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Including private sector participants in international rulemaking: governance models

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Abstract:

International organisations seeking to develop a principled approach to stakeholder participation in rulemaking processes should consider for-profit stakeholders, which can be influential participants. This chapter evaluates potential governance models for their effectiveness in facilitating the benefits and restraining the harms of for-profit influence in rulemaking processes, recommending a balanced approach. A successful governance model should also acknowledge that for-profit stakeholders can use a variety of channels to communicate their input, including individual business entities, trade and industry associations, other non-governmental groups, academics and think tanks, and domestic officials. Because of these sometimes invisible links between for-profit actors and other kinds of groups, approaches that attempt to distinguish between for-profit and other actors are not likely to prove durable over time. Instead, two basic governance models are most likely to succeed: a *roundtable* model that includes only a small set of actors through an invitation or application process but then invites deep substantive engagement by those stakeholders, or a *public comment* model that allows participation by all interested parties but at an arms-length level of engagement.

I. Introduction

Who should be entitled to participate in international rulemaking processes? What rights should those participants have? With respect to participants who represent the private sector, there are no easy answers. For example, should the World Coal Association help shape treaty texts addressing climate change? Should Philip Morris International, a tobacco industry leader, contribute to rules about tobacco control? In these contexts, for-profit contributions would seem to be obviously detrimental to the lawmaking tasks at hand. On the other hand, Boeing and Airbus, leading aircraft manufacturers, could be responsible partners for rulemaking on aircraft financing, and Lixil, a global sanitation products company, might be well positioned to help UNICEF develop sanitation policy guidelines for governments in Eastern and Southern Africa. As these examples make clear, a more inclusive approach to stakeholder participation in rulemaking presents a governance challenge for international organisations. One of the key factors for organisations to consider is how to respond to the business community.

This chapter was prepared for a volume titled: “Improving Inclusiveness of IO Rulemaking.” The framing of this project assumes that international organisations make rules, and their rulemaking processes should be more inclusive. Both premises are well-founded. Many different international organisations develop many kinds of international instruments (Alvarez, 2006; White, 2017). They create model rules and non-binding standards, convene treaty conferences, and generate other normative products. Some of this rulemaking is “informal” (Pauwelyn et al., 2012); at other times, rules are incorporated into treaties, implemented at the domestic level, or both (White, 2017). Because these international rulemaking processes can shape international and domestic laws or create standards or policy benchmarks, many kinds of stakeholders seek to offer input. Theories of democratic legitimacy and administrative process affirm the importance of offering various stakeholders opportunities to offer input into the making of rules to which they will be subject (de Burca, 2008; Esty, 2006; Kingsbury et al 2005; MacDonald, 2008; Peters et al, 2009; Stewart, 2014; Bogdandy et al., 2010). Incorporating stakeholder input produces more effective rules and increases their likelihood of acceptance.

A more inclusive approach to stakeholder participation, however, requires international organisations to determine which stakeholders should participate in a rulemaking process, and what opportunities they should have to offer their perspectives. This governance challenge is particularly acute in the context of for-profit actors, given the potential that their participation can create both significant benefits and harms (Berman, 2017; Durkee 2016, 2017; Charney, 1983). Since business actors and their many forms of representatives frequently do participate or seek to participate in rulemaking processes (Berman, 2017, 2022; Durkee, 2016, 2017, 2023), any successful governance model for stakeholder participation in international rulemaking must address the business community.

Addressing the business community in a stakeholder governance model presents a tension. On the one hand, for-profit groups can sometimes present unique challenges for a rulemaking process, so rulemakers must specifically address their unique characteristics and roles in a process (Berman, 2022). On the other hand, there is often no crisp dividing line between business groups and other groups (Braithwaite & Drahos, 2000; Durkee, 2017), so a successful governance process cannot rely on strict categories and divisions between kinds of group and develop different rules for different groups.

This chapter proposes that two different governance models could realistically resolve this tension: first, a “roundtable” model would allow an organisation to exert more control over the kinds of input it receives in its rulemaking process and, in turn, would allow stakeholders to offer more meaningful forms of input. The tradeoff is that a roundtable model forces the organisation to make its own choices about which stakeholders should be included in the rulemaking process, which will inevitably exclude participants who could offer meaningful perspectives. This can create effectiveness and legitimacy concerns. Second, a “public” model would minimize an organisation’s gatekeeping function and ensure that anyone who wants to participate in a rulemaking process can do so while keeping these participants at arms length to minimize the potential for undue influence. This approach would maximize transparency and ensure that all stakeholders can be heard, but could also reduce the impact

of stakeholder engagement and fail to reap some benefits that an inclusive process would otherwise create.

This chapter proceeds as follows. First, it offers a balanced assessment of the potential benefits and risks of including for-profit actors in a stakeholder participation process. Then it offers context, describing the state of play with respect to incorporating stakeholders in the rulemaking process, and reviewing several models for how organisations include or exclude for-profit actors. The section reviews frameworks developed by the International Labour Organisation (ILO), the Economic and Social Council (ECOSOC), the United Nations Framework Convention for Climate Change (UNFCCC), and the World Health Organisation (WHO). Third, the chapter evaluates the distinct features of these participation frameworks, considering the difficult challenge of identifying and segregating private sector perspectives. Finally, the chapter identifies two ideal type governance models and the tradeoffs each model represents.

II. Why include or exclude for-profit entities?

Any stakeholder participation process must balance beneficial aspects of a more inclusive process with the potential harms of opening up a rulemaking process to outsiders. For example, openness to public input can increase popular trust in a rule, but it may decrease trust if the process seems ineffective or tainted by undue influence. Any stakeholder governance model will need to take a balanced approach that weighs these benefits and harms, regardless of the composition of participants in the rulemaking process. Yet, different governance models will offer trade-offs, as regulators use different strategies to strike a balance between capturing potential benefits and avoiding harms. Understanding the unique benefits and harms that private sector participants can bring to a rulemaking process will help regulators strike the governance balance more effectively.

II.1. Reasons to include for-profit entities

The reasons to include for-profit participants in an international rulemaking process build on the reasons to include other kinds of actors. One well-established framework for describing the value of stakeholder participation is input and output legitimacy (Keohane & Nye, 2001). Rules are produced with “input” legitimacy when they are developed through a rulemaking process that is perceived to be “fair, just, and well-ordered” (Reiser & Kelly, 2011). Allowing participation by those who have some stake in the outcome of a rulemaking process can increase the perception of fairness, justice, and good order. Welcoming input from a variety of sources can also help foster input legitimacy because hearing from a diversity of stakeholders can create a balanced process that airs countervailing interests (Abbott & Snidal, 2009). Rules have “output” legitimacy when they are “useful” and accomplish the goals they are meant to address (Reiser & Kelly, 2011). Building on contributions offered by those with relevant technical, professional, community, or personal expertise can improve the substantive success of rules (Abbott & Snidal, 2009). Thus,

instruments that emerge from a process that includes stakeholder input are likely to be more effective in content and more accepted by the communities they seek to regulate.

Including private sector participants in a rulemaking process can facilitate both input and output legitimacy. Just like any other stakeholder group, private sector groups that participate in a rulemaking process are more likely to perceive the resulting rule as the product of a “fair, just, and well-ordered process” (Reiser & Kelly, 2011). They are also able to contribute to the usefulness of the rule by providing specialised expertise (Block-Lieb & Halliday, 2017; Charney, 1983; Durkee, 2016). Their participation, like that of other stakeholders, can balance the deliberative process by ensuring that different interests are represented. In addition, including private sector groups can blunt later lobbying campaigns at the domestic level, which can improve the effectiveness of the rule by facilitating domestic implementation and compliance (Braithwaite & Drahos, 2000). Enabling participation by private sector groups can also potentially enhance transparency and foster domestic acceptance of a rule by allowing those groups to disseminate information about the rule and the rulemaking process to others in the business community. For example, trade and industry groups might inform their memberships about the rulemaking process and its results (Dadush, 2017).

The OECD’s Compendium of International Organisations’ Practices (“IO Compendium”) offers a slightly different terminology for evaluating the benefits of stakeholder participation (OECD, 2021). In the IO Compendium’s formulation, the reasons to include stakeholders are both principled and practical. The principled reason is that stakeholder engagement is central to good governance. As the IO Compendium articulates this, stakeholder participation is a “fundamental determinant of public trust, process legitimacy, and rule credibility” (OECD, 2021). The practical reason is that stakeholder engagement produces better rules. It does so by “broadening the evidence base” for those rules, “increasing [their] responsiveness” to perceived needs, and “fostering a sense of ownership, confidence, and trust” in both international organisations and the rules they produce (OECD, 2021). Private sector participation can help organisations to do all of these things.

II.2. Reasons to limit participation of for-profit entities

The reasons to exclude or limit the participation of for-profit participants in rulemaking processes arise out of the unique challenges and risks their participation presents.

To begin, the IO Compendium notes the “risk of capture of the engagement process by those who have sufficient resources to exert influence” (OECD, 2021). Capture and undue influence concerns are at their height in the context of private sector interests. Concerns about undue influence and capture relate to whether an organisation can pursue its mission without getting derailed by special interests or by other distractions or destabilising forces. An organisation subject to undue influence or capture could begin to pursue the mission of certain special interests at the expense of its own mission. As the literature observes, and as the prior section describes, organisations can sometimes foster their missions by engaging with business groups. But private sector participation can also push an organisation away

from its core agenda. Berman (2022) described “legal, subtle” forms of capture that are “increasingly prevalent in international rulemaking,” such as information capture, representational capture, and resource capture.

For-profit participation in rulemaking has been criticised as “dilut[ing] member-state control” over decision-making (Kelly, 2011), causing over-representation of well-resourced representatives from geopolitically powerful states, and exacerbating the difficulties organisations have in engaging with more marginalised stakeholders (Willets, 2011). If all non-state groups are admitted into a rulemaking process on equal terms, groups with more resources will tend to dominate (Wagner et al., 2011). While international participatory processes are understudied (Berman, 2017), research focusing on domestic contexts shows that industry and trade associations wield outsized influence (Hackney, 2015). In the international context, trade associations with fossil fuel industry 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 (Durkee, 2023). The overwhelming presence of trade associations and other representatives from the fossil fuel industry may have discredited or limited the impact of the COP, at least in public opinion. Greta Thunberg memorably illustrated this point in a tweet: “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” (Thunberg, 2021). Taken together, these representational imbalances can harm input legitimacy and regulatory trust (Bratspies, 2009; Tyler, 1990).

In addition to concerns with capture and representational imbalances, a third challenge with the participation of for-profit groups in rulemaking processes is the issue of transparency. These different concerns are related as for-profit groups can sometimes try to avoid an appearance of capture or over-representation by engaging in a participatory process less transparently. As I have described in prior work, major multinational corporate actors sometimes “advance their positions without attribution through the mouthpiece(s) of academic, third world, or grassroots organisations” (Durkee, 2017). As Keohane & Nye have observed, transparency is an important component of input legitimacy (2002). It also facilitates output legitimacy, or the effectiveness of rules, because it allows decision makers to weigh the credibility of the information they receive. Non-transparent participation by for-profit groups (such as through purportedly independent academics or NGOs) can make it harder for rule makers to perform both of these legitimacy-related tasks: to ensure they are hearing from a representative range of perspectives and to evaluate the credibility and utility of the perspectives they receive.

Finally, for-profit participation in rulemaking can also create less useful rules, and thus rules with less output legitimacy. In particular, business participation has been critiqued as degrading the overall information economy in a rulemaking process. This has been notably apparent in the context of coordinated private sector campaigns, like those against tobacco and sugar control at the WHO, where powerful industries flooded the Organisation with sponsored academic research, misleading “third world” perspectives and other low value

information (Durkee, 2017, Berman, 2022). These input and output legitimacy deficits can cast doubt on the international rulemaking process itself, and the organisations convening that process. Private sector participation in rulemaking processes can thus harm public trust not only in the products of the rulemaking process, but also in the international organisations engaged in rulemaking.

II.3. Weighing the factors

There are potential benefits and risks that arise from an inclusive stakeholder process regardless of the kinds of stakeholders who participate in the process. In large part, the benefits and risks of including for-profit stakeholders in a process are the same in kind as benefits and risks of including other kinds of actors. There is no bright line that separates “stakeholder participation” and “interest group lobbying,” even though stakeholder participation has a positive valence and lobbying a negative one. Lobbying is associated with capture and undue influence, whereas stakeholder participation is associated with responsive and representative governance (Durkee, 2018). Lobbying is perceived to harm legitimacy, while stakeholder participation is said to improve it. Business groups can be stakeholders, and excluding them can harm the legitimacy and effectiveness of rules/rulemaking. Developing a balanced process requires sensitivity to these potential benefits and harms.

III. There is no standard approach to including for-profit entities in decision-making processes

There is significant variation among international organisations as to what kind of rules the organisations produce, how they conduct their rulemaking processes, and how these processes welcome or exclude participation by various actors. The variation extends to how formalised the rules of process are, and even the terminology organisations use to describe the various actors who seek to participate in rulemaking. Among these many kinds of variation, there is also no standard approach to business participation in international rulemaking. This section describes this lack of standardization and offers a few examples of kinds of participation frameworks.

III.1. Diverse rulemaking processes

First, international organisations make rules of various kinds. The IO Compendium defines “international rulemaking” as “the design, development, implementation, and enforcement of international instruments developed by international organisations” or their secretariats, “regardless of their legal effects or attributes” (OECD, 2021). Those international instruments are, in turn, defined as both “legally binding requirements that are meant to be directly binding on members [of an organisation] and non-legally binding requirements that may in some cases be given binding value through transposition in domestic legislation or recognition in international legal instruments; and statements of intent or guidance” (OECD, 2021). International organisation rulemaking thus concerns a broad range of different kinds of normative product including “treaties, legally binding decisions, non-legally binding

recommendations, model treaties or laws, declarations, international technical standards, statements of intent or any other guidance” (OECD, 2021).

Just as the products of an international rulemaking process are diverse, so are the rulemaking processes themselves, and this includes a diverse range of ways that organisations engage with stakeholders. The IO Compendium lists eight modalities, including specific consultation procedures; opportunities for commentary from the general public; invitations to specific stakeholders to help develop instruments or to help implement, disseminate, monitor, or evaluate them; advisory groups or expert committees; processes to give certain groups status to engage regularly with a body; and invitations to participate in meetings of a governing body (OECD, 2021).

One point of commonality amid this significant diversity is that “all IOs engage stakeholders to ensure the quality of their instruments” (OECD, 2021). This trend appears to be increasing as international organisations have perceived a variety of benefits from stakeholder engagement including input and output legitimacy, leading to greater regulatory trust. Stakeholder participation at a minimum holds instrumental value in that it can create better, and more accepted, rules.

Despite a greater openness to stakeholder input across international organisations, there is very little standardization across organisations for how to engage with stakeholders. There is no standard model of engagement, no set of best practices, and organisations even show significant variation in the terminology they use to describe their stakeholder engagement process and the actors that participate in it (Durkee, 2018; OECD, 2021). Many have not formulated or published a comprehensive approach to dealing with stakeholders.

There is even variation within organisations when it comes to stakeholder participation models. The IO Compendium recommends organisations adopt “whole-of-organisation” approaches to standardize their internal processes and render them predictable and transparent (OECD, 2021). This would, in turn, increase legitimacy and the ultimate success of the instruments the organisations produce. The volume in which this chapter appears has been commissioned to offer lawmakers insights about how to develop this whole-of-organisation approach, and to encourage some standardization in participation frameworks across organisations.

III.2. Diverse stakeholder inclusion models

While there is little consistency between international organisations as to how they incorporate stakeholder input in rulemaking processes, there are some prominent examples of whole-of-organisation approaches. These models can help illuminate the variation in possible approaches to for-profit participants. Four models are particularly salient, in that they offer a spectrum of potential approaches. The spectrum extends between, on one end, organisations that offer for-profit actors very robust opportunities to participate in their rule generation processes as full members of the organisation and, on the other end, organisations

that carefully constrain the participation of for-profit actors to avoid the possibility of undue influence. Between these two extremes, there are a variety of middle-ground approaches.

International Labour Organisation. The ILO is the best example of an organisation that incorporates for-profit actors as full members and full participants in the work of the organisation. The ILO's "tripartite" structure includes labour unions, businesses, and state parties as equal participants (ILO, 2023b). The ILO's unique structure may be explained by the fact that its labour rights mission requires support by the business community. Another explanation is that the ILO is the first and oldest of the United Nations-affiliated organisations, originally founded in 1919 under the League of Nations system (ILO, 2023a). Later, the United Nations created more distinct lines of separation between intergovernmental organisations and other transnationally active groups, and thus did not develop more organisations with this tripartite structure. That trend may be reversing in the 21st century as the United Nations has begun to encourage public-partnerships and develop multi-stakeholder organisations that include national representatives, non-governmental organisations, and business actors on equal footing (Abbott & Gartner, 2012; Kell, 2017).

United Nations Economic and Social Council. ECOSOC's accreditation procedure offers one of the leading ways that non-state actors can participate in the work of the United Nations and, specifically, one of the ways that actors can gain access to various rulemaking procedures. The UN Charter's Article 71 provides that "The Economic and Social Council may make suitable arrangements for consultation with non-governmental organisations which are concerned with matters within its competence." Article 71 has served as a "de facto charter for NGO activities" (Charnovitz, 2006), but the UN Charter has no similar mention of a working relationship with other entities, like business entities.

ECOSOC has exercised its Article 71 authority by developing an accreditation procedure. Its rules define a "non-governmental organisation" as "[a]ny international organisation which is not established by intergovernmental agreement." The definition reflects ECOSOC's principal concern at its founding, which was to draw a distinction between *intergovernmental* organisations (such as the United Nations itself) and *nongovernmental* groups (Hobe, 2012; Charnovitz, 1997). ECOSOC has since updated the consultation procedure to stipulate that consultative groups must be organised as non-profit entities and that they must have some basic indicia of responsiveness to their memberships (e.g., a democratically adopted constitution and representative policy-making process) (U.N., 2003, 2004). Organisations that receive consultative status are categorized into tiers (general, special, and roster), with different levels of access afforded to each (Spiro, 2007). Accreditation through the ECOSOC procedure entitles organisations to UN grounds passes, press releases, and access to treaty-making conferences and other events. Accredited groups can make written presentations and sometimes offer input from the floor during negotiation sessions.

Because ECOSOC requires that accredited groups be not-profits, it would seem to exclude the business community from consultative status, and thus access to rulemaking procedures through the ECOSOC consultation mechanism. However, while ECOSOC procedures

exclude individual businesses, *associations* of businesses have always consulted with the United Nations through this accreditation procedure. In fact, the International Chamber of Commerce was one of the first associations with consultative status (Tully, 2007). Industry and trade organisations, which advocate on behalf of profit-oriented entities, are usually non-profits, so these groups are not barred from accreditation. Many do hold consultative status with ECOSOC. For example, as of this writing, approximately 5,000 organisations hold consultative status with ECOSOC, and 10% of these have selected “business and industry” as an area of expertise and field of activity (U.N., 2023). Among these are groups representing multinational oil and gas companies, financial services, construction, lumber, automotive industries, railways, nuclear power, and coal.

While there is no consistent blueprint that international organisations use to govern the participation of non-state stakeholders, the ECOSOC accreditation regime is one of the most influential. Like ECOSOC, many other organisations admit “non-governmental” groups that are registered as non-profits, but they do not exclude traditional lobbying groups (industry and trade organisations), so long as those groups are non-profits and can articulate purposes concordant with the mission of the relevant organisation (Durkee, 2017).

World Health Organisation. The World Health Organisation’s procedures for regulating the participation of for-profit actors falls to the opposite end of the spectrum from that of the International Labour Organisation and recent multi-stakeholder organisations, as described above. In other words, far from accepting for-profit actors on equal terms as state or non-profit participants (the ILO approach), or from accepting all non-profits on equal terms, whether or not they advocate for business agendas, the WHO has explicitly tried to restrict the participation of any group that speaks on behalf of a for-profit entity (WHO, 2016; Berman, 2022). This is so, despite the fact that the WHO accreditation system quite explicitly models itself after the ECOSOC system, with a parallel Article 71 in the WHO constitution. The new approach responds to the WHO’s embattled history with private sector influences, including its experience with concerted lobbying efforts by the tobacco, pharmaceutical, and agribusiness industries around attempted regulations (Berman, 2022). Thus, in 2016, WHO adopted a Framework of Engagement with Non-State Entities (FENSA, “The Framework”). The Framework erects a separate set of rules for “private sector entities” and “international business associations” than for “nongovernmental organisations,” with additional safeguards in place for engagement with the private sector (WHO, 2016).

The Framework’s safeguards are meant to guard against conflicts of interest that might have negative impacts on the “WHO’s integrity, independence, credibility and reputation; and public health mandate” (WHO, 2016). WHO declared that it would no longer “engage with the tobacco industry,” the arms industry, or any nonstate actors that advance those industries’ work, and it would “exercise particular caution” when engaging with other entities whose policies or activities are “negatively affecting human health and are not in line with WHO’s policies, norms and standards” (WHO, 2016).

To carry out these policies, FENSA broadly defines “private sector entity” to include commercial enterprises as well as “international business associations . . . that do not intend

to make a profit for themselves but represent the interests of their members, which are commercial enterprises” (WHO, 2016) In addition, the category includes other entities or associations that are not sufficiently independent from their commercial sponsors. The WHO takes upon itself the task of determining if an entity should be categorised as a private-sector entity given that it is the recipient of “undue influence” from commercial entities through financing, participation in decision making, or otherwise (WHO, 2016). For example, other NGOs, philanthropic foundations, or academic institutions may be categorised as private-sector entities and thus also be subject to the WHO’s new provisions on engagement with this type of entity. To equip its gatekeepers with sufficient information to determine which entities might have such private-sector relationships, all would-be consultant organisations are required to provide detailed information on their membership, legal status, objectives, governance structure, assets, income and funding sources, affiliations, webpage, and other data so that the WHO can conduct its own due diligence (WHO, 2016; Berman, 2022). The WHO’s due diligence process is explicitly aimed at determining why an organisation seeks access and what interests it may have. Along with FENSA, the WHO established an electronic tool for managing engagement that contains a register of nonstate actors and identification of potential conflicts of interest (Berman, 2022).

WHO’s reforms are innovative in that they regulate different nongovernmental entities differently, attempting to erect separate influence pipelines for public-interest NGOs on the one hand and, on the other, for private-sector entities and any other entities that might be unduly influenced by those private-sector entities. The Food and Agriculture Organisation has implemented similar reforms, separating business representatives from groups it calls “Civil Society Organisations” (FAO, 2013). 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” (FAO, 2000). These groups are not permitted to obtain formal status or accreditation but may engage with the FAO in “policy dialogue” among other things (FAO, 2000).

United Nations Framework Convention for Climate Change. One last model is worth a brief mention. Like WHO’s FENSA, the UNFCCC also erects distinctions between different kinds of groups—specifically between different kinds of NGOs. These categories include “research and independent NGOs (‘RINGOs’), business and industry NGOs (‘BINGOs’), environmental NGOs (‘ENGOS’), local NGOs, Indigenous Peoples organisations (‘IPOs’), local government and municipal authorities (‘LGMAs’), islanders, trade unions, and faith-based groups” (Tully, 2005). The categories do not affect the amount of access a particular organisation receives when accredited but are rather designed to help organisations coordinate with each other and help the UNFCCC communicate in a coordinated fashion with them (Tully, 2005). Unlike the WHO’s FENSA, therefore, the UNFCCC does not separate groups into tracks to separately regulate the access of these groups, or to single out for-profit groups for special safeguards.

IV. The challenge of defining and segregating for-profit influence

Profit-driven perspectives can appear in a rulemaking process in many forms. This is a very significant challenge that must be confronted by international organisations seeking to develop a trusted, effective rulemaking process. That is, business influence in a rulemaking process can take many guises. These influences can emerge most obviously from for-profit entities and their trade and industry group representatives. But for-profit perspectives can also be aired by non-profit groups, experts and academic institutions, national delegations, philanthropic foundations, and other sources. These influences can be overt or covert. They can be part of a concerted influence campaign, or not. A principal challenge for-profit entities present for rulemaking processes is therefore that their perspectives are hard to define, segregate, and regulate separately. Any realistic stakeholder governance model must account for the fact that for-profit perspectives cannot easily be isolated within a process.

Nevertheless, the governance challenge is significant: regulating for-profit input *too little* can expose a rulemaking process to undue influence and capture, but regulating it *too much* can drive that influence underground, making the process less transparent, effective, and trusted. The standard models for incorporating stakeholder input can fall prey to one or another of these challenges.

IV.1. Stakeholder types and links

Many different kinds of actors participate (or seek to participate) in the rulemaking processes that international organisations convene. The IO Compendium has developed a taxonomy of stakeholder groups in the following way:

Figure 4.4. Actors regarded as stakeholders by IOs



(Source: OECD, 2021).

As this figure makes clear, there are at least two kinds of self-evidently for-profit actors among the “actors regarded by stakeholders by IOs.” These are private sector entities and international business organisations. Private sector entities are individual entities—such as multinational corporations or other business entities—speaking on their own behalf. International business organisations are usually organised as non-profit entities within a domestic jurisdiction (Dadush, 2017; Rieser & Kelly, 2011). They exist to serve their memberships in various ways, including by advocating for a common industry or sector-specific perspective before domestic and international governance bodies (Dadush, 2017).

For-profit perspectives are not, however, confined to these two self-evidently business-oriented categories. The IO Compendium’s taxonomy of stakeholder groups is useful in that it offers an expansive view of the varieties of actors that may participate in a rulemaking process. The taxonomy’s categories should not, however, be viewed fully distinct or separate. Rather, they are permeable, overlapping, and susceptible to cross-influence.

This is certainly the case when it comes to for-profit stakeholders. For-profit perspectives can be aired through many of the other groups listed in the taxonomy. Here are a few examples of the blurring and overlapping between for-profit actors and other groups:

Governmental delegations sometimes include industry representatives. The International Maritime Organisation (IMO) was recently subjected to critique for failing to adopt greenhouse gas emissions standards or other climate change policies. A report by Transparency International attributed this in part to the fact that “[m]ember states are able to appoint employees of corporations, including shipping companies, to their delegations, and these have dominated some delegations. These delegates can actually determine ‘their government’s position on IMO policy’ and ‘are not subject to conflict of interest rules nor to a code of conduct’” (Psaraftis & Kontovas, 2020). One report claimed that “the Marshall Islands, the flag with the world’s third largest fleet in the world, is represented in part by International Registries Inc. (IRI), a US-based private shipping company” (Psaraftis & Kontovas, 2020). Moreover, there is no requirement that the industry affiliations of these national delegates be made transparent.

There is no natural dividing line between “private sector” NGOs and NGOs organised to advance other interests. Non-governmental organisations can be organised to accomplish many different missions. Many commentators use the terms “NGO” or “civil society” to refer to non-profit organisations composed of individual members who share a moral or ideological commitment to the organisation’s distinctive purpose (Charnovitz, 2006). This can lead to an understanding that “public interest” or “civil society” groups are in a separate category from industry associations or trade associations, but this is a relatively recent distinction (Durkee, 2023). Both kinds of groups (private sector and public interest) can be organised as non-profits, and both can seek to participate in the rulemaking processes of many international organisations on equal terms. For example, the IMO has granted consultative status to “well-established environmental organisations such as Greenpeace International, World Wide Fund for Nature, and Friends of the Earth International” as well as trade and industry associations such as “Cruise Lines International Association and Oil Companies International Marine Forum” (Psaraftis & Kontovas, 2020). As previously discussed, many trade and industry associations have accreditation at ECOSOC alongside other kinds of groups. While trade and industry associations have not received sustained attention as actors in international governance (Berman, 2017), they are nevertheless present in many forums alongside other NGO groups.

Individual experts, academic institutions, philanthropic organisations, and consumer groups can also be used overtly or covertly for business interests. For example, when the 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 (WHO, 2000). To conduct this campaign, powerful multinational companies hid behind “tobacco company-created front groups and trade unions that had obtained consultative status at the WHO” (WHO, 2000). As one example among many, tobacco industry insiders transformed the International Tobacco Growers’ association (ITGA) “from an underfunded and disorganised group of

tobacco farmers into a highly effective lobbying organisation” in order to serve as a “front for [their] third world lobby activities at WHO” (WHO, 2000). Industry insiders infiltrated the group to benefit from its “integrity and independence,” and sought to use the group to “capture the moral high ground” (WHO, 2000). To conduct this campaign, industry insiders caused ITGA to seek and obtain accreditation at the WHO and FAO and to oppose or undermine the WHO’s tobacco control activities before those organisations as well as the World Bank and the United Nations Conference on Trade and Development. In connection with this campaign, the tobacco industry also created NGOs and research groups, with innocuous titles like the Center for Indoor Air Research, Institute for International Health and Development, and Associates for Research in the Science of Enjoyment (WHO, 2000). The WHO’s report noted that it found “such a considerable body of evidence pointing to use of other organisations with undisclosed relationships to tobacco companies, that it [sic] likely that the committee has identified only a small proportion of the organisations that have such undisclosed relationships” (WHO, 2000). Indeed, the tobacco industry campaign itself is just one of many instances of “astroturf activism” in international governance (Durkee, 2017), where major corporate actors act covertly, through apparently grassroots organisations or other actors.

For-profit groups sometimes use multiple access points to influence a process. In the context of the IMO, in addition to serving on governmental delegations, powerful industry groups have used observer and consultative status to access the process (Psaraftis & Kontovas, 2020). In the context of concerted campaigns at the WHO, industry representatives also used multiple points of access (WHO, 2000; Berman, 2022).

IV.2. A categorical approach to inclusion/exclusion

The links between private sector groups and the other groups, and definitional difficulties, make it challenging for international organisations to take a categorical approach to identifying and separately regulating private sector perspectives. For example, the ECOSOC stakeholder accreditation model described previously in this chapter distinguishes between non-profit and for-profit groups and permits accreditation only of non-profits (ECOSOC, 1996). On a first glance this distinction would seem to exclude for-profit perspectives from the kinds of access afforded through accreditation. This is not the case. Business groups regularly access United Nations processes through ECOSOC accreditation, in both overt and covert ways.

First, and most simply, industry and trade associations are fully eligible for accreditation alongside other non-governmental organisations. Indeed, just like other non-governmental organisations, international business organisations tend to be registered in domestic jurisdictions as non-profit entities, feature a membership bonded by some common interest, and participate in international rulemaking processes in order to advocate for that common interest of their membership. The clear difference is the composition of the memberships of the two groups, which, in the case of international business organisations, is a set of business groups classified by region or sector. The ECOSOC accreditation rules do not, however, stipulate what interests accredited groups may or may not represent, so long as the group can

articulate “aims and purposes” that support the work of the United Nations. Rather, the accreditation rules focus on whether groups seeking accreditation are registered as non-profits drawing their funding from their membership, whether they have a representative process of governance, and whether their representatives are accountable to the membership (ECOSOC, 1996). Industry and trade groups that exist to lobby for the interests of their business membership can satisfy these criteria. Indeed, business groups constitute about 10% of groups accredited with ECOSOC. These groups include, for example, the World Coal Association, which announces an explicit lobbying objective: to “deepen and broaden understanding amongst policy makers and key stakeholders of the positive role of coal.”

Second, the “non-profit” criteria does not exclude “astroturf” groups, or groups that have been influenced by or captured by business interests. The term “astroturf” has been used to describe groups that appear to be grass-roots social movement groups, but are in fact mouthpieces for covert business agendas. As Braithwaite and Drahos (2000) have noted, businesses sometimes create groups that appear to be grassroots citizens groups, with names like “Citizens for Sensible Control of Acid Rain” (created by coal and electricity companies), “Consumers for World Trade” (formed by an industry coalition) or the “National Wetlands Coalition” (a tool of U.S. real estate developers). Such groups can satisfy ECOSOC’s accreditation criteria. In addition to forming “astroturf” groups, businesses can capture existing groups through donations, partnerships, and NGO board representation. There are well-documented instances of powerful industry interests covertly using NGO surrogates to advance agendas at the international level. ECOSOC’s accreditation criteria do not screen for this kind of influence.

Third, non-profit status is obtained domestically when a group registers as such with the relevant domestic agency. When international organisations like ECOSOC rely on for-profit or non-profit status to identify and segregate business influences, they have to rely on domestic level regulators to screen non-profit registrants. As Reiser and Kelly (2011) have shown, domestic officials often have little capacity to evaluate whether an organisation is a legitimate non-profit or maintains any accountability to its stated mission.

In sum, the non-profit criterion does not successfully segregate and exclude for-profit influences in a stakeholder participation process. Rather, those for-profit influences can enter overtly through industry and trade associations, covertly through NGO influence or capture, or haphazardly through inconsistent or under-reviewed domestic non-profit entity registrations. As a final note, in addition to the fact that the non-profit criterion may be unsuccessful as a descriptive matter, it also may not be the best choice as a matter of policy: it forces actors to organise as non-profit groups and gain access only through those groups. This excludes individuals and individual businesses, whose participation may otherwise be beneficial for the reasons summarised earlier in this chapter.

IV.3 An alternative to categories

Because the categorical approach to identifying and segregating business input, such as through the “non-profit” label, is unsuccessful due to the deep links between business actors

and other groups, organisations may seek a more nuanced approach. The WHO offers an example. It developed a comprehensive set of guidelines on engaging with the private sector, FENSA, as described earlier in this chapter. The FENSA guidelines anticipate the fact that the boundaries between different kinds of stakeholders in a rulemaking process are permeable, overlapping, and susceptible to cross-influence, and the guidelines try to anticipate all the different ways that for-profit perspectives could be delivered within a rulemaking process. So, for instance, the framework includes not just commercial enterprises and non-profit international business associations, but also other entities and associations (NGOs, philanthropic foundations, or academic institutions) with close links to private-sector sponsors.

The challenge with this more nuanced, or non-categorical, approach is that it raises the gatekeeping burden for rule makers. The WHO has assumed the burden of determining if an entity should be categorised as a private-sector entity since it is the recipient of “undue influence” from commercial entities through financing, participation in decision making, or otherwise. All groups who seek accreditation with the WHO must provide detailed information on their membership, legal status, objectives, governance structure, assets, income and funding sources, affiliations, webpage, and other data. The WHO has also established an online registry to catalogue different groups and to try to identify potential conflicts of interest. The WHO’s resource-intensive due diligence process is explicitly aimed at determining why an organisation seeks access and what interests it may have. While these goals would seem to solve the problems the categorical approach do not, they raise a question about whether it is really feasible for officials to discover and determine what interests a group represents. This is especially the case considering the limited bandwidth of gatekeepers and the potential for very significant links between for-profit and non-profit groups. Moreover, stakeholder groups are not static, and are subject to changing influences and partnerships. Will gatekeepers have enough information and bandwidth to effectively assess “undue influence”? One clear risk is that attempting to eliminate conflicts of interest could send those interests underground. The process could produce a cat-and-mouse game where motivated corporate actors could use ever-more-covert methods of hiding influence. Indeed, this approach incentivises business groups who would act covertly to go to greater lengths to hide their links with the groups seeking access to the rulemaking process. Gatekeepers must thus continuously assess whose interests an actor truly represents, and this duty is ongoing. A non-categorical approach to identifying actors with profit motives therefore requires a very high level of due diligence by gatekeepers.

Second, and adding to the gatekeeper burden, the WHO’s more nuanced approach creates definitional problems around what constitutes “undue influence.” Does this include corporate donations to a foundation? Or the presence of an NGO board member who previously worked at a multinational corporation? Or in-kind donations? Finally, this approach exposes the organisation to potential legitimacy complaints if its analysis is over- or under- inclusive, excluding groups that do not perceive themselves as linked to the private sector, or including groups that others perceive as “tainted” by private sector.

IV.4. Assessing the models

In sum, the *categorical* approach imposes a formidable burden on institutional gatekeepers, especially because NGOs often have close links and partnerships with the corporate world, and well-resourced and motivated business actors can seek all potential avenues of influence. Yet a *non-categorical* approach might fail to identify and segregate private sector influences because of failures in capacity.

V. Governance models

International organisations could resolve the dilemma for-profit stakeholders present by moving away from an approach that divides those private sector or for-profit actors from others. Instead, two different governance models could realistically help organisations meet their stakeholder inclusiveness goals: a roundtable model or a public comment model.

A *roundtable* model would, I propose, allow an organisation to exert more control over the kinds of input it receives in its rulemaking process and would, in turn, allow stakeholders to offer more meaningful forms of input. The roundtable model borrows from the innovations of new multi-stakeholder projects like GAVI, the Vaccine Alliance, UNAids and UN Women, which welcome business groups as full participants in multi-stakeholder processes (Abbott & Gartner, 2012; Durkee, 2018). These organisations do so to capture the various contributions those private actors can offer, like financial resources, access to populations or groups, or voluntary compliance within their scope of operations. The trade-off is that a roundtable model forces the organisation to make its own choices about which stakeholders should be included in the rulemaking process, which will inevitably exclude participants who could offer meaningful perspectives. This can create effectiveness and legitimacy concerns.

A *public comment* model would minimise an organisation's gatekeeping function and ensure all actors who want to participate in a rulemaking process can do so, but this governance model would keep these participants at arm's length to minimize the potential for undue influence. Such a model would accept input from all sources, presuming that groups will advance a diversity of special interests, some profit motivated, and some unrelated to profit. Potential conflicts-of-interest issues could be mitigated by a structured process drawing from domestic models such as administrative notice-and-comment procedures or lobbying laws requiring disclosures and implementing other protections. For example, OECD lobbying guidelines, which are directed at decision makers at the national and sub-national level recommend that all stakeholders — “the private sector and the public at large”— should have “fair and equitable access to participate in the development of public policies” (OECD, 2022). The guidelines emphasize disclosure, including the objectives and beneficiaries of lobbying activities, and recommend that all stakeholders should have access to information about lobbying (OECD, 2022). This public comment approach would maximize transparency and ensure that all stakeholders can be heard, but could also reduce the impact

of stakeholder engagement and fail to reap some benefits that an inclusive process would otherwise create.

The choice then, is to (1) refrain from policing the representativeness or for-profit links of participants and use regulatory tools like disclosure and transparency (public comment model), or (2) build participatory multistakeholder structures that permit a smaller number of hand-selected representatives to participate more robustly in the rulemaking process (roundtable model).

The first model would improve administrability by avoiding admission criteria meant to enhance representativeness and accountability but not successfully doing that. It would instead borrow domestic regulatory strategies focusing on registration and publicly available disclosure. Organisations would not assess a group's motives and influences, and instead put all entrants on an equal playing field. Lawmakers would be charged with assessing the value of the input on its own terms for its expertise or other functional value. This approach would give public access but would not try to balance perspectives in any kind of representative process.

The second model would improve administrability, but in a different way. It would decrease the number of representatives who are permitted to participate but enable organisations to try to select groups who should be indispensable to the process. In reducing the number of participants, this model could offer stakeholders more robust opportunities to offer input, such as speaking rights, or even a voting stake in the rulemaking process. This structure would not likely be the right choice for all international organisations, but it could be a promising reform for some, particularly in areas where collaboration with private-sector entities is likely to produce better, more effective, or more broadly accepted legal rules.

Which strategy will be most successful for a given organisation will depend on how well those collaborations will help the organisation carry out its mission. Organisations that draw substantially on private-sector assistance—for expertise, voluntary compliance, or financial support—may be more likely to benefit from the roundtable model. Indeed, the multistakeholder models identified earlier (UNAids, UN Women, and GAVI, the Vaccine Alliance) adopt a roundtable format in order to engage robustly with industry partners or groups that work with affected populations. Future efforts in tech, such as regulating cybersecurity, data-privacy, AI, or content moderation, may similarly benefit from a roundtable model for stakeholder engagement. Organisations that require substantial support and buy-in from national governments for the results of the rulemaking process may be best advised to use public comment structures that safeguard intergovernmental control. For example, in areas implicating national security, territorial delimitation, or other matters of sovereign prerogative, or requiring detailed domestic implementing regulations, governments may not accept the result of a roundtable process and organisations should opt for a public comment model.

These models are rough archetypes and there are more nuances to explore elsewhere and to work out over time. For example, organisations like the United Nations Commission on

International Trade Law (UNCITRAL) may fall in a middle-ground area between these approaches because these organisations are caught in a bind: On the one hand, they need governmental support in order to obtain domestic implementation of the rules they produce. On the other hand, these organisations benefit from private-sector expertise and buy-in to produce more useful and more accepted rules. Should UNCITRAL adopt the roundtable model or the public comment model? Perhaps it and other middle-ground organisations would still be better off with the categorical approach (ECOSOC) or its more nuanced variation (FENSA). Understanding the limitations of those models should nevertheless ensure that they are implemented with attention to their risks and challenges, and that these models do not become default options. That is, the ECOSOC and FENSA approaches should not become a more general blueprint for stakeholder engagement in circumstances where the roundtable or public comment model would be more suitable.

VI. Conclusion

While private sector participants can make valuable contributions to international organisation rulemaking—helping international organisations make more effective or more accepted rules—they can also pose unique challenges. These challenges stem from the capacity of private sector groups to imbalance a process, exert undue influence over rulemakers, or reduce the quality of information flow. For these reasons, a whole-of-organisation approach to stakeholder inclusion should consider how it will apply to private sector actors.

This chapter has illustrated the tension international organisations must resolve in order to develop a principled approach to private sector contributions. On the one hand, private sector participants in a rulemaking process offer distinct benefits and risks. On the other hand, it is challenging to define, distinguish, and segregate the actors that offer private sector perspectives.

The bottom line, as this chapter has proposed, is that organisations often cannot realistically divide private sector interests from that of other groups. Instead, stakeholder participation frameworks could follow one of two more realistic patterns: (1) a “public comment” process that is open to all participants on equal terms in a transparent, arms-length manner; or (2) a “roundtable” process that includes a smaller, hand-selected group of participants that are likely to represent the interests at issue in the rulemaking process. These models are ideal types, and there is certainly room for variation and middle paths. But either of these models should address difficulties presented by the often-substantial engagement of private sector actors in stakeholder participation processes.

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