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

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, 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 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.¹ The Cooperation has developed on the basis of the political will to safeguard the wellbeing of 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.

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.² However, the legal issues have scarcely attracted

the attention of scholars, 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.


2.1. The Barents Euro-Arctic Council

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. The BEAC chairmanship rotates only between selected members rather than being extended to all members.

2.1.2. Observers

The Cooperation has involved a number of states by giving them observer status in order to function more efficiently. The observer states are Canada, France, Germany, Italy, Japan, the Netherlands, Poland, the United Kingdom, and the United States of America.

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).

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 protocol (hereinafter the Protocol Agreement). In fact, the BRC was established at the same place and day as the BEAC with the similar aims and

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objectives. It promotes basic day-to-day cooperation in the region. The organisational framework of the BRC includes two categories: members and the Executive Regional Committee (RC).

2.2.1 Members

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)

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.

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. 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:

3.1.1. Individual Subordinate Bodies under the BEAC

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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).

3.1.2. Individual Subordinate Bodies under the BRC

Regional Working Group on Environment; Regional Working Group on Communication; Regional Working Group on Youth Issues; Regional Working Group on Investment and Economic Cooperation

3.1.3 Joint Subordinate Bodies


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. 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. 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 and the Far East (RAIPON). The WGIP members elect a chair from among themselves for a period of two years; a person may be re-elected for the chairmanship.

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8 The Kirkenes Declaration, “Indigenous peoples.”
10 Section 6.
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.\(^{11}\) The international secretariat is located in Kirkenes, Norway and enjoys legal personality under Norwegian national law. 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.\(^{12}\)

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.\(^{13}\) However, in the course of time, those promises have become useful to the states of the Barents Region through the practice of 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 development\(^{14}\) along with the rights of indigenous peoples\(^{15}\) living in the Barents Region articulated in international law. They have committed themselves to


\(^{13}\) 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.


\(^{15}\) Chapter 26 of Agenda 21, “Recognizing and Strengthening the Role of Indigenous People and their Communities.”
strengthening the bilateral and multilateral cooperation imposed by the OSPAR Convention\textsuperscript{16} and the Espoo Convention\textsuperscript{17} for the protection of the fragile environment of the region.\textsuperscript{18}

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,\textsuperscript{19} 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. 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 words that make the provisions flexible: ‘will normally be conducted’ and ‘will normally convene’.\textsuperscript{20} Furthermore, it leaves room for various options by using terms like ‘may decide’.\textsuperscript{21}

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.\textsuperscript{22} 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,\textsuperscript{23} serious concern but only loose commitment,\textsuperscript{24} and intent to do a little.\textsuperscript{25} 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. The agreement was designed in the same fashion as a

\textsuperscript{18} The Kirkenes Declaration, “The Environment” and “Economic Cooperation.”
\textsuperscript{19} 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.”
\textsuperscript{20} Section 5.
\textsuperscript{21} Section 11.
\textsuperscript{23} 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.’
\textsuperscript{24} Examples are ‘continues to pay special attention,’ ‘underlines the need to address,’ ‘emphasizes the importance,’ ‘commends the enhanced cooperation,’ ‘believes that,’ and so on.
\textsuperscript{25} 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.’
classical treaty, containing, for example, provisions for amending the agreement and withdrawing from it. The IBS has practiced its legal competence by concluding an agreement with Norway that has created real obligations for Norway by using the authoritative term ‘shall.’ It has provided for the legal personality of the IBS in Norway, guaranteeing *inter alia* immunity to the IBS and its properties from legal process and the inviolability of the premises from administrative, judicial or legal actions. The IBS is also entitled to use its own flag and emblem.

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 Response in Moscow; which will become binding in international law after its entering into force.

The BRC has adopted protocols, reports and joint statement with the BEAC which express appreciation, deep concern or recommendations rather than any real commitments, even if though BRC cannot in any case conclude an international treaty. 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. The Agreement includes authoritative instructions with respect to its operational expenditures.

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

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27 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 fulfilment [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.”
28 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.”
29 Article 4.
30 Article 5.
31 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).
32 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).
33 Section 4.
34 Section 5.
international organisations is an international treaty,\textsuperscript{35} whereas in the case of the BEAC it is an inter-governmental declaration.

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.\textsuperscript{36} 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 IBS\textsuperscript{37} impose a mandatory obligation on member-states to some extent.\textsuperscript{38} 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.

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-

\textsuperscript{35} 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.

\textsuperscript{36} For instance, if they do not perform their duties or submit reports regularly.

\textsuperscript{37} Financial and Staff Rules of the International Barents Secretariat.

\textsuperscript{38} Section 4.3 says: “The Parties shall make their assessed contributions available to the Secretariat by 31st March each year.”
vis two platforms; this partnership may raise complex issues or provide new ideas concerning the evaluation of the platforms’ legal position under international law.

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 Barents Cooperation is not an international organisation under classical international law; it generates mainly voluntary or moral obligations through political commitments. However, 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.

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39 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.