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Abstract:

Process-based certification schemes have been proposed as a way forward in the area of Monitoring Reporting and Verification for climate change. Niederburger and Kimble (2011) argue that a certification scheme for national climate management systems, which would require countries to establish a climate policy, set national goals and timetables, secure resources to implement related national actions and track their progress over time, would support rather than police developing country climate policy progress.

The purpose of this note is to explore whether regulatory theory, a conceptual framework drawn on infrequently in the climate space, can help clarify any of these challenges or point a way forward. More specifically, insights from literature on certification and private standard-setting regimes in settings other than climate change, combined with insights from an influential literature on 'responsive regulation' offer some opportunity to assess what is feasible to achieve with a certification approach. The driving question is: can regulatory theory clarify when monitoring climate policy processes and actions will a) help to facilitate interaction across scales and b) facilitate national and sub-national cooperation and ambition?

The impact of the note is to provide a simple but not simplistic lens into debates about the institutional dimensions of climate change governance, one that clarifies the issues for outsiders to the debate without distorting or over-simplifying the details for experts.

Keywords:	regulation, governance, climate mitigation policy, institutions, MRV

Using Insights from Regulatory Theory to Reinforce National and Global Climate Governance Mechanisms

Note prepared for the workshop on 'Building the Hinge'
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One of the key premises of this workshop is the increasing salience of national and sub-national climate actions as well as actions led by non-state actors. The resulting picture is fragmented and hybrid in comparison to a 'cleaner' focus on the global regime, for all its limitations. But arguably one clear strand of the 'messier' picture emerging in recent years is an increased emphasis on essentially voluntary national plans, accompanied by a parallel intensification of monitoring, reporting on and sometimes verifying (MRV) the making and execution of such plans.

This 'pledge and review' system gives rise to reasonably obvious risks of defection or shirking. One of the key challenges in responding to this risk is balancing the need for keeping states to their pledged plan of action with respect for national sovereignty. A second, related, key challenge is carving a judicious path between facilitation and prescription in the mechanisms devised to achieve that balance. And a third key challenge is the non-unitary nature of the fragmented complex that is currently emerging – a complex that has not only multiple levels of governance but which is composed of multiple sectoral spaces (energy, forests, land-use, technology, trade etc).

One response to these three challenges is to draw on process-based certification schemes. Such a scheme has recently been suggested as a way forward in the area of MRV. Niederburger and Kimble (2011) argue that a certification scheme for national climate management systems, which would require countries to establish a climate policy, set national goals and timetables, secure resources to implement related national actions and track their progress over time, would support rather than police developing country climate policy progress.

The purpose of this note is to explore whether regulatory theory, a conceptual framework drawn on infrequently in the climate space, can help clarify any of these challenges or point a way forward. More specifically, insights from literature on certification and private standard-setting regimes in settings other than climate change, combined with insights from an influential literature on 'responsive regulation' offer some opportunity to assess what is feasible to achieve with a certification approach. The driving question is: **can regulatory theory clarify when monitoring climate policy processes and actions will a) help to facilitate interaction across scales and b) facilitate national and sub-national cooperation and ambition?**

Lessons from certification

Recent literature about the regulatory efficacy of private global certification schemes in other areas, particularly forestry, suggests that a regulatory perspective has some advantages over the traditional interstate or IR approaches. Takacs (2013), for example, argues that MRV in the REDD+ space provides an example of how multiple stakeholders engaging in negotiated cooperation over standards and reporting mechanisms create reciprocal, contractual and fragmented sovereignty that is more inclusive of weaker states and important private sector actors than traditional interstate or IR approaches.

Moreover certification schemes can attract constructive political coalitions between otherwise unlikely groups. A 2011comprehensive literature review on certification showed that as a mechanism of social regulation, it has a dual appeal both to companies who prefer private self-regulation and to social movements seeking to building new political institutions at the transnational level (Bartley 2011). Of course, certification typically is take up by companies and firms, whereas the proposal to certify 'climate management systems' is aimed at states. But as with companies, certification would be a voluntary choice for states and as such would preserve national sovereignty of developing countries.

On the other hand, it would likely involve third party-review, aimed at reassuring all stakeholders of progress by all parties (ie striking that judicious balance between facilitation and prescription). The crunch would come in terms of the precise actors that would carry out audits against the standard and the substantive content of the standard. Standards for private industry certification point the way – several options have been developed here that, although all 'private and voluntary' at one level, vary in terms of greater influence of states (ISO 14-064), private corporate actors (Carbon Disclosure Project) and civil society (the GHG Protocol developed by the World Resources Institute in dialogue with the World Business Council on Sustainable Development.). For certifying *policy processes* (as opposed to industry emissions), the World Resources Institute, keeping a close dialogue with civil society, is already developing a standard against which to evaluate policy measures, and ISO is doing early work on a standard articulating the requirements of a management system. Regulatory competition between these various approaches is likely to dominate the field of climate policy integration for some considerable time to come.

The implications of such competition may be paradoxically productive, even if at first sight multiple standard-setting efforts may seem to drain resources and muddy an already complex field. In a different context, Perez 2011 argues that if the 'ensemble structure of global private regulation' (via the proliferation of different schemes and standards) is properly understood, certification is no longer vulnerable to 'greenwash' accusations of purely symbolic compliance. He focuses particularly on cross-linkage between different standards. Cross-linkages create two *positive* externality effects. One is in enforcement, where the compliance mechanisms of one regime serve as an enforcement agent of other regimes in the network and amplify compliance. A commonly cited example is where trade measures are used to enforce environmental standards, but perhaps in the climate complex a better example would be the possible synergies between emerging 'equity reference frameworks' and carbon reduction benchmarks.

The complex overlaps and disjunctions between differing standards in a multiple certification situation can also at times pose a challenge to compliance by making the content and credibility of specific benchmarks unclear. This potential disadvantage is however mitigated by a second positive externality effect of the ensemble: its impact on normativity. Mutual feedback between multiple standards amplifies the presence of sustainability as a regulatory principle across multiple regimes, its normative standing as a moral-political principle, and the moral legitimacy of the ensemble as a whole.

Certification, then, can mitigate some concerns over intrusion into national sovereignty, but over time it can have perverse side-effects which undermine the facilitative and encouraging nature of the pressure exerted by the schemes. We can see this in a study by Gilad of diverse forms of 'process-oriented regulation' which she defined as occurring 'when regulators direct and monitor [states'] self-evaluation, design and management of their production/internal controls in light of regulatory objectives (Gilad 2011). One of her key findings was that the use of third party auditors had a centralizing impact on the way that risks were defined/ This flowed from the requirement that risk be 'auditable'. Even if the 'auditability' is judged by multiple external parties (rather than, say, a single UNFCCC-related body), the drift towards a unitary definition of what is required often tends to increase policymaker resistance to the scheme as a whole. One way of pre-empting such a perverse side-effect might be to deploy the 'escalated enforcement' pyramid of the literature on responsive regulation (Ayres and Braithwaite 2005)

Enforcement pyramid of responsive regulation

Ayres and Braithwaites' theory of responsive regulation combined game theory and civic republican political theory to account for patterns of cooperation and defection by regulates in response to regulation. Their typical context was sub-national settings of industry regulated by national states, posing some challenges to the translation of their findings into a complex and fragmented multi-level space such as the climate policy complex. However, the basic idea underpinning the 'enforcement pyramid' in the theory has some direct relevance.

The enforcement pyramid provides a framework for institutional design which privileges facilitation even while building in a backstop of prescription. The enforcement pyramid suggests coercive prescription is a real possibility as a last resort strategy, but facilitation via education, consensus-building and information-based regulation should be the first option. That idea is that the base of the pyramid (the broadest and most frequently used enforcement strategies) focuses on 'soft' tools such as education and persuasion. These are the priority strategies of those who seek to enforce a particular regulatory regime, but if and when defection occurs, regulators should escalate up to more prescriptive and eventually punitive strategies – from formal warnings (eg negative reports flowing from MRV processes), to specific legal action to correct a particular defection (eg the appointment of an expert review group to review a specific national plan declared wanting), and finally to broader punishments that remove broadbased entitlements and rights (eg loss of a right to participate in an emissions trading market). The enforcement pyramid is supplemented by an emphasis on 'tripartism' where civil society plays a 'third-party' role in pressuring states to escalate up the pyramid.

Since the pyramid is distributed over different levels of governance, questions arise as to how it applies in the climate policy context. The first point to make here is that the relevance of the pyramid is confined to process-based evaluation of overall climate policy integration systems, rather than applying to the substantive details of particular policy areas. This keeps it one step removed from the complexity of multi-track, multi-level sectoral specificities. Secondly, the pyramid can be seen as multi-dimensional with three 'faces': interstate/international; national/sub-national; and non-state actors. From the perspective of the international face, the facilitative base is the key focus, with strategies in effect 'capped' at the formal warning stage. From the perspective of the national focus, escalation towards coercive prescription is the greater emphasis, catalysed by the formal warning stage of the international face. This preserves some sensitivities over national sovereignty while allowing both facilitation and prescription to operate. Finally, from the perspective of non-state actors, the important task is to coordinate the effects of the other two faces, primarily through information and transparency contributions.

The advantages of regulatory theory

Regulatory literature is a fruitful source for 'building a hinge'. On the one hand, its roots (in sociology, criminology, comparative politics) are more grounded in an appreciation of the importance of domestic political dynamics than regime theory grounded in international relations, which tends to blackbox domestic politics. On the other hand regulatory theory is (at least in its less economistic versions) better at accommodating political deliberation, interest group conflicts and the inevitability of self-interested 'dealmaking' than the more technocratic policy process literature.

Regulatory literature tends to focus on monitoring, control and coordination dynamics, and less on the substance of policy – this is particularly useful for exploring the national-international

articulation, but also for understanding general ways in which national-level institutions might pervasively influence a wide range of domestic policy areas.

Finally regulatory theory can be fairly agnostic about whether it is applied to transnational, international or domestic settings, and this is useful in the climate space.

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