Arctic Council Soft Law: An Effectiveness Analysis

By

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Abstract

Increased hydrocarbon exploitation within the Arctic combined with recent oil spill disasters have increased the importance of ensuring the existence of adequate oil and gas regulations. Currently, the only Arctic specific oil and gas regulatory mechanism is the Arctic Offshore Oil and Gas Guidelines (AOOGG) – a soft-law mechanism developed within the Arctic Council. Given the fragileness of the Arctic ecosystem, ensuring that the AOOGG is effective in its goal of protecting the Arctic environment is paramount.

Analyzing the effectiveness of the Council can be done by assessing how it develops state concern, promotes a contractual environment, and builds state capacity. As it is currently structured, the Council's soft-law framework is ineffective. Lacking compliance and review mechanisms, the Council fails to effectively develop state concern or create a contractual environment. The Council, however, has relatively effective capacity building mechanisms.

Improving the effectiveness of the Council would not come from developing binding hard-law. Rather improvements can be made through the development of review mechanisms. These would serve to increase state concern for oil and gas regulation in the Arctic, as well as improve the AOOGG. Review mechanisms would further develop the AOOGG's normative niche, promoting attention to norms that the AOOGG advances. Improvements could also be made by developing a clearing-house of information that could improve the capacity of states to implement and promote oil and gas guidelines. This would promote the dissemination of best available technology.

INTRODUCTION

Environmental degradation and imagined fears of a conflict over Arctic resources have caused a flurry of literature written about the Arctic. Popular focus has dealt with Arctic security concerns and thus the majority of literature follows this issue. Since the Deepwater horizon incident in the Gulf of Mexico, however, popular focus has transitioned to the issue of oil and gas within the Arctic. Literature focusing on Arctic oil and gas regulations generally falls into two categories. The first deals with the wealth of oil and gas within the Arctic and the risks that are involved with Arctic hydrocarbon extraction. The second addresses oil and gas regulation in the Arctic from a governance perspective. This second category of literature has been important in advancing theories for the creation of better Arctic oil and gas regulations. The general focus of this category is how current Arctic specific soft law oil and gas regulations do not work and that binding international agreements need to be created. While a dearth of literature exists, what is lacking is a discussion of why the current oil and gas regulations do not work.

A complex framework of laws and treaties covers Arctic hydrocarbon exploitation. Many of these laws and treaties, however, do not deal with the Arctic specifically. Arctic specific oil and gas regulations are found within the Arctic Council's Arctic Offshore Oil and Gas Guidelines (AOOGG). The AOOGG are soft-law mechanisms designed to assist regulators and industry with developing offshore oil and gas regulations that protect the Arctic. They were first created in 1997 and have been updated in 2002 and 2009. The guidelines involve recommendations for the

entire process of oil and gas exploitation including Indigenous Consultation; Environmental Impact Assessments; Environmental Monitoring; Safety and the environment; Operating Practices; Emergencies; and Decommissioning and Site Clearance. The purpose of the guidelines is to harmonize oil and gas regulations between Arctic states by securing common policy and practices to prevent a natural disaster.[1] As non-binding mechanisms, the guidelines thus place upon states obligations of attempt using phrases such as states "may" or "should" when providing recommendations.[2] While the focus is generally upon national regulators, in order to promote a harmonization of policies, the guidelines also attempt to target industry to ensure that Arctic oil exploitation is conducted according to certain standards of safety. To promote best practices towards protecting the environment, the guidelines are mandated to undergo periodic assessment and amendment in order to "support timely and effective measures for protection of the Arctic environment."[3] By outlining best practices for all stages of oil and gas production and through periodic amendment, the guidelines advocate protection of the Arctic environment.

Within existing literature, allegations exist that the soft-law AOOGG are ineffective. Authors such as Kristin Casper, Timo Koivurova and Eirik Molenaar argue that the AOOGG are ineffective and that they should be replaced by binding hard law treaties. Lacking from these authors is an explanation as to why the

[1] (PAME 2009) Section 1.2
[2] (Offerdal 2007), 145.
[3] (PAME 2009) Section 1.1

current soft-law guidelines are ineffective and how hard-law institutions would rectify these inefficiencies. The question that this paper will attempt to answer is whether a soft-law institution regulating oil and gas can be effective?

To understand whether the AOOGG can be effective requires first understanding what soft-law is. Giving a precise and concise definition to soft-law is a difficult task. Generally, it is defined and understood in comparison to what it is not: hard law. In the international sphere, hard law entails binding legalization including both contract and covenants that compel actors to adopt specified normative behaviours. [4] In this regards hard law is often associated with international treaties or agreements that have firm requirements. Hard-law treaties promote compliance to behaviour specified within treaties in three ways. First, violating a treaty may involve punitive measures. This can be seen most clearly within the World Trade Organization framework, where violation of trade laws resulting in the economic disadvantage of a victim state, results in legalized retaliation by the victim. Second, violating a treaty negatively affects a state's reputation. Thus, states may be less inclined to negotiate treaties with a state that has violated a treaty in the past, as the possibility that they will break a future treaty exists.[5] Third, violating treaties may foster the view that international law is not important. While breaking treaty law may benefit a state's interests in the short

[4] (Kenneth W. Abbott and Duncan Snidal Hard and Soft Law in International Governance *International Organization* (54, 3, Summer 2000, pp. 421–456), 422.)
[5] Guzman, Andrew T and Timothy L Meyer *International Soft Law* Journal of Legal Analysis (SP 2010: Volume 2 Number 1),177

term, it may harm its long-term interests, as it might cause others to violate treaties that are in that state's strategic interest.[6]

Soft-law differs from hard law in that it is non-binding. As Guzman and Meyer note, soft-law is therefore sometimes understood as anything that falls short of hard law.[7] Naturally this encompasses a wide range of international governance mechanisms including: guidelines, standards, codes of conduct, principles, or resolutions that are accepted by international and regional organizations.[8] Soft-law is thus a mechanism that promotes certain benchmarks of behaviour but does not have binding aspects that can enforce compliance to these benchmarks.

While lacking binding regulations, it should not be understood that soft-law is ineffective as it can develop legal clout. This is primarily the case when domestic structures promote a strong adherence to international law. Abbot and Snidal discuss this as they advance the argument that soft law should be understood as a continuum or spectrum between political positions and fully binding treaties.[9] On the lower end, soft-law mechanisms have little legal authority and simply promote behaviours to which states take little notice. At the other end, however, soft-law may involve instruments that interact with hard law by interpreting or specifying how binding legal rules can be acted upon.[10] By integrating with treaty based regulations, soft-law can acquire to some extent a *de facto* legal character. Soft-law can gain legal clout when it is implemented into national regulations. States with

[6] (Kenneth W. Abbott and Duncan Snidal Hard and Soft Law in International Governance *International Organization* (54, 3, Summer 2000, pp. 421–456), 428
[7] (Guzman and Meyer 2010)174
[8] (Chinkin 1989), 851
[9] (Guzman and Meyer 2010), 173
[10] (Guzman and Meyer 2010), 174.

strong emphasis on the importance of law may adapt these soft-law standards, even while they are non-binding. The argument for this is also based on the fact that given the priority of international law – especially among arctic states – not adapting these regulations may tarnish a state's reputation towards compliance to international law[11] Thus, while not law itself, soft-law may point to existing laws, formative *opinio juris,* or the development of new state laws.[12]

The approach that will be undertaken throughout this paper is to evaluate how the Arctic Council's soft-law mechanisms compare to the theoretical requirements needed for effective institutions that are advocated by neo-liberal institutionalists. Neo-liberal institutional theory has been chosen, as it provides the best theoretical groundwork for understanding the cooperation occurring within the Arctic Council. Neo-liberal institutional theory views the international system as anarchic in the sense that it lacks a supranational governing body as the international system is comprised of sovereign nation states. In other words, states are the primary actors within the international system, as there is no higher order that can compel states to act certain way. Neo-liberals institutionalists view that within this system states are geared towards taking actions that benefit the states themselves. While insecurity, competition and conflict may prevent cooperation from occurring, incentives to cooperate exist. Thus neo-liberal institutionalists

[11] (Raustiala 2000), 410
[12] Alan Boyle, "Soft law in international law-making", in (Boyle 2010), Malcolm D. Ed., International Law, 3rd edition, Oxford University Press, 2010, (pp. 122-140.) 123.

advocate that states are willing to work together to address certain issue areas resulting in joint gains.[13]

The neo-liberal institutional framework was also adopted due to its focus on institutions. According to neo-liberal theory, institutions are created by states to facilitate joint gains which can be attained through cooperation. This can occur by providing information that can influence state policy away from self-help behavior to more cooperative means. This information can facilitate more cooperation at the local, national, and international level. Neo-liberal institutionalist theory can be seen within the Arctic Council's mandate: "to provide a means for promoting cooperation, coordination and interaction among the Arctic States."[14] As the Arctic Council was formed as an institution designed to facilitate cooperation in regards to Arctic environmental protection, using a neo-liberal framework to assess the efficiency of this institution seems paramount.

Neo-liberal institutionalists place emphasis on the role of institutions within the international system. Institutions are mechanisms that are designed to promote cooperation but do not necessarily entail a physical organization: "[institutions are] connected sets of rules and practices that prescribe behavioural roles, constrain activity and shape expectations. They may take the form of bureaucratic organizations, regimes, or conventions."[15] According to this theory, states are the primary units within the international sphere and thus institutions must respect the principle of state sovereignty. For this reason, institutions can be weakened in

[13] (Donnelly 2000), 22.
[14] (Arctic Council: About n.d.)
[15] (Keohane, Haas and Levy 1993), 5

achieving the goals they are designed to address, as they often lack enforcement mechanisms. [16] Institutions thus must rely on other mechanisms to promote compliance towards institutional goals.

Institutional effectiveness can be understood as the degree to which it is able to achieve its institutional goals.[17] According to Robert Keohane, one of the founders of neo-liberal institutionalist thought, the effectiveness of institutions in achieving environmental protection depends upon three areas. The first requirement for institutional effectiveness is how well an institution can promote state concern for an environmental issue. As mentioned earlier, neo-liberal institutionalism holds that states are sovereign, therefore institutional effectiveness is based on how well it can influence states to adopt certain actions. The first aspect of this requirement involves bringing an issue to the attention of states as in order to address a certain issue, these issues must first be identified.[18] Once brought to the agenda of states, there needs to be a sufficient level of governmental concern in order for states to address the situation. Governmental concern depends upon pressures emerging from domestic societies such as scientists or environmental groups that can point out hazards and demand that they be addressed.[19] This seems to run counter intuitive to neo-liberal institutional thought which argues that states are generally affected by institutions and external events. While neo-liberal theory generally reduces emphasis upon domestic actors, Keohane acknowledges that in regards to environmental action the role of these actors need to be addressed: "if there is one

[16] (Keohane, Haas and Levy 1993), 6.
[17] (Hønneland and Stokke 2007), 2
[18] (Keohane, Haas and Levy 1993), 12
[19] (Keohane, Haas and Levy 1993), 19

key variable accounting for policy change, it is the degree of domestic environmentalist pressure in major industrialized democracies, not the decision making rules of the relevant international institution."[20] While acknowledging the role of domestic actors, Keohane does not argue that they can fully replace the importance of institutions. He argues, however, that institutional effectiveness is increased when they are able to provide channels for domestic pressure to reach government decision makers. Therefore this first criteria for effective institutions depends on how well it can facilitate governmental concern for the issue at hand.

The second criterion for an effective institution relies upon how it facilitates a contractual environment that can contribute to the furthering of comprehensive and specific international policies. Institutions are designed to encourage state action to address environmental problems. This second criterion analyzes what the types of actions that are available for the institution to enact state action. Effectiveness is also assessed according to the regulatory mechanisms an institution can make and how states abide by these mechanisms.[21]

The third criterion for effective institutions is how an institution can trigger a national policy response to implement institutional mechanisms. This generally involves ensuring that states have the physical capabilities to enforce the regulations. Keohane argues it also involves ensuring that the state has to have a broader ability for civil society to play a role in policy making and in

[20] (Keohane, Haas and Levy 1993), 14
[21] (Keohane, Haas and Levy 1993), 14

implementation.[22] Further it involves providing mechanisms that allows states to follow and implement the institutional guidelines.

Utilizing this neo-liberal approach will be effective in determining whether the Council and its soft-law AOOGG can be effective at regulating oil and gas activities in the Arctic. Furthermore, this approach will show where effectiveness is lacking and what changes would be needed to foster institutional improvement. The last section of the paper will develop and discuss this issue.

Information used to make this theoretical evaluation is compiled from a variety of sources including secondary sources, primary sources, and interviews. This wide assortment of literature is used because literature pertaining the institutional effectiveness of the Arctic Council oil and gas regulations is limited. Secondary sources comprise of academic literature. They provide the theoretical understanding for institutional effectiveness, and for soft-law. They will also provide the background of the Arctic Council. Primary sources are used to provide current information on actions of Arctic Council regarding oil and gas regulations. They include reports of Arctic Council meetings, newspaper articles referring to the Arctic Council, and government documents. Primary sources are used to assess whether the Arctic Council has been effective in advancing state concern in developing a contractual environment. Interviews conducted with government and Council officials have provided information on how Arctic soft-law was negotiated and how it has influenced governments. The information will display that the way in which the Council is currently structured has reduced its effectiveness, yet implementing

[22] (Keohane, Haas and Levy 1993), 20

systems of review and disseminating best technologies can serve to improve its soft-law framework.

PART I: Influencing state concern

The first section of this paper assesses how effective the Arctic Council is at developing governmental concern. Creating state interest for oil and gas regulation is integral to the Arctic Council because it a soft-law organization. The continental shelf in which hydrocarbon exploitation is recoverable falls under the domestic jurisdictions of the Arctic States and thus is under the regulation of national and sub-national legal systems[23] Lacking legal clout, the Council must influence states to adopt and integrate into national law actions which promote environmental protection and sustainable development in regards to oil and gas activities. Many scholars and international legal practitioners have argued that the strength and utility of the Council emerges from its ability to frame issues for state attention. The Council plays an integral role in influencing the approach through which Arctic states view the Arctic. This is emphasized by Oran Young: "arguably even more important is the role of the Council in setting the policy agenda for the circumpolar north and in framing the issues that occupy prominent places on this agenda."[24] Thus as a soft-law institution, the Arctic Council must rely upon setting the agenda of states.

The Council attempts to bring environmental issues to the agendas of states by promoting knowledge of the Arctic. Environmental monitoring and the

[23] Koivurova, Timo & Vanderzwaag David, 157.
[24] (Young), 16

production of research assessments have emerged as one of the specialties of the Council.[25] According to literature on regime effectiveness, for an institution to develop an effective knowledge building niche that can serve to increase an institution's problem solving potential, three factors must exist.[26] The first is the credibility of the information produced. This pertains to the best knowledge available. In regards to the Council, this is often the case as knowledge produced is often the only research that has been conducted. Oftentimes states are unwilling to develop environmental regulations dues to the high cost associated with unilaterally conducting the necessary Arctic research to inform these regulations.[27] By pooling resources, data collection has occurred and has vastly improved the knowledge base for environmental measures. The second requirement deals with the legitimacy of the information. Council assessments generally entail the broad involvement of states, industry, scientific groups, indigenous groups, and environmental groups. For this reason, the values, data, and concerns of all groups seem to be balanced which increases the legitimacy of the product.[28] Thirdly, knowledge is required to be salient in that it can respond to urgent policy concerns. This has been the case in regards to the 2007 Oil and Gas Assessment (OGA). Initially, the OGA was not going to include socio-economic aspects. However, once these were included, they filled a policy of void that the US was interested in filling. As a result the US provided resources and leadership in conducting this assessment.[29]

[25] (Stokke 2007), 404
[26] (Stokke, Interplay Management, Niche Selection and Arctic Governance 2011), 147
[27] (Stokke 2007)406
[28] (Stokke, Interplay Management, Niche Selection and Arctic Governance 2011), 148.
[29](Offerdal 2007), 151.

Overall the Arctic Council role as an information provider has been successful in influencing the agenda of states. One of the most pertinent examples of Council success in this regard has occurred with the Arctic Climate Impact Assessment (ACIA). The ACIA has been very successful in increasing the knowledge of the pollutants in the Arctic and bringing the issue to the attention of government representatives.[30] It captivated the agenda of the Arctic States, eventually leading the Arctic states to push for universal adherence to the Stockholm Convention on Persistent Organic Pollutants (POPs) and the Convention on Long-Range Transported Air Pollution (CLRTAP). Two reasons exist as to why the Council was able to influence the agendas of Arctic states to adopt this issue and eventually push for its adherence within legally binding treaties. First, the Council acted as a collaborative research vehicle that produced studies such as the ACIA that was able to demonstrate specifically that damage to the Arctic environments had been taking place. This was integral as the Council provided a body that could provide overarching, legitimate, and credible information on the Arctic pollutants (normally research and monitoring of the CLRTAP was conducted only by interested states.)[31] The fact that ACIA was able to provide examples of Arctic pollution had been extremely vital to the process. Also of importance was the fact that they were conducted collaboratively. This raised both the credibility and legitimacy of scientific findings on the detrimental effects of POPs in the North.[32]

[30] Hoel, Alf Hakon "Do we need a new legal Regime for the Arctic Ocean" The International Journal of Marine and Coastal Law 24 (2009) (443–456), 446.
[31] (Stokke, Interplay Management, Niche Selection and Arctic Governance), 154
[32] (Stokke, Interplay Management, Niche Selection and Arctic Governance 2011), 154.

Secondly the Council was able to influence states to take action towards POPs due the Council's participatory inclusiveness. This inclusiveness has granted the Council and the information it provides a sense of legitimacy. Often exemplified as a strength of the Council is the participation within the Council of the Arctic's Indigenous people. Their input regarding POPs at the Stockholm conference was very effective as they were able to humanize the issue, provide specific examples of the harmful effects of POPs and were able to advance the issue. The chair of the conference remarked that indigenous involvement was productive in influencing the negotiation and also ensured the publicity of the process.[33] Therefore, while lacking regulatory mechanisms, the Council's research mechanisms and participatory inclusiveness has been able to advance its mandate of environmental protection upon the agendas of states.

Overall the Arctic Council has been effective at influencing the agenda of states as is seen by the CLRTAP and Stockholm conventions. In regards to oil and gas, the Council seems effectively posed to placed the issue onto the agenda of states. The way in which the Council influences states to address oil and gas issues is by framing oil and gas issues in ways that garner state attention.[34] This is done through knowledge promotion and research assessments. The information produced in the assessments is brought to the attention of states through the biannual ministerial meetings held by the council. During these meetings Council Working Groups bring issues to the attention of high-level bureaucrats that can have

[33] (Stokke, Interplay Management, Niche Selection and Arctic Governance 2011), 155.
[34] (Egede-Nissen and Veenema 2009), 15

an effect on developing national policy.[35] In regards to oil and gas, this has been done within the OGA that analyzed the impacts of the oil and gas industry in the Arctic. The OGA evaluated issues such as hydrocarbon technology, the effects of oil and gas in the past, predicted effects of oil and gas in the future, affects to human health, impacts on the marine environment and others issue areas. This assessment has been quite effective at influencing states to address the issue of oil and gas. For instance, as mentioned to earlier, once socio-economic issues were integrated into the OGA, the US became wholeheartedly involved where as before it was reluctant to engage in it. This shows how the Council has been able to place the issue of oil and gas on the agenda of states.[36] The OGA further brought the issue to the agenda of states as it provided practical guidance on how to reduce risks associated with oil and gas activities that involve threats to the Arctic environment.[37] The producing knowledge on the effects of oil and gas has been seen as quite effective as it gained both government and industry attention.[38] Furthermore, it brought about the revision of the AOOGG in 2009.

The Arctic Council may be relatively effective at outlining a problem and bringing that environmental problem to the issue of states. Secondary literature as outline above displays that the OGA was effective in placing the issue on the agenda of states and industry. Yet to be an effective organization, the Council needs to do more than bring issues to the agenda of states as it has to encourage the development and ensure the promotion of governmental concern. This is integral in

[35] (Young, Whither the Arctic? Conflict or Cooperation in the circumpolar North), 79.
[36] (Offerdal 2007), 151.
[37] (Stokke, A Legal Regime for the Arctic? Interplay with the Law of the Sea Convention 2007), 408
[38] (Offerdal 2007), 151

evoking state action. The ability to foster concern for Arctic oil and gas is quite limited due to the integrity of the oil industry to the economies of the Arctic states.

Developing government concern for oil and gas regulations above symbolic commitments is quite difficult. Arctic states with continental shelves capable of Arctic offshore drilling have very limited incentive to relinquish their sovereignty and have strong political interests in preventing the development of regulation that would diminish the economic benefits to be gained from hydrocarbon extraction.[39] Concerns about sovereignty over hydrocarbon activities, present a serious obstacle towards facilitating concern for development and compliance to Arctic oil and gas regulations as the oil and gas industry plays major economic and political roles within the Arctic states. Greenland's full independence from Denmark relies upon the development of its oil and gas wealth. While currently in a period of self-rule, Denmark manages Greenland's foreign affairs, defense, and provides block grants to support the economy. Many Greenlanders support the development of oil and gas, as oil wealth will eliminate the dependency upon Denmark and make Greenland a fully independent nation.[40] The United States and the European Union are net energy importers and are interested in diversifying their energy supply and thus are favourable to Arctic hydrocarbon exploitation. Russia similarly favours Arctic exploitation as oil and gas production is integral to its economy and over 80% of Russian gas is produced in the Arctic.[41] As the oil and gas industry plays a major

[39] (Stokke, Interplay Management, Niche Selection and Arctic Governance 2011), 158
[40] (Dagg, et al. 2011),34
[41] (Offerdal 2007), 142

economic and political role within the Arctic states, the Arctic Council's ability to develop governmental concern is an arduous task.

Developing governmental concern for environmental issues generally emerges from domestic societal pressure. An effective international institution channels and develops this public pressure allowing it to have a greater effect.[42] The Council does offer mechanisms to channel domestic pressure on the issue of oil and gas. This emerges first from its ability to increase the role of civil society actors. This is primarily done within the Council structure. The Council structure allows for the participation of state representatives, observers, and permanent participants. While states have the final say on decisions, the permanent participants and observers have the ability to contribute. The permanent participants consist of six Arctic indigenous organizations that have full consultation rights in regards to Council decisions and negotiations. Observers involve non-Arctic states, inter-parliamentary organizations, and non-governmental organizations. The observers are generally able to participate in meetings and to contribute information, while this is done at the discretion of the chair. Observers are also able to provide information and participate actively within Council working groups that develop research information and create mechanisms such as guidelines. In this way, the Council allows for participation of societal actors and channels domestic pressures.

The structure of the Council allows the possibility of societal actors to gain access to state governments. A biennial, high-level ministerial meeting allows indigenous participants access to state governments. Furthermore, information

[42] (Keohane, Haas and Levy 1993), 14

provided by observers is presented at these meetings. While it seems that the Council provides the structure to channel public pressure towards governments through the biennial meetings, it is hard to establish a causal effect between this and governmental concern. Before the 2011 ministerial meeting in Nuuk, Greenland, the Inuit Circumpolar Council, and indigenous Permanent Participant, presented the "Circumpolar Inuit Declaration on Resource Development Principles in Inuit Nunaat." This was designed to influence states to increase state concern over the effects of oil and gas on the indigenous peoples. Furthermore it called for states to respect the Arctic Council's Soft-law Oil and Gas Guidelines as a minimum standard.[43] Discussions with Arctic state diplomats assigned to the Arctic Council, revealed that this has had little impact upon state governments.

The AOOGG has also been designed to encourage domestic pressure upon states to further state oil and gas regulation. This emerges from section 1.6 of the AOOGG that calls for transparency from oil and gas operators and states and encourages that all documents pertaining to oil and gas regulation be submitted for public review.[44] Transparency encourages the role of domestic society within the process of developing regulation. A recent Greenpeace action displays how this can come to fruition. In 2011 demands were made by Greenpeace to access Oil Spill Response Plan from Cairn Energy who had been drilling off the coast of Greenland. Lacking response from Cairn, a public action campaign was launched to access this document that involved a formal letter to the Premier and the eventual occupation of a Cairn Drilling platform. Referenced in the letter to the Premier was section 1.6

[43] (Council 2011)
[44] (Greenpeace 2011)

of the AOOGG. As Greenland has accepted the AOOGG as part of its oil and gas regulation, societal groups have pushed to ensure that state and industry comply with the guidelines. Thus by encouraging transparency, the AOOGG encourages the involvement of domestic groups into pressuring states to address environmental aspects associated with oil and gas activities.

While the Arctic Council is poised in a way that can develop state concern for the regulation of oil and gas, it appears as if it has had little effect. While movement towards oil and gas regulation has increased recently, it seems that this has emerged due to the Deepwater Horizon oil spill in the Gulf of Mexico. This can be seen in Canada, as the National Energy Board conducted a comprehensive review of Arctic Drilling regulations, citing the Deepwater Horizon incident as being a major factor for this review. Following the incident, Arctic states – primarily the United States – looked towards developing a binding mechanism for oil spill response in the Arctic.[45] The AOOGG advocates the development of a multilateral Arctic response plan. This plan would designate specific response zones, identify lead response groups for each region, and identify which group has responsibility to help in an oil spill response and outline their responsibilities.[46] At the 2011 ministerial meeting of the Arctic Council, Artic States mandated the Council to establish a task force that can develop an international instrument on Arctic Marine oil pollution, preparedness and response. According to a Canadian Department of Foreign Affairs Official, the AOOGG guidelines did not play a role in creating this concern, but rather the Deepwater horizon incident provided the impetus for the development of a oil

[45] (Official 2012)
[46] (PAME, AOOGG 2009), Section 7.2

and gas treaty.[47] Furthermore, the Council nor the Deepwater incident created enough concern for an effective binding treaty. What the Task force is currently advocating appears to be a symbolic gesture. The task force seems to be creating binding legislation that simply applies the international Convention on Oil Pollution Preparedness, Response and Cooperation (OPRC), to which all Arctic States are party, to the Arctic arena rather than negotiation new regulations. In this regards, the Council has had limited effectiveness in promoting state concern and has acted more as a venue in which state concern could be advocated.

The overall the ability of the Council to spark state concern has been limited. Through knowledge generation, the Council has been relatively successful in bringing issues of oil and gas to the agenda of states. The OGA provided new understandings concerning the effects which oil exploitation has upon the Arctic. However, the Council has been less effective in how it has been able to generate concern. While it maintains channels that can allow indigenous and environmental organizations to influence states, it has little capacity to foster public pressure to influence states. Further, the Arctic Council has had little ability to channel state concern emerging from incidents such as Deepwater Horizon. While the Council provided the venue in which a binding treaty could be fostered. However, little evidence exists that soft-law mechanisms such as the AOOGG were influential in developing this agreement. Rather it seems as if state concern is quite symbolic in that the binding agreement on oil spill response will follow existing norms outlined

[47] (Official 2012)

within the OPRC. The inability to spark state concern has reduced the ability of the Arctic Council in promoting oil and gas regulation.

PART II: The Arctic Council's Contractual Environment

According to environmental regime effectiveness literature, the second requirement for an effective institution is to have a hospitable contractual environment. This involves the ability to develop further commitments and joint rules with relative ease. It also involves the ability to ensure that these rules are adhered to. The soft-law nature of the Arctic Council seems to make the ability to create commitments easier. As a non-binding legal mechanisms, soft-law can promote reduce sovereignty costs, reduce bargaining costs, and have a flexible nature which can quickly adapt to the changing nature of the Arctic. The result is that soft-law can promote commitments to oil and gas regulation. The draw back is that without compliance mechanisms, soft-law is unable to encourage adherence to these guidelines creating standards to which compliance has been limited.

Soft-law Characteristics

The soft-law nature of the Arctic Council has been able to promote a beneficial contract environment in which further regulations can be promoted. The first way this is done is through reduction of sovereignty and reputation costs. Often states are unwilling to negotiate treaties as they do not want to restrict their future sovereignty.[48] Signing treaties binds states to certain behaviours and submits them to reputational or punitive costs if they defect. As this effectively reduces states'

[48] (Guzman and Meyer 2010), 171.

future sovereignty, states may forgo a treaty if they believe they are unable to maintain the standards stated in the treaty. The reluctance to sign treaties is exacerbated in situations of high uncertainty where states do not wish to bind their actions in the present, effectively limiting their ability to react to events should situations change in the future.[49] This reduces the impact of international governance, as states are unwilling to adopt mechanisms that will ensure coordinated behaviours.

Soft-law can be advantageous as a governance mechanism as its non-binding nature rectifies concerns of threats to sovereignty that prevent cooperation and compliance. Eliminating the binding nature of treaties removes the consequences associated with non-compliance such as sovereignty and reputation costs, granting states more lee-way when it comes to future action. Eliminating costs of non-compliance in essence serves to remedy negative aspects of treaties where unwillingness to sign hard-law treaties effectively eliminates cooperative regulation.[50] Soft-law, therefore promotes cooperation without necessarily entailing the full cost of defection.

The second way that soft-law facilitates a contract-making environment within the Arctic Council, is through the flexibility soft-law offers. As soft-law standards do not entail binding aspects, states do not have to negotiate as fiercely to ensure that the agreement does not result in threats to sovereignty, punitive costs and reputation costs as they would with hard law. Lacking binding specifications, soft law can be renegotiated to adapt to changing domestic, environmental, and

[49] (Snidal and Abbott 2000), 442
[50] (Boyle 2010), 125

economic issues.[51] In this regards, soft-law treaties serve to reduce the physical costs of negotiations. When states have high-invested interest in an issue area, such as oil and gas, negotiating treaties becomes a high priority. This requires large amounts of time from bureaucratic officials and legal experts who need to learn about the issue, bargain, draft and approve various treaty proposals.[52] This type of negotiation incurs many expenses. As soft-law reduces the binding nature of treaties, ensuring precision of detail is reduced, and the need to incur high negotiation costs is reduced. In this regards, lower ranking bureaucratic officials who have a firm understanding of the negotiated area can conclude soft-law instruments.[53]

Soft-law reduction of effectiveness potential

The soft-law nature of the Arctic Council has facilitated a contractual environment that allows for the further development of institutional mechanisms. In regards to the field of oil and gas, the Council has become the primary interstate forum in which Arctic specific standards are developed. While other international treaties that refer to oil and gas are in existence, the Council provides an Arctic specific oil and gas framework. The Council provides a beneficial contractual environment as can be seen in how since the creation of the AOOGG it has been reviewed twice. It can also be seen in how Arctic states have viewed the Council as a viable way in which to advance further oil and gas mechanisms. The 2011 Arctic Council Ministerial in Nuuk, mandated that recommendations and best practices be

[51] Boyle, 128
[52] Abbott and Snidal, 434.
[53] Guzman, 186.

developed by the Emergency Preparedness Pollution and Response (EPPR) working group.[54] This new mechanism will contain soft-law guidelines on the prevention of oil spills and will be presented at the next ministerial meeting in 2013.[55] Thus the soft-law nature of the Council resulted in the facilitation of standards that outline best practices in regards to oil and gas cooperation, albeit the standards that are created are also soft-law.

Soft-law has facilitated the development of oil and gas regulations, however, it has not attributed to their effectiveness. While theoretically it might be assumed that the soft-law nature of the AOOGG would promote effective guidelines that promote action to high standards, in some cases this has not occurred. Thus the effectiveness potential of the guidelines has been reduced. If effectiveness is measured as causing states to change their behavior, an ineffective regulatory mechanism would require little or no behavioural changes from the *status quo.*[56] An effective mechanism would cause states to change their behavior to address a specified problem. This process is referred to as measuring the output or the effectiveness potential of an international mechanism.[57] Two issues arise in measuring the effectiveness of output. The first, guidelines could require strong behavioural change. In this case the guidelines would have a high effectiveness potential, but if states were unable to achieve these types of behavior, the guidelines would be ineffective. Secondly, guidelines could require low levels of change. This could emerge from states agreeing to guidelines that outlined existing state

[54] (Arctic Council 2011)
[55] (Veritas 2012)
[56] (Raustiala 2000), supranote 99
[57] (Offerdal 2007), 145

behaviours. States could achieve these levels and thus they would be viewed as effective, but overall the guidelines would be ineffective in that they did not adequately address the specified problem.[58] Analyzing the extent to which the guidelines require a change in state behavior will be the focus of the next few paragraphs.

The extent to which the AOOGG encourages states to adopt new guidelines is varied. According to a 2007 assessment of the effectiveness of Arctic institutions conducted by Kristine Offerdal, the effectiveness of the AOOGG is quite low. She argues that effectiveness would be high if it were specific and binding, but the fact that it is already a soft-law institution, the effectiveness is greatly reduced. Furthermore, while analyzing the 2002 guidelines she notes that the AOOGG encourages states to adopt equipment that is deemed economically feasible: "offshore oil and gas activities should make use of the best available and safest technologies that are determined to be economically feasible."[59] The 2009 revision does not increase this, as in order to spark improvements to the industry it encourages states to adopt from a provided list of Best Available Techniques that are both economically and technically available.[60] Offerdal's argument is that requirements involving terms such as "economic feasibility" will not result in much action as states may deme certain requirements as not feasible. This is amplified due to the fact that the oil and gas sector is an integral aspect of the economies of the Arctic states: "we cannot expect such non-binding guidelines to be followed if they

[58] (Raustiala 2000), supranote 99.
[59] (PAME, AOOGG 2002), Section 6.3
[60] (PAME, AOOGG 2009), Section 6.3

are not compatible with state interests."[61] Thus recommendations for technology adoption staying within a realm of "economic availability" automatically reduce the onus for states to change their behavior. High economic costs for safe-technology may increase prices of oil extraction which may run contrary to state interests, preventing states from complying with guideline behaviours.

The shallowness of the AOOGG can also be seen in recommendations for indigenous participation within oil and gas activities. This, in some regards, counters the Arctic Council's prioritization of indigenous involvement where the six Arctic indigenous groups are permanent participants. Indigenous participation is lauded by many international relations theorists as granting legitimacy to the Council. Indigenous participation integrates the voices of those who live in the region into the international governmental organization that governs the region.[62] The AOOGG calls for states to create political and regulatory structures that will integrate indigenous peoples within the regulatory process. Furthermore, it calls for states to increase indigenous participation: "[states should] pursue regulatory and political structures that allow for participation of indigenous people and other local residents in the decision making process as well as the public at large."[63] In this regards, the AOOGG recommends a lower aspect of commitment to indigenous peoples than what is located in other international treaties such as the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP). In Article 32, UNDRIP states: "states shall … obtain their free and informed consent prior to the

[61] (Offerdal 2007), 146.
[62] (Kovurova 2008), 25.
[63] (PAME, AOOGG 2009) Section 2.4

approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."[64] While the AOOGG closely resembles the UNDRIP, it does not adopt as strict of a standard in integrating Indigenous consent in oil and gas projects. This is due to the fact that all Arctic states except for Russia have signed on to the UNDRIP. In this regards a lowest common denominator for action had to be adopted lowering the standard for the AOOGG. While the AOOGG can be seen as effective in that seven of the Arctic states have gone above this requirement, it can also be seen as ineffective as Russia does not have to advocate great leaps to achieve this recommendation.

The ineffectiveness of the AOOGG can also be seen in standards proposed for dealing with a well blowout. Arctic conditions present difficulties in extracting hydrocarbons. Vast amounts of ice and a small drilling season reduces the ability to extract hydrocarbons, while at the same time it reduces the ability to remedy an oil spill. Should a blow out occur at the end of the season, the time period to capture the spilled oil may be reduced as it may be covered in ice, causing oil to continue to pour out over the winter months and causing that oil to be trapped within the ice. Drilling a same-season relief well (SSRW) can reduce the effects of a spill as it could eliminate the oil leaking and prevent a multiyear blowout.[65] The AOOGG section concerning oil spill reduction contains a recommendation entitled "relief well arrangement." However this section merely states: "the operator should outline his immediate response to a well control incident or blowout. Also, the operator should

[64] (UNDRIP 2007), Article 32.2
[65] (WWF 2011)

demonstrate the availability of the necessary equipment, and support systems to be utilized."[66] Therefore, by mentioning the SSRW but not advancing it as a standard, the AOOGG has limited the level of environmental protection to which states need to achieve.

High Effectiveness potential

The effectiveness potential of the AOOGG is not entirely low. The AOOGG does outline standards that are at levels higher than other international agreements that thus encourage states to adopt standards above levels of bounded cooperation. This seems to echo soft-law theory that hypothesizes that states may adopt more stringent guidelines than would happen in a hard law format. As many Arctic states give priority to the Arctic it may emerge that states: "adopt, or at least put their names behind, policies that they would not have approached in the same way in the absence of the AC."[67] In regards to oil and gas regulation at the international level, there exists various other legal frameworks to which certain Arctic States are signatories such as: the UN Convention on the Law of the Seas (UNCLOS), the Convention for the Protection of the marine Environment of the North-East Atlantic (OSPAR), the OPRC, and The Convention for the Prevention of Pollution from Ships (MARPOL 73/78). While these treaties bind the regulations of various states, in certain regards they are broad and vague. For instance the basis of the AOOGG emerges from UNCLOS Article 208.5 that refers to pollution from sea-bed activities subject to national jurisdiction. The article specifies that states acting through organizations shall "establish global and regional rules, standards and

[66] (PAME, AOOGG 2009), Section 7.2
[67] (Offerdal 2007), 142.

recommended practices and procedures to prevent, reduce and control pollution of the marine environment."[68] As states have simply agreed to adopt regional guidelines within UNCLOS, the AOOGG puts this into action. Further not all Arctic states are party to UNCLOS, thus by placing their names behind the AOOGG, they advance standards higher than what might have occurred in the absence of the AOOGG.

In certain aspects, AOOGG encourages states to adopt higher and more specific standards in regards to pollution prevention than is outlined in other binding treaties that offer only vague requirements. For instance, in regards to pollution from sea-based activities, UNCLOS only requires that states adopt "measures as may be necessary to prevent, reduce and control such pollution."[69] Further UNCLOS states when there are operations that may cause pollution, states have a duty to assess and produce reports displaying this.[70] Through sections on oil spill response plans, and operating practices, the AOOGG goes beyond vague actions required in UNCLOS as it encourages states to adopt specific ways outlined within the AOOGG in which states can do so. Further, this includes recommendations for how to conduct risk analysis of hazards present in the region thus preventing the possibility of pollution happening.[71]

The AOOGG goes farther than existing international treaties in regards to oil spill prevention. To mitigate the threat of pollution, OSPAR calls for progressive risk

[68] (UNCLOS n.d.) Article 208.5
[69] (UNCLOS n.d.) Article 208.2
[70] (UNCLOS n.d.) Article 206
[71] (PAME, AOOGG 2009), Section 1.3, 6.4, 7.1

assessment strategies concerning the effects of oil to the Marine environment.[72] OPRC also has requirements for oil spill pollution, requiring an assessment of the nature, the extent, and possible consequences of the oil pollution incident. However, these stipulations are required to be completed after an oil spill has occurred.[73] The AOOGG acknowledge that despite the adoption of recommended best practices at the national, there is still the possibility that an oil spill disaster may occur as all standards may not be fully engrained into the safety culture.[74] Studies indicate that while rules, guidelines and standards exist, accidents which have taken place have been a result of neglect of rules, regulations and guidelines resulting from the fact that these have not seeped into an organization's safety culture.[75] For this reason the AOOGG advocates developing oil spill response mechanisms before hydrocarbon activities occur.[76]

The AOOGG also seems to have stricter standards concerning oil spill response than what is located in multilateral treaties. Certain oil spill response plans are in existence, but the majority of these mutual contingency plans are formed at the bilateral level.[77] OPRC does make mention of what a national oil spill response mechanism should contain stipulating that minimum levels of spill equipment must be made available and that a description of the plan should be made available.[78] The AOOGG goes farther than this advocating the development of all-encompassing response plans that entails an initial assessment concerning hazards in the area, an

[72] (OSPAR 1992), Annex IV, Article 2.3
[73] (OPRC n.d.) Article 5.1.b
[74] (Mayrand 2010), 72.
[75] (NEB Offshore Drilling Review 2011), 29-30
[76] (Mayrand 2010), 72.
[77] Mayrand, 72.
[78] (OPRC n.d.), Article 3.2

assessment of risk, and a description of how both of these will be mitigated. Furthermore it encourages states to describe the planned operations, equipment which will be used to facilitate the cleanup, how the spill will be monitored and how the sensitive areas will be protected. Further it requires that there must be adequate training in the response plan and that all personnel must be familiar with it.[79] The AOOGG also promotes a sense of transparency, urging operators to allow the plan to be open for public review and comment. While basic guidelines for oil spill response plans exist within binding treaties, the AOOGG specifies specific actions that can be taken which go farther than these treaties.

The AOOGG has resulted in states putting their names behind higher standards regarding environmental impact assessments (EIAs) than have been outlined within most international treaties. This can be seen within AOOGG suggestions that states and operators develop Strategic Environmental Assessments (SEA). According to the AOOGG, an SEA is an integrated approach involving "a systematic process for evaluating the environmental consequences of a proposed policy, plan or program initiative in order to ensure they are included and appropriately addressed at the earliest appropriate stage of decision-making."[80] While Environmental Impact Assessments are enshrined in other treaties, the SEA is viewed as a more stringent assessment. An SEA Protocol was created under the ESPOO Convention – a convention dealing with rules regarding EIAs to which many Arctic states are members. Only Finland, Norway, and Sweden consented to be

[79] (PAME, AOOGG 2009) Section 7.2
[80] (PAME, AOOGG 2009), Section 3.3

legally bounded. Denmark signed it, but has not ratified it yet.[81] While it has not yet entered into force, it has emerged as a norm for conducting assessments as certain states have already abided by these. Norway requires a SEA assessment in hydrocarbon activities.[82]In assessing bids for who can start drilling, Greenlandic authorities make their decision upon whether the companies are willing and to what capability they will contribute to an SEA.[83] The SEA guideline, while non-binding, promotes a higher standard of environmental assessments than what Arctic states have currently signed. This increases the effectiveness potential of the AOOGG.

While soft-law has created a contractual environment that allows for the development of standards, it has done little for the enforcement of effective best practices. The non-binding nature may cause states to sign onto certain soft-law standards, however it does not ensure that states will actually comply with the outlined guidelines.[84] This can be seen within the example of SEAs where Canada, the US, Russia, and Iceland have not yet attempted to implement SEAs into oil and gas regulation. As a soft-law institution, the AOOGG cannot enforce compliance to guidelines. For this reason, increasing state concern is integral in promoting adherence to the guidelines.

While soft-law does not contain punitive measures, other mechanisms are available which can alter the utility of states that can thus invoke an aspect of rule adherence. Verification methods can be used to analyze whether states are

[81] (Molenaar and Koivurova 2009), 34-35
[82] (Bankes 2010), 121
[83] (Bankes 2010), 112
[84] (Raustiala 2000), 403.

implementing outlined rules. Mechanisms of review can analyze information to see at what levels states are implementing these rules.[85] The importance of this is that it could bring attention to how states are adhering to the specified rules of behavior. In regards to oil and gas, the AOOGG has neither systems of official verification, review or punishment. Therefore, assessment of AOOG implementation is non-existent. This is detrimental for the effectiveness of the AOOGG as it retains state' commitments to the AOOGG as merely symbolic. States may sign onto the guidelines, but do not have to evoke action as there are no official means to verify that they are attempting to adhere to these guidelines. This can prevent the development of state concern for important issues at hand. Also this prevents the ability of channeling the pressure of social actors. Lacking a system of review, reputational costs that can affect a states' environmental record are non-existent. In this way societal actors are not able to place pressure upon states that are failing to live up to guidelines to which they agreed.

While lack of review prevents the discovery of where states are failing to implement standards, more importantly it prevents the discovery as to why states are not living up to these standards. In this regards, an institution cannot work to develop the capacity necessary to carry out these guidelines. Effective review mechanisms within a soft-law framework are possible. This has been the case within the Arctic Marine Shipping Assessment (AMSA), which was created in 2009 and focused upon Arctic shipping practices. Following the findings of the assessments, 16 recommendations were integrated into AMSA, regarding the future

[85] (Stokke, Interplay Management, Niche Selection and Arctic Governance 2011), 150

role of the Arctic Council and Arctic States.[86] In 2011, a Council sponsored follow-up review was completed, outlining where states and industry were achieving the recommendations and where they were falling short. This effectively channelled societal pressure as academic literature has been created outlining best practices for how to encourage states and build capacity necessary for states to live up to AMSA recommendations. Therefore, as the AOOGG lacks review and verification mechanisms, the ability to place pressure on states to adapt to the AOOGG is limited. Furthermore, the ability to develop techniques that could facilitate state compliance is reduced.

The effectiveness of the contractual environment that the Arctic Council provides seems to be quite varied. Soft-law has facilitated an environment that reduces sovereignty, negotiation, and reputational costs allowing states to create environmental agreements. The effectiveness potential of these guidelines has also been varied in that certain guidelines encourage states to attain certain levels of commitment as is the case with pollution prevention, risk assessment, and strategic environmental assessments. However, the guidelines also have aspects that maintain the status quo and thus do not promote effective action that would develop effective regulation. Further, without a mechanism of enforcement, the AOOGG is unable to create an impetus for state action. Without a system for verification or review, there is little knowledge as to whether states are actually complying with the AOOGG or are taking steps to develop the capacity to comply with the guidelines. Lacking this the contractual environment that the soft-law framework develops

[86] (PAME)

appears to be ineffective. As a result, the AOOGG relies upon symbolic gestures, but does not require states to develop specific actions that can create a harmonization of effective oil and gas regulations in the Arctic.

Part III: Capacity

The third requirement for an effective environmental institution is the ability of the institution to ensure that states have the capacity to implement the created guidelines. Institutions can promote capacity building by developing models for best practices, providing assistance to live up to standards, and by providing funds to ensure states can enact guidelines.[87] When dealing with environmental institutions, oftentimes this involves providing technology or funds towards developing states in order to ensure their compliance towards environmental standards.

Arguably ensuring the monetary capacity of states is available to carry out commitments is not a high priority as the majority of Arctic States contain highly industrialized economies. However, Russia still receives funds in order to increase its capacity to live up to its commitments. Furthermore, Council members have sponsored Russia's participation within Council projects. This has been the case with the Oil and Gas assessment in which funds were provided to sponsor information gathering in Russia.[88] While not specifically related to oil and gas, Arctic states also voluntarily provide funds to Project Support Initiatives that are used to ensure that Arctic states live up to their Council commitments as well as create projects that clean pollutants from the Arctic. While the commitment to provide

[87] (Stokke, Interplay Management, Niche Selection and Arctic Governance 2011), 159.
[88] (Offerdal 2007), 150.

these funds to assist Russia currently exists and is strong, Arctic States have recently questioned as to why they provide the financial capacity for Russia to live up to its Council obligations. This emerges as a result of Russia's high and rising petroleum revenues. It is argued that this commitment will not abate, but rather that the current way in which projects are funded may change in the future.[89]

Capacity building also involves creating models that states can emulate to achieve their commitments. Within the AOOGG, the development of models is relatively non-existent and is rather left up to states to accomplish. Council guidelines in some senses are supposed to be the models to which states are supposed to aspire. The AOOGG provides the best industry practices for operating offshore oil and gas extraction activities. It recommends best ways for what should be involved in regards to safety. For example, it outlines what is needed for an effective Emergency Response plan (alarm systems etc.), but does not outline the best materials which would accomplish this. As stated earlier, the AOOGG calls for operators of drilling rigs to outline their response to a well control incident. The Guidelines also do not advocate what level of technology should be used. Briefly referred to is a SSRW, but neither this nor other technology is advocated. The guidelines do recommend that Best Available Techniques that are economically feasible be used. Yet, this can result in a lowering of standards as industry can pressure governments into stating what the most economical technology that is in existence. For instance, prior to the Deepwater incident, the oil drilling industry attempted to influence Canada's national oil regulator - the National Energy Board –

[89] (Stokke, Interplay Management, Niche Selection and Arctic Governance 2011), 160

(NEB) into eliminating the requirement for a same season relief well. Following, the Deepwater incident which caused a review of Canadian Arctic well drilling regulations, the NEB affirmed its commitment to a SSRW requiring oil and gas operators to have the capacity to create an SSRW or use a technology that would exceed the protection of a SSRW.[90] Therefore, in some cases the Arctic Council provides the best practices to promote the safety of oil and gas within the Arctic, but lacks in its capacity building in that it does not refer to the exact models that are needed.

PART IV: THE WAY FORWARD

The way in which the Arctic Council and the AOOGG are currently structured have prevented the full effectiveness of these environmental institutions. While promotion of knowledge serves to push the issue of oil and gas onto the agenda of states, soft-law mechanisms have prevented states from being bound to certain actions and being required to take actions to promote oil and gas regulation. Soft-law can overcome sovereignty, reputational, and bargaining costs which has in essence facilitated a contractual environment which can facilitate more oil and gas regulations. However, soft-law has served to reduce the effectiveness of the contractual environment as it does not offer binding commitments nor promotes a system of review. While the ability to develop capacity for states to implement the guidelines is varied, it can be improved as models and best available technology is not advocated. Certain academics argue that in order to improve the effectiveness of

[90] (Canadian Environmental Law Association 2012)

the Arctic Council and the AOOGG in promoting oil and gas regulation, hard law should be adopted. This, however, does not seem be politically feasible given the importance of the oil and gas industry for Arctic states. Thus emphasis should be placed upon improving soft-law mechanisms. This can be done through the promotion of norms, as it appears that the Council is structurally poised in a way that could develop this. Furthermore to improve the effectiveness of the capacity building, the Council can create a mechanism that would disseminate best available technologies and information for how to implement the AOOGG.

Soft-law involves non-binding guidelines and standards that are designed to promote cooperation by overcoming sovereignty, reputational, and bargaining costs. In regards to the Arctic Council soft-law has been advanced as one of the primary form of Arctic governance. In regards to oil and gas, however, soft-law has had limited effectiveness. While the structure of the Council has been effective in bringing issues to the agenda of states, lacking a binding nature, soft-law has prevented the Council from ensuring states will abide by agree obligations. Without a review mechanism, states are able to sign onto guidelines such as the AOOGG, yet punitive measures, such as reputation costs, do not occur when they do not comply with the Guidelines. This has reduced the contractual nature of the AOOGG, as state implementation into national law has been limited transforming the AOOGG into a symbolic commitment.

A possibility for increasing the effectiveness of the Arctic Council and the AOOGG would be to adopt hard law mechanisms. To ensure the highest protection of the Arctic, many scholars advocate the development of binding oil and gas

legislation. This follows the calls of scholars who advocate that soft-law has been ineffective at promoting environmental governance. Linda Nowlan has argued that environmental problems such as pollution are more adequately addressed by binding legal agreements.[91] Further, Erik Molenaar, Timo Koivurova, and Kristin Casper, argue that codifying rules would eliminate inefficiencies and gaps in environmental regulation, as states would be subjected to following binding international law. [92] Therefore, in trying to ensure the highest levels of environmental protection, there has been a push by various scholars to transition towards legally binding resolutions.

Adopting legalized regulations may entail the highest aspects of regulations, however, moving in this direction involves the political will in order to do so. Gaging the political will of the Arctic States, it seems as if a transition to a hard-law environmental treaty may not be available. Since the Council's founding, various scholars have pushed for an all-encompassing security, political, and environmental Arctic Legal Treaty similar to the Antarctic Treaty System. The Arctic, however, differs from the Antarctic in that it is composed of eight sovereign Arctic states. Yet, there are some, such as the World Wildlife Federation (WWF) who have called for adapting the Antarctic Treaty to fit Arctic realities.[93] It does not seem however, that there is the political will to do so. In 2008, the five Arctic Coastal States assuaged fears of a "race for the Arctic" and signed the Ilulissat Declaration following the planting of a Russian flag on the seabed under the North Pole in 2007. This

[91] (Nowlan 2001), 56.
[92] (Casper 2009), 867.
[93] (Molenaar 2009), 82.

agreement rejected the possibility for negotiating an Arctic legal treaty.[94] Thus the possibility of an overarching legal regime does not fit the realities of the Arctic and its development does not seem probable

The ability to develop binding legalization also appears to be limited due to economic reasons. Due to the importance of oil and gas to the economies of the Arctic States, the ability for the Council to advocate environmental regulations is small: "member states may be willing to accord the Arctic Council some role with respect to environmental aspects related to oil and gas issues, but only to the extent that its work does not interfere with their strategic interests."[95] While scholars and environmental organizations have pushed for binding treaties, it does not appear that there currently exists the will to do so among states, especially in the field of oil and gas.

Normative Niche

Furthermore even if binding regulation were to be developed, it may not bring about increased regulation that can promote environmental protection within the Arctic. At the Nuuk ministerial a Task Force was created to develop an oil spill response instrument. This mechanism has been developed as a binding document. However, it will adopt the framework of the OPRC, and thus will not advance new legislation but rather reiterate existing international treaties and apply it to the Arctic. Thus, the inability of binding regulation to promote new oil and gas regulations might be limited.

[94] (Casper 2009), 858.
[95] (Offerdal 2007), 142.

While states have not fully abided by all the AOOGG guidelines, there are instances in which states have adhered to them. Greenland has fully implemented the guidelines. Greenland is an interesting case in this regards as its oil and gas regulations are based within the Greenland Mineral Resources Act. When the Greenlandic Bureau of Minerals and Petroleum approves exploratory drilling it compares applications with the exploration of drilling guidelines in conjunctions with other international guidelines such as the Arctic Council and the Norwegian Standards (NORSOK).[96] Therefore, Greenland has in effect, implemented the AOOGG. According to a study by Offerdal, the Norwegian government has also made reference to the AOOGG. This occurred when the Norwegian Pollution Control Authority did use the AOOGG when it provided recommendations to the Environment Ministry when the Barents Sea oil and gas activities were opened up.[97]

There are various cases in which state oil and gas regulations in fact reflect that which is mentioned within the AOOGG. One aspect of this can be seen within the Canadian Oil and Gas Drilling and Production Guidelines. Under this legislation Safety and Environmental Protection Plan guidelines were developed. These guidelines that were revised in 2009, are almost identical to the Compliance and Monitoring Auditing and Verification sections found within Chapter 5 of the AOOGG.[98] The impact that the AOOGG has had can be seen in this regard. The effectiveness of it is further demonstrated as a Canadian National Energy Board (NEB) official, mentioned that in revising national offshore oil and gas guidelines to

[96] (BMP n.d.)
[97] (Offerdal 2007), 147.
[98] (Baker, Operating Practices 2010), 12.

a certain extent, the AOOGG were influential.[99] While this example displays a specific case, it can be seen that many Arctic State's oil and gas regulations reflect to some extent the guidelines displayed within the AOOGG.

The AOOGG while predominantly geared towards state regulators also is geared towards providing best practices to the oil industry. The impact that the AOOGG has had upon industry, appears to be varied. The oil and gas industry overall has made little mention of adopting the AOOGG. Research conducted on the corporate social responsibility of Norwegian state owned oil company, Statoil, displayed that the AOOGG had little impact and the guidelines were not recognized in their sustainability reports.[100] This however does not mean that the AOOGG has not been influential. A document by Shell outlying its interaction with indigenous peoples did make mention of the Arctic Council, but did not refer to how it applied to the AOOGG guidelines. Yet in certain instances actions described in their indigenous statements reflected AOOGG guidelines. For instance AOOGG calls for the development of regulatory and political structures that allow for the participation of indigenous people in the decision making process.[101] The document states that shell has consulted indigenous peoples in the North Slope of Alaska regarding all their actions. Further they have provided funds to develop a Village Voice Initiative to integrate industry, government, NGOs, and the villages of North Slope Borough to assist in adapting to change.[102] Cairn drilling has also referenced principles outlined in the AOOGG, such as the precautionary approach and the requirement to develop

[99] (Dixit 2012)
[100] (Klick 2009), 24.
[101] (PAME, AOOGG 2009), Section 2.4
[102] (SHELL 2011),5.

impact assessments especially in regards to the whale population in Greenland.[103] Furthermore Cairn advocates that through participation within the Oil and Gas Producers (OGP) they have worked with the Arctic Council to develop best practices with oil spill prevention and response.[104] Shell has also stated that it works with the Arctic Council to develop the guidelines on oil spill prevention.[105] Therefore, while industry makes reference to the Arctic Council, works with the council, and certain actions reflect the AOOGG, it is difficult to ascertain if the AOOGG has actually influenced changes in industry practice, or if this is due to another factor.

As the AOOGG has been reflected in certain state regulations, it emerges that the AOOGG has a sort of normative commitment in that it advances best standards currently available. The fact that industry has begun to take heed of the AOOGG and participates in Council activities advances the view that the Council has a normative pull. Therefore it seems that the Council could further develop into a normative niche that advances best norms and understandings for appropriate oil and gas activities within the Arctic. The possibility for this emerges from the structure of the AOOGG. To develop an effective norm-building niche, an institution must have norms that are applicable to the Arctic context, large coverage, and substantive Strength.[106] The AOOGG has strong interplay with other institution such as OSPAR, OSPAR, UNCLOS, and the IMO. In this regards it can adapt these to the Arctic to develop Arctic specific norms. This can give these norms a sense of legal clout and substantive strength as they intertwine with existing law. When intertwined with

[103] (CAIRN CSR 2009), 52
[104] (CAIRN CSR 2009), 56.
[105] (Parliment.UK 2012)
[106] (Stokke, Interplay Management, Niche Selection and Arctic Governance 2011), 149

binding treaties, soft-law commitments emerge as a way to implement existing agreements.

The coverage of the Council further poises it to develop a normative niche. This emerges first from the fact that the Arctic states that have the territory in which offshore oil and gas extraction is possible, are the ones developing the guidelines. Furthermore, the coverage aspect of the council can be beneficial to developing the normative niche as norms are created that echo what was outlined in treaties to which certain states are not part of. The AOOGG retains references to OSPAR, DRIP, and UNCLOS. Non-parties to these binding treaties are respectively Canada and the US; Russia; and the United States. Therefore the Council can progress norms existing in treaties, to states that are not party to these treaties. This will advocate this behavior as the best available without forcing state compliance.

The substantive strength of Council norms is relatively low, however, reducing the Council's ability to develop into a norm creating institution. This is due to the lack of implementation and concern of many of the standards within the AOOGG. For instance, the AOOGG advocates the polluter pays principle. The principle states that: "the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment."[107] Russia, Greenland and Norway all have unlimited liabilities. The US and Canada have liabilities caped at $75 and 40$ million respectively, although this may be higher if fault or negligence is established. The details of Iceland's liability regime are unclear however, as the operator or licensee may be held accountable.

[107] (PAME 2009), section 1.3

This accountability, however, is exempted from Acts of God.[108] The requirements of Canada, the US, and Iceland seem to be very insufficient in comparison to the $40 billion which was required to clean up after the Deepwater Horizon incident.[109] As is shown with the polluter pays principle, the normative strength of the guidelines are limited

Increasing the substantive strength of the institutions could emerge with the development of a review mechanism. A review mechanism could be used to increase state interest, by bringing to light areas in which states have been lagging. This could create a sort of reputational cost for a state's reputation in regards to environmental action. This could successfully channel societal and domestic pressures towards encouraging state concern and ensuring that mechanism are adequate for the Arctic sphere. In this way, the normative pull of the AOOGG may gain credibility as states actually work towards and view normative issues as the best practice.

Clearing House Mechanism

The effectiveness of the Arctic Council could be improved if best practices and models for action were provided. This would improve the ability of the Council to build capacity that could encourage states to adopt guidelines and stringent safety mechanisms. By providing latest and best technology, the AOOGG could achieve its goals of harmonization within the Arctic. To facilitate this, the Arctic Council may look towards becoming a clearing-house for best practices and standards available. This would increase the role that the AOOGG plays at advancing

[108] (Lloyds 2012), 55.
[109] (Canadian Environmental Law Association 2012)

norms within the international sphere. While a Canadian NEB representative mentioned that the AOOGG had influence upon national regulations, he mentioned that what was more influential is the International Regulators Forum.[110] This forum was established in 1994 after government regulators realized that exchanging experiences and information could promote increased safety performances.[111] The transfer of ideas and standards can play a role in changing states actions about compliance. Further, new developments in technology may act as a way in which industry can comply with the Guidelines. Conducting assessments in the Arctic concerning Arctic oil and gas recovery is both difficult and an expensive process. The Council should thus link with the oil and gas industry that is increasingly becoming interested in the development of economic and safe oil and gas extraction technology. Providing a clearing-house in which this information can be disseminated easily and quickly may help states and industry to adapt to new techniques and promote highest mechanisms of oil and gas regulations within the Arctic

The structure of this clearing-house mechanism could follow the structure of the Convention on Biological Diversity (CBD). Betsy Baker, the head author of the Arctic Ocean Review, has advocated this strategy.[112] The CBD clearing-house is an internet based system which attempts to promote collaboration among states, provide needs based information which can be used to promote decision making

[110] (Dixit 2012)
[111] (International Regulators Forum 2010)
[112] (Baker 2012)

and work to strengthen public education and awareness.[113] The AOOGG already publishes best practices, however this is infrequent. Since its creation in 1997, the AOOGG has only been revised twice. Conducting assessments in the Arctic are expensive. Therefore collaborating to create this information and publishing their results may promote best practices for oil spill prevention and response. The AOOGG seems to be poised perfectly for this as it caters specifically to the Arctic and involves all Arctic states. In this regards it could be used to adapt existing standards available within the American Petroleum Institute or the International Standards Organization to the Arctic sphere. The Council could capitalize on industry's increasing involvement within the Council and advance industry practices and technology for Arctic oil and gas safety. Therefore, developing a clearing-house within the Council would serve to produce Arctic specific guidelines and promote best technology for achieving these guidelines.

CONCLUSION

In its current structural framework, the soft-law mechanisms of the Arctic Council are relatively ineffective. Without adequate compliance mechanisms, the Council is unable to promote adequate concern among states. The Council has been effective in bringing issues to the attention of states through knowledge generating mechanisms. However, it has been ineffective in influencing states to make effective actions towards oil and gas regulations. Soft-law mechanisms have facilitated a contractual environment in which standards and guidelines can be easily negotiated. However, the effectiveness of these guidelines is limited as there is no

[113] (Diversity n.d.)

way to ensure that these guidelines will be implemented. This evokes a sense that state commitment to these guidelines as just symbolic gestures. Soft-law does not detract from the capacity building potential, however, the effectiveness of this aspect can also be improved. As the oil and gas industry has a major impact on the economic prosperity of states, influencing states to adopt oil and gas regulations is an arduous task. The Council seems poised to develop into a normative niche as it can advance proper norms of behavior into the Arctic sphere. This can be evidenced by the fact that the regulations of states and actions of industry reflect in some ways the AOOGG. The Council could improve this by developing a review mechanism that would increase state attention to the AOOGG. Further, the council could adopt a clearing-house mechanism that would advance best technologies. This would build the capacity of states but also advocate best oil and gas regulatory norms. Lacking these changes, the Council could develop into a talk shop in which only symbolic commitments are made.

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