Collaborative Governance for Climate Change Mitigation: Implementing a Co-Regulation Mechanism for Managing the Private Sector’s Contribution to Climate Change

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Abstract
For the past two decades, international climate policy has been handled as a matter for State to State deliberation. Non-state actors have played at best marginal roles in making and implementing international policy. This paper argues that climate change remains an intractable transnational problem because State to State deliberations failed to acknowledge that both climate mitigation and adaptation require ongoing collaborative governance with non-State actors to shift normative behavior. This paper proposes implementing an international co-regulation strategy as a collaborative governance mechanism in order to improve the legitimacy and accountability of intergovernmental meetings. This paper specifically proposes in the context of climate change implementing a co-regulatory approach through a combination of industry sector wide agreements and binding individual firm environmental contracts.

1 Introduction

In June 2010, the Japan Times editorial board reflecting on the 2009 United Nations Framework Convention on Climate Change’s Conference of Parties in Copenhagen and its April and May follow up meetings in Bonn and wrote, “Global warming fight fizzles.” After the COP-15 meeting, government officials from the G-77 negotiating bloc blamed the meeting for locking “countries into a cycle of poverty forever” and civil society leaders accused world leaders of signing “a death warrant for many of the world’s poorest children.” 1 Unsurprisingly, given the inability for States to compromise, there has been a lack of global enthusiasm to re-engage in future negotiations.

Scientific constraints demand more creativity from policymakers in moving negotiating forwards. As scientists have argued, somewhere between 350 parts per million (ppm) and 500 ppm of carbon dioxide in the atmosphere will destabilize the current ecological balance. In spite of multilateral, national, and local efforts to reduce emissions, the proportion of carbon dioxide in the atmosphere continues to increase. In order to maintain 500 ppm of carbon dioxide, global carbon dioxide emissions need to be reduced by 50% within approximately the next 50 years. 2 Since all policymaking is accompanied with some period of inertia before adequate implementation, the time frame is short.

Yet, as this paper will argue, the key to achieving mitigation relies not so much on the ability of States to cooperate at intergovernmental meetings as on the will power and decision-making powers of corporate stakeholders. Traditionally a state-centric model of

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1 John Vidal, Low targets, goals dropped: Copenhagen ends in failure, THE GUARDIAN, December 18, 2009.
2 Stephen, Pacala and Robert Socolow. Stabilisation Wedges: Solving the Climate Problem for the Next 50 Years with Current Technologies, 305 Science: 968-972, 2004
international law has relied on a majority of States at intergovernmental meetings defining globally beneficial policies to be subsequently implemented domestically. This approach works well where there exists uniformity among States and a good faith effort to translate the agreed upon tenets of international law into binding and precise domestic law. Where there are strong domestic lobbies that continually intervene in ratification processes in order to protect private corporate interests, this approach has failed. As public investigative journalists discovered at the recent Copenhagen meeting, private firms attend international meetings to stay informed of potential developments. As Brian Flannery from Exxon explained “This [COP 15] isn’t a place for lobbying...All the industry associations recognize their key issue is to work at home, with their governments, in their capitals.”

Corporate activism to influence the domestic implementation of international climate policy is well documented by the media. In Canada, a party to the Kyoto Protocol, the oil and gas industry is the largest lobbying group demanding that exceptions be made in climate change legislation to protect their industry. In the U.S., the auto industry, despite producing commercially viable hybrid models, continues to oppose raising corporate average fuel standards. In the late 1990s, the industry organized Global Climate Coalition with influential members such as Exxon, Ford, and Dow Chemical spent millions of dollars successfully lobbying against the U.S. ratifying the Kyoto Protocol. Even though corporations regularly exercise their rights to be heard in policy discussions, States especially have rarely formally engaged private actors in emission negotiations.

Part I. Regulatory Options

This paper proposes focusing international efforts on devising a regulatory approach primarily targeted at changing the behavior of private actors rather than extending State responsibility. There are three types of international regulatory governance tools available to States: command and control regulation, self-regulation, and co-regulation. As suggested below, command and control regulation and self-regulation are inappropriate tools for transboundary environmental management. Co-regulation provides the appropriate compromise between government goal-setting and industry implementation.

1. Command and Control Regulation

Command and control regulations are issued by governments with little to no input from regulated entities. While some command and control regulation has been effective in stimulating needed corporate behavioral changes in certain sectors, proponents of market

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3 Kate Willson and Andrew Green, Meet the Lobbies: Oil and Coal, (December 11, 2009) http://www.publicintegrity.org/investigations/global_climate_change_lobby/copenhagen/
5 Donald Mayer, Corporate Governance in the Cause of Peace: An Environmental Perspective, 35 VANDERBILT JOURNAL OF TRANSNATIONAL LAW. 585, 612 (2002).
regulation criticize command and control approaches as being economically inefficient. Command and control regulations have not been widely embraced by States as a strategy to tackle emission reductions at the domestic level with private firms pressuring instead for market based regulatory solutions. At the international level, it would be politically impossible to promulgate command and control regulations targeted at individual firms given the ongoing controversies over whether States can bind private actors through public international law.

2. **Self-regulation**

At the opposite extreme of command and control regulation is self-regulation which has been enthusiastically embraced by some industry sectors in part to deflect inflexible and costly command and control regulatory schemes. In their classic book on responsive regulation, Ayres and Braithwaite define self-regulation as follows:

[S]elf-regulation envisions that in particular contexts it will be more efficacious for the regulated firms to take on some or all of the legislative, executive, and judicial regulatory functions. As self-regulating legislators, firms would devise their own regulatory rules; as self-regulating executives, firms would monitor themselves for noncompliance; and as self-regulating judges, firms would punish and correct episodes of noncompliance.

As Ayres and Braithwaite suggest, self-regulation involves corporations assuming government-like responsibilities. Private actors frequently assume the role of self-regulating legislators by playing leading roles in bottom up law making through the promotion of “trade-legal” technical standards. The technical standards promoted by companies in public fora such as the International Standards Organization are likely to have a high level of implementation within industry sectors since they reflect either existing company practice or practices which companies intend to adopt. Ultimately, internationally adopted standards may become de facto domestic law if individual States decline to individually legislate on technical product matters and instead accept a standard for which there is both corporate consensus and existing compliance. Corporations have embraced self-regulation especially marked-based approaches both at the domestic and international level because it gives corporations control over both what standards to adopt and how to implement the standards.

Most of the ongoing climate governance efforts that affect the behavior of private entities fall within the parameters of self-regulation and voluntary commitments. For instance the oil industry created the Petroleum Industry Guidelines for Reporting

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10 *Id.* at 521.
Greenhouse Gas Emissions\textsuperscript{11} to guide the practice of its members and to provide an industry-wide standard for measuring impact. In a report from global auditors Ernst & Young, 70\% of the 300 corporate executives from companies with at least $1 billion in annual revenue indicated that they intend to increase spending on climate change initiatives between 2010 and 2012.\textsuperscript{12} Unless regulatory conditions are imposed by the government, most of these initiatives will involve self-regulation. Businesses are motivated to engage in detailed regulatory-like standard setting in hopes of establishing parameters for any future government debate about new regulations.

Critics decry much corporate self-regulation as meaningless greenwashing especially where a self-regulatory scheme relies on unverified self-reporting. In response to unverified self-regulation, civil society groups have been instrumental in designing a new set of collaborative non-state multistakeholder governance initiatives which have been hailed as new models of cooperative governance.\textsuperscript{13} For purposes of this article, these initiatives which usually involve some form of certification are considered self-regulatory because there is no government oversight or public ability to sanction parties who fail to comply. While these initiatives have had some success in areas such as promoting fair trade coffee and certain sustainable fisheries, there are no equally influential multistakeholder initiatives addressing long-term climate mitigation or adaptation.

Self-regulation as an international governance strategy only provides a partial solution to the environmental management crisis since self-regulation fails to address concerns of long-term public accountability. Technical standard-setting and multistakeholder environmental certification do not provide a complete solution to the complex problems described in part one. Ultimately, voluntary self-regulation is voluntary. While there are various reasons for remaining in a voluntary regime, individual parties that feel disadvantaged by an initiative have the capacity to leave without any immediate repercussions. Multistakeholder collaborations based around certification efforts address some public concerns but have had limited success in influencing the behavior of non-members who may be the major perpetrators of environmental problems.

3. Co-Regulation

In the middle of spectrum of command and control regulation and self-regulation is co-regulation. Co-regulation is a model of regulation which involves a sequential combination of specific goal setting by the government for a sector coupled with a case by case implementation strategy for individual corporate actors within a sector. As an


incentive for participating in a co-regulation approach, public government agencies will not regulate firms that agree to assist their sector in achieving a previously legislated environmental goal unless the firm fails to meet previously agreed upon targets. Co-regulation has some appeal for private actors because it provides certainty over the course of an industry-government agreement regarding regulatory targets.

The most cited general example of successful co-regulation is the Dutch environmental covenant which has introduced a whole new form of effective hybrid governance. In the Netherlands, state agencies give private economic associations the powers to enter into binding environmental covenants with the government. Prior to beginning negotiations with economic associations or industry representatives, the government has legislated non-negotiable national performance targets including abatement targets for 200 substances. Once these performance targets are set, the parties collaborate to negotiate strategies for efficiently achieving environmental performance. In the Netherlands, covenants have been negotiated to address concerns about environmental aspects of products, pollution caused by companies, and the exercise of certain government powers.

Like a standard civil contract, the covenants are legally binding. Specifically, the covenants involve two-part negotiations. The first part creates a declaration of intent which is not binding but provides a framework for negotiating subsequent binding contracts between individuals, firms, and government agencies which usually entails developing a Company Environmental Plan. The contracts may include civil liability measures where a company has failed to comply with the terms of its agreement.

In the Netherlands, private firms in numerous industry sectors have agreed to legally binding environmental covenants with agencies such as the Ministry of Housing, Land-Use Planning, and the Environment in the sectors of agriculture, refining, energy, building and waste disposal. The 100 plus covenants cover a wide spectrum of problems including climate change, acidification, eutrophication, toxic pollution, soil contamination, groundwater contamination, and nuisance. To achieve performance goals, the covenants focus on specific aspects of the problems such as reducing nitrous oxide and carbon dioxide from power plants, reducing ammonia from cattle breeding, cleaning up of contaminated soil underneath gasoline stations, recycling packaging, and phasing out harmful substances.

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17 Harrison, *supra* note 14, at 64.
20 OECD, *supra* note 15, at 52, Table 2.
The regulated industry sectors develop plans to meet environmental targets. State agencies review and comment upon the plans before the plans are released to the public. While the earliest covenants lacked safeguards for implementation, the most recently negotiated covenants have specific monitoring requirements. A joint government-industry “steering group” reviews the performance of the industry in making progress towards meeting its goals under the covenant. The incentive for private entities participating in these frameworks is that they can help to proactively shape regulation rather than simply respond to external regulation.

Concerning climate change, the Dutch government has entered numerous covenants across multiple industrial sectors to promote energy efficiency in order to reduce demands for fossil fuels. The Dutch government is of the opinion that “Long range covenants (5-10 years) which permit some flexibility over the nature and timing of implementation actions are proving more efficient and effective than direct regulation in many cases.”

The idea behind developing “co-regulation” in the Netherlands as a process was to create a culture of “internalization” where the state would work to build consensus with major industries on the relevant policy options and available means. This approach becomes especially important in light of the discovery that command and control regulations have failed to deliver results in many respects and in some instances have even resulted in under-regulation. The Dutch concluded that forcing stringent external generic standards upon firms would backfire and potentially lead to greater resistance in integrating environmental management practices and environmental values into larger decision-making processes.

Part of the success of co-regulation at an industry level is that industry leaders may be implicitly encouraging better performance from their peers and subcontractors for fear of a return to command and control regulation if the industry as a whole fails to perform. Because industries play an active rather than passive role in co-regulation, a co-regulatory approach sustains long-term collective action on the part of an industry sector. Industries are perceived not just as part of the problem but also a key part of the solution. In addition to accelerating the achievement of some environmental goals, co-regulation in the Netherlands has also had the added advantage of improving overall collaboration between government and industry on environmental problem solving.

Some academics question whether the Dutch covenants have been effective in improving energy usage because even where goals are clear and sanctions have been set, corporate actors have not made major changes in their business practices.

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22 Harrison, supra note 14 at 63.
23 Id. at 64.
24 Rehbinder, supra note 21.
Acknowledging that there may be and may have been substantive issues with how particular covenants have been domestically negotiated, covenants still have the potential to play an important role in creating a co-regulatory environment especially at an international level. The mechanism of environmental covenants offer two key contributions to climate change governance: formal participation in climate governance by necessary corporate actors and public transparency.

**Part II. International Co-regulation: Reimagining Negotiations to Achieve Reciprocity, Legitimacy, and Accountability**

Regular intergovernmental meetings convened by United Nations Environmental Programme or by Secretariats for the various multilateral environmental agreements are key fora where social relationships are built, reciprocity is extended, and parties contemplate potential international regulatory frameworks. If co-regulation presents a better collaborative public private model than self-regulation as this paper argue, it can only be implemented if there are substantial procedural changes in how parties conduct intergovernmental negotiations. It is time for a procedural paradigm shift moving international environmental law and policy from being an exclusive State-centric club to policymaking being generated a more “democratic” space where non-governmental interests are formally recognized as legitimate policymakers capable of being bound by international commitments.

Corporate actors already have marked informal influences on international law-making processes. As Jody Freeman argues, non-state organizations especially businesses exercise “coercive power” in governance processes because they are able to set standards and enforce compliance with these standards. By setting standards that determine what products and services are available in the global marketplace, corporate actors define the parameters of international legal regulation. In the context of self-regulation, corporations legislate the technical aspects of their business by actively negotiating and creating consensus on international environmental management standards through organizations such as the International Standard Organizations.

These same actors also play key roles in existing international policymaking by supplying experts, lobbying State representatives, and participating as non-state observers at intergovernmental meetings. In certain intergovernmental processes such as the drafting and updating of the Codex Alimentarius, industry is expected to provide regular input on whether proposed rules and standards are technically feasible for commercial production. Technical experts employed by governments circulate proposed changes to the Codex Alimentarius to both government and industry representatives for comment. In the cases of highly technical matters of regulation where both the government and industry

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29 State delegations to these meetings have included participants such as senior executives from Danone and Nestle. See e.g. Joint FAO/WHO Food Standards Programme, Codex Alimentarius Commission, ALINORM 09/32/REP, ftp://ftp.fao.org/codex/Alinorm09/al32REPe.pdf
participate, there is often little divergence between a standard proposed by a corporate interest and the ultimately legislated standard.

Corporations participate regularly as non-state observers at intergovernmental meetings. In this position, private for-profit entities have the opportunity to attend most sessions of the meeting, make oral interventions, disseminate information either directly at the meeting or through side events, and informally lobby members of State delegations. In recent meetings, business interests have advocated for States to adopt specific policy positions. For example, at the Sixth Conference of Parties for the Kyoto Protocol, the International Chamber of Commerce delegation pushed for States to adopt the position to permit carbon transfers to be available for trade across State boundaries.\(^{30}\) The ICC also supported the position that multinationals be able to participate in the Clean Development Mechanism regardless of whether the State where the parent corporation resided had ratified the protocol or not.\(^{31}\)

1. Collaborative Governance through Co-Regulation

Just as the idea of separating public from private in the domestic administrative legal world is a long-promoted legal fiction, so too is the idea that public international law must be separated from any private lawmaking influence. As social actors seeking reciprocity, government representatives actively seek strategic relationships with private businesses especially where the private sector is perceived as having some advantage in managing or solving a problem. These relationships between governments and businesses as social actors can be leveraged in both directions. The government receives a partner to provide technology and financial transfers to assist the public sector in meeting its existing international environmental obligations. Businesses receive a favorable reception for proposed technical standards.

International policymaking that was once the sole responsibility of the state or international governmental organization has truly become a space of shared responsibility.\(^{32}\) Self-regulation as a model for effective international environmental governance to resolve collective transnational environmental problems is proving insufficient since the social interactions remain restricted to members of a single industry engaging in fully voluntary undertakings.

There have been a number of other proposals for incorporating business interests within the frameworks of existing international environmental law including requiring companies to comply with existing multilateral environmental agreements.\(^{33}\) Proposals


\(^{33}\) Harris Gleckman, *Balancing TNCs, the states, and the international system in global environmental governance: A Critical Perspective* in *EMERGING FORCES IN ENVIRONMENTAL GOVERNANCE*, 203, 213 (Norichika Kanie and Peter Haas eds., 2004).
such as this have not been adopted for implementation, and arguably should not be, because they follow a command and control strategy that interferes with the opportunities for an ongoing and evolving dialogue between private interests and States.

Co-regulation is a better model for incorporating diverse interests in the regulatory process. It provides the needed credible regulatory threat to ensure compliance with public goals. Co-regulation offers possibilities not imagined by the current international governance frameworks. Applying a co-regulation model would narrow the wide-ranging conversation about environmental protection and emission reductions to several concrete, technical goals that can be measured e.g. emission reductions, water quality standards, or percent of forest coverage. This shift from general to specific goal setting would be an explicit acknowledgment that international environmental policy requires a technical quantifiable rather than qualitative approach. As Contini and Sand have argued previously, “International environmental protection ... may and should indeed be a highly technical matter” rather than a more abstract ethical and philosophical concept.  

With the structured involvement of the business sector in a coregulatory process, the current “light, thin, top-down” approach to domestic environmental regulations could be reconfigured to developing more “heavy, thick and bottom-up” international environmental regulations.

How might a co-regulation system work to address current governance deficits in addressing climate change? In the remainder of this subsection, I discuss one possible approach to developing collaborative governance through co-regulation. For co-regulation to be fully operative, both government and private industry must be engaged in the process. As I envision the process, co-regulatory governance would consist of two phases.

In the first phase, a plenary of State parties and formal non-state participants, which I discuss in the following subsection, would meet to debate appropriate regulatory performance goals. Both State and non-state participants would participate in the negotiations, but only State parties would vote either by consensus or majority on the adoption of quantitative environmental regulatory performance goals in order to meet the objectives of existing international environmental law. The goals would be clearly worded and not open to the interpretation of individual parties.

In the context of climate change, performance goals might be set for permissible carbon intensiveness for an industry. The performance goals would be ideally sector wide in order to focus attention on those corporate entities that have the most impact on emissions and potentially generate greater capital investment to address these impacts. The current economy-wide target approach has failed to produce sufficient emission reductions. While some economic sectors have done an admirable job of slashing emissions, some of the key emission producing sectors have failed to achieve sustainable emission reductions. What constitutes a sector would need to be negotiated and would

ideally target the largest actors in a given industry. Sector wide goals may “help provide a more level regulatory playing field in areas where cross-border trade and investment is significant.”

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It makes both financial and compliance sense to pursue this co-regulation approach. International regulatory harmonization has the advantage of increasing the geographical reach of a regulatory goal while simultaneously reducing the engagement costs of both States and industries in the regulatory process. As Kal Raustiala has observed in his work on transgovernmental networks, harmonization is advantageous “[t]o the degree it renders regulatory landscapes similar and provides regularity and predictability across borders.”38 The industry sector negotiated goals would be measurable performance standards in contrast to management standards which only require changes in how something is processed or produced but do not necessarily lead to measurable improvements in environmental quality.

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Once the targets are set, in the second phase of implementing a co-regulatory approach, representatives from both industry sectors and individual firms within the sector would be invited to enter into environmental covenants with States to achieve negotiated international regulatory goals. These covenants would provide specific timelines for achieving the regulatory goals and contractual language for creating internationally binding commitments. The commitments would be covered by private international law like other international contracts. In return for becoming a member of an industry sector environmental covenant, individual companies would not be subject to domestic State regulation unless a State party enters a specific objection at the time the regulatory goals are adopted indicating that it intends to impose within its jurisdiction more stringent regulatory goals than the internationally negotiated goal.


39 Ralph Espach, Private Environmental Regimes in Developing Countries. 15, (2009).
developing individual company environmental plans to meet sector targets. For example, in order to meet targets, some private firms may invest in new and unexpected strategic business assets that achieve both the financial bottom-line and the environmental commitments of the firm. Collaborative governance provides for the potential for new solutions emerging “from face-to-face deliberative engagement among knowledgeable parties who would never otherwise share information or devise solutions together.”

The forum of an intergovernmental meeting would provide an optimal negotiating space for identifying environmentally protective and fair regulatory goals. In order to overcome historic shortcomings of existing international environmental negotiated agreements, international State representatives will need to focus on clearly-defined targets, defining regulatory sanctions for non-compliance, ensuring transparency, and providing safeguards to prevent distortions in competition. (OECD, 1999, 134-135)

Once an international regulatory target has been set which addresses the concerns inherent in sustainable development, the actual negotiation of an environmental covenant should be kept to a minimum number of participants in order to maximize the opportunity for finding a shared area of agreement. Just as the Dutch Industry Consultation Committee, the joint government and industry body that oversees implementation of environmental covenants in the Netherlands, has a restricted membership, it may be advantageous to keep any State-industry sector-civil society negotiation meetings restricted to six business representatives, two subnational representatives, four civil society representatives, and a limited number of State representatives. Ideally one of the work products that a minilateral meeting might produce would be model environmental contracts that individual firm members could use to structure their binding commitment. These model contracts could include neutral language from researchers regarding best available emission reduction technologies or production practices.

Environmental covenants with targeted goals provide real opportunities to foster innovation. As Michael Porter and Claas van der Linde argued in 1995, strict but flexible environmental regulations can stimulate innovation which in turn can lead to better environmental and business performance. Here the strict environmental regulations would consist of concrete industrywide reductions or phase out targets. The flexibility in the regulation would emerge in how individual firm commit to attaining clearly specified environmental goals. This should “create the maximum opportunity for innovation” thereby “leaving the approach to innovation to industry and not the standard-setting agency.”

a. Formal Participation of Non-State Interests

Co-regulation requires participation by non-state actors and trust between non-state and State actors. In order to succeed as a governance model, international co-regulation requires that non-state actors be treated largely commensurate to State actors.

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in terms of the negotiating process. In order to create the procedural conditions under which private firms may enter binding international environmental covenants, State actors must create a climate of reliability and trust. This means that States must adopt the perspective that inviting non-state actors to participate actively at the negotiating table is a necessary step to ensuring that those whose daily decisions have the most impact on the environment are a necessary part of the public problem solving process. For some State representatives involved in groups such as the Asia-Pacific Partnership on Clean Development and Climate which has public-private sector task forces, it will be a natural progression to see industry members as negotiating partners at intergovernmental meetings designed to create and implement climate policy. For other State representatives, co-regulation as a new form of collaborative problem-solving may require a radical re-imagination of international governance.

What is important in promoting this procedural model for problem-solving is that parties have opportunities to regularly interact and build shared stakeholder relationships. Even where relations begin as adversarial relationships, they may eventually evolve as ongoing diplomacy efforts have demonstrate into more cooperative relationships. Where there is continued engagement structured by certain formal rules between parties rather than the transitory engagements of some public-private partnerships, there is likely to be more genuine efforts on the parts of parties to resolve their difference and find common ground for action. When a State consistently objects to other State’s proposals for problem-solving approaches, it alienates others and finds it harder to realize important parts of its agenda. The same would be true for non-State parties who isolate themselves as non-participants in the process.

Since it would be logistically impossible and pragmatically unwise to include every relevant non-state stakeholder at the negotiating table, I propose assigning six formal non-state negotiating seats to membership based organizations that represent general international business interests, industry sector specific interests, sub-national interests (provinces, cities), environmental interests, and other public interests. The representatives of these organizations would be non-voting participants in the intergovernmental meetings entitled to submit formal proposals to be distributed through the Secretariat, to attend all meetings including inter-sessional workshops, and to participate in industry sector negotiations over environmental covenants. Presently, the participation of non-state actors is restricted within subsidiary meetings where policymaking takes place. 42

This paper proposes creating six formal seats-three for business organizations and three for public organizations: one for a sub-national organization, and two for civil society organizations. The International Chamber of Commerce (ICC) would be an obvious candidate for a formal business interest seat at the intergovernmental negotiating table. The organization has been in existence since 1919 and, in fact, enjoyed full voting rights before the League of Nations43 where it participated in negotiating conventions on

industrial property, scientific property, and bills of exchange. While it has not been permitted the same voting and negotiating rights under the UN framework, it has been an active participant at contemporary intergovernmental meetings. It was present at the first United Nations Conference on Human Environment where it presented a short intervention. Its presence has been ubiquitous at recent meetings including the 1992 Earth Summit in Rio and the 2002 World Summit on Sustainable Development.

Presently, the ICC has general consultative status which means that it can submit oral and written interventions during international meetings and can attend meetings open to the public. As a body representing many of the largest transnational companies, the ICC is an ideal membership candidate to formally participate in negotiating proactive co-regulation covenants that address operating concerns of its members such as Chevron, Coca-Cola, Canon, DuPont, Dow Chemicals, Exxon Mobil, General Electric, Monsanto, Shell, and Total.

In terms of international environmental covenants, the ICC could function as an international equivalent of the Dutch nationwide trade and industry associations. Just as the Dutch business groups negotiate in advance their preferred language for the covenants and the strategies that they intend to pursue, the ICC formal position on various issues would be pre-negotiated at ICC plenaries. Internal negotiations might be analogous to negotiations between members States of the European Union negotiations. On contentious issues, member states of the EU take positions that may clash with other member states. After much internal debate and dispute resolution, the European Union speaks with one voice at intergovernmental meetings. Where members have failed to reach a common position, the EU may take a weak stance. In other instances, where member states have convinced other states to assume a different position than their opening position, the EU will speak with authority on newly emerging regional norms. Similar new norms could develop in the context of member only ICC meetings and result in unexpected synergies among major industry players.

Another possible candidate for a business interest seat at intergovernmental meetings is the World Business Council for Sustainable Development (WBCSD). In contrast to the ICC which promotes and protects its members international commercial interests, the WBCSD is focused on fostering environmentally desirable business practices. The organization started with 50 senior CEOs of major companies who spoke on their own behalf and not just on behalf of the companies that they represent. The organization now has CEOs from 160 of the world’s largest companies and has formed 35 international business councils. WBCSD coordinates with think tanks such as the International Institute for Environment and Development and intergovernmental organization such as the World Bank and UNDP on developing pro-environment business strategies.

A final permanent candidate for representative engagement in intergovernmental meetings and negotiations would be the International Organization for Standards as the institution responsible for one of the most widely adopted voluntary codes of environmental management. ISO standards are negotiated primarily by industry actors through national standard organizations and then subsequently incorporated favorably

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into intergovernmental policies. The ISO would bring not just a commercial perspective but also a technological perspective to the table in terms of explaining what it might take to make long-term changes in existing industrial systems to achieve particular negotiated performance standards.

In addition to participation from the ICC and WBCSD, some environmental covenant negotiations may produce more effective results if industry umbrella organizations representing majority interests in particular sectors are invited for specific industry relevant negotiations as formal parties. For example, for meetings specifically regarding climate change, it may be valuable to invite key private firm interest groups representing major players in the international energy industry or organizations involved in transportation such as the International Association of Oil & Gas producers or International Association of Independent Tankers Organization. For the problems discussed in part one, broad sector-wide participation will be essential to achieving measurable progress towards environmental targets. Major industrial firms may in a public international setting with coverage from the global press be willing to make scheduled emission reduction commitments where there is a strong possibility that the international targets will become global standards and where individual firms activities receive some guarantee (perhaps through an Memorandum of Understanding) that they will not be domestically regulated once they have agreed to comply with the co-regulated terms of their individual firm covenant. Where key industry players accept internationally negotiated quantifiable targets, it becomes more likely that these same targets will then be adopted domestically just as standards set by the International Standard Organization have frequently become the basis for domestic rules and regulations.

A formal non-voting seat should be allocated for sub-nationals (provincial representatives or municipal representatives) so that they will be aware of commitments and action plans that business firms have made within their jurisdiction and be able to provide input in the negotiating process. Membership groups that might represent interests of sub-nationals include World Mayor’s Forum, International City/County Management Association, or the International Council on Local Environmental Initiatives. Transnational membership organizations that might represent and advocate for environmental and human rights interests include the International Conservation Union, Conservation International, International Institute for Sustainable Development, or World Resources Institute. Just as it may be appropriate to invite significant industry sectors to participate in certain negotiations with impact on their industry, it may also be appropriate to invite groups that are impacted proportionally more than other groups by a particular environmental problem to participate formally in negotiations. For example, in negotiations on climate change, it may be appropriate to have an umbrella organization representing communities from Small Island states propose targets and measures as part of the negotiation among States regarding environmental goal-setting.


46 Id. at 304.
2. Legitimacy and Transparency in Climate Governance

This paper’s proposal seeks to remedy an increasing democratic deficit in governance where public transnational policy decisions affecting disproportionately non-State actors remain under the exclusive aegis of States. The exclusive State-only club has not produced behavioral shifts since private firms assume that what is negotiated by States in international fora may or may not translate into domestic policy. Under the model proposed in this paper, private industry is offered through co-regulation in an international forum both regulatory certainty and regulatory flexibility. While sector wide performance targets are set by the public representatives, corporations and industry sectors have broad latitude on how to achieve the performance targets.

The formal participation of non-state actors creates the opportunity to enhance both the existing legitimacy of the intergovernmental process and the effectiveness of international policy. As Karin Buhmann suggests, “participation makes for legitimacy of norms in regulatory instruments, and the legitimacy makes for acceptance of resulting constraints.” Allocating seats for business and civil society organizations at the negotiating table desegregates the international policymaking club of States and opens the process up to new and potentially greater norm-generating dynamics. In the proposed co-regulation framework, firms have the opportunity to participate in a more meaningful international regime by becoming active stakeholders in the international process rather than weighty but marginalized voices.

The environmental covenant component of the proposal enhances the transparency of what firms are doing to meet publicly defined goals. Because the Kyoto Protocol relies on exclusively State based commitments, there is little opportunity for the public to understand what firms are doing to reduce emissions unless a State requires disclosure of emission reduction programs, has entered into an environmental covenant or agreement that sets targets (e.g. Netherlands and United Kingdom), or a firm chooses to share its internal emission reduction strategies. With public access to firm covenants, government regulators and civil society monitoring groups as well as other private firms will have access to what actions a firm has committed to undertake. The transparency of the covenants should contribute to higher levels of accountability on the part of sector participants. Industry sector participants may internally sanction or openly criticize a firm that refuses to participate in sector efforts. Where firms can distinguish themselves on the basis of their environmental commitments, they will do so to enhance their corporate reputation and potentially improve their market share.

The co-regulatory model presented here with non-state party formal participation, public goal-setting and private international contracts satisfy criteria that scholars have proposed as essential to a functioning climate change policy including a measurable environmental outcome, equity in application, participation and compliance.  

States negotiate in good faith for meaningful quantitative environmental targets and individual firms commit to making quantitative reductions, then there will be measurable environmental outcomes. Likewise, the co-regulatory method offers an equitable approach because it focuses on sector-wide reductions and adaptations rather than on the artificial division of Annex 1 versus non-Annex 1 membership. More so than other approach, co-regulation provides for meaningful participation from more stakeholders which should contribute to greater levels of compliance with negotiated agreements.

3. Challenges Inherent in Co-Regulation as a Climate Governance Strategy

While this proposal should remedy some of the deficiencies in legitimacy of the current intergovernmental system and address some of the self-regulation accountability concerns, the approach of environmental covenants has inherent challenges: biases in favor of certain types of corporation, lowest common denominator problem, administrative costs, and quasi-state corporations.

First, certain sized business entities are likely to dominate the membership groups that States might invite to formally participate in intergovernmental meetings. Most of these entities will be based in Northern countries. Transnational corporations from the North have some of the strongest economic interest in setting global emission standards and are more likely to be involved in business interest groups such as the ICC and WBCSD than small and medium sized domestic based companies. Better-resourced groups from the North may set the industry agenda without the input of business actors from the South who may or may not be able to comply with the sector standards because of financial constraints.

This North-South imbalance is an inevitable problem of attempting to create single shared targets for industry-wide sectors. In terms of the success of this proposal, States should seek participation by the largest emitters such as transnational companies who are more likely to have the capacity to create company-specific implementation plans. Large polluting national firms that do not participate in substantial cross border trade such as China’s largest coal producer Shenhua Energy will likely be reluctant to participate since they are not concerned with influencing international standards so much as they are concerned with influencing domestic policymaking. These industries would be regulated under the domestic legislations that States are expected to promulgate in response to the adoption of the international performance standards.

For the success of an international covenant, not all companies within a corporate sector need to participate in the covenant process for the environmental covenants to still be a success in terms of changing firm behavior. The key will be persuading the largest players in a sector to participate in hopes that their participation will create normative or possibly economic pressures on smaller industry players to adapt their corporate behavior.

A second limitation on the sector wide covenant approach is the high likelihood of disagreements among corporate actors within a sector. On key environmental implementation issues, there are likely to be differences of opinion. Where individual companies have already invested in certain strategies, they will be unlikely to concede to the environmental management choices of their competitors. What may result is that sectors who cannot reach consensus among its members to define best environmental practices will instead defer to a lowest common denominator solution. Sectors will only be
willing to commit to achieving easy environmental targets. The more difficult targets will remain subject to the fragmentation of domestic policymaking. While there is no singular solution to the problem of the lowest common denominator, this paper argues that meaningful non-State participation even at less than optimal levels will still create conditions of social reciprocity among State and non-State actors. These linkages may generate unexpected compromises among industry actors which can more rapidly achievement of environmental goals than the current State-centric system.

A third limitation to the covenant approach is the cost of administering the program. In the Netherlands, the government was committed to negotiating environmental covenants and allocated $70 million to cover negotiations with 600 companies representing 85-95% of the primary energy consumption within the State. 49 The number of global companies involved in ongoing negotiations would be obviously much higher if international co-regulation approach is adopted even if only the largest multinationals were approached to enter covenants. Secretariats may be able to better manage costs if they focus on negotiating a single covenant targeted at the largest sector contributing to a specifically defined collective problem (e.g. agriculture sector for methane reduction, chemical sector for HCFCs and oil, gas, and coal sectors for carbon dioxide reductions).

Finally, there will be problems with applying co-regulation approaches to fully owned government companies. These companies may or may not be subject to rigorous government environmental regulation in their home country or in the countries they currently operate. States are likely to resist imposing performance standards on these entities. This is an issue that would need to be addressed explicitly by both States and private actors especially for industries such as the oil production industry where many of the largest producers are nationalized oil companies. 50

**Conclusion**

International co-regulation is an underexplored regulatory strategy. States have relied too heavily on seeking national commitments rather than creating an ongoing dialogue with non-state transnational actors about what steps private actors will undertake to reduce their individual and sector emissions. Co-regulation provides an opportunity to strengthen climate governance by offering a more transparent and legitimate regulatory space for both public and private stakeholders to seek mutually acceptable environmental management solutions. Co-regulation ensures that State representatives publicly exercise their political responsibility to negotiate discrete environmental goals while still offering private firms some latitude in how they will contribute to climate change mitigation.

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49 OECD supra note 15, at 110.

50 See e.g. Petronas is Malaysia’s national petroleum corporation and one of the largest multinationals in the developing world with business interests in 31 countries. It is wholly owned by the government and controls the entire oil and gas industry in Malaysia. Most of the oil being produced today is produced by nationalized corporations including Saudi Arabian Oil Company, National Iranian Oil Company, Iraq National Oil Company, Kuwait National Oil Company, and Petroleos de Venezuela S.A.