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Recommended Citation

Tully, Stephen. "Commercial Contributions to the Climate Change Regime: Who's Regulating Whom?" *Sustainable Development Law & Policy*, Spring 2005, 14-27, 76-79.

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COMMERCIAL CONTRIBUTIONS TO THE CLIMATE CHANGE REGIME: WHO'S REGULATING WHOM?

By Stephen Tully*¹

INTRODUCTION

One corporate response to climate change is engaging directly or indirectly with the intergovernmental regime. Of the some six thousand registered participants attending the tenth Conference of the Parties ("COP") of the U.N. Framework Convention on Climate Change ("UNFCCC") in Buenos Aires during 2004, over 560 individuals represented industry including 123 delegates accredited to the International Chamber of Commerce ("ICC"). This article considers the manner and extent to which corporations initiate or prevent regulatory change at the international level through the procedural lens of their participatory entitlements at a COP. Part One reviews the applicable procedural rules governing access, attendance, and terms of corporate participation. It also traces how the modalities for corporate participation have evolved since 1992 in tandem with mutating corporate strategies. Part Two assesses the degree of regulatory change initiated by corporations in substantive and procedural terms and characterizes the nature of their contribution against different regulatory models. Part Three identifies several reasons supporting the conclusion that engagement with intergovernmental negotiations as a strategic business opportunity can prove to be impeded and ultimately unconstructive in the context of climate change.

PART ONE: THE COMMERCIAL STRATEGY OF PARTICIPATING IN REGULATORY DESIGN

Corporate responses to environmental regulation oscillate between reactive and obstructionist strategies to proactive and constructive approaches.² This observation is also true in the context of climate change.³ Companies seize commercial opportunities, manage risk, minimize transaction costs, develop environmentally-friendly products, compete against rivals, and anticipate (or seek to influence) likely market developments.⁴ More specifically, management responses to rules that are ambiguous, contradictory, and subject to rapid change range between competition, avoidance, accommodation, collaboration, and compromise.⁵ The degree of corporate assertiveness depends on what is at stake (assessable against individual corporate strategy, financial condition, or perception of urgency) and relative leverage power (enhanced by forming coalitions with like-minded protagonists, becoming indispensable, or threatening withdrawal).

Non-market strategies at the national level include participating in regulatory design. Corporate officers are urged to encourage the emergence of regulatory climates that are stable, predictable, and conducive to investment.⁶ Political entrepre-

neurialism includes serving on government panels, providing information, targeting receptive audiences, and molding commercial objectives around pre-existing political agendas. Access to government officials enables agenda-setting and publicizing an issue to increase the likelihood of inclusion in regulatory development. Interestingly, large firms exploit their well-developed corporate image to build political capital for deployment elsewhere, whereas more vulnerable firms pursue business objectives from their new-found political legitimacy.⁷

In the cross-border context the strategic behavior of multinational corporations also includes regulatory engagement. This is unsurprising since multilateral environmental agreements are increasingly defining the scope of corporate liability.⁸ Furthermore, private sector participation in the climate change context is expressly contemplated by each of the flexibility mechanisms of the Kyoto Protocol: international emissions trading between Annex 1 Parties (developed States) under Article 17; investment in projects within Annex 1 Parties (joint implementation) under Articles 3, 4, and 6; and investments by Annex 1 Parties within non-Annex 1 Parties (developing States) through the clean development mechanism ("CDMs") of Article 12.⁹ It has been observed that corporate political practices do not replicate those ordinarily utilized within the home State but respond to the immediate political environment.¹⁰ The manner and visibility of corporate political activity will therefore adapt to the particular institutional characteristics of intergovernmental fora. However, the proposition that corporations initiate intergovernmental regulatory development presupposes that they enjoy favorable terms of access and inclusion. A review of the modalities for observer participation at COPs suggests only limited opportunities to formally contribute.

THE MODALITIES FOR CORPORATE PARTICIPATION IN THE UNFCCC PROCESS

It is axiomatic that only heads of government, diplomats, and other accredited representatives may express the formal consent of States to be bound to conventional instruments.¹¹ This does not preclude non-State actors from participating in COPs as observers. Observers are "willing to provide meaningful contributions to the climate change process and to enhance the engagement by civil society in the pursuit of sustainable development."¹² The formal arrangements for observer participation involve a prior accreditation process and the modalities for participating at the COP itself.

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The Accreditation Process

Article 7(6) of the UNFCCC contemplates national or international non-governmental bodies or agencies “qualified in matters covered by the Convention” being represented at COPs as observers unless one-third of States Parties object.¹³ Observers must be relevantly competent or broadly representative of a group interested in the topic of climate change. UNFCCC accreditation is a continuous process with 834 non-governmental organizations (“NGOs”) admitted as observers to date.¹⁴ Those already in consultative status with the United Nations (“U.N.”) are automatically accredited without further screening. Although the UNFCCC secretariat initially evaluates applications, admission is without prejudice to subsequent COP decisions. Applicants provide official documentation describing the scope of their mandate, governing structure, evidence of non-profit (tax exempt) status, activities demonstrating their competence, affiliation details, funding sources, publications, and designated contact points.

The non-profit criterion is partly irrelevant since a legitimate purpose of politically-organized business is to defend and advance the interests of enterprises they represent. For example, the International Climate Change Partnership represents chemical companies, the American Petroleum Institute represents U.S. oil companies, and the World Energy Council represents energy and utility interests. Although participating through politically-organized business groups usefully distances corporations from political negotiations, it also poses several disadvantages (considered further below). Nonetheless, the Subsidiary Body for Implementation (“SBI”) concluded that “the current arrangements for the accreditation of NGOs were satisfactory, and that no change in the accreditation procedures was required.”¹⁵

Formal Modalities for Observer Participation

Observer participation at a COP is circumscribed by a primary enabling provision located within the UNFCCC text, secondary rules of procedure, and relevant governing body decisions. Article 7(2)(1) of the UNFCCC provides that COPs shall “seek and utilize, where appropriate, the services and co-operation of, and information provided by, competent...non-governmental bodies.” Observer participation is more specifically proscribed by procedural rules. The UNFCCC envisages that the COP will adopt these rules at its first session.¹⁶ However, COP 1 was unable to do so and provisional rules have since been applied.¹⁷

The procedural rules contemplate two modalities for formal participation by observers: oral interventions and written sub-

missions. Rule 7(2) of the procedural rules provides that “observers may, upon invitation of the President, participate without the right to vote in the proceedings of any session in matters of direct concern to the body or agency they represent, unless at least one third of the Parties present at the session object.” Observers do not enjoy voting rights nor have they called for them, particularly if this entails responsibility to implement decisions taken.

For the orderly conduct of proceedings, the prior permission of the COP President is required under Rule 32 before individuals may speak. Although priority for oral interventions is accorded to States there is no obligation to balance statements from other speakers. Observers address the COP for three minutes at the conclusion of the final plenary session. The ICC typically appoints a representative from the local chamber of commerce to act as spokesperson. Although this opportunity is jealously safeguarded by observers, such interventions are

neither useful nor effective since decisions have already been made and there is no opportunity for meaningful dialogue. Only as recently as COP 9 were observers permitted to make interventions on substantive agenda items during the plenary session.

Under Rule 30 COP meetings are ordinarily public, and although meetings of the two UNFCCC subsidiary bodies (the Subsidiary Body for Scientific and Technological Advice, “SBSTA,” and the SBI) are designated as private, this does not preclude participation by duly accredited observers. However, attendance can be unproductive and uninformative given diplomatic posturing and limited time. Meetings closed to observers include press briefings given by national delegations and more importantly meetings of intergovernmental groups other than convention bodies. UNFCCC expert group meetings are ordinarily closed to observers and although there has not been any demand for informal contact between them, expert groups may draw upon additional expertise on an ad hoc basis as deemed necessary.

Observers may also produce written statements in the nature of reports and position or issue papers in U.N. languages at their own expense. Although their content is not screened, documents may only be displayed at designated locations, cannot promote products or services, and samples must be deposited with the secretariat. Under Rule 36 formal proposals are introduced in writing by State Parties and distributed to delegations through the secretariat. Observer submissions when solicited by governments are reproduced through the internet and do not constitute official U.N. documents. By this route

Infusing commercial perspectives can facilitate or impede orderly regime development by extenuating the common or disparate economic interests of States.

observers can propose textual suggestions on individual agenda items or draft decisions.¹⁸

Although receiving objective information is a costless means for governments to increase their knowledge base provided the volume is manageable, it is also a significant lobbying technique. Just as there is no right or expectation for observers to produce written submissions, so too is there no attendant obligation upon governments to consider their content. Influence thus depends upon a credible reputation for producing balanced proposals possessing intrinsic merit above author self-interest. Observers undermine their stature by presenting unreliable data, making exaggerated claims, or misjudging public opinion.

Observer practices are also regularized by governing body decisions. The COP decided that observers may also attend open-ended (that is, open to all States) contact group meetings unless one third of State Parties present object.¹⁹ This is with the understanding that proceedings can be closed at any time. Such a decision marks a departure from orthodox U.N. practice insofar as informal meetings are ordinarily closed to accredited observers. The COP also decided that observers enjoy a right of access to all official documentation unless the relevant body determines otherwise.²⁰ This is consistent with the SBI instructing “the secretariat to proceed with...activities, within the available resources...[for]... improving the availability of documentation and information to NGOs.”²¹

Managing Observer Participation in Practice

Finally, the modalities for observer participation at a COP evolve by accretion based upon experimentation and prior experience. This includes the practice of States, the UNFCCC secretariat, and observers.

State Parties under Rule 17 are represented by heads of delegation “and such other accredited representatives, alternate representatives and advisers as it may require.” Observers may be appointed to national delegations to act in a general advisory capacity or to negotiate specific points. States enjoy the widest possible freedom of appointment, particularly where specialized technical matters require enlisting experts possessing the necessary training and experience.²² European practice permits corporate officers to act as experts or consultants and exceptionally as head of delegation.²³ Comparable U.S. guidelines envisage that private sector representatives may not speak on behalf of the government but may explain factual details where competent to do so for promoting national objectives.²⁴ Industry assistance may be offered to governments to prepare oral interventions delivered during plenary sessions or intergovernmental debates. For example, the Global Climate Coalition (“GCC”) advised the Saudi Arabian, Kuwaiti, and Russian governments, purportedly to obstruct political deliberations and weaken the language of scientific reports.²⁵

The UNFCCC secretariat has formulated guidelines concerning observer participation at COPs “reflecting current practice” and “in line with those governing NGO participation at sessions of other bodies in the UN system.”²⁶ Contemporary practices include briefing observers, conducting information sessions outlining substantive negotiation issues, allocating

office space, and arranging meetings with senior delegates.²⁷ To facilitate COP proceedings the secretariat also commissions work or expertise, exchanges information, and identifies suitable observer representatives to participate in panel discussions. Secretariat practices are fluid and incremental: once privileges are secured by observers they must be safeguarded since they can be withdrawn without, notice particularly if abused.

The UNFCCC secretariat employs a constituency system that differentiates between research and independent NGOs (“RINGOs”), business and industry NGOs (“BINGOs”), environmental NGOs (“ENGOs”), local NGOs, indigenous peoples organizations (“IPOs”), local government and municipal authorities (“LGMAs”), islanders, trade unions, and faith-based groups. Participation in constituency groups is not official or binding and does not preclude direct secretariat communication. Designated focal points (for example, the ICC for BINGOs) act as conduits to ensure effective observer participation by providing logistical support, identifying attendance demand, and recruiting qualified individuals. Although the constituency channel usefully structures observer participation, it inaccurately pools distinctive groups, can ignore differences of opinion, and obfuscates overlapping membership.

The terms of observer participation, as formally defined by the procedural rules with the accretions of State and secretariat practices, provide an important platform legitimating attendance and activity at COPs. However, several informal techniques do not depend upon these foundations for their effectiveness. Observer techniques also include lobbying, submitting proposals, organizing side-events, and raising issues for resolution.²⁸ Additional modalities for observer participation include participating in workshops or panel discussions, conducting constituency meetings, and information gathering or dissemination.

For example, roundtables are an informal means for identifying the capacities, mandate, expectations, experiences, and constraints of others. Although participation occurs on conditions approximating equality, meaningful dialogue need not eventuate, since interventions are limited by time and depend upon the Chairperson’s discretion. Furthermore, senior corporate executives assess attendance against other business demands notwithstanding their considerable economic credentials and readiness, or otherwise to make commitments. The UNFCCC secretariat has thus been pressing governments towards more innovative formats which produce open, frank, and spontaneous discussion.

The current practice for attendance and participation at inter-sessional workshops and limited-membership bodies is by invitation only and may be closed to observers when confidential matters are discussed.²⁹ Constituency groups employ their own selection procedures to identify representatives and bear their own expenses. The challenge for governments is to promote transparency and observer participation (balanced geographically and by mandate) while safeguarding operational efficiency and effectiveness (as determined by purpose, interest, and available resources). For example, the U.S. objected to one observer allocation by the UNFCCC secretariat which “clearly

avored” representatives of companies that were members of the ICC, “an umbrella organi[z]ation that is not fully representative of our private sector.”³⁰ SBI guidance instructs chairpersons to tailor the number of observers to the nature of the workshop and for the secretariat to improve the timeliness of distributing notifications and non-confidential documents, including through web-based publications.³¹

To summarize, the formal conditions for observer admission to and participation at COPs critically depend upon State consent.³² Observers only possess a legitimate expectation in most respects and do not possess many rights that are opposable against governments.³³ That said, under Rule 8 duly-accredited observers are entitled to receive notification of forthcoming COPs and proposed agenda items.³⁴ However, this does not guarantee admission and negotiations strictly remain a matter for States Parties. This is evidenced by the procedural rules, governing or subsidiary body decisions, and the role of discretion exercised by individual Chairpersons. Contemporary practices concerning observer participation within the UNFCCC process are a leading illustration of U.N.-civil society engagement and as such are subject to ongoing refinement. COPs typically invite observers to play an active role in deliberations, recognize the desirability of information exchange, and indicate a willingness to consider submissions. How then do corporations seek to engage with intergovernmental negotiators on climate change?

CORPORATE STRATEGIES FOR ENGAGEMENT

Corporate strategies for engaging with the UNFCCC spring initially from intergovernmental negotiations for protecting the ozone layer if not earlier. This is unsurprising given the presence of repeat players such as the Alliance for a Responsible Atmospheric Policy.³⁵ A brief overview of the historiography of the Vienna Convention and Montreal Protocol ostensibly demonstrates “the crucial role played by industry in developing and implementing international environmental policy.”³⁶

Corporate Coalitions (and Fragmenting Industry Opinion)

Similarly observed in the context of climate change, producers initially sought to refute existing scientific opinion through extensive lobbying and media campaigns. This tactic was abandoned following intergovernmental scientific assessments which concluded that human activity contributed to ozone layer depletion.³⁷ Indeed, one U.K. firm had been officially reprimanded for employing discredited language.³⁸ The European chemical industry’s attempts to block international regulation were abandoned with the adoption of the Montreal Protocol.³⁹ European governments also initially had espoused industry opinion concerning scientific uncertainty, non-viable product substitution, and lower living standards,⁴⁰ an interesting contrast to their leadership aspirations in the climate change context.

In a similar fashion the GCC financed advertising campaigns, commissioned reports and recruited scientists, think tanks, and public relations firms. In its view, measures to curb

greenhouse gas emissions “are premature and are not justified by the state of scientific knowledge or the economic risks they create.”⁴¹ This strategy emphasized the undesirable opportunity costs associated with mitigation or adaptation and highlighted disparities between States. The GCC predicted increased energy costs, unemployment, and declining economic growth.⁴² More recently it points to the lack of universal participation by States as limiting the environmental effectiveness of the UNFCCC.⁴³

These strategies were not universally supported by industry. Indeed, one may speculate whether fragmenting industry opinion prompted the adoption of the Kyoto Protocol. The U.S. Council for International Business had urged the U.S. government to consult with it prior to ratification.⁴⁴ A \$13 million media campaign sought to bolster North American opposition.⁴⁵ However, the failure of several members of the U.S. Business Roundtable to secure a more moderate advertising text underscored divisions within industry. Although the U.S. Business Roundtable subsequently endorsed the U.S. government’s decision not to ratify, the ICC envisaged continuing business participation, particularly by European firms.⁴⁶ In fact, the ICC was represented at Kyoto by a one-hundred-member delegation.⁴⁷

So too will the GCC “continue offering assistance to international policymakers.”⁴⁸ However, its declining credibility as the singular voice of industry was marked by the withdrawal of several prominent members between 1997 and 2000. The newly-established Business Environmental Leadership Council of the Pew Center on Global Climate Change became an alternative vehicle for presenting commercial perspectives. It also permitted a volte-face on the emerging scientific consensus and enabled its members to reposition themselves as offering constructive solutions to climate change questions. The latter is consistent with business views that sustainable development offers commercial opportunities.⁴⁹

Furthermore, the critical participatory role occupied by corporations in the sustainable development context is sought to be linked to and replicated within the UNFCCC process. Business and industry as a “major group” of civil society participates in deliberations of the U.N. Commission on Sustainable Development to formulate and implement common policy approaches.⁵⁰ The ICC believes that climate change “is inextricably linked to the pursuit of a sustainable future.”⁵¹ The World Business Council for Sustainable Development (“WBCSD”) also acknowledges that “it is prudent for business to play its part by looking for ways to reduce emissions of those gases.”⁵² Framing issues in sustainable development terms therefore broadens the political appeal of its climate change position statements.⁵³

The Use (and Abuse) of Science

The ozone layer negotiations also indicated that technical scientific critiques can be a useful procedural tool to facilitate entry. For example, in 1995 the Intergovernmental Panel on Climate Change (“IPCC”) identified a discernable human influence upon the global climate.⁵⁴ Alleging that contributing authors had excluded elements of dissension or scientific uncertainty, the GCC criticized the lack of transparency as to how

comments on IPCC drafts were taken into account.⁵⁵ Although the U.S. was among those that defended the IPCC's integrity, subsequent changes to the review process opened up the reporting process to corporate actors.

An emphasis on sound science can be employed substantively to demand a high burden of proof before regulatory measures are adopted. For this reason, elements of the business community supports the precautionary principle. Orthodox risk management techniques provide a ready alternative to command and control regulation⁵⁶ since scientifically derived standards limit the potential for political arbitrariness in governmental decision-making.⁵⁷ A scientific rather than political basis for identifying carbon emission stabilization targets could also more accurately take into account natural sources. The application of the precautionary principle moreover affords reputational assurances of environmentally-sound business practices and enforcement thereof can eliminate uncompetitive rivals.⁵⁸ Promoting greater resort to voluntary initiatives is also consistent with anti-regulatory objectives.⁵⁹

That the procedural agenda-forcing power of expert groups can counter the substantive decision-making power of COPs is also observable within the UNFCCC process. The technical expertise marshaled by industry enables representatives to participate in expert working groups underpinning negotiations, monitor developments, and ensure that commercial perspectives are accurately understood. For example, the International Petroleum Industry Environmental Conservation Association ("IPIECA") attends IPCC plenary sessions, participates in expert workshops, publishes joint reports with the U.N. Environmental Programme, and organizes intergovernmental symposia.⁶⁰ It also recruited corporate officers to meet the IPCC's call for a stronger industry presence when preparing technical reports.⁶¹ However, attracting industry interest may prove more problematic than competency criteria.

The UNFCCC secretariat similarly seeks to draw business into its work program. Close relationships tend to be formed with well-established business groups who offer more stable participation. Corporate experts occupy temporary positions to share experiences and in turn acquire familiarity with its institutional performance. The secretariat's effectiveness turns upon budgetary arrangements and decision-making time-frames. Lessons could also be learned from the Global Environmental Facility ("GEF"), which also solicits financial management expertise from corporate officers.⁶² The GEF secretariat cooperates with commercial interests with a view to executing projects in the most efficient and cost-effective manner.⁶³ However, private sector roles have been limited to public procurement or advisory responsibilities on account of bureaucratic inertia and information disclosure requirements.⁶⁴ Furthermore, the firms recruited to construct operational capacity for newly-privatized industries are predominantly drawn from North America and Europe.⁶⁵

Adaptation and Activism

One corporate strategy common to negotiations concerning ozone depletion and climate change has been for user and pro-

ducer industries to insist that proposed reduction schedules accommodate adaptation. Phase-out programs should respect normal product and equipment lifetimes since overly strict timetables impose costly transition periods before full values have been realized. However, Du Pont demonstrated the advantages arising from pragmatic engagement as a "first mover" by breaking ranks with resistant business elements that were experiencing declining negotiating influence at that time. It proposed voluntarily phasing-out chlorofluorocarbon ("CFC") production ahead of intergovernmental schedules notwithstanding that "neither the marketplace nor regulatory policy...has provided the needed incentives" to justify the necessary investment for developing substitutes.⁶⁶

Although by no means committing itself to a comparable extent, British Petroleum ("BP") is credited with being the first oil industry firm to acknowledge the case for adopting precautionary measures notwithstanding scientific uncertainty. This strategy is properly appreciated in light of government signals that hardened industry opposition. In particular, the U.S. government abandoned voluntary approaches in favor of legally-binding arrangements, and more importantly, invited private sector contributions in crafting market-based mechanisms. A strategy of constructive engagement enhances prestige, secures consumer recognition for "progressive" environmental leadership, offers opportunities to influence outcomes, and better prepares firms when the inevitable regulation becomes effective.

Both case studies "suggest that international environmental treaties require the assent of major affected industries" as preconditions for their effectiveness.⁶⁷ Differences in the regulatory evolution of these two regimes have been attributed to clearer scientific evidence and the ready availability of alternatives with respect to ozone depletion. Business transformed from outright opposition to supporting CFC production controls, since the concentrated nature of industry and accompanying market incentives enabled an orderly transition to substitute products. The climate change context by contrast is associated with relatively greater and more widely dispersed economic impacts where the financial commitments, applicable time-frames, and investment risks deter interest in alternatives.

General versus Specific Politically-Organized Business Groups

A further distinction is the proliferation of politically-organized business groups and their diverse role within climate change negotiations. The ICC, as the most prominent corporate actor, fulfils advocacy, facilitative, and corrective functions. First, it supports the UNFCCC process provided that business is recognized as part of the solution.⁶⁸ This includes "the opportunity to contribute to rule making by providing information and views"⁶⁹ such as substantive proposals on selected items of interest.⁷⁰ The ICC seeks to accurately portray the views of its member federations to national delegations, which in practice reflects "mainstream" (albeit predominantly European) industry opinion. ICC statements are also endorsed by trade associations, national chambers of commerce and industry, and individual

PART TWO: ASSESSING AND CHARACTERIZING REGULATORY INITIATIVES FROM THE PRIVATE SECTOR

firms. To formulate common business messages the ICC solicits sector contributions across a range of issues and subsequently coordinates their distribution. It also organizes BINGO interventions during high-level ministerial sessions and regularly conducts side events with the UNFCCC secretariat and the Expert Group on Technology Transfer. BINGO presentations are also conducted jointly with one or more governments.

Second, the ICC performs a service function by enabling firms to undertake more effective interventions during a COP. BINGO meetings review prior developments, identify like-minded delegations, assess the state of negotiations and highlight forthcoming events. The facilitative function also includes identifying appropriately qualified representatives to participate on panel discussions and arranging private meetings between governments and national industries attending a COP. The ICC additionally prepares detailed accounts of national positions⁷¹ to enable informed lobbying by its members.⁷²

Third, the ICC ensures that national delegations espouse perspectives consistent with positions assumed in other U.N. fora and prior national determinations. It moreover signals the economic viability of proposals from a practical commercial perspective by reminding governments of probable market impacts and corrects misinformation within industry.

National or trade-specific industry associations exercise several functions at a COP on behalf of their non-attending members. These include recruitment, monitoring political deliberations, advocacy (raising issues for intergovernmental resolution), education (providing scientific or policy advice), research (identifying best commercial practice), and marketing (promoting voluntary mitigation measures to governments or advertising upcoming trade fairs). National trade associations enjoy close working arrangements with State delegations such as private briefings during a COP on account of routine national level engagement. Although they can create “noise” around particular issues, trade associations are unable to assume commitments without prior conferral with their membership. National anti-competition law moreover limits the degree of cooperation and information exchange.

Ad hoc or permanent corporate coalitions represent one or more economic sectors and promote single or multiple issues. Sponsoring firms in effect purchase time slots during promotional side-events to showcase voluntary corporate initiatives for tackling carbon emissions, demonstrating research and development activity, and highlighting cost reduction measures. Finally, partnerships and strategic alliances may be established with ENGOs to pursue their mutual interest in influencing international environmental policy. Deriving the assumed social legitimacy of ENGOs also demonstrates good corporate citizenship.⁷³ Collaboration may additionally facilitate technological development: for example, “hydrocarbons have made a remarkable penetration in the domestic refrigeration market, partly because of their support and promotion by NGOs.”⁷⁴ The question for present purposes is whether these multiple arrangements are effective in initiating regulatory change.

The “new diplomacy” of intergovernmental environmental negotiations is reputedly characterized by novel procedures⁷⁵ and the participation of non-State actors including corporations.⁷⁶ The comparative analysis of Part One above indicated that infusing commercial perspectives can facilitate or impede orderly regime development by extenuating the common or disparate economic interests of States. Do the strategic developments suggest that corporations are attempting to regulate governmental behavior and circumvent the self-evident procedural constraints? If one accepts commercial contributions, does that make the climate change regime ultimately self-regulatory or are politically-organized business groups predominantly located within industrialized States effectively regulating smaller firms and/or Southern companies? To what extent does regulatory adaptation by firms correlate with treaty implementation by governments? This Part argues that the benevolent or malign implications of regulatory initiatives emanating from the private sector depend upon the perceived governmental role in designing environmental policy, which regulatory model is employed, and how its products are correspondingly characterized.

ASSESSING CORPORATE CONTRIBUTIONS

The initial task is accurately elucidating the degree of commercial influence over the regulatory outcome. “The problem of causality looms large when trying to isolate the influence of one set of actors from that of others.”⁷⁷ Although governments are encouraged to solicit the maximum possible input from observers to enrich deliberations, there is no assurance that voluntary contributions will be reflected in the final product. Academic attention has devoted particular attention to the ENGO role within climate change negotiations.⁷⁸ Interestingly, ENGOs have themselves conceded that governments may be unresponsive to observer activism.⁷⁹

An analytical framework for linking participation with the degree of observer influence has been formulated.⁸⁰ “Influence” is defined as the intentional transmission of information by observers and behavioral alterations in response by governments. The former is evidenced by observer activity (for example, lobbying, agenda setting, submitting written, and oral information), access (participatory terms of attendance or providing advice), and resources (sources of leverage including knowledge, extent of support, and particular role). Behavioral alterations by governments are evidenced both procedurally (to what extent did observers participate?) and substantively (were observer goals actually attained as evaluated against the final negotiating outcome?).⁸¹

Procedurally speaking, the private sector has contributed to the climate change debate from the outset. Mr. Maurice Strong, then-CEO of a Canadian electric utility, was Secretary-General for the U.N. Conference on Environment and Development in Rio during 1992. The preparatory process encouraged equitable

observer representation from developed and developing countries including a fair balance between those with an environmental focus and those having a sustainable development agenda.⁸² The ICC formulated an environmental management code of conduct and the WBCSD was established to promote self-regulation by industry. Observer representatives could be appointed to national delegations and, in accordance with U.N. practice, oral interventions were at the discretion of Chairpersons.⁸³ Over one thousand firms participated with around forty engaged in a broad range of activity.⁸⁴ The ICC responded positively to Agenda 21,⁸⁵ particularly since it sought to enhance formal participatory procedures “for the involvement of [NGOs] at all levels from policy-making and decision-making to implementation.”⁸⁶

Diverse commercial perspectives overwhelm intergovernmental deliberations with complexity, forestall regulatory progress, and render public policy imperatives irrelevant.

Substantively the corporate impact upon intergovernmental negotiations cannot be discerned from official documents. Notwithstanding the sentiment of Agenda 21, COP reports continue to emphasize State-centric decision-making and observer contributions are only recognized *en passant*. One roundtable report, for example, identified the “catalytic role governments play” and the “importance of the private sector was acknowledged.”⁸⁷ Similarly, the SBSTA welcomed an exchange of views with industry during pre-session consultations, invited continued cooperation by industry with the Expert Group on Technology Transfer, and envisaged industry participation in sector-specific workshops.⁸⁸ The SBI additionally foresaw developing risk transfer mechanisms in conjunction with insurance firms.⁸⁹

It is entirely plausible that the commercial influence is overstated given the existing cacophony of disparate voices. BINGOs constantly question the effectiveness by which their messages are communicated to and received by governments. Firms raise issues for consideration, direct agendas, and cajole governments but final outcomes may be unpredictable or important decisions deferred. Experienced corporate participants are uncertain whether deliberate strategies succeed or whether

governments were merely receptive at that time. Conversely BINGOs are wary of assuming commitments that are properly matters of State responsibility and volunteering information which may be ignored, filtered, or misused. Governments could be exploiting their interest and expertise when soliciting information on how observer activities could contribute to intergovernmental processes.⁹⁰ Consultation can be tokenistic or selective with industry contributions limited to presenting information on technological developments to IPCC workshops or expert meetings. Nonetheless BINGOs seek to make their contribution meaningful: informal meetings during each COP identify issues around which business opinion has coalesced, share experiences, and discuss topics of common concern. Although the prediction that European businesses are more environmentally aware than U.S. firms is not universally apparent, the climate change scenario “best fits the stereotype of a transatlantic divide.”⁹¹

CHARACTERIZING CORPORATE CONTRIBUTIONS

This article proposes that assessing commercial contributions to international regulatory development depends upon which regulatory model is sought to be applied. Part One above observed that corporate political practices tend to conform to local regulatory styles. For example, the relatively pluralist U.S. political system is perceived to be more amenable to interest group pressures. However, it need not be any more adversarial than the European Commission (“E.C.”) system, as illustrated by the successful lobbying of European firms against a carbon tax. The orthodox command and control approach suggests that imposing environmental standards is likely to engender resistance, in which case the regulatory response is avoidance by target groups, and regulatory initiatives by them are characterized as obstructive.

PROMOTING REGULATORY COMPETITION OR HARMONIZATION?

The converse of the adversarial model of regulation – the regulatory competition model – recognizes that environmental regulation can spur industrial performance as a source of comparative advantage.⁹² Regulatory innovation and targeted intervention by “pioneer” environmental policymakers can create lead markets for national firms and profitable export opportunities.⁹³ Regulation is a driver in the commercial self-interest since it pushes industry towards technological innovation, encourages the development and commercialization of alternative products or production processes, and establishes novel service sectors. The waste disposal industry, for example, is supported by regulatory measures concerning pollution control.⁹⁴ Governments deliberately develop local specialities and incidentally increase economic growth and taxation revenue.

The regulatory competition model transposed to the international context entails greater inter-sectoral competition characterizing intergovernmental bargaining insofar as governments allocate gains and losses. The pertinent question is “who will be the winners and losers” in the transition towards a less carbon-intensive global economy.⁹⁵ Economic sectors promote their

particular production speciality (whether it is fossil fuel, nuclear, hydropower, wind, or solar energy sources) as preferred policy solutions. The International Gas Union, for example, promotes natural gas as a readily-available fuel alternative associated with reduced carbon emissions.⁹⁶ The ICC argues that multilateral decision-making should not cherry-pick “winners and losers” by conferring legally-embedded competitive advantages to particular technologies, production processes, or economic sectors and thereby subverting market forces. Industries moreover compete for favorable treatment by way of subsidies or exemptions. For example, the U.K. government offers incentive payments to participating firms in its emissions trading scheme.⁹⁷ It is similarly argued that taxpayer-sponsored initiatives in pilot programs and demonstration studies are warranted so that renewable energy sources become competitive in terms of cost and reliability with conventional fossil fuels.

National perspectives can accordingly be appreciated in light of their structural dependence upon particular economic sectors and principal sources of energy supply. Industry groups opposed to strict emission controls are naturally aligned with those States that consume or export fossil fuels. Their regulatory initiatives involve the joint pursuit of mutually-shared negotiating objectives. Lobbying by industry becomes superfluous since there is solidarity with home or host States.⁹⁸ Governments reciprocate by recognizing national firms for their voluntary environmental effort and provide technical assistance for completing greenhouse gas inventories. Corporations also contribute to regulatory diffusion by promoting the national regulatory framework with which they are most accustomed. Its adoption as the agreed international legal framework re-directs the basis for competition, appropriates market share from rivals, facilitates capital access, and re-allocates regulatory adaptation costs.

For example, the Australian government has concluded that ratification of the Kyoto Protocol “is not in Australia’s national interest.”⁹⁹ Although arguments for and against ratification are evenly balanced, the fossil fuel industry is understandably reluctant to relinquish its global leadership in and dependency upon producing energy and energy intensive products. The Australian renewable energy sector unsuccessfully argues that ratification is necessary “to build the next generation of core industries and to help traditional industries maintain competitiveness in a global marketplace that is increasingly ascribing sustainability principles to development and trade.”¹⁰⁰ That said, the government is voluntarily committed to meeting its Kyoto target and has initiated a range of greenhouse gas abatement programs. Australian companies have similarly established emissions reduction targets to maintain their market position and preserve trading opportunities, possibly in anticipation of the unsheltered competition associated with eventual ratification.

That the regulatory competition model may pose undesirable consequences is reflected in the threat of migration by energy-intensive industries to havens offering regulatory relief.¹⁰¹ Companies extract an “unfair” competitive advantage through lower regulatory compliance costs free from comparable legal

constraints. The variable progress of States Party to the Kyoto Protocol, non-Parties, and Parties voluntarily exceeding their commitments “call into question whether an international framework approach based on binding, differentiated, and absolute emission reduction targets can effectively marshal a sustained global response to climate change concerns.”¹⁰² Non-Party status may be one means for governments to attract inward investment and enable economic growth. However, commercial activity outside the formal regulatory regime is a short term solution on account of legal uncertainty, restricted access to resource markets, and exclusion from trading opportunities. Systematic cost-benefit assessments of the competitive impacts arising from regulatory policies are desirable for improving political decision-making. State Parties either downgrade regulatory stringency where legally permissible or encourage non-Parties to assume binding commitments.

The advantages of a level competitive playing field for firms underlie the regulatory harmonization model. Universal participation by States maximizes the geographical scope and liquidity of markets, simplifies cross-border procedures, and reduces regulatory compliance costs for all.¹⁰³ Furthermore, uniform implementation and enforcement prevent un-innovative rivals from undermining conventional regimes and may ultimately lead to their demise through elimination or acquisition. Commercial contributions to regulatory development become cost-effective since they obviate lobbying for identical results within each national jurisdiction. However, the corporate interest in regulatory harmonization is not unlimited. In particular, industry espouses the free choice of means principle concerning the mode of implementation: all technological options should remain open with decisions left to host States in light of local conditions and in conjunction with business consultation.

Relevant to the regulatory harmonization model is that legal predictability is frequently emphasized by firms as a precondition to foreign direct investment.¹⁰⁴ Regulatory uncertainty is a barrier to business participation when implementing conventional regimes since firms lack the confidence to engage in long-term investment planning.¹⁰⁵ Operational requirements have lifetimes and cost-recovery considerations extending beyond the first commitment period. Although the Kyoto Protocol calls for subsequent commitments by Annex 1 Parties to be considered during 2005, it does not proscribe their nature, commencement, and duration or specify obligations for Non-Annex 1 Parties. Governments understandably do not wish to foreclose policy options. However, the absence of detailed information unsettles business since decisions concerning technology, siting, permitting, access, and infrastructure must be made now to secure an acceptable cost, quality, and availability of future energy supplies.¹⁰⁶ The immediacy of answering these investment questions fortuitously coincides with the environmental urgency of addressing climate change. However, the legitimate interest of firms to limit commercial risks cannot justify inordinate regulatory predictability just as the governmental responsibility for economic growth must respect the business function of identifying opportunities and threats.

The regulatory competition and regulatory harmonization models both suggest a degree of industry-government collaboration for identifying appropriate economic incentives. The co-regulation model formalizes this close cooperation between government authorities and target industries in regulatory design. European environmental policy formulation is noteworthy for relatively greater resort to consensus-building, voluntary industry agreements, and negotiated outcomes.¹⁰⁷ The preferences of the European Business Roundtable, for example, are reciprocally expected to be taken into account by European governments.¹⁰⁸

States and corporations are expected to jointly implement international environmental law “to the extent they are able.”¹⁰⁹ Joint collaboration satisfies legal obligations for governments and enables firms to secure competitive advantages within international markets.¹¹⁰ The political objective of effective treaty implementation at the national level thereby converges with the commercial goal of minimizing operational disruption. The effectiveness and political acceptability of environmental agreements at the national level depends upon support from the corporate constituency. By this reasoning industry is entitled to prior participation in intergovernmental negotiations since exclusion renders subsequent implementation more difficult given likely non-compliance.¹¹¹

Although intergovernmental negotiations arise in the context of pre-existing economic conditions, permitting incremental regulatory adaptation by industry should not dictate the sequencing of regulatory implementation by governments. Public policy objectives are achievable through contractual mechanisms.¹¹² Designing international environmental regulation as a market-enabling regime can be expected to draw corporate support.¹¹³ In their joint efforts to construct robust and credible markets, both governments and firms are engaged in ongoing processes of organizational self-learning to smooth transition periods.

For example, governments and firms seek to acquire experience with emissions trading as a novel form of environmental regulation. Several firms engaged in voluntary experimentation by developing intra-corporate schemes before formal regulatory arrangements were instituted.¹¹⁴ The International Emissions Trading Association (“IETA”) has particularly espoused a bullish approach.¹¹⁵ It has identified points of regulatory uncertainty such as whether emissions reduction units constitute recognizable property rights or whether national courts are able to provide cost-effective dispute resolution.¹¹⁶ By monitoring CDM decision-making, IETA can employ regulatory familiarity to attract potential clients to the traders and brokers it represents.¹¹⁷ Observers attend meetings of the CDM Executive Board in a nearby listening room and respond to calls for substantive or procedural input.¹¹⁸ IETA also drafted standardized contracts to streamline commercial negotiations and reduce transaction costs.¹¹⁹

The result reflected at COPs is that regional, national, or intra-national emissions trading regimes are promoted by governments in conjunction with industry experts. Attempts to court

prospective market entrants involve government-backed schemes claiming commercial credibility. Industry groups analyze each scheme and call for further refinement, particularly where participatory conditions confer advantages upon local firms.¹²⁰ To increase market size IETA further proposed linking emissions trading regimes.¹²¹

An illuminating contrast is that firms with investment projects qualifying under the Kyoto Protocol (and promoted as such for public relations purposes) may lack the financial incentive to formally participate as operational entities. The administrative bureaucracy of the CDM Executive Board concerning project eligibility and accredited methodologies has thus far limited private sector participation to speculative activity.¹²² The CDM remains under-resourced and its lethargic approval process has only sanctioned several projects to date. To initiate regulatory decision-making several firms developed candidate CDM projects with a view to evaluating investment viability and distributed data to governments.¹²³

THE RISK OF REGULATORY CAPTURE

The co-regulation model poses the prospect of regulatory capture whereby corporations successfully curtail the regulatory autonomy of governments. From the corporate perspective, environmental strategies are formulated with an eye to subsequent implementation in terms of production cost, potential liability, and ease of regulatory compliance.¹²⁴ To minimize operational disruption to core businesses, environmental strategies are tailored to existing competencies, stakeholder expectations, and corporate cultures. The undesirable alternative includes management restructuring, unrealized goals given limited resources, and operational inconsistencies across business divisions. From the intergovernmental perspective, (over)reliance upon information inputs such as the technical expertise or management experience of firms increases with the number and complexity of issues to be addressed at a COP.¹²⁵ Full disclosure is unrealistic in view of business proprietary information and competition from State enterprises and other firms. Since the onus lies upon government to identify novel information sources, they may prefer to engage with the business community through roundtables and workshops where other actors (including commercial rivals, smaller firms, and NGOs) offer counterbalancing perspectives.

Perfecting regulatory regimes necessitates soliciting observer contributions on the interpretation and application of the UNFCCC. For example, the GCC provided its views on the interaction between dispute settlement mechanisms and compliance procedures. Emphasizing the voluntary nature of governmental participation and employing a strictly textual approach to treaty interpretation, the GCC identified several issues as “not ripe for resolution,” promoted greater expert inclusion, and argued that only States Parties could initiate compliance procedures; “not the secretariat, not by other intergovernmental organizations and certainly not by NGOs.”¹²⁶ The compliance procedures of the Kyoto Protocol by contrast can be triggered by “competent” observers in respect of an existing case.¹²⁷ This extends to submitting factual and technical information where

questions of implementation are raised.¹²⁸ Furthermore, reducing carbon emissions has created demand for compliance measurement protocols. Reporting standards and verification techniques were developed by the private sector for prospective adoption by firms as risk management tools and by governments as the basis for national regulation.¹²⁹ Accounting, standardization, and accreditation firms also offer their quality assurance services to government and industry.

Regulatory capture as a means of maintaining “business as usual” is well-illustrated with respect to technology transfer. Those industries which originally caused environmental damage also possess the technical means for rectification. Developing States seek access to affordable technology free from dependency upon foreign patent holders and developed States are unable to compel private sector cooperation. Firms are prepared to transfer technology on mutually agreed terms provided there is strong intellectual property protection and respect for contractual arrangements.¹³⁰ It could be argued that the application or adaptation of existing technological solutions is sufficient to mitigate climate change since it is proven in the field, less risky, and currently available. Its more efficient application reduces energy consumption and reaps “quick win” emission reductions, delays obsolescence, and recoups a reasonable return on investment.

Permitting firms to utilize cost-effective solutions may amount to implementing what is most technologically convenient. Novel and practical solutions (such as photovoltaics, solar or hydrogen cells, and wind or tidal turbines) pose more challenging technological innovations and lie further from the core businesses of the incumbent fossil fuel industry. Furthermore, large firms possess economies of scale to spread research and development expenditure and the means for global deployment. Such firms can simply acquire this technology once it has been demonstrated to be commercially viable by risk-taking companies.

The resulting governmental role will be to remove regulatory and market barriers to the commercialization of technical options. Meaningful controls may also be desirable to overcome the preoccupation of well-entrenched firms with short-term profits and provide a competitive boost to those second generation firms inclined to innovate. Does the conclusion that regulatory initiatives tend to track market developments entirely account for the contemporary inertia within the climate change regime?

PART THREE: ENHANCING THE EFFECTIVENESS OF CORPORATE CONTRIBUTIONS

European attempts at COP 10 to initiate negotiations on post-2012 commitments were rebuffed by the U.S. as premature and encountered resistance from the Group of 77. Governments merely agreed to organize an intergovernmental seminar to informally exchange information on measures currently being undertaken to implement existing commitments and on ways to further develop climate change initiatives.¹³¹ Government resolve (or its absence) is one stimulus for business perceptions

of commercial opportunities and investment risks. Flawed through it may be, ratifying the Kyoto Protocol provides directional certainty that sustainable and renewable energy sources will receive regulatory support. Such a governmental commitment triggers “top down” changes in corporate strategy insofar as national operating conditions are affected. Intergovernmental organizations accordingly call upon governments to transmit the right market signals to investors.¹³²

Political consensus is reciprocally preconditioned by signals from the business community. COP side events assume greater significance when political negotiations stagnate and governments become observers to contemporary business practices. From the “bottom up” intergovernmental negotiations bridge the pace of operational adaptation by intransigent incumbents and voluntary experimental effort by progressive market participants. This article offers two further explanatory insights to the timing of regulatory development. The first is the prospect that diverse commercial perspectives overwhelm intergovernmental deliberations with complexity, forestall regulatory progress, and render public policy imperatives irrelevant. The second is the concomitant challenge of ensuring that business voices are commensurate with the envisaged implementation role.

THE (IN)COHERENCY OF BUSINESS MESSAGES

It has been asserted that “the companies that stand to lose the most – at least in the short term – have from the beginning been the most prominent and influential business voices in the climate negotiations.”¹³³ These include the fossil fuel industries (coal and oil) as well as energy intensive sectors such as electricity, automobile manufacturing, cement, glass, chemicals, paper, aluminum, and steel production. Such sectors undertake cost-benefit analysis, propose further research and caution against legal commitments. Regulatory initiatives are discouraged by appealing to the strategic or military importance of industry, domestic energy requirements, detrimental employment impacts, lower economic growth, lost business competitiveness, high investment outlay, and modest environmental impact.

It could be reasoned that (a) fossil fuel industries seek to forestall regime development, and (b) since their views dominate industry opinion, then (c) commercial contributions to the climate change negotiations favor regulatory inertia. It is true that the fossil fuel and energy intensive industries have engaged with the UNFCCC process since its inception whereas other factions are more recent entrants.¹³⁴ However, the fossil fuel sector is unrepresentative of the private sector generally and since “progressive” oil companies are simply adopting hedging strategies, the significance of their regulatory initiatives should not be overstated.

To simplify regime design, governments prefer to deal with organized groups representing mainstream opinion. However, it can be difficult to identify which interlocutor reflects dominant business opinion and carries sufficient authority to speak “on behalf of industry.” Industries expected to benefit over the long term (nuclear, natural gas, and renewable energy sources) have

become increasingly active but the balance is yet to tilt in their favor. These sectors press for stricter timetables and targets which boost product demand and capture market share. The electronics, agricultural, and forestry products sectors are less engaged. One survey concluded that although companies are adopting governance measures, measuring greenhouse gas emissions and discussing climate change at board level, few are treating the issues raised as imminent financial and environmental threats.¹³⁵ Business attitudes “should therefore be considered cautiously and in context.”¹³⁶

This hypothesis suggests that the diversity of business interests prevents this constituency from acting as a cohesive block. Since the business community is not homogeneous it may be unable to marshal coherent or uniform recommendations. What firms espouse individually or collectively, how they behave nationally or internationally, and the consistency of their public posturing with their private action should be carefully distinguished. Individual businesses vary: some are motivated by technological advancement and others are concerned with the security of raw materials or stable product demand. Transnational firms in particular may be unable to espouse any particular opinion since different national units will pursue that political strategy most compatible with their host environment. Furthermore, operational divisions within a single firm may be differently affected by climate change, thereby precluding the formulation of a coherent policy.

That considerable variation exists within sectors is confirmed by studies seeking to account for the different strategies of oil multinationals. Whereas several companies have accepted the inevitability of regulation, others continue to challenge the scientific basis of climate change.¹³⁷ Their initial reactions were influenced by distinctive home country institutional contexts and individual corporate histories.¹³⁸ With the exception of Exxon-Mobil, strategic approaches began to converge as the climate change issue matured on account of participation in a common industry and management expectations. Differences in the timing, pace, and type of shift in their climate change strategies are explicable by reference to their respective commercial interests, management structures, and national operating contexts.¹³⁹ Particularly pertinent was location (social demands for environmental protection, regulatory culture, and national environmental policy), internal organizational attributes (institutionalized

memory, degree of decentralization and availability of scientific expertise), and economic position (market assessments, long range planning, and investment interests).¹⁴⁰ Since company-specific features (risk management technique, environmental

reputation, and capacity for organizational learning) and international market factors were approximately identical for each firm, their variable response is attributed to the national context, including the political institutions at work.¹⁴¹ Industry-specific factors militating against the generality of these observations include its oligopolistic nature following consolidation during the 1990s and technological progress (albeit not always rewarded) towards renewable energy sources.

It has also been observed that BINGO participation is relatively more turbulent than ENGOS: strategic shifts by key players create tensions within the business community and business associations may become hamstrung.¹⁴² Messages from politically-organized business groups can also reflect the lowest common denominator between its progressive and conservative members. Their perspective consequently reflects the views of dominant members: Korean industry, for example, remains resolutely opposed to the Kyoto Protocol.¹⁴³ Consensus decision-making becomes an opportunity for an intransigent or conservative majority to exert disproportionate leverage and delay or obstruct regulatory development.

Sector-Specific Solutions to Procedural Obstacles

Diverse participation is encouraged at a COP on the assumption that intergovernmental deliberations will be enriched and implementation enhanced through the identification of broadly shared aims. The UNFCCC secretariat encourages observer participation by organizations that (a) possess relevant competence; (b) are broadly representative of sectoral opinion; and (c) produce an equitable geographical balance. COPs are predominantly attended by commercial interests from industrialized States and only rarely from developing ones. Politically-organized business organizations from the North counter-argue that they represent companies headquartered, sited, or having operations in the South who will ultimately assume a greater implementation burden.¹⁴⁴

The coherency of the business voice will dissipate in light of changing scenarios, organizational attributes, and operational specialization. However, it may be sufficient that the business community concurs at a level of generality. Market-supportive

It can be predicted that regulatory initiatives will be forthcoming from European firms on a formal basis within the E.C., whereas the voluntary commercial efforts of Australian and U.S. firms will indirectly shape regulatory outcomes.

regulatory frameworks entail freedom to trade, respect for property rights (including protection from expropriation), fair competition, and non-discriminatory treatment. For example, governments were called upon to recognize as valid all carbon emission credits acquired by companies without imposing selective criteria based upon national origin.¹⁴⁵ Commercial decision-making and investment planning is sought to be insulated from policy and regulatory uncertainty. Regulatory conditions should be characterized by stability, transparency, information access, non-arbitrary decision-making, minimal transaction costs (including taxation), protecting intellectual property rights, and contractual certainty.¹⁴⁶ Common industry perspectives also coalesce around binding legal obligations rather than weak political commitments, comprehensive disclosure concerning prospective national implementation, and up-front terms for corporate participation.¹⁴⁷

This article proposes that successfully harnessing commercial contributions – and diluting the influence of dominant industry players – necessitates a sector-specific approach to public policy engagement.¹⁴⁸ Preparatory activities for the International Conference on Financing for Development notably drew functional distinctions between private banks, institutional investors, other market institutions, non-financial corporations, and business associations.¹⁴⁹ Participating firms were selected by reference to their commercial interests, likely investment in developing States, geographical distribution, and gender perspective.¹⁵⁰ This analogy particularly applies to interconnected industries yet to perceive the risks posed by climate change. For example, although actively courted by ENGOs, the financial services industry has been unable to counterbalance the influence of energy corporations.¹⁵¹ This is notwithstanding that global warming will occasion more claims against insurance and re-insurance firms.¹⁵² The financial sector continues to be unaware of the gravity of the issue, perceives no financial connection, lacks adequate information on corporate emissions (which in turn hampers integrating climate concerns into financial assessments), and remains uncertain about investment opportunities on alternative energy sources.¹⁵³ However, governments wish to draw upon the expertise of the financial services sector to inform the deliberations of intergovernmental workshops.¹⁵⁴ Promoting the business case for emissions reductions is therefore important for countering sector disinterest and raising awareness.

ENSURING THE PROPORTIONALITY OF COMMERCIAL PERSPECTIVES

Business has hitherto preferred political action at national levels where it is accustomed to well-chartered and predictable channels of influence.¹⁵⁵ Significantly, only well-entrenched U.S. firms participated in the ozone layer negotiations since most companies were content to concentrate their efforts elsewhere.¹⁵⁶ The private sector moreover favors national regulation “because it is also more familiar with this approach, and feels it can influence it through negotiation.”¹⁵⁷ The susceptibility of governments to local pressures coincides with an interest in retaining national regulatory autonomy. Multinationals

supposedly fear the emergence of international environmental regimes.¹⁵⁸ Commercial activity within international fora is therefore directed at either blocking transnational measures or circumventing applicable national constraints (for example, where lobbying proves ineffective for reversing undesirable legislation or judicial precedents).

Industry also seeks to maintain effective participation pursuant to standardized procedural rules during intergovernmental negotiations.¹⁵⁹ Corporations support the UNFCCC secretariat’s initiatives by providing resources¹⁶⁰ since it is likely to be more receptive to their global management perspectives than nationally-oriented governments, a fact which could be usefully directed towards domestic audiences. Proposals for improving the UNFCCC process include less structured panel sessions involving free-form dialogue, audience participation, swifter document dissemination, improved access to the floor during plenary sessions, oral interventions during discussions, written comments on specific agenda items, soliciting observer input through the secretariat, and enhancing expert contributions. BINGOs also proposed a Policy Dialogue Forum which contemplated a frank exchange of optimum policy options in a transparent and depoliticized forum open to all interested actors.

Such proposals are consistent with deepening the engagement between civil society and intergovernmental bodies.¹⁶¹ The UNFCCC secretariat is involved in ongoing efforts to enhance the effectiveness of observer contributions. It is generally supported in this endeavor by governments who are careful not to establish precedents and prefer to be guided by their needs on particular occasions. Governments prohibited observers from approaching national delegations during plenary debates and considered excluding observers who promoted perspectives contrary to UNFCCC objectives. Extensive agendas, proliferating meetings or activities, lack of resources, limited available time, and fragmenting agenda items are overloading delegations and making negotiations more difficult to efficiently manage. The growing number of side events is “indicative of deficiencies in the formal process.”¹⁶²

Business Consultation, Observer Equality, and Counterbalancing Perspectives

New Zealand was the first government within the UNFCCC process to express an interest in receiving counsel directly from business during the mid-1990s. The COP convened a workshop on the desirability of observer advisory committees.¹⁶³ Business representatives argued that their participation was crucial for selecting, developing, and implementing economically-sound policies and highlighted their responsibilities for economic growth, employment, competitiveness, environmental protection, and social development. They supported a more structured process for communicating commercial perspectives to ensure that practical technical and economic information could be utilized. Since no current arrangement served industry or government needs, a convenient, direct, and additional communication channel had to be created. Furthermore, a single mechanism involving different constituencies was not feasible or desirable.¹⁶⁴ ENGOs agreed that contemporary

consultative mechanisms for soliciting technical input required strengthening.¹⁶⁵

The SBI subsequently evaluated observer entitlements within other U.N. bodies with a view to developing procedures to enhance observer participation within the UNFCCC process.¹⁶⁶ It concluded that the secretariat's "improvised responses have tended to generosity; the result is an open house with a rather flimsy structure."¹⁶⁷ Systematically soliciting observer perspectives could add a "new dimension" even where existing practice was merely codified since it was uncertain whether governments would routinely obtain observer opinions or whether observers are entitled to be heard.¹⁶⁸ Additional questions included addressing different opinions within constituencies, whether governments should engage with non-State actors at national levels so that observer interaction with the UNFCCC reflected international interests, and whether governments should enjoy direct access to the views of individual firms unfiltered by trade associations or ENGOs.

BINGOs proposed a business consultative mechanism ("BCM") distinct from the UNFCCC structure whose framework, activities, and internal processes would be determined by participating business groups.¹⁶⁹ It would enable industry to volunteer unfiltered information and respond to intergovernmental queries in a timely manner on the full range of climate change issues.¹⁷⁰ Achieving a prior consensus position would be unnecessary since the full panoply of business opinion demonstrated the complexity of issues requiring intergovernmental resolution. Furthermore, the BCM would not be a means of negotiating business commitments that were properly made at national or regional levels. Observers "cannot and should not" be negotiating parties since it is for governments to decide what is environmentally necessary and practically achievable given credible technical and economic assessments. Finally, business participants from developing countries should receive administrative support and financial assistance.

ENGOs rejected the proposal since mechanisms for observer input should be open and transparent. The BCM in their view would provide industry with privileged access, enable unreviewed material to be submitted, and curb the numerical superiority of other observers. The principle of parity moreover requires that participatory entitlements granted to one constituency be extended to all others. As an aside, equality of observer treatment could be usefully affirmed if not by the UNFCCC procedural rules then pursuant to a COP decision. One complication is that UNFCCC Parties such as Australia and the U.S. wish to participate as observers under the Kyoto Protocol. Industry recommendations have a self-interested flavor insofar as the purveyors of particular technology may possess conflicts of interest. Governments are wary of improper or disproportionate influences exerted by COP observers. Since domestic constituencies whose agendas are already being advocated by their national government have little incentive to participate, minority interests, or those with protectionist ambitions whose views have previously been rejected may wish to repeat their exaggerated messages during intergovernmental negotiations.

The SBSTA concluded that existing consultative mechanisms be improved until consensus between the UNFCCC constituencies was achieved.¹⁷¹ Significantly, informal activities undertaken by observers are left unaffected. Although their impact is difficult to assess on account of their nature, such activities tend to favor economically privileged actors. These include lobbying, organizing side events (hiring Conference facilities, staff attendance costs, and promotional publicity), providing exhibits, conducting information sessions and supporting the UNFCCC secretariat. By embedding their best commercial practices within regulatory regimes, market leaders possessing the advantages of establishment have the opportunity to determine economic conditions for the remainder of industry, eliminate uncompetitive rivals, and facilitate corporate consolidation.

Observer participation enables timely access to intergovernmental deliberations and suggests the likely direction of national policies. The non-participation of developing States from the first commitment period, albeit in recognition that developed countries have historically contributed the lion's share of carbon emissions, has afforded the national corporations of industrialized States a valuable lead time over their Southern counterparts. Such anticipatory action is not without limit since formal legal frameworks are ultimately required to underpin market transactions. Prudence dictates a "wait-and-see" approach before irreversible commercial decisions are taken according to orthodox business criteria and what governments actually decide. Directors also owe fiduciary duties to shareholders not to engage in overly-speculative investment activity.

It is also noteworthy that intergovernmental negotiations have become an elongated and dynamic process where the distinction between negotiation and implementation is blurred. International environmental regimes are characterized by venues peripheral to the COP (workshops, pre-session consultations, expert panels, seminars, and executive body meetings) and attended by States, intergovernmental organizations and observers. Off-site side events ("side-bars") organized outside the Conference venue involve industry presentations to invited government delegates and UNFCCC secretariat officials. Although these fora facilitate information exchange and consensus-building, they also shift decision-making further behind the scenes and render them accessible to only the well-resourced.

Ensuring proportionality to business views may be unattainable insofar as commercial opportunities for influencing governments extend beyond the fora of COPs to include public procurement contracting and concluding investment agreements. Government and UNFCCC secretariat officials attend industry-convened conferences which parallel intergovernmental programs. For example, the Business Council for Sustainable Energy organized roundtables composed of corporations, ENGOs, governments, and UNFCCC secretariat officials.¹⁷² Finally, observers are engaged in education, training, and public awareness-raising activities largely free from governmental oversight.¹⁷³

CONCLUSION

The challenge of reducing carbon emissions and facilitating the eventual transition to renewable energy sources is enveloped within the distinctive sustainable development paradigm. Emissions trading is an interim measure for Annex 1 Parties before joint implementation projects come to fruition and foreign direct investment is sought to be redirected towards developing States through the CDM. This article notes how different regulatory models offer a useful explanatory value when characterizing commercial contributions and intergovernmental outcomes under the UNFCCC. Hence oppositional postures or proactive strategies by firms may be symptomatic of the adversarial or collaborative regulatory models. It can be predicted that regulatory initiatives will be forthcoming from European firms on a formal basis within the E.C., whereas the voluntary commercial efforts of Australian and U.S. firms will indirectly shape regulatory outcomes. That these corporate initiatives are having an impact is vindicated by the IPCC's conclusion that "significant progress relevant to greenhouse gas emissions reductions has been made and has been faster than anticipated."¹⁷⁴

Corporate engagement with the UNFCCC process offers useful procedural lessons for other sustainable development concerns. Commercial contributions include disseminating information, gathering information, participating in interactive roundtable sessions, appointing to national delegations, providing counsel or advice, supporting international secretariats, and conducting side-events. The proposal to institutionalize a communication channel in parallel to the UNFCCC supports several conclusions. First, the BCM illustrates greater corporate interest in formally engaging with intergovernmental negotiators. Second, the BCM represents an acknowledgment that the procedural rules of access have a limited effectiveness. Informal methods may favor the well-resourced, but participants are less

controlled, the process less transparent, and outcomes less predictable. Third, the fact that their attempt to enhance their participatory conditions failed also tends to rebut the presumption that corporations wield inordinate influence over regulatory outcomes.

The concern expressed by governments and ENGOs that commercial participants enjoy a disproportionate role during negotiations is not altogether groundless. An anti-competitive or unrepresentative flavor to industry participation is justifiable inasmuch as the principal corporate participants are large multinationals possessing the requisite financial, technical, and organizational resources whereas small and medium-sized enterprises depend upon trade associations. Observer parity encounters the reality that corporations operate within the industrialized North, developing countries, and States not Party to the Kyoto Protocol.

Finally, commentators must be cautiously discerning when seeking to identify prevailing business opinion. The fossil fuel industry will remain active in negotiations since the outlook for energy products remains strong in the short- to medium-term. Their strategic objective to prevent or favorably shape regulatory development has been inadvertently assisted by an incoherent business voice. The renewable energy industry, a niche business, will correspondingly occupy a marginal political role, but one which has been growing since COP 3. Corporate engagement as a strategy for initiating regulatory change is moreover complicated by the widely-recognized tension between global integration and local responsiveness. Insofar as intergovernmental negotiations have stalled then progress must emanate from within industry. The first Meeting of the Parties to the Kyoto Protocol to be held in Canada in December 2005 may prove to be that catalyst.



ENDNOTES:

Commercial Contributions to the Climate Change Regime

¹ Stephen Tully, Law Department, The London School of Economics and Political Science. I wish to thank several individuals who also attended COP 9 of the UN Framework Convention on Climate Change ("UNFCCC") in Milan during December 2003 and whose opinions were taken into consideration in the preparation of this article. These include Mr. Nick Campbell, Chairman and Mr. Jack Whelan, Secretary, International Chamber of Commerce ("ICC") Environment and Energy Commission Task Force on Climate Change; Ms. Norine Kennedy, Vice President, Environmental Affairs, U.S. Council for International Business ("USCIB"); Dr. Brian Flannery, Manager, Science, Strategy and Programs (Safety, Health and the Environment), Exxon-Mobil Corporation; Ms. Robyn Priddle, Executive Director, Australian Industry Greenhouse Network; Mr. Adam Bumpus, Programme Coordinator, Responding to Climate Change; Mr. Stephen Dahl, Environmental

Planner, Norske Skog; Mr. Robert Dornau, International Emissions Trading Association ("IETA"); Mr. Nick Marshall, Global Product Manager, British Standards Institute; Mr. Alex Beckitt, Executive Officer, Renewable Energy Generators Australia Ltd.; Mr. Leonard Bernstein, Global Climate Coalition ("GCC") and Ms. Barbara Black, Non-governmental Organisation ("NGO") Liaison Officer, UNFCCC Secretariat. Note that all views expressed in this article are the author's own (and are not to be attributed to any particular individual unless cited) as are any errors and omissions.

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