ARTICLE

Astroturf Activism

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Abstract.

Corporate influence in government is more than a national issue; it is an international phenomenon. For years, businesses have been infiltrating international legal processes, secretly lobbying lawmakers through front groups that function as "astroturf" imitations of grassroots organizations. But, because this business lobbying is covert, it has been underappreciated in both the literature and the law. This Article unearths this "astroturf activism" phenomenon. It offers an original descriptive account that classifies modes of business access to international officials, identifies harms, and develops a critical analysis of the laws that regulate this access. I show that the perplexing set of access rules for aspiring international lobbyists creates the transparency problem I identify by prohibiting direct business access. I argue that the access rules have been rendered obsolete by globalization and fundamental changes in relationships between national governments and multinational business entities. To that historical critique, the Article adds an efficiency account and an evaluation of the law's conceptual coherence that draws from pluralistic theory. The analysis gives rise to two potential avenues for reform. One reform would require enhanced disclosures, and the other would offer formal access to business entities, engaging business input but also exposing it. Either potential reform would update the law to better accommodate contemporary business roles in international governance. The stakes are high. On the one hand, business can offer lawmakers expertise and politically neutral solutions that will build better laws. On the other hand, unchecked business influence can obstruct and neutralize laws aimed at solving critical global problems.

* Assistant Professor, University of Washington School of Law. This Article advances a larger project that explores how business entities shape the content and effect of international treaties. For invaluable comments I thank Erez Aloni, Julian Arato, Pamela Bookman, Sarah Dadush, Jean Galbraith, Maggie Gardner, Catherine Hardee, Rob Knowles, Lisa Manheim, Cornel Marian, Anita Ramasastry, Zahr Said, Greg Shaffer, participants at workshops at the American Society of International Law Research Forum; the JILSA Annual Meeting at the University of Pennsylvania; the Corporate Law in Society CRN at the Law and Society Annual Meeting, and the Second Annual Business and Human Rights Scholars Conference; and participants at law faculty colloquiums at the University of Illinois and the University of Washington. Thanks also to the excellent editorial team at the Stanford Law Review, and, for exceptional research assistance, to Laura Daugherty and Carolyn White.

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Introduction

> A newer kind of national business organization is the corporate front group which presents itself to the community as an NGO rather than a business organization. . . . These "astroturf" (as distinct from grass-roots) NGOs . . . are the most sincere form of flattery the business community pays to the efficacy of social movement politics.[1]

Citizens United v. Federal Election Commission[2] famouslyheld that the First Amendment confers on corporations the right to express themselves by unlimited spending on political speech.[3] The holding allegedly unleashed a torrent of corporate political spending[4] as well as a vigorous public debate about corporate rights to participate in the U.S. lawmaking process.[5] The *Citizens United* debate has featured a sharp critique by President Obama, "a flurry" of proposed fixes in Congress, campaigns to amend the U.S. Constitution, and an avalanche of academic commentary and public protest.[6]

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1. JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION 489 (2000) (offering examples of astroturf NGOs: "Consumers for World Trade (a pro-GATT industry coalition), Citizens for Sensible Control of Acid Rain (a coal and electricity industry front), and the National Wetlands Coalition (US oil company and real estate developers)").
2. 558 U.S. 310, 340 (2010) (holding 5-4 that the First Amendment prohibits the government from restricting independent political expenditures by corporate entities).
3. *Id.* at 365.
4. This corporate political spending is said to be channeled secretly, through "dark money" and Super PACs. *See* Gabrielle Levy, *How Citizens United Has Changed Politics in 5 Years*, U.S. NEWS & WORLD REP. (Jan. 21, 2015, 12:56 PM), http://www.usnews.com/news/articles/2015/01/21/5-years-later-citizens-united-has-remade-us-politics (*Citizens United* has resulted in a "deluge of cash poured into so-called super PACs—particularly single-candidate PACs, or political action committees—which are only nominally independent from the candidates they support. . . . [M]uch of this spending, known as 'dark money,' never has to be publicly disclosed.").
5. *See* Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 143 (2010) ("*Citizens United v. FEC* unleashed a torrent of popular criticism . . . .") (footnote omitted); *see, e.g.*, Richard L. Hasen, Citizens United *and the Illusion of Coherence*, 109 MICH. L. REV. 581, 583 (2011) (*Citizens United* "amplified other significant, incoherent aspects of the [Court's] campaign finance jurisprudence."); *see also* Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 83-85 (2010) (noting that "[c]onstitutional law scholars will long debate the wisdom" of *Citizens United* and offering a corporate law analysis of its implications).
6. Sullivan, *supra* note 5, at 143; *see also* Richard A. Epstein, Citizens United v. FEC*: The Constitutional Right that Big Corporations Should Have but Do Not Want*, 34 HARV. J.L. & PUB. POL'Y 639, 639 (2011) (discussing how the opinion "captured the public imagination").

But the attention stops at the border. The scholarly and popular uproar is focused on corporate participation in U.S. *domestic* political processes; it does not extend to legal systems beyond U.S. borders.[7] The truth is that businesses also carry expressive rights in *international* legal processes.[8] In particular, businesses are able to secretly gain access to international officials by exploiting an obscure set of rules developed by the Economic and Social Council, an organ of the United Nations. Businesses do this by creating or commandeering nonprofit associations, which in turn register as "consultants" with special rights to advise international officials. Businesses thus work covertly through nonprofit groups to exploit the special access those organizations enjoy.[9] I call this phenomenon "astroturf activism" in international law.[10]

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7. The press captured news of backroom deals by business lobbyists during the secretive negotiation of the Trans-Pacific Partnership. *See* Melissa J. Durkee, *The Business of Treaties*, 63 UCLA L. REV. 264, 266 n.1 (2016) [hereinafter *Business of Treaties*] (citing 158 CONG. REC. S3517 (daily ed. May 23, 2012) (statement of Sen. Wyden) ("[T]he majority of Congress is being kept in the dark as to the substance of the [Trans-Pacific Partnership] negotiations, while representatives of U.S. corporations—like Halliburton, Chevron, PHRMA, Comcast, and the Motion Picture Association of America—are being consulted and made privy to details of the agreement."); Taylor Wofford, *What Is the Trans-Pacific Partnership and Why Are Critics Upset by It?*, NEWSWEEK (Jun. 12, 2015, 1:12 PM), http://www.newsweek.com/what-tpp-trade-deal-342449 ("[D]rafts of the agreement [are] under lock and key, although some 700 'cleared advisers,' most of them corporate lobbyists, have been able to read it and make suggestions."). But little is known and written about the mechanisms and effects of business influence on international treaty production. *See* Durkee, *Business of Treaties*, *supra*, at 266-67 (arguing that the mechanisms, extent, and effects of business participation in treaty making are understudied and underappreciated); 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).

8. *See infra* Part I for an examination of the legal rules that give rise to these rights, specifically Article 71 of the United Nations Charter and subsequent accreditation rules developed by the United Nations Economic and Social Council pursuant to Article 71.

9. *See infra* Part I.C for an examination of this legal structure.

10. This Article is not the first to use the term "astroturf" to refer to corporate use of the "grassroots" form. *See e,g.*, BRAITHWAITE & DRAHOS, *supra* note 1, at 489 (using the term "astroturf NGOs" to refer to corporate front groups). Indeed, the term "astroturf activism" itself has appeared in the press in various contexts. *See, e.g.*,*"Astroturf Activism": Leaked Memo Reveals Oil Industry Effort to Stage Rallies Against Climate Legislation*, DEMOCRACY NOW!, (Aug. 21, 2009), http://www.democracynow.org/2009/8/21/astroturf_activism_leaked_memo_reveals_oil (alleging that the American Petroleum Institute asked oil companies to recruit their employees to participate in rallies against climate change legislation); George Joseph & StudentNation, *Astroturf Activism: Who is Behind Students for Education Reform?*, THE NATION (Jan. 11, 2013), https://www.thenation.com/article/astroturf-

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Astroturf activism, facilitated by dysfunctional legal rules, obscures business influence in international lawmaking; casts suspicion on legitimate public-interest organizations (often called "nongovernmental organizations" or "NGOs"); and blunts the power of international actors to effectively regulate corporate access.[11] It also sacrifices the expertise and efficiency benefits businesses might offer lawmakers in a well-regulated process.[12]

This Article offers an original study to uncover and describe the astroturf activism phenomenon in the context of international organizations such as the U.N. Economic and Social Council, and a theory of the legal failures that produce the phenomenon. The argument is this: Astroturf activism is the product of archaic access rules that fail to accommodate drastically altered relationships between two sets of actors. Those actors are, on the one hand, national governments and their international lawmakers, and, on the other, the business sector, which has exploded in size and global influence since the early twentieth century when the access rules were developed. The flaws in the law, I argue, are rooted in obsolescence.

This obsolescence yields perverse incentives toward covert behavior, forcing businesses to dissemble or lose out on access to officials and lawmakers.[13] The resulting harm stretches in two directions: In one direction, the law provides an incentive for business to infiltrate the NGO world in a way that attenuates accountability, mixes messages, and threatens the legitimacy of NGO participation in international lawmaking.[14] In the other direction, the law curbs the effectiveness of contributions businesses can make to lawmaking.[15] It forces businesses to aggregate into associations that may be poor fits for their expertise and agendas, provide lowest-common-denominator proposals, or capture the agendas of weaker public-interest organizations.[16] The law also taxes the resources of gatekeepers—who have insufficient mechanisms to judge between different

activism-who-behind-students-education-reform (alleging that the organization "Students for Education Reform" is a front for a corporate lobbying firm). This Article adopts the "astroturf activism" term in a new context to refer to the phenomenon this Article uncovers whereby corporations use nonprofit NGOs as front groups to advance business interests through the U.N. consultancy system.

11. *See* discussion *infra* Part II.C.
12. *See generally* Durkee, *Business of Treaties*, *supra* note 7, (showing that business participation in international law production can sometimes be beneficial, as businesses can contribute expertise, break geopolitical logjams, and offer efficient solutions).
13. *See* discussion *infra* Part II.B.
14. *See* discussion *infra* Parts II.C.1, II.C.2.
15. *See* discussion *infra* Part II.C.4.
16. *Id.*

would-be participants in the international process—and institutional decision makers—who face an onslaught of input from often-veiled sources.[17]

This project is both descriptive and critical. Descriptively, the Article identifies the legal structure that creates the astroturf activism phenomenon and its effects. To do so, the Article uses a multisource approach to uncover forms of secret corporate access to lawmakers.[18] It shows that the phenomenon I describe as astroturf activism occurs in at least three modes: (i) businesses capture existing NGOs or form their own NGOs with nonprofit status and mission statements that obscure the company's true interests; (ii) *for-profit* entities exploit gatekeeping weaknesses to gain access notwithstanding their non-compliance with eligibility rules; or (iii) powerful businesses capture trade associations that purport to speak on behalf of a wider range of actors in a particular industry.[19]

What is the source of this covert mayhem? The astroturf activism practice arises as businesses try to take advantage of "consultancy" status at international organizations like the United Nations' Economic and Social Council (often called "the Council" or "ECOSOC") or the World Health Organization ("WHO"). The consultancy status offers special access to

17. *See* discussion *infra* Part II.C.3. The project shares objectives with liberal theory in international legal scholarship, which seeks to understand how interest groups shape international law. The liberal account, however, focuses on the ways interest groups influence domestic lawmakers, who in turn enter into international agreements. *See, e.g.*, Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1952-54 (2002) (identifying the core aims of liberal theory); *see also* Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513, 516-21 (1997) (elaborating liberal theory in international relations; explaining that domestic constituencies construct state interests). Interest group pressures also play a role in process-based accounts of law's development and reception. *See*, *e.g.*, Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 MICH. L. REV. 167, 168-70 (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, 502 (2004) (arguing that domestic interest groups can advocate for international agreements in an attempt to influence domestic law and policy); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2654-56 (1997) (reviewing ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995) and THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995)) (explaining that government officials, NGOs, "transnational moral entrepreneurs," and business entities all generate norms which are later formalized in international law). Those accounts, however, do not isolate the role of business actors in lawmaking and study the effect of those business roles on international law. There is much more to be understood.

18. For a description of this Article's research methods, see *infra* Part II.A.

19. For an examination of these modes of access, see *infra* Part II.B.

international officials and lawmakers.[20] Significantly, these consultative relationships are limited to nonprofit associations and exclude for-profit corporations and other business entities.[21] Rather than sit on the sidelines, however, businesses surreptitiously find access through creating or co-opting the traditional NGO format.[22] In fact, a business literature even guides businesses in how to effectively gain access by making use of the NGO form.[23]

Because much of this behavior is underground, little attention has been paid to its significance.[24] Yet, at the same time, a robust literature considers the role of NGOs as a whole in international governance.[25] While this literature sometimes cautions that NGO participation can lack in

20. For a discussion of the rules governing this access, see *infra* Parts I.B, I.C. *infra.* The legal roots of this consultancy structure lie in the United Nations Charter, which empowers the Council to make arrangements to consult with NGOs "concerned with matters within its competence." U.N. Charter art. 71.

21. *See infra* Part Part I.C.1 & 2; *see also Introduction to ECOSOC Consultative Status*, U.N. DEP'T OF ECON. & SOC. AFF: NGO BRANCH, http://csonet.org/index.php?menu=30 (last visited July 31, 2016) (describing the groups anticipated by these criteria as "international, regional, sub-regional, national non-governmental organizations, non-profit organizations, public sector or voluntary organizations").

22.*See* BRAITHWAITE & DRAHOS, *supra* note 1, at 489 (explaining that these front or captured NGOs do not present themselves as business organizations); Fairouz El Tom, *Diversity and Inclusion on NGO Boards: What the Stats Say*, THE GUARDIAN (May 7, 2013, 5:56 AM EDT), http://www.theguardian.com/global-development-professionals-network/2013/apr/29/diversity-inclusion-ngo-board (finding that over half of the "[t]op 100 NGOs" had one or more board members affiliated with companies that invest in or provide services to the arms, tobacco, and financing industries); *see also* discussion *infra* Part II.B.

23. *See* Robert W. Fri, *The Corporation as Nongovernment Organization*, 27 COLUM. J. WORLD BUS. 90, 92-93 (1992) (recommending that business entities consider participating in U.N. activities by sponsoring or partnering with NGOs); *see also* discussion *infra* Part II.B.2.

24. *See generally* Stephan, *supra* note 7, at 1577 (proposing that more attention be paid to private-sector influence on international lawmaking). By contrast, a robust literature considers business roles in standard-setting, "bottom-up" lawmaking, and regulatory cooperation. *See, e.g.*, TIM BÜTHE & WALTER MATTLI, THE NEW GLOBAL RULERS: THE PRIVATIZATION OF REGULATION IN THE WORLD ECONOMY 29-33 (2011) (identifying private non-market regulatory regimes); Janet Koven Levit, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT'L L. 125, 126-27 (2005) (showing how business entities participate in setting standards that can become absorbed into formal law) ; 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).

25. *See* Peter J. Spiro, *Accounting for NGOs*, 3 CHI. J. INT'L L. 161, 161 n.2 (2002) [hereinafter Spiro, *Accounting for NGOs*] ("Reflecting the rise of non-state actors, the academic and policy literature on NGOs has itself exploded.").

accountability or legitimacy,[26] it often celebrates NGOs as "democratizers" that exercise moral authority and enhance the legitimacy of the international process.[27] Prominent international officials share this assessment: U.N. Secretary-General Boutros Boutros-Ghali called NGO activity a "basic form of popular representation in the present-day world" and "a guarantee of . . . political legitimacy . . . ."[28] Later, U.N. Secretary-General Kofi Annan praised the rise of NGO consultants as a "revolution" and a "global people-power."[29] Finally, in a 2004 report on the consultancy program, U.N. officials continued to champion participation by civil society, asserting that "[t]he growing participation and influence of non-State actors is enhancing democracy and reshaping multilateralism."[30]

As this Article shows, the "people" advancing this global "revolution" are often corporations. And many of these "democratizing" NGOs are associations of business entities. Do they too proceed from moral authority and enhance the legitimacy of the international legal process? I argue that, in fact, sometimes business input can enhance procedural legitimacy and improve substantive outcomes. But legal reforms are needed to capture these benefits and guard against the harms business influence can cause. I offer a set of principles to guide these reforms in order to better regulate business contributions and more appropriately suit twenty-first century

26. *See, e.g.*, 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 their "legitimacy" in the international system is an empty form of auto-legitimation); Edith Brown Weiss, *The Rise or the Fall of International Law?*, 69 FORDHAM L. REV. 345, 358 (2000) (noting that while "[p]articipation by non-State actors in the international system greatly enhances [the] accountability" of the international legal system, it can also be difficult for donors and "those affected by the NGOs to hold them accountable").

27. For an overview of the literature, see generally Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100 AM. J. INT'L L. 348, 365-66 (2006); *see also* Spiro, *Accounting for NGOs*, *supra* note 25, at 162 ("[T]he accountability challenge may be better answered by formally and fully recognizing NGO power in international institutional architectures."); discussion *infra* Part I.A.

28. Boutros Boutros-Ghali, Sec'y Gen., United Nations, Keynote Address to the 47th DPI/NGO Conference (Sept. 20, 1994), *in* 47TH ANNUAL DPI/NGO CONFERENCE FINAL REPORT 3 (1994).

29. 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).

30. Rep. of the Panel of Eminent Persons on United Nations-Civil Society Relations, *We the Peoples: Civil Society, the United Nations and Global Governance*, transmitted by Letter Dated 7 June 2004 from the Chair of the Panel of Eminent Persons Established Pursuant to Resolution 57/300 (2002), U.N. DOC. A/58/817, at 3 (June 11 2004) [hereinafter *Cardoso Report*].

relationships between international officials, public-interest NGOs, and business actors.

The Article proceeds in three parts. Part I begins by identifying the ECOSOC consultancy law and exploring its perplexing application to business entities. Part II documents the astroturf activism phenomenon through an original study and a taxonomy, cataloging the results as problems of opacity, mission accountability, gatekeeping, and access. Part III constructs a critical analysis—rooted in a historical account, but also drawing on functionalism and pluralistic theory—and develops a set of principles to guide legal reform.

I. A Regime of Consultants

The astroturf activism phenomenon in international law and governance is a product of the international legal rules that offer a special consultancy status to nonprofit entities but exclude businesses. This Part first frames the discussion by offering a vivid case study in astroturfing, then identifies the relevant legal rules and describes their operation.

A. Who Makes International Law?

During the course of the infamous mass tort litigation in the U.S. against Philip Morris and other tobacco companies, litigators accomplished a major strategic coup d'état through the simple act of discovery.[31] The tobacco companies were forced to produce thousands of documents that drew the curtain on a vast and insidious array of strategies the companies used to resist tobacco control.[32]

Among the buried secrets was evidence that the industry did not confine itself to efforts to influence *domestic* regulation—rather, it had also launched an "elaborate, well financed, sophisticated, and usually invisible" campaign of deliberate subversion of international lawmaking institutions.[33] The campaign was focused most intensely on the WHO,[34] as the tobacco

31. COMM. OF EXPERTS ON TOBACCO INDUS. DOCUMENTS, WORLD HEALTH ORG., TOBACCO COMPANY STRATEGIES TO UNDERMINE TOBACCO CONTROL ACTIVITIES AT THE WORLD HEALTH ORGANIZATION 25 (2000), http://www.who.int/tobacco/resources/publications/general/who_inquiry/en/ [hereinafter TOBACCO COMPANY STRATEGIES REPORT].

32. *See id.* at 25, 30.

33. *Id.* at iii.

34. *Id.* ("The tobacco companies' own documents show that they viewed WHO, an international public health agency, as one of their foremost enemies . . . [and] instigated global strategies to discredit and impede WHO's ability to carry out its mission.").

companies sought to shape that organization's agenda. The campaign came at a time when the WHO was in the midst of developing a major international treaty targeted at regulating the tobacco industry: the Framework Convention on Tobacco Control (Tobacco Convention").[35] As a committee of experts who reviewed the tobacco industry documents concluded, "[t]hat tobacco companies resist proposals for tobacco control comes as no surprise, but what is now visible is the scale, intensity and, importantly, the tactics, of their campaigns."[36]

The scale and intensity of the tobacco companies' campaign, however, was shrouded in secrecy. Most of their efforts to influence international lawmakers were covert. Their tactics included hiring former WHO officials to gain valuable contacts within the organization;[37] secretly "pitting other U.N. agencies against WHO";[38] manipulating the scientific and public health debate about the health effects of tobacco through funding purportedly "independent" experts;[39] speaking through developing countries by convincing them that WHO's tobacco control program was a "First World" agenda unworthy of their attention and support;[40] and conducting secret surveillance of WHO activities.[41]

This battery of covert activities reveals the technique this Article calls "astroturf activism": the tobacco companies "hid behind a variety of ostensibly independent quasi-academic, public policy, and business organizations whose tobacco industry funding was not disclosed."[42] In particular, these included tobacco company-created front groups and trade unions that had obtained consultative status at the WHO.[43] These groups used their consultant status to lobby against tobacco control activities generally, and more specifically against the treaty aimed at responding to

35. *Id.* at 80 (warning that the tobacco industry would likely mobilize to oppose the Tobacco Convention).

36. *Id.* at 228.

37. *Id.* at 2, 37.

38. *Id.* at 1.

39. *Id.* at 3, 50.

40. *Id.* at 1, 23, 30, 86.

41. *Id.* at 53.

42. *Id.* at iii.

43. *See, e.g.*, *id.* at 7 ("[T]obacco companies made prominent use of the International Tobacco Growers' Association (ITGA) . . . [which] claims to represent the interests of local farmers. The documents indicate, however, that tobacco companies have funded the organization and directed its work."). *See also infra* note 265, and accompanying discussion.

the globalization of the "tobacco epidemic"[44]: the Tobacco Convention.[45] It is impossible to fully measure the results of the tobacco companies' campaign against the WHO and Tobacco Convention[46]—and the Tobacco Convention was ultimately successful against these odds.[47] But the tobacco industry activities did succeed in "slow[ing] and undermin[ing]" the WHO's tobacco control campaign and therefore effective tobacco regulation around the world.[48]

Business entities influence international lawmaking. The tobacco industry example demonstrates the proposition in an unfortunately nefarious manner. Not all examples of business influence put business at odds with international regulators.[49] But the nature and extent of business influence remains underappreciated and underexamined.[50]

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44. *Preamble* to WHO Framework Convention on Tobacco Control, May 21, 2003, 2302 U.N.T.S 166, http://apps.who.int/iris/bitstream/10665/42811/1/9241591013.pdf?ua=1 .pdf [hereinafter Framework Convention].

45. TOBACCO COMPANY STRATEGIES REPORT, *supra* note 31, at 6, 80. Incidentally, the Framework Convention was the first treaty negotiated under WHO auspices. *Forward* to Framework Convention, *supra* note 44, at v.

46. The report of the Committee of Experts was released during the preparation and prior to the conclusion of the Framework Convention on Tobacco Control. However, the experts concluded that this tobacco industry would likely continue its "sophisticated and sustained" campaign to "attempt to defeat" the Tobacco Convention or "to transform the proposal into a vehicle for weakening national tobacco control initiatives." TOBACCO COMPANY STRATEGIES REPORT, *supra* note 31, at 18-19.

47. *See About the WHO Framework Convention on Tobacco Control*, WORLD HEALTH ORG., http://www.who.int/fctc/about/en/ (last visited July 30, 2016) (noting that the WHO Framework Convention on Tobacco Control entered into force on February 27, 2005 and "has since become one of the most rapidly and widely embraced treaties in United Nations history.").

48. TOBACCO COMPANY STRATEGIES REPORT, *supra* note 31, at iii. As one example, the documents disclose that Phillip Morris took credit for a decision by the WHO to "drop tar and nicotine reductions" from a policy agenda. *Id.* at 64; *see also id*. at iii. ("Although the number of lives damaged or lost as a result of the tobacco companies' subversion of WHO may never be quantified," "the committee of experts is convinced that, on the basis of the volume of attempted and successful acts of subversion identified . . . it is reasonable to believe that the tobacco companies' subversion of WHO's tobacco control activities has resulted in significant harm.").

49. *See* Durkee, *Business of Treaties*, *supra* note 7, at 295-297 (examining diverse and important business contributions to a successful private law treaty, the Cape Town Convention on International Interests in Mobile Equipment).

50. *See id*. at 266-67; 288-291; *see also* Stephan, *supra* note 7, at 1577 (urging attention to the role of private actors in international lawmaking). While the international legal literature has far to go in this area, Braithwaite and Drahos have made a substantial contribution in sociology. *See generally* BRAITHWAITE & DRAHOS, *supra* note 1, 27-33 (detailing findings of a major study: that large corporations are effective actors in "enrolling the power of states and the power of the most potent international organizations" to shape global regulations). For a

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By contrast, a voluminous literature considers business influence in informal or "bottom-up" lawmaking—that is, business roles in setting codes of conduct and private standards; contributing to "soft" or voluntary international law or international regulation; and engaging in investor-state arbitration that imports content into investment treaty regimes.[51] That literature principally identifies, in Greg Shaffer's terms, the ways that businesses construct "private legal systems . . . and private institutions to enforce it,"[52] and examines the way that those private systems sometimes make their way into formal law.[53]

Less has been said in the legal literature about direct business influence on international lawmakers and, in turn, on formal international treaty law.[54] In a previous article, I offered case studies to show that businesses

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discussion of the literature on business influence in the environmental context, see *infra* note 65.

51. *See, e.g.*, BÜTHE & MATTLI, *supra* note 24, at 29-33 (describing private standardization regimes); VIRGINIA HAUFLER, A PUBLIC ROLE FOR THE PRIVATE SECTOR: INDUSTRY SELF-REGULATION IN A GLOBAL ECONOMY 1-5 (2001) (exploring the phenomenon of industry self-regulation in codes of conduct and coordinated standards); Julian Arato, *Corporations as Lawmakers*, 56 HARV. INT'L L.J. 229, 232-33 (2015) (showing that business entities engage in arbitration that defines the terms of bilateral investment treaties); Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 VAND. J. TRANSNAT'L L. 513 (2009) (describing transnational regulation as the product of a "governance triangle" between states, firms, and NGOs); Dan Danielsen, *How Corporations Govern: Taking Corporate Power Seriously in Transnational Regulation and Governance*, 46 HARV. INT'L L.J. 411, 412 (2005) (identifying private businesses' various roles in global governance); Levit, *supra* note 24, at 126 (identifying "bottom-up lawmaking" as the idea that "practitioners—both public and private . . . create, interpret, and enforce their rules. Over time, these initially informal rules blossom into law that is just as real and just as effective, if not more effective, as . . . treaties . . . ."); Andreas Georg Scherer & Guido Palazzo, *The New Political Role of Business in a Globalized World: A Review of a New Perspective on CSR and its Implications for the Firm, Governance, and Democracy*, 48 J. MGMT. STUD. 899, 911 (2011) ("Business firms engage in processes of self-regulation through '*soft law*' in instances where state agencies are unable or unwilling to regulate.") (citations omitted)); Markus Wagner, *Regulatory Space in International Trade Law and International Investment Law*, 36 U. PA. J. INT'L L. 1, 56-58 (2014) (describing mechanism whereby the WTO SPS Agreement incorporates international standards).

52. Shaffer, *supra* note 7, at 151-52 (organizing business impact on lawmaking into two broad categories: first, creating private law and second, influencing public lawmakers).

53. *See* sources cited *supra* note 51.

54. *See* 54. *See* Danielsen, *supra* note 51, at 411 (noting that "scholars have focused little attention on . . . the precise mechanisms through which corporations contribute to transnational regulation and governance" or the welfare effects of those

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can be deeply involved at all points in the treaty production process and that this has significant implications for the health of international treaty regimes.[55] The article also observed that, at least in the private law context, business input can at times be helpful: improving the treaty production process by offering expertise, proposing politically neutral solutions acceptable to differently-situated states, moving the process expeditiously forward, assisting with implementation, and monitoring compliance.[56] That work began to respond to the call for more sustained analysis of business influence on formal international lawmaking. But it also revealed important gaps in the legal literature in this area. In sum, while corporate pressure on lawmakers has long been a topic of interest within U.S. *domestic* legal literature, there is a striking lacuna in this area in international legal literature.[57]

The gap is demonstrated by a notable contrast: a "copious" literature examines the contributions and influences of NGOs on international lawmaking.[58] Dozens of law review articles consider the NGO role in consulting with and influencing international lawmakers, through formal

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corporate contributions); Shaffer, *supra* note 7, at 175-76 (collecting literature); Stephan, *supra* note 7, at 1577 (proposing this as a fertile area of research).

55. *See* Durkee, *Business of Treaties*, *supra* note 7, at 291-305 (offering case studies on the Cape Town Convention on International Interests in Mobile Equipment and the Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, which is also known as the Rotterdam Rules).

56. *See id.* at 294-297.

57. This is not to say that the literature on interest group impacts on lawmakers is wholly absent. To the contrary, understanding the effect of domestic politics on the development of international law is one of the central projects of liberal theory in international scholarship. *See* Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 470-83 (2005) (identifying core aims of legal theory and examining how international legal theory borrows from international relations); *see also* Moravcsik, *supra* note 17, at 518-20 (arguing that domestic constituencies construct state interests). Moreover, the attention by liberal theorists to interest group influence on international law has inspired a broader literature. *See*, *e.g.*, Benvenisti, *supra* note 17, at 168-70 (casting the sovereign state as an agent of small interest groups); Brewster, *supra* note 17, at 502 (arguing that domestic interest groups try to influence international law in order to set domestic policy); Koh, *supra* note 17, at 2656 (identifying a process-based theory that views substate officials and interest groups as involved in a process of law development, reception, and integration). But liberal theory and its progeny do little to explain how this interest group activity affects the ultimate success or failure of international treaties; nor do they isolate the role of business actors in lawmaking, or study the effect of those business roles on international law. *See* Hathaway, *Do Human Rights Treaties Make a Difference?*, *supra* note 17, at 1954-55 (noting some limitations of liberal theory).

58. Charnovitz, *supra* note 27, at 349-50.

consultancy regimes and otherwise.[59] The literature addresses, among other questions, the legal status of NGOs;[60] the impact of NGOs on the lawmaking process;[61] the legitimacy of NGO participation as consultants to international lawmakers;[62] and whether NGOs might have a "right to consult" with international lawmakers.[63] But this literature focuses its attention on classic public-interest NGOs and not on business-promoting NGOs such as industry or trade associations, or business influence on public-interest NGOs.[64] In doing so, this literature has not attended to the

59. *See* Spiro, *Accounting for NGOs*, *supra* note 25, at 161 n.2 ("[T]he academic and policy literature on NGOs has . . . exploded."). For a relatively pithy overview of the NGO literature, see generally Charnovitz, *supra* note 27, at 365-66 (identifying literatures related to the identity, functions, and legal status of NGOs, as well as the legitimacy and effects of NGO activity on the international stage). For an early annotated bibliography, see THE THIRD FORCE: THE RISE OF TRANSNATIONAL CIVIL SOCIETY 241-76 (Ann M. Florini ed., 2000). Despite the wealth of literature, Spiro points out that the role of NGOs in international lawmaking "remains under-theorized." Peter J. Spiro, *NGOs and Human Rights: Channels of Power*, *in* RESEARCH HANDBOOK ON INTERNATIONAL HUMAN RIGHTS LAW 115, 115 (Sarah Joseph & Adam McBeth eds., 2010).

60. S*ee, e.g.*, Karsten Nowrot, *Legal Consequences of Globalization: The Status of Non-Governmental Organizations Under International Law*, 6 IND. J. GLOBAL LEGAL STUD. 579, 580 (1999) ("This Article analyzes the legal consequences of the changing international system for the legal status of NGOs under international law.")

61. S*ee, e.g.*, JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 611 (2005) ("[N]o one questions today the fact that international law—both its content and its impact—has been forever changed by the empowerment of NGOs.").

62. *See, e.g.*, Anderson, *supra* note 26, at 846, 890 (arguing that NGOs serve as their own gatekeepers and their "legitimacy" in the international system is an empty form of auto-legitimation); Robert Charles Blitt, *Who Will Watch the Watchdogs?: Human Rights Nongovernmental Organizations and the Case for Regulation*, 10 BUFF. HUM. RTS. L. REV. 261, 264-65 (2004) (arguing that NGO access is insufficiently regulated).

63. *See generally* Steve Charnovitz, *The Illegitimacy of Preventing NGO Participation*, 36 BROOK. J. INT'L L. 891, 909 (2011) (suggesting that "state practice is moving toward a duty to consult NGOs in the activities of IOs").

64. Many commentators "reserve the term 'NGO' for organizations that pursue a 'public interest,'" rather than a profit motive. *Cf* Charnovitz, *supra* note 27, at 350 n.12. Some do note that the term NGO can include organizations promoting profit-seeking businesses. *See, e.g.*, *id.* at 350 (defining NGOs as "not profit seeking," but noting that "*associations* of business entities can be" NGOs (emphasis added)). But even those who include associations of businesses within their definition of NGO appear to have in mind public-interest NGOs rather than, for example, industry associations. Steve Charnovitz himself argues that "[i]ndividuals join . . . an NGO out of commitment to its purpose" and thus give NGOs their "moral authority." *Id.* at 348. Notably, while a subcurrent in the literature expresses concern that NGOs are insufficiently regulated, many celebrate NGO activity as enhancing the moral authority, representativeness, and democratic accountability of the international system. *See supra* notes 25-29 and accompanying text.

astroturf activism phenomenon this Article identifies. It does not focus on the ways that business influence is channeled through the consultancy system both overtly and covertly; nor does it analyze the implications of this phenomenon on the success or failure of international treaties.[65]

As the Tobacco Convention saga suggests, international treaties are under pressure.[66] The popular press and academic literature alike observe that international treaty production faces an array of challenges, including

65. There is a separate literature that highlights and critically examines the role of business-oriented NGOs in the context of *environmental* treaties. *See, e.g.*, 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. ENVT'L L.J. 201, 220 (1999) (noting that business NGOswere active lobbyists at a number of different climate change treaty negotiations). This literature responds in part to the fact that some environmental treaties have different consultancy regimes than the one under consideration in this Article. *See infra* Part I.B.1 (examining the consultancy regime developed by ECOSOC pursuant to Article 71 of the UN Charter and other regimes that follow the ECOSOC format). For example, 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 SUST. DEV. L. & POL'Y 14, 16 (2005) [hereinafter Tully, *Commercial Contributions*]. Thus, in the environmental treaty literature, "BINGO" (for business and industry NGOs) is a familiar term. *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"); Giorgetti, *supra*, at 220 (using the term BNGO to mean "interest groups that unite several companies to campaign for a specific point of view"); Monica Brookman, Book Note, 25 COLUM. J. ENVTL. L. 369, 374-75 (2000) (reviewing ANITA MARGRETHE HALVORSSEN, EQUALITY AMONG UNEQUALS IN INTERNATIONAL ENVIRONMENTAL LAW (1999)) (referring to "business NGOs" as "large, influential lobbying groups" sometimes "represent[ing] commercial interests that are not always compatible with environmental protection"). While this environmental treaty literature recognizes the descriptive fact that businesses act through NGOs to influence international lawmakers (and sometimes offers a normative response), it does not focus on the critique developed in this Article: that forcing businesses to act through NGOs rather than independently creates perverse results. *See, e.g.*, Joëlle de Sépibus & Kateryna Holzer, *The UNFCC at a Crossroads: Can Increased Involvement of Business and Industry Help Rescue the Multilateral Climate Regime?*, 8 CARBON & CLIMATE L. REV. 23, 24 (2012) (urging increased participation by business within the current UNFCCC consultancy structure). In fact, the critique and reforms developed in this Article may have equal force in the UNFCC context, but that analysis is beyond the scope of this Article.

66. Sungjoon Cho & Claire R. Kelly, *Promises and Perils of New Global Governance: A Case of the G20*, 12 CHI. J. INT'L L. 491, 497-98, 497-98 nn.13-17 (2012) (identifying why treaties are ineffective at coordinating global financial regulations and collecting literature on multilateral treaty failures).

global power imbalances, geopolitical logjams, and domestic legal and political pressures that can obstruct the production of a treaty altogether or eviscerate the effect of any treaty that is ultimately concluded.[67] However, although treaties are under pressure, they remain indispensable legal tools.[68] They erect the fundamental architecture of international governance—creating institutions and courts, setting the ground rules for informal cooperation and governance, and serving as the foundation upon which modern global regulatory life depends.[69] And treaties remain fundamentally important to solving important global problems like climate change.[70] Thus, in order to achieve better solutions to pressing global problems, legal doctrine and scholarship must address defects in treaty law.

One important defect in treaty law is the lack of a specific regulatory response to business influence.[71] And developing that regulatory response requires understanding the phenomenon to be regulated. This Article

67. The latter problem was on startling display in the United States recently as the Supreme Court granted a preliminary injunction halting the Obama Administration's regulation of coal power plants to comply with the Paris Agreement—a major international agreement to combat climate change hailed as a great success just months earlier. *See* West Virginia v. EPA, S. Ct. 1000 (2016) (mem.) (granting a preliminary injunction halting the Environmental Protection Agency's enforcement of President Obama's Clean Power Plan while litigation over the plan is pending in the D.C. Circuit). The Supreme Court's decision (albeit preliminary) put not just United States compliance into question, but also that of India and China—the world's two largest polluters—who may retract their commitments if the United States fails to uphold its own. Coral Davenport, *Supreme Court's Blow to Emissions Efforts May Imperil Paris Climate Accord*, N.Y. TIMES (Feb. 10, 2016), http://nyti.ms/1KFMplF (quoting Navroz K. Dubash, a senior fellow at the Center for Policy Research in New Delhi: "If the U.S. Supreme Court actually declares the coal power plant rules stillborn, the chances of nurturing trust between countries would all but vanish. . . . This could be the proverbial string which causes Paris to unravel.") Thus, in one stroke of the Supreme Court's pen, a major and important international agreement faces implosion. For critiques in the academic literature see, for example, Abbott & Snidal, supra note 51, at 501, 510 (criticizing the "persistent regulatory inadequacies" of treaty-based governance).

68. *See* Melissa J. Durkee, *Persuasion Treaties*, 99 VA. L. REV. 63, 74-77 nn.44-61 (2013) [hereinafter Durkee, *Persuasion Treaties*] (collecting literature).

69. *Id.*; *see also* Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581, 614 (2005) ("[E]ven a networked world will require explicit agreements.").

70. Durkee, *Persuasion Treaties*, *supra* note 68, at 74-75 (citing Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AM. J. INT'L L. 259, 282-83 (1992)).

71. *See generally* Durkee, *Business of Treaties*, *supra* note 12, at 268 (arguing that international law has not developed adequate tools to regulate business influence on lawmaking); BRAITHWAITE & DRAHOS, *supra* note 1, at 10-14 (using tools from sociology, macroeconomics, and psychology to examine unregulated business influence on domestic and international lawmakers).

undertakes a foundational element of that task by narrowing in on a specific and important locus of business influence: the legal structure that gives rise to astroturf activism. For the purpose of this analysis, "astroturf activism" is the overt and covert use by business of the consultancy system at international institutions such as the Economic and Social Council and the WHO to influence international lawmaking, as subsequent Parts explain.

An exposure and systematic analysis of the astroturf activism phenomenon is long overdue. Over a decade ago, the committee of experts that considered the tobacco industry disclosures detailed above recommended that lawyers and policymakers rethink the relationships between the tobacco industry, NGOs, and lawmakers and find new means to expose the covert relationships between them.[72] That work has yet to be done. Indeed, those experts recommended finding a way to disclose the identity and affiliations of *all* non-state actors who attempt to influence the production of international law.[73] That mission, vitally important to the health of modern multilateral treaty regimes, begins in the pages that follow.

B. The Consultancy Structure

The first step in the mission the committee of experts identified is to clearly identify the legal structure that gives rise to the astroturf activism phenomenon. In other words, what is this consultancy structure that permits special access to international lawmakers?

1. NGOs Press for Access to the United Nations

The story begins at the drafting of the U.N. Charter in San Francisco at the conclusion of World War II. Twelve hundred NGOs were present in San Francisco at the time, some serving as part of the U.S. delegation to the Conference on International Organization, which would bring the U.N. to life.[74] One of the agendas the NGOs were pursuing was to obtain some sort of status for themselves within the new organization.[75] NGOs had been active in the earlier League of Nations and sought to preserve their access in

72. In fact, the Tobacco Report was published in 2000. TOBACCO COMPANY STRATEGIES REPORT, *supra* note 31.

73. *Id.* at 9, 19, 104.

74. Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT'L L. 183, 250-51 (1997).

75. *See id.* at 251 (reporting that NGO consultants sought "a provision on NGOs in the U.N. Charter," an idea that had not been previously considered by state delegates).

the new UN.[76] They were ultimately successful in these aims, as the U.N. Charter included Article 71[77]:

> The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned.[78]

Since Article 71 includes the *only* mention of associations in the U.N. Charter, the provision "has served de facto as a charter for NGO activities."[79] This "de facto . . . charter" both facilitates and restrains the opportunities for associations to take roles within the United Nations.[80] It means that the only officially recognized way that an NGO can participate in the work of the United Nations is through the consultation arrangements the Economic and Social Council is empowered to make.[81] The U.N. Charter does not, for example, contain any provision allowing non-state associations to have voting privileges, membership on delegations to treaty-drafting conventions, or any other kind of rights. Notably, for the purposes of this analysis, the Charter also does not make any particular mention of access rights for business entities.[82]

Article 71 is situated among the provisions of the U.N. Charter that constitute the Economic and Social Council, which is the organ of the United Nations charged with overseeing U.N. programs on "economic, social, cultural, educational, health, and related matters."[83] The Council

76. *Id.*; *see also id.* 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).

77. *See id.* at 250-51, 257 (describing how NGOs assisted to draft Article 71).

78. U.N. Charter art. 71.

79. Charnovitz, *supra* note 27, at 357.

80. *Id.*

81. *See* Charnovitz, *supra* note 74, at 250 ("Not everyone viewed Article 71 as a step forward for NGOs"; some viewed it as a "so-far-and-no-further obstacle to any continuance of the pragmatic but close . . . partnership [between NGOs and International Organizations] developed under the League.").

82. The text of the charter could be read to include individual business "organizations," as businesses are, after all, the result of individuals organizing to accomplish a common purpose, with the only distinguishing feature being profit motive. Franklin G. Snyder has made a similar point, albeit outside of the UN Charter context, in *Sharing Sovereignty: Non-State Associations and the Limits of State Power*, 54 AM. U. L. REV. 365, 378 (2004) (noting that business enterprises are "voluntary associations" just as NGOs are). However, this interpretation is likely not what the drafters intended. As Steve Charnovitz has noted, "[t]he practice of excluding commercial organizations from the category of 'associations' goes back at least to . . . 1910." Charnovitz, *supra* note 74, at 187 n.17.

83. U.N. Charter art. 62, ¶ 1.

also sets up commissions concerning the economic, social, and other issues within its mandate.[84] And, under the authority of Article 71, the Council has become the body charged with supervising and managing NGO access to the U.N. system.[85]

2. The Council Sets Access Regulations

The Council has exercised its Article 71 authority and "made . . . arrangements for consultation with non-governmental organizations" by developing rules to govern an accreditation procedure.[86] Those rules define an NGO as "[a]ny international organization which is not established by intergovernmental agreement."[87] The definition reflects the Council's principal concern at the time, which was to draw a distinction between international *intergovernmental* organizations (such as the U.N. itself) on the one hand and *nongovernmental* associations (such as Greenpeace) on the other.[88] The Council was not trying to distinguish between different kinds of nongovernmental associations.[89]

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84. U.N. Charter art. 68.

85. Ferdinand Trauttmansdorff, *The Organs of the United Nations*, *in* THE UNITED NATIONS: LAW AND PRACTICE 25, 41 (Franz Cede & Lilly Sucharipa-Behrmann eds., 2001).

86. The Council has passed various resolutions to govern NGO access to the UN pursuant to Article 71, including Resolution 4 (I), passed in 1946, Economic and Social Council Res. 4(I) (Feb. 14, 1946) hereinafter E.S.C. Res. 4(I)]; Resolution 288(X)(B), passed in 1950, which codified privileges and practices relating to NGOs that had developed between 1946 and 1950, Economic and Social Council Res. 288(X)(B) (Feb. 27, 1950) [hereinafter E.S.C. Res. 288(X)(B)]; Resolution 1296 (XLIV), passed in 1968, Economic and Social Council Res. 1296 (XLIV) (May 23, 1968) [hereinafter E.S.C. Res. 1296 (XLIV)]; and, finally, Resolution 1996/31 in 1996, which offered an updated set of rules that remain in effect as of this writing, Economic and Social Council Res. 1996/31 (July 25, 1996) [hereinafter E.S.C. Res. 1996/31]. For narrative descriptions of the role of these resolutions, see 2 BRUNO SIMMA ET AL., THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1797 (3d ed. 2012) [hereinafter SIMMA ET AL., THE CHARTER (2012)]; BRUNO SIMMA ET AL., THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 904-05 (1st ed. 1995) [hereinafter SIMMA ET AL., THE CHARTER (1995)].

87. E.S.C. Res. 1296 (XLIV), *supra* note 86, ¶ 7.

88. *See* Charnovitz, *supra* note 74, at 252-53.

89. The definition did exclude *national* organizations on the theory that those national organizations could present their views to their own national governments. *Id.* at 253. The original rules provided for two tiers of access for NGOs (Category A and Category B) depending on the breadth of the NGO mission. *See id.* Of particular relevance to this Article's analysis, "[a]mong the earliest Category A organizations admitted were the World Federation of Trade Unions . . . and the" International Chamber of Commerce. *Id.*

In the Council's conception, consultative status serves dual purposes: to assist the U.N. in gathering relevant expertise from nongovernmental sources and to give members of civil society the opportunity to have access to governance functions and express their opinions.[90] To that end, in 1996 the Council updated its eligibility criteria for associations with rules that remain in force today.[91] The new criteria were intended to respond to a rise in the prominence of NGOs in the early 1990s and a perception that the earlier eligibility rules were too restrictive.[92] In addition, with an increased global understanding of governance disparities between the developed and developing worlds, the new rules were meant to ensure "a just, balanced, effective and genuine involvement of non-governmental organizations from all regions and areas of the world."[93] In particular, the Council sought (1) an increased representation of associations from developing countries and (2) to ensure that accredited associations would be accountable representatives of the interests of their constituencies.[94] The eligibility criteria were meant to assist the Council in achieving these objectives.

The criteria required, first, that an association seeking consultative status have "aims and purposes" that support "the spirit, purposes and principles" of the U.N. and promote that body's work.[95] In addition, an association must be "of recognized standing within the particular field of its competence or of a representative character."[96] It must be able to establish the accountability and representativeness of its internal governance

90. *See* E.S.C. Res. 1996/31, *supra* note 86, ¶ 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.").

91. *See id*.

92. *Id.* ¶ 5; *see also* SIMMA ET AL., THE CHARTER (2012), *supra* note 86, at 1800 (observing that the prior rules were perceived as too restrictive in their "narrow criteria for inclusion, the requirement of internationality, and the veto granted to States toward granting consultative status to NGOs from their own countries").

93. E.S.C. Res. 1996/31, *supra* note 86, ¶ 5; *see also* SIMMA ET AL., THE CHARTER (1995), *supra* note 86, at 912 (noting that "issues . . . unresolved" in 1995 included "the unequal representation under Art. 71 of non-governmental organizations from different regions of the world" and, in particular, the overrepresentation of organizations from Western industrialized countries). Resolution 1996/31 was passed to implement these reforms after a three-year period of review. SIMMA ET AL., THE CHARTER (2012), *supra* note 86, at 1801.

94. E.S.C. Res. 1996/31, *supra* note 86, ¶¶ 1-17. The Council also eliminated the earlier distinction between international and national organizations but required that national organizations consult with the member state concerned prior to obtaining accreditation. *Id.* ¶¶ 5, 8.

95. *Id.* ¶¶ 2, 3.

96. *Id.* ¶ 9.

mechanisms through indicia such as "an established headquarters";[97] "a democratically adopted constitution" providing for a representative process to set policy;[98] a responsive "executive organ";[99] and documented "authority to speak for its members through its authorized representatives."[100] Finally, organizations must be nonprofits and obtain their funding from "national affiliate[] [organizations] . . . or from individual members."[101]

In addition to establishing admission criteria for would-be U.N. consultants, the Council updated its gatekeeping mechanism. Specifically, it updated the rules governing the work of the Committee on Non-Governmental Organizations (NGO Committee),[102] whose members it elects.[103] The NGO Committee has jurisdiction over the accreditation application process.[104] It receives applications from prospective NGO consultants and meets twice a year to vote on whether to grant accreditation to pending applicants.[105] Neither the Council nor the NGO Committee, however, independently verifies whether the organizations comply with the accreditation criteria.[106] Rather, they rely on representations made by the organizations themselves in their application materials.[107]

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97. *Id.* ¶ 10.

98. *Id*.

99. *Id*.

100. *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.

101. *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 NGO Committee) the organization's reasons for not meeting these requirements. *Id.*

102. *Id.* ¶ 60; *see also* Jeffrey Andrew Hartwick, *Non-Governmental Organizations at United Nations-Sponsored World Conferences: A Framework for Participation Reform*, 26 LOY. L.A. INT'L & COMP. L. REV. 217, 223 (2003) (identifying the functions of the NGO Committee).

103. Members of the committee are delegates from UN member states, selected "on the basis of equitable geographical representation." E.S.C. Res. 1996/31, *supra* note 86, ¶ 60.

104. Hartwick, *supra* note 102, at 223.

105. *Id*.

106. *See id.* at 224 & n.45 (stating that applications are first screened by the Council's Department of Economic and Social Affairs (DESA) then sent to the NGO committee, where "[v]oting rights and democratic accountability are determined by an examination of an NGO's submitted constitution or by-laws" and financial status is determined by financial statements the organizations submit; "[t]he UN does not actually verify" the information contained in these documents) (citing

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Organizations that successfully gain admission to the consultancy regime are organized into three tiers, which relate to the scope of the organization's activities and the degree of assistance it might offer the U.N. as a consultant.[108] "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."[109] Greenpeace and Médecins Sans Frontières (Doctors Without Borders), for example, have obtained General consultative status.[110] "Special" status is for organizations that are concerned with "a few of the fields of activity" the Council pursues, such as Human Rights Watch and the American Bar Association.[111] 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.[112] Among these are the Sierra Club and Heifer Project International.[113] As of this Article's writing, over 4600 organizations have taken advantage of consultancy status.[114]

Interview with Meena Sur, Program Officer, U.N. Dep't of Soc. & Econ. Affairs, NGO Section, in Wash., D.C. (Apr. 11, 2003)).

107. *See id.*

108. E.S.C. Res. 1996/31, *supra* note 86, ¶¶ 21-26; *see also* STEPHEN TULLY, CORPORATIONS AND INTERNATIONAL LAWMAKING 66 (2007) (reviewing the tiered consultation structure); Charnovitz, *supra* note 74, at 267 (same).

109. E.S.C. Res. 1996/31, *supra* note 86, ¶ 22; *see also* Kal Raustiala, *NGOs in International Treaty-Making*, *in* THE OXFORD GUIDE TO TREATIES 150, 156-57 n.24 (Duncan B. Hollis ed., 2012) [hereinafter Raustiala, *NGOs*] (NGOs with general status "tend to be fairly large, established international NGOs with a broad geographical reach.").

110. *Consultative Status with ECOSOC and Other Accreditations*, U.N. DEP'T OF ECON. & SOC. AFFAIRS: NGO BRANCH, http://esango.un.org/civilsociety/displayConsultativeStatusSearch.do?method=search&sessionCheck=false (last visited Oct. 7, 2016) [hereinafter *Consultative Status with ECOSOC*].

111. E.S.C. Res. 1996/31, *supra* note 86, ¶ 23; *Consultative Status with ECOSOC*, *supra* note 110; *see also* Raustiala, *NGOs*, *supra* note 109, at 157 n.24 (stating that NGOs with Special consultative status "tend to be smaller and more recently established").

112. E.S.C. Res. 1996/31, *supra* note 86, ¶ 24; *see also* Raustiala, *NGOs*, *supra* note 109, 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.").

113. *Consultative Status with ECOSOC*, *supra* note 110.

114. *Id.* (showing that as of September 2016, over 4,600 groups had obtained accreditation).

3. Consultants Have Access to Lawmakers

Let us turn to the access opportunities consultants gain through the consultancy. There are three principal points of access: to the Council itself and its commissions' subsidiary bodies; to the broader UN; and—perhaps most importantly for the purposes of influencing formal international lawmaking—to international conferences convened by the UN.

First, access opportunities within the Council are keyed to the consultant's tier, with the most rights afforded to General consultants.[115] Consultants may send representatives to sit as observers at meetings of the Council and its commissions and other subsidiary bodies, and they may present written and sometimes oral comments to international officials in various contexts.[116] Those with General consultative status may even present their own agenda items to officials in a number of contexts.[117]

Second, in addition to consulting with the Council and its subsidiary bodies, consultative status gives organizations broader access within the UN. Organizations may consult with the U.N. Secretariat "on matters in which there is a mutual interest or a mutual concern" at the request of either party.[118] They may be commissioned by the Secretary-General to carry out studies or prepare papers on particular matters.[119] They can receive press releases.[120] And these organizations may obtain general access with U.N. "grounds passes."[121] Importantly, because consultative status offers consultants access to nonpublic areas where governmental delegates and international organization officials gather, the status confers plenty of "informal lobbying opportunities."[122]

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115. *See* E.S.C. Res. 1996/31, *supra* note 86, at pts. IV & V (enumerating access rights of General, Special, and Roster consultants to the Council itself, and to commissions and other subsidiary bodies of the Council, respectively). Roster organizations have slightly fewer rights. *See id.* ¶¶ 29, 31(e)&(f), 36, 37(f), 38(b) (noting that Roster organizations may have representatives present only at meetings "concerned with matters within their field of competence"; may submit longer written statements only upon invitation of the Secretary-General; and may only speak at meetings of the commission or other subsidiary organs upon the recommendation of the Secretary General and the request of the body in question).

116. *Id.* ¶¶ 29, 30, 32(a); *see also* Charnovitz, *supra* note 74, at 267 (reviewing rights for General consultants).

117. E.S.C. Res. 1996/31, *supra* note 86, ¶ 28.

118. *Id.* ¶ 65.

119. *Id.* ¶ 66.

120. *Id.* ¶ 67.

121. *See Accreditation*, U.N. OFFICE AT GENEVA, http://www.unog.ch/ngo/accreditation (last visited Oct. 9, 2016).

122. TULLY, *supra* note 108, at 66.

Third, among the array of privileges afforded to consultants is presumptive access to UN-sponsored treaty-making conferences and the preparatory processes leading up to those conferences—an important point of access for consultants to influence the work of international lawmakers.[123] Consultants are automatically accredited to international conferences (and their preparatory processes) simply by expressing their interest to the U.N. Secretariat.[124] No further screening is necessary.[125] This saves associations the burden of applying separately to every conference and preparatory process they wish to attend.[126] Consultants, once admitted, do not have a negotiating role but can participate in working groups, make written presentations, and sometimes even engage in floor debates.[127] This is a key benefit of accreditation and, as a result of this access right, UN-sponsored treaty negotiations or conferences now regularly have "a sizeable, sometimes enormous, NGO component."[128]

4. The Council's Rules as a Blueprint

What is the significance of Article 71 and the Council's resulting accreditation regime? Why study this accreditation regime as the focal point for nongovernmental associations' access to the work of international lawmakers? Several answers have been offered in the preceding paragraphs: the consultancy structure is the only point of contact between nonstate associations and the U.N. that is regularized in the U.N. Charter, and it offers formal and informal access to U.N. officials and national lawmaking delegates at U.N. treaty conferences.

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123. E.S.C. Res. 1996/31, *supra* note 86, at pt. VII; *see also* Paul Wapner, *Defending Accountability in NGOs*, 3 CHI. J. INT'L L. 197, 203 (2002) (arguing that participation in UN-sponsored treaty making "has been essential for NGO influence on international treaties").

124. E.S.C. Res. 1996/31, *supra* note 86, ¶ 42 (providing that organizations with consultative status "shall as a rule be accredited" to participate at international conferences). Accreditation is not guaranteed, but "those non-state actors already possessing ECOSOC accreditation enjoy a legitimate expectation of admission." TULLY, *supra* note 108, at 206.

125. *See* E.S.C. Res. 1996/31, *supra* note 84, ¶ 42; *supra* text accompanying note 124 and accompanying discussion.

126. By contrast, associations that are not consultants must first apply for accreditation to each individual conference before receiving admission as observers—requiring them to "submit official documents outlining their mandate, scope and governing structure, evidence their non-profit status, describe activities suggesting competence and provide details of affiliations, funding sources, publications and designated contact points." TULLY, *supra* note 108, at 205; *see also* E.S.C. Res. 1996/31, *supra* note 86, ¶¶ 42-47.

127. E.S.C. Res. 1996/31, *supra* note 86, ¶¶ 49-52.

128. Raustiala, *NGOs in International Treatymaking*, *supra* note 109, at 156.

Consider an additional reason: the Council's consultancy structure has spread far beyond the Council and served as a blueprint for many other consultancy regimes at other international organizations.[129] These include agencies within the U.N. system, such as the WHO and UNESCO, which have adopted accreditation rules nearly identical to the Council's.[130] In fact, as the U.N. launched its specialized agencies, it usually closely followed the Article 71 model and the Council's implementing rules to define and structure relationships with NGOs.[131]

While a certain degree of heterogeneity remains among different accreditation structures,[132] the Council's accreditation rules are a meaningful point of entry.[133] Outside the UN, the influence of the Article 71 Council regime has spread to institutions as diverse as the Organization of American States, the Antarctic Treaty, and the African Union.[134] Thus, considering the Council's regime as an exemplar will serve as a useful way to expose the problem this Article considers, frame its critique, and model a potential solution. And, to the extent a reform will be effective for the Council's consultancy structure, it will likely also serve as an effective blueprint for a more diverse set of accreditation regimes.

129.*See* Charnovitz, *Nongovernmental Organizations and International Law*, *supra* note 27, at 358-59 ("Even though Article 71 refers only to ECOSOC, a consultative role for NGOs gradually became an established practice throughout the UN system."); *see generally* UNITED NATIONS NON-GOVERNMENTAL LIAISON SERVICE, UN SYSTEM ENGAGEMENT WITH NGOS, CIVIL SOCIETY, THE PRIVATE SECTOR, AND OTHER ACTORS: A COMPENDIUM (2005), https://www.unngls.org/pdfs/compendium-2005-withCOVER.pdf (cataloging a diverse array of accreditation regimes throughout the UN system).

130.*See* Charnovitz, *Two Centuries of Participation*, *supra* note 74, at 253-55 (noting that UNESCO, the WHO, and the (unsuccessful) ITO are among the agencies mirroring the Article 71 consultation model). Significantly, "Article 71 gave NGOs a hunting license to pursue involvement in the U.N. beyond ECOSOC" and served to "codify the custom of NGO participation" that had existed in the League of Nations period. *Id.* at 257-58.

131 *See* Charnovitz, *Nongovernmental Organizations and International Law*, *supra* note 27, at 358-59; *see generally* UNITED NATIONS NON-GOVERNMENTAL LIAISON SERVICE, *supra* note 129 (summarizing NGO accreditation structures at diverse international organizations).

132 For an excellent analysis of the features and flaws of the consultation regime of the United Nations Commission on Trade Law (UNCITRAL), as well as an account of efforts to reform that consultation regime, *see* SUSAN BLOCK-LIEB & TERENCE HALLIDAY, GLOBAL LAWMAKERS: INTERNATIONAL ORGANIZATIONS IN THE CRAFTING OF WORLD MARKETS (Oct. 10, 2016) (unpublished manuscript) (on file with author).

133.*See* Charnovitz, *Two Centuries of Participation*, *supra* note 74, at 249.

134.*See* Charnovitz, *Nongovernmental Organizations and International Law*, *supra* note 27, at 359.

C. The Rules Apply Oddly and Uneasily to Businesses

How do businesses fit within the consultancy rules? Quite simply, *individual* businesses are excluded. But the rules do not restrain businesses from expressing themselves and attempting to wield influence through *nonprofits* formed or used for such a purpose. Although I call this quasi-accommodation an odd and uneasy treatment of business entities—a critique I will defend in Parts II and III—this structure would have seemed inevitable to the drafters of Article 71 and the early ECOSOC rule-makers. The following Subparts explain the current legal structure and its origins.

1. The Consultancy Rules Exclude Individual Businesses

Article 71 of the U.N. Charter employs the neutral term "non-governmental organizations."[135] That term might at first glance seem to accommodate for-profit entities just as well as other kinds of NGOs. After all, business entities are created by individuals organizing to accomplish a common purpose just as other organizations are. The only distinguishing feature is that business organizations have a profit motive. This is a point some commentators have made outside the Article 71 context: "Walt Disney Co., for example, is as much a voluntary association as Amnesty International . . . ."[136] But this more capacious definition of association, or "organization[]," is likely not what the Charter's drafters intended. As Steve Charnovitz has noted, "[t]he practice of excluding commercial organizations from the category of 'associations'" was well established at the time the Charter was drafted.[137]

The Council's accreditation rules eliminated all doubt by making clear that individual, profit-seeking, businesses are excluded.[138] The criteria demand that an accredited organization be a nonprofit and obtain its funding from "national affiliate[] [organizations] . . . or from individual

135. Charnovitz, *Two Centuries of Participation*, *supra* note 74, at 187 n.17 ("The practice of excluding commercial organizations from the category of 'associations' goes back at least to . . . 1910.").

136. Snyder, *supra* note 82, at 378.

137. Charnovitz, *Two Centuries of Participation*, *supra* note 74, at 187 n.17.

138. *Id.* at para. 13 ("The basic resources of the organization shall be derived in the main from contributions of the national affiliates or other components or from individual members."). The rules also require "a democratically adopted constitution" and that an organization have "authority to speak for its members through its authorized representatives." *Id.* at ¶¶ 10, 11. Businesses may have an argument that their corporate charter and shareholder voting structure satisfy these criteria, but the rules are clearly designed with other purposes in view, and the Paragraph 13 nonprofit requirement is dispositive.

members," a requirement which excludes any associations organized for commercial or profit-making purposes, namely businesses.[139] In addition to this requirement, accredited organizations must be organized for purposes in conformity with the "spirit, purposes and principles" of the United Nations.[140] This is to say, in the hypothetical world in which the nonprofit criteria did not bar entry, businesses would also have to show that their "aims and purposes" support the "spirit, purposes and principles" of the UN Charter.[141] The Council's website describes the groups anticipated by these criteria as "international, regional, sub-regional, national non-governmental organizations, non-profit organizations, public sector or voluntary organizations."[142]

Other international organizations that follow the Article 71 accreditation template, such as U.N. specialized agencies like the WHO, also exclude individual businesses from their consultancy structures. For example, the WHO's parallel to Article 71 "enables it to conclude suitable arrangements with non-state actors in the execution of its mandate"[143] but specifies that it may not form this official relationship with nonstate actors pursuing "concerns which are primarily of a commercial or profit-making nature."[144] Simply put, businesses are not granted access to the consultation regime.

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139. *Id.* at ¶ 13

140. *Id.* at ¶¶ 2-3. Other entities excluded by these criteria include governmental or intergovernmental organizations, *id.* at para. 12; individuals, *see id.* at para. 5; and secessionist or other armed groups with governmental ambitions, *see id.* at para. 4

141. *Id.* at ¶ 2-3

142. *Introduction to ECOSOC Consultative Status*, *supra* note 21. The Council's brochure, which explains consultative status to potential applicants certainly affirms a general sense that consultative status is meant for small, hard-working public-interest groups: the brochure is replete with photographs of a diverse array of people, some in native attire and others in t-shirts emblazoned with activist slogans, nary a corporate suit to be found. *See generally* UNITED NATIONS, WORKING WITH ECOSOC: AN NGOS GUIDE TO CONSULTATIVE STATUS (2011) http://csonet.org/content/documents/Brochure.pdf.

143. TULLY, *supra* note 108, at 68.

144. World Health Org., World Health Assembly Res. 40.25, *Principles Governing Relations Between the World Health Organization and Nongovernmental Organizations*, ¶ 3.1 (1987), *in* Basic Documents, at 98 (48th ed. 2014), http://apps.who.int/gb/bd. Even the UNFCCC—which includes the distinct category "BINGO" or "Business and Industry NGO" as a particular type of constituency group within its larger pool of observer organizations—explicitly requires that admitted organizations be non-profit NGOS, not individual business entities. *See* Tully, *Commercial Contributions*, *supra* note 65, at 15, 16.

2. But They Permit Businesses to Act Through Nonprofits

Although businesses are individually excluded, they are permitted to consult through accredited nonprofits. A brief account of the origins of this legal structure will frame the critique of its effects, which is to come in Parts II and III.

The story begins even further back in time, in the 1920s and 1930s era of the League of Nations. Article 71—and, in turn, ECOSOC's rule structure—was designed to enshrine the earlier "League Method"[145] whereby voluntary associations and international organizations had very close working relationships.[146] As one commentator noted, "[b]ehind many [early international organizations] stood idealistic and active NGOs."[147]

In that era, there was no strong distinction between voluntary associations that advanced business or commercial ends and those that lobbied for other causes.[148] Rather, associations advancing business interests were among these influential early NGOs. They contributed to the development of international organizations, participated in meetings, and helped draft international treaties.[149] According to Steve Charnovitz's masterful historical account of NGO involvement in the work of the UN, the International Chamber of Commerce took its place among the top three most significant associations in the League period (together with the Red

145.2 BRUNO SIMMA ET AL., THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1070 (2d ed. 2002) (explaining that Article 71 was an attempt to codify the "usual practice" of the League of Nations).

146.*See* Charnovitz, *Two Centuries of Participation*, *supra* note 74, at 245 (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 [becoming] international by 1850." *Id.* at 212. "By the end of the nineteenth century, there was a pattern of private international cooperation evolving into public international action." *Id.*

147.Charnovitz, *Two Centuries of Participation*, *supra* note 74, at 212.

148. *Id.* at 245 (noting that one of the major successes of this period was the International Labor Organization, which engaged business and labor groups as full and equal participants).

149.*See, e.g.*, *id.* at 202 (noting that railway businesses helped form the International Railway Congress Association, which led to the creation of the intergovernmental Central Office for International Railway Transport); *id.* at 211 (noting that the International Telegraph Union invited private companies to participate in its meetings).

Cross and the Women's International League for Peace and Freedom).[150] Business associations also participated in the League's work relating to finance, commercial law, transportation, and pharmaceuticals, among other things.[151]

However, the League did make a distinction between, on the one hand, private and public organizations (terms that correspond to modern-day NGOs and International Organizations, respectively), and, on the other, "organizations with a commercial objective."[152] For example, the League included only the former (noncommercial) organizations in a directory of international organizations and in publications dedicated to aggregating policy recommendations.[153] Thus during the League period, *individual* businesses and entities pursuing commercial purposes were excluded as informal consultants to the League of Nations while *associations* of businesses were included.

Because Article 71 of the U.N. Charter and the resulting Council regime were meant to continue the League practice, the criteria for accreditation maintained those earlier distinctions. The term "non-governmental organization," or "NGO," was itself coined at the birth of the U.N. and the drafting of Article 71.[154] The term was meant, eponymously, to set aside government-sponsored organizations.[155] It reflects the primary preoccupation of the drafters, who did not seek to distinguish between different types of voluntary associations—those associations that advanced business aims, on the one hand, and "public-interest" associations, on the other.[156] Rather, the drafters were concerned about whether to allow *national* NGOs to serve as consultants (in addition to *international* NGOs), because of a concern that this would allow UN entanglement in domestic affairs.[157]

150.*See* Charnovitz, *Two Centuries of Participation*, *supra* note 74, at 212-13, 223, 245-46 (noting that the ICC even "gained official roles" in League-sponsored economic conferences).

151.*Id.* at 222-27.

152.*Id.* at 221.

153.*See id.* (The League published "the *Handbook of International Organizations* . . . [which] included public, semi-public and private organizations, but excluded organizations with a commercial objective.").

154.*See id.* at 186 & n.14.

155.*See id.* at 186.

156.*See* TULLY, *supra* note 108, at 66 ("Although subsuming corporations within the NGO category suppresses important distinctions, equality of status for the purposes of counterbalancing competing perspectives was preferred to differential access or treatment to exploit operational specialization.").

157. Charnovitz, *Two Centuries of Participation*, *supra* note 74, at 252-53; *see also* SIMMA ET AL., THE CHARTER (2012), *supra* note 86, at 1792 (noting that "the

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Associations of businesses began to consult with the U.N. as they had with the League. For example, the International Chamber of Commerce (ICC) became one of the first associations accredited with ECOSOC.[158] Moreover, after the Council's 1996 rules change, the ICC became one of the comparatively small number of organizations that received the coveted General consultative status, giving it the broadest available consultation rights.[159] The ICC has made use of this status at the Council to engage in a broad array of activities, including "organiz[ing] study groups, collborat[ing] with the International Law Association and prepar[ing] legal drafts."[160] It has, in fact, taken a "catalytical role within the international legal process for producing documents that are ultimately adopted" as legally binding on nations.[161]

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While a whole bevy of supporters and critics have focused their attention on the role of NGOs as international consultants, one important aspect of the legal structure has gone underexamined and underappreciated. That aspect is the way businesses—profit-seeking entities—fit within the consultancy system—specifically, how the consultancy rules apply to businesses and what is the resulting effect on business behavior.

This Part has offered a legal analysis to answer that question. Simply put, business entities may not become accredited as consultants. That is, they may not become accredited as individual, profit-seeking business entities. However, they may influence international lawmakers through proxies, channeling their lobbying activity through nonprofit associations, which may themselves become accredited. But this black-letter-law answer reveals even deeper puzzles. Specifically, what is the effect of this odd legal structure on business activity? And—crucially—what are the effects of this structure and the resulting business activity on international lawmaking? As Part II argues, the consultancy rules have in effect funneled business influence into NGOs, producing an array of harmful results.

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language of Art. 71 supports the view that the focus is primarily on establishing relations between the UN and international NGOs"; national NGOs would have only contingent access).

158.*See* TULLY, *supra* note 108108, at 66.

159.*Id.* at 66, 67.

160.*Id.* at 67.

161.*Id.* (pointing out that treaty negotiations sometimes involve "ICC drafts sponsored by developed states").

II. Astroturf Activism

"Astroturf activism," in this Article's usage, describes the phenomenon whereby 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.[162] This happens most starkly when business organizations capture an existing NGO or form their own NGO with nonprofit status and a mission statement that obscures the company's true interests. It also happens when powerful businesses capture trade associations that purport to speak on behalf of a wider range of actors in a particular industry. The phenomenon may also capture the scenario where *for-profit* entities escape the notice of gatekeepers and become accredited, notwithstanding their noncompliance with accreditation eligibility rules.

A brief note at the outset: This conceptual framework is an oversimplification. The simplicity, however, is useful. It focuses attention on the relevant features of the phenomenon, the features of the consultancy laws that have facilitated it, and starting points for reform. Because the astroturf activism phenomenon has not received systematic attention, even the basic framework illuminates important problems and frames existing questions.

This Part turns to those questions, first identifying methods businesses use to obtain access to lawmakers through the consultancy system and classifying those methods into a three-part taxonomy. Businesses gain access by: (1) continuing the League-of-Nations era practice of working through traditional trade and industry associations; (2) defying the rules and exploiting gatekeeping weaknesses to become accredited as individual market participants; and (3) mimicking or capturing typical public-interest oriented, civil-society NGOs.[163] These responses bring an array of problems—which this Part identifies as issues of transparency and access—some predictable, and some surprising.

A. Identifying the Phenomenon

The analysis that follows draws from a variety of sources, using both primary and secondary materials to compile a preliminary study and import insights from business and popular literatures into law.

The principal source of primary materials is ECOSOC's own library of resources, which the Council makes available in an online database.[164] The

162.For a discussion of other uses of the term "Astroturf Activism," *see supra* note 10.

163.The tripartite approach to obtaining access is, of course, the aggregated product of decisions by many different business actors, rather than of a monolithic entity with a unitary agenda, as tempting as it may be to draw that simplified caricature.

164. *Civil Society Participation Database*, U.N. DEP'T OF ECON. & SOC. AFFAIRS: NGO BRANCH, http://esango.un.org/civilso

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database contains basic information on all organizations that have obtained consultancy status, which is principally gleaned from the application materials organizations submit when they apply to be accredited as consultants. Building on those primary materials, this Article contributes additional due diligence, reporting the results of an original investigation to determine the context of some of the claims in the application materials and the identities of individuals and entities named. The results of this investigation are presented in a series of case studies, which are meant to expose the basic contours of business access and lay a foundation for further empirical study.

B. Modes of Access

The descriptive analysis that follows moves through modes of access from the most transparent to the most covert.

1.Industry and Trade Associations

The first mode of business access is through trade and industry associations. While these associations explicitly advance business agendas,[165] they are themselves organized as nonprofit entities and so are eligible for accreditation with the Council. In fact, the practice of accrediting industry and trade associations is quite historically grounded, with roots in pre-U.N. League of Nations relationships.[166] The practice is also relatively extensive. Of the approximately 4,600 associations that had obtained accreditation as consultants with ECOSOC as of September 2016, 458—or approximately ten percent—selected "business and industry" as an area of expertise and field of activity.[167] That figure likely does not represent the complete number of associations that advance business or industry interests; it is merely the number that explicitly acknowledges this focus.[168]

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ciety/displayAdvancedSearch.do?method=search&sessionCheck=false (last visited Mar. 3, 2016) [hereinafter ECOSOC Consultative Status Database].

165.TULLY, *supra* note 108, at 207 (noting that "a legitimate and recognized purpose of trade associations is to defend and advance the interests of enterprises they represent").

166.*See* discussion *supra* Part I.C.2.

167.ECOSOC Consultative Status Database, *supra* note 164 (then search by selecting all options from the "Organization's type" field, then select all options from the "Consultative status" field, and then expand the "Areas of expertise & Fields of activity" field and select "Economic and Social" and then "Business and Industry") [Hereinafter ECOSOC Consultative Status Database, Business and Industry Search]. These numbers are current as of September 30, 2016.

168.*See id.*

While these associations also had the option to elect that they were "private sector" organizations, the vast majority did not, preferring the more traditional term "NGO."[169] This is true even of organizations that overtly advance private sector interests, such as the Confederation of European Paper Industries.[170]

In fact, the titles and descriptions of many of these organizations in the ECOSOC database suggest that they are characterizing their activities so as to amplify the public interest, nonprofit-driven aspects of their work and de-emphasize their roles as spokespeople for profit-seeking businesses.[171] For example, the World Coal Association, afforded Special accreditation in 1991, seeks to "[d]eepen and broaden understanding amongst policy makers and key stakeholders of the positive role of coal in addressing global warming, widespread poverty in developing countries, and energy security."[172] The National Association of Home Builders of the United States (NAHB), which obtained Special status in 2011, represents the U.S. home building industry.[173] It serves both bigger corporate members and smaller state and local builders associations, but it affirms that one of its

169. Only three out of the 458 associations that selected "business and industry" as their area of expertise indicated that their organization type was "private sector." ECOSOC Consultative Status Database, *supra* note 164 (then search by selecting "Private Sector" from the "Organization's type" field, then select all options from the "Consultative status" field, and then expand the "Areas of expertise & fields of activity" field and select "Economic and Social" and then "Business and Industry") [Hereinafter ECOSOC Consultative Status Database, Private Sector Business and Industry Search]. The three were the World Coal Association; Freann Financial Services Limited; and United States Sustainable Development Corporation. *Id.*

170. ECOSOC Consultative Status Database, Business and Industry Search, *supra* note 169 (select the "Confederation of European Paper Industries" hyperlink to see organization type designation).

171. To be sure, it is one of the requirements of the accreditation process that these associations have "aims and purposes" that support the "spirit, purposes and principles" of the UN, and the associations must demonstrate that their work promotes the work of the E.S.C. Resolution 1996/31, *supra* note 86, at ¶¶ 2-3. However, these associations appear to be taking pains to establish that they promote more than just the economic work of the UN.

172. World Coal Ass'n, Mission Statement, *in* ECOSOC Consultative Status Database, Private Sector Business and Industry Search, *supra* note 169 (from the results list select the "World Coal Association" hyperlink and then select "Activities" under the "Profile" tab to view the mission statement). For accreditation year, see the World Coal Ass'n, *in* ECOSOC Consultative Status Database, Business and Industry Search, *supra* note 169.

173. Nat'l Ass'n of Home Builders of the U.S., Mission Statement, *in* ECOSOC Consultative Status Database, Business and Industry Search, *supra* note 169 (from the results list select "National Association of Home Builders of the United States" hyperlink and then select "Activities" under the "Profile" tab to view the mission statement). For accreditation year, see Nat'l Ass'n of Home Builders, *in* ECOSOC Consultative Status Database, Business and Industry Search, *supra* note 169.

primary goals is to "provid[e] and expand[] opportunities for all people to have safe, decent, and affordable housing."[174]

Both of these organizations, while highlighting their public-interest goals in their U.N. applications, also reveal that they are principally engaged in lobbying government officials to advance the financial interests of their members. 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 as part of "national and regional energy portfolios" and to educate relevant communities and policymakers about the benefits of coal and the coal industry.[175] The NAHB, likewise, seeks to "[b]alance legislative, regulatory and judicial public policy" and "[i]mprove[] [the] business performance of its members."[176]

Many of the 458 associations that claim "business and industry" as an area of expertise and field of activity advance the interests of a particular industry or a particular economic sector. A few examples will illuminate the kinds of groups included:

- *The World Nuclear Association*, afforded Roster accreditation in 1993, "is the global private-sector organization that seeks to promote the peaceful worldwide use of nuclear power."[177] The organization's website claims that its "members are responsible for virtually all of world uranium mining, conversion, enrichment and fuel fabrication; all reactor vendors; major nuclear engineering, construction, and waste management companies; and most of the world's nuclear generation."[178]
- *The Asociacion Regional de Empresas de Petroleo y Gas Natural en Latinoamerica y el Caribe (APREL)* is a Uruguay-based NGO

174. *See* Nat'l Ass'n of Home Builders, Mission Statement, *in* ECOSOC Consultative Status Database, Business and Industry Search, *supra* note 169.

175. Word Coal Ass'n, Mission Statement, *in* ECOSOC Consultative Status Database, Private Sector Business and Industry Search, *supra* note 169.

176. Nat'l Ass'n of Home Builders, Mission Statement, *in* ECOSOC Consultative Status Database, Business and Industry Search, *supra* note 169.

177. World Nuclear Ass'n, Mission Statement, *in* ECOSOC Consultative Status Database, Business and Industry Search, *supra* note 169 (from the results list select the "World Nuclear Association" hyperlink and then select "Activities" under the "Profile" tab to view the mission statement). For accreditation year, see World Nuclear Ass'n, *in* ECOSOC Consultative Status Database, Business and Industry Search, *supra* note 169.

178. *World Nuclear Ass'n Members*, WORLD NUCLEAR ASS'N, http://world-nuclear.org/our-association/membership/our-members.aspx (last visited Mar. 3, 2016) ("Other members provide international services in nuclear transport, law, insurance, brokerage, industry analysis and finance.").

that obtained Special consultative status in 1976.[179] Members of the organization are thirty-two national and international oil, gas, and biofuels companies and institutions including many major energy corporations like Chevron, Petrobras, Repsol, and Spectrum Energy Corp.[180] One of the organization's principal purposes is to "promote and facilitate the industry's . . . improvement in their operational . . . and economic performance" in addition to social, environmental, and collaborative goals.[181]

- *The American Forest and Paper Association (AF&PA)* successfully achieved Roster accreditation in 1996.[182] While the AF&PA is allegedly "international" in geographic scope, its self-declared purpose is to "sustain[] and enhance[] the interests of the US forest products industry."[183] The organization's mission statement, per its home website, is to successfully influence public policy to benefit the U.S. paper and forest products industry.[184] Members of AF&PA include U.S. lumber, timber, and paper products companies.[185] The European equivalent—*The Confederation of European Paper In-*

179. Asociacion Regional de Empresas de Petroleo y Gas Natural en Latinoamerica y el Caribe, Profile, *in* ECOSOC Consultative Status Database, Business and Industry Search, *supra* note 169 (from the results list select "Asociacion Regional de Empresas de Petroleo y Gas Natural en Latinoamerica y el Caribe" to view the profile). For accreditation year, see Asociacion Regional de Empresas de Petroleo y Gas Natural en Latinoamerica y el Caribe, *in* ECOSOC Consultative Status Database, Business and Industry Search, *supra* note 169.

180. *Member Companies*, REG'L ASS'N OF OIL, GAS & BIOFUELS SECTOR COS. IN LATIN AMERICA & THE CARIBBEAN, https://arpel.org/actual-members (last visited Mar. 3, 2016).

181. Asociacion Regional de Empresas de Petroleo y Gas Natural en Latinoamerica y el Caribe, Mission Statement, *in* ECOSOC Consultative Status Database, Business and Industry Search, *supra* note 169) (from the profile page select "Activities" under the "Profile" tab to view the mission statement).

182. Am. Forest & Paper Ass'n, Mission Statement, *in* ECOSOC Consultative Status Database, Business and Industry Search, *supra* note 169.

183. Am. Forest & Paper Ass'n, Mission Statement, *in* ECOSOC Consultative Status Database, Business and Industry Search, *supra* note 169 (from the results list select the "American Forest and Paper Association" hyperlink and then select "Activities" under the "Profile" tab to view the mission statement).

184. *Mission and Vision*, AM. FOREST & PAPER ASS'N, http://www.afandpa.org/about/mission-and-vision (last visited Mar. 3, 2016).

185. *Membership Directory*, AM. FOREST & PAPER ASS'N, http://www.afandpa.org/about/membership-directory (last visited Mar. 3, 2016).

dustries—also received Roster accreditation, in 2004.[186] Members are pulp and paper industry associations of EU member states.[187]

- *The European Association of Automotive Suppliers*, which received Roster status in 2002, is "[t]he voice of the automotive supply industry in Europe . . . representing an industry with . . . more than 3000 companies . . . and covering all products and services within the automotive supply chain."[188] The industry claims a 600 billion euro annual turnover.[189]
- *The Association of Latin American Railways (ALAF)* received Roster status in 1999.[190] According to its website, ALAF represents most railway companies in Latin America.[191]

Together with these industry- or sector-specific associations, others among the 458 "business and industry"-promoting associations advance the interests of business more generally. It has already been noted that the International Chamber of Commerce was one of the first organizations to receive General consultative status, and it did so as soon as the Council's accreditation regime was developed in 1946.[192] More recently, other business-promoting organizations have joined the ranks. For example:

- *The World Union of Small and Medium Enterprises (the Union)* obtained Special status in 2013.[193] The Union's objectives are to "assist Member Institutions in their dealings with national policy and . . . represent the interests of [Small and Medium Enterprises] at International—and United Nations—Organisations [sic] . . . in the event of global economic crisis and the challenges and problems

186. The Confederation of Eur. Paper Indus., *in* ECOSOC Consultative Status Database, Business and Industry Search, *supra* note 169.

187. *Id.* at Number and Type of Members (from the results list select the "Confederation of European Paper Industries" hyperlink and then select "Activities" under the "Profile" tab to view the number and type of members).

188. THE EUR. ASS'N OF AUTOMOTIVE SUPPLIERS, http://clepa.eu (last visited Mar. 3, 2016). For accreditation year, see European Ass'n of Automotive Suppliers, *in* ECOSOC Consultative Status Database, Business and Industry Search, *supra* note 169.

189. THE EUR. ASS'N OF AUTOMOTIVE SUPPLIERS, *supra* note 188.

190. The Ass'n of Latin Am. Railways, *in* ECOSOC Consultative Status Database, Business and Industry Search, *supra* note 169.

191. *Quienes Somos* (About Us), ASS'N OF LATIN AM. RAILWAYS, http://www.alaf.int.ar/acerca-de-alaf.php (last visited Mar. 3, 2016).

192. *See supra*, Part I.C.2.

193. The World Union of Small and Medium Enters., *in* ECOSOC Consultative Status Database, Business and Industry Search, *supra* note 169.

of SMEs in the 21st Century."[194] The stated goal of the organization is to lobby on behalf of these small and medium enterprises, stating that it will "efficiently and effectively contribute to present proposals for solutions and reforms on a regional level that can improve the business environment for SMEs."[195]

- *The Turkish Confederation of Businessmen and Industrialists (Turkiye Isadamlari ve Sanayiciler Konfederasyonu)*, which gained Special accreditation status in 2013, aims, eponymously, to promote Turkish businesses.[196] It seeks to "make [Turkish] enterprises and entrepreneurs a part of the global world of business."[197] Interestingly, the organization identifies itself to the Economic and Social Council as a trade union, even though it appears to support business executives.[198]
- *The Confédération Européenne des Cadres*, which received Special accreditation status in 2012, likewise identifies itself to the Council as a trade union, although it also supports managers and executives.[199] The Confederation "has implemented an international managers' network," and aims "[t]o express and defend the needs and points of view of managers on current topics."[200]

194. *Id.* at Mission Statement (from the results list select the "World Union of Small Enterprises" hyperlink and then select "Activities" under the "Profile" tab to view the mission statement).

195. The Union does not seek to obscure its intentions as a lobbying organization, offering as an additional objective that it will "[e]stablish itself as the premier international organisation [sic] advocating the interests of micro-, small, and medium enterprises (SMEs) at relevant international fora, before all national, regional and international bodies and with leading media that shape public opinion." *Id.*

196. Turkiye Isadamlari ve Sanayiciler Konfederasyonu, *in* ECOSOC Consultative Status Database, Business and Industry Search, *supra* note 169.

197. *Id.* at Mission Statement (from the results list select the "Turkiye Isadamlari ve Sanayiciler Konfederasyonu" hyperlink and then select "Activities" under the "Profile" tab to view the mission statement).

198. *Id.* at Profile (from the results list select the "Turkiye Isadamlari ve Sanayiciler Konfederasyonu" hyperlink).

199. Confédération Européenne des Cadres CEC, Profile, *in* ECOSOC Consultative Status Database, Business and Industry Search, *supra* note 169 (from the results list select the "Confédération Européenne des Cadres CEC" hyperlink to view the profile).

200. *Id.* at Mission Statement (select "Activities" under the "Profile" tab to view the mission statement).

2. For-Profit Entities

According to the Council's regulations implementing U.N. Charter Article 71, consulting organizations must be nonprofits.[201] That is, organizations must obtain their fees from members or local affiliate organizations and not from participation in commerce as a for-profit entity.[202] Nevertheless, some companies appear to have flouted these rules and obtained accreditation despite funding from the sale of goods or services or the fact that they are organized as for-profit entities. In fact, at least one commentator claims that the gatekeeping for the consultancy status is quite lax.[203]

For example, Freann Financial Services Limited, an organization that received Special accreditation status in 2013, has as its mission, among other goals, "[t]o provide lease or hire purchase financing to the private sector"; "to underwrite larger financing type transactions"; and "[t]o provide management advisory and consultancy services for its clients and other potential customers."[204] The company records its funding structure as "[p]roduct sales and business services" as well as fees for consulting and research services.[205] The company appears to have "aims and purposes" in line with those of the U.N. in that the capital it provides is directed to development, often through microfinance, and the company is focused on green financing and increasing financial literacy.[206] However, the company does not fit within the traditional definition of an NGO as its funding source indicates that it generates fees for service and sells financial products.[207] And, in other respects, the company behaves like a business. It has, for

201.*See* discussion *supra* Part I.B.2.

202.*See* E.S.C. Res. 1996/31, *supra* note 86, at ¶ 13.

203.*See* TULLY, *supra* note 108, at 207.

204.Freann Fin. Servs. Ltd., Mission Statement, *in* ECOSOC Consultative Status Database, Private Sector Business and Industry Search, *supra* note 169 (from the results list select the "Freann Financial Services Limited" hyperlink and then select "Activities" under the "Profile" tab to view the mission statement).

205.*Id.* at Funding Structure.

206.*See* Letter from Kwabena Anning Frederick, Exec. Dir., Freann Fin. Servs. Ltd., to Dir., UN Global Compact (Sept. 14, 2015), https://www.unglobalcompact.org/system/attachments/cop_2015/188491/original/COMMUNICATION_OF_PROGRESS_-_UN_GLOBAL_COMPACT_2015.pdf?1442243255.

207.*See* Freann Fin. Servs. Ltd., Funding Structure, *in* ECOSOC Consultative Status Database, Private Sector Business and Industry Search, *supra* note 169 (from the results list select the "Freann Financial Services Limited" hyperlink and then select "Activities" under the "Profile" tab to view the funding structure).

example, signed on to the U.N. Global Compact, which categorizes it as a small or medium enterprise ("SME") in the financial services sector.[208]

Another example of an entity that fits oddly under the "NGO" moniker is an organization called United States Sustainable Development Corporation (USSDC).[209] The organization, which received Special consultative status in 2015, calls itself a "private sector" organization rather than an NGO.[210] The organization is involved in sustainable development, with a mission to "find creative approaches to stimulate the local economy."[211] It particularly attends to impoverished regions of the United States "through job creation and business development."[212] While many of these purposes seem consistent with the aims and purposes of the United Nations, USSDC is organized in the United States as a *for-profit corporation* incorporated in the state of Virginia in 2011.[213] The company is funded through fees for consulting and research services.[214] Notably, when USSDC's application came before the Council's Committee on NGOs, the Committee granted the application (and therefore consultative status) without any comment.[215] In particular, the committee did not note or consider the alleged NGO's for-profit corporate status, or the fact that it functions as a consulting firm.[216]

For other organizations, funding is obtained through mixed sources, and it is difficult to determine whether the entity has registered domestically as a nonprofit or for-profit entity. For example, The Turkish Confederation of Businessmen and Industrialists—a Special accreditation consultant since 2013[217]—reports the usual sources of funding for an NGO, that is,

208. *Freean Financial Services Limited*, UN GLOBAL COMPACT, https://www.unglobalcompact.org/what-is-gc/participants/29061 (last visited Mar. 3, 2016).

209. U.S. Sustainable Dev. Corp., *in* ECOSOC Consultative Status Database, Private Sector Business and Industry Search, *supra* note 169.

210. *Id.* Profile (from the results list select the "United States Sustainable Development Corporation" hyperlink to view the profile).

211. *Id.* Mission Statement (from the profile page select "Activities" under the "Profile" tab to view the mission statement).

212. *Id.*

213. *Id.* Organizational Structure.

214. *Id.* Funding Structure.

215. *See* Econ. & Soc. Council, Rep. of the Comm. on Non-Governmental Orgs. on Its 2015 Resumed Session, U.N. Doc. E/2015/32 (Part II) (June 17, 2015).

216. That is to say, the minutes of the meeting record no mention of the for-profit status of this organization. *See id.*

217. *Turkiye Isadamlari ve Sanayiciler Konfederasyonu*, *in* ECOSOC Consultative Status Database, Private Sector Business and Industry Search, *supra* note 169.

membership fees, and "[d]onations and grants from domestic sources."[218] But the Confederation also reports income from "[p]roduct sales and business" and "[f]ees for providing consulting or research services."[219]

Freann Financial Services, the USSDC, and the Turkish Confederation serve as evidence of the fact that the nonprofit criterion is at best inadequately enforced, permitting some businesses access to the consultancy regime directly through channels meant for NGOs.

3. Grassroots mimicry and capture

The third mode of business access to the consultancy system is the one to which the term "astroturf activism" most clearly applies: grassroots mimicry and capture. Businesses form associations that appear to be dedicated to nonprofit, public-regarding, causes but are, in fact, mouthpieces for covert business agendas. Alternatively, businesses capture existing associations by placing corporate officers on NGO boards, funneling donations, offering revolving door incentives, or creating partnerships that eviscerate the NGOs' power to act independently. These tactics can result in mixed agendas that render the organizations' intentions and loyalties unclear. The result is organizations with names like "Citizens for Sensible Control of Acid Rain" (formed by coal and electricity companies);[220] the "National Wetlands Coalition" (serving U.S. oil companies and real estate developers);[221] "Consumers for World Trade" (formed by an industry coalition);[222] and, in the example that opened this paper, "Center for Indoor Air Research" (captured by the tobacco industry).[223]

This third mode of access, as the least transparent, is also the most challenging to uncover and map. Discerning this mode of access requires gathering evidence from diverse primary and secondary sources and stitching it together, a process that requires inferential leaps. Because this Article is the first to focus analytical attention on the astroturf activism phenomenon within the consultancy system, this account, preliminary as it is, nevertheless serves a useful purpose. It exposes this important issue,

218.*Id.* Funding Structure (from the profile page select "Activities" under the "Profile" tab to view the funding structure).

219.*Id.*

220.BRAITHWAITE & DRAHOS, *supra* note 1, at 489.

221.*Id.*

222.*Id.*

223.TOBACCO COMPANY STRATEGIES REPORT, *supra* note 31, at 48, 245 (Though the source uses the phrase "Center for Indoor Air Quality," "Center for Indoor Air Research" is the correct term as listed in the Glossary.

frames the critique to follow, and lays a foundation for a future, more systematic empirical analysis.

It appears that businesses began to use NGO mimicry and capture to gain access to the consultancy regime right around the time of the 1996 rules change at the Council that liberalized the access rules—the change implemented by Resolution 1996/31.[224] At that time, businesses seemed to be beginning to note that NGOs had access to international decision-making processes—and therefore influence over those processes—in a way that businesses did not.[225] The business literature noted that, at least in the environmental context, businesses had begun to copy the NGO format and "behav[e] like NGOs" in order to accomplish a number of goals, including obtaining access to U.N. lawmaking processes and helping to set international agendas.[226] The literature recommended that businesses appropriate the NGO format to mimic the success of NGOs in obtaining access to international decision-making processes and influencing international policy.[227]

At the same time, Robert Fri in 1992 acknowledged business's uneasy fit within the NGO rubric.[228] Fri noted that while business entities are certainly nongovernmental—and familiar with the practice of banding together to advocate for their common positions—they had not been typically interested in advancing broader policy agendas at the international level, at least in the environmental area.[229] While businesses were familiar with the rules of the game in the Washington, D.C. lobbying context, businesses were at the time unfamiliar with the realm of international policy

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224.*See supra* Part I.B.

225.Fri, *supra* note 23, at 92 (noting that the fact that NGOs had been so successful at defining agendas—particularly with respect to climate change—was "not lost on at least some business leaders.")

226.*Id.* at 93.

227.*See id.*

228.Fri's colorful description demonstrates how striking it must have been at the time that business would appropriate the NGO format:

> The notion of the corporation as a nongovernment organization (NGO) doesn't quite pass the "duck" test for most of us. . . . . [B]usiness looks like an NGO duck, since most corporations are nongovernmental. It even walks like a duck, for like any good NGO, business organizations are forever scurrying about to form coalitions to advance their shared positions on one issue or another. But . . . . . At least on energy and environmental issues that have been so prominent on the public policy agenda for the past 20 years, business has rarely been a voice for change. . . . [Instead it] regarded environmental protection as a costly compliance problem best left to lobbyists and lawyers.

Id. at 91.

229.*See id.*

in which NGOs were operating.[230] And yet business leaders were starting to note that those NGOs were pushing policies that could have a"profound[]" effect on business interests[231]:

> What [business leaders] saw, of course, was that policies profoundly affecting their operations were being shaped outside the system in which they operated. . . . . It seems likely that this realization played a major role in leading business to find ways to participate, essentially as an NGO, in the new extra-system game. And so it did, both by gaining access to the preparations for [the United Nations Conference on Environment and Development] and the parallel climate negotiating process, and by forming its own organizations . . . to play the NGO role.[232]

Thus, in Fri's account, the realization that an important lobbying game was being played outside of the traditional channels likely led to an uptick in business interest in forming NGOs to advance its own interests.[233] Fri concluded in 1992 that business lobbying at the domestic level "seem[ed] not to give business the scope it needs to do the things it wants," and so he found it plausible that "the curious sight of business as an NGO is here to stay."[234] In another article in the same business journal in the early 1990s, Larry Susskind echoed Fri's remarks but focused specifically on the "UN-sponsored system of environmental treaty-making."[235] Business leaders should, Susskind argued, get involved to assist the U.N. to make better treaties, whether or not they supported the expansion of domestic or international environmental regulation.[236]

There is evidence that businesses took up that early 1990s charge and began forming or appropriating NGOs to advance their interests within the consultancy system at the Council and elsewhere. The Tobacco Report, for instance, shows that tobacco companies, to avoid credibility limitations, "have frequently used surrogates in their attempts to influence WHO's tobacco control activities."[237] These surrogates include "a variety of front

230.*Id.* at 91-92 (noting that businesses could learn from NGOs the skills to "operate outside the established political and economic system" to "identify issues that belong on the official agenda, define policies . . . and organize" to bring these issues to the attention of deciders).

231.*Id.* at 92.

232.*Id.*

233.*Id.*

234.*Id.* at 94.

235.Lawrence E. Susskind, *New Corporate Roles in Global Environmental Treaty-Making*, COLUM. J. WORLD BUS., Fall & Winter 1992, at 62, 63.

236.*Id.* at 66, 71.

237.TOBACCO COMPANY STRATEGIES REPORT, *supra* note 31, at 47.

organizations," some of which were existing organizations that the tobacco industry funded and groomed for its use.[238]

For example, the tobacco industry insiders transformed the International Association of Tobacco Growers (ITGA) "from an underfunded and disorganized group of tobacco farmers into a highly effective lobbying organization. . . ."[239] Tobacco industry insiders noted that ITGA could be useful because it was perceived as a coalition of farmers who were independent from the rest of the tobacco industry—that is, the large tobacco companies responsible for producing and marketing products for consumers.[240] The plan was for the ITGA to "get fully accredited observer status at the [Food and Agriculture Organization of the U.N. (FAO)]" and serve as a "front for our third world lobby activities at WHO."[241] In serving in this capacity, the tobacco companies concluded specifically that ITGA's "integrity and independence are of great potential value . . . ."[242] In transforming ITGA to a "pro-active, politically effective organisation, the industry created the opportunity to capture the moral high ground in relation to a number of fundamental tobacco-related issues."[243] The ITGA did in fact lobby the FAO, the World Bank, and the United Nations Conference on Trade and Development "to oppose or undermine WHO tobacco control activities."[244]

Other organizations, the Tobacco Report found, were formed specifically for the purpose of advancing tobacco industry interests. For example, the Center for Indoor Air Research (CIAR) was "an ostensibly independent scientific organization actually created by US tobacco companies"[245] that proposed and funded counterresearch to challenge studies linking tobacco with cancer.[246] Other examples the Tobacco Report disclosed were the

238.*Id.*

239.*Id.*

240.*Id.*

241.*Id.* (quoting Memorandum from John Bloxcidge to Board Members of British American Tobacco Company 1-2 (Oct. 11, 1988) (on file with the University of California, San Francisco Library)).

242.*Id.* (quoting Memorandum from John Bloxcidge to Board Members of British American Tobacco Company 1 (Oct. 11, 1988) (on file with the University of California, San Francisco Library)).

243.*Id.* (quoting Letter from Martin Oldman, Assistant Secretary General, International Tobacco Information Center, to Gaye Pedlow, British American Tobacco Company 2 (Mar. 13, 1991) (on file with the University of California, San Francisco Library)).

244.*Id.* at 48.

245.*Id.* at 201. CIAR was later disbanded under the terms of a settlement agreement between U.S. Attorneys General and the tobacco companies. *Id.*

246.*Id.* at 51.

Institute for International Health and Development (IIHD); Associates for Research in the Science of Enjoyment (ARISE); and LIBERTAD.[247] The committee also noted that it found "such a considerable body of evidence pointing to use of other organizations with undisclosed relationships to tobacco companies, that it is likely that the committee has identified only a small proportion of the organizations that have such undisclosed relationships."[248]

Forwarding the clock to the present day, evidence of corporate mimicry or capture of grassroots NGOs—or at a minimum very cozy collaboration with them—persists. Some observe that these relationships are increasing, perhaps driven by the fact that the ever-proliferating NGOs must secure funding to maintain their activities,[249] even when corporate support might produce mission drift or a legitimacy price tag.[250]

For example, in a revealing piece of investigative journalism, Fairouz El Tom conducted a review of the "top 100 NGOs"[251] as identified by the *Global Journal*.[252] El Tom investigated links between these "top 100 NGOs" and the tobacco, weapons, and finance industries.[253] Specifically, El Tom found in 2013 that of these 100 NGOs, 54% had at least one board member affiliated with the tobacco industry, 56% had a board member

247.*Id.* at 48.

248.*Id.*

249.*See* Nuria Molina-Gallart, *Strange Bedfellows? NGO-Corporate Relations in International Development: An NGO Perspective*, 1 DEV. STUD. RES. 42, 43-44 (2014) (noting that NGO and corporate partnerships are increasing and arguing that this increase may be borne of NGO financial constraints).

250.*See* Kultida Samabuddhi, *Money Can Taint NGO's Clean Image*, GLOBAL POL'Y F. (Mar. 4, 2011), https://www.globalpolicy.org/ngos/introduction/49912-money-can-taint-ngos-clean-image.html (noting that corporate partnerships can raise suspicion for NGOs, as critics worry that corporate sponsorship will produce NGO mission drift).

251.El Tom, *Diversity and Inclusion*, *supra* note 22.

252.*The Top 100 NGOs: A Complete List*, GLOBAL J., Jan-Feb 2013, at 90, 90-91.; *see also The New Top 500 NGOs*, GLOBAL_GENEVA ASS'N, http://www.top500ngos.net/the-new-top-500-ngos (last visited Mar. 4, 2016) (updating and expanding list of top NGOs in 2015).

253.El Tom, *Diversity and Inclusion*, *supra* note 22 (finding that over half of the "top 100 NGOs" in her study had one or more board members "affiliated with companies that invest in, or provide . . . services to the arms, tobacco, and finance industries"); *see also* Fairouz El Tom, *Annual NGO Ranking Shows "White Savior" Status Quo Remains Intact*, NONPROFIT Q. (May 26, 2015), http://nonprofitquarterly.org/2015/05/26/annual-ngo-ranking-shows-white-savior-status-quo-remains-intact [hereinafter El Tom, *White Savior*] (updating the study for the top NGOs on the Global Journal's 2015 list).

affiliated with the arms industry, and 59% with the finance industry.[254] Of the top 100 NGOs in the 2013 El Tom study, 40% have obtained accreditation at the Economic and Social Council.[255] El Tom's 2015 follow-up highlighted accredited organizations with clear links to major corporate partners. For example, CARE International, an NGO with General consultancy status, has a partnership with corporate agricultural giant Cargill (ostensibly to combat poverty),[256] and Vital Voices, an NGO with Special consultancy status, has a close relationship with Walmart (ostensibly to increase economic opportunities for women).[257] In El Tom's estimate, these "[f]igures reveal a clear disjunction between the world NGOs seek to create, and the world their governance structures reproduce"[258] as links with corporate interests "appear to be inconsistent with [the NGOs'] mandate or public identity."[259] Other questionable links between NGOs and business partners have garnered controversy. For example, Conservation International, a U.S. environmental charity, sustained criticism for close links with corporate partners including Cargill, Chevron, Monsanto, and Shell.[260] Conservation International nevertheless obtained Special consultative status at the Economic and Social Council in 2014, several years after the controversial links were reported in the press.[261]

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254. El Tom, *Diversity and Inclusion*, *supra* note 22. . In a 2015 update, El Tom concluded again that "over half" the top 100 NGOs had corporate links to tobacco, arms, or finance. El Tom, *White Savior*, *supra* note 251.

255. For ECOSOC accreditation status, see ECOSOC Consultative Status Database, *supra* note 164.

256. For ECOSOC accreditation status, see ECOSOC Consultative Status Database, *supra* note 164. See El Tom, *White Savior*, *supra* note 251 for CARE and Cargill partnership.

257. For ECOSOC accreditation status, see ECOSOC Consultative Status Database, *supra* note 164. See El Tom, *White Savior*, *supra* note 251 for Vital Voices and Walmart partnership.

258. El Tom, *Diversity and Inclusion*, *supra* note 22 ("Many would question whether association with the arms and tobacco industries is compatible with the promotion of ideals of justice and social progress. Even if no position of principle is taken, however, NGOs certainly need to explain how association with these industries is consistent with their objectives.").

259. El Tom, *White Savior*, *supra* note 251.

260. *See, e.g.*, Tom Levitt, *Conservation International 'Agreed to Greenwash Arms Company,'* ECOLOGIST (May 11, 2011), http://www.theecologist.org/News/news_analysis/877241/conservation_international_agreed_to_greenwash_arms_company.html.

261. *See Conservation International Foundation*, ECOSOC Consultative Status Database, *supra* note 164.

In short, this third mode of business access to the consultancy system is what I have called "grassroots mimicry and capture" because it involves businesses either forming sham or front groups that appear to be classic NGOs or co-opting existing NGOs to serve as corporate mouthpieces. Because this form of access is the most covert of the three described in this Article, it is the most difficult to identify. It could also be the form most challenging to regulate, as NGOs are dependent for their existence on funding, and, for many, corporate sponsorship offers a ready source of funding.[262] The next Subpart addresses the potential harms a regulatory response must address.

C. Types of Harm

The three forms of astroturf activism outlined above reveal a number of different issues that can be organized broadly into problems of transparency and access. As for transparency problems, the fact that the identities of the actors driving the agenda are obscured (an *opacity* problem) renders more complex the more common problem that it is difficult to determine an organization's mission and, in turn, its fidelity to that mission (a *mission accountability* problem). These problems make it challenging for gatekeepers to do their job, which perhaps explains the fact that those gatekeepers have largely avoided excluding organizations for opacity or mission accountability issues (a *gatekeeping* problem). Finally, a legal regime that forces organizations to either engage in astroturf activism or not participate at all sacrifices benefits the private sector may otherwise offer to the lawmaking process (an *access* problem).

1.Opacity

Astroturf activism, as defined in these pages, is the phenomenon whereby an organization like CARE can advance the agenda of Cargill before international organizations, including at UN-sponsored treaty conferences.[263] As the preceding paragraphs have demonstrated, the distorted nature of this phenomenon is most starkly apparent when business organizations capture purportedly independent associations, such as the Center for Indoor Air Research, or form their own associations, such as the National Wetlands Coalition.[264] In both cases, the association's nonprofit status, benign mission statement, and often public-regarding title obscure the sponsoring company's profit-seeking motives.

262.*See* Molina-Gallart, *supra* note 249, at 43-44.

263.*See* discussion *supra* Part II.B.3.

264.*Id.*

Astroturf activism also describes the related scenario in which powerful businesses capture trade associations that purport to speak on behalf of a wider range of actors in a particular industry but in fact are captured by a single actor or a set of powerful actors. This happened, for example, in the context of the Tobacco Convention, when the tobacco industry co-opted a trade association called the International Association of Tobacco Growers (ITGA).[265] While the trade association "claims to represent the interests of local farmers," as the Tobacco Report noted, in fact the organization is "funded" and "directed" by major multinational tobacco companies such as Philip Morris, R.J. Reynolds, and the British American Tobacco Company.[266]

Finally, the astroturf activism phenomenon also captures the scenario in which *for-profit* entities escape the notice of gatekeepers and become accredited, notwithstanding the noncompliance of these associations with accreditation eligibility rules.[267] It is challenging for a gatekeeper or onlooker to police whether an association is a nonprofit or for-profit entity because international gatekeepers rely on the representations of the association itself and a company obtains nonprofit or for-profit status at the domestic level by registering with a national or local government.[268]

In short, the current system allows—and perhaps even encourages—the funneling of business views into NGOs or their aggregation into trade associations. In such a regime, it is very difficult for international lawmakers, officials, and academic or public critics to determine which entity is trying to advance which goals.

2. Mission accountability

Indeed, the interest-mapping problem is a subspecies of a larger problem that Dana Brakman Reiser and Claire R. Kelly call a "mission accountability" problem, which can bedevil any regime that accepts organizations as consultants or lawmakers.[269] Mission accountability, in the

265. TOBACCO COMPANY STRATEGIES REPORT, *supra* note 31, at 7 ("[T]obacco companies made prominent use of the International Tobacco Growers' Association (ITGA) . . . [which] claims to represent the interests of local farmers. The documents indicate, however, that tobacco companies have funded the organization and directed its work.").

266. *Id.*; *see also id.* at 2 (identifying the relevant tobacco companies).

267. This latter phenomenon was described in *supra* Part II.B.2.

268. *See* discussion *supra* note 106 and accompanying text.

269. Dana Brakman Reiser & Claire R. Kelly, *Linking NGO Accountability and the Legitimacy of Global Governance*, 36 BROOK. J. INT'L L. 1011, 1047 (2011) ("For an NGO involvement to enhance the legitimacy of global governance, its mission

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Reiser and Kelly formulation, "means that the organization owes fealty to achieving its particular goals or purpose, i.e., its mission."[270] In the consultancy arena, an accredited organization must have "aims and purposes" that align with the goals of the U.N. as a whole or the particular agency or organ to which the organization is accredited as a consultant.[271] This "aims and purposes" requirement—which is replicated both in Article 71 of the U.N. Charter and in ECOSOC's implementing regulations—clearly puts an onus on gatekeepers to determine the mission and purpose of a given organization when those gatekeepers admit the organization to the consultancy ranks.[272]

Setting aside the gatekeeping problem for a moment, consider the experience of a lawmaker who is weighing the contributions of a number of accredited organizations that have offered opinions with respect to a lawmaking project. An international lawmaker must be able to identify and rely on the authenticity of the mission the organization pursues in order for the lawmaker to effectively assess that input.[273] This is true whether the lawmaker seeks the input of organizations for the purpose of gaining valuable expertise from those organizations or, instead, for enhancing the legitimacy of the decisional process by weighing a variety of viewpoints prior to making a decision.[274] In other words, organizations cannot contribute to the "input" legitimacy of a lawmaking process—that is, the integrity of a process of decision making—unless it is possible for lawmakers to be assured of the mission accountability of the organizations that participate.[275]

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must align with the global governance goals of an international regulator or the international community.").

270.*Id.* at 1022.

271.*See* discussion *supra* Part I.B.2.

272.Moreover, to effectively implement this Article 71 legal requirement, it would be necessary to institute some sort of ongoing monitoring or screening function to respond to the mission accountability issue Reiser and Kelly have identified. Organizations with ECOSOC accreditation are required to submit regular reports. *See* Resolution 1996/31, *supra* note 86, at paras. 55, 61 (requiring accredited consultants to submit quadrennial reports). But some query whether this reporting system is effective at policing mission accountability. *See* Reiser & Kelly, *supra* note 269, at 1050 (noting that global regulators need to address the regulatory gap).

273.*See* Reiser & Kelly, *supra* note 269, at 1049.

274.*See id.*

275.Input legitimacy refers to "participation in, and the process of, decision making." *Id.* at 1016. *See generally* Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT'L AFF. 405, 406-07 (2006) (identifying input and output legitimacy criteria); Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J.

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Moreover, in addition to lawmakers, critics and onlookers are also ill-equipped to assess the input legitimacy of an international lawmaking process unless they, too, are able to assess the mission accountability of the participant organizations. In other words, beyond lawmakers and gatekeepers, mission accountability is also a problem for observers who are trying to assess the legitimacy of the process of decision making by determining which interests were accommodated in the lawmaking process.

Reiser and Kelly note that, for a number of reasons, mission accountability is "difficult to track and enforce."[276] The descriptive analysis offered in this Article adds a further layer of complication to this problem. In particular, the astroturf activism phenomenon adds the potential for mixed, indeterminate, and profit-driven motives, and reduces the capacity of international lawmakers and onlookers to evaluate mission accountability.

In addition to mission accountability problems, Reiser and Kelly identify financial accountability as another potential problem to guard against. In defining financial accountability, Reiser and Kelly focus on the tendency of organizations to use funds inappropriately to benefit insiders, "skimming off funds" and leaving the organization with fewer resources to pursue its mission.[277] While astroturf activism is not a financial accountability problem per se, it is a mission accountability problem that is affected by an organization's financial pressures and incentives. When an organization accepts large donations, it faces pressure to accommodate the preferences of those donors. In other words, that organization becomes more susceptible to capture. The result of inappropriate use of funds and inappropriate acceptance of funds can merge. As Reiser and Kelly put it, without financial accountability, "NGOs risk becoming ineffective or even

1490, 1492-94 (2006) (arguing that administrative law principles like opportunity to comment and power sharing affect the legitimacy of international processes).

276. Reiser & Kelly, *supra* note 269, at 1029. It is, first, difficult to find "how and where a nonprofit's mission is articulated." *Id.* Then, even if one does find an organization's mission statement, that statement "may be quite general, such as an organization formed for 'religious' or 'educational' purposes." *Id.* at 1029-30. Missions can evolve over time. *See id.* at 1030. Moreover, there are few domestic or international mechanisms to police whether an organization holds to any particular mission. *See id.* at 1030-31 (noting that under U.S. domestic law, the key officials charged with policing nonprofit mission accountability are state attorneys general and the IRS but the "tools with which these regulators are equipped are ill-suited to enforcing mission accountability"). In fact, although Reiser and Kelly note that "mission accountability is fundamental to an NGO's legitimacy as an entity," "[m]onitoring mission at every turn" would be impractical and counterproductive because it would "require regulators to devote vast resources and would diminish NGOs' ability to innovate in a sphere separate from government influence." *Id.* at 1035-36.

277. *Id.* at 1044-45.

sham organizations, which are inadequate to regulate or contribute to the work of other global regulators."[278]

3. Gatekeeping

The opacity and mission accountability issues caused or exacerbated by astroturf activism place added burdens on an already taxed gatekeeping system. Gatekeeping is the province of the NGO Committee,[279] which meets only twice per year to vote on pending applications, most of which it eventually approves.[280] But the NGO Committee's work is plagued by political obstruction,[281] a ballooning workload as an increasing number of organizations seek accreditation,[282] and limited capacity to investigate the veracity of the information presented for its review.[283] These limitations make it difficult for the committee to effectively assess whether an aspiring consultant fronts for a for-profit entity. The Astroturf Activism phenomenon thus both exposes the limitations of the gatekeeping that exists and potentially serves as one of the many factors that overwhelms it. Nor do domestic mechanisms currently perform this task effectively.[284]

278.*Id.* at 1047.

279.*See* discussion *supra* note 106 and accompanying text.

280.*See id.* The presumption toward accreditation is so strong that denied applications were usually deferred rather than closed. *See* Econ. & Soc. Council, Rep. of the Comm. on Non-Governmental Orgs. on Its 2014 Resumed Session, ¶ 31, U.N. Doc. E/2014/32 (Part II) (June 12, 2014) (statement by U.S. representative to the NGO Committee); *see also Basic Facts about ECOSOC Status*, U.N. DEP'T OF ECON. & SOC. AFF.: NGO BRANCH, http://csonet.org/?menu=100 (last visited Mar. 6, 2016) ("Roughly one-third of all new recommendations are recommended by the Committee immediately. Two-thirds are deferred to the next session of the Committee. Most applications get approved within two or three sessions of the Committee.").

281.*See* Charnovitz, *Nongovernmental Organizations and International Law*, *supra* note 27, at 359 ("The work of the committee in granting and reviewing accreditation of NGOs has been criticized for overpoliticization and lack of due process." (citing *Cardoso Report*, *supra* note 30, at 54)).

282.*See Basic Facts about ECOSOC Status*, *supra* note 280 ("In 2014-2015, 632 organizations applied for consultative status. On average 160 applications are recommended by the Committee in each of its two sessions per year.").

283.Hartwick, *supra* note 102, at 224 n.45 (noting that an aspiring consultant's compliance with the accreditation criteria is assessed by a review of the organization's application material—"the UN does not actually verify" the information contained in these documents (citing Interview with Meena Sur, Program Officer, U.N. Dep't of Soc. & Econ. Affairs, NGO Section, in Wash., D.C. (Apr. 11, 2003))).

284.Reiser & Kelly, *supra* note 269, at 1050 (noting that "enforcement of domestic nonprofit law will not sufficiently guard NGOs' mission accountability").

4. Access

An additional kind of potential harm emerges from the current accreditation rules because they *exclude* direct business input into the accreditation process. The legal rules that structure the consultancy regime offer an incentive and, in fact, an imperative for major corporate actors to speak through nonprofits; otherwise, corporate perspectives go unheard.

While commentators sometimes note that for-profit entities can thwart public agendas,[285] business input can also have positive effects on the international process. Involving business in international lawmaking can sometimes produce better rules, reduce business resistance to the rules ultimately adopted, and facilitate a more effective international lawmaking process.[286] Thus, the current consultancy rules cause harm in part because they exclude major international corporations from having direct access to the international lawmaking process. Corporate actors that seek to contribute their expertise and perspectives are forced to make use of the accreditation regime designed for nonprofit members of civil society. There is no parallel access mechanism for corporate actors who seek to act directly. Corporate actors are *required* to engage in astroturf activism, find alternative channels to reach international lawmakers, or forgo any form of input. Because companies are forced into covert activity rather than having the chance to act directly, international lawmakers miss out on valuable benefits these corporate actors might have to offer through direct engagement.

Of course, not all will agree that the lack of a direct channel of access for business entities is a bug rather than a feature of the current system. Here are a few potential counterarguments:

First, direct access for business entities might give businesses *too much* access to officials and lawmakers, drowning out other voices, decreasing the legitimacy of a lawmaking process, or increasing nefarious and destructive influences. This may be a particular concern since businesses may play a two-level game, lobbying both domestic and international

285. This is, of course, one of the concerns animating the debate over the *Citizens United* decision. *See* sources cited *supra* notes 5-6.

286. *See, e.g.*, Jonathan I. Charney, *Transnational Corporations and Developing Public International Law*, 32 DUKE L.J. 748, 787-88 (1983) (arguing for an expanded role for transnational corporations in international lawmaking on the theory that these corporations will be more likely to accept international law rules if they regard these rules as legitimate; that legitimacy will be enhanced by corporate access to the rulemaking process); Durkee, *Business of Treaties*, *supra* note 7, at 295-96 (noting that business participation in the process of treaty making can contribute technical expertise and break political logjams, facilitating negotiations between differently situated states).

officials. Moreover, businesses may continue to use front groups even if they enjoy the benefits of direct access, unduly duplicating their impact.

Second, even if direct business access does not cause the harms just mentioned, it may increase at least the *appearance* of corruption and illegitimacy, which international officials and lawmakers may seek to avoid.

Finally, forcing businesses to speak through NGOs may serve a tempering function. That is, requiring businesses to engage in conversations with nonprofits could prove to be useful in altering and tempering the business contribution to the lawmaking process. As Part II.B.3 illustrated, in some cases businesses speak through public interest-oriented nonprofits. The fact that businesses must engage with those public interest organizations in order to advance their positions in international processes could result in a tempering of the business position into a more socially productive or public interest-oriented contribution. Clearly, more data is needed to determine whether this potential counterargument has a basis in fact; and so it offers a productive avenue for future research.

Putting aside the final point, the first two concerns might be ameliorated by legal reforms that sufficiently identify and respond to the astroturf activism phenomenon. The next Part begins with three different kinds of analysis, addresssing the genesis, persistence, and coherence of the current legal structure, and then concludes with some preliminary proposals as to how such reforms might be structured.

III. Accounting for Astroturfing

The early twenty-first century reflects a new epoch of engagement between three sets of actors: states, business entities, and civil society.[287] The international system both evinces the new patterns of engagement and struggles to adapt its legal structures to the challenges these new relationships present. While this struggle may be seen throughout the

287. Other commentators have noted the blurring of lines between state actors on the one hand and nonstate actors such as business and NGOs on the other. *See, e.g.*, Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 547 (2000) (noting the "deep interdependence among public and private actors in accomplishing the business of governance"). This Article instead focuses on the blurring of lines two between different kinds of nonstate actors: business and NGOs. Nevertheless, identifying the three as distinct categories of actors serves as a useful means of shorthand and one that is customary in the literature. *See, e.g.*, Abbott & Snidal, *supra* note 51, at 513 (describing transnational regulation as the product of a "governance triangle" between states, firms, and NGOs).

international system,[288] this Article explores a particular example of it: the U.N. consultancy system, which reveals an area where legal rules fail to accommodate the changing nature of relationships between the state, businesses, and civil society. This Article argues that the new facts require new legal tools to effectively regulate the respective contributions of each of these actors to international lawmaking.

This Part constructs an analysis of the U.N. consultancy rules that facilitate astroturf activism. The analysis is tripartite: It begins with an historical account of the rise of business entities as global actors, demonstrating that the social facts on which the consultancy structure is founded have changed, rendering the current rules outdated and unsuited to the phenomena they regulate. This historical account explains the *existence* of rules that respond poorly to the astroturf activism phenomenon. Next, a functional account identifies efficiency reasons for the *persistence* of that legal structure. The Part then asserts that the current structure exhibits conceptual incoherence between a principle of pluralistic equality on the one hand and an instrumentalist approach to admitting consultants on the other.

Finally, this Part builds on the three-part analysis of the consultancy regime to identify potential avenues for reform. One potential reform strategy would open a regulatory pathway to *include* individual businesses, providing them more direct access to state-driven lawmaking processes and offering states and international lawmakers more opportunities for regulatory control of that business access. An alternate reform strategy would require enhanced disclosures, relying on interested third parties to identify the more pernicious forms of astroturf activism and arming those third parties to do so more effectively. Either approach may offer benefits for international legal structures beyond the ECOSOC consultancy regime, serving as a blueprint for wider legal reform.

A. History: Epochs of Engagement

Astroturf activism can be explained by the historical development of the relationship between states and business entities, as well as the development of the relationship between each of those two entities and civil society. As Part I described, the U.N. consultancy regime codified, and thus froze in time, the League of Nations-era consultancy practice.[289] Although the legal rules structuring the consultancy regime were updated in 1996, that update did not change the Council's basic approach to business entities,

288. This Article uses the term "international system" to refer to the organizations, courts, networks, and other institutions that organize and regulate global society.

289. *See supra* Part I.C.

which remains the same in its essential details as it was in the early twentieth century. Yet, in the intervening century, the nature of multinational enterprises—specifically their global power and their relationship with states—has undergone profound and fundamental changes. The argument of this Part, then, is that the flaws in the law are rooted in obsolescence. Thus, while Part I.B offered a historical account of the Council's exclusion of business entities from the consultancy system, this Part constructs the obsolescence argument by mapping that history onto a separate account of the development of business entities during this time.

1. Epoch one: League of Nations

In the early twentieth century, when the League of Nations practice developed, it was practical for businesses to communicate with international organizations solely through trade or industry associations in part because few businesses would have had the capacity to participate in international lawmaking on their own behalf. While some colonial trading companies functioned as transnational entities as early as the sixteenth and seventeenth centuries, the number of entities operating across national borders remained small until the time of the Industrial Revolution.[290] It was during that period—between 1850 and 1914—that more businesses began to emerge as transnational entities.[291] Even so, the late nineteenth century was a period of only limited transnational business development. The growth was limited initially to British firms,[292] followed around the turn of the twentieth century by emerging U.S. firms.[293] And, even then, the growth was limited in scope and focused on former colonizers and their former colonies.[294]

Thus, the early twentieth century League of Nations practice emerged in a period in which few businesses operated across national borders, had the capacity to lobby international decision-makers, and had the motivation to do so. On the other hand, associations of businesses, like the Internation-

290. PETER T. MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW 8-9 (2d ed. 2007) (noting that although the "great European colonial trading companies" were commissioned in the sixteenth and seventeenth centuries, the Industrial Revolution ushered in technologies that enabled many more entities to function across borders, so most economists date the emergence of multinational business entities to this period).

291. *Id.* at 10 (explaining that in this period, multinational business entities "began to emerge as part of the newly developing modern industrial economy").

292. *Id.*

293. *Id.* at 10-11.

294. *See id.* at 12 (noting that in this time cross-national investment was focused on African and Asian colonies, and the newly independent Latin American nations).

al Chamber of Commerce, were active at this time alongside other voluntary organizations like the Women's International League for Peace and Freedom.[295] Because economic development organizations were among those animating the League of Nations at this time, it would have been perfectly natural that economically motivated voluntary associations would have had status equal to other kinds of voluntary associations.

2. Epoch two: U.N. charter

In 1945, at the time of the drafting of the U.N. Charter, the international community was just emerging from the second period in the development of modern multinational entities.[296] That period, stretching from 1918 to 1939, featured a much slower rate of development due to instability in the world economy, significantly more nationalistic economic policies, and national cartels in various industry sectors.[297] Thus, because business-promoting non-profit associations had been operating alongside other kinds of voluntary associations since the early twentieth century in the international system—and business entities had not acquired substantially greater power, influence, or transnational capacity in the intervening time[298]—the U.N. drafters (and later ECOSOC) did not erect a new distinction between profit-focused consultants and everyone else. In fact, these actors were not focused on the issue of business entities, either individually or in associations.[299] There was simply not yet reason to change the first epoch's accreditation structure.

3. Epoch three: 1990s-era reforms

Next was an era of massive growth of business entities and the transformation of many of these businesses into fully transnational and multinational actors. This third epoch of multinational business development followed World War II, stretching from 1945 to 1990.[300] In that period, "[multinational enterprises] acquired unprecedented importance in

295.*See* discussion *supra* Part I.C.2.

296.MUCHLINSKI, *supra* note 290, at 12.

297.*Id.*

298.*See id.* and accompanying text.

299.*See* TULLY, *supra* note 108, at 66. As noted in Part I.B, by 1945, when the UN enshrined the League of Nations practice in Article 71, the drafters were instead preoccupied with the distinction between national and international voluntary associations. *See also* Charnovitz, *Two Centuries of Participation*, *supra* note 74, at 252 (noting ECOSOC's definition of NGOs as "any international organization which is not established by intergovernmental agreement").

300.MUCHLINSKI, *supra* note 290, at 15.

international production."[301] First, American firms grew rapidly in the first decade and a half after World War II and were globally dominant until the 1970s.[302] Then, starting in the 1960s, came a period of international competition, as European and Japanese firms emerged from the shocks of WWII and were joined by newly industrialized economies—China and the formerly socialist countries in Eastern Europe.[303] The rapid growth in multinational corporations in the third epoch brought a literature suspicious of that growth and growing global power.[304] Also in this time social scientists began to draw distinctions between economic actors on the one hand and the remainder of nonstate actors on the other, with the latter coming to be known as "civil society."[305]

While it would seem that this change in the nature of business entities might militate toward a change in the consultancy access rules, that change did not occur because, again, ECOSOC was focused on a different issue: heightened awareness of disparities between the developing world and industrialized states.[306] The new accreditation rules therefore affected the types of organizations to be accredited only on the margins and did not produce a wholesale change. Specifically, the rules did not reframe the role of businesses as consultants in light of the Epoch Three growth in those entities.

4. Epoch four: Globalization of influence

Finally, the decades since 1990 have been characterized by rampant globalization. As one commentator expressed, business entities have now

301.*Id.*

302.*See id.* at 15-18.

303.*See id.* at 18-21.

304.*See, e.g.*, RAYMOND VERNON, SOVEREIGNTY AT BAY: THE MULTINATIONAL SPREAD OF U.S. ENTERPRISES (1971) (providing an account of the future wherein powerful multinational power would grow at the expense of state power); *see also* John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT'L L. 819, 819 (2007) (noting that the UN "attempted to establish binding international rules to govern the activities of transnationals in the 1970s").

305.*See generally* JEAN L. COHEN & ANDREW ARATO, CIVIL SOCIETY AND POLITICAL THEORY (1992) (elaborating a three-part model that distinguishes civil society from economic and political society). Cohen and Arato noted in 1992 that "[t]he concept of civil society . . . has become quite fashionable today, thanks to struggles against communist and military dictatorships in many parts of the world." *Id.* at vii.

306.See *supra* notes 93-94 and accompanying discussion. Thus, the 1996 rules change focused on enhancing the diversity of associations and interests represented among the consultants, particularly with respect to amplifying voices in the developing world. *See id.* It was also responsive to a literature that challenged the legitimacy of participation by these associations and thus focused on demanding internal governance structures that made associations accountable to their members. *See id.*

grown so much that "[t]hey appear to be a power unto themselves."[307] Many businesses have acquired size and economic capacity that rivals that of states.[308] Many more of them have become transnational entities, with supply chains crossing national borders and transnational or global distribution of goods and services.[309] Many of them have become actively involved in self-regulation and coregulation with states.[310] Their capacities to lobby spread from principally national activity to include significant foreign, transnational, and international lobbying as well.[311] Their partnership and consent became indispensable to many projects at the heart of the international agenda, such as development, trade, and climate change.[312] Innovations such as benefit corporations (which seek "triple bottom line" economic, environmental, and social returns), and social finance (which "operates at the intersection of commerce and philanthropy") have blurred lines between business actors and civil society actors.[313] Indeed, as Sarah Dadush notes, "[i]n a world of diminishing public funding for addressing social problems, governments and international organizations are [increasingly] eager to put private investment to work in the social

307. MUCHLINSKI, *supra* note 291, at 3 ("It is often said that the major [multinational enterprises] have a turnover larger than many nation states, that they are powerful enough to set their own rules and to sidestep national regulation.").

308. *See* Philippe Sands, *Turtles and Torturers: The Transformation of International Law*, 33 N.Y.U. J. INT'L L. & POL. 527, 541 n.39 (2001) (noting that some global corporations have "annual operating budgets vastly in excess of most states").

309. *See* MUCHLINSKI, *supra* note 291, at 21-22 (This period brought "adoption of truly global production chains by [multinational enterprises] and their associates, a marked shift from raw materials and manufacturing towards services based FDI [foreign direct investment], and the development of major regional trade and investment liberalization regimes, alongside the establishment of the WTO.").

310. *See, e.g.*, HAUFLER, *supra* note 51, at 3-4; (offering case studies that explore the phenomenon of industry self-regulation in codes of conduct and coordinated standards); Danielsen, *supra* note 51, at 412 (identifying private businesses' varying roles in global governance); Freeman, *supra* note 287, at 547 (identifying business participation in shaping the content of regulatory rules in the United States in what the author describes as a process of contractual cocreation, rather than traditional top-down, command-and-control regulation); Scherer & Palazzo, *supra* note 51, at 911 ("Business firms engage in processes of self-regulation through '*soft law*' in instances where state agencies are unable or unwilling to regulate." (citation omitted)).

311. *See* Ruggie, *supra* note 304, at 819 (referring to the "adjust to the expanding reach and growing influence of transnational corporations.").

312. *See* José E. Alvarez, *Are Corporations "Subjects" of International Law?*, 9 SANTA CLARA J. INT'L L. 1, 5 (2011) ("[C]orporations . . . have exerted considerable influence in the making of rules governing trade, investment, antitrust, intellectual property, and telecommunications . . . .").

313. Sarah Dadush, *Regulating Social Finance: Can Social Stock Exchanges Meet the Challenge?*, 37 U. PA. J. INT'L L. 139, 143, 159-60 (2015).

sphere."[314] But this fourth epoch of mixed interests, where corporations and impact investors pursue public goods together with private profit, comes with risks.[315] The risks include the potential for conflicts of interest and mission drift that can ultimately undermine these public goods and cause serious harm.[316]

As this historical account makes clear, one way to understand the characteristics of the current accreditation regime is to view it as a historical relic born of early twentieth-century League of Nations relationships that has persisted long past its shelf life. That is, the consultancy rules have persisted into a time when the entities in that relationship have so fundamentally altered that the categories the rules were built on no longer retain their form. It is only over time that the great mass of organizations now known as "civil society" began to be understood as distinct from profit-motivated business organizations.[317] Now, trade and industry associations are treated as "civil society" even though businesses are otherwise distinguished. At the same time, those profit-motivated businesses now have a greater capacity to participate in international processes on their own, rather than aggregated through associations. They have elsewhere begun to take much more substantial roles as transnational power brokers, standard setters, and participants in international governance.

The historical critique suggests that the astroturf activism phenomenon stems from a significantly evolved relationship between business entities and states (and, in turn, international organizations) and legal rules that do not accommodate these new social facts. In other words, the positive historical account gives rise to the normative critique that while the regime may have been appropriate in the early twentieth century social context, it no longer serves well in the context of a very different set of social facts. It shows which solutions lie behind—the unitary approach of Epochs One and Two and the 1990s era sharp divisions between economic actors and the remainder of civil society—and which lie ahead—an approach that

314.*Id.* at 143-44 ("We've got a great idea here that can really transform our societies by using the power of finance to tackle the most difficult social problems that we face." (quoting David Cameron, U.K. Prime Minister, speech at the Social Impact Investment Forum (June 6, 2013), https://www.gov.uk/government/speeches/prime-ministers-speech-at-the-social-impact-investment-conference)).

315.*See id.* at 144-45.

316.*See id.*

317.*See generally* COHEN & ARATO, *supra* note 305 (tracing the history of the term "civil society" and distinguishing civil society from business actors); JOHN EHRENBERG, CIVIL SOCIETY: THE CRITICAL HISTORY OF AN IDEA (1999) (examining the historical, political, and theoretical development of the concept of civil society).

recognizes the reality that businesses are, in fact, powerful global actors deeply involved in global governance. Thus, the historical account appears to point toward a legal structure that accommodates business actors but better reveals economic and profit-seeking agendas to ameliorate the harms of opacity, mission accountability, and gatekeeper incapacity identified in Part II.C.

B. Function: An Efficiency Analysis

While the historical account casts the consultancy regime as a product of the particular social context in which it developed, this Subpart introduces a second positive account of the consultancy regime. That is, there is a second way to answer the question: "why does the consultancy regime persist in its current form?" The answer takes the form of an efficiency account.

The efficiency explanation arises from the observation that avoiding the astroturf activism phenomenon at the accreditation or NGO annual reporting stages would be costlier than the structure that currently exists, which sends on downstream the burden to ferret out astroturf activism. Those downstream actors are the international organization officials and lawmakers who ultimately receive the consultants' input. Thus, the existing accreditation structure relieves the burden on the NGO committee to assess the bona fides of would-be consultants by placing the admission threshold very low. Instead, it shifts that burden to the lawmakers who are later at the receiving end of that consultant lobbying. In the current structure, those lawmakers, many of whom are accepting NGO input to try to preside over a legitimate process, are the ones who must decide whether the actors presenting position statements and other comments are public-regarding NGOs or corporate mouthpieces. That work has not been done for them upstream, at the accreditation stage.

Why leave it to the downstream officials and lawmakers to assess the authenticity of NGO positions, rather than placing this burden on the upstream accreditation gatekeepers? The efficiency argument is that the ECOSOC gatekeepers are the actors best positioned to effect a change in the accreditation rules, so the rule that persists will be the rule most helpful to those gatekeepers. And, in fact, an overly inclusive accreditation standard conserves limited gatekeeper resources, so that is the rule that persists.

Gatekeeper resources are limited for a number of reasons. In fact, over *six hundred* organizations applied for consultative status in the 2014-2015 one-year period.[318] And tracing lines of accountability for NGOs is

318.*See Basic Facts about ECOSOC Status*, *supra* note 282 (noting that "[i]n 2014-2015, 632 organizations applied for consultative status.").

notoriously difficult.[319] Moreover, it is difficult to determine the functional mission of an organization and ensure that the organization maintains a stable mission over time.[320] ECOSOC has implemented some safeguards, such as requiring organizations to report income streams and governance structures.[321] But even with these reporting requirements, there is no simple or consistently effective way to ferret out business influence in NGOs, as the astroturf activism phenomenon exemplifies.[322] Nor is there a simple or consistently effective way to determine whether an organization that has ties to profit-seeking companies will promote public-regarding rules or rather advance rules that serve the economic bottom line while ultimately proving detrimental to other U.N. aims and purposes.[323] All of these factors place an enormous burden on the actors who must assess which organizations to admit to the consultancy regime, and which to exclude. A functionalist reading of this structure suggests that the broadly inclusive standards exist because they do not waste gatekeeper resources by entangling the Council or its NGO Committee in an attempt to make decisions these entities simply lack the capacity effectively to make.[324]

The efficiency account leads to a normative prescription that would focus reform efforts on the bounded capacity of NGO Committee gatekeepers and ECOSOC reporting monitors. One approach would be to

319. There is a robust literature on this point. *See, e.g.*, Anderson, *supra* note 26, at 843 (evaluating NGOs' "external" accountability as supposed representatives of the "peoples" of the world and noting the "open and contested" nature of questions in this area); Blitt, *supra* note 62, at 367-68 (noting that controls have not been put into place to ensure NGO accountability); Reiser & Kelly, *supra* note 269, at 1011 (suggesting that domestic nonprofit law offers some measures to resolve the accountability deficits); Weiss, *supra* note 26, at 358 (noting that it can be difficult for donors and others to hold NGOs accountable); *see also* Charnovitz, *The Illegitimacy of Preventing NGO Participation*, *supra* note 63, at 893 (collecting literature on accountability).

320. *See supra* note 269 and accompanying text.

321. *See* discussion *supra* Part I.B.2.

322. For instance, consider an NGO that advances clean energy goals but reports corporate membership and funding. How will this organization balance its clean energy goals with the interests of its corporate shareholders, and how will gatekeepers ascertain this balance? The current consultation regime offers no mechanism to address this kind of potential mission accountability issue.

323. *Cf.* Dadush, *supra* note 313, at 144-47 (noting potential harms that flow from mission drift).

324. There may also be a political economy story at play here, which would flow from the presumption that government agencies wish to preserve and consolidate their power and authority. Permissive accreditation criteria permit more discretion by the Council and its NGO Committee gatekeepers and thus allow the Council to have more control over which associations will be admitted as consultants than a more highly developed set of rules would allow.

address not the initial gatekeepers and monitors but rather those downstream lawmakers who will later receive input from the accredited consultants and weigh the value of the ideas those consultants propose. Those downstream lawmakers could be assisted, for instance, by disclosure requirements that are better tailored to assessing the astroturf activism phenomenon, which the current rules do not address.[325] They might also be assisted if more of those disclosures by consultants (in initial applications or ongoing reports) were publicly available in a searchable database. Making disclosures publicly available would make these disclosures available to the lawmakers themselves, and they would also equip third parties to more effectively assist those lawmakers. Third parties could then help police the bona fides of accredited organizations. For example, other consulting NGOs would then be better equipped to respond to contributions they see as harmful and inconsistent with an organization's stated mission and elevate those concerns to lawmakers.[326]

C. Theory: Pluralistic Equality

While the previous Subparts offered historical and functional critiques of the consultancy rules, this Subpart moves on to the third form of analysis, which is a normative evaluation of the jurisprudential coherence of the consultancy structure. This form of critique deserves a sustained analysis that is beyond the scope of this paper. However, a preliminary examination suggests that the consultancy regime is conceptually incoherent: While it exhibits characteristics of both pluralism and an instrumentalist "mediating institutions"[327] theory, it does not consistently follow either principle.

The term "pluralism" has a variety of definitions and usages,[328] but it is often used to describe and analyze the relationships between state and nonstate actors.[329] In one formulation, relevant to our topic, the basic thesis

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[325] For further discussion, see *infra* Part III.D.2.

326. Enhanced disclosure could be facilitated by, for example, opening a separate regulatory pathway for business entities and business-supporting associations. *See infra* Part III.D.2. The proposal is preliminary, however, and merits more sustained analysis.

327. Snyder, *supra* note 82, at 366.

328. *See, e.g.*, PAUL SCHIFF BERMAN, GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS 12-13 n.25 (2012) (collecting literature on pluralism); Erez Aloni, *The Puzzle of Family Law Pluralism*, 39 HARV. J.L. & GENDER 101, 107 (2006) (discussing definitions of pluralism); Hanoch Dagan, *Pluralism and Perfectionism in Private Law*, 112 COLUM. L. REV. 1409, 1421-29 (2012) (discussing various justifications for pluralism in private law).

329. Meghan Campbell & Geoffrey Swenson, *Legal Pluralism and Women's Rights After Conflict: The Role of CEDAW* (forthcoming 2016) (manuscript at 5),

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of pluralism is that "the State is but one of a number of associations within society."[330] In fact, States—and, in turn, international organizations constituted by States—are not "the sole originator[s] and interpreter[s] of law."[331] Rather, in the pluralist vision, "all associations in society, from . . . [national] government[s] down to the smallest and most marginalized group, are formally equal and are entitled to dignity and consideration—to *sovereignty* in their own affairs."[332] By extension, international organizations constituted by States are on the same footing as States and other associational groups.[333]

Because the pluralist thesis puts the State on the same ground as all other associations, the theory holds that it is not the State's role to choose between organizations and elevate some over others.[334] Rather, in the pluralist conception, "[e]ach of these groups is organized for a purpose, and each is an end in itself, not merely a piece of the 'State's machinery.'"[335] Pluralistic principles thus justify a regulatory structure that facilitates the flourishing of a diversity of groups and associations alongside the State.

Nevertheless, pluralistic principles do not require nonintervention. Because there will, of course, be conflicts between different associational groups, any society will develop "mechanisms to mediate the conflicts" between these groups.[336] In fact, according to one common interpretation of pluralistic principles, pluralism requires the State to regulate and control the participation of various associations.[337] A commitment to diversity and

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http://ssrn.com/abstract=2805359 ("Definitions [of pluralism] are almost always rooted in idealized notions of how the state and non-state justice systems should operate."). *But see* BERMAN, *supra* note 328, at 14 (noting that "hard-line pluralists will complain that a view focusing on how official actors respond to hybridity is overly state-centric.").

330. Snyder, *supra* note 82, at 389; *see also* BERMAN, *supra* note 328, at 12-13 ("[L]egal pluralists have long noted that law does not reside solely in the coercive commands of a sovereign power. Rather, law is constantly constructed through the contest of . . . various norm-generating communities." (citations omitted)).

331. Snyder, *supra* note 82, at 389; *see also* BERMAN, *supra* note 328, at 12 (noting that pluralists recognize that "our conception of law must include more than just officially sanctioned governmental edicts or formal court documents"; rather "many different non-state communities assert various forms of jurisdiction and impose all kinds of normative demands.").

332. Snyder, *supra* note 82, at 389.

333. *See id.*

334. *See id.*

335. *Id.*

336. *Id.* at 393.

337. *See* Dagan, *supra* note 328, at 1429-30 (arguing that pluralistic interpretation of private law is inconsistent with noninterference approach to regulation); *see also*

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accommodation of different types of players means that the State can take separate steps to support the sovereignty and flourishing of each distinct category of players.[338]

To apply these principles here, a consistently pluralist legal structure would support the participation of all types of associational groups, such as both profit-seeking and nonprofit organizations, although not necessarily without regulatory distinctions. The activity performed by nonprofits may very well be different from the activity performed by for-profits. And thus, according to pluralistic principles, while the State should accommodate both, it may also regulate them in a way that distinguishes between the two.[339]

By contrast to the pluralistic thesis, in the "mediating institutions" view, nonstate associations serve instrumental purposes. In this account, voluntary associations exist to mediate conflicts in state/nonstate relationships,[340] for instance "to influence, channel, or mask the power of the State."[341] As Franklin Snyder argues, this "'mediating' institutions" conception is susceptible to unprincipled instrumentalism:

> If our goal is not the rampant flourishing of a rain forest of associations, but rather the careful care and pruning of valuable plants in a well-tended garden, we may . . . argue over which associations should be privileged . . . . [But] that means that the associations with the most political strength at the moment will likely be favored.[342]

The literature on NGOs usually proceeds from an instrumental premise, Snyder asserts, and "asks what beneficial ends mediating institutions serve

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BERMAN, *supra* note 328, at 18 (noting that the cosmopolitan pluralist theory he advances "need not commit one to a worldview free from judgment, where all positions are equivalently embraced" but instead argues for a set of "procedural mechanisms, institutions, and practices that are more likely to expand the range of voices heard or considered"); *cf.* Snyder, *supra* note 82, at 393 (arguing that the pluralistic thesis itself does not offer guidance as to how to mediate conflicts and order relationships among associations; it just clarifies that the method we choose does not ultimately affect the formal status of those human associations as formally equal).

338. *See* Dagan, *supra* note 328, at 1425-29.

339. *See supra* note 82 and accompanying discussion.

340. Snyder, *supra* note 82, at 366 (explaining that the "mediat[ion]" imagines "a bipolar world with the State at one end of the axis and the Individual at the other, with all the other associations in society distributed between them"; associations are imagined to "mediat[e]" because they "occup[y] a middle position" and are "interposed between the extremes" of the State and Individual; they "interpose between parties in order to reconcile them or to interpret them to each other" (quoting 2 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1402 (1981))).

341. *Id.* at 399.

342. *Id.*

in their interactions with the State" in order to develop a theory of the legitimacy or value of these associations' participation in the process.[343] This, Snyder says, "work[s] backwards," as commentators "see something that they find valuable," "note that these values are reflected or developed by certain associations," and then "tend to develop theories that these groups (though not others) should be favored by (or at least protected from) the State."[344] A coherent legal structure organized on the principle that associations mediate between states and individuals must at least evidence *consistent* instrumentalism. In other words, a "mediating institutions" legal structure would exhibit principled consistency in the distinctions it makes between associations.

Consider how the consultancy regime fits within the two theoretical structures offered here. The consultancy regime appears to be in large part pluralist in that it makes very few hierarchical distinctions or classifications among association type. Trade, religious, academic, and humanitarian associations are all grouped together in the same "rain forest of associations."[345] But the legal framework does make the one key instrumentalist distinction that is under scrutiny here: that between business associations and other kinds of associations. This distinction is odd in the pluralistic account as, in at least some formulations of that account, there is no principled way to distinguish between business entities and other types of voluntary associations. All are "aggregations of people and property working together to accomplish particular purposes."[346] This distinction in the consultancy rules implicitly reflects the value that only associations that pursue agendas other than the profit agenda provide acceptable inputs. Putting aside for a moment the legitimacy of that decision,[347] the distinction

343.*Id.* at 366.

344.*Id.* at 379.

345.*Id.* at 399; Charnovitz, *Nongovernmental Organizations and International Law*, *supra* note 27, at 362 (stating that "NGOs compete with other actors in a dynamic marketplace of ideas." and "nongovernmental 'competition' could lead to a richer WTO politics, which could help improve the effectiveness of the WTO." (citing Daniel C. Esty, *Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion*, 1 J. INT'L ECON. L. 123, 135-37 (1998)))).

346.Snyder, *supra* note 82, at 378.

347.The distinction may express a fear of corruption by corporate influences; that admitting businesses directly through the consultancy regime will give them outsized influence in international negotiations. As the Tobacco Report, discussed *supra* at notes 44-48 makes clear, corporate influence can have detrimental impacts on international lawmaking processes. The concern about undue corporate influence could be heightened by the fact that businesses are likely playing a two-level game—lobbying both at the national and international levels. On the other hand, the distinction seems to be out of step with the "triple bottom line" approach-

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itself exhibits an instrumental preference for some associational inputs over others.

The consultancy legal structure thus seems to be incoherently theorized, with tendencies toward both pluralism and instrumentalism—or, that is, a "mediating institutions" account. A consistently pluralist legal structure would support diverse types of associational groups, even if it makes some regulatory distinctions between them. A structure that embraces instrumentalism must account for why it has chosen the particular viewpoints it seeks to embrace. The consultancy rules instead are inconsistent. They express an instrumentalist desire to admit associations that pursue the aims and purposes of the UN, exhibit good internal governance, and offer a balanced set of perspectives between the global north and south. Beyond that, they embrace pluralism, admitting all associations except business entities.[348] The exclusion of business organizations as the only category of excluded associational group aside from states themselves suggests an inconsistent under-theorized instrumentalism.

This normative, theory-based critique points toward reforms that would permit more direct access by business entities. These reforms would ease the conceptual incoherence by eliminating under-theorized rules that serve unintended instrumentalist ends and move the needle toward pluralism.

D. Legal Reform

While a fully developed proposal is beyond the scope of this Article, the foregoing analysis does offer a set of guiding principles to guide future reforms. To be clear, the aim here is not to close the conversation but rather to open it: to identify productive avenues for systematic empirical research and point the way toward constructive analysis and reform. This Subpart first identifies the principles to arise from the foregoing analysis, and then, drawing from those principles, offers two potential avenues for reform.

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es of many modern business entities that seek social goods alongside profit, *see* Dadush, *supra* note 313, at 148; the fact that businesses can also benefit the international lawmaking process, *see* Durkee, *supra* note 7; and the reality that many business entities are actively involved in developing regulation at the national and international levels, independently or alongside states, *see supra* note 287 and accompanying discussion.

348. The de jure and de facto rules may diverge here, with the de facto rules significantly more political in nature. *See supra* Part II.C.3 (discussing the political nature of the gatekeeping process).

1.Principles

First, this research supports a strong hypothesis that *covert* business access is harmful. It is potentially harmful to officials and lawmakers receiving consultation because it obscures the identity of the true consultants, making it more difficult for them to weigh the merits of the input they receive.[349] It also reduces the capacity of lawmakers to determine whether they have received input from a representative range of sources and thus achieved a process with input legitimacy.[350] Covert business access is potentially harmful to NGOs because it diminishes the capacity of captured NGOs to hold to their missions and casts suspicion on all NGOs, whether captured or not, thus heightening concerns expressed throughout the literature about the legitimacy and accountability of their participation as consultants.[351] It is potentially harmful to big businesses because it interposes an obstacle to communicating with lawmakers directly, which could filter the message and increase the cost. Finally, it may be harmful to small businesses, whose trade associations are co-opted by major multinational players in search of a consultant association to pass along messages to lawmakers.[352]

It is also possible that a lack of transparency is not always harmful; that there is a benefit to allowing businesses and NGOs to consult with each other prior to the time that those NGOs interpose their comments through the consultation procedure. This non-transparent initial consultation process could, hypothetically, improve downstream outcomes, tempering the NGO positions, business interests, or both. The outcome could be more pragmatic positions that are more acceptable to the relevant business interests than the NGO would have otherwise advanced; it could also result in more public-regarding versions of those business perspectives than those businesses would advance on their own. Perhaps this initial discussion and crystallization of positions is more effective when accomplished out of the public eye. If so, some degree of non-transparency may be useful. The merits of this hypothesis could be tested further through research concerning the ways NGOs and non-profit trade and industry associations develop positions internally prior to advancing them through the consultancy process.

Second, the current consultancy rules, which force businesses to consult through nonprofits, fail to guard against (and may even provoke) capture, mission distortion, and covert behavior. The historical analysis of the previous Subpart shows that while requiring any business contribution to be

349.*See* discussion *supra* Part II.C.2.

350.*See* discussion *supra* Part II.C.2.

351.*See* sources cited *supra* note 26 and accompanying text.

352.*See supra* notes 239-244 and accompanying discussion.

made through non-profits may have reasonably suited the respective capacities of early twentieth century businesses, non-profits, and international organizations, respectively, times have changed. Now, requiring businesses to speak through non-profits can lead to the astroturf activism distortions identified in this Article. Many businesses are now fully capable of acting independently, and their interests are not always suitable for aggregation, even transparently through a trade association. As Stephen Tully points out, aggregating business interests in trade associations makes it "difficult to identify which business interlocutor reflects dominant corporate opinion . . . . Business and industry is incorrectly assumed to possess a coherent voice as determined by organizational attributes and operational specialization."[353]

Third, in some cases, *direct* business access to international officials and lawmakers (not mediated through nonprofit NGOs and industry associations) may be the better course of action. The reasons for this include the fact that, as the case studies presented above suggest, excluding them can lead to covert access and all the identified attendant harms.[354] In other words, closing the door to business access points those entities to the proverbial window. It is also inefficient and impracticable to expect gatekeepers with limited capacities to extricate business influence that flows covertly through alternate channels, and offering direct access could reduce this flow.[355] Moreover, as a matter of normative theory, excluding business would move away from the pluralistic approach to admitting associations that the U.N. access rules appear to affirm.[356] This exclusion would require a coherent defense. Also, businesses can have valuable benefits to offer, including expertise, neutral resolutions to geopolitically sensitive problems, and an understanding of the practicality of proposed rules.[357] Finally, enlisting business input at the lawmaking stage can facilitate compliance down the line.[358]

Of course, direct business access to officials and lawmakers could also have detrimental effects, including overrepresentation of business voices, an appearance of special treatment of businesses, and an appearance of corruption and reduced legitimacy of the lawmaking process. Direct input by businesses could also exacerbate inequities between representation from actors in the global north and south, or over-represent voices from a

353.TULLY, *supra* note 108, at 220-21.

354.*See* discussion *supra* Part II.B.

355.*See* discussion *supra* Part III.B.

356.*See* discussion *supra* Part III.C.

357.*See supra* note 286 and accompanying text.

358.*See supra* note 286 and accompanying text.

particular country or region—inequities that ECOSOC has in the past tried to reduce. These countervailing concerns suggest that an effective legal reform must carve a careful middle ground to capture the benefits businesses can offer to the lawmaking process while restraining the harms.

2. Implementation

While the exact characteristics of a reformed approach to incorporating and restraining business input at the U.N. will require further study and analysis, this Subpart offers two potential approaches, together with some preliminary assessments about their benefits and shortcomings.

Reform Approach A: Disclosure

One potential avenue for reform would rely solely on an increased disclosure regime. Such a disclosure regime could require, among other things, disclosure by NGOs and industry associations of any known affiliations of board members and more robust disclosure of any funding by corporate sources. A reform premised on disclosure would have to focus not just on *what* is disclosed, but about how best to enhance the effectiveness of the disclosures—including the disclosures already required as well as any additional disclosures. Because it is clear that the capacities of the NGO Committee gatekeepers are bounded,[359] one way to enhance the effectiveness of any disclosures could be to make them more publicly available, perhaps on an easily searchable website accessible to the public. In this way, interested journalists, activists, NGOs, and other businesses could investigate potential mixed interests and bring them to the attention of gatekeepers and the officials and lawmakers at the receiving end of consultation. Another benefit of a disclosure regime is that it can maintain mutually beneficial relationships between NGOs and business actors that can secure funding streams for NGOs and potentially temper and reform business contributions to the process.[360]

Another benefit of an enhanced disclosure regime is that it could help officials and lawmakers better trace the origin and purposes of input they receive and ameliorate accountability and legitimacy problems. It would also help lawmakers ensure that they have secured input from a range of different viewpoints.

Disclosure alone, however, has limits. For example, a reform that incorporated only enhanced disclosures would not address the concerns that aggregating corporate positions through industry associations reduces the clarity and effectiveness of corporate contributions that could otherwise

359.*See supra* notes 318-324 and accompanying discussion.

360.For a more extended discussion of this tempering point, see discussion *supra* Part II.C.4.

assist the lawmaking process. It is also only effective when others have an incentive to monitor the disclosures and capacity to effectively use the disclosures in a productive way.

Reform Approach B: Accreditation Track for Business

Another potential approach to reform would entail allowing businesses direct access to officials and lawmakers, perhaps through a separate regulatory pathway for business consultants. This pathway could include individual business entities. It could also include the nonprofit associations that support profit-seeking entities that have previously been lumped together with NGOs—such as industry and trade associations.[361] Or the pathway could include just one or the other.

A separate regulatory pathway offers the possibility for separate regulations for profit-seeking entities than those that apply to NGOs in the traditional track. This could include a separate application process, accreditation criteria, and admission procedures,[362] all of which can be tailored to promote goals appropriate to members of the business community. For example, applicants could be required to commit to the United Nations Global Compact, or make other commitments. Once accredited, businesses and business groups could have tailored access rights to lawmakers. That is, the rules could be structured to offer profit-seeking entities more or less access than NGOs in the traditional NGO track. For example, profit-seeking entities could have more or less speaking time, agenda items, and written submissions than NGOs in different contexts. A dual track approach would also provide different disclosure rules for profit-seeking entities than for NGOs, including type, quantity, and frequency of reports and disclosures. The regulations applicable to profit-seeking entities could simply be different than those for NGOs and tailored to the legitimacy and appearance of corruption concerns, as well as the distinctive benefits businesses could offer the process. Just as with the disclosure regime, one benefit of opening a separate access pathway is that it could

361. Note that this proposed reform shares features with the consultancy structure established by the UNFCCC in that it proposes separate regulatory pathways for business entities and public interest NGOs. *See* UNFCCC, Non-Governmental Organization Constituencies, http://unfccc.int/files/parties_and_observers/ngo/application/pdf/constituencies_and_you.pdf (outlining UNFCCC constituency group accreditation process). However, it departs from the UNFCC context in a significant respect: in the UNFCCC context business entities must *always* register through NGOs, and there is no consultancy pathway that they can access directly, as profit-seeking entities. *See id.* (outlining UNFCCC accreditation admission criteria).

362. *Cf.* TULLY, *supra* note 108, at 207 ("[E]ntry hurdles could always be lifted" by, for example, "information disclosure (such as reporting or financial accounting), enhanced transparency requirements or further accountability (including democratic decisionmaking or independent oversight).").

help officials and lawmakers get a better sense of the origins and purposes of the input they are receiving, and it could help them ensure that contributions by entities with a profit motive are not overrepresented in their deliberative process.

There are a number of potential difficulties and regulatory challenges that the separate regulatory pathway would present. The pathway could open the door to a flood of new would-be consultants, overwhelming gatekeepers and lawmakers. That tide, however, could be stemmed by access barriers that would encourage (or require) smaller players to aggregate into associations. One concern, however, is that the new business consultants could also crowd out the contributions of other members of civil society. The separate track might allow businesses to exert too much pressure on lawmakers by, for example, flooding them with an "obfuscatory level of detail."[363] This concern might be ameliorated by carefully toggling access rights between businesses consultants, on the one hand, and other members of civil society, on the other. Theoretically, at least, with a dual-track approach, access rights for each group of actors can be controlled separately, so inputs by business entities and other actors may be better balanced.

While the foregoing concerns permit ready answers, two additional problems pose more fundamental difficulties that may disqualify a reform based on a separate accreditation track, and militate instead toward a reform focused principally on disclosure:

First, there is often a very deep blending between business interests and other interests, with profit-seeking entities promoting public-regarding goals like clean energy or sustainable development, and nonprofit entities relying heavily on corporate sponsorship for their survival. Is it possible to direct these entities into one track or another? Clearly, the separation would not be entirely clean. However, forming a separate regulatory pathway would give gatekeepers, lawmakers, and other observers (such as other NGOs) a clear response and means of eradicating astroturf activism when it is discovered: the profit-promoting NGO can simply be required to re-register in the alternative for-profit track, thereby exposing and rendering explicit the motive animating that entity's contributions. Relatedly, a business might simply register in the for-profit track while continuing current partnerships or capture of NGOs, thereby engaging in both astroturf activism and direct advocacy at the same time. After all, businesses in many cases may prefer for their positions to be articulated by NGO mouthpieces. A separate pathway would not offer gatekeepers and lawmakers tools to

363.*Id.* at 221.

respond to this problem unless this reform were adopted together with an effective disclosure regime.

Second, accreditation gatekeepers are already taxed by a flood of NGOs seeking access. Without an alternate source of funding or administrative capacity, how could gatekeepers administer yet another accreditation track?

Despite these difficulties, a reform featuring a separate accreditation track does offer one clear benefit: A separate accreditation track for business would avoid an extension of consultation rights to profit-seeking entities. Some commentators have observed a nascent "right" to consult with international organizations or a duty of international organizations to consult with the public;[364] others have proposed a right to consult as a normative matter.[365] But if individual businesses speak through NGOs and business associations count among those NGOs, then affording NGOs a right to consult confers participatory rights on businesses. Affording businesses a *right* to consult or assigning international organizations a *duty* to consult with businesses constitutes extending participatory rights to businesses in much the same way as U.S. Constitutional doctrine, including *Citizens United*, has recognized expressive rights forcorporate persons in the United States.[366] A separate regulatory pathway could prevent this otherwise seemingly inevitable result. It would instead ensure that businesses are afforded a type and quantum of access that is distinct from that of the remainder of civil society.

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In sum, the two potential reform approaches offered here are preliminary and require further development and study. Both, however, offer potential regulatory means to respond to the astroturf activism phenomenon. They offer the potential to allow gatekeepers, officials, and lawmakers to better trace lines of accountability, incorporate diverse perspectives in their deliberative processes, and facilitate a legitimate lawmaking process.

Conclusion

International law is at a crossroads. Increasingly powerful multinational business entities demand access to the lawmaking process, but international law has not developed adequate responses to that demand. The failures flow from profound changes in the relationships between nation states and

364.Charnovitz, *Nongovernmental Organizations and International Law*, *supra* note 27, at 368-72.

365.*See, e.g.*, Charnovitz, *The Illegitimacy of Preventing NGO Participation*, *supra* note 63, at 909-10.

366. Citizens United v. FEC, 558 U.S. 310, 319 (2010).

business entities over the past century. Now, business entities—sometimes rivaling nation-states in size and economic status—produce law as well as consume it. They serve as co-regulators domestically, standard setters internationally, and governors of their own supply chains around the world. Yet they are shut out of formal international lawmaking processes. Rather than sit idly by, businesses use the access points available to them, however awkward the fit. One result is the astroturf activism phenomenon, rife with accountability, efficiency, legitimacy, and access problems. As I have argued, the astroturf activism phenomenon is the product of a legal relic: an old regime that has failed to accommodate a new set of facts. It also serves as a case study for a larger challenge: Can foundational international legal rules be updated to accommodate rapidly changing relationships between business entities and nation-states? International law can respond to this challenge or slip into dysfunction and obsolescence. Because major international problems require successful multilateral collaboration, the outcome of stasis is failure. But if the astroturf activism analysis is a case study, it is also a blueprint. The key is to unearth business influence, so as to capture the benefit and minimize the harm.