

2024

The Ambivalent Logics of Business Representation in International Organizations

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The Ambivalent Logics of Business Representation in International Organizations

Melissa J. Durkee

1. INTRODUCTION

This chapter considers how for-profit actors participate in the work of international organizations (IOs), and how this relates to democratic representation in and through those organizations. Specifically, I want to focus attention on *perspectives* on inclusion of these for-profit actors in the work of IOs. What are the rationalities that animate movements to include or exclude business entities and groups, which in turn produce regulatory and institutional design choices?

By ‘for-profit actors’, I mean non-State actors that are business organizations, such as corporations and other business entities. I am also focusing on groups that represent business interests, such as industry and trade associations. While those industry and trade associations are usually formally organized as non-profit entities, I am grouping them together with for-profit actors because they participate in international governance fora for the purpose of advancing the agendas of the business sector¹ – for shorthand, I will also refer to both for-profit entities and their non-profit representatives as ‘business’. Together, these various business actors interact with IOs to advance and represent a particular kind of interest: investor profits.

The animating question of this chapter is thus whether those who advance the profit interests of investors should participate in the work of international governance. The question is live because for-profit actors and their representatives now take very significant roles in many aspects of global governance, serving as commentators, consultants, funders, partners, stakeholders, experts, delegates, and lobbyists, as well as rule generators, interpreters, and enforcers. To a large extent, IOs have not developed regulatory frameworks or whole-of-organization approaches to these forms of engagement by for-profit actors and their representatives, though there are some outliers.² The regulatory gap flows in part from a legal gap, as business groups have no formal legal status under international law, unlike

¹ Incidentally, because trade and industry associations are usually organized as non-profit entities, they formally fall within the larger umbrella of non-governmental organizations (‘NGOs’) for the purposes of many IO access rules, and thus gain access on equal terms with groups advancing other missions. Melissa J Durkee, ‘Industry lobbying and ‘interest blind’ access norms at international organizations’ (2017) 111 AJIL Unbound 119. For the purposes of this chapter, I am carving out the subset of NGOs that represent for-profit actors and considering them as a unified group with the for-profit businesses they represent.

² OECD, *Compendium of International Organisations’ Practices: Working Towards More Effective International Instruments* (OECD Publishing 2021); see also Ayelet Berman, ‘Between Participation and Capture in International Rule-Making: The WHO Framework of Engagement with Non-State Actors’ (2021) 32 EJIL 227, 228 (noting the regulatory gap).

States, IOs, and, nascently, civil society. Somewhere between the regulatory gap and the legal status gap lies a conceptual gap: scholars and organizations have not yet developed adequate frameworks to conceptualize how for-profit representatives should participate in international governance or what the ideal form of this participation should be.

So now the question is framed: should for-profit actors and their representatives participate in the work of IOs, and if so on what terms? Rather than addressing that question in a normative sense, this chapter offers a conceptual scaffold for it. Specifically, my claim is that it is possible to elicit answers to this question in the ways that IOs have welcomed or excluded a broader range of non-State actors over time. These answers reveal an ambivalence that centres on the *value* of representation versus other agendas. That is, there are two basic logics animating the ways that IOs organize themselves with respect to for-profit actors and their representatives.³ One of these is a status-based logic, and the other is functional. Let us call the first a logic of ‘representation’, and the second a logic of ‘expedience’.

The logic of *representation* is concerned with participation, processes, and participants. Concerns about representation prompt a certain set of questions about for-profit participation in the work of IOs. For example, is for-profit participation *balanced* with the participation of other groups or is the presence of for-profit groups (e.g. trade lobbyists) preventing, outweighing, or drowning out other interests that should be represented (e.g. labour, environment, health, or other groups)? Are the for-profit representatives *speaking for* the relevant interests or groups in a particular process?

The logic of *expedience* is concerned with effectiveness. Concerns about expedience prompts a separate set of questions about for-profit participation in the work of IOs. Does for-profit participation improve or harm an organization’s *achievement of its agenda*? Can for-profit groups offer useful things, like resources, knowledge, technical expertise, or domestic political support?

The logics of representation and expedience are not mutually exclusive. That is, I am not arguing that one logic does not value expedience or the other does not value representation. Rather, these labels are meant to highlight the emphases, or most core values, of each logic. These organizing logics have different priorities, agendas, blind spots, and potential consequences. Moreover, conversations about institutional design tend to focus on one or the other. The two logics can operate like parallel sliding doors, moving past each other without being in conversation.

Each logic has come to prominence at different moments during the last century of public-private relationships in international governance. Now, debates about the proper role of for-profit actors in governance are fuelled by these competing rationalities, and both narratives are intensifying in parallel as crises like climate change ratchet up demands on the international system. Conceiving of a way

³ It is also likely true that for-profit groups may organize their relationships with IOs according to these two logics, justifying their participation according to one or the other. While this analysis is beyond the scope of this brief chapter, the reader may consider Marieke Louis’s chapter in this volume as a starting point for the inquiry.

forward should involve bringing these narratives to the surface so they may be reconciled or the choice among them rendered explicit.

In this contribution I will proceed through three steps. First, I will outline the state of play in terms of public-private interactions in IOs, offering a taxonomy of some of the many roles for-profit actors now take (2). The discussion focuses on the United Nations (UN). I will then introduce the two logics, illustrating them with a vignette about responses to for-profit participation in conferences of the parties (COP) of the United Nations Framework Convention on Climate Change (UNFCCC) (3). Finally, I will illustrate the push and pull of these logics through several important moments in the history of engagement between UN entities and for-profit actors (4).

2. PARTICIPATION OF PRIVATE ACTORS: THE STATE OF PLAY

First, let us frame the importance of this debate by considering the very significant roles business actors and groups now take in the work of IOs. There is nothing new about links between the public and private sectors at the international level. The International Chamber of Commerce, for example, has sought to counsel UN entities since the founding of that organization, and had significant roles in the earlier League of Nations system.⁴ Since the turn of the twenty-first century, however, there has been a very significant ‘opening up’ of the UN to collaborations of many kinds with the private sector, including business.⁵ For-profit actors and representatives are so embedded in many forms of IO governance, and so significant to some of them, that it is not possible to consider questions of democratic representation in and through IOs without evaluating that representation in context of these business roles.

This ‘opening up’ is reflected in the Sustainable Development Goals and the Global Compact, which heavily emphasize public-private partnerships, as well as a whole array of other modes of interaction.⁶ Many organizations are ‘updating their strategies and work programmes to collaborate through partnerships’ with business groups.⁷ Ayelet Berman describes this trend as a transformative move that ‘spans all issue areas, policy functions, and world regions’ and that is gaining momentum.⁸ Projects celebrate synergies between the private sector’s need for stable market conditions and the UN’s peace imperative, which in the post-Cold War context has prompted the organization’s attention to human rights and development.⁹

⁴ Steve Charnovitz, ‘Two Centuries of Participation: NGOs and International Governance’ (1997) 18 *Michigan Journal of International Law* 183, 223. See Marieke Louis, in this volume.

⁵ George Kell, ‘Relations with the Private Sector’ in Jacob K Cogan, Ian Hurd and Ian Johnson (eds), *The Oxford Handbook on International Organizations* (OUP 2016) 730, 743.

⁶ See, e.g., UN, ‘Transforming our World: the 2030 Agenda for Sustainable Development’ (2015) <<https://sustainabledevelopment.un.org/post2015/transformingourworld>> accessed 31 May 2023.

⁷ Berman (n 2) 3.

⁸ *ibid* 228.

⁹ Kell (n 5).

What follows is an array of examples of ways business groups now engage with IOs.¹⁰ Because a complete account is beyond the scope of this chapter, the taxonomy is meant to be illustrative rather than comprehensive.

Consultants & Observers. Business entities and representatives serve as consultants and observers within IOs, often on the same terms as civil society organizations. For example, the Economic and Social Council (ECOSOC) non-governmental organization (NGO) accreditation procedure excludes for-profit entities (such as individual businesses) but accepts non-profit *representatives* of for-profit entities.¹¹ Since many trade and industry associations are organized as non-profit entities, they can become accredited consultants alongside other kinds of civil society organizations.¹² Approximately ten per cent of accredited groups are organized to advance business agendas.¹³ Among these are representatives of multinational oil and gas companies, financial services, construction, lumber, automotive industries, railways, nuclear power, and coal.¹⁴ Accreditation gives groups a variety of rights of access to the work of the UN, including access to agendas and working documents, grounds passes that give consultants access to delegates for informal lobbying, and sometimes the right to circulate information, speak from the floor in a proceeding, or raise an agenda item.¹⁵

Business representation among consultants and observers is significant enough that a number of organizations have developed separate tracks or pathways for these groups. Among these are the Food and Agriculture Organization (FAO), the World Health Organization (WHO), and the UNFCCC's COP process. The first two organizations have divided business groups from other civil society groups in order to protect the organization against capture or undue influence from those with profit motives.¹⁶ Thus, these organizations have implemented more restrictive working methods for groups that have private sector links than for other groups. The UNFCCC COP process has not separated the groups to modulate levels of access for each but to streamline communication to and within the groups.¹⁷

¹⁰ I am using 'international organizations' capaciously to include IOs in the legal sense (including treaty-based organizations governed by international law and possessing legal personality) as well as other intergovernmental forums without separate legal personality but that engage in rulemaking, such as UNCITRAL and the UNFCCC COP process.

¹¹ For descriptions of ECOSOC regulations codifying privileges and practices relating to NGOs, see Stephen Hobe, 'Article 71' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary*, vol 2 (3rd edn, OUP 2012) 1788, 1797.

¹² Melissa J Durkee, 'Astroturf Activism' (2017) 69 *Stanford Law Review* 201.

¹³ UN, 'Advanced Search for Civil Society Organizations, United Nations Department of Social and Economic Affairs' <<https://esango.un.org/civilsociety/displayAdvancedSearch.do?method=search&%20%20sessionCheck=false>> accessed 19 May 2023.

¹⁴ *ibid*; see also Melissa J Durkee, 'International Lobbying Law' (2018) 127 *Yale Law Journal* 1742, 1768–9.

¹⁵ See The UN Office at Geneva, 'Accreditation with the United Nations Office at Geneva (UNOG)' <www.ungeneva.org/en/faq/52> accessed 31 May 2023; see ECOSOC, Res 1996/31, 'Consultative relationship between the United Nations and non-governmental organizations' (25 July 1996); see generally Kal Raustiala, 'NGOs in International Treaty-Making' in Duncan B Hollis (ed), *The Oxford Guide to Treaties* (1st edn, OUP 2012) 150.

¹⁶ WHO, WHA69.10, 'Framework of Engagement with Non-state Actors' (28 May 2016) <https://apps.who.int/gb/ebwha/pdf_files/wha69/a69_r10-en.pdf> accessed 31 May 2023; FAO, *Principles and Guidelines for FAO Cooperation with the Private Sector* (FAO 2016) <www.fao.org/3/a-x2215e.pdf> accessed 31 May 2023.

¹⁷ Stephen Tully, 'Commercial Contributions to the Climate Change Regime: Who's Regulating Whom?' (2005) 5(2) *Sustainable Development & Law Policy* 14, 16.

Delegates. A second way business groups can engage in the work of IOs is through participating on a State delegation to an IO. This can be a somewhat invisible mode of participation as States are often not required to disclose the composition of their delegation. For example, a recent study of the International Maritime Organization (IMO) revealed that many delegations were staffed by industry representatives.¹⁸ The report found that national delegations ‘can have a mixture of government officials and industry representatives, with no established norm on composition’.¹⁹ Indeed, the authors noted, many national delegations featured representatives of the shipping industry.²⁰ This representation supplements the shipping industry’s official representation, which is through industry associations (NGOs) with observer status.²¹

Participants in Multi-Stakeholder Institutions. Private sector actors participate in multi-stakeholder organizations. The most prominent example here is the International Labour Organization (ILO), which features a tripartite governance structure including representatives of employers, labour, and States.²² The ILO’s founding predated the UN and this tripartite structure was not replicated when the UN system was developed.²³ Nevertheless, in the late twentieth and early twenty-first centuries, the UN began to establish new multi-stakeholder projects that also welcomed business groups as robust participants. The GAVI Alliance (founded by the Gates Foundation), and the Global Fund to Fight AIDS, Tuberculosis and Malaria are more recent examples of multi-stakeholder partnerships.²⁴

Funders & Sponsors. Private sector actors fund the work of IOs. As Kristina Daugirdas has noted, voluntary contributions make up an increasingly large share of organizations’ budgets, and private actors are increasingly significant contributors under this umbrella.²⁵ This includes landmark donations, such as the Bill & Melinda Gates Foundation’s sponsorship of the WHO, as well as more pedestrian fundraising projects, like the 7.28 million the IMO’s Department of Partnerships and Projects mobilized in 2021.²⁶ Daugirdas has observed that voluntary contributions make up more than eighty per cent of WHO’s funding and more than ninety-seven per cent of the funding of the International Organization for Migration (IOM).²⁷ The UN frequently issues ‘calls for participation and assistance’ to

¹⁸ Harilaos N Psarftis and Christos A Kontovas, ‘Influence and Transparency at the IMO: the Name of the Game’ (2020) 22 *Maritime Economics & Logistics* 151.

¹⁹ *ibid* 159.

²⁰ *ibid* 159–60.

²¹ *ibid* 160.

²² ILO, ‘Structure’ (2023) <<http://ilo.org/global/about-the-ilo/who-we-are>> accessed 19 May 2023.

²³ ILO, ‘History of the ILO’ (2023) <<http://ilo.org/global/about-the-ilo/history>> accessed 19 May 2023.

²⁴ See generally Kenneth W Abbott and David Gartner, ‘Reimagining Participation in International Institutions’ (2012) 8 *Journal of International Law and International Relations* 1.

²⁵ Kristina Daugirdas, ‘Funding Global Governance’ (2021) 29 *NYU Environmental Law Journal* 639, 641–2.

²⁶ IMO, *Financial Report and Audited Financial Statements for the Year Ended 31 December 2021: Report Of The External Auditors* (IMO 2021) <<https://wwwcdn.imo.org/localresources/en/OurWork/Documents/Financial%20Statements/IMO%20Financial%20Statements%202021.pdf>> accessed 31 May 2023.

²⁷ Daugirdas (n 25) 642.

elicit support from philanthropic foundations.²⁸ These contributions affect IOs' governance choices as they often come with conditions and earmarks.²⁹

Other Forms of Partnership. In addition to the four general categories of participation by business actors and their representatives outlined above (observers, delegates, participants, and funders), business actors engage in a variety of other forms of partnership, support, and engagement with IOs, sometimes in conjunction with one of the other categories. These can take many forms. For example, the United Nation's Children Fund (UNICEF) has developed 'strategic public-private partnerships to move populations up the sanitation ladder', such as a partnerships with Lixil, a global sanitation products company, which 'aims to increase the availability of affordable sanitation products and services'.³⁰ Microsoft launched a 'United Nations representation office' in New York, with an aim to engage in 'multi-stakeholder action', particularly 'enabling the UN and its agencies to achieve more using computer and data science'.³¹ The Boeing- and Airbus-created Aviation Working Group developed a treaty on aviation equipment financing, which was ultimately taken up and finalized by UNIDROIT.³² 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.³³ Other multi-stakeholder efforts that include the private sector are the CEO Water Mandate, Caring for Climate, Every Women Every Child, Sustainable Energy for All, and Education First, among others.³⁴ An Annual Private Sector Forum gathers 'CEOs and government officials in conjunction with the opening of each annual UN [General Assembly]' to 'ensure that private sector solutions garnered from an informal setting will inform subsequent Assembly debate'.³⁵ As may be gathered from this quite varied list of 'partnership' examples, the forms of engagement are varied and their number is extensive.

The bottom line is that for-profit actors and their representatives are now significant presences within IOs. Despite the UN's 'opening up', the participation of these actors in international governance is under theorized. Indeed, the breadth of this participation has largely been a 'silent revolution', drawing little scholarly analysis, popular attention, or regulatory response. Given the significance of business engagement in twenty-first century IOs, any consideration of the composition, legitimacy, or representativeness of those organizations should account for it.

²⁸ Julia Emtseva, 'The Philanthropic Community and International Law' (2023) 116 Proceedings of the Annual Meeting (American Society of International Law) 29, 30.

²⁹ Daugirdas (n 25) 642–3.

³⁰ UNICEF, 'Sanitation and Hygiene' <www.unicef.org/esa/sanitation-and-hygiene> accessed 31 May 2023.

³¹ John Frank, 'Our Interconnected World Requires Collective Action' (*Microsoft on the Issues*, 17 September 2020) <<https://blogs.microsoft.com/on-the-issues/2020/09/17/microsoft-un-affairs-team-unga/>> accessed 31 May 2023.

³² Melissa J Durkee, 'The Business of Treaties' (2016) 63 UCLA Law Review 264.

³³ UN Women, 'UN Women Launches Private Sector Leadership Advisory Council' (2 June 2014) <www.unwomen.org/en/news/stories/2014/6/private-sector-leadership-advisory-council-launched> accessed 30 June 2020.

³⁴ Kell (n 5) 743.

³⁵ *ibid.*

3. THE LOGICS OF REPRESENTATION AND EXPEDIENCE

While for-profit participation in the work of IOs is undertheorized, the claim of this chapter is that it is possible to perceive two basic logics or rationalities that motivate responses to this participation: the logics of ‘representation’ and ‘expedience’. These logics appear in responses to business participation and appear to animate institutional design and regulatory choices in relation to these business roles. A caveat at the outset: first, the titles are shorthand. Second, creating two categories requires lumping different movements and approaches together. Any such lumping exercise will inevitably gloss over differences that are significant in other contexts. Whether it is useful to overlook those differences depends on whether the categories produce useful insights. My argument is that in this case the categories help make sense of a persistent ambivalence toward for-profit participants in the work of IOs over the past century or so of experience, and thus offer structure for a principled approach to these actors in the future. Before describing these logics, let me begin with an anecdote that demonstrates their use in practice.

3.1. *Illustrating the logics*

Each year, COPs to the UNFCCC draw droves of participants of every kind, and garner global attention. In recent years, these conferences have received particularly pointed critique for the presence of many oil and gas representatives.³⁶ Consider COP 26, in Glasgow, Scotland, in November of 2021. This COP was particularly notable for at least two reasons: it was delayed for a year due to the Covid-19 pandemic, and according to the five-year timetable set by the Paris Agreement, this was the first COP at which many parties were required to communicate new climate pledges that reflected more ambition than the pledges they had delivered when first joining the Paris Agreement.³⁷ Adding to the drama of the occasion, organizers had promised ‘the most inclusive COP ever’, specifically encouraging participation by traditionally marginalized groups.³⁸

Consider the narratives emerging from this climate conference. The first was a narrative of failure, principally focused on failures of participation, representation, and access, but also noting substantive failures and linking those substantive failures to process failures. The second was a narrative of success, focusing neither on representation nor on the substantive content of the traditional interstate

³⁶ See e.g., 350.org and others, ‘Open Letter Calling for Rules to Protect the Integrity of Climate Policy-Making from Vested Corporate Interests’ (Corporate Europe Observatory, 21 November 2013) <<https://corporateeurope.org/en/blog/open-letter-calling-rules-protect-integrity-climate-policy-making-vested-corporate-interests>> accessed 31 May 2023.

³⁷ COP 21, Decision 1/CP.21, ‘Adoption of the Paris Agreement’ (30 November – 13 December 2015) paras 23–4.

³⁸ Alok Sharma, ‘Questions to the President of COP26’ (Sir Alok Sharma MP Official Website, 9 June 2021) <www.aloksharma.co.uk/parliament/questions-president-cop26-1> accessed 31 May 2023.

climate agreements (in this case the pledges made by State parties), but rather on innovative new agreements made by private sector entities.

Narrative 1. Many reports coming out of Glasgow focused on how, despite the organizers' claims that this would be the 'most inclusive COP ever', Glasgow was in fact not inclusive at all. The challenge mostly seemed to stem from pandemic restrictions, but reports in popular and social media communicated the sense that these restrictions excluded some groups more than others, and the privileged groups were private sector lobbyists.³⁹ Reports highlighted the fact that indigenous peoples' groups, groups from the Global South, and other civil society actors had borne the expense and burdens of pandemic travel, yet were not able to gain access to the conference.⁴⁰ They described prohibitively long lines and pandemic restrictions that kept participants from meaningful engagement with the conference. The result was rampant frustration, with civil society representatives being sent back to their expensive hotel rooms to view the proceedings over the internet – no different than if they had not made the effort to attend the COP at all. Juxtaposed against these access challenges were stories about fossil fuel representatives garnering privileged access.⁴¹ According to one BBC headline, the '[f]ossil fuel industry has [the] largest delegation'.⁴² Climate youth activist Greta Thunberg tweeted in response: 'I don't know about you, but I sure am not comfortable with having some of the world's biggest villains influencing and dictating the fate of the world'.⁴³ Others claimed that fossil fuel representatives were being 'ushered to the beginning of the line' and that they had access to otherwise closed-door negotiations between the delegates.⁴⁴ One story concerned Australia's pavilion being sponsored by a fossil fuel company, with the observation that the pavilion colouring and logos looked strikingly similar to those of the corporate sponsor.⁴⁵ This narrative juxtaposed the privileged access of fossil fuel groups with the disappointing substantive results of the conference, expressed memorably from outside the pavilion by the activist chant: 'blah blah blah'.⁴⁶ Indeed, State pledges made at that conference expressed insufficient ambition to avert disastrous global warming consequences, and often committed States to reductions far in the future, much past the tenure of current officeholders.⁴⁷

³⁹ Center for International Environmental Law, 'Public Participation and COP26: A Report from Glasgow' <www.ciel.org/public-participation-and-cop26-a-report-from-glasgow/> accessed 31 May 2023.

⁴⁰ *ibid.*

⁴¹ See generally Climate Investigations Center, 'Thousands of Fossil Fuel 'Observers' Attended Climate Negotiations–UNFCCC Data 2005-2018 COP1-COP24' (21 June 2019) <<https://climateinvestigations.org/thousands-of-fossil-fuel-observers-attended-climate-negotiations-unfccc-data-2005-2018-cop1-cop24/>> accessed 31 May 2023.

⁴² Matt McGrath, 'COP26: Fossil Fuel Industry Has Largest Delegation at Climate Summit' *BBC News* (London, 8 November 2021) <www.bbc.com/news/science-environment-59199484> accessed 31 May 2023.

⁴³ Karla Adam and Harry Stevens, 'Who Has the Most Delegates at the COP26 Summit? The Fossil Fuel Industry' *The Washington Post* (Washington, 8 November 2021).

⁴⁴ Alexandria Villaseñor, [Tweet] (*Twitter*, 2 November 2021). <<https://twitter.com/AlexandriaV2005/status/1455706039769186310>> accessed 31 May 2023.

⁴⁵ Adam Morton, 'Australia Puts Fossil Fuel Company Front and Centre at Cop26' *The Guardian* (London, 2 November 2021) <www.theguardian.com/australia-news/2021/nov/03/australia-puts-fossil-fuel-company-front-and-centre-at-cop26> accessed 19 November 2021.

⁴⁶ Alyssa Lukpat and Marc Santora, 'Greta Thunberg Joins a Protest in Glasgow' *New York Times* (New York, 1 November 2021) <www.nytimes.com/2021/11/01/world/europe/greta-thunberg-cop26-glasgow.html> accessed 31 May 2023.

⁴⁷ David Hunter, James Salzman and Durwood Zaelke, *International Environmental Law and Policy* (6th edn, Foundation Press 2022).

Narrative 2. A second narrative emerging from the conference was a celebratory one. This report did not focus on representational disparities or even the mediocre pledges by State parties, but rather celebrated non-State commitments. These reports focused on the newly launched Glasgow Financial Alliance for Net-Zero (GFANZ) project, a platform to coordinate climate pledges by the financial sector, which, by the end of the COP, had drawn membership from financial firms responsible for assets of over \$130 trillion.⁴⁸ A November 2021 GFANZ press release delivered the message that ultimate climate success had essentially been achieved. Here is the headline: ‘Amount of finance committed to achieving 1.5 °C now at scale needed to deliver the transition’.⁴⁹ According to Mark Carney, UN Special Envoy for Climate Action and Finance (and former head of the Bank of England), ‘[t]he rapid, and large-scale, increase in capital commitment to net zero, through GFANZ, makes the transition to a 1.5 °C world possible’.⁵⁰ In this narrative, governments are not sources of public authority or agenda-setters, but rather sources of ‘help’ for the private sector: ‘Now we need governments to help get the job done, by setting the ambitious policies that can unlock, accelerate and help direct the investment to where it’s needed most’.⁵¹

As these stories show, popular and social media reporting from the Glasgow climate conference offer a window into two narratives that can arise around the work of IOs.

The first centres public process values, representation, and input legitimacy. Those who decry the failures of the Glasgow conference are concerned not just about substantive failures but about public law values like representation, transparency, and equality in the processes of decision-making, and they link failures in substance to failures in process. Animating this narrative is an implicit claim that, without these process values, an international institution cannot effectively wield public authority.⁵² There is a deontological claim here: indigenous people’s groups, island nations and other members of civil society *should* be heard. There is also a consequentialist claim: States’ failure to take more ambitious action within the COP process could be related to the fact that the primary influences in that conference were those who have a stake in doing little, that is, fossil fuel representatives. Bad outcomes flow from a tainted, illegitimate process that includes undue influence or capture.

The second narrative shifts focus from the representativeness of the process to functional outcomes, no matter the source of those outcomes. It is laser-focused on consequences: which actors and which actions can best achieve the 1.5 °C goal? This narrative widens the lens beyond State action

⁴⁸ Liz Alderman and Eshe Nelson, ‘Global Finance Industry Says It Has \$130 Trillion to Invest in Efforts to Tackle Climate Change’ *New York Times* (New York, 3 November 2021) <www.nytimes.com/2021/11/03/world/europe/cop26-climate-change-finance-industry.html> accessed 31 May 2023.

⁴⁹ Glasgow Financial Alliance for Net Zero, ‘Amount of Finance Committed to Achieving 1.5 °C Now at Scale Needed to Deliver the Transition’ (3 November 2021) <www.gfanzero.com/press/amount-of-finance-committed-to-achieving-1-5c-now-at-scale-needed-to-deliver-the-transition/> accessed 31 May 2023.

⁵⁰ *ibid.*

⁵¹ *ibid.*

⁵² Armin von Bogdandy, Matthias Goldmann and Ingo Venzke, ‘From Public International Law to International Public Law: Translating World Public Opinion into International Public Authority’ (2017) 28 EJIL 115.

to celebrate productive contributions by any kind of actor. This is a functionalist, consequentialist, output legitimacy sort of account. Proponents of these successes celebrate the way that private actors can sometimes outstrip or bypass slow-moving States or interstate organizations.⁵³ IOs can be ‘reinvented’ by a process of opening up and welcoming input and participation from multiple stakeholders, which can bring fresh ideas and capacity to solve important problems.⁵⁴ According to this perspective, progress can be achieved outside of formal interstate commitments and all forms of progress are equally worth celebrating.

3.2. Representation and expedience as ideal types

The two lenses on the Glasgow COP illustrate the two logics I am trying to crystallize. I will soon claim that these logics have animated various choices to open and close international institutions to private sector actors over time. Before getting there, let me sketch out the logics another way – as ideal types.

The *logic of representation* centres the values of democratic self-determination and interest representation. It views legitimacy through these lenses of democracy and representation. That is, an organization possesses democratic legitimacy when it can make a claim that its governance decisions are representative of populations, whether through State authority or a broader conception of public authority.⁵⁵ Because self-determination and representation are the touch points for the legitimacy of the organization’s work, the organization seeks to ensure that the right actors are contributing to governance, however that ‘rightness’ is conceived. Indeed, different concepts of representation have gained prominence at different times.

Because, in this concept, self-determination and representation are key to an organization’s legitimacy, organizations should care about democratic values like the *accountability* of governance organizations to represented populations for actions taken in their interest. Governance acts should be constrained by notions of accountability to the public. Moreover, those purporting to take decisions or actions in the public interest must bear some sort of *authority* to do that, grounded in the principle of representation. Different theoretical strains within this logic will focus on different units of authority, whether those be national governments, smaller self-determining political communities, or perhaps interests, represented by civil society or others.

The key challenges for organizations, as this logic sees it, are to reconcile diverging interests and policy differences and to determine how to implement functional public structures at the global level without the many possible representation distortions that lead to legitimacy failures and effectiveness failures. Thus, the logic of representation sees many of the problems facing the international system as

⁵³ Kell (n 5).

⁵⁴ *ibid.*

⁵⁵ Samantha Besson, ‘The International Public: A Farewell to Functions in International Law’ (2021) 115 AJIL Unbound 307.

distortions of public authority and democratic process: rent seeking, imperfect interest representation, and replication of entrenched power structures.

The logic of representation can be conceived as a deontological perspective rather than a consequentialist or teleological one. That is, democratic self-determination and interest representation are inherent goods. Decisions made, rules developed, and actions taken through a legitimate process are right and correct because they are products of that process.

The *logic of expedience* is defined by its embrace of consequentialist and teleological reasoning. An outcome is right and correct when it advances the mission of an organization. This position values efficiency, problem solving, and progress on accomplishing public goals, whether those goals be public health, climate stabilization, sustainable development, etc.

What is important, according to this logic, is ends-oriented progress. Therefore, participants in the process should be those who can help the organization accomplish these ends. Participants to be welcomed include those with expertise, capacity to develop meaningful rules or policy interventions, innovative new approaches, or ability to assist with implementation.

This perspective can see processes of public deliberation as draws on the resources of an organization, and civil society as an outside force to be answered by satisfactory resolutions to practical challenges. It sees the challenges facing the international system as information and capacity failures, and opportunities for innovation and new synergistic partnerships. An organization's incapacity to address a problem may arise out of a need for scientific and technical advancement, or it might be a result of bureaucratic dysfunction and too much deliberation without action.

The blind spots for this approach are legitimacy problems, particularly input legitimacy, and the entrenchment of the western economic elite. As with the logic of representation, the logic of expedience can encompass different conceptualizations of how to capture progress, such as technocracy or neoliberalism.

| | <i>Logic of Representation</i> | <i>Logic of Expedience</i> |
|-----------------------------|---|---|
| Values | Self-determination, interest representation | Efficiency, problem-solving, faithfulness to mission |
| Source of legitimacy | Authority, representation | Progress, accomplishments |
| Looks for | Accountability, transparency, public authority | Capacity, expertise, effectiveness |
| Sees as challenges | Reconciling divergent interests, avoiding representation distortions like rent-seeking and over-representation of global elites | Information and capacity failures, bureaucracy, implementation problems |
| Blinds spots | Output legitimacy and effectiveness issues | Input legitimacy, deliberative failures, entrenchment of western economic elite |
| Ethical orientation | Deontological | Consequentialist |

Table 1: Two Logics

Of course, proponents of one logic or the other will have differences of opinion about some of the particulars. For example, theories falling within the ‘representation’ logic might be concerned with the authority of States in the international system, deriving public authority at the international level from the representative structures within the nation-State.⁵⁶ A more cosmopolitan approach to representation might note the realities of global interdependence and interconnectedness⁵⁷ and seek representation of populations, whether or not mediated by governments.⁵⁸ Armin von Bogdandy has called this a concept of ‘international public’ authority, and others have explored other extra-governmental perspectives on authority.⁵⁹ The logic of expedience could be more technocratic,

⁵⁶ A Claire Cutler, ‘Critical Reflections on Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy’ (2001) 27 *Review of International Studies* 133, 138. For an extreme view, see Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (OUP 2005).

⁵⁷ Eyal Benvenisti, ‘Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders’ (2013) 107 *AJIL* 295.

⁵⁸ Samantha Besson has suggested ‘the institutional continuum of the international public’ that is, that the public ‘institutes’ itself in various ways at various scales. Besson, ‘The International Public’ (n 55) 310.

⁵⁹ von Bogdandy, Goldmann and Venzke (n 52); see also Terry Macdonald, *Global Stakeholder Democracy: Power and Representation Beyond Liberal States* (OUP 2008) 193; Grainne de Burca, ‘Developing Democracy Beyond the State’ (2008) 46 *Columbia Journal of Transnational Law* 221; Anne Peters, ‘Membership in the Global Constitutional Community’ in Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (OUP 2009).

taking a knowledge-based perspective, or it could be more neo-liberal, seeking synergies between the goals of the public and private sectors and advocating for market-based solutions to public problems.

The two positions do tend to lead to distinct perspectives about the participation of private sector actors in international governance, and it is this difference that concerns us for the purposes of this chapter.

| | <i>Logic of Representation</i> | <i>Logic of Expedience</i> |
|---|--|---|
| <i>Participation orientation</i> | Status | Function |
| <i>Welcomes participation by...</i> | Representatives of those affected by governance choices | Those with expertise, capacity, ideas |
| <i>Attitude toward for-profit participation in law-making & governance</i> | For-profit entities and their representatives can distort law- and policy-making process; should guard against undue influence and capture | For-profit entities and their representatives should be included to the extent they can present useful expertise, capacity, ideas |

Table 2: Logics of Participation

4. MAPPING THE LOGICS OVER TIME

While the previous section set out some features of the two logics in an impressionistic way, these two rationalities are best illustrated in the context of significant moments in the history of for-profit engagements in international governance. This section reviews five such moments over the last century or so.

4.1. *The ‘League Method’: expedience*

During the 1920s and 1930s, the League of Nations approach to non-State groups came to be known as the ‘League Method’. The League Method characterized a working relationship where ‘voluntary associations’ and IOs had very close collaborations. As Steve Charnovitz characterizes this, ‘[b]ehind many [early international organizations] stood idealistic and active [associations]’.⁶⁰ These associations

⁶⁰ Charnovitz (n 4) 245. Charnovitz used the anachronistic term ‘NGOs’ here, which I substituted with the term ‘associations’, since the term ‘non-governmental organization’ was not coined until its use at the founding of the UN in Article 71 of the Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945).

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, principally through policy conferences; and lobbied those in power.⁶¹ These methods of cooperation had emerged by the end of the nineteenth century, when 'there was a pattern of private international cooperation evolving into public international action'.⁶²

In the League era, there was no strong distinction made between voluntary associations that advanced business or commercial ends and those that lobbied for other causes. Rather, associations advancing business interests were among the influential early 'semi-public and private organizations', terms which correspond to the modern-day NGO.⁶³ In Charnovitz's assessment, during the League period, the International Chamber of Commerce (ICC) was among the top three most significant associations in its impact on international governance, together with the Red Cross and the Women's International League for Peace and Freedom.⁶⁴

For example, at this time railway businesses helped form the International Railway Congress Association, which led to the creation of the intergovernmental Central Office for International Railway Transport. The International Telegraph Union invited private companies to participate in its meetings. The ICC had official roles in League-sponsored economic conferences. Business associations also participated in the League's work relating to finance, commercial law, transportation, pharmaceuticals, and other areas.⁶⁵

With some exceptions, the League of Nations generally took an approach to engagement with private sector actors that aligns with the logic of expedience. Public-private relationships in this era were often characterized by function over status, looked for expertise, capacity, and ideas more than interest representation, and were open to associations representing the private sector whenever their participation was relevant to the matter under consideration. That said, even in the League of Nations, there was a status-function ambivalence. For example, the ILO was developed according to a tripartite structure that welcomed employers, labour organizations, and government representatives on equal, but status-based, terms.

⁶¹ *ibid.*

⁶² *ibid.*

⁶³ *ibid.* 221.

⁶⁴ *ibid.* 12–13, 223, 245–6.

⁶⁵ *ibid.* 222–7.

4.2. Article 71 of the UN Charter: representation

The pendulum swung in a different direction at the founding of the UN – toward status and away from function; toward authority and representation, and away from ends-based collaboration.

Consider Article 71 of the UN Charter, which contains the Charter's single reference to non-State actors and empowers ECOSOC to 'make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence'.⁶⁶ The 'League Method' of close working relationships between non-State groups and intergovernmental groups had been an informal practice, but non-State groups wanted to formalize this practice in the new UN Charter. About twelve hundreds of them travelled to San Francisco in 1945 to seek some sort of 'provision for NGOs in the UN Charter'.⁶⁷ They partly succeeded, as Article 71 did authorize the ECOSOC to 'consult' with NGOs. However, that provision formalized a clearly subordinate role for NGOs in comparison with IOs and State parties. NGOs did not obtain any voting privileges, rights to participate in treaty drafting, or any other formal rights of participation. Moreover, even the term 'consultation' was not defined in the Charter, and so the contours of this relationship were left to ECOSOC's later discretion. The Charter also failed to articulate or formalize relationships between NGOs and any other organ or instrumentality of the UN, such as the General Assembly or the Security Council.

Article 71's terms reflect the preoccupation of the drafters of the UN Charter, and this was to clarify the special status of intergovernmental organizations, like the UN itself. Even the term 'non-governmental organization', or 'NGO', was coined at the birth of the UN; its purpose was to distinguish these groups from *intergovernmental* organizations, as well as government-sponsored groups. These are status-based distinctions, as groups are organized based on identity. If a group is governmental, it must be represented through a delegation and not through the consultation procedure. If it is non-governmental, it can participate, but only as an outsider to the organization: merely 'consulting', not contributing.

Note, too, that Article 71 did not distinguish between groups advancing different kinds of agendas, such as business agendas versus other kinds. Rather, as Stephen Tully has tellingly observed, Article 71 lumped together all kinds of non-governmental groups, in order to obtain '*equality of status for the purpose of counterbalancing competing perspectives*' rather than '*differential access or treatment to exploit operational specialization*'.⁶⁸

⁶⁶ Article 71 of the Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945).

⁶⁷ See Bill Seary, 'The Early History: From the Congress of Vienna to the San Francisco Conference' in Peter Willets (ed), *The Conscience of The World: The Influence Of Non-Governmental Organisations in the U.N. System* (Rowman & Littlefield Publishers/Brookings Institution Press 1996) 15, 25–6; see also Charnovitz (n 4) 251.

⁶⁸ Stephen Tully, *Corporations and International Lawmaking* (Martinus Nijhoff 2007) (emphasis added).

Thus, the UN at its founding moved away from the League's largely function-based working relationships toward a largely status-based model that attempted to elevate governments and the new intergovernmental organizations by giving all *non*-governmental groups an equal and secondary status.

4.3. ECOSOC accreditation reforms: still representation

Another significant moment in the relationship between IOs and non-State actors came a half century later, when ECOSOC reformed its working relationships with NGOs in 1996. This moment featured a reaffirmation of the logic of representation, but in a more cosmopolitan and less sovereigntist form than at the UN's founding.

In the half-century between the founding and the 1996 reforms, ECOSOC had wielded the authority granted to it by Article 71 to pass regulations establishing an accreditation procedure and consultation system.⁶⁹ However, by the early 1990s, the existing accreditation procedure had drawn various forms of criticism. There was a perception that the rules were too restrictive in that they allowed only 'international' groups, and allowed States to veto consultative status for NGOs from their own countries.⁷⁰ There was also a perception that there was 'unequal representation . . . [of NGOs] from different regions of the world' and, in particular, overrepresentation of organizations from Western industrialized nations.⁷¹

The resulting reforms clearly spotlight the influence of the logic of representation in seeking a 'representative' composition of NGOs in the consultation system. ECOSOC Resolution 1996/31 noted that ECOSOC sought 'just, balanced, effective and genuine involvement of non-governmental organizations from all regions and areas of the world', and in particular, greater participation from developing countries and countries in transition.⁷²

In addition to an increased representation of NGOs from developing countries, ECOSOC sought to ensure that accredited associations would be *accountable* representatives of the interests of their constituencies. The new rules therefore moved to a criterion that evaluated the representativeness of the organization's governance structure. The criteria focus on how well an NGO seeking accreditation represents its members, whether it has internal governance mechanisms that make its representatives accountable to that membership, and whether it has governance documents that evidence and safeguard this representational character. For example, the new rules required:

⁶⁹ See Hobe (n 11); and Rainer Lagoni, 'Article 71' in Bruno Simma and others (eds), *The Charter Of The United Nations: A Commentary* (OUP 1995) 902, 904–5.

⁷⁰ See ECOSOC, Res 1996/31 (n 15); see also Hobe (n 11) 1800.

⁷¹ Hobe (n 11) 1801.

⁷² ECOSOC, Res 1996/31 (n 15) para 5.

10. The organization shall . . . have a democratically adopted constitution, . . . which shall provide for the determination of policy by a conference, congress or other representative body and for an executive organ responsible to the policy-making body[;]

11. . . . shall have authority to speak for its members through its authorized representatives[;]

12. . . . [and] shall have a representative structure and possess appropriate mechanisms of accountability to its members, who shall exercise effective control over its policies and actions through the exercise of voting rights or other appropriate democratic and transparent decision-making processes.⁷³

Organizations must be non-profits and obtain their funding from ‘national affiliates . . . or from individual members’.⁷⁴ Finally, the organization must represent its particular field by ‘be[ing] of recognized standing within the particular field of its competence or of a representative character’. ECOSOC moved to a three-tier access structure at this time, with NGOs representing the broadest constituencies receiving the most access, and those representing more narrow, specialized interests receiving the least. All of these reforms express a *representative* model, premised on the theory that what NGOs offer is representation of populations or interests.

Indeed, this representative function was explicitly celebrated at the time. UN Secretary-General Boutros Boutros-Ghali gave a speech in 1994 calling NGO participation in IOs a ‘basic form of popular representation in the present-day world’ and a ‘guarantee . . . of political legitimacy’.⁷⁵ A high-level panel of experts a decade later observed that ‘[t]he growing participation and influence of non-State actors is enhancing democracy and reshaping multilateralism’.⁷⁶

Several years after the 1996 reforms, ECOSOC commissioned a report known as the ‘Cardoso Report’, which organized then-prominent critiques of the existing consultation system and proposed reforms. This report, too, emphasized the representative function of the NGO consultation system. It advocated ‘forging stronger links between [NGOs at] the local and global levels, which would help overcome democratic deficits in global governance’.⁷⁷ The Cardoso report also collected concerns by national governments about the ‘legitimacy, accountability and “hidden agendas”’ of NGO consultants: ‘Many of the accredited NGOs are perceived as lobbyists rather than “true” stakeholders. Most are seen

⁷³ *ibid* paras 10–12.

⁷⁴ *ibid* para 13.

⁷⁵ Boutros Boutros-Ghali, UN Secretary-General, [ST/DPI/1670, ‘Keynote Address by Secretary-General Boutros Boutros-Ghali to the 47th DPI/NGO Conference’ in 47th Annual DPI/NGO Conference, *We the People: Building Peace* (8–10 September 1994) 3.

⁷⁶ UN, A/58/817, ‘We the Peoples: Civil Society, the United Nations and Global Governance: Report of the Panel of Eminent Persons on United Nations-Civil Society Relations’ (11 June 2004) 3.

⁷⁷ UN, ‘Press Briefing by Panel on UN – Civil Society Relations’ (21 June 2004) <www.un.org/press/en/2004/Cardoso062104.doc.htm> accessed 31 May 2023.

as not accountable while demanding higher government accountability. Many governments feel they, being elected, are the legitimate representatives of society'.⁷⁸

These concerns by national governments exhibit the prominence of the logic of representation in how the consultation system was conceived at the time. They reveal a fundamental normative assumption that it is NGOs' 'democratizing' and representational qualities that qualify them to participate as consultants to IOs. For example, if the principal concern were to gather sufficient expertise to develop an efficient or workable rule, the principal analysis would not be whether an NGO represents its members, but whether the organization offers expertise, local knowledge, implementation assistance, or some other benefit.

4.4. *Global Compact: now expedience*

As the latter half of the twentieth century brought longer supply chains and globally dispersed corporate families, IOs sought to engage multinationals directly, in a move that embraced functional contributions over representation of populations. UN Secretary-General Kofi Annan ushered in a new logic and created a major inflection point in the relationship between the UN and non-State entities just a few years after the 1996 ECOSOC reforms. In a landmark speech at the 1999 World Economic Forum in Davos, Switzerland, to an audience of CEOs, Annan advocated for 'a creative partnership between the United Nations and the private sector'.⁷⁹ The speech, introducing the Global Compact, proposed a synergy of interests:

[T]he everyday work of the United Nations—whether in peacekeeping, setting technical standards, protecting intellectual property or providing much-needed assistance to developing countries—helps to expand opportunities for business around the world. And . . . without your know-how and your resources, many of the objectives of the United Nations would remain elusive.⁸⁰

Through the Global Compact initiative, Kofi Annan asked business entities to 'demonstrate their leadership roles as world citizens' by pledging to 'endors[e] and champion' the principles of the Global Compact and try to carry them out in corporate practice.⁸¹ The Global Compact was an enormously successful initiative, claiming, as of this writing, membership from 'over 15,000 companies based in

⁷⁸ 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) <<https://archive.globalpolicy.org/reform/initiatives/panels/cardoso/0503practices.htm>> accessed 31 May 2023.

⁷⁹ UN, SG/SM/6881, 'Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, in Address to World Economic Forum in Davos' (1 February 1999) <<https://press.un.org/en/1999/19990201.sgsm6881.html>> accessed 31 May 2023.

⁸⁰ *ibid.*

⁸¹ Kathryn Gordon, *The OECD Guidelines and Other Corporate Responsibility Instruments: A Comparison*, Working Paper No. 2001/05 (OECD Publishing 2001).

over 160 countries, both developed and developing, representing nearly every sector and size'.⁸² Its participant database has nearly 20,000 entries.⁸³

The impact of the Global Compact has stretched far beyond the four corners of that initiative. As George Kell has observed, in its wake, 'cooperation with the private sector became politically acceptable and institutionally supported'.⁸⁴ It 'enabl[ed] other UN entities to explore cooperation with the private sector. It gave strong impulse to the role of business in the work of the Organization'.⁸⁵

The launch of the Global Compact coincided with several other significant movements in the relationship between the UN and private sector entities, including the Millennium Declaration and the creation of the Millennium Development goals, which advocated for lifting populations out of poverty and improving health, education, equality, and environmental sustainability while reducing hunger, lack of shelter, and disease. These were all goals to which the private sector was invited to contribute, and indeed, the Millennium Declaration of 2000 noted explicitly that the private sector had an important role to play in carrying out these agendas. The year 2000 also saw the founding of the Global Fund to Fight AIDS, Tuberculosis and Malaria, a multi-stakeholder project that welcomed participation from the private sector. The next year, the General Assembly introduced UN-private sector relationships as a new agenda item.

In the years since that 2000 launch, the UN has seen a 'silent reform',⁸⁶ with the organization adopting private sector ideas like 'brand management, modern management formats, more effective use of technology, and . . . opensourced, networked collaborations'.⁸⁷ The UN has developed a 'Private Sector Focal Point', the 'Annual Private Sector Forum' and numerous public-private partnerships.

By 2015, the orientation toward the private sector had changed such that UN Secretary-General Ban Ki-moon called for 'all hands on deck' when opening the Paris Climate conference.⁸⁸ In particular, he praised climate pledges by 'some of the world's largest' oil and gas companies and financial institutions and asked that others come on board.⁸⁹ The Paris Agreement adoption document contained meticulous provisions calling for efforts by non-State actors and launching the Non-State Actor Zone for Climate Action (NAZCA) platform and its Global Climate Action portal. Both called for non-State actors to 'display their commitments to act on climate change'.⁹⁰

⁸² United Nations Global Compact, 'The World's Largest Corporate Sustainability Initiative' <www.unglobalcompact.org/what-is-gc> accessed 1 June 2023.

⁸³ See United Nations Global Compact, 'See Who's Involved' <<https://unglobalcompact.org/what-is-gc/participants>> accessed 1 June 2023.

⁸⁴ Kell (n 5) 749.

⁸⁵ *ibid* 740.

⁸⁶ Georg Kell, Ann-Marie Slaughter and Thomas Hale, 'Silent Reform through the Global Compact', (2007) 44(1) UN Chronicle 26.

⁸⁷ Kell (n 5) 749.

⁸⁸ Ban Ki-moon, UN Secretary-General, 'Remarks to COP21 Presentation of Draft Outcome Document' (12 December 2015) <www.un.org/sg/en/content/sg/speeches/2015-12-12/remarks-cop21-presentation-draft-outcome-document> accessed 1 June 2023.

⁸⁹ *ibid*.

⁹⁰ COP 21, 'Adoption of the Paris Agreement' (n 37) para 114.

The narrative these events expose is an ends-oriented narrative. It is about encouraging progress on distinct goals, and enlisting contributions from all actors who can contribute to these goals. It is less concerned with self-determination, which requires representativeness of some sort, and more concerned with progress, which requires contributions. It is less about status—public versus private, international versus domestic—and more about function—less poverty, less disease, more renewable energy.

4.5. *Early twenty-first century: unreconciled narratives*

What has unfolded since the Global Compact turning point? In the first quarter of the twenty-first century, the two narratives are both prominent in the UN system. They animate debates about the practices and outcomes of IOs and, to the extent they conflict, this conflict is largely unresolved.

United Nations Framework Convention on Climate Change. For example, the reports from the COPs at UNFCCC show one area where the two logics produce entirely different perspectives on what happened and how to assess what happened. After the Glasgow COP, one narrative decried failures in inclusivity and linked these to failures in output. Better representation, according to this account, may have produced a better outcome. The presence of oil and gas interests—and perhaps their privileged access—was detrimental to progress on climate stabilization commitments. The failure to offer adequate access to those most affected by climate change could have affected the outcome, and tainted the conference regardless of outcome. In sum, the conference was plagued with both input and output legitimacy problems. The second narrative from the Glasgow COP focused on an entirely different set of facts: rather than representation, participation, or access issues, this narrative focused instead on progress. Rather than progress by State actors on core climate commitments, which was limited, the narrative focused on commitments by non-State actors, celebrating the Glasgow Financial Alliance for Non-State Action.

United Nations Commission on International Trade Law. The United Nations Commission on International Trade Law (UNCITRAL), an organization focused on the harmonization and modernization of international trade law, offers another view of the competing, unreconciled narratives. In its working processes, UNCITRAL has come to embrace the logic of expedience. The organization is very open to outside observers. Its deliberations are open to both non-Member States and non-State actors, all of which are called ‘observers’, and which are admitted without distinction. Note the focus on function, rather than status, in UNCITRAL’s description of its participatory structures: UNCITRAL ‘maintains mailing lists of organizations whose expertise is relevant to issues addressed by the various working groups’ and will send invitation letters to request expertise for a particular meeting. UNCITRAL will continue to send invitations to particular groups ‘so long as their work remains relevant’. Moreover, these non-State actors can shape the consensus process, so the UNCITRAL

working practices themselves minimize the status distinctions between State parties and non-State actors.

However, those UNCITRAL working methods have been subject to critique by those who would instead have the organization emphasize status and representation. France challenged current practices in a complaint lodged in 2007, calling for a review of the meaning of consensus and the level of non-member participation. France noted that non-State actors were ‘play[ing] a major role because of the expertise they possess in the areas under discussion’.⁹¹ In particular, France observed that when UNCITRAL seeks to draft a new legal instrument, it is the non-State experts and the groups that they represent that initiate the process and provide much of the technical expertise. France expressed the concern that these non-State groups were neither representatives nor delegates, and that their number had expanded greatly, with a substantial effect on the ultimate UNCITRAL work product. France’s principal complaints were identity based: many of the NGOs were not members of civil society but instead professional associations; distinction between Member States and observers was frequently blurred; and non-State groups had too much influence in the decision-making procedure. France sought to preserve the sovereign rights of States to exert control over the international law-making process.

This debate at UNCITRAL crystallizes the two narratives. UNCITRAL’s working practices exhibit a functionalist, consequentialist, logic of expedience approach. France sought a status-based approach that preserved a special role for State authority.

World Health Organization. The World Health Organization’s recent activity also epitomizes the current century’s representation/expedience ambivalence. The WHO reforms address a function problem by doubling down on status.

The WHO has long been plagued by concerted interest campaigns around tobacco, sugar, pharmaceuticals, and other public health issues, which have harmed its efforts on these issues. In response, the organization updated its working relationships with non-State entities in 2016 with a Framework of Engagement with Non-State Actors (FENSA).⁹² FENSA distinguishes between ‘private sector entities’ and ‘international business associations’ on the one hand, and ‘non-governmental organizations’ on the other, with additional safeguards in place for engagement with the former group.⁹³ FENSA’s safeguards are meant to guard against conflicts of interest that may have negative impacts on the ‘WHO’s integrity, independence, credibility and reputation; and public health mandate’.⁹⁴ Thus, the rules try to create separate influence pipelines for public interest NGOs on the one hand, and for-profit entities and groups on the other.

⁹¹ Claire Kelly, ‘The Politics of Legitimacy in the UNCITRAL Working Methods’ in Tomer Broude, Marc L Busch and Amelia Porges (eds), *The Politics of International Economic Law* (CUP 2011) 106, 115.

⁹² WHO, WHA69/2016/REC/1, ‘Framework of Engagement with Non-State Actors’ (28 May 2016).

⁹³ *ibid.*

⁹⁴ *ibid.*

The WHO's reform flows from a functional concern about bad outcomes, but it addresses this concern by making a further set of distinctions based on status. Yet this reform is not about representation. That is, this looks different than the prior examples of institutional design based on representation: the WHO reforms are not aimed at elevating the status of governmental representatives (as at the UN founding) or trying to generate a sense of popular democracy (as with the 1996 ECOSOC reforms). Rather, they flow from an *ex ante* normative judgment about the functional benefits and risks that attach to private sector participation. This is a functional concern channelled into a status-based distinction: private sector influences may taint a process seeking to develop public health regulations. Non-profit-oriented groups do not pose such a risk. What is to be regulated, then, are the *actors* that participate in the process.

The WHO reform suggests the possibility that IOs do not have adequate tools to conceive of the relationship between themselves and the for-profit sector. Even when organizations, like the WHO, think functionally about these relationships, the familiar tools are representational. But as I have argued elsewhere, those status-based tools will not likely address the problems they aim to solve. Nor will they necessarily deliver a process with more representation or more public authority because they are not optimized for that agenda, but rather aimed at a functional problem.

5. CONCLUSION

How should IOs compose themselves with respect to non-State actors, specifically for-profit entities and their representatives? The question is live because for-profit actors are now embedded in many aspects of international governance, and their participation is increasing. Trade and industry association representatives serve as members of civil society, usually on the same terms as other groups.⁹⁵ IOs increasingly lean on for-profit actors and their trade and industry association representatives for 'partnerships', financial sponsorship, technical expertise, and implementation of international agendas. At the same time, sharp criticism of these roles persists by those who believe that the participation of business actors threatens something essential about the way IOs conduct their activities.

Resolving this tension requires greater clarity about what we expect of IOs. Do we require 'public' institutions?⁹⁶ That is, do we require institutions that instantiate and facilitate the self-determination of populations? Are IOs instruments of democratic representation at the supranational

⁹⁵ See Samantha Besson and José Luis Martí, 'Legitimate Actors of International Law-Making: Towards a Theory of International Democratic Representation' (2018) 9 *Jurisprudence* 504 (noting that there is no clear way to distinguish between 'good' and 'bad' members of civil society, between 'democratic' and 'non-democratic' ones, or between those concerned with general or collective interests and those who are merely motivated by personal or partial agendas').

⁹⁶ As Letizia Lo Giacco points out, even the question of how to imagine or evaluate the 'publicness' of international law is underexplored. See Letizia Lo Giacco, 'Private Entities Shaping Community Interests: (Re)Imagining the "Publicness" of Public International Law as an Epistemic Tool' (2023) 14 *Transnational Legal Theory* 270.

scale?⁹⁷ Their working practices should reflect some sort of ongoing responsiveness and fidelity to the interests of a ‘public’, however that public is constituted. Business groups might be a part of this if they, too, mediate public interests.⁹⁸ Or, do we instead have a teleological view: an IO exists to serve a particular purpose. It is a wound clock, so to speak, which carries out its time-telling with no additional inputs needed along the way to refine its goal. In this latter view, the agenda is supreme—climate stabilization, public health—and anyone who can contribute to that mission should be welcome to do so. ‘All hands on deck’, says Ban Ki-moon. Business groups come out well in this analysis, especially those that have been honed into efficiency machines by the forces of capitalism. Why shouldn’t Microsoft teach the UN to better use technology? In this logic of expedience, public input can keep the actors honest; civil society can serve a ‘watchdog’ function.⁹⁹ But the true measure of an organization is not its responsiveness to these perspectives, but its capacity to take concrete action, or so this logic goes.

In an era when threats to international peace, equality, and environmental security seem increasingly insistent, the competition between these two visions for the institutional design and legitimacy of IOs is likely to persist and intensify. The best resolution will not be ever more detailed regulations governing non-State access to these institutions, but rather approaches aligning with our deeper purposes for them.

⁹⁷ Samantha Besson, ‘Democratic Representation within International Organizations: From International Good Governance to International Good Government’ (2022) 19 *International Organizations Law Review* 489.

⁹⁸ Lo Giacco (n 96).

⁹⁹ Kell (n 5).