To frack or not to frack, that is the question. The decision against exploratory drilling in Lancashire as a case of deliberation in institutional contexts

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Aims

- Analyzing and evaluating the debate on 'fracking' in the UK – e.g. June 2015 Lancashire County Council
- Developing Critical Discourse Analysis: a framework for the analysis and evaluation of argumentative (e.g. deliberative) discourse - policy, parliament debates...
- Developing Argumentation Theory: proposing an argument scheme, a set of questions & a 'dialectical profile' for the evaluation of practical argumentation
- A better understanding of the nature of extrinsic constraints/(structural) pre-conditions on deliberation in institutional contexts
- Understanding the place of analysis of argumentation in CDA & relation between normative & explanatory critique

Corpora

- **Lancashire County Council debates (June 2015) and final officer's report; LCC Constitution**
- Cuadrilla's own reports, e.g. Environmental Risk Assessment
- Parliament debates on shale gas exploration
- Government reports (e.g. DECC 2013, DEFRA 2014...)
- Expert reports (Royal Society and Royal Academy of Engineering report on shale gas extraction; IRGC report on shale gas development....)
- NGO campaign material & websites (Friends of the Earth, Frack Free Lancashire)
- Media corpora (e.g. 300 UK newspaper articles, June-July 2015)

'Discourse has constructive effects'

- Simple speech acts (assertions...) and macro speech acts (arguments, narratives...) → changes in belief and action (e.g. via persuasion)
- One type of speech act works in a different way: **speech act of declaration** (Searle 1969, 2010)
- **Declarations create social/institutional reality:** governments, universities, County Councils...
- They create **status functions** which assign **deontic powers** to individuals... → powers to change reality
- E.g. Job contract → employee

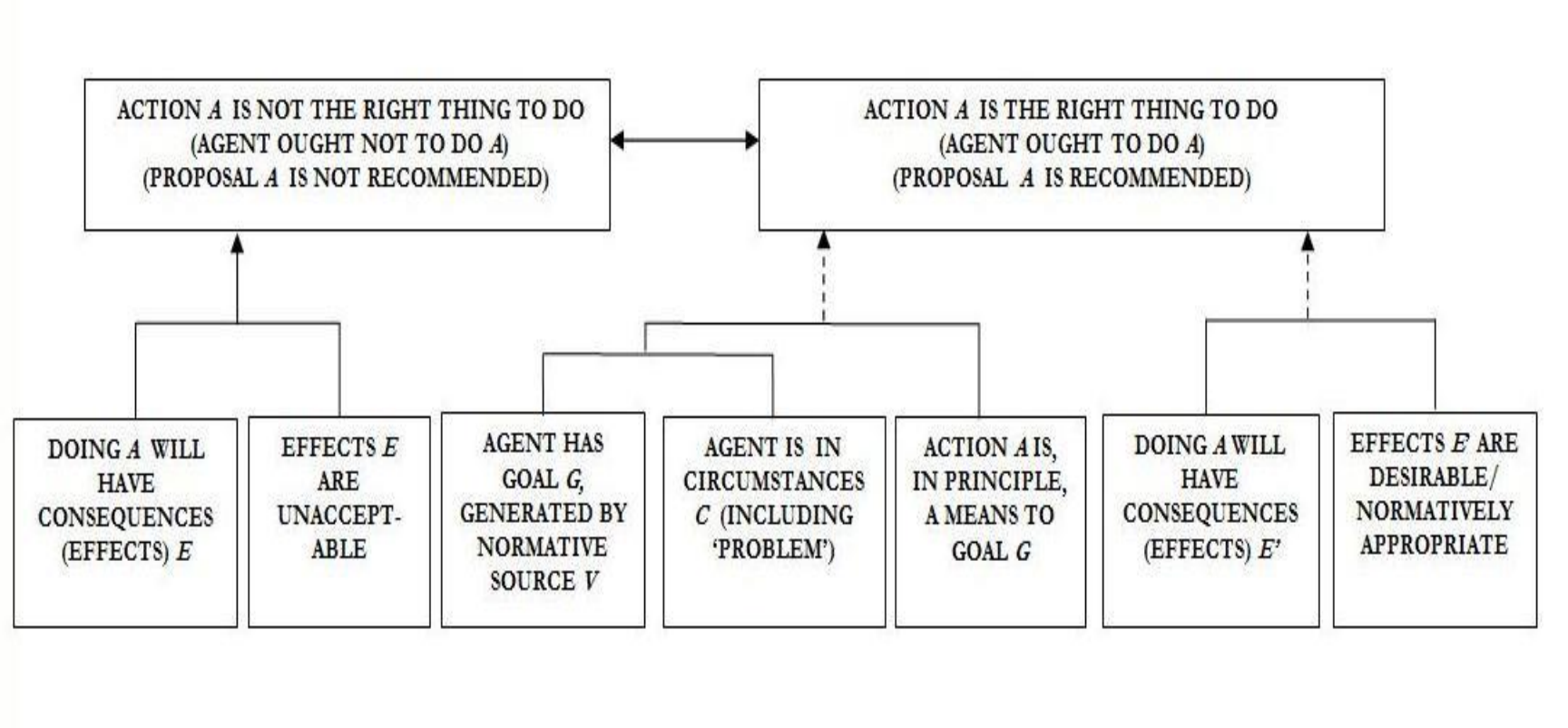
Theoretical background

- Dialectical theories of argumentation (Walton 2007, van Eemeren 2010, etc.)
- **Institutional contexts impose extrinsic constraints on what counts as reasonable argumentative behaviour**
- These constraints are related to the **institutional point** of certain genres of communicative activity
- **Question: what is the nature of institutional constraints on deliberation and decision-making in democratically elected political institutions?**
- **John Searle's (2010) theory of the creation of institutional reality by speech acts of declaration**

Searle (2010): a single mechanism for creating institutional facts

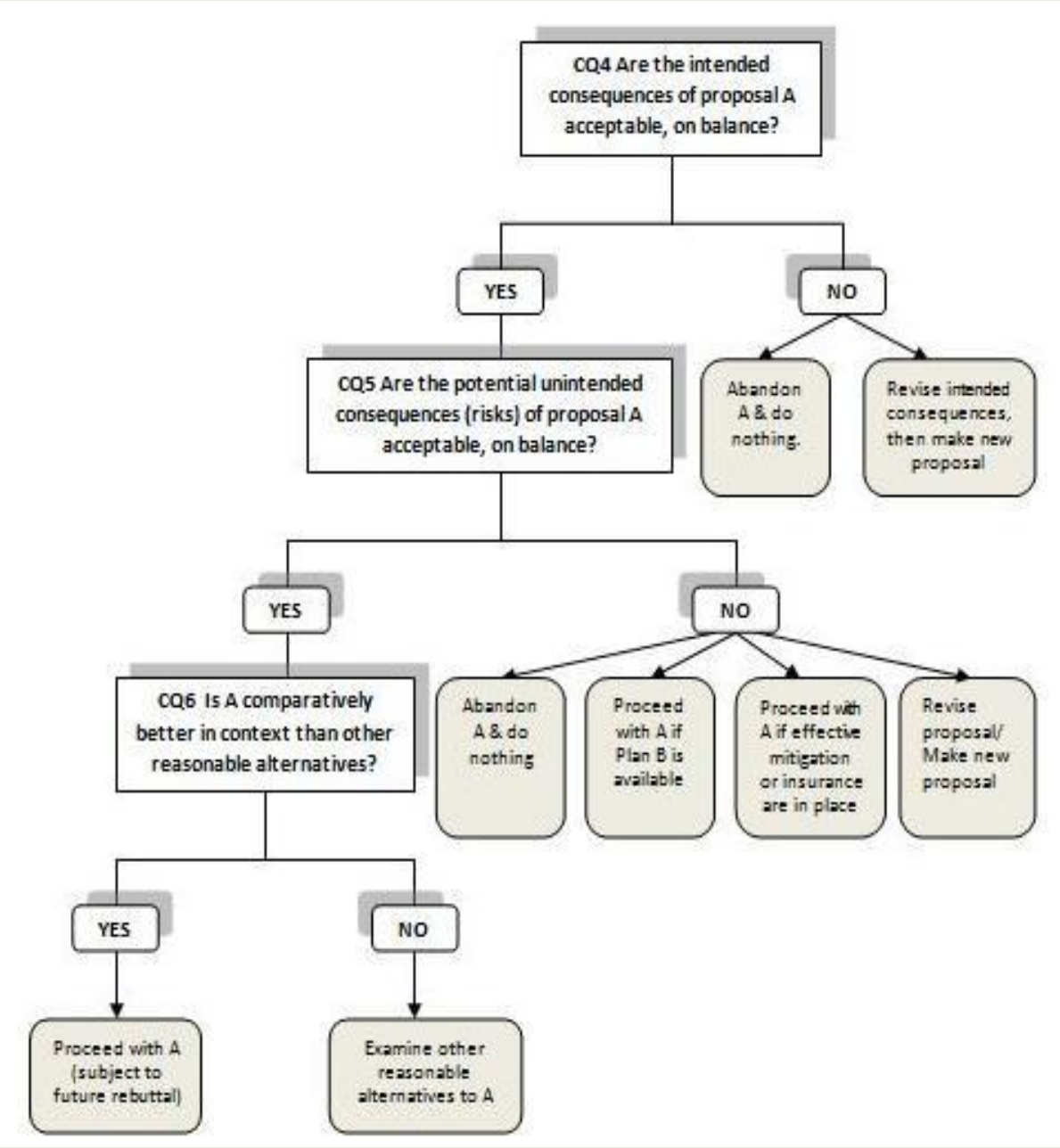
- All institutional reality is created by **speech acts of declaration**, whereby **status functions** are assigned to objects/persons.
- Status functions exist in virtue of **collective recognition** (collective intentionality).
- Status Functions carry/generate **deontic powers**: rights, obligations, entitlements, authorizations...
- Once recognized, **deontic powers provide agents with desire-independent reasons for action.**
- **Human institutions generate deontic reasons for agents (e.g. obligations, rights) that act as structural constraints on what agents can reasonably do.**

Deliberation



Critical Testing of proposals

- Set of 6 critical Questions (CQ1-CQ6)
- Purpose of CQ4-CQ5: **eliminate unreasonable proposals** by examining their intended consequences (e.g. goals) and foreseeable unintended consequences
- If consequences are on balance unacceptable/ if they are critical objections → proposal rebutted
- Purpose of CQ6: **Choosing from among several *reasonable* proposals one that is comparatively better,** based on contextually-relevant criteria.
- Assuming satisfactory answers to CQ1-CQ3, **dialectical profile consists of CQ4-CQ5-(CQ6)**


CQ4 Are the intended consequences of proposal A acceptable, on balance?
YES
NO
CQ5 Are the potential unintended consequences (risks) of proposal A acceptable, on balance?
Abandon A & do nothing.
Revise intended consequences, then make new proposal
YES
NO
CQ6 Is A comparatively better in context than other reasonable alternatives?
Abandon A & do nothing
Proceed with A if Plan B is available
Proceed with A if effective mitigation or insurance are in place
Revise proposal/ Make new proposal
YES
NO
Proceed with A (subject to future rebuttal)
Examine other reasonable alternatives to A

Unacceptable consequences = critical objections

- When do consequences constitute critical objections?
  - when proposal undermines other arguably non-overridable goals (i.e. leads to a future state of affairs in which these non-overridable goals are not preserved)
  - when proposal clashes with non-overridable social/institutional ('deontic') constraints on action (i.e. leads to a future state of affairs in which these constraints are not preserved)

Events

- **Cuadrilla**: 4 applications for **exploratory drilling** and construction of monitoring stations at Roseacre Wood and Preston New Road (Little Plumpton) in Fylde area.
- Applications debated and voted on 23, 24, 25, 29 June 2015 by the **Development Control Committee of the Lancashire County Council (LCC, Preston)** after being deferred at meeting of 28 January 2015.
- Roseacre main application rejected 14:0 on account of **traffic** impacts; Little Plumpton application rejected 10:4 on account of **unacceptable noise and visual impacts** (including **unacceptable urbanisation of rural area**).

Preston New Road application refused by 10 votes to 4 (29 June)

- Resolved: That the application be refused for the following reasons:
- 1. The development would cause an **unacceptable adverse impact on the landscape**, arising from the drilling equipment, noise mitigation equipment, storage plant, flare stacks and other associated development. The combined effect would result in an **adverse urbanising effect on the open and rural character of the landscape and visual amenity of local residents contrary to policy DM2 of Lancashire Minerals and Waste Local Plan and Policy EP11 of the Fylde Local Plan.**
- 2. The development would cause **unacceptable noise impact resulting in a detrimental impact on the amenity of local residents** which could not be adequately controlled by condition **contrary to Policy DM2 of the Lancashire Minerals and Waste Local Plan and Policy EP27 of the Fylde Local Plan.**

Allowable reasons for DCC: ‘material considerations’ for planning applications for oil and gas development

noise associated with the operations / **dust** / **air quality** / **lighting** / **visual intrusion** / **landscape character** / archaeological and heritage features / **traffic** / **risk of contamination of the land** / soil resources / the impact on best and most versatile agricultural land / flood risk / land stability or subsidence / internationally, nationally and locally designated sites / nationally protected geological and geomorphological sites and features / sites restoration and aftercare

Official LCC Officer's Report (23 June)

- **Conclusion (summary)**. According to all the evidence and expert opinion, **the concerns raised by the opponents (e.g. risks) are not sustainable. It would therefore be unreasonable to refuse the applications.** The application must be considered on its merits, **not on the basis of what it might become.** All concerns can be addressed satisfactorily by placing **more conditions** on the applicant and by the **regulatory regime in place**. **The application complies with all relevant legislation [of Lancashire Minerals and Waste policy framework and Fylde Local Plan, including DM2] except SP2 & EP11 of the Fylde Local Plan, which can be overridden in this case** ('**little weight should be attached to them** and more weight should be attached to the policies of the LMW development policies').

Cuadrilla. Environmental Risk Assessment (summary from report on Cuadrilla website, 2014)

	Risk	Likelihood	Consequence	Risk Score
1	Gas (methane) escapes above ground surface	LOW	LOW	**LOW**
2	Uncontrolled release of gas (blowout)	V. LOW	MODERATE	**LOW**
3	Contamination of ground water	LOW	LOW	**LOW**
4	Spillage causes pollution of surface water	LOW	LOW	**LOW**
5	Waste products enter environment	V. LOW	MODERATE	**LOW**
6	Spills in transit pollute environment	LOW	LOW	**LOW**
7	Induced seismic events damage infrastructure	LOW	LOW	**LOW**
8	Ground subsidence	no pathway	no pathway	**negligible**
9	Road traffic accidents	LOW	LOW	**LOW**
10	Water shortage, reduced mains pressure	V. LOW	LOW	**LOW**
11	Flooding	V. LOW	MODERATE	**LOW**
12	Loss of archaeological heritage	LOW	LOW	**LOW**
13	Dust from proppants released into the air and inhaled	V. LOW	LOW	**LOW**
14	Failure in well integrity in abandoned wells leads to contamination of ground water	LOW	LOW	**LOW**
15	Radioactive emissions contaminate environment	V. LOW	LOW	**LOW**

Why should proposal be approved, according to LCC Officer's report?

- Negative consequences identified (impacts and risks) are not sufficient to rebut the proposal, according to expert reports: **all risks are low (< expert reports)**
- **Almost all impacts can be mitigated** by additional 'conditions' (restrictions → revised proposal)
- Impacts that cannot be satisfactorily mitigated, leading to **breaches of local policy**, are **overridable** in light of the **greater weigh**t of other policies, or **not relevant.**
- **Counter-considerations are not critical objections: impacts can be mitigated & overridden; risks are low**
- **Critical force of arguments from risk & from non-overridable deontic reasons = neutralized by the way risks are assessed and impacts are balanced.**

Why is proposal rebutted, according to opponents?

- Opponents' case: there are (non-overridable) critical objections
- Unacceptable risks to health & environment (and fundamental uncertainty) →precautionary principle
- Unacceptable impacts in process of attaining goals (noise, pollution, visual impact)
- Unacceptable impact on non-overridable deontic reasons created by institutional facts – **obligations** that agents are bound would be overridden
- N/O: human rights (incl rights of future generations), policies, democratic will of local communities

Deontic constraints on decision-making < LCC Constitution & relevant laws

- **decision must be made by evaluating proposal's impact on a specific range of 'material considerations'** ('noise' YES, 'climate change' & 'property prices' NO) and **on relevant legislation and policies**
- **decision must be made by considering all available evidence, but:**
  - Cllrs ***do not have to agree*** with the views of officers and experts in weighing reasons
  - *Cllrs must be* ***'advocates of and for their communities';***
- *Legitimate to exclude certain reasons and to weigh reasons in favour of one of the parties?*

LCC Constitution

[sets out , by declaration, the positive and negative 'deontic powers' of the council]

- *All County Councillors will ...*
- *represent their communities and bring their views into the Council's decision-making process, i.e. become the advocate of and for their communities;*
- *deal with local issues and act as an advocate for constituents in resolving particular concerns or grievances;*
- *balance different interests identified within the electoral division and represent the electoral division as a whole...*

Legal advice

- 'Parliament has given the **duty** to determine planning applications to **local planning authorities**, almost all of which are councils consisting of **elected councillors**.... Planning decisions are taken by **politicians** rather than experts or lawyers and the **balancing of benefits and harm is ultimately a political decision**.'
- [Councillors] **must... consider** the comments made, including advice received from experts from their own authority, other public bodies, the applicant and third parties. **It is open to the committee to disagree with any particular advice that they are given**.'

- ...Members **are entitled to depart from the officer's advice,** provided there is a rational and discernable basis for doing so. Importantly, **the weight to attach to a material consideration is also a matter for the decision taker** (...)
- Whether an application does or does not comply with the development plan or, if it does not, whether material considerations outweigh that conflict, **is a matter of planning judgment for elected members...**
- ...[Cllrs] are **entitled to place greater or less weight on material considerations than that of their officers**, for example they may place greater weight on landscape harm and less weight on the temporary effects of that harm than their officers.

Speech by member of the public (23 June)

'... By now you will have heard many reasons why this application should be refused, ..., but **there is an elephant in the room which needs talking about: democracy**. If I were a member of your committee, I too would be faced with an impossibly narrow range of material planning grounds, due to the restricted scope of the report in front of you. The author of the report, your planning officer, has also experienced the restrictive force of government intervention, as evidenced by the letter from George Osborne and the redacted report from DEFRA.

[This] demonstrates grave interference from government departments into the decision-making of this local planning authority. ... The result is a planning process that is ostensibly independent, but in reality is subject to a degree of interference that would embarrass a banana republic. In other words, you are being asked to take part in a sham event: the pretence of arriving at a democratic decision ... (...) If I were in your position I would be faced with one of two paths to choose: one would be to go quietly into the night....

... cowed to reside in a state of solemn acquiescence at being coerced into opening the door to massive industrialization of our Lancashire countryside. [...] **The other path is the right one, the one to do what you were elected to do, which is representing the people of Lancashire's best interests ...** [...]. We in Lancashire will not go quietly into the night, but we will fight, and we will fight even if you, our elected members, choose to accede to these demands. You must refuse. '

Other constraints?

- '...the restrictive force of government intervention, as evidenced by the letter from George Osborne...'
- '... grave interference from government departments into the decision-making of this local planning authority...'
- ' ... a planning process that is ostensibly independent, but in reality is subject to a degree of interference that would embarrass a banana republic...'
- 'the non-material consideration, some could say threat, of exposure to potential costs...'

Are these constraints institutional?

- Pressure to give in to government interference: is this an **institutional constraint** for LCC Councillors?
- Is it inscribed in documents such as the LCC Constitution, is there an obligation to decide in favour of the government, laid down in documents by a speech act of declaration?
- Cllrs have a deontic reason (**obligation**) to arrive at a decision that embodies the interest of local communities, as elected representatives, but do not have a similar obligation to arrive at a decision that agrees with their own officers' advice or with the government (they have a **right** to disagree).

Conclusion (1)

- Limited set of wide range of reasons used in public debate were relevant 'material considerations' for LCC
- Allowable reasons were weighed differently in argument for & against (< different expert views)
- **Very high vs very low weight was attached to environmental risk** (public vs applicant & LCC)
- Applicant's case: impacts that went against policies were said to have been mitigated, irrelevant or overridable
- **Various attempts by government to change legislation to remove potential clashes with deontic constraints**
- Result: a potentially contestable decision, based on unacceptable visual, noise &traffic **impacts, not major risks**

Conclusion (2)

- Deliberation and decision-making in political institutional contexts are subject to institutional constraints (e.g. LCC: allowable reasons, duty of democratic representation...)
- **Only deontic reasons** (arising from collectively recognized institutions) **are genuine institutional constraints**
- Deontic reasons (e.g. obligations) as normative sources create non-overridable goals that may be in conflict with agents' other goals.
- **What agents are institutionally obliged to do must be distinguished from what they feel inclined/disinclined to do, or what is prudentially advisable for them to do.**
- It may be prudentially advisable for Cllrs to agree with government, but their duty (= institutional deontic constraint) is to their electorate.

Putting argumentation in its proper place

- EAC Report (January 2015)
- Parliamentary Environmental Audit Committee (EAC) Report + Reply from Department of Energy and Climate Change (DECC)
- EAC: Large-scale fracking is ‘inconsistent with’ achieving the UK’s Climate Change targets for reducing carbon emissions, so there should be a ‘moratorium’ on fracking.

Goals and Circumstances

- Problem-solution structure of practical argument

- Multiple goals: critical questions
  - goals of energy policy: energy security, growth + jobs, carbon emission targets

- Multiple goals and multiple strategies
- Regulatory regime

Multiple goals – critical questions

- Are these *all* of the goals of Government, or are there others which are not generally stated?
- Are there conflicts between Government and other interpretations of goals, or about what sub-goals they subsume?
- Do goals all have the same status? Are any of them non-overridable and non-negotiable? Do the Government or other parties recognise differences of status?
- Are (sub-)goals consistent with each other, or are there inconsistencies or contradictions between them?

Extracts from EAC Report

- ‘extraction of shale gas ... is *unlikely to be commercially viable unless developed at a significant scale*, to be able to *compete against a growing renewable energy sector*, but *large-scale fracking will not be able to be accommodated within still tightening carbon budgets*.’

- ‘Permit appraisals must consider *the cumulative impacts of fracking* ... Attention must be paid to *the way in which the industry and the risks might scale up in future*.’ (My italics)

Enterprise strategy (Osborne 2012/13)

People ask how we're going to earn our way in the world. This is how:

- With an enterprise strategy that safeguards low interest rates ... reduces taxes ... creates confidence that this country has a government that can pay its bills. ...
- We'll be activists for ... cutting through delays and red tape and **where was there more red tape than in our planning laws?**
- An enterprise strategy means investing in renewable energy, and **opening up the newly discovered shale gas reserves beneath our land.**
- **We are today consulting on a generous new tax regime for shale so that Britain is not left behind as gas prices tumble on the other side of the Atlantic.**
- Our enterprise strategy is accepting Britain faces competition ... and backing what we're good at. (Osborne 2012. *My bold*.)
- And should we accept that this nation that mined deep for coal, and took to the cold, stormy seas to search for oil, will **turn its back on new sources of energy like shale gas? No. We absolutely should not.** (Osborne 2013)

EAC: regulatory regime

- First, the Strategic Environmental Assessment of the Licensing Rounds, Environmental Impact Assessments, planning and permit appraisals *must all consider the cumulative impacts of fracking*. Second, environmental impact assessment must be mandated for all fracking activity. Third, attention must be paid to *the way in which the industry and the risks might scale up.* There is the prospect that a regulatory regime for operational extraction would be applied without the same rigour that had been applied to the exploration phase. It is important that the necessary regulatory arrangements are determined and in place prior to the expansion of the industry. Finally, there should be *a consolidated regulatory regime specifically for fracking*. (My italics.)

Consequences, explanations, explanatory critique

- Consequences and explanations
- EAC Report and DECC Reply
  - EAC: ‘extensive production’ of shale gas is ‘inconsistent with’ the UK Climate Change and carbon reduction obligations
  - Shale gas extraction is ‘unlikely to be commercially viable unless developed at a significant scale, to be able to compete against a growing renewable sector’, + ‘large-scale fracking will not be able to be accommodated within still tightening carbon budgets’.
  - Explanatory account: how competitive markets work.
  - DECC explanatory account (and re-problematization): how carbon targets can be achieved in a market (‘cost effective’) way through a competitive energy market in which shale gas may (CCS) have a long-term place.
- Explanatory critique

DECC Reply

- The Committee suggests a moratorium on shale gas principally because it is concerned it will contribute to climate change. However, the Committee on Climate Change is clear: we need gas for decades to come if we are to cut carbon emissions in a cost effective way. The Committee on Climate Change said last year that the UK will “continue to use considerable, albeit declining, amounts of gas well into the 2030s” and that “if anything, using well-regulated UK shale gas…could lead to lower overall lifecycle greenhouse gas emissions than continuing to import LNG”. ... The question therefore is where we source the gas we use ... it would be irresponsible to not explore our shale potential, where safe and sustainable to do so. Shale gas has the potential to enhance our energy security and grow the UK economy.

Strategies, hegemonies and arguments

- Climate change (fracking): hegemonic strategies.
- Argument: there are a lot of discourses, declarations, policies and (hegemonic) strategies around, but not all world-changing - they don't all get selected, implemented, operationalized. We need the CPE concern with selection and retention of strategies, but also a recognition that selection, retention and operationalization inherently depend upon argumentation, conceived in a dialectical way.
- Dialectic: 'any process of conceptual or social conflict, interconnection and change, in which the generation, interpenetration and clash of oppositions, leading to their transcendence in a fuller or more adequate mode of thought or form of life, plays a key role' (Bhaskar 1993).

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