

SYMPOSIUM ON INDUSTRY ASSOCIATIONS IN TRANSNATIONAL LEGAL ORDERING

INDUSTRY LOBBYING AND “INTEREST BLIND” ACCESS NORMS AT INTERNATIONAL ORGANIZATIONS

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The standard approach of international organizations (IOs) makes no formal distinctions between nonprofit private sector associations, known as trade or industry groups, and public interest groups like Amnesty International or Greenpeace. After all, these groups are all organized as nonprofits; they may all be characterized as nongovernmental organizations representing the interests of their memberships; and the groups all seek to advance the agendas of members by offering ideas and expertise to international officials or bodies—classic lobbying activity. Thus, most IOs offer accreditation and access to both private sector and public interest groups on equal terms, without differentiating between them. I will call this approach “interest blind” and use this essay to examine its origins and consequences.

Specifically, the interest blind approach has resulted in robust participation by private sector groups, and their contributions affect the quality of deliberation at international organizations, and of information that international lawmakers receive. While there are dangers, a successful reform will not seek rigid divisions between public interest and private sector groups, as the [World Health Organization has recently tried to do](#),<sup>1</sup> but will instead capture the informational and practical contributions of all nonstate participants, while introducing more functional registration and disclosure rules.

*Interest Blind Access Rules*

The United Nations Economic and Social Council (ECOSOC) accreditation system offers a seminal example of how IO access rules work, and has served as a blueprint for other IOs. ECOSOC is empowered by [Article 71 of the UN Charter](#) to “make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence.”<sup>2</sup> ECOSOC has accordingly elaborated [regulations enabling NGOs to become accredited](#) to ECOSOC and agencies or bodies within ECOSOC’s purview.<sup>3</sup> Under these regulations, ECOSOC’s screening of applicants is *not* focused on determining which interests the association represents, and whether or not the association’s members are for-profit entities. Rather, the criteria principally focus on how well the group represents its membership: A successful applicant must be a nonprofit organization, obtain its funding from its membership, support the United Nations’ work, and demonstrate that it has internal governance

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<sup>1</sup> World Health Organization [WHO], [Framework of Engagement with Non-State Actors](#) [hereinafter Framework], WHA69/2016/REC/1 (May 28, 2016).

<sup>2</sup> [UN Charter](#) art. 71.

<sup>3</sup> See, e.g., [UN Econ. & Soc. Council Res. 1996/31](#) (July 25, 1996) [hereinafter E.S.C. Res. 1996/31].

structures that make it accountable to its membership.<sup>4</sup> These rules do not offer accreditation to individual businesses, but nonprofit associations advocating for business agendas are eligible.

This interest blind approach did not originate in the United Nations. Rather the United Nations perpetuated the League of Nations practice, which made no distinction between associations that promoted for-profit agendas and those that promoted gender equality, public health, labor rights, and so forth. To some extent this reflected a positive view of links between business and commerce and human flourishing.

Now, private sector groups have registered for accreditation in droves. Examples include:

- Global sectoral associations, such as the [World Coal Association](#)<sup>5</sup> and the [World Nuclear Association](#),<sup>6</sup>
- Regional sectoral associations, such as the [National Association of Home Builders of the United States](#),<sup>7</sup> the [European Association of Automotive Suppliers](#),<sup>8</sup> and the [Association of Latin American Railways](#);<sup>9</sup> and
- Generalist organizations, whether global or regional, such as the [International Chamber of Commerce](#),<sup>10</sup> the [World Union of Small and Medium Enterprises](#),<sup>11</sup> and the [Turkish Confederation of Businessmen and Industrialists](#).<sup>12</sup>

Indeed, of the approximately [4,600 organizations that are now accredited with consultative status at ECOSOC](#),<sup>13</sup> [10 percent self-report “business and industry”](#) as an area of expertise or field of activity.<sup>14</sup> Because it relies on loosely monitored self-reporting, this figure likely underreports the total number of private sector associations. Many of these organizations have disclosed that their principal organizational purposes include lobbying. For example, the World Coal Association discloses that it aims to “[a]ssist in the creation of a political climate supportive of action by governments” to use coal technologies, and to educate policymakers about the benefits of coal and the coal industry.<sup>15</sup> The World Nuclear Association “seeks to promote the peaceful worldwide use of nuclear power.”<sup>16</sup> The National Association of Home Builders of the United States seeks to “[b]alance legislative, regulatory and judicial public policy.”<sup>17</sup>

These business-promoting associations work alongside, and on equal terms with, familiar public interest NGOs like the Sierra Club and Heifer Project International. All of these accredited organizations, public interest and private sector alike, enjoy the same potential menu of access privileges. They can send representatives to sit as observers at meetings of ECOSOC and its commissions and other subsidiary bodies, present written or oral comments, and otherwise advance their agenda items in various contexts, including by direct lobbying.

<sup>4</sup> *Id.* at para. 2–12. For example, a consultant association must have a democratically adopted constitution, representative process of governance, and authorized representatives who speak for the membership.

<sup>5</sup> See [World Coal Association](#), UNITED NATIONS DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, DESA, NGO BRANCH.

<sup>6</sup> See [World Nuclear Association](#), DESA, NGO BRANCH.

<sup>7</sup> See [National Association of Home Builders of the United States](#), DESA, NGO BRANCH.

<sup>8</sup> See [European Association of Automotive Suppliers](#), DESA, NGO BRANCH.

<sup>9</sup> See [Association of Latin American Railways](#), DESA, NGO BRANCH.

<sup>10</sup> See [International Chamber of Commerce](#), DESA, NGO BRANCH.

<sup>11</sup> See [World Union of Small and Medium Enterprises](#), DESA, NGO BRANCH.

<sup>12</sup> See [Turkish Confederation of Businessmen and Industrialists](#), DESA, NGO BRANCH.

<sup>13</sup> See [Consultative Status with ECOSOC and other accreditations](#), DESA, NGO BRANCH.

<sup>14</sup> [Civil Society Participation Database](#), DESA, NGO BRANCH (462 organizations selected “business and industry” as of January 2017).

<sup>15</sup> See [World Coal Association](#), DESA, NGO BRANCH.

<sup>16</sup> See [World Nuclear Association](#), DESA, NGO BRANCH.

<sup>17</sup> See [National Association of Home Builders of the United States](#), DESA, NGO BRANCH.

The interest blind ECOSOC framework has been replicated around the UN system. Some organizations [have a parallel to Article 71 in their organizational charters](#), authorizing a consultation system patterned explicitly on ECOSOC's.<sup>18</sup> Most, following ECOSOC, will accept input from any association that meets minimal screening criteria. To be clear, ECOSOC's model is by no means the only way for IOs to incorporate outside input. Some IOs do not maintain a standing bench of associational consultants but will instead seek input from associations they invite to consult [at particular decision points](#).<sup>19</sup> Nevertheless, most IOs with some form of accreditation system admit associations advancing for-profit agendas alongside other NGOs on equal terms.

### *Consequences*

What are the consequences of this interest blind approach? [Commentators in law and political science have evaluated](#) the legitimacy and appropriateness of offering accreditation to NGOs,<sup>20</sup> but these studies have not tended to focus on the private sector. Elsewhere, in developing such an analysis, I have argued that the rules both exclude important business contributions and produce an [“astroturf activism” phenomenon](#) whereby businesses covertly use NGOs to advance their agendas.<sup>21</sup> But covert activity is only one potential way businesses can interact with international organizations. Trade and industry groups are *overt* champions of business positions at the international level,<sup>22</sup> and their activity can affect both the quality of the deliberative process and the quality of information that international officials and lawmakers receive.

### *Quality of deliberative process*

[The benefits of soliciting input from NGOs](#) and other civil society actors have been broadly observed in domestic literatures on administrative law and in parallel international law literatures,<sup>23</sup> and many of these benefits are equally applicable in the context of private sector groups. In short, the theory is that robust participation by non-state groups can enhance democratic values in international forums, which are themselves only [derivatively democratic](#);<sup>24</sup> can offer “input” legitimacy by facilitating more deliberation and a process that incorporates the views of all potentially affected parties; and can produce greater transparency. Indeed, offering trade and industry groups opportunities to submit input during a rulemaking process can have additional benefits, enhancing the credibility

<sup>18</sup> [WHO Constitution](#) art. 71, July 22, 1946, 14 UNTS 185.

<sup>19</sup> See e.g., IMF, [2015 Guidelines on the IMF Staff Engagement with Civil Society Organizations](#).

<sup>20</sup> See generally, Steve Charnovitz, [Nongovernmental Organizations and International Law](#), 100 AJIL 348 (2006); see also, PETER WILLETS, [NON-GOVERNMENTAL ORGANIZATIONS IN WORLD POLITICS: THE CONSTRUCTION OF GLOBAL GOVERNANCE](#) (2011); Kenneth Anderson, [“Accountability” as “Legitimacy”: Global Governance, Global Civil Society and the United Nations](#), 36 BROOK. J. INT'L L. 841 (2011); Steve Charnovitz, [The Illegitimacy of Preventing NGO Participation](#), 36 BROOK. J. INT'L L. 891 (2011); Peter J. Spiro, [Accounting for NGOs](#), 3 CHI. J. INT'L L. 161 (2002).

<sup>21</sup> See Melissa J. Durkee, [Astroturf Activism](#), 69 STAN. L. REV. 201 (2017).

<sup>22</sup> For insights from private sector association representatives, thanks to a conference on [Industry Associations and Transnational Governance](#), organized by the Rutgers Law School Center for Corporate Law and Governance and ASIL's International Organizations Interest Group on June 10, 2016.

<sup>23</sup> See, e.g., Kenneth W. Abbott & David Gartner, [Reimagining Participation in International Institutions](#), 8 J. INT'L L. & INT'L REL. 1, 26 (2012); Daniel Esty, [Good Governance at the Supranational Scale: Globalizing International Law](#), 155 YALE L.J. 1490 (2006); Bedendict Kingsbury et al., [The Emergence of Global Administrative Law](#), 68 LAW & CONTEMP. PROB. 15 (2005); Wendy Wagner, [Participation in the U.S. Administrative Process](#), in COMPARATIVE LAW AND REGULATION 109 (Francesca Bignami & David Zaring eds., 2016).

<sup>24</sup> Grainne de Burca, [Developing Democracy beyond the State](#), 46 COLUM. J. TRANSNAT'L L. 221 (2008).

of international rules among those private sector constituents, and building support for the rules among national governments, which may otherwise be subject to disaffected private sector lobbying efforts. Finally, allowing private groups access to the rulemaking process potentially can enhance transparency by allowing those groups to disseminate information about it to their members. In addition to these benefits, Kenneth Abbott and David Gartner particularly celebrate participation by a mix of groups, or “multiple, countervailing interests—such as NGOs, business groups, and technical experts,” as a way of balancing the deliberative process.<sup>25</sup> Abbott and Gartner see this diversity as a means of preserving equilibrium and preventing capture of lawmakers by any one group.

In organizations like [UNIDROIT](#)<sup>26</sup> and [UNCITRAL](#),<sup>27</sup> where rules principally govern private sector interests, private sector participation is particularly valuable. For example, a private sector association was instrumental in developing the [Cape Town Convention on International Interests in Mobile Equipment](#),<sup>28</sup> an important treaty that [standardizes financing](#) for aircraft and other mobile equipment.<sup>29</sup> In particular, the [Aviation Working Group](#),<sup>30</sup> an association formed by market titans [Airbus Industrie](#)<sup>31</sup> and the [Boeing Company](#),<sup>32</sup> offered significant feedback to UNIDROIT on the aircraft manufacturing industry’s preferred financing rules, and then later launched a major campaign encouraging state governments to adopt the convention and offering best practices for implementation.<sup>33</sup>

At the same time, private sector participation in IO deliberative processes can heighten existing concerns about the representativeness of those processes. [Commentators, and the United Nations itself](#), have long been concerned with the overrepresentation of accredited groups from the Global North to the exclusion of voices from the Global South.<sup>34</sup> The participation of private sector organizations representing business interests can exacerbate these representational disparities. Beyond North-South disparities, there is the balance of influence between state and nonstate actors at stake. In a recent reform proposal at UNCITRAL, France [expressed concern](#) that overly robust participation by private sector associations threatens “dilution of member state control over the decision adopted by UNCITRAL.”<sup>35</sup> A new [WHO Framework of Engagement](#) with nonstate actors airs concerns about conflicts of interest that may arise when nonstate actors, particularly those affiliated with economic, commercial, or financial interests, unduly influence the WHO’s independence, objectivity, or professional judgment.<sup>36</sup> Finally, public-interest NGOs have occasionally expressed surprise and outrage at the idea that industry and trade

<sup>25</sup> Abbott & Gartner, *supra* note 23, at 26.

<sup>26</sup> See [UNIDROIT.ORG](#).

<sup>27</sup> See [UNCITRAL.ORG](#).

<sup>28</sup> See [Cape Town Convention on International Interests in Mobile Equipment](#), Nov. 16, 2001, 2307 UNTS 285.

<sup>29</sup> Sandeep Gopalan, Comment, *Harmonization of Commercial Law: Lessons From the Cape Town Convention on International Interests in Mobile Equipment*, 9 LAW & BUS. REV. AM. 255, 255 (2003); see also, Roderick A. Macdonald, *When Lenders Have Too Much Cash and Borrowers Have Too Little Law*, in TRANSNATIONAL LEGAL ORDERS 114 (Terence C. Halliday & Gregory Shaffer eds., 2015).

<sup>30</sup> See [AWG.AERO](#).

<sup>31</sup> See [AIRBUS.COM](#).

<sup>32</sup> See [BOEING.COM](#).

<sup>33</sup> See Melissa J. Durkee, *The Business of Treaties*, 63 UCLA L. REV. 264, 294–95 (2016).

<sup>34</sup> E.S.C. Res. 1996/31, *supra* note 3, para. 5; see also, BRUNO SIMMA ET AL., [THE CHARTER OF THE UNITED NATIONS: A COMMENTARY](#) 912 (1995).

<sup>35</sup> Claire R. Kelly, *The Politics of Legitimacy in the UNCITRAL Working Methods*, in THE POLITICS OF INTERNATIONAL ECONOMIC LAW 106, 119 (Tomer Brodeur et al. eds., 2011).

<sup>36</sup> Framework, *supra* note 1, Annex, para. 22.

groups have equal rights, which signals that the interest blind approach can negatively affect the perceived legitimacy of an IO's decisional process.<sup>37</sup>

In sum, private sector participation can enhance the diversity and legitimacy of IO decisionmaking processes, but the case is not unequivocal. If regulatory legitimacy arises in part from the trust that the regulated public has in the process of regulatory decisionmaking, then the presence of private sector consultants has a separate salience than that of the classic NGOs. It is these classic NGOs that international officials and commentators appear to have in mind when they laud the surge in NGO accreditations in the mid-1990s as a “[participatory revolution](#)” and expression of “[global people power](#).”<sup>38</sup>

### *Quality of information*

There is clear evidence that, at least in some contexts, private sector associations can enhance the quality of information available to IO decisionmakers. This can, in turn, affect the quality and effectiveness of the rules an organization produces. Private sector associations can contribute to a rule's output legitimacy when they offer expertise about what legal standards might work in a given situation, what alternatives may be available, and what potential externalities may arise. For example, as the Cape Town Convention was being developed, the Aviation Working Group assembled a series of detailed drafts which included extremely technical definitions of aircraft and aircraft engines, which would have only been available to industry insiders.<sup>39</sup> They also proposed useful default remedies and priority rules, and designed an international online registry to record priority of interests. Another private sector association, the [International Air Transport Association \(IATA\)](#), suggested an innovative treaty design approach that was ultimately adopted in the final text.<sup>40</sup> Finally, the Aviation Working Group was successful at convincing governmental representatives to adopt a text that would depart in some respects from legal cultural norms that diverged across civil and common law jurisdictions. In short, [commentators conclude](#) that this private sector association's participation was “critically important,” and of “inestimable value” to the ultimate success of the treaty.<sup>41</sup>

At the same time, the [WHO's experience with tobacco association infiltration](#) demonstrates the potential risks of degradation of information value that flow from the private sector associations when conflicts of interest between the IO agenda and the private sector agenda arise. Phillip Morris and others engaged in “an elaborate, well financed, sophisticated, and usually invisible” campaign to discredit and impede the WHO, “hid[ing] behind a variety of ostensibly independent quasi-academic, public policy, and business organizations,” including “tobacco company-created front groups and trade unions that had obtained consultative status at the WHO.”<sup>42</sup> As one example among many, the [International Tobacco Growers' Association \(ITGA\)](#),<sup>43</sup> a private sector association that originally represented a small group of tobacco farmers, came to be controlled by the larger tobacco industry in order to “serve as a front for [their] third world lobby activities at WHO,” to “undermine WHO tobacco control activities.”<sup>44</sup>

<sup>37</sup> WILLETS, [supra note 20](#), at 27 (2011).

<sup>38</sup> Kofi Annan, Secretary-General, Press Release, [Partnership with Civil Society Necessity in Addressing Global Agenda, Says Secretary-General in Wellington, New Zealand Remarks](#), UN Press Release SG/SM/7318 (Feb. 29, 2000).

<sup>39</sup> Durkee, [supra note 33](#), at 295.

<sup>40</sup> See [IATA.ORG](#).

<sup>41</sup> Roy Goode, [From Acorn to Oak Tree: The Development of the Cape Town Convention and Protocols](#), 17 UNIF. L. REV. 599, 603 (2012).

<sup>42</sup> WHO, [Tobacco Company Strategies to Undermine Tobacco Control Activities at the WHO](#) [hereinafter TCS Report] 25 (2000).

<sup>43</sup> See [TOBACCOLEAF.org](#).

<sup>44</sup> [TCS Report](#), [supra note 42](#), at 48.

*Reforms*

The classic interest-blind UN approach to NGOs opens the accreditation process to a pluralistic contest of values and welcomes valuable private sector contributions, but it does not resolve potential legitimacy and conflicts-of-interest challenges. In some IOs, those challenges have become acute, prompting the IOs to rethink this interest-blind model.

For example, in summer 2016, the World Health Assembly adopted a new [Framework of Engagement](#),<sup>45</sup> which establishes separate rules for the WHO's interactions with two distinct groups: "non-governmental organizations" and "private sector entities and international business associations." The explanation for this divergence from the classic interest blind approach is historical: it responds to the WHO's [embattled history with private sector influences](#).<sup>46</sup> For this reason, the rules for private sector entities seek to guard against conflicts of interest and negative impacts on "WHO's integrity, independence, credibility and reputation; and public health mandate."<sup>47</sup> The innovative reform flows from an ex ante normative judgment about benefits and risks that attach to private sector participation. What the reform misses, however, is that erecting categorical distinctions for the purpose of balancing representation or quashing conflicts of interest may send some business interests underground—reducing, rather than enhancing, transparency. Moreover, the reforms are likely to overburden already taxed gatekeepers, resulting in application backlogs, incapacity to meaningfully screen applicant associations, and accidental admission of noncompliant groups. Strikingly, under the WHO Framework, officials are charged with independently assessing whether an association may harbor any private sector influences that could potentially cause undue influence over WHO officials and state delegates. This imposes a formidable burden on those institutional gatekeepers in an era where NGOs often have close links and partnerships with the corporate world, and where business actors seek all potential avenues to influence transnational ordering.

A better course may be for IOs to stop examining a group's accountability to its membership, as the ECOSOC approach requires, and to refrain from attempts to police a group's motives, as the WHO reform does. Rather, a better reform might accept input from all sources, presuming that groups will advance a diversity of special interests, some profit motivated, and some unrelated to profit. Potential conflicts-of-interest issues could be mitigated by a structured process drawing from domestic models such as U.S. notice-and-comment procedures or lobbying laws requiring disclosures and implementing other protections.<sup>48</sup>

<sup>45</sup> Framework, [supra note 1](#).

<sup>46</sup> TCS Report, [supra note 42](#), at iii., 7, 25.

<sup>47</sup> *Id.* at Annex, para. 7(a), (c).

<sup>48</sup> For further development of this idea, see Melissa J. Durkee, *International Lobbying Law*, 127 *YALE L.J.* (forthcoming 2018).