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## Privatizing International Governance

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## PRIVATIZING INTERNATIONAL GOVERNANCE

*Melissa J. Durkee\**

Consider the following headlining events of our recent history:

- Private actors arrived *en masse* to COP26, the 2021 climate conference in Glasgow. Climate pledges by private sector financial institutions received headlining attention.<sup>1</sup> State pledges were disappointing.<sup>2</sup> They were memorably framed by youth activist Greta Thunberg as empty “blah blah blah.”<sup>3</sup>
- Microsoft set up a “United Nations Affairs office” in New York City in 2020. It announced its intention to “deepen its work with the UN” on matters relating to technology, environment, development, security, and humanitarian goals.<sup>4</sup>
- Private entities with “huge financial stakes in commercial shipping” serve on national delegations to the International Maritime Organization (IMO). This is according to a *New York Times* article that ricocheted around social media in summer 2021.<sup>5</sup> At the same time, as the reporting concluded, the IMO “has repeatedly delayed and watered down climate regulations, even as emissions from commercial shipping continue to rise.”<sup>6</sup>
- As of 2019, the Bill and Melinda Gates Foundation was the second highest financial contributor to the World Health Organization (WHO). Its contributions were exceeded only by the United States.<sup>7</sup>

The theme of this panel is “Privatizing International Governance.” As the opening vignettes should make clear, public-private partnerships of all kinds are increasingly common in the international system. Since United Nations Secretary General Kofi Annan’s launch of the Global

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<sup>1</sup> Liz Alderman & Eshe Nelson, *Global Finance Industry Says it has \$130 Trillion to Invest in Efforts to Tackle Climate Change*, N.Y. TIMES (Nov. 3, 2021), <https://www.nytimes.com/2021/11/03/world/europe/cop26-climate-change-finance-industry.html>.

<sup>2</sup> Kate Abnett, *World Heading for 2.4C of Warming After Latest Climate Pledges – Analysts*, REUTERS (Nov. 9, 2021, 10:03 AM), <https://www.reuters.com/business/cop/world-track-24c-global-warming-after-latest-pledges-analysts-2021-11-09/>.

<sup>3</sup> Alyssa Lukpat & Marc Santora, *Greta Thunberg Joins a Protest in Glasgow*, N.Y. TIMES (Nov. 1, 2021), <https://www.nytimes.com/2021/11/01/world/europe/greta-thunberg-cop26-glasgow.html>.

<sup>4</sup> <https://news.microsoft.com/on-the-issues/2020/10/05/un-affairs-lead-john-frank-unga/>

<sup>5</sup> Matt Apuzzo & Sarah Hurtes, *Tasked to Fight Climate Change, a Secretive U.N. Agency Does the Opposite*, N.Y. TIMES (Jun. 3, 2021), available at <https://www.nytimes.com/2021/06/03/world/europe/climate-change-un-international-maritime-organization.html>.

<sup>6</sup> *Id.*

<sup>7</sup> Kristina Daugirdas & Gian Luca Burci, *Financing the World Health Organization: What Lessons for Multilateralism?*, 16 INT’L ORGS. L. REV. 299, 300-01 (2019).

Compact in 2000, the United Nations has increasingly opened up to business entities. Now, the Sustainable Development Goals, the Global Compact, and the Guiding Principles on Business and Human Rights all encourage engaging with business entities as partners in developing and executing global governance agendas. These partnerships are seen by some as indispensable to sustainable development, international business regulation, climate change mitigation, and other global governance agendas. Business entities can offer expertise and funding, and their participation can soften resistance and increase buy-in for international regulatory agendas.

At the same time, UN climate change bodies have been criticized for cozying up to corporate fossil fuel lobbies, global financial governance institutions are charged with leaning toward the interests of the large banking and financial industry they are meant to regulate, and the pharmaceutical industry has been accused of exerting outsized influence in health-related international standard-setting, sometimes in contradiction with public health objectives. Shareholders at major multinational oil and gas companies have tried to rein in lobbying that is at odds with the goals of the Paris Climate Agreement, and reforms at the WHO, Food and Agriculture Organization, and others seek to restrain the dangers of mission-distortion and capture by business groups.

The 2022 annual meeting of the American Society of International Law invited reflection on, among other matters, how “business entities . . . shape international law, and how states might react to these efforts.” This panel takes up that challenge. Specifically, the panel invites us to lift the hood on international lawmaking and governance—to focus attention on who is in the “room where it happens,” or where the important decisions are made. Even more specifically, what is the role of private business entities in shaping international law, and how should international law respond, especially in light of pressing challenges around technology, security, climate change, and development?

These questions have not yet received enough attention, despite the increasingly thick connective tissue between international bodies and private business entities. We have experts here today with varying perspectives on these matters to tease out some of the most important questions and identify the stakes. In addition to myself, the panel includes Nancy Thevenin of the United States Council for International Business, Suzy Nikiéma of the International Institute for Sustainable Development, and Nora Mardirossian of the Columbia Center on Sustainable Investment.

## I. HISTORY

First, let us start with some brief background. Interactions between the private sector and international organizations are nothing new. At the time of the League of Nations, prior to World War II, international organizations worked with many different groups, including business groups. There were no sharp distinctions made between groups advancing business agendas and other public interests, or even between private groups and public groups.

At the founding of the United Nations, business was a strong supporter of the organization. The young International Chamber of Commerce, which had only gotten its start in 1919, participated in the 1945 conference in San Francisco, together with many other business and civil society representatives.

Despite the support of business representatives, the United Nations had no clear agenda or mandate to work with the private sector, and the same is true of most other international organizations in the post-war legal order. Rather, the focus was on state-to-state relations. Private groups of all kinds were marginalized.

This state of affairs continued throughout the long decades of the Cold War, which entrenched these patterns. International organizations had to maintain a neutral stance toward business given competing economic ideologies among the great powers.

Things really changed in the 1990s. The United Nations was able to open up to new actors and new agendas with the end of the Cold War. The United Nations saw participation by non-governmental organizations (NGOs) in particular as a way to “democratize” the United Nations – to bring in new voices and perspectives from around the world.

Then, at the very end of the 20th century, Kofi Annan launched the Global Compact which signaled a big shift and a turn toward the private sector as a source of partnership in UN goals. This coincided with the increasing globalization of businesses themselves, and their need for the development of stable global markets.

## II. PRIVATIZATION TODAY

In the two decades since the launch of the Global Compact, many events have driven the “privatization” of international governance, in the words of our panel. Here are just a few highlights: John Ruggie developed the Guiding principles on Business and Human Rights, engaging business directly in implementing human rights principles. The United Nations developed the Millennium Development Goals, and then later the Sustainable Development Goals, and Agenda 2030. Sustainable Development Goal 17 is aimed directly at developing and enhancing partnerships to advance technology exchange, economic development, and international trade.

There are now a whole host of partnerships and patterns of engagement, both formal and informal, throughout the UN system. These include the high-level annual Private Sector Forum, in which corporate CEOs gather in advance of meetings of the UN General Assembly; multi-stakeholder projects such as UN Women, UNAIDS, Gavi, the Vaccine Alliance, and others; private sector funding of many projects through many channels; and informal forms of support around technology, standard-setting, and other problem solving.

Finally, but significantly, business has been engaging deeply in lawmaking processes at the WHO, at UNCITRAL, at the global climate conferences, and in many other fora. Business representatives serve as national delegates, sponsor national pavilions and receptions, and show up in droves to informally lobby the decisionmakers.

### III. QUESTIONS PRESENTED

We are lawyers at an international legal conference. What is the lawyer's perspective on this? Do we have rule-of-law or good governance concerns or is this a bright new future in terms of solving important global problems? What is the future of public-private governance partnerships, and what is the lawyer's role?

There have been some landmark efforts to structure the working relationship between international organizations and the private sector, such as the WHO's Framework of Engagement with non-state actors, known as FENSA. But in many corners of the United Nations, these relationships are not specifically regulated.

The questions international lawyers might ask start from the granular and then increase in scope:

*First*, how can individual international bodies capture the benefits of private sector participation—expertise, buy-in, resources—without sacrificing an organization's claim to legitimacy or its capacity to carry out its mandate? Is this possible to do?

*Second*, how do we ensure that the engagement of multinational companies in lawmaking or governance processes is not disproportionate—that is, that it does not drown out other perspectives or further silence the voices of marginalized communities?

*Third*, and building on the prior two questions, how do we embed rule-of-law and good governance principles like accountability, transparency, and representation? What are the practical ways to do that?

*Fourth*, we should seize the opportunity to consider a larger question: Should we be moving toward privatizing international governance or away from it? That is, should we be moving toward a system where we embrace public-private partnerships, multi-stakeholder projects, synergies between public and private goals, and more seats at the table for private entities at lawmaking processes? Do we buy into the general idea that the public and private sectors' goals are, or can be, aligned? (For example, we need clean water, education, and sustainable energy production around the world not only as a matter of public concern and human rights, but also as a matter of private concern in terms of developing stable markets.) Or, should we instead be moving toward a system where we try to reclaim a space of publicness—focusing on representation of populations through national representatives and trying to put guardrails around participation by private actors, as the WHO's FENSA has done or in another way?

### IV. THE CONTEXT

This panel is taking place just over a month after the initial hostilities by Russia against Ukraine. Many international lawyers at this conference and elsewhere have expressed shock at Russia's defiance of fundamental international legal rules prohibiting the use of force against another sovereign nation. There is a sense in many rooms here that the multilateral rules-based

international order is suffering severe hits. Not only are we having trouble making new treaties to solve global problems, but we are also having unprecedented trouble enforcing the rules on the books. We are even challenged by conflicting views about what the rules mean and the value of truth.

At the same time, and below the level of attention for many international lawyers and scholars, there is a vast universe of governance activity aimed at incremental change. It is coordinated by international organizations, but increasingly privatized. It is wrapped in the rubric of sustainable development, market-based solutions, technological innovation, and modernization.

The thrust of this panel is that it is time for lawyers to pay attention to this subterranean activity, just as they do to the high-level responses to international crises. Even as the system of multilateralism and the postwar rules-based order falters, we are moving toward another way of ordering international affairs. The terms of this new order can be subtle and hard to perceive. However, the shift toward privatization of governance seems to be an important part of the new world order. There is substantial work for lawyers here in defining, structuring, regulating, or resisting these new patterns.