


2023

Industry Groups in International Governance: A Framework for Reform

Melinda (M.J.) Durkee

Washington University in St. Louis School of Law, mjdurkee@wustl.edu

Follow this and additional works at: https://openscholarship.wustl.edu/law_scholarship

 Part of the [International Law Commons](#), [International Trade Law Commons](#), and the [Legal Studies Commons](#)

Repository Citation

Durkee, Melinda (M.J.), "Industry Groups in International Governance: A Framework for Reform" (2023). *Scholarship@WashULaw*. 406.

https://openscholarship.wustl.edu/law_scholarship/406

This Article is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Scholarship@WashULaw by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

Industry Groups in International Governance: A Framework for Reform

Melissa J. Durkee
Allen Post Professor, University of Georgia School of Law
mjdurkee@uga.edu

The Sustainable Development Goals and the UN Guiding Principles on Business and Human Rights encourage engaging with businesses as partners in important global governance agendas. Indeed, many international organisations are now partnering with business groups to secure funding and private sector engagement. At the same time, reforms at the World Health Organization, Food and Agriculture Organization and others seek to restrain the dangers of mission distortion and capture by business groups. Shareholders at major multinational oil and gas companies also recognise these dangers and are trying to rein in lobbying that is at odds with the goals of the Paris Climate Agreement. Despite these tensions, little scholarly attention has been paid to the regulations that govern how industry and trade groups may participate in the work of international organisations. Specifically, little attention has been devoted to how those regulations could best capture the potential benefits of business engagement while restraining the potential harms. This article offers a history of engagement between international organisations and industry and trade associations, reviews arguments for embracing or restraining their participation, and develops a framework for regulations to govern their access.

Keywords: International Organisations, Global Governance, Trade Associations, Non-State Actors, Participation, Lobbying, Climate Change

1 INTRODUCTION

How should international organisations productively engage trade and industry associations in law and policy making? This article places this question in historical context, evaluates existing models, and offers a five-part framework to guide future reforms.

To some, the question of how to *engage* lobbying groups like trade and industry associations in international governance might seem like precisely the wrong question to ask. After all, these groups lobby on behalf of multinational corporations, which have a chequered history when it comes to environmental and human rights movements.¹ Trade and industry groups bear reputations as powerful lobbyists, sometimes directly against global public goods. For example, shareholders at the multinational oil and gas company Chevron decided in the

¹ See, e.g., Elisa Morgera, *Corporate Environmental Accountability in International Law* (Oxford 2d edn 2020) 3-6 (describing major environmental damage produced by corporate activity); Florian Becker-Ritterspach, Katharina Simbeck, and Raghda El Ebrashi, 'MNCs' Corporate Environmental Responsibility in Emerging and Developing Economies: Toward an Action Research Approach,' (2019) 15 *Crit Persp on Intl Bus* 179-200 (proposing that without adequate regulatory control, any international business activity 'can cause exacerbated negative environmental externalities'); Peter T. Muchlinski, 'Human rights and multinationals: is there a problem?' (2001) 77 *Intl Affairs* 31 (referencing collusion between host governments and multinationals in significant human rights violations); Upendra Baxi, 'Human Rights Responsibility of Multinational Corporations, Political Ecology of Injustice: Learning from Bhopal Thirty Plus?' (2015) 1 *Bus & Hum Rts J* 21, 25-26 ('[Multinational corporations] do not regard themselves as either under a moral obligation or legal responsibility for preventing mass disasters they cause').

spring of 2020 to target climate lobbying by trade associations. They voted to approve a shareholder proposal asking the board of directors to report on climate lobbying, and the proposal garnered 53% of the votes cast.² This was a striking result, as shareholder proposals rarely obtain the votes to succeed.³ The odds-defying Chevron shareholder proposal requested that the Board of Directors should:

[C]onduct an evaluation and issue a report . . . describing if, and how, Chevron’s lobbying activities (direct and through trade associations) align with the goal of limiting average global warming to well below 2 degrees Celsius (the Paris Climate Agreement’s Goal). The report should also address the risks presented by any misaligned lobbying and the company’s plans, if any, to mitigate these risks.⁴

The proposal’s supporting statement noted that lobbying is ‘[o]f particular concern’ when it comes from ‘trade associations and other politically active organizations that speak for business but, unfortunately, too often present forceful obstacles to progress in addressing the climate crisis’.⁵

Chevron shareholders are not the only ones concerned that trade association lobbying might have detrimental effects on climate governance. A group of 75 civil society organisations published an open letter to the United Nations Secretary General and United Nations Framework Convention on Climate Change (UNFCCC) Executive Secretary in 2013 decrying the ‘exclusive access to negotiators granted to corporate lobby groups’, including coal industry lobby groups, and the resultant risks to ‘both our climate and the integrity of the

² See ‘Chevron 2020 Shareholder Proposal Voting Results’ (27 May 2020) <<https://www.chevron.com/-/media/chevron/stories/documents/chevron-2020-shareholder-proposal-voting-results.pdf>> accessed 28 June 2020. In the United States, shareholder proposals regularly bring matters of corporate policy to a vote by all stockholders in the company; under U.S. federal law, qualifying proposals must be disseminated by the company to shareholders for a vote. See Sarah C. Haan, ‘Shareholder Proposal Settlements and the Private Ordering of Public Elections’ (2016) 126 Yale LJ 262, 272 (offering background on shareholder proposal procedure, regulations, and current practice). An increasing number of shareholder proposals are directed to social and environmental matters, Haan at 266, and an increasing percentage of these address policies related to climate change. See Ceres, ‘Proxy Voting Guidebook 2020: The Business Case for Select Climate-Related Shareholder Proposals’ (Ceres 2020) <<https://www.ceres.org/resources/reports/proxy-voting-guidebook-2020?report=view>> accessed 28 June 2020 (reporting that in 2020 131 shareholder proposals were filed on climate change-related topics, including lobbying disclosure, carbon asset risk, board oversight, greenhouse gas reduction goals, sustainable agriculture, deforestation, and clean energy transportation). These proposals rarely obtain a majority vote.

³ For example, of seven proposals on Chevron’s ballot in 2020, the remaining 6 failed. See ‘Chevron 2020 Shareholder Proposal Voting Results’ (27 May 2020) <<https://www.chevron.com/-/media/chevron/stories/documents/chevron-2020-shareholder-proposal-voting-results.pdf>> accessed 28 June 2020. The prior year, all failed. ‘Chevron 2019 Shareholder Proposal Voting Results’ <<https://www.chevron.com/-/media/chevron/stories/documents/2019-shareholder-proposal-voting-results.pdf>> accessed 28 June 2020. A key reason for the success of this proposal is that it was embraced by the institutional investing behemoth BlackRock Inc. See ‘Voting Bulletin: Chevron Corporation’ <<https://www.blackrock.com/corporate/literature/press-release/blk-vote-bulletin-chevron-may-2020.pdf>> accessed 28 June 2020.

⁴ Ceres, ‘Report on corporate climate lobbying in line with Paris Agreement’ (2020). <https://engagements.ceres.org/ceres_engagementdetailpage?recID=a011H00000BZUITQAX>.

⁵ The supporting statement also noted that companies ‘have an important and constructive role to play’ in enabling policy-makers to close the gaps between the commitments national governments have made and the actions required to prevent the worst effects of climate change. Ceres (n 4).

UNFCCC as a multilateral process to tackle climate change'.⁶ The group called for rules to govern the relationship between the UNFCCC and the fossil fuel industry that recognise conflicts of interest between trade association 'partners' such as the World Coal Association and international organisations such as the UNFCCC.⁷ At the 2019 UNFCCC conference of the parties, activists described a conference where fossil fuel industry lobbyists obstructed major decisions and commitments by running out the clock before votes could be taken.⁸ At the next conference of the parties in 2021, fossil fuel lobbyists were again well represented⁹ and prominent.¹⁰

At the same time, the United Nations seeks to actively engage with private sector actors across a variety of agendas and bodies. The Sustainable Development Goals (SDGs) encourage engaging with business groups to accomplish goals like ending poverty and combatting climate change.¹¹ The UN Guiding Principles on Business and Human Rights also seek to engage businesses directly.¹² New multi-stakeholder organisations like the Global Fund to Fight AIDS, Tuberculosis, and Malaria and UN Women offer agenda setting and decisional rights to private sector groups, and the UN General Assembly recently granted observer status to the International Chamber of Commerce. Ayelet Berman describes this trend as a transformative move toward 'opening up' by international organisations that 'spans all issue areas, policy functions, and world regions,' and that is gaining momentum.¹³

As international organisations increasingly engage private sector partners and participants, they will need to grapple with concerns about mission distortion and capture, which prompt movements such as those by the Chevron shareholders and the authors of the UNFCCC Open Letter. How should access to industry groups be regulated to capture the benefits of private sector partnership on important goals, while avoiding potential harms? Surprisingly, while trade associations have earned a reputation as dominant forces in U.S.

⁶ 'Open letter calling for rules to protect the integrity of climate policy-making from vested corporate interests' (Corp. Eur. Observatory 21 November 2013) <<https://corporateeurope.org/en/blog/open-letter-calling-rules-protect-integrity-climate-policy-making-vested-corporate-interests>> accessed 29 June 2020.

⁷ *Id.*

⁸ See Simon Evans & Josh Gabbatiss, 'COP25: Key Outcomes Agreed at the UN Climate Talks in Madrid' (CarbonBrief 15 December 2019) <<https://www.carbonbrief.org/cop25-key-outcomes-agreed-at-the-un-climate-talks-in-madrid>> accessed 29 June 2020.

⁹ 'Provisional list of registered participants' (United Nations Framework Convention on Climate Change Conference of the Parties, Twenty-sixth session, Glasgow, 31 October to 12 Nov 2021) <https://unfccc.int/sites/default/files/resource/PLOP_COP26.pdf>

¹⁰ Adam Morton, 'Australia puts fossil fuel company front and centre at Cop26' (The Guardian 2 Nov 2021) (reporting that '[t]he Australian government has been criticised for prominently hosting a fossil fuel company at its pavilion at the Cop26 climate summit in Glasgow') <<https://www.theguardian.com/australia-news/2021/nov/03/australia-puts-fossil-fuel-company-front-and-centre-at-cop26>> accessed 19 Nov 2021.

¹¹ United Nations, 'Transforming our world: the 2030 Agenda for Sustainable Development' (U.N. 2015) <<https://sustainabledevelopment.un.org/post2015/transformingourworld>>. For example, paragraph 28 states that 'the business sector and other non-State actors and individuals must contribute to changing unsustainable consumption and production patterns, including through the mobilization, from all sources, of financial and technical assistance to strengthen developing countries' scientific, technological and innovative capacities to move towards more sustainable patterns of consumption and production'. *Id.*

¹² See 'The UN Guiding Principles on Business and Human Rights (U.N. 2011) <<https://www.ungpreporting.org/resources/the-ungps/>> accessed 29 June 2020.

¹³ See Ayelet Berman, 'Between Participation and Capture in International Rule-Making: The WHO Framework of Engagement with Non-State Actors' (2021) 32 Eur J Intl L 227, 228.

domestic interest group politics,¹⁴ they have received much less attention as actors in international governance.¹⁵ This article addresses the question of how international organisations might productively engage with industry groups by placing such engagement in historical context, examining literature and current reforms, and synthesising insights from those investigations to generate a framework for future reforms.

Specifically, Part 2 places the current conversation in historical context. The relationship between international organisations and business groups has had a long and complex history that defies easy characterisation. Industry and trade associations have been active in global governance since even before the League of Nations period and were considered to be indispensable partners to international organisations in the early 20th century. It was not until the late 20th century that commentators began to regard them separately from ‘civil society’ organisations working for the public benefit. The early 21st century is ushering in a more nuanced perspective toward business groups: they are both regarded with suspicion and sought after as important partners. With the advent of the 2030 Agenda and the SDGs, international organisations might now be at an inflection point in their relationship with industry groups. Part 3 reviews literature evaluating the benefits and risks of business participation in governance, and critically examines existing models that international organisations have used to offer access to industry and trade associations. Finally, Part 4 offers a framework to guide international organisations in developing future reforms. The framework directs reformers to evaluate proposed access models according to how well they ensure five factors: mission accountability, balance of perspectives, transparency, meaningful access, and administrability.

2 HISTORY OF ENGAGEMENT

The participation of business groups in international law and policy making is not a new phenomenon. It has developed alongside the participation of a wider universe of nongovernmental organisations (NGOs) and other associations in international governance over the last two centuries. While it is now common to think about ‘public interest’ NGOs or ‘civil society’ groups as a separate category of groups than industry and trade groups that lobby on behalf of business interests, this distinction between the two types of actors is relatively new, emerging toward the end of the 20th century.¹⁶ In the early 21st century, that

¹⁴ See Philip T. Hackney, ‘Taxing the Unheavenly Chorus: Why Section 501(c)(6) Trade Associations Are Undeserving of Tax Exemption’ (2015) 92 Denv UL Rev. 265, 269 (reviewing literature that finds that trade associations ‘are often considered some of the most politically influential organizations’ in the U.S. and that ‘there is a bias in the interest group system towards business interests’).

¹⁵ See Berman (n 13), at 229.

¹⁶ Some definitional clarity is in order here. Many commentators now use the terms ‘NGO’ and ‘civil society’ to refer to non-profit organizations that individuals join out of a moral commitment to the group’s particular purpose. See Steve Charnovitz, ‘Nongovernmental Organizations and International Law’ (2006) 100 Am JIL 348, 350 n12; see also Kenneth Anderson, ‘Global Governance: The Problematic Legitimacy Relationship Between Global Civil Society and the United Nations’ (2008) Am Univ Wash Coll of Law Research Paper Series Working Paper 2008-71, 16 <http://ssrn.com/abstract_id=1265839> accessed 30 June 2020 (affirming this usage and noting, critically, that commentators often reserve the term for politically ‘progressive’ organizations). Many trade and industry associations are also technically ‘non-governmental organizations’ in that they are non-governmental, non-profit groups, but the literature does not tend to refer to them as NGOs. For avoidance of doubt, this paper uses the terms ‘civil society’ and ‘public-interest NGOs’ to refer to groups that do not advocate for business interests, and the terms ‘trade and industry associations,’ ‘business groups,’ and ‘private sector

distinction is well established, and the dominant approach toward business groups is to engage them as partners, funders and stakeholders, while at the same time guarding against their potentially harmful influences in global governance.

2.1 Pre WWII patterns of engagement: business groups and other associations as partners and participants

Associations became involved in international governance as early as the late 18th century, when various groups travelled to international conferences to pursue agendas such as the abolition of slavery, peace and worker solidarity.¹⁷ Associations pursuing commercial and economic agendas participated right alongside human rights oriented groups. According to Steve Charnovitz's leading review of early interest group participation in international governance, by the mid 19th century a number of organisations advocated free trade, such as the 'Anti-Corn Law League', which advocated against corn tariffs; the 'Free Trade Association' in France; and the 'Belgian Association for Commercial Liberty'.¹⁸ Later in the 19th century, business groups were instrumental in establishing the 'International Railway Congress Association', which included both governments and railroad companies.¹⁹ Later still, a business group called the International Maritime Committee drafted international conventions on maritime law, resulting in 'numerous treaties'.²⁰

In the early 20th century, world commerce became a major topic of interest for governments, and a number of international lawmaking conferences included both governments and industry representatives. The International Chamber of Commerce (ICC) became a major actor in international governance during this time, and both government and business delegates attended the 1905 International Congress of Chambers of Commerce.²¹ Conferences about customs regulation, railways, motor vehicles, shipping and financial relations also incorporated both government and business group representatives during this timeframe.²²

These patterns of close engagement between business groups and international organisations continued in the League of Nations era after World War I, reflecting a positive view of links between commerce and human flourishing. This close and cooperative relationship was not formalised by law but was well entrenched in custom. It was recognised at the time as the 'League Method,' referring to informal but substantial cooperative interactions between associations (including business groups) and international organisations.²³

groups' to refer to groups that do. The more general terms 'associations' or 'non-state actors' refers to all non-governmental groups without distinction.

¹⁷ Steve Charnovitz, 'Two Centuries of Participation: NGOs and International Governance' (1997) 18 *Mich JIL* 183, 190-93 (noting that some, like the Roman Catholic Church, were active even earlier).

¹⁸ *Id.* at 194.

¹⁹ *Id.* at 202.

²⁰ *Id.*

²¹ *Id.* at 209.

²² Charnovitz (n 17) at 208-2011.

²³ *See id.* at 221-237; 245-46 (describing the League era context in which voluntary associations defined and presented issues for the League's consideration, served as 'insiders working directly with government officials and international civil servants to address' international problems, and lobbied those in power).

For example, the League established a ‘consultative committee’ including representatives of industry, commerce, agriculture, finance, and transport — among others.²⁴ League officials attended meetings of the International Chamber of Commerce (ICC), and the ICC took official consultative roles in economic conferences held by the League.²⁵ The ICC offered input on treaties on taxation, industrial and scientific property, and the enforcement of arbitral awards, and was even welcomed as a signatory to a customs treaty.²⁶ Outside the League of Nations, the ICC instigated international conferences on air law, postal mail rules and shipper’s liability. The League of Nations also formalised a relationship with business groups in the International Labour Organization, using a tripartite membership structure that included representation by business groups on equal terms with governments and labour groups. During this period businesses principally communicated with international organisations through trade and industry associations because few businesses had transnational footprints or the capacity to participate in international lawmaking directly.²⁷

2.2 Engagement in the post-war period: business groups and other associations as consultants and observers

While non-state actors, including business groups, worked closely and cooperatively with the League of Nations in many aspects of its work, the League Method was an informal practice rather than a statutorily sanctioned relationship. For this reason, after World War II non-state groups sought to have the practice formalised, and perhaps even expanded, under the new UN Charter.²⁸ The result fell somewhat short of expectations. The UN Charter contained a single reference to associations, with its Article 71 empowering the new Economic and Social Council (ECOSOC) to ‘make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence’.²⁹ The UN Charter offered no other avenues of influence, such as a new multi-stakeholder organisation, for example, or participatory rights at the General Assembly.

Nevertheless, Article 71 did serve to preserve the essence of the League Method in practice. ECOSOC established regulations that welcomed associations to become accredited to ECOSOC and to agencies or bodies within ECOSOC’s purview. Under these regulations, trade and industry associations became eligible to participate as ‘consultants’ to the United Nations on equal terms with other associations, just as they had during the League of Nations era.³⁰ The regulations merely required that the groups should be organised as non-profit organisations and support some aspect of the United Nations’ work. Thus, the accreditation system formalised the then-existing role of trade and industry associations as mouthpieces for business interests: Trade and industry associations, as non-profit entities, are eligible for consultative status, while individual for-profit businesses are not.

²⁴ *Id.* at 224.

²⁵ *Id.* at 213.

²⁶ *Id.* at 223.

²⁷ Peter T. Muchlinski, *Multinational Enterprises and the Law* (Oxford 2d edn, 2007) 8-9.

²⁸ Charnovitz (n 17) at 251.

²⁹ U.N. Charter art. 71.

³⁰ For descriptions of ECOSOC regulations codifying privileges and practices relating to NGOs, see Stephen Hobe, ‘Article 71’, in Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary* vol 2 (Oxford 3rd edn, 2012) 1788, 1797.

The consultancy system offers business groups and public interest organisations a variety of access rights on equal terms, including the right to observe meetings, present written or oral comments, propose agenda items, receive press releases and obtain ‘grounds passes’ offering informal access to governmental delegates and other officials.³¹ ECOSOC consultants may also obtain access to international conferences. The ECOSOC accreditation regime has served as a blueprint for consultancy regimes at other bodies within the United Nations and has spread to other organisations such as the Organization of American States, the Antarctic Treaty System, and the African Union.³²

Subsequent reforms of the ECOSOC accreditation system have not displaced the standing of business and trade association ‘consultants’. The consultant groups are not divided according to who they represent or for what positions they seek to advocate, but rather by whether they pursue a broad mission and have a global reach (general status), or whether they have a narrower range of interests (special or roster status).³³ Reforms have sought, rather, to ensure that associations that become accredited represent their members through a ‘democratically adopted constitution’, and adopt other indicia of good internal governance.³⁴

2.3 From the 1990s to the present: a growing ambivalence toward business groups and new distinctions between those groups and civil society

The post-war pattern — where international organisations generally invited trade and industry associations to engage with them on the same terms as public interest NGOs and other associations — persisted until the latter part of the 20th century. Then gatekeepers and commentators began to express more ambivalence. On the one hand, they began to regard business groups with more suspicion, and on the other, they began to embrace them as important partners in pursuing certain global governance agendas. The rising level of unease with the participation of business groups has produced several reforms of the interest group participation structure, leading to attempts to regulate businesses separately.³⁵ Meanwhile, the parallel move toward embracing business groups as essential partners has fueled several multi-stakeholder organisations, other forms of partnership, and the welcoming approach of the Sustainable Development Goals.

The growing concern about business roles in global governance coincides with the growth of multinational entities in the second half of the 20th century. In the period from 1945 to 1990, multinational business enterprises ‘acquired unprecedented importance in international production,’ as American firms became the first major multinational players, followed by European, Japanese, and Chinese firms as well as those in newly open market countries.³⁶ The rapid growth of multinational corporations in this period sparked pushback among scholars who were suspicious of the increasing global power of business entities,³⁷ and

³¹ See generally Kal Raustiala, ‘NGOs in International Treaty-Making’ in Duncan B. Hollis (ed) *The Oxford Guide to Treaties* 150 (Oxford 2012).

³² Charnovitz (n 17) at 259.

³³ Economic and Security Council Res. 1996/31 (25 July 1996) paras 21-26.

³⁴ *Id.* at paras 9,10, 11. The reforms have also responded to criticism that the consultancy system reflects an overrepresentation of associations from the Global North.

³⁵ It has not, as Ayelet Berman notes, produced new international laws on participation, lobbying, or interest-group capture. Berman (n 13) at 1.

³⁶ Muchlinski (n 27) at 15-21.

³⁷ See Raymond Vernon, *Sovereignty at Bay: The Multinational Spread of U.S. Enterprises* (Basic Books NY

ignited a movement at the United Nations to regulate transnational business entities.³⁸ Social scientists began to highlight distinctions between economic actors and other non-state actors, newly designating the latter group ‘civil society’.³⁹

The globalisation of the 1990s unleashed business entities that ‘appear[ed] to be a power unto themselves’, with the capacity to ‘set their own rules and to sidestep national regulation’.⁴⁰ Many businesses became transnational entities, with supply chains crossing national borders and transnational or global distribution of goods and services.⁴¹ Their capacities to lobby for influence spread from principally national activities to include significant foreign, transnational, and international lobbying.⁴²

The growth of multinational entities has begun to produce an ambivalent response from international organisations, diplomats, and commentators. On the one hand, it has become clear to some observers that private sector groups have disruptive power within international organisations. For example, when the World Health Organization (WHO) sought to develop the Framework Convention on Tobacco Control, the organisation became the target of an ‘elaborate, well financed, sophisticated, and usually invisible’ campaign by tobacco industry groups to discredit and impede it.⁴³ The tobacco industry hid behind ‘tobacco company-created front groups and trade unions that had obtained consultative status at the WHO’.⁴⁴ Later, when the WHO tried to update guidelines on the consumption of sugar, multinational food and beverage companies such as Coca Cola and McDonalds ‘vigorously fought the WHO guideline’, including by ‘attacking the validity of scientific studies on the health effects of sugar’.⁴⁵ In other corners of the global governance system, France lodged a series of complaints about the significant influence of non-state actors (specifically industry and professional groups) in influencing consensus-based rule-making at the United Nations Commission on International Trade Law (UNCITRAL),⁴⁶ and, as previously described, 75 civil society groups signed a petition calling on the United Nations to better protect climate change policy negotiations from the fossil fuel industry’s influence.⁴⁷

1971).

³⁸ See John Gerard Ruggie, ‘Business and Human Rights: The Evolving International Agenda’ (2007) 101 Am. JIL 819, 819.

³⁹ See generally Jean L. Cohen & Andrew Arato, *Civil Society and Political Theory* (MIT Press 1992) (elaborating a three-part model that distinguishes civil society, economic society, and political society and noting that ‘[t]he concept of civil society . . . has become quite fashionable today’); Martha L. Schweitz, ‘NGO Participation in International Governance: The Question of Legitimacy’ (1995) 89 Am Socy Intl L Proc Ann Mtg 415-26 (distinguishing between ‘government, business and the so-called ‘third sector’ which includes NGOs).

⁴⁰ Muchlinski (n 27) at 3 (also noting that ‘the major [multinational enterprises] have a turnover larger than many nation states’).

⁴¹ See *id.* at 21-22 (explaining that this period brought ‘adoption of truly global production chains’).

⁴² See Ruggie (n 38) at 819 (referring to the ‘expanding reach and growing influence of transnational corporations’); José E. Alvarez, ‘Are Corporations ‘Subjects’ of International Law?’ (2011) 9 Santa Clara JIL 1, 5 (‘[C]orporations . . . have exerted considerable influence in the making of rules governing trade, investment, antitrust, intellectual property, and telecommunications . . .’).

⁴³ WHO, ‘Tobacco Company Strategies to Undermine Tobacco Control Activities at the WHO’ (2000) 25 <https://www.who.int/tobacco/en/who_inquiry.pdf?ua=1> accessed 28 June 2020 [TCS Report].

⁴⁴ *Id.*

⁴⁵ Berman (n 13) at 1.

⁴⁶ See Susan Block-Lieb & Terence C. Halliday, *Global Lawmakers: International Organizations in the Crafting of World Markets* (Cambridge 2017) 325-28.

⁴⁷ ‘Open letter calling for rules to protect the integrity of climate policy-making from vested corporate interests’ (Corp. Eur. Observatory 21 November 2013) <<https://corporateeurope.org/en/blog/open-letter->

Concerns about the harmful effect of lobbying by trade and industry associations have provoked calls for reforms that would separate business groups from other groups and better regulate the influence of the former. One of the major innovations is the WHO's Framework of Engagement with Non-State Actors, which separates 'private-sector entities' and 'international business associations' on the one hand, from 'non-governmental organizations' on the other, and regulates the two groups separately.⁴⁸ Regarding business groups, the Framework implements safeguards meant to guard against 'conflicts of interest' that might impact the WHO's 'integrity, independence, credibility and reputation; and public health mandate'.⁴⁹ France called for a similar reform at UNCITRAL, arguing that the most active participants at UNCITRAL rule making sessions should not be considered NGOs, a title it associated with civil society groups, but rather as business or professional associations. France argued that these latter groups should be subject to greater restraints.⁵⁰ The FAO has also implemented reforms where it separates business representatives from other groups, which it calls 'Civil Society Organizations'.⁵¹ The business, or 'private sector,' groups are defined as 'all sectors of the food, agriculture, forestry and fisheries systems' including 'enterprises, companies or businesses . . . private financial institutions; industry and trade associations; and consortia that represent private sector interests'.⁵² These groups are not permitted to obtain formal status or accreditation but may engage with the FAO in 'policy dialogue' among other things.⁵³

At the same time as some global governance reformers began to try to avoid the potentially detrimental influences of business engagement, the partnership and consent of business entities became indispensable to many projects at the heart of the international agenda, such as development, trade and climate change. Many business groups have become actively involved in self-regulation and co-regulation with states,⁵⁴ and innovations such as benefit corporations (which seek 'triple bottom line' economic, environmental, and social returns) and social finance (which 'operates at the intersection of commerce and philanthropy') have blurred lines once again between business and civil society actors.⁵⁵ The UN Guiding Principles on Business and Human Rights project, for example, has long tried to engage business directly.⁵⁶ The Sustainable Development Goals have endorsed public-private

[calling-rules-protect-integrity-climate-policy-making-vested-corporate-interests](#)> accessed 29 June 2020.

⁴⁸ World Health Organization, Framework of Engagement with Non-State Actors, WHA69/2016/REC/1 (28 May 2016) [WHO, FENSA].

⁴⁹ WHO, FENSA at Annex, 9-10, 7(a), (c).

⁵⁰ Claire Kelly, 'The Politics of Legitimacy in the UNCITRAL Working Methods' in Tomer Broude et al. (eds), *The Politics of International Economic Law* (Cambridge 2011) 106, 115.

⁵¹ 'FAO Strategy for Partnerships with Civil Society Organizations' (Food & Agric. Org. of the United Nations 2013) 1 <<http://www.fao.org/docrep/018/i3443e/i3443e.pdf>> accessed 30 June 2020.

⁵² 'Principles and Guidelines for FAO Cooperation with the Private Sector' (Food & Agric. Org. of the United Nations 2000) 5 <<http://www.fao.org/3/a-x2215e.pdf>> accessed 30 June 2020.

⁵³ Id.

⁵⁴ See, e.g., Virginia Haufler, *A Public Role for the Private Sector: Industry Self-Regulation in a Global Economy* (Carnegie 2001) 1-5 (codes of conduct and coordinated standards); Tim Büthe & Walter Mattli, *The New Global Rulers: The Privatization of Regulation in the World Economy* (Princeton 2011) 29-33 (private nonmarket regulatory regimes).

⁵⁵ Sarah Dadush, 'Regulating Social Finance: Can Social Stock Exchanges Meet the Challenge?' (2015) 37 U Pa JIL 139, 143, 159-60.

⁵⁶ U.N. 'Frequently Asked Questions About The UN Guiding Principles on Business and Human Rights' (U.N. 2014) <https://www.ohchr.org/Documents/Publications/FAQ_PrinciplesBusinessHR.pdf> accessed 30

and multi-stakeholder partnerships.⁵⁷ Many organisations are ‘updating their strategies and work programmes to collaborate through partnerships’ with business groups.⁵⁸ Indeed, these collaborations are on the rise. For example, UN Women established a Private Sector Leadership Advisory Council, which invites business leaders, including chief executives of The Coca-Cola Company, L’Oréal, Goldman Sachs, Unilever and others, to offer periodic strategic input.⁵⁹ The GAVI Alliance (founded by the Gates Foundation), the Global Fund to Fight AIDS, Tuberculosis and Malaria, and The Internet Corporation for Assigned Names and Numbers (ICANN, a non-profit multi-stakeholder group) are other prominent examples of multi-stakeholder partnerships.

It is also important to note that while the early 21st century brought innovations in both restricting and embracing the participation of business groups in the work of international organisations, these changes have so far mostly taken place on the margins. The standard model of interaction at ECOSOC — and at the many treaty bodies and organisations that piggyback on the ECOSOC framework or use it as a blueprint — has remained the same. As of this writing, approximately 5,000 associations are accredited as consultants to ECOSOC, and 10% of these report ‘business and industry’ as their area of expertise or field of activity.⁶⁰ That figure likely underreports the number of associations representing the private sector, as it merely reflects the number of associations that explicitly report this focus. Examples of accredited business and industry associations include global sectoral associations such as the World Coal Association and the World Nuclear Association, regional sectoral associations such as the Association of Latin American Railways, the National Association of Home Builders of the United States, and the European Association of Automotive Suppliers, as well as generalist organisations, whether global or regional, such as the International Chamber of Commerce, and the World Union of Small and Medium Enterprises. Many of these associations have disclosed that their principal organisational purposes include lobbying.⁶¹ These trade and industry groups work alongside and on equal terms with familiar public-interest NGOs like Greenpeace and Médecins Sans Frontières.

The brief history offered in this part of the article shows that, notwithstanding the recent movements to restrain business influence in global governance, business participation in international law and policy making through trade and industry associations has a long

June 2020 (noting that the Guiding Principles were unanimously endorsed in 2011, but the debate over how human rights apply to business stretched into the decades before its endorsement).

⁵⁷ United Nations, ‘Transforming our world: the 2030 Agenda for Sustainable Development’ (U.N. 2015) <<https://sustainabledevelopment.un.org/post2015/transformingourworld>>.

⁵⁸ Berman (n 13) at 3 (citing UN Joint Inspection Unit (n5), 10-30).

⁵⁹ UN Women, ‘UN Women Launches Private Sector Leadership Advisory Council’ (2 June 2014), <<http://www.unwomen.org/en/news/stories/2014/6/private-sector-leadership-advisory-council-launched>> accessed 30 June 2020.

⁶⁰ NGO Branch, ‘Advanced Search for Civil Society Organizations’ (United Nations Dep’t Econ. & Soc. Aff. 2020) <<http://esango.un.org/civilsociety/displayAdvancedSearch.do?method=search&sessionCheck=false>> accessed 30 June 2020.

⁶¹ See Melissa J. Durkee, ‘International Lobbying Law’ (2018) 127 Yale LJ 1742, 1768-69 [International Lobbying Law] (‘For example, the World Coal Association lists among its goals that it aims to [a]ssist in the creation of a political climate supportive of action by governments’ to use various kinds of coal technologies, and to educate policymakers about the benefits of coal and the coal industry. The World Nuclear Association ‘seeks to promote the peaceful worldwide use of nuclear power’. The National Association of Home Builders of the United States seeks to [b]alance legislative, regulatory and judicial public policy.’.)

history. For much of that history, this participation was not considered to be problematic, or to be different from the work of NGOs addressing other kinds of human benefit. This history, therefore, explains the structure of current access rules, which tend to accept business groups alongside other groups on equal terms. It also shows how there is nothing legally or theoretically necessary about this structure. Rather, many of the rules exist as they do because they are continued prior practice (the League Method), formalised prior practice (UN Charter Article 71), borrowed from prior practice (ECOSOC access rules and their progeny), or reactions to such (reforms at WHO and FAO). These access and participation frameworks need not present a limitation but can serve as a reference point for future structures, which should accommodate the needs of present day organisations.

3 COMMENTARY AND REFORMS

Access frameworks that engage and restrain the influence of business groups in the work of global governance should draw from the theoretical insights of commentators, as well as upon the historical experience reviewed in part 2, above. Domestic literatures on administrative law and their international parallels have both championed the benefits of soliciting input from civil society and non-state actors. Some strands of scholarship affirm that input by outside groups can enhance an organisation's democratic mandate, while others focus on more moderate legitimacy benefits and explain how outside input can assist an organisation to govern more effectively. Many of these studies do not focus on whether these benefits apply equally in the context of business groups, but some preliminary conclusions are available, as the following sections will discuss: While business groups can contribute to the legitimacy and effectiveness of law and policy making processes, their participation can also threaten these values.

3.1 Commentary: business engagement as boon and peril

3.1.1 *Engagement as democratisation*

One of the most prominent arguments given for the participation of non-state actors in international governance is that these actors serve to 'democratise' international organisations and confer upon them an enhanced legitimacy and mandate by receiving the views of a global constituency through their NGO representatives.⁶² In this way, participation by non-state groups has been imagined to be a 'basic form of popular representation'⁶³ that offers

⁶² See, e.g., Terry MacDonald, *Global Stakeholder Democracy: Power and Representation Beyond Liberal States* (Oxford 2008) 193 (arguing that 'nonelectoral mechanisms of authorization and accountability could potentially be employed to confer democratic legitimacy upon a range of agents of public power in global politics, including [international organizations]'); Grainne de Burca, 'Developing Democracy Beyond the State' (2008) 46 *Colum JTL* 221; A von Bogdandy et al., *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer 2010), Anne Peters, 'Membership in the Global Constitutional Community', in Geir Ulstein, Jan Klabbbers, Anne Peters (eds.), *The Constitutionalization of International Law* (Oxford 2009); see also 'We the Peoples: Civil Society, the United Nations and Global Governance: Rep. of the Panel of Eminent Persons on United Nations-Civil Soc'y Relations' (11 June 2004) U.N. Doc. A/58/817, at 3 [Cardoso Report] ('The growing participation and influence of non-State actors is enhancing democracy and reshaping multilateralism').

⁶³ Boutros Boutros-Ghali, U.N. Sec'y-Gen., 'Keynote Address by Secretary-General Boutros Boutros-Ghali to the 47th DPI/NGO Conference' (8 September 1994), in 47th Annual DPI/NGO Conference, We the

international organisations ‘quasi-democratic legitimacy’.⁶⁴ This view has been enormously influential in shaping the ECOSOC access regime and the regimes that borrow from it. In particular, ECOSOC regulatory reforms in 1996 focused on the representative nature of participation by various groups, and implemented reforms that functioned to ensure that those groups actually represent the interests of their members. For example, reforms sought to ensure a ‘democratically adopted constitution’, ‘determination of policy by a . . . representative body’, a ‘representative structure’, and ‘appropriate mechanisms of accountability’ through, for example, voting.⁶⁵ The reforms also emphasised the democratic representation theme by seeking to ensure greater representation from the Global South.⁶⁶ A later 2004 report on the ECOSOC structure by a panel of experts advocated strengthening relationships with non-state groups in order to ‘overcome democratic deficits’.⁶⁷

The strong form of the view that the consultancy regime confers democratic legitimacy on international organisations by offering the views of the global public has fallen out of vogue. This change was due in part to the fact that public interest NGOs began to critique aspects of the multilateral system, and in part to the concern that these groups were not necessarily representative of the views of some imagined global public; they came to be seen as ‘lobbyists rather than ‘true’ stakeholders’.⁶⁸

3.1.2 Engagement as legitimation

What remained was a more moderate and descriptive claim: that engaging non-state actors in the process of law and policy making can enhance the legitimacy of international organisations not through democratic representation, but through administrative law virtues like openness and procedural fairness.⁶⁹ Participation by stakeholders can offer input legitimacy by facilitating more deliberation, transparency, reason giving, and a process that incorporates the views of all potentially affected parties.⁷⁰

Many of these benefits are equally applicable in the context of private sector groups.⁷¹ Indeed, offering trade and industry groups opportunities to submit input during a rule-making

Peoples: Building Peace, at 3 (8 September 1994).

⁶⁴ Anderson (n 16), at 16.

⁶⁵ See Economic and Social Council Res. 1996/31 (n 33) paras 10-12.

⁶⁶ *Id.* at para 5.

⁶⁷ United Nations, ‘Press Briefings by Panel on UN-Civil Society Relations’ (21 June 2004) <<http://www.un.org/press/en/2004/Cardoso062104.doc.htm>> accessed 30 June 2020.

⁶⁸ Global Pol’y F, ‘UN System and Civil Society - An Inventory and Analysis of Practices: Background Paper for the Secretary-General’s Panel of Eminent Persons on United Nations Relations with Civil Society’ (May 2003) <<http://www.globalpolicy.org/component/content/article/226/32330.html>> accessed 30 June 2020 [Inventory]; see also Lisa Maria Dellmuth & Jonas Tallberg, ‘Advocacy Strategies in Global Governance: Inside versus Outside Lobbying’ (2017) 65 *Pol Stud* 705-23 (analogizing non-governmental organization advocacy to ‘interest group lobbying in American and European politics’); Schweitz (n 39), at 419 (describing concerns about the legitimacy of NGOs in the international governance process).

⁶⁹ See, e.g., Benedict Kingsbury et al., ‘The Emergence of Global Administrative Law’, *Law & Contemp. Probs.* (2005) 15, 17; Richard Stewart, ‘Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness’, (2014) 108 *Am. JIL* 211.

⁷⁰ See, e.g., Daniel C. Esty, ‘Good Governance at the Supranational Scale: Globalizing Administrative Law’ (2006) 115 *Yale LJ* 1490, 1524.

⁷¹ See, e.g., Jonathan I. Charney, ‘Transnational Corporations and Developing Public International Law’ (1983) 32 *Duke LJ* 748, 787-88 (corporations would be more likely to accept international law rules if they regarded them as legitimate, and perceived legitimacy is enhanced by corporate access to the rulemaking process).

process can have additional benefits, such as enhancing the credibility of international rules among those private sector constituents, and building support for the rules among national governments, which might otherwise be subject to disaffected private sector lobbying efforts.⁷² Finally, allowing private groups access to the rule-making process can potentially enhance transparency by allowing those groups to disseminate information about the process to their members. Participation by a mix of groups, or ‘multiple countervailing interests’, can balance the deliberative process and prevent capture of lawmakers by any one group.⁷³ Private sector associations can also enhance the quality of information available to decisionmakers, offering expertise about what legal standards might work in a given situation, what alternatives might be available, and what potential externalities could arise.⁷⁴

3.1.3 *Engagement as danger*

On the other hand, private sector participation in the deliberative processes of international organisations can present a variety of potential harms. Ayelet Berman has described these concerns as relating to ‘legal, subtle’ forms of capture that are ‘increasingly prevalent in international rule-making’.⁷⁵ She taxonomizes these forms of capture as including information capture, representational capture and resource capture.⁷⁶ The presence of business groups has been criticised as ‘dilut[ing] member state control’ over decision-making,⁷⁷ diminishing regulatory trust, and casting the NGO accreditation process in a negative light that will harm trust in public interest organisations.⁷⁸ This participation by business groups can heighten existing concerns about the representativeness of those processes, such as the overrepresentation of accredited groups from the Global North and underrepresentation from the Global South, which business groups can exacerbate.⁷⁹ Perhaps most importantly, business participation has been critiqued as degrading the value of information flowing from non-state actors, particularly in the context of coordinated private sector campaigns, like those against tobacco and sugar control.⁸⁰

3.2 Current reforms

The early 21st century reforms of access rules at international organisations build on the tension the literature identifies between the costs and benefits of business participation. Reforms take two main forms that, perplexingly, cut in opposite directions. These reforms flow out of critiques of the ECOSOC participation blueprint, which focus on both too little and too much engagement by business actors. The reforms either separate business and non-business groups in order to regulate business participation more carefully, or they give

⁷² See Melissa J. Durkee, ‘Industry Lobbying and ‘Interest Blind’ Access Norms at International Organizations’ (2017) 111 Am. JIL Unbound 119, 122.

⁷³ Kenneth W. Abbott & David Gartner, ‘Reimagining Participation in International Institutions’ (2012) 8 JIL & IR 1.

⁷⁴ Durkee, Industry Lobbying (n 72), at 123

⁷⁵ Berman (n 13) at 232.

⁷⁶ *Id.* at 4-6.

⁷⁷ Kelly (n 50), at 111-12.

⁷⁸ Peter Willets, *Non-Governmental Organizations in World Politics: The Construction of Global Governance* (Routledge 2011) 27.

⁷⁹ Economic and Social Council Res. 1996/31 (n 33), at para 5.

⁸⁰ See, e.g., Berman (n 13); Melissa J. Durkee, ‘Astroturf Activism’ (2017) 69 Stan L Rev 201.

businesses more participatory rights in order to engage with business more fully.

The first critique is that the ECOSOC rules do not give particularly meaningful access for non-state actors, including business actors, to the work of international organisations; and the second is that the rules do not adequately prevent capture by business groups. In terms of meaningful access, groups accredited through ECOSOC have complained that their interaction with lawmakers can be almost purely informal, with the most significant feature of consultative status being the right to an access badge giving them access to the ‘corridors, cafeteria and other sites at various UN headquarters’.⁸¹ When it comes to large international treaty conferences where non-state groups show up in large numbers, the groups can fare even worse. They are often relegated to a large conference facility separate from the main negotiations and have little effect on that process.⁸² Instead, much of the influence of non-state actors takes place at the domestic or transnational level as these groups lobby national delegates to persuade them to adopt particular negotiating positions. When it comes to business, an additional access critique arises: individual businesses cannot become ECOSOC consultants, but must speak through their non-profit representatives.⁸³ In terms of capture, the ECOSOC rules have not been attentive to this risk. The regulations have focused on ensuring that accredited groups represent their stakeholders, rather than on identifying the lobbying positions or major clients of trade or industry associations.⁸⁴ The regulatory structure appears designed for ‘civil society’ groups and not their business counterparts.

Reforms at other international bodies have tended to focus on one or the other of these ECOSOC accreditation shortcomings. The reforms at the WHO and the FAO described earlier in this paper attempt to address the capture problem by erecting an additional set of regulations that apply only to business groups. A second set of reforms has moved in the opposite direction, toward a multi-stakeholder model that offers more robust forms of access to private actors in exchange for various resources that those private actors can offer.⁸⁵ These resources can be financial (e.g., UN Women and GAVI), access to affected populations (UNAIDS and UNCITRAL), or support or voluntary compliance by private-sector actors (UNCITRAL and UN Women).⁸⁶ These reforms give business actors either full membership or agenda setting, decisional, or more robust participatory rights in all or some part of the organisation.

While these different reforms appear to be in tension, they might also simply reflect the distinctive needs of different international organisations. Organisations that draw substantially on private sector assistance—for expertise, voluntary compliance or financial support — might be more likely to benefit from a multi-stakeholder structure that brings on

⁸¹ Emanuele Rebasti, ‘Beyond Consultative Status: Which Legal Framework for Enhanced Interaction Between NGOs and Intergovernmental Organizations?’ in Pierre-Marie Dupuy & Luisa Vierucci (eds), *NGOs in International Law: Efficiency in Flexibility?* (Elgar 2008) 32.

⁸² See generally *id.* at 31-37; see also Lars H. Gulbrandsen & Steinar Andresen, ‘NGO Influence in the Implementation of the Kyoto Protocol: Compliance, Flexibility Mechanisms, and Sinks’ (2004) 4 *Global Env’tl Pol* 59 & n.13 (noting that NGOs had to rely mostly on ‘corridor politics’ and ‘distribution of documents during session breaks,’ and referencing NGO-sponsored ‘side events’).

⁸³ See Durkee, *International Lobbying Law* (n 61) at 1768.

⁸⁴ *Id.*

⁸⁵ See generally Marco Schäferhoff, Sabine Campe & Christopher Kaan, ‘Transnational Public-Private Partnerships in International Relations: Making Sense of Concepts, Research Frameworks, and Results’ (2009) 11 *Intl Stud Rev* 451-474 (describing these ‘transnational public-private partnerships’ as a ‘hybrid type of governance, in which nonstate actors co-govern along with states for the provision of collective goods’).

⁸⁶ Durkee, *International Lobbying Law* (n 61) at 1818-25.

agency partners. Organisations that require substantial support and buy-in from national governments should probably use a structure that preserves more national sovereignty over the law and policy making process and focus on sunlight reforms, such as better registration and disclosure rules. The trickiest set of questions will be for organisations like UNICTRAL that fall in the middle, requiring both national support for implementation and private sector expertise and rule compliance.

4 FRAMING ENGAGEMENT

In the early decades of the 21st century, one hundred years after the League Method reached its high point, international organisations could now be at an inflection point in their relationships with business groups. The question international organisations will have to answer going forward is how to reconcile this growing ambivalence: If private sector groups are both potentially dangerous influences and important partners in international governance, how should their participation be both embraced and regulated? How can organisations design methods of engaging with business groups that embrace the beneficial aspects of their participation, while restraining the potential harms? This Part draws on lessons from the history of engagement with non-state actors, the literature, and the lessons of current reform projects to develop a five-part framework to guide future reforms that synthesises those insights. Future reformers should consider mission accountability, balance of perspectives, transparency, meaningful access, and administrability.

4.1 Mission accountability

Conversations about capture are driven by concerns about mission accountability.⁸⁷ An organisation with ‘mission accountability,’ as I am using the term, is an organisation that can pursue its mission without getting derailed by special interests or by other distractions or destabilising forces.⁸⁸ Of course, stakeholders can have legitimate debates about the contours of an organisation’s mission. For example, should the International Whaling Commission pursue whale conservation at all costs or should it ensure a sustainable harvest?⁸⁹ Diverse stakeholders will answer this question differently. An organisation’s mission can be subject to contestation, it can be multifaceted and it can evolve. Nevertheless, the concern characterised as ‘capture’ is the concern that the organisation will begin to pursue the mission of certain special interests at the expense of its own mission. It is the concern that the organisation will not be ‘accountable’ to its mission, but instead to one or more special interests who involve themselves in the organization’s law or policy making process.

In designing reforms of international organisation participatory structures, the first question to address is what participatory structure will help organisations remain faithful to their missions and protect against capture? This will involve careful thinking about to what extent the input of non-state actors will help the organisation accomplish its purpose, and to

⁸⁷ See Dana Brakman Reiser & Claire R. Kelly, ‘Linking NGO Accountability and the Legitimacy of Global Governance’ (2011) 36 Brook JIL 1011, 1047 (‘For an NGO involvement to enhance the legitimacy of global governance, its mission must align with the global governance goals of an international regulator or the international community.’)

⁸⁸ *Cf. id.* at 1022 (defining the mission accountability as a duty: ‘the organization owes fealty to achieving its particular goals or purpose, i.e., its mission’).

⁸⁹ International Convention for the Regulation of Whaling [1946] 62 Stat. 1716, 161 UNTS 72.

what extent input may hinder that purpose. As the literature observes, organisations can sometimes increase their mission accountability by engaging with business groups. For example, engaging with business groups can help an organisation gather expertise, disseminate information about the lawmaking process, and overcome resistance at the national level, among other benefits. These benefits have been particularly important for organisations such as UNCITRAL and the International Institute for the Unification of Private Law (UNIDROIT), whose missions involve creating rules that can facilitate contracting and commerce. Conversely, of course, participation might push an organisation away from its core agenda if the interests of the participants in the process are at odds with the organisation's purpose. This is the concern driving the non-state actors who lodged the climate complaint, and it is the main concern that prompted the WHO to develop its Framework of Engagement with Non-State Actors.

The important point here is that while concerns about mission accountability drive more restrictive participation frameworks at international organisations, mission accountability is also the factor that demands variation among participation frameworks. It is the factor that would make a uniform solution bad policy. Some organisations will have missions that demand more engagement with the private sector, others more protection from it. The first factor to consider in developing a participation structure is therefore the organisation's distinctive needs in this regard.

4.2 Balance of perspectives

The second part of the five-part framework directs reformers to consider whether the access rules facilitate a meaningful balance of perspectives. This is the value scholars are invoking when they call for the 'democratisation' of law and policy making processes.⁹⁰ Moreover, opening law and policy making processes to input from a diversity of participants can enhance the credibility and persuasive power of the resulting rules. According to Robert Keohane and Joseph Nye's classic framework, rules attract 'input legitimacy' when they are formed through processes that are more representative and inclusive.⁹¹ Commentators have built on this insight to suggest that participation by a mix of groups, or 'multiple countervailing interests—such as [civil society groups], business groups, and technical experts—' is a way of balancing the deliberative process, preserving equilibrium, and preventing capture of lawmakers by any one group.⁹²

To obtain these benefits, an access structure will need to ensure that the groups are actually in some sort of equilibrium, rather than dominated by a particular interest. However, one of the challenges posed by drawing in non-state actor voices is that welcoming additional participants into a deliberative process can tend to amplify some perspectives and drown out others. While the participation equilibrium in international institutions is understudied,⁹³ domestic literatures in the United States have observed that industry and trade associations

⁹⁰ See Discussion *infra* 3.1.1.

⁹¹ Robert Keohane & Joseph Nye, 'Between Centralization and Fragmentation: The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy' (2001) KSG Working Paper 01-004, 9-10 <<https://ssrn.com/abstract=262175>> accessed 30 June 2020.

⁹² Abbott & Gartner, (n 73), at 31.

⁹³ In terms of bare numbers, the percentage of industry and trade lobby groups accredited to ECOSOC remained at around 10% at the time of this writing, but the numbers themselves do not offer terribly significant insight into the relative participation of these groups.

face fewer obstacles to organising and have therefore dominated domestic administrative notice and comment processes.⁹⁴

Reformers should consider structures that can enhance input legitimacy without falling into a variety of participation traps. One potential participation trap is equilibrium problems between groups with different influence capacities. For example, one might find an imbalance (a) between business groups and non-business groups such as public interest NGOs;⁹⁵ (b) between more powerful and better-resourced business groups lobbying on behalf of pharmaceutical, fossil fuel, or other multinational interests and less powerful business groups advocating for medium and small businesses; (c) between groups representing constituencies in the Global North and the Global South; and (d) between government delegates as a whole and non-state participants as a whole.

If all non-state groups are admitted into a process on equal terms, groups with more lobbying power will tend to dominate. Among other reasons, better resourced groups can send more representatives to participate in informal lobbying work. For example, trade associations with fossil fuel members have been able to send thousands of delegates to conferences of the parties of the UNFCCC, including large numbers of representatives from the International Emissions Trading Association, the International Chamber of Commerce, the World Coal Institute, and the International Gas Union, among others.⁹⁶ Research on domestic lobbying groups in the United States has demonstrated that trade and industry groups tend to dominate over other groups. At an international level, the participation of private sector organisations representing business interests has been known to exacerbate North-South representational disparities, as many business lobbying groups hail from the Global North. As for government-private actor disparities, France's concern at UNCITRAL was that overly robust participation by private sector associations and a permissive participatory structure can 'dilute[e] . . . member state control' over UNCITRAL decisions.⁹⁷

While *too much* participation by non-state actors can be a concern, *too little* participation — or too little participation by groups whose perspective would be valuable in a particular deliberation — can also be a concern, as it can fail to secure the benefits of interest group participation in governance. How could a reformer navigate these participation traps? To ensure meaningful input from participants with a diversity of perspectives relevant to the matter at hand, a reformer will need some method of distinguishing and differentiating between groups, and of balancing representation among various groups. One method is to separate the participants into separate tracks, as the WHO Framework of Engagement, and the FAO and UNFCCC participation structures do, and to regulate the tracks separately, as the WHO and FAO structures do. However, this approach can be challenging to execute, as many public interest groups are funded by or have other partnerships with businesses. Thus, a

⁹⁴ Hackney (n 14), at 279 ('Empirical evidence confirms that there is a bias in the interest group system towards business interests.');

but see Surjinder Johal & Alistair Ulph, 'Globalization, Lobbying, and International Environmental Governance' (2002) 10 Rev Intl Econ 387-403 (concluding that asymmetries in interest group lobbying 'have greater effect when policy is set at the national rather than supranational level'); Heie Klüver, 'Biasing Politics? Interest Group Participation in EU Policy-Making' (2012) 35 W Eur Pol 1114-33 (concluding that 'lobbying success does not vary systematically across interest group type').

⁹⁵ See sources cited *id.*

⁹⁶ See Climate Investigations Center, 'Thousands of Fossil Fuel "Observers" Attended Climate Negotiations – UNFCCC Data 2005-2018 COP1-COP24' available at <https://climateinvestigations.org/thousands-of-fossil-fuel-observers-attended-climate-negotiations-unfccc-data-2005-2018-cop1-cop24/>.

⁹⁷ Kelly (n 50) at 119.

reform that seeks to find an equilibrium between different perspectives by differentiating between the groups and regulating them separately will have to address the transparency and administrability concerns identified below.

4.3 Transparency

A third essential consideration for the reformer is transparency. The ECOSOC's participation structure, and those that build on it, have tended to focus on *representation over transparency*. Regulations related to representation may help ensure that an association speaks for a particular community of interest, but they do less to address the concerns associated with private sector lobbying. For example, the 1996 reforms at ECOSOC asked each organisation to affirm that it has a 'democratically adopted constitution,' that the organisation's representatives are accountable to the membership, and that it uses a representative process to set policy. Guidelines related to lobbying tend to focus instead on transparency problems. For example, the Organization of Economic Cooperation and Development (OECD) guidelines on national lobbying regulation focus on requiring disclosures about the objectives, beneficiaries, funding sources and targets of lobbying activity.⁹⁸ As Ayelet Berman explains, the OECD lobbying principles:

recommend creating a policy-making 'footprint', that is, information about the topics discussed, who has been consulted, the inputs made; in addition, the reasoning behind the policy outcome should be transparent. This would indicate who has sought to influence the policy-making process and would facilitate public scrutiny.⁹⁹

A group of civil society organisations including Transparency International and the Sunlight Foundation have developed recommendations related to lobbying that also emphasise transparency, suggesting a robust disclosure regime in a public lobbying register.¹⁰⁰ U.S. lobbying regulations require extensive disclosures and then publish those in a 'searchable, sortable, exportable database'.¹⁰¹ The United Nations Convention Against Corruption, a treaty with 187 parties worldwide, also emphasises transparency as a core value.¹⁰² Relevantly, the treaty requires parties to legislate to 'enhance transparency in its public administration, including with regard to its . . . decision-making processes', and enhancing the transparency of outside contributions to those processes'.¹⁰³

While transparency is an important concern for those seeking to implement or to update national lobbying regulations, or to combat corruption by public officials, it should be no less significant in the international law and policy making context. In the Keohane/Nye framework, transparency of the deliberative process is an important competent of input

⁹⁸ OECD, *Transparency and Integrity in Lobbying: 10 Principles for Transparency and Integrity in Lobbying* (OECD 2013).

⁹⁹ Berman (n 13) at 238-239.

¹⁰⁰ 'International Standards for Lobbying Regulation: Towards Greater Transparency, Integrity and Participation' 3 (Transparency Intl 2015) <<http://lobbyingtransparency.net/lobbyingtransparency.pdf>> accessed 30 June 2020; Libby Watson, 'Influence Abroad: The State of Global Lobbying Disclosure' (Sunlight Found 2016) <<https://sunlightfoundation.com/2016/11/30/influence-abroad-the-state-of-global-lobbying-disclosure/>> accessed 30 June 2020.

¹⁰¹ Watson (n 100).

¹⁰² U.N. Convention Against Corruption [2003] G.A. Res. 58/4, U.N. Doc. A/RES/58/4, Foreward.

¹⁰³ *Id.* at arts. 10, 13.

legitimacy.¹⁰⁴ A lack of transparency can be harmful to the international law and policy making process because this makes it more challenging for decision makers to weigh the merits of the input they receive. For example, the WHO's experience with tobacco association infiltration shows how a lack of transparency can obscure conflicts of interest and hijack the international law and policy making process. As one example among many, the International Tobacco Growers' Association, a private sector association that originally represented a small group of tobacco farmers, came to be controlled by the larger tobacco industry in order to 'serve as a front for [their] third world lobby activities at the WHO,' to 'undermine WHO tobacco control activities'.¹⁰⁵ The WHO was unaware at the time that the farming association was in fact serving as a mouthpiece for developed world tobacco interests. This only became known later through discovery in connection with litigation against the tobacco industry in the United States. This is just one of many instances of 'astroturf activism' in international governance, where major corporate actors act covertly, through apparently grassroots organisations.¹⁰⁶

When major multinational corporate actors advance their positions without attribution through the mouthpiece of academic, third world, or grassroots organisations, this reduces the capacity of decisionmakers to accurately weight the merits of the input they receive. It also reduces the capacity of lawmakers to determine whether they have received input from a representative range of sources, and can reduce regulatory trust and public confidence in the integrity of the lawmaking process. Reforms focused on transparency should borrow from lobbying regulations and guidelines, which focus on public disclosure of funding, lobbying positions, and all contacts with decisionmakers. Transparency will not always be a sufficient condition for a responsible participatory structure, however. It will not, for instance, address concerns regarding balance of perspectives. However, it will usually be a necessary condition.

4.4 Meaningful access

The fourth factor reformers should consider is whether the proposed participation structure offers meaningful amounts of access for non-state participants. For the international law and policy making process to obtain the benefits of participation by non-state groups — the input legitimacy that is to be gained from openness to comment, from the participation of many different groups in the process, and from the information these actors have to offer — the participatory framework must offer these groups a meaningful ability to engage.

At many international organisations, non-state actors have some informal participation rights such as to UN grounds passes, access to the agenda, and perhaps some power to raise agenda items and to sit in on meetings, but not much power to provide real input unless they secure places on national delegations. For example, public interest NGOs have criticised the ECOSOC structure for a variety of access limitations: offering only limited participatory rights, failing to give groups the full measure of access rights they are due, and for the fact that formal consultative rights often provide minimal influence over the lawmaking process. The participation of non-state groups has become a 'medieval fair' sideshow, as one critique goes, and not a true participatory structure.¹⁰⁷ A 'sideshow' participation structure may not offer many benefits at all.

Accruing the benefits of non-state actor participation — including information, private

¹⁰⁴ Keohane & Nye (n 91).

¹⁰⁵ TCS Report (n 43) at 25.

¹⁰⁶ See generally Durkee, *Astroturf Activism* (n 80).

¹⁰⁷ Inventory (n 68).

sector buy-in, and the input legitimacy that comes from a diversity of voices participating in the process — requires meaningful participation. One way to secure that is to give non-state actors roles in the decisional processes of the organisation, as some modern multi-stakeholder organisations have done. For example, the GAVI Alliance and the Global Fund to Fight AIDS, Tuberculosis and Malaria give actors, including private sector actors, seats on the board and voting capacities. However, robust participation by non-state actors should be balanced against the other factors offered in this framework — particularly mission accountability, and administrability — discussed next.

4.5 Administrability

The final consideration for reformers is whether the participation structure is administrable by gatekeepers. To ensure mission accountability, gatekeepers need some way of ensuring that including non-state actor participation will not derail the organisation from its core mission. Obtaining a balance of perspectives should ideally involve ensuring that the participants in a law or policy making process are diverse. A disclosure regime to ensure transparency requires monitors. Finally, any regime that offers meaningful access to non-state actors must be developed and maintained. The ‘administrability’ concern asks whether it is feasible to ask gatekeepers to perform the tasks the participation structure requires.

For example, consider mission accountability. It really feasible for officials to ferret out who or what interests a group represents? To the extent policymakers or reformers want to divide and separately regulate business groups and other civil society groups, as the WHO’s Framework of Engagement has attempted to do, do the gatekeepers have enough information and bandwidth to do that effectively? This is an especially difficult challenge because many public interest NGOs have partnerships with, or support from, major corporations. Moreover, erecting categorial distinctions for the purpose of balancing representation or quashing conflicts of interest could send some business interests underground — reducing, rather than enhancing transparency. At minimum the charge to try to make these distinctions is likely to overburden already taxed gatekeepers.

To address the administrability concern, a better course might be for international organizations to use a less heavy-handed governance framework. Rather than examining a group’s accountability to its membership, as the ECOSOC approach requires, and rather than trying to police a group’s motives, as the WHO and FAO reforms do, a participatory structure might accept input from all sources, presuming that groups will advance a diversity of special interests: some profit motivated and some unrelated to profit. Potential conflict of interest issues could be mitigated through a structured notice and comment process, disclosures rules aimed at funding and lobbying positions, and publicly accessible databases that cast sunlight into the process.

4.6 Synthesis and further research

This article proposes that the five considerations offered above are supported by the history of UN experiences with trade and industry associations as well as by literature regarding non-state participation in international law and policymaking processes. The principal work of these five factors is to distill the current knowledge — gathered from the experiences of international organisations and from the relevant literature — into an analytical framework to guide future reforms. These considerations do not offer a precise blueprint for how access rules should be developed in the context of any individual organisation. Rather, the five

factors can be conceptualised as an interconnected set of levers. Pushing one might require letting others slide. Thus, designing a participatory system fit for purpose will involve determining which factors are most important in a particular circumstance.

For example, in considering whether to reform the UNFCCC's accreditation procedure and the participation of non-state groups at conferences of the parties to the UNFCCC, analysts might weigh the factors together. Participation of fossil fuel interests represents a risk of mission distortion and of overrepresentation from Global North business lobbying groups, but the UNFCCC access structure does not restrain business participation in a way that will cause transparency or administrability problems. Also, the quantum of access afforded to all non-state participants is minimal. This set point represents tradeoffs: fewer problems with transparency and administrability in return for little control over who participates in the process; fewer deliberative and decisional rights for participants in return for more protection of the deliberative process from mission distortion. If, however, a reformer wanted to dial down the participation of fossil fuel representatives in the process (in order to achieve a better balance of perspectives and to better protect against mission distortion), any new participation structure would need to differentiate between groups, increasing the burden on gatekeepers (diminishing administrability) and putting pressure on transparency (as some groups might choose to go underground, speaking through front groups who are able to obtain access).

Indeed, different organisations could find it useful to emphasise different factors in designing a responsible participation structure. Organisations that draw substantially on private sector assistance for expertise or financial assistance might need to privilege meaningful access in order to secure the benefits that non-state groups can bring. Organisations that face legitimacy deficits might need to focus on transparency. Those, like the WHO, that have been the focus of intense, non-transparent lobbying campaigns may find that mission accountability concerns will require higher levels of screening to differentiate between groups and less access by non-state groups.

I have previously suggested that reforms should generally either refrain from distinguishing between different non-state actors because of the risk of pushing business interests underground, or else should embrace a multi-stakeholder approach that offers more robust participatory rights to a smaller set of actors.¹⁰⁸ This analysis supports that conclusion. Either path would help organisations respond to administrability and transparency concerns. The choice between paths would involve a set of tradeoffs, which could be motivated by the organisation's mission and by concerns with accountability to mission. For example, organisations requiring significant amounts of global legitimacy or support and buy-in from national governments could benefit from an approach that borrows from international guidelines on lobbying and corruption, which anticipate input from a variety of non-state actors and also feature robust transparency and sunlight rules. Organisations that draw substantially on private sector assistance might be especially attuned to the meaningful access consideration and choose the multi-stakeholder approach, which features partnerships between states and select non-state groups. Further research can help test these hypotheses.

5 CONCLUSION

At a time when even the shareholders of major multinational companies are seeking to

¹⁰⁸ Durkee, *International Lobbying Law* (n 61) at 1821-22.

discipline pernicious lobbying by trade associations but many international organisations are focusing on bringing companies on board as partners for important goals such as climate mitigation and adaptation, it is important to think carefully about how to maximize the benefit — and restrain the harms — of these partnerships. While several international organisations are experimenting with new formats to accomplish these goals, these are relatively new efforts and the area has not received sustained academic attention. This article has first framed these regulatory innovations in their historical context, finding that many of the current rules are historically contingent rather than theoretically principled: they were designed around the capacities and concerns of their respective times. The analysis has suggested that 21st century access structures should be nimble and responsive to current needs, not path dependent, because there is simply nothing inevitable about the received structures. Literatures evaluating non-state participation in global governance bolster this conclusion. While most are focused on classic public interest NGOs, their analysis suggests that business participation in governance can deliver an array of benefits, if properly structured.

Building on all of these insights, this article offered a framework to guide the development of future international access structures. The framework encourages consideration of whether a participation structure will: (a) help an organisation to stay accountable to its mission; (b) encourage a balance of perspectives; (c) offer transparency about what interests are being represented in the process; (d) offer access that is meaningful; and (e) be administrable without overwhelming its gatekeepers. The five factors do not produce a uniform blueprint, but a flexible guideline for evaluating the likely effectiveness of future reform projects.