

⁸⁷ The issues are poverty alleviation (Article III); health problem (Article IV); education, human resource development and youth mobilization (Article V); promotion of the status of women (Article VI); promotion of rights and well-being of the child (Article VII); population stabilization (Article VIII); and drug de-addiction, rehabilitation and reintegration (Article IX).

⁸⁸ See SAARC Social Charter, note 86, at Art. X.

⁸⁹ Ibid. Art. VIII(3).

⁹⁰ Ibid. Art. VII(4).

⁹¹ Ibid. Art. VI(3).

provision entitled 'Dispute Settlement Mechanism'.⁹² It establishes bilateral consultation as a dispute settlement mechanism between the disputing parties. However, if the consultation fails, the consequences come following a lengthy process - the provision permits the aggrieved party to withdraw concessions in the same amount as it claims from the violating party. The prediction is that if such withdrawals occur frequently, they may restrict the areas of free trade, contrary to main aim of SAFTA. The effects on the reputation of offending States can be considered as a consequence. The question is how much a State values its reputation in comparison with its political or economic interests. There are many instances where the big States have shown little or no concern for their reputations with respect to SAARC activities, which has created obstacles even in convening regular annual summits. Thus, the conclusion is that although SAARC has most of the essential elements of an international organisation,⁹³ it cannot be considered as international organisation for purposes of international law. Moreover, it has not yet created any legally binding obligations.

6 Reasons Underlying the Creation of Soft Law

The reasons prompting the creation of soft law are twofold: 1) the weakness of traditional sources in international law, and 2) the growing involvement of non-State actors in international cooperation. The first focuses on treaties and custom - a critical view - while the second acknowledges non-State actors' contributions - a practical perspective - as discussed above in sections 5.A and 5.B.

State practice and *opinio juris*, the two basic elements of customary international law, suffer from lack of clarity. International lawyers do not have the proper criteria for determining what counts as State practice.⁹⁴ The required duration of State practice to mature as custom is difficult to ascertain. Establishing State practice is more difficult if there is a discontinuation of a practice for a short period of time or a minor inconsistency even in the form of a single act in a particular practice. Confusion also persists in the case of *opinio juris*;

⁹² See Article 20 of SAFTA.

⁹³ International law defines an international organization as: 'An association of States established by and based upon a treaty, which pursues common aims and which has its own special organs to fulfil particular functions within the organization.' See *Encyclopedia of Public International Law* (Amsterdam: North-Holland, 1983, Part 5) at p. 120.

⁹⁴ Guzman, note 19, at 1874.

demonstrating its requirements is complicated in the sense that its criteria of assessment are vague. The indeterminacy of customary international law poses a challenge when the violation of a customary law is at issue. Different interpretations can be inferred with regard to the customary law status of the same practice, quite often resulting in the ineffectiveness of customary law in establishing the international obligations in question.⁹⁵

Soft law is a product of State practice. When concluding an international treaty becomes difficult, States usually look for alternatives. Formation of a soft-law instrument is always the first priority. For instance, creating an international organisation or concluding a treaty seems time-consuming; the process does not protect confidentiality⁹⁶ and is somewhat complex. Moreover, it appears that powerful States are showing a reluctance to join international organisations or formal treaties.

In certain cases, parties who have entered into a cooperative arrangement might lack the power to conclude treaties. For example, when the Middle East peace process was restarted in 1993 by concluding the Declaration of Principles on Interim Self-Government Arrangements – a political agreement between Israel and the PLO – the Declaration in many ways focused on a peace treaty. However, the lack of statehood on the Palestinian side prevented it from acquiring treaty status.

A number of scholars advocate soft law for international organisations in order to avoid a poor ratification record, such as the recent conventions adopted by the International Labour Organization.⁹⁷ Some scholars also see soft law bodies as the preliminary stage of development in creating treaties or formal organisations. The law of treaties generally recognises the right to lodge reservations when ratifying a treaty, except where a treaty itself restricts reservations or limits the subjects and extent of reservations.

⁹⁵ See Anthony D'Amato, *The Concept of Custom in International Law* (Cornell University Press: London and Ithaca, 1971) at p. 66.

⁹⁶ See e.g., Article 102 of the UN Charter and Article 80 of the Vienna Convention on the Law of Treaties, 1969.

⁹⁷ Francis Maunpain, "International Labor Organization Recommendations and Similar Instruments" in Dinah Shelton (ed.), *Commitment and Compliance: the Role of Non-binding Norms in the International Legal System* (Oxford University Press: New York, 2000) at pp 372-393.

Then again, the reservation system helps to increase the number of States parties. Later, the powerful States who are parties to the treaties try to fully involve the States who have made the reservations. Every so often, treaty bodies are formed under specific treaties to oversee compliance with the treaties. Although treaty bodies monitor compliance with international treaties, international law has little to say about their legal status, e.g., whether they should follow the law of treaties or the law of international organisations.⁹⁸

7 Conclusion

A formal treaty usually binds the States parties to it and sets out their obligations. However, it does not always impose specific obligations on its parties. By using special types of words in a formal treaty, States refrain from accepting legally binding obligations. Sometimes a treaty may be concluded without any agreement: it may be an agreement on future activities or an agreement without enforcement mechanisms. International treaties have numerous examples of ambiguous obligations or the absence of a clear agreement. Enforcement of obligations is not an important question when international law considers soft-law mechanisms. Moreover, States create a large number of informal agreements that do not follow the procedures prescribed under the law of the treaties. The commitments in non-treaty agreements are legally non-binding. The States conclude non-treaty agreements as part of their political obligations.

The permanent State cooperation created in soft-law instruments works to address practical necessities. The participants in such cooperation benefit from it. These soft law forums many times advocate compliance with specific international legal instruments. Although violation of normative rules created by such forums does not create legal consequences, one cannot suddenly refuse to observe the norms, as there is always the risk of losing interest and reputation. Moreover, there is evidence that international law has incorporated rules that once were soft law.⁹⁹

⁹⁸ However, see Robin R. Churchill and Gear Ulfstein, "Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law", *American Journal of International Law*, vol. 94 (2000), pp. 623-59.

⁹⁹ The incorporation of three G.A. Resolutions (GA Res.1721/XVI, 1884/XVIII and 1962/XVIII) into the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space including the Moon and Celestial Bodies 1967 is an example. For more examples, see C. M. Chinkin, 'The Changes of Soft Law: Development

The conclusion of formal international treaties by States seems somewhat impossible in certain instances. In such cases, the negotiators somehow try to sustain cooperation rather than discontinue it. They go on to consider a flexible agreement or conclude a non-binding instrument.

A tentative definition of soft law can be sketched in the light of the above discussion. The provisions of treaties without real agreement or non-treaty agreements concluded by the States, which appear in certain situations, are soft law. However, this serves only as a working definition. Scholars are still working to formulate a more precise one. Presently, States resort to soft law in maintaining international cooperation. Soft law has occupied a place in the conceptual terrain of international law within a short period. The variation observed in the academic formulations may be viewed as one of the barriers to defining soft law. It is optimistic to say that scholarly endeavours to produce a definition for soft law will be rewarded and that a pragmatic approach to the concept seems more viable.

3: TOWARDS MODEL ARCTIC-WIDE ENVIRONMENTAL COOPERATION COMBATING CLIMATE CHANGE

‘Towards Model Arctic-Wide Environmental Cooperation Combating Climate Change’, 20 *Yearbook of International Environmental Law* (2009), pp. 122-157.

CHAPTER 3 TABLE OF CONTENTS:

III. INTRODUCTION	122
IV. HISTORY OF THE ARCTIC COOPERATION	124
1. The Cooperation of the AEPS	124
2. Formation of the Arctic Council.....	125
III. FUNCTIONING SYSTEM OF THE COOPERATION	127
1. Organizational Framework	127
A. Members	127
B. Permanent Participants.....	128
C. Observers	129
2. Operational Framework	130
A. SAOs.....	130
B. Working Groups.....	131
(i) AMAP	131
(ii) PAME	133
(iii) EPPR.....	134
(iv) CAFF.....	135
(v) SDWG.....	136
(vi) ACAP.....	137
C. The Secretariat	138
IV. THE ISSUE OF CLIMATE CHANGE IN ARCTIC COOPERATION	139

2. The Issue of Climate Change under the AEPS.....	139
2. The Issue of Climate Change under the Arctic Council.....	140
V. ACHIEVEMENTS OF THE COOPERATION WITH RESPECT TO CLIMATE CHANGE IN THE ARCTIC.....	144
VI. MAIN SHORTCOMINGS OF THE COOPERATION IN ADDRESSING ARCTIC CLIMATE CHANGE.....	147
10. Soft Law Character.....	147
11. Lack of Permanent Secretariat.....	147
12. Ineffective Funding Mechanism.....	148
13. Poor Coordination with Respect to Working Groups.....	148
14. Problems Concerning National Delegates.....	149
15. Lack of Realization of Arctic Needs at the National Level.....	149
16. Members' Lack of Confidence in the Cooperation.....	149
17. Disagreements among the Members.....	150
18. Other Deficiencies of the Cooperation.....	150
VII. PROPOSAL FOR A MODEL COOPERATION ADDRESSING CLIMATE CHANGE IN THE ARCTIC.....	150
4. Introduction.....	150
5. Reasons of Reforming the Cooperation.....	151
6. Existing Proposals Regarding the Reform of the Cooperation.....	152
VIII. CONCLUSION.....	155

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Towards Model Arctic-Wide Environmental Cooperation Combating Climate Change

Md. Waliul Hasanat

I. INTRODUCTION

Arctic-wide inter-governmental cooperation protecting the Arctic environment formally began in 1991 with the establishment of the Arctic Environmental Protection Strategy (AEPS), which was later transformed into the Arctic Council in 1996. The Arctic states created the Arctic Council to provide a mechanism to address the common concerns and challenges faced by the Arctic governments and the people of the Arctic with the adoption of the Declaration on the Establishment of the Arctic Council (Ottawa Declaration).¹ The main objective of the Arctic Council is to promote environmental protection and sustainable development in the Arctic. Climate change has seriously affected this objective, however, and has become a central concern within Arctic-wide cooperation. Therefore, two years after its establishment, the Arctic Council began addressing the issue of climate change. In general, the council provides important information to policy-makers and other actors by conducting a number of projects to mitigate the impacts of climate change on the ecosystems and inhabitants of the Arctic. The council has also issued a comprehensive policy document regarding climate change in the Arctic.

The founding documents of this Arctic-wide cooperation (the Cooperation) were soft law in nature rather than internationally concluded treaties, which can be seen as the main drawback of the cooperation since soft law instruments may create either voluntary or political commitments rather than legally binding obligations under international law.² Alternatively, it is somewhat difficult for the members of the Arctic Council to be bound by any legal obligation in the field of climate change, in particular, because of conflicts with their varied national interests. Moreover, imposing legally binding obligations on the Arctic states is not sufficient to address the issue of

¹ Declaration on the Establishment of the Arctic Council, Ottawa, Canada, 19 September 1996, Joint Communiqué and Declaration on the Establishment of the Arctic Council, 35 I.L.M. 1382 (1996) [Ottawa Declaration].

² Evan T. Bloom, *Establishment of the Arctic Council* 93 A.J.I.L. 712 at 712 (1999).

climate change—the involvement of the global community is essential since activities conducted elsewhere also have an impact on the Arctic climate.

This Arctic-wide Cooperation encourages non-state actors—in particular, indigenous peoples in the Arctic—to participate along with states.³ It also provides important information and recommendations to state actors to protect the sensitive Arctic from adversities created both in the Arctic and in the rest of the world.⁴ In the course of time, the Arctic Council has involved a number of states and organizations from outside the region in advancing its mandates. The Cooperation has accomplished a number of projects related to climate change, and others are ongoing. However, they have not always been entirely effective in dealing with the growing challenges presented by climate change, which raises a number of questions. How well do these projects help the inhabitants of the Arctic counter the challenges created by climate change in their way of life? To what extent is this Cooperation successfully attracting the attention of residents living in the non-Arctic parts of the member states? Does the Cooperation have any additional value as a regional forum compared with a global climate change regime or a system of national activities addressing the issue of climate change?

There are a few scholarly works that have dealt with this Cooperation,⁵ some of which have made recommendations for improving its operations, although the Arctic states have hesitated in accepting them.⁶ Two decades after the beginning of the Cooperation, it seems timely to conduct an extensive evaluation of its success mainly in the field of climate

³ Granting ‘permanent participant’ status to the indigenous communities of the region is a comparatively new concept in international cooperation.

⁴ The working groups and subordinate bodies prepare separate reports based on findings from both scientific research and traditional knowledge and submit them to the Arctic Council from time to time.

⁵ Timo Koivurova and David L. VanderZwaag, *The Arctic Council at 10 Years: Retrospect and Prospects* 40 U.B.C. L.R. 121 (2007); Timo Koivurova, *Limits and Possibilities of the Arctic Council in a Rapidly Changing Scene of Arctic Governance* 45 Polar Record 1 (2009); and Monica Tennberg, *The Arctic Council: A Study in Governmentality* (1998).

⁶ Timo Koivurova, *Alternatives for an Arctic Treaty: Evaluation and a New Proposal* 17 R.E.C.I.E.L. 14(2008); Olav Schram Stokke, *Protecting the Arctic Environment: The Interplay of Global and Regional Regimes* 1 Y.B. Polar L. 349 (2009); D. VanderZwaag, R. Huebert, and S. Ferrara, *The Arctic Environmental Protection Strategy, Arctic Council and Multilateral Environmental Initiatives: Tinkering While the Arctic Marine Environment Totters* 30 Denver J. Intl L. & Policy 131 (2002); David Leary, *Bi-Polar Disorder? Is Bioprospecting an Emerging Issue for the Arctic as well as for Antarctica?* 17 R.E.C.I.E.L. 41 (2008); Philippe Sands, *Principles of International Environmental Law*, at 731 (2nd edition, 2003); Geir Hønneland and Olav Schram Stokke, *Introduction*, in Olav Schram Stokke and Geir Hønneland, eds., *International Cooperation and Arctic Governance: Regime, Effectiveness and Northern Region Building*, at 1 (2007); Julia Jabour and Melissa Weber, *Is It Time to Cut the Gordian Knot of Polar Sovereignty?* 17 R.E.C.I.E.L. 27 (2008); D.R. Rothwell, *The Polar Regions and the Development of International Law* (1996); and H. Corell, *Reflections on the Possibilities and Limitations of a Binding Legal Regime* 37 *Env't'l Pol'y & L.* 321 (2007).

change. By examining the relevant existing literature and other sources (for example, debates in the meetings of the Arctic Council, discussions in international seminars, and interviews), this article analyses the present Cooperation in the Arctic, highlights the main shortcomings within the Cooperation's functioning system, and offers a few recommendations for how the existing Cooperation could perform better in the area of climate change.

The article consists of seven parts. Following an introductory section, the second part describes the development of Arctic-wide Cooperation. The third section deals with the functioning system of the Cooperation. The following part explains how the Cooperation has addressed the issue of climate change, and the fifth part analyses the achievement of this Cooperation with respect to climate change in the Arctic. The next part discusses its main shortcomings in countering climate change in the Arctic. The final part concludes with a proposal for a model of Arctic-wide Cooperation that effectively addresses climate change in the Arctic.

II. HISTORY OF THE ARCTIC COOPERATION

During the Cold War, the existence of the United States and the Soviet Union in the Arctic, two superpowers at odds with each other, made any cooperative relationship among the Arctic states a complex matter. However, the initiative of Finland as well as support from other Arctic states and actors, in particular, organizations of indigenous peoples, resulted in the creation of the AEPS. At the end of the Cold War, this Cooperation became better organized when the Arctic Council was established and took over the activities of its forerunner, the AEPS. As a result, the development of the cooperation process can be described in two phases: the cooperation of the AEPS and the formation of the Arctic Council.

1. The Cooperation of the AEPS

The Arctic environmental protection process began when the secretary general of the former Soviet Union, Mikhail Gorbachev, spoke in Murmansk in October 1987, *inter alia*, about cooperation for the protection of the Arctic environment.⁷ His idea for cooperation advanced somewhat in 1989 when Finland organized a meeting in Rovaniemi with the representatives of the eight Arctic states: Canada, Denmark, Finland, Iceland, Norway, the Soviet Union, Sweden, and the United States. In 1991, the Arctic states met again

⁷ The proposal included a nuclear weapon-free zone in northern Europe, limited naval activities in the sea areas adjacent to northern Europe, the utilization of Arctic resources in a peaceful manner, scientific research on the Arctic, cooperation among northern countries for environmental protection, and openness of the northern sea route to icebreakers for escorted passage. For details, see Rothwell, *supra* note 6 at 229–31.

in the same place along with other actors (including, in particular, various indigenous people's organizations) and developed the Declaration on the Protection of the Arctic Environment (Rovaniemi Declaration),⁸ along with the AEPS in a single document.⁹

The ministers of the eight Arctic states committed themselves to the implementation of the AEPS and the further expansion of their cooperation. In addition, they committed themselves to a joint action plan that would include cooperation on scientific research and the assessment of environmental impacts as well as the full implementation of measures to control pollution and further considerations for reducing negative impacts on the Arctic environment.¹⁰ The ministers also committed themselves to implementation of the Arctic Monitoring and Assessment Program (AMAP), the Protection of the Marine Environment in the Arctic (PAME), Emergency Prevention, Preparedness and Response in the Arctic (EPPR), and the Conservation of Arctic Flora and Fauna (CAFF).¹¹

The objectives of the AEPS led to high expectations (for example, the protection of ecosystems, the maintenance of environmental equality, the sustainable utilization of natural resources, and respect for traditional cultures),¹² and they included a monitoring system for the Arctic environment as well as the elimination of pollution.¹³ The principles adopted for the AEPS seemed goal-oriented (including, for example, international cooperation, mutual cooperation, and indigenous knowledge).¹⁴ In fact, the AEPS more or less limited its activities to collecting data, research, assessment, information exchange, and cooperation. Decisions made at the ministerial meetings were weakened by the lack of binding obligations,¹⁵ and the expectations for robust response mechanisms and obligatory instruments were never met.

2. Formation of the Arctic Council

Canada took the initiative for an international instrument that would be legally binding in the Arctic.¹⁶ Canadian prime minister Brian Mulroney

⁸ Declaration on the Protection of the Arctic Environment, Rovaniemi, Finland, 14 June 1991, <<http://arctic-council.org/filearchive/Rovaniemi%20Declaration.pdf>> [Rovaniemi Declaration].

⁹ Declaration on the Protection of the Arctic Environment, 1991, and the Arctic Environmental Protection Strategy, Rovaniemi, Finland, 14 June 1991, 30 I.L.M. 1624 (1991), <http://arctic-council.org/filearchive/artic_environment.pdf> [AEPS].

¹⁰ Rovaniemi Declaration, *supra* note 8 at paras. 8–10. ¹¹ *Ibid.* at paras. 12–15.

¹² Timo Koivurova, Environmental Impact Assessment in the Arctic: A Study of International Legal Norms, at 71–2 (2002). ¹³ AEPS, *supra* note 9 at s. 2.1.

¹⁴ *Ibid.* at s. 2.2.

¹⁵ See Evelyn M. Hurwich, *Arctic* 5 YbIEL 233 (1994). The second ministerial meeting of the AEPS was held in Nuuk, Greenland, in 1993, the third in Inuvik, Canada, in 1996, and the fourth and final meeting in Alta, Norway, in 1997.

¹⁶ VanderZwaag, Huebert, and Ferrara, *supra* note 6 at 154.

proposed the idea of establishing the Arctic Council in Leningrad in November 1989.¹⁷ However, US officials were unwilling to support the initiative until the Democrat Bill Clinton became president in 1993. In September 1994, the United States proclaimed a new policy regarding its involvement in Arctic environmental issues. Canada also announced the idea of transforming the AEPS into a legally binding international instrument in the same year.¹⁸ In February 1995, US President Bill Clinton announced that the United States would join with Canada and the other Arctic nations to set up an Arctic Council by early 1996.¹⁹ However, the United States insisted on certain conditions for its participation: the Council would not deal with security-related issues, and financial contributions would be voluntary rather than compulsory.²⁰ These issues, along with others, were resolved through a long process of negotiation.²¹

The third ministerial meeting of the AEPS took place in Inuvik, Canada, on 15 March 1996, and it decided on the earliest possible creation of the Arctic Council.²² Officials from the Arctic states prepared the final draft of the Ottawa Declaration to establish the Arctic Council, and it was adopted by the Arctic states along with the *Joint Communiqué of the Governments of the Arctic Countries* on 19 September 1996. The declaration created the Arctic Council as a 'high level forum' with four main purposes:

1. to provide a means for promoting cooperation, coordination, and interaction among the Arctic states involving the inhabitants of the Arctic, in particular, indigenous communities, on issues affecting the Arctic, particularly sustainable development and environmental protection of the Arctic;
2. to continue with the programs of four working groups established under the AEPS, which include the AMAP, the CAFF, the PAME, and the EPPR;
3. to adopt terms of reference for a sustainable development program as well as its implementation; and
4. to provide information, encourage education, and call attention to issues related to the Arctic.²³

¹⁷ Alan Saunders, *Pondering an Arctic Council* 19 Northern Perspectives 1 (1991).

¹⁸ Hurwich, *supra* note 15 at 233.

¹⁹ Evelyn M. Hurwich, *Arctic* 6 YbIEL 298 (1995).

²⁰ VanderZwaag, Huebert, and Ferrara, *supra* note 6 at 154.

²¹ Four negotiation meetings were held in June, August, September, and December 1995 in Ottawa, Copenhagen, Washington, DC, and Toronto respectively aiming to conclude the agreement to establish the Arctic Council. See Hurwich, *supra* note 15 at 302–3.

²² Inuvik Declaration on Environmental Protection and Sustainable Development in the Arctic, 21 March 1996, <<http://arctic-council.org/filearchive/The%20Inuvik%20Declaration.pdf>> at para. 15 [Inuvik Declaration].

²³ Ottawa Declaration, *supra* note 1, Article 1.

In accord with US conditions, matters related to military security were kept outside the jurisdiction of the Arctic Council.

The meeting also identified three initial priorities: to develop the rules of procedure for the Arctic Council and the terms of reference for a sustainable development program, and to ensure the completion of the transformation of the AEPS into the Arctic Council by the next AEPS ministerial meeting.²⁴ At its first ministerial meeting in 1998, the Arctic Council adopted the Arctic Council Rules of Procedure²⁵ and the Terms of Reference for a Sustainable Development Program.²⁶ The next five ministerial meetings were held in 2000 in Barrow, Alaska, in the United States, in 2002 in Inari, Finland, in 2004 in Reykjavik, Iceland, in 2006 in Salekhard, Russia, and in 2009 in Tromsø, Norway, respectively.

III. FUNCTIONING SYSTEM OF THE COOPERATION

The functioning system of the Cooperation can be explained under two subsections: the organizational framework and the operational framework.

1. Organizational Framework

For the purposes of this article, the organizational framework means the basic working structure of the Cooperation. It points to the entities responsible for the interior functions of the system as well as its various policy-making functions. The Cooperation comprises three different entities in its main body. They are members, permanent participants, and observers. The establishing instrument of the Arctic Council specifies the members and the criteria for permanent participants and observers.²⁷

A. Members

The eight Arctic states are members of the Arctic Council: namely Canada, Denmark, Finland, Iceland, Norway, the Russian Federation, Sweden, and the United States.²⁸ The members are the same as those that participated in the AEPS cooperation. The presumption is that membership in the Arctic

²⁴ *Joint Communiqué of the Governments of the Arctic Countries*, 35 I.L.M. 1386 (1996), <<http://arctic-council.org/filearchive/Joint%20Communique%20of%20the%20Governments%20of%20the%20Arctic%20Countries.pdf>>.

²⁵ Arctic Council Rules of Procedure as adopted by the Arctic Council at the First Arctic Council Ministerial Meeting, Iqaluit, Canada, 17–18 September 1998, <<http://www.arctic-council.org/filearchive/official%20rules%20and%20procedures.pdf>> [Rules of Procedure].

²⁶ Arctic Council Terms of Reference for a Sustainable Development Program as adopted by the Arctic Council at the First Arctic Council Ministerial Meeting, Iqaluit, Canada, 17–18 September 1998, <<http://arctic-council.npolar.no/Meetings/Ohers/CBW/ACTermsofReference2.pdf>> [Terms of Reference].

²⁷ Ottawa Declaration, *supra* note 1, Articles 2–3.

²⁸ *Ibid.*, Article 2.

Council is limited to these eight states in the absence of any provision for expanding the membership.

B. Permanent Participants

Representatives of certain indigenous peoples groups in the region are entitled to be permanent participants in the Arctic Council.²⁹ The Ottawa Declaration incorporates three associations of indigenous peoples as permanent participants,³⁰ which were also observers in the AEPS,³¹ and has also provided opportunities for the participation of other indigenous groups in the region.³² According to the declaration, a permanent participant can be chosen from among the majority of the Arctic indigenous constituency representing 'a single indigenous people resident in more than one Arctic state' or 'more than one Arctic indigenous people resident in a single Arctic state.'³³ The Arctic Council can accredit more permanent participants, but their total number must always be less than the number of the council's members.³⁴ Currently, there are six permanent participants: (1) the Aleut International Association; (2) the Arctic Athabaskan Council; (3) the Gwich'in Council International; (4) the Inuit Circumpolar Council; (5) the Russian Association of Indigenous Peoples of the North; and (6) the Saami Council.³⁵ Therefore, the council could, if it so desired, accredit one more permanent participant.³⁶

The inclusion of permanent participants is a way of recognizing the special importance of the indigenous peoples of the Arctic region.³⁷ The idea behind the selection of the permanent participants is to ensure their active involvement and full consultation.³⁸ They are welcome not only in ministerial meetings but also to all other meetings and activities of the Arctic Council.³⁹

²⁹ Although the Ottawa Declaration has used the term 'indigenous peoples' out of respect for its traditional use by indigenous groups, it has also made it clear that the word 'peoples' does not have any implications relating to the creation of rights under international law (*ibid.*, Article 2).

³⁰ The Inuit Circumpolar Council, the Saami Council, and the Association of Indigenous Minorities in the Far North, Siberia, the Far East of the Russian Federation.

³¹ AEPS, *supra* note 9, Preface.

³² Ottawa Declaration, *supra* note 1, Article 2.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ Despite the fact that the organization changed its name to the present form before the creation of the Arctic Council in 1994, the declaration uses the former name, the Association of Indigenous Minorities in the Far North, Siberia, and the Far East of the Russian Federation.

³⁶ There are eight members of the Arctic Council. Since it already has six permanent participants, it could choose one more.

³⁷ Terms of Reference, *supra* note 26 at para. 1.

³⁸ See the Ottawa Declaration, *supra* note 1, Article 2; Rules of Procedure, *supra* note 25, rule 5.

³⁹ Rules of Procedure, *supra* note 25, rule 5.

The Rules of Procedure allow the permanent participants to take part in all meetings and activities of the Arctic Council. According to the rules, a permanent participant is entitled to raise a point of order during discussion on any issue, and this point will be decided immediately by the chairperson.⁴⁰ Consultations with the permanent participants are also essential to fix the time and location of biennial meetings⁴¹ and limit the size of delegations.⁴² The permanent participants can also propose supplementary agenda items⁴³ or cooperative activities in the Arctic Council meetings.⁴⁴ The designation of a representative from each permanent participant to the meetings of the senior arctic officials (SAO) has been confirmed.⁴⁵ Consultations with the permanent participants are also necessary for the chair to convene SAO meetings.⁴⁶

C. Observers

Observer status in the Arctic Council is open to non-Arctic states and other organizations.⁴⁷ It is granted to those organizations or states that are able to contribute to the work of the Arctic Council.⁴⁸ They are invited to all meetings and activities of the Arctic Council, and their status continues as long as consensus exists at the ministerial meetings (the status of an observer can be suspended if they engage in practices that are at odds with the Ottawa Declaration).⁴⁹ The Arctic Council may allow observers on an *ad hoc* basis for individual meetings. When the Cooperation began, observer status for certain entities was approved for a period of two years, but, lately, the Arctic Council has been approving observers without a time limit.⁵⁰

Annex 2 of the Rules of Procedure must be followed in order for observers to gain accreditation.⁵¹ Nominations or applications for observer status are directed to the host country (the state that holds the chair), and the application must contain a written description of the applicant's ability to contribute to the Arctic Council. If the applicant is an organization, it needs to submit more information (for example, the purpose of the organization, a copy of the annual report, the activities, the total number of

⁴⁰ *Ibid.*, rule 12. ⁴¹ *Ibid.*, rule 15. ⁴² *Ibid.*, rule 13. ⁴³ *Ibid.*, rule 19.

⁴⁴ *Ibid.*, rule 26. ⁴⁵ *Ibid.*, rule 21. ⁴⁶ *Ibid.*, rule 25.

⁴⁷ Ottawa Declaration, *supra* note 1, Article 3.

⁴⁸ Rules of Procedure, *supra* note 25, rule 36. ⁴⁹ *Ibid.*, rule 37.

⁵⁰ Reykjavik Declaration on Occasion of the Fourth Ministerial Meeting of the Arctic Council, 24 November 2004, Reykjavik, Iceland, <http://arctic-council.org/filearchive/Reykjavik_Declaration.pdf> [Reykjavik Declaration]; Salekhard Declaration on the Occasion of the tenth Anniversary of the Arctic Council and the Fifth AC Ministerial Meeting, 26 October 2006, Salekhard, Russia, <http://arctic-council.org/filearchive/SALEKHARD_AC_DECLARATION_2006.pdf> [Salekhard Declaration].

⁵¹ Rules of Procedure, *supra* note 25, Annex 2 at para. 1, refers to the names of the accredited observers of the AEPS that have been granted observer status under the Arctic Council.

members, and its system of governance).⁵² At present, six states (and four states with *ad hoc* observer status),⁵³ ten international organizations,⁵⁴ and eleven non-governmental organizations⁵⁵ have observer status in the Cooperation.

2. Operational Framework

Operational framework means, for the purposes of this article, the structure through which the Cooperation performs its activities in order to achieve its final goal—sustainable development and the environmental protection of the Arctic. It mainly includes SAOs, working groups, and the Secretariat.

A. SAOs

SAO meetings include a senior official from each of the Arctic states and representatives from the indigenous peoples organizations that have permanent participant status in the Arctic Council. The SAO coordinates, monitors, and guides the working groups, task forces, and other subordinate bodies of the Arctic Council.⁵⁶ It receives reports from the working groups and subordinate bodies, discusses with them, and reports regularly to the Arctic Council on the basis of these communications. The SAO also reviews proposals concerning cooperative activities submitted by the Arctic states and permanent participants and prepares recommendations on these proposals for the ministerial meetings. The Arctic ministers request or instruct the SAOs to provide the means of addressing individual issues connected with the Arctic Council. The Rules of Procedure require at least two SAO meetings per year, but the frequency of SAO meetings depends on the

⁵² *Ibid.*, Annex 2, para. 3.

⁵³ France, Germany, Poland, Spain, the Netherlands, and the United Kingdom are observers. The last SAO meeting in November 2009 approved China, Japan, Italy, and the Republic of Korea as *ad hoc* observers.

⁵⁴ The International Federation of Red Cross and Red Crescent Societies, the International Union for the Conservation of Nature, the North Atlantic Marine Mammal Commission, the Nordic Council of Ministers, the Nordic Environmental Finance Corporation, the Standing Committee of Parliamentarians of the Arctic Region, the United Nations Economic Commission for Europe, the United Nations Development Programme, and the United Nations Environment Program. The last SAO meeting approved the EU Commission as an *ad hoc* observer. See <http://arctic-council.org/section/observers_intergovernmental_and_inter_parliamentary_organization>.

⁵⁵ The Advisory Committee on Protection of the Seas, the Arctic Circumpolar Gateway, the Association of World Reindeer Herders, the Circumpolar Conservation Union, the International Arctic Science Committee, the International Arctic Social Sciences Association, the International Union for Circumpolar Health, the International Work Group for Indigenous Affairs, the Northern Forum, the University of the Arctic, and the World Wide Fund for Nature. See <http://arctic-council.org/section/observers_non_governmental>.

⁵⁶ See the Rules of Procedure, *supra* note 25, Part II: Arctic Council Meetings.

willingness of the host country, which is responsible for assigning a chairperson and calling the meeting to order.

B. Working Groups

The Arctic Council may form working groups, task forces, and other subsidiary bodies to prepare programs and carry out its activities under the guidance of the SAO.⁵⁷ The main work of the Arctic Council takes place within six working groups.⁵⁸ The working groups include representatives drawn mainly from the national ministries and other government bodies of the member states, as well as from the permanent participants, but the programs and projects have had much more variety in their structure of representation. The ministerial meetings fix the composition and mandate of the working groups. Each working group selects a chairperson and vice-chairperson, fixing their tenure in consultation with the SAO. The secretariats of the working groups and subordinate bodies are supported voluntarily by the individual Arctic states.⁵⁹ The location, agenda, and date of the meetings of these bodies are set by the consensus of the participating Arctic states. The working groups may establish their own operating guidelines subject to the approval of the SAO. Each of these working groups is described in more detail in the following sections and will provide a good understanding of the overall cooperation system.

(i) AMAP

The AEPS established the AMAP task force in 1991. It was transformed into a working group in 1993. The key objective of the AMAP working group is to measure the level of anthropogenic pollutants and assess their effect on the Arctic environment. AMAP's tasks include the preparation of integrated assessment reports on the status of Arctic ecosystems and trends, the identification of possible causes for changing conditions, the detection of emerging problems and their possible causes, and the evaluation of potential risks to the Arctic ecosystems. AMAP's mandate includes

⁵⁷ *Ibid.*, Part III: Implementation of Cooperative Activities.

⁵⁸ *Ibid.*, Part III and Part IV.

⁵⁹ The Secretariat for the Arctic Monitoring and Assessment Program (AMAP) is located in Oslo, Norway. The Secretariat for the Protection of the Marine Environment in the Arctic (PAME) is located together with the Conservation of Arctic Flora and Fauna (CAFF) Secretariat in Akureyri, Iceland. The Secretariat for the Emergency Prevention, Preparedness and Response in the Arctic (EPPR) and the Secretariat for Arctic Contaminants Action Programme (ACAP) are situated in Moscow, Russia, and the Secretariat for the Sustainable Development Working Group (SDWG) is located in Ottawa, Canada.

making recommendations for required actions that would reduce threats to the ecosystems and residents of the region.⁶⁰

The assessments of AMAP are based upon published scientific data obtained from its own monitoring programs, traditional knowledge, and other national and international research institutions. For the incorporation of AMAP's recommendations at the national level, each Arctic state is required to define its national implementation plan. When it was first developed, AMAP was directed to establish comprehensive monitoring programs in three priority fields: persistent organic chemicals, heavy metals, and radionuclides. The 1996 ministerial meeting in Inuvik tasked AMAP to finalize a report on the state of the Arctic environment by early 1997. It was presented to the final AEPS cooperation meeting in Alta.⁶¹ The report raised many issues for decision makers from an Arctic, regional, and global perspective. For instance, the report showed that persistent organic pollutants (POPs) tend to end up in the Arctic because of the prevailing wind patterns, even though these substances are only marginally produced in the Arctic region. In 2002, AMAP finalized a report on Arctic pollution, which was presented to the 2002 ministerial meeting in Inari.⁶² The meeting considered the implications of the findings of the report as they pertained to the Arctic Council policies at both the national and international levels.⁶³ The report documented increasing mercury levels in some parts of the Arctic, and the ministerial meeting agreed to address this problem through global cooperation.⁶⁴

In 2004, the ministerial meeting in Reykjavik requested AMAP to complete by 2006 two assessments—one of the oil and gas industry's impacts on the Arctic and the other on acidification of the Arctic—and to prepare proposals for effective measures to counter the threats identified in these assessments, along with the continuation of works in progress. It approved AMAP's Strategic Plan 2004+ and welcomed the efforts of AMAP and the Arctic Contaminants Action Programme (ACAP) to address the emerging problem of chemical contaminants in the Arctic.⁶⁵

The 2006 ministerial meeting in Salekhard directed AMAP to cooperate with other working groups and relevant scientific bodies in its reviewing

⁶⁰ AEPS, *supra* note 9 at s. 6.1.

⁶¹ Alta Declaration on the Arctic Environmental Protection Strategy, 13 June 1997, <<http://arctic-council.org/filearchive/The%20Alta%20Declaration.pdf>> at Preamble [Alta Declaration].

⁶² AMAP, *Arctic Pollution 2002*, State of the Arctic Report, <<http://www.amap.no/>> [*Arctic Pollution 2002 Report*].

⁶³ Inari Declaration on the Occasion of the Third Ministerial Meeting of the Arctic Council, 10 October 2002, <http://arctic-council.org/filearchive/inari_Declaration.pdf>, Article 5 [Inari Declaration].

⁶⁴ *Ibid.*

⁶⁵ AMAP, *AMAP Report 2004:5*, Strategic Plan 2004+, <<http://www.amap.no/>>.

process, which looks for needs and gaps in climate monitoring in the Arctic in order fully to realize a comprehensive Arctic observation network through collective action.⁶⁶ It reviewed the assessment report on acidifying pollutants, Arctic haze and acidification in the Arctic, and requested future assessments on acidification that would review the extent of air pollution and climate change.⁶⁷

The recent work plan of AMAP has covered much ground, including the publication of the 2009 *AMAP State of the Environment Report on Selected Pollution Issues* and the related 2009 *AMAP Update Report on Selected Climate Issues of Concern*, as well as the presentation and dissemination of these reports at appropriate venues.⁶⁸ It has also prepared an extended summary of the project entitled *Snow, Water, Ice, and Permafrost in the Arctic*.⁶⁹

(ii) PAME

In 1991, the Arctic states committed themselves to take preventive and other measures, directly or through competent international organizations, to protect the marine environment of the Arctic from different sources of pollution.⁷⁰ The priorities related to this commitment include following the relevant provisions of the UN Convention on the Law of the Sea (LOSC),⁷¹ maintaining international standards regarding the discharge of pollutants, taking part in international forums to reinforce recognition of the sensitivity of the ice-covered parts of the Arctic Ocean, and ensuring the protection of the Arctic marine environment from accidental pollution.⁷²

The 1993 ministerial meeting in Nuuk established the PAME working group in order to implement the priority areas identified in the AEPS. The 1996 ministerial meeting in Inuvik tasked PAME with developing both a regional program of action for the protection of the Arctic marine environment from land-based activities and guidelines for offshore petroleum activities. In 1998, PAME was mandated by the ministerial meeting in Iqaluit to assess present and possible shipping activities to ascertain whether there

⁶⁶ Salekhard Declaration, *supra* note 50, 'Climate Change in the Arctic.'

⁶⁷ *Ibid.*

⁶⁸ *Arctic Monitoring and Assessment Programme (AMAP) Work Plan for 2009–2011 and Tentative List of Deliverables 2009–2013*, 'Assessments,' <http://arctic-council.org/filearchive/amap_draft_work_plan_2009_-_2011.pdf>.

⁶⁹ Module 2: The Greenland Ice Sheet in a Changing Climate.

⁷⁰ Rovaniemi Declaration, *supra* note 8.

⁷¹ United Nations Convention on the Law of the Sea, 21 I.L.M. 1261 (1982).

⁷² AEPS, *supra* note 9 at s. 7.

is a need for additional shipping measures in the Arctic. The mandate included working on an international code of safety for ships operating in polar waters (Polar Code) under the auspices of the International Maritime Organization (IMO).⁷³

The 2002 ministerial meeting in Inari requested PAME to develop a strategic plan for the protection of the Arctic marine environment that would lay the foundation for a more coordinated and integrated approach in addressing the challenges of the Arctic coastal and marine environments.⁷⁴ The ministerial meeting also endorsed the revised Arctic Offshore Oil and Gas Guidelines,⁷⁵ which were first adopted by PAME in 1997 and recently updated.⁷⁶

Recently, PAME has developed its work plan for 2009–11 based on the priorities chosen by the present chairmanship of the Cooperation.⁷⁷ The plan includes three main objectives: improving knowledge about the Arctic marine environment and taking action based on existing knowledge, determining the competence of applicable commitments and promoting their implementation, and creating partnerships, programs, and technical support both within and outside the Cooperation.

(iii) EPPR

The AEPS established the EPPR as a priority in 1991 and later transformed it into a working group. The EPPR's initial mission, as identified by the AEPS, included the exchange of information concerning all relevant issues in the field of emergency prevention and response and the establishment of a system for early notification of significant accidental

⁷³ Iqaluit Declaration on the Occasion of the First Ministerial Meeting of the Arctic Council, Iqaluit, Canada, 17–18 September 1998, Article 26 [Iqaluit Declaration]. The Guidelines for Ships Operating in Arctic Ice-Covered Waters were adopted by the International Maritime Organization as recommendatory provisions. Canada was the leading country in preparing the guidelines, and the Arctic Council had a close connection to the proceedings through Canada.

⁷⁴ Inari Declaration, *supra* note 63, Article 5.

⁷⁵ PAME, Arctic Offshore Oil and Gas Guidelines, 12 October 2002, Protection of the Arctic Marine Environment Working Group, <<http://old.pame.is/sidur/uploads/ArcticGuidelines.pdf>> [*Offshore Oil and Gas Guidelines*]. The Offshore Oil and Gas Guidelines are a revised form of the guidelines as they were first adopted by the Alta meeting in 1997. The revision was based on comments from a variety of representatives, including Arctic governments, regional governments, non-governmental organizations, indigenous groups, industries, and members of the scientific community.

⁷⁶ Arctic Council Protection of the Arctic Marine Environment Working Group, Arctic Offshore Oil and Gas Guidelines, 29 April 2009, <<http://arctic-council.org/filearchive/Arctic%20offshore%20oil%20and%20Gas%20Guidelines%202009.pdf>>.

⁷⁷ See Protection of Arctic Marine Environment of the Arctic Council, *PAME Work Plan 2009–2011*, <http://www.pame.is/images/stories/PAME_Work_Plan_2009–2011/PAME_b_work__plan_2009–2011.pdf>.

pollution or an imminent threat of such an incident.⁷⁸ The ministerial meeting in Inuvik expanded the EPPR's work and requested that it would complete the *Arctic Guide for Emergency Prevention, Preparedness and Response*. This request also included further developing the preventative, mitigation, and response measures for accidental oil and gas releases in the Arctic, which is a field of policy that overlaps with some of the other working groups. Other priorities set by the ministerial meeting included analysing the effectiveness of existing accident reporting systems, refining the risk analysis on environmental threats to the Arctic,⁷⁹ and analysing the adequacy and effectiveness of existing international agreements and arrangements in the Arctic.

The EPPR working group finalized its analysis of the adequacy and effectiveness of agreements and arrangements relevant to land-based maritime or nuclear accident responses in 2000.⁸⁰ The 2004 ministerial meeting in Reykjavik suggested the inclusion of natural disasters within the activities of the working group and noted the completion of the *Shoreline Cleanup Assessment Technique Manual*.⁸¹ The EPPR work plan for 2009–11, which was included in its report to the ministerial meeting in Tromsø, addressed issues such as oil and gas, radiation, and natural disasters and also pledged to cooperate with other organizations, including the other working groups involved in the Cooperation.⁸²

(iv) CAFF

Like AMAP, the CAFF working group had its origins in the 1991 AEPS. The AEPS recognized that economic development projects, the long-range movement of pollutants, and the degradation of habitats posed grave threats to Arctic flora and fauna.⁸³ It ascertained that most existing agreements protecting flora and fauna had no specific focus on the Arctic, which was a big problem with respect to the traditional livelihood and cultures of Arctic indigenous peoples. Lacking was a forum in which scientists, indigenous peoples, and conservation activists could exchange data and information

⁷⁸ AEPS, *supra* note 9 at s. 8.1 (i)–(x).

⁷⁹ Inuvik Declaration, *supra* note 22, Article 6, para. 6.

⁸⁰ Barrow Declaration on the Occasion of the Second Ministerial Meeting of the Arctic Council, 13 October 2000, Article 10, <<http://arctic-council.org/filearchive/barrow%20-%20english.pdf>> [Barrow Declaration]. See also David L. VanderZwaag, *Arctic 11 YbIEL* 265 (2000).

⁸¹ Reykjavik Declaration, *supra* note 50, 'Emergency Prevention Preparedness and Response.'

⁸² EPPR, *EPPR Working Group Report on 2006–9 Activities*, 20 January 2009, Sixth Arctic Council Ministerial Meeting, Tromsø, Norway, 29 April 2009, section 4, <http://arctic-council.org/filearchive/eppr_dreft_work_plan_2009_-_2011.pdf>.

⁸³ AEPS, *supra* note 9, at s. 9.

relating to shared species and habitats. To this end, CAFF was established as a working group in 1992 and recognized by the Nuuk Declaration on Environment and Development in the Arctic in 1993.⁸⁴

Various priorities for CAFF were identified by the 1996 ministerial meeting in Inuvik, including the development of a circumpolar protected area network (CPAN).⁸⁵ The meeting asked CAFF to develop a draft Arctic strategy relating to the goals of the UN Convention on Biological Diversity by recognizing an important link to the convention.⁸⁶ The focus of CAFF expanded in 1998, when the Iqaluit ministerial meeting endorsed CAFF's Strategic Plan for the Conservation of Arctic Biological Diversity as an overall framework for CAFF activities and its implementation through the creation of more detailed work plans.⁸⁷ The ministerial meeting also welcomed CAFF's intention to prepare an overview of the status and trends in changes to ecosystems, habitats, and species in the Arctic. The meeting also requested CAFF to identify the necessary elements for a program to monitor circumpolar biological diversity and make assessments as well as identify, jointly with AMAP, the effects of climate change and UV-B radiation on Arctic ecosystems.⁸⁸

CAFF's present work plan for 2009–11 includes a follow-up to the Arctic Climate Impact Assessment (ACIA) through the Arctic Biodiversity Assessment (ABS) and the Circumpolar Biodiversity Monitoring Program, the continued work of the CAFF expert groups—the CAFF Flora Group and the CAFF Seabird Group—and collaboration with the other working groups involved in the Cooperation as well as with international conventions, agreements, and organizations.⁸⁹

(v) SDWG

The AEPS formed the Task Force on Sustainable Development and Utilization in 1993, which was later transformed under the Arctic Council into a working group named the Sustainable Development Working Group (SDWG).⁹⁰

⁸⁴ Nuuk Declaration on Environment and Development in the Arctic, 16 September 1993, Article 2 [Nuuk Declaration].

⁸⁵ See CAFF, *Circumpolar Protected Area Network (CPAN): Strategy and Action Plan* (1996), <<http://arcticportal.org/en/caff>>. See also Timo Koivurova, *Governance of Protected areas in the Arctic* 5 Utrecht L. R. 44 (2009).

⁸⁶ Convention on Biological Diversity, 31 I.L.M. 818 (1992).

⁸⁷ CAFF, *Strategic Plan for the Conservation of Arctic Biological Diversity*, September 1998, at <<http://web.arcticportal.org/uploads/hw/Kd/hwKdRxnTLfzt5cewJeEtjg/Strategic-Plan-for-the-Conservation-of-Arctic-Biological-Diversity.pdf>>.

⁸⁸ Iqaluit Declaration, *supra* note 73, Articles 20–1.

⁸⁹ See CAFF Working Group of the Arctic Council, *CAFF Work Plan 2009–2011 Ministerial Period*, April 2009, <http://archive.arcticportal.org/460/01/CAFF_Work_Plan_2009-2011.pdf>.

⁹⁰ Nuuk Declaration, *supra* note 84, Article 2.

The 1998 ministerial meeting in Iqaluit adopted the Terms of Reference, which provided a procedure for proposing sustainable development projects.⁹¹ The 2000 ministerial meeting in Barrow adopted the Sustainable Development Framework Document,⁹² which identified six priorities for the sustainable development program.⁹³ They are (1) health issues and the well-being of people living in the Arctic; (2) sustainable economic activities and increasing community prosperity; (3) education and cultural heritage; (4) children and youth; (5) the management of natural, including living, resources; and (6) infrastructure development.⁹⁴

The *Arctic Human Development Report (AHDR)* was published in 2004 for the purpose of assisting the SDWG.⁹⁵ The *AHDR* identified major gaps in knowledge, including the areas of cumulative changes in cultural identity and social well-being, industrial influences on community viability and governance arrangements, and innovations in the Arctic.

The current priorities of the SDWG are included in the work plan for 2009–11, which complements the existing declarations adopted under the Cooperation, the Sustainable Development Terms of Reference, the SDWG operating guidelines, and the Arctic Council's Sustainable Development Action Plan.⁹⁶ The priorities focus mainly on ongoing projects and activities, the inclusion of new projects and activities, possible follow-up projects and activities, and thematic areas for SDWG projects and activities.⁹⁷

(vi) ACAP

The Arctic Council endorsed the Arctic Council's Action Plan to Eliminate Pollution in the Arctic at the 2000 ministerial meeting in Barrow.⁹⁸ In 2006, the action plan was transformed into a working group entitled the Arctic Contaminants Action Program (ACAP). ACAP focuses mainly on pollution prevention and remediation. The priorities of ACAP were selected based on AMAP's findings in regard to POPs, heavy metals, radioactivity, and the

⁹¹ Terms of Reference, *supra* note 26, Articles 1 and 3.

⁹² *Framework Document (Chapeau) for the Sustainable Development Program*, 13 October 2000, <<http://arctic-council.org/filearchive/Framework%20Document.pdf>>.

⁹³ Barrow Declaration, *supra* note 80, Article 1.

⁹⁴ *Ibid.*

⁹⁵ *Arctic Human Development Report*, 2004, <<http://www.svs.is/AHDR/AHDR%20chapters/English%20version/Chapters%20PDF.htm>>.

⁹⁶ SDWG, *SDWG Work Plan for 2009–2011*, <http://arctic-council.org/filearchive/sdwg_work_plan_for_2009-2011_final.pdf>.

⁹⁷ Thematic areas include certain issues in the Arctic: socio-economic, cultures and languages, human health, adaptation to climate change, the management of natural resources, energy, and communities. *Ibid.* at s. D.

⁹⁸ Barrow Declaration, *supra* note 80, Article 2.

depletion of the ozone layer.⁹⁹ Most of the activities of the working group are related to the Russian Federation. The Multilateral Cooperative Project on the Phase-out of Polychlorinated Biphenyl (PCB) Use, the Management of PCB-Contaminated Wastes in the Russian Federation, the Reduction/Elimination of Dioxins and Furans Released in the Russian Federation, and the Reduction of Atmospheric Mercury Releases from Arctic States are some examples of ongoing ACAP projects.

ACAP's work plan for 2009–11 includes, *inter alia*, developing an integrated hazardous waste management strategy, assessing the performance of Russian hazardous waste destruction facilities, the implementation of control technologies, and the continuation of relationships with the other working groups involved in the Cooperation as well as various international organizations such as the Barents Euro-Arctic Council, UN Environment Programme, and the Nordic Environment Finance Corporation.¹⁰⁰

In addition to these working groups, the Arctic Council has also established some action programs. These programs are operated jointly by the working groups, the permanent participants, and various organizations that maintain a relationship with the Arctic Council. An action program can later be transformed into a working group.¹⁰¹ The Arctic Climate Impact Assessment is an action program under the Arctic Council. In addition, the Search and Rescue Task Force is currently being established, and it will negotiate an Arctic search-and-rescue instrument to be ready by the 2011 ministerial meeting, which will be the first time the Cooperation has negotiated a legal instrument.¹⁰²

C. The Secretariat

The Arctic Council has not had a permanent secretariat since its inception. In fact, the Rules of Procedure have imposed the responsibility of providing secretarial supports on the state that holds the chair.¹⁰³ Nonetheless, the council currently has a semi-permanent secretariat located in Tromsø, Norway, which has been shared by Norway, Denmark, and Sweden during their chairmanships (2006–12).¹⁰⁴ There is much uncertainty whether

⁹⁹ ACAP, *List of Approved Activities and Proposals for Future Activities*, June 2001, at 2, <<http://arctic-council.npolar.no/index.html/Meetings/SAO/2001%20Ro/ACAP2001.pdf>>.

¹⁰⁰ See ACAP Work Plan for 2009–2011 (as a draft and subject to approval by the SAOs) at: <http://arctic-council.org/filearchive/acap_final_work_plan_2009-2011.doc>.

¹⁰¹ Examples are the SDWG and ACAP.

¹⁰² Meeting of Senior Arctic Officials, Final Report, 12–13 November 2009, Copenhagen, s. 5.2 (Search and Rescue Task Force).

¹⁰³ Rules of Procedure, *supra* note 25, rule 32.

¹⁰⁴ Norwegian, Danish, Swedish common objective for their Arctic Council chairmanships 2006–12, Common objectives and priorities for the Norwegian, Danish and Swedish chairmanships of the Arctic Council (2006–2012), <http://arctic-council.org/article/2007/11/common_priorities>.

Canada, which will assume the chair after Sweden, will continue to use the Tromsø Secretariat.

IV. THE ISSUE OF CLIMATE CHANGE IN ARCTIC COOPERATION

Neither the AEPS nor the Arctic Council included the issue of climate change in their working agendas or as a primary concern at the time they were established. However, the issue of climate change has increasingly become a feature in the Cooperation's agenda and presently dominates the work of the Cooperation in many ways.¹⁰⁵

1. The Issue of Climate Change under the AEPS

The AEPS included the problem of climate change at the time of its establishment but not as one of its priority concerns.¹⁰⁶ One of the principles that it adopted was to 'respect the Arctic's significance for and influence on the global climate.'¹⁰⁷ The argument at that time focused on the already existing international forums that had started to work on the depletion of the ozone layer and climate change issues.¹⁰⁸ The AEPS acknowledged climate change as a major threat to the Arctic environment¹⁰⁹ and expected a close working relationship with several international climate change programs to exchange relevant data for the purpose of assessing climate change in the Arctic.¹¹⁰ The 1993 ministerial meeting in Nuuk requested that AMAP engage in research related to climate change.¹¹¹ Moreover, in 1996, the AEPS reaffirmed its support for the United Nations Framework Convention on Climate Change (UNFCCC),¹¹² and it also asked AMAP to review the integrated results of existing programs dealing with climate change regularly 'with a view to identifying gaps in the scope of the monitoring and research under these fora and with a view to ensuring that specific issues related to the Arctic region are placed on the agenda of the appropriate international bodies.'¹¹³ AMAP responded to this request by including the issue of climate change in its 1997 report on the state of the Arctic environment,¹¹⁴ which prompted the ministerial meeting in Alta to encourage AMAP to

¹⁰⁵ For a detailed description, see Timo Koivurova and Md Waliul Hasanat, *Climate Policy of the Arctic Council in Climate Governance in the Arctic*, at 51–75 (Timo Koivurova, Carina Keskitalo, and Nigel Bankes, eds., 2009).

¹⁰⁶ The priority areas were persistent organic contaminants, oil pollution, heavy metals, noise, radioactivity, and acidification.

¹⁰⁷ AEPS, *supra* note 9 at s. 2.2(iii)(c).

¹⁰⁸ *Ibid.* at s. 3.

¹⁰⁹ *Ibid.* at s. 6.

¹¹⁰ *Ibid.*

¹¹¹ AMAP, *AEPS Nuuk Report 16 September 1993*. The Nuuk report was adopted along with the 1993 Nuuk Declaration, <http://arctic-council.npolar.no/Archives/AEPS%20Docs/Arctic%20Council%20A0_%C2%A0Nuuk%20Report.htm>.

¹¹² Inuvik Declaration, *supra* note 22, Preamble.

¹¹³ AMAP, *supra* note 111.

¹¹⁴ *Arctic Pollution Issues: A State of the Arctic Environment Report*. This was developed into the more comprehensive *AMAP Assessment Report: Arctic Pollution Issues*, which was presented to the first ministerial meeting of the Arctic Council in 1998.

continue the monitoring process and assess the impacts of climate change on the Arctic environment.¹¹⁵

2. The Issue of Climate Change under the Arctic Council

Research on climate change in the Arctic intensified following the establishment of the Arctic Council. The AMAP and CAFF working groups had already organized a workshop on climate change before the first 1998 ministerial meeting of the Arctic Council was held.¹¹⁶ In the meantime, the International Arctic Science Committee (IASC) had also initiated a number of projects on the impact of climate change in the Arctic from the mid-1990s onwards. In late 1998, the Executive Committee of the IASC suggested that the IASC work with the Arctic Council and the Intergovernmental Panel on Climate Change (IPCC) and that their appropriate subsidiary bodies develop and maintain a scientific assessment of consequences of climate variability in the Arctic region.¹¹⁷

The IASC cooperated with CAFF, AMAP, and the permanent participants of the Arctic Council to form the Assessment Steering Committee.¹¹⁸ The SAOs were convinced of the need to carry out an Arctic climate impact assessment (ACIA) after two workshops had been organized in 1998 and 1999. The United States provided secretarial support and funding assistance to establish the ACIA.¹¹⁹ The Barrow ministerial meeting endorsed the ACIA as a joint project of AMAP, CAFF, and the IASC.¹²⁰ The Barrow ministerial meeting requested the ACIA to evaluate and synthesize knowledge on climate variability in the Arctic and to support policy-making processes and the work of the IPCC.¹²¹ It urged the ACIA to address the consequences of climate change for the Arctic environment, human health, social structures, cultures, and economies.¹²²

The 2002 ministerial meeting in Inari recognized that global climate change would have enormous consequences in the Arctic and that the

¹¹⁵ Alta Declaration, *supra* note 61 at para. 9.

¹¹⁶ AMAP/CAFF Workshop on Climate Change, Rovaniemi, 24–5 March 1998.

¹¹⁷ Arctic Climate Impact Assessment (ACIA), *An Assessment of Consequences of Climate Variability and Change and the Effects of Increased UV in the Arctic Region* (Implementation Plan Version no. 3.7), prepared by the Assessment Steering Committee, September 2000, preface, <http://arctic-council.npolar.no/Meetings/ohers/barrow/Arctic%20Council%C2%A0_%C2%A0Climate%20Impact%20Assessment.htm>. See also Annika E. Nilsson, *A Changing Arctic Climate: Science and Policy in the Arctic Climate Impact Assessment* (2007).

¹¹⁸ ACIA, *ACIA Scientific Report* (2005) at 6, <<http://www.acia.uaf.edu/pages/scientific.html>>.

¹¹⁹ *Ibid.* ¹²⁰ Barrow Declaration, *supra* note 80, Article 3.

¹²¹ *Ibid.* ¹²² *Ibid.*

Arctic could serve as an early warning of climate change.¹²³ It noted the innovative methodology used in creating the ACIA, in which indigenous knowledge was used in parallel with modern scientific methods.¹²⁴ The meeting also urged that an integrated approach to existing activities be taken to address the challenges caused by climate change in the Arctic environment.¹²⁵

The ACIA published a synthesis report in 2004¹²⁶ and a scientific report in 2005¹²⁷ on the basis of the same data.¹²⁸ The synthesis report was forwarded to the Arctic Council and the international science community, and it identified the prevailing trends of climate change in the region and the implications of warming in the Arctic for the rest of the world.¹²⁹ The report also set out its ten key findings:

1. the Arctic climate is now warming rapidly, and much larger changes are projected;
2. Arctic warming and its consequences have worldwide implications;
3. Arctic vegetation zones are very likely to shift, causing wide-ranging impacts;
4. the diversity of animal species, their ranges, and distribution will change;
5. many coastal communities and facilities face increasing exposure to storms;
6. reduced sea ice is very likely to increase marine transport and access to resources;
7. thawing ground will disrupt transportation, buildings, and other infrastructures;
8. indigenous communities face major economic and cultural impacts;
9. elevated ultraviolet radiation levels will affect people, plants, and animals; and

¹²³ *Ibid.* ¹²⁴ *Ibid.*, Article 8. ¹²⁵ *Ibid.* at para. 5.

¹²⁶ ACIA, *Impacts of a Warming Arctic*, ACIA Overview Report (2004) [ACIA Synthesis Report].

¹²⁷ Arctic Climate Impact Assessment, *supra* note 119.

¹²⁸ The synthesis report has been prepared in a simple manner that is understandable to general readers and policy makers, while the scientific report is somewhat more extensive and is mainly aimed at technical experts. The ACIA scientific report, entitled Arctic Climate Impact Assessment and published in 2005, is the first comprehensive evaluation of climate change in the Arctic, changes in ultraviolet radiation and their impacts on the Arctic and the rest of the world.

¹²⁹ The report divided the Arctic region into four sub-regions according to different impacts of climate change. They are: sub-region I (East Greenland, Iceland, Norway, Sweden, Finland, northwest Russia, and the adjacent seas), sub-region II (Siberia and the adjacent seas), sub-region III (Chukotka, Alaska, the western Canadian Arctic, and the adjacent seas), and sub-region IV (the central and eastern Canadian Arctic, west Greenland, and the adjacent seas).

10. multiple influences will interact to cause increased impacts on people and ecosystems.¹³⁰

The 2004 ministerial meeting in Reykjavik recognized climate change as the cause of severe risks to the region, and it recommended the dissemination of the ACIA findings in various forums so that those findings might be considered in national and international climate policy-making, mainly in terms of mitigation and adaptation to climate change in the Arctic. The meeting directed the SAOs to report on progress in organizing activities connected with climate change at the next ministerial meeting in 2006.¹³¹ The ACIA findings encouraged the Arctic Council members, permanent participants, and observers to issue a joint statement at the first meeting of the Kyoto Protocol, which also served as the eleventh Conference of the Parties (COP-11) to the UNFCCC, to energize the climate regime, and to consider the ACIA results in decision making concerning the global climate change regime.¹³² The Cooperation prepared the ACIA policy document,¹³³ which acknowledged the need to further organize the work of the Arctic Council and its subsidiary bodies.¹³⁴

The 2006 ministerial meeting in Salekhard reconfirmed the implementation of the ACIA policy document;¹³⁵ provided a general endorsement of the development of Arctic expertise in the field of climate change and of an increase in the adaptive capacity of Arctic residents;¹³⁶ highlighted the need for further research conducting up-to-date assessments; directed the SAO to review these assessments and report to the following ministerial meeting;¹³⁷ and established a 'focal point' process to discuss options for ACIA follow-up activities.¹³⁸ The focal point consists of the chair of the SAOs, the chairs of the Arctic Council working groups, and one representative from among the permanent participants.

The 2009 ministerial meeting in Tromsø made some practical decisions with respect to addressing climate change in the Arctic, *inter alia*, recognizing that mitigating the impact of anthropogenic climate change depends

¹³⁰ ACIA Synthesis Report, *supra* note 126, at 10–11.

¹³¹ Reykjavik Declaration, *supra* note 50, 'Emergency Prevention Preparedness and Response.'

¹³² See <http://arctic-council.org/filearchive/AC%20statement%20CoP11%20Montreal_final.pdf>.

¹³³ *Arctic Climate Impact Assessment Policy Document*, Issued by the Fourth Arctic Council Ministerial Meeting, Reykjavik, 24 November 2004, <http://www.acia.uaf.edu/PDFs/ACIA_Policy_Document.pdf>. See also *The Arctic Council Policy Document on Global Warming* 99 A.J.I.L. 256 (2005).

¹³⁴ Reykjavik Declaration, *supra* note 50, 'Emergency Prevention Preparedness and Response.'

¹³⁵ Salekhard Declaration, *supra* note 50, 'Climate Change in the Arctic.'

¹³⁶ *Ibid.* ¹³⁷ *Ibid.*

¹³⁸ *Report of Senior Arctic Officials to Ministers at the Fourth Arctic Council Ministerial Meeting*, Reykjavik, 24 November 2004, 'The Role of the Arctic Council,' <http://arctic-council.org/filearchive/SAO_ReporttoMinistersReykjavik_2004.pdf>.

mainly on substantially reducing the global emissions of carbon dioxide and other greenhouse gases.¹³⁹ Recognizing the urgent need for an effective global response to address the challenge of climate change, the ministerial meeting agreed on the active contribution of all Arctic states in reaching an adequate outcome at COP-15 to the UNFCCC in Copenhagen in December 2009. It decided to report on mass loss from the Greenland ice sheet to COP-15 and expressed the hope that the full results of the Arctic cryosphere project, entitled Snow, Water, Ice, and Permafrost in the Arctic, would be delivered in 2011.¹⁴⁰

The ministerial meeting encouraged its members to strengthen their work on adaptation to climate change, including community-level actions, and to share information on effective practices. It also appreciated the initiatives of the indigenous peoples. It emphasized the importance of regular updates concerning the impact of climate change in the Arctic. Considering that short-lived climate forcers such as black carbon, methane, and tropospheric ozone precursors may contribute to climate change in the Arctic, as stated in the AMAP 2009 Update on Selected Climate Issues of Concern¹⁴¹ report, the ministerial meeting decided to establish a task force on short-lived climate forcers to identify existing and new measures to reduce emissions of these forcers and recommended immediate actions and a report on their progress at the next ministerial meeting. In the joint chair program for the years 2006–12, Norway, Denmark, and Sweden identified climate change as the top priority issue.

In addition to the above-mentioned activities, climate change has appeared as a priority in other Arctic-related venues. For instance, the strategic plan for the protection of the Arctic marine environment developed by PAME, which the Cooperation endorsed in 2004 and which is widely known as the Arctic Marine Strategic Plan, identified climate change and increasing economic activities as two of the major issues affecting sustainable development in the Arctic.¹⁴² The Arctic Council also endorsed the 2000 ACAP, which selected five priorities for identifying actions in its overall strategy. In the first phase, all of these priorities are closely connected to climate change.¹⁴³

¹³⁹ Tromsø Declaration on the occasion of the Sixth Ministerial Meeting of the Arctic Council, Tromsø, Norway, 29 April 2009, 'Climate Change in the Arctic,' <<http://arctic-council.org/filearchive/Tromsoe%20Declaration-1.pdf>>. ¹⁴⁰ *Ibid.*

¹⁴¹ *Senior Arctic Official (SAO) Report to Ministers*, Tromsø, Norway, April 2009, at 7–8, <http://arctic-council.org/workarea/agenda_tromso_meeting_april_2009/filearchive/final_sao_report_to_ministers_april_2009.pdf>.

¹⁴² See *Workshop Report in support of the Arctic Marine Strategic Plan, Reykjavik*, Iceland 20–22 October 2003, 'Foreword,' <http://www.pame.is/images/stories/AMSP_files/Workshop-Report.pdf>.

¹⁴³ See Arctic Council Action Plan to Eliminate Pollution of the Arctic, Barrow, 13 October 2000, s. 3.1 (Identification and Assessment of Problems), <http://www.ac-acap.org/files/acap%20org/ACAP_overall_strategy_Oct_2000.pdf>. The priorities are: food security,

V. ACHIEVEMENTS OF THE COOPERATION WITH RESPECT TO
CLIMATE CHANGE IN THE ARCTIC

The most important achievements of the Arctic-wide Cooperation regarding climate change are the establishment of the ACIA and the ACIA policy document.¹⁴⁴ The ACIA can be considered a significant development as far as addressing climate change in the Arctic is concerned. The aim of the ACIA was to gather knowledge on climate change and ultraviolet radiation and provide reliable information to the governments and peoples of the region by using indigenous knowledge in parallel with modern scientific methods.¹⁴⁵ The ACIA has presented the Arctic as the early warning zone for climate change because the consequences of global warming have been evident there since the 1960s and the consequences of global warming are projected to be twice as intense in the Arctic as in the rest of the world.

The ACIA projected the impact of climate change on human beings—in particular, the indigenous peoples of the Arctic—from various perspectives. Climate change may threaten the cultural survival of indigenous peoples whose ways of life are based on hunting, herding, and fishing. These peoples may be deprived of their traditional food and have to adapt to new species that may move to the north. The hunting of marine mammals on thin ice will become more challenging. Open water is less predictable than water that is covered by ice. New insects and animal vectors may cause new diseases. Increasing skin cancer, cataracts, and viral infections are already evident in the Arctic. The effect of climate change on the petroleum and fisheries industries may be mixed. Increased shipping would develop the financial situation of the Arctic, but it could also cause further pollution.

The ACIA policy document suggests two types of action: mitigation and adaptation.¹⁴⁶ For the mitigation of climate change-related risks, the document, in considering the findings of the ACIA and other relevant studies under the UNFCCC and other agreements, has suggested taking incentive actions without delay to address global emissions. It urges limiting greenhouse gas emissions to levels consistent with the ultimate goal of the

including drinking water; human health; ecosystem health, including biodiversity; the protection of living natural resources; and socio-economic benefits, including cultural values.

¹⁴⁴ *The Arctic Climate Impact Assessment Policy Document*, Issued by the Fourth Arctic Council Ministerial Meeting, Reykjavik, 24 November 2004, <http://www.acia.uaf.edu/PDFs/ACIA_Policy_Document.pdf> [ACIA Policy Document].

¹⁴⁵ See *Notes from the Second Ministerial Meeting of the Arctic Council*, Barrow, Alaska, United States, 12–13 October 2000, 'Ministerial Roundtable Discussions,' at 6, <http://arctic-council.org/filearchive/barrow_notes.pdf>.

¹⁴⁶ ACIA Policy Document, *supra* note 144, 'Arctic Climate Policy Actions.'

UNFCCC,¹⁴⁷ promoting appropriate technologies and sources of energy, and adopting policies and programs for the conservation and enhancement of carbon sinks and reservoirs, following the principles of sustainable development.¹⁴⁸

Adaptation is needed in situations where climate change is unavoidable, and special attention is needed to strengthen the adaptive capacities of populations in the Arctic.¹⁴⁹ The policy document recommends that the Arctic states work closely with Arctic residents, including indigenous and local communities in order to promote the ability to adapt to, and manage, the various impacts of climate change and ultraviolet radiation. The development and management of new economic opportunities in a sustainable manner may protect the environment and population of the Arctic. Local and indigenous knowledge, as well as the participation of local and indigenous communities, are required in the implementation of adaptive management strategies, policies, and programs concerning the use of natural resources and in reducing the risks from natural calamities, taking into account costs and benefits.

The policy document also recommends increasing natural and social science research on the impact of climate change and adaptation to it.¹⁵⁰ It encourages national and international research bodies and sponsors to develop and implement programs. It seeks to expand links to circumpolar research and monitoring networks in order to ensure relevant data for various research and monitoring programs. It also recognizes the need to consider methods of conducting further studies regarding climate change in the Arctic.

The policy document recommends that member states disseminate the ACIA documents in international forums to improve cooperation and address implications of climate change in the Arctic and promote the ACIA at the national and local levels by using various methods and languages in order to include more residents of the Arctic in the process.¹⁵¹ It affirms the importance of providing residents of the Arctic with information on climate change and monitoring in order to help them adapt and encourages the member states to integrate ACIA materials into educational, research, and training programs. Finally, the policy document recommends the

¹⁴⁷ In fact, the ultimate goal of the UNFCCC is the 'stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system' (Article 2). However, the convention does not clearly define that level and thus the concentrations that would exceed it. For details, see Michael Oppenheimer and Annie Petsonk, *Article 2 of the UNFCCC: Historical Origins, Recent Interpretations* 73 (Climate Change 195 (2005)).

¹⁴⁸ ACIA Policy Document, *supra* note 144, 'Arctic Climate Policy Actions.'

¹⁴⁹ *Ibid.* ¹⁵⁰ *Ibid.*, 'Research, Observations, Monitoring and Modelling.'

¹⁵¹ *Ibid.*, 'Outreach.'

reorganization of the work of the Arctic Council and its subsidiary bodies to provide better results in mitigating climate change. It recommends that the ministers:

- direct relevant technical working groups of the Arctic Council to review the scientific chapters of the ACIA in the context of their ongoing and future work programs and to report on the progress made at the 2006 ministerial meeting;
- decide to keep under review the need for an updated assessment of climate change in the Arctic, drawing, *inter alia*, on the IPCC fourth assessment report and the results of the 2007–9 International Polar Year;
- direct SAOs to nominate a focal point and to be responsible for an ACIA follow up, including an assessment of gaps in knowledge; and
- communicate, as appropriate, any Arctic Council ACIA follow-up actions to the COP of the UNFCCC.¹⁵²

A number of projects are currently operating under the various working groups of the Cooperation to address the consequences of climate change. In February 2010, AMAP registered sixty-five projects related to climate change operated by Arctic and non-Arctic states.¹⁵³ Most of these projects are research oriented for a better understanding of climate change in the Arctic and its impact on Arctic populations, flora, and fauna. Since the completion of the Vulnerability and Adaptation to Climate Change in the Arctic project, which aimed specifically at increasing the adaptive capacity of Arctic communities, there have been new projects, such as the Arctic Cryosphere: Snow, Water, Ice, and Permafrost in the Arctic.

The Cooperation has been concerned with the activities of the UNFCCC and has supported the convention since its inception, although the Cooperation does not have a formal position (for example, observer status) under the convention. At the tenth anniversary of the Arctic Council, it was noted that all of the members had joined the climate convention,¹⁵⁴ however, the unwillingness of the United States to ratify the Kyoto Protocol was not mentioned. The Cooperation decided to set up an Arctic venue at the recent UN climate summit in Copenhagen, to organize a side event and promote its projects on the Greenland Ice Sheet in a Changing Climate and the Arctic Cryosphere: Snow, Water, Ice, and Permafrost in the Arctic to COP-15.¹⁵⁵

¹⁵² *Ibid.*, ‘The Role of the Arctic Council.’

¹⁵³ The projects can be found in the AMAP Project Directory on the AMAP website at <<http://www.amap.no/>>.

¹⁵⁴ Salekhard Declaration, *supra* note 50, ‘Climate Change in the Arctic.’

¹⁵⁵ Meeting of Senior Arctic Officials, *supra* note 102 at s. 2.1 (Arctic Council Outreach at COP-15).

The Cooperation has gained a leading position in producing scientific knowledge on various issues related to the Arctic, particularly on climate science, and it supports high standards of research and appropriate initiatives in this regard. For instance, a task force on short-lived climate forcers is being established, and the Cooperation has been successful in involving a good number of non-Arctic states, along with international organizations, for this purpose. Furthermore, it has formed a climate expert group—the main aim of which is to provide expert advice to AMAP concerning future activities related to climate change in the Arctic. The group consists of two co-chairs who together call meetings with relevant experts in the field of climate change.¹⁵⁶

VI. MAIN SHORTCOMINGS OF THE COOPERATION IN ADDRESSING ARCTIC CLIMATE CHANGE

Some shortcomings in the Cooperation system relate not only to the issue of climate change but also to issues with the whole system. Considering general weaknesses together with the climate-specific drawbacks may provide fruitful ideas about the Cooperation, as explained in the following sections.

1. Soft Law Character

The major shortcoming of the Cooperation, as identified by many scholars, is its soft law character—its inability to make formal decisions that are legally binding on the member states. In other words, it is seen more as a decision shaper rather than a decision maker. However, the rapid climate changes of recent years have posed new challenges that a formal international organization with classical characteristics would not be able to address. A special arrangement of inter-state cooperation is needed with flexibility particularly in terms of the involvement of relevant non-state actors in policy making.

2. Lack of a Permanent Secretariat

The lack of a permanent secretariat can be seen as one of the main deficiencies within the Cooperation. Having an independent secretariat would enable the Cooperation to continue with its regular work, giving an individual personality to the Cooperation and keeping it free from the influence of individual members. A permanent secretariat could continue the Cooperation's functions in particular when the chair shifts because many

¹⁵⁶ The Climate Expert Group is co-chaired by John Walsh (University of Alaska) and Øystein Hov (Norwegian Meteorological Institute). There are no fixed members in the group. However, the co-chairs may request distinguished climate experts if they desire to have a meeting.

projects planned for the period of the outgoing chair remain incomplete. Alternatively, in the absence of a permanent secretariat, the activities of the Cooperation depend very much on the will of the state that holds the chair.

3. Ineffective Funding Mechanism

The fact that the Cooperation lacks its own funds to be used for its projects can be seen as a drawback to fulfilling its main objectives. At present, any Arctic state or permanent participant may propose any projects whatsoever that serve the key interests of the Cooperation, subject to showing a guarantee of adequate funding and support from another Arctic state. In fact, states may propose projects that are not very important simply in order to get credit for being the lead country of an Arctic Council project. The Cooperation manages its regular work with annual fees from the members. However, implementing development projects depends on outside funding. At present, it has developed a project support instrument jointly with the Nordic Environment Finance Corporation, which will be functional soon.¹⁵⁷ The Cooperation has limited control over its projects, and one of the main reasons for this situation is the issue of funding—any lead country may withdraw a project at any phase. For instance, Norway withdrew a follow-up to the Vulnerability and Adaptation to Climate Change in the Arctic project at the last SDWG meeting.¹⁵⁸ There is no specific guideline to ensure the Cooperation's control over its projects.

4. Poor Coordination with Respect to Working Groups

No clear boundaries delineate the working groups, which has made it difficult to determine which working group is the appropriate one to operate certain projects. At one time, there was criticism that the activities of the working groups generally lack specificity and are largely descriptive.¹⁵⁹ The participants at the recent SDWG meeting used such wording to criticize the fact that AMAP deals with health care issues, while CAFF handles cultural matters.¹⁶⁰ Canada proposed a strategic task force to decide on the working area of each working group and determine what specific type of work is to be done by which group.

¹⁵⁷ See PSI Status ACAP Working Group Meeting, Ottawa, Canada, 16–18 September 2009, <[http://www.ac-acap.org/files/WGM%202009.09.16-18%20Ottawa/4_Presentations/Status%20PSI-Criteria%20and%20Process%202009.ppt#256,1,PSI Status](http://www.ac-acap.org/files/WGM%202009.09.16-18%20Ottawa/4_Presentations/Status%20PSI-Criteria%20and%20Process%202009.ppt#256,1,PSI%20Status)>.

¹⁵⁸ Observation by the present author in the SDWG Regular Meeting, Copenhagen, Denmark, 10–11 November 2009.

¹⁵⁹ David VanderZwaag, *International Commons: The Arctic* 9 YbIEL 266 (1998).

¹⁶⁰ Observation by the present author, *supra* note 158.

5. Problems Concerning National Delegates

National delegates in the various committees or meetings in the Cooperation mainly come from their respective national foreign ministries and other departments, and are participating in the activities of the Cooperation in addition to performing their regular tasks. What is more, the member states frequently change their SAO and other representatives to the Cooperation. For these reasons, they can neither pay adequate attention to the Cooperation's work nor become deeply knowledgeable about the Cooperation, which results in the national delegations having few experts (subject to exceptions, of course), as opposed to the permanent participants, who use consultants with real knowledge about the functioning and activities of the Cooperation and other issues related to the Arctic. Sometimes a member state may include people who are not able to make a useful contribution to their delegation or it may send a big team that lacks proper coordination.

6. Lack of Realization of Arctic Needs at the National Level

Member states often do not pay adequate attention to issues related to the Arctic in their national priorities. One reason for this oversight could be that the inhabitants of the Arctic do not have enough influence in national policy making. National delegates to the Cooperation may lack knowledge on issues related to the Arctic since most of them are chosen from their national capital, mainly by the Ministry for Foreign Affairs, which is located far away in the south (except for Iceland). However, the Arctic part of the Arctic states is different from the national capitals in many respects. A survey conducted in certain southern cities of the Arctic states revealed that few people living in the non-Arctic parts of the member states know anything about the Cooperation.¹⁶¹

7. Members' Lack of Confidence in the Cooperation

The Cooperation has been unable to create confidence in its members, particularly with respect to addressing the consequences caused by climate change in the Arctic. For instance, the five states that have a coast on the Arctic Ocean (Canada, Denmark, Norway, Russia, and the United States), who are members of the Arctic Council, convened a meeting in 2008 aimed at managing the increasingly accessible Arctic Ocean. They adopted a declaration at the Arctic Ocean Conference in Ilulissat in which the three other members (Finland, Iceland, and Sweden) were not involved.¹⁶² In the decla-

¹⁶¹ The interviews conducted by the present author took place in Washington, New York, Moscow, Copenhagen, Aarhus, Stockholm, and Helsinki.

¹⁶² The Ilulissat Declaration Arctic Ocean Conference, Ilulissat, Greenland, 27–9 May 2008, 48 I.L.M. 372 (2009), <<http://arctic-council.org/filearchive/Ilulissat-declaration.pdf>>.

ration, the coastal states do not see the necessity of creating any new legally binding instruments since existing international agreements, mainly the LOSC, seem sufficient to address the increasing challenges in the marine Arctic. The same states convened another meeting in March 2010 in Chelsea, Canada. The initiative of the coastal states can be seen as a major challenge since a core Arctic issue is being dealt with outside the Cooperation.

8. Disagreements among the Members

The member states observe different challenges and opportunities caused by climate change in terms of their national interests. Thus, it seems reasonable that the members have taken different positions on some issues. There is clear disagreement in terms of financial support and formalizing the Cooperation, in addition to disagreements on specific issues.¹⁶³ For instance, from the very beginning, Canada wanted to have a formal international organization. Finland took the initiative of reorganizing the Cooperation during its chairmanship. Norway tried to bring significant changes within the Cooperation's functioning system during the last chair period, which did not work out due to different opinions among the member states.¹⁶⁴ The United States is very reluctant to see the Cooperation become a formal international organization. However, uniting states associated with the Cooperation may yet bring about a functional global climate regime since two members (Russia and the United States) and an *ad hoc* observer (China) play a key role in global climate politics.¹⁶⁵

9. Other Deficiencies of the Cooperation

In addition to the above-mentioned deficiencies, the Cooperation lacks a separate unit dealing with external relationships with other states and relevant organizations, sufficient practical activities using the results of the research, and the ability to evaluate prepared documents (guidelines and reports) in terms of influence and value.

VII. PROPOSAL FOR A MODEL COOPERATION ADDRESSING CLIMATE CHANGE IN THE ARCTIC

1. Introduction

Although there have been many reforms to the Cooperation since its inception, many scholars still question, twenty years after its establishment, its

¹⁶³ Samantha Smith has expressed her view as follows: 'For a variety of reasons, the US has worked to ensure that the Arctic Council has a limited mandate, and thus has limited significance.' Samantha Smith, *Ministerial with Only Three Ministers* 4 WWF Arctic Bulletin 4 (2000).

¹⁶⁴ Interview with Stein Paul Rosenberg, senior advisor to the Ministry of Foreign Affairs (Section for the High North, Resources and Russia), Norway (11 November 2009, Copenhagen).

¹⁶⁵ Stokke, *supra* note 6 at 349–50.

effectiveness, particularly with respect to climate change.¹⁶⁶ However, the Cooperation is unwilling to welcome criticism even though there have been internal debates about its success. For instance, the SAO meeting criticized Oran Young severely when he introduced the Arctic governance project, warning, at the same time, that the chairperson should not include any such project criticizing the Cooperation in future agendas.¹⁶⁷ The Cooperation's achievement with respect to creating awareness among indigenous peoples in countering climate change has not been without question.¹⁶⁸ It is true that the present activities of the Cooperation are not sufficient to counter the challenges created by rapid climate change, which, in any case, is a daunting task. There is also evidence that international law has occasionally incorporated rules that once were soft law¹⁶⁹ and that soft law can serve as a platform for making treaties.¹⁷⁰

2. Reasons for Reforming the Cooperation

At present, the Cooperation has taken the issue of climate change seriously due to its increasing impact on the ecosystem and inhabitants of the Arctic. However, it is true that researchers involved in climate science have become frustrated since politicians have not implemented many of their findings. The ongoing uncertainty and failure of the UNFCCC to establish an effective global climate change regime are evidence that there is a need for regional cooperation such as the Arctic-wide Cooperation.¹⁷¹

¹⁶⁶ Koivurova, *supra* note 5.

¹⁶⁷ Observation by the present author in the SAO meeting (12–13 November 2009, Copenhagen).

¹⁶⁸ *Towards an Inuit Declaration on Arctic Sovereignty*, Statement Issued by Inuit Leaders at the Inuit Leaders' Summit on Arctic Sovereignty, Kuujjuaq, Quebec, 6–7 November 2008, <http://www.sikunews.com/skriv_ut.html?catid=2&artid=5711>.

¹⁶⁹ The incorporation of three General Assembly resolutions (GA Res.1721/XVI, 1884/XVIII and 1962/XVIII) into the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space including the Moon and Celestial Bodies 1967 is an example. For details, see C.M. Chinkin, *The Changes of Soft Law: Development and Change in International Law* 38 Int'l & Comp. L. Q. 850 at 857 (1989).

¹⁷⁰ For instance, the Declaration of Legal Principles Governing Activities of States in Exploration and Use of Outer Space, 13 December 1963, UN Doc.A/Res/1962 (XVII), led to the negotiation of the Treaty on Principles Governing Activities of States in the Exploration and Use of Outer Space, 610 U.N.T.S. 205. The Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction, G.A. Res.2749, U.N.GAOR, 25th Sess., Supp. No. 28 at 24, UN Doc.A/8028 (1971), reprinted in 10 I.L.M. 220 (1971), preceded the negotiation of the United Nations Convention on the Law of the Sea, 21 I.L.M. 1261 (1982). The Universal Declaration of Human Rights, 10 December 1948, UN Doc.A/Res/217 (III 1948), preceded two legally binding instruments: the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, and the International Covenant on Economic, Social and Cultural Rights, 16 December 1966, in force 3 January 1976, 993 U.N.T.S. 3.

¹⁷¹ For instance, the recently adopted Copenhagen Accord has in no way satisfied people around the world, <<http://unfccc.int/resource/docs/2009/cop15/eng/107.pdf>>.

The findings of the ACIA and the recent report of the IPCC predict an alarming situation for the globe as well as for the Arctic. The situation of the Arctic will become more complicated when the Arctic Ocean opens up due to the melting of sea ice caused by climate change. Navigation, fishing, and the exploration and exploitation of resources by coastal and other states recognized by the LOSC will create numerous challenges for the Arctic environment—for example, impacts on health, tourism, and traditional culture. On the other hand, the melting of the Greenlandic ice sheet and the frozen Arctic Ocean will cause a rise in sea levels that will result in the creation of a large number of environmental refugees because many coastal and low-lying island states will be under water. The situation will be unmanageable if those environmental refugees try to move to the industrialized states that are largely responsible for global climate change.

The Cooperation needs to be strong enough to address these challenges before the Arctic Ocean is completely open due to melting ice. As a regional forum, the Cooperation may adapt to changes at the Arctic level and join the global community in mitigating climate change because regions outside the Arctic obviously contribute to climate change in the Arctic.

3. Existing Proposals Regarding the Reform of the Cooperation

From the very beginning, it was argued that a formal international treaty was the best basis from which to deal with these issues. Donat Pharand, for instance, wanted to develop Arctic-wide cooperation by drafting a formal international treaty under the auspices of the Canadian Arctic Resources Committee during the formation of the AEPS.¹⁷² However, neither the AEPS nor later the Arctic Council accepted his proposal. After the Cooperation had been in existence for a decade, some scholars did not even see the possibility of it being a formal international organization in the near future.¹⁷³

Linda Nowlan has argued for the formalization of Arctic cooperation through an international treaty that would derive inspiration from the Madrid Protocol to the Antarctic Treaty and contain principles, substantive legal obligations, and innovative features relevant to the Arctic.¹⁷⁴ She has pointed out the dissimilarities (for example, lands under national jurisdiction, permanent inhabitants, industrial activities, strategic and militarized territories) and similarities (for example, an inaccessible and fragile environment that is vulnerable to outside sources, an extreme climatic condition) between the Arctic and Antarctica while explaining the need for a

¹⁷² D. Pharand, *Draft Arctic Treaty: An Arctic Region Council Proposal Prepared for the Canadian Arctic Resources Committee* (1991), <<http://www.carc.org/pubs/v19n02/5.htm>>.

¹⁷³ VanderZwaag, Huebert and Ferrara, *supra* note 6 at 166–71.

¹⁷⁴ L. Nowlan, *Arctic Legal Regime for Environmental Protection* 44 IUCN Environmental Policy and Law Paper 40 (2001), <<http://data.iucn.org/dbtw-wpd/edocs/EPLP-044.pdf>>.

new Arctic environmental agreement.¹⁷⁵ She concludes that there must be a move made to promote and strengthen the innovative features that are already part of the Arctic regime.¹⁷⁶ However, at some point, she argues for allowing a certain period of time to evaluate the effectiveness of the existing soft law arrangement and determine whether it needs to be supplemented by a treaty.¹⁷⁷ David Leary expresses reservations about considering the Antarctic Treaty System (ATS) as a model for an Arctic treaty since the Arctic includes areas that are mainly under the national jurisdiction of the Arctic states, and there are territorial disputes for areas that lie beyond national jurisdiction.¹⁷⁸ On the other hand, Philippe Sands has argued that there is a case for formal international cooperation for the Arctic, similar to that which exists for Antarctica, in the near future:

The adoption of the Arctic Environmental Protection Strategy and the establishment of the Arctic Council provide a useful opportunity to develop new legal arrangements and institutions to govern an ecosystem which transcends national boundaries and requires international cooperation for its adequate protection to be assured. The soft law approach currently envisaged provides a first step; ultimately, it will be necessary to establish appropriate institutional arrangements and substantive rules, perhaps similar to those applied in the Antarctic, to ensure that agreed obligations are respected and enforced.¹⁷⁹

The European Parliament has suggested adopting an international treaty for the protection of the Arctic inspired by the ATS, however, taking into account the populated nature of the Arctic and ensuring the rights and needs of the Arctic inhabitants.¹⁸⁰ In contrast, the European Union Commission has preferred the implementation of existing instruments rather than creating any new legal instruments for protecting the Arctic environment.¹⁸¹

The SAOs have made a concrete proposal to reform the Cooperation that includes, *inter alia*, better coordination among the working groups, communication with other regional bodies, increased funding, the provision of financial support to permanent participants, and the expansion of the role of observers.¹⁸² Following this step, the Arctic Athabaskan Council,

¹⁷⁵ *Ibid.* at viii–ix. ¹⁷⁶ *Ibid.* at 66. ¹⁷⁷ *Ibid.* at x.

¹⁷⁸ Leary, *supra* note 6 at 54–5.

¹⁷⁹ Sands, *supra* note 6 at 731.

¹⁸⁰ European Parliament, *Resolution of 9 October 2008 on Arctic Governance*, para. 15. <<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2008-0474>>.

¹⁸¹ *Communication from the Commission to the European Parliament and the Council, the European Union and the Arctic Region*, Doc. COM/763(2008) final (20 November 2008) at 4, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0763:FIN:EN:PDF>>.

¹⁸² See *SAOs Report to Ministers on The Review of the Arctic Council Structures*, Doc. SA02002/A/8.0, Version 15 May 2002 FINAL, at <http://arctic-council.npolar.no/index.html/Meetings/SAO/2002%20u/8_0_review.pdf>. Finland commissioned Mr. Pekka Haavisto to

a permanent participant in the Cooperation, has suggested reforms in response to the selected weak points.¹⁸³ However, the suggestions were, according to Norway—which was the chair at the time—very similar to suggestions made when Finland was chair in 2001–2.¹⁸⁴

The Worldwide Fund for Nature (WWF), an international non-governmental organization, has proposed forming a commission under the present Cooperation in order to conclude a formal treaty protecting nature in the Arctic.¹⁸⁵ As Neil Hamilton, who was then the director of the WWF Arctic Programme, has said:

We need a new approach, which includes thinking about a solid Arctic Treaty and a multilateral governance body ... This is the only way to ensure the implementation of sustainable development regimes and help the Arctic adapt to the severe impact of climate change and ultimately stabilise the world's climate.¹⁸⁶

Olav Schram Stokke has argued for a flexible approach to norm building in order that the Cooperation can interact with other existing institutions.¹⁸⁷ Indeed, the Cooperation has already involved a number of existing institutions and cooperated in producing scientific data. He and Geir Hønneland have noticed 'three great powers' in terms of Arctic actors: the Russian Federation, the European Union, and the United States. Any initiative concerning the Cooperation needs their support and active contribution to succeed.¹⁸⁸ The Arctic Military Environmental Cooperation (AMEC), which is another entity of Arctic politics, was initiated in 1996 and involves the ministries of defence of Norway, Russia, and the United States. The United Kingdom joined the AMEC later in 2003.

Julia Jabour and Melissa Weber have proposed a flexible governance structure in the Arctic to advance national interests in a cooperative manner that takes into account the regional interdependence of the Arctic states and their own economic and political pressures as well as technological

prepare a report for the SAOs concerning the structure of work in the Arctic Council. The final report was delivered to the Arctic Council Secretariat on 29 June 2001 after the SAOs had discussed the draft report (12–13 June 2001). This report formed the background for the SAO recommendations.

¹⁸³ Improving the Efficiency and Effectiveness of the Arctic Council: A Discussion Paper prepared by the Arctic Athabaskan Council, March 2007, 6–8, <http://arctic-council.org/filearchive/AAC_Arctic_Council_Future_Dec_2006.pdf>.

¹⁸⁵ See Worldwide Fund for Nature, <<http://www.panda.org>>.

¹⁸⁶ See <http://www.wwf.org.uk/what_we_do/press_centre/?134/New_rules_needed_for_the_Arctic_WWF>.

¹⁸⁷ O. Schram Stokke, *The Law of the Sea Convention and the Idea of a Binding Regime for the Arctic Marine Environment*, paper prepared for the Seventh Conference of Parliamentarians of the Arctic Region, Kiruna, Sweden, 2–4 August 2006, <http://www.arcticparl.org/_res/site/File/images/Underlagsrapport%20eng-rysk3.pdf>.

¹⁸⁸ Geir Hønneland and Olav Schram Stokke, *Introduction*, in Hønneland and Stokke, *supra* note 6 at 6–8.

advancements.¹⁸⁹ Meanwhile, Hans Corell has proposed the implementation of existing international treaties rather than building a new regime for the region, although he advocates the strengthening of the present Cooperation by engaging more entities such as the general public, politicians, businesses, and governments.¹⁹⁰

D.R. Rothwell has advocated that the Arctic could be seen as part of the common heritage of mankind.¹⁹¹ Although an inspiring idea, Rothwell's proposal has to meet with the reality of the law of the sea. Only the deep sea bed is currently seen as part of the common heritage of mankind, and after the Arctic states have drawn the outermost limits of the continental shelves, there is not much sea bed left. Yet, the consequences of climate change in the Arctic have different impacts on different places. Therefore, Timo Koivurova has suggested that creating a framework treaty that would be managed by the Arctic states would be a faster way to proceed since the consequences of climate change in the Arctic will create severe environmental problems for the region in a relatively short time frame.¹⁹² His detailed proposal with Erik Molenaar points out some ambitious alternatives, focusing mainly on marine contexts.¹⁹³ However, it would be difficult to conclude such an instrument since the Arctic states vary in their commitment to the activities of the Cooperation.

VIII. CONCLUSION

There was not much reform in the Cooperation when the AEPS was replaced by the Arctic Council in 1996—there were a few changes, although the fundamental elements of the Cooperation, including its legal status, financing, and institutional structure, remained nearly identical. Of particular importance, where issues related to climate change are concerned, is the soft law character of the Cooperation—that is, the fact that it cannot produce any legally binding rules or standards. Therefore, most of the proposals mentioned earlier in this article recommend a formal legal instrument to replace the Cooperation in the belief that a formal, legally binding agreement would be taken more seriously by the member states than a soft law instrument.¹⁹⁴

¹⁸⁹ Jabour and Weber, *supra* note 6 at 40.

¹⁹⁰ Corell, *supra* note 6 at 321–4. ¹⁹¹ Rothwell, *supra* note 6 at 229–31.

¹⁹² Koivurova, *supra* note 6 at 22 and 26.

¹⁹³ Timo Koivurova and Erik J. Molenaar, International Governance and Regulation of the Marine Arctic: A Proposal for a Legally Binding Instrument, a report prepared for the WWF International Arctic Programme (2010), <<http://img9.custompublish.com/getfile.php/1092819.1529.wdyvvtwvst/Proposal+for+a+Legally+BindingInstrument+for+Printing.pdf?return=arcticgovernance.custompublish.com>>.

¹⁹⁴ See, however, Judith Goldstein and Lisa L. Martin, *Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note* 54 Int'l Org. 603 at 604 (2000); Md. Waliul Hasanat, *Definitional Constraints Regarding Soft Law* 3 AALCO Quarterly Bulletin 8 at 31–2 (2007);

However, these proposals do not seem feasible at this time because of the lack of support for a binding instrument from the member states.

A wise suggestion would be not only to consider the available documents, reports, and statements in making recommendations to improve the functioning of the Cooperation but also to take into account the historical point of view and the reaction of the members and the permanent participants. The existence of three 'great powers' and their positions will certainly have an influence on the future characteristics of the Cooperation. An early initiative for a formal treaty might even lose some members if it is launched before all members fully recognize the importance of the Cooperation with respect to combating climate change. Another downside of a formal treaty with respect to the Cooperation is that it may pose new challenges to the special position that indigenous peoples have gained through the Cooperation.¹⁹⁵ Alternatively, if a group of states is really committed to achieving success in a specific field through international cooperation or based on some instrument, then the legal status of the cooperation¹⁹⁶ or the instrument¹⁹⁷ does not seem like a serious obstacle. In fact, states comply with certain instruments because of their own interests or in order to maintain their reputation in international society.¹⁹⁸ Thus, in the case of the Cooperation, it would be important to pay attention to the practical obstacles that it faces at the moment rather than creating legally binding obligations or a formal international organization. The focus could be on how the Cooperation could make politicians knowledgeable about issues affecting the Arctic, particularly with respect to climate science. Such knowledge would enable the Cooperation to address climate change in the Arctic more effectively. In the short term, working groups should be coordinated effectively, and their working boundaries should be clarified. The Arctic states should ensure that extra burdens are not imposed on national delegates, so

Dinah Shelton, *Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized?* 35 *Denver J. Intl L. & Policy* 129 (2006).

¹⁹⁵ The Cooperation supports the Indigenous Peoples Secretariat (IPS) along with granting them permanent participant status. See Koivurova, *supra* note 6 at 26.

¹⁹⁶ For instance, as a soft law body, the Barents Euro-Arctic Council has contributed to the conclusion of a legally binding instrument: the Agreement between the Governments in the Barents Euro-Arctic Region on Cooperation within the Field of Emergency Prevention, Preparedness and Response, Moscow, 11 December 2008.

¹⁹⁷ The Basel Capital Accord could be an example. The Basel Committee on Banking Supervision set out a group of policies regarding financial institutions in 1988. The accord, never considered a treaty under international law, does not create binding obligations on the states involved. Not even the committee has the authority to enforce recommendations, although most of the states adhere to its policies in their financing system by enacting relevant national legislation. Surprisingly, the policies have been observed not only by the states that negotiated the accord but also by states that were not involved. See the Basel Capital Accord at <<http://www.bis.org/publ/bcbs04a.htm>>.

¹⁹⁸ See Andrew T. Guzman, *A Compliance-Based Theory of International Law* 90 *Cal. L. Rev.* 1823 at 1864 (2002).

that they can spend enough time on the Cooperation's activities; national governments should develop closer contacts with residents of the Arctic and ensure their proper representation in national delegations; and regional representatives in national governments should be included in order to highlight issues affecting the Arctic at the national level. The SAOs should not be changed too frequently. If an SAO retires from governmental service, the position should be filled by someone who has experience participating in the delegation.

Setting up an international Arctic secretariat with an office with permanent representatives from all of the member states and one for the permanent participants might ensure up-to-date communications in all relevant issues involving national and group interests. States interested in various issues would have an opportunity to exchange opinions in a more comfortable setting at the premises of the Secretariat, which might lead to the conclusion of several international instruments or arrangements regarding different issues, where the Cooperation would play the central role of negotiating such instruments. Establishing confidence and faith among the members is largely a political issue—more interaction may be seen as a means for gaining such confidence and faith. The proposed secretariat could be the permanent venue for such communications, and it could be surrounded by various units: one could assess the utilization of research findings conducted under the auspices of the Cooperation, another could coordinate international external relations, and another could evaluate prepared documents (guidelines and reports) in terms of influence and value.

Cooperation among the Arctic states was established in 1991, and advanced through several reforms from 1996 to the present. These changes have brought the Cooperation closer to institutional status. However, it still faces certain challenges within its present capacity and has so far been unable to deal effectively with the consequences of rapid climate change in the Arctic. Its timely reform is warranted. Such a reform would allow the Arctic states to combat the impacts of climate change in the Arctic as well as play an effective role in limiting global climate change. In fact, there is not much time left.

4: COOPERATION IN THE BARENTS EURO-ARCTIC REGION IN THE LIGHT OF INTERNATIONAL LAW

‘Cooperation in the Barents Euro-Arctic Region in the Light of International Law’, 2 *The Yearbook of Polar Law* (2010), pp. 279-309.

CHAPTER 4 TABLE OF CONTENTS:

1. INTRODUCTION	279
2. THE ORGANISATIONAL FRAMEWORK OF THE COOPERATION	281
2.1. The Barents Euro-Arctic Council	282
2.1.1 . Members	282
2.1.2. Observers	284
2.1.3. Committee of Senior Officials.....	284
2.2. The Barents Regional Council.....	284
2.2.3 Members	285
2.2.4 The Executive Regional Committee.....	286
3. THE FUNCTIONAL FRAMEWORK.....	286
3.1. Subordinate Bodies.....	286
3.1.1 . Individual Subordinate Bodies under the BEAC.....	286
3.1.1.1. Working Group on Economic Cooperation.....	287
3.1.1.2. Working Group on Custom Cooperation.....	287
3.1.1.3. Working Group on Environment.....	288
3.1.1.4. Working Group on Youth Policy.....	288
3.1.1.5. Steering Committee for the Barents Euro-Arctic Pan-European Transport Area	289
3.1.1.6. Interim Joint Committee on Rescue Cooperation.....	290
3.1.2. Individual Subordinate Bodies under the BRC	290
3.1.2.1. Regional Working Group on Environment.....	291
3.1.2.2. Regional Working Group on Communication.....	291

3.1.2.3. Regional Working Group on Youth Issues.....	292
3.1.2.4. Regional Working Group on Investment and Economic Cooperation.....	292
3.1.3. Joint Subordinate Bodies	293
3.1.3.1. Joint Working Group on Health and Related Social Issues.....	293
3.1.3.2. Joint Working Group on Education and Research	294
3.1.3.3. Joint Working Group on Energy.....	296
3.1.3.4. Joint Working Group on Culture	296
3.2. The Secretariats	298
4. LEGAL ELEMENTS IN THE COOPERATION	299
5. CONCLUSION.....	307

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Cooperation in the Barents Euro-Arctic Region in the Light of International Law

*Md. Waliul Hasanat**

1. Introduction

Cooperation in the Barents Euro-Arctic Region (BEAR) (hereinafter the Cooperation) formally began in 1993 with the establishment of separate two platforms: the Barents Euro-Arctic Council (BEAC) and the Barents Regional Council (BRC). However, neither the BEAC nor the BRC was formed as the result of an international treaty. In the case of the BEAC, the five Nordic states (Denmark, Finland, Iceland, Norway and Sweden) and the Russian Federation, along with the Commission of the European Communities, agreed on a platform aiming to promote sustainable economic and social development in the Barents Region,¹ which had been an area of military confrontation during the Cold War. In the case of the BRC, the regional governments (e.g., provincial, county, and oblast' governments) of the region, together with the indigenous peoples, created another platform. From the beginning of the Cooperation, both platforms have been working together closely. In the

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¹ The Cooperation has introduced the concept of the Barents Region, which initially included the county of Lapland in Finland, the counties of Finnmark, Troms, and Nordland in Norway, "the counties of Murmansk and Archangel in Russia," and the county of Norrbotten in Sweden. Declaration, Cooperation in the Barents Euro-Arctic Region, Conference of Foreign Ministers, adopted in the First and Founding Session of the Barents Euro Arctic Council, Kirkenes, Norway, 11 January 1993, "Participation and area of application." http://www.barentsinfo.fi/beac/docs/459_doc_KirkenesDeclaration.pdf (accessed December 30, 2009). Later on the region expanded with the inclusion of the Republic of Karelia, the Nenets Autonomous Okrug, and the Republic of Komi in the Russian Federation, and Kainuu, Oulu, and the Vasterbotton Regions.

course of time, the Cooperation has become more important with respect to addressing the challenges faced by the inhabitants of the region.

The idea of two-fold cooperation has created a unique international situation that seems suitable for fulfilling the needs of the inhabitants of the Barents Region. An important characteristic of the Cooperation is that it does not generate any legally binding obligations under international law, nor does it follow the formalities applicable to a formal international organisation as articulated in international law.² The Cooperation has developed on the basis of the political will to safeguard the wellbeing of the region. It has established close relationships between universities, research institutes, administrative and other relevant bodies in the region. Yet, despite certain institutional weaknesses (e.g., lack of legally binding obligations), the Cooperation functions through various working groups and other programs since the political commitments of the members generate some sort of obligations which are non-binding under international law, though they are binding in other ways.³

The Cooperation has acquired a mature organisational shape these days. The structure chosen for the Cooperation has attracted interest among scholars of international law and international relations, who would like to see how informal forums carry out their work dealing with common concerns at the international level. The existing literature and scholarly works dealing with the region cover several different aspects.⁴ However, the legal issues

² Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986, signed in Vienna, Austria 21 March 1986, not yet in force; *International Legal Materials* 25 (1986):543. See also Jan Klabbers, *An Introduction to International Institutional Law* (Cambridge: Cambridge University Press, 2002), 203; Josef L. Kunz, "General International Law and the Law of International Organizations," *The American Journal of Int'l Law* 47 (1953):456–462.

³ Timo Koivurova, *Environmental Impact Assessment in the Arctic: A Study of International Legal Norms* (Aldershot: Ashgate Publishing Limited, 2002), 125.

⁴ See, e.g., Oran R. Young, "Institutional Linkages in International Society: Polar Perspectives," *Global Governance* 2 (1996):1–24. Pertti Joenniemi, "The Barents, Baltic and Nordic Projects: A Comparative Analysis," in *The Barents Region Revisited*, ed. Geir Flikke (Oslo: Norwegian Institute of International Affairs, 1998), 9–23. John M. Kvistad, *The Barents Spirit: The process of regionalization and Norwegian foreign policy in the Barents Euro-Arctic Region* (Oslo: University of Oslo Press, 1994). Frank Möller and Samu Pehkonen, "Discursive Landscapes of the European North," in *Encountering the North: Cultural Geography, International Relations and Northern Landscapes*, eds. Frank Möller and Samu Pehkonen (Aldershot: Ashgate, 2003), 1–30. Mark Monsma, "Winds of Change within the Barents Organization: An Institutional Analysis of Transnational Regionalization in the North," (*Working Paper No. 10*, Umeå: CERUM, 1995). Nils Orvik, "Nordic Cooperation and High Politics," *International Organization* 28 (1974), 61–88. Alexander A. Sergounin, "The Barents Regional Cooperation and the Russian Security Discourse," in *The Barents Region*

have scarcely attracted the attention of scholars,⁵ leading to a few questions regarding the Cooperation: Should the two platforms be a single entity within the Cooperation, or should they be treated as individual bodies from the viewpoint of international law? What type of obligations does the Cooperation create? Does allowing membership to states outside the region or the active participation of non-state actors (e.g., indigenous peoples) create any challenge to established intergovernmental cooperation? Since the Cooperation has been in existence for almost two decades, it would be useful to have a legally oriented study to examine how well it functions and serves the needs of the Barents and the global community at large.

The aim of the present article is to examine the Cooperation's position from the viewpoint of international law rather than a critical view of its performance, successes, or failures. However, a brief description of both platforms and their activities would be useful in providing a good understanding of the Cooperation system. The following section describes the structural framework of the Cooperation. Section three deals with the functional framework of the Cooperation and its activities. Section four explains legal elements in both platforms. The concluding section attempts to determine the legal status of the Cooperation under international law.

2. *The Organisational Framework of the Cooperation*

By 'organisational framework,' I mean, for the purposes of this article, the basic working structure of the two platforms within the Cooperation. It points to the entities responsible for interior functions as well as policy-making. The organisational framework of the BEAC and the BRC is described below.

Revisited, ed. Geir Flikke (Oslo: Norwegian Institute of International Affairs, 1998), 48. Ulf Wiberg, "Cooperation in the Barents Region," in *The Barents Region: Security and Economic Development in the European North*, eds. Jan Å. Dellenbrant and Mats Olsson (Umeå: CERUM, 1994), 27–39. Nils A. Engstad, "Developing the Barents Sea Region: Opportunities and Risks," in *The Barents Region: Security and Economic Development in the European North*, eds. Jan Å. Dellenbrant and Mats Olsson (Umeå: CERUM, 1994), 21–23. Johan Eriksson, "Security in the Barents Region: Interpretations and Implications of the Norwegian Barents Initiative," (*Working Paper No. 5*, Umeå: CERUM, 1995).

⁵ See, however, Md. Waliul Hasanat, "Definitional Constraints Regarding Soft Law," *AALCO Quarterly Bulletin* 3 (2007):28–30 and S.G. Sreejith, "Subjective Environmentalism: The Barents Euro – Arctic Council and Its Climate Policy," in *Climate Governance in the Arctic*, eds. Timo Koivurova, Karina Keskkitalo and Nigel Bankes (United Kingdom: Springer, 2009), 383–402.

2.1. *The Barents Euro-Arctic Council*

The Kirkenes Declaration⁶ 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 aiming to support and promote regional cooperation in the Barents Region. Two special features of the BEAC are the fact that membership is open to all interested states⁷ and that the active participation of indigenous peoples along with states is recognized within the Cooperation. The structures chosen by the BEAC and the operational modes set forth in the Terms of Reference⁸ have provided its organisational shape. The organisational framework of the BEAC encompasses members, observers and the Committee of Senior Officials.

2.1.1. *Members*

The members are: Denmark, Finland, Iceland, Norway, the Russian Federation, Sweden, and the European Commission. However, membership is open to other states that wish to take part in the BEAC activities.⁹ The BEAC chairmanship rotates only between selected members rather than being extended to all members. It is understandable that a question may arise concerning this apparent discrimination within a progressive platform in terms of its incorporating members. However, this special arrangement is understandable for practical reasons – only states that possess territories within the Barents Region can hold the chairmanship – although this explanation has not been set down in any document produced by the BEAC. The Terms of Reference simply state:

The chairmanship of each session will be assumed by the Minister of Foreign Affairs of the host country. The chairmanship will initially rotate between Finland, Norway, Russia and Sweden.¹⁰

⁶ *Supra* note 1. 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.

⁷ The Kirkenes Declaration, “Participation and area of application.” *Supra* note 1. See also note 8, Section 2.

⁸ Terms of Reference for the Council of the Barents Euro-Arctic Region, adopted by the Cooperation in the Barents Euro-Arctic Region, Conference of Foreign Ministers, Kirkenes, Norway, 11 January 1993. The Terms of Reference were set forth in the Annex to the Kirkenes Declaration, http://www.barentsinfo.fi/beac/docs_tmp/460_doc_AnnextotheKirkenesDeclaration.pdf (accessed December 31, 2009).

⁹ The Kirkenes Declaration, “Participation and area of application,” *supra* note 1.

¹⁰ *Supra* note 8, Section 6.

In selecting the chair, the members follow a principle which is similar to that used in the selection of the chair of the BRC. The principle is that a state cannot hold the chairmanship at the same time that its region holds the chair of the BRC. In practice, the tenure of the chairmanship is two years. The state presently holding the chair is Sweden.

The BEAC¹¹ meets at the level of Foreign Ministers; however, representatives of the BRC, indigenous peoples, parliaments, regional bodies and invited guests are permitted to make presentations at Ministerial Meetings along with the members and observers. The Ministerial Meetings were held annually¹² up to 2001, following the directions given in the Terms of Reference;¹³ since then, they have convened every other year. The decisions of the BEAC and its subsidiary bodies are made with the consensus of the members who are present.¹⁴ In 2003 the Cooperation brought together the Heads of the Governments of the region for its ten-year celebration, at which a declaration was adopted.¹⁵ The Heads of Government emphasized their interest in further strengthening the Cooperation as well expressing appreciation for the EU programs operating in the region.¹⁶ The BEAC has continued with meetings of Ministers of the Environment in the Barents Region since 1994,¹⁷ in addition to the meetings of Foreign Ministers. In fact, the meetings *inter alia* reaffirm the BEAC's commitment to and support for certain international legal instruments.¹⁸

¹¹ The Council includes representatives of the member governments and the European Commission (EC).

¹² The year 1997 was exceptional in that there was no Ministerial Meeting.

¹³ Section 5.

¹⁴ *Supra* note 8, Section 9.

¹⁵ Barents Euro-Arctic 10 Year Anniversary Declaration, Kirkenes, Norway, 11 January 2003, http://www.barentsinfo.fi/beac/docs/462_doc_BarentsSummitDeclaration.pdf (accessed December 30, 2009).

¹⁶ *Ibid.*, Paragraph 2.

¹⁷ The Ministers of the Environment met for the first time in 1994 in Bodø, where they adopted the Barents Euro-Arctic Council Environmental Action Program, followed thereafter by meetings of the Ministers of the Environment in Rovaniemi in 1995, St. Petersburg in 1997, Umeå in 1999, Kirkenes in 2001, Luleå in 2003, Rovaniemi in 2005, and Moscow in 2007. Ministers responsible for other important fields (culture, youth and sports, etc.) also meet occasionally.

¹⁸ For instance, their commitment to the UN Conference on Environment and Development in Rio de Janeiro in 1992, the World Summit on Sustainable Development in Johannesburg in 2002, Millennium Development Goals, the Convention on Biological Diversity, and the Stockholm Convention on Persistent Organic Pollutants.

2.1.2. *Observers*

The Cooperation has involved a number of states by giving them observer status in order to function more efficiently. The BEAC Terms of Reference permits a wide range of participants:

The Council and its working bodies may decide to invite special participants, guests or observers to contribute to its work. This may include representatives of regions, subregions and international organizations.¹⁹

In fact, the observers are chosen on the basis of their interest and willingness to participate in BEAC activities. The observer states are Canada, France, Germany, Italy, Japan, the Netherlands, Poland, the United Kingdom, and the United States of America.²⁰

2.1.3. *Committee of Senior Officials*

There is another unit consisting of a group of senior officials within the BEAC, besides members and observers, known as the Committee of Senior Officials (CSO). However, the CSO cannot be seen purely as an organisational component, since it is also active as the central point of the functional units. The CSO consists of ambassadors or officials selected by the member states and the EC, although representatives from the nine observer states of the BEAC and indigenous peoples also participate regularly in CSO meetings. The CSO oversees BEAC activities in between the Ministerial Meetings. It meets on a regular basis, usually four or five times a year. It can form new Working Groups (WGs) suggested by the BEAC, provide guidance to the WGs, and terminate a working group that has completed its task.

2.2. *The Barents Regional Council*

The regional governments of the Barents Region and the Saami Council established the Barents Regional Council (BRC) by signing a cooperation protocol²¹ (hereinafter the Protocol Agreement). In fact, the BRC was established at the same place and day as the BEAC with the similar aims and objectives. It promotes basic day-to-day cooperation in the region.²² The

¹⁹ Section 11.

²⁰ "Observer States of the Barents Euro-Arctic Council," <http://www.barentsinfo.org/?deptid=25893> (accessed December 31, 2008).

²¹ 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 December 30, 2009).

²² Andrei Kozyrev, "Visions of the Authors of the Barents Euro Arctic Region Cooperation – Past and Future," in *Europe's Northern Dimension: the BEAR Meets the South*, eds. Lassi

organisational framework of the BRC includes two categories: members and the Executive Regional Committee (RC).

2.2.1. *Members*

The seven regional governments which, along with the Saami Council, adopted the statutory protocol are considered to be permanent members of the BRC.²³ However, the membership of the Saami Council is rather different since the Protocol Agreement states:

The Regional Council consists of the leaders of the County Councils (Fylkeskommune, Oblast and Län) in the Barents Region. In addition, a joint representative appointed by the popularly elected Sami bodies of the Region will attend.²⁴

The Protocol Agreement provides for the incorporation of new members through the submission of an application.²⁵ In the course of time, the BRC has expanded its membership to thirteen regions: three from Norway (Nordland Fylke, Troms Fylke, and Finnmark Fylke), two from Sweden (Västerbotten Län and Norrbotten Län), three from Finland (Kainuu, Oulu, and Lapland) and five from Russia (Murmansk Oblast, the Republic of Karelia, Arkhangelsk Oblast, the Nenets Autonomous Okrug, and the Republic of Komi).²⁶ However, it later refused membership to North Karelia, making a decision not to include any new members for several years.²⁷ Decisions are made by consensus, and the chairmanship of the BRC rotates among the member regions;²⁸ the Chair is elected for a period of two years.²⁹ The region which holds the chair of the BRC also holds the chair of the Executive Regional Committee at the same time. The region of Tromsø is the present chair of both the BRC and the RC. The BRC meets twice a year.

Heininen and Richard Langlais (Rovaniemi: University of Lapland Press, 1997), 45; see also Johan Jorgen Holst, "The Barents Region: Institutions, Cooperation and Prospects," in *The Barents Region: Cooperation in Arctic Europe*, eds. Olav Schram Stokke and Ola Tunander (London: SAGE Publications, Ltd., 1994), 11–24.

²³ The founding members of the BRC are: Archangelsk County (Oblast'), Finnmark County Council (Fylkeskommune), Lapland County (Län), Murmansk County (Oblast'), Nordland County Council (Fylkeskommune), Norrbottens County (Län), the Saami Council, and Troms County Council (Fylkeskommune).

²⁴ *Supra* note 21, Section 4.

²⁵ *Ibid.*, Section 9.

²⁶ The Republic of Karelia joined the BRC in 1993, the Nenets Autonomous Okrug in 1996, the Kainuu, Oulu and Västerbotten Regions in 1998, and the Republic of Komi in 2002.

²⁷ Towards More Effective Regional Barents Cooperation, report prepared by the Ad-Hoc Group on Organisational Changes 14 May 2007, 5, http://www.barentsinfo.fi/beac/docs/Ad-Hoc_Group_Report_ENG.pdf (accessed December 28, 2009).

²⁸ *Supra* note 21, Section 4.

²⁹ *Ibid.*

2.2.2. *The Executive Regional Committee*

The Executive Regional Committee (RC) works within the BRC in a similar fashion to the CSO within the BEAC. According to the Protocol Agreement, the RC consists of advisors, mainly subordinate officials, from the eight permanent members;³⁰ their task is to take new initiatives and follow up approved projects of the Council.³¹ However, nowadays the RC includes advisors from thirteen sub-national governments in the Barents Region along with the Saami Council. In June 2005 the RC formed an Ad-Hoc Group on Organisational Changes which prepared a report entitled 'Towards More Effective Regional Barents Cooperation.'³²

3. *The Functional Framework*

By 'functional structure,' I mean, for the purposes of this article, the framework through which the Cooperation carries out its activities in order to achieve the final goal: peaceful development in the northernmost part of Europe. However, it would be logical to describe the functional framework of the Cooperation in a single section since the two platforms in the Cooperation work jointly, covering a large number of areas alongside their individual activities. The functional framework of the Cooperation mainly includes a group of subordinate bodies and secretariats.

3.1. *Subordinate Bodies*

The Cooperation has created a number of subordinate bodies to carry out its activities; these bodies can be divided into three groups for the purposes of analysis:

- 1) Individual subordinate bodies under the BEAC,
- 2) Individual subordinate bodies under the BRC, and
- 3) Joint subordinate bodies.

3.1.1. *Individual Subordinate Bodies under the BEAC*

The individual subordinate bodies are those working groups and other units established under the BEAC and functioning under the auspices of it. The BEAC has formed a good number of subordinate bodies to carry out its activities. The CSO may appoint new members to the working groups

³⁰ Signatories of the Protocol Agreement.

³¹ Protocol Agreement, *Supra* note 21, Section 4.

³² *Supra* note 27.

if needed. However, in practice the Cooperation can do little if any of the working groups fails to duly report or carry out its duties.³³ The subordinate bodies are: the Working Group on Economic Cooperation (WGEC), the Working Group on Customs Cooperation (WGCC), the Working Group on Environment (WGE), the Working Group on Youth Policy (WGYP), the Steering Committee for the Barents Euro-Arctic Pan-European Transport Area (BEATA), and the Interim Joint Committee on Rescue Cooperation (IJCRC).

3.1.1.1. Working Group on Economic Cooperation

The main responsibility of the Working Group on Economic Cooperation (WGEC) is to work towards an improved investment climate and the removal of technical and other barriers to trade. The most important instruments of the WGEC are the Barents Business Advisory Group (BBAG), the Barents Industrial Partnership (BIP), and the Barents Forest Sector Task Force (BFSTF). It works in cooperation with the Regional Working Group on Investment and Economic Cooperation, which was established in 2004. The WGEC formed the Barents Forest Sector Task Force (BFSTF) in 2004 as a subgroup aiming to develop model forests and sustainable forestry³⁴ in the Barents Region, create the necessary conditions for the development of forestry, protect the environment, and develop wood-based industries.³⁵ The BFSTF works towards better cooperation, mutual actions, programs and projects within the forest sector. The BFSTF has established three networks: a network for assessing the logistic chain and trade of timber and other wood products (the lead country is Norway), a network dealing with the utilization of forest resources and wood-based energy (the lead countries are Russia and Finland), and a network for co-operation and collaboration between forest authorities (the lead country is Sweden). The BFSTF also participates in the activities of the Task Force on Bioenergy, initiated by the BEAC Working Group on Energy.

3.1.1.2. Working Group on Customs Cooperation

The CSO launched a task force on Trade Barriers in the Barents Region (Task Force II) in 1999 to work with issues concerning trade barriers between Russia and other countries in the region. This task force consists of customs

³³ For instance, see *supra* note 27, 11 and 19.

³⁴ It includes the economic, environmental, and social dimensions of further exploitation of forest resources.

³⁵ "Forest Sector Task Force," <http://www.beac.st/?deptid=26056> (accessed December 31, 2009).

experts from Russia, Denmark, Iceland, Finland, Norway, Sweden, and the European Commission. The Task Force was transformed into the Working Group on Trade Barriers (WGTB) in 2004 and renamed the Working Group on Custom Cooperation (WGCC) in 2008. The WGCC works towards improved custom cooperation and a simplified cross-border custom system. It focuses on customs cooperation through concrete proposals as well as long-term information activities. The main priorities of the WGCC are the simplification and unification of customs procedures, cooperation in cross-border issues, the improvement of customs information technologies, support for legal supply chains, and providing information about BEAC Customs Administration activities.³⁶

3.1.1.3. Working Group on Environment

The BEAC initiated environmental cooperation in 1994, when the Ministers of the Environment of the Barents Region met in Bodø, Norway. This led in 1999 to the establishment of the Working Group on Environment (WGE), the goal of which is to provide environmental advice to the BEAC and promote environmental cooperation in the region. The Environment Ministers meet every two years, and the chairmanship of the WGE rotates between Finland, Norway, Russia, and Sweden. The last meeting of the Environment Ministers took place in November 2007 in Moscow, where they adopted guidelines for the activities of the WGE in 2007–2009.³⁷ The priorities of the WGE are climate change, environmental hot spots, cleaner production and sustainable consumption, the protection of nature, water issues, and transboundary cooperation. Three subgroups have been established under the WGE: the Subgroup on Cleaner Production and Sustainable Consumption, the Subgroup on Nature Protection, and the Subgroup on Water Issues and Transboundary Cooperation.³⁸

3.1.1.4. Working Group on Youth Policy

Youth policy first came to the BEAC agenda in the 1999 Bodø Ministerial Meeting that established an Ad-Hoc Working Group on Youth Policy

³⁶ "Working Group on Customs Cooperation," <http://www.barentsinfo.org/?Deptid=25673> (accessed December 31, 2009).

³⁷ "Working Group on Environment," <http://www.beac.st/?Deptid=25674> (accessed December 31, 2009).

³⁸ The AMAP/NEFCO Hot Spot list shows 42 serious environmental challenges in North-West Russia. The Environment Ministers have agreed to counter those challenges with a view to eliminating all hot spots in the Barents Region.

(WGYP).³⁹ The WGYP was made permanent in 2002, and the BEAC Ministers for Youth Policy adopted an action plan to promote cooperation in the field of youth-related activities. For this purpose, the Barents Youth Cooperation Office (BYCO) was established in Murmansk in 2002 to provide information and guidance for youth groups, organisations and networks concerning national and international resources for funding projects, possible cooperation with partners, and youth projects and meetings in the Barents Region.⁴⁰

The priorities of the WGYP are set during every chair period; for the period of 2003–2005 the priorities were: promoting cooperation between important regional youth information structures, enabling them to function as a body of experts for the BEAC on issues related to youth policies; cooperation with other bodies in the BEAC and BRC with respect to youth-related issues; examining possibilities for cooperation among youth activities, youth organisations and groups, and youth researchers in the Barents Region; and providing information concerning co-operational opportunities outside the region. The WGYP maintains close contact with regional representatives of Barents Cooperation, other working groups in the BEAC, and relevant ministries dealing with issues related to indigenous people. The Ministers who are responsible for youth issues in the region met in September 2009 in Murmansk, where they adopted a declaration aiming to strengthen cooperation in the field of youth policy in the region.⁴¹

3.1.1.5. Steering Committee for the Barents Euro-Arctic Pan-European Transport Area

Ministers of Transport in the Barents Region along with representatives from the EC and selected companies discussed the possibility of establishing cooperation in the transportation sector in the region when they met in Arkhangelsk in 1996, although the issue of cooperation in transportation was considered to be on the agenda of the EU.⁴² The Ministers established the Steering Committee for the Barents Euro-Arctic Pan-European Transport Area (BEATA) cooperation at Copenhagen in 1998, aiming to strengthen cooperation and create an efficient transport system in the region.

³⁹ “Working Group on Youth Policy”, <http://www.beac.st/?Deptid=25710> (accessed December 31, 2009).

⁴⁰ *Ibid.*

⁴¹ The Conclusion of the Barents Euro-Arctic Conference of Ministers Responsible for Youth Policy Murmansk, 23–24 September 2009, <http://www.barentsinfo.fi/beac/docs/Declaration-Youth-Minister-Conference2009.pdf> (accessed December 31, 2009).

⁴² The identification of transport corridors on the European scale began in a conference in Crete in 1994. The third Pan-European Transport Conference in Helsinki in 1997 introduced the Barents Region into EU transport cooperation as a transport area.

The Steering Committee is required to submit annual reports to the BEAC and the EC regarding transportation cooperation: border crossing points, customs cooperation, maintenance and reconstruction, and new projects to improve the infrastructure. Sustainable Transport in the Barents Region (STBR), a joint project of the BEAR Communications Group and BEATA, aims at compiling national transport investment programs and strengthening cooperation between decision makers, authorities and planners. A recent BEATA conference which took place in Murmansk pointed out important directions for the development of transport and shipping and ports infrastructure in the region.⁴³ BEATA's permanent secretariat is located in Helsinki, Finland.

3.1.1.6. Interim Joint Committee on Rescue Cooperation

Finland, Norway, Russia, and Sweden have developed a draft agreement on Cooperation within the Field of Emergency Prevention, Preparedness and Response on the basis of which an intergovernmental agreement on collaboration in those areas was signed in Moscow in 2008.⁴⁴ Subsequently, the 'Extensive International Training Exercises, Barents Rescue 2009' were held in the Murmansk Region in September 2009, although the agreement has yet to come into force. At present, an Interim Joint Committee on Rescue Cooperation (IJCRC) is working to enhance cooperation in the field of emergency rescue operations in case of traffic accidents, fires, tourism accidents, floods and ice plugs, and chemical and industrial accidents. The main reason for this initiative is that the region shares some common concerns. They are: 1). closer economic centres, 2). larger populations in the rural communities, 3). rescue personnel and equipment, 4). transportation and hospital resources in case of large-scale accidents, etc. The main objective of rescue cooperation is to improve the possibilities for rescue service agencies to cooperate in emergency situations crossing county or national borders in the Barents Region.

3.1.2. *Individual Subordinate Bodies under the BRC*

The BRC has established a number of working groups, appointing experts from the member regions. The mandates of the working groups are determined by the RC. The chairs of the regional working groups prepare annual

⁴³ Development of the transport infrastructure in the BEATA region, 24 April 2008 in Murmansk, Russia.

⁴⁴ Agreement between the Governments in the Barents Euro-Arctic Region on Cooperation within the Field of Emergency Prevention, Preparedness and Response, Moscow, December 11, 2008, http://www.barentsinfo.fi/beac/docs/Agreement_Emergency_Prevention_Preparedness_and_Response_English.pdf (accessed December 31, 2009).

progress reports and submit them to the RC, including work done during the previous year and planned for the coming year. The regional working groups are discussed below.

3.1.2.1. Regional Working Group on Environment

The BRC established the Regional Working Group on Environment (RWGE) in 1993. Basic reforms aimed at protecting the Barents environment were introduced in 2001.⁴⁵ The RWGE provides consultative services to the WGE established under the BEAC. The WGE may make suggestions to the RWGE or give a mandate for the implementation of specific projects. The RWGE submits annual progress reports and future work plans every year to the BRC and the WGE. The RWGE updates its priorities for work and activities to be undertaken from time to time; at present, it is focusing on water quality and biodiversity in the region. Once it took the initiative of linking natural conservation and tourism, which was highly appreciated at a meeting of the Ministers of the Environment in 2003.⁴⁶ The goals of the RWGE include the improvement of the environmental situation in the region: for instance, with respect to the Pechenganikel industrial complex, it coordinated the meeting of a large number of research institutes from the region to assess the state of affairs on the Finnish-Norwegian-Russian border and environmental problems caused by the complex.⁴⁷ Recently, the RWGE has initiated a three-year Action Program including four key issues related to the Barents environment: surface and drinking water, the management of natural resources, biodiversity, and environmental consciousness.⁴⁸

3.1.2.2. Regional Working Group on Communication

The Regional Working Group on Communication was established in 1993 with the aim of assessing the transportation situation in the Barents, both the present situation and future possibilities. The RWGC prepared a report

⁴⁵ "Regional Working Group on Environment," <http://www.beac.st/?Deptid=25685> (accessed December 31, 2009).

⁴⁶ Report from the Regional Working Group on Environment to the Environment Ministers of the Barents Euro-Arctic Council, Lulea, August 28th, 2003, http://www.barentsinfo.fi/beac/docs/RWGE_report_Lulea_20030828.pdf (accessed December 31, 2009).

⁴⁷ The Pechenganikel industrial complex is located on the Kola Peninsula in northwest Russia. However, emissions from the complex pollute a large area in neighboring countries as well. For a detailed description, see the Pasvik Program project 'Co-operation project between the environmental authorities and researchers in the three countries (2003-2006),' http://www.pasvikmonitoring.org/english/index_en.html (accessed December 31, 2009).

⁴⁸ The Barents Euro-Arctic Council Regional Working Group on Environment Action Program 2007-2010. For the Action program see, http://www.barentsinfo.fi/beac/docs/RWGE_Action_Program2007-2010.pdf (accessed December 31, 2009).

in 1997 entitled 'Transport Analysis of the Barents Region' that was updated in 1999.⁴⁹ It proposed the establishment of a Barents regional backbone network, a heavy freight network, a Barents transport and forwarding company, and the establishment of cross-border passenger transport. The RWGC works on sensible activities to carry out the recommendations of the 1997 Transport Analysis of the Barents Region and cooperates closely with the BEATA Steering Committee within the framework of Sustainable Transport in the Barents Region (STBR), which is a joint project at the EU and regional levels.⁵⁰ However, in fact, the working group was replaced by the STBR for a few years.

3.1.2.3. Regional Working Group on Youth Issues

The Regional Working Group on Youth Issues (RWGYI) was established to support the implementation of youth programs in close cooperation with the intergovernmental working group on youth policy. The working group of the Barents Regional Youth Council prepared a draft for a youth program for 2007–2010 which was adopted by the BRC.⁵¹ The main objective of the youth program is to make the Barents Region attractive to young people so as to keep them in the region or entice them to return if they have been educated outside the region. It offers young people mobility and active participation in developing Barents Cooperation.⁵² The goal of the working group is to establish close cooperation with the WGYI established at the national level under the BEAC.

3.1.2.4. Regional Working Group on Investment and Economic Cooperation

The Regional Working Group on Investment and Economic Cooperation (RWGIEC) was established to strengthen business cooperation within the region.⁵³ The main tasks of the RWGIEC are to assess the business infrastructure of small and medium enterprises (SME), make proposals for the development of the business environment, and address trade barriers within the Barents Region.⁵⁴ The working group organises meetings between entrepreneurs and administrators, distributes trade-related information, encour-

⁴⁹ "Regional Working Group on Communication," <http://www.beac.st/?Deptid=25686> (accessed December 29, 2009).

⁵⁰ *Ibid.*

⁵¹ "Regional Working Group on Youth Issues," <http://www.beac.st/?Deptid=25687> (accessed December 27, 2009).

⁵² *Ibid.*

⁵³ "Regional Working Group on Investment and Economic Cooperation," <http://www.beac.st/?Deptid=25688> (accessed December 31, 2009).

⁵⁴ *Ibid.*

ages SMEs in order to strengthen cross-border economic cooperation, and arranges dialogue between big companies and SMEs. Sometimes the RWGIEC works together (e.g., through workshops and meetings) with the WGEC, a working group formed under the BEAC.

3.1.3. *Joint Subordinate Bodies*

The BEAC works together with the BRC,⁵⁵ addressing many issues to promote basic day-to-day cooperation in the region.⁵⁶ The Cooperation has established some Working Groups under the auspices of both platforms together. The CSO makes decisions on the mandates of national working groups, while the RC deals with regional working groups. The joint working groups have shared co-chairmanship at the national and regional levels. They report separately to the BRC and the BEAC concerning their activities. These groups are the Joint Working Group on Health and Related Social Issues (JWGHS), the Joint Working Group on Education and Research (JWGER), the Joint Working Group on Energy (JEWG), and the Joint Working Group on Culture (JWGC).

3.1.3.1. Joint Working Group on Health and Related Social Issues

The BEAC established the Working Group on Health and Related Social Issues (WGHS) to develop and oversee the cooperation program on health and related social issues in the region. The first cooperation on health issues was adopted at the 1999 Bodø meeting in which priority areas for the 1999–2004 period were selected.⁵⁷ The second phase, planned for the 2004–2007 period, introduced activities to improve medical and technical knowledge, train and promote the exchange of experiences, develop preventive measures and primary health care, provide organisational advice, and control strategies and treatment services. The third phase, planned for the 2008–2011 period,⁵⁸

⁵⁵ See Section 11 of the Terms of Reference and the Joint Statement of the Barents Euro-Arctic Council in the Second Session of the Barents Euro-Arctic Council, Tromsø, Norway 14–15 September 1994, Part B: Regional Activities.

⁵⁶ Kozyrev, *supra* note 22, 45; see also Holst, *supra* note 22, 11–24.

⁵⁷ The BEAC Bodø meeting of 4–5 March 1999 established the following priorities: combating new and re-emerging infectious diseases, supporting reproductive health care and child health care, counteracting lifestyle-related health problems, improving services for indigenous people, and improving the quality of medical services. However, it gave special attention to projects focusing on children. The Barents Euro-Arctic Council, BEAC Working Group on Health and Related Social Issues, *Co-operation Programme on Health and Related Social Issues in the Barents Euro-Arctic Region 2008–2011*, Section 1.1, <http://www.barentsinfo.fi/beac/docs/JWGHS+Program+2008–2011.pdf> (accessed December 30, 2009).

⁵⁸ *Ibid.*

gives the WGHS a strong structural shape as well as establishing its mandate.⁵⁹ The WGHS may choose its own working methods, which allows it to appoint expert groups, form steering committees for sub-programs, consult external experts, and organise conferences involving universities and other research institutions.⁶⁰ The co-chairmanship is shared between a Nordic country and a Russian region for a two-year period, and the International Barents Secretariat (IBS) provides the necessary secretarial support.⁶¹ The cooperation programme instructs the WGHS with respect to funding issues in a way that does not involve any real commitments. It reads:

The Working Group should keep in contact and promote financing of co-operation with the authorities responsible for funding in each participating country, financial organisations, and international actors such as the EU, WHO and Nordic Council of Ministers in order to identify funding sources.⁶²

3.1.3.2. Joint Working Group on Education and Research

The BEAC approved an Exchange Programme for Higher Education and Research in the Barents Region in 1999 and established a Programme Board for dealing with the same areas, including representatives from relevant authorities to facilitate exchanges of higher education and research.⁶³ The BRC established the Regional Working Group on Education and Research in 2001 to serve as a consultative body to respond to important questions submitted by the RC and initiate projects within its field, including a survey of cooperative projects of higher education and research.⁶⁴ The Program Board was closed down, along with the Regional Working Group on Education and

⁵⁹ The mandate of the WGHS is to: 1). prepare and monitor multilateral actions in each of the three priority areas, 2). ensure co-ordination with other international initiatives in the Barents Region, 3). support the development of targeted sub-programmes on prioritized issues and concrete project proposals, 4). keep in touch with national and international donors in order to obtain funding, including combined funding from multiple sources, 5) organise evaluation of the co-operation by competent and suitable external institution, and 6) report to the Barents Euro-Arctic Council, BEAC. See *supra* note 57, Section 2.7.2.

⁶⁰ *Ibid.*, Section 2.7.3.

⁶¹ *Ibid.*, Section 2.8.

⁶² *Ibid.*, Section 2.9.

⁶³ Terms of Reference, Working Group on Education and Research, approved by the BEAC/CSO and the Barents Regional Committee (10 June 2004), Committee of Senior Officials Information Document Doc. BEAC.CSO.2004.27 (22 June 2004), "Background", http://www.barentsinfo.fi/beac/docs_tmp/5198_doc_CSO.2004.27ToRWGER.pdf (accessed December 30, 2009).

⁶⁴ "Education and Research," <http://www.beac.st/?Deptid=25681> (accessed December 31, 2009).

Research, in 2003, when their tasks were transferred to a new working group named the Joint Working Group on Education and Research (JWGER).

The Terms of Reference of the JWGER, issued by the CSO mandates, include the development of multilateral and bilateral interdisciplinary cooperation in the Barents Region.⁶⁵ All regional units which have member status under the BRC, national authorities of the BEAC member states, and the Working Group of Indigenous Peoples (WGIP) are members; participation in the JWGER is also open to representatives from relevant organisations like the European Commission and the Nordic Council of Ministers.⁶⁶ It may establish a smaller executive group with one participant from each county and state to manage tasks between the meetings of the Working Group. The Terms of Reference include a shared chairmanship which rotates at intervals of two years with a central government representative and a representative of a regional authority or administrative entity working together.⁶⁷ It may choose its own working methods in terms of different activities such as consulting external experts, organising conferences or seminars, and involving universities and other research institutions, as well as nongovernmental organisations, directly in agreed activities.⁶⁸ The JWGER has set up a Barents Education Network and a Barents Specialists Network as well as establishing close ties with other educational institutes conducting researches on northern issues.⁶⁹ Self-evaluation of the activities of the Working Group is an important development: the Terms of Reference provide for an assessment of the Working Group's activities along with its organisational modes on the basis of which the Terms of Reference can be amended; the CSO and RC can also make any changes determined to be appropriate at any time before the expiration of the Terms of Reference.⁷⁰ As an ongoing process, it receives instructions and requests from the BEAC and the BRC through the CSO and the RC, and reports on activities through the same channels. It prepares progress reports on a yearly basis.⁷¹

⁶⁵ *Supra* note 63.

⁶⁶ *Ibid.*, "Composition and chairmanship of the WGER."

⁶⁷ *Supra* note 63, "Composition and chairmanship of the WGER."

⁶⁸ *Ibid.*, 'Method of Work.'

⁶⁹ The University of the Arctic. For detailed information about the U-Arctic see, www.uarctic.com/.

⁷⁰ Terms of Reference, Working Group on Education and Research, *supra* note 63, 'Duration.'

⁷¹ The annual progress report for the proceeding year must be submitted by 1 February of each year.

3.1.3.3. Joint Working Group on Energy

The BEAC established the Working Group on Energy (EWG) in 1998, giving it a renewed mandate for the years 2001–2004.⁷² The aim of the EWG was to promote the sustainable exploitation, production, transmission and use of energy in the Barents Region.⁷³ The EWG was transformed into a mixed national-regional working group, the JEWG, with a joint chairmanship which agreed to a draft work plan for energy cooperation in several priority areas.⁷⁴ The JEWG has launched a bi-lingual website which contains important information mainly in Russian, as well as some in English.⁷⁵

3.1.3.4. Joint Working Group on Culture

The Cultural Ministers of the Barents Region met in Kirkenes in 1993, setting up the Barents Cultural Committee to facilitate cross-border cultural cooperation. This became the Barents Regional Working Group on Culture (BRWGC) under the BRC in 2001.⁷⁶ A Joint Working Group on Culture (JWGC) presently operates under the BEAC and the BRC, having replaced the BRWGC in 2007. Like the JWGE, the JWGC includes representatives from each regional group and responsible national authorities for culture from Finland, Norway, Sweden, Russia and the WGIP; its chairmanship is shared between regional and national bodies.⁷⁷ The JWGC aims to strengthen Barents cultural identities and increase the impact of culture and knowledge of arts and culture both within the region and outside it. The first cultural program under the JWGC, 'Voices in the Barents Region,' was implemented in the 2003–2006 period. The second program, entitled 'New Winds in the

⁷² New Terms of Reference were approved by the CSO and the RC on 20 and 31 December 2004, respectively. See: BEAC Working Groups and Task Forces: Annual Reports (2006), Committee of Senior Official Information Document, Doc.BEAC.CSO.2007.2 (2 February 2007), 33. For this report see, <http://www.barentsinfo.fi/beac/docs/CSO2007.2+WG+annualreports2006.pdf> (accessed December 28, 2009).

⁷³ "Working Group on Energy," <http://www.barentsinfo.org/?Deptid=25682> (accessed December 30, 2009).

⁷⁴ Its priorities are: promotion of the activities of the Barents Energy Focal Points; further development, implementation and maintenance of the Barents information and communication concept; improvements in the efficiency of energy production, distribution and consumption in the Barents Region; project financing; promotion of the use of bio energy in northwest Russia; further work on the use of Joint Implementation and the other Kyoto mechanisms; and co-ordination with other relevant initiatives.

⁷⁵ <http://www.barentsenergy.org/stem/smpage.fwx?smlanguage=RUS> (accessed December 31, 2009).

⁷⁶ "The Joint Working Group on Culture," <http://www.beac.st/?Deptid=25684> (accessed December 30, 2009).

⁷⁷ "Working Group of Indigenous Peoples," <http://www.barentsinfo.org/?Deptid=26084> (accessed December 26, 2009).

Barents Region,' is planned for the 2008–2010 period; it highlights cultural diversity and the significance of culture and the cultural industry as a unique tool for the development of the region, and it can be seen as a framework for inter-cultural cooperation in the Barents Region.⁷⁸

Besides the working groups, the RC or any WG may create a Task Force (TF) to address a specific issue or undertake activities for a limited period of time. The main differences between WGs and TFs are: 1). a WG is usually established on a permanent basis, while a TF is established for a limited time to perform a specific task; 2). the CSO or RC can create a WG, whereas a WG is also mandated to form specific TFs; 3). a WG consists of ex-officio personnel (e.g., representatives from Finland or from the Saami Council), while task forces are formed mainly with individual people on the basis of their personal capability. A TF may also contribute to generating legal obligations in some instances: for example, the Task Force on Information and Data Cooperation recommended drawing up an agreement of cooperation (memorandum of understanding) describing the aims of the cooperation and the rights and responsibilities of each party.⁷⁹ This can be seen as an example of the Cooperation taking steps towards legal formalization.

Besides the above-mentioned subordinate bodies, there is another body called the Working Group of Indigenous Peoples (WGIP). The idea for the establishment of a Working Group of Indigenous Peoples was already contained in the Kirkenes Declaration, which established the BEAC.⁸⁰ The WGIP, established in 1995, consists of representatives from the Saami, the Nenets and the Vepsian peoples. The WGIP includes six members: one Saami representative from each country – Finland, Norway, Russia, and Sweden – along with one Vepsian and one Nenets representative from the Russian side.⁸¹ It has three observers in all, including one representative from the Saami Council, one from the Association of World Reindeer Herders, and one from the Russian Association of the Indigenous Peoples of the North, Siberia and the Far East (RAIPON).⁸² The WGIP members elect a chair from

⁷⁸ *Supra* note 77.

⁷⁹ Towards More Effective Regional Barents Cooperation, *supra* note 27, 13–14.

⁸⁰ The Kirkenes Declaration, *supra* note 1, "Indigenous peoples."

⁸¹ Terms of Reference for the Working Group of Indigenous Peoples in the Barents Euro-Arctic Region, Section 4b. The English version of the Terms of Reference is available in the Action Plan of Indigenous Peoples 2005–2008, Appendix 2, p. 31, http://www.barentsinfo.fi/beac/docs/11934_doc_IPActionPlan2005-2008_English.pdf (accessed December 30, 2009).

⁸² *Supra* note 81, Section 4c.

among themselves for a period of two years; a person may be re-elected for the chairmanship.⁸³

One distinctive characteristic of the WGIP is that it has been established on a permanent basis and plays an advisory role to both platforms of the Cooperation along with its representation at Ministerial meetings of the BEAC and on the Regional Council and Regional Committee (of the BRC).⁸⁴ The WGIP has recently adopted a four-year action plan⁸⁵ promoting measures in the fields of development of trade and business, language and media, health and social-related issues, and – in the Russian part of the region – the environment and culture. The Barents Indigenous Peoples Office (BIPO), established in Murmansk in 2003 and moved to Lovozero in 2007, is responsible for the activities of the WGIP.

3.2. *The Secretariats*

The BEAC worked with separate national secretariats of member states until 2007. Since then an International Barents Secretariat has been established through the signing of an agreement between the four states; the aim of the secretariat is to provide technical support for multilateral coordinated regional activities under the Cooperation.⁸⁶ The international secretariat is located in Kirkenes, Norway and enjoys legal personality under Norwegian national law.⁸⁷ However, the IBS works for the BEAC together with the BRC since it is important to continue the Cooperation's activities in particular when the chair changes from one member to another. The legal personality and other issues between Norway and the secretariat were resolved through the conclusion of a bilateral agreement.⁸⁸

⁸³ *Supra* note 81, section 6.

⁸⁴ "Working Group of Indigenous Peoples." *Supra* note 77.

⁸⁵ Action Plan for Indigenous Peoples in the Barents Euro-Arctic Region 2009–2012 adopted by the Working Group of Indigenous Peoples in the Barents Euro-Arctic Region (WGIP), Tromsø, January 21, 2009, http://www.barentsinfo.fi/beac/docs/WGIP_Action_Plan_2009-2012_ENG.pdf (accessed December 28, 2009).

⁸⁶ Agreement between the Government of the Republic of Finland, the Government of the Kingdom of Norway, the Government of the Russian Federation and the Government of the Kingdom of Sweden on the Establishment of an International Barents Secretariat for the Cooperation in the Barents Euro-Arctic Region, signed on 15 November 2007, http://www.barentsinfo.fi/beac/docs/IBS_Agr_signed.pdf (accessed December 22, 2009).

⁸⁷ *Ibid.*, Articles 1–2.

⁸⁸ Host Country Agreement between the Government of the Kingdom of Norway and the International Barents Secretariat for the Cooperation in the Barents Euro-Arctic Region on the Legal Status of the Secretariat and the Privileges and Immunities of the Secretariat and its Permanent Staff Members, concluded in Rovaniemi, Finland, 15 November 2007, <http://>

The Terms of Reference of the IBS⁸⁹ connect both platforms by providing technical support. A set of rules has been formulated describing the secretarial functions in a similar fashion to that which can be seen in well-established international organisations.⁹⁰ The rules cover almost every essential component, even the appointment of staff and their facilities.

There are also national Barents secretariats in all the main member states except Russia. Having a national Barents secretariat is part of the recognition of Barents cooperation. The Finnish national Barents secretariat is located in Rovaniemi in association with the Regional Council of Lapland, the Norwegian Barents secretariat is in Kirkenes, and the Swedish contacts are the County Administrative Board of Norrbotten and the County Administrative Board of Västerbotten. However, in the case of Russia the Regional Governments share the secretarial functions on behalf of the national level.⁹¹ The IBS provides secretarial support to the BEAC chair and the chair region of the BRC in addition to its normal communication with the national secretariats.

4. *Legal Elements in the Cooperation*

The Kirkenes Declaration, the establishing instrument of the BEAC, is not an international treaty; it states some common problems of the Barents Region and general promises for cooperation rather than creating any legal obligations for its members.⁹² However, in the course of time, those promises have become useful to the states of the Barents Region through the practice of

www.barentsinfo.fi/beac/docs/IBS_Host_Country_Final_Eng.pdf (accessed December 31, 2009).

⁸⁹ Terms of Reference for an International Barents Secretariat for the Cooperation in the Barents Euro-Arctic Region, adopted by the Barents Regional Council on 6 September 2007, Tromsø, Norway and by the Committee of Senior Officials of the Barents Euro-Arctic Council on 9 October 2007, Helsinki, Finland, http://www.barentsinfo.fi/beac/docs/TOR_IBS.pdf (accessed December 31, 2009).

⁹⁰ Financial and Staff Rules of the International Barents Secretariat adopted by the CSO on 16 September 2008, http://www.barentsinfo.fi/beac/docs/IBS_Financial+Staff_Rules_16_September_2008_final.pdf (accessed December 30, 2009).

⁹¹ Towards More Effective Regional Barents Cooperation, *supra* note 27, 6–7.

⁹² The declaration begins with an introduction. It has several separate parts: the Barents Euro-Arctic Council and its objectives, participation and area of application, the environment, economic cooperation, scientific and technical cooperation, regional infrastructure, indigenous peoples, human contacts and cultural relations, and tourism. However, none of the parts contains sufficient commitments to create legal obligations.

mutual activities under the auspices of the Cooperation. Nevertheless, the Declaration has not only addressed the challenges in the region caused by its harsh climatic or inaccessible location, but has also dealt with compliance with certain international legal instruments. For instance, the signatories of the Declaration reaffirmed their commitments with respect to the declaration on the global environment and sustainable development⁹³ along with the rights of indigenous peoples⁹⁴ living in the Barents Region articulated in international law.⁹⁵ They have committed themselves to strengthening the bilateral and multilateral cooperation imposed by the OSPAR Convention⁹⁶ and the Espoo Convention⁹⁷ for the protection of the fragile environment of the region.⁹⁸

The annex of the Declaration includes BEAC's Terms of Reference; it could be evaluated in diverse ways in terms of international law. It has created obligations for the member states to a limited extent. For example, the document imposes all financial responsibilities caused by the arrangement of a meeting of the BEAC on the host country,⁹⁹ a practice which the states have followed up to this day. It also contains a provision preventing the members from infringing on any international legal or even political obligation by participating in the Cooperation, which expresses the intention of the parties not to create any legally binding obligation.¹⁰⁰ Its authority is somewhat weakened by the use of 'will' and 'will not' in the provisions in place of stronger terms like 'shall' and 'shall not'. Subsequently, it has included

⁹³ Rio Declaration on Environment and Development adopted by the United Nations Conference on Environment and Development, Rio de Janeiro 3–14 June 1992. UN Doc. A/CONF.151/26 (Vol. I); *International Legal Materials* 31 (1992):874.

⁹⁴ Chapter 26 of Agenda 21, "Recognizing and Strengthening the Role of Indigenous People and their Communities."

⁹⁵ The Kirkenes Declaration, *supra* note 1, "The Barents Euro-Arctic Council and its Objectives" and "Indigenous Peoples."

⁹⁶ The Convention for the Protection of the Marine Environment of the North-East Atlantic, 22 September 1992, entered into force 25 March 1998; *International Legal Materials* 32 (1993):1069.

⁹⁷ The Convention on Environmental Impact Assessment in a Transboundary Context (the EIA Convention), signed on 25 February 1991, entered into force in 1997; *International Legal Materials* 30 (1991):802.

⁹⁸ The Kirkenes Declaration, *supra* note 1, "The Environment" and "Economic Cooperation."

⁹⁹ Terms of Reference, Section 7 reads: "The participant hosting a meeting of the Council will bear the costs related to conference services, premises and interpretation."

¹⁰⁰ *Ibid.*, Section 13 reads: "Participation in the Council will not in any way infringe on any international obligation, be it of a legal or a political nature, undertaken by any of the participating states."

words that make the provisions flexible: 'will normally be conducted'¹⁰¹ and 'will normally convene.'¹⁰² Furthermore, it leaves room for various options by using terms like 'may decide.'¹⁰³

In addition to the constituent declaration, BEAC meetings have adopted either Joint Statements or Joint Communiqués. The exception is the Declaration adopted by the Heads of Government at BEAC's ten-year anniversary meeting in 2003.¹⁰⁴ However, the words chosen in phrasing those instruments (the constituent declaration, joint statement, joint communiqués and summit declaration) can be placed in three categories in terms of the strength of the obligation they create: simple recognition or appreciation,¹⁰⁵ serious concern but only loose commitment,¹⁰⁶ and intent to do a little.¹⁰⁷ In fact, none of the words or phrases in the instruments is sufficient to create real commitments for the member states.

The agreement regarding the IBS, which involves the four member states of the Cooperation, has created real commitments.¹⁰⁸ The agreement was designed in the same fashion as a classical treaty, containing, for example, provisions for amending the agreement and withdrawing from it. It includes a group of obligations which are binding on the parties. There is a provision requiring notification by the parties concerning acceptance of the agreement as well as reporting on the completion of national measures necessary for the entry into force of the agreement.¹⁰⁹ The IBS has practiced its legal competence by concluding an agreement with Norway¹¹⁰ that has created

¹⁰¹ *Supra* note 8, Section 8.

¹⁰² *Ibid.*, Section. 5.

¹⁰³ Section 11.

¹⁰⁴ Barents Summit Declaration on the Occasion of the Barents Euro-Arctic 10 Year Anniversary, Kirkenes, Norway, 11 January 2003, http://www.beac.st/_upl/doc/568_doc_Joint%20Communiqué%20eng.doc (accessed December 23, 2009).

¹⁰⁵ Examples of words in this category are 'recognizes,' 'takes note of,' 'encourages enhanced cooperation,' 'expresses its appreciation,' 'welcomes,' 'appreciates the activities,' and 'notes the active role.'

¹⁰⁶ Examples are 'continues to pay special attention,' 'underlines the need to address,' 'emphasizes the importance,' 'commends the enhanced cooperation,' 'believes that,' and so on.

¹⁰⁷ Examples of words showing the intention of doing something are 'supports efforts to further improve,' 'stresses the urgent need to affirm,' 'Parties should,' 'reaffirms its willingness,' and 'considers the application of.'

¹⁰⁸ Agreement, *supra* note 86.

¹⁰⁹ Articles 8–9.

¹¹⁰ Host Country Agreement between the Government of the Kingdom of Norway and the International Barents Secretariat for the Cooperation in the Barents Euro-Arctic Region on the Legal Status of the Secretariat and the Privileges and Immunities of the Secretariat and its Permanent Staff Members, concluded in Rovaniemi, Finland 15 November 2007, <http://>

real obligations for Norway by using the authoritative term 'shall.' It has provided for the legal personality of the IBS in Norway,¹¹¹ guaranteeing *inter alia* immunity to the IBS and its properties from legal process¹¹² and the inviolability of the premises from administrative, judicial or legal actions.¹¹³ The IBS is also entitled to use its own flag and emblem.¹¹⁴ The privileges and immunities provided by the agreement may be compared to those enjoyed by a diplomatic mission in a foreign state.¹¹⁵

As mentioned earlier, the four states in the Barents Region (Finland, Norway, Russia and Sweden) have signed an agreement in the Field of Emergency Prevention, Preparedness and Response¹¹⁶ in Moscow; which will become binding in international law after its entering into force.¹¹⁷ Furthermore, Norway has supported a project for the preparation of an ethical code of conduct for industrial companies' activities in indigenous peoples' areas; this code will follow the obligations established under international law.¹¹⁸ The BRC has adopted protocols, reports and joint statement with the BEAC which express appreciation, deep concern or recommendations rather than

www.barentsinfo.fi/beac/docs/IBS_Host_Country_Final_Eng.pdf (accessed December 31, 2009).

¹¹¹ Article 2 reads: "The Secretariat shall possess a legal personality in Norway. It shall have such legal capacity as may be necessary for the exercise of its functions and the fulfillment [sic] of its purposes, including the capacity to contract, to acquire and dispose of movable and immovable property and to institute and participate in legal proceedings."

¹¹² Article 5.

¹¹³ Article 7(2) reads: "The premises and the property and assets of the Secretariat in Norway shall be immune from search, requisition, confiscation, expropriation and any other form of interference whether by executive, administrative, judicial or legislative action."

¹¹⁴ *Supra* note 110, Article 4.

¹¹⁵ The Vienna Conventions on Diplomatic Relations, Vienna, Austria signed 18 April 1961, entered into force 24 April 1964; 500 *United Nations Treaty System* 95; The Vienna Conventions on Consular Relations, Vienna, Austria signed 24 April 1963, entered into force 19 March 1967; 596 *United Nations Treaty System* 262.

¹¹⁶ *Supra* note 44.

¹¹⁷ As declared by the Chair of the BEAC: "In December 2008, the first intergovernmental agreement in the history of the BEAC, on cooperation in emergency prevention, preparedness and response, was signed in Moscow. As a follow on to it, extensive international training exercises, Barents Rescue 2009, were held in the Murmansk Region this past September." See the Agenda of the XII Session of the Barents Euro-Arctic Council, Murmansk, 15 October 2009, 3, http://www.barentsinfo.fi/beac/docs/All_Documents_of_the_XII_Session_of_BEAC.pdf (accessed December 29, 2009).

¹¹⁸ Mr. Bjarne Store-Jakobsen, Chair of the Working Group of Indigenous Peoples, reported to the BEAC in the XII Session of the Barents Euro-Arctic Council, Murmansk, 15 October 2009, 22. For the minutes see, http://www.barentsinfo.fi/beac/docs/All_Documents_of_the_XII_Session_of_BEAC.pdf (accessed December 30, 2009).

any real commitments, even if though BRC cannot in any case conclude an international treaty.¹¹⁹ However, the Protocol Agreement which established the BRC encompasses some sort of commitments in describing the background information, objectives and goals of the Cooperation as well as in identifying the conditions for the establishment of two bodies: the Regional Council and the Regional Committee.¹²⁰ The Agreement includes authoritative instructions with respect to its operational expenditures.¹²¹

The recent action plan prepared by the WGIP expresses one of the main aims of indigenous peoples' representation in the Cooperation: to implement the rights of indigenous peoples as recognized in international law.¹²² The important instruments dealing with indigenous peoples' rights articulated in the plan are: the principles of the Rio Conference (UNCED 1992), the ILO Convention No. 169 (Concerning Indigenous and Tribal Peoples in Independent Countries), the UN Covenant on Civil and Political Rights (of 1966), the UN Convention on Biological Diversity (of 1992), and the UN Declaration on the Rights of Indigenous Peoples (adopted by the General Assembly¹²³ in September 2007). The WGIP's action plan appreciates the resolution adopted by the General Assembly with respect to the rights of indigenous peoples¹²⁴ and the declaration of the 2005–2014 period as the Second International Decade of the World's Indigenous People. It sees the Barents Cooperation as a means of implementing rights which are applicable to indigenous peoples, *inter alia* the right of self-determination.¹²⁵

The Cooperation has involved non-state actors, and in particular groups of indigenous peoples, in its activities. However, the involvement of non-state actors nowadays is appreciated in new international law in order to help the global community adapt to the rapid changes occurring in various areas. For instance, in 2004 the International Court of Justice (ICJ) adopted Practice Direction XII, which allows for the participation of non-state actors in its procedure.¹²⁶ Non-state actors participate in the international legal system

¹¹⁹ According to international law, only states are able to conclude an international treaty. See the Vienna Convention on the Law of Treaties, Vienna, 22 May 1969, entered into force 27 January 1980; 1155 *United Nations Treaty Series* 331; *International Legal Materials* 8 (1969): 679, Articles 2 (a) and 2(g).

¹²⁰ Section 4.

¹²¹ Section 5.

¹²² Action Plan, *supra* note 85, Section 4.1.

¹²³ General Assembly Resolution No. 61/295 of 13 September 2007.

¹²⁴ Resolution A/RES/59/174 of 22 December 2004.

¹²⁵ Action Plan, *supra* note 85, Section 4.1.

¹²⁶ ICJ Practice Direction XII (July 30, 2004), <http://www.icj-cij.org/presscom/index.php?p1=6&p2=1&pr=94&search=%22soulev%E9es%22> (accessed December 31, 2009). The

by reviewing state compliance with international obligations,¹²⁷ which can be seen as one way of monitoring human rights, humanitarian and environmental law.¹²⁸ NGOs are supplying experts and resources to monitor compliance with multilateral environmental treaties, since states do not always seem to be eager to provide them.¹²⁹ The Cooperation already has several essential characteristic elements of an organisation with its established subordinate bodies and the maintaining of internal communications among the different units with which the IBS works as the central pillar. It would not be unusual to compare the Cooperation with an international organisation. However, the founding document of classical international organisations is an international treaty,¹³⁰ whereas in the case of the BEAC it is an inter-governmental declaration. International organisations may give formal institutional roles to subordinate bodies which share their common objectives, while the Cooperation has established some kind of institutional roles for its subordinate bodies. The permanent International Barents Secretariat, with its status of legal personality, is strong evidence of a separate independent organ within the Cooperation to carry out its particular functions.

Direction permits an NGO on its own initiative to submit a document or statement relating to an advisory opinion which will be placed in a designated location in the Peace Palace. According to Steve Charnovitz, these types of papers will be treated as a readily available publication and may be referred to by states and international organisations in the same manner as publications in the public domain, although they will not be considered as part of the case file. Steve Charnovitz, "Nongovernmental Organizations and International Law," *American Journal of Int'l Law* 100 (2006):353. The Union of International Associations (UIA), established in 1907, and the International Law Association, founded in 1873, began to promote legal personality for international NGOs in 1910. *Institut de droit international*, Draft Convention Relating to the Legal Position of International Associations (1923); reprinted in *International Association Statute Series* 1 (1988). See also James Brown Scott, "The Institute of International Law," *American Journal of Int'l Law* 17 (1923):751, and 753-756.

¹²⁷ Charnovitz, *supra* note 126, 354.

¹²⁸ Harold K. Jacobson and Edith Brown Weiss, "Assessing the Record and Designing Strategies to Engage Countries," in *Engaging Countries: strengthening compliance with international environmental accords*, eds. Harold K. Jacobson and Edith Brown Weiss (USA: MIT Press, 1998), 511, 527, 529, and 533.

¹²⁹ Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: compliance with international regulatory agreements* (Harvard: Harvard University Press, 1998), 250-251.

¹³⁰ International law defines an international organisation as: "An association of States established by and based upon a treaty, which pursues common aims and which has its own special organs to fulfill particular functions within the organization." See Rudolf Bernhardt ed. *Encyclopedia of Public International Law: Regional Cooperation, Organizations and Problems* (Amsterdam: North-Holland Publishing Company, 1983), 120.

The Cooperation's Terms and Reference give specific directions as to how the Cooperation works. There is a key organ in the cooperation system, the CSO, which includes officials designated by each member state, although the CSO has limited control over the WGs.¹³¹ Furthermore, the Cooperation and its subordinate bodies produce mainly documents which are intended to persuade rather than compel and which have an influence on member states. However, the rules regarding the IBS¹³² impose a mandatory obligation on member-states to some extent.¹³³ This shows the authoritative jurisdiction of the Cooperation's organ, but at the same time the question arises whether a subordinate body may impose mandatory guidelines on a superior authority. Yes, a subordinate body mandated by a superior authority may prepare mandatory rules applicable to the authority; however, the rules become obligatory subject to the authority's acceptance through its regular practices.

Self-evaluation is one feature of an advanced international organisation that has been observed in the Barents Cooperation. For instance, the Ministry for Foreign Affairs of Norway formed a commission to evaluate the Cooperation. This commission, chaired by Mr. Erling Fløter, produced and submitted a report to the last Foreign Ministers' meeting during the Norwegian chairmanship.¹³⁴ The main focus of this report was on challenges that may arise and what should be done in the future to strengthen and develop the Cooperation. The report recommended *inter alia* reducing the number of working groups, introducing a committee to coordinate the activities of NGOs, and also not to expand the region geographically.¹³⁵ Norway has performed two evaluations of the Norwegian projects implemented under WGHS.¹³⁶ Furthermore, the Regional Committee formed an Ad-Hoc Group on Organisational Changes in June 2005 chaired by Mr. Esko Lotvonen from the Regional Council of Lapland. The Ad-Hoc group submitted its report to the RC and the BRC in 2007. The Group found difficulties within the present structure. The group concluded that Cooperation in the two-sided structure has not worked well: cooperation between the WGs and CSO under the BEAC or between the Council and Committee under the BRC did not function efficiently, and there was confusion with national and regional working groups. Activities under specific WGs should be defined more clearly so as to

¹³¹ For instance, if they do not perform their duties or submit reports regularly.

¹³² Financial and Staff Rules of the International Barents Secretariat, *supra* note 90.

¹³³ *Ibid.*, Section 4.3 says: "The Parties shall make their assessed contributions available to the Secretariat by 31st March each year."

¹³⁴ Towards More Effective Regional Barents Cooperation, *supra* note 27, 11–12.

¹³⁵ *Ibid.*

¹³⁶ The Cooperation Programme of WGHS, Section 1.2.

assign responsibilities with respect to specific issues. Effective participation from the capitals is recommended, and – in particular with respect to the Russian side – many issues need to be dealt with. The group recommended that the Regional Council and Committee should be connected: national and regional cooperation should be organised in a single organisation.¹³⁷ Barents states should have effective coordination of the Cooperation inside the country.¹³⁸

The current structure, which consists of separate frameworks maintained by the BEAC and the BRC, has provided each platform with an individual identity even though they are closely connected. For instance, in the case of the BEAC, the CSO oversees its activities between Ministerial Meetings, may form necessary WGs or TFs, provides guidance to them and monitors their functions. The subordinate bodies perform their tasks following the guidance of the CSO and report to it. Alternatively, for the BRC, the RC takes care of its functions between the meetings of the Regional Council; it may form WGs or TFs, supply proper guidance to them and observe their activities; the WGs and TFs follow the guidance of the RC and report to it. The establishing instruments of the BEAC and the BRC are divergent and were concluded by different forums. The Ministerial Meeting is the supreme authority in BEAC decision-making, while the Regional Council makes decisions for the BRC. Thus, the two platforms enjoy individual organisational merits in terms of their functioning systems. However, since they have a common international secretariat and similar objectives, they can be considered as forming an associate partnership vis-à-vis two platforms;¹³⁹ this partnership may raise complex issues or provide new ideas concerning the evaluation of the platforms' legal position under international law.

¹³⁷ Towards More Effective Regional Barents Cooperation, *supra* note 27, 18.

¹³⁸ *Ibid.*, 27.

¹³⁹ Since the creation of the Cooperation, the two individual bodies have never fallen into confrontation, as explained in the BEAC Joint Communiqué: "The Council underlines that the International Barents Secretariat (IBS) should be utilized to improve the coherence, efficiency and the continuity of the BEAC and BRC cooperation and strengthen the effectiveness of their sectoral and intersectoral work." Joint Communiqué of the 11th session of the Barents Euro-Arctic Council, Rovaniemi 14–15 November 2007, Paragraph 31. See, <http://www.barentsinfo.fi/beac/docs/JointCommuniqué11thBEACSession151107.pdf> (accessed December 30, 2009).

5. Conclusion

The Barents Region covers an area of great diversity: political situations, bureaucracy, legislation, customs, geographical scope, languages, cultures, and so on. It is rather difficult to create an international legal instrument that is generally applicable to the region. The two-level structure has been developed keeping in mind the reality of the situation: the fact that the Barents Region is different from the national capitals of the countries in many respects provides support for the idea of having a sub-national international platform in addition to a national platform. On the basis of the above discussion it is understandable that the Barents Cooperation involves different entities and various subordinate bodies in a complex manner. The Cooperation displays a few special characteristics and diversity relating to its position in international law. Having a separate organisational framework and independent decision-making body for each platform provides distinctive identities within the Cooperation along with the joint activities. Both platforms create voluntary or moral responsibilities generated from political commitments, although decisions made by one platform have a clear influence on the other.

The documents produced by the Cooperation do not create legally binding obligations under international law, though they can create real commitments to some extent. The presumption is that if the constituent instrument of an intergovernmental cooperative forum does not provide clearly worded mandate to the organs to make binding decisions, the decisions of such organs are non-binding.¹⁴⁰ However, this does not mean that the documents produced do not have any consequences or that they are irrelevant under international law.¹⁴¹ The important factor is that the member-states have fulfilled the obligations imposed by those documents through their regular practices for two decades; this gives the documents some weight under international law. Moreover, the activities of the Cooperation support compliance with certain international legal instruments. The CSO or RC may be compared, at least to some extent, with treaty bodies formed under certain treaties to monitor activities under the associated treaties, even though their position is ambiguous in international law: the treaty bodies have followed neither

¹⁴⁰ As Schermers and Blokker describe: "A rule of thumb is that, while states are free to act as long as this is in accordance with international law (which may prescribe or proscribe state activities), international organizations are competent to act only as far as powers have been attributed to them by the member states." See Henry G. Schermers and Niels M. Blokker, *International Institutional Law* (Leiden: Martinus Nijhoff, 2004), 141.

¹⁴¹ See Koivurova, *supra* note 3, 125.

the law of treaties nor the law of international organisations in performing their activities.

Ambiguity also prevails in determining the position of indigenous peoples. They have permanent membership in the BRC since their representative was one of the signatories of the Protocol Agreement, the establishing document of the BRC. However, they are considered neither members nor observers within the BEAC, even though their participation in all meetings under the Cooperation has been assured. Furthermore, they could be provided with the status of 'Permanent Participants' in the BEAC, following the model used in the Arctic Council, a high level intergovernmental forum of the eight Arctic states.¹⁴²

The above analysis provides some reasons for seeing the Cooperation as close to being an international organisation which influences its members' behaviour through political commitments. A formal treaty wherein states have the key roles may ensure legal obligations under international law. However, the rapid global changes of recent years have created challenges, and limiting involvement only to states does not seem to be sufficient to address those challenges. So international law should make room for this type of forum and adapt to the new environment and the developments of other branches of science. International law should be dynamic enough to meet the real needs of present peoples adapting to those challenges.¹⁴³ Judge Alvarez has suggested applying a new international law which is perfectly modified and follows the changes in the lives of peoples.¹⁴⁴ He sees a fundamental difference between classical international law and the new international law:

Classical international law was *static*, it scarcely altered at all, because the life of peoples was subject to few changes; moreover, it was based on the *individualistic regime*. The *new international law* is *dynamic*; it is subject to constant and rapid transformations in accordance with the new conditions of international life which it must ever reflect. This law, therefore, has not the character of quasi-immutability; it is constantly being created. Moreover, it is based upon the *regime of interdependence* which has arisen and which has brought into being the *Law of social interdependence*, the outcome of the revitalized juridical conscience, which accords an important place to the general interest. This is *social justice*. This law is not, therefore, mere speculation; nor is it the ideal law of the future, but it is a reality; it is in conformity with the spirit of the Char-

¹⁴² See, <http://arctic-council.org> (accessed December 31, 2009).

¹⁴³ Dissenting opinion of Judge Read, *Anglo-Iranian Oil Co. Case* [1952] ICJ Rep.93 (United Kingdom v. Iran), 144.

¹⁴⁴ Dissenting opinion of Judge A. Alvarez, *supra* note 143, 125.

ter as it appears from the Preamble and from Chapter 1 thereof.¹⁴⁵ [Original emphasis]

On balance, the Barents Cooperation is not an international organisation under classical international law. It generates mainly voluntary or moral obligations through political commitments. However, a few changes can be seen in the Cooperation in recent years: it has been moving towards the creation of stronger commitments by producing several international instruments. The Cooperation is a unique forum, compared to existing international organisations, which may be given the status of a 'Soft-Law Body' or be considered a form of 'Soft-Law Cooperation' under the auspices of new international law.

¹⁴⁵ *Supra* note 144, 124–125.

5: INTERNATIONAL COOPERATION IN THE NORTHERN FORUM: EMERGING NEW NORMS IN INTERNATIONAL LAW?

‘International Cooperation in the Northern Forum: Emerging New Norms in International Law?’ *Polar Record*, Cambridge University Press (online published 31 October 2011, doi: 10.1017/S0032247411000404), pp. 1-15.

CHAPTER 5 TABLE OF CONTENTS:

INTRODUCTION	1
HISTORY OF THE NORTHERN FORUM	1
EARLY MEETINGS OF THE INTERNATIONAL CONFERENCE ON HUMAN ENVIRONMENT IN NORTHERN REGIONS	2
COOPERATING IN A CHANGING WORLD: THE STATEMENT OF INTENT AND EVALUATION OF THE NORTHERN FORUM	2
THE FOUNDING MEETING OF THE NORTHERN FORUM	3
STRUCTURE OF THE FORUM	4
MEMBERSHIP IN THE NORTHERN FORUM	4
ORGANISATIONAL STRUCTURE OF THE NORTHERN FORUM	6
OPERATIONAL SYSTEMS OF THE NORTHERN FORUM	7
LEGAL ELEMENTS IN THE NORTHERN FORUM	8
THE LEGAL STATUS OF THE NORTHERN FORUM	10
THE NORTHERN FORUM’S IMPACT ON INTERNATIONAL LAW	11
THE FORUM’S INPUTS TO INTERNATIONAL LAW	12
CHALLENGES POSED BY THE FORUM TO INTERNATIONAL LAW	12
CONCLUSION	12
ACKNOWLEDGEMENT	13
REFERENCES	13

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International cooperation in the Northern Forum: emerging new norms in international law?

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ABSTRACT. The Northern Forum has been in existence for more than two decades. The cooperative initiatives implement through the forum allow sub-national governments from different parts of the world to improve the quality of life of northern inhabitants and to support their sustainable development. Over time, the forum has established a clear structure with self-created rules and guidelines. However, its legal status is somewhat ambiguous: it has neither fulfilled the essential criteria of an international organisation nor that of an intergovernmental cooperative body. Nevertheless, these shortcomings are not immense obstacles to the forum's ability to serve the well being of residents of the northern regions. The forum has granted membership to business organisations, as well as to sub-national governments, which is an innovative concept in international cooperation. This article examines the evolution, administrative system, and legal status of the forum along with its contribution to the development of international law. The article concludes with observations on how this unique international regional co-operation forum could be characterised under international law and whether it has any influence in creating new norms in international administrative and environmental law.

Introduction

The Northern Forum (hereinafter the forum) is a unique international cooperation body that operates at a sub-national level. Formally established in 1991, it aims to improve the quality of life of peoples living in the north and to support their sustainable development. Its membership consists of sub-national governments (that is, regional, sub-regional and municipal) from three continents (Asia, Europe and North America) although it is registered as a non-profit corporation under the domestic law of the United States. The forum describes itself as an international organisation even though its founding document is not an international treaty and nor is it covered by the law of international organisations as articulated in public international law. It operates on the basis of internally defined resolutions and bylaws and maintains relationships with other relevant international organisations. Its financial affairs are governed by U.S. national and state of Alaska laws.

Thirteen sub-national governors, in their official capacity, from eight states (Norway, Mongolia, United States, Soviet Union, Finland, Canada, Japan and China) established the forum, under the Alaska Nonprofit Corporation Act in November 1991 for 'charitable, scientific, literary and educational purposes' (NF 1991a: article iii). Subsequently, it has accepted new members and has established a clear functional structure. However, its legal status under international law remains ambiguous: the constituent instrument is not a treaty, thus it is clear that it is not an international organisation. Nonetheless, the forum's creators were mainly representatives from regional governments (not national-level state representatives), which means that the forum is not an intergovernmental cooperative body. It allows business organisations to hold membership alongside sub-national govern-

ments and this is an innovative concept in international cooperation.

The forum has been studied very little despite being in existence for two decades. The only other articles appear to be a short description (Langlais 2000: 23–28) and an even briefer description by the author (Hasanat 2007: 23–25). For this reason, it is important to have a closer look at its structures and functions. This legally-oriented study raises several questions. Does the forum hold a clear legal status under international law? What type of obligations does the forum create for participating entities? Does the forum pose any challenges to classical international law? Has the forum created any new norms in modern international law? The answers to these questions will be of interest and benefit to northerners and the global community alike.

This article explores these questions and searches for their answers rather than offering a critical view of the forum's performance, successes or failures. Since there are no general accounts in the academic literature, it is useful to examine the evolution, structure and functions of this unique form of international co-operation without comparing it to parallel developments of other northern and Arctic international co-operation forums.

The article consists of eight parts. Following brief reviews of its historical background, structure and operational systems, this article explores legal elements within the forum itself, including its status and the challenges such an entity poses in international law as well as an assessment of the influence the forum offers for the creation of new norms in international law.

History of the Northern Forum

The genesis of the forum dates to the 1970s, two decades before its formal establishment. The development of a

common platform for the regions of the north evolved from several initiatives that led to the establishment of a not-for-profit, membership-supported international organisation (Langlais 2000: 23). The structure and focus of the current activities of the forum emerged from a series of four major conferences. These meetings culminated in the official establishment of the body in 1991.

Early meetings of the International Conference on Human Environment in Northern Regions

The seed of the forum was sown in 1974 when the Governor of Hokkaido, Japan organised an international conference on the human environment in northern region in Sapporo. Representatives from 15 provincial and regional governments in North America and three Scandinavian capital cities attended the inaugural meeting of what was to become the Northern Forum. The conference identified common opportunities and challenges related to environmental, climatic, or socio-economic concerns in northern regions. The participants concluded that the way one region addressed a particular issue could be applied to other regions. Improved communication and cooperation among the inhabitants of northern regions through more frequent meetings to discuss common issues would improve the standard of living of inhabitants across the northern regions.

The second International Conference on Human Environment in Northern Regions convened in Alberta, Canada in 1979 with representatives from 22 northern regions. Their goal was to identify the means for improving the lifestyle of inhabitants of northern regions (NF undated a). They realised that having an organisation to deal with common concerns emerging from the northern climate could benefit the entire region, although no definition of 'northern climate' was offered.

Cooperating in a changing world: the statement of intent and evolution of the Northern Forum

By 1990, the world had changed and the opening of the USSR to the outer world provided northern Russian regions with the opportunity to join in the creation of a 'voice of northern regions' with the convening of the third Conference of Northern Regions in Anchorage, Alaska (NF undated a). The conference progressed in two stages: i) the Governor's summit on regional environmental cooperation, during which governors, premiers, ministers and chairs of northern regions or their representatives adopted political decisions; and ii) cooperating in a changing world, four workshops organised under the auspices of the International Business Forum with contributions from political and business representatives.

Regional leaders agreed to move forward with international cooperation for the development of northern regions; the business community representatives mainly prepared recommendations to advance cooperation. Participants recognised that the irregular or *ad hoc* basis for transboundary cooperation was not serving the needs

of inhabitants of the region and recommended the establishment of a permanent regional organisation for the north, namely the Northern Forum (Governors' summit 1990: clause I). The 'statement of intent' was adopted by nineteen regional governors representing nine states (Canada, China, Denmark, Finland, Japan, Soviet Union, Sweden and United States). The delegates intended that the forum would act as a mechanism for regular interactions among representatives of northern peoples; improve the quality of local, national, and international decision making regarding northern issues by providing a means through which 'northern voices' could be heard; and offer opportunities to exchange ideas, address common problems, as well as plan mutually beneficial cooperative northern regions' initiatives (Governors' summit 1990: clauses I and II). Although 'northern regions' remained undefined, the conference did encourage other northerners to participate in this cooperative initiative.

The signatories to the statement of intent agreed to establish the forum as a 'permanent organization' (clause III (A)) with representatives from all participating regions establishing a council (Governors' summit 1990: clause III (B)). The secretariat would serve as a collective voice both regionally and internationally (Governors' summit 1990: clause III(C)). They decided that the office of the Governor of Alaska would provide staff services on an interim basis which was tasked with receiving and disseminating specific proposals regarding the terms of reference for the forum and circulating draft bylaws for comment and approval within six months. They also identified issues of common concern for cooperative activities (Governors' Summit 1990: clause IV):

- environmental assessment, monitoring and research;
- infrastructure, including northern communications and transportation systems;
- northern technology and engineering;
- human resources, including culture, education, and health;
- protection and cooperative management of northern renewable resources; and
- pollution prevention and clean-up.

While political leaders established the parameters for regional cooperation at the sub-government level, the international business forum explored issues from the viewpoint of obstacles and opportunities to business and economic development in the north (International Business Forum 1990: 1). The workshops came to a consensus on a detailed model for regional cooperation recommendations (International Business Forum 1990: 1-4) under three broad categories:

- 1) Natural resources development, fisheries, and appropriate northern technology (for example development of model technology transfer and communication systems and regional demonstration projects; targeting small business, tourism, manufacturing and international trade initiatives; natural resource conservation; development of fishery management measures for the

Bering Sea; facilitating fisheries industry innovation in processing, species utilization, marketing, and waste products utilization; international fisheries research)

- 2) Northern markets, financing and tourism (for example sources of and access to capital, creation of an international fund for economic development, inventory and coordination of economic development institutions, coordinated efforts to dispel myths of the north that hinder investment, enhanced support for regional advocacy and implementation of measures)
- 3) Communications and transportation (for example enhanced multilateral cooperation in telecommunications and air and sea routes)

The adoption of the statement of intent galvanized cooperation and facilitated communication among participant regions, which led to the May 1991 Northern Forum conference. The participants to this conference adopted the Northern Forum agreement (NF 1991d), which established the functional bodies and rules governing the forum. Most of these bodies were established on an interim basis and were later transformed into permanent units.

A draft charter for the forum, together with bylaws and draft policies excerpted from the statement of intention, served as the basis for discussion. Participants agreed to nominate/elect a board of directors who would be tasked with preparing a final set of bylaws, rules, and regulations, which then would be confirmed by the general body (NF 1991c: 38) comprised of regional leaders (NF 1991c: 28). They decided to register the forum as a not-for-profit organisation in order to be affiliated with the United Nations (NF 1991c: 32).

Participants raised several questions concerning the funding of the forum (NF 1991c: 22). How would one region finance a selected project that had priority and one that benefits other regions? Who would provide the funding for the forum, that is, federal or local governments? In the end, they agreed to two types of projects: those funded by all members that demonstrated the regional capacity of the forum at the international level, and regional projects funded by interested parties that met the goals of the forum and reported to it (NF 1991c: 33). At that stage, some participants were concerned about the limits of their authority to give consent to an international cooperative initiative such as the forum (NF 1991c: 31).

Understanding was reached on certain words used in the draft charter. They used the word 'local' to avoid confusion with terms articulated in the national constitution of a state and a lower case 'g' when referring to governors. During the debate they did not find it as critical as if it were involved in court (NF 1991c: 79–80). Yet, some participants had the idea that northern provinces and Arctic provinces are the same since the definition of 'north' remained unresolved at this meeting. Clarification was needed on the extent to which a sub-regional entity such as a province, as a member in the

forum, could support a forum statement that was different from its national government view (NF 1991c: 65).

The conference concluded with the adoption of the Northern Forum Agreement (NF 1991d), which included, *inter alia*, provisions for an interim organising committee (Board of Directors) consisting of one representative from each of the eight participating nations. The main tasks of the Board were to review and revise bylaws, charters and principles used by the Northern Forum and its secretariat; to determine budget and fee structures for the members, to define 'northern regions', to clarify membership rules, to make up the permanent Board of Directors, and to review and revise proposals for the process of selecting priority projects (NF 1991d: section 4). The office of the Governor of Alaska was to develop a proposal for the process of selecting priority projects to be submitted to the board for review and comment (NF 1991d: section 5). The signatories of the Northern Forum Agreement agreed that all documents prepared by the interim board would be reviewed by the founding meeting of the forum. The founding meeting would consist of governors from all participating regions and would take the necessary steps to establish the forum formally and a timetable for that meeting was established (NF 1991d: section 6).

The founding meeting of the Northern Forum

The leaders officially adopted the charter in the founding meeting of the forum (NF 1991e) and registered articles of incorporation before a notary public in the state of Alaska in 1991. The participants at the founding meeting agreed that, in addition to their regular interactions, the forum would act as a means for cooperation, continuing consultation and exchange of concerns among the northern leaders (NF 1991b: preamble).

At subsequent regular meetings of the forum, regional leaders have adopted a series of declarations concerning principles and priorities for forum activities (NF 2008a: section 2.6(1)). The 1993 Tromsø declaration (NF 1993c) set out the goals and plans of the forum, concerning, *inter alia*, sustainable development strategies following on Agenda 21 (United Nations Conference on Environment and Development 1992) and the Brundtland Commission Report (UNGA 1987). In 1995, the forum provided guidelines and goals for the secretariat and member regions, enhanced the stated principles, and undertook a self-evaluation of its progress over the previous five years (NF 1995: preamble and section 2.B). In the 1997 Yakutsk declaration, leaders expressed their commitment to expansion of regional interaction and their optimism about the prospects of further cooperation in enhancing the role of the Arctic and the north in the international community (NF 1997: section 1).

The Lapland declaration (NF 1999: commitment of current activities) established a framework with specified time limits for results from priority projects and

development of a viable long term financial strategy. This defined the forum's mission as follows:

To improve the quality of life of Northern peoples by providing Northern regional leaders a means to share their knowledge and experience in addressing common challenges; and To support sustainable development and the implementation of cooperative socio-economic initiatives among Northern regions and through international fora [original emphasis] (NF 1999).

The 2001 Alberta declaration (NF 2001a) recognised the need to advance northern economies, to improve the socio-economic capacity of the northern regions, and to enhance in a sustainable manner the quality of life in northern regions, in particular that of indigenous peoples. It also committed members to enhance the profile and operations of the forum and to continue to make it a multilateral voice for the northern regions. In 2003, the St. Petersburg declaration (NF 2003b) focused on the northern sea route as the single most important infrastructure priority in the northern regions and recognised the responsibility of members in protecting the Arctic environment, advancing indigenous participation in northern economies, the sustainable use of natural resources, maintaining and enhancing unique cultures in the northern regions, and promoting, as a priority, the creative potential of indigenous peoples.

The northern leaders noted with appreciation in 2005 the progress on priority projects and established partnerships with other circumpolar and global international organisations and the national governments of the north (NF 2005: background). They expressed their intention of enhancing the forum's partnership with the Arctic Council and other international organisations (for example the Barents Regional Council, the Network of Regional Governments for Sustainable Development, Nordic Council, Arctic Parliamentarians, and the United Nations) by identifying additional cooperative measures. The northern regional governments committed themselves to expand the forum's work in research and cooperation in climate change adaptation and to continue efforts to promote conservation of nature and ecologically sensitive development (NF 2005: background).

By 2007 northern leaders were able to demonstrate their progress in health care and education, expanded international cooperation regarding northern issues, and enhanced cooperation with the business community (NF 2007: B.1). They acknowledged the creation of the Business Support Services programme and praised members for their commitment to strengthening cooperation between regional governments and the business community (NF 2007: B.5). The declaration noted the success of projects enhancing quality of life in three major categories:

health care (for example telemedicine, infectious disease control, and treatment of substance abuse) education, including promotion of international understanding culture (for example support of performances

and efforts to preserve unique northern cultures) (NF 2007: E.1)

Scientific cooperation under the auspices of the forum has focused on expanding knowledge about the northern environment and protection of life and property, in particular the impacts of, and adaptation to, climate change. The declaration also called for members to explore partnerships for circumpolar monitoring (NF 2007: E.2). The leaders committed themselves to organise yearly summits of ministers, including those from environment, education, health and economic development, to enhance cooperation between the member regions (NF 2007: E.2); to extend partnerships to relevant international organisations or UN agencies, and to take part more efficiently in the activities of the Arctic Council and the UN Framework Convention on Climate Change (United Nations 1992), and to implement a public relations campaign to enhance awareness of northern and Arctic issues and strengthen the voice of northern regions (NF 2007: E.2).

In the 2009 Whitehorse declaration, northern leaders recognized the impacts of global financial crisis on the regions and agreed to focus its projects and programmes on this issue (NF 2009c: D.1). They acknowledged the enormous benefits of bilateral and multilateral relations among regional governments from both a northern and global perspective. They emphasised the need for the review of the forum's strategic plan to focus on implementation of new projects and initiatives rather than a review of its mission or overall goals and objectives (NF 2009c: D.2). They recommended coordination of business summits and meetings on the current situation in northern economies (for example decreasing of rural population, lack of employment); innovation and expansion of green industries as alternative energy source and climate change mitigation and adaptation actions; a circumpolar regional pact aimed at addressing economic growth and advancing indigenous participation in northern economies (NF 2009c: D.3).

The forum will celebrate its twentieth anniversary in 2011 at its next biennial meeting in Korea where northern leaders will address future challenges faced by the north.

Structure of the forum

The forum comprises entities responsible for internal decision making purposes as well as overall policy making. The composition of these entities is based on a two-tiered/level membership system that has emerged over the past 20 years. After a review of the membership categories, each of the governing entities of the forum will be examined in turn.

Membership in the Northern Forum

Under the charter (NF 1991b: article VII), members must satisfy the requirements set forth in Article III of the bylaws, which provide for the granting of membership to regional governments (membership I) and business partners (membership II).

The interested governments of the northern regions are eligible for membership. However, it was somewhat unclear to how to appraise whether a region had the ability to become a member until the forum defined 'northern regions'. Participants to the third Northern Regions Conference in 1990 (NF undated a) engaged in a long discussion about the selection criteria for defining a region as the basis of forum membership (NF 1991c: 40). To this end, they defined northern regions and membership selection on the basis of the following criteria:

- Harsh climate and vulnerable ecosystems;
- Small population, diverse and strong indigenous cultures;
- Economy based primarily upon extraction of natural resources and outsourcing of all goods;
- Limited internal investment capital, high operating costs;
- Limited infrastructure, mostly oriented north-south; and
- Limited influence on national government and multinational corporate decision making (NF 2008b: section 3.2).

Clearly other regions share similar climatic conditions and fulfill these criteria but they are not members of the forum (for example some parts of Nepal, India, Pakistan or South America), nor have they applied for membership. The forum has not invited them to join and has not sought to extend its areas beyond the northern hemisphere.

The rules of procedure determine the rights of member regions (membership I). A member is entitled

- To attend all meetings and sponsored events of the forum;
- To participate in project working groups, conduct and host project activities as agreed to by members;
- To receive various publications of the forum;
- To receive information from the secretariat and associate secretariats on projects and issues of concern to particular members;
- To participate in open meetings and events of the United Nations (UN) as part of the forum's official delegation;
- To participate in the Arctic Council's (AC) projects and activities as an observer. Attend AC meetings as part of the forum's official delegation;
- To vote in creating and approving forum policy statements, bylaws amendments, supporting priority projects and taking any and all other actions necessary to operate the forum (NF 2008b: section 3.2).

Over the years, new members have joined and some have left. The forum has adopted a flexible approach to withdrawal (NF 2008a). However, a member region has to pay its regular annual fee which the forum has fixed at 15,000 US dollars for a region of 100,000 population or more; in case of smaller population it is 5,000 US dollars although the BOG may change the amount in both cases on a biennial basis (NF 2008b: section 3.4). A member region may manage the fee from its local resources or

ask (full or partly) its national government as a part of the regular allocation within its annual budget.

The board of governors may terminate the membership of an inactive member (that is in cases of non-payment of dues and of not contributing to cooperative initiatives) upon notification, with an option to resume membership upon payment of membership arrears (NF 2008b: section 3.6). Several founding members have withdrawn from the forum. In 2002, the forum adopted its current streamlined classes of memberships (NF 2002b): i) full regional government member (including Russian federal cities, and municipal governments where no regional structure exists); and ii) business partners (that is businesses, chambers of commerce, NGOs, and others with an interest to work in cooperation with the forum to achieve its goals).

At present, the membership I category comprises Nunavut and Yukon Territories and Quebec Province (Canada); Heilongjiang Province (China); City of Akureyri (Iceland); Hokkaido Prefecture (Japan); Gangwon Province (Republic of Korea); Chukotka Autonomous Okrug, Khanty Mansiysk Autonomous Okrug, Komi Republic, Sakha Republic (Yakutia), Vologda and Yamal-Nenets Autonomous Okrug (Russian Federation); and the state of Alaska (United States) (NF undated c). In addition to these members, the Province of Lapland (Finland), which had been continuing with the forum membership since the beginning up to 2010, is now somewhat ambiguous – neither has Lapland withdrawn the forum's membership nor the forum has terminated/suspended the membership. In fact, this has been resulted from Finnish interior regional administrative reform which has abolished the provincial government of Lapland. During this transitional period the everyday functions of the former government are currently taken care through three authorities (Regional State Administrative Agencies; Centres for Economic Development, Transport and the Environment; and the Regional Council of Lapland) as an interim basis. However, none of these three has taken up the forum membership to this date.

Membership II status is granted mainly to business partners with a significant role in the northern economy. Business partners include companies and associations such as chambers of commerce. Granting membership to business entities is a unique characteristic of the forum and an innovative idea in international cooperation. The first Northern Business Conference was held in 1999 in conjunction with the forum's fourth general assembly (NF 1999). Subsequently, the forum has hosted regular trade and business summits during its biennial meetings, a productive way for the regions to expose business and trade potential to each other. Like membership I, the forum has introduced annual dues (subject to change by the BOG) for its business partners which are based on three different categories: small business membership (50 employees or fewer) dues as ascertained 1,000 US dollars; while, for medium business (employees from 51 to 99) and northern forum sponsor (100 employees or

more) the amounts are 5,000 US dollar and 10,000 US dollar respectively (NF 2008b: section 3.4).

At the present there are 22 business partners from four countries: they are Ded Moroz Tourism Company, EPL Diamond, Generations Fund of Khanty-Mansiysk, Khanty-Mansiysk Bank OSC, International Women's Expeditions, Makarov Clean Water JV, JSC Prognoz, Promtehnologiya-Arktika, Tispa Diamond (Russia) Ltd., Uralsvyazinform OJSC, Yugoria State Insurance Company, Yugoria State Television & Radio Company of Kmao, Yugra Timber Holding, and Yugraavia Khanty-Mansiysk Airport from Russian Federation; Alaska Native Heritage Center, Alaska Sealife Center, Denali Commission, GIT Satellite LLC, and World Trade Center of Alaska from the USA; Ferguson Simek Clark International, and Rockford Lang International Consulting Inc. (RLICI) from Canada; and Kometos Oy from Finland (NF undated d).

Business partners are entitled to attend all the open meetings of the forum (NF 2008b: section 3.3). This provides them with the opportunity to meet regional government officials to discuss business and trade challenges and opportunities. They have the right to access the forum's databases, publications, and other resources, as well as to use the office of the forum secretariat when in Anchorage in conducting their business (NF 2008b: section 3.3). The idea of inclusion business groups in the forum serves the mutual interests of business community (expansion of business, getting relevant information, secretarial support, tax or visa related assistance etc) and local residents (job opportunities, economic development in the remote areas etc).

The membership rules have been amended over the years. For example, to meet functional requirements, an entity granted category II membership may change its status to category I. Initially, membership II status was extended to associations of municipalities in the absence of regional government level memberships. This was expanded to single municipalities when the forum amended its bylaws in order to grant membership to the municipality of Akureyri, Iceland, in 2001 (NF 2001b). In 2002, the City of Akureyri was granted the status of membership I (member region) (NF 2002a).

Initially, the forum had two additional membership levels, associate and advocate, both of which were non-voting but entitled to attend the general assembly, board of directors and regional coordinators meetings (NF 1993b). Associate membership was meant for business and corporate institutions and advocate membership for individuals, non-profit organisations, or NGOs with a demonstrated interest in relevant northern issues (NF 1996a). However, the forum did not use these membership categories.

Organisational structure of the Northern Forum

The forum comprises three primary decision making bodies: the Board of Governors, the Executive Committee

and the Regional Coordinators Committee. A permanent secretariat manages day-to-day business. Its primary role is to provide continuing oversight, supervision and guidance to the executive director, the head of the secretariat (see below), concerning fiscal or policy matters of the secretariat, and other activities of the forum. Additional support is provided by the Northern Forum Advisory Council. The role of each of these operational entities is discussed in turn below.

Initially, the Board of Directors was the decision making body. In 2001, the forum changed the name to the Board of Governors (BOG) to reflect its high profile more accurately (NF 2001d). The BOG includes all member regions and exercises all the powers and authority granted by their national laws subject to any restrictions imposed by the forum's articles of incorporation and bylaws (NF 2008a: sections 4.1–4.2). Generally, the forum expects that the seat of each region be held by the top executive official of the region (for example governor, premier or chair) although plenary power may be delegated (NF 2008a: section 4.2). Usually, each governor serves a four year term on the BOG. If the status of the governor as senior government official changes, he/she shall be deemed to have resigned and his/her successor in the member region will serve out the remainder of the term until the next general assembly (NF 2008b: section 4.2). In addition to general governance, financial and public relations responsibilities, the BOG establishes and reviews strategic directions and sets institutional priorities (NF 2008b: section 4.1).

The General Assembly of the BOG (GA) includes all fully recognised members together with associate entities and business partners (NF 2008b: section 4.5). A GA is held every other year (NF 1991b: section 1.01). It can elect a seven person executive committee to represent all members between the GA meetings. An informal but structured meeting of the governors (or the senior executive officials), the governors summit, is a component of the GA (NF 2008b: section 4.5(3)). Heads of the regions discuss policy issues and other strategic planning matters of concern. This informality is enhanced by the strict provision that only one staff member can accompany a governor during the summit (NF 2008b: section 4.5(3)).

The BOG selects an executive committee (EXCOM) consisting of five members, one chair and four vice-chairs, representing each of the five regions (that is North America, Northern Europe excluding Russia, Northwest Russia, Northeast Russia, and Northern Asia excluding Russia) (NF 2008a: section 6.1).

The current EXCOM is an anomaly in that two co-chairs from North America (Nunavut and Yukon regions of Canada) were selected (NF 2009a). The EXCOM is to meet at least once every calendar year (NF 2008b: section 6.1). Its primary role is to provide continuing oversight, supervision, and guidance to the executive director concerning fiscal and policy matters of the secretariat, and other activities of the forum. It acts on behalf of the BOG to address issues requiring immediate attention that arise

during interim periods between regular board meetings, including authorisation of changes in expenditures that affect the approved budget of the forum.

The Regional Coordinators Committee (RCC) is generally responsible for the implementation of forum declarations, work plans, projects and other activities directed by the BOG (NF 2008b: section 6.2). Delegates are chosen by each member of the BOG and a regional coordinator nominated by the chair region of the forum presides over the RCC (NF 2008a: section 6.2). The RCC provides recommendations to the BOG or the EXCOM on the work and performance of the secretariat and of the executive director and guidance to the latter concerning issues that might be brought before the EXCOM and/or the BOG.

Prior to 2006, the RCC met in alternate years; since then it has convened yearly in person or through telecommunications (as was the case in 2009). The established custom and practice is that an RCC meeting is convened roughly three months before each BOG meeting because its proposals need to be approved by the BOG (NF 2008b: section 6.2).

Since its inception, the main secretariat has been located in Anchorage, Alaska; a satellite office is located in Moscow, Russia. The secretariat is headed by an executive director chosen by the BOG and serves as the president of the forum. The main tasks of the secretariat are administering daily operations of the forum, including planning and facilitation of the biennial GA and other executive level meetings, fund raising, information exchange and dissemination, and project coordination (NF 2008b: section 1.3). There are also other staff tasked for different administrative or public relations activities including project management specialists and regional representatives from member regions (NF undated b). The deputy director (NF 2008b: section 5.8) and secretary/treasurer (NF 2008b: section 5.9) are examples. The deputy director exercises the power and functions of the executive director in the absence of or on the request of the executive director; and the BOG may keep this position vacant as desired (NF 2008b: section 5.8). Then, the secretary/treasurer is tasked for maintaining financial matters including preparing a biennial audit that contains all the income and expenses to be submitted to the EXCOM and BOG (NF 2008b: section 5.9). In addition to this biennial report, the duties of secretary/treasurer and/or the executive director also include the preparation for the BOG, EXCOM, RCC of an annual financial report that includes current financial situation (membership dues, payments) on basis of which the EXCOM and RCC approve the forum's annual budget (with necessary changes in expenditure or fundraising efforts) (NF 2008b: section 8.2).

Established under the rules of procedure (NF 2008b: section 6.3) and the bylaws (NF 2008a: section 6.3), the Northern Forum Advisory Council comprises past chairs of the forum. Established at the fifth biennial GA in 2001 (NF 2001c), the advisory council provides strategic direction to the BOG and EXCOM, helps develop a

long term vision, facilitates the forum's financial stability, and other functions as defined by the BOG (NF 2008a: section 6.3 and NF 2001c). The council is also expected to promote the forum in the inter-regional and international arenas (NF 2008a: section 6.3). Ironically, although the forum is prepared to accept the vision, persistence and wisdom of this group of experts with real knowledge and practical experience in meeting the needs and expectations of northern peoples, it does not assume responsibility for the costs associated with their participation (NF 2001c).

Operational systems of the Northern Forum

The operations of the forum, that is, its activities in support of its goals, are undertaken through various prioritised projects. The rules of procedure suggest establishing a working group for each priority project composed of the chair and project participants from regions participating in that project. The chair is chosen by the members of the working group for the purposes of planning, implementation, and reporting: each working group works closely with the secretariat and the RCC to meet annual reporting and financial requirements; a working group is independent and can seek assistance from special advisors, experts or observers and prepare its own meeting schedule and project implementation timeline (NF 2008b: section 7.2).

The statement of intent established the first working group, which had the task of preparing the list of priorities for action emanating from the governors' summit (Governors' Summit 1990: clause III (F)). Working groups established to date include those concerned with brown bears, flood management, healthy lifestyles, telemedicine, infectious diseases surveillance (with the Arctic Council), and the Association of Northern Zoos. Some working groups are well structured (for example the brown bear working group) with long time members who work together continuously. Others are less formal, and, at most, meet once a year. However, for a project to be approved by the BOG, there has to be a group of people working on it; a project cannot be something proposed by an individual with the hope that other regions will follow, as it has been too often the case in the past (N. Novik, personal communication, 19 January 2011). Some working groups, such as the northern tourism working group, are inactive, possibly because the regional coordinators have no interest in their subject matter or because they do not know how to find people to participate in the working group (N. Novik, personal communication, 19 January 2011). However, there is the possibility that such working groups could be reactivated.

Approving priority projects requires consensus agreement among members present at the GA (NF 1991b: article X(1.01)). This is evidence of the importance accorded each member regarding development projects. Clause V of the 1990 statement of intent (Governors' Summit 1990) sets out specific areas for forum activities:

Joint efforts to establish communication networks among northern peoples, with special emphasis on television;

Shared monitoring of atmospheric pollution (for example nitrogen and sulphur oxides);

Joint research on oil pollution in northern seas;

Interaction among the peoples of the north;

Opportunities to open the northern sea route to international shipping;

Action to ensure that best available environmental technology is employed and properly financed;

Joint research on hazardous waste disposal and the safe clean up of contaminants;

International dissemination of knowledge about the special situation of northern hunting societies;

Collaboration among the northern regions on oil spill prevention and response;

Joint efforts to protect the cultures of northern peoples;

Improvement of northern and Arctic environmental monitoring and creation of regional data systems for ecological and meteorological influences on northern regions; and

Monitoring of northern peoples' adaptation to industrial development.

In practice, the forum has introduced number of programme areas that cut across issues and specific themes. For instance, society and culture programmes can deal with healthy lifestyle, telemedicine, and infectious diseases; a sustainable development programme could deal with northern tourism, rural development, northern building and technologies.

Legal elements in the Northern Forum

The leaders of the northern regions have created legal tools to govern the internal operations of the forum as well as its external relations. However, it is difficult to determine the legal authority of these instruments under international law and the extent to which they create legally binding obligations on forum members. These include each of the forum operating instruments (that is bylaws and rules of procedure) and founding instruments (that is statement of intent, Northern Forum agreement, articles of incorporation, and charter (Governors' Summit 1990; NF 1991d, 1991a, 1991b)), as well as more broadly-based instruments such as declarations and resolutions, as well as the Rovaniemi code of conduct (NF 1994a).

The bylaws and rules of procedure for the legal basis for operation rules to meet the objectives set out in the Northern Forum charter (NF 1991b: article XIII (1.00); NF 2008a: section 2.4; NF 2009b). The rules of procedure expand the provisions in the bylaws and set out the functional management methods of the organisation on a day-to-day basis (NF 2009b).

The statement of intent (Governors' Summit 1990), signed in September 1990 by nineteen governors of northern regions, supporting the establishment of a

permanent entity (NF 1991a: article II (9.00)), could be seen as a milestone document. The leaders agreed to some commitments in principle with clear guidelines that could be loosely compared to fundamental principles set out in the constitution of a modern state (Governors' Summit 1990; preamble).

This instrument identifies common characteristics in the northern regions, in particular environmental protection, economic well being, and the appropriate role of regional government in decision making. It describes regional priorities for northern region policy makers, namely,

Coordination and cooperation of the management of migratory species of fish, waterfowl and marine and terrestrial mammals,

Transboundary air and water pollution,

Maintaining the unique culture, economy and livelihood of indigenous peoples living in the remote regions in the north,

Managing shared natural resources and ecosystems (Governors' Summit 1990: preamble).

The statement of intent was an agreement (in principle) to establish the forum as a mechanism for regular interaction among northern leaders in their official capacity as representatives of northern publics to deal with such issues (Governors' Summit 1990: article I).

Following the adoption of the agreement in 1991 (NF 1991d), the structural components of the forum, and their functional parameters, were put in place, namely the GA, permanent secretariat, and the Board of Directors, subsequently BOG. In addition, the agreement provided the basis for operational instruments and procedures, for example, the bylaws and charter as well as the convening of the founding meeting to establish the forum formally. The consensus demonstrated in the agreement is evidence of the strong unity among the governors to work together on northern issues of common concern and to adopt obligatory provisions to undertake these activities.

The forum articles of incorporation (NF 1991a) describe it as a non-profit corporation and were adopted on 8 November 1991 and registered before judicial authority in Alaska. However, the articles do not clarify whether the forum is an international forum of sub-national governments in the northern region.

The purposes of the forum, as described in the articles, are for the charitable, scientific, literary and educational purposes within the meaning of specific provisions of U.S. national law (United States 1986: section 501(C) (3)), including convening of conferences (NF 1991a: article III). However, the instrument does not define the geographic scope of the forum. The incorporators, representatives from northern regions, assumed the role in a personal, not official, capacity, and established the Board of Directors. The articles include provisions to protect directors from assuming liability for claims against the forum (NF 1991a: articles VIII-X).

The charter (NF 1991b), in the model of a treaty with a preamble and articles, sets out the purposes,

principles, powers and functions of the forum. It calls on sub-national governments (states, provinces, territories, counties, prefectures and autonomous regions) to address common challenges faced by the inhabitants of the regions, in particular economic development and protection of natural environment and traditional cultures of indigenous peoples (NF 1991b: preamble). The purposes establish its advisory character, for example, ‘to propose a framework for specific action in the resolution of problems addressed by the organization’ and ‘to act as an advisory body to form official statements of position with respect to issues of northern concern’ (NF 1991b: article III (1.03–1.04)). Its functional character is established in provisions such as the call on members ‘to initiate, coordinate, and effectuate positive changes solutions to problems addressed by the organization’ (NF 1991b: article III (1.05)). The advisory and functional character established in the charter do not, however, create binding obligations on the part of participating governments, merely an invitation to participate in mutually benefiting collaborative action. Thus the charter can be seen as a soft law international instrument.

As discussed above, the forum has adopted biennial declarations that set out commitments to current activities and look to future activities, together with a few statements on principles or areas of concern. These declarations denote some promises publicly made by the BOG and often include references to its international and commercial partners. These forward looking statements consider directions for future activities based on the spirit of international good will and cooperation. They have been prepared with soft approaches, using words like ‘recognise’, ‘believe’, ‘pledge to promote’, ‘support’, ‘commit to cooperate’, and so on. This type of wording does not create any strong commitment generating legal obligations, although it may create a political or moral commitment on part of the regional governments.

In contrast to declarations, resolutions of the forum are very formal in terms of decisions making. As set out in the bylaws, ‘Resolutions are prepared for a specific issue and presented by the Executive Director’ (NF 2008a: section 2.6(3)). Resolutions are generally developed by the regional coordinators; then reviewed by the EXCOM; and finally approved by the BOG (NF 2008a: section 2.6(2)). Moreover, a two-thirds majority vote of the BOG quorum is required for approval of a resolution (NF 2008a: section 2.6(3)). To date, the forum has adopted 145 resolutions concerning, *inter alia*, bylaws and rules of procedure amendments, membership rules, rules concerning appointment of officials, establishment of committees and other subsidiary bodies, allocation of annual fees and other financial matters, and project approval.

The 1994 Rovaniemi code of conduct (NF 1994a) represents a further ‘soft’ measure endorsed by the forum. The code encourages national and regional governments, along with businesses, to contribute to the development of the north, a region of abundant natural resources. Its main aim is to introduce effective business policies and appro-

priate regulations that will benefit the inhabitants of the region with respect to property rights (for example land ownership and use issues) and environmental protection and sustainable development (for example environmental safety, assessing environmental liabilities and protecting lifestyle of the communalities) (NF 1994a: Background). However, most of the instrument is full of salutary advice. The code seeks to ensure the rights of investors through recommendations on ‘investment strategies’ directed to local, regional and state level administrations, which could be seen as promising much in terms of local development:

To reduce uncertainties concerning the conditions governing the rights of investors, special efforts should be made by local, regional and state authorities to: i. ensure the rights of investors (e.g., the ownership and integrity of property, and the enforcement of contracts); ii. stimulate and assist investment activities through clearly defined rules and regulations (including stable taxation policies); iii. clearly specify the rules and guidelines regulating environmental safety, environmental liability and the rights of local populations, including indigenous peoples, in areas under development; and iv. take a constructive approach towards harmonizing the above mentioned policies with neighboring countries. (NF 1994a: section 1).

The code introduced the concept of ‘common environmental domain’ concerning the relationship between property stewardship and ownership with the aim of protecting the region from activities that deplete or damage environmental integrity (including water, air and land) (NF 1994a: section 2). This concept is based on the congenial coexistence of people and nature, a precondition of human life in the harsh and adverse conditions of the north (NF 1994a: section 2; Heinämäki 2010).

The code also argues for the rights of local peoples, primarily indigenous communities: improvement of living conditions; respect for the cultural and traditional values; their basic means of subsistence, and their rights as recognised by national, regional and international norms and rules; participating in the economic benefits including training and educational programmes, employment and in resource development decisions; utilisation of local indigenous knowledge to the decision making process; adherence to the international human rights instruments; importance of the culture and values for their traditional relationship to resource use of land and water, and so on (NF 1994a: section 6). It calls for infrastructure development that takes into account ‘the needs, values and decision-making rights of each community concerned, and [is] in harmony with the internal development policy of the region in question’ (NF 1994a: section 4) with a focus on environmental protection (NF 1994a: section 5).

Although the code introduces these concepts and principles, arguing for the rights of investors, development of local peoples and protection of the environment, it does not create any legally binding obligations or real

commitments on the part of forum members. Rather the code offers guidelines that serve the goals of the forum.

The legal status of the Northern Forum

There was a long debate among the negotiators regarding the nature of the forum during its establishment, in particular whether it should be considered as a private or public entity. To the surprise of some delegates, the 1991 conference decided to establish a private organisation to encourage cooperation with government support (NF 1991c: 27). Two years later, it received the status of non-profit corporation (NF 1993a). At the same time, the charter introduced the forum as an 'international organization' and 'non-governmental organization' (NF 1991b: article II). This multidimensional identity presents a somewhat challenging approach to scholars seeking to determine the legal status of the forum.

The forum introduces itself as 'corporation' and 'organization', among other expressions, each of which have a different meaning under international law (NF 2008b: section 1.1). An intergovernmental organisation created by a treaty is a formal body with legal personality under international law, with legal rights and obligations and certain immunities; a corporation denotes a legal person under national law. According to its charter, the forum is both an international organisation and a non-governmental organisation (NF 1991b: preamble, article II). It defines 'international organization' as global orientation, with a northern emphasis, and 'non-governmental organization' as recognised and defined by the United Nations (NF 1991b: article II). This complex character may surprise some international lawyers although it does not create any complications in terms of the forum's ability to serve the practical needs of the residents of the northern regions. It is worth noting that in the last 20 years the forum has not faced any legal question in the USA or abroad.

The forum manages its internal functions in a systematic manner that is similar to that of an international organisation. The members follow its operating rules, guidelines, resolutions, and other internal agreements. The forum is very formal in convening meetings and all meetings follow strict procedural rules (for example notice of meetings is served in the required manner and time). Nonetheless, the forum's legal personality is defined by U.S. national law, that is, the Alaska Nonprofit Corporation Act (Alaska 2009) and Section 501 (C) (3) of the Internal Revenue Code of 1986 (United States 1986), which is applicable to incorporated non-profit organisations, and the forum enjoys the privileges and immunities conferred by domestic law in Alaska. The forum has introduced necessary changes to adapt to changes in both federal and state law. Recently, it has amended its bylaws and the rules of procedure in order to bring the utmost transparency to its activities, including making official minutes of the BOG meetings and annual tax statements publicly available (NF 2009b). Thus, the forum conducts

its affairs in accordance with the laws of the state in which it is registered, in addition to its self-made instruments, like a classical international organisation.

Over time, the instruments produced by the forum have gained some authority. For instance, the acceptance of punitive actions by the members in relation to failure to pay annual fees and other dues (that is falling into the inactive membership category, which includes loss of voting rights, and financial and secretarial support) (NF 2008b: section 3.6).

Since its inception, the forum has tried to be a formal body and has established a clear structure with robust decision making organs (EXCOM and BOG). At the same time, it has maintained its regional focus. For example, since 1991 plenary meetings of the GA have rotated between cities of member states (NF 1991c: 35). The BOG created a permanent flag for the forum, which provides a common regional image and integrity (NF 1994b). Personnel engaged in forum activities enjoy legal immunity to some extent while performing official duties (for instance, any members in BOG is not personally liable to the forum unless any exception is made by Alaska State or US federal laws; or no officials could be claimed responsible for any debts of the forum (NF 2008a: section 8.6)). That is loosely comparable to the privileges extended to employees of an international organisation recognised under international law.

In addition to its formal rules and regulations, the forum members have established informal internal practices, that is, those outside the written rules. For instance, agenda items of a BOG meeting are generally set in a RCC meeting by agreement among the regional coordinators.

Phone or video conference attendance during face-to-face meetings is possible if no objection is made by another member (NF 1991b: section 1.05). Such practical measures are both timely and realistic and encourage the participation of vulnerable members (that is members experiencing financial or other limitations in attending meetings physically) in the decision making process of the forum. These types of practices could be seen as evidence of sub-national governments' ability to create regular practices; over the long term, such practices generate customary value.

The forum has sought to encourage indigenous peoples as active participants in northern economies (NF 2009c: D.3), to protect their traditional cultures (NF 2003b: section 3), and to take part in decision making processes related to their community's concerns (NF 1994a: sections 4-6). These are significant initiatives that would recognise their right to self determination although any special position for indigenous peoples within the forum has not yet been proposed.

The forum cooperates with many international organisations and programmes promoting sustainable development, environmental conservation and economic development. These include UNDP, UNEP, UNESCO, UNFCCC, the Arctic Council, Barents Regional Council,

WHO) etc (NF 2009c: section D.6). The forum has observer status at the Arctic Council and is a member of its sustainable development working group. It was recognized as a NGO (in early 1994) by the UN, which allows it to take part in certain UN activities. For instance, the forum is active in UNDP sponsored UN-Regions Partnerships – Towards Carbon Neutral and Climate Change Resilient Territories – part of a multiphase programme which objectives include to support national governments decentralization by assisting regional and provincial governments in developing and implementing their own development strategies in partnership with all stakeholders (UNDP undated). The forum has also partnership with the Network of Regional Governments for Sustainable Development (nrg4SD) and the Forum of Global Associations of Regions (FOGAR). In 2007, it concluded a memorandum of understanding (MOU) with the UNDP (UNDP and NF 2007) and a letter of agreement jointly with UNDP and FOGAR, establishing, *inter alia*, a social communication network (UNDP, NF and FOGAR 2007). These involvements in international fora provide the forum with the opportunity to be a partner in the global community and to raise regional issues in the international arena, that is, the issues facing the inhabitants living in northern regions.

The forum could be seen as being conservative in terms of publicising produced documents since a large number of documents on its website are password protected and only accessible to members. There is also some inconsistency between documents (for example the charter (NF 1991b) refers to article II of bylaws for regulations relating to membership under section 1.00 of the charter but membership was dealt in Article III of the bylaws (NF 2008a)). Some instruments adopted through regular procedures have not been put into practice or repealed and remain on the books (for example the provisions relating to associate membership and advocate membership in resolutions 12, 41 and 42 (NF 1993b, 1996a, 1996b)). One may criticise the forum for such mistakes, superficial documentation, or non-application of an instrument. However, these issues do not appear to be a dilemma for a soft-law body since they do not harm any member or associated entity.

The lack of a treaty together with the other shortcomings mentioned above, suggest that the forum is best characterized as a soft-law body (Hasanat 2007). Generally, however, an important element of soft-law cooperation is the participation by national governments, which is absent in this case. However, the sub-national level representatives engaged in the forum have a mandate from the inhabitants of their respective regions, which demonstrates indirect democratic practice within the forum. Sub-national governments handling matters related to issues crossing national borders, which are usually taken care of by the national government, in particular foreign ministries, also does not appear to be *ultra vires* because in most cases either the national government has delegated power to the sub-national au-

thority or has not objected to the practice for a long period of time. For instance, in the 1980s, when the provincial government of Lapland (Finland) initiated a cooperation agreement with the Murmansk Oblast (Russia), the central government of Finland exchanged a few letters concerning how to deal with a regional government of a foreign state. Ultimately the Lapland Province received permission from the national government to conclude the agreement. (H. Viranto, personal communication, 21 February 2011). Then again, national governments have provided with support to the sub-national governments as a contribution to societal development that serves the community interest at the regional level (for example the Finnish Ministry for Foreign Affairs recently allocated funds to the Arctic Centre, a research institute focusing on to Arctic issues, located in Rovaniemi Finland, to help the ministry establish bilateral cooperative links between Lapland and northwest Russia).

The forum seeks to strengthen this firm relationship between national and regional governments. For instance, the 1993 Tromsø declaration stated: ‘We believe that national governments and regional governments should work together to improve decision making on environmental and development issues by strengthening the power of regional governments’ (NF 1993c: national and regional government relationships). While the forum has further recognised the jurisdiction of central governments over many issues of concern (NF 1995: section 4.D), there has also been an emphasis on providing information on the forum and its activities to appropriate central government to encourage closer cooperation (NF 1995: section 4.D). Moreover, it has asked central governments to help raise awareness of issues of concern to northern regions and to address other relevant issues (NF 1999: commitment to current activities of the Northern Forum).

The forum is clearly an innovative entity in international cooperation, encompassing characteristics of different types of entities, international organisations, NGOs, and corporations controlled under U.S. national laws. It could be described, as a ‘not-for-profit, membership-supported international organization’ (Langlais 2000: 23). At the same time, it strictly follows self-made rules while also appearing to be relaxed and less formal, characteristics which suggest its identity is as a soft-law body. The non-participation of national governments directly in the forum further suggest that even a soft law characterization is too strong. Perhaps the forum is best characterised as a hybrid soft-law body.

The Northern Forum’s impact on international law

The complex and unique characteristics of the forum have had diverse impacts on international law. On the one hand, it has contributed to the development of public international law; on the other hand, it has posed a few challenges to international law, in particular to classical international law. The forum’s contribution to international law is both these regards is analysed below.

The forum's inputs to international law

The forum has introduced new concepts as well as promoting established ideas in international environmental law. It has explained standard concepts in innovative ways that better serve the challenges faced by the inhabitants of the north due to extreme geographic or climatic situations. It has established a few customs and practiced them since its inception. Moreover, it strictly follows procedural formalities with respect to specific issues.

Two concepts introduced by the forum, and its interpretation of another international concept, contribute to the development of international environmental law and in meeting these challenges: 'northern regions' and 'common environmental domain'. The concept of northern regions has been fashioned in such an innovative way that it may include regions from different parts of the world; the common environmental domain concept offers a useful tool under international environmental law to counter environmental degradation. Likewise it has adopted an inclusive approach to the concept of sustainable development (NF 1994a: section 5):

Sustainable development includes the following concepts: A. Taking a *long-term view* which takes into consideration the interests of future generations, the co-existence of various industries and the health of local populations; B. *Adherence to environmental standards* which prevent pollution and the degradation of the land and resources; C. *Accountability for environmental damage* under which those who generate pollution pay for its consequences; D. Non-renewable resource development should be accomplished utilizing *Best Management Practices* to avoid damaging renewable resources. Reclamation of developed areas should be part of each development plan. E. *A Precautionary approach* to all development activities in the North, developing and using the best scientific information and technology available. This approach includes analysis of reasonably foreseeable impacts of development [Original emphasis].

Thus, the forum has contributed to the conceptual development of international law concerning environmental protection of certain regions and the well-being of their communities.

Challenges posed by the forum to international law

The UNDP and the forum concluded a memorandum of understanding which recognises that '... partnerships between regional governments can achieve greater results than working at the national level ...' (UNDP and NF 2007: preamble). This phrase, however, opens up a sensitive question in international law, namely, states' ability to deal with global challenges, particularly where states are the key player. The UNDP, finds regional cooperation more effective compared to traditional intergovernmental organisations and argues for the granting of 'meaningful authority' to sub-national governments. This raises two questions: What does 'meaningful' denote and 'author-

ity' in which context? Searching for the answers to these questions is likely to show the basic limitations of classical international law in handling modern challenges posed by the expanding concept of 'legal personality' in international law.

The Rovaniemi code further poses a challenge to traditional international law by including the following statement: 'These guidelines are not intended to compromise in any way national, regional or local sovereignty' (NF 1994a: section 1). This could be seen as rethinking the concept of strict state sovereignty established under classical international law and recognising the concept of 'limited sovereignty' (Lapidoth 1992: 325–346) or 'responsible sovereignty' (Birnie 1992: 84). These concepts of sovereignty were introduced as alternatives to 'strict sovereignty' in order to address emerging global challenges in environmental protection and protecting the rights of vulnerable communities (Chayes and Chayes 1995: 271–286). In contrast, others may hesitate to recognize the forum's authority and would question whether it has any power to make this type of statement. There are, however, other similar concepts in the scholarly literature such as 'ecological sovereignty' (Conca 2004: 72–79), 'Arctic sovereignty' (Inuit Leaders 2008), and 'polar sovereignty' (Jabour and Weber 2008: 27–40). The basis of these concepts is considering sovereignty from the view point of 'fact' (that is intrinsic to states) and 'norm' (that is defined by international rules) in which norms facilitate the fact (Jackson 1990: 50–78). However, there is much doubt about the capacity of the forum to convince states in advancing its innovative concepts, which a group of scholars has identified as a major shortcoming of soft-law bodies (Levy and others 1993: 415–417).

Conclusion

The Northern Forum was established through a lengthy process that focused on sub-national governmental cooperation across national boundaries based on mutual interests in the northern regions. It has built relationships with international entities such as the Arctic Council and the United Nations to make the voice of northerners better heard on the global agenda. Drawing on the experience of existing cooperative institutions, the founders established an entity with a unique characteristic under international law and one that has introduced new concepts and offered innovative approaches to some existing concepts in international law.

Many of the innovations of the forum can be seen as positive steps in advancing regional cooperation in the north, albeit not without some caveats. It has introduced a new concept, northern regions, by setting criteria that seems rather ambiguous in terms of specifying geographical location compared to the definition established by other entities such as the Barents Euro-Arctic Council. Others might argue though that the forum could be seen as being progressive in including regions from many parts

of the world. The record of the forum in drawing attention of a number of business organisations to the region, and establishing relationships with international bodies and taking part in many international projects also serves the interest of local peoples. Further, it has considered 'indigenous culture' as one of the principal criteria in defining the northern regions. However, non-adoption of any special position in regard to indigenous peoples in terms of decision making or compliance with its mandates (as is the case in the Arctic Council) provides the impression that the forum is not serious about integrating indigenous peoples participating entities under its auspices.

It has sensibly adopted modern technology, together with other innovations, in this age of globalization and is reaping the benefits. For example, the forum had increased member regions' participation through the use of teleconference technology. It makes decisions with the support of two third majority votes rather than a consensus approach (which is the practice of most other soft-law entities). This development in soft-law cooperation decision making reduces vulnerability to inaction due to objections by single member. The wide range of participants (that is both government and business), have brought new perspectives to resolving regional problems. The forum has participated as a partner of global development cooperation through its relationships with many international actors focused on raising global awareness of northern and Arctic issues (NF 2007: section E.2). As noted by the UNDP, sub-national level cooperation is often more effective than national government level cooperation in achieving many goals without compromising the ability of national governments to work together in other areas of mutual benefit.

The norms created by the forum also have clear consequences and its members and business partners and pose several challenges to classical international law. The norms are observed as strict, flexible and optional in terms of compliance and also generate different types of obligations. It is thus no surprise that the school of thought called global administrative law (GAL) has gained prominence among international lawyers (Krisch and Kingsbury 2006: 1–13). Its particular insight is that the starting point is not to begin by examining the formal status of a legal instrument but rather by analysing 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. The concept of *hybrid soft-law body* fairly serves as working definition for the forum. However, it requires more acceptances among international lawyers and further in-depth research to develop its parameters as a distinct concept under (modern) international law.

The forum holds an innovative legal status compared to other existing international cooperative initiatives in the Arctic. The set of self-created instruments effectively promote regional development and warrant international recognition. Much as Migdal has set out in his notion of

state capacity, the forum has adopted a unique approach to penetration of civil society in northern regions and the use of its resources for defined state purposes (Migdal 1993: 3–43). While some international lawyers will not see any legal consequences from the adoption of certain forum instruments (for example UNDP and NF 2007; code of conduct (NF 1994a)), these instruments have proved potential in the development of specific communities or regions irrespective of the involvement of states. The activities of sub-national governments within the forum can be seen as exercising delegated power of national governments, which have added value because of their uninterrupted practice over a long period of time. The forum effectively works as a complementary body to national governments in regard to regional development that neither violates any order of a national government nor denies the authority of a national government. Thus, the forum offers a unique approach to international cooperation at a sub-national level and contributes to the well being of present and future generations of northerners. The forum also offers unique insights into the creation of new norms under international administrative and environmental law.

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6: CONCLUSION

1. INTRODUCTION

Features such as temperature increase, sea level rise, decreasing snow and ice coverage, together with extreme weather events such as acute hot or cold waves, flood, wildfire, tornado or tropical cyclone, drought, thunderstorm, dust storm, and so on are major phenomena of today's climate change. They affect the usual natural characteristics of a place (e.g., the geography, seasons, flora and fauna), as well as impacting on many issues with respect to human livelihood (e.g., food habit, health, cultures and so on) and including their social and economic existence. The consequences of climate change manifest in a diverse way in different parts of the globe. Thus, climate change appears as a major driver of global environmental degradation and is the key driver of Arctic change. However, the climate change issue is not only complex to understand but it is also difficult to deal with.¹

The situation in the Arctic with respect to climate change is more serious than experienced in other parts of the globe, since the region is much more vulnerable to the phenomenon and the changes that occur in the Arctic can be observed more clearly.² Early summer and late winter seasons, the openness of the Arctic Ocean and the retreat of the permafrost layer are primarily evident in the Arctic due to increasing climate change which generates diverse (mainly negative) consequences

¹ Figdor and Cassady, (2006), p. 6.

² See Arctic Report Card: Update for 2010 Tracing Recent Environmental Changes, (2010).

on the inhabitants and the ecosystem.³ The early summer and late winter seasons impact upon plants and animal species and also bring new insects and diseases to the Arctic. These changes have created severe challenges for the governments and inhabitants of the Arctic and the climate change occurring in the Arctic also impacts on the global changes experienced by others.⁴

A major consequence of climate change is the gradual opening of the frozen Arctic Ocean which has provided Arctic coastal states and companies with access to natural resources that were once inaccessible. Open sea generates more marine traffic, offshore oil and gas drilling as well as other forms of mine extraction. Thus, the consequences pose serious concerns in terms of protecting the environment of the Arctic and the affect they have on the traditional livelihood of Arctic residents (mainly those who depend on ice and snow or arctic mammals). States from outside the region and other actors, are becoming more and more interested in Arctic issues and are involved in different activities of the Arctic Council (AC), including scientific research. The issue of national security has also become an issue, with some of the Arctic states becoming concerned as outside interests have increasing access to the Arctic Ocean and Arctic waters.

The initiatives of the global community to mitigate climate change and address the negative consequences of climate change continue to increase. However, the global climate change regime established by the international community is full of uncertainties, limitations and challenges. In particular, reaching a consensus for

³ Recent researches show the melting of ice sheets is faster than projected. See Kerr, (2006), pp. 1747-1750.

⁴ For instance, the melting of the Greenland Ice sheet would cause a sea level raise of 23 feet worldwide. Oppenheimer and Alley, (2005), pp. 257-267. In contrast; further loss of ice and a warmer Arctic would bring colder weather to mid-latitude climates. See Arctic Report Card: Update for 2010 Tracing Recent Environmental Changes, (2010), p 15.

substantial emission control seems challenging, mainly due to uncertainty as regards what is going to happen after 2012 – the ending of the first commitment period under the Kyoto Protocol.⁵ It can be seen that states have created a few cluster groups to bargain for group interests, rather than individually implementing the scientific recommendations to combat climate change. The Arctic Council has also developed its own climate policy including the production of climate change science from global and Arctic perspectives.

The aim of this chapter is to examine how the Arctic Council, as the soft-law form of cooperation studied in this dissertation, can tackle the vast challenges posed by economic globalization (short-term) and climate change (long-term); and whether it can be argued that they constitute an adequate response to the consequences of climate change in the region or should the Arctic actors establish a stronger governance mechanism (perhaps even one based on an international treaty), with which to counter the vast challenges which lie ahead.

In order to answer to the two questions posed above, it is imperative to examine two particular issues. Firstly, given that many soft-law international co-operation forms have been studied within this dissertation, it is of importance to analyze the reasons why soft-law has emerged in international law. It is asked: what are the pros and cons of this sort of international co-operation and to then apply the findings to the Arctic perspective by examination of the inter-relationships between the three forms of soft-law co-operation studied in this dissertation (the AC, the cooperation in the Barents Euro-Arctic Region (BEAR) and the Northern Forum (NF)). Secondly, it is of relevance to examine in depth the way the 1991 Arctic Environmental Protection

⁵ For a detailed treatment of present climate governance see Zelli et al., (2010), pp. 25-34; Aldy and Stavins, (2009).

Strategy (AEPS) and the 1996 Arctic Council have both conducted their climate policy and law.

It is noted in Chapter Three that neither the AEPS nor the Arctic Council included the issue of climate change as a primary concern at the times they were established. The issue of climate change entered into their agenda gradually and presently dominates the work of the Arctic Council in different ways.⁶

During the AEPS's inception, it set forth a principle showing respect to "the Arctic's significance for and influence on the global climate". This was the main basis of admission of the climate change issue into the Arctic cooperation.⁷ One reason of not including the climate change issue as priority concern within the Arctic cooperation at that time, was that a number of international forums had already started working on the depletion of the ozone layer and climate change issues.⁸ However, the AEPS included climate change in the Arctic as a major threat to the Arctic environment,⁹ as well building a close working relationship with the initiatives of those international fora.¹⁰ The formal mandate came through the 1993 Nuuk Ministerial Meeting when it requested Arctic Monitoring and Assessment

⁶ For a detailed description, see Koivurova and Hasanat, (2009), pp. 51-75.

⁷ The AEPS, (1991), sec. 2.2(iii)(c).

⁸ *Ibid.*, sec. 3.

⁹ *Ibid.*, sec. 6. It reads: "Two of the most significant threats to the present Arctic environment may come from climate change, induced by global warming, and the effects of stratospheric ozone depletion."

¹⁰ *Ibid.*, sec. 6 contains: "Programs to detect and determine the causes and effects of climate change and ozone depletion are to a large extent being developed by other international groupings and in other fora. It is important for AMAP to be aware of these programs and to develop links with them from an Arctic perspective in order to encourage and facilitate an Arctic component in climate programs. Data obtained for assessing climate change will provide important inputs to the AMAP dataset. In turn, AMAP data will be relevant to -climate change programs in the Arctic."[sic].

Programme (AMAP) to engage in climate change research which aimed to assess the impact of climate change in the Arctic.¹¹ Subsequently in 1996, the AEPS confirmed its support of the United Nations Framework Convention on Climate Change (UNFCCC),¹² and requested AMAP to regularly review the integrated results of existing programmes dealing with climate change, with a view to identifying gaps in the scope of the monitoring and research conducted by those forums and to ensuring that specific issues related to the Arctic region are placed on the agenda of the appropriate international bodies.¹³ AMAP responded to the request by including the issue of climate change in its report in 1997.¹⁴ The State of the Arctic Environment Report- Arctic Monitoring and Assessment Programme prompted the Ministerial Meeting in Alta to encourage AMAP to continue the monitoring process and to assess the impacts of climate change on the Arctic environment.¹⁵

Research on climate change in the Arctic intensified following the establishment of the Arctic Council. However, before the first Ministerial Meeting of the Arctic Council in 1998, the AMAP and Conservation of Arctic Flora and Fauna (CAFF)

¹¹ The AEPS Nuuk Report, (1993), the part: Arctic Monitoring and Assessment Programme (AMAP).

¹² Inuvik Declaration, (1996), the preamble.

¹³ The AEPS Nuuk Report, (1996), the part: Arctic Monitoring and Assessment Programme (AMAP). It includes: "Noting the existing global cooperation on climate change and stratospheric ozone programs, the Ministers requested AMAP to regularly review the integrated results of these programs with a view to identifying gaps in the scope of the monitoring and research under these fora and with a view to ensuring that specific issues related to the Arctic region are placed on the agenda of the appropriate international bodies."

¹⁴ Arctic Pollution Issues: A State of the Arctic Environment Report, (1997). This was developed into the more comprehensive AMAP Assessment Report in 1998, which was presented to the first Ministerial Meeting of the Arctic Council.

¹⁵ Alta Declaration, (1997), para. 9.

working groups had jointly organised a workshop on climate change.¹⁶ The 1998 Iqaluit Ministerial Meeting expressed its appreciation of the activities of CAFF/AMAP in the field of climate change and their joint intention to monitor and assess the impacts of climate change on the Arctic ecosystem.¹⁷

In the meantime, the International Arctic Science Committee (IASC) had also initiated a number of projects focused on the impact of climate change in the Arctic from the mid-1990s onwards. These finally lead IASC to co-operate with CAFF, AMAP and permanent participants of the Arctic Council and eventually to the forming of the Assessment Steering Committee (ASC).¹⁸ After two workshops in 1998 and 1999, the Senior Arctic Officials (SAOs) were convinced of the need to carry out an Arctic Climate Impact Assessment (ACIA).¹⁹ The ACIA was endorsed in the Barrow Ministerial Meeting which ended the US incumbent chair period, as a joint project of AMAP, CAFF and IASC (including permanent participants).²⁰

The ACIA can be considered as a significant regional response to climate change. Its aim was to gather knowledge on climate change and ultraviolet radiation and to provide authentic data (using indigenous knowledge paralleled with modern science)

¹⁶ AMAP/CAFF Workshop on Climate Change, (1998).

¹⁷ Iqaluit Declaration, (1998), para. 21. It comprises: “Welcome CAFF’s intention to prepare an overview on the status and trends in changes to ecosystems, habitats and species in the Arctic and to identify elements of a program to monitor circumpolar biological diversity and to assess, in collaboration with AMAP, the effects of climate change and UV-B radiation on Arctic ecosystems.”

¹⁸ See ACIA Scientific Report, (2005), p. 6.

¹⁹ In late 1998 the Executive Committee of the IASC suggested that the IASC work with the Arctic Council and the Intergovernmental Panel on Climate Change (IPCC) and that their appropriate subsidiary bodies develop and maintain a Scientific Assessment of Consequences of Climate Variability in the Arctic Region. Arctic Climate Impact Assessment (ACIA), (Implementation Plan Version 3.7), (2000), the part: Preface. See also Nilsson, (2007).

²⁰ Barrow Declaration, (2000), art. 3.

to the governments and people of the consequences of these environmental problems to the region.²¹ The ACIA was requested to evaluate and synthesise knowledge on climate variability and the change of increased ultraviolet radiation in the Arctic, and to support the policy-making processes and the work of the Intergovernmental Panel on Climate Change (IPCC). The Barrow Ministerial Meeting urged the ACIA to address the consequences of (especially), climate change as applied to many spheres of policy (the impacts on the environment, human health, social structures and cultures and economies) and also to include policy recommendations.²²

By the time of the 2002 Inari Ministerial Meeting, the work of the ACIA had progressed to the extent that the meeting made a point of noting its concern of ongoing, significant warming in most areas of the Arctic. It also recognised that the impacts of global climate change would have large consequences for the Arctic, and that the Arctic can act as an early warning indicator of climate change.²³ The meeting specifically noted the innovative methodology used in forming the ACIA, namely that indigenous knowledge was used in parallel with modern science.²⁴ It

²¹ Notes from the Second Ministerial Meeting of the Arctic Council, (2000), the part: Ministerial Roundtable Discussions.

²² Barrow Declaration, (2000), art. 3. The Council continued with additional activities relating to climate change other than the ACIA. The 2000 Barrow Ministerial Meeting endorsed the Arctic Council Action Plan to Eliminate Pollution of the Arctic (ACAP), a programme that selected the depletion of ozone layer as one of its four priorities in the first phase – a problem very much connected to climate change (Arctic Council Action Plan to Eliminate Pollution in the Arctic (ACAP): List of Approved Activities and Proposals for Future Activities (June 2001)), *Ibid.*, art. 2. Ozone and climate change are indirectly linked because both ozone-depleting gases and substitute gases contribute to climate change. See Scientific Assessments of Ozone Depletion, (Global Ozone Research and Monitoring Project—Report No. 52 (2010), p. XX (the part: Influence of Stratospheric Ozone and ODS Changes on Climate).

²³ Inari Declaration, (2002), art.8.

²⁴ *Ibid.*, art.8.

urged for a more coordinated and integrated approach to existing activities, to address the challenges of the Arctic environment.²⁵

Published in 2004 the ACIA Synthesis Report²⁶ was forwarded to the Arctic Council and the international science community. The report identified prevailing trends of climate change in the region and the implications of Arctic warming for the rest of the world. It also identified four sub-regions²⁷ on the basis of different natural characteristics within their respective parts of the Arctic. The ACIA report included ten key findings,²⁸ and was released just before the 2004 Reykjavik

²⁵ *Ibid.*, art. 5

²⁶ ACIA Synthesis Report, (2004); see generally ACIA Scientific Report, (2005).

²⁷ The regions areas follows: sub-region I- East Greenland, Iceland, Norway, Sweden, Finland, Northwest Russia and adjacent seas; sub-region II- Siberia and adjacent seas; sub-region III- Chukotka, Alaska, Western Canadian Arctic and adjacent seas; sub-region IV- Central and Eastern Canadian Arctic, West Greenland, and adjacent seas.

²⁸ The key findings are:

- 1.The Arctic climate is now warming rapidly, and much larger changes are projected;
- 2.Arctic warming and its consequences have worldwide implications;
- 3.Arctic vegetation zones are very likely to shift, causing wide-ranging impacts;
- 4.The diversity of animal species, their ranges and distribution will change;
- 5.Many coastal communities and facilities face increasing exposure to storms;
- 6.Reduced sea ice is very likely to increase marine transport and access to resources;
- 7.Thawing ground will disrupt transportation, buildings, and other infrastructures;
- 8.Indigenous communities face major economic and cultural impacts;
- 9.Elevated ultraviolet radiation levels will affect people, plants, and animals;
- 10.Multiple influences will interact to cause increased impacts on people and ecosystems.

ACIA Synthesis Report, (2004), pp. 10-11.

Ministerial Meeting of the Arctic Council,²⁹ on the basis of which the expectations for the Arctic Council to do something substantial in its policy document were apparent.³⁰ The 2004 Ministerial Meeting adopted some important decisions, firstly of which was the recognition that there are grave risks from climate change to the Arctic.

The meeting also urged that the findings of ACIA be disseminated to various forums and that they be taken into account not only within climate change research but also within national and international Arctic climate policy-making, both in terms of mitigation and adaptation.³¹ The meeting issued the Arctic Climate Impact Assessment Policy Document, which recognises the authenticity of ACIA synthesis report as well as the need to further organise the work of the Arctic Council and its subsidiary bodies.³² The policy document report includes ACIA related decisions from the Reykjavik Declaration as stated, and the key findings of the synthesis report. It also briefly describes the historical background of ACIA programme. The latter part of the document contains climate policy actions and the role of the Arctic

²⁹ Reykjavik Declaration, (2004).

³⁰ For a good review of the ‘politics’ surrounding formulation of the ACIA Policy Document and its major shortcomings, such as its being declaratory in nature and short on specifics, see Watt-Cloutier et al., (2005), pp. 57–68.

³¹ Reykjavik Declaration, (2004), the part: Climate Change in the Arctic. The PAME organised a workshop in October 2003 which purpose was to provide a forum for exchanging information and ideas on drivers of change, trends in oceans management and possible circumpolar responses to Arctic oceans issues; where climate change was identified as a strong driver of the changes in the Arctic. See Workshop Report In Support of the Arctic Marine Strategic Plan, (2003), p. 4. During the same Reykjavik Ministerial Meeting the Council endorsed the Arctic Marine Strategic Plan (AMSP) which acknowledged the Arctic region as seriously vulnerable to the consequences of climate change; it has wrought environmental, economic and socio-cultural changes in the region. Arctic Council Arctic Marine Strategy in Plan, (2004), pp. 3–4. According to the AMSP 2004 (PAME, 2004), climate change is one of the main two drivers (another is increasing economic activity) responsible for those changes in the Arctic.

³² The Arctic Climate Impact Assessment Policy Document, (2004). See also The Arctic Council Policy Document on Global Warming, (2005), pp. 256-57.

Council to counter the impacts of climate change. Possibly of most significance, the meeting acknowledged the need to further organise the work of the Arctic Council and its subsidiary bodies, based on the ACIA's findings.³³ The ministerial meeting endorsed the ACIA policy recommendations for mitigation, adaptation, research, monitoring and outreach with respect to climate change in the Arctic and as contained in the SAO Report to Ministers.³⁴ The SAOs were directed to report on their progress in organising climate change work, to the AC at the 2006 Salekhard meeting.³⁵ The ministerial endorsed the SAOs recommendations which included *inter alia*, to nominate a 'focal point' responsible for any ACIA follow up, including an assessment of any gaps in knowledge.³⁶

The Ministers acknowledged that the Arctic Council should respond to the ACIA recommendations and to further policy-oriented recommendations as developed and presented in the SAOs report. They also instructed the SAOs to appoint a "focal point" to plan for the Arctic Council's ACIA Follow-up activities.³⁷ To this end the Arctic Council Focal Point was established in 2005.

At the same time, the AMAP established a Climate Expert Group, which was tasked to provide expert advice to the AMAP Working Group to assist its plans for future activities related to climate issues in the Arctic. The Group consists of two co-chairs

³³ Reykjavik Declaration, (2004), the part: Climate Change in the Arctic.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ Report of Senior Arctic Officials, (November 2004), p. 34..

³⁷ *Ibid.*

who together call meetings with relevant experts in the field of climate change.³⁸ The first priority of the expert group was to help shape the AMAP scientific response to the ACIA report, while its future activities included the planning and conduct of assessment activities and other activities as to be determined.³⁹ A second responsibility was to provide advice for use in a larger set of Arctic Council activities which would be determined from time to time as appropriate.⁴⁰

The ACIA findings induced the Arctic Council members, permanent participants and observers to issue a joint statement at the first 2005 meeting of the Kyoto Protocol, which also served as the 11th Conference of the Parties to the UNFCCC, to have a climate regime and that the IPCC take ACIA results into account in their future decisions.⁴¹

The 2006 Salekhard Ministerial Meeting did not suggest any practical initiative to reduce greenhouse gas emissions that would play a positive role in mitigating climate change, although it did reconfirm the implementation of the ACIA Policy Document in a general manner.⁴² The ministerial meeting provided a general

³⁸ At the present the Climate Expert Group is co-chaired by Dr. John Walsh (University of Alaska) and Øystein Hov (Norwegian Meteorological Institute). There are no fixed members in the Group. However, the co-chairs may request distinguished climate experts if they desire to have a meeting.

³⁹ Summary of Meeting of AMAP Climate Expert Group, (2006).

⁴⁰ *Ibid.*

⁴¹ See Statement on Climate Change in the Arctic Region, (2005).

⁴² Salekhard Declaration, (2006), the part: Other. . . *Ibid.*, the part : Climate Change in the Arctic. It reads: “*Reconfirm* their commitments to the Reykjavik Declaration and to the ACIA policy document, adopted at the AC meeting in 2004, and that the Member States will continue their active efforts to implement the recommendations on mitigation, adaptation, research, monitoring and outreach . . . *Endorse* the ongoing efforts of the SAOs and the Arctic Council working groups to implement activities, as appropriate, to follow-up the Arctic Climate Impact Assessment (ACIA) and the ACIA Policy Document, adopted by the Fourth Ministerial Meeting.” (Original emphasis) .

endorsement to developing Arctic expertise in the field of climate change and to increasing the adaptive capacity of Arctic residents, including indigenous peoples.⁴³ The ministers were satisfied that all the member states of the AC were parties to the UNFCCC.⁴⁴

The ministerial requested the Senior Arctic Officials to direct the Sustainable Development Working Group (SDWG) to identify and share adaptation expertise and best practice and any possible actions in for the better adaption of Arctic inhabitants to climate change. They were to report on the status of this activity at the next ministerial meeting ⁴⁵ and to make publicly available any results or lessons learned from this undertaking. The significance of the Salekhard meeting (regarding climate change) is that it highlighted the need for further research, to conduct up-to-date assessments and finally to report to the AC after two years at the next Ministerial Meeting.⁴⁶

The Arctic Council Chair was shifted to Norway in 2006 which identified in its chair plan three goals, which had as their aim, the consolidation of the climate policy of the Arctic Council. The first goal was to strengthen climate change research and monitoring, for example by developing regional climate models and scenarios to

⁴³ *Ibid.*, the part: Climate Change in the Arctic. It states: “*Request* the SAOs and the Arctic Council working groups to continue supporting, analyzing and synthesizing Arctic climate research, including the gathering and compilation of indigenous and local knowledge of the effects of climate change, so that the exchange of expertise at the global level through the IPCC can better reflect unique Arctic conditions and that global decision-making can take Arctic needs into account.” (Original emphasis).

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.* It cites: “*Request* that the follow-up on the ACIA and the ACIA Policy document be based on the latest scientific findings and will be kept under review by the SAOs, who will report to the next Ministerial Meeting.” (Original emphasis).

identify the possible impacts on ecosystems and species distribution. It also looked to enhance the knowledge feedback mechanisms of Arctic climate change to the global climate system and to increase the overall understanding of the interacting impacts from climate change and other stressors. The second goal was to strengthen the adaptive capacities of Arctic residents, including indigenous peoples and local communities, and to identify the most vulnerable sectors of society. The third goal was to consider initiatives and measures to reduce emissions and enhance the removal of greenhouse gases in the region. The plan pointed out that even though emissions of greenhouse gases from activities in the Arctic are fairly limited in global terms, there are important mitigation opportunities in the region, and it suggested as examples, the fields of energy efficiency and renewable energy; the cleaner production of fossil fuels, including CO₂ capture and storage; the use of new carbon-free and low-carbon technologies; a reduction in emissions from transport (including shipping); the conservation of reservoirs and the enhancement of the removal of carbon deposits in soil and by forests and other vegetation.

In the joint chair programme for the Arctic Council (years 2006-2012), Norway, Denmark and Sweden identified climate change as being the top priority issue.⁴⁷ The programme envisages that the AC will continue its efforts to provide high quality information on climate change that includes input from all Arctic states and peoples. According to the plan, the AC should maintain its special focus on the effects of climate change on Arctic residents and the traditional ways of life of indigenous peoples. It should also share experiences, e.g., the experiences of Member States in taking action to develop and implement the local adaptation strategies for Arctic areas, of introducing local measures to reduce climate gases, of their reviewing of

⁴⁷ Norwegian, Danish, Swedish common objectives for their Arctic Council chairmanships 2006-2012.

best practices, and of developing and using renewable energy resources in the Arctic.⁴⁸

Climate change was the main agenda item of the SAO meeting in the Lofoten Islands, organised at the end of April 2008. At the meeting, SAO Chair, Karsten Klepshvik, noted that the objectives for the meeting included progress on the Snow, Water, Ice and Permafrost in the Arctic (SWIPA) project, non-CO₂ drivers and International Polar Year (IPY) legacy proposals.⁴⁹ SAOs approved the revised SWIPA project;⁵⁰ approved AMAP proposals to assess the influence of non-CO₂ drivers on climate change in the Arctic and paid attention to the projects dealing with adaptation to global warming.⁵¹ He also affirmed strong support for the Arctic Council's work on Vulnerability and Adaptation to Climate Change in the Arctic (VACCA).⁵² The speech given by the Indigenous Peoples Secretariat (IPS) Chair to the UN Permanent Forum on Indigenous Peoples (UNPF) to pay attention to dates of relevant international events when setting dates of the SAO meetings so as to they do not overlap each other was endorsed, with the intention that indigenous people may participant in the decision making and discussions on climate change in all UN agencies.⁵³ It was also interesting that the World Wide Fund for Nature (WWF) Arctic delivered a report to the SAO meeting, which summarized key aspects of Arctic science published since the ACIA was compiled. Even though this was an

⁴⁸ *Ibid.*, the part: Climate change.

⁴⁹ Meeting of Senior Arctic Officials, (April 2008).

⁵⁰ *Ibid.*, sec. 3.1 (Climate Change and the Cryosphere – Snow, Water, Ice and Permafrost in the Arctic – SWIPA).

⁵¹ *Ibid.*, sec. 3.2 (Non CO₂ drivers of Climate Change).

⁵² *Ibid.*, sec. 3.3 (Progress report on Vulnerability and Adaptation to Climate Change in the Arctic (VACCA)).

⁵³ *Ibid.*

NGO produced report, it was supported by scientific evidence.⁵⁴ The assessment analyses relevant scientific findings of the 4th Assessment Report of the IPCC and more recent climate science outcomes, and shows that the changes resulting from climate change will be much more intensive and rapid than those projected in the ACIA. Rather than making any formal acceptance of the report as ACIA II, the SAO Chair expressed appreciation of the WWF's production of its report and thanked them for demonstrating the importance of work the AC is undertaking.⁵⁵

The 2009 Tromsø Ministerial Meeting made some practical decisions with respect to addressing climate change in the Arctic, *inter alia* recognising that mitigating the impact of anthropogenic climate change depends mainly on substantially reducing the global emissions of CO₂ and other greenhouse gases.⁵⁶ Recognising the urgent need for an effective global response to address the challenge of climate change, the Ministerial Meeting agreed on the active contribution of all Arctic states in reaching an adequate outcome at the UNFCCC 15th Conference of the Parties (CoP15) in Copenhagen in December 2009. It decided to report on the mass loss from the Greenland Ice Sheet to the COP 15 of the UNFCCC and expressed the hope that the full results of the Arctic Cryosphere: Snow, Water, Ice, and Permafrost in the Arctic project would be delivered in 2011.⁵⁷

The Tromsø Ministerial Meeting encouraged its members to strengthen their work on the adaptation to climate change (including community-level actions), and to

⁵⁴ Arctic Climate Impact Science – An Update Since ACIA, (Norway 2008).

⁵⁵ Meeting of Senior Arctic Officials, (April 2008), sec. 11.3 (Presentation by WWF).

⁵⁶ Tromsø Declaration, (2009), the part: Climate Change in the Arctic.

⁵⁷ *Ibid.*

share information on effective practices. It also appreciated the initiatives of the indigenous peoples, since they were performing a leading role in using the best available traditional and scientific knowledge to help understand the challenges related to climate change, as well as adapting to those challenges.⁵⁸

The AMAP released a comprehensive report in 2009 - Update on Selected Climate Issues of Concern: Observations, Short-lived Climate Forcers, Arctic Carbon Cycle Predictive Capability.⁵⁹ This update report summarizes the recent observations of changing parameters in the Arctic. It provides a review of the significance of short-lived climate forcers and a vision for their mitigation; a re-evaluation of the Arctic carbon cycle, and innovative initiatives to improve understanding of the Cryosphere, and the ability to model climate change and its consequences in regional scale.⁶⁰ AMAP also released a summary – The Greenland Ice Sheet in a Changing Climate (GRIS): Snow, Water, Ice, and Permafrost in the Arctic (SWIPA) 2009.⁶¹ This summary report is available in Chinese, Danish, French, Greenlandic, and Russian translations along with its official English version and submitted to the UNFCCC COP 15 meeting in Copenhagen and IPCC for use in the IPCC's future assessment.

In 2011, AMAP organised (in collaboration with the universities of Aarhus and Copenhagen), an international conference in May 2011 focusing on the Arctic as a

⁵⁸ *Ibid.*

⁵⁹ Update on Selected Climate Issues of Concern: Observations, Short-lived Climate Forcers, Arctic Carbon Cycle Predictive Capability, (2009).

⁶⁰ *Ibid*, the part: Preface.

⁶¹ Summary – The Greenland Ice Sheet in a Changing Climate (GRIS): Snow, Water, Ice, and Permafrost in the Arctic (SWIPA), (2009).

messenger of global process including climate change;⁶² and published an Executive Summary of the SWIPA Assessment.⁶³ The AC appreciated the SWIPA project, primarily for its works in assessing the local, regional and global effects of observed and predicted changes in the Arctic and emphasised a need for an increase in Arctic resilience aiming to lessen the human and environmental impacts of climate change in the Arctic.⁶⁴ It instructed the SAO to consider the best use of SWIPA recommendations in the future activities of the AC.

The Tromsø Ministerial Meeting emphasized the importance of regular updates concerning the impact of climate change in the Arctic, which is appropriate considering that short-lived climate forcers such as black carbon, methane, and tropospheric ozone precursors may contribute to climate change in the Arctic.⁶⁵ To this end, the Ministerial Meeting decided to establish a Task Force on Short-Lived Climate Forcers (TFSLCF) to identify existing and new measures to reduce the emissions of these forcers and to recommended further immediate actions and report on progress at the next Ministerial Meeting.⁶⁶ The TFSLCF has recently produced a report on mitigation options for black carbon in the Arctic and submitted it to the Nuuk Ministerial Meeting of May 2011.⁶⁷ The Ministers appreciated the report and

⁶² The Arctic as a Messenger for Global Processes – Climate Change and Pollution, (2011).

⁶³ SWIPA 2011 Executive Summary: Snow, Water, Ice and Permafrost in the Arctic, (2011).

⁶⁴ Nuuk Declaration, (2011), the part: Climate Change and Environmental Protection.

⁶⁵ Senior Arctic Official Report, (April 2009), pp. 7-8.

⁶⁶ Tromsø Declaration, (2009), the part: Climate Change in the Arctic. It reads:

“Decide to establish a task force on short-lived climate forcers to identify existing and new measures to reduce emissions of these forcers and recommend further immediate actions that can be taken and to report on progress at the next Ministerial meeting.”

⁶⁷ An Assessment of Emissions and Mitigation Options for Black Carbon for the Arctic Council, (2011).

encouraged its member states to implement the recommendations made in the report as appropriate to their national circumstances in aiming to reduce black carbon emissions. They also requested the TFSLCC and AMAP Expert Group to continue their research focusing on methane and tropospheric ozone along with further research on black carbon where necessary, and provide a report at the next Ministerial Meeting in 2013.⁶⁸ The meeting also decided to establish a Short-Lived Climate Forcer Contaminants project steering group which would be tasked with circumpolar demonstration projects in order to reduce black carbon and other Short-Lived Climate Forcers (SLCF) emissions.⁶⁹

The Nuuk Ministerial Meeting recognised that the incoming changes to the Arctic (mainly caused by climate change), have increased both the challenges and opportunities in the region, but expressed a will to strengthen the Arctic Council so as to address those changes⁷⁰. It reaffirmed the importance of traditional knowledge and capacity building initiatives of indigenous peoples living in the Arctic, including the planning and implementation and adoption of measures against the negative consequences of climate change, which have impacted upon the traditional livelihood, food safety and security of the inhabitants of the Arctic.⁷¹ This ministerial meeting made assurance that all Arctic states would work together with the other states reached in Cancun and by climate talks in Durban and urged all Parties to the UNFCCC to take urgent actions in order to meet the long-term goal of limiting the global average temperature to two degrees Celsius above the

⁶⁸ Nuuk Declaration, (2011), the part: Climate Change and Environmental Protection.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

preindustrial level.⁷² Interestingly, this is the first time the AC has felt there is a need for an integrated assessment⁷³ of the multiple drivers of Arctic change and directed the SAO to review matters; on the basis of whose recommendations, the Deputy Ministers would consider a possible Arctic Change Assessment and an Arctic Resilience report at their next meeting.⁷⁴

Thus, it seems that climate change work has continued as being science driven and that it has proven to be very influential, not only in feeding a climate change awareness for the local and regional populace and urging them in a need for adaptation, but also in having impacts on the role of mitigation in the climate regime (via ACIA and other works taken into the IPCC, or in members commitments to the climate talks to be held in Durban, and which feeds into the overall climate change regime).

Careful examination of these two issue-areas enable the author to answer to the first question and provide basis for answering the second question, that is, whether the Arctic Council, as a soft-law regional international forum, is well enough equipped to counter the vast challenges caused by climate change and increasing economic activities in the region, or is a stronger response mechanism necessary, such as one based on an overarching international treaty, as for example proposed by the European Parliament in 2008 and 2009.

⁷² *Ibid.*

⁷³ For detailed treatment on integrated approach see Keskitalo, (2008).

⁷⁴ Nuuk Declaration, (2011), the part: Climate Change and Environmental Protection.

2. SOFT-LAW IN INTERNATIONAL LAW

2.1. Why Soft-law has Emerged in International Law?

There are different explanations as to why soft-law has emerged in international law as a concept.⁷⁵ Some argue that a new world order is emerging, which does not anymore fit with the 1648 Westphalian state-based structure. It seems obvious that the global order is changing very rapidly, given the emergency of almost fully global markets, transnational companies, various kinds of transnational loyalties (for example environmental NGOs), and an ever-increasing set of global threats (climate change, the spread of weapons of mass destruction, the loss of biodiversity, etc.), all of which require either global or regional solutions.⁷⁶ This type of new world order requires new ways to co-operate, many of which escape those methods familiar to international law, namely international treaties and inter-governmental organisations. There are nowadays all kinds of international co-operative structures, varying from those formed between private companies (with voluntary codes of conduct, but supervised by NGOs), to private associations that have been mandated to undertake authoritative and influential decisions. Additionally, there are types of inter-governmental organisations which have grown on the strength of e.g. a multilateral environmental agreement, but can hardly be judged as comparable to traditional inter-governmental organisations. Among these types of developments, soft-law has clearly been one of the most prominent forms of international co-operation, but at the same time, one of the most difficult since there are many conceptions what soft-law is and what it should be.

⁷⁵ See Robilant, (2006), pp. 599-554.

⁷⁶ For role of soft law see Abbott and Snidal, (2000), pp. 421-456; Boyle, (1999), pp. 901-913; Chinkin, (1989), pp. 850-866.

According to the liberal institutionalist school, hard law composed of three dimensions – precision, obligation and delegation.⁷⁷ A strong reliance on consensus-based decision making could be evaluated as a source of institutional binding and legitimacy.⁷⁸ Sometimes soft law appears as effective as hard law in the meeting of specific needs or in solving problems.⁷⁹ However, viewing soft law as a substitute for harder domestic or international obligations may result in more effective hard law options being supplanted and the various values that these seek to uphold being devaluated.⁸⁰

The mainstream of international law has been able to come up with constructive ways of how these new forms of co-operation can be fitted in with the fairly elastic overall construct of international law. Some scholars simply deem these concepts as non-legally binding but worthy of evaluation as they exercise compliance on nation-states as well as lesser bodies. One group of scholars has engaged in finding constructive solutions as to how the traditional international law could be used in a beneficial way when negotiating and working within these soft-law forums and organisations.⁸¹ As an example, they have suggested the analogical use of treaty law to help to solve problematic issues that may arise in soft-law co-operation.⁸² Still, it seems fair to say that the mainstream of international law has had a hard time with

⁷⁷ Abbott et al., (2000), pp. 401-420.

⁷⁸ See, Ikenberry, (2001).

⁷⁹ See Cutler, (1999), pp. 25-48; Cutler, (2003); Scheuerman, (1999), pp. 3-25; Beveridge and Nott, (1998), pp. 285-309.

⁸⁰ Blackett, (2004), pp. 121-133.

⁸¹ Sand, (1991), pp. 213–277.

⁸² Kingsbury, (2005), pp. 15-62; see also Battini, (2005).

these arrangements,⁸³ given that they do not fit easily within the existing concepts of treaty and inter-governmental organisation. For this reason, concepts, such as the Global Administrative Law (GAL) school of thought, have risen in prominence in recent years.⁸⁴ The strong side of GAL is that it does not ask the status of forms of international co-operation initially; rather, it perceives them as authoritative and influential international forms of co-operation, which need to be studied for the exact reasons they do wield power. Since they wield societal power, they should be studied – as are other governance forms recognized by international law - according to the concepts of good governance criteria, such as transparency, public participation, accountability, etc.

2.2. The Strong and Weak Sides of Soft-law

Soft law mostly comes in a complex variety of forms and it is somewhat difficult to determine common characteristics among them. However, John Kirton and Michael Trebilcock have found two common instruments: i) the forms set voluntary standards which serve as an equivalent to formally legislated and ratified government law and legislation; ii) they form informal institutions at international, transnational or national levels, dependent on the voluntarily supplied levels of participation, resources, and the consensual actions of their members rather than on the formally mandated participation and the regularly assessed obligatory contribution, organisation, resources and sanctions of the institution itself.⁸⁵ Despite

⁸³ See Klabbers, (1998), pp. 381- 391.

⁸⁴ Krisch and Kingsbury, (2006), pp. 1-13; Cassese et al. (eds.), (2008). See also Regent, (2003), pp. 190-214.

⁸⁵ Kirton and Trebilcock, (2004), p. 4 (3-30).

the variety in appearance of soft-law forms, it does not seem difficult to identify their advantages and disadvantages, which are explained below.

2.2.1 Weak sides of soft-law

One weak side of soft-law is that it cannot create any legally binding obligations other than by generating voluntary responsibilities or political commitments. States may create legally binding obligations by concluding an international treaty and any forum established without the basis of an international treaty cannot enact legally binding regulations. Thus, decisions made by a soft-law body remain recommendatory and international law has little to do for their compliance in case of any unwillingness of those involved. Under the auspices of international law, there are established institutions which act against any violation of international law. These may sometimes even permit internationally illegal measures (called counter-measures) for any prior violation of international law by another state.⁸⁶ Thus, partner entities involved in a soft-law approach cannot do anything against the non-performing of any commitments by another entity, generated through such a soft-law form.

Soft law has influenced the discourse over the sources of international law doctrine and it has had an effect on diplomatic practices.⁸⁷ The concern is that if international law accommodates soft law as a source, then the source doctrine becomes

⁸⁶ For instance, if one state violates the rules of war using illegal methods, the state against which the illegal methods (e.g. chemical weapon) were applied can legally do the same against the state who started illegal methods. It is also known as a 'counter measure'.

⁸⁷ Blutman, (2010), pp. 605-624.

challenged as well as diplomatic processes of treaty making under classical international law. These discussions however seem fairly academic, given the factual reality of the ever-increasing use of soft-law in international relations.

Another weak side of soft-law is that in some countries, it escapes parliamentary scrutiny. In such countries, the constitution requires at least some input from parliament in the ratification of a convention, but not if it is conducted in soft-law. Thus, soft law can be seen to lack strong democratic practice. Another downside of soft-law can be perceived to be that states use it mostly as a form of testing whether they are willing to move toward more demanding regulatory efforts. Hence, it shows that states often avoid soft-law forms for tackling more demanding and ambitious issues. One can also ask whether the use of soft-law can be used as a camouflage for inaction. States can argue that they are, in effect, taking responsible action when adopting a soft-law instrument, yet this may have no influence at all on their behaviour.

2.2.2 Strong sides of soft-law

Soft law offers many advantages: timely action when governments are in a situation when they cannot take any hard-law action; bottom-up initiatives bring the additional legitimacy, expertise, and other resources required for making and enforcing new norms and standards; and an effective means for direct civil society participation in global governance.⁸⁸ Soft law shifts towards a society without a

⁸⁸ Kirton and Trebilcock, (2004), p. 5.

state,⁸⁹ while the complementary actions or support of states is essential for the soft law to be fully effective.⁹⁰

Soft-law could be seen as flexible in the sense that amendments to the law can be effected without the many national and international formalities and bureaucratic procedures often encountered. These can fragment a treaty regime, when for example, an amendment is endorsed by some states but not others.⁹¹ It can also respond quickly to new situations, precisely because there are no formal procedures involved, and can involve other actors much more flexibly than the nation-states are able to commonly do, because treaties are only for the conduct of states and occasionally to their (inter-governmental) organisations.

Tollefson has suggested that in some cases a soft law option may be a viable alternative or even substitute for unattainable harder law, in particular in the field of the rights of indigenous peoples.⁹² The same can also be said of the influence the International Law Commission's work has had on the development of customary international law, even though many of its products are legally non-binding drafts.

Soft law (thought of in flexible terms) also allows non-state actors to express their intention not to compromise any issues of local, regional or national sovereignty.

⁸⁹ Santos, (2002), pp. 94-96.

⁹⁰ See, Bernstein and Cashore, (2004), pp. 33-63.

⁹¹ Hillgenberg, (1999), p. 501; see also Francioni, (1996), p. 176; Shaffer and Pollack, (2010), pp. 706-799.

⁹² Tollefson, (2004), pp. 93-118.

This could be seen as perhaps rethinking the concepts of ‘limited sovereignty’⁹³ or ‘responsible sovereignty’⁹⁴ and recognising their place in addressing the emerging global challenges in environmental protection and in protecting the rights of vulnerable communities. Similarly, there are other sovereignty concepts found in related scholarly literature such as ‘ecological sovereignty’⁹⁵ and ‘polar sovereignty’⁹⁶. The Inuit constituencies adopted the Arctic Circumpolar Declaration on Arctic Sovereignty during the Arctic Council Ministerial Meeting, testifying to the effect of potential, inherent in the new instruments of international co-operation. Thus, it indicates the necessity of rethinking the concept of strict state sovereignty in international law, in order to properly address new challenges to vulnerable communities caused by climate change.⁹⁷

2.3. Conclusion on Soft-law in International Law

The author considers that soft-law must be seen as a fact of international life. It is obvious that states (and other actors) are increasingly making use of soft-law instruments, and they are doing this with intention: they do not want to create an international treaty. In the short-term, the best solution from a research viewpoint is to admit this reality, but as argued in GAL, there is a need to keep studying these new co-operation structures not only from the viewpoint of what they do, but also whether they perform on the basis of good governance criteria, such as transparency

⁹³ Lapidoth, (1992), pp. 325-346.

⁹⁴ Birnie, (1992), pp. 51-84.

⁹⁵ Conca, (2004), pp. 71-81.

⁹⁶ Jabour and Weber, (2008), pp. 27-40.

⁹⁷ Chayes and Chayes, (1998), pp. 271-286.

and accountability. Soft-law instruments are used mostly by states as a testing-ground for engaging in deeper and more ambitious co-operation, but in some cases they may well be able to create a strong governance system of their own. In the long-term, it will be interesting to see whether international law can evolve with the rapid changes in international co-operation forms, in an increasingly international society. This also applies to the phenomenon of soft-law. If states continue resorting to these forms of co-operation, it may well be that the customary law of treaties evolves to develop secondary rules for what we now deem as soft-law instruments.

One possible working definition of soft-law could be: ‘The provisions of treaties without real agreement or non-treaty agreements concluded by the states’. However, this definition mainly serves as a working definition in this dissertation, given the definitional complexities currently surrounding the concept.

At present, the states practice to the conclusion of soft law in addressing global environmental challenges and in maintaining international cooperation, has occupied a place in the conceptual terrain of international law within a considerably short period.⁹⁸ The variations observed in its academic formulation and endeavour may be viewed as one of the barriers to defining soft law, however these contradictions may also open up new windows in approaching to achieve a better definition of the practice.

⁹⁸ See Boyle, (2005), pp.3-26.

3. SOFT-LAW COOPERATION FORMS IN THE ARCTIC

Soft-law cooperation forms include international governance established without concluding any formal international treaty and allow more space for including regional actors than just state bodies.⁹⁹ There are number of soft-law cooperation forms prevailing in the Arctic. These include the North Calotte Council, the Nordic Council, the Standing Committee of Parliamentarians of the Arctic Region and the International Arctic Science Committee among others. This study has focused on three forms of Arctic and northern soft-law co-operation; namely the Arctic Council, the Barents co-operation and the Northern Forum.¹⁰⁰ These three soft-law forums try to advance well-being in the region and two of them involve northern indigenous peoples in their work; most strongly the Arctic Council by according indigenous

⁹⁹ For institutional effectiveness of soft-law governance see Skjærseth et al., (2006), pp. 104-120.

¹⁰⁰ The criteria for selecting the cooperation initiatives in the Arctic, included Arctic-wide participation in the forum (meaning involvement of national governments, sub-national governments, inhabitants in the region) and general capability of those forums for the protection of the Arctic environment and promoting the wellbeing of the region. Many of forums do not fulfil those criteria, except for the selected three (AC, BEAR and NF). For instance, the regional politicians from the northern most parts of Finland, Sweden and Norway met through the North Calotte Council (established in 1967), where they exchange views on common concerns in the region. The Nordic Council (established in 1952) choose members from five Nordic states plus Faroe Island, Greenland and Åland, which excluded a huge area in the Arctic (Alaska, Russian and Canadian parts). The Standing Committee of Parliamentarians of the Arctic Regions is a discussion forum of lawmakers from the eight Arctic states, which works like a think tank; however, it does not accommodate governmental representatives either at the national or sub-national level. While, the Arctic Science Committee is (established in 1990) composed of scientific groups involved in Arctic research. Although all these initiatives contribute to the development of the region in different ways, the selected three are more profound in the sense that they involve governments (national or provincial level) and local community (mainly indigenous peoples in the region). Furthermore, the organisational frameworks of the three are different, which provides a more diverse understanding of soft-law forms of cooperation.

peoples the status of permanent participants – a status that has now been demanded by indigenous peoples involved in Barents co-operation, based on their self-determination.¹⁰¹ These three co-operation forms have relationships with each other. The Northern Forum is an observer to the Arctic Council and the governmental side of Barents co-operation (BEAC) includes Canada and the United States as observers, thus, in practice, the BEAC including all eight Arctic Council members.

A. The Arctic Cooperation

The Arctic Council (the present form of the Arctic cooperation), is an international cooperative forum of the eight Arctic states (Canada, Denmark, Finland, Iceland, Norway, Sweden, Russia, and the United States). It was established in 1996 with the adoption of the Ottawa Declaration,¹⁰² replacing the Arctic Environmental Protection Strategy (AEPS), which had been established by the same group in 1991. The AC was put in place with the aim of providing mechanisms for addressing the common concerns and challenges faced by Arctic states and their inhabitants, such as environmental protection and sustainable development in the Arctic. The AC has granted special status to Arctic indigenous communities (Permanent Participant), a comparatively new approach to international cooperation which has allowed indigenous peoples to sit side-by-side with state officials and address the present and future challenges in the Arctic as well as to ensure their active involvement in the activities of the AC. To date, the AC has accredited six groups with the status of Permanent Participant. These include:

¹⁰¹ Koivurova, (2011), pp. 169-192.

¹⁰² Ottawa Declaration, (1996).

- i) Inuit Circumpolar Council,
- ii) Saami Council,
- iii) Russian Arctic Indigenous Peoples of the North,
- iv) Aleut International Association,
- v) Arctic Athabaskan Council, and
- vi) Gwich'in Council International.

The Arctic Council has involved actors outside the region (non-Arctic states as well as governmental and non-governmental organisations) within its activities, providing them with 'Observer' status. Observer status in the AC is granted to non-Arctic states and other organisations that are able to contribute to the work of the AC. Presently, ten states (including four operating on an ad-hoc basis)¹⁰³, nine intergovernmental organisations¹⁰⁴ and eleven non-governmental organisations¹⁰⁵ maintain observer status in the AC.

The rules regarding AC's interior functions and its various policy-making decisions are made at a biennial meeting of the Ministers for Foreign Affairs of the Arctic

¹⁰³ France, Germany, Poland, Spain, the Netherlands, and the United Kingdom are observers; while, China, Japan, Italy, and the Republic of Korea serve as ad-hoc observers.

¹⁰⁴ The International Federation of Red Cross and Red Crescent Societies, the International Union for the Conservation of Nature, the North Atlantic Marine Mammal Commission, the Nordic Council of Ministers, the Nordic Environmental Finance Corporation, the Standing Committee of Parliamentarians of the Arctic Region, the United Nations Economic Commission for Europe, the United Nations Development Programme, and the United Nations Environment Programme. In 2009 the SAO meeting approved the EU Commission as an ad hoc observer. Online: < <http://www.arctic-council.org/index.php/en/about/documents/category/40-sao-meeting-copenhagen-november-2009>> (accessed 9 November 2011).

¹⁰⁵ The Advisory Committee on Protection of the Seas, the Arctic Circumpolar Gateway, the Association of World Reindeer Herders, the Circumpolar Conservation Union, the International Arctic Science Committee, the International Arctic Social Sciences Association, the International Union for Circumpolar Health, the International Work Group for Indigenous Affairs, the Northern Forum, the University of the Arctic, and the World Wide Fund for Nature. Online: < <http://www.arctic-council.org/index.php/en/about-us/partners-links>> (accessed 9 November 2011).

states. Recently, the AC has introduced a yearly meeting of deputy ministers to lessen the gap of communication at a political level. Both ministers and deputy ministers direct the SAO (Senior Arctic Officials from each of the Arctic states), to implement their political commitments. The SAO coordinates, monitors, and guides the subordinate bodies established under the AC including its working groups (at present six):

- i) Arctic Monitoring and Assessment Programme
- ii) Protection of the Arctic Marine Environment
- iii) Emergency Prevention, Preparedness and Response
- iv) Conservation of Arctic Flora and Fauna
- v) Sustainable Development Working Group
- vi) Arctic Contaminants Action Programme

The Arctic ministers request or instruct the SAOs to provide the means of addressing individual issues connected with the Arctic Council. The Rules of Procedure require at least two SAO meetings per year, but the frequency of SAO meetings depends on the willingness of the host country, which is responsible for assigning a chairperson and calling the meeting to order.

The main work of the AC takes place within the working groups. The ministerial meetings fix the composition and mandate of the working groups, although each working group selects a chairperson and vice-chairperson and fixing their tenure. The working groups also establish their own operating guidelines in consultation

with the SAO. The secretariats of the working groups and subordinate bodies are supported voluntarily by the individual Arctic states.

The working groups include representatives drawn mainly from the national ministries and other government bodies of the member states, as well as from the permanent participants. The programmes and projects though have had much more variety in their structure of representation. The mandates of the working groups cover the diverse areas of the state of affairs of the Arctic. These include the assessment, causes, possible ways of countering changes occurring in the Arctic; each and every thing related to the Arctic, with the exception of military security. There are no crystal clear boundaries between the working groups however and this has sometimes made it difficult to determine the most suitable working group for certain projects or operations. This has not hindered their performance however and they have produced quite a good number of research reports, some of which are presented in such a fashion that policy-makers and people in general can easily digest them, whilst some others are intended for the specialist attention of advanced scientists. All of these reports contain information of influential value in the Arctic context and many of them also hold global applicability. Thus, one can quite easily name the AC as the ‘powerhouse of Arctic sciences’.

The AC had been working with a temporary secretariat since its formation, rotating the chair as voluntary funded by states. In 2006, three continuing members (Norway, Denmark, and Sweden) agreed on a semi-permanent secretariat located in Tromsø, Norway, during their chairmanship period of 2006-2012. This was made permanent by the Arctic states at the Nuuk Ministerial Meeting of 2011.

B. The Barents Cooperation

The cooperation in the Barents Euro-Arctic Region (BEAR) includes two separate cooperative platforms: the Barents Euro-Arctic Council (BEAC) and the Barents Regional Council (BRC). The five Nordic states (Denmark, Finland, Iceland, Norway and Sweden) along with Russia and the then Commission of European Communities (now the European Union (EU)), established the BEAC in 1993 after signing the Kirkenes Declaration.¹⁰⁶ The BEAC aims to promote sustainable economic and social development in the Barents Region, which was an area of military confrontation during the Cold War.¹⁰⁷ Special features of the BEAC include granting membership also to states outside the Barents Region, and its chairmanship rotates between a select number of members (Finland, Norway, Russia and Sweden) possessing territories within the region.¹⁰⁸ In order to function more efficiently, the BEAC has accredited a number of states (Canada, France, Germany, Italy, Japan, the Netherlands, Poland, the United Kingdom, and the United States) outside the region as observers, who intent to contribute to the work of the BEAC.

Seven regional governments¹⁰⁹ (e.g. provincial, county, and oblast governments) in the Barents Region together with the Saami Council, established the Barents

¹⁰⁶ Kirkenes Declaration, (1993).

¹⁰⁷ The Cooperation has introduced the concept of the Barents Region, which initially included the county of Lapland in Finland, the counties of Finnmark, Troms and Nordland in Norway, the counties of Murmansk and Archangel in Russia, and the county of Norrbotten in Sweden. See *Ibid.*, the part: Participation and area of application. Later on the region expanded with the inclusion of the Republic of Karelia, the Nenets Autonomous Okrug, Kainuu, Oulu, the Vasterbotton Regions, and the Republic of Komi.

¹⁰⁸ Terms of Reference for the Council of the Barents Euro-Arctic Region, (1993), sec. 6.

¹⁰⁹ The founding members of the BRC are: Archangelsk County (Oblast), Finnmark County Council (Fylkeskommune), Lapland County (Län), Murmansk County (Oblast), Nordland County Council

Regional Council via a cooperation protocol¹¹⁰ at the same time and place aiming the same objectives.¹¹¹ During the course of time, the BRC has expanded its membership to thirteen regions.¹¹²

Meetings at the level of Foreign Ministers in the BEAC make its policies as the highest decision-making body. These meetings were held annually¹¹³ up to 2001, but since then they have convened every other year. Ministers of the Environment from the member states started to convene regular meetings since 1994,¹¹⁴ and the heads of the governments from the member states met in 2003 at its ten-year celebration. The CSO (Committee of Senior Officials) consists of ambassadors or officials selected by the member states and the EU, and acts as the central point of the functional units. The committee meets on a regular basis, usually four or five times a year and oversees the activities during the time between ministerial meetings. It has a mandate to form subordinate bodies, directed by the ministers and provides guidance to them mainly via the working groups or terminates a working group that has completed its task. The working groups and subordinate bodies responsible to BEAC include:

(Fylkeskommune), Norrbottens County (Län), the Saami Council, and Troms County Council (Fylkeskommune).

¹¹⁰ The Protocol Agreement of the Regional Council of the Barents Region, (1993).

¹¹¹ Kozyrev, (1997), p. 45; see also Holst, (1994), pp. 11-24.

¹¹² Three from Norway (Nordland Fylke, Troms Fylke, and Finnmark Fylke), two from Sweden (Västerbotten Län and Norrbotten Län), three from Finland (Kainuu, Oulu, and Lapland) and five from Russia (Murmansk Oblast, the Republic of Karelia, Arkhangelsk Oblast, the Nenets Autonomous Okrug, and the Republic of Komi).

¹¹³ The year 1997 was exceptional in that there was no Ministerial Meeting.

¹¹⁴ The Ministers of the Environment met for the first time in 1994 in Bodø, where they adopted the Barents Euro-Arctic Council Environmental Action Programme, followed thereafter by meetings of the Ministers of the Environment in Rovaniemi in 1995, Saint Petersburg in 1997, Umeå in 1999, Kirkenes in 2001, Luleå in 2003, Rovaniemi in 2005, and Moscow in 2007. Ministers responsible for other Departments (e.g., culture, youth and sports) also meet occasionally.

- i) Working Group on Economic Cooperation
- ii) Working Group on Customs Cooperation
- iii) Working Group on Environment
- iv) Working Group on Youth Policy
- v) Steering Committee for the Barents Euro-Arctic Pan-European Transport Area
- vi) Interim Joint Committee on Rescue Cooperation.

The Regional Council comprises leaders from the regions and is the highest decision-making body under the BRC. The Executive Regional Committee (RC), consists of subordinate officials of regional governments from the member regions and the Saami Council, works as the main functional unit within the BRC. It takes new initiatives and follows-up on approved projects of the BRC. The BRC has its own working groups, mainly composed of regional experts from the member regions responsible to the BRC via the RC. These include:

- i) Regional Working Group on Environment
- ii) Regional Working Group on Communication
- iii) Regional Working Group on Youth Issues
- iv) Regional Working Group on Investment and Economic Cooperation

There are some other working groups are formed under the auspices of both the BEAC and BRC. Each of them has shared co-chairs – one from a national level

(BEAC) and other from a regional level (BRC). These joint working groups report separately to the CSO and the RC could be seen as a unique example how national and regional governments can operate together within this mechanism of international cooperation. They are:

- i) Joint Working Group on Health and Related Social Issues
- ii) Joint Working Group on Education and Research
- iii) Joint Working Group on Energy
- iv) Joint Working Group on Culture

Besides these different working groups under the BEAR cooperation, there is another body named the Working Group of Indigenous Peoples (WGIP) which consists of the three indigenous communities in the region – the Saami, the Nenets and the Vepsian peoples. The WGIP has granted observer status to the Saami Council, Association of World Reindeer Herders, and Russian Association of Indigenous Peoples of the North (RAIPON). In reality, the WGIP is a permanent working group and plays an advisory role to both the BEAC and BRC. The Barents Indigenous Peoples Office (BIPO) is responsible for the activities of the WGIP, thus, the WGIP appears as an independent body and has influence within the Barents cooperation.

The BEAC and BRC maintain a complex relationship. Both councils were established based on shared aims and objectives. They have been working in close cooperation since their inception and have formed close ties to universities, research institutes and administrative institutes, as well as other bodies. The BRC has followed the activities and adopted the policies and plans, initially put forward by

the BEAC. The International Barents Secretariat provides technical support to the BEAC and BRC although there are also national Barents secretariats in all the main member states, with the exception of Russia. Despite their connections, the BRC is in no way subordinate to the BEAC. The BEAC could be characterised as a ‘soft-law body’ by examining its establishing instrument and other produced documents, whilst the BRC may be characterised as a ‘hybrid soft-law body’ since it lacks state representation.

C. Cooperation in the Northern Forum

The Northern Forum (NF) is an international cooperation of sub-national governments (regional, sub-regional and municipal) established in 1991 and aiming to improve the quality of life of peoples living in the north and to support their sustainable development. The NF grants non-voting membership to business organisations (companies and associations such as chambers of commerce)¹¹⁵ (which is an innovative idea in international cooperation) in order to involve them in the development of the northern economy, along with its main members sub-national governments. Presently its main members include thirteen sub-national governments from seven states of three continents (Asia, Europe and North America).¹¹⁶ The NF practices a flexible approach to the withdrawal of old members and in accrediting new members.

¹¹⁵ The NF has twenty-two business partners located in four countries: 14 from Russian Federation; five from United States; two from Canada; and one from Finland. Online: <<http://www.northernforum.org/servlet/content/business.html>> (accessed 9 November 2011).

¹¹⁶ Currently, this category is comprised of Nunavut and Yukon Territories and Quebec Province (Canada); Heilongjiang Province (China); City of Akureyri (Iceland); Hokkaido Prefecture (Japan); Gangwon Province (Republic of Korea); Chukotka Autonomous Okrug, Khanty Mansiysk Autonomous Okrug, Komi Republic, Sakha Republic (Yakutia), Vologda and Yamal-Nenets Autonomous Okrug (Russian Federation); and the State of Alaska (United States). Online: <<http://www.northernforum.org/servlet/content/memberregions.html>> (accessed 9 November 2011).

The Board of Governors (BOG) is the highest decision-making body and comprises the heads of the member regions (e.g., governor, premier or chair). It meets biennially at a General Assembly and decides on general administrative issues, financial and public relations and responsibilities, the establishment and review of strategic directions and also sets institutional priorities for the NF. The BOG selects an Executive Committee (EXCOM) consisting of five members from among the member regions in order to oversee, supervise and guide the Executive Director (ED), concerning fiscal and policy matters along with other relevant activities of the NF during the period between BOG meetings. The BOG ensures regional representation when selecting the EXCOM; one representative from each of the regions of North America, Northern Europe excluding Russia, Northwest Russia, Northeast Russia, and Northern Asia excluding Russia). There is another entity named the Regional Coordinators Committee (RCC) which consists of delegates sent by member regions. The chair region at the time nominates a coordinator to preside over the RCC, whose main tasks include preparing recommendations for BOG or EXCOM on different administrative works and to provide guidance to the ED concerning issues that might be brought before the EXCOM or the BOG. Its secretariat is located in Anchorage, Alaska and headed by the ED (chosen by the BOG) who serves as the president of the Forum.

The activities that support the NF's goals are undertaken through various prioritized projects, overseen by specific working groups. These groups work closely with the secretariat and the RCC to meet annually for reporting and financial requirements. They also monitor knowledge production, for example, organising seminars,

workshops and conferences or preparing reports on specific projects, and sharing the created knowledge with relevant groups and authorities. Working groups established to date include those concerned with brown bears, flood management, healthy lifestyles, telemedicine, infectious disease surveillance (with the Arctic Council) and the Association of Northern Zoos.

The NF works in a complex way encompassing the characteristics of different types of entities including international organisations, NGOs, and corporations controlled under U.S. national laws. It follows self-made rules while also appearing to be relaxed and less formal, the characteristics of which suggest its identity to be in-line with a soft-law body. The non-participation of state representatives has made the NF weak as a soft-law body, but it may be characterized as a ‘hybrid soft-law body’.

3.1. Reasons for Creating Soft-law Cooperation Forms in the Arctic

There have been several attempts at establishing a formal international organisation in the Arctic.¹¹⁷ Although they did not come to fruition, the current measures and initiatives utilized in the governance of the Arctic region may serve as stepping stones to the formation of legally binding agreements and international treaties. The appearance of a number of soft-law forms of governance in the Arctic has raised concern as to whether they properly serve to address the emerging challenges faced by the region. The 2004 Arctic Human Development Report (AHDR) (prepared

¹¹⁷ For instance, Pharand drafted a treaty model about an Arctic Regional Council, which was published by Canadian Arctic Resource Committee (CARC) in 1991, suggesting for the establishment of a formal international organisation in the region. Draft Arctic Treaty: An Arctic Region Council Proposal (1991). Afterwards Finland commissioned Mr. Pekka Haavisto to prepare a report for the SAOs concerning the structure of the work of the Arctic Council. The final report was delivered to the AC secretariat on 29 June 2001 after the SAOs had discussed the draft report (12-13 June 2001).

under the auspices of the Icelandic Chairmanship of the Arctic Council 2002-2004) includes:

“The issues that dominate the Arctic agenda today typically involve institutional issues or matters of governance. These concerns arise at the local level (e.g. creating co-management regimes), the regional level (e.g. resolving frictions between public governments and indigenous peoples organizations, finding ways for county, state, and territorial governments to generate needed revenues), and the circumpolar level (e.g. sorting out relations between the Arctic Council and the Northern Forum).”¹¹⁸

Thus, it seems important to examine the *raisons d’être* for the existence of so many soft-law forms of governance in the Arctic and which can be achieved by analyzing the following subjects.

3.1.1. Issues of concern

The eight Arctic states may not suffice in mitigating the rapid and multifaceted changes that are taking place in the region. Non-Arctic states and non-state actors (including local peoples) need to be included in the governance process.¹¹⁹ For example, actions taken outside of the region significantly affect the climate change in the Arctic. These changes have, in turn, directly affected the Arctic environment and livelihoods of local populations. It is, however, difficult to compromise living standards and the facilities of modern science and to place binding obligations on

¹¹⁸ Arctic Human Development Report, (2004), p. 10 (Summary of Major Findings).

¹¹⁹ Such as international organisations (governmental and non-governmental), research institutes, local peoples, civil society, etc.

Arctic states. Initiatives taken to address these issues are also challenging because they provide little in terms of visible results. Governments from outside of the region therefore, are less likely to sacrifice their national interests for the sake of the Arctic environment and the livelihood of its indigenous peoples.

Changes are rapidly occurring in the Arctic and immediate action is required in addressing some of them. The adoption of a formal international treaty may be a lengthy process, so the complexity of Arctic issues and the multilevel governance prevailing in the region may not provide a favourable context for the creation of overarching inter-governmental organisations or treaty regimes.

3.1.2. The inhabitants

One sector of Arctic residents are the indigenous communities who have resided in the region for long periods of time. As a result, the indigenous peoples of the region (who would prefer to be referred to as peoples, rather than minorities), have developed distinct livelihoods and cultures. It is understandable that national decision-making takes place in the region's capital cities, which are located far south of the region (aside from Iceland) and also that there is a clear difference in the lifestyles enjoyed by Arctic and non-Arctic residents. Arctic residents may, thus, have closer ties to similar groups of peoples living in other parts of the Arctic that extend beyond traditional state boundaries. However, formal international organisations operating under classical international law do not allow for the parallel participation of these groups with states, despite the fact that decisions made for the well being of the region require the participation of local residents. Soft-law bodies, on the other hand, have the ability to so. As a result, the Arctic indigenous peoples

have gained a significant role in contributing to issues of concern (and traditionally be dealt with by international organisations), primarily by their participation in multiple forums and in the decision-making processes concerning regional challenges. The soft-law cooperation in the Arctic can involve other actors flexibly and this has increased their legitimacy. They have been able to combine both central government level and regional Arctic level involvement, as evidenced by the three soft-law forms of cooperation, currently in place in the Arctic.

As previously mentioned, the AC has provided indigenous peoples with the status of permanent participants, but also reserved their own position in regards to the meaning of ‘peoples’ in international law.¹²⁰ This status may ensure the active involvement and full consultation of the indigenous peoples with respect to many Arctic issues¹²¹ and they have extensive participation rights at Ministerial Meetings, as well as at other Arctic Council meetings and activities.¹²² The principles adopted for the AEPS recognised the application of indigenous knowledge, paralleled with modern science, in assessing the state of affairs in the Arctic.¹²³ The issues of indigenous peoples were properly placed in the ACIA report which includes *inter alia* the statement: “indigenous communities face major economic and cultural impacts”.¹²⁴ The ACIA Policy Document recommends that Arctic states work closely with the residents of the region (including indigenous and local

¹²⁰ There is a footnote in the Ottawa declaration on this regard that the use of the term “peoples” in the declaration shall not be construed as having any implications as regard the rights which may attach to the term under international law.

¹²¹ See Ottawa Declaration, (1996), art. 2; Arctic Council Rules of Procedure, (1998) (SAO REPORT, Iqaluit: ANNEX 1), sec. 5.

¹²² Arctic Council Rules of Procedure, (1998), sec. 5.

¹²³ Ottawa Declaration, (1996), art. 2(2).

¹²⁴ ACIA Synthesis Report, (2004), pp. 10-11.

communities), in order to promote their ability to adapt to and manage the various impacts of climate change and ultraviolet radiation.¹²⁵ The AC also supports the Indigenous Peoples Secretariat (IPS).¹²⁶

In the BEAC, the participation of indigenous peoples is ensured by the CSO (Committee of Senior Officials); while in the BRC, the Saami Council maintains a membership with regional governments. The WGIP established under the Barents cooperation includes six members: one Saami representative from each country—Finland, Norway, Russia and Sweden—along with one Vepsian and one Nenets representative from Russia.¹²⁷ It has three observers, including representatives from the Saami Council, the Association of World Reindeer Herders and the RAIPON.

The WGIP plays an advisory role to both wings of the Barents cooperation and partakes in the Ministerial Meetings of the BEAC and the Regional Committee (of the BRC).¹²⁸ The WGIP promotes measures in the field of trade and business development, language and media, health and social-related issues,¹²⁹ and also in measures within the field of environmental and cultural issues in the Russian Arctic regions. The Barents Indigenous Peoples Office (BIPO), (established in Murmansk in 2003 and moved to Lovozero in 2007), is responsible for the activities of the

¹²⁵ Arctic Climate Impact Assessment Policy Document, (2004), the part: Arctic Climate Policy Actions. See also The Arctic Council Policy Document on Global Warming, (2005), p. 256.

¹²⁶ See Koivurova, (2008), p. 26.

¹²⁷ Terms of Reference for the Working Group of Indigenous Peoples in the Barents Euro-Arctic Region, (2005), sec. 4b.

¹²⁸ < <http://www.beac.st/?DeptID=8852>> (accessed 9 November 2011)

¹²⁹ Action Plan for Indigenous Peoples in the Barents Euro-Arctic Region 2009-2012 Adopted by the Working Group of Indigenous Peoples in the Barents Euro-Arctic Region (WGIP), Tromsø, January 21, 2009. Online: <http://www.barentsinfo.fi/beac/docs/WGIP_Action_Plan_2009-2012_ENG.pdf> (accessed 9 November 2011).

WGIP. The Nenets, Saami, and Vepsians - three indigenous peoples groups in this co-operation, now demand to be given similar status that indigenous peoples have on the Arctic Council, on the basis of their self-determination.¹³⁰

In contrast with the position taken by the AC and the cooperation shown within the BEAR, the NF has not provided indigenous peoples with membership or any form of participation within its main bodies. It has, however, adopted the indigenous issue as one of its four priorities by including in its Statement of Intent, the mention of “maintaining [of] the unique culture, economy and livelihood of indigenous peoples living in the remote regions in the north.”¹³¹ One of the criteria for defining the northern region as ascertained by the NF is its “small population, [as well as] diverse and strong indigenous cultures”.¹³² The Charter of the Northern Forum calls on sub-national governments (states, provinces, territories, counties, prefectures and autonomous regions) to address common challenges faced by the inhabitants of the region, in particular economic development and the protection of the natural environment and the traditional cultures of indigenous peoples.¹³³ Many NF documents have included a number of issues with respect to indigenous peoples, including the protection of their traditional cultures¹³⁴ and their ability to take part in the decision-making processes related to community concerns.¹³⁵

¹³⁰ Resolution from the 1st Barents Indigenous Peoples’ Congress, (2010), res. 5. For an analysis, see Koivurova, (2011), pp. 169-192.

¹³¹ Statement of Intent among the Governors, Premiers, Ministers and Chairs of northern regions at the Third Northern Regions Conference, Governors’ Summit on Regional Cooperation, (1990).

¹³² The Northern Forum Rules of Procedure, (2008), sec. 3.2.

¹³³ Charter of the Northern Forum, (1991), preamble.

¹³⁴ Saint Petersburg Declaration, (2003), sec. 3.

¹³⁵ The Rovaniemi Code of Conducts, (1994), secs. 4-6.

3.1.3. Historical reasons

During the Cold War, the Arctic served as military strategic region for the two world superpowers – the then Soviet Union and the United States. At that time, the possibility of establishing any form of Arctic cooperation seemed unfeasible.¹³⁶ Despite the end of the Cold War and the growth of trust and desire to cooperate among the eight Arctic states, no formal treaty or legally binding regime has been put in place. The European Union has also emerged as a factor by way of its two Arctic members, Finland and Sweden.¹³⁷ Olav Schram Stokke and Geir Hønneland have noted that the cooperation and support of the ‘three great [Arctic] powers’ (the EU, Russia and the United States) is required for the success of any Arctic initiative.¹³⁸ Even if Canada is not seen by these authors as a global superpower, it clearly qualifies as an Arctic superpower with its strong geographical presence in the region and the fact that it greatly contributes to regional Arctic policy-making. In fact, one can argue that its presence is stronger than that of the United States. The United States, in line with most superpowers, has not agreed to most formal international organisations or treaties which generate binding legal obligations.

The end of the Cold War has allowed for the development of formal regional intergovernmental cooperation, via a diverse set of platforms. The Finnish initiative resulted in the creation of the AEPS, which later transformed into the Arctic Council under the Canadian initiative. The Barents cooperation was established under the initiative of Norway and the governor of Alaska played a leading role in the creation

¹³⁶ Young, (2005), pp. 9-15. Keskitalo,(2004).

¹³⁷ Denmark is also a member state of the Arctic Council as well as the European Union, but its Arctic territories are not part of the EU.

¹³⁸ Hønneland and Stokke, (2007), pp. 6–8.

of the NF. The states, peoples and regional or sub-national governments of the Arctic, established these bodies around the same time (the beginning of 1990s), and so collaborates that the political history of the Arctic has had a clear influence on cooperation development in the area.

3.1.4. National resource interests

The prime indicator of climate change in the Arctic is the melting of sea ice and the opening of new sea routes, which in-turn has allowed for increased access to previously inaccessible resources. These changes have led to a rise in shipping and economic activities. Thus, coastal Arctic states have taken a particular interest in the changes taking place, especially those affecting national interests.¹³⁹ For example, the five coastal Arctic states (Canada, Denmark, Norway, the Russian Federation, and the United States), have formed a group to manage their interests in the Arctic and adopted the Ilulissat Declaration in 2008.¹⁴⁰ These states are sceptical as to whether a new international arrangement could limit their national interests on continental shelves or in regard to increasingly accessible natural resources. It is also ironic that existing arrangements better serve the national interests of these given member states, as they are primarily based on the law of the sea and the United Nations Convention on the Law of the Sea (UNCLOS)¹⁴¹, which provides coastal states with a number of beneficial rights.¹⁴²

¹³⁹ For a detailed see also Dodds, (2011), pp. 303- 311.

¹⁴⁰ Ilulissat Declaration,(2008); see also Koivurova, (2010), pp. 146-156.

¹⁴¹ The United Nations Convention on the Law of the Sea, (1982).

¹⁴² Article 234. Ilulissat Declaration uses the term 'law of the sea' because the US is not a party to the UNCLOS. However, the US has many times affirmed that most provisions of UNCLOS codify the customary international law of the sea.

3.1. 5. Member states prioritize Arctic co-operation in different ways

Arctic cooperation is not viewed with the same importance by all member states. The absence of a number of ministers from AC ministerial meetings (except for the most recent meeting in Nuuk) serves as evidence for this statement.¹⁴³ Whereas some may find international cooperation in the Arctic to be a fruitful endeavour, other actors see it as a casual platform generating varied motivations for cooperation. Similarly, a recent survey has found that 61 % of northern Canadians, 51% of southern Canadians, 61 % of Icelanders, 51% of Danes and 47% of Finns, 40% of Norwegians, 27% of Swedes, 21% of Russian, and 16% of Americans are aware of international cooperation in the Arctic and have heard of the Arctic Council.¹⁴⁴ Arctic cooperation among the citizens and residents of the eight Arctic states is relatively low. This is particularly exasperating for those northern residents whose locales are directly affected. It shows a variety in the sentiments and understanding of Arctic cooperation between both the governments of the eight Arctic states, as well as among their residents. This warrants the need to place Arctic issues higher on national agendas so as to create more awareness and to establish a formal international organisation that would include all eight Arctic states.

The above mentioned reasons and special circumstances in the Arctic are the main causes of developing the high number of soft-law forms of cooperation (as opposed to formal international organisations) that are perceptible in the Arctic.

¹⁴³ This is the First time when six foreign ministers presented in a ministerial meeting. There were reasonable grounds of absence for two other foreign ministers from the meeting – Finland could not send because the formation of a new government was in progress and the newly formed government in Canada sent their health minister.

¹⁴⁴ Rethinking the Top of the World: Arctic Security Public Opinion Survey, (2011), the part: International Views on the Arctic Council.

3.2. Interrelations among the Arctic, Barents, and Northern Forum forms of Cooperation

Each cooperative initiative has its own objectives. The primary objectives of the AC are environmental protection and sustainable development in the Arctic. Environmental protection refers to the practise of protecting the environment for the benefit of the natural environment, as well as its inhabitants.¹⁴⁵ This connects several Arctic issues, both the physical environment (ice, snow, wilderness and the biological life forms, flora and fauna), and the traditional cultures of Arctic residents that include their traditional livelihood, hunting, reindeer herding, as well as other aspects. The concept of sustainable development is however, a vague term that relates a number of topics. These include the use of natural resources for the wellbeing of local peoples and their future generations, the contribution of economic activities to local development, the adaptive capacity of locals to the rapidly changing conditions that result from climate change, as well as the utilization of these opportunities for positive benefits. Thus, sustainable development covers an overall improvement of the situation of local peoples and their future generations. The Barents cooperation aims to promote sustainable economic and social development in the Barents Region. Similarly, the cooperation in the Northern Forum aims to improve the quality of life of those peoples living in the north and to support their sustainable development.¹⁴⁶ Overall, the objectives of these three soft-

¹⁴⁵ See, Carraro and Domenico, (1993), pp. 309–328.

¹⁴⁶ The mission or philosophy of the NF is:

To improve the quality of life of Northern peoples by providing Northern regional leaders a means to share their knowledge and experience in addressing common challenges; and

To support sustainable development and the implementation of cooperative socio-economic initiatives among Northern regions and through international fora. [Original emphasis].

law cooperation forms, aim to achieve similar results in the long-term. Thus, it is important to examine their inter-relationships.

The manner in which these three soft-law forms of cooperation inter-relate appears to be ambiguous on both a policy level and at meetings. Although their websites maintain that they cooperate and enjoy strong relations, there is little evidence in the form of real cooperation in their daily operational activities. However, their indirect relations appear to be more evident and are analysed below.

The Northern Forum's observer status at the AC serves as the only formal relationship between the three cooperative initiatives. This observer status has provided the NF with the opportunity to work with the AC's working groups. Currently the NF is a member of the AC's Sustainable Development Working Group and was also a member of the Sustainable Development Task Force under the AEPS.¹⁴⁷ The Russian regions (via the NF) are now a part of the International Circumpolar Surveillance (ICS) for Infectious Disease System of the AC. The NF also cooperates with the BRC.¹⁴⁸ Scholarly suggestion includes the creation of a joint working group and organising occasional joint meetings at senior official level (SAO and EXCOM).¹⁴⁹ The NF had intended a joint meeting with the SAO (the main operational organ of the AC), but unfortunately this has not been arranged at this time.

Lapland Declaration (1999), Mission or Philosophy.

¹⁴⁷ The NF also had membership in the Sustainable Development Task Force under the AEPS. Rovaniemi Code of Conducts, (1994), the part: Background.

¹⁴⁸ Whitehorse Declaration,(2009), sec. D.6.

¹⁴⁹ Young, (2002), pp. 289-296.

These three soft-law forms of cooperation often express normative and/or conceptual support for the programmes launched by other initiatives. These include formal endorsements, as well as the dissemination of relevant information on their websites. Repeated cooperation between the same groups has led to the development of a strong bond. For example, states with a membership in both the Arctic and Barents cooperation include Finland, Russia, Denmark, Norway, Sweden, and Iceland. France, Germany, the Netherlands, Poland, and the United Kingdom, and they have been granted observer status in both cooperation. Canada and the United States¹⁵⁰ maintain a membership of the AC and observer status at the BEAC. Japan and Italy have also been granted observer status in the BEAC and hold an ad-hoc observer status at the AC. Additionally, the European Commission is also strongly connected to both. It holds membership in the BEAC and an ad-hoc observer status at the AC. Thus, similar group dynamics may be found in both the AC and BEAC. Many of these states (Canada, Iceland, Japan, Russian Federation, and United States) also participate in the NF, by means of their sub national governments. China and the Republic of Korea have ad-hoc observer status in the AC and their sub-national governments have membership of the NF.

In the Arctic and Barents cooperation, foreign ministers meet regularly. Likewise, ministerial level meetings of other government departments (e.g. health and environment) are also held. In addition to the communications at ministerial level, the Arctic and Barents forms of cooperation also connect with each other's high-level civil servants. An example of this is that the high-level civil servants coordinating both the Arctic Council (as SAO) and the BEAC (as CSO), are mostly the same, in particular in the case of states which hold common membership to the two

¹⁵⁰ Finland's position is ambiguous in the NF due to its interior administrative reforms, which has deleted the provincial government of Lapland continued with NF's membership since its inception.

governances. Thus, the same actors take part under the auspices of more than one cooperative initiative.

Both the AC and BEAC have connected national parliamentarians in distinguished forums, such as at the Conference of Parliamentarians of the Arctic Region (CPAR)¹⁵¹ and the Barents Forum¹⁵². These two forums provide both the AC and BRC with fruitful discussions and prepare recommendations for national governments, as well as the relevant institutions that meet matters of emerging regional importance, that result from rapid climate change and globalization.

These initiatives support each other conceptually and have introduced innovative ideas: the AC has introduced ‘Permanent Participant’ status (which may influence the development of a similar institution for the Barents co-operation) and used traditional indigenous knowledge in parallel with modern science in particular producing valuable knowledge in the field of climate change. The BEAC has set up ‘The Barents Region’ and included members from outside the region, whilst the NF has provided the definition of ‘northern regions’ and explained the concept of sustainable development in innovative way. Together, they handle complex issues, such as environmental protection, sustainable development, climate change, issues

¹⁵¹ The first meeting of Arctic Parliament was held in Reykjavik, Iceland in 1993. Afterward, CPAR (which has observer status to the Arctic Council) formed in 1996 with the inclusion of European Parliament and thereafter regular meetings were convened in Yellowknife (Canada), Salekhard (Russia), Rovaniemi (Finland), Tromsø (Norway), Nuuk (Greenland), Kiruna (Sweden), Fairbanks (Alaska) and the European Parliament in Brussels (Belgium). The next conference will be held in Iceland in 2012. Conference Statement of Ninth Conference of Parliamentarians of the Arctic Region, (2010), sec. 39.

¹⁵² The first meeting of Barents parliamentarians was held in Kirkenes 1997, and the first conference - in Alta (Norway) 1999. The second conference was in Bodø (Norway) in 2005, the third in Rovaniemi in 2007 and the fourth in Syktyvkar in the Komi Republic in 2009. Resolution of the Fourth Parliamentary Barents Conference, (2009). It seems that nowadays each BEAC Chairmanship hosts a Barents Parliamentary Conference as a general practice. See also ‘Barents Region - Cooperation and Dialogue towards Sustainable Development’, pp.6-7 (the part: Parliamentary Cooperation).

relating to indigenous people, economic and social development, and quality of life, which seem particularly challenging in the rapidly changing Arctic arena. Each initiative follows its own established norms as articulated in its formal rules and regulations and all of them have established informal internal practices – those which fall outside the written rules. An example of this is the inclusion of regional representatives in the national delegation to the AC. Moreover, these initiatives compare their own created norms to those of other initiatives.

In fact, the three selected forms of cooperation are not equal in terms of their soft-law characters and the strength of the commitment they produce varies greatly. In recent years these three soft-law cooperation forms have been moving towards the creation of stronger commitments by producing several international instruments, despite their soft-law character. For example, members of the AC have adopted an Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic; the first ever legally binding agreement between the eight Arctic states.¹⁵³ In 2007 the NF concluded a Memorandum of Understanding (MOU)¹⁵⁴ with the United Nations Development Programme (UNDP) and composed a joint Letter of Agreement with UNDP and Access to Global Online Research in Agriculture (AGORA), with clear legal consequences. Within the Barents cooperation; Finland, Norway, Russia and Sweden have signed an agreement in the Field of Emergency Prevention, Preparedness and Response, in Moscow 2008, which is also legally binding.¹⁵⁵ The Barents cooperation has established the International Barents

¹⁵³ Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic, (2011)..

¹⁵⁴ Memorandum of Understanding between the United Nations Development Programme and the Northern Forum, (2007).

¹⁵⁵ Agreement between the Governments in the Barents Euro-Arctic Region on Cooperation within the Field of Emergency Prevention, Preparedness and Response, (2008)..

Secretariat (IBS) by signing an agreement between its four member states.¹⁵⁶ The IBS and Norway have subsequently concluded a bilateral agreement in order to resolve the legal and other issues that may arise between them.¹⁵⁷

As a result, it is profound that these initiatives have managed to build informal and indirect and conceptual connections while also establishing legally binding obligations to some extent on participating Arctic states in their operational fields. Recently the BEAC has suggested that the AC exclude ‘environmental hot spots’ from its mandate, because all of them are located in the Barents Region and the BEAC has been addressing these issues.¹⁵⁸ The Barents Institute, Kirkenes, Norway and the University of Tampere (Finland) have jointly conducted research into selecting possible fields of cooperation where the AC and the BEAC can work together; the report will be published which is expected by the end of this year.

3.3. Conclusion on Soft-law Cooperation in the Arctic

The forms of soft-law cooperation outlined above were initiated at the beginning of the 1990s and came into operation following the end of the Cold War. All of these forms of co-operation chosen in the Arctic were of a decidedly soft-law nature other than formal international organisation in the light of public law. Among the

¹⁵⁶ Agreement between the Government of the Republic of Finland, the Government of the Kingdom of Norway, the Government of Russia and the Government of the Kingdom of Sweden on the Establishment of an International Barents Secretariat for the Cooperation in the Barents Euro-Arctic Region, (2007).

¹⁵⁷ Host Country Agreement between the Government of the Kingdom of Norway and the International Barents Secretariat for the Cooperation in the Barents Euro-Arctic Region on the Legal Status of the Secretariat and the Privileges and Immunities of the Secretariat and its Permanent Staff Members, (2007).

¹⁵⁸ Interview with Alexander Ignatiev, (2011).

cooperative bodies, the AC maintains the richest profile and serves as an umbrella for most forms of international cooperation in the Arctic. The position of the BEAC falls into the middle although its connections with the BRC seems relatively more practical in terms of regional representation, whilst the NF is becoming less significant due to the decreasing interests of several Arctic states (along with the withdrawal of membership of certain regions). The NF has, however, provided new ideas that rethink how classical international law fits with the dynamic realities of the area. The absence of national government representation, however, has made it weaker than a soft-law body. This and a lack of the essential elements of an international cooperation has led the author to choose the ‘hybrid soft-law body’ concept to determine the NFs position in international law.

The three initiatives maintain their own agenda although their core objectives are the same, those being; the well-being of the region with a particular focus on issues related to environmental protection and indigenous peoples of the north. They have incorporated Arctic and non-Arctic states, international organisations, as well as non-state actors in their activities and the same group of states takes part in both the AC and the BEAC. These states, both Arctic and non-Arctic, are also connected to the NF via their sub-national governments. However, a proper coordination mechanism that includes them and enables them to work in a more effective manner has not yet been developed.

Currently, there are global efforts to synergize the international cooperative bodies. A key objective of Rio+20 (which will be convened from the 4th to the 6th of June, 2012), is to strengthen the institutional framework for sustainable development by enhancing synergies between existing sustainable development co-operative

institutions.¹⁵⁹ A window of opportunity for strengthening the synergies between the Arctic Council, the Barents cooperation and the Northern Forum relates to the establishment of a permanent AC secretariat, an idea that was endorsed by ministers at the 2011 Nuuk Ministerial Meeting. A permanent secretariat could focus on establishing a stronger synergy between the three northern cooperative forums, as they move towards a common goal – regional development. As the AC has no representation at the sub-national level, the permanent secretariat could examine the possibilities of utilizing the Barents co-operation and Northern Forum to influence the AC.

A more formalized association or partnership could allow for a stronger focus on relevant Arctic issues and a more global orientation. Such a coordination mechanism could provide Arctic governance with alternative ideas. It would promote the sharing of responsibility among initiatives, as well as effect a reduction in the number of regional bodies of governance through merger. This would allow for a more effective system of operation and promote a better protection of the environment and its inhabitants.

4. THE ARCTIC COUNCIL AND ITS CLIMATE CHANGE WORK

A good test case as to whether a soft-law co-operation forum can tackle difficult policy problems is the Arctic Council, which is hard pressed to address current concerns of climate change consequence in the region. Being a soft-law co-operation, the AC can do little to mitigate global climate change which requires a cut

¹⁵⁹ Online:
<<http://www.uncsd2012.org/rio20/index.php?page=view&nr=248&type=12&menu=106&template=435>> (accessed 11 November 2011).

in CO₂ emission from all parts of the world. However, contributions for adaptation to climate change and its consequences require action within the region. The climate change work of the AC includes the establishment of the ACIA, the ACIA Policy Document, the Arctic Council Focal Point, SWIPA, the Arctic Council Task Force on Short-lived Climate Forcers, the Climate Expert Group, climate change related projects, and the AC's involvement in the global climate change regime.

4.1. Arctic Climate Impact Assessment

The ACIA is a joint project of the AC (AMAP and CAFF) and the IASC. It was established in 2000, aiming to gather knowledge on climate change and ultra violet radiation as well as to provide an authentic message about their consequences on the Arctic environment to the governments and people in the Arctic. In fact, the ACIA has presented the Arctic as the early warning region for climate change, since the consequences of global warming have been evident in the region from the 1960s onwards and the consequences of global warming are projected to be twice as intense in the Arctic as in the rest of the world. The ACIA emphasized that climate change is a cross-cutting issue which is significant in addressing climate change in the Arctic, which is important at the present time when the AC is passing through a transitional period – from policy shaping to decision making.

The ACIA produced two reports: In 2004 it produced an overview (synthesis) report, mainly prepared for the policy-makers and general public, and in 2005 it produced scientific reports prepared for people with technical knowledge (although both were prepared based on the same data and obtained from a combination of modern research and traditional indigenous knowledge).

The ACIA synthesis report presented dramatic changes caused from climate change in the Arctic including ten key findings as articulated previously.¹⁶⁰ The report has also presented number of alarming phenomena relevant to the Arctic:

- i) The temperature rise in the Arctic within a century is projected to be up to 7 degrees centigrade;¹⁶¹
- ii) The increase of glacial melt and river runoff flows will deposit more freshwater into the ocean. This may slow the water circulation which usually carries tropical heat to the Arctic. Together with a rise in sea level, the disturbances of insects and other non-native species may cause new diseases;¹⁶²
- iii) The present level of received UV radiation per person in the Arctic is 30 percent higher than previously measured;¹⁶³
- iv) The northern shrimp collection could decline by up to 70 percent;¹⁶⁴

¹⁶⁰ ACIA Synthesis Report, (2004), p. 10-11.

¹⁶¹ *Ibid.*, pp. 22-23.

¹⁶² pp. 46-57.

¹⁶³ pp.98-105.

¹⁶⁴ p. 115.

- v) Infrastructure damage resulting from the thawing of permafrost in Siberia, is projected to rise by up to 90 percent based on a survey of the 1990s;¹⁶⁵
- vi) The abundance of sea lions has declined up to 80 percent over a few decades in the seas adjacent to Chukotka, Alaska and the Western Canadian Arctic;¹⁶⁶
- vii) In summertime, the maximum northward retreat of ice is projected to increase from the present 150-200 kilometres to 500-800 kilometres during this century.¹⁶⁷

One of the important elements of the ACIA report is the projection of climate change impacts on human beings (in particular the indigenous peoples of the Arctic) and from various perspectives.¹⁶⁸ Climate change may threaten the cultural survival of indigenous peoples, whose ways of life are based on hunting, herding, and fishing. The consequences of climate change in the Arctic may deprive these peoples of their traditional food and they may have to adapt to new species which may move to the north. The change in the Arctic would also cause more challenging conditions for them to hunt marine mammals on thin ice. Open water is less predictable than water that is covered by ice. As regards health, new insect and animal vectors may cause new diseases and increasing levels of skin cancer, cataracts, and viral infections are already evident in the Arctic. The effect of climate change on the

¹⁶⁵ p.117.

¹⁶⁶ p. 118.

¹⁶⁷ p. 120.

¹⁶⁸ ACIA Scientific Report, (2005), pp. 61-98 (Chapter 3).

petroleum and fishery industries may be mixed. Whilst increased shipping would develop the financial situation of the Arctic, it could also cause further pollution.

4.2. ACIA Policy Document

The Arctic Council has issued the Arctic Climate Impact Assessment Policy Document inspired by the ACIA report.¹⁶⁹ It has recognised the Arctic climate as a critical phenomenon of the global climate system.¹⁷⁰ The policy document includes the ACIA related decision from the Reykjavik Ministerial as it is, the key findings of the synthesis report, as well as a brief description of the historical background of the ACIA. The latter part of the document contains climate policy action and the role of the Arctic Council to counter the impacts of climate change.

In order to combat climate change in the Arctic, the ACIA Policy Document suggests two types of actions: mitigation and adaptation.¹⁷¹ For the mitigation of climate change-related risks and considering the findings of the ACIA and other relevant studies for the implementation of the recommendations under the UNFCCC and other agreements; it has suggested taking decisive actions without delay, to address global emissions. The Document urges the limiting of greenhouse gas

¹⁶⁹ The AMAP and the CAFF were requested to prepare the ACIA policy report on the basis of the ACIA findings; they formed a policy drafting team comprising designated people from member states and permanent participants. The team prepared three drafts (first, second and third) of the policy report as well as those sent to the SAO in an informal manner. They developed four sets of recommendations (e.g., i) mitigation, ii) adaptation iii) research and iv) observation, monitoring, modelling, communication and education) including a scientific summary. See the Meeting of the Senior Arctic Officials, (October, 2003).

¹⁷⁰ Reykjavik Declaration, (2004), the Part: Climate Change in the Arctic.

¹⁷¹ The Arctic Climate Impact Assessment Policy Document, (2004), the part: Arctic Climate Policy Actions.

emissions to standard levels, the promotion of appropriate technologies and sources of energy, and the adoption of policies and programmes for the conservation and enhancement of carbon sinks and reservoirs, following the principles of sustainable development.¹⁷²

The mitigation of climate change in a specific region is both challenging and uncertain, mainly for reasons of regional governance. Adaptation to change however, could be a useful approach. According to the Policy Document, adaptation is needed in situations where climate change is unavoidable and special attention is needed to strengthen the adaptive capacities of populations in the Arctic.¹⁷³ The Policy Document recommends that the Arctic states work closely with residents of the Arctic (including indigenous and local communities), in order to promote their ability to adapt to and manage the various impacts of climate change and ultraviolet radiation. The development and management of new economic opportunities in a sustainable manner may help protect the environment and population of the Arctic. Local and indigenous knowledge, as well as the participation of local and indigenous communities, are required in the implementation of adaptive management strategies, policies and programmes concerning the use of natural resources and in reducing the risks from natural calamities, whilst taking into account the costs and benefits.

The Policy Document has encouraged national and international research bodies and sponsors to develop and implement programmes since increasing natural and social science research on the impact of climate change and adaptation to it may play a

¹⁷² *Ibid.*

¹⁷³ *Ibid.*

useful role in adapting local people to changed situation.¹⁷⁴ It seeks to expand links to circumpolar research and monitoring networks, in order to ensure the provision of relevant data for various research and monitoring programmes. It also recognises the need to consider methods of conducting further studies regarding climate change in the Arctic.

The Policy Document recommends the dissemination of the ACIA documents in international forums to improve cooperation, to address the implications of climate change in the Arctic. It also looks to promote the ACIA documents at both national and local levels by using various methods and languages in order to include more residents of the Arctic in the process.¹⁷⁵ The member states could contribute to such dissemination. It affirms the importance of providing the residents of the Arctic with information on climate change and monitoring in order to help them adapt, and also encourages the member states to integrate ACIA materials into educational, research and training programmes. Finally, the Policy Document recommends the reorganisation of the work of the Arctic Council and its subsidiary bodies to provide better results in mitigating climate change.

4.3. Arctic Council Focal Point

The Senior Arctic Officials established the Arctic Council Focal Point (FP) in 2005 mainly to take care of ACIA follow-up activities derived from the recommendations

¹⁷⁴ *Ibid.*, the part: Research, Observations, Monitoring and Modelling.

¹⁷⁵ *Ibid.*, the part: Outreach.

of ACIA Policy Document Report.¹⁷⁶ In fact the SAO established the ‘focal point’ comprised of the Chairs (or their designated representatives) of the Arctic Council Working Groups. Whilst the SAOs are represented in the ‘focal point’ by the Chairman of the SAOs, the permanent participants are invited to nominate one representative to the ‘focal point’ to represent them all.¹⁷⁷ The ‘focal point’ group would coordinate the ACIA follow-up activities within the working groups and prepare proposals for the Arctic Council in relation to ACIA follow-up issues, as articulated in the Reykjavik Declaration and the SAO report to Ministers at the Fourth Arctic Council Ministerial Meeting.¹⁷⁸ The ‘focal point’ was expected to report on the progress made, to the upcoming SAO meetings and leading to the 2006 Ministerial Meeting. They were also expected to cooperate closely with the IASC and other relevant actors to ensure that proposals for ACIA follow-up by the AC working groups are coordinated and they are harmonised with activities outside of the Arctic Council.¹⁷⁹

¹⁷⁶ The Arctic Climate Impact Assessment Policy Document, (2004), the part: Arctic Climate Policy Actions. It recommended ministers to:

1. Direct relevant technical working groups of the Arctic Council to review the scientific chapters of the ACIA in the context of their ongoing and future work programmes and to report on the progress made at the 2006 Ministerial Meeting;
2. Decide to keep under review the need for an updated assessment of climate change in the Arctic, drawing *inter alia* on the IPCC fourth assessment report and the results of the International Polar Year 2007-2009;
3. Direct SAOs to nominate a focal point and to be responsible for an ACIA follow up, including an assessment of gaps in knowledge; and
4. Communicate, as appropriate, any Arctic Council ACIA follow-up actions to the Conference of the Parties to the UNFCCC.

¹⁷⁷ Minutes of Arctic Council Meeting of Senior Arctic Officials, (April 2005), pp. 8-9. See also Report of the Arctic Council Focal Point (FP) for ACIA Follow-up Activities, (2006), p. 27 [Annex 8 (Paper prepared by Norway on the topic of revising the Arctic Council Focal Point, the part: Review of the establishment of the Focal Point (FP) on 7 April 2005)].

¹⁷⁸ *Ibid.* p. 9 (the part: Review of the establishment of the Focal Point).

¹⁷⁹ *Ibid.*

As mandated, following its six formal meetings, the FP prepared the Focal Point Report to SAOs in 2006, for them to advance to the Ministerial Meeting of 2006.¹⁸⁰ The reports included a set of recommendations including that the continuing responsibility for coordination of ACIA Follow-up activities would be assigned to a single Working Group. The recommendation at that time was for AMAP to assume the role, and the AC should plan and implement ACIA follow-up assessments as soon as possible.¹⁸¹ AMAP was assumed to be charged with the establishment of an ad-hoc team to prepare a prospectus for review by the AC and to define the structure and scope of future assessments.¹⁸²

The report recommended the FP as an implementation mechanism in order to prioritize work for advance adaptation in the circumpolar Arctic, including regular scientific assessment or vulnerability and risk.¹⁸³ However, disagreement arose in whether to establish a new mechanism or to utilise the existing working groups and to strengthen them where needed. In the initial stages it suggested a case study approach in which case studies addressing adaptation issues were examined and shared; to facilitate continuous learning, knowledge sharing and capacity building and to gain experience with and further develop methodologies. This approach aimed to clearly demonstrate the issues, decision making processes and the results of

¹⁸⁰ Report of the Arctic Council Focal Point (FP) for ACIA Follow-up Activities, (2006), p.6 (the part: Summary of Focal Point activities since April 2005).

¹⁸¹ *Ibid.* pp.4- 5.

¹⁸² *Ibid.*, p. 4.

¹⁸³ The part: Annex 7. Adaptation Workshop – Oslo, 26-27 June 2006, Executive Summary and Recommendations, p. 25.

adaptation measures.¹⁸⁴ Another view of undertaking adaptation activities (assessments on Arctic vulnerability and adaptation), was to strengthen the basis for priority setting and actions planned in regard to adaptation.¹⁸⁵ It included the seeking of opportunities to promote a global, national and local awareness of the ACIA results and to advance education, outreach and information on adaptation issues in the Arctic Region. It also looked to the following-through of research, observations, monitoring and modelling, such as those included in the ACIA science report and policy document.¹⁸⁶ These recommendations were built on the Third Assessment Report of the IPCC (TAR) and the ACIA reports, and in looking forward to the Fourth Assessment Report of the IPCC (AR4), that the AC should take early and substantive action on the adaptation to climate change in the Arctic.¹⁸⁷

However, within a short period to time it was realised that the FP (as composed in 2005), had insufficient expertise on climate issues. Many parts of the Arctic Council objected to their limited access or non-access to FP meetings and in particular, the permanent participants looked for stronger representation.¹⁸⁸ Under these circumstances, Norway suggested two options for replacing the FP; 1. to create a new climate working group under the AC, with the main responsibility of climate change follow-up and implementation; or 2. establish one of the existing working groups as the lead group for climate and involve other working groups as

¹⁸⁴ *Ibid.*

¹⁸⁵ The part: Annex 7. Adaptation Workshop – Oslo, 26-27 June 2006, Executive Summary and Recommendations, p. 26.

¹⁸⁶ *Ibid.*

¹⁸⁷ The part: Adaptation Workshop – Oslo, 26-27 June 2006, Executive Summary and Recommendations, p. 25.

¹⁸⁸ The part: Annex 8, p. 28.

appropriate.¹⁸⁹ 2006, the SAOs recognised that the future work on ACIA follow-up, should be undertaken within the AC working group structure where all the working groups could contribute to this endeavour.¹⁹⁰

4.4. Snow, Water, Ice and Permafrost in the Arctic

The SAO approved Snow, Water, Ice and Permafrost in the Arctic (SWIPA) in 2008. This is in fact an update and extension to the ACIA findings on the consequences of change in the Arctic Cryosphere component of the global climate system.¹⁹¹ The detailed SWIPA results would be published in the SWIPA Scientific Assessment Report,¹⁹² and the related SWIPA Overview Report, both of which are currently being prepared for publication. This assessment of the impacts of climate change on SWIPA brings together the latest scientific knowledge about the changing state of each component of the Arctic Cryosphere,¹⁹³ and examines how these

¹⁸⁹ *Ibid.*, pp. 29-30.

¹⁹⁰ Report of Senior Arctic Officials, (October 2006), the part: Climate Change.

¹⁹¹ ‘Cryosphere’ is the scientific term for that part of the Earth’s surface that is seasonally or perennially frozen. It includes snow, frozen ground, ice on rivers and lakes, glaciers, ice caps, ice sheets and sea ice. The cryosphere structures the physical environment of the Arctic. It provides services to humans such as freshwater supplies and transport routes. The cryosphere is an integral part of the climate system, and affects climate regionally and globally.

¹⁹² An unofficial unedited draft could be found online: < <http://amap.no/swipa/CombinedDraft.pdf> > (accessed 11 November 2011).

¹⁹³ SWIPA 2011 Executive Summary: Snow, Water, Ice and Permafrost in the Arctic, (2011), p. 3 (the part: Executive summary and key messages: SWIPA Summary for policymakers). It reads:

‘Cryosphere’ is the scientific term for that part of the Earth’s surface that is seasonally or perennially frozen. It includes snow, frozen ground, ice on rivers and lakes, glaciers, ice caps, ice sheets and sea ice. The cryosphere structures the physical environment of the Arctic. It provides services to humans such as freshwater supplies and transport routes. The cryosphere is an integral part of the climate system, and affects climate regionally and globally.

changes will impact both the Arctic as a whole, as well as people living within the Arctic and elsewhere in the world.¹⁹⁴

AMAP released the SWIPA Summary in 2009 which includes fifteen key findings¹⁹⁵ along with a set of recommendations. The key findings relate to the

¹⁹⁴ *Ibid.*

¹⁹⁵ The key findings are:

1. The past six years (2005–2010) have been the warmest period ever recorded in the Arctic. Higher surface air temperatures are driving changes in the cryosphere.
2. There is evidence that two components of the Arctic cryosphere (snow and sea ice) are interacting with the climate system to accelerate warming.
3. The extent and duration of snow cover and sea ice have decreased across the Arctic. Temperatures in the permafrost have risen by up to 2 °C. The southern limit of permafrost has moved northward in Russia and Canada.
4. The largest and most permanent bodies of ice in the Arctic (multiyear sea ice, mountain glaciers, ice caps and the Greenland Ice Sheet) have all been declining faster since the year 2000 than they did in the previous decade.
5. Model projections reported by the Intergovernmental Panel on Climate Change (IPCC) in 2007 underestimated the rates of change now observed in sea ice.
6. Maximum snow depth is expected to increase over many areas by 2050, with the greatest increases noted over Siberia. Despite this, the average snow cover duration is projected to decline by up to 20% by 2050.
7. The Arctic Ocean is projected to become nearly ice-free in summer within this century, likely within the next thirty to forty years.
8. Changes in the cryosphere cause fundamental changes to the characteristics of Arctic ecosystems and in some cases, the loss of entire habitats. This has consequences for people who benefit from Arctic ecosystems.
9. The observed and expected future changes to the Arctic cryosphere impact the Arctic society on many levels. There are challenges, particularly for local communities and traditional ways of life. There are also new opportunities.
10. Transport options and access to resources are radically changed by differences in the distribution and seasonal occurrence of snow, water, ice and permafrost in the Arctic. This affects both daily living and commercial activities.
11. Arctic infrastructure faces increased risks of damage due to changes in the cryosphere, particularly the loss of permafrost and land-fast sea ice.

reasons of Arctic Cryosphere change (1,2); ways of changing (3,4,5); prediction of higher changes (6,7); affects of the changes on Arctic ecosystems and people (8-11); their impacts on the global climate and global society (12,13); next requirements for change (14,15). The recommendations include five different segments – adaptation, mitigation, observation, outreach and policy needs.¹⁹⁶ With respect to adaptation, it urges AC members and governments at all levels in the Arctic work to:

- I. Develop regional-scale assessments of cryospheric change and the associated risks.
- II. Develop and implement Arctic adaptation strategies appropriate to the scale and character of anticipated changes - such strategies must take account of other relevant drivers of change.

12. Loss of ice and snow in the Arctic enhances climate warming by increasing absorption of the sun's energy at the surface of the planet. It could also dramatically increase emissions of carbon dioxide and methane and change large-scale ocean currents. The combined outcome of these effects is not yet known.

13. Arctic glaciers, ice caps and the Greenland Ice Sheet contributed over 40% of the global sea level rise of around 3 mm per year observed between 2003 and 2008. In the future, the global sea level is projected to rise by 0.9–1.6 m by 2100 and Arctic ice loss will make a substantial contribution to this.

14. Everyone who lives, works or does business in the Arctic will need to adapt to changes in the cryosphere. Adaptation also requires leadership from governments and international bodies, and increased investment in infrastructure.

15. There remains a great deal of uncertainty about how fast the Arctic cryosphere will change in the future and what the ultimate impacts of the changes will be. Interactions ('feedbacks') between elements of the cryosphere and climate system are particularly uncertain. Concerted monitoring and research is needed to reduce this uncertainty.

¹⁹⁶ SWIPA 2011 Executive Summary: Snow, Water, Ice and Permafrost in the Arctic, (2011), p. 15 (the part: Recommendations).

- III. Ensure that standards for environmental management are in place, or can be adapted, to take account of cryospheric change. Develop regulations where necessary.
- IV. Upgrade the capacity for search and rescue operations and environmental hazard responses.
- V. Facilitate measures to increase the accuracy of forecasting for ice, weather, and sea conditions, and make forecasts accessible to all Arctic residents and organisations.

For mitigation it suggests that:

- I. International negotiations to reduce global greenhouse gas emissions should be pursued as a matter of urgency.
- II. Member States of the Arctic Council should increase their leadership role in this process.

For observer it includes that Arctic countries and international organisations should:

- I. Improve and expand systematic, comprehensive surface-based monitoring of the cryosphere.
- II. Maintain and support the development of remote sensing methods for observing the cryosphere.
- III. Develop and enhance systems to observe the cascading effects of cryospheric change on ecosystems and human society.
- IV. Expand research into processes that are important for modelling the cryosphere, to reduce uncertainty in predicting cryospheric change. In particular, improvements are needed in modelling permafrost dynamics,

snow-vegetation interactions, and mass loss from glaciers, ice caps, and the Greenland Ice Sheet.

The report suggests informing and educating Arctic societies along with the global society about the changes in the Arctic linked to climate change, and how they affect people locally regionally and globally for its outreach. This responsibility is expected to be undertaken by AC members and observers both collectively and individually. Finally, it recommends increased cooperation and coordination efforts at all levels of governments and institutions, to respond to the challenges and opportunities associated with climate change. It includes the recommendation that the “Arctic Council should conduct an integrated assessment of the combined impacts of change in the Arctic, focused on how to minimize environmental damage and enhance human well-being”.¹⁹⁷

4.5. Arctic Council Task Force on Short-lived Climate Forcers

The AC established the TFSLCF in 2009 in order to assess the impacts of short-lived climate forcers (e.g., black carbon, methane, tropospheric ozone precursors), on climate change in the Arctic. The TFSLCF has recently produced a report on mitigation options for black carbon (BC) in the Arctic.¹⁹⁸ This technical report includes relevant useful information may contribute to not only determining the sources of BC in the region or limit its emission so as to reduce negative consequences in the Arctic, but also to contribute to the development of natural science in general. For instance, according to the report, BC remains in the

¹⁹⁷ *Ibid.*

¹⁹⁸ An Assessment of Emissions and Mitigation Options for Black Carbon for the Arctic Council, (2011).

atmosphere from periods of days to weeks and warms the climate by absorbing both incoming and outgoing solar radiation and also by darkening snow and ice after deposition, thereby reducing the surface albedo, or reflectivity. Clearly, it is this albedo effect that is particularly pertinent in the Arctic.¹⁹⁹ The main findings of the TFSLCF report include:

- i) The largest sources of black carbon emissions in Arctic Council nations have been identified;
- ii) There is still considerable uncertainty regarding the quantification of the exact magnitude of black carbon emissions, particularly from sources such as agricultural burning, open biomass burning (i.e., wildfires and prescribed forest burning), and gas flaring;
- iii) Overall, the total black carbon emissions from Arctic Council nations are projected to decrease in the coming decades, primarily due to the effective implementation of transportation-related particulate matter controls;
- iv) To maximize climate benefits, PM [Particulate Matter] control programmes must aim to achieve maximum black carbon reductions;
- v) Several mitigation measures have been identified to further reduce major emission source categories;
- vi) Additional measurements, research, and analyses are needed to better identify the specific BC mitigation measures (both inside and outside of the Arctic Council nations) that will lead to the largest Arctic climate benefits.

¹⁹⁹ *Ibid.*, p. TS-2 (Technical Summary).

4.6. Climate Change Related Projects

A number of projects have been undertaken by the various working groups of the AC relating to climate change, with some others still ongoing. At present (in October 2011), AMAP has registered sixty seven projects related to climate change operated by Arctic and non-Arctic states.²⁰⁰ Most of these projects are research-oriented to achieve a better understanding of climate change in the Arctic and its impact on arctic populations, flora, and fauna. Since the completion of Vulnerability and Adaptation to Climate Change in the Arctic (VACCA),²⁰¹ which aimed specifically to increase the adaptive capacity of Arctic communities, there have been new projects, such as Arctic Cryosphere: Snow, Water, Ice, and Permafrost in the Arctic (SWIPA) project.

The conduct of climate change oriented research by the working groups of the AC has created experts and strengthened their credibility at a global level in producing knowledge related to climate change. This has encouraged global institutions to work with them. The ‘Climate Change and POPs [Persistent Organic Pollutants]: Predicting the Impacts’²⁰² report can be taken as an example; the UNEP/Stockholm Convention Secretariat prepared this report in collaboration with the AMAP Expert

²⁰⁰ The projects could be found in the AMAP Project Directory. Online: < <http://www.amap.no/>> (accessed 11 November 2011).

²⁰¹ Vulnerability and Adaptation to Climate Change in the Arctic (VACCA): An Analysis of the Scoping Study Data (2008). Main objects of the VACCA was to undertake a scoping study including collect and disseminate information on the expertise, existing and ongoing research and adaptation strategies/measures on adaptation to climate change in the Arctic; and to arrange international expert/stakeholder workshop in which leading experts, policy makers working group representatives and key stakeholders would meet and discuss on vulnerability and adaptation to climate change as well as preparing recommendations for potential future work for the Arctic Council. The project was completed in December 2008 and the Tromsø ministerial noted that vulnerability and adaptation would be strengthened in future reports on climate change.

²⁰² Climate Change and POPs: Predicting the Impacts – Report of the UNEP/AMAP Expert Group, (2011).

Group in 2011. The results of the report include that climate change may increase the planet's vulnerability to highly toxic chemicals. The report focuses on the complex relationships between climate change and POPs, and human and environmental exposures in a changing climate both in global and Arctic contexts. It also identifies several key areas where knowledge gaps exist and provides recommendations.²⁰³

4.7. Involvement in the Global Climate Change Regime

The AC has been concerned with the activities of the UNFCCC since its inception which was limited (until 2009) to re/affirming its support of the Convention, organising side-events and issuing a couple of statements, rather than creating any strong commitment to emission control. It does not hold a formal position with the Convention (e.g., observer status). All AC members have joined the climate convention,²⁰⁴ but they have never discussed the ratification of the Kyoto Protocol within the AC. However, the situation has since changed and the AC has been trying to become more globally oriented. The AC decided to set up an Arctic Venue at the UN climate summit in Copenhagen, organise a side event and release the Greenland Ice Sheet in a Changing Climate (GRIS) and SWIPA reports to the public at COP-15.²⁰⁵ In 2011 the AC gave assurance that all its member states would work together with other countries in reaching an agreement at climate talks to be held in

²⁰³ *Ibid.*, pp. 7-8 (the part: Executive Summary).

²⁰⁴ Salekhard Declaration, (2006), the part: Climate Change in the Arctic.

²⁰⁵ Meeting of Arctic Council Senior Arctic Officials, (November 2009), sec. 2.1 (Arctic Council Outreach at COP 15).

Durban. It also urged all Parties to the UNFCCC to taking urgent action in order to meet the long-term goal.²⁰⁶

The AC has gained a leading position in producing scientific knowledge on various issues related to the Arctic (in particular climate science) and supports high standards of research and the taking of appropriate initiatives in this regard. The AC has been successful in involving a good number of non-arctic states, along with international organisations, for this purpose. However, the entirety of the AC's activities (e.g., developing awareness among the local peoples to enable them to adapt to the changes, and producing climate change science) does not seem sufficient – there is also a need to push Arctic issues forward in the global arena for collective action.

The AC initially considered the issue of climate change at the secondary level of its mandate while, within two years, the climate change issue became well-known with the publication of the State of the Arctic Environment Report.²⁰⁷ This report highlighted climate change as a driver of Arctic change and policy-makers became familiar with the issue which could be described as the first generation of Arctic climate change science. Subsequently the establishment of ACIA and the release of the ACIA reports (including the Policy Document Report), presented a valuable breadth of knowledge on climate change in the Arctic. These reports have provided dramatic information concerning the consequences of climate change in the Arctic, identified main causes, predicted future changes and suggested some possible means of solution. After this, the formation of the Arctic Council Focal Point initiated their

²⁰⁶ Nuuk Declaration, (2011), the part: Climate Change and Environmental Protection.

²⁰⁷ Arctic Pollution Issues: A State of the Arctic Environment Report, (1997); AMAP Assessment Report: Arctic Pollution Issues, (1998).

follow-up activities. At that stage, climate issues were identified as the most powerful driver of the changes occurring in the Arctic which could be described as the second generation of Arctic climate change science. At present, the TFSLCF has produced advanced knowledge of science. The SWIPA project has presented an integrated approach to Arctic change where climate change is a crosscutting issue and connected to all kinds of changes and challenges in the Arctic. These addresses are progressively more scientific than previously seen, and could be explained as the third generation of climate change science. Thus, increased access to advanced climate science has generated some serious concerns and the Arctic states have been offering stronger commitments to combat climate change and its consequences in the Arctic. Overall, they seek a strong global orientation since a fruitful result may come through the active participation of the global community as a whole.

5. CAN THE ARCTIC COUNCIL RESPOND TO THE CHALLENGES POSED BY ECONOMIC GLOBALISATION AND CLIMATE CHANGE?

It is now fitting to examine whether the Arctic Council can prepare an adequate response to the climate change consequences in the region, or should the Arctic actors establish a stronger governance mechanism (even one based on an international treaty) to counter the immense challenges resulting from climate change. At the heart of this discussion is how the AC reacts to the threat posed by increasing economic activity in the region and whether it enables a proactive coordinated response to promote sustainable development in the region, particularly in its waters.

The European Parliament has twice proposed in its resolution, that an Antarctic treaty modelled agreement should be negotiated to govern the Arctic (even if they

have recently changed their course and no longer advocate an Arctic treaty).²⁰⁸ The idea behind the Parliament's proposal was to borrow the governance framework from the other Pole, the Antarctic Treaty's Environment Protocol, and modify it to Arctic circumstances. The Parliament (as a minimum), wanted the European Commission to pursue negotiations with Arctic states on the possibility of negotiating a treaty to conserve the high seas areas of the Arctic Ocean. The overarching Arctic Treaty idea is also suggested by scholars.²⁰⁹ Independent work done by Koivurova and Molenaar for WWF Arctic International, suggests that the Antarctic Treaty does not provide a viable basis for a legally binding Arctic instrument but they do suggest elements for an overarching Arctic treaty.²¹⁰ Their suggested model derives from the regional seas agreements; their argument being that the law of the sea and UNCLOS encourages states to implement its framework type obligations on a regional basis. This would have the effect of shifting Arctic co-operation to only marine areas, in contrast to the AC approach, which includes both the land and marine areas of the region.²¹¹

There may be benefits to negotiating an Arctic treaty. At the very least, a much more ambitious governance could be achieved in the Arctic than is currently enacted within the Arctic Council. Moreover, the currently fragmented governance of the Arctic could be more consistently governed by a set of regional institutions that could co-

²⁰⁸ See Online: <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0024+0+DOC+XML+V0//EN>> (accessed 11 November 2011).

²⁰⁹ For instance, see Koivurova, (2008), pp. 22, 26.

²¹⁰ International Governance and Regulation of the Marine Arctic: A Proposal for a Legally Binding Instrument, (2010).

²¹¹ See Stokke, (2007), pp. 402-408.

ordinate how various treaties (applicable in the region) could be synergistically implemented.²¹²

Yet, a political will does not seem to exist to create such a treaty, given that in their Ilulissat Declaration of 2008, the Arctic Ocean coastal states explicitly rejected any overarching legal regime to govern the Arctic. None of the current Arctic states seem to be willing to engage in negotiating an Arctic treaty, as testified by their newly revised Arctic national policy documents.²¹³ While, states voluntarily expressed cooperation and support with other states and local people (rather than create a legally binding obligation as result of hard or harsh negotiation), this seems to be more effective mainly in the field of environmental protection.²¹⁴

The author does not view this as a desirable way to conduct matters, since the consequences of both hard law (treaty based) and soft law (non-treaty based) in international law mainly depends on how law types interact with changing conditions in specific region.²¹⁵ It has to be also raised, that there are multiple levels of international, regional, national and sub-national governance layers in the Arctic, which seem not amenable to creating an overarching Convention structure. Much of the Arctic Ocean and waters are under the jurisdiction of the Arctic states, making it more difficult to introduce overarching international treaties to the region. From the authors perspective, it seems much more viable to follow what is currently happening in the AC, since it has stepped up its pace considerably in a range of

²¹² Ostrom, (2003).

²¹³ Borlase, (2010). For why states and other actors care so much about soft-law arrangements see Huang, (2002), pp. 237-258.

²¹⁴ See Henkin, (1979), p. 47; Stein, (1990).

²¹⁵ See Skjærseth, (2010), pp. 1-14.

matters, including its legal development. The AC has also decided to establish a permanent secretariat by 2013 in Tromsø, Norway, replacing the semi-permanent secretariat, which can also be anticipated as being beneficial.

There are however, still many problems that need to be addressed in the AC if it can serve as a platform for effective action.²¹⁶ The AC lacks a strong coordination of working groups, an effective funding mechanism and national delegates well-experienced in Arctic needs. Also lacking are a separate unit dealing with the external relations with other states and relevant international platforms, sufficient practical activities which utilize the results of research, robust evaluations of prepared documents (guidelines and reports) in terms of their influence and value and a strong social media centre.²¹⁷ The sub-units of the Arctic states that are conducting day-to-day governance in the Arctic have no place in the Arctic Council, and this can be reflected in their lack of confidence in the AC system.

The Arctic Council and the newly started Arctic Ocean Coastal State Co-operation seem to show that the states and other actors in the region have taken a very responsible approach to address the forthcoming challenges. To some extent, these co-operation forms have been seen as competing with each other, even if at the moment it seems that much of the momentum behind the Arctic Ocean Coastal State

²¹⁶ See Ronson, (2011), pp. 95-111; Young, (2009), pp. 73-82.

²¹⁷ A strong media centre seems important for the AC in order to supply relevant news to the governments and local inhabitants mainly focusing on member states contributions and other sensitive events so as to avoid unexpected tension caused from wrongly broadcasting in other media. An example of such broadcasting was when in August 2007, two Russian mini-submarines planted a Russian flag at the bottom of the Arctic Ocean at the North Pole, it was in fact an adventure trip partly financed by a Scandinavian businessman. The flag of the Adventurer's Club of New York was also on board and an Australian and an American citizen, who were the masterminds of the trip, were included in the mission. However, the media presented the event in a different way, and that Russia had occupied the North Pole as part of its sovereign territory although it was no way an official act of the Russian Government.

Co-operation is overshadowed because of developments in the Arctic Council. The second meeting of the Arctic Ocean Coastal States in Chelsea Canada was heavily criticized by the US Secretary of State Hillary Clinton, who argued that the Arctic Council is the best place for dealing with Arctic issues.²¹⁸

The Arctic Council performs best as a science provider, feeding science on threats to the region to all national, sub-national and indigenous governing structures, in order for these to respond adequately. This is most evident in its ever-increasing and important work on various aspects of climate change in the region, which feed information to national and local policy makers as to the adaptation and mitigation challenges and options, thereby increasing the overall resilience of the region.

6. CONCLUSION ON THE ARCTIC COUNCIL IN ADDRESSING CLIMATE CHANGE IN THE ARCTIC

The Arctic cooperation started with the establishment of the AEPS merged into the Arctic Council, and which has not changed its legal status or financial mechanism. Its main shortcomings with respect to dealing with issues related to climate change include its soft-law character, which is, however gradually changing in a unique manner. A number of proposals recommend a formal legal instrument to handle the AC although the member states lack consensus of opinion in order to proffer support for binding instruments. One needs to bear in mind that the AC can handle the climate change issue in a better way, if it becomes stronger in general and develops expertise in climate change science mainly relevant to the Arctic. The reality is that special situations in the Arctic (e.g., Arctic issues, history and peoples) facilitate a soft-law form of cooperation other than its regular international organisation.

²¹⁸ Online: < <http://www.thestar.com/news/canada/article/787178--canada-gets-cold-shoulder-at-arctic-meeting>> (accessed 11 November 2011).

A much more promising way forward is the most recent development in the Arctic Council, which can be seen as being unique in international relations. Although the Arctic Council is a soft-law inter-governmental forum, it was able to co-ordinate efforts to adopt the first legally binding treaty on search and rescue in the Arctic between the eight Arctic states; a treaty on a topic of particular importance to a region with difficult rescue conditions and an increasing use of its maritime areas. The conclusion of the Search and Rescue (SAR) agreement was followed by the establishment of a new task-force on oil spill preparedness and response, a topic that is highly relevant, given the opening of waters for offshore hydrocarbon exploitation and its transportation by ships. The work of this task-force may well produce another legally binding agreement, posing a general question as to whether this is the new way in which the Arctic Council responds to the vast challenges of this dramatically transforming region. In addition, in those issue-areas where the Arctic states do not possess enough capacity to counter the management of emerging economic activities in the Arctic (in particular shipping in the melting Arctic Ocean waters), they act together to push for global regulation. This is shown in the way the Arctic Marine Shipping Assessment (AMSA)²¹⁹ conducted by the AC, recommended to the member states to push for a mandatory Polar Code in the International Maritime Organisation (IMO), a process that is now on-going.²²⁰

Together with the newly established process to establish a permanent secretariat in Tromsø, it is pertinent to ask whether the Arctic Council is gradually becoming ready to counter the challenges posed by economic activities in the region gradually,

²¹⁹ Arctic Council Status on Implementation of the Arctic Marine Shipping Assessment, (2011).

²²⁰ For an analysis of the process to develop a mandatory Polar Code, see Developing a Mandatory Polar Code– Progress and Gaps presented at the Thirty four Antarctic Treaty Consultative Meeting, (2011).

proactively and one-by-one. It is also of importance to emphasize the unique nature of this emerging practice of a soft-law body producing proactive and legally binding agreements. If we take into consideration that the ministerial meetings have become much stronger in recent years (as has the overall guidance from the ministerial meetings to match the forthcoming challenges), together with the establishment of a permanent secretariat and a new way of tackling these challenges (with legally binding agreements); there seems to be some very promising development and this lessens the need to ponder any overarching treaty ideas for the region.

Yet, this is not to say that there is no need for reform in the Arctic Council. There would clearly be the need to create a form of Arctic Regional Council, to include Arctic regional governments in the work of the AC. Working groups should also be coordinated more effectively and their working boundaries should be clarified in such a way that an AC project may find its clear lead. The Arctic states should ensure that extra burdens are not imposed on national delegates, so that they can spend appropriate time on the AC's activities. The SAOs should not be changed too frequently – if an SAO retires from governmental service, then the position should be filled by someone who has experience participating in Arctic affairs. National governments should develop closer contacts with residents of the Arctic and ensure their proper representation in national delegations – the proposed Arctic Regional Council could play an advocacy role in this regard, while inclusion of more regional representatives in national governments might be helpful in highlighting issues affecting the Arctic at a national level. Although establishing confidence and faith among its members is largely a political issue, a higher level of interaction may be seen as a means for gaining such.

As a conclusion, it can be said that even if there are still many open questions as to whether the AC can counter the challenges ahead (mainly caused by global climate change), there are very strong recent developments within the Council. These relate to both climate change mitigation and to its response to concerns over the economic and social impact of economic activities entering the region. In terms of its climate mitigation role, the AC has become the main platform for assessing the pace and scale of climate change in the region, thereby influencing global science processes such as the IPCC assessments. This in-turn has an indirect impact on how the decision-makers perceive climate change proceeding. Since decision-makers at various levels have to rely on established climate science to make climate change mitigation decisions, it can be argued that the Arctic Council does have a role to play in the overall efforts to mitigate climate change. Yet, the climate science work in the Council does not pertain only to climate change mitigation but also to those efforts in the Arctic, to adapt to the consequences of climate change. As a main platform for assessing the consequences of climate change in the region, it simultaneously feeds information to various levels of Arctic governance. In respect of this, the AC need to take into account how their activities are in-line with cutting-edge knowledge of how climate change is proceeding in the region, and take necessary measures to adapt to its consequences. This role of the AC would be enhanced by having a strong media centre (as suggested above), which could communicate the main findings of the assessments of the AC more effectively and in a popularized manner.

For a long time, the Arctic Council was criticized for not having a strong enough structure to manage the incoming economic activities in the region, in particular, those in the marine environment. The AC is clearly on the way to making a full transition, as it moves from a traditional decision shaping role to one of decision making. Its political guidance role has become stronger with high-profile ministerial

meetings and the new annual deputy minister meetings, and soon it will be serviced not only by SAOs, but also by a permanent secretariat. The new manner of proactively regulating difficult issues within the Arctic (search and rescue and oil spill preparedness and response), testify – to the surprise of many – that the Arctic Council has been able to create a new form of governance that is of soft-law status but can react to emerging problems in a timely manner and with legal instruments in order to provide effective governance.

Even though climate change is rapidly transforming the region, it does seem (at the time of writing), that the Arctic Council is moving in the right direction. This dissertation has presented proposals to make it even stronger, as well as how the various soft-law bodies functioning in the region could synergize their activities and in that way keep up the strong momentum with which the AC is currently progressing. It is with scholarly attention to the possible problems in the AC that we can steer the AC to counter the challenges posed by climate change consequences in the region.

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