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## International Lobbying Law

**ABSTRACT.** An idiosyncratic array of international rules allows “consultants” to gain special access to international officials and lawmakers. Historically, many of these consultants were public-interest associations like Amnesty International. For this reason, the access rules have been celebrated as a way to democratize international organizations, enhancing their legitimacy and that of the rules they produce. But a focus on the classic public-law virtues of democracy and legitimacy produces a theory at odds with the facts: Many of these international consultants are now industry and trade associations like the World Coal Association, whose principal purpose is to lobby for their corporate clients. The presence of these corporate lobbyists challenges the conventional view, which I call strong legitimacy optimism, by focusing on a set of longstanding critiques: Consultant associations are not always representatives of the “global public” and consultation is not robust participation in governance. Moreover, the access rules both overregulate and underregulate access to lawmakers. This critique is particularly salient in the context of business lobbying, where the access rules do not balance the costs and benefits of business access to international lawmaking and governance.

This Article introduces a theory of international lobbying law. Reframing the international access rules as a body of lobbying regulations delivers explanatory and normative payoffs by identifying (1) the full array of actors who obtain access (public interest and private sector alike); (2) the quantum of access that the current system delivers (informal lobbying, not participation in governance); and (3) new regulatory strategies. Specifically, two regulatory models emerge. One draws on the flawed but best-available registration and disclosure norms of domestic lobbying regulation. The other is a multistakeholder model pioneered by twenty-first-century public-private partnership organizations. The Article develops an original typology to organize and identify features of the international access rules across diverse international organizations, thereby clarifying the regulatory tradeoffs that accompany each choice. Perhaps counterintuitively, reformers should likely eschew the most common middle-of-the-road access models—which are grounded in the flawed legitimacy optimism view—and instead choose among the two divergent regulatory models, with that choice driven by organizational mission.



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## INTRODUCTION

In national jurisdictions like the United States, laws governing lobbying activity are well developed<sup>1</sup> and subject to robust analysis and critique.<sup>2</sup> Internationally, however, the regulatory environment for lobbying activity is highly idiosyncratic and undertheorized. In fact, legal rules that govern lobbying activity at the international level have not yet been recognized as a body of lobbying law. Rather, the patchwork of legal regimes is cast as a variety of “consultation” rules<sup>3</sup> that allow individuals and groups to “democratize” international institutions by offering to lawmakers and policymakers the diverse perspectives of a global polity.<sup>4</sup> This input is said to be a “basic form of popular representation in the present-day world” and “a guarantee of . . . political legitimacy.”<sup>5</sup> I call this conventional account “strong legitimacy optimism.”

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1. For a history of U.S. federal lobbying laws, see William N. Eskridge, Jr., *Federal Lobbying Regulation: History Through 1954*, in THE LOBBYING MANUAL 5 (William V. Luneburg et al. eds., 4th ed. 2009); and Thomas M. Susman & William V. Luneburg, *History of Lobbying Disclosure Reform Proposals Since 1955*, in THE LOBBYING MANUAL, *supra*, at 23.
  2. See, e.g., Heather K. Gerken & Alex Tausanovitch, *A Public Finance Model for Lobbying: Lobbying, Campaign Finance, and the Privatization of Democracy*, 13 ELECTION L.J. 75, 87–90 (2014) (proposing reforms that would subsidize lobbying activity by public-interest groups); Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 216 (2012) (proposing a “national economic welfare” rationale for lobbying regulation); Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 121 (2010) (reviewing efforts to redress the “financial vulnerabilities of democracy”); Maggie McKinley, *Lobbying and the Petition Clause*, 68 STAN. L. REV. 1131, 1199 (2016) (asserting that current lobbying regulation and practice violates the First Amendment’s Petition Clause); Zephyr Teachout, *The Forgotten Law of Lobbying*, 13 ELECTION L.J. 4, 6 (2014) (noting that the scope of the constitutional lobbying right is unclear).
  3. See, e.g., U.N. Charter art. 71 (“The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence.”); Economic and Social Council Res. 1996/31 (July 25, 1996) (making “arrangements for consultation” with NGOs). Following common usage in the literature, here “consultation” is used to refer to access to international institutions by nonstate actors and “consultants” to those actors who gain such access. This follows the usage introduced in Article 71 of the Charter. Of course, “consultants” in this international context are not contracted, employed, or compensated for their services.
  4. See, e.g., We the Peoples: Civil Society, the United Nations and Global Governance: Rep. of the Panel of Eminent Persons on United Nations-Civil Soc’y Relations, U.N. Doc. A/58/817, at 3 (June 11, 2004) [hereinafter *Cardoso Report*] (“The growing participation and influence of non-State actors is enhancing democracy and reshaping multilateralism.”).
  5. Boutros Boutros-Ghali, U.N. Sec’y-Gen., Keynote Address by Secretary-General Boutros Boutros-Ghali to the 47th DPI/NGO Conference (Sept. 8, 1994), in 47th Annual DPI/NGO Conference, *We the Peoples: Building Peace*, at 3 (Sept. 8, 1994).

The lofty goals of this conventional account belie the quotidian reality of international lobbying. The truth is that the rules vary from institution to institution, with frameworks that appear to be driven principally by historical accident, rather than coherent theory or principled design. Many of the international “consultants” are now industry and trade lobbyist associations like the World Coal Association. These associations play a two-level game, lobbying both national and international officials.<sup>6</sup> They are neither democratic representatives of a mythical “global public,” nor are they offered the meaningful quantum of access that the strong legitimacy optimist model suggests. Yet private-sector actors can possess valuable expertise and innovative perspectives that are sometimes suppressed by obsolete access rules or drowned out in the melee of an unstructured process.

Thus, the facts show that the strong legitimacy optimist theory is descriptively flawed and normatively limited. The result, as this Article argues, is a set of legal regimes at the international level that both under- and overregulate international lobbying activities. On the one hand, these regimes can sacrifice transparency, administrability, or effectiveness; on the other hand, they can unnecessarily expose international officials and lawmakers to capture.<sup>7</sup> This matters to both international and national law, as international legal rules can be implemented within national jurisdictions and shape choices by domestic regulators.<sup>8</sup> In contemporary parlance, when it comes to regulating global business lobbying, there is plenty of room to make “[e]verything that’s working . . . better,” to fix what is not working, and to do away with obsolete rules.<sup>9</sup>

The Article develops a theory of international lobbying law. The theory begins with a critique, challenging the well-established but mistaken assumption in international law that consultation with nonstate actors is, as a formal matter,

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6. See generally Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT’L ORGS. 427 (1988) (theorizing that the negotiating behavior of national leaders reflects the dual and simultaneous pressures of international and domestic political games).

7. See *infra* Section II.A, Part IV.

8. See Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 497–500 (2005) (observing that “much of international law is obeyed primarily because domestic institutions create mechanisms for ensuring that a state abides by its international legal commitments”); see also Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 MICH. L. REV. 167, 170 (1999) (conceiving of the sovereign state as an agent of small interest groups); Rachel Brewster, *The Domestic Origins of International Agreements*, 44 VA. J. INT’L L. 501, 539 (2004) (“Governments may form treaties for many of the same reasons that they enact statutes—to achieve domestic goals.”).

9. Somini Sengupta, *Nikki Haley Puts U.N. on Notice: U.S. Is ‘Taking Names,’* N.Y. TIMES (Jan. 27, 2017), <http://www.nytimes.com/2017/01/27/world/americas/nikki-haley-united-nations.html> [http://perma.cc/7HDM-ZX38] (“Everything that’s working we’re going to make it better. Everything that’s not working we’re going to try and fix. And anything that seems to be obsolete and not necessary we’re going to do away with.” (quoting Ambassador Haley)).

a means of democratizing international institutions. While the strong form of this theory has fallen out of vogue in the legal scholarship, it still serves as the theoretical foundation on which many of the access structures in international organizations were built. The critique this Article develops is that strong legitimacy optimism is both descriptively inaccurate and unhelpful as a reform principle. In short, it obstructs (1) regulation that would prevent undue influence and capture, as well as (2) development of multistakeholder institutions that would incorporate meaningful private-sector input.

The lobbying framework offered in this Article better describes the actors involved (diverse, often corporate); reflects the kinds of access that the rules afford (limited); and offers promising regulatory responses borrowed from national lobbying theory and jurisprudence, such as registration and disclosure. At the same time, by illustrating that international lobbying access is currently quite limited in scope, the theory also invites lawmakers to develop new non-lobbying structures when those structures would better suit institutional purposes. Thus, the lobbying theory facilitates more coherent regulation of lobbying activity, and, at the same time, reveals the need for truly participatory public-private partnership structures when those will better respond to pressing global problems. Finally, the Article maps these payoffs onto an original typology that organizes lobbying rules across a diverse set of international institutions.

The Article thus contributes to, and simultaneously attempts to reframe, the growing literature on the participation of nonstate actors in shaping the development of international law.<sup>10</sup> In particular, this project contributes to incipient

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10. A first literature, arising principally out of international relations, focuses on how nonstate actors lobby at the national government level, thereby shaping a nation's international preferences. See, e.g., Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORGS. 513 (1997) (elaborating liberal theory in international relations and explaining that domestic constituencies construct state interests). Other accounts have noted nonstate actor contributions to governance occurring *beyond* the state. See, e.g., PAUL SCHIFF BERMAN, *GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS* (2012) (developing a theory of global legal pluralism); KATERINA LINOS, *THE DEMOCRATIC FOUNDATIONS OF POLICY DIFFUSION: HOW HEALTH, FAMILY AND EMPLOYMENT LAWS SPREAD ACROSS COUNTRIES* (2013) (developing a theory of democratic policy diffusion); ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2005) (conceptualizing this activity as trans-governmental networks); Gráinne De Búrca et al., *Global Experimentalist Governance*, 44 BRIT. J. POL. SCI. 477 (2014) (developing a theory of "experimentalist" governance); Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders*, in *TRANSNATIONAL LEGAL ORDERS* 3 (Terence C. Halliday & Gregory Shaffer eds., 2015) (developing a theory of transnational legal orders). This project is situated in the context of a third literature, which notes nonstate contributions to governance *through* international institutions. See, e.g., JOSÉ E. ALVAREZ, *THE IMPACT OF INTERNATIONAL ORGANIZATIONS ON INTERNATIONAL LAW* (2017) [hereinafter *THE IMPACT OF INTERNATIONAL ORGANIZATIONS ON INTERNATIONAL LAW*] (studying nonstate actor contributions to formal law); JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS*

literatures that seek to understand the ways one influential kind of nonstate actor – the business entity – is involved in the formal processes of intergovernmental development of law and policy.<sup>11</sup> Notable contributions in this arena analyze business lobbying in the context of individual treaties – such as climate treaties – and the adoption of private standards into public agreements.<sup>12</sup> However, the literature that evaluates nonstate participation in lawmaking under the auspices of “consultation” at international institutions has principally focused on

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(2005) [hereinafter INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS] (same); Kenneth W. Abbott & David Gartner, *Reimagining Participation in International Institutions*, 8 J. INT’L L. & INT’L REL. 1 (2012) (conceptualizing this activity as taking place through multistakeholder structures); Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 VAND. J. TRANSNAT’L L. 501 (2009) (conceptualizing this activity as cooperative public-private mechanisms and projects); Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, LAW & CONTEMP. PROBS., Summer/Autumn 2005, at 15 (conceptualizing this activity as administrative action).

11. See Gregory C. Shaffer, *How Business Shapes Law: A Socio-Legal Framework*, 42 CONN. L. REV. 147, 150 (2009) (proposing this area of research); Paul B. Stephan, *Privatizing International Law*, 97 VA. L. REV. 1573, 1595-1601 (2011) (noting a lack of information about the degree and effect of corporate participation in international lawmaking). There are a number of more robust contributions in political science, international relations, and sociology. See, e.g., JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* (2000) (sociology); THE POLITICS OF GLOBAL REGULATION (Walter Mattli & Ngair Woods eds., 2009) (political science); PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS (A. Claire Cutler et al. eds., 1999) (international relations).
12. See, e.g., TIM BÜTHE & WALTER MATTLI, *THE NEW GLOBAL RULERS: THE PRIVATIZATION OF REGULATION IN THE WORLD ECONOMY* (2011) (reviewing delegation of regulatory power to international private-sector standard-setting organizations); Markus Wagner, *Regulatory Space in International Trade Law and International Investment Law*, 36 U. PA. J. INT’L L. 1, 56-58 (2014) (describing a mechanism whereby the Sanitary and Phytosanitary (SPS) Agreement incorporates privately created international standards); David Zaring, *Informal Procedure, Hard and Soft*, in *International Administration*, 5 CHI. J. INT’L L. 547, 548-50 (2005) (describing the entrenchment of international regulatory standardization through bureaucratic cooperation). A separate robust literature responds to institutionalized efforts to engage the business sector through the Global Compact, the Ruggie Principles, and a potential Business and Human Rights treaty. See generally Kishanthi Parella, *Treaty Penumbra*, 38 U. PA. J. INT’L L. 275 (2017) (reviewing this literature).



NGOs,<sup>13</sup> and downplayed or underrecognized any business presence in this group.<sup>14</sup>

Here, I show that business involvement as “consultants” or “observers” in institutions across the UN is a broad phenomenon.<sup>15</sup> It is also an area that is currently facing a significant degree of controversy and change, as exemplified by reform proposals recently lodged at the World Health Organization (WHO) and the United Nations Commission on International Trade (UNCITRAL).<sup>16</sup> The reform proposals respond to the ambivalent nature of business contributions. On the one hand, welcoming and facilitating business input is essential in many instances, when business entities offer expertise, develop technical standards, facilitate politically neutral solutions, offer funding for important global projects, or serve as essential stakeholders whose acceptance will be necessary to a rule’s success. On the other hand, fears of undue business influence, capture, and other forms of subversion of regulatory processes are justified when profit-seeking motives conflict with public regulatory agendas. Perhaps as a result of that essential ambivalence, there is no consistent regulatory response to business lobbying across international institutions, either within or outside of the UN.

The current international legal context is further muddled by the instability of settled law and institutions, as exemplified by unfolding phenomena like

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13. For representative discussions, see, for example, Kenneth Anderson, “Accountability” as “Legitimacy”: *Global Governance, Global Civil Society and the United Nations*, 36 BROOK. J. INT’L L. 841, 846, 890 (2011) (arguing that NGOs serve as their own gatekeepers and confer legitimacy on themselves); David Gartner, *Beyond the Monopoly of States*, 32 U. PA. J. INT’L L. 595 (2010) (advocating for more NGO participation in lawmaking); and Edith Brown Weiss, *The Rise or the Fall of International Law?*, 69 FORDHAM L. REV. 345, 358 (2000) (contending that “[p]articipation by non-State actors in the international legal system greatly enhances [the] accountability [of the international legal system]”). For reviews of the literature, see Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100 AM. J. INT’L L. 348, 365–66 (2006); and Peter J. Spiro, *Accounting for NGOs*, 3 CHI. J. INT’L L. 161, 161 n.2 (2002) (“Reflecting the rise of non-state actors, the academic and policy literature on NGOs has itself exploded.”).
  14. See Melissa J. Durkee, *Astroturf Activism*, 69 STAN. L. REV. 201 (2017) (noting that a literature regarding the role of businesses in lobbying through accreditation at international institutions has not yet matured and making an initial foray into this topic).
  15. See *infra* Section I.A for a preliminary discussion and Part IV for a more fulsome treatment.
  16. See U.N. Director-General, *Framework of Engagement with Non-State Actors*, World Health Org. [WHO], U.N. Doc. A69/6 (May 18, 2016) (providing a draft framework with alternative provisions proposed by state parties); Claire R. Kelly, *The Politics of Legitimacy in the UNCITRAL Working Methods*, in *THE POLITICS OF INTERNATIONAL ECONOMIC LAW* 106, 119 (Tomer Broude et al. eds., 2011). The WHO’s framework was finalized on May 28, 2016. World Health Org., *Framework of Engagement with Non-State Actors*, WHA69.10 (May 28, 2016) [hereinafter WHO, *Framework*].

Brexit,<sup>17</sup> the threat of African withdrawals from the International Criminal Court,<sup>18</sup> and announcements by the current U.S. executive and other populist leaders of bold reformist agendas that include proposals to exit major international agreements.<sup>19</sup> The potential retreat from globalism challenges the post-World War II consensus, and a rise of geopolitical multipolarity threatens to disrupt the success of hallowed international institutions.<sup>20</sup> But uncertainty and change also present opportunities to reconsider key features of the current order. How do nonstate actors participate in the process of international lawmaking, and how should they? What is the theory that justifies opening or closing the doors to these actors? What structures might best regulate nonstate participation, and, in particular, business lobbying? This Article offers a theory capable of producing new answers to these questions. It focuses reforms on developing the means to capture important informational and practical contributions of all nonstate participants – whether they are classic public-interest NGOs, industry or trade associations, business entities, or others – while restraining the risk of capture.

The Article proceeds as follows. Parts I and II review the structure of the access rules and existing scholarly accounts of them, highlighting a persistent dilemma about whether, and if so to what extent, nonstate actor participation contributes to the legitimacy or democratization of international organizations and the rules they produce. The argument of Part I is that the conventional, though contested, “legitimacy optimist” position is evident in the structure of the access rules themselves, as this theory has guided reforms over time. Part II then develops a critique of that conventional theory by showing that business use of these access rules through trade or industry associations is a significant –

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17. See, e.g., Phuong Tran, *Brexit: How A Weakened European Union Affects NAFTA*, 22 L. & BUS. REV. AM. 281, 282 (2016).

18. See, e.g., Michael Plachta, *28th Summit of the African Union Backs Collective Withdrawal from the International Criminal Court*, 33 INT’L ENFORCEMENT L. REP. 80 (2017).

19. See Karen Alter, *The Future of International Law* 9 (Nw. Pub. Law Research Paper No. 17-18, 2017), [http://ssrn.com/abstract\\_id=3015177](http://ssrn.com/abstract_id=3015177) [<http://perma.cc/8952-MM2X>] (noting Donald Trump’s “insist[ence] that the United States will neither lead nor necessarily honor its commitments” among other forms of backlash against the international liberal order).

20. See, e.g., Michael Hirsh, *Why the New Nationalists are Taking Over*, POLITICO (June 27, 2016), <http://www.politico.com/magazine/story/2016/06/nationalism-donald-trump-boris-johnson-brexit-foreign-policy-xenophobia-isolationism-213995> [<http://perma.cc/YN2G-DWJC>]; *League of Nationalists*, ECONOMIST (Nov. 19, 2016), <http://www.economist.com/news/international/21710276-all-around-world-nationalists-are-gaining-ground-why-league-nationalists> [<http://perma.cc/P5YY-GP5E>]; *The Liberal Order of the Past 70 Years is Under Threat*, ECONOMIST (Sept. 21 2017), <http://www.economist.com/news/books-and-arts/21729415-it-was-underpinned-movement-make-waging-aggressive-war-illegal-and> [<http://perma.cc/P9RH-YE9F>] (reviewing OONA A. HATHAWAY & SCOTT J. SHAPIRO, *THE INTERNATIONALISTS* (2017)).

but underappreciated and undertheorized — feature of transnational business activity. The argument is not that this business activity is *necessarily* problematic, but rather that the strong legitimacy optimist theory and existing access rules do not adequately respond to potential risks.

In Part III, the Article offers a theory of international lobbying law and asserts that, as a descriptive theory, it better describes the nature of the access that lobbying rules afford (not voting, not representative), and the actors who engage in that lobbying activity (industry and trade associations as well as public-interest NGOs and others). As a prescriptive theory, it offers a productive analogy to domestic lobbying law, which focuses on the benefits nonstate actors can offer lawmakers, and rules that are responsive to potential ills, with reporting and transparency safeguards that cast sunlight on the lobbying process.

Finally, Part IV offers a typology that organizes lobbying rules along two dimensions: (1) the degree of influence nonstate actors can exercise within the regulatory or legislative process, and (2) the degree to which the rules classify actors or groups and offer varied levels of access to each. The typology facilitates analysis of the array of existing access rules at diverse international organizations within the Article's international lobbying frame. It crystallizes regulatory tradeoffs and potential reforms. In short, reframing “consultation” rules as international lobbying law should facilitate reform of outdated and undertheorized rules that threaten the effectiveness of important international institutions. At the same time, clarifying the limitations of lobbying should help pave the way for more transformative participatory structures.

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Before proceeding, one clarification is in order. The term “lobbying” is fraught. It is not the argument of this Article that international access regimes are plagued by inappropriate influences. Nor is the point to denigrate the valuable input that public-interest and private-sector groups can offer to the international law- and policy-making process. Rather, the theory and practice of lobbying regulation offers a useful model to understand and govern public participation in lawmaking in the international context.

Indeed, this Article's analysis unearths a strange contrast. On the one hand, international commentators have expressed an outsized optimism about the potential of international access structures to improve governance: to enhance the transparency of international organizations, to legitimize or democratize them, or to offer them the perspectives of underrepresented groups. On the other hand, observers of lobbying regulation in the U.S. and elsewhere seem to express an unwarranted cynicism about the law and practice of lobbying. The following analysis suggests that both reactions may be too extreme.

## 1. THE INTERNATIONAL ACCESS RULES

The rules by which nonstate actors gain access to international lawmakers and officials do not flow from a single origin. That is, there is no treaty or other unified source of law that prescribes how and when international organizations should offer access to the public. There is no international Administrative Procedure Act to require a notice-and-comment process, or constitutional speech or petition rights to protect access. Rather, the legal authority for each international organization to permit nonstate access—to the extent that such authority exists—usually originates in the treaty or other foundational document that serves as the organization’s charter. International organizations implement those charter provisions by developing access rules. Those rules are analogous to the procedural rules and standards that administrative agencies in national governments apply to regulate access. Because these charter provisions and their resultant regulatory rules differ across international organizations, the result is a patchwork of rules that vary from institution to institution.<sup>21</sup> Perhaps it is because of this diversity and heterogeneity that no previous legal analysis has examined these rules as a single body of lobbying law,<sup>22</sup> or organized them within a single theoretical framework.<sup>23</sup>

Nevertheless, there is a clear starting point for such an analysis. Many of these rules follow a template established by the United Nations’ Economic and

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21. See *infra* Part IV.

22. To be clear, NGO access to international lawmakers has been the subject of sustained interest and analysis in law and political science, with great attention paid especially to the United Nations Economic and Social Council (ECOSOC) structure with which I begin this Article, and consultation structures for environmental treaties like the Convention on International Trade in Endangered Species (CITES) and the United Nations Framework Convention on Climate Change (UNFCCC). But these accounts do not conceive of these rules as a body of international lobbying law. For a selection of leading accounts, see INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS, *supra* note 10; PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS, *supra* note 11; SLAUGHTER, *supra* note 10; Abbott & Snidal, *supra* note 10, at 501; Anderson, *supra* note 13; Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT’L L. 596 (1999); Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT’L L. 183 (1997); Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490 (2006); Gartner, *supra* note 13; Kingsbury et al., *supra* note 10; Kal Raustiala, *The “Participatory Revolution” in International Environmental Law*, 21 HARV. ENVTL. L. REV. 537 (1997); Peter J. Spiro, *Non-Governmental Organizations and Civil Society*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 770 (Daniel Bodansky et al. eds., 2007).

23. See *infra* Part IV for the organizational framework this Article offers.

Social Council (ECOSOC), which has implemented rules pursuant to a statutory mandate in the UN Charter.<sup>24</sup> This Part introduces those ECOSOC rules, identifies the strong legitimacy optimist theory, and demonstrates how that conventional theory has become embedded as a normative principle into the access rules themselves. In doing so, the Part lays a foundation for the critique to come.

### A. *Introducing the Access Rules*

The ECOSOC accreditation system offers a seminal example of how international access rules work. The ECOSOC regulatory structure is important because it was developed early in the life of the UN and thus has inspired path dependence among other international access structures, serving as a blueprint for many of them.<sup>25</sup> It also functions as a gatekeeper for a number of international organizations within the UN system.<sup>26</sup> That is, to gain access to these latter organizations, an association must first obtain access to ECOSOC.

The ECOSOC access rules are authorized by the UN Charter. Article 71 of the Charter empowers ECOSOC to “make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence.”<sup>27</sup> The negotiating history of this provision is illuminating. About twelve hundred NGO representatives were present in San Francisco for the signing of the NGO charter at the end of World War II.<sup>28</sup> Some of these NGOs were invited consultants to national delegations, and others simply traveled to the conference to see if they could persuade the delegates to adopt their agendas.<sup>29</sup> One of these agendas was to obtain a formal status within the new United Nations.<sup>30</sup> During the League of Nations era, before World War II, NGOs had worked closely and cooperatively with the League in many aspects of

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24. U.N. Charter art. 71.

25. See *infra* Part IV.

26. See *id.*

27. U.N. Charter art. 71.

28. Charnovitz, *supra* note 22, at 251.

29. See Bill Seary, *The Early History: From the Congress of Vienna to the San Francisco Conference*, in ‘THE CONSCIENCE OF THE WORLD’: THE INFLUENCE OF NON-GOVERNMENTAL ORGANISATIONS IN THE UN SYSTEM 15, 25-26 (Peter Willetts ed., 1996).

30. See Charnovitz, *supra* note 22, at 251 (reporting that an NGO consultant sought “a provision on NGOs in the U.N. Charter,” an idea that had not been previously considered by state delegates at the Dumbarton Oaks conference); see also Seary, *supra* note 29, at 27 (noting that “the US government gave in to pressure from the NGO consultants and accepted the idea” that NGOs should have an official role in ECOSOC).

its work in what was dubbed at the time the “League Method” of interaction.<sup>31</sup> That League Method was an informal practice rather than a statutorily sanctioned relationship, so NGOs sought to have this practice formalized, and perhaps even expanded, under the new UN Charter.<sup>32</sup>

The San Francisco NGO lobbyists partly succeeded in that the UN Charter contained the Article 71 provision authorizing ECOSOC to “consult” with NGOs.<sup>33</sup> But in a larger sense, the NGOs were unsuccessful in that this provision formalized a clearly subordinate role for NGOs in comparison with international organizations and nation-states. NGOs did not attain any voting privileges, rights to participate in treaty drafting, or any other formal participatory rights. The term “consultation” is not defined in the Charter and so the nature of the relationship – and indeed, whether ECOSOC formed such consultative relationships at all – was purely at ECOSOC’s discretion. The UN Charter also failed to formalize relationships between NGOs and any other organ of the UN besides ECOSOC, like the General Assembly or the Security Council.<sup>34</sup>

Empowered by Article 71, ECOSOC has adopted a set of regulations enabling NGOs to apply to become accredited “for consultation with” the Council.<sup>35</sup> In the Council’s conception, consultative status serves dual purposes: to assist the UN in gathering relevant expertise from nongovernmental sources and to give members of civil society the opportunity to have access to governance functions

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31. See Charnovitz, *supra* note 22, at 221-237, 245-46 (describing the League-era context in which voluntary associations defined and presented issues for the League’s consideration; served as “insiders working directly with government officials and international civil servants to address” international problems, principally through policy conferences; and lobbied those in power). Indeed, voluntary, issue-oriented associations became active in influencing international law much before the League period, “emerg[ing] at the end of the eighteenth century and bec[oming] international by 1850. By the end of the nineteenth century, there was a pattern of private international cooperation evolving into public international action . . . Behind many [early international organizations] stood idealistic and active NGOs.” *Id.* at 212.

32. *Id.* at 251.

33. U.N. Charter art. 71.

34. See generally U.N. Charter (referring to NGOs only in Article 71).

35. The Council has passed various resolutions to govern NGO access to the UN pursuant to Article 71. Economic and Social Council Res. 43 (June 21, 1946) (making arrangements for consultation with NGOs); Economic and Social Council Res. 288 (X) (Feb. 27, 1950) (codifying privileges and practices relating to NGOs that had developed between 1946 and 1950); Economic and Social Council Res. 1296 (XLIV) (May 23, 1968); Economic and Social Council Res. 1996/31, *supra* note 3 (offering an updated set of rules that remain in effect as of this writing). For narrative descriptions of the role of these resolutions, see 2 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1797 (Bruno Simma et al. eds., 3d ed. 2012); and THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 904-05 (Bruno Simma et al. eds., 1st ed. 1994).

and to express their opinions.<sup>36</sup> ECOSOC has updated the regulations several times in an attempt to better serve these dual purposes and respond to perceived deficits.<sup>37</sup> The rules currently in force were last updated in 1996.<sup>38</sup>

The 1996 rules contain a variety of criteria that focus on how well an NGO seeking access represents its members, and whether it has internal governance mechanisms that make its representatives accountable to that membership. As a preliminary manner, the association must have “aims and purposes” that support “the spirit, purposes and principles” of the UN and “promote” the UN’s work.<sup>39</sup> It must be able to establish the accountability and representativeness of its internal governance mechanisms through indicia such as “an established headquarters”;<sup>40</sup> “a democratically adopted constitution” providing for a representative process to set policy;<sup>41</sup> a responsive “executive organ”;<sup>42</sup> and documented “authority to speak for its members through its authorized representatives.”<sup>43</sup> Organizations must be nonprofits and obtain their funding from “national affiliate[] [organizations] . . . or from individual members.”<sup>44</sup> Finally, the organization must represent its particular field by “be[ing] of recognized standing within the particular field of its competence or of a representative character.”<sup>45</sup>

The menu of privileges offered to accredited associations includes access to information, opportunities to submit oral and written comments, and informal lobbying opportunities. For example, accredited organizations may obtain UN

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36. See Economic and Social Council Res. 1996/31, *supra* note 3, ¶ 20 (“[C]onsultative arrangements are to be made, on the one hand, for the purpose of enabling the Council or one of its bodies to secure expert information or advice from organizations . . . and, on the other hand, to enable international, regional, subregional and national organizations that represent important elements of public opinion to express their views.”).

37. See *supra* note 35 and accompanying text.

38. See Economic and Social Council Res. 1996/31, *supra* note 3.

39. See *id.* ¶¶ 2-3.

40. *Id.* ¶ 10.

41. *Id.*

42. *Id.*

43. *Id.* ¶ 11. Resolution 1996/31 also includes a repetitive catchall provision: the organization must possess “a representative structure and . . . appropriate mechanisms of accountability to its members, who shall exercise effective control over its policies and actions through the exercise of voting rights or other appropriate democratic and transparent decision-making processes.” *Id.* ¶ 12.

44. *Id.* ¶ 13. There is a loophole: when an organization is financed from other sources, it must explain to the satisfaction of the Council (via its Committee on NGOs) the organization’s reasons for not meeting these requirements. *Id.*

45. See *id.* ¶ 9.

“grounds passes” and admission to UN-sponsored treaty-making conferences, both of which offer opportunities for informal dialogue with national delegates and international officials.<sup>46</sup> They may also send representatives to sit as observers at meetings of ECOSOC, its commissions, and other subsidiary bodies; present written or oral comments to international officials; receive meeting agendas; and propose agenda items.<sup>47</sup> Organizations are accredited in three different tiers, obtaining access and lobbying privileges that correspond to the organization’s tier. “General” consultants are offered the broadest range of access privileges, while “special” and “roster” organizations receive fewer.<sup>48</sup>

The ECOSOC framework has been replicated around the UN system, with other agencies adopting similar access regulations. A few organizations have a parallel Article 71 in their organizational charters, authorizing a consultation system for those organizations in the same way as the UN Charter authorizes one for ECOSOC.<sup>49</sup> Many, like ECOSOC, will minimally screen organizations in an initial accreditation procedure; a number will divide associations into rough categories that correspond to the association’s breadth and depth of expertise across relevant subject areas and afford tailored access privileges to each, as does ECOSOC. However, ECOSOC’s model is by no means the only way for international institutions to incorporate outside input. Another method, which has been embraced by organizations like the International Monetary Fund (IMF), is to

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46. See *Accreditation*, UNITED NATIONS OFF. GENEVA, <http://www.unog.ch/ngo/accreditation> [<http://perma.cc/Y95U-BUMA>].

47. Economic and Social Council Res. 1996/31, *supra* note 3, ¶¶ 27–30, 32(a).

48. *Id.* ¶¶ 21–26; see also STEPHEN TULLY, CORPORATIONS AND INTERNATIONAL LAWMAKING 66 (2007) (reviewing the tiered consultation structure); Charnovitz, *supra* note 22, at 267 (same). “General” status is reserved for organizations that are the most global in footprint and pursue the broadest missions: they “are concerned with most of [ECOSOC’s] activities”; “can demonstrate . . . sustained contributions . . . to the achievement of [UN] objectives”; and are “broadly representative of major segments of society in a large number of countries.” Economic and Social Council Res. 1996/31, *supra* note 3, ¶ 22; see also Kal Raustiala, *NGOs in International Treaty-Making*, in *THE OXFORD GUIDE TO TREATIES* 150, 156 n.24 (Duncan B. Hollis ed., 2012) (noting that NGOs with general status “tend to be fairly large, established international NGOs with a broad geographical reach”). “Special” status is for organizations that are concerned with “a few of the fields of activity” the Council pursues. Economic and Social Council Res. 1996/31, *supra* note 3, ¶ 23; see also Raustiala, *supra*, at 156 n.24 (stating that NGOs with Special consultative status “tend to be smaller and more recently established”). Finally, “Roster” status falls short of full consultancy status and is granted to NGOs that do not qualify for the other two categories but may make “occasional and useful contributions” to the UN’s work. Economic and Social Council Res. 1996/31, *supra* note 3, ¶ 24; see also Raustiala, *supra*, at 157 n.24 (“Organizations that apply for consultative status but do not fit in any of the other categories are usually included in the *Roster*. These NGOs tend to have a rather narrow and/or technical focus.”).

49. See, e.g., Constitution of the World Health Organization art. 71, July 22, 1946, 62 Stat. 2679, 14 U.N.T.S. 185.



solicit input from particular associations at particular decision points, rather than maintaining a standing bench of consultants. Other, more innovative institutions, like the International Labour Organization (ILO), UN Women, and the GAVI Alliance, offer full membership – and even voting rights – to nonstate actors. UNCITRAL demonstrates another unique model, allowing consultants to participate in a consensus decision-making procedure, thereby affording robust participatory rights to nonstate actors, even though it does not offer full membership to those entities. These variations are explored in greater length in Part IV. This preliminary introduction of the ECOSOC rules is offered not to serve as a full analysis of those rules but to lay a foundation for the theory and critique that follows.

### *B. Theorizing the Rules*

Can consultation “democratize” international organizations, bolstering their authority to undertake global governance? The question has been the subject of robust debates in law and political science, and it has significant practical consequences. If the answer is yes – the access rules can enhance an organization’s democratic legitimacy – then international organizations can potentially claim broader authority than that delegated by national governments. The consequences of this position are particularly sensitive in a political milieu like that which exists at the time of this writing – an era of nationalist retraction, growing multipolarity, and skepticism of the broadly claimed authority of multilateral institutions. Moreover, the answer to the descriptive question brings normative consequences. If input from nonstate entities is legitimizing and democratizing, then access rules should likely attend to the representativeness and accountability of the entities that offer that input. If, on the other hand, input from NGOs cannot confer on international organizations additional authority or legitimacy, then regulation of nonstate access is susceptible to a different, more pluralistic and pragmatic, set of reforms.

The following sections divide this question into its descriptive and normative aspects, and review each debate in turn.

#### *1. The Descriptive Dimension: Can Consultation Confer Legitimacy?*

The first debate is descriptive: can consultation confer on international organizations additional legitimacy or a broader democratic mandate than those organizations would have without it? There are three responses to this question: legitimacy optimism in strong and moderate forms, and legitimacy pessimism.

a. *Strong Legitimacy Optimism*

The strong legitimacy optimist view asserts that nonstate actor input through the access rules can indeed contribute to the legitimacy of international legal rules.<sup>50</sup> This contribution is thought to be particularly valuable because international organizations struggle with legitimacy deficits.<sup>51</sup> The argument is that international organizations lack “democratic legitimacy” because they cannot be held accountable through the ballot box.<sup>52</sup> Indeed, they could not be democratically accountable unless there was some sort of global parliamentary system.<sup>53</sup> Rather, international organizations derive their legitimacy derivatively, through member states: they only have the authority granted to them by member states, and cannot claim a broader mandate.<sup>54</sup>

Nonstate actor input through the access structures is said to be a means by which international organizations can transcend that limitation and claim to speak and function directly on behalf of the global public. NGOs are imagined to be representatives of that global public. Thus, NGO consultation is understood to be a “basic form of popular representation”<sup>55</sup> and a democratizing influence<sup>56</sup> because it offers international organizations a form of quasi-democratic legitimacy,” or at least “a plausible connection to a global constituency” beyond the governments of the member states.<sup>57</sup> This nongovernmental input enables organizations to receive the views of a broad cross-section of individuals advocating for different social causes through their NGO representatives, and thus contributes directly to the international organization’s governance mandate.

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50. For a description of this basic position, see Kenneth Anderson, *Global Governance: The Problematic Legitimacy Relationship Between Global Civil Society and the United Nations* 16 (Am. Univ. Wash. Coll. of Law Research Paper Series, Working Paper No. 2008-71, 2008), [http://ssrn.com/abstract\\_id=1265839](http://ssrn.com/abstract_id=1265839) [<http://perma.cc/RXZ7-WW6E>].

51. *See id.* at 26.

52. *Id.* at 24.

53. *Id.* at 26.

54. *See id.* at 16 n.46.

55. Boutros-Ghali, *supra* note 5, at 3.

56. *See Cardoso Report*, *supra* note 4, at 3 (“The growing participation and influence of non-State actors is enhancing democracy and reshaping multilateralism.”).

57. Anderson, *supra* note 50, at 16; *see also* TERRY MACDONALD, GLOBAL STAKEHOLDER DEMOCRACY: POWER AND REPRESENTATION BEYOND LIBERAL STATES 193 (2008) (arguing that “non-electoral mechanisms of authorization and accountability could potentially be employed to confer democratic legitimacy upon a range of agents of public power in global politics, including [international organizations]”).

Thus, the strong view has both descriptive and normative dimensions. Descriptively, the view asserts that international organizations act with a broader and more legitimate mandate when they respond to the views and opinions of global publics and not just their governmental representatives. Thus, a mechanism to solicit and incorporate those views serves to confer excess legitimacy and democratic mandate on international organizations. Normatively, then, in this view the “consultation” or other mechanisms for incorporating the views of nonstate actors are beneficial to global governance.

On that latter normative point, Steven Charnovitz argues that an individual can “delegate the function of representing himself,” to an NGO.<sup>58</sup> Because this choice is voluntary, “[o]ne should not assume that on any particular issue . . . an individual has delegated more decisionmaking authority to an elected politician rather to an NGO.”<sup>59</sup> Conversely, the voting power does not equate to an individual choice of elected representatives, as the individual’s choice may not prevail.<sup>60</sup> Charnovitz’s point is that this representative role of NGOs should justify their access to international organizations and officials, and militate against excluding them from processes and deliberation that lead to international lawmaking.<sup>61</sup>

In sum, the strong legitimacy optimism position suggests that nonstate actors contribute to international lawmaking and governance through their function as representatives of the interests of individuals.

### *b. Moderate Legitimacy Optimism*

Moderate legitimacy optimism does not claim that the consultation mechanism can directly confer a democratic or representational mandate on international organizations. But it does assert that opening a law- and policy-making process to nonstate groups can enhance legitimacy and assist an organization in governing effectively.<sup>62</sup> The claim is thus more modest and descriptive than

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58. Steve Charnovitz, *The Illegitimacy of Preventing NGO Participation*, 36 BROOK. J. INT’L L. 891, 905 (2011).

59. *Id.*

60. *Id.*

61. See *id.* Relatedly, Terry MacDonald has proposed a “Global Stakeholder Democracy” model, which he suggests could employ the representation of “multi-stakeholder” interests by NGOs – either to supplement or to substitute for the representation of nation-state constituencies by governments. MACDONALD, *supra* note 57, at 14.

62. See, e.g., Esty, *supra* note 22, at 1515-23 (outlining various alternatives to democratic accountability that may serve as sources of potential legitimacy for international organizations); Kingsbury et al., *supra* note 10, at 15, 17 (identifying an “embryonic field of global administrative

strong legitimacy optimism. The central claim is that access and consultation mechanisms can be especially useful when international organizations do not have adequate enforcement mechanisms to impose their legal rules by force on recalcitrant nation-states. Thus, offering access and consultation opportunities to nonstate actors can assist an international organization in gathering legitimacy that will enhance the persuasive power of the rules the organization develops.<sup>63</sup> The idea is that offering different groups opportunities to submit input during a rulemaking process can enhance the credibility of international rules among those groups and build support for the rules among national governments, which may otherwise be subject to lobbying efforts by disaffected groups. 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.

For example, Claire Kelly builds on accounts by Robert Keohane and Joseph Nye to describe legitimacy as a product of *inputs* (“the means by which constituents participate in [international organizations], e.g., representation, inclusiveness, or process”)<sup>64</sup> and *outputs* (“substantive outcomes, e.g., trade liberalization . . . or fairness, and whether goals set by the [international organizations] themselves are reached, i.e., is the [international organization] effective”).<sup>65</sup> Thus, in the input/output legitimacy account advanced by Kelly and others, input legitimacy focuses on the representativeness of the rulemaking, including participation by those who will be affected by the rule, and the fairness and transparency of the deliberative process.<sup>66</sup> Output legitimacy focuses on the outcomes of the rulemaking. Is a rule “fair, just, well ordered, universally accepted, or supportive of a particular goal”?<sup>67</sup> Output legitimacy also inquires whether the

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law” that has bolstered the legitimacy of international organizations through “standards of transparency, participation, reasoned decision, . . . legality, and . . . effective review”).

63. See Melissa J. Durkee, *Persuasion Treaties*, 99 VA. L. REV. 63, 97-104 (2013).

64. Claire R. Kelly, *Institutional Alliances and Derivative Legitimacy*, 29 MICH. J. INT’L L. 605, 613-14 (2008) (citing Robert Keohane & Joseph Nye, *Between Centralization and Fragmentation: The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy* 9-10 (Harvard Kennedy Sch. of Gov’t Working Paper Series, Paper No. RWP01-004, 2001), [http://ssrn.com/abstract\\_id=262175](http://ssrn.com/abstract_id=262175) [<http://perma.cc/RVV7-P2MD>]).

65. Kelly, *supra* note 16, at 123.

66. *Id.*; see also Esty, *supra* note 22, at 1524 (proposing that international organization legitimacy can be improved by using traditional administrative law devices, such as notice, comment, and power sharing).

67. Kelly, *supra* note 16, at 124 (arguing that since a better, more inclusive, and more transparent process can enhance legitimacy, an important question is whether NGOs help or hinder this).

norms are “useful,” and notes that usefulness can often be enhanced by the expertise of the inputs.<sup>68</sup> In short, those who measure input/output legitimacy accept the premise that consultation with outsiders can enhance the legitimacy of an organization and the rules it produces. For this reason, I characterize these accounts as moderately legitimacy optimistic.

Moderate legitimacy optimism thus characterizes intellectual movements like global administrative law, which works to identify groups that can offer expertise and “technocratic competence” that enhance the output legitimacy of various global administrative projects. In addition, Kenneth Abbott and David Gartner 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>69</sup> Abbott and Gartner see this diversity as a means of preserving equilibrium and preventing capture of lawmakers by any one group.

In sum, according to accounts that advance moderate legitimacy optimism, consultation with private groups—whether they be experts, NGOs, businesses, or others—can enhance the effectiveness and legitimacy of international organizations and their rulemaking processes. These accounts stop short of strong legitimacy optimism because they do not assert that this consultation legitimizes organizations by transforming them into direct representatives of any particular group of people.

### c. *Legitimacy Pessimism*

Legitimacy pessimism starkly contrasts with strong legitimacy optimism. It expresses the view that international organizations and NGOs have been caught in a “closed legitimization-circle”<sup>70</sup>: NGOs confer apparent legitimacy on international organizations by claiming to speak for populations affected by the decisions of those organizations. This allows international organizations to claim the authority of representational quasi-democracy. In turn, those international organizations legitimate the work of the NGOs, which exist only to advocate for a

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68. *Id.*; see also Abbott & Gartner, *supra* note 10, at 29 (noting the value of expertise for “policy formulation and legitimacy”).

69. See Abbott & Gartner, *supra* note 10, at 26.

70. Anderson, *supra* note 50, at 34.

cause before the international organizations.<sup>71</sup> The two exist in reciprocal symbiosis in a closed loop, with no external checks on the accuracy of their claims.<sup>72</sup> Thus NGOs are seen as “self-appointed spokesmen for their cause” or even “a self-serving coterie of elitists.”<sup>73</sup> The legitimacy pessimist position observes that because NGOs are unelected, they cannot be truly representative of any particular group of people and “need not answer to the broad public they claim to represent.”<sup>74</sup> Kenneth Anderson is a key proponent of this position, which he articulates in the following way:

[T]o ask about accountability is really to ask whether NGOs are representative of those they claim (or once claimed) to represent and whether they merit the legitimacy that they claim such representativeness confers. In this sense, to ask about accountability is [to ask] . . . whether a basis exists for them to be invested with such power in the first place . . . . [I]f it is on the basis of representing “people” or “peoples” or “the world’s Peoples,” then we should not . . . presume the quite radical conclusion that they have a legitimate claim to “represent” and account for the interests and desires and values of all these “people” in the first place.<sup>75</sup>

Rather than enhancing the legitimacy of international organizations, these NGOs at best have a neutral effect on international processes, and at worst challenge the legitimacy or effectiveness of them. At times, they have even challenged the legitimacy of the national governments that delegate power to international institutions. In fact, as Kenneth Anderson notes, fascist regimes such as Mussolini’s or Franco’s also treated civil society organizations as “representative, intermediary organizations between the people and the states” to try to make up for their lack of “ballot box legitimacy.” These fascist regimes therefore supported supposed civil society organizations as substitutes. This self-legitimizing circle

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71. Similar concerns have been aired in the U.S. domestic context. See, e.g., Moshe Cohen-Eliya & Yoav Hammer, *Nontransparent Lobbying as a Democratic Failure*, 23 WM. & MARY POL’Y REV. 265, 268 n.12 (2011) (citing David Lowery, *Why do Organized Interests Lobby? A Multi-Goal, Multi-Context Theory of Lobbying*, 39 POLITY 29, 36-37 (2007)) (noting that organizations frequently lobby even when they do not expect success for the purpose of demonstrating to their supporters that they are active and to justify continued support).

72. Anderson, *supra* note 50, at 34.

73. MACDONALD, *supra* note 57, at 4 (internal citations omitted).

74. *Id.* at 4 (noting concerns about NGO representativeness and accountability).

75. Kenneth Anderson, *What NGO Accountability Means – and Does Not Mean*, 103 AM. J. INT’L L. 170, 176 (2009).

cannot substitute, Anderson and others claim, for authentic democratic legitimacy.<sup>76</sup>

2. *The Normative Dimension: Strong Legitimacy Optimism as Reform Principle*

Strong legitimacy optimism has shaped legal reforms. Specifically, because legitimacy optimism operates from the descriptive premise that consultation *can* confer legitimacy on international organizations, it carries with it a normative claim that reforms should therefore operate to enhance the access, representativeness, and accountability of consultant groups. Thus, strong legitimacy optimism led to reforms at ECOSOC in 1996 that expanded access rights for NGOs<sup>77</sup> and that attempted to enhance the representative nature of NGO participation as consultants. For example, Resolution 1996/31 introduced a number of regulations aimed at ensuring that NGOs actually represent the interests of their members and that NGO governance documents evidence and safeguard this representational character:

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

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

12 . . . [and] shall have a representative structure and possess appropriate mechanisms of accountability to its members, who shall exercise effective control over its policies and actions through the exercise of voting rights or other appropriate democratic and transparent decision-making processes.<sup>78</sup>

The 1996 reform also responded to concerns about the problem of overrepresentation of NGOs from the Global North and underrepresentation

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76. Anderson, *supra* note 50, at 24 (citing John Bolton, *Should We Take Global Governance Seriously?*, 1 CHI. J. INT'L L. 205, 205 (2000), for the proposition that "[i]t is . . . precisely the detachment from governments that makes international civil society so troubling, at least for democracies" because it "posits 'interests' . . . as legitimate actors along with popularly elected governments").

77. Economic and Social Council Res. 1996/31, *supra* note 3.

78. *Id.* ¶¶ 10-12.

from the Global South. Resolution 1996/31 noted that ECOSOC sought “just, balanced, effective and genuine involvement of non-governmental organizations from all regions and areas of the world,”<sup>79</sup> and in particular, greater participation from developing countries and countries in transition.<sup>80</sup>

The twelve-member Panel of Eminent Persons on United Nations-Civil Society Relations that considered further reforms to the ECOSOC access structure in 2004 continued to embrace strong legitimacy optimism as a principle of reform.<sup>81</sup> For example, the report they produced (known as the Cardoso Report) advocated “forging stronger links between [NGOs at] the local and global levels, which would help overcome democratic deficits in global governance,”<sup>82</sup> and again focused on representational disparities between the Global North and South. Nevertheless, the Cardoso panel’s findings also reported concerns by national governments about the “legitimacy, accountability and ‘hidden agendas’” of NGO consultants:

Many of the accredited NGOs are perceived as lobbyists rather than “true” stakeholders. Most are seen as not accountable while demanding higher government accountability. Many governments feel *they*, being elected, are the legitimate representatives of society.<sup>83</sup>

The concerns aired in the 1996 reforms and Cardoso Report reveal a fundamental normative assumption that it is NGOs’ democratizing and representational qualities that qualify them to participate as consultants to international organizations. For example, if the principal concern were to gather sufficient expertise to develop an efficient or workable rule, the principal analysis would not be whether an NGO represents its members, but whether the organization professes representatives with scientific, technocratic, or other qualifications.

After significant attention in the 1990s and 2000s, scholarly promotion of strong legitimacy optimism as either a descriptive theory or principle of reform has ebbed. As far as the legal rules themselves, the UN has not responded to the reform proposals of the Cardoso Report, and the access rules continue to require

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79. *Id.* ¶ 5.

80. *Id.* ¶¶ 6–7.

81. *Cardoso Report*, *supra* note 4.

82. *Press Briefings by Panel on UN-Civil Society Relations*, UNITED NATIONS (June 21, 2004), <http://www.un.org/press/en/2004/Cardoso062104.doc.htm> [<http://perma.cc/5MGD-B8MU>].

83. *UN System and Civil Society - An Inventory and Analysis of Practices: Background Paper for the Secretary-General’s Panel of Eminent Persons on United Nations Relations with Civil Society*, GLOBAL POL’Y F. (May 2003) [hereinafter *Inventory*], <http://www.globalpolicy.org/component/content/article/226/32330.html> [<http://perma.cc/QT74-W7XE>].



features of NGOs—like constitutional governance and democratically selected representatives—that appear to be premised on strong legitimacy optimism. The significance of these regulatory choices persists. In addition to the fact that there are roughly five thousand associations accredited with ECOSOC,<sup>84</sup> an array of other international organizations have followed in ECOSOC's path by adopting the ECOSOC structure, permitting basic forms of "consultation," and requiring basic forms of representation.

## II. WHY STRONG LEGITIMACY OPTIMISM FAILS

The primary reason for the tenacity of strong legitimacy optimism as a guide to regulatory design appears to be the persistent and deeply entrenched idea that the nonstate groups who obtain access this way fit a certain mold. The idea is that these participants are virtuous nonprofit groups championing social goods and the views of individuals, minorities, and social groups who are not adequately represented by national delegations. This is not to say that this premise has gone without challenge. Principally, however, as the previous Section described, responses to perceived deficits in accountability and representativeness have consisted of proposals to further promote participation by virtuous groups, rather than to supplant the "consultation as democracy" idea at the heart of strong legitimacy optimism.

As it turns out, however, the nonstate groups gaining access to international organizations are very diverse. For example, business groups make significant use of the access rules alongside the classic public-interest actors that the conventional account imagines. The presence of business actors brings the existing criticisms of that frame into focus. This Part uses these facts to illustrate the descriptive inaccuracy of strong legitimacy optimism and the persistent access problems it fails to address as a principle of reform. In short, while business lobbying appears to repudiate the premises of strong legitimacy optimism, businesses also contribute to the work of international organizations in socially beneficial ways. The access rules do not respond appropriately to either of these facts.

### A. *Explanatory Faults: The Question of Business*

Business groups use the access rules to offer input to international organizations in both overt and covert modes. These facts show that the conventional

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84. NGO Branch, *Advanced Search for Civil Society Organizations*, UNITED NATIONS DEP'T ECON. & SOC. AFF., <http://esango.un.org/civilsociety/displayAdvancedSearch.do?method=search&sessionCheck=false> [<http://perma.cc/KPK8-KBJL>].

account fails in two ways. It mischaracterizes both the nature of the groups making use of the access structures and the nature of the access opportunities presented to these groups.

1. *Overt Business Access*<sup>85</sup>

Academic attention to the access rules has been focused principally on classic public-interest NGOs. As Anderson articulates this orientation:

[T]he meaning of the term [civil society] in the international community is reserved for politically “progressive” organizations, defined in broad terms as a leftwing politics and an orientation toward global governance over merely democratic sovereign governance. The legion academic literature on global civil society largely assumes that it is about the leftwing Human Rights Watch and Greenpeace . . . and that it is committed to . . . the idea of global governance.<sup>86</sup>

Perhaps this scholarly focus arises from the fact that the accreditation opportunities have been of interest primarily to civil society groups seeking to advance a particular cause (and usually, in Anderson’s view, a socially liberal one). Nevertheless, the accreditation structure is also a point of entry for international business groups, who may consult on the same terms as the public-interest NGOs, provided that the business group meets the accreditation criteria. In particular, in the ECOSOC context, the business group must be organized as a non-profit and report “aims and purposes” consistent with ECOSOC’s purposes.<sup>87</sup> Since ECOSOC’s own aims and purposes include economic development, many private-sector groups can demonstrate such a link.

In fact, ECOSOC’s screening of would-be consultant groups is not focused on determining *which* interests the group represents, aside from the bare determination that the group advances some elements of ECOSOC’s work. Nor do the screening criteria focus on the makeup of the group’s membership, other than to evaluate whether the group has some means of maintaining accountability to that membership. In practice, the rules have been interpreted to mean that

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85. This subsection draws substantially on a short essay previously published in *AJIL Unbound* as part of a Symposium on Industry Associations in Transnational Legal Ordering. See Melissa J. Durkee, *Industry Lobbying and “Interest Blind” Access Norms at International Organizations*, 111 *AJIL UNBOUND* 119 (2017).

86. Anderson, *supra* note 50, at 32 (footnote omitted) (critiquing this view as excluding conservative and religious civil society groups).

87. See Economic and Social Council Res. 1996/31, *supra* note 3, at ¶¶ 2-3.

an association's members may be either individuals, businesses, or other entities. Thus, business advocacy groups – trade and industry associations – may become accredited as consultants to ECOSOC. In fact, they can become accredited alongside and on the same terms as NGOs who advance various social causes. However, *individual* businesses cannot become accredited to consult unless they are organized as nonprofits.

Indeed, of the approximately 5,000 associations that are now accredited as consultants to ECOSOC, a full ten percent self-report “business and industry” as an area of expertise or field of activity.<sup>88</sup> That figure likely underreports the total number of associations representing the private sector, as it merely reflects the number of associations that explicitly report this focus. Examples of accredited business and industry associations include:

- Global sectoral associations, such as the World Coal Association and the World Nuclear Association;
- Regional sectoral associations, such as the National Association of Home Builders of the United States, the European Association of Automotive Suppliers, and the Association of Latin American Railways; and
- Generalist organizations, whether global or regional, such as the International Chamber of Commerce, the World Union of Small and Medium Enterprises, and the Turkish Confederation of Businessmen and Industrialists.

Many of these associations have disclosed that their principal organizational purposes include lobbying. For example, the World Coal Association lists among its goals that it aims to “[a]ssist in the creation of a political climate supportive of action by governments” to use various kinds of coal technologies, and to educate policymakers about the benefits of coal and the coal industry.<sup>89</sup> The World Nuclear Association “seeks to promote the peaceful worldwide use of nuclear

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88. NGO Branch, *supra* note 84. In the “Consultative status” field, select “General,” “Special,” and “Roster” and add them to the search field; expand “Areas of expertise & Fields of activity”; then select “Economic and Social” and add “Business and Industry” to search field; designate “search type” as “[a]ll the criteria above”; then search. *Id.* (listing 514 organizations that selected “business and industry” as of October 2017).

89. NGO Branch, *World Coal Association*, UNITED NATIONS DEP’T ECON. & SOC. AFF., <http://esango.un.org/civilsociety/showProfileDetail.do?method=showProfileDetails&sessionCheck=false&tab=3&profileCode=1029> [http://perma.cc/B2CC-67G9].

power.”<sup>90</sup> The National Association of Home Builders of the United States seeks to “[b]alance legislative, regulatory and judicial public policy.”<sup>91</sup>

Thus, business-promoting groups work alongside, and on equal terms with, familiar public-interest NGOs like the Sierra Club, Greenpeace, and Heifer Project International. All of these accredited groups, public interest and private sector alike, enjoy the same potential menu of access privileges.

## 2. *Covert Business Access*

Businesses access international lawmakers and officials not just overtly, through industry and trade associations, but also covertly. In a prior article, I identified an “astroturf activism” phenomenon whereby “business entities gain access to international lawmakers through front groups that obscure the identity of the profit-seeking enterprise.”<sup>92</sup> One way businesses gain this covert access is through grassroots mimicry: forming NGOs with nonprofit status and a mission statement that obscures the association’s true agenda.<sup>93</sup> John Braithwaite and Peter Drahos offer some choice examples of this phenomenon, noting the “National Wetlands Coalition,” which serves U.S. oil companies and real estate developers, and “Consumers for World Trade,” which was formed by a pro-GATT (General Agreement on Tariffs and Trade) industry coalition.<sup>94</sup>

In addition to forming astroturf groups, businesses have formed sponsorship or other close relationships with public-interest NGOs, suggesting some degree of capture or—at minimum—influence.<sup>95</sup> According to a study of one hundred influential NGOs in 2013, 54% had at least one board member affiliated with the tobacco industry, 56% with the arms industry, and 59% with the finance

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90. NGO Branch, *World Nuclear Association*, UNITED NATIONS DEP’T ECON. & SOC. AFF., <http://esango.un.org/civilsociety/showProfileDetail.do?method=showProfileDetails&sessionCheck=false&tab=3&profileCode=1047> [<http://perma.cc/BK3B-HMPM>].

91. NGO Branch, *National Association of Home Builders of the United States*, UNITED NATIONS DEP’T ECON. & SOC. AFF., <http://esango.un.org/civilsociety/showProfileDetail.do?method=showProfileDetails&sessionCheck=false&tab=3&profileCode=6881> [<http://perma.cc/CGX6-BZBM>].

92. Durkee, *supra* note 14, at 229.

93. *Id.* at 238.

94. BRAITHWAITE & DRAHOS, *supra* note 11, at 489.

95. Durkee, *supra* note 14, at 241–42.

industry.<sup>96</sup> Of the NGOs in the study, 40% have obtained accreditation at ECOSOC.<sup>97</sup>

Businesses also access the accreditation structure covertly by capturing trade associations.<sup>98</sup> For example, in an effort to defeat the WHO's tobacco regulation efforts, multinational tobacco companies like Philip Morris and British American Tobacco transformed the International Tobacco Growers' Association (ITGA) "from an underfunded and disorganized group of tobacco farmers into a highly effective lobbying organization"<sup>99</sup> purporting to speak on behalf of developing-world tobacco farmers. The ITGA lobbied the FAO, World Bank, and United Nations Conference on Trade and Development "to oppose or undermine WHO tobacco control activities."<sup>100</sup>

### 3. *The Significance of Business Access*

The presence of businesses among the groups who gain access to officials and lawmakers through the access rules sharpens the critiques of the legitimacy pessimists. That business groups are accredited NGOs in this context entails that the persons NGOs represent are not just natural people but also juridical people—that is, business entities constituted by states. NGOs are not always even *purporting* to be representatives of the "global public"; rather, some overtly advance the interests of corporate constituencies.<sup>101</sup> Others do so non-transparently.<sup>102</sup> As the previous subsections clarified, trade and industry associations, organized as nonprofits, can and do make use of international accreditation re-

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96. *Id.* at 242 (citing Fairouz El Tom, *Diversity and Inclusion on NGO Boards: What the Stats Say*, *GUARDIAN* (May 7, 2013, 5:56 AM EDT), <http://www.theguardian.com/global-development-professionals-network/2013/apr/29/diversity-inclusion-ngo-board> [<http://perma.cc/M5VG-WY5K>]).

97. *Id.*

98. *Id.* at 206.

99. *Id.* at 240-41 (quoting COMM. OF EXPERTS ON TOBACCO INDUS. DOCUMENTS, WORLD HEALTH ORG., *TOBACCO COMPANY STRATEGIES TO UNDERMINE TOBACCO CONTROL ACTIVITIES AT THE WORLD HEALTH ORGANIZATION* 47 (2000) [hereinafter *TOBACCO COMPANY STRATEGIES*], [http://www.who.int/tobacco/en/who\\_inquiry.pdf](http://www.who.int/tobacco/en/who_inquiry.pdf) [<http://perma.cc/9WKS-5N3X>]).

100. *Id.* at 241 (quoting *TOBACCO COMPANY STRATEGIES*, *supra* note 99, at 48).

101. See *supra* notes 92-94 and accompanying text (offering profit-oriented mission statements for a number of organizations with consultative status).

102. See *supra* Section II.A.2 (reviewing business methods to create or make use of apparently public-interest NGOs to gain access to international organizations through consultative status).

gimes to advocate for their corporate interests in international laws and policies.<sup>103</sup> Both kinds of group—public-interest and private-sector—can play the same two-level game, lobbying domestically and internationally to advance their preferred legal rules.<sup>104</sup>

#### 4. *The Poverty of Access*

Strong legitimacy optimism overstates the quality and quantity of access consultant groups receive. Strong legitimacy optimism imagines a “participatory revolution,”<sup>105</sup> and a quantum of input by NGOs akin to representative voting.<sup>106</sup> Moderate legitimacy optimism also envisions robust contributions to lawmaking, capable of improving the input and output legitimacy of the ultimate rule.<sup>107</sup> But, in many cases, the quantity of access nonstate actors enjoy, and the amount of influence they wield, are much more impoverished than these theories suggest. In particular, participatory rights are limited, NGOs are not always allowed the full measure of access rights they are due,<sup>108</sup> and formal consultative rights can provide minimal influence over the lawmaking process.<sup>109</sup>

What kinds of access and influence do the consultation rules afford? Formally three kinds: information rights, such as the capacity to receive press releases; rights to make written and—at times—oral comments; and opportunities to lobby informally by accessing UN facilities and places where lawmakers and

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103. See *supra* Sections II.A.1, II.A.2 (reviewing the lobbying aims of associations that have received accreditation at ECOSOC).

104. See generally Putnam, *supra* note 6 (theorizing that the negotiating behavior of national leaders reflects the dual and simultaneous pressures of international and domestic political games).

105. Raustiala, *supra* note 22, at 537; see also Steven Bernstein, *Legitimacy in Global Environmental Governance*, 1 J. INT’L L. & INT’L REL. 139, 148 (2005) (noting the increased participation of NGOs in international environmental organizations).

106. See discussion *supra* Section I.B.1.

107. See discussion *supra* Section I.B.1.

108. See Emanuele Rebasti, *Beyond Consultative Status: Which Legal Framework for Enhanced Interaction Between NGOs and Intergovernmental Organizations?*, in *NGOS IN INTERNATIONAL LAW: EFFICIENCY IN FLEXIBILITY?* 21, 32 (Pierre-Marie Dupuy & Luisa Vierucci eds., 2008).

109. See *Inventory*, *supra* note 83; see also Lars H. Gulbrandsen & Steinar Andresen, *NGO Influence in the Implementation of the Kyoto Protocol: Compliance, Flexibility Mechanisms, and Sinks*, 4 GLOBAL ENVTL. POL. 54, 59 (2004) (noting that many of the final negotiations in treaty conference delegations are conducted behind closed doors, shutting out accredited NGOs).

officials gather.<sup>110</sup> But in surveys of NGO perceptions about the significance of their own access, NGOs have said that formal conferral of these rights is not a sufficient means of facilitating their “participation” in international lawmaking and governance.<sup>111</sup>

One problem is that the “patterns of interaction” with international organizations “depart[] significantly from the one embodied in” the formal consultative relationship.<sup>112</sup> Rather than facilitating increased “participation,” NGOs object that their interaction with lawmakers can be almost purely informal, with the most significant feature of consultative status being the right to an access badge giving them access to “corridors, cafeteria and other sites at various UN headquarters.”<sup>113</sup> When it comes to large international treaty conferences where NGOs show up in droves, groups can fare even worse. They are often relegated to a large conference facility separate from the main negotiations and have little effect on that process.<sup>114</sup> Instead, much of the NGO influence takes place at the domestic or transnational level prior to the negotiations, as NGOs lobby national delegates to persuade them to adopt particular negotiating positions.<sup>115</sup>

The poverty of the access rules is again clarified by a focus on business contributions. Offering trade and industry groups opportunities to submit substantive input during a rulemaking process can enhance the credibility of the ultimate rule among that group’s constituents. Soliciting views can help build support for the rule among national governments, which may otherwise be subject to lobbying efforts at the national level by disaffected private-sector groups.<sup>116</sup> Finally, allowing private groups access to the rulemaking process potentially can enhance transparency by allowing those groups to disseminate information about that lawmaking process to their members. For example, a private-sector association

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110. See Economic and Social Council Res. 1996/31, *supra* note 3 (outlining scope of consultation opportunities at ECOSOC). See generally PETER WILLETTS, NON-GOVERNMENTAL ORGANIZATIONS IN WORLD POLITICS: THE CONSTRUCTION OF GLOBAL GOVERNANCE 32-63 (2011) (reviewing different NGO modes of access to global policy-makers).

111. See Rebasti, *supra* note 108, at 31.

112. *Id.*

113. *Id.* at 32.

114. See *Inventory*, *supra* note 83; see also Gulbrandsen & Andresen, *supra* note 109, at 59 & n.13 (noting that NGOs had to rely mostly on “corridor politics” and “distribution of documents during session breaks,” and referencing NGO-sponsored “side events”). See generally Rebasti, *supra* note 111, at 31-37 (reviewing additional ways that the consultation rules inadequately facilitate NGO participation).

115. See WILLETTS, *supra* note 110, at 154-61.

116. Durkee, *supra* note 63, at 78-81.

was instrumental in developing the Cape Town Convention on International Interests in Mobile Equipment, a treaty that standardizes financing for aircraft and other mobile equipment and has been hailed as perhaps “the most significant piece of private international law in recent history.”<sup>117</sup> In particular, the Aviation Working Group, an association formed by market titans Airbus Industrie and the Boeing Company, 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 states best practices for implementation.<sup>118</sup>

There is also established evidence that private-sector groups can enhance the quality of information available to international organization decisionmakers, at least in some contexts. Private-sector associations can 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, “[t]he Aviation Working Group assembled a series of detailed drafts . . . which included extremely technical definitions of aircraft and aircraft engines” — information that would have only been available to industry insiders.<sup>119</sup> They also “proposed useful default remedies and priority rules, and designed the international [online] registry” to record priority of interests.<sup>120</sup> 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>121</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.<sup>122</sup> In short, commentators conclude that this private-sector association participation was “critically important,”<sup>123</sup> and of “inestimable value” to the ultimate success of the treaty.<sup>124</sup>

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117. Sandeep Gopalan, *Harmonization of Commercial Law: Lessons from the Cape Town Convention on International Interests in Mobile Equipment*, 9 LAW & BUS. REV. AM. 255, 255 (2003).

118. See Melissa J. Durkee, *The Business of Treaties*, 63 UCLA L. REV. 264, 294-96 (2016).

119. *Id.* at 295.

120. *Id.*

121. *Id.*

122. *Id.* at 295-96.

123. Roy Goode, *From Acorn to Oak Tree: The Development of the Cape Town Convention and Protocols*, 17 UNIFORM L. REV. 599, 606 (2012).

124. *Id.* at 603.



Accruing all of these benefits requires meaningful access to lawmakers, rather than a consultation structure that facilitates a “medieval fair” sideshow purporting to be a participatory structure.<sup>125</sup> Kenneth Abbott and David Gartner compare the consultation rules to what they see as truly participatory multistakeholder structures adopted by “a new generation of global health institutions.”<sup>126</sup> Those structures—such as the GAVI Alliance and the Global Fund to Fight AIDS, Tuberculosis and Malaria (Global Fund)—“incorporat[e] civil society representatives and other non-state actors directly into formal decision-making bodies.”<sup>127</sup> These actors, including “[NGOs], the private sector, private foundations, and other constituencies within civil society,” have seats on the board and full voting capacity in the new institutions.<sup>128</sup> Abbott and Gartner characterize this structure as “direct participation” and contrast it with “mere consultative process,” arguing that the former has a number of important advantages, including improving input and output legitimacy, enhancing the effectiveness of these institutions, and grooming civil society leadership.<sup>129</sup> They also recognize particular difficulties that could inhere to these multistakeholder structures, such as inefficiency, but note that these problems have not arisen in the context of the innovative public health structures on which their study focuses.<sup>130</sup>

While strong legitimacy optimism imagines global publics voting through representative NGOs, the consultation structure offers something closer to unstructured lobbying access to those able to take advantage of it. The contrast between these forms of access and those of next generation multistakeholder institutions demonstrates the limitations of the former.

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To summarize the insights of this Section, strong legitimacy optimism does not accurately characterize either the diversity of actors who obtain access to international organizations or the quantum of access those nonstate participants receive. The presence of business groups—acting in both overt and covert ways—clarifies these descriptive failures. The suggestion is nuanced: while business input can be useful to the legitimacy and effectiveness of international organizations and the rules they produce, that input contributes to the input and output legitimacy that *moderate* legitimacy optimists study. Its presence challenges the democratic assumptions of strong legitimacy optimism.

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125. *Inventory*, *supra* note 83 (internal quotation marks omitted).

126. Abbott & Gartner, *supra* note 10, at 3–4.

127. *Id.* at 3.

128. *Id.* at 4.

129. *Id.* at 4, 5, 25–34.

130. *Id.* at 25.

### *B. Practical Faults: Persistent Regulatory Defects*

These failures of description correlate with failures in regulatory practice. To summarize these regulatory failings – most of which have been previewed in the prior discussion – the current system suffers from problems related to transparency, access, gatekeeping, administrability, and legitimacy.

*Transparency.* The fact that the consultancy rules exclude for-profit entities has resulted in the astroturf activism phenomenon, whereby businesses create or co-opt nonprofit groups to serve as front groups to promote their causes within international organizations.<sup>131</sup> This creates a transparency problem, as the actors driving the agendas of various organizations are obscured.

*Access.* The rules also create an access problem, as for-profit actors cannot consult directly but must aggregate their views through trade associations, create astroturf NGOs, or co-opt existing groups to communicate on their behalves.<sup>132</sup>

*Gatekeeping.* The gatekeeping system is overburdened with the task of evaluating the suitability of numerous organizations for admission to the consultancy according to a complex set of rules that includes evaluations of NGOs' internal governance structures, accountability to memberships, nonprofit registration status, constitutional structure, and other factors.<sup>133</sup> As a result, the gatekeepers enforce the rules idiosyncratically, occasionally allowing access to entities that should clearly be excluded (such as for-profit entities), barring access to others for purely political reasons, and floundering under a persistent backlog.<sup>134</sup>

*Effectiveness.* The consultation regime faces criticisms that the sheer number of associations that are admitted results in a “medieval fair” sort of sideshow that does not amount to meaningful consultation with international officials.<sup>135</sup> Sometimes, as a result, accredited associations are not granted the forms of access to officials they believe they are formally due.<sup>136</sup>

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131. See Durkee, *supra* note 14, at 229-44; cf. MACDONALD, *supra* note 57, at 2 (noting that “corporations have attempted to enhance their perceived public legitimacy by establishing ‘partnerships’ or ‘stakeholder dialogues’ with NGOs”).

132. See Durkee, *supra* note 14, at 229-44.

133. See *id.* at 247, 256-57.

134. See *id.* at 256-57; see also Rebasti, *supra* note 111, at 29-30 (noting gatekeeping problems, such as when the 19-member committee charged with considering NGO applications to ECOSOC often “appeared to be led more by political than by technical considerations”).

135. *Inventory*, *supra* note 83 (internal quotation marks omitted).

136. See Rebasti, *supra* note 111, at 31-33 (noting a number of instances in which NGOs complained that their access had been curbed).

*Legitimacy.* The transparency, gatekeeping, and effectiveness problems lead to legitimacy problems, as the system fails to deliver diverse perspectives and meaningful engagement with nonstate actors.<sup>137</sup> Moreover, in some circumstances, nonstate actors can have too much influence, even undue influence.<sup>138</sup> Some nonstate actors use their access privileges to dominate the conversation in a way that may harm the perceived legitimacy of a final product.<sup>139</sup>

### C. *Why the Critique Matters*

A business presence among those groups obtaining access to international organizations complicates conventional accounts of the purpose and effects of that access system, as we have seen. Identifying that site of business influence also contributes to literatures on business roles in international governance, offers a new way of thinking about reforms to the access structures, and has the potential to curb the development of a customary international legal rule that confers greater international legal status to corporate entities.

#### 1. *Highlights an Underappreciated Site of Business Influence*

This account contributes to literatures that analyze business roles in international lawmaking but have not yet focused on the consultation structures. That literature has focused on rich description, ferreting out private-sector roles in international rulemaking using a variety of theoretical lenses.

Liberal theory focuses on business as one of the interest groups that shape nation-state preferences at the international level through domestic lobbying.<sup>140</sup>

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137. See *Cardoso Report*, *supra* note 4, at 16, 25 (proposing to “bring[] people from diverse backgrounds together to identify possible policy breakthroughs on emerging global priorities,” and noting the growing influence of nonstate actors in multiconstituency partnerships); see also Rebasti, *supra* note 111, at 33 (noting that, in practice, the consultation system “risks working to the disadvantage of the smallest, less resourced and less networked organizations and thus, in general, of southern-based NGOs”).

138. See Durkee, *supra* note 14, at 229-44.

139. See Kelly, *supra* note 16.

140. See, e.g., Moravcsik, *supra* note 10 (elaborating liberal theory in international relations and explaining that domestic constituencies construct state interests).

Interest group lobbying might aim to secure domestic compliance with international legal rules,<sup>141</sup> for example, or to harmonize rules in the various jurisdictions in which a business entity operates.<sup>142</sup> Liberal theory has also inspired network theories which sometimes recognize the significance of nonstate actor networks operating transnationally to shape international law and policy.<sup>143</sup>

The global administrative law project has focused particular attention on rulemaking<sup>144</sup> through private or hybrid organizations like, for example, the International Standards Organization (ISO), which harmonizes product and process rules; the Fair Labor Association which sets standards for sports apparel; and the Internet Corporation for Assigned Names and Numbers (ICANN), a once-private body that has come to include governmental representatives as well.<sup>145</sup> This literature observes that business entities self-regulate by engaging in regulatory arbitrage, by setting up governance regimes in underregulated spaces such as their own supply chains;<sup>146</sup> by developing practices that develop over time into “law that is just as real . . . [as] treaties”;<sup>147</sup> or by creating private standards that are later codified in treaty law.<sup>148</sup>

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141. See Brewster, *supra* note 8; see also Benvenisti, *supra* note 8, at 170-84 (conceiving of the sovereign state as an agent of small interest groups).

142. See Shaffer, *supra* note 11, at 173.

143. See, e.g., SLAUGHTER, *supra* note 10 (conceptualizing this activity as transgovernmental networks).

144. See Kingsbury et al., *supra* note 10, at 18, 22-23; see also Karsten Nowrot, *Transnational Corporations as Steering Subjects in International Economic Law: Two Competing Visions of the Future?*, 18 IND. J. GLOBAL LEGAL STUD. 803, 803 (2011) (asserting that transnational corporations are “political actors who are increasingly involved in the progressive development and enforcement of the regulatory structures of the international economic system,” specifically the World Trade Organization and foreign investment regime).

145. Kingsbury et al., *supra* note 10, at 22-23.

146. *Id.*; see also Larry Catá Backer, *Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board, and the Global Governance Order*, 18 IND. J. GLOBAL LEGAL STUD. 751, 762-72 (2011) (noting that businesses self-regulate through regulatory arbitrage, and also self-regulate by creating rules for their supply chains); Kishanthi Parella, *Outsourcing Corporate Accountability*, 89 WASH. L. REV. 747, 753-56 (2014) (noting that corporations are increasingly responsible for regulating throughout their “global value chains”).

147. Janet Koven Levit, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT’L L. 125, 126 (2005).

148. See, e.g., Wagner, *supra* note 12, at 56-61 (describing the mechanism whereby the WTO Agreement on Sanitary and Phytosanitary Measures incorporates privately elaborated standards).

Global legal pluralism and related accounts also focus on privately created legal rules.<sup>149</sup> For example, the new “*lex mercatoria*” is a global commercial law shaped by nonstate actors and sometimes adopted into formal law by states or international organizations.<sup>150</sup> Businesses self-regulate through private codes of conduct or trade association standards; sometimes these rules compete with, prevent, or are absorbed by publicly created law.<sup>151</sup> While the global legal pluralist account focuses on much of the same phenomena studied by global administrative law, the two accounts differ in approach. Global administrative law considers how the multiplicity of participants in international legal process can be conceptualized as players in an administrative process, and how administrative law safeguards like transparency, participation, review, and reason-giving can enhance the legitimacy of that process. Global legal pluralism, by contrast, focuses on the hybrid, pluralist, and cosmopolitan nature of these overlapping public and private regimes and suggests tools like conflict-of-law rules to mediate conflicts.

As for the topic of this Article’s analysis – business access to international organizations – there are some excellent topical accounts on which this analysis builds. For example, there is a literature on “business and industry” NGOs, or “BINGOs,”<sup>152</sup> in the environmental arena, and especially with respect to climate

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149. See BERMAN, *supra* note 10, at 41–44 (discussing areas in which state and nonstate norms come into conflict).

150. See, e.g., Ralf Michaels, *The True Lex Mercatoria: Law Beyond the State*, 14 IND. J. GLOBAL LEGAL STUD. 447, 447 (2007) (asserting that the new *lex mercatoria* “freely combines elements from national and non-national law”).

151. See Abbott & Snidal, *supra* note 10 (outlining the relationships among private actors, inter-governmental organizations, and states and mapping them into a “governance triangle”).

152. See, e.g., Asher Alkoby, *Global Networks and International Environmental Lawmaking: A Discourse Approach*, 8 CHI. J. INT’L L. 377, 378 (2008) (using the term “BINGO” to refer to “business and industry nongovernmental organizations”); Chiara Giorgetti, *From Rio to Kyoto: A Study of the Involvement of Non-Governmental Organizations in the Negotiations on Climate Change*, 7 N.Y.U. ENVTL. L.J. 201, 220 (1999) (noting that business NGOs were active lobbyists at a number of different climate change treaty negotiations).

change.<sup>153</sup> In addition, recent accounts by Susan Block-Lieb and Claire Kelly focus on industry and trade association participation at UNCITRAL.<sup>154</sup> Other scholars focus on business involvement in the new multistakeholder governance structures.<sup>155</sup> Thus, this account contributes to a growing literature on business participation in various lawmaking and governance projects,<sup>156</sup> highlighting an important and understudied phenomenon in that realm.

## 2. *Confronts a Reform Standstill*

The access structure rules that flow from the strong legitimacy optimist frame have produced an array of regulatory failings. Proposed reforms that operate within this set of theoretical assumptions have not responded meaningfully to those failures. Eschewing that conventional theory could create opportunities for new regulatory solutions.

In particular, reform attempts have not been promising. Many of the reforms proposed in the Cardoso Report, prepared in 2004 after a high-level study of the ECOSOC consultation rules, were never adopted.<sup>157</sup> Some international environmental organizations, once celebrated as examples of the success of consultation structures, have pulled back on allowing access to nonstate actors,<sup>158</sup> but these retractions are undertheorized. At UNCITRAL, France has lodged a series of complaints about the consultation structure without successfully obtaining any meaningful reform.<sup>159</sup> Recently the WHO successfully instituted a new “Framework of Engagement” for its interactions with nonstate actors.<sup>160</sup> But the

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153. This literature responds in part to the fact that the United Nations Framework Convention on Climate Change (UNFCCC) has developed a set of accreditation rules that “differentiates between research and independent NGOs (‘RINGOs’), business and industry NGOs (‘BINGOs’), environmental NGOs (‘ENGOS’), local NGOs, indigenous peoples organizations (‘IPOS’), local government and municipal authorities (‘LGMAs’), islanders, trade unions, and faith-based groups.” Stephen Tully, *Commercial Contributions to the Climate Change Regime: Who’s Regulating Whom?*, 5 SUSTAINABLE DEV. L. & POL’Y 14, 16 (2005). Thus, in the environmental treaty literature, “BINGO” is a familiar term.

154. See SUSAN BLOCK-LIEB & TERENCE C. HALLIDAY, *GLOBAL LAWMAKERS: INTERNATIONAL ORGANIZATIONS IN THE CRAFTING OF WORLD MARKETS* (2017); Kelly, *supra* note 16.

155. See, e.g., Abbott & Gartner, *supra* note 10.

156. In a previous work, I began this project by looking at business participation through the accreditation structure at ECOSOC. Durkee, *supra* note 14.

157. See WILLETTTS, *supra* note 110, at 59.

158. See Abbott & Gartner, *supra* note 10, at 3.

159. See Kelly, *supra* note 16.

160. WHO, *Framework*, *supra* note 16.

framework institutes a patchwork of fixes that may not ultimately prove to be any more administrable than the current ECOSOC structure.

Focusing particularly on the proposed WHO reform, the WHO Framework erects a separate set of rules for “private-sector entities” and “international business associations” as distinct from “non-governmental organizations,” with additional safeguards in place for engagements with the private sector.<sup>161</sup> The Framework’s safeguards are meant to guard against “conflicts of interest” that might have negative impacts on “WHO’s integrity, independence, credibility and reputation; and public health mandate.”<sup>162</sup> In this manner, the WHO Framework responds to concerns about conflicts of interest that may arise when non-state actors, particularly those affiliated with economic, commercial, or financial interests, could unduly influence the WHO’s independence, objectivity, or professional judgment.<sup>163</sup>

But the Framework leaves to the WHO the task of discerning when an NGO is, or is unduly influenced by, a “private sector entity.”<sup>164</sup> What the reform misses 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.<sup>165</sup> 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 international law and policy.

Part of the reason for the lack of meaningful reforms to the ECOSOC and other standard access structures may simply be path dependence. There is nothing predetermined about the current access structure. Rather, the structure appears to be principally the result of historical accident—the fact that the League

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161. *Id.* at Annex, ¶¶ 9–10.

162. *Id.* at Annex, ¶ 7(a), (c).

163. *Id.* at Annex, ¶ 22.

164. *Id.* at Annex, ¶ 13.

165. This critique was originally developed in Durkee, *supra* note 85, at 124, and draws substantially on that account.

of Nations had a similar consultation practice – rather than principled theory.<sup>166</sup> This is because the original Article 71 structure did not offer any significant guidance for what form “consultation” was to take. Indeed, the legislative history of the UN Charter appears to suggest that Article 71 was developed with very little debate or discussion as a concession to the NGOs in San Francisco that pushed for the provision.<sup>167</sup> The spread of this same basic access structure throughout much of the UN system seems to be similarly undertheorized.<sup>168</sup>

Thus, efforts to explain the access rules and consultation practice through the conventional legitimacy optimist account are post-hoc rationalizations. They do not flow from the text, context, or intent of Article 71 of the UN Charter.<sup>169</sup> Nothing about the ECOSOC access structure, or the structures that follow it, are required by current international treaty law. Recognizing the shortcomings of the conventional frame offers the potential to break reform logjams by adopting another theory that might structure meaningful reforms.

### 3. *Implicates Expressive Rights of International Business*

Reforming private sector participation within the international access rules has the potential to curb the development of a customary international legal rule that would move business entities farther along the spectrum from “object” to “subject” status under international law. That is, a reform could prevent the development of an international legal rule that grants additional legal standing under international law to business entities. For shorthand, the reader might analogize what is at stake here to the protection of certain legal personhood rights for businesses in *Citizens United* in the United States.<sup>170</sup> The argument is not immediately obvious, but it has significant implications.

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166. Charnovitz, *supra* note 22, at 258 (explaining that Article 71 served to “codify the custom of NGO participation” that had existed in the League of Nations period prior to World War II).

167. *Id.* at 249–50.

168. See Charnovitz, *supra* note 13, at 358 (“Even though Article 71 refers only to ECOSOC, a consultative role for NGOs gradually became an established practice throughout the UN system.”); see also Abbott & Gartner, *supra* note 10, at 4 (discussing the spread of the Article 71 access structure); Durkee, *supra* note 14, at 223–34 (discussing the significance of Article 71).

169. See Vienna Convention on the Law of Treaties, arts. 31–32, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) (offering text, context, and intent as sources of authority for treaty interpretation).

170. *Citizens United v. FEC*, 558 U.S. 310, 340–41 (2010) (holding 5–4 that the First Amendment prohibits the government from restricting independent political expenditures by corporate entities).



In addition to the debate about whether or not NGOs contribute to the legitimacy or democratic accountability of international organizations, a second question has attracted a fair amount of attention. That is, have nonstate actors obtained *rights* to consult with nonstate organizations? And do international organizations have a *duty* to receive international consultation?<sup>171</sup> The majority position maintains that NGOs have no consultation rights or special status as subjects of international law.<sup>172</sup> A minority position, however, maintains that NGOs *do* have a right to consult, or that international organizations have a duty to receive NGO consultation.<sup>173</sup>

The minority argument is as follows: International customary law is developed through the consistent practice of states, accompanied by a sense of legal obligation to maintain that practice.<sup>174</sup> International organizations operate under authority delegated from states and so have some degree of delegated law-making authority.<sup>175</sup> Because a variety of international institutions have maintained the practice of offering consultation rights to NGOs over the past century, and because there is some evidence that these institutions believe these consultation structures to be obligatory, international customary law may be currently evolving to require that international organizations continue to offer those access rights.<sup>176</sup>

This unresolved debate raises the stakes for anyone seeking to design or reform international consultation rules. If these regulatory practices can harden over time to become binding law that governs international organizations and the nation-state delegates that operate within them—law from which those actors cannot legally deviate—then the features of those regulatory practices take on an added significance.<sup>177</sup> Lawmakers should take care to ensure that they

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171. See Charnovitz, *supra* note 58, at 909 (suggesting that “state practice is moving toward a duty to consult NGOs in the activities of [international organizations]”).

172. See *id.*

173. See *id.*

174. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (AM. LAW INST. 1987) (defining international custom as “a general and consistent practice of states followed by them from a sense of legal obligation”).

175. See ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS, *supra* note 10, at 15 (international organizations “are institutions of limited and delegated powers”); *id.* at 17–45 (exploring theories that interrogate, inter alia, the nature and scope of these delegated powers); cf. ALVAREZ, THE IMPACT OF INTERNATIONAL ORGANIZATIONS ON INTERNATIONAL LAW, *supra* note 10, at 18–45 (challenging the positivist conception that the activity of international organizations is limited to explicit delegations of authority from states).

176. See Charnovitz, *supra* note 58, at 909.

177. Even if access rules diverge to some extent across international organizations, common features of those rules could conceivably become binding law.

maintain access rules and practices that best serve desired institutional and public goods.

That significance is particularly acute in the case of business entities. If NGOs have acquired, or are in the midst of acquiring, access rights to international institutions, then these rights must extend equally to trade and industry associations. This is because customary international law rules are based on practice, and there is no practice-based distinction between public-interest associations and profit-promoting trade and industry associations.<sup>178</sup> To the extent that international organizations hold a duty to consult with NGOs, the same principles apply to both kinds of associations, and international organizations can make no meaningful distinction between kinds of entity. The current practice would appear to pave the way for a set of legally mandated access rights for profit-promoting associations, much in the same way as business entities in the United States have constitutionally protected speech rights.<sup>179</sup>

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This Part has attempted to show that strong legitimacy optimism – which imagines the international access rules as producing a “global people-power”<sup>180</sup> that confers excess legitimacy on international organizations – fails as an explanatory theory. Among other shortcomings, it has not grappled with the reality and significance of the global business lobby. Moreover, strong legitimacy optimism has been unsuccessful as a normative principle, producing unadministrable rules that underregulate, overregulate, or arbitrarily regulate access.

At the same time, existing literature on business contributions to lawmaking has engaged in investigative description, seeking to ferret out businesses’ lawmaking methods and motivations. However, the literature has underexplored a traditional form of business activity (lobbying) taking place in a non-traditional place (international institutions). Thus, literatures regarding corporate accountability, social responsibility, undue influence, and lobbying have not yet addressed the international access rules. Those access rules have suffered as a result

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178. See discussion *supra* Section II.A.1.

179. See *Citizens United v. FEC*, 558 U.S. 310, 339–40 (2010) (holding that the First Amendment confers on corporations the right to express themselves by unlimited spending on political speech).

180. Press Release, Secretary-General, Partnership with Civil Society Necessity in Addressing Global Agenda, Says Secretary-General in Wellington, New Zealand Remarks, U.N. Press Release SG/SM/7318 (Feb. 29, 2000) (remarks by Secretary-General Kofi Annan), <http://www.un.org/press/en/2000/20000229.sgsm7318.doc.html> [<http://perma.cc/Q4TY-WSWS>].

of the blind spot at the intersection of these two literatures. They are now characterized by problems relating to access, transparency, administrability, gate-keeping, and legitimacy.

Moderate legitimacy optimism holds more promise as both an explanatory and a normative theory. After all, even if strong legitimacy optimism is susceptible to the criticisms of this Part, the Article embraces the idea that access and participation in rulemaking by nonstate actors can contribute to the legitimacy or effectiveness of an organization's ultimate rules. However, moderate legitimacy optimism likely overstates the legitimacy effects of the current access rules and suffers from indeterminacy as a principle of reform. The challenge is to build reforms on accurate facts and to transform an indeterminate theory into a functional guide for action. How exactly should access to international organizations be regulated? This is the task of the next Part.

### III. A THEORY OF INTERNATIONAL LOBBYING LAW

The international access rules should be understood as a body of lobbying law. The frame offers both a new analytical framework and positive law payoffs. Descriptively, it more accurately describes the *access* to international officials that these rules provide and the *actors* to which these rules offer access. Conceiving of the accreditation rules as lobbying rules focuses regulators on the salient *features* of these rules and identifies a useful set of regulatory tools. These tools are imported from U.S. domestic law lobbying strategies, international guidelines, and the experience of other jurisdictions like the EU. They particularly focus on registration and disclosure.

The lobbying model responds to pressures on the international access system described in the prior Part and evidenced by the variety of reform proposals at ECOSOC, the WHO, and UNCITRAL.<sup>181</sup> It also shows the limits of current opportunities for nonstate input in lawmaking, thereby clearing the way for reforms that would offer more robust kinds of participation, such as incorporating nonstate actors as full voting members of multistakeholder organizations. Thus, reframing the access rules – or “consultation” structure in the ECOSOC nomenclature – as international lobbying law cuts through stagnant conversations about legitimacy to better explain the function of the current access rules and update outdated, path-dependant structures to meet the demands of twenty-first century facts.

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181. See *supra* note 16 and accompanying text.

### A. *The Lobbying Framework Offers a Helpful Descriptive Analogy*

Describing the international access rules as a body of international lobbying law offers a more faithful characterization of the facts than descriptions that paint these rules as a nonstate actor “consultation” regime, or a structure that invites nonstate actor participation in governance. As foreshadowed in Section II.A., the lobbying framework more accurately describes the limited access to international officials that these rules provide. This is not a voting structure, where accreditation would offer nonstate actors full participation in the lawmaking process. Rather, it offers them many informal points of access to lawmakers through UN grounds passes as well as opportunities to submit written comments and, at times, to raise agenda items or make statements from the floor.<sup>182</sup> Nonstate actors themselves claim that the most important feature of the consultation rules is the “informal dimension,” or access to “corridors, cafeteria and other sites,” where they may lobby governmental delegations and other officials.<sup>183</sup> In short, the access opportunities principally include access for purposes of informal lobbying, and groups can make of this what they will.<sup>184</sup>

The lobbying frame also more accurately describes the kinds of actors that are granted access. These actors are not *only* representatives of public interest groups who are working to advance a concept of the public good.<sup>185</sup> Rather, they are also private sector groups like trade and industry associations whose traditional purposes include lobbying domestic lawmakers.<sup>186</sup> In addition, as the legitimacy pessimists have long asserted, the actors with access often inadequately

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182. See Economic and Social Council Res. 1996/31, *supra* note 3 (outlining the scope of consultation opportunities at ECOSOC). See generally WILLETTS, *supra* note 110, at 32-63 (outlining different NGO modes of access to global policy makers).

183. Rebasti, *supra* note 111, at 32 (noting also that “[t]he gap between the actual means of action (lobbying) and the legal framework of the NGO-IGO [international governmental organization] relationship is made clear by the cases in which, despite the formal respect for their legal status, advocacy NGOs are prevented from having direct access to governmental delegations,” which NGOs see as “crucial to the advocacy role”).

184. See WILLETTS, *supra* note 110, at 61-63.

185. Cf. Anderson, *supra* note 50, at 32 (noting that the established assumption that NGOs advance “leftwing” values is undermined by growing international prominence of industry groups like the National Rifle Association).

186. See Sarah Dadush, Industry Associations, Governance & Chocolate 1 (Feb. 1, 2017) (unpublished manuscript) (on file with author) (“The most common stories about industry associations and governance focus on domestic regulatory capture.”); see also *supra* Sections II.A.1, II.A.2 (reviewing the lobbying aims of associations that have received accreditation at ECOSOC).

represent the persons or interests they purport to promote,<sup>187</sup> and some are influenced, or covertly co-opted, by other interest groups.<sup>188</sup>

Moreover, to eschew the lobbying framework and embrace strong legitimacy optimism introduces a potentially unintended consequence, as described in Section II.C.3. That is, to imagine that nonstate actors are conferring democratic legitimacy through the consultation system by representing the interests of a broader civilian constituency is to recognize private sector groups as relevant civilian constituencies.<sup>189</sup> Because status follows practice in international law, those private sector groups necessarily take their place among the “global publics” entitled to access to international officials.<sup>190</sup> Thus, description matters: the strong legitimacy optimist account potentially extends expressive rights to international business, while the lobbying frame does not.<sup>191</sup>

Finally, consider another potential analogy for nonstate actor access to international lawmakers: the notice-and-comment procedure in U.S. administrative law under the Administrative Procedure Act (APA). Of these two regulatory analogies, lobbying better captures the freer-form features of the nonstate actor access structure. In a notice-and-comment procedure, actors offer comments within a structured process and then regulators are required to respond. In the international access structures, nonstate actors have opportunities to make comments, but also to lobby on a more informal basis, and there is no response requirement. Granted, contemporary administrative legal scholarship notes that a great deal of informal lobbying behavior also takes place outside of the formalized notice-and-comment process.<sup>192</sup> However, the notice-and-comment procedure still reflects top-down attempts by administrative agencies to promulgate

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187. See Anderson, *supra* note 13, at 873-77 & n.98 (noting that after the so-called Battle in Seattle protests against the World Trade Organization in 1999, UN officials began to appreciate the fact that NGOs' interests do not always align with UN interests; they then began to adopt critiques of NGO representativeness and discovered that some NGOs were simply “three people and a fax” (quoting Justin Marozzi, *Whose World Is It, Anyway?*, SPECTATOR (Aug. 5, 2000), at 15, who interviewed Fareed Zakaria, then Managing Editor of *Foreign Affairs*)).

188. See Durkee, *supra* note 14, at 238-43.

189. See *supra* Section II.C.3 for a more complete analysis of this point.

190. Press Release, *supra* note 180.

191. See *supra* Section II.C.3.

192. Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 102 (2011) (“[I]n practice, notice-and-comment rulemaking may only be the tip of the iceberg in providing avenues for interest groups to inform agencies' rulemaking projects.”). See generally William F. West, *Inside the Black Box: The Development of Proposed Rules and the Limits of Procedural Controls*, 41 ADMIN. & SOC'Y 576 (2009) (studying “prenotice participation” — which takes place before the official notice-and-comment period — by business and other interest groups).

particular rules, while the lobbying analogy captures the open-textured nature of relationships between lobbying groups and law- and policy-makers, to the point where outside groups may even – at times – drive the agenda of the organization they lobby. Moreover, a lobbying frame focuses reformers on salient features of the access structures, as follows.

### *B. The Lobbying Framework Invites Meaningful Reforms*

In offering a helpful descriptive analogy, the lobbying framework also lays groundwork for meaningful reforms.

The lobbying framework helps vindicate the agenda of the moderate legitimacy optimists, who argue that input by outside groups has a number of substance and process benefits and can often be quite helpful to lawmaking projects.<sup>193</sup> The lobbying frame does not suggest that those contributions by outside actors should be eliminated, but that existing theory and practice is mismatched: *access* to officials and lawmakers through the accreditation regimes is mistaken for *participation* in the work of international organizations, with corresponding legitimating and democratizing benefits. Moreover, this participation is imagined to principally involve public interest organizations, rather than paid lobbyists. Both of these flawed premises lead to flawed regulations that both over- and under-restrict access to nonstate actors. The regulations neither offer the meaningful quantum of participation that would allow nonstate actors to offer the substance and process goods the moderate legitimacy optimists imagine, nor do they adequately restrain against harms like undue influence and capture.

Recognizing those flaws allows reformers to choose between two more reasonable options: regulating a pluralistic access regime like a lobbying regime, with regulation focusing on registration and disclosure; or creating multistakeholder structures that embrace more robust participation by nonstate actors.<sup>194</sup>

This argument builds on the work of those who advocate for enhanced multistakeholder structures,<sup>195</sup> observe the benefits of global legal pluralism, or seek greater opportunities for business participation in law production.<sup>196</sup> For exam-

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193. See, e.g., Durkee, *supra* note 118, at 291–97 (describing business roles in ensuring the success of the Cape Town Convention); Goode, *supra* note 123, at 606 (same); see also *supra* notes 10–11 and accompanying text (describing recent literature on the role of nonstate actors in the development of international law).

194. See, e.g., Abbott & Gartner, *supra* note 10, at 1–5, 25–35.

195. *Id.* at 4.

196. *Id.*

ple, Abbott and Gartner argue that nonstate actor participation in multistakeholder structures can contribute to an institution's credibility and ensure deliberative values like transparency, reason-giving, and consideration of a broader range of interests,<sup>197</sup> without sacrificing effective performance.<sup>198</sup>

By contrast, many of the current access structures, including the ECOSOC structure, do not allow outside actors to engage in robust multistakeholder participation in the production of law or policy. Rather, the access rules at ECOSOC and elsewhere maintain the primacy of states, preserving the classic hierarchy of state sovereignty and nonstate subordination. Characterizing these policies as lobbying rules clarifies that fundamental hierarchical relationship. The implications are instructive: if international officials and nation-state delegates seek to incorporate nonstate actor input in deeper ways, they must craft new regulatory structures to accomplish those goals. Otherwise, they can borrow from the toolbox of national-level lobbying regulations and guidelines to craft a more administrable international lobbying regime.

### *C. The Lobbying Framework Identifies Pertinent Regulatory Tools*

The lobbying framework identifies regulatory models for potential international reforms. In particular, model regulations offered by the Organisation for Economic Co-operation and Development (OECD) and watchdog groups, as well as lobbying regulations in the United States, focus on transparency and meaningful disclosure as the best regulatory response to lobbying activity. This discussion will begin with an examination of those models, and then turn to an explanation of some of the nuances and tensions in U.S. lobbying law that must be taken into account in any use of the U.S. model as a guiding frame.

#### *1. International Guidelines on Lobbying Regulation*

Guidelines issued by the OECD and democracy watchdog groups may serve as useful regulatory analogies for the international stage.

International guidelines have been developed out of a perception that lobbying is underregulated in national jurisdictions. According to a 2016 report by the Sunlight Foundation, a U.S. nonprofit focused on open government, only twenty countries other than the United States regulate lobbying.<sup>199</sup> For obvious

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197. *Id. passim*.

198. *Id.* at 32.

199. Libby Watson, *Influence Abroad: The State of Global Lobbying Disclosure*, SUNLIGHT FOUND. (Nov. 30, 2016, 3:34 PM), <http://sunlightfoundation.com/2016/11/30/influence-abroad-the>

reasons, this list skews toward democracies, and the list includes just a smattering of countries from each continent: the United Kingdom, Ireland, the Netherlands, France, Germany, Austria, Slovenia, Macedonia, Montenegro, Poland, Lithuania, Georgia, Israel, Canada, Mexico, Brazil, Chile, Peru, Australia, and Taiwan.<sup>200</sup> The European Union itself also regulates lobbying, although only a few of its constituent states have domestic lobbying regulations.<sup>201</sup> Remarkably, then, only ten percent of the world's countries regulate lobbying. A 2013 report by the OECD confirmed this dearth of lobbying regulation worldwide, stating that of the OECD's thirty-five mostly economically advanced member countries, only twelve had "approved legislation and government regulations" regarding lobbying as of 2013, and some of the countries appearing on that list required only voluntary reporting.<sup>202</sup>

Since national lobbying regulation on the whole appears to be underdeveloped, there is a push by the OECD and nonprofits like the Sunlight Foundation to encourage more countries to adopt robust lobbying regulations, especially because businesses now lobby transnationally. The OECD, for example, elaborated a set of guidelines recognizing that one of the obstacles that typically prevents countries from further regulating lobbying is the "complexity and sensitive nature" of lobbying regulations, and that most existing reforms have developed responsively, in the wake of political scandals.<sup>203</sup> At the same time, the OECD's surveys of both lobbyists and legislators in OECD member countries show that both parties prefer disclosures in order to "alleviate actual or perceived problems of inappropriate influence peddling by lobbyists."<sup>204</sup> To this end, "the OECD re-

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-state-of-global-lobbying-disclosure [<http://perma.cc/T44U-QNTS>]. The Sunlight Foundation, which bills itself as a nonpartisan nonprofit that advocates globally for open government, has undertaken extensive research on international lobbying laws. The group was founded by Michael Klein, a former partner at WilmerHale, and its advisory board includes Harvard's Lawrence Lessig and Yochai Benkler among others. *Board & Advisors*, SUNLIGHT FOUND. (2017), <http://sunlightfoundation.com/about/board> [<http://perma.cc/75GP-W8HN>]. The group also notably includes Wikipedia founder Jimmy Wales and Craig Newmark of Craigslist.

200. Watson, *supra* note 199.

201. *See id.*

202. *Transparency and Integrity in Lobbying*, ORG. FOR ECON. CO-OPERATION & DEV. 2 (2013), <http://www.oecd.org/corruption/ethics/Lobbying-Brochure.pdf> [<http://perma.cc/792P-NNSP>] (listing Australia, Canada, France, Germany, Hungary, Israel, Mexico, Poland, Slovenia, the United States, and, most recently, Austria and the Netherlands as the only countries with lobbying regulations).

203. *Id.*

204. *Id.*



viewed data and experiences of government regulation, legislation and self-regulation of lobbyists” as well as “comparative reviews, country case studies and an analytical framework endorsed by governments” in order to develop “10 Principles” of effective lobbying regulation, which it issued in 2009.<sup>205</sup>

According to the OECD’s findings, effective lobbying regulation includes (a) unambiguous definitions of lobbyists and lobbying activities; (b) required disclosure about the objectives, beneficiaries, funding sources, and targets of lobbying activity; (c) rules regarding use of confidential information, conflicts of interest, and revolving-door incentives; (d) monitoring and enforcement mechanisms; and (e) “a culture of integrity and transparency in daily practice through regular disclosure and auditing to ensure compliance.”<sup>206</sup>

The OECD emphasizes that public officials should benefit from the free flow of information and allow all stakeholders, from the private sector to the public at large, fair and equitable access.<sup>207</sup> It also presses for a clear definition of lobbying, and focuses on the importance of disclosures by lobbyists and a “publicly available register” where the public and all potential stakeholders (“including civil society organisations, businesses, the media and the general public”) can access lobbying disclosures and scrutinize lobbying activities.<sup>208</sup> Additionally, the OECD emphasizes the importance of clear behavioral standards for lobbyists and officials alike with respect to revolving-door opportunities and the use of confidential information.<sup>209</sup> The OECD does not offer a model law for lobbying regulation, but instead stresses the importance of home-grown legal solutions.

A group of civil society organizations including Transparency International and the Sunlight Foundation also put together their own guidelines for lobbying regulation in 2015, attempting to build on prior efforts by the OECD and existing regulations in national jurisdictions.<sup>210</sup> These guidelines closely align with the

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205. *Id.* at 1.

206. *Id.*

207. *Id.* at 3 (“Public officials should preserve the benefits of the free flow of information and facilitate public engagement.”).

208. *Id.* at 4.

209. *Id.* (“In particular, they should cast no doubt on their impartiality to promote the public interest, share only authorised information and not misuse ‘confidential information,’ disclose relevant private interests and avoid conflict of interest . . . . Countries should consider establishing restrictions for public officials leaving office . . .”).

210. *International Standards for Lobbying Regulation: Towards Greater Transparency, Integrity and Participation*, TRANSPARENCY INT’L 3 (2015), <http://lobbyingtransparency.net/lobbyingtransparency.pdf> [<http://perma.cc/54PY-SQU9>].

OECD recommendations in that they emphasize the transparency of the decision-making process through robust disclosure in a lobbying register,<sup>211</sup> public access to the information,<sup>212</sup> and adequate enforcement and sanctions.<sup>213</sup> Like the OECD effort, the civil society effort also focused on clear codes of conduct for lobbyists and public officials.<sup>214</sup> The civil society guidelines also recommended open access to officials in order to achieve more balanced representation by a diversity of interests.<sup>215</sup> However, the guidelines merely emphasized “open and fair access” and contained few concrete suggestions about how to achieve representational balance.<sup>216</sup> Finally, like the OECD effort, the civil society guidelines refrained from offering model regulations, ostensibly to encourage regulators to “address the particularities of the local context.”<sup>217</sup>

Thus, lobbying regulations are underdeveloped outside of the United States, and reform efforts seek to protect open access and promote transparency. However, reformers have stopped short of providing model regulations that could serve as reference points for international lobbying regulations.

## 2. *U.S. Lobbying Law*

U.S. lobbying regulations are significantly more robust than lobbying regulations in much of the rest of the world, and so may serve as the most meaningful regulatory framework to guide international reforms.<sup>218</sup> According to the Sunlight Foundation report, the U.S. stands out in that it clearly defines lobbyists and lobbying activity, requires extensive disclosures, and then publishes those disclosures “in a searchable, sortable, exportable database on the Senate’s website.”<sup>219</sup> By contrast, only fifteen other countries offer any online data about lobbying activity, and many fewer host a searchable database.<sup>220</sup> While the United Kingdom appears to have a rigorous lobbying disclosure regime, it defines lobbying so narrowly as to capture only a fraction of potential lobbying activity in

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211. *Id.* at 6.

212. *Id.* at 7.

213. *Id.* at 12.

214. *Id.* at 8.

215. *Id.* at 5.

216. *Id.* at 10.

217. *Id.* at 13.

218. This is the case even though lobbying activity has recently dramatically increased in countries such as England, Canada, and Australia. Cohen-Eliya & Hammer, *supra* note 71, at 268.

219. Watson, *supra* note 199.

220. *Id.* (noting that only six countries besides the United States host a searchable database).

those disclosures<sup>221</sup>—perhaps three percent.<sup>222</sup> Because of the comparative robustness of the U.S. model, the following discussion will examine the U.S. approach in some detail.

Regulatory tools used in the United States principally include sunlight rules requiring disclosures and registration.<sup>223</sup> The 1946 Federal Regulation of Lobbying Act initially “imposed registration requirements for those who lobbied Congress, as well as a requirement of quarterly reports of money spent and received for lobbying activities.”<sup>224</sup> Forty years later, Congress passed the U.S. Lobbying Disclosure Act (LDA),<sup>225</sup> which improved on the 1946 Act by expanding the scope of disclosure for lobbying activity, the list of who must register as a lobbyist, and what information must be disclosed.<sup>226</sup> Yet the LDA faced criticism for being inaccessible and indecipherable to average citizens.<sup>227</sup> Thus, Congress amended it in 2007 to further strengthen disclosure requirements and, significantly, to make data available for online searching.<sup>228</sup> Also in 2007, inspired by the Jack Abramoff scandal, Congress passed the Honest Leadership and Open Government Act (HLOGA),<sup>229</sup> which, among other things, “expanded disclosure of lobbying coalitions,” introduced “a new reporting system for lobbyist contributions and disbursements,” and “improved public access to information disclosed under the LDA.”<sup>230</sup>

In addition to the general registration and disclosure-based lobbying laws, the U.S. Congress has also sought to address undue influence and bribery. For

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221. *Id.*

222. *Id.*

223. In an article surveying the field just after the *Citizens United* decision, Richard Hasen compiled a useful history of lobbying regulation. Hasen, *supra* note 2, at 200-08. Hasen drew from William V. Luneburg et al.’s co-edited volume, *The Lobbying Manual*. See THE LOBBYING MANUAL, *supra* note 1.

224. Hasen, *supra* note 2, at 201.

225. Lobbying Disclosure Act of 1995, Pub. L. No. 104-65, 109 Stat. 691 (codified as amended at 2 U.S.C. §§ 1601-1614 (2012)); Hasen, *supra* note 2, at 201-02.

226. Hasen, *supra* note 2, at 202.

227. *Id.* (citing Anita S. Krishnakumar, *Towards a Madisonian, Interest-Group-Based, Approach to Lobbying Regulation*, 58 ALA. L. REV. 513, 520 (2007)).

228. *Id.* at 202-03.

229. Honest Leadership and Open Government Act of 2007 (HLOGA), Pub. L. No. 110-81, 121 Stat. 735 (codified in scattered sections of 2 and 18 U.S.C.).

230. Thomas M. Susman & William V. Luneburg, *History of Lobbying Disclosure Reform Proposals Since 1955*, in THE LOBBYING MANUAL, *supra* note 1, at 37.

example, the HLOGA attempted to reduce revolving-door pressures by extending the waiting period for senators to work as lobbyists,<sup>231</sup> “required reports on lobbyists’ ‘bundling’ of campaign contributions,” and “banned gifts from lobbyists to members of Congress and staffers.”<sup>232</sup> Finally, Congress sought to ensure that lobbyists do not receive extra federal subsidies for engaging in lobbying activity by denying business income tax deductions for lobbying expenses and limiting lobbying activity by 501(c)(3) organizations.<sup>233</sup>

Individual U.S. states have developed lobbying rules that share features with the federal system, though particular state rules vary widely.<sup>234</sup> States have employed strategies such as banning campaign contributions or fundraising activities, banning contingency fee lobbying, or imposing provisions to prohibit revolving-door incentives.<sup>235</sup> In addition, most states have lobbyist disclosure and registration requirements.<sup>236</sup>

While the basis for lobbying rights in the United States is contested,<sup>237</sup> the U.S. Supreme Court has addressed challenges to disclosure and tax laws with a First Amendment free speech analysis.<sup>238</sup> It upheld the 1946 Act on the ground that legislators should be able to properly evaluate the “myriad pressures to which they are regularly subjected.”<sup>239</sup> Thus, the Court “held that the state’s in-

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231. *Id.* at 205.

232. *Id.*

233. *Id.* at 203.

234. Trevor D. Dryer, *Gaining Access: A State Lobbying Case Study*, 23 J.L. & POL. 283, 285-86 (2007); *id.* at 293 n.28 (listing state lobbying laws).

235. See *id.* at 285-86, 293; *Ethics: Contingency Fees for Lobbyists*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/ethics/50-state-chart-contingency-fees.aspx> [http://perma.cc/P86Z-V94Q].

236. Andrew P. Thomas, *Easing the Pressure on Pressure Groups: Toward a Constitutional Right To Lobby*, 16 HARV. J.L. & PUB. POL’Y 149, 176 (1993) (“Forty-six states have mandated both registration and disclosure requirements for lobbyists, and one requires only registration.”).

237. There is a debate within the United States about whether there is a constitutional right to lobby, but courts and scholars mostly agree that such a right is guaranteed by the First Amendment’s Petition Clause. The Clause enshrines a citizen’s right to petition the government, and there is broad agreement that this extends to lobbying activity. This view, while embraced by courts, including the Supreme Court, is nevertheless contested. Recently, Maggie McKinley compiled a history of the Petition Clause in order to defend an argument that the Petition Clause protects a narrower set of activities than the “bundle” of practices regulated under federal lobbying laws. See McKinley, *supra* note 2.

238. Hasen, *supra* note 2, at 209-12.

239. *United States v. Harriss*, 347 U.S. 612, 625 (1954).

terest in providing information to legislators justified the disclosure requirements.”<sup>240</sup> The Supreme Court has also noted the need for public confidence in legislative integrity, noting that “[t]he activities of lobbyists who have direct access to elected representatives, if undisclosed, may well present the appearance of corruption.”<sup>241</sup> This latter justification accords with rationales offered by Congress in the legislative history of the LDA.<sup>242</sup>

The U.S. lobbying framework is subject to a number of critiques. One addresses the sufficiency of disclosure as a means of regulation, which requires sufficiently motivated watchdog groups to monitor the disclosures. Another notes the opaqueness of the lobbying process to outsiders.<sup>243</sup> Moshe Cohen-Eliya and Yoav Hammer suggest remedying transparency failures and reducing monitoring costs by drastically increasing required disclosures: for example by requiring lobbyists to publish online all written material transmitted to politicians and to list all areas of lobbying activity.<sup>244</sup> Others suggest that the principal problem is unevenness in the lobbying capabilities of private-sector and public-interest groups. Reformers have proposed public funding to subsidize “lobbyists that represent diffuse, non-corporate interests,”<sup>245</sup> as a means of “leveling up” or evening the playing field.<sup>246</sup> Maggie McKinley has proposed a reform of a First

240. Hasen, *supra* note 2, at 209.

241. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 356 n.20 (1995); *see also* *Citizens United v. FEC*, 558 U.S. 310, 369 (2010) (“[T]he Court has upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself.”).

242. The legislative history of the LDA focuses on “public awareness of lobbyist activities and public confidence,” Hasen, *supra* note 2, at 210, noting that “effective public disclosure of the identity and extent of the efforts of paid lobbyists to influence federal officials in the conduct of Government actions will increase public confidence in the integrity of Government,” *id.* (quoting 2 U.S.C. § 1601(3) (2012)). These disclosure procedures are thus drawn from similar rationales as offered in campaign finance disclosure cases, which rest on principles of anticorruption, appearance of corruption, and information interests. Elizabeth Garrett et al., *Constitutional Issues Raised by the Lobbying Disclosure Act*, in *THE LOBBYING MANUAL*, *supra* note 1, at 197, 201.

243. *See* McKinley, *supra* note 2.

244. Cohen-Eliya & Hammer, *supra* note 71, at 267.

245. Dorie Appollonio et al., *Access and Lobbying: Looking Beyond the Corruption Paradigm*, 36 *HASTINGS CONST. L.Q.* 13, 48 (2008); *see also* Heather Gerken, *Keynote Address: Lobbying as the New Campaign Finance*, 27 *GA. ST. U. L. REV.* 1155, 1165-67 (2011) (making a similar claim).

246. Gerken, *supra* note 245, at 1166, 1168; Gerken & Tausanovitch, *supra* note 2, at 86-90; Hasen, *supra* note 2, at 208 (referencing Gerken for the idea of “leveling up”); *see also* Heidi Li Feldman, *Toward an Ethics of Being Lobbied: Affirmative Obligations To Listen*, 12 *GEO. J.L. & PUB. POL’Y* 493, 493 (2014) (asserting the ethical principle that “those in political office have affirmative obligations to seek out and listen to the widest and most diverse possible range of people” affected by a given regulation).

Amendment Petition Clause practice that has now fallen into desuetude, consisting of clear rules and procedures by which members of the public can petition Congress.<sup>247</sup> This fix could entail something akin to a congressional Administrative Procedure Act<sup>248</sup> including “formal guidelines to make transparent and predictable the consideration [Congress] will afford” to petitions, and the requirement that all “lobbying” follow this formalized procedure.<sup>249</sup> McKinley claims this would “allow professionalization of the representatives who represent the public in the formal petition process,”<sup>250</sup> benefit those clients pursuing public interests, and reduce the current “vilifi[cation]” of professional lobbyists.<sup>251</sup> A number of scholars propose campaign finance reform to bolster current lobbying disclosure laws and curb potential undue influence. Reform proposals have suggested additional bans on lobbyist fundraising or contributions to congressional election campaigns to avoid quid pro quo or “pay to play” arrangements.<sup>252</sup> Finally, other reformers have targeted enforcement deficits. The Sunlight Foundation points to a large number of unregistered lobbyists and a lack of response by the Department of Justice.<sup>253</sup>

Thus, U.S. lobbying rules are susceptible to an array of critiques. However, there is nevertheless evidence that the United States’ basic registration-plus-disclosure model represents global best practice at this time. The OECD’s and the Sunlight Foundation’s recommendations advocate for this approach, and most jurisdictions surveyed in the Sunlight Foundation study follow at least some of its basic elements. For example, due to the absence of domestic lobbying regulations in EU member countries, the EU’s lobbying regulations took U.S. lobbying regulations as a guide. Over time, the EU lobbying framework has moved even closer to the U.S. approach by focusing particularly on transparency, open government, and accountability.<sup>254</sup> One commentator notes that the two regulatory

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247. McKinley, *supra* note 2, at 1199–1200.

248. *Id.* at 1199.

249. *Id.* at 1200.

250. *Id.* at 1201.

251. *Id.*

252. Hasen, *supra* note 2, at 208.

253. Watson, *supra* note 199 (observing that “there are thousands of people in D.C. who are paid to influence public policy, but don’t register as lobbyists”).

254. Liliana Mihut, *Lobbying in the United States and the European Union: New Developments in Lobbying Regulation*, 8 ROMANIAN J. EUR. AFF. 5, 14 (2008).

structures “have sprung from similar problems, and therefore have targeted similar goals, in a world where globalization has diffused lobbying practices.”<sup>255</sup> The European Commission’s specific strategy consists of a voluntary register for interest representatives together with a binding code of conduct,<sup>256</sup> while the European Parliament instituted a mandatory register with full financial disclosure.<sup>257</sup>

In conclusion, a reformer may query whether, in light of critiques of the registration-plus-disclosure model, those strategies should become a model for reforms at international organizations. However, these criticisms appear to point more to the challenge inherent in regulating lobbying activity than to the particular shortcomings of this regulatory approach.

### 3. *Applying the Lobbying Regulatory Analogy*

Lobbying regulation in the U.S. — as an example of global best practice — is relevant to regulation of international lobbying activity by identifying the following principles.

First, the principal regulatory tools to address lobbying activity are the registration of lobbyists and the disclosure of lobbying activity. The rationale for these regulatory strategies is not well established in the United States, but proposed explanations include: (a) protection of the legislator’s capacity to evaluate the nature and origin of the pressures to which they are subjected; and (b) protection of the public’s confidence in legislative integrity and reduction of the appearance of corruption. Both of these public interests are balanced in the United States against First Amendment free speech rights (and potentially First Amendment Petition Clause rights), so lobbying cannot be entirely restricted. Moreover, banning lobbying may impinge on the public interest in gathering the views of constituents and the expertise of experts.

The U.S. approach does not select particular kinds of groups for lobbying activity as do the international access rules. U.S. tax rules that prohibit 501(c)(3) charitable organizations from participating in lobbying activity do not separate for-profit from non-profit organizations in the way that the international system does. Rather, the U.S. tax system makes this distinction in order to even the playing field by regulating all entrants equally. The purpose of the tax rule is to

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255. *Id.* Nevertheless, some differences in approach remain. Europe retains corporatist traditions where unions, employer associations, and public officials engage in dialogue, resulting in a less robust tradition of lobbying and less stringent regulatory requirements. *See id.*

256. *Id.* There is a particular inducement for representatives to register: those who do are alerted to opportunities to comment on specific areas of interest. *Id.*

257. *Id.* One of the EU leaders responsible for launching and implementing the EU register focused specifically on the similarities between the EU regulations and those of the United States. *Id.*

ensure that tax-exempt organizations do not receive a subsidy for participating in lobbying activities. In short, the U.S. approach focuses on individual rights to lobby, benefits accruing to lawmakers when they hear from the public, and the transparency of that process.

Many elements of the U.S. domestic lobbying model apply well in the international context. Specifically, international lobbying regulations should focus on protecting a lawmaker's capacity to evaluate the nature and origin of the pressures to which they are subjected, protecting the public's confidence in the law-making process, and allowing third-party watchdog groups to monitor lobbying activity and bring it to the attention of relevant lawmakers or decisionmakers. Registration and disclosure rules do not cut against an international organization's capacity to gather the diverse nonstate views and the expertise of experts. Significantly, the lobbying framework offers no basis to maintain archaic, path-dependent distinctions between for-profits and nonprofits that have become meaningless in light of trade association and industry association lobbying activity. The framework also gives no reason to maintain a procedure that requires "purposes and principles" in concert with the UN's own, as the point is not to administer an *ex ante* merit test, but rather to clarify the identities and intentions of the diversity of groups that seek to offer input.

#### *D. Caveats and Limitations*

The benefits of the lobbying framework in the international context are that it better describes the actors, regulations, and activities of the access regimes in international organizations like ECOSOC; that by doing so it clears out outdated assumptions and makes room for meaningful reforms; and that it offers potential regulatory tools to structure these reforms. However, there are a number of limitations and potential objections to the lobbying analysis. I will take them in turn.

First, the access rights offered by international organizations do not map on perfectly to lobbying rights, and the behavior of NGOs does not exactly mirror that of lobbyists in the United States and elsewhere. In the United States, lobbying is understood as "an amalgam of a broad range of advocacy practices,"<sup>258</sup> which include both informal and formal practices. Formal practices in the United States are largely analogous to those on the international stage, as these include appearing before Congress and submitting written comments, as well as engaging informally with members of Congress. But U.S. domestic practice diverges in that it includes significant elements of campaign finance and other *quid pro quo* arrangements. I have ascertained no evidence of these latter arrangements

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258. McKinley, *supra* note 2, at 1188 (internal quotation marks omitted).



internationally, and so campaign finance rules and tax law rules in the United States do not have parallel applicability internationally.

However, the fact that not all regulatory tools used to respond to lobbying activity in the United States and elsewhere are translatable to the international context should not detract from the thrust of the argument. The point is not to suggest an exact replication of U.S. regulatory strategies internationally, but instead to discern broad regulatory principles that characterize governmental responses to lobbying activity, and to suggest that those principles may be of use internationally.<sup>259</sup>

Second, as considered briefly in the previous Section, U.S. lobbying rules are susceptible to critiques regarding under-enforcement and the limited utility of disclosure. Nevertheless, as indicated above, these criticisms are less about the regulatory approach itself than about challenges of regulating lobbying activity.

Finally, a lobbying frame carries a strong pejorative connotation in the United States and abroad. As Maggie McKinley has noted, many Americans “hold lobbyists in incredibly low regard,” “decry lobbying as rent seeking and a corruption of the democratic process,” and believe that “more must be done to regulate lobbying.”<sup>260</sup> Richard Hasen points out that “[i]n difficult times like

259. As previously mentioned, an alternative theoretical candidate to the lobbying frame is the notice-and-comment model drawn from U.S. domestic practice pursuant to the APA. But the notice-and-comment process in the United States appears to diverge from the international context in that it functions through a structured, top-down process. In practice, “off-the-record communications between government officials and private parties” do regularly occur. Cass R. Sunstein, *Interest Groups in American Public Law*, 28 STAN. L. REV. 29, 62–63 (1985) (considering whether the APA prohibits or at least requires disclosure of such contacts). In fact, studies in administrative law show that lobbying is a pervasive force in the U.S. regulatory context despite the seemingly restrictive procedural restraints of the APA. See, e.g., Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1365–66 (2010) (observing that while the APA “does require communications between agencies and stakeholders to take place in the sunlight, . . . [b]oth before and after this transparent process . . . stakeholders and agency staff can negotiate regulatory policies in the shadows”); Wagner et al., *supra* note 192, at 102 (“[I]n practice, notice-and-comment rulemaking may only be the tip of the iceberg in providing avenues for interest groups to inform agencies’ rulemaking projects.”). But recent reforms have not moderated or meaningfully structured this activity. See, e.g., Susan Webb Yackee, *The Politics of Ex Parte Lobbying: Pre-Proposal Agenda Building and Blocking During Agency Rulemaking*, 22 J. PUB. ADMIN. RES. & THEORY 373 (2012) (using empirical data to analyze significance of lobbying in the pre-proposal stage of rulemaking). So, in short, the notice-and-comment frame neither cleanly fits the facts nor offers meaningful reforms.

260. McKinley, *supra* note 2, at 1156–58; see also Cohen-Eliya & Hammer, *supra* note 71, at 265 (noting that some “defin[e] lobbying by interest groups as ‘the most serious and worrisome problem of American democracy’” (quoting GRANT MCCONNELL, PRIVATE POWER AND AMERICAN DEMOCRACY 25 (1965))).

these, when people are looking for someone to blame for a financial meltdown, [or] a failing health care system . . . lobbyists are a convenient target.”<sup>261</sup> Distaste for lobbying extends beyond the United States. A recent European Parliament working paper suggested, with a degree of reserve, that “it should also be mentioned that the term ‘lobbyist’ still carries a rather negative meaning in a number of other Community languages.”<sup>262</sup> Part of the problem is that lobbying—a notoriously difficult term to define<sup>263</sup>—often implies more than offering suggestions to lawmakers and also connotes nefarious activities like bribery and capture. A working paper from the European Parliament acknowledged the ambiguity of the term:

[O]ne advantage of using the term “lobbyist” is that, even though it is often shunned in some countries and associated with the United States “pork barrel” system, it is widely understood and the functions of the lobbyist are more clearly recognised than other terms such as “government relations,” “public affairs” or “special interest groups.”<sup>264</sup>

The suggestion to transport the lobbying framework to the international context is not meant to carry the implicit critique that international access regimes are plagued by inappropriate influences. Yet international organizations may be reticent to adopt the lobbying frame given the apparent strength of its pejorative connotations.

As foreshadowed at the beginning of this Article, the Article’s analysis showcases a strange dichotomy: while commentators evaluating international access structures have regarded them with outsized optimism, commentators who evaluate lobbying regulation in the United States and elsewhere seem to express an outsized cynicism about the law and practice of lobbying. Perhaps this is partially a matter of semantics. This Article’s analysis suggests that both reactions may be too extreme. The theory and practice of lobbying regulation might be better understood as a flawed but useful means to understand and govern public participation in governance.

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261. Hasen, *supra* note 2, at 194.

262. Wilhelm Lehmann, *Lobbying in the European Union: Current Rules and Practices* 2 (European Parliament, Directorate-Gen. for Research, Working Paper, 2003).

263. See, e.g., *id.* (“If lobbying essentially describes the direct advocacy of a point of view about a matter of public policy, it is less clear as a description of the actual work undertaken by most people in the lobbying industry.”).

264. *Id.*

At bottom, the purpose of the lobbying analogy is to highlight the descriptive fact that interest group lobbying is an international as well as domestic phenomenon; to reframe this international activity as interest group lobbying, rather than multistakeholder membership in global governance, as strong legitimacy optimism has long asserted; and to borrow useful regulatory tools vertically across jurisdictions from the domestic to the international.

#### IV. INTERNATIONAL LOBBYING LAW: A TYPOLOGY

Drawing on the lobbying framework developed in Part III, this Part proposes a typology of access structures across international organizations affiliated with the United Nations. The account is stylized, but the simplicity is useful: it helps identify common features within a heterogeneous set of consultation rules and organize the prescriptive points offered in Part III.

Significantly, the typology clarifies a set of tradeoffs that the lobbying analysis produces: officials can either embrace the lobbying frame as an organizing principle for reform and focus on regulatory tools like registration and disclosure; or they can take another route entirely, building multistakeholder structures that welcome a smaller group of nonstate participants as full voting members. These two choices offer distinct tradeoffs. But I hypothesize that either has the potential to better satisfy an organization's goals with respect to nonstate participation than the most common middle-ground approach. As the following discussion suggests, that middle-ground approach is premised on the strong legitimacy optimism theory critiqued in this analysis, and also is the source of many of the practical problems outlined in prior Parts.

##### *A. The Lobbying Rules Map*

The access structures at international organizations have a variety of common features. Mapping these features along two spectra produces useful ideal types. Those types organize recurring features of the access rules and facilitate exploration of the reform hypotheses this Part will propose.

To be sure, the typology by necessity cannot capture a great degree of variety among the access structures. Nevertheless, the schema isolates meaningful similarities and variations, particularly as they pertain to private-sector lobbying. In particular, nearly half of the UN organizations maintain regulatory structures closely patterned on ECOSOC's in the following respects: they have established an accreditation system for NGOs, require nonprofit status (and thus exclude individual businesses), and yet include business-promoting NGOs (such as industry and trade associations) on equal terms as other NGOs. The variations from this standard access structure principally stretch along two dimensions.

First, along a horizontal spectrum lie the degrees of regulatory control the organization exercises over the *types of entities* that are permitted access to it. Of course, since the analysis focuses on nongovernmental entities, this spectrum does not include membership rules for state entities. On one end of the spectrum are access rules that accept all would-be participants in the process. On the other end are the rules that divide organizations into categories, with different access rules applicable to each.

Second, along a vertical spectrum lie the degrees of opportunity for nongovernmental entities to *shape an organization's decisional process*. For example, at the top of this vertical spectrum lie international organizations that offer only access, including limited persuasive rights like submission of position papers in a carefully regulated process, informal lobbying opportunities, and perhaps receipt of bulletins and other information. At the bottom end are consultation structures that welcome nonstate groups as full voting members in the process or otherwise formalize and elevate nonstate input in the ultimate regulatory rules. Toward the middle of this second spectrum are access structures that permit a form of participation more robust than mere access but short of full voting membership. Organizations in this middle group may offer participation in discussions leading to consensus decision making, for example.

The two spectra identify a set of regulatory ideal types, as follow:

TABLE 1.

		Less Categorical		More Categorical	
Access ↑		Generalist Classic	Moderate Classic	Specialist Classic	
Participation					
Membership ↓		Generalist Innovator	Moderate Innovator	Specialist Innovator	

Structures at the top of the vertical spectrum I call “classics” whereas those at the bottom are “innovators.” This is not to say that structures at the top were necessarily developed earlier in time than the others. Rather, classic structures hew to classic legal understandings about the relative statuses of nation-states

and nonstate actors.<sup>265</sup> Structures at the bottom innovate by disrupting those classic international legal understandings. They offer more access to nonstate entities and spread authority beyond nation-state delegates. They dispense with the bare consultation structure and incorporate more nonstate authority over the end result through voting or participation in a consensus procedure. Of course, there is room all along this spectrum, with some organizations falling into a middle zone between classic and innovator.

Another set of observations may be made about the location of an organization along the horizontal spectrum. I will call organizations toward the left “generalist,” and toward the right “specialist.” Generalist organizations accept all entrants on equal terms. Specialist structures have restricted access criteria, giving access to only certain kinds of groups or making many distinctions between kinds of groups and offering different access rights. Thus, we have “generalist classics” in the top left corner, “specialist innovators” in the bottom right corner, and so on.

To reiterate, organizing the access rules in this manner reduces spectra to simplified ideal types. Mapping all UN-affiliated organizations according to more precise locations on the intersecting spectra would produce a scatter diagram, rather than a typology.

As a descriptive matter, I propose that each of the locations on the map represents a set of tradeoffs: between maintaining administrability and balancing nonstate inputs; between preserving state sovereignty and capturing robust nonstate expertise and engagement; between openness and selectiveness. I theorize that organizations should choose their point on the lobbying rules map according to their distinctive organizational goals. While it appears that over time there has been a rightward drift along the horizontal spectrum, from organizations that make fewer distinctions among organizations to those who make more (from generalist to specialist), I hypothesize that organizations have not been able to reap the benefits they may have hoped to reap from that movement because they have not made a corresponding movement down the vertical

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265. According to this view, nation-states are sovereign and possess the capacity to determine their own fates, so they are the only actors that may make law for themselves. Nations may sometimes delegate their lawmaking authority to international organizations; but nonstate entities have no capacity to make international law. See 1 LASSA OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 341 (1905) (“Since the Law of Nations is a law between States only and exclusively, States only and exclusively are subjects of the Law of Nations.”); see also JAN KLABBERS, *AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW* 53–73 (2d ed. 2009) (comparing theories that institutions with lawmaking and adjudicatory powers derive their authority either from an initial act of express delegation or from implied powers); Duncan B. Hollis, *Why State Consent Still Matters – Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 *BERKELEY J. INT’L L.* 137, 146–71 (2005) (describing international lawmaking powers by nonstate actors pursuant to delegations of authority from states).

spectrum (toward specialist innovator). These observations underpin my proposal that organizations should consider strategies that leave them in the far top left corner (generalist classic) or bottom right (specialist innovator), and eschew middle-of-the-map solutions.

To pave the way for that discussion, the following table shows how the ideal types might be replaced by consultation structures at a number of international organizations. The examples are far from exhaustive. Rather, they are selected to capture the diversity of structures that exist:

TABLE 2.

Less Categorical		More Categorical	
Access	IMF (Cf. U.S. APA Notice & Comment procedure)	ECOSOC Codex (Most Populated Area)	WHO FAO
Participation		UNCITRAL	UNAids
Membership	(Null set)		ILO GAVI UN Women

1. *The ECOSOC Structure and Its Progeny Are Moderate Classics*

UN-affiliated organizations typically fall into the “moderate classic” portion of the rules map. The cluster is largely due to many international organizations’ reliance on ECOSOC’s structure as a starting point for regulatory design.

As for the horizontal spectrum, the ECOSOC rules do not accept all potential participants, but rather have some sort of access criteria and screening or application mechanism. This is, I submit, a direct result of the eminence of strong legitimacy optimism as a normative basis for regulatory design. Over time, the ECOSOC rules were amended and reformed in an attempt to make divisions between associations to achieve a representative set of “consultants,” gradually moving the ECOSOC rules along the horizontal spectrum from left to right and into the moderate category over time. Thus, the ECOSOC rules now have a gate-keeping structure that requires potential lobbyists to apply for accreditation. Only some groups can obtain this status. Notably, individuals and for-profit organizations are excluded, along with any organization that cannot assert “aims and purposes” that support the UN’s work and demonstrate that it has internal

governance structures that make it accountable to its membership.<sup>266</sup> Rather than simply offering comments on an ad hoc basis, consultants must prepare an application and be voted in by a nineteen-member NGO committee. Most must then provide quadrennial reports to maintain their accreditation status and corresponding access.

ECOSOC rules fall at the top of the vertical scale and thus are “classic” because they hew to a classic state/nonstate hierarchy of authority. The impact a nonstate entity can have over the rulemaking process is limited to receiving information and exercising various forms of persuasion such as offering written or oral comments or informally buttonholing delegates outside of meeting rooms. Lobbying groups do not, for example, participate in decision making, voting, forming a consensus, or otherwise adopting rules. In addition, consultants are organized into various tiers corresponding to the breadth of scope of their mission, with organizations given more or less expansive access rights depending on their accreditation tier. ECOSOC is not classified as a “specialist” organization in this analysis because its accreditation forms a very broad tent. Many different kinds of associations make up the approximately five thousand that currently hold accreditation, from small groups of grassroots activists to familiar NGO mega-groups like Amnesty International, to academic and professional associations like the American Society of International Law and, as is particularly relevant to this project, to industry and trade associations who lobby on behalf of for-profit entities.

The Codex Alimentarius (Codex) is an illuminating example of the dominance of the moderate classic access rules for two reasons. First, the organization has received some scholarly attention as an outlier in terms of its nonstate access rules, but nevertheless still falls into the well-established and relatively common “moderate classic” category. Second, unlike a number of other organizations including ECOSOC, the United Nations Framework Convention on Climate Change (UNFCCC), and WHO, the Codex’s access structure was not originally authorized in a charter provision but instead from separately adopted rules of procedure; yet in practice the rules end up preserving the moderate classic norm.<sup>267</sup>

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266. Economic and Social Council Res. 1996/31, *supra* note 3, ¶¶ 2–12 (prescribing that a consultant organization must have, inter alia, a democratically adopted constitution, representative process of governance, and authorized representatives who speak for the organization’s membership).

267. *Procedural Manual*, CODEX ALIMENTARIUS COMM’N 16–17 (1st ed. 1968), [ftp://ftp.fao.org/codex/Publications/ProcManuals/Manual\\_o1e.pdf](ftp://ftp.fao.org/codex/Publications/ProcManuals/Manual_o1e.pdf); cf. *Procedural Manual*, CODEX ALIMENTARIUS COMM’N 237–48 (25th ed. 2016), <http://www.fao.org/3/a-i5995e.pdf> [<http://perma.cc/WA32-58GW>].

Codex was established jointly by the UN Food and Agriculture Organization (FAO) and the WHO in 1962,<sup>268</sup> and later adopted Rules of Procedure elaborating access rules which grant “observer” status to nonstate entities. That status is available automatically to NGOs with relationships with Codex’s founding organizations (the FAO and WHO),<sup>269</sup> and to other NGOs that apply to the Secretary of the Commission and meet criteria which closely follow the ECOSOC blueprint.<sup>270</sup> An eligible NGO must, inter alia: (1) be international in structure and scope of activity, and representative of the specialized field of interest in which it operates; (2) be concerned with matters covering a part or all of the Commission’s field of activity; (3) have aims and purposes that conform to the Commission’s objectives; and (4) have a representative leadership structure that is responsive to its membership.<sup>271</sup> The FAO and WHO make final determinations about whether to grant observer status at Codex,<sup>272</sup> which 147 NGOs have

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268. Notably, the conference that established Codex was attended by representatives of forty-four member countries of the FAO and WHO as well as by observers from fourteen NGOs, including a variety of trade associations (e.g., the Federation of Margarine Associations, the International Office of Cocoa and Chocolate, and the International Dairy Federation). See *Report on Joint FAO/WHO Conference on Food Standards*, CODEX ALIMENTARIUS COMM’N 36 (Oct. 1962), [http://www.fao.org/input/download/report/715/al62\\_o8e.pdf](http://www.fao.org/input/download/report/715/al62_o8e.pdf) [<http://perma.cc/QX8G-BHKM>].

269. *Id.* Observer status is also possible for nonmember nations and other intergovernmental organizations. *Id.*

270. The application requests information on the aims and subjects of the organization, structure of the organization, meetings concerned with matters covering the Commission’s field of activity, relations with other international organizations, expected contributions to the Commission, past activities in relation to Codex, and an indication of the source of funding. *Information Required from International Non-Governmental Organizations Requesting “Observer Status,”* CODEX ALIMENTARIUS COMM’N (Aug. 18, 2016), <http://www.fao.org/fao-who-codexalimentarius/members-observers/ngo-participation/en> [<http://perma.cc/DU89-PSHH>].

271. Finally, the organization must have been established for at least three years prior to applying for observer status. *Principles Concerning the Participation of International Non-Governmental Organizations in the Work of the Codex Alimentarius Commission*, CODEX ALIMENTARIUS COMM’N (Aug. 18, 2016) [hereinafter *Principles Concerning Participation*], <http://www.fao.org/fao-who-codexalimentarius/members-observers/ngo-participation/en> [<http://perma.cc/DU89-PSHH>]. Through its collaboration with international NGOs, Codex seeks “expert information, advice and assistance from international non-governmental organizations and to enable organizations which represent important sections of public opinion . . . to express the views of their members and to play an appropriate role in ensuring the harmonizing of intersectoral interests.” *Id.*

272. *Id.*



currently obtained.<sup>273</sup> Of these, approximately sixty, or just over one-third, are associations representing a specific trade or industry, including organizations such as the European Potato Trade Association, International Chewing Gum Association, and International Frozen Foods Association.<sup>274</sup>

Thus, although Codex has been hailed as an example of innovation because of the presence of so many private-sector groups, the access rules in fact are not structurally different from the mainstream. The Codex structure is *moderate* in that, like ECOSOC, it does not accept all potential participants, but only participants with particular governance structures and interests. Codex has a *classic* consultation structure because, just like ECOSOC, NGOs with observer status enjoy a range of privileges including informational and consultation privileges, but no full membership or voting privileges. These NGOs may send an observer to sessions of the Commission and subsidiary bodies; receive working documents and discussion papers from the Secretary of the Commission; circulate to the Commission views in writing; and participate in discussions when invited by the Chairperson.<sup>275</sup> The fact that Codex has received attention as an innovator may perhaps simply be a result of the fact that private-sector access has been underappreciated in other international organizations.

## 2. *Reforms Have Produced More Specialist Structures*

A number of international organizations have deviated from ECOSOC's approach due to perceived shortcomings, such as too much access, too little regulation, lack of administrability by overburdened gatekeepers, and the potential capture of officials in sensitive matters of public policy like global health.<sup>276</sup>

For example, the WHO has an accreditation system quite explicitly modeled on ECOSOC's. In fact, the WHO Constitution has a parallel Article 71 that states, nearly identically to the UN Charter's Article 71, that the WHO "may, on matters

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273. *Codex Observers*, CODEX ALIMENTARIUS COMM'N (Aug. 18, 2016), <http://www.fao.org/fao-who-codexalimentarius/members-observers/observers/en> [<http://perma.cc/J5SK-W7WH>].

274. *Id.*

275. NGOs may also be invited by the Directors-General to participate in, and submit views in writing to, meetings or seminars on subjects organized by the FAO/WHO Standards Programme. Observers also receive documentation and information about planned meetings agreed upon with the Secretariat. *Principles Concerning Participation*, *supra* note 271.

276. See, e.g., Ayelet Berman, *Industry, Regulatory Capture and Transnational Standard Setting*, 111 AJIL UNBOUND 112, 113-15 (2017) (discussing the risk of regulatory capture in transnational standard setting and regulation and offering several examples of WHO capture).

within its competence, make suitable arrangements for consultation and co-operation with non-governmental international organizations and . . . with national organizations, governmental or non-governmental.”<sup>277</sup> Notably, the WHO Constitution retains both the “non-governmental organizations” language as well as language authorizing “suitable arrangements for consultation” from the UN Charter’s parallel Article 71. The WHO provision diverges only in that it includes the word “co-operation,” potentially authorizing a broader scope of consultation rights for nonstate actors. This explicit borrowing of the UN Charter language is unsurprising in light of the fact that the WHO Constitution was negotiated just a month after the UN Charter was signed in June 1946.

Over time, however, the practices of the two organizations have diverged. In May 2016, the World Health Assembly adopted a new Framework of Engagement for the WHO’s interactions with nonstate actors.<sup>278</sup> Notably, the Framework erects a separate set of rules for “private sector entities” and “international business associations” than for “nongovernmental organizations,”<sup>279</sup> with additional safeguards in place for engagement with the private sector.<sup>280</sup> 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.”<sup>281</sup> This distinction between the two groups responds to the WHO’s embattled history with private-sector influences.<sup>282</sup>

The WHO’s experience with tobacco association infiltration in fact demonstrates the potential risks of degradation of information value that flow from private-sector group participation when conflicts of interest between an international organization’s agenda and private-sector agendas arise. Philip 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 organiza-

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277. WHO CONST. art. 71. The constitution was adopted by the International Health Conference held in New York from June 19 to July 22, 1946, signed on July 22, 1946 by the representatives of sixty-one states, and entered into force on April 7, 1948. *Id.* at 1 n.1; see United Nations World Health Organization Interim Commission, *Summary Report on Proceedings, Minutes, and Final Acts of the International Health Conference, Held in New York from 19 June to 22 July 1946*, in 2 OFFICIAL RECORDS OF THE WORLD HEALTH ORGANIZATION 99 (1948).

278. WHO, *Framework*, *supra* note 16.

279. *Id.* at Annex, ¶ 10.

280. *Id.* at Annex, ¶¶ 13, 45.

281. *Id.* at Annex, ¶ 7(c).

282. See, e.g., TOBACCO COMPANY STRATEGIES, *supra* note 99. The committee authoring this report was convened by the WHO Director-General. *Id.* at ii.

tions,” including “trade unions, tobacco company-created front groups and tobacco companies’ own affiliated food companies.”<sup>283</sup> As one example among many, the International Tobacco Growers’ Association, a private-sector association that originally represented a small group of tobacco farmers, came to be controlled by the larger tobacco industry in order to serve as a “front for [their] third world lobby activities at WHO,” meant specifically to “undermine WHO tobacco control activities.”<sup>284</sup> To avoid a repeat of these negative experiences in the new Framework, the WHO articulated a policy change: the WHO would no longer “engage with the tobacco industry,” the arms industry, or any nonstate actors that advance those industries’ work.<sup>285</sup> 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.”<sup>286</sup>

To carry out these new policies, the Framework 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.”<sup>287</sup> 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 categorized as a private-sector entity due to the fact that it is the recipient of “undue influence” from commercial entities through financing, participation in decision making, or otherwise.<sup>288</sup> For example, other NGOs, philanthropic foundations, or academic institutions may be categorized as private-sector entities and thus also be subject to the WHO’s new provisions on engagement with this type of entity.<sup>289</sup> In order to equip its gatekeepers with sufficient information to determine which entities might have such private-sector relationships, all would-be consultant organizations 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.<sup>290</sup> The

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283. *Id.* at iii, 3-5.

284. *Id.* at 47-48.

285. WHO, *Framework*, *supra* note 16, at Annex, ¶ 44.

286. *Id.* at Annex, ¶ 45.

287. *Id.* at Annex, ¶ 10.

288. *Id.* at Annex, ¶ 13.

289. *Id.*

290. *Id.* at Annex, ¶ 39.

WHO's due diligence process is explicitly aimed at determining *why* an organization seeks access and what interests it may have.<sup>291</sup> Along with the Framework, the WHO established an electronic tool for managing engagement that contains a register of nonstate actors and identification of potential conflicts of interest.<sup>292</sup>

The WHO's innovative reform flows from an *ex ante* normative judgment about the benefits and risks that attach to private-sector participation. But, as the discussion in Section II.C.2 noted, this reform may prove to be unsuccessful,<sup>293</sup> overburdening already taxed gatekeepers<sup>294</sup> and offering no realistic means to respond to the fact that NGOs often have close links and partnerships with the corporate world.<sup>295</sup>

To return to the lobbying rules map, the WHO's recent reforms have driven it to the right, toward specialist classic. The access rules are now *specialist* because 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. They are *classic* because, like ECOSOC, they offer nonstate entities mere access, rather than membership or deep participation in government.

Like the WHO, the FAO is a specialist because it distinguishes between public-interest NGOs and private-sector entities. Like the WHO, the FAO was established in 1945<sup>296</sup> and has a long history of engaging with external entities.<sup>297</sup>

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291. *Id.* at Annex, ¶ 31 (stating that the objective is to “clarify the interest and objectives of the entity in engaging with WHO and what it expects in return”).

292. *Id.* at Annex, ¶¶ 21, 38; *see also* WHO Register of Non-State Actors, WORLD HEALTH ORG., <http://www.who.int/about/collaborations/non-state-actors/register> [<http://perma.cc/DV88-CEPD>].

293. *See* Durkee, *supra* note 14, at 206–07.

294. *Id.* at 205.

295. *See id.* at 253–54.

296. *About FAO*, FOOD & AGRIC. ORG. OF THE UNITED NATIONS, <http://www.fao.org/about/en> [<http://perma.cc/6KAA-77A4>]. The organization's goals are “the eradication of hunger, food insecurity and malnutrition; the elimination of poverty and the driving forward of economic and social progress for all; and the sustainable management and utilization of natural resources.” *Id.* The FAO now has 194 member nations, two associate members, and one member organization – the European Union. *Membership of FAO*, FOOD & AGRIC. ORG. OF THE UNITED NATIONS, <http://www.fao.org/legal/home/membership-of-fao/en> [<http://perma.cc/33KK-8YKN>].

297. *FAO Strategy for Partnerships with Civil Society Organizations*, FOOD & AGRIC. ORG. OF THE UNITED NATIONS 1 (2013), <http://www.fao.org/docrep/018/i3443e/i3443e.pdf> [<http://perma>

The FAO now defines the organizations that are eligible for access as “Civil Society Organizations” (CSOs), which are “those non-state actors that work in the areas related to FAO’s mandate.”<sup>298</sup> These include member-based organizations, NGOs, and social movements.<sup>299</sup> Unlike the WHO, the FAO explicitly excludes private-sector entities.<sup>300</sup> Beyond the distinction between CSOs and private-sector entities, the FAO’s access structure is fairly traditional. CSOs have two main avenues through which to engage with the FAO: formal accreditation and informal collaboration. As for accreditation, as with ECOSOC,<sup>301</sup> qualified international NGOs may apply for and obtain one of three potential types of formal status—consultative, specialized consultative, or liaison status—based on the importance of the CSO’s work to the activities of the FAO.<sup>302</sup> To obtain any of these types of formal status, CSOs must meet representational criteria, possess “aims and purposes” in accordance with the FAO’s work, and demonstrate sufficient accountability to the CSO’s membership through a formal governance structure.<sup>303</sup> Unlike at ECOSOC, at the FAO, formal status will not be considered until a CSO has cooperated with the FAO at a technical level during at least a two-year period.<sup>304</sup>

The FAO has also recently instituted reforms with respect to its relationships with the private sector. In 2013 and 2015 documents, the FAO articulated rules in which the private sector is defined as “all sectors of the food, agriculture, forestry and fisheries systems—from production to consumption—and all sizes of enterprise . . . as well as related trade, financial and other service organizations.”<sup>305</sup> In

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.cc/WT7T-77RJ] (“Only through effective collaboration with governments, civil society, private sector, academia, research centres and cooperatives, and making use of each other’s knowledge and comparative advantages, can food insecurity be defeated.”).

298. *Id.* at 3.

299. *Id.* at 17.

300. *Id.* at 8 (“In principle, food producer organizations will fall under the private sector strategy, unless they state otherwise and comply with the criteria for CSOs.”).

301. *See supra* Section I.A.

302. 2 *Basic Texts of the Food and Agriculture Organization of the United Nations*, FOOD AND AGRIC. ORG. OF THE UNITED NATIONS § M, ¶¶ 2, 6-8 (2015), <http://www.fao.org/3/a-mpo46e.pdf> [<http://perma.cc/8KVY-TCCB>].

303. *Id.* at § M, ¶¶ 6-8.

304. *Frequently Asked Questions*, FOOD & AGRIC. ORG. OF THE UNITED NATIONS, <http://www.fao.org/partnerships/civil-society/faq/en> [<http://perma.cc/T3MX-X4B6>].

305. *Principles and Guidelines for FAO Cooperation with the Private Sector*, FOOD & AGRIC. ORG. OF THE UNITED NATIONS 5 (2000), <http://www.fao.org/3/a-x2215e.pdf> [<http://perma.cc/HC2X-5ZZJ>] (emphasis omitted); *see also* *FAO Strategy for Partnerships with the Private Sector*, FOOD & AGRIC. ORG. OF THE UNITED NATIONS 13 (2013), <http://www.fao.org/docrep/018/i3444e>

a marked divergence from the ECOSOC norm, the FAO's definition of for-profit enterprises also includes "enterprises, companies or businesses . . . private financial institutions; industry and trade associations; and consortia that represent private sector interests."<sup>306</sup> Private-sector entities may not be granted formal status or accreditation, but may engage in less formalized ways.<sup>307</sup>

Finally, another organization that has moved to the right along the horizontal dimension from the ECOSOC norm toward specialist classic is the UNFCCC. In most respects, the UNFCCC accreditation system follows that of ECOSOC. But in an effort to enhance administrability, the organization has developed a set of categories that differentiate 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 organizations ('IPOs'), local government and municipal authorities ('LGMAs'), islanders, trade unions, and faith-based groups."<sup>308</sup> The categories do not affect the amount of access a particular organization receives when accredited, but are rather designed to help organizations coordinate with each other and help the UNFCCC communicate in a coordinated fashion with them.

The UNFCCC's access structure falls somewhere between moderate classic and specialist classic along the horizontal spectrum. The UNFCCC maintains the fundamental distinction that ECOSOC introduced between for-profit and nonprofit entities, accepting only the latter for accreditation. That is, all accredited organizations must be NGOs, even though the rules recognize that different NGOs will have different constituencies. Moreover, even though the UNFCCC separates constituencies into different tracks, it does not regulate access differently for different groups, unlike the WHO and the FAO, which endeavor to separate private-sector influences from the rest and manage that private-sector

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/i3444e.pdf [http://perma.cc/M7HK-A8KR] ("The private sector includes enterprises, companies or businesses, regardless of size, ownership and structure."). The 2000 guidelines were renewed in 2015. See *Progress Report on FAO Strategy for Partnerships with the Private Sector* 4 (2016), <http://www.fao.org/3/a-mr854e.pdf> [http://perma.cc/XW2X-Y3CW].

306. *Private Sector*, FOOD & AGRIC. ORG. OF THE UNITED NATIONS, <http://www.fao.org/partnerships/private-sector/en> [http://perma.cc/5DMN-QTVT].

307. *FAO Strategy for Partnerships with the Private Sector*, *supra* note 305, at 18. The *FAO Strategy for Partnerships with the Private Sector* describes the main areas and types of engagement between the FAO and private-sector entities, including "development and implementation of technical programmes, policy dialogue, norms and standard setting, advocacy and communication, knowledge management and dissemination, and mobilization of resources." *Id.* at 4; see also *id.* at 18 (noting that most collaborations and all private-sector partnerships must be governed by a written agreement that formalizes the terms of agreement, typically involving memoranda of understanding, "Partnership Agreements," or "Exchange of Letters").

308. Tully, *supra* note 153, at 16.

relationship on separate and more restrictive terms. The UNFCCC is also a “classic” organization like all of the organizations so far examined in this Section because of the limited impact organizations are permitted to assert over the decision-making process.

### 3. *Outliers Exist*

A minority of organizations diverge from the well-trod path between moderate and specialist classic regulatory formats.

One outlier classic organization is the IMF. The consultation structure lands on the “generalist” end of the horizontal spectrum because, unlike in other UN agencies and bodies, there appears to be no specific set of criteria that must be followed in selecting nonstate actors that may engage. In fact, the IMF does not have a formal accreditation process through which it structures its relationships with nonstate actors. Instead, IMF engagement takes a variety of informal and formal forms at the global and country levels. The IMF broadly defines CSOs to include:

[N]ongovernmental organizations (NGOs), business forums, faith-based organizations, labor unions and professional organizations, local community groups, philanthropic and charitable organizations, gender and women’s associations, local organizations of persons with disabilities, social movements (including representatives of the informal sector and rural areas), academics, research centers and think tanks.<sup>309</sup>

Rather than have a concrete accreditation procedure with set admission criteria, IMF staff are simply cautioned that it is a best practice to “[c]onduct[] due diligence on the legitimacy of the selected CSO” in order “to ensure proper representation within the country and avoid interaction with politically motivated organizations.”<sup>310</sup>

The IMF is also far toward the top “classic” end of the vertical spectrum because, in marked contrast to the equal membership of state and nonstate entities at the International Labour Organization (ILO), discussed below, the IMF’s

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309. 2015 *Guidelines on the IMF Staff Engagement with Civil Society Organizations*, INT’L MONETARY FUND 2 n.2 [hereinafter *IMF CSO Guidelines*], <http://www.imf.org/external/np/exr/cs/pdf/CSOGuidelinesMarch2016.pdf> [<http://perma.cc/7JHL-2PGT>]. CSOs can focus on a particular country or region or “have a global operation.” *Id.*

310. *Id.* at 6 (directing staff to use internal resources such as regional and technical offices as well as drawing on the IMF Communication Department’s CSO database).

methods of engagement with nonstate entities are classically hierarchical. Non-state actors have a variety of points of contact with IMF policymakers, but no decision-making authority. These points of contact can include meetings and forums; public consultations on the IMF's policy and strategy papers; meetings and seminars with IMF staff and executive directors on specific policy or country issues; invitations by the IMF to contribute to review of the IMF's policies at seminars or on its external website; and a "Civil Society Policy Forum" held jointly with meetings of the IMF and World Bank.<sup>311</sup>

In a process somewhat analogous to the notice-and-comment process in the United States, a key way that CSOs can engage with the IMF is through public and private consultations.<sup>312</sup> The public consultation process is "an open call for feedback from CSOs, and interested stakeholders" that runs for approximately six to eight weeks.<sup>313</sup> Interested CSOs and stakeholders submit comments that become part of the official record through an online platform, phone conferences, or emails.<sup>314</sup> IMF departments sometimes conduct a "road-show" during the public consultation period to help ensure that CSOs and other key stakeholders understand the issue and to receive their direct feedback.<sup>315</sup> At the end of the public consultation, all comments received are made public on the online platform.<sup>316</sup> Public consultations have taken place on issues including, for example, financial-sector taxation, low-income countries' facilities review, and natural

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311. *Factsheet: The IMF and Civil Society Organizations*, INT'L MONETARY FUND (Apr. 2017), <http://www.imf.org/About/Factsheets/The-IMF-and-Civil-Society-Organizations?pdf=1> [<http://perma.cc/9JS5-SQHF>]. Importantly, many of the sessions covered at the Civil Society Policy Forum are organized by the CSOs. The Policy Forum also includes a Fellowship Program for CSOs that was initiated by the IMF in 2003 to increase diversity in CSO attendance. The program sponsors twenty to forty CSO fellows, mainly from developing countries and emerging market economies, to participate in the meetings. See *IMF CSO Guidelines*, *supra* note 309, at 12-13. At the country level, engagement with CSOs is also undertaken in a variety of different forms. Generally, IMF staff are encouraged to engage with CSOs during the three major phases of IMF in-country mission work—i.e., pre-mission, on-mission, and post-mission phases—in order to seek consultation on program design and implementation. *Id.* at 9-12. IMF staff engagement with CSOs ranges from "in-depth one-on-one meetings" to "group meetings" with representatives from a number of CSOs. *Id.* at 10.

312. *IMF CSO Guidelines*, *supra* note 309, at 14-15.

313. *Id.* at 15-16.

314. *Id.* at 16.

315. *Id.*

316. *Id.* at 17.



resources.<sup>317</sup> The IMF also engages with CSOs by inviting participation in targeted and closed consultations for more sensitive or complex policy issues.<sup>318</sup> These private consultations can take the form of “off-the-record meetings or conference calls” and are often organized to seek initial CSO input to inform the IMF’s thinking prior to opening up the consultation to a wider set of CSOs.<sup>319</sup> This process again parallels U.S. administrative-law practice in the period prior to notice-and-comment rulemaking.

In short, the IMF has adopted a consultation model closest to that of the U.S. administrative notice-and-comment procedure because it actively seeks input from a broad cross-section of nonstate actors without imposing categorical constraints such as requiring nonprofit status. Nevertheless, the model welcomes *consultation* rather than *participation* in that it does not entitle the nonstate actors to engage in any decision-making capacity.

A second outlier is the United Nations Commission on International Trade Law (UNCITRAL), which falls somewhere toward the exact center of the lobbying rules map on both horizontal and vertical spectra. On the vertical spectrum, UNCITRAL falls between the ILO and IMF (between classic and innovator) because nonstate actors can significantly affect the organization’s decisional processes, but participation by nonstate actors falls short of full membership, as the ILO affords. This is because nonstate actors are in practice able to participate in the consensus required for UNCITRAL’s adoption of legal rules, even though those nonstate actors do not possess *de jure* voting rights. On the horizontal spectrum, UNCITRAL also falls toward the middle because it does not permit all entrants to access its meetings and consensus-forming procedures (unlike the IMF), but exercises *some* control over which entities are entitled to participate in the work of the Commission (like ECOSOC).<sup>320</sup>

Because this organization’s relationship with nonstate actors is somewhat unique, it merits a more sustained analysis. First, UNCITRAL’s work helps explain its unique relationship with nonstate actors: it focuses on the international trade law that governs the relationship between private parties, developing rules related to international contracting, payments, insolvency, secured transactions, sale of goods, and so forth. The organization is composed of sixty member states elected by the General Assembly for six-year terms and carries out its agenda-

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317. *Id.* at 14.

318. *Id.*

319. *Id.* Often, the policy issues considered require “consensus building at the membership level, or . . . have a complex preparation process.” *Id.* at 15.

320. *Id.* at 15.

setting work at annual sessions, with more frequent working groups on particular subjects.<sup>321</sup> Working groups draft the legal instruments in particular subject areas<sup>322</sup> and are assisted by preparatory work developed by the UNCITRAL secretariat in consultation with experts.<sup>323</sup> Notably, UNCITRAL develops draft instruments that states may later choose to adopt, including conventions, model laws, legislative guides, and model provisions.<sup>324</sup> The fact that many of the norms UNCITRAL produces are both nonbinding<sup>325</sup> and of very keen interest to nonstate actors helps explain why nonstate actors have been afforded more extensive participatory rights than is normal for other organizations.

Second, UNCITRAL is very open to outside observers. Both nonmember states and nonstate actors are called “observers,” and the deliberation process is open to both.<sup>326</sup> UNCITRAL “maintains mailing lists of organizations whose expertise is relevant to issues addressed by the various working groups” and will send invitation letters to various organizations to request expertise for a particular working group meeting or general meetings.<sup>327</sup> Organizations may be placed on the mailing lists at their own request, provided the Secretariat and the member states approve the request.<sup>328</sup> UNCITRAL will continue to send invitations to particular organizations “so long as their work remains relevant.”<sup>329</sup> Observers may circulate documents to working groups, and have the same rights as member states to make statements and respond to proposals.<sup>330</sup> In short, these *observers* (both nonmember states and nonstate entities) share the access rights of the member-state *participants* on equal terms.

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321. See FAQ—*Origin, Mandate and Composition of UNCITRAL*, UNITED NATIONS COMMISSION ON INT’L TRADE L., [http://www.uncitral.org/uncitral/en/about/origin\\_faq.html](http://www.uncitral.org/uncitral/en/about/origin_faq.html) [<http://perma.cc/XZ6F-GXSD>]; see also Kelly, *supra* note 16, at 108.

322. *Id.* In 2005, the six working groups addressed subjects such as arbitration, insolvency law, and electronic commerce. *The UNCITRAL Guide: Basic Facts About the United Nations Commission on International Trade Law*, UNITED NATIONS 5 n.12 (2007), [http://www.uncitral.org/pdf/english/texts/general/06-50941\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/general/06-50941_Ebook.pdf) [<http://perma.cc/7H5K-84CQ>].

323. Kelly, *supra* note 16, at 108.

324. *The UNCITRAL Guide: Basic Facts About the United Nations Commission on International Trade Law*, *supra* note 322, at 13-17 (reviewing UNCITRAL’s use of these various legislative techniques).

325. See *id.* Although UNCITRAL at times produces draft treaties that become binding when states sign and ratify them, it also produces model legislation and legislative guides and recommendations, none of which are binding on member states. *Id.*

326. Kelly, *supra* note 16, at 111 & n.39 (“UNCITRAL . . . prides itself on its openness.”).

327. *Id.* at 111 n.40.

328. *Id.*

329. *Id.*

330. *Id.* at 112 n.42.

Third, UNCITRAL has developed unusual consensus voting rules. Rather than being established as an organ or agency of the UN (like ECOSOC, the WHO, and the IMF) or a treaty body (like the UNFCCC), UNCITRAL was established by the General Assembly<sup>331</sup> and has declared that the General Assembly's Rules of Procedure will apply where appropriate, as UNCITRAL itself has no distinct rules of procedure.<sup>332</sup> Largely, however, UNCITRAL has developed its own idiosyncratic and nonformalized working methods. Under these methods, both the working groups and the Commission act by consensus rather than by voting. But consensus does not mean unanimity. Rather, it is something closer to a "substantially prevailing view"<sup>333</sup> that does not allow a veto by any individual state.<sup>334</sup> As UNCITRAL's literature explains, "[t]he basis of consensus is that efforts are made to address all concerns raised so that the final text is acceptable to all."<sup>335</sup> This decisional structure is particularly important because, as Claire Kelly has recently noted, nonstate observers can shape the consensus process and thus have influence akin to voting rights.<sup>336</sup>

The openness of UNCITRAL's working methods to nonstate actors – combined with the consensus voting mechanism – produced a controversy between UNCITRAL member states that reveals the depth of influence held by nonstate observers. In 2007, France challenged current practices and called for a review of the meaning of consensus and the level of nonmember participation. France noted that the "NGOs play a major role because of the expertise they possess in the areas under discussion."<sup>337</sup> In particular, France observed that when UNCITRAL seeks to draft a new legal instrument, it is the nonstate experts and the groups that they represent that initiate the process and provide much of the technical expertise. These groups are neither representatives nor delegates of any member and they operate without any guidelines. France also noted the rise of

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331. G.A. Res. 2205 (XXI) (Dec. 17, 1966). UNCITRAL was established in 1966 for the purpose of reducing disparities in national laws governing international trade by harmonizing and unifying those laws. *Id.* at 99.

332. Kelly, *supra* note 16, at 106-07.

333. *Id.* at 111 (citation omitted).

334. *Id.* at 110-11.

335. *FAQ—Methods of Work*, UNITED NATIONS COMMISSION ON INT'L TRADE L., [http://www.uncitral.org/uncitral/en/about/methods\\_faq.html](http://www.uncitral.org/uncitral/en/about/methods_faq.html) [<http://perma.cc/R3CG-6QWC>].

336. Kelly, *supra* note 16, at 111-12. Kelly's analysis is based on documentation of a dispute between UNCITRAL member states in which France was concerned that the robust participation of nonstate observers served to dilute nation-state influence over the proceedings. *See id.* at 113-20.

337. *Id.* at 114 (quoting *France's Observations on UNCITRAL's Working Methods*, ¶ 3.1, U.N. Doc. A/CN.9/635 (May 24, 2007)).

NGO influence, observing that in the past there were only a small number of NGOs active within UNCITRAL, whereas now the number has expanded greatly, with a substantial effect on the ultimate UNCITRAL work product.<sup>338</sup>

Highlighting the uniqueness of UNCITRAL's relationship with nonstate actors, one of France's complaints was that nonstate actor participation exceeds that permitted by ECOSOC's Resolution 1996/31, which it claimed provides the "general framework" for NGO activities that UNCITRAL should follow.<sup>339</sup> Moreover, France complained that these nonstate entities are not properly NGOs, but rather should be called "non-state entities" or "professional associations."<sup>340</sup> Finally, France objected to the fact that distinctions between member states and observers have frequently been blurred, in part because observers are permitted to circulate working documents on their own initiative and are able to speak at any time during the process.<sup>341</sup> Notably, France alleged and the Secretariat "readily admit[ted]" that this collapsing of distinctions allows nonstate entities outsized influence because of the consensus decision-making procedure, since it is unclear when the speakers are true members and when they are observers.<sup>342</sup> Without a vote, more input by nonstate entities readily influences the sense of a room with respect to whether consensus has been achieved.

France sought to limit the influence of these entities by moving UNCITRAL's access rules up the vertical spectrum, to use this Article's framework. France sought more of a *classic* structure, as it advocated for a process whereby the working groups may determine who will attend their meetings and shut out the nonstate entities when they so choose. France also sought to move toward the right of the horizontal spectrum toward the *specialist* end by establishing an accreditation mechanism for NGOs, with separate categories for entities with general expertise and more specific expertise. The accreditation process would also specify the participatory rights of these organizations and limit their rights to contribute to the formation or blocking of consensus. In sum, France's objections demonstrate concerns both about administrability and about the relative status of nonstate entities in relation to state entities; they sought to preserve the sovereign right of states to exert control over the international lawmaking process.

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338. Kelly, *supra* note 16, at 115.

339. *Id.*

340. *Id.*

341. *Id.* at 116.

342. *Id.*

#### 4. *The New Multistakeholder Institutions Are Specialist Innovators*

While the spectrum of organizations along the horizontal classic dimension is well-populated based on the ECOSOC model, a cluster of specialist innovators have different origin stories. This corner of the rules map is becoming increasingly populated. For example, the ILO has a very unusual access structure in which “labour unions and businesses are formal participants in the ILO’s work and deliberative processes.”<sup>343</sup> The ILO’s structure is known as “tripartite”—labor unions, businesses, and nation-states operate as participants on equal terms. This structure makes the ILO unusual among international organizations,<sup>344</sup> particularly since the ILO is not a contemporary innovator, but rather an early, pre-World War II institution, founded in 1919 as part of the Treaty of Versailles that ended World War I.<sup>345</sup> The ILO is a specialist in our analysis because it divides the private sector from other nonstate actors—in this instance labor unions—and gives each a distinct status. It is an innovator in that nonstate actors are full members.

A much more modern outlier in the same “specialist innovator” quadrant as the ILO is UN Women. This organization serves as an exemplar of a very recent trend: in the last ten to fifteen years before this writing, a number of organizations have adopted innovative structures offering nonstate actors robust membership rights. For many years, the ILO would have been the only organization in this quadrant; now a number of organizations crowd the field. UN Women was established in July 2010 by a General Assembly resolution,<sup>346</sup> which “[r]ecognizes that civil society organizations, in particular women’s organizations, play a vital role in promoting women’s rights, gender equality and the empowerment of women;”<sup>347</sup> and, in a phrasing reminiscent of the ECOSOC norm, “[r]equests the head of [UN Women] to continue the existing practice of effective consultation with civil society organizations, and encourages their meaningful contribution to the work of [UN Women].”<sup>348</sup> UN Women has since developed three primary ways for civil society to participate in developing its strategies, programs, and policies.

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343. Raustiala, *supra* note 48, at 158.

344. *Structure*, INT’L LABOUR ORG., <http://ilo.org/global/about-the-ilo/who-we-are> [<http://perma.cc/BX5K-QBYJ>].

345. *Origins and History*, INT’L LABOUR ORG., <http://ilo.org/global/about-the-ilo/history> [<http://perma.cc/WG3Y-U5VE>].

346. G.A. Res. 64/289, ¶ 49 (July 21, 2010).

347. *Id.* at ¶ 54.

348. *Id.* at ¶ 55.

First, UN Women's executive board may invite NGOs in consultative status with ECOSOC to participate in its deliberations.<sup>349</sup> Second, individuals and groups may join "Civil Society Advisory Groups" (CSAGs), which are talk shops formed at national, multi-state, regional, and global levels<sup>350</sup> to engage civil society.<sup>351</sup> CSAG applicants may be members of academia, women's and grassroots communities, gender equality networks, and development or social policy think tanks.<sup>352</sup> It is preferred that they have "strong credentials as gender, development and/or human rights advocates."<sup>353</sup> There is no provision in the CSAG guiding principles that excludes individuals and organizations associated with business interests, so they presumably may be accepted if they are otherwise eligible.

So far, these modes of access are rather standard. The third point of access between the organization and nonstate actors is the one that moves UN Women to the bottom of the vertical spectrum into the "innovator" category. In 2014, UN Women created a Private Sector Leadership Advisory Council, which grants membership to nonstate groups upon invitation of the UN Women executive board. The focus of the Council is to "accelerate economic and social progress for

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349. *The UN-Women Executive Board: An Informal Guide*, UN WOMEN 9 (Feb. 2015), <http://www.unwomen.org/-/media/headquarters/attachments/sections/executive%20board/un%20women%20executive%20board%20informal%20guide.pdf> [<http://perma.cc/F4EW-LAKY>].

350. *Civil Society Advisory Groups*, UN WOMEN, <http://www.unwomen.org/en/partnerships/civil-society/civil-society-advisory-groups> [<http://perma.cc/5ZU7-AP68>] (including a list of six regional CSAGs, twenty-nine national CSAGs, two multicountry CSAGs, and one global CSAG).

351. *Guiding Principles: UN Women's Civil Society Advisory Groups*, UN WOMEN 1, [http://www.unwomen.org/-/media/headquarters/attachments/sections/partnerships/civil%20society/guiding\\_principles\\_civil\\_society\\_advisory\\_groups.pdf](http://www.unwomen.org/-/media/headquarters/attachments/sections/partnerships/civil%20society/guiding_principles_civil_society_advisory_groups.pdf) [<http://perma.cc/U3YQ-LXP8>] (explaining that CSAGs "build on existing close relationships and increase strategic dialogue with civil society partners at global, regional and national levels and . . . formally recognize civil society as one of our most important constituencies"). For membership in a CSAG, an individual must be nominated, elected, or selected in a manner determined through consultation with "civil society networks/organizations in accordance with practices well-suited to local and national contexts" with a focus on achieving "balanced and diverse membership." *Id.* at 1-2.

352. *Id.* at 2.

353. *Id.* The membership list for the global CSAG is published on the UN Women website; however, membership lists for the regional, national, and multicountry CSAGs are published inconsistently on regional UN Women website pages. See, e.g., *UN Women Asia Pacific Regional Civil Society Advisory Group*, UN WOMEN, <http://asiapacific.unwomen.org/en/about-us/civil-society-advisory-group> [<http://perma.cc/7KT2-TFGB>]. CSAGs are also granted access to a web-based platform to facilitate communication among themselves. *Civil Society Advisory Groups*, *supra* note 350.

women and girls worldwide by combining our expertise, reach and resources";<sup>354</sup> indeed, as far as resources go, these businesses are major financial contributors to UN Women.<sup>355</sup> There are ten founding corporate leaders on the Council, including chief executives of The Coca-Cola Company, L'Oréal, Goldman Sachs, and Unilever.<sup>356</sup> The Council meets twice per year to review progress and provide strategic input to guide advocacy and resource mobilization efforts. It is unclear what, if any, additional access rights to UN Women membership in the Council secures. It is expected that each of the corporate-sector members will "deepen their engagement with UN Women through partnership agreements in support of the organization's priorities."<sup>357</sup> They may also sign onto the Women's Empowerment Principles, which offer guidance to businesses on how to support women in the workplace, marketplace, and community.<sup>358</sup>

Other specialist innovators that similarly trade policy making and oversight rights for financial support are the GAVI Alliance and the Global Fund to Fight AIDS, Tuberculosis and Malaria.<sup>359</sup>

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In sum, the lobbying rules map describes a number of ideal types, but organizations instantiate those types in unique ways. Nevertheless, the common features the typology identifies are useful in evaluating tradeoffs each basic type makes between administrability and balancing nonstate inputs, between preserving state sovereignty and capturing robust nonstate expertise and engagement, and between openness and selectiveness. These tradeoffs give rise to the larger prescriptive hypotheses in the Section that follows.

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354. *UN Women Launches Private Sector Leadership Advisory Council*, UN WOMEN (June 2, 2014), <http://www.unwomen.org/en/news/stories/2014/6/private-sector-leadership-advisory-council-launched> [<http://perma.cc/T6GL-UGSR>].

355. See, e.g., *Annual Report 2015-2016*, UN WOMEN 47 (2016), <http://www2.unwomen.org/-/media/annual%20report/attachments/sections/library/un-women-annual-report-2015-2016-en.pdf> [<http://perma.cc/Y6ZH-W4CK>] (showing that The Coca Cola Company contributed \$310,000 in 2015-16 and that other companies not on the board also contributed, such as MasterCard, which contributed \$500,000); see also *id.* at 41 (explaining that \$20 million will be pledged by foundations and corporations to fund gender equality and women's empowerment).

356. *UN Women Launches Private Sector Leadership Advisory Council*, *supra* note 354.

357. *UN Women's Major Partners*, UN WOMEN, <http://www.unwomen.org/en/partnerships/businesses-and-foundations/major-partners> [<http://perma.cc/Y83V-W7BP>].

358. *Women's Empowerment Principles*, UN WOMEN, <http://www.unwomen.org/en/partnerships/businesses-and-foundations/womens-empowerment-principles> [<http://perma.cc/D49D-BYBU>].

359. See Abbott & Gartner, *supra* note 10, at 4.

### *B. Payoffs and Open Questions*

The lobbying rules typology offers a conceptual structure to organize the Article's main claims. The following discussion reviews those claims and proposes potential prescriptive consequences. Most significantly, I argue that reforms should likely occupy the far top left and bottom right corners of the lobbying rules map.

First, a brief summative review: Framing the current access rules as lobbying regulation allows reformers to borrow from the toolbox of domestic regulations in the United States and elsewhere, as well as frameworks for reform developed by international bodies like the OECD. It also marries and cross-pollinates two diverse scholarly traditions: 1) the highly optimistic tradition that imagines non-state actors as legitimacy-conferring representatives of global publics, positing that those publics can democratize international organizations and thereby enlarge their mandates;<sup>360</sup> and 2) the highly pessimistic strand that decries lobbying as a “most serious and worrisome problem”<sup>361</sup> and “a corruption of the democratic process,”<sup>362</sup> which even the most globally advanced lobbying regulator fails to adequately control.

This Part, to this point, has illustrated that access by nonstate actors to international organizations is usually more akin to lobbying than it is to democratic voting, as the strong legitimacy-optimist position imagines. Not only are private-sector lobbying groups like trade and industry associations registered as “consultants” or “observers” to a wide variety of institutions, but the access they are afforded can be analogized to lobbying access, since the majority of the international structures cluster to the “classic” end of the vertical spectrum, affording full decisional power to nation-states and various forms of controlled access and input opportunities to nonstate actors. At the same time, some innovator organizations have begun to offer more robust forms of access to private actors in exchange for various resources those private actors can offer, like financial resources (e.g., UN Women and GAVI); access to affected populations (UNAIDS); or support or voluntary compliance by private-sector actors (UN-CITRAL and UN Women).

Based on this analysis, I suggest the following prescriptive proposal: reforms should push regulatory structures diagonally into opposite corners of the rules map. That is, reforms should produce structures that fall into the generalist classic or specialist innovator categories, as shown in Table 3:

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360. See, e.g., *Cardoso Report*, *supra* note 4, at 24, 30.

361. Cohen-Eliya & Hammer, *supra* note 71, at 265.

362. McKinley, *supra* note 2, at 1158.



TABLE 3.

	Less Categorical		More Categorical
	Generalist Classic	Moderate Classic	Specialist Classic
Access			
Participation			
Membership	Generalist Innovator	Moderate Innovator	Specialist Innovator

To start with the simplest part of this prescription, organizations should generally stay away from the generalist innovator category. The category appears to be a null set among current international organizations and it is unlikely that any organizations should adopt structures in this category in the future. The reason is that a generalist innovator’s access rules would give *full* membership rights to *all* potential entrants, of whatever interest or type. That is, individuals, NGOs, trade and industry associations, business entities, and others would all have the capacity to participate in the development of international rules through voting rights or other recognized decision-making capacity. Not only would this be a radical step under international law—dispensing with state sovereignty altogether and putting lawmaking power in the hands of individuals and sub-state entities—it is hard to envision how an international organization could administer such a pluralist voting structure.

Next, why should more classic organizations move to the left along the horizontal spectrum? As this Article has shown, the tendency over time has in fact been in the opposite direction: organizations have moved rightward across the horizontal spectrum from generalist to specialist, with many access rules clustering toward the center of that spectrum. But this shift has been motivated at least in part by strong legitimacy optimism, as lawmakers try to admit NGOs that would help those organizations claim the legitimacy of the “global public.” In service of this end, organizations have needed to be able to claim that those NGOs were representative of their members, that the groups represented a balance of individuals from the global north and south, and that their leaders answered to the members.<sup>363</sup> So organizations have implemented reforms that erect more distinctions between different kinds of groups (they have become more specialist) in an effort to carry out this strong legitimacy-optimist agenda. The recent reform at the WHO is a prime example of this: the WHO wishes to

363. See *supra* Section I.B.2.

distinguish between public-interest and private-sector groups in order to regulate each separately.

The argument I have made in this Article is that this move toward more specialist organizations is ill-advised and likely will not produce the intended results. Literature examining the ECOSOC rules shows that it is difficult to determine whether a consultant group speaks for its members and to maintain a balance of voices from the global north and south. Here and in previous work I have built on that critique by suggesting that the presence of a significant private-sector lobby makes it even more difficult for international organizations to determine what interests an association represents. In particular, I have described an “astroturf activism” phenomenon, where business entities “gain access to international lawmakers through front groups that obscure the identity of the profit-seeking enterprise that is really the relevant actor.”<sup>364</sup> Business organizations do this by capturing existing NGOs, forming their own,<sup>365</sup> or capturing trade associations that purport to speak on behalf of a particular group of actors—such as an organization that purports to speak for farmers in the global south.<sup>366</sup> Moreover, sometimes for-profit entities can escape the notice of gatekeepers and become accredited, notwithstanding their noncompliance with accreditation eligibility rules. Indeed, the nonprofit criterion itself is domestically administered, and domestic administration is notably uneven.<sup>367</sup>

In short, here and elsewhere, I argue that erecting yet more categorical distinctions between different nonstate entities for the purpose of enhancing representation is a futile game because trying to reduce or eschew certain actors, like private-sector actors, can provoke capture of NGOs, mission distortion, and covert behavior. Experience has shown that separately regulating different entities does not appear to produce the representative participation those reforms seek.<sup>368</sup> Thus, moving a set of access rules toward the right-hand “specialist” category, by adding additional categorical distinctions, will likely further sacrifice administrability. The WHO reform is a particularly striking example of this, as the WHO itself is charged with reviewing applicant associations to independently assess whether there might be any potential private-sector influences lurking that could potentially cause undue influence over WHO officials and

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364. Durkee, *supra* note 14, at 229.

365. *Id.*

366. *Id.*

367. See Dana Brakman Reiser & Claire R. Kelly, *Linking NGO Accountability and the Legitimacy of Global Governance*, 36 BROOK. J. INT'L L. 1011, 1030–31 (2011).

368. See Durkee, *supra* note 14, at 205.

state delegates.<sup>369</sup> This imposes a heavy burden on those institutional gatekeepers to ferret out the kinds of astroturf activism the private sector will be most eager to hide; it may also chill productive partnerships between public-interest and private-sector groups.

Thus, the lobbying frame presents a set of tradeoffs. Officials can either (1) recognize the “consultation” procedure as lobbying, embrace the “generalist classic” model in which they get out of the business of policing the representativeness of NGOs, and use lobbying regulatory tools like disclosure and transparency as constraints; or (2) build truly participatory multistakeholder structures that permit a smaller number of hand-selected representatives to participate as policymakers and members, crafting new “specialist innovator” models such as those seen in the new global health context (e.g., GAVI, the Global Fund, UNAIDS).

The former strategy would improve administrability. Reforms would extricate admission criteria meant to enhance representativeness and accountability and borrow domestic regulatory strategies focusing on registration and publicly available disclosure of lobbying activities. Organizations would stop policing motives and accountability 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 the expertise or other functional value of the input, rather than as a quasi-vote on a particular legal rule delivered by an unaccountable representative of an imagined global constituency.

The latter strategy—moving to specialist innovator organizations—would also improve administrability, but instead by radically decreasing the number of representatives who are permitted to participate. It would move away from the chimeric, imagined participation of the consultation process to true participation, where nonstate organizations have a voting stake in the work of the international institution. This actual stake could encourage consolidation of views among particular kinds of stakeholders. This structure would not likely be the right choice for all international organizations, 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 organization will depend on how well those nonstate collaborations will help the organization carry out its mission.

Indeed, one might imagine plotting *types* of international organizations on a third spectrum and transforming the map into a cube. This could allow predictions about where on the lobbying rules map a particular organization’s rules ought to land, based on the distinctive needs of that organization. Organizations

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369. See *supra* Section IV.A.2.

that draw substantially on private-sector assistance – for expertise, voluntary compliance, or financial support – may be more likely to benefit from access rules in the specialist innovator space. Organizations that require substantial support and buy-in from national governments may be best advised to maintain “classic” structures that preserve nation-state sovereignty over the relevant issues. Organizations like UNCITRAL may fall in the middle because they are caught in a bind: On the one hand, they need state support in order to obtain implementation in national jurisdictions of the rules they produce. On the other hand, they benefit from private-sector expertise and will need private-sector buy-in as well, or national jurisdictions will have trouble overcoming objections at home when they seek to implement the rules they have developed at the international level. Perhaps it is these factors which explain both UNCITRAL’s location in the center of the rules map and the controversy its access rules have produced. Other organizations, like UNAIDS, have decided that it is important to give a full voting stake to NGOs that work with populations affected by the AIDS virus. Future efforts regarding cybersecurity, which will depend heavily on private-sector expertise, might also be excellent candidates for such an approach.

## CONCLUSION

With change comes opportunity. The early twenty-first-century global context poses existential threats to fundamental principles of the post-World War II order, such as the value of multilateralism, the primacy of diplomacy over military force, and the neoliberal promise of free trade. But uncertainty and change also present fertile opportunities to transform key features of the current order.

One important feature of the changing global landscape is the relationship between nation-states and nonstate actors. Business entities have become their own global powers, rivaling nations in their economic and political clout. While profit motives can distort and thwart international lawmaking intended to serve the public good, nations and international organizations also depend on business entities for expertise, innovation, and cooperation. How should international law respond to these facts? This Article addresses one key facet of this question.

The theory of this Article is that reframing the international accreditation structures as a body of international lobbying law focuses reforms on means to capture the important informational and practical contributions of *all* nonstate participants – whether they be classic public-benefit NGOs, industry or trade associations, business entities, or others – while introducing sunlight into the process through more functional registration and disclosure rules.

At the same time, by framing these contributions as lobbying, not participation, the theory clears away misleading assumptions that have insidiously

thwarted deeper reforms. The lobbying framework reveals that the current international access laws preserve a clear hierarchy between national sovereigns and nonstate entities. New multistakeholder institutions offer promising models for areas like cybersecurity, climate change, and global health, where productive public-private collaboration may be critical to addressing global challenges.

