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Governance of Arctic Offshore Oil & Gas Activities:
Multilevel Governance & Legal Pluralism at Stake

Cécile Pelaudeix

This article analyses the governance process of offshore oil and gas activities in the Arctic with the concept of multilevel governance and legal pluralism to address both issues of management of the environment and public participation. The analysis goes beyond the single issue of fragmentation pertaining to the international and supranational levels, to encompass national and regional levels and evaluate how the interactions between those levels structure the policy process and impact the efficiency of environmental management and public participation.

Four paths of reflection arise from the analysis. First it is unlikely that a dualistic vision opposing a normative option and an enabling option opens new avenues for solutions but the evolution of international law and customary international law deserves attention and a certain level of harmonisation may be welcome, for instance to cooperate efficiently on the prevention of an oil spill and the response to it. A second path relates to the institutional settings and proposes considering the stress lines pertaining to the entanglement of public and indigenous rights and authorities and the consequences at the local level. A third path suggests options pertaining to contract law to not only optimise the operator-regulator interface, but also more generally to offer a stable framework for inclusive dialogue between actors. In the end, the analysis of the rationale for engaging in offshore activities in the Arctic region, from a state perspective and from regional government, indigenous shareholders and corporation perspectives, could be helpful in providing relevant actors with arguments to weigh the decision on seismic and drilling activities in relation to risk acceptance.

The concept of governance, which first emerged in the field of public policy, entered the field of international relations to allow the analysis of decision-making processes in societies as they become more complex, and to highlight the role of non-state actors in the mechanism of political regulation. As a concept underlying the fact that state governments no longer possess a monopoly on legitimate authority, how should the governance of offshore hydrocarbon activities be analysed when states usually retain jurisdiction over these activities? The question is of particular relevance in the Arctic region, which is impacted by globalisation mechanisms including the expansion of international law, which creates obligations on state parties and exercises a normative pressure on

Cécile Pelaudeix is an Assistant Professor in the School of Culture and Society at Aarhus University.

non-state parties, and which is also impacted by devolution processes to the benefit of territorial governments and other sub-national actors.

The governance of offshore activities in the Arctic has been mainly studied with regard to international law (Johnstone 2015) and the issue of fragmentation (Koivurova & Hossain 2008, Humrich 2013). Fragmentation is defined as "the division of legal systems in various sectors, each of them having its own goal and values that can contradict with other branches of international law" (Koivurova 2014: 7), and the issue has triggered academic debates on the creation of an overarching international regime – the necessity of which the five Arctic coastal states denied in 2008 (Ilulissat Declaration 2008). Various analytical paths have emerged favouring a normative, critical, functional or pragmatic approach of governance (Pelaudeix 2014, Humrich 2013, Young 2011, Koivurova & Molenaar 2009). The aim of this article is to provide an evaluation of governance that goes beyond the single issue of fragmentation pertaining to the international and supranational levels, to encompass national and regional levels and analyse how the interactions between those levels structure the policy process and impact the efficiency of environmental management and public participation.

The Arctic region is characterised by particularly vulnerable ecosystems which are already under pressure of ongoing changes, which include warming and economic development (CAFF 2013), and by the presence of indigenous coastal communities who rely on marine species as a means of subsistence leading to the question of their participation in consultation and decision-making.[1] Indeed, the Arctic region presents huge challenges for offshore exploitation owing to extreme natural-climate conditions (icing, icebergs, ice floes, high winds, darkness), to remoteness of the region from basic infrastructure, and the low sustainability of the region's ecosystems. To properly address the risks of oil spill but also environmental consequences of offshore drilling, there is still a need for increased scientific knowledge, and progress in technology, in particular the modeling of offshore drilling activity, local weather forecasting, observing and monitoring sea-ice and icebergs mobility, oil spill detection in ice-affected waters and oil fate in sea ice (Barber et al. 2014a, Barber et al. 2014b).

While the Arctic is said to hold immense reserves of gas and petrol[2] and while some reserves are depleting in conventional fields – like the Prudhoe onshore field in Alaska, or in the North Atlantic – Arctic states are looking up north for offshore potential, including in the deep offshore. Arctic offshore exploitation has already begun in Norway (Snøhvit field, Barents Sea) and in Russia (Prirazlomnaye field, Pechora Sea), and exploration is taking place in many areas in the US, Canada, and Greenland.

In the present analysis, governance is understood with reference to the definition of the Commission on Global Governance, which characterises governance as "the sum of many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and co-operative action taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interest" (Commission on Global Governance 1995: 4).

Offshore governance in the Arctic involves many different actors: states, international law and regional agreements, territorial governments, advisory bodies, governmental agencies, corporations, organisations representing indigenous peoples and non-governmental associations

(NGOs), for instance. The article analyses the governance process to address both issues of management of the environment and public participation. It does not focus on a gap analysis, even though some shortcomings are highlighted. To answer these questions, the analysis also relies on the concept of multilevel governance (MLG). As an analytical tool, MLG allows one to tackle the overlapping competencies among levels of governments and the interaction of various actors (across those levels). Various levels of jurisdiction are involved in the offshore oil and gas activities and the analysis focuses on cases where regional governments are in place – for instance in Greenland, where the government has taken responsibility over offshore activities in the EEZ, or in Nunavut, which has no offshore jurisdiction but where Inuit rights are protected through various mechanisms.

Acknowledging the importance of the legal dimension of governance, the analysis also refers to the concept of legal pluralism which indicates that we inhabit a world of multiple normative communities (Zumbansen 2011; Callies & Renner 2009). Normative communities include the nation-state governments and courts familiar to legal scholars, but many other normative communities articulate norms without formal state power behind them. Indeed, many actors from the private sectors (including transnational corporations) as well as NGOs can also design norms and values in the offshore activities, potentially leading to a situation of legal pluralism where legal systems overlap (Berman 2007). Pluralism is conceived here principally as a descriptive, not a normative, framework to study the interplay of norms, and it does not propose a hierarchy of substantive norms and values (Berman 2007: 1166).

The article is structured in three parts: it first deals with interactions of authorities between the national level (state) on one hand, and the international and supranational levels (international law and the EU) on the other hand. The second part analyses multilevel governance cases involving national and regional (sub-state) authorities. In a third part, the role of non-governmental actors such as companies and NGOs in governance processes is assessed at both international and national levels. The article concludes with suggestions on paths to improve the efficiency of environment management and public participation.

Interactions between national level and international/supranational level

Fragmentation of international law

Offshore activities take place in the EEZ or on the continental shelf of Arctic coastal states, where under UNCLOS states enjoy sovereign rights over resources (article 56 and article 77) and their domestic legislation applies to activities in their own area. These sovereign rights carry with them the duty of due regard for the rights and duties of other states (article 56) and minimum standards to protect and preserve the marine environment (articles 192 and 193). In addition to domestic law, and although no international convention is dedicated to offshore oil and gas activities, many international rules and international or regional agreements apply to the EEZ in the Arctic region when it comes to pollution at sea.

Difficulties arise from the diversification and expansion of international law (Koskenniemi 2006) and this is particularly true for environmental conventions and protocols. When it comes to offshore exploitation, no international agreement with all the Arctic states as parties exist, but international rules and international or regional agreements apply to the Arctic region (e.g. with

regard to pollution caused by shipping: MARPOL 73/78, the International Convention for the Prevention of Pollution from Ships and the Polar Code).

This situation leads to the issue of fragmentation of law, geographically or functionally limited treaty systems potentially creating not only gaps but also problems of consistency. The UNCLOS provides applicable legal principles which are fairly general and vague (Koivurova & Hossain 2008), the OSPAR convention for the protection of the marine environment of the Northeast Atlantic covers pollution from offshore sources (article 5), but geographically it only covers the North-East Atlantic (and half of Greenland). It is ratified by three of the European Arctic states (Norway, Iceland and Denmark including Greenland), but Russia is not a party. Another example of the limited duties ascribed to state parties is the International Convention on Oil Pollution Preparedness, Response and Co-operation 1990 (OPRC) which does not require that states meet minimal requirements concerning the positioning and deployment of oil spill equipment and personnel (Byers & Stoller 2013).

The issue of international law and offshore hydrocarbon activities has been well documented (Johnstone 2015, Byers 2013). This includes the issue of ratification – for instance the Espoo Convention that sets out the obligations of parties to assess the environmental impact of activities at an early stage of planning is poorly ratified in the Arctic – or legal uncertainties pertaining to sovereign rights claims (in Svalbard or the Beaufort Sea for instance). I will thus focus on recent treaties.

The Agreement on Co-operation on Marine Oil Pollution Preparedness and Response (2013) signed by the Arctic states and the Faroe Islands under the auspices of the Arctic Council stands as an essential agreement for a coordinated response between Arctic states. It is yet considered a "weak and incomplete response" to the risks associated with Arctic offshore oil (Byers & Stoller 2013) on the grounds that it does not create any new obligations to existing regulations. In addition, the implementation of the agreement is subject to the capabilities of the parties to the agreement and the availability of relevant resources (article 15). A state could thus meet its obligations of due diligence without spending the funds necessary for actual preparedness. Moreover, the outcome of disputes between parties under the agreement is basically unenforceable: indeed, disputes arising between states "shall be settled by direct consultations"; "no weaker provision could have been drafted" (Johnstone 2015: 161).

The adoption of the Polar Code (International Code for Ships Operating in Polar Waters 2015) by the IMO in May 2015 leaves some uncertainties. What happens when the regulation is less strict than domestic norms? For instance, the carriage and use of heavy fuel, which is banned in Antarctica (regulation 43 of MARPOL Annex I) is not banned in the Arctic, where shipping activity has increased in the Northern Sea Route. A recommendation in the Polar Code "*encourages* the application of regulation 43 in Arctic waters" (Polar Code 2014).[3] Norway imposes a ban on the use of heavy fuel oil in some areas around Svalbard (AECO 2015). The new EU Directive (2012/33/EU) as regards the sulphur content of marine fuels[4] follows the MARPOL Annex VI to reduce the transport of heavy fuels and the sulphur emission from shipping, which harms human health and the environment and contributes to acid deposition. Both rules have different obligations in regional areas: the obligations are not strong in the Arctic area where the Polar Code applies, but are stronger in the North Sea under Directive 2012/33/EU which, on the initiative of the EU is categorised as an Emission Control Area (ECA), whereas the North Atlantic is not an

ECA. These obligations regarding the maximum sulphur content of heavy fuel oil and gas are implemented in Danish law.[5]

The coexistence of many regulations results in a very patchy regulatory framework to manage air pollution in the Arctic. But the long-range transport of pollutants is already affecting the region, and recent studies show that sulphur particles not only have a negative impact but also function as a transport container for black carbon in the Arctic (Massling et al. 2015).

Interpretation of law and political settings

In addition to the fragmentation of law, difficulties in managing the environment also arise from differences in the interpretation of law. As indicated with the example of sulphur emission, some Arctic coastal states share their legal authority with the European Union through the Agreement on the European Economic Area (1994) or as members of the Union. The migration of different legal and social norms as well as legal practices across territorial boundaries does have an impact on the governance system. Even though it is specifically designed to have EEA relevance, Norway has deemed that the EU Directive of the European Parliament and of the Council of 12 June 2013 on the safety of offshore oil and gas operations – the Offshore Directive (European Parliament and Council 2013) – does not apply to its EEZ. Norway argues that the EEA does not extend to the EEZ, and that the Norwegian security policy is stricter than that of the EU (The Nordic Page 2013). The deadline for implementation was 19 July 2015.

As an EU member state, Denmark has to transpose EU law in its legislation. The implementation of the Directive on Safety of Offshore Oil and Gas Operations (2013/30/EU) was carried out in Denmark by amending several existing Danish acts, including the Environmental Marine Protection Act.[6] A new Section 34b of the Environmental Marine Protection Act rules on the prevention of major accidents by a public risk management planning. None of these rules cover the marine areas around Greenland (Basse 2014). Greenland has taken responsibility for offshore activities in the EEZ, but has not taken responsibility for the protection of the marine environment beyond its territorial sea. The Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic stipulates that Greenland is responsible for responding to oil spills at sea wherever they occur, but only Denmark (and the Faroe Islands) – and not Greenland – has signed this agreement.

More generally, the extent to which EU environmental law covers the EEZ around Greenland should be thoroughly examined (Pelaudeix *in press*). This also includes the strategy for the marine environment which relies on a Directive (2008/56/EC) that establishes a common framework and objectives for the protection and conservation of the marine environment as this directive has been implemented by the above-mentioned Environmental Marine Protection Act – but with only the 2004 version covering Greenland.

Public and indigenous participation: accession, ratification and interpretation

Several international legal instruments are relevant when it comes to public and indigenous peoples participating in consultation processes or decision-making related to offshore oil and gas activities: the UNDRIP and the Aarhus Convention are two of these instruments, and they incite various interests amongst Arctic states. In the Aarhus Convention, which aims at guaranteeing access to information, public participation and access to justice in environmental matters, Denmark made a

reservation for Greenland. Whereas the Self-Rule government of Greenland has competences over the development of natural resources, and whereas the content, form and practice of consultation processes are criticised in Greenland (Olsen & Hansen 2014), this reservation was questioned in the Greenlandic Parliament. The Self-Rule government consequently commissioned a report to assess the conditions under which Greenland could accede to the Convention. A 199-page report was submitted to the government of Greenland in May 2014 and should be presented to the parliament. In June 2014, the government of Greenland proposed amendments to the 2009 Mineral Resources Act in order to reduce public access to documents for the purpose of making decisions pursuant to the Act. Finally, after much concern in Greenland about the issue, the restriction of access has been removed from the proposed amendments on pre-consultation and consultation.

Canada endorsed the UNDRIP in 2010 and announced it would do it "in a manner fully consistent with Canada's Constitution and laws" (Canada 2010). This conditional endorsement has been critically analysed by legal scholars as being inconsistent with the principle of good governance; Joffe deems it undermines the status of this vital instrument and prevents its application whereas the "Declaration can be effectively used in litigation in Canadian courts" (Joffe 2010).

Recently, a case was brought before the Supreme Court of Canada regarding seismic tests in Nunavut. The Hamlet Council of Clyde River, its Mayor and the Hunters and Trappers Organization-Clyde River tried to reverse a 2014 National Energy Board (NEB) decision to allow a consortium of three seismic companies[7] to survey in Baffin Bay and Davis Strait, to determine if there is any potential for oil and gas extraction (Federal Court of Appeal 2014). The plaintiffs argued that seismic tests could impact upon marine mammals which the Inuit rely on for subsistence.

The rights of indigenous peoples are protected in Canada in the Constitution and through court decisions, as developed further in the second part of the article dealing with interactions between the federal and territorial level in Nunavut. In the case of Clyde River, the judge, who did not cite the UNDRIP, concluded on the issue of consultation that the Crown had fulfilled its duty to consult and the consultation was properly conducted: "The consultation process does not dictate a particular substantive outcome. Thus, the consultation process does not give Aboriginal groups a veto over what can be done with land pending proof of their claim. Nor does consultation equate to a duty to agree."[8] The judge dismissed the application for judicial review.

By contrast, the UNDRIP contains provisions on reaching the consent of indigenous peoples. Article 19 indicates that the consultation should result in a "free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them." Some legal scholars deem that due to the normative pressures from the international community, the non-consideration of UNDRIP might change. Koivurova and Stepien (2011) are of the opinion that "the Canadian position that the UN Declaration does not codify customary international law will be called into question".

This first part of the article has shown that not only legal fragmentation but also legal interpretation is at stake, and that the effective implementation of existing regulations and norms is challenging. The next part deals with the interactions between national level and regional level, where legal pluralism and multi-level governance are at stake in the governance of offshore oil and gas activities.

National and regional levels

Aboriginal self-government as a means to institutionalize an Aboriginal voice in the Canadian federal system can create complex government arrangements (Rodon 2014). Multi-level governance in the Canadian territories involves several jurisdictions (local, territorial/provincial and federal). Inuit rights are well-anchored in Canadian law, in the Constitution under section 35(1) of the Constitution Act which recognises the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada, through Supreme Court decisions according to which the Crown has a duty to consult (Haida and Taku River decisions in 2004, the Mikisew Cree decision in 2005, and in the more recent decisions of Rio Tinto and Little Salmon Carmacks 2010).[9] Inuit rights are also protected through settled land claim agreements which are treaty based. The Nunavut Land Claims Agreement (NLCA) for example provides in its preamble that the parties agree on the objectives "to provide for certainty and clarity of rights to ownership and use of lands and resources and of rights for Inuit to participate in decision-making concerning the use, management and conservation of land, water and resources, including the offshore" (NLCA 1993). The territorial government of Nunavut is negotiating a devolution agreement for land and resources management with the federal government: the federal government has full jurisdiction of land and resource development in Nunavut, but the Crown has a duty to consult.

Still in 2010, the Qikiqtani Inuit Association (QIA) brought a case before the Court to stop seismic tests in the Lancaster Sound because of the major potential impacts on the marine mammals that Inuit rely on for subsistence. The QIA is a regional association affiliated with Nunavut Tunngavik Inc. (NTI), the legal representative of the Inuit of Nunavut, a non-profit corporation established to ensure that the NLCA is fully implemented by the government of Canada and the government of Nunavut. The QIA has authority to commence actions on behalf of the beneficiaries of the NLCA. The seismic tests were approved by the federal government and the territorial government, the latter through two agencies, the Nunavut Research Institute and the Nunavut Impact Review Board. The QIA alleged that the federal government and the government of Nunavut failed to meet their constitutional and common-law duties to consult. The judge of the Nunavut Court of Justice reminded the court that the duty to consult does not mean a duty to reach an agreement or a veto right on government decisions (Nunavut Court of Justice 2010). She considered that at this stage the true nature or the value of the consultations that did take place could not be determined – but that there were serious issues to be addressed. Even so, the injunction stated that the potential for significant harm that the testing posed to the Inuit was greater than the losses that would be incurred if the injunction was granted and the testing was not completed as scheduled (Nunavut Court of Justice 2010).[10]

In 2015, five years later, another case, as mentioned in the first part of this article,[11] was brought before the Federal Court of Appeal, and the ruling resulted in a different decision. In the first part of the article I raised the issue of the application of UNDRIP in answering the issue of the requirement for adequate consultation in that particular case. Another issue, out of a total of four, was addressed in this case: do the applicants have the standing to bring the application? If one connects this issue with domestic law, it can be related to the interactions between national (federal) and regional (territorial) level, and the empowerment of public and ethnic local

institutions. The lawyers for the consortium, as well as the Crown, argued against the applicant's right to file the legal challenge, suggesting it should instead have been filed on their behalf by a regional or territorial *Inuit* association which enjoys specific rights under the Nunavut Land Claims Agreement (Rogers 2015). The lawyer representing the companies claimed that none of the applicants were granted collective rights under the Nunavut Land Claims Agreement, and that none of them had the right to be consulted (Rogers 2015).

Interestingly, on the issue of public standing the judge concluded that HTO-Clyde River had a real stake and genuine interest in the issues and should be granted public interest standing. The judge did not consider the case of the hamlet of Clyde River (nor the case of its mayor), considering it sufficient that one of the applicants had the standing to assert issues relating to Aboriginal or treaty rights[12]; she explained that had she found it necessary to decide on the Hamlet public interest, she would have seen relevant to consider that while the respondents rely on the participation of the applicants to claim that the consultation was a robust one, on the other hand they deny them the right to challenge the Decision. As explained in part 1, the case was lost: the judge ruled that consultation processes were adequately conducted.

These two cases illustrate the difficult process of implementation of Land Claims Agreements *and* the complex governance setting in Nunavut, where the public government (the government of Nunavut) and an Inuit organisation (Nunavut Tunngavik Inc.) are both involved in the governance of the territory, a situation which has been characterised as a horizontal governance system (Loukacheva 2007; Rodon 2014) creating the potential for conflict in various areas. This is the case in the offshore hydrocarbon resources area where public authority at the federal and regional level and indigenous organisations are involved in the governance process. In these arrangements, various interests but also legal systems interact, pertaining to the rights of indigenous peoples, constitution law and administrative law, civil law, realising vertical but also horizontal legal pluralism, and contributing to a complex governance setting of offshore oil and gas activities.

It remains to be seen what could be the empowerment of the local level in the issues of the impact of offshore activities when claims are based upon Aboriginal or treaty rights. The judgment of HTO-Clyde River, Clyde River v. Canada did not answer the question of whether the hamlet, whose purpose according to the Hamlet Act includes providing good government and developing safe and viable municipalities, had standing in an application. According to the current governance system, the legitimacy of an Inuit organisation (like the QIA) to oppose a public government decision appears to be stronger than a local public administration (the Clyde River Hamlet). This sheds light on the decision of the Nunavut Association of Municipalities to support the Clyde River Hamlet and pass a resolution to call on the governments of Canada and Nunavut to respect the local council and its concerns over marine development (Varga 2014). Meanwhile, the federal government has started a public comment period to gather experiences and learn the views of Aboriginal groups, federal, provincial and territorial officials and industry stakeholders about the duty to consult to help Canada improve the way the federal government manages consultation processes (Aboriginal Affairs and Northern Development Canada 2014).

A multi-level governance setting can create the conditions for legal pluralism. This is the case in regions where the devolution of power is granted to accommodate indigenous people rights. Under the Act on Greenland Self-Government, a number of policy areas have been transferred from the Kingdom of Denmark to the government of Greenland. The Act also lays down which

matters can be taken over by the Greenlandic authorities (Mortensen 2013). This is the case in the area of mineral resources, which was taken over when the Self-Governmental Act was passed. As Greenland has been granted self-government pursuant to the people's right to self-determination, it is nevertheless a public government. Anyone born in Greenland is considered a Greenlander.

The regulations related to mineral (including oil) resources do not contain any specific provision or protection of indigenous rights: "With the authorities of the Greenland Self-Government having assumed full responsibility for mineral resources, there is no longer any need to have special rules concerning the right of indigenous peoples" (Vermont Law School Institute for Energy and the Environment 2011: 18). In Greenland, where the land cannot be considered an individual property, this comes with some challenges. Aqqaluk Lynge, former President of the Inuit Circumpolar Council, emphasised in 2009 the growing gulf between the political discourse of Greenland leaders and the social and environmental realities (Lynge 2009). He invoked the founding texts of international law in this area, starting with the International Convention on the Elimination of All Forms of Racial Discrimination (1965), and continuing to the United Nations Declaration on the Rights of Indigenous Peoples (2007) in order to hold the government to its duty to obtain a free agreement from the affected communities concerning all initiatives and projects for development.

Offshore exploration can take place in areas where the hunters are of the opinion that customary rights exist, areas with hunting or fishing rights held by specific individuals whose identity they know thanks to oral accounts (Olsen 2014; Brøsted 1986). These customary rights have not been translated into law and they are not accepted by the acts passed by the Greenlandic government. In addition, the Western conception of land property relying on a strict delineation of a geographical area is at odds with the traditional Inuit conception of ownership which is rather a user right and custodianship that comes with social responsibilities, and is very often flexible depending on the resources move, e.g. mammals or fish (Dahl 1998). Until Home Rule, management of the land followed customary rules of the community, a situation that changed dramatically with the introduction of Home Rule, and a centralised (Nuuk-based) authority disconnected from territorial social control (Dahl 1998).

Various legal orders are at stake in Greenland: the indigenous legal order (which is not necessarily monolithic, and which is made of social norms and relies on a community-based control), and the self-rule legal order which borrows some features both from a former colonial order (a centralised authority) and from Inuit culture (no individual property). As Usher writes, "there is a crucial distinction between common property in the state system and communal property in the indigenous system" (Usher 1987: 6). No special rules for indigenous peoples govern the consultation processes, whose content, form and practice are already being criticised in Greenland, as mentioned in the first part of the article (Olsen & Hansen 2014). Such legal pluralism also creates uncertainties when it comes to compensation rights. In case of an oil spill in Greenland, it is unclear how hunters without a licence (when their income from hunting is less than 50% of their gross income) could get compensation rights.[13]

Non-governmental actors interacting with states and international regimes

Strong private actors (multinational and transnational, as well as national and local companies) can design norms to manage offshore activities. Approaches to regulation can be characterised as

either prescriptive or as performance-based (goal-based) (DNV-FNI 2012, Baker 2012). Many regulatory regimes for offshore drilling include elements of both approaches. A prescriptive approach, which is how the US approach is mainly designed, gives a fixed check list of things that must be done to meet a statutory requirement. Performance-based or goal-based regulations identify outcomes, but allow companies considerable flexibility to determine how they will proceed. The EU Offshore Directive advocates the goal-setting approach that was first adopted by the North Sea countries.

With the use of a goal-setting approach in the regulation, companies are required to continually demonstrate that they are taking measures to minimize the risk of oil and gas releases to as low a level as reasonably practicable. Such an approach enables companies to adapt their management to new and safer standards without having to wait for the legislation to incorporate such standards (DNV-FNI 2012: 21; Dagg et al. 2011). This regulatory design raises the issue of corporate social responsibility (Mikkelsen & Langhelle 2011). Indeed, the failure to adequately manage risks, as assessed in the Kulluk rig case (United States Coast Guard 2012), could have disastrous consequences. Some observers deem that the real effect on behaviour does not lie in the regulations themselves, but in the way in which the meeting of the goals regarding minimization the risks established by the regulations can be met to avoid what Carson identified as an "institutionally tolerated non-compliance" (Carson 1981). In this perspective, it is important to note that some normative authorities as well as advisory bodies are not necessarily prone to accept such tolerance.

In Canada, the National Energy Board remains the regulator of oil and gas activities offshore, operating under existing federal legislation and with quasi-judicial powers, and the rights and privileges of a superior court, as established by the National Energy Board Act: its decisions are all enforceable in law.[14] This applies to all offshore hydrocarbon activities in Canadian territories, even when a devolution agreement on resources development has been established.

The situation in Greenland is different, because here an advisory agency, the Danish Center for Environment and Energy (DCE) – the former National Environmental Research Institute (NERI) at Aarhus University – provides consultancy services to the Greenlandic government, i.e. to the Environment Agency for Mineral Resources Activities in connection with the production and transportation of minerals and petroleum in Greenland. DCE provides recommendations. The Environment Agency for Mineral Resources Activities cooperates closely with the DCE to implement the provisions of the Mineral Resources Act stating that assessments and decisions of the Mineral Resources Authority regarding environmental issues must be based on assessments and proposals for decisions from one or more scientific and independent environmental institutions (Government of Greenland 2013). This includes the preparation of strategic environmental impact assessments, the drafting of guidelines for environment impact assessments (performed by the licensee), and the examination of the EIA before they are put out to public consultation and final approval by the government of Greenland (Government of Greenland 2014: 27). In addition, the DCE works as a consultant for the inspection regarding compliance with the environmental requirements for drilling operations (Government of Greenland 2012: 20). It is true that compliance is not always achieved: the quantity of chemicals used by Cairn as a lubricant in its drilling campaign in Greenland has been highly criticised *a posteriori* by the DCE which found such practice in contravention with international agreements [OSPAR] on discharges to the marine

environment (the "anti dumping convention"). In addition, transportation of the discharged chemicals over great distances by ocean currents is possible, and the fate of the chemicals is unknown (DCE 2012).

This situation has led some scholars to address the question of governance through a focus on the contract between a public authority, which has monitoring rights and duties, and a licensee who will also establish subcontracts with other companies. It has been shown that governance mechanisms for handling complex procurements involving several actors (incentives, authority and trust) complement each other: and furthermore that there is a complex interplay between the specific uses of the different mechanisms with a multiplier effect (Olsen et al. 2005). Debates also question the nature of the licence: is it a contract (private law), or is it public law? To what extent does the design of a licence pertaining to contract law allow for more powerful leverage in terms of the enforcement of terms and the protection of the environment? What is the potential of relational contracts (emphasising long-term relations, and obligations such as commitment and loyalty) *versus* transactional contracts (which focus more on short-term competitiveness and effectiveness) in the offshore industry to overcome the issue of increased risks through subcontracts and ensure the effective fulfilment of monitoring duties? Developing knowledge in this area could open new perspectives when the governance of offshore oil and gas activities involves an increasing number of actors.

Even though they are non-state actors with few formal powers over international or national decision-making, non-governmental organisations such as the Inuit Circumpolar Council and the WWF actively promote norms, be they environmental or related to human or indigenous rights. As another example of legal pluralism, the ICC has contested the sovereignty as defined by the Arctic coastal states in the Ilulissat Declaration (2008) and has provided an "Inuit Declaration of Sovereignty" which states that: "Sovereignty is a contested concept […] and does not have a fixed meaning. […] Sovereignties overlap and are frequently divided within federations in creative ways to recognize the right of peoples" (Inuit Circumpolar Council 2009). In this declaration, the ICC associates the notion of a territory ("Inuit Nunaat") and of a people, with a different notion from that of authority, which is traditionally used for states: instead, the ICC associates the notion of Inuit people and territory with the notions of "rights and responsibilities." The ICC founds the legitimacy of its sovereignty on the notion of self-determination that is granted to indigenous peoples through international law (UNDRIP 2007): "Issues of sovereignty and sovereign rights must be examined and assessed in the context of our long history of struggle to gain recognition and respect as an Arctic indigenous people having the right to exercise self-determination over our lives, territories, cultures and languages."

The ICC requires that Inuit be partners of states, industry and other actors, and also requires that Inuit land claims and self-government agreements be respected. In accordance with this goal, the ICC launched in May 2011 a Circumpolar Inuit Declaration on Resource Development Principles in Inuit Nunaat (Inuit Circumpolar Council 2011), defined in an official communication as "Inuit homeland" (Inuit Tapiriit Kanatami 2011). This declaration mentions the UN Declaration on the Rights of Indigenous Peoples as the basis for further progress. With these declarations, the ICC is contributing to the formation and diffusion of norms and values that are expected to compete with the traditional conception of state sovereignty, characterising a situation of legal pluralism. Through its status of Permanent Participant at the Arctic Council, the ICC also enjoys a strong

position in an inter-governmental forum that results in the chance to form better coalitions with all the policy actors in the Arctic and to influence the projects conducted in the working groups of the Arctic Council, as well as the design of the Arctic Offshore Oil and Gas Guidelines (PAME 2014, Koivurova 2011).

As an Observer to the Arctic Council, the WWF is an environmental organisation that also contributes to the formation and diffusion of norms in order to have an impact on the outcomes of policy-making. The WWF constitutes a science-policy interface through the commission of scientific reports on issues such as the management of the Arctic Ocean, or (very recently) on marine fuel alternatives for use in the Canadian Arctic, in order to promote new norms for government and industry to consider and to contribute to higher and stricter standards than those included in the Polar Code, which has just been adopted without banning the use of heavy fuel in the Arctic (Vard 2015). As an Observer of the Arctic Council, and the only circumpolar environmental NGO, the WWF actively takes part in working groups meetings to promote the protection of Arctic biodiversity and the sustainable use of natural resources to influence governmental policies.

Conclusion

This article has analysed the governance of offshore oil and gas activities in the Arctic with an approach relying on the concepts of multi-level governance and legal pluralism. It shows that in order to identify paths to increase efficiency in environmental management and public participation, it is useful to take into account the interactions of the various levels of governance involving actors with diverse interests, authorities and cultures.

First, the interactions between the international and national levels show that if the current state of governance of offshore oil and gas activities in the Arctic is characterised by an expansion of international law leading to fragmentation and problems of consistency, more issues are at stake which also hinder the efficiency of environment management and public participation and which pertain to the interpretation of law. States can manoeuver with the regulation of various aspects such as air pollution or pollution at sea (e.g. the use of heavy fuel in the Polar Code, or in the regulations in the North Atlantic), safety and liability rules (incorporation of Directives in national legislation), indigenous peoples rights (UNDRIP), and access to information (Aarhus convention). In this context, the Agreement on Co-operation on Marine Oil Pollution Preparedness and Response, a binding agreement signed under the auspices of the Arctic Council, offers a useful framework for coordinated response to oil spill; but in addition to not being enforceable, it does not place many duties on the parties. Even so, the Arctic Council plays an important role in discourse-shaping and in the promotion of values and standards of best practices.

Second, when it comes to national and regional levels, two main features have been highlighted. First: the entanglement of indigenous and public rights and authority. Both governments in Greenland and Nunavut are public, but very diverse settings are in place. Nevertheless, in both cases devolution happens to be implemented at the expense of the local level. The entanglement of indigenous and public rights and authority constitutes a source of tension in political relations, observed both in Nunavut and in Greenland, and it also generates inefficient processes of decision-making resulting in high court costs for Nunavut.

Third, as far as non-governmental actors are concerned, the WWF and the ICC, through their respective statuses in the Arctic Council, have the opportunity to play a constructive role in raising awareness on important issues and producing scientific reports. As for corporations, they play a crucial role in the governance of offshore hydrocarbon activities, especially when the goal setting approach is favoured in the regulation, thereby raising the issue of corporate social responsibility. In this context, regulatory and advisory agencies enjoy very different degrees of leverages. In both cases regulation is not the be all and end all, and the issue of enforcement remains central as activities take place in remote areas lacking infrastructure (for instance the disposal of drilling wastes onshore when this is possible) and in a harsh environment.

What path of reflection lies ahead? Taking into account the interconnection between the three levels definitely calls for a comprehensive understanding of governance of the offshore sector. Four paths of reflection arise from our analysis.

First, it is unlikely that a dualistic vision opposing a normative option and an enabling option opens new avenues for solutions. If normativity alone is definitely not a solution, still the evolution of international law and customary international law deserves attention and a certain level of harmonisation may be welcome, for instance to enable states with different norms to cooperate efficiently on the prevention of an oil spill and their response to it (Baker 2012). Further research could focus on a comparison between the governance approaches of Canada and Greenland/Denmark, as Canada and Denmark signed an Agreement for Cooperation Relating to the Marine Environment in 1983, and have a 3,000-kilometre maritime border.

A second path relates to the institutional settings and proposes considering the stress lines pertaining to the entanglement of public and indigenous rights and authorities and the consequences at the local level. It is to be expected that with conflicting interests between local populations on the one hand, and corporations (where indigenous peoples may also have shares in some regions) and regional/national governments on the other hand, the development of offshore resources will lead to an increase in the number of cases ending up in court.

The third path to enhance efficiency in both environmental management and public (including indigenous) participation bears a more procedural feature. As enforcement appears crucial, some options pertaining to contract law may not only optimise the operator-regulator interface and ensure the effective performance of monitoring, but also more generally offer a stable framework for inclusive dialogue between actors and develop a culture of trust, in particular in terms of risk acceptance. This is what relational contracts emphasise: long-term relations and obligations such as commitment and loyalty.

In the end, the analysis of the rationale for engaging in offshore activities in the Arctic region, from a state perspective (e.g. energy security), and from regional government, indigenous shareholders and corporation perspectives, could be helpful in order to shed light on the current governance settings but also to provide relevant actors with arguments to weigh the decision on seismic and drilling activities in relation to risk acceptance.

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Notes

1. For a discussion on the influence of international law on national policy and law related to indigenous peoples in the Arctic, see Koivurova and Stepien, 2011.
2. In 2008 the US Geological Survey estimated the reserves would amount 13% of the undiscovered reserves of oil and 30 % of the undiscovered gas reserves (USGS 2008).
3. Our emphasis. Polar Code, Part II-B, Article 1. Regulation 43 of MARPOL Annex I applies to Antarctic waters and prohibits the carriage in bulk as cargo, or carriage and use as fuel, of heavy fuel. http://www.imo.org/MediaCentre/HotTopics/polar/Pages/default.aspx
4. EU Directive 2012/33/EU amending the Sulphur Directive (1999/32 as amended by Directive 2005/33/EC).
5. Statutory Order no. 640 of 12 June 2014 on the Content of Sulphur in Solid and Liquid Fuel.
6. Act no. 1499 of 23 December 2014.
7. TGS-NOPEC Geophysical Company ASA, Petroleum GeoServices and MultiKlient Invest AS.
8. At paragraph 47.
9. In the Rio Tinto and Little Salmon Carmacks decisions, the Supreme Court of Canada has further explained that the duty to consult is a constitutional duty.
10. The legal argument for the injunction relied on the Supreme Court of Canada's 1997 Delgamuukw decision, which acknowledged an inherent aboriginal right to land, plus the two rulings (Haida in 2004 and Mikisew in 2005) which require the Crown to consult first nations even if a treaty is settled.
11. Hamlet of Clyde River, Nammautaq Hunters & Trappers Organization – Clyde River, and Jerry Natanine versus TGS-NOPEC Geophysical Company ASA (TGS), Petroleum Geo-Services Inc. The applicants tried to reverse a 2014 National Energy Board (NEB) decision to allow a consortium of three seismic companies to survey in Baffin Bay and Davis Strait.
12. At paragraph 25.
13. Compensation could be based on the liability rules that are decided by Danish law on liability. See also Johnstone 2015, 90.
14. The NEB has the powers to regulate, make decision on licensing and judicial powers, but it is possible to bring a case before the Federal court of Appeal as mentioned in the two first parts of the article.

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