CHAPTER 4

CORPORATE CONTRIBUTIONS TO TREATY FORMATION AND IMPLEMENTATION

Classical international law provides that only states enjoy the legal capacity to conclude treaties and that only heads of government, diplomats and other accredited representatives may express their consent to be bound. However, contemporary treaty negotiation is an elongated and dynamic process involving multiple actors interacting within various fora. Section A reviews the origins of several bilateral and multilateral regimes where distinctive corporate contributions are observable. The full range of participatory modalities and their respective merits are considered in Section B with respect to the evolving legal regimes with respect to ozone layer depletion and climate change.

Section C examines intergovernmental efforts to enrich deliberations by soliciting contributions from non-state actors generally, as well as proposals defining the conditions for their inclusion. These questions are important, because they determine access to conference venues, define the formal entitlement of non-state actors to make written submissions or provide oral interventions and legitimate other informal activities. The prospect of an emergent right of participation for non-state actors discernable from the accreditation criteria and procedural rules applicable to Conferences of the Parties is discussed in Section D. Section E attempts to identify the degree of corporate influence upon the substantive outcome of treaty negotiations and Section F examines corporate roles during subsequent implementation. It becomes apparent that corporate objectives are espoused through individual states and intergovernmental organizations but also independently. However, fluid informal practices frequently exceed procedural rules, and intercorporate disagreements may preclude a common industry perspective, thereby suggesting the challenges posed by business engagement.

A. ILLUSTRATIONS OF CORPORATE PARTICIPATION IN TREATY NEGOTIATIONS

This section selects several topics that are the subject of a bilateral or multilateral treaty, describes corporate contributions to negotiations, foreshadows

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the participatory techniques employed and identifies several generalizable lessons. The conventions may be categorized as natural resource exploitation (the law of the sea, biological diversity), national security (chemical weapons), international trade, investment protection and protecting social welfare by asserting corporate control (the bribery of government officials, anti-competitive behavior and tobacco advertising).

It should first be noted that corporations influence national positions prior to negotiation. For example, since the Australian government “should properly consult” with interested groups, the Department of Foreign Affairs and Trade undertakes consultation according to, *inter alia*, the following principles:

1. All groups whose interests might be substantially affected were Australia to become a party to a treaty are consulted.
2. Ministers invite NGO representatives to participate on treaty negotiating delegations where this would significantly enhance their ability to have their interests taken into account. The delegation’s balance and the NGOs level of interest in the treaty are relevant.
3. Consultation is continued at appropriate points throughout treaty negotiations.

Apart from reasons of confidentiality and national security, the private sector is “actively engaged, ex ante and in a real-time sense” in treatymaking including devising the breadth and depth of treaty frameworks, developing negotiation strategies or tactics and active front-line participation. Industry also contributes to the negotiation and implementation of soft law instruments. However, a “whole of government” approach with maximum consultation is necessary to ensure that individual government departments do not recommend treaty ratification that has unanticipated impacts. Furthermore, flaws in a treaty having adverse commercial consequences frequently result from a lack of proper consultation. Although the Australian government is therefore making a greater effort to consult with industry during the treaty-making process, previously employed processes may commit governments into undertaking future consultation. Thus consultation may be “spasmodic,” with industry views “deliberately sought” for only a limited number of treatymaking-processes, and requests

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3 *Id.* at para. 12.3.
4 *Id.* at para. 12.10 (The Australian Chamber of Commerce and Industry).
5 *Id.* at para. 12.15 (Australian Manufacturing, Engineering and Construction Industry Association).
6 *Id.* at para. 12.5 (Australian Mining Industry Council).
7 *Id.* at para. 12.11 (Business Council of Australia).
8 *Id.* at para. 12.12.