EXPERIMENTING WITH INTERNATIONAL COLLABORATIVE GOVERNANCE FOR CLIMATE CHANGE MIGRATION BY PRIVATE ACTORS: SCALING UP DUTCH CO-REGULATION

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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 experimenting with scaling up Dutch environmental covenants as an international co-regulation strategy to improve both the legitimacy and accountability of international climate governance. This paper specifically proposes in the context of climate change mitigation implementing a co-regulatory approach through a combination of State-approved emission targets and binding individual firm environmental agreements.

TABLE OF CONTENTS

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I. INTRODUCTION

In June 2010 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, the Japan Times 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 make meaningful compromises because of a combination of ideological reasons and pressure from internal constituencies, there has been a lack of global enthusiasm for States to re-engage in future State to State negotiations. As a result, State to State negotiations continue in a desultory *ad hoc* fashion with United States negotiators waiting for clear signs of commitment from China and India while European negotiators lose patience with their North American counterparts.

Even though geographically specific consequence of continued climate change remain uncertain, the general trend is clear—we need to make systemic changes to avert future scenarios replete with unpredictable severe weather, depleted food stocks, and scarce freshwater. In order to maintain 500 ppm of carbon dioxide, the level at which scientists predict irreversible ecological shifts, 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 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, a good faith effort to translate the agreed upon tenets of international law into binding and precise domestic law, and where States have authority.

Governance for the environment, however, has undergone massive shifts in the past few decades so that authority to respond to environmental challenges has shifted from top-down approaches by public actors to lateral interventions by private actors. Private corporate actors, especially transnational corporation, play key roles in environmental "governance without government." [3]

Drawing on the disaggregated power of globalization, transnational governance continues to expand its reach beyond simply commercial matters. What corporations decide to do matters to more than simply corporate shareholders and commercial actors. New forms of governance are branching across the classical schism between public international law and private international law. Repeat international interaction between public and private actors is leading to new international leadership roles for private commercial actors as well as the adoption of new norms by States.[4]

Yet in spite of the changes in governance, States have made few formal changes in incorporating corporate actors into governmental negotiations as both decision-makers and implementers of international policy. While corporations regularly exercise their rights to be heard in environmental lawmaking as lobbying interests, States have rarely formally engaged private actors in negotiations over emissions.[5] This lack of a public relationship between corporations and states in the arena of global environmental governance may become problematic since private actors "do influence the negotiations between public actors" and "more importantly, they govern in some areas."[6]

This paper calls for experimentation with new governance mechanism that formally recognizes both the political, economic, and social authority of both States and non-State commercial actors. Most hybrid international governance efforts related to climate change have been largely informal efforts which have been difficult to measure progress because there have been an absence of targets. This paper proposes instead scaling up domestic environmental co-governance mechanisms providing for binding agreements between States and private interests to an intergovernmental level. The proposal is not meant to be a universal proposal but to be an option for public-private partnership between willing States and willing corporate actors. The paper concludes with a review of some of the challenges of creating an environmentally adequate international co-governance system in light of some of the major emitters being nationally owned sovereign entities.

For purposes of this paper, mitigation is defined narrowly as either an

immediate reduction or elimination of greenhouse gases within a short time frame. Short-term mitigation requires not just a change to new low carbon products but also a cessation of existing high carbon activities. While this paper acknowledges that introducing new energy sources such as renewable and planting new carbon sinks are part of a long-term greenhouse gas mitigation strategy, short-term immediate mitigation will be crucial if we are to achieve anywhere near a 50% global carbon dioxide emissions reduction within the next 50 years.[7] Within this paper, the term mitigation does not include long-term carbon offset programs, preservation of existing carbon sinks, or any geo-engineering effort to absorb carbon. While these latter programs may be part of a long-term mitigation strategy, they do not easily translate into easily measured reductions in atmospheric greenhouse gases.

II. Existing Public-Private Hybrid Governance for Climate Change Mitigation

There are an array of hybrid public-private partnerships that are being forged internationally to address climate change. Almost of these international efforts are directed at jumpstarting the green economy that will wean States and firms from fossil fuel dependency and provide a transition to a low-carbon future. Two examples include the majority of the projects under the Clean Development Mechanism and EV20. The Clean Development Mechanism provides a framework for public and private entities from an investor state to support sustainable development projects in exchange for credits towards meeting reduction commitments. Many projects credited under the Clean Development Mechanism may not be actually eliminating existing greenhouse gas intensive products and or fossil fuel practices in the recipient countries but are rather creating long-term low-carbon infrastructure. EV20 includes as corporate partners Smith Electric Vehicles, Johnson Controls, and Deutsche Bank and as governments partners subnationals such as New York State and Quebec Province. The purpose of the EV20 initiative is to creating better collaboration on financing and promoting infrastructure for one million additional electric cars within the next five years. Understandably from a commercial perspective, very few of the international public-private partnerships focus on short-term mitigation rather than long-term adaptation projects such as green economy shifting projects. Projects like CDM and EV20 present new untapped business opportunities. If the projects come to fruition, they will contribute to long-term mitigation efforts by creating new demands for low-carbon products and processes. Businesses regard short-term mitigation of emissions for existing processes and products as lost commercial opportunities as long as companies can continue to market and access inexpensive fossil fuels.

There are very few short-term mitigation projects and efforts that can be characterized as public and private hybrid international governance. Under the Clean Development Mechanism, of the 1038 projects that have received credits as of April 2011, there are only a handful of projects that eliminate greenhouse gases. Two projects for example received credits for converting sulphur hexafluoride, a greenhouse gas which persists for a long time in the atmosphere, into a non-greenhouse gas sulfur dioxide. Twenty-nine projects received credit for Nitrous Oxide abatement 81 projects for methane recapture or avoidance, 18 projects for avoidance of hydrofluorocarbons, 23 projects for energy efficiency and 36 projects for switching fuel. The majority of the thousand plus projects had no direct effect on mitigation of existing greenhouse gases but instead provided new low-carbon infrastructure maximizing resources such as agricultural and animal waste. While the CDM projects bring benefit to non-Annex I communities, it remains to be seen whether they will have contributed substantially to the need for existing emission reductions. Only a few of the companies involved as project participants such as BHP Billiton and Mitsubishi are among the largest multinational company. There is a noticeable absence of large energy, oil, and transport companies.

One large public-private mitigation initiative exists in the Global Methane Initiative which was conceived of at the 2002 World Summit on Sustainable Development as the Methane to Markets Partnership. Led primarily by States with the US EPA providing administrative and steering group support, the initiative focuses on opportunities in initiative member countries to capture methane and transform it into electricity. Industry members network with States through subcommittees on coal, oil and gas, agriculture, and landfills. States provide some guidance while project network members including industry, academia, financial institutions, state and local governments implement methane capture and use projects in States belong to the Initiative.

Some sectors such as the international reinsurance sector in cooperation with governments have called for greater emission reduction efforts, but there are few links in insurance products between existing levels of greenhouse gas emissions and premiums. The industry has instead focused on indirect efforts that may in the long-term absorb emissions and reduce the industry's exposure to risk. For example in Ethiopia, a local insurance company, reinsured by Swiss Re and supported by the government's cash-for-work program, has issued micro-insurance for farmers which is triggered by a rainfall index. While this project may reduce short-term individual poverty in case of a drought, it doesn't reduce

directly or systematically greenhouse gases. While called a mitigation project, it focuses not on short-term changes in fossil-fuel dependence but rather on addressing long-term trends by promoting regional tree-planting.

Most of the short-term, mitigation-specific projects that might loosely be characterized under a label of public-private hybrid governance have been focused at soliciting volunteer participation at the domestic level from specific sectors. Corporations have quickly adopted these programs for fear of more stringent government regulation in response to growing political and social pressures to do something about the climate issues. These self-regulation voluntary programs have been largely and regrettably unsuccessful in achieving meaningful levels of mitigation. Morgenstern, Pizer, and Shih evaluated the Climate Wise program, a voluntary program administered by the United States Environmental Protection Agency and focused on efforts by non-utilities to reduce greenhouse gases. Participants were expected to develop baseline emission estimate and commit to reducing emissions. Yet in retrospect, the program ceased to deliver on the transformative possibilities of self-regulation. When the program ceased operation in 2000, it had only made a very modest 3% reduction in emissions over the course of six years. There was no third-party auditing of emissions and no public disclosure of emissions. Hindsight suggests that a better model might have been a larger role for the government in the Climate Wise program than simply as a facilitator providing external publicity and exercising only weak threats of regulation.

Most of the continuing international climate governance mitigation efforts especially those being spearheaded by fossil-fuel dependent private sectors continue to favor a model of self-regulation and voluntary commitments. Private actors are setting the mitigation agenda for not just public-private ventures but also for future public discussions. For example, the oil industry recently released the Petroleum Industry Guidelines for Emission Reductions from Carbon Capture and Geological Storage providing that implementing carbon capture strategies would be considered an emission reduction by the oil sector. If they are to maintain their international authority as legitimate rule makers, State and intergovernmental organization leaders will needs to re-engage the private sector to ensure that the private sector by making particular types of targeted investments such as in carbon capture rather than renewable infrastructure does not artificially reduce the choices available to public governance actors. As States have reached an impasse with other States in terms of negotiating public international mitigation strategies, engagement with the private sector provides an alternative negotiating table for States

to seek mitigation through private international law means. One means of engaging the private sector in a transparent fashion that will enhance State legitimacy while leveling the competitive field for private actors within a sector is through co-regulation of the largest global emitters. Corporate actors are already pledging to reduce emissions. A central co-governance mechanism linked to ability to trade would induce more corporate actors including large emitters to engage in short-term emission mitigation. The following section describes one national model for co-regulation and proposes scaling up the model as a basis for global international regulation.

III. Scaling up Co-Regulation for Climate Change: Dutch Co-Regulation and the Energy Efficiency Benchmarking Covenant

There is increasing recognition by the largest global companies that they will need to engage in some action on climate change to protect their corporate interests. 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.[8] Most of this spending will likely be targeted at long-term transitioning into products and services for the green economy rather than on making short-term reductions that are needed to achieve mitigation. The unabated use of fossil fuels combined with the massive production of cement continues to contribute the lion share of emissions.[9]

The few public-private efforts described above to collaboratively mitigate corporate emissions all rely on voluntary self-regulation which encourages free-riding behavior by non-participants and early defection by parties that are unable to meet targets. So far no one has piloted a co-regulatory approach for governments and corporations to share regulatory rule-making and implementation responsibilities. As Karin Backstrand observes in her work on networked climate governance "no example of public-private partnerships in rule making can be identified in the climate governance arena."[10] Co-regulation is an underexplored option for improving rule-making and rule implementation in the context of climate governance. This section describes how co-regulation for environmental rule-making and implementation has operated within the Dutch legal system. The section that follows proposes using the Dutch co-regulation model to create an international co-regulation strategy for negotiators between States committed to reducing emissions and major greenhouse gas emitters.

Co-regulation is a model of regulatory interaction between public and

private actors, 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. Co-regulation as a broad concept encompasses voluntary environmental management agreements as well as negotiated rule-making. Co-regulatory approaches have been experimented with in the Netherlands, Denmark, Germany, United States, Canada, New Zealand, and Japan.[11] In this paper, the term co-regulation specifically refers to the Dutch practice of co-regulation, which is one of the most integrated public-private regulatory systems. Co-regulation is not an isolated regulatory strategy but coexists with State-based command and control regulation. In a State that offers co-regulation options, firms have an incentive for participating in a co-regulation approach since public government agencies will waive command and control regulations as long as firms are making progress towards achieving a specific environmental target. Co-regulation has additional 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 in the environmental field is the Dutch environmental covenant which has introduced a whole new form of effective hybrid governance. The genesis of co-regulation in the Netherlands was the 1980s. When the Christian Democrats and Liberals came into power in 1982, the parties emphasized streamlining regulations to order to improve environmental outcomes and reduce government inefficiency. Pieter Winsemius, the Minister for Housing, Spatial Planning, and the Environment, approached regulatory streamlining by promoting an environment-wide planning process which would cross the gaps between different ministries with environmental responsibilities.[12] Pushing for internalization of regulations, the government decided to consult with private stakeholders such as industry to work towards setting viable environmental targets.[13]

The process of co-regulation in the Netherlands is an iterative process.[14] State agencies give private economic associations the powers to enter into binding environmental covenants with the government. [15] Prior to beginning negotiations with economic associations or industry representatives, the government has already legislated non-negotiable national environmental performance targets including, for example, abatement targets for 200 substances.[16] Once these performance targets are set, the parties collaborate during a two-part negotiation on strategies for efficiently achieving environmental performance. During the first phase of negotiations, the regulated Party makes a declaration of intent that is not binding. In the second phase of

negotiations, the Parties enter a binding legal relationship based on individual firms developing Company Environmental Plans. State agencies review and comment upon the plans before the plans are released to the public. A joint government-industry "steering group" reviews the performance of the industry in making progress towards meeting its goals under the covenant.

What is unusual about the Dutch process in contrast to other public-private voluntary negotiated agreements is that while the covenants may be entered into voluntarily, once parties conclude a covenant, the covenants are legally binding.[17] 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 entered legally binding environmental covenants[18] with the government 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 of 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.[19]

In the 1990s the Ministry for Housing, Spatial Planning, and the Environment focused on addressing industry sector emission targets.[20] During the 1990s, the government concluded a number of emission reduction agreements including one with the chemical industry in 1993 and one with the oil and gas extraction industry in 1995. Environmental managers heralded the 1993 agreement with the chemical industry as a model agreement since it set specific emission targets for 1995, 2000, and 2010.[21]

Concerning specifically the reduction of greenhouse gas emissions, the Dutch government designed in 1999 a Benchmarking Covenant to promote energy efficiency across multiple industrial sectors in order to reduce immediate demands for fossil fuels. [22] The Benchmarking Covenant was a response to Netherland's obligation under the Kyoto Protocol to mitigate national emissions.[23] The Ministry of Housing, Spatial Planning and the Environment on behalf of the central government, provincial authorities, the VNO-NCW Confederation of Netherlands Industry and Employers and numerous sectoral organisations

including the chemical and the electricity production industries signed the Benchmarking Covenant.[24] The covenant functions as a civil law agreement. [25]In return for no additional national legislation being imposed on the participating companies and no "specific national energy tax" being levied, the companies agree in their production plants to become world leaders in energy efficiency by "complying with the best international energy efficiency standards."[26]Companies are expected to independently ratchet-up their compliance to become world energy efficiency leaders by 2012. The standards for leaders are based on a benchmark identified by third-party experts or best practice approach.[27] In setting benchmarks and best practices, experts are expected to look at the average energy efficiency of regions "outside the Netherlands that are comparable with the Netherlands in terms of size and number of processing plants", and to set an energy efficiency benchmark based on the performance of the top 10% most efficient production plants.[28] The energy efficiency benchmarks should be re-evaluated every 4 years.[29] Where a company fails to comply with its agreements under the Benchmark Covenant, Article 22 provides for sanctions. After conferring with parties that may be out of compliance, the Dutch government is expected to "make efforts to tighten the terms of the Company's current environmental licence in a unilateral action"[30]. Notably all commitments unless otherwise noted are "effort commitments" and not "result commitments."[31]

Some academics question whether the Dutch benchmarking covenants have been effective in improving energy usage because even where goals are clear and sanctions have been set since corporate actors have not made major changes in their business practices.[32] Others observe that there have been significant normative shifts with the benchmarking process and that some of the successes of the co-regulation process have included more ambitious targets than "business as usual", quantified objectives, clear staged goals, frequent reporting, independent verification of reporting, sanctions for non-compliance, and institutionalization of environmental cooperation through working groups. [33] While it remains to be seen whether the post 2012 review of the benchmarking covenant will yield the results expected by the government, the government has been sanguine about the impact of the covenant that includes participation by 84 per cent of industrial manufacturers comprising 94 per cent of the energy consumption by the industrial sector. [34]In a 2002 report, the government reported that they expect the Dutch industrial sector, as distinguished from the electricity producing sector, to reduce 4.6 million tons of carbon dioxide by 2012.[35]

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 general environmental problem solving. [36] Acknowledging that covenants are no "magic bullet" for super-wicked problems like climate change, covenants still have the potential to play an important role in international climate change governance by enhancing private participation in international climate governance and providing greater transparency in corporate decision-making related to emission reductions.

IV. International Co-regulation through Private Legal Agreements: Reimagining International Climate Negotiations to Achieve Greater 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. There has been a notable absence of collaborative regulations between States and private actors to achieve greenhouse gas mitigation within international fora. The Dutch environmental covenants present an interesting model for international corporate climate mitigation particularly for the largest transnational corporations. Corporate change has been slow in climate mitigation in part because certain groups of high-emitting corporations have actively resisted intergovernmental regulation while other corporations have passively waited to see what regulatory scheme may be implemented before changing corporate behaviors.

A co-regulatory approached modeled on the Dutch approach presents opportunities as well as limitations. The remainder of this paper will examine the international context for co-regulation, explain why scaling up a Dutch covenant model could be effective in international efforts to mitigate greenhouse gases, and why co-regulation meets international standards.

1. *The Context for International Co-regulation*

If co-regulation presents a better collaborative public private model than self-regulation as this paper argues, 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 an exclusive State-centric club to 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 and exercise "coercive power" in governance processes because they are able to set standards and enforce compliance with these standards. [37] 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 Organization

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.[38] In the cases of highly technical matters of regulation where both the government and industry 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. [39]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. [40]

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.[41] 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. [42] These ideas have received little political traction because there is no incentive for corporations to participate in agreements where duties for private actors were never originally contemplated.

Co-regulation as captured by the Dutch model presents an interesting alternative to engaging the private sector in transnational environmental governance. It gives a structure for articulating an environmental result-based framework. 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. [43]With the structured involvement of the business sector in a coregulatory process, the current "light, thin, top-down" approach to domestic environmental regulations pursued by many States could be reconfigured to developing more "heavy,

thick and bottom-up" international environmental regulations.[44]

In principle co-regulation is a pragmatic approach to a State-to-State governance system that has reached an impasse. Public-private environmental agreements with targeted goals provide real opportunities to foster innovation that has been especially absent at an international level of engagement in spite of the transnational aspects of greenhouse gases. Co-regulation can provide simultaneously strict but flexible approaches to environmental problem-solving. As Michael Porter and Claas van der Linde argued in 1995, environmental regulatory regimes that are simultaneously strict at one level but flexible at another can stimulate innovation which in turn can lead to better environmental and business performance. States would supply the strictness in an international co-regulatory scheme by negotiating specific performance targets. Firms would supply the flexibility by determining how they can best comply with the target or how they can transform industry practices to remain economically viable.[45] This should "create the maximum opportunity for innovation" thereby "leaving the approach to innovation to industry and not the standard-setting agency."[46]

2. *Scaling up the Dutch Covenant Model*

How might a co-regulation system work to address current governance deficits in addressing climate change? One promising approach is the Dutch Covenant system that has been successful in part because environmental regulation in the Netherlands was fractured across ministries and effective implementation required actions by a large variety of stakeholders. The same conditions apply in the international system. Environmental regulation to provide for climate change mitigation is fragmented across numerous domestic and regional governance systems and there are numerous players from States, transnational corporations, state-owned corporations, and individual citizens contributing to ever-increasing emissions.

The Dutch covenant system's success also relies on two institutional arrangements that may be unique configured within the Netherlands to bolster the social and political conducive to environmental covenant negotiation. First, the Netherlands has a strong organization of trade and industry associations with whom the government initially engages. Second, the Netherlands has a pre-existing environmental permit system that poses a credible regulatory threat for companies that do not agree to enter environmental covenants. At the international level, the States do not formally recognize trade and industry associations as anything more than observers. There are no environment specific global regulatory

requirements that the international leaders can invoke as threats.
Given the relative success of the Dutch Covenant model at least in terms of nearly universal participation of industry actors in some sectors, the ability of the government to maintain some oversight, and the potential for sizable emission cuts, one means of scaling up the Dutch Covenant would be to encourage a proliferation of the model among every other State that has signed the UN Framework Convention on Climate Change to "Formulate, implement, publish and regularly update national and, where appropriate, regional programs containing measures to mitigate climate change."[47] Assuming that States were willing to experiment with Dutch style covenant system, national standard-setting for emission targets would result in a dizzying array of targets given the common but differentiated responsibilities of States. While this would not necessarily generate the feared "race to the bottom", it could very well have the unintended effect of corporate migration for those corporations that are not place-dependent such as mining or oil companies. Unlike some of the Dutch companies participating in the current environmental covenants, there may be no national pride shared across a given sector in having a reputation as a global leader in energy efficiency or emission reductions.

For a truly transnational problem, a global regulatory target makes sense in terms of not imposing barriers on inter-firm competition while still preventing corporate entities from externalizing costs of emission. Uniformity provides for predictability. Transnational corporations frequently exceed national regulatory standards because they adhere to a uniform standard across its own transnational network regardless of the geographical setting of a particular corporate entity. Transnational standards for appropriate climate emissions can and should emerge to prevent climate mitigation activities from posing competitive transboundary disadvantages. Based on previous public-private efforts in collaborative governance, transnational standards already exist for food safety, nuclear safety, product manufacturing, and environmental management. New transnational guidance standards are emerging including for social responsibility.[48]

In the remainder of this subsection, I discuss one possible approach to developing collaborative governance through co-regulation based on target-setting for mitigation and negotiating State-private legal agreements to meet targets. Two additional ideas are presented to address the role of corporations and industry organizations as participants in formal international governance and the need for credible regulatory threats.

a. Phase One of Coregulation Negotiations- Target Setting

In the first phase, a plenary of State parties and formal non-state participants would meet to debate appropriate regulatory performance goals. The idea of intergovernmental target setting is not new. In 2000, State governments set the Millennium Development Goals which include explicit targets for humanitarian relief by 2015 such as reducing the percentage of individuals living on less than a dollar a day.[49] Likewise, in 2010, State governments set the Aichi Targets providing for slowing the rate of habitat loss by 50% by 2020, increasing the land area to be protected from 13 to 17% by 2020, and increasing the marine protected areas from 1% to 10% over the same period.[50] Both State and non-state participants would participate in the pre-target negotiations, but only State parties would vote either by consensus or majority on the adoption of quantitative environmental regulatory performance goals in order to advance the goals of international climate change mitigation.

In the context of climate change, performance goals might be set for permissible carbon intensiveness for an industry[51] or based on broad sector-wide cuts. The performance goals would be ideally targeted to specific sectors to focus attention on those corporate entities that have the greatest impact on emissions such as electricity generation, cement-production, transport and industrial manufacturing. The current economy-wide target approach has failed to produce sufficient emission reductions. Sector wide goals may "help provide a more level regulatory playing field in areas where cross-border trade and investment is significant." [52]

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 ."[53] 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. [54]

b. Phase Two of Coregulation Negotiations- Private Legal Agreements between States and Firms

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 legally environmental agreements with States to achieve negotiated international regulatory goals. Like the environmental efficiency agreements negotiated under the Dutch Benchmaking Covenant, any State-private firm legal agreement 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 with interpretation provided through arbitration. 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 performance targets than the internationally negotiated goal. As with the Dutch covenants, there would be a need for third-party verification of progress towards targets and regular firm reporting under the agreements.

In terms of seeking co-management solutions to transboundary problems, co-regulation provides an advantage over the current domestic regulatory approach. Co-regulation simultaneously provides a uniform standard for a sector coupled with flexibility at the firm level in achieving specific environmental targets. Instead of certain practices and technologies being mandated, firms can decide what practices and technologies will best ensure that the firm achieves its environmental commitments within the context of the sector agreement. Since there is no one-size-fits-all approach for industries to meet environmental targets, businesses may find business opportunities through the process of developing individual company environmental plans to meet sector targets. 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." [55]

c. Jumpstarting Public-Private Agreements

Since it would be logistically impossible and pragmatically unwise to include every relevant non-state stakeholder at the negotiating table, there is a need for streamlining actor participation. As noted above, at the international level there is no formal recognition of industry bodies except as non-governmental observers. This paper proposes that three organizations be formally authorized to participate as non-voting participants in any target-setting intergovernmental meeting. The International Chamber of Commerce (ICC), World Business Council on Sustainable Development (WBCSD), and the International Standards

Organization would each be assigned a formal non-voting negotiating seat. These organizations would be entitled to submit formal proposals to be distributed through the Secretariat, to attend all meetings including inter-sessional workshops, and to participate in phase two negotiations over State-firm environmental agreements. Presently, the participation of non-state actors is restricted to observing subsidiary meetings where policymaking takes place. [56]

While none of the proposed organizations are representative of the diversity of global business interests, all of these organizations have had successful long histories in representing corporate interests. 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 Nations[57] where it participated in negotiating conventions on industrial property, scientific property, and bills of exchange.[58] 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 advocate for the interest 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 agreement, 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.

Another possible candidate for an industry interest seat at intergovernmental meetings is the 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 regularly 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 some of the most widely adopted standards for product specifications and environmental management. ISO standards are negotiated primarily by industry actors through national standard organizations and then subsequently incorporated into intergovernmental policies such as the World Trade Organization agreements on Sanitary and Phytosanitary measures. [59]The ISO would bring not just a commercial perspective but also a technical perspective for what it might take to make long-term systemic changes in existing industrial systems to achieve particular negotiated performance standards.

Depending on the type of target being set, it would be appropriate to seek participation of key private firm interest groups representing major players in the international energy industry such as the International Association of Oil & Gas producers or organizations involved in transportation such as the International Association of Independent Tankers Organization. The success of any international co-regulatory experience would depend on broad sector-wide participation.

Why would ICC, WCSBD, ISO, or industry interest groups participate where they have been hesitant to engage previously in intergovernmental processes? There are a number of reasons for intergovernmental engagement including normative shifts in perceptions about climate change and advancement in new technologies. Corporations may engage today in a co-regulatory experiment because of internal shifts in corporate decision-making where company leadership perceives the need to invest in climate solutions out of their own long-term self-interest. The potential for rising sea levels impact coastal refineries and port infrastructures. Corporate sectors may also be more willing to engage today in a co-regulatory governance experiment because alternatives to "business as usual" are more readily available for adoption. In between the era of denying climate change and tentatively accepting climate change, innovation has happened in everything from ship design[60] to material production.[61]

There are also long-term institutional advantages to being an early adopter of greenhouse gas reducing technologies. Firms that demonstrate commercial viability of alternative technologies may gain a competitive advantage in future domestic and international standard setting or products and processes. If the adopters of new technologies are key industry players, it becomes even more likely that these same targets will ultimately be adopted domestically just as standards set by the International Standard Organization have frequently become the basis for numerous domestic rules and regulations.[62]

d. Incentivizing Participation

The success of public-private environmental agreements in the Netherlands is predicated on the existence of a credible regulatory threat. Corporations that opt out of voluntary agreements are still subject to regulation. Where a firm believes that an external regulatory framework threatens their interests by being administratively burdensome or interfering with core corporate interests, there is a clear incentive to agree to generalized targets and then select appropriate means to achieve the target.

In an analysis of negotiated environmental agreements, researchers found that in addition to having an environment conducive to negotiation and a body that was representative of members' interests, successful negotiated environmental agreements also included "the stick behind the door." Within the Dutch Benchmarking covenant, "the stick behind the door" included subjecting industries to specific yet to be determined energy taxes and future energy efficiency legislation. Failure for Dutch corporations to appear cooperative would have consequences. Parliamentarians responding to the public could reference the lack of a critical mass of industry participation as a reason for stricter regulation. Firms may lose autonomy over their decision-making.

There is no global legislature or global permitting system that would operate as a "stick" for international co-regulation. The one international system that matters to all multinational firms and to many small and medium sized firms is global trade. Firms within a carbon intensive industry sector that opt out of participating in a co-regulation experiment might be restrained from trading with States that have agreed to targets. This is a potent behind the door stick.

As proposed, this "stick" may seem to violate tenets of most-favored nation treatment under WTO law. Yet, there is something substantively different. A State that refuses products or services from a

particular set of large emitting companies who have refused to participate in State-firm environmental agreements may do so on the basis of its commitments under an emission target negotiation, the UNFCCC or the Kyoto Protocol. There is precedent for this approach with State responses to private actors engaged in unregulated fishing. Under regional fishing management agreements in order to promote conservation efforts and regulated fishing, Port States can deny port entry to boats suspected of illegal, underreported and unregulated fishing. They can also deny landing and transshipment of fish products.[63]

The same logic applies here. States who have agreed to general emission targets can exercise the option to restrict trade with corporations that have not independently demonstrated that they are meeting sector-wide targets or participating in a co-regulation scheme. Assuming that the Dutch would support targets for a global co-regulatory scheme to reduce carbon, the Netherlands would be able to unilaterally restrict trade in products from unregulated U.S. based concrete companies. As with fish commodities, there are weaknesses in this approach. Illegal fish become mixed with legal fish. Fossil fuels are equally fungible. Yet having access to trade as a "stick" could result in subtle ripple effects through economies. Transport companies that fail to commit to meeting targets may find ports closed to their services which should result in competitive advantages for transport companies that do agree to meet targets. Transport companies seeking to lower their emissions may put commercial pressure on oil and gas companies to innovate and develop less carbon intensive products.

3. *Legitimacy and Transparency in Climate Governance*

This paper's proposal seeks to remedy an increasing democratic deficit in international governance where public transnational policy decisions that rely on cooperation from 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. With the exception of a few private firms such as those participating in the World Wildlife Fund's Climate Saver program, firm await regulatory direction before acting.

Co-regulation provides an impetus for firm action. Under the model proposed in this paper, private industry is offered both strict regulatory certainty and regulatory flexibility. While the public representatives set sector wide performance targets, corporations and industry sectors have broad latitude on how to achieve the performance targets. The formal participation of industry actors in negotiating agreements 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."[64] Allocating formal seats for business organizations at the intergovernmental 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 largely silent participants watching to see the outcome of negotiations.

The environmental agreement 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 or a firm has entered into an environmental covenant requiring public disclosure (e.g. Netherlands and United Kingdom). When firms publicly disclose their efforts, government regulators, civil society monitoring groups and other private firms understand what a firm is doing to address emissions. The transparency of the covenants should contribute to higher levels of accountability on the part of sector participants. Government regulators may be able to intervene earlier and assist corporate institutions with environmental management challenges. Civil society groups will be able to alert the public both to corporate leaders and corporate laggards. Private firm participants may be able to use public information to internally sanction or openly criticize other firms that fail to participate effectively in sector efforts. Where firms can distinguish themselves on the basis of their environmental commitments, they may 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. [65]Where 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.

4. *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, an international proposal for co-regulation has certain inherent challenges including 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. [66]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. [67]

V. Conclusion

Co-regulation of corporations alone will not address all responsible actors. Industries are only one part, albeit a large part, of the emission reduction puzzle. States with their large operating budgets and individuals (e.g. farmer cutting rainforest in Brazil) are also notable carbon contributors. Yet international co-regulation based on scaling up the success in the Dutch covenant model is an underexplored international 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 large emitters are willing to undertake to reduce their firm and sector emissions. Co-regulation provides an opportunity to get beyond the current State to State impasse by instead offering a more transparent and legitimate regulatory space for both public and private stakeholders to seek mutually possible environmental management solutions.

Co-regulation is proposed as a method. Whether it will deliver adequate mitigation on an international level or even on a national level remains to be seen. But at least, it should be considered as a legal option to shift the existing status quo where some companies innovate and many wait for direction on how to innovate. Franklin D. Roosevelt in a speech at Ogelthorpe University in 1932 urged students to "not confuse objectives with methods...The country needs and .... demands bold, persistent experimentation. It is common sense to take a method and try it: If it fails, admit it frankly and try another."[68]

The UNFCCC has declared a global objective that includes mitigating emissions. As this paper argues, co-regulation may be a method that leads both public and private actors a more pragmatic cooperation. Even if co-regulation is only a partial solution to mitigation of emissions, it will be something. Roosevelt's sentiments in his 1932 speech continue to remain true in this time of super-wicked problems, "But above all, try something." [69]

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