

## ASTROTURF ACTIVISM

*Melissa J. Durkee\**

Corporate influence in politics is more than a national problem; it is an international phenomenon. For years, businesses have been invisibly coopting international legal processes. They secretly lobby lawmakers through sham or front groups, which are “astroturf” imitations of grassroots organizations. But because business lobbying is covert, it has been neglected in both the literature and the law. That neglect has consequences.

This Article unearths the phenomenon I call “astroturf activism.” It offers an original descriptive account that taxonomizes modes of business access to international lawmakers and identifies harms. The Article then develops a critical analysis of the laws that offer this access. I argue that the perplexing set of access rules for aspiring international lobbyists actually creates a perverse incentive for businesses to act covertly. I show that the access rules are the product of an early twentieth-century context, and are now 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 points toward a reform that would update the law to accommodate contemporary business roles in international governance.

Counter-intuitively, the reformed law would reverse retrograde incentives toward secrecy by offering *more* access to business entities. It would engage business input, but also expose it. The stakes, I show, are high. On the one hand, business can offer lawmakers expertise and more politically neutral solutions. On the other hand, business influence, left unchecked, can obstruct and eviscerate laws aimed at solving critical global problems.

---

\* Assistant Professor, University of Washington School of Law. [Acknowledgments.] I very much welcome comments and suggestions and may be reached at [mdurkee@uw.edu](mailto:mdurkee@uw.edu).

## CONTENTS

INTRODUCTION.....	2
I. A REGIME OF CONSULTANTS .....	8
A. Who Makes International Law?.....	8
B. The Consultancy Structure.....	15
C. The Rules Apply Oddly and Uneasily to Business .....	23
II. ASTROTURF ACTIVISM.....	28
A. Methodology .....	29
B. Modes of Access .....	29
C. Types of Harm .....	43
III. ACCOUNTING FOR ASTROTURFING.....	48
A. History: Epochs of Engagement.....	49
B. Function: An Efficiency Analysis.....	55
C. Theory: Pluralistic Equality .....	57
D. Legal Reform: More Access, More Control.....	60
CONCLUSION .....	64

## 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.<sup>1</sup>*

---

<sup>1</sup> JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION 489 (2000) (examples include “Consumers for World Trade (a pro-GATT industry coalition), Citizens for Sensible Control of Acid Rain (a coal and electricity front), and the National Wetlands Coalition (U.S. oil company and real estate developers)”).

*Citizens United*<sup>2</sup> unleashed an avalanche of attention to corporate rights to participate in the U.S. lawmaking process.<sup>3</sup> Corporations have a protected first amendment speech right, *Citizens United* held,<sup>4</sup> which allows them to express themselves by spending unlimited amounts of money on political activities—usually secretly, through “dark money” Super-PACs.<sup>5</sup> The holding inspired a sharp critique by the President; “a flurry” of proposed fixes in Congress; campaigns to amend the U.S. Constitution; and a landslide of academic commentary and public protest.<sup>6</sup>

But the attention stops at the border. The truth is that businesses also carry expressive rights in *international* lawmaking processes.<sup>7</sup> In the international context, however, the uproar in the scholarly and popular presses quiets to a whisper.<sup>8</sup> In the meantime, businesses exploit a legal wrinkle that allows them

---

<sup>2</sup> *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010) (holding in a 5-4 split decision that the First Amendment prohibits the government from restricting independent political expenditures by corporate entities).

<sup>3</sup> See Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143 (2010) (“*Citizens United v. FEC* unleashed a torrent of popular criticism.”); see also Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 84 (2010) (noting that “[c]onstitutional law scholars will long debate the wisdom” of *Citizens United*; offering a corporate law analysis of the implications). 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”).

<sup>4</sup> *Citizens United*, 558 U.S. at 365.

<sup>5</sup> Gabrielle Levy, *How Citizens United Has Changed Politics in 5 Years*, U.S. NEWS & WORLD REP. (Jan. 21, 2015), <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.”).

<sup>6</sup> Sullivan, *supra* note 3, 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 (2011) (the opinion “captured the public imagination”).

<sup>7</sup> 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.

<sup>8</sup> The press captured news of backroom deals by business lobbyists during the secretive negotiation of the Trans-Pacific Partnership, but little is still known and little written about the mechanisms and effects of business influence on international treaty production. See Paul Stephan, *Privatizing International Law*, 97 VA. L. REV. 1573 (2011) (proposing this area of research); see also Melissa J. Durkee, *The Business of Treaties*, 63 UCLA L. REV. 264 (2016) [hereinafter *Business of Treaties*] (same); Gregory Shaffer, *How Business Shapes Law: A Socio-Legal Framework*, 42 CONN. L. REV. 147, 147 (2009) (same).

---

---

to secretly create or coopt non-profit associations to serve as lobbying front groups, obtaining special access to international lawmakers to serve as so-called consultants.<sup>9</sup> I call this phenomenon “astroturf activism.”

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. It also sacrifices the expertise and efficiency benefits businesses might offer lawmakers in a well-regulated process.<sup>10</sup>

This Article exposes the astroturf activism phenomenon, offering an original study to uncover and describe it, and a theory of the legal failures that produce it. 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: 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 20th century when the access rules were developed. The flaws in the law, I argue, are rooted in obsolescence.

The result offers perverse incentives toward covert behavior, forcing businesses to dissemble or lose out. The harm stretches in two directions: In one direction the law provides an incentive to business to infiltrate the NGO world in a way that attenuates accountability, mixes messages, and threatens the legitimacy of NGO participation in international lawmaking. In the other direction, the law curbs the effectiveness of contributions businesses can make to lawmaking: 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. The law also taxes the resources of gatekeepers—who have insufficient mechanisms to judge between different would-be participants in the international process—and institutional decision-makers—who face an onslaught of input from often-veiled sources.<sup>11</sup>

---

<sup>9</sup> See *infra* Part I.C. for an examination of this legal structure.

<sup>10</sup> See generally Durkee, *Business of Treaties*, *supra* note 8 (defending the claim that business participation in international law production can sometimes be beneficial, as businesses can contribute expertise, break geopolitical logjams, and offer efficient solutions).

<sup>11</sup> The project shares objectives with liberal theory in international legal scholarship, which seeks to understand how interest groups shape international law; however, the liberal account

The project is descriptive and critical. Descriptively, the Article identifies the legal structure that creates the astroturf activism phenomenon and the effects of that legal structure. To do so, the Article uses a multi-method approach to uncover forms of secret corporate access to lawmakers.<sup>12</sup> The phenomenon occurs in at least three modes: businesses capture existing NGOs or form their own NGOs with non-profit status and mission statements that obscure the company's true interests; powerful businesses capture trade associations that purport to speak on behalf of a wider range of actors in a particular industry; or *for-profit* entities exploit gatekeeping weaknesses to gain access notwithstanding their non-compliance with eligibility rules.<sup>13</sup>

What is the source of this covert mayhem? The practice arises to take advantage of a “consultancy” status at international organizations such as the United Nations’ Economic and Social Council (the Council, or ECOSOC) or the World Health Organization (the WHO), which offer special access to international officials and lawmakers.<sup>14</sup> Significantly, these consultative relationships are limited to non-profit associations, and exclude for-profit

---

focuses on the ways interest groups influence domestic lawmakers, which, in turn, enter into international agreements. *See, e.g.* Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1954-55 (2002) (identifying core aims of liberal theory); *see also* Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT’L ORG. 513, 513 (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.* Rachel Brewster, *The Domestic Origins of International Agreements*, 44 VA. J. INT’L L. 501, 502 (2004) (domestic interest groups attempt to set domestic policy and develop domestic law in part influencing international law); 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); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2603, 2656 (1997) (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.

<sup>12</sup> For methodology, see part II.A, *infra*.

<sup>13</sup> For an examination of these modes of access, see Part II.B, *infra*.

<sup>14</sup> For a discussion of the rules governing this access, see Parts I.B. & 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 non-governmental organizations “concerned with matters within its competence.” U.N. Charter art. 71.

corporations and other business entities.<sup>15</sup> Rather than sit on the sidelines, businesses find access through creating or coopting the traditional NGO format.<sup>16</sup> In fact, a business literature guides businesses in how to effectively gain access by making use of the NGO form.<sup>17</sup>

Because much of this behavior is underground, little attention has been paid to its significance.<sup>18</sup> Yet, at the same time, a robust literature considers the role of NGOs as a whole in international governance.<sup>19</sup> While this literature sometimes cautions that NGO participation can lack in accountability or legitimacy,<sup>20</sup> it often celebrates NGOs as “democratizers,” who exercise moral

---

<sup>15</sup> See Part II.B.3 & 4, *infra*; see also *Introduction to ECOSOC Consultative Status*, U.N. DEPT OF ECON. & SOC. AFFAIRS: NGO BRANCH, <http://csonet.org/index.php?menu=30/>. (last visited Feb. 29, 2016) (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.”)

<sup>16</sup> See BRAITHWAITE & DRAHOS, *supra* note 1 (explaining that these front or captured NGOs take advantage of UN accreditation regimes); Fairouz El Tom, *Diversity and Inclusion on NGO Boards: What the Stats Say*, THE GUARDIAN (May 7, 2013, 5:56 EDT), <http://www.theguardian.com/global-development-professionals-network/2013/apr/29/diversity-inclusion-ngo-board> [Hereinafter El Tom, *Diversity and Inclusion*] (finding that over half of the “top 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.

<sup>17</sup> See Robert W. Fri, *The Corporation as Nongovernment Organization*, 27 COLUM. J. WORLD BUS. 90, 90 (1992) (recommending that business entities consider participating in UN activities by sponsoring or partnering with NGOs); see also discussion *infra*, Part II.B.2.

<sup>18</sup> See generally Stephan, *supra* note 8 (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 international soft law. See, e.g., TIM BÜTHE & WALTER MATTLI, *THE NEW GLOBAL RULERS: THE PRIVATIZATION OF REGULATION IN THE WORLD ECONOMY* (2011) (identifying private standardization regimes); Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171, 187–88 (2010) (“soft law,” includes various forms of informal cooperation between states, substate entities, private parties, and nongovernmental organizations); Janet Koven Levit, *Bottom-up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT’L L. 125, 126 (2005) (business entities participate in setting standards that can become absorbed into formal law).

<sup>19</sup> See Peter J. Spiro, *Accounting for NGOs*, 3 CHI. J. INT’L L. 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.”).

<sup>20</sup> See, e.g., Kenneth Anderson, “Accountability” as “Legitimacy”: *Global Governance, Global Civil Society and the United Nations*, 36 BROOK. J. INT’L L. 841 (2011) (arguing that NGOs serve as their own gatekeepers and their “legitimacy” in the international system is an empty form of auto-legitimation).

authority and enhance the legitimacy of the international process.<sup>21</sup> Prominent international officials share this assessment: UN 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.”<sup>22</sup> Later, UN Secretary-General Kofi Annan praised the rise of NGO consultants as a “revolution” and a “global people-power.”<sup>23</sup>

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? In fact, I argue, 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 new theory to guide these reforms, in order to better regulate business contributions and more appropriately suit 21<sup>st</sup> century 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, and catalogs the results as problems of opacity, mission accountability, gatekeeping, and access. Part III constructs a critical analysis—which is rooted in an historical account, but also draws on functionalism and normative theory—and develops a set of principles to guide legal reform.

---

<sup>21</sup> For an overview of the literature, see generally Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100 AM. J. INT’L L. 348 (2006) [hereinafter Charnovitz, *Nongovernmental Organizations and International Law*]; Spiro, *Accounting for NGOs*, *supra* note 19; see also discussion *infra* Part I.A.

<sup>22</sup> Boutros Boutros-Ghali, Sec’y Gen., United Nations, Speech at the 47<sup>th</sup> Annual UN Department of Public Information Conference of Non-Governmental Organizations (Sept. 20, 1994).

<sup>23</sup> 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). The United Nations’ 2004 Cardoso report also championed participation by civil society, asserting that “[t]he growing participation and influence of non-State actors is enhancing democracy and reshaping multilateralism.” U.N. Secretary-General, *We the Peoples: Civil Society, the United Nations and Global Governance: Rep. of the Panel of Eminent Persons on United Nations—Civil Society Relations*, at 3, U.N. Doc. A/58/817 (June 11, 2004) [hereinafter *Cardoso Report*].

## I. A REGIME OF CONSULTANTS

A. *Who Makes International Law?*

During the course of the infamous mass tort litigation against Philip Morris and other tobacco companies, U.S. litigators accomplished a major strategic coup d'état through the simple act of discovery. The tobacco companies were forced to produce millions of documents that drew the curtain on a vast and insidious array of strategies the companies used to resist tobacco control. Granted, it was unsurprising that the companies attempted to alter the course of impending tobacco regulation, but the documents revealed just how far they were willing to go. Among the buried secrets was evidence that the industry did not confine itself to efforts to influence *domestic* regulation—rather, it launched a sustained, secret, and lethally effective campaign against international lawmakers.<sup>24</sup>

In fact, the tobacco company documents reveal an “elaborate, well financed, sophisticated, and usually invisible” campaign of deliberate subversion of international institutions.<sup>25</sup> The campaign was focused most intensely on the World Health Organization (WHO),<sup>26</sup> as the tobacco 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). As a committee of experts who reviewed the tobacco industry documents concluded: “that tobacco companies resist proposals for tobacco control comes as no surprise. What is now clear is the scale and intensity of their often-deceptive strategies and tactics.”<sup>27</sup>

The scale and intensity of that campaign, however, was shrouded in secrecy. Most of the tobacco companies’ efforts to influence international lawmakers were covert. Their tactics included hiring former WHO officials to gain valuable contacts within the organization; secretly “pitting other UN

---

<sup>24</sup> TOBACCO COMPANY STRATEGIES TO UNDERMINE TOBACCO CONTROL ACTIVITIES AT THE WORLD HEALTH ORGANIZATION: REPORT OF THE COMMITTEE OF EXPERTS ON TOBACCO INDUSTRY DOCUMENTS (July 2000), iii, [http://www.who.int/tobacco/resources/publications/general/who\\_inquiry/en/](http://www.who.int/tobacco/resources/publications/general/who_inquiry/en/) [hereinafter TOBACCO COMPANY STRATEGIES REPORT].

<sup>25</sup> *Id.*

<sup>26</sup> *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.”).

<sup>27</sup> *Id.*

agencies against WHO”<sup>28</sup>; manipulating the scientific and public health debate about the health effects of tobacco through funding purportedly “independent” experts; speaking through developing countries, by convincing them that WHO’s tobacco control program was a “First World” agenda unworthy of their attention and support;<sup>29</sup> and conducting secret surveillance of WHO activities.<sup>30</sup>

Among this battery of covert activities was what 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.”<sup>31</sup> These included tobacco company-created front groups and trade unions that had obtained consultative status at the WHO. These groups used that status as consultants to lobby against tobacco control activities generally, and specifically against the treaty aimed at “respon[ding] to the globalization of the tobacco epidemic”<sup>32</sup>: the Tobacco Convention.<sup>33</sup> It is impossible to fully measure the results of the tobacco campaign against the WHO and the Tobacco Convention<sup>34</sup>—and the Tobacco Convention was ultimately successful against these odds. 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.<sup>35</sup>

---

<sup>28</sup> *Id.* at 1.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 53.

<sup>31</sup> *Id.*

<sup>32</sup> World Health Organization [WHO] Framework Convention on Tobacco Control, Forward, May 21, 2003, 2302 U.N.T.S 166, [http://www.who.int/tobacco/fctc/text/en/fctc\\_en.pdf](http://www.who.int/tobacco/fctc/text/en/fctc_en.pdf) [hereinafter Framework Convention].

<sup>33</sup> *Id.* at 3. Incidentally, the Framework Convention was the first treaty negotiated under WHO auspices.

<sup>34</sup> 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 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 24, at 17–19.

<sup>35</sup> 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

As the WHO example demonstrates, in an unfortunately nefarious manner, business entities influence international lawmaking. But that business influence remains underappreciated and deeply under-examined.<sup>36</sup> By contrast, a voluminous literature considers business influence in informal or “bottom-up” lawmaking—in other words, business roles in setting codes of conduct and private standards; contributing to “soft” or voluntary international law; and engaging in investor-state arbitration that imports content into investment treaty regimes.<sup>37</sup> That literature principally identifies, in Greg Shaffer’s terms, the ways that businesses construct “private legal systems, including private institutions to enforce privately-made law,”<sup>38</sup> and examines the way that those private systems sometimes make their way into formal law.<sup>39</sup>

---

reasonable to believe that the tobacco companies’ subversion of WHO’s tobacco control activities has resulted in significant harm.”).

<sup>36</sup> See *id.* at 264; see also Stephan, *supra* note 8, at 1577 (urging attention to business roles in international lawmaking). While the international legal literature has far to go in this area, Braithwaite & Drahos have made a substantial contribution in sociology. See generally BRAITHWAITE & DRAHOS, *supra* note 1. For a discussion of the literature on business influence in the environmental context, see *infra* note 46.

<sup>37</sup> See, e.g., BÜTHE & MATTLI, *supra* note 18 (describing private standardization regimes); Julian Arato, *Corporations as Lawmakers*, 56 HARV. INT’L L.J. 229 (2015) (showing that business entities engage in arbitration that defines the interpretation of terms of bilateral investment treaties); 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); Guzman & Meyer, *supra* note 18, at 187–88 (defining soft law to include cooperation between states, substate entities, private parties, and nongovernmental organizations); Levit, *supra* note 18, at 126 (identifying as “bottom-up lawmaking” 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.”); Daniel Danielsen, *How Corporations Govern: Taking Corporate Power Seriously in Transnational Regulation and Governance*, 46 HARV. INT’L L.J. 411 (2005) (identifying private businesses’ significant role in global governance); 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(4) J. OF MGMT. STUD. 899, 922 (June 2011) (“Business firms engage in processes of self regulation through ‘soft law’ in instances where state agencies are unable or unwilling to regulate.”); VIRGINIA HAUFLE, A PUBLIC ROLE FOR THE PRIVATE SECTOR: INDUSTRY SELF-REGULATION IN A GLOBAL ECONOMY (2001) (exploring the phenomenon of industry self-regulation in codes of conduct and coordinated standards).

<sup>38</sup> Shaffer, *supra* note 8, at 147 (organizing business impact on lawmaking into two broad categories: first, creating private law and second, influencing public lawmakers).

<sup>39</sup> See sources cited *supra* note 37.

By contrast, much less has been said about direct business influence on international lawmakers, and, in turn, on formal international treaty law.<sup>40</sup> In a previous article, I offered case studies to show that businesses are deeply involved at all points in the process of treaty production, with significant implications for the health of international treaty regimes.<sup>41</sup> That work began to respond to the call for serious analysis of business influence on formal international lawmaking. But it also revealed an important gap: 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.<sup>42</sup>

The gap is demonstrated by a notable contrast: A “copious” literature examines the contributions and influences of NGOs on international lawmaking.<sup>43</sup> Dozens, perhaps hundreds, of law review articles consider the NGO role in consulting with and influencing international lawmakers, through formal consultancy regimes and otherwise.<sup>44</sup> The literature addresses, among

---

<sup>40</sup> See Shaffer, *supra* note 8, at 147 (identifying this as the second way that businesses influence law: “business influences the public institutions that make and apply law” and noting that this area is ripe for research); Stephan, *supra* note 8 (proposing this area of research); see also Durkee, *Business of Treaties*, *supra* note 8 (same).

<sup>41</sup> See generally Durkee, *Business of Treaties*, *supra* note 8.

<sup>42</sup> 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) (identify core aims of legal theory, and examining how international legal theory borrows from international relations); see also Moravcsik, *supra* note 11, at 513 (domestic constituencies construct state interests). Moreover, the liberal theory attention to interest group influence on international law has inspired a broader literature. See, e.g., Brewster, *supra* note 11, at 502 (domestic interest groups try to influence international law in order to set domestic policy); Benvenisti, *supra* note 11, at 168–70 (casting the sovereign state as an agent of small interest groups); Koh, *supra* note 11, at 2656 (identifying a process-based theory that views sub-state 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 and study the effect of those business roles on international law. See Hathaway, *Do Human Rights Treaties Make a Difference?*, *supra* note 11, at 1954–55 (noting these limitations).

<sup>43</sup> Charnovitz, *Nongovernmental Organizations and International Law*, *supra* note 21, at 349–50.

<sup>44</sup> See Spiro, *Accounting for NGOs*, *supra* note 19, at 161 n.2 (2002) (“[T]he academic and policy literature on NGOs has . . . exploded.”); 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

other questions, the legal status of NGOs; the impact of NGOs on the lawmaking process; the legitimacy of NGO participation as consultants to international lawmakers; and whether NGOs might have a “right to consult” with international lawmakers.<sup>45</sup> But this literature focuses its attention on classic public-interest NGOs, and not on business-promoting NGOs, or business influence on public-interest NGOs.<sup>46</sup> In doing so, this literature has

---

lawmaking “remains undertheorized.” See Peter J. Spiro, *NGOs and Human Rights: Channels of Power*, in RESEARCH HANDBOOK ON HUMAN RIGHTS (Sarah Joseph, ed. 2009).

<sup>45</sup> There is an extensive literature on each of these points. For legal status, see, e.g., Karsten Nowrot, *Legal Consequences of Globalization: The Status of Non-governmental Organizations Under International Law*, 6 IND. J. GLOBAL LEGAL STUD. 579 (1999); for the impact of NGOs on the lawmaking process, see, e.g., JOSE E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAWMAKERS 611 (2005) (“no one questions today the fact that international law—both its content and its impact—has been forever changed by the empowerment of NGOs”); for critical perspective on the legitimacy of NGO participation in international lawmaking, see, e.g., Anderson, *supra* note 20 (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 (2004) (arguing that NGO access is insufficiently regulated); for an argument in favor of a “right to consult,” see generally Steve Charnovitz, *The Illegitimacy of Preventing NGO Participation*, 36 BROOK. J. INT’L L. 891 (2011) [hereinafter Charnovitz, *The Illegitimacy of Preventing NGO Participation*]; and for a relatively pithy overview of the NGO literature, see generally Charnovitz, *Nongovernmental Organizations and International Law*, *supra* note 21.

<sup>46</sup> Many commentators “reserve the term ‘NGO’ for organizations that pursue a ‘public interest,’” rather than a profit motive. Charnovitz, *Nongovernmental Organizations and International Law*, *supra* note 21, 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). But even those who include associations of businesses within their definition of an NGO appear to have in mind public-interest NGOs, rather than, for example, industry associations. For example, Steve Charnovitz himself argues that “[i]ndividuals join . . . an NGO out of commitment to its purpose,” and 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 22–24 and accompanying text.

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. ENV’T L. J. 201, 211-212 (1999) (noting that business NGOs were 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

not attended to the astroturf activism phenomenon this Article identifies. The literature does not focus on the ways that business influence is channeled through the consultancy system in both overt and covert ways; nor does it analyze the implications of this phenomenon on the success or failure of international treaties.

As the Tobacco Convention saga and others show, international treaties are under pressure.<sup>47</sup> The popular press and academic literature alike observe that international treaty production faces an array of challenges including 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.<sup>48</sup> However, although

---

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). Thus, in the environmental treaty literature, “BINGO” (for business and industry NGO) 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”); Monica Brookman, *Review of Anita Margrethe Halvorsen, Equality Among Unequals in International Environmental Law*, 25 COLUM. J. ENVTL. L. 369, 374-75 (2000) (referring to “business NGOs” as “large, influential lobbying groups” sometimes “represent[ing] commercial interests that are not always compatible with environmental protection”); Giorgetti, *supra* (using the term BNGO to mean “interests groups that unite several companies to campaign for a specific point of view”). 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, which is 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 (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.

<sup>47</sup> 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 nn.13–14, 498 nn.15–17 (2012) (collecting literature on multilateral treaty failures and identifying why treaties are ineffective at coordinating global financial regulations).

<sup>48</sup> The latter problem was on startling display in the United States recently as the Supreme Court halted the Obama administration’s regulation of coal power plants in an effort to comply with the Paris Agreement—a major international agreement to combat climate change

---

---

treaties are under pressure, they remain indispensable legal tools.<sup>49</sup> They erect the fundamental architecture of international governance—constituting institutions and courts, setting the ground rules for informal cooperation and governance, and serving a foundational role upon which modern global regulatory life depends.<sup>50</sup> And treaties remain fundamentally important to solving important global problems like climate change.<sup>51</sup> 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.<sup>52</sup> And developing that regulatory response requires understanding the phenomenon to be regulated. This Article 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 what I identify as “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

---

hailed as a great success just two short months prior to this writing. The Supreme Court’s decision (albeit preliminary at this stage) puts not just U.S. compliance into question, but that of India and China, the world’s two largest polluters, who may retract their commitments if the U.S. fails to uphold its own. Coral Davenport, *Decision on Climate Rule May Imperil Paris Accord*, N.Y. TIMES, Feb. 11, 2016, at A19 (quoting observers from India and China. E.g., 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 pen, a major and important international agreement faces implosion. For critiques in the academic literature see, for example, Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 VAND. J. TRANSNAT’L L. 501, 510 (2009) (criticizing the “persistent regulatory inadequacies” of treaty-based governance).

<sup>49</sup> See Melissa J. Durkee, *Persuasion Treaties*, 99 VA. L. REV. 63, 74-77 (2013) [hereinafter Durkee, *Persuasion Treaties*] (collecting literature).

<sup>50</sup> *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”).

<sup>51</sup> Durkee, *Persuasion Treaties*, *supra* note 49, at 74–75 (citing Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AM. J. INT’L L. 259, 282–83 (1992)).

<sup>52</sup> See generally Durkee, *Business of Treaties*, *supra* note 8 (arguing that international law has not developed adequate tools to regulate business influence on lawmaking); BRAITHWAITE & DRAHOS, *supra* note 1 (using sociological tools to examine unregulated business influence on domestic and international lawmakers).

and the WHO to influence international lawmaking, as the subsequent Parts will 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 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.<sup>53</sup> 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. 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 is to clearly identify the legal structure that gives rise to the phenomenon at issue: 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 UN Charter in San Francisco, just after 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 that would draft the United Nations into life.<sup>54</sup> One of the agendas the NGOs were pursuing was to obtain some sort of status for themselves within the new organization.<sup>55</sup> NGOs had been active within the earlier League of Nations, and sought to preserve their access in the new United Nations.<sup>56</sup> They were ultimately successful in these aims, as the UN Charter included Article 71,<sup>57</sup> which provided that:

The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are

---

<sup>53</sup> In fact, the Tobacco Report was published in the year 2000. TOBACCO COMPANY STRATEGIES REPORT, *supra* note 24.

<sup>54</sup> Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT'L L. 183, 250–51 (1997) [hereinafter Charnovitz, *Two Centuries of Participation*].

<sup>55</sup> *See id.* at 251 (NGO consultants sought “a provision on NGOs in the U.N. Charter,” an idea that had not been previously considered by state delegates).

<sup>56</sup> *Id.*; *see also id.* at 258 (Article 71 served to “codify the custom of NGO participation” that had existed in the League of Nations period prior to World War II).

<sup>57</sup> *See id.* at 250–51, 257 (NGOs assisted to draft Article 71).

---

---

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.<sup>58</sup>

Since Article 71 includes the *only* mention of associations in the UN Charter, the provision has served “de facto as a charter for NGO activities.”<sup>59</sup> This both facilitates and restrains the opportunities for associations within the United Nations; it means that the only officially recognized way that an NGO can participate in the work of the United Nations is through making arrangements with the Economic and Social Council to consult.<sup>60</sup> The UN Charter does not, for example, make any provision for non-state associations to have voting privileges, membership on delegations to treaty-drafting conventions, or any other kinds of rights. Notably, for the purposes of this analysis, the Charter also does not make any mention of access rights for business entities.<sup>61</sup>

Article 71 is situated among the provisions of the UN Charter that constitute the Economic and Social Council, the organ of the United Nations charged with overseeing UN programs on “economic, social, cultural, educational, health, and related matters.”<sup>62</sup> The Council is also authorized to set up commissions concerning the economic, social, and other issues within

---

<sup>58</sup> UN Charter art. 71.

<sup>59</sup> Charnovitz, *Nongovernmental Organizations and International Law*, *supra* note 21, at 357..

<sup>60</sup> See Charnovitz, *Two Centuries of Participation*, *supra* note 54, 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.”)

<sup>61</sup> 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) (“The exclusion of business enterprises from most discussions of voluntary associations is interesting, given that the Walt Disney Co., for example, is as much a voluntary association as Amnesty International.”). 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, *Two Centuries of Participation*, *supra* note 54, at 187 n.17.

<sup>62</sup> U.N. Charter art. 62, ¶ 1.

its mandate.<sup>63</sup> Under the authority of Article 71, the Council has become the body charged with supervising and managing NGO access to the UN system.<sup>64</sup>

## 2. The Council Sets Access Regulations

The Council has exercised its Article 71 authority and “made . . . arrangements” to consult by developing rules that erect an accreditation procedure for non-governmental organizations.<sup>65</sup> In these rules, the Council has defined an NGO as “any international organization which is not established by intergovernmental agreement.”<sup>66</sup> That choice of definition reflected the Council’s principal concern at the time, which was to make a distinction between international *intergovernmental* organizations, on the one hand (such as the United Nations itself), and *non-governmental* associations, on the other (such as Doctors Without Borders).<sup>67</sup> The Council was not trying to distinguish between different kinds of non-governmental association (such as between NGOs advancing business agendas and other kinds of NGO).<sup>68</sup>

In the Council’s conception, consultative status serves a dual purpose: to assist the United Nations to gather relevant expertise from non-governmental sources and to give members of civil society the opportunity to have access to

---

<sup>63</sup> U.N. Charter art. 68.

<sup>64</sup> Ferdinand Trauttmansdorff, *The Organs of the United Nations*, in THE UNITED NATIONS: LAW AND PRACTICE 25, 40–41 (Franz Cede & Lilly Sucharipa-Behrmann, eds., 2001).

<sup>65</sup> The Council has passed various resolutions to govern non-governmental organization access to the UN pursuant to Article 71, including Resolution 4 (I), passed in 1946, E.S.C. Res. 4 (I) (Feb. 16, 1946) [hereinafter Resolution 4 (I)]; Resolution 288 B (X), passed in 1950, which codified privileges and practices relating to NGOs that had developed between 1946 and 1950, E.S.C. Res. 288b (Date, 1950) [hereinafter Resolution 288 B]; Resolution 1296 (XLIV), passed in 1968, E.S.C. Res. 1296 (XLIV) (May 23, 1968); and, finally, Resolution 1996/31 in 1996, which offered an updated set of rules which remain in effect as of this writing, E.S.C. Res. 1996/31 (Jul. 25, 1996) [hereinafter Resolution 1996/31]. For narrative descriptions of the role of these resolutions, see BRUNO SIMMA ET AL., THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1797 (3d ed. 2012); BRUNO SIMMA ET AL., THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 904-905 (1st ed. 1995).

<sup>66</sup> Resolution 4 (I), *supra* note 65, at para. 8.

<sup>67</sup> See Charnovitz, *Two Centuries of Participation*, *supra* note 54, at 253.

<sup>68</sup> The definition did exclude *national* organizations, on the theory that those national organizations could present their views to their own national governments. *Id.* The original rules provided for two tiers of access for NGOs depending on the breadth of the NGO mission: Category A and Category B. *See id.* Of particular relevance to this Article’s analysis, among the earliest Category A organizations admitted were the World Federation of Trade Unions and the International Chamber of Commerce. *Id.*

governance functions and to express their opinions.<sup>69</sup> To that end, the Council set specific eligibility criteria for associations in 1996, in an update of the accreditation rules that remains in force today.<sup>70</sup> The new criteria were intended to respond to a rise in prominence of NGOs in the early 1990s and a perception that the earlier eligibility rules were too restrictive; in addition, with an increased global understanding of governance disparities between the developed and developing world, 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.”<sup>71</sup> 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.<sup>72</sup> The eligibility criteria were meant to assist the Council to achieve these objectives.

The criteria required, first, that an association seeking consultative status must have “aims and purposes” that support the “spirit, purposes and principles” of the United Nations, and must promote its work.<sup>73</sup> In addition, an association must be of “recognized standing within the particular field of its competence or of a representative character.”<sup>74</sup> It must be able to establish the accountability and representativeness of its internal governance mechanisms through indicia such as an “established headquarters”; “a democratically adopted constitution” providing for a representative process to set policy; “a

---

<sup>69</sup> See Resolution 1996/31, *supra* note 65, at para. 20 (“Consultative 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, sub-regional and national organizations that represent elements of public opinion to express their views.”).

<sup>70</sup> See Resolution 1996/31, *supra* note 65.

<sup>71</sup> *Id.* at para. 5; see also SIMMA ET AL., THE CHARTER (3d ed. 2012) *supra* note 65, at 1800 (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”); SIMMA ET AL., THE CHARTER (1st ed. 1995) *supra* note 65, 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 3-year period of review. SIMMA ET AL., THE CHARTER (3d ed. 2012), *supra* note 65, at 1801.

<sup>72</sup> *Id.* at paras. 1–17. The Council also eliminated the earlier distinction between international and national organizations, but required that national organizations must consult with the member state concerned prior to obtaining accreditation. *Id.* at paras. 5, 8.

<sup>73</sup> *Id.* at paras. 2, 3.

<sup>74</sup> *Id.* at para. 9.

[responsive] executive organ”<sup>75</sup>; and “authority to speak for its members through its authorized representatives,” with documentation of this authority.<sup>76</sup> Finally, organizations must be non-profits, obtaining their funding from “national affiliate organizations . . . or from individual members.”<sup>77</sup>

In addition to establishing admission criteria for would-be UN consultants, the Council updated its gatekeeping mechanism. Specifically, it updated the rules governing the work of the Committee on Non-Governmental Organizations (NGO Committee),<sup>78</sup> whose members it elects.<sup>79</sup> The NGO Committee has jurisdiction over the accreditation application process; it receives applications and meets twice a year to vote on whether to grant accreditation to pending applicants.<sup>80</sup> However, neither the Council nor the NGO Committee independently verify whether the organizations comply with the accreditation criteria.<sup>81</sup> Rather, they rely on representations made by the organizations themselves in their application materials.<sup>82</sup>

Organizations that successfully gain admission to the consultancy regime are organized into three tiers, which relate to the scope of the organizations’ activities and the degree of assistance they might offer to the UN as

---

<sup>75</sup> *Id.* at para. 10.

<sup>76</sup> *Id.* at para. 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.* at para. 12.

<sup>77</sup> *Id.* at para. 13. There is a loophole: When an organization is financed from other sources, it must explain to the satisfaction of the Council (via its Committee on NGOs) the organization’s reasons for not meeting these requirements. *Id.*

<sup>78</sup> *Id.* at para. 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).

<sup>79</sup> Members of the committee are delegates from UN member states, selected “on the basis of equitable geographical representation.” Resolution 1996/31, *supra* note 65, at para. 60.

<sup>80</sup> Hartwick, *supra* note 78, at 223.

<sup>81</sup> See *id.* at 223–24, 224 n.45 (applications are first screened by the Council’s Department of Economic and Social Affairs (DESA) then sent to the NGO committee, where “voting 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; “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)).

<sup>82</sup> See *id.*

consultants.<sup>83</sup> “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 population in a large number of countries.”<sup>84</sup> Greenpeace and Médecins Sans Frontières (Doctors Without Borders), for example, have obtained General consultative status.<sup>85</sup> “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.<sup>86</sup> 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.<sup>87</sup> Among these are the Sierra Club and Heifer International, for example. As of this writing, over 4,200 organizations have taken advantage of the consultancy status.<sup>88</sup>

### 3. Consultants Have Access to Lawmakers

Let us turn to the access opportunities consultants gain through the consultancy opportunity. There are three principal points of access: to the Council itself and to its commissions’ subsidiary bodies; to the broader United Nations; and—perhaps most importantly for the purposes of influencing

---

<sup>83</sup> Resolution 1996/31, *supra* note 65, at paras. 21-26; *see also* Charnovitz, *Two Centuries of Participation*, *supra* note 54, at 267 (reviewing the tiered consultation structure); STEPHEN TULLY, CORPORATIONS AND INTERNATIONAL LAWMAKING 66 (2007) (same).

<sup>84</sup> Resolution 1996/31, *supra* note 65, at para. 22; Kal Raustiala, *The Role of NGOs in International Treaty-making*, in THE OXFORD GUIDE TO TREATIES 150, 157 (Duncan B. Hollis ed., 2012) [hereinafter Raustiala, *Role of NGOs*] (NGOs with general status tend to be “fairly large, established international NGOs with a broad geographical reach.”).

<sup>85</sup> *Consultative Status with ECOSOC and Other Accreditations*, U.N. DEPT OF ECON. & SOC. AFFAIRS: NGO BRANCH, <http://esango.un.org/civilsociety/displayConsultativeStatusSearch.do?method=search&sessionCheck=false>. (last visited Feb. 28, 2016) [hereinafter *Consultative Status with ECOSOC*].

<sup>86</sup> Resolution 1996/31, *supra* note 65, at para. 23; *see also* Raustiala, *Role of NGOs*, *supra* note 84, at 156 n.25 (NGOs with Special consultative status “tend to be smaller and more recently established.”).

<sup>87</sup> Resolution 1996/31, *supra* note 65, at para. 24; *see also* Raustiala, *Role of NGOs*, *supra* note 84, at 156 n.25 (and “[o]rganizations 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.”).

<sup>88</sup> *Consultative Status with ECOSOC*, *supra* note 85 (showing that as of February 2016, over 4,200 groups had obtained accreditation).

formal international lawmaking—to international conferences convened by the United Nations.

*First*, access opportunities within the Council are keyed to the consultant's tier, with the most rights afforded to General and Special consultants, and much fewer opportunities dispensed to the Roster groups.<sup>89</sup> General and Special consultants may send representatives to sit as observers at meetings of the Council and its commissions and other subsidiary bodies, submit written statements, and sometimes make oral presentations.<sup>90</sup> Those with General consultative status may even present their own agenda items.<sup>91</sup>

*Second*, in addition to consulting with the Council and its subsidiary bodies, consultative status gives organizations broader access within the United Nations. Organizations may consult with the UN Secretariat “on matters in which there is a mutual interest or a mutual concern” at the request of either party;<sup>92</sup> may be commissioned by the Secretary-General to carry out studies or prepare papers on particular matters;<sup>93</sup> receive press releases;<sup>94</sup> and obtain general access with UN “grounds passes.”<sup>95</sup> Importantly, because consultative status offers consultants access to non-public areas where governmental delegates and international organization officials gather, it presents plenty of informal lobbying opportunities.<sup>96</sup>

*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.<sup>97</sup> General and Special consultants are automatically accredited to international conferences (and their preparatory processes) simply by expressing their interest to the UN

---

<sup>89</sup> See generally Resolution 1996/31, *supra* note 65, at pt. IV & V (enumerating access rights). Note that Roster organizations have fewer rights. See *id.*

<sup>90</sup> *Id.*; see also Charnovitz, *Two Centuries of Participation*, *supra* note 54, at 267 (reviewing the consultation rights).

<sup>91</sup> Resolution 1996/31, *supra* note 65, at para. 28.

<sup>92</sup> *Id.* at para. 65.

<sup>93</sup> *Id.* at para. 66.

<sup>94</sup> *Id.* at para. 67.

<sup>95</sup> TULLY, *supra* note 83, at 66.

<sup>96</sup> *Id.*

<sup>97</sup> Resolution 1996/31, *supra* note 65, at pt. VII; see also Paul Wapner, *Defending Accountability in NGOs*, 3 CHL J. INT'L L. 197, 203 (2002) (participation in UN-sponsored treaty making “has been essential for NGO influence on international treaties.”).

Secretariat, without any further screening.<sup>98</sup> This saves associations the burden of applying separately to every conference and preparatory process they wish to attend.<sup>99</sup> Consultants, once admitted, do not have a negotiating role, but can participate in working groups, make written presentations, and sometimes even in engage in floor debates.<sup>100</sup> 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.”<sup>101</sup>

#### 4. The Council’s Rules Serve as a Blueprint

What is the significance of Article 71, and the resulting accreditation regime at the Economic and Social Council? Why study this accreditation regime as the focal point for access by non-governmental associations 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 non-state associations and the United Nations that is regularized in the UN Charter, and it offers formal and informal access to UN officials, as well as national lawmaking delegates at UN treaty conferences.

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.<sup>102</sup> These include agencies within the UN system, such as the WHO and UNESCO, which have

---

<sup>98</sup> Resolution 1996/31, *supra* note 65, at para. 42 (organizations with general and Special consultative status “shall as a rule” be accredited to participate at international conferences). Accreditation is not guaranteed, but that “those non-state actors already possessing ECOSOC accreditation enjoy a legitimate expectation of admission.” TULLY, *supra* note 83, at 206.

<sup>99</sup> 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 83, at 205; *see also* Resolution 1996/31, *supra* note 65, at paras. 43–47.

<sup>100</sup> Resolution 1996/31, *supra* note 65, at paras. 49–52.

<sup>101</sup> Raustiala, *Role of NGOs*, *supra* note 84, at 157.

<sup>102</sup> *See* Charnovitz, *Nongovernmental Organizations and International Law*, *supra* note 21, at 358 (“Even though Article 71 refers only to ECOSOC, a consultative role for NGOs gradually became an established practice throughout the UN system.”) *See also* UN System Engagement with NGOs, *Civil Society, the Private Sector, and Other Actors: A Compendium*, UN NON-GOVERNMENTAL LIAISON SERVICE, (2005), <https://www.unngls.org/pdfs/compendium-2005-withCOVER.pdf>.

adopted accreditation rules nearly identical to the Council's rules.<sup>103</sup> In fact, as the UN 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, although there is a certain degree of heterogeneity among different accreditation structures.<sup>104</sup> And the influence of the Article 71 Council regime has spread beyond the UN system to institutions as diverse as the Organization of American States, the Antarctic Treaty and the African Union.<sup>105</sup>

Thus, the Council's accreditation rules are a meaningful point of entry to understanding and evaluating the formal relationship between state and private actors both at the UN and at other international organizations. Considering the Council's regime as an exemplar will serve as a useful way to expose the problem considered within this article, to frame the critique, and to 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.

The preceding paragraphs have identified how the consultancy regime came into being, and the legal rules that structure that consultancy relationship, including who may consult, and what access rights those consultants obtain. The next subpart applies the law to the facts in question, considering the odd and uneasy way the consultation structure addresses business entities.

### *C. The Rules Apply Oddly and Uneasily to Business*

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 *non-profits* formed 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 Economic and Social Council rule-makers, as the following sections will explain.

---

<sup>103</sup> See Charnovitz, *Two Centuries of Participation*, *supra* note 54, at 253–55 (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 UN beyond ECOSOC,” and served to “codify the custom of NGO participation” that had existed in the League of Nations period. *Id.* at 258.

<sup>104</sup> See *id.* at 249.

<sup>105</sup> See Charnovitz, *Nongovernmental Organizations and International Law*, *supra* note 21, at 359.

### 1. The Consultancy Rules Exclude Individual Businesses

Article 71 of the UN Charter employs the neutral term “non-governmental organizations.”<sup>106</sup> That term might at first glance seem to accommodate for-profit entities just as well as other kinds of non-governmental organization. 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 Franklin Snyder has made outside the Article 71 context: “the Walt Disney Co., for example, is as much a voluntary association as Amnesty International.”<sup>107</sup> 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.<sup>108</sup>

The Council’s accreditation rules eliminated all doubt by making clear that individual businesses are excluded.<sup>109</sup> Most importantly, the criteria demand that an accredited organization be a non-profit, obtaining its funding from “national affiliate organizations . . . or from individual members,” a requirement which excludes business associations organized for commercial or profit making purposes.<sup>110</sup>

---

<sup>106</sup> Charnovitz, *Nongovernmental Organizations and International Law*, *supra* note 21, at 357 (“The practice of excluding commercial organizations from the category of ‘associations’ goes back at least to . . . 1910.”).

<sup>107</sup> Snyder, *supra* note 61, at 378.

<sup>108</sup> Charnovitz, *Two Centuries of Participation*, *supra* note 54, at 187 n.17.

<sup>109</sup> Resolution 1996/31, *supra* note 65, at para. 2. 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.

<sup>110</sup> *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 paras. 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 non-profit requirement is dispositive. In the hypothetical world in which the non-profit criteria did not bar entry, businesses would also have to show that their “aims and purposes” further the “spirit, purposes, or principles” of the UN Charter. *Id.* at paras. 2, 3. 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.” *Introduction to ECOSOC Consultative Status*, *supra* note

Other international organizations that follow the Article 71 accreditation template, such as UN specialized agencies like the WHO, also exclude individual businesses from their consultancy structures. For example, the WHO's parallel Article 71 "enables it to conclude suitable arrangements with non-state actors in the execution of its mandate,"<sup>111</sup> but specifies that it may not form this official relationship with non-state actors pursuing "concerns which are primarily of a commercial or profitmaking nature."<sup>112</sup>

## 2. But They Permit Businesses to Act Through Non-Profits

Although businesses are individually excluded from becoming accredited as consultants, they are permitted to consult through accredited non-profits. 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. This story begins even farther back in time, in the 1920s and '30s era League of Nations. Article 71—and, in turn, the Economic and Social Council's rule structure—was designed to enshrine the earlier "League Method,"<sup>113</sup> where voluntary associations and international organizations had very close working relationships.<sup>114</sup> As one commentator has noted, "[b]ehind many [early international organizations] stood idealistic and active NGOs."<sup>115</sup>

---

15. 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, or in t-shirts emblazoned with activist slogans, with 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>.

<sup>111</sup> TULLY, *supra* note 83, at 68.

<sup>112</sup> World Health Assembly Res. 40.25, Principles Governing Relations Between the World Health Organization and Nongovernmental Organizations, ¶ 3.1 (1987).

<sup>113</sup> BRUNO SIMMA ET AL., THE CHARTER OF THE U.N.: A COMMENTARY 1070 (2d ed. 2002) (Article 71 was an attempt to codify the "usual practice" of the League of Nations).

<sup>114</sup> See Charnovitz, *Two Centuries of Participation*, *supra* note 54, at 245 (during the League of Nations era, voluntary association 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.*

<sup>115</sup> *Id.* at 212.

In that era, there was no strong distinction between voluntary associations that advanced business or commercial ends, and those that lobbied for other causes.<sup>116</sup> Rather, associations advancing business interests were among these influential early NGOs. They contributed to the development of international organizations, participated in meetings, and helped to draft international treaties.<sup>117</sup> In fact, during the League period, business associations were among the most active and influential associations: 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 Cross and the Women's International League for Peace and Freedom).<sup>118</sup> Business associations also participated in the League's work relating to finance, commercial law, transportation, and pharmaceuticals, among other things.<sup>119</sup>

However, the League did make a distinction between, on the one hand, public and private organizations (terms that correspond to modern-day NGOs and International Organizations), and, on the other hand, "organizations with a commercial objective."<sup>120</sup> For example, the league included only the former (non-commercial) organizations in a directory of international organizations and in publications dedicated to aggregating policy recommendations.<sup>121</sup> Thus, during the League period, individual businesses and entities pursuing commercial purpose were excluded as informal consultants to the League of Nations, while *associations* of businesses were included.

Because Article 71 and the resulting Economic and Social Council regime were meant to continue the League practice, the criteria for accreditation

---

<sup>116</sup> Charnovitz, *Two Centuries of Participation*, *supra* note 54, at 245 (one of the major successes of this period was the International Labor Organization, which engaged business and labor groups as full and equal participants).

<sup>117</sup> *See, e.g., id.* at 202 (railway businesses formed the International Railway Congress Association, which led to the creation of the intergovernmental Central Office for International Railway Transit); *id.* at 211 (the International Telegraph Union invited private companies to participate in its meetings); *id.* at 209 (NGOs participated in drafting a Convention regarding the International Circulation of Motor Vehicles).

<sup>118</sup> *See id.* (noting that the ICC even "gained official roles" in League-sponsored economic conferences).

<sup>119</sup> *Id.* at 222–27.

<sup>120</sup> Charnovitz, *Two Centuries of Participation*, *supra* note 54, at 221.

<sup>121</sup> *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.").

maintained those earlier distinctions. The term “non-governmental organization,” or “NGO” was itself coined at the birth of the UN and the drafting of Article 71 of the UN Charter.<sup>122</sup> The term was meant, eponymously, to set aside governmentally-sponsored organizations.<sup>123</sup> It reflects the primary preoccupation of the drafters, who were not seeking to make a distinction between different types of voluntary associations—such associations who advanced business aims, on the one hand, and “public-interest” associations, on the other.<sup>124</sup> Rather, the drafters were concerned about a balance of powers between sovereign nations at the UN, and wished to avoid a situation where a nation could amass too much influence by sponsoring organizations to separately lobby for its preferred positions.<sup>125</sup>

Associations of businesses began to consult with the United Nations as they had with the League. For example, the International Chamber of Commerce (ICC) became one of the first associations accredited with the Economic and Social Council.<sup>126</sup> 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.<sup>127</sup> The ICC has made use of its General consultative status at the Council to engage in a broad array of activities, including “prepar[ing] study groups, collborat[ing] with the International Law Association and prepar[ing] legal drafts.”<sup>128</sup> It has, in fact, taken a “catalytic role within the international legal process for producing documents that are ultimately adopted” as legally binding on nations.<sup>129</sup>

\* \* \*

While a whole bevy of supporters and critics have focused their attention on the role of non-governmental organizations as international consultants, one important aspect of the legal structure has gone underexamined and

---

<sup>122</sup> See Charnovitz, *Two Centuries of Participation*, *supra* note 54, at 245.

<sup>123</sup> *See id.*

<sup>124</sup> See TULLY, *supra* note 83, 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.”).

<sup>125</sup> Charnovitz, *Two Centuries of Participation*, *supra* note 54, at 245.

<sup>126</sup> TULLY, *supra* note 83, at 67.

<sup>127</sup> *Id.* at 66, 67.

<sup>128</sup> *Id.* at 67.

<sup>129</sup> *Id.* (also pointing out that treaty negotiations sometimes involve “ICC drafts sponsored by developed states”).

---

---

underappreciated. That aspect is the way businesses—profit-seeking entities—fit within the consultancy system. Specifically, how do the consultancy rules apply to businesses, and what is the resulting effect on business behavior?

This Part has offered a legal analysis to answer the 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 non-profit 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 law making? As Part II argues, the consultancy rules have created a perverse incentive for businesses to act covertly, producing an array of harmful results.

## II. ASTROTURF ACTIVISM

The phenomenon I identify as “astroturf activism” is the phenomenon where business entities gain access to international lawmakers through front groups that obscure the identity or identities of the profit-seeking enterprise that is really the relevant actor. This happens most starkly when business organizations capture existing NGOs or form their own NGOs with non-profit status and mission statements that obscure 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 non-compliance with accreditation eligibility rules.

First, a note at the outset: This conceptual framework I call astroturf activism 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.<sup>130</sup> These responses bring an array of problems—which this Part identifies as issues of transparency and access—some predictable, and some surprising.

#### *A. Methodology*

The analysis that follows uses a mixed-methods approach, drawing both from primary and secondary materials to compile a preliminary study, offer case studies, and import insights from business and popular literatures into law.

The principal source of primary materials is the Economic and Social Council's own library of resources, which the Council makes available in an online database.<sup>131</sup> The database contains basic information on all organizations that have obtained consultancy status. That information 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 material 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 modes to the most covert.

---

<sup>130</sup> Business's tripartite approach to obtaining access is, of course, a functional result of the rules structure itself. Thus, it is 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.

<sup>131</sup> U.N. DEP'T OF ECON. & SOC. AFFAIRS: NGO BRANCH, <http://esango.un.org/civilsociety/displayAdvancedSearch.do?method=search&sessionCheck=false> (last visited Mar. 3, 2016) [hereinafter ECOSOC Consultative Status Database].

### 1. Industry and Trade Associations

The first mode of business access is through trade and industry associations. While these associations explicitly advance business agendas,<sup>132</sup> they are themselves organized as non-profit 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-UN League of Nations relationships.<sup>133</sup> The practice is also relatively extensive. Of the approximately 4,200 associations that have obtained accreditation as consultants with the Economic and Social Council (in any of the three tiers of accreditation: General, Special, or Roster), 417, or approximately 10% of these selected “business and industry” as an area of expertise and field of activity, as of February 2016.<sup>134</sup> That 10% 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.<sup>135</sup>

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.”<sup>136</sup> This is true even of organizations that overtly advance private sector interests, such as the “Confederation of European Paper Industries.”<sup>137</sup>

---

<sup>132</sup> TULLY, *supra* note 83, at 207 (“A legitimate and recognized purpose of trade associations is to defend and advance the interests of enterprises they represent.”)

<sup>133</sup> See discussion *supra* Part I.C.2.

<sup>134</sup> ECOSOC Consultative Status Database, *supra* note 131 (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].

<sup>135</sup> See *id.*

<sup>136</sup> Only 3 out of 417 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 131 (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 (a for-profit Ghanaian company); and United States Sustainable Development Corporation. *Id.*

<sup>137</sup> ECOSOC Consultative Status Database, Business and Industry Search, *supra* note 134 (select the “Confederation of European Paper Industries” hyperlink to see organization type designation).

In fact, the titles and description of many of these organizations suggest that they are characterizing their activities so as to amplify the public interest, non-profit-driven aspects of their work, and minimize their role as spokespersons for profit-seeking businesses.<sup>138</sup> 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.”<sup>139</sup> The National Association of Home Builders (NAHB), which obtained “Roster” status in 2002, represents the U.S. home building industry, serving both bigger corporate members and smaller state and local builders associations, but it affirms that one of its primary goals is to “provide[e] and expand[] opportunities for all people to have safe, decent, and affordable housing.”<sup>140</sup>

Both of these organizations, while amplifying their public-interest goals in their UN applications, make clear on their home websites 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 “assist 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.”<sup>141</sup> The NAHB, likewise, seeks to “[b]alance legislative, regulatory and judicial public policy;” and “[i]mprove[] [the] business performance of its members.”<sup>142</sup>

---

<sup>138</sup> 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 Resolution 1996/31, *supra* note 65, at paras. 2, 3. However, these associations appear to be taking pains to establish that they promote more than just the economic work of the UN.

<sup>139</sup> World Coal Ass’n, Mission Statement, *in* ECOSOC Consultative Status Database, Private Sector Business and Industry Search, *supra* note 136 (from the results list select the “World Coal Association” hyperlink and then select “Activities” under the “Profile” tab to view the mission statement).

<sup>140</sup> National Ass’n of Home Builders of the U.S., Mission Statement, *in* ECOSOC Consultative Status Database, Business and Industry Search, *supra* note 134 (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).

<sup>141</sup> World Coal Ass’n, Mission Statement, *in* ECOSOC Consultative Status Database, Private Sector Business and Industry Search, *supra* note 136.

<sup>142</sup> National Ass’n of Home Builders, Mission Statement, *in* ECOSOC Consultative Status Database, Business and Industry Search, *supra* note 134.

Many of these 417 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.”<sup>143</sup> 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.”<sup>144</sup>

- *The Asociacion Regional de Empresas de Petroleo y Gas Natural en Latinoamerica y el Caribe (APREL)* is a Uruguay-based NGO that obtained Special consultative status in 1976.<sup>145</sup> Members of the organization are 24 national and international oil, gas and biofuels companies and institutions including many major energy corporations like Chevron, Petrobras, Repsol, and Spectrum Energy Corp.<sup>146</sup> 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.<sup>147</sup>

- *The American Forest and Paper Association (AF&PA)* successfully achieved Roster accreditation in 1996. While the AF&PA is allegedly “international” in

---

<sup>143</sup> World Nuclear Ass’n, Mission Statement, in ECOSOC Consultative Status Database, Business and Industry Search, *supra* note 134 (from the results list select the “World Nuclear Association” hyperlink and then select “Activities” under the “Profile” tab to view the mission statement).

<sup>144</sup> *World Nuclear Ass’n Members*, WORLD NUCLEAR ASS’N, <http://world-nuclear.org/our-association.aspx> (last visited March 3, 2016) (“Other members provide international services in nuclear transport, law, insurance, brokerage, industry analysis and finance.”)

<sup>145</sup> *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 134 (from the results list select “Asociacion Regional de Empresas de Petroleo y Gas Natural en Latinoamerica y el Caribe” to view the profile).

<sup>146</sup> *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).

<sup>147</sup> *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 134 (from the profile page select “Activities” under the “Profile” tab to view the mission statement).

geographic scope, its self declared purpose is to “sustain[] and enhance[] the interests of the US forest products industry.”<sup>148</sup> The organization’s mission statement, per its home webpage, is to successfully influence public policy to benefit the US paper and forest products industry.<sup>149</sup> Members of AF&PA include US lumber, timber, and paper products companies.<sup>150</sup> The European equivalent—*The Confederation of European Paper Industries*—also received Roster accreditation, in 2004.<sup>151</sup> Members are pulp and paper industry associations of EU member states.<sup>152</sup>

- *The European Association of Automotive Suppliers*, which received Roster status in 2002, is the “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.”<sup>153</sup> The industry claims a 600 billion euro annual turnover.<sup>154</sup>

- *The Association of Latin American Railways (ALAF)* received Roster status in 1999.<sup>155</sup> According to its website, ALAF represents most railway companies in Latin America.<sup>156</sup>

Together with these industry or sector-specific associations, others among the 417 “business and industry”-promoting associations advance the interests of business more generally. It has already been noted that the International

---

<sup>148</sup>Am. Forest & Paper Ass’n, Mission Statement, in ECOSOC Consultative Status Database, Business and Industry Search, *supra* note 134 (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).

<sup>149</sup> *Mission and Vision*, AM. FOREST & PAPER ASS’N, <http://www.afandpa.org/about/mission-and-vision> (last visited Mar. 3, 2016).

<sup>150</sup> *Membership Directory*, AM. FOREST & PAPER ASS’N, <http://www.afandpa.org/about/membership-directory> (last visited Mar. 3, 2016).

<sup>151</sup> The Confederation of European Paper Indus., in ECOSOC Consultative Status Database, Business and Industry Search, *supra* note 134.

<sup>152</sup> *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).

<sup>153</sup> THE EUROPEAN ASS’N OF AUTOMOTIVE SUPPLIERS, <http://clepa.eu/> (last visited Mar. 3, 2016). For accreditation year, see the European Ass’n of Automotive Suppliers, in ECOSOC Consultative Status Database, Business and Industry Search, *supra* note 134.

<sup>154</sup> THE EUROPEAN ASS’N OF AUTOMOTIVE SUPPLIERS, *supra* note 153.

<sup>155</sup> The Ass’n of Latin America Railways, in ECOSOC Consultative Status Database, Business and Industry Search, *supra* note 134.

<sup>156</sup> *Quienes Somos* (About Us), ASS’N OF LATIN AMERICA RAILWAYS, <http://www.alaf.int.ar/acerca-de-alaf.php> (last visited Mar. 3, 2016)

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.<sup>157</sup> More recently, other business-promoting organizations have joined the ranks. For example:

- *The World Union of Small and Medium Enterprises (the Union)* obtained Roster status in 2010.<sup>158</sup> 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 organizations . . . in the event of global economic crisis and the challenges and problems of SMEs in the 21<sup>st</sup> century."<sup>159</sup> The goal of the organization is explicitly 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."<sup>160</sup>

- *The Turkish Confederation of Businessmen and Industrialists (Turkiye Isadamlari ve Sanayiciler Konfederasyonu)*, which gained Special accreditation status in 2012, aims, eponymously, to promote Turkish businesses.<sup>161</sup> To "make our enterprises and entrepreneurs a part of the global world of business."<sup>162</sup> Interestingly, the organization identifies itself to the Economic and Social Council as a trade union, even though it appears to support business executives.<sup>163</sup>

- Similarly, the *Confédération Européenne des Cadres*, which received Special accreditation status in 2012, also identifies itself to the Council as a trade

---

<sup>157</sup> See *supra*, Part I.C.

<sup>158</sup> The World Union of Small and Medium Enters., in ECOSOC Consultative Status Database, Business and Industry Search, *supra* note 134.

<sup>159</sup> *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).

<sup>160</sup> The Union does not seek to obscure its intentions as a lobbying organization, offering as an additional objective that it will: "Establish itself as the premier international organisation 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.*

<sup>161</sup> *Turkiye Isadamlari ve Sanayiciler Konfederasyonu*, in ECOSOC Consultative Status Database, Business and Industry Search, *supra* note 134.

<sup>162</sup> *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).

<sup>163</sup> *Id.*

union, although it also supports managers and executives.<sup>164</sup> The Confederation “has implemented an international managers’ network,” and aims “to express and defend the needs and points of view of managers on current topics such as sustainable development, environment protection, Europe’s energy independence and security, lifelong learning, active ageing, equal opportunities, promotion of diversity.”<sup>165</sup>

## 2. For-Profit Entities

According to the Economic and Social Council’s regulations implementing UN Charter Article 71, consulting organizations must be non-profits.<sup>166</sup> That is, organizations must obtain their fees from members or local affiliate organizations, and not from participation in commerce as a for-profit entity.<sup>167</sup> Nevertheless some companies appear to have flaunted these rules and obtained accreditation despite obtaining their funding from sale of goods or services or being organized as for-profit entities. In fact, at least one commentator claims that the gatekeeping for the consultancy status is so lax that “the non-profit criterion is largely irrelevant.”<sup>168</sup>

For example, Freann Financial Services Limited, an organization that received Special accreditation status in 2013, has as its mission “to provide lease or hire purchase financing to the private sector”; to “underwrite larger financing type transactions”; and “to provide management advisory and consultancy services for its clients and other potential customers.”<sup>169</sup> The company records its funding structure as “product sales and business services”

---

<sup>164</sup> Confédération Européenne des Cadres CEC, Profile, *in* ECOSOC Consultative Status Database, Business and Industry Search, *supra* note 134 (from the results list select the “Confédération Européenne des Cadres CEC” hyperlink to view the profile).

<sup>165</sup> *Id.* at Mission Statement (from the profile page select “Activities” under the “Profile” tab to view the mission statement).

<sup>166</sup> See discussion *supra* Part I.B.2.

<sup>167</sup> See Resolution 1996/31, *supra* note 65, at para. 13.

<sup>168</sup> See TULLY, *supra* note 83, at 207. The claim may be overstated in this particular context, as Tully’s evidence for it is that “individual corporations were invited to attend the International Conference on Financing for Development,” and “a legitimate and recognized purpose of trade associations is to defend and advance the interests of enterprises they represent.” *Id.*

<sup>169</sup> Freann Financial Services Ltd., Mission Statement, *in* ECOSOC Consultative Status Database, Private Sector Business and Industry Search, *supra* note 136 (from the results list select the “Freann Financial Services Limited” hyperlink and then select “Activities” under the “Profile” tab to view the mission statement).

as well as fees for consulting and research services.<sup>170</sup> The company appears to have “aims and purposes” in line with those of the UN 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.<sup>171</sup> 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.<sup>172</sup> And, in other respects, the company behaves like a business. It has, for example, signed on to the UN Global Compact, which categorizes it as a “small or medium enterprise” in the financial services sector.<sup>173</sup>

Another example of an entity that fits oddly under the “NGO” moniker is an organization called United States Sustainable Development Corporation (USSC).<sup>174</sup> The organization, which received Special consultative status in 2011, calls itself a “private sector” organization rather than an NGO.<sup>175</sup> The organization is involved in sustainable development, with a mission to “find creative approaches to stimulate the local economy;” it particularly attends to impoverished regions of the United States “through job creation and business development.”<sup>176</sup> While many of these purposes seem consistent with the aims and purposes of the United Nations, USSC is organized in the United States as a *for-profit corporation*, incorporated in the state of Virginia in 2011.<sup>177</sup> The company is funded through fees for consulting and research services.<sup>178</sup> Notably, when USSC’s application came before the Council’s Committee on NGOs, the Committee granted the application (and therefore consultative

---

<sup>170</sup> *Id.* at Funding Structure

<sup>171</sup> Letter from Kwabena Anning Frederick, Exec. Dir., Freann Financial Services Ltd. to UN Global Compact Director, Communication on Progress (Sept. 14, 2015), [https://www.unglobalcompact.org/system/attachments/cop\\_2015/188491/original/COMMUNICATION\\_OF\\_PROGRESS\\_-\\_UN\\_GLOBAL\\_COMPACT\\_2015.pdf?1442243255](https://www.unglobalcompact.org/system/attachments/cop_2015/188491/original/COMMUNICATION_OF_PROGRESS_-_UN_GLOBAL_COMPACT_2015.pdf?1442243255).

<sup>172</sup> Freann Financial Services Ltd., Funding Structure, *in* ECOSOC Consultative Status Database, Private Sector Business and Industry Search, *supra* note 136.

<sup>173</sup> *Freann Financial Services Limited*, UN GLOBAL COMPACT, <https://www.unglobalcompact.org/what-is-gc/participants/29061> (last visited Mar. 3, 2016).

<sup>174</sup> U.S. Sustainable Dev. Corp., *in* ECOSOC Consultative Status Database, Private Sector Business and Industry Search, *supra* note 136.

<sup>175</sup> *Id.* at Profile (from the results list select the “United States Sustainable Development Corporation” hyperlink to view the profile).

<sup>176</sup> *Id.* at Mission Statement (from the profile page select “Activities” under the “Profile” tab to view the mission statement).

<sup>177</sup> *Id.* at Organizational Structure.

<sup>178</sup> *Id.* at Funding Structures.

status) without any comment—specifically, the committee did not note or consider the alleged NGO’s for-profit corporate status, or the fact it functions as a consulting firm.<sup>179</sup>

For other organizations, funding is obtained through mixed sources, and it is difficult to determine whether the entity has registered domestically as a non-profit or for-profit entity. For example, The Turkish Confederation of Businessmen and Industrialists, a Special accreditation consultant since 2012, reports the usual sources of funding for an NGO, that is, membership fees, donations, and grants from domestic sources.<sup>180</sup> But the Confederation also reports income from “product sales and business” and “fees for providing consulting or research services.”<sup>181</sup>

### 3. Grassroots Mimicry & Capture

The third mode of business access to the consultancy system is the mode I call grassroots mimicry and capture. Businesses form associations that appear to be dedicated to non-profit, public-regarding causes, but are, in fact, mouthpieces for covert business agendas. Or, businesses capture existing associations by placing corporate officers on NGO boards, funneling donations, offering revolving door incentives, or creating partnerships that eviscerate the NGO’s 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); the “National Wetlands Coalition” (serving U.S. oil companies and real estate developers); “Consumers for World Trade” (formed by an industry coalition);<sup>182</sup> and, in the example that opened this paper, “Center for Indoor Air Research” (captured by the tobacco industry).<sup>183</sup>

---

<sup>179</sup> That is to say, the minutes of the meeting record no mention of the for-profit status of this organization. See U.N., Econ. & Soc. Council, Comm. on Non-Governmental Orgs., Official Report of the 2014 Resumed Session New York, 19-28 May and 6 June 2014, U.N. Doc. E/2014/32 (Part II) (June 12, 2014).

<sup>180</sup> Türkiye Isadamları ve Sanayiciler Konfederasyonu, Funding Structure, *in* ECOSOC Consultative Status Database, Business and Industry Search, *supra* note 134 (from the results list select the “Türkiye Isadamları ve Sanayiciler Konfederasyonu” hyperlink and then select “Activities” under the “Profile” tab to view the funding structure).

<sup>181</sup> *Id.*

<sup>182</sup> BRAITHWAITE & DRAHOS, *supra* note 1, at 489.

<sup>183</sup> TOBACCO COMPANY STRATEGIES REPORT, *supra* note 24, at 48.

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, in 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 and inferential as it is, nevertheless serves a useful purpose: It exposes this important issue, frames the critique to follow, and lays a foundation for a future more systematic empirical analysis.

This story appears to begin right around the time of the 1996 rules change at the Council that liberalized access to the consultancy regime—the change implemented by Resolution 1996/31, described in Part I.B, *infra*. At that time, business journal articles show that 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.<sup>184</sup> 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 UN lawmaking processes.<sup>185</sup> 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.<sup>186</sup> Part of the problem this would solve, as the business journals noted, was that the NGOs were able to gain access and set international agendas in a way that businesses were not.<sup>187</sup>

At the same time, in an article in 1992, Robert Fri acknowledged business’s uneasy fit within the NGO rubric, noting that while business entities are certainly non-governmental, and familiar with the practice of banding together to advocate for their common positions, they had not at the time been typically interested in advancing broader policy agendas at the international level, at least in the environmental area.<sup>188</sup> While they were familiar with the

---

<sup>184</sup> Fri, *supra* note 17 (“explaining the emergence of business as an NGO”). Fri noted that the fact that NGOs have been so successful at defining agendas, particularly with respect to climate change was “not lost on at least some business leaders.” *Id.* at 92.

<sup>185</sup> *Id.* at 93.

<sup>186</sup> *See id.*

<sup>187</sup> *Id.*

<sup>188</sup> Fri’s colorful description demonstrates how striking it must have been at the time that business would appropriate the NGO format:

rules of the game in the Washington, D.C. lobbying context, NGOs were operating in a realm that was at the time unfamiliar to business—the international policy realm—and yet business leaders were starting to note that those NGOs were pushing policies that could be of “profound” effect on business interests.<sup>189</sup>

The realization that an important lobbying game was being played outside of the traditional channels likely led to an uptick of business interest in forming NGOs and advancing their interests in the ways the NGOs were on the international stage.<sup>190</sup> In Fri’s account:

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.<sup>191</sup>

Fri concluded, in 1992, that business lobbying at the domestic level “seem[ed] to not give business the scope it needs to do the things it wants,” and so he found it likely that “the curious sight of business as an NGO is here to stay.”<sup>192</sup> In another article in the same business journal in the early 90s, Larry Susskind echoed Fri’s remarks, but focused specifically on the UN-

---

The notion of the corporation as a nongovernment organization (NGO) doesn’t quite pass the “duck” test for most of us. . . . business 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 in 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 they] regard environmental protection as a costly compliance problem best left to lobbyists and lawyers.

*Id.* at 91.

<sup>189</sup> *Id.* at 91 (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).

<sup>190</sup> *See id.* at 92.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 94.

sponsored system of international treaty making. Business leaders should, Susskind argued, get involved to assist the UN to make better treaties, whether or not they supported the expansion of domestic or international environmental regulation.<sup>193</sup>

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 shows that tobacco companies, to avoid credibility limitations, “have frequently used surrogates in their attempts to influence WHO’s tobacco control activities.”<sup>194</sup> These surrogates include “a variety of front organizations,” some of which were existing organizations that the tobacco industry funded and groomed for their use.<sup>195</sup>

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.”<sup>196</sup> Tobacco industry insiders noted that ITGA could be useful because it was perceived as independent from tobacco industry.<sup>197</sup> The plan was for the ITGA to “get fully accredited observer status at the [Food and Agriculture Organization of the UN (FAO)],” and serve as a “front for our third world lobby activities at WHO.”<sup>198</sup> In serving this capacity, the tobacco companies concluded specifically that ITGA’s “integrity and independence are of great potential value.”<sup>199</sup> In transforming ITGA to a “proactive, politically effective organization, the industry created the opportunity to capture the moral high ground in relation to a number of fundamental tobacco-related issues.”<sup>200</sup> The ITGA did in fact lobby the FAO, the World Bank, and United Nations Conference on Trade and Development to oppose or undermine WHO tobacco control activities.<sup>201</sup>

---

<sup>193</sup> Lawrence E. Susskind, *New Corporate Roles in Global Environmental Treaty-Making*, 27 COLUM. J. WORLD BUS. 62 (1992).

<sup>194</sup> TOBACCO COMPANY STRATEGIES REPORT, *supra* note 24, at 47.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* (quoting industry documents).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 47–48.

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” which proposed and funded counter-research to challenge studies linking tobacco with cancer.<sup>202</sup> Other examples the Tobacco Report disclosed were the Institute for International Health and Development (IIHD); Associates for Research in the Science of Enjoyment (ARISE) and LIBERTAD.<sup>203</sup> 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.”<sup>204</sup>

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,<sup>205</sup> even when corporate support might produce mission drift or a legitimacy price tag.<sup>206</sup>

For example, in a revealing piece of investigative journalism, Farouz El Tom conducted a review of the “top 100 NGOs”<sup>207</sup> as identified by the Global

---

<sup>202</sup> *Id.* at 201. CIAR was later disbanded under the terms of a settlement agreement between U.S. attorneys general and the tobacco companies. *Id.*

<sup>203</sup> *Id.* at 48.

<sup>204</sup> *Id.* at 48.

<sup>205</sup> 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; arguing that this increase may be borne of NGO financial constraints).

<sup>206</sup> See Kultida Samabuddhi, *Money Can Taint NGO’s Clean Image*, GLOB. POL’Y FORUM (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).

<sup>207</sup> El Tom, *Diversity and Inclusion*, *supra* note 16 (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 financing industries); and 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/> (updating the study for the top 100 NGOs) [Hereinafter El Tom, *White Savior*].

Journal.<sup>208</sup> El Tom investigated links between these “top 100 NGOs” and the tobacco, weapons, and finance industries.<sup>209</sup> Specifically, El Tom found in 2013 that of these 100 NGOs, 54% had at least one board member affiliated to the tobacco industry, 56% had a board member affiliated to the arms industry, and 59% to the finance industry.<sup>210</sup> Of the top 100 NGOs in the El Tom study, 40% have obtained accreditation at the Economic and Social Council.<sup>211</sup> These include accredited organizations with clear links to major corporate partners. For example, CARE International, an NGO with General consultancy status (ostensibly to combat poverty), has a partnership with corporate agricultural giant Cargill;<sup>212</sup> and Vital Voices, an NGO with Special consultancy status (ostensibly to increase economic opportunities for women), has a close relationship with Walmart.<sup>213</sup> 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”<sup>214</sup>; as links with corporate interests “appear to be inconsistent with the [NGOs]’ mandate or public identity.”<sup>215</sup> 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 controversial partners including Cargill, Chevron, Monsanto, and Shell.<sup>216</sup> Conservation International nevertheless obtained Special consultative status at

---

<sup>208</sup> *Top 100 NGOs*, THE GLOBAL J. (2013), <http://theglobaljournal.net/group/top-100-ngos/>; 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).

<sup>209</sup> El Tom, *Diversity and Inclusion*, *supra* note 16.

<sup>210</sup> *Id.* 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 207.

<sup>211</sup> See ECOSOC Consultative Status Database, CARE International, *supra* note 131.

<sup>212</sup> For ECOSOC accreditation status, see ECOSOC Consultative Status Database, *supra* note 131. See El Tom, *White Savior*, *supra* note 207 for CARE and Cargill partnership.

<sup>213</sup> For ECOSOC accreditation status, see ECOSOC Consultative Status Database, *supra* note 131. See El Tom, *White Savior*, *supra* note 207 for Vital Voices and Walmart partnership.

<sup>214</sup> El Tom, *Diversity and Inclusion*, *supra* note 16 (concluding that “[m]any 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”).

<sup>215</sup> El Tom, *White Savior*, *supra* note 207.

<sup>216</sup> See, e.g., Tom Levitt, *Exclusive Conservation International ‘Agreed to Greenwash Arms Company,’* The Ecologist (May 11, 2011), [http://www.theecologist.org/News/news\\_analysis/877241/conservation\\_international\\_agreed\\_to\\_greenwash\\_arms\\_company.html](http://www.theecologist.org/News/news_analysis/877241/conservation_international_agreed_to_greenwash_arms_company.html).

the Economic and Social Council in 2014, several years after the controversial links were reported in the press.<sup>217</sup>

### *C. Types of Harm*

These three forms of astroturf activism 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 advances the agenda of Cargill before international organizations, including at UN-sponsored treaty conferences.<sup>218</sup> That is, businesses gain access to international lawmakers through front groups that obscure the identity or identities of the profit-seeking enterprise that actually sets the agenda. 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. In both cases, the association's non-profit status, benign mission statement, and often public-regarding title obscure the sponsoring company's profit-seeking motives.

The phenomenon 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 coopted a

---

<sup>217</sup> See ECOSOC Consultative Status Database, Conservation International Foundation, *supra* note 131.

<sup>218</sup> See discussion *supra* Part II.B.

---

---

trade association called the International Tobacco Growers' Association (ITGA).<sup>219</sup> 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.<sup>220</sup>

Finally, the astroturf activism phenomenon also captures the scenario in which *for-profit* entities escape the notice of gatekeepers and become accredited, notwithstanding the non-compliance of these associations with accreditation eligibility rules.<sup>221</sup> It is challenging for a gatekeeper or onlooker to police whether an association is a non-profit or a for-profit entity because international gatekeepers rely on the representations of the association itself and a company obtains non-profit or for-profit status at the domestic level, by registering with a national or local government.

In short, the current system allows—and perhaps even encourages—the subversion 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.<sup>222</sup> Mission accountability, in the Reiser & Kelly formulation, “means that the organization owes fealty to achieving its particular goals or purpose, i.e., its mission.”<sup>223</sup> In the consultancy arena, an accredited organization must have a “mission and purpose” that aligns with the goals of the UN as a whole or the particular agency or organ to which the

---

<sup>219</sup> TOBACCO COMPANY STRATEGIES REPORT, *supra* note 24, 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.”).

<sup>220</sup> *Id.* at 7; *see also id.* at 2 (identifying the relevant tobacco companies).

<sup>221</sup> This latter phenomenon was described in *supra* Part II.B.2.

<sup>222</sup> 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 must align with the global governance goals of an international regulator or of the international community.”).

<sup>223</sup> *Id.* at 1022.

organization is accredited as a consultant.<sup>224</sup> This “mission and purpose” requirement—which is replicated both in Article 71 of the UN Charter and in the Economic and Social Council’s implementing regulations—clearly puts an onus on gatekeepers to determine what is the mission and purpose of a given organization when those gatekeepers admit the organization to the consultancy ranks.<sup>225</sup>

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.<sup>226</sup> 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.<sup>227</sup> 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.<sup>228</sup>

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

---

<sup>224</sup> See discussion *supra* Part I.B.2.

<sup>225</sup> 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 & Kelly have identified. Organizations with Economic and Social Council accreditation are required to submit regular reports. See Resolution 1996/31, *supra* note 65, at paras. 55, 57 (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 222, at 1050 (noting that global regulators need to address the regulatory gap).

<sup>226</sup> See *id.* at 1047.

<sup>227</sup> See *id.* at 1049.

<sup>228</sup> Input legitimacy refers to “participation in, and the process of decision making.” *Id.* at 1016; see generally Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L. J. 1490 (2006) (administrative law principles like opportunity to comment and power sharing affect the legitimacy of international processes); Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT’L AFF. 405, 406 (2006) (identifying input and output legitimacy criteria).

---

---

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 & Kelly note that, for a number of reasons, mission accountability is “difficult to track and enforce.”<sup>229</sup> The descriptive analysis offered in this Article adds a further layer of complication to this mission accountability 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 & Kelly identify financial accountability as another potential problem to guard against. In defining financial accountability, Reiser & Kelly focus on the tendency of organizations to use funds inappropriately to benefit insiders, “skimming off funds,” and leaving the organization fewer resources to pursue its mission.<sup>230</sup> While the astroturf activism problem 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 & Kelly put it, without financial accountability, “NGOs risk becoming ineffective or even sham organizations, which are inadequate to regulate or contribute to the work of other global regulators.”<sup>231</sup>

---

<sup>229</sup> Reiser & Kelly, *supra* note 222, at 1029. It is, first, difficult to find “how and where a nonprofit’s mission is articulated;” then, even if one does find an organization’s mission statement, that statement “may be quite general, such as an organization formed for “environmental” or “health” 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 non-profit mission accountability are state attorneys general and the Federal Internal Revenue Service but the tools with which these regulators are equipped are ill-suited to enforcing mission accountability). In fact, although Reiser & 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.

<sup>230</sup> *Id.* at 1045.

<sup>231</sup> *Id.* at 1047.

### 3. Gatekeeping

The opacity and mission accountability issues caused or exacerbated by the astroturf activism phenomenon place added burdens on an already taxed gatekeeping system. Gatekeeping is the province of the NGO Committee,<sup>232</sup> which meets only twice per year to vote on pending applications, most of which it eventually approves.<sup>233</sup> But the NGO Committee's work is plagued by political obstruction,<sup>234</sup> a ballooning workload as an increasing number of organizations seek accreditation,<sup>235</sup> and limited capacity to investigate the veracity of the information presented for its review.<sup>236</sup> These limitations make it difficult for the committee to effectively assess whether an aspiring consultant fronts for a for-profit entity. Nor do domestic mechanisms currently perform this task effectively.<sup>237</sup>

### 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

---

<sup>232</sup> See discussion *supra* note 81 and accompanying text.

<sup>233</sup> See *id.*; see also *Basic Facts about ECOSOC Status*, U.N. DEP'T OF ECON. & SOC. AFFAIRS: 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."). The presumption toward accreditation is so strong that denied applications were usually deferred rather than having the applications closed. See U.N., Econ. & Soc. Council, Comm. on Non-Governmental Orgs., Official Report of the 2014 Resumed Session, ¶ 31, U.N. Doc. E/2014/32 (Part II) (June 12, 2014) (statement by U.S. representative to the NGO Committee).

<sup>234</sup> See Charnovitz, *Nongovernmental Organizations and International Law*, *supra* note 21, 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 23 ("[I]t is essential to depoliticize the accreditation process.")).

<sup>235</sup> See *Basic Facts about ECOSOC Status*, *supra* note 233 ("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.").

<sup>236</sup> Hartwick, *supra* note 78, at 224 n.45 (an aspiring consultant's compliance with the accreditation criteria is assessed by a review of the organizations' 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)).

<sup>237</sup> Reiser & Kelly, *supra* note 222, at 1050 (noting that enforcement of domestic non-profit law does not sufficiently guard NGOs' mission accountability).

offer an incentive and, in fact, an imperative for major corporate actors to speak through non-profits; otherwise, corporate perspectives go unheard.

While commentators often note the danger that for-profit entities can thwart public agendas, business input can also have positive effects on the international process. Involving business in the international lawmaking process can sometimes produce better rules, reduce business resistance to the rules ultimately adopted, and facilitate a more effective international lawmaking process.<sup>238</sup> 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 non-profit 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 alternate channels to reach international lawmakers, or forego 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.

### 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.<sup>239</sup> The international system both evinces the new patterns of engagement and struggles to adapt its outdated legal structures to the challenges these new

---

<sup>238</sup> 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 8, at 295 (noting that business participation in the process of treaty-making can contribute technical expertise and break political logjams, facilitating negotiations between differently-situated states).

<sup>239</sup> Many have noted the blurring of lines between state actors on the one hand, and non-state actors such as business and NGOs, on the other. This Article instead sheds light on the blurring between different kinds of non-state actors: business and NGOs. Nevertheless, identifying the three as distinct categories of actor serves as a useful means of shorthand, and one that is customary in the literature. See, e.g., Abbott & Snidal, *supra* note 48, at 513 (describing transnational regulation in terms of a “governance triangle” between states, firms, and NGOs).

relationships present. While this struggle may be seen throughout the international system,<sup>240</sup> this Article explores a particular example of it: The UN consultancy system reveals an area where legal rules fail to accommodate the changing nature of relationships between the state, businesses, and civil society. The result is astroturf activism. The argument of this Article is 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 a critique of the UN consultancy rules that facilitate the astroturf activism phenomenon. The critique is tripartite: It begins with a historical account of the consultancy regime that explains how the social facts on which that legal structure is based have changed, rendering the current rules outdated and unsuited to the phenomena they regulate. Next, a functional account identifies efficiency reasons that explain the persistence of the 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 critique of the consultancy regime to sketch the outlines of a preliminary proposal for reform. The reform proposal is grounded in the insight that business entities have benefits to offer international lawmakers, if their contributions are regulated appropriately. In a sharp departure from the existing structure, this reform would open a regulatory pathway to *include* individual businesses, enabling access and more control. The idea is to offer businesses direct access to state-driven lawmaking processes, and to offer states and international lawmakers more opportunities for regulatory control of that business access. This “more access, more control” approach is, I argue, a regulatory strategy that may offer benefits for international legal structures far beyond the consultancy regime under specific consideration in this Article. Thus, the consultancy regime can serve as a blueprint for wider legal reform.

#### *A. History: Epochs of Engagement*

The astroturf activism phenomenon 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. The UN consultancy regime codified, and thus froze in time, the

---

<sup>240</sup> By “international system” I mean the organizations, courts, networks, and other institutions that organize and regulate global society.

---

---

League of Nations-era consultancy practice, as Part I.C. noted. Although the legal rules structuring the consultancy regime were updated in 1996, the practice remains the same, in essential details, as it was in the early 20th 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 is that the flaws in the law are rooted in obsolescence.

1. Epoch One: League of Nations

In the early 20th 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 individually, on their own behalf. Businesses only began to emerge as transnational entities—that is, business entities that located production or distribution in multiple nations—between 1850 and 1914, at the time of the industrial revolution.<sup>241</sup> Even so, the late 19th century was a period of only limited transnational business development, and the growth was limited initially to British firms,<sup>242</sup> followed around the turn of the 20th century by emerging U.S. firms.<sup>243</sup> And, even then, the growth was limited in scope and focused on former colonizers and their former colonies.<sup>244</sup>

Thus, the early 20th century League of Nations practice emerged in a period in which few businesses operated across national borders or had the capacity to lobby international decision-makers—or motivation to do so. On the other hand, associations of businesses, like the International Chamber of Commerce, were active at this time right alongside other voluntary organizations like the Women’s International League for Peace and Freedom.<sup>245</sup> Because economic development organizations were among those animating the League of Nations, it would have been perfectly natural that economically motivated voluntary associations would have had equal status as other kinds of voluntary associations.

---

<sup>241</sup> PETER MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW* 10 (2d ed. 2007) (in this period multinational business entities “began to emerge as part of the newly developing modern industrial economy.”).

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 10–11.

<sup>244</sup> *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).

<sup>245</sup> *See* discussion *supra*, Part I.C.

## 2. Epoch Two: UN Charter

It would not have occurred to drafters of the UN Charter in 1945 to make substantial changes to the League of Nations practice when it came to business entities and associations because the international community was just emerging from the second period in the development of modern multinational entities, which took place between 1918 and 1939.<sup>246</sup> This second period featured a much slower rate of development due to the instability in the world economy, and significantly more nationalistic economic policies and national cartels in various industry sectors.<sup>247</sup> By 1945, when the UN enshrined the League of Nations practice in Article 71 of the Charter (and slightly later when the Economic and Social Council developed the consultancy regime regulations), international lawmakers were not focused on the issue of business entities, either individually or in associations.

The drafters were instead preoccupied with the distinction between national and international voluntary associations, on the one hand, and the distinction between voluntary associations and international associations, on the other.<sup>248</sup> The drafters made structural decisions that were meant to elevate international organizations (such as the UN itself) over other kinds of voluntary associations (such as the Women’s International League for Peace and Freedom), and protect against too much input by national governments acting through associations.<sup>249</sup> Thus, because business associations had been operating alongside other kinds of voluntary associations since the early 20th century—and business entities had not acquired substantially greater power, influence, or transnational capacity in the intervening time—the UN drafters and later the Economic and Social Council did not focus on whether it would be prudent to erect a new distinction between profit-focused consultants and everyone else. Simply put, there was not yet reason to change the accreditation structure of the first epoch.

## 3. Epoch Three: ‘90s-Era Reforms

Next was an era of massive growth of business entities, and the transformation of many of these into fully transnational and multinational actors. This third epoch of multinational business development followed

---

<sup>246</sup> MUCHLINSKI, *supra* note 241, at 12–15.

<sup>247</sup> *Id.* at 12–13.

<sup>248</sup> See Charnovitz, *Two Centuries of Participation*, *supra* note 54, at 253.

<sup>249</sup> See *id.*

World War II, stretching from 1945 to 1990.<sup>250</sup> In that period, “MNEs [multinational enterprises] acquired unprecedented importance in international production.”<sup>251</sup> First, American firms grew rapidly in the first decade and a half after the war and were globally dominant until the 1960s.<sup>252</sup> Then came a period of international competition, as the European and Japanese firms emerged from the shocks of WWII, and were joined by newly industrialized economies—China, and formerly socialist countries in Eastern Europe.<sup>253</sup> The rapid growth in multinational corporations in the third epoch brought a literature suspicious of that growth and growing global power.<sup>254</sup> Also in this time, a social science literature began to draw distinctions between economic actors on the one hand, and the remainder of non-state actors on the other, with the latter coming to be known as “civil society.”<sup>255</sup>

However, when the Economic and Social Council reformed its accreditation rules in 1996, the change was once again not directed to evaluating the roles of business associations as distinct from other voluntary associations. Rather, this reform responded to a different emerging issue: heightened awareness of disparities between the developing world and industrialized states. 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.<sup>256</sup> It was also responsive to a literature that challenged the legitimacy of participation by these associations; it therefore focused on demanding internal governance structures that made associations accountable to their members.<sup>257</sup> Thus, the

---

<sup>250</sup> MUCHLINSKI, *supra* note 241, at 15.

<sup>251</sup> *Id.*

<sup>252</sup> *See id.* at 15–18.

<sup>253</sup> *See id.* at 18–21.

<sup>254</sup> *See generally* 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 in response to growing awareness of their influence).

<sup>255</sup> *See, e.g.*, JEAN L. COHEN & ANDREW ARATO, CIVIL SOCIETY AND POLITICAL THEORY (1992) (elaborating a three-part model that distinguishes civil society from economic and social society). Cohen and Arato noted in 1992 that “the 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.

<sup>256</sup> *See* discussion *supra*, Part I.B.2.

<sup>257</sup> *See id.*

new accreditation rules affected the types of organizations to be accredited only on the margins, and did not effect a wholesale change. The rules did not reconsider the role of business organizations as consultants in light of the epoch three growth in those organizations.

#### 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 grown so much that, “[t]hey appear to be a power unto themselves.”<sup>258</sup> Many businesses have acquired size and economic capacity that rivals that of states.<sup>259</sup> Many more of them have become transnational entities, with supply chains crossing national borders, and transnational or global distribution of goods and services.<sup>260</sup> Many of them began to be actively involved in self-regulation and co-regulation with states.<sup>261</sup> Their capacities to lobby spread from principally national activity to significant foreign, transnational, and international lobbying as well. Their partnership and consent became indispensable to many projects at the heart of the international agenda, such as

---

<sup>258</sup> MUCHLINSKI, *supra* note 241, at 3 (“It is often said that the major MNEs [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.”).

<sup>259</sup> The Democratic Leadership Council (DLC), a partisan research group, noted that in 2010 the six largest companies on the *Fortune* Global 500 list had a combined dollar-value revenue of \$2.34 trillion which exceeded the United Kingdom’s GDP at \$2.22 trillion. *The World’s Top 50 Economies: 44 Countries, Six Firms*, DLC (July 14, 2010), [http://www.dlc.org/ndol\\_cie5ae.html?kaid=108&subid=900003&contentid=255173](http://www.dlc.org/ndol_cie5ae.html?kaid=108&subid=900003&contentid=255173). (the six firms included Walmart, Royal Dutch Shell, ExxonMobil, BP, Toyota, and Japan Post). *See also* Phillippe 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.”).

<sup>260</sup> *See* MUCHLINSKI, *supra* note 241, at 21–22 (this period brought “adoption of truly global production chains by MNEs 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.”).

<sup>261</sup> *See, e.g.*, Danielsen, *supra* note 37 (identifying private businesses’ significant role in global governance); Scherer & Palazzo, *supra* note 37, at 922 (June 2011) (“Business firms engage in processes of self regulation through ‘soft law’ in instances where state agencies are unable or unwilling to regulate.”); HAUFLE, *supra* note 37 (exploring the phenomenon of industry self-regulation in codes of conduct and coordinated standards).

development, trade, and climate change.<sup>262</sup> Innovations such as benefit corporations (which seek “triple bottom line” economic 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.<sup>263</sup> 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 sphere.”<sup>264</sup> But this fourth epoch of mixed interests, where corporations and impact investors pursue public goods together with private profit, comes with risks.<sup>265</sup> The risk includes the potential for conflicts of interest and mission drift that can ultimately undermine these public goods and cause serious harm.<sup>266</sup>

### 5. Assessing the Epochs

As this historical account makes clear, one way to understand the characteristics of the current accreditation regime is to view the regime as a historical relic born of early 20th century League of Nations relationships, which has persisted long past its shelf life. In other words, that legal structure has endured into a time when the entities in that relationship have so fundamentally altered that these categories no longer make sense. It is only with time that the great mass of voluntary organizations now known as “civil society” began to be understood as distinct from profit-motivated business interests,<sup>267</sup> and those profit-motivated businesses began 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

---

<sup>262</sup> 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.”).

<sup>263</sup> Sarah Dadush, *Regulating Social Finance: Can Social Stock Exchanges Meet the Challenge?*, 37 U. PENN. J. INT’L L. 139, 143 (2015).

<sup>264</sup> *Id.* at 143-44 (quoting UK Prime Minister David Cameron: “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.”).

<sup>265</sup> See *id.* at 144-45.

<sup>266</sup> See *id.*

<sup>267</sup> See generally COHEN & ARATO, *supra* note 255 (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).

states (and, in turn, international organizations), and legal rules that do not accommodate these new social facts. It also shows which solutions lie behind (the unitary approach of epochs one and two, and the '90s era sharp divisions between economic actors and the remainder of civil society); and it shows which solutions lay ahead (an approach that accommodates businesses as powerful global actors deeply involved in global governance).

Thus, the historical account appears to point toward a legal structure that accommodates business actors, but that better reveals economic and profit-seeking agendas, to ameliorate the harms of opacity, mission drift, and gatekeeper incapacity identified in Part II.C.

### *B. Function: An Efficiency Analysis*

The historical account casts the consultancy regime as a product of the particular social context in which it developed. That positive argument gives rise to the normative critique that while the regime may have been appropriate in the early 20th century social context, it no longer serves well in the context of a very different set of social facts. However, there is a second account of the consultancy regime sounding in positive rather than normative theory. Specifically, there is an efficiency explanation for the current legal structure—a structure that excludes business entities individually, but permits those entities to have access to lawmakers through astroturf activism.<sup>268</sup>

The efficiency argument is that an overly inclusive accreditation standard conserves limited gatekeeper resources. As it is, over *six hundred* organizations applied for consultative status in the 2014-15 year period.<sup>269</sup> Tracing lines of accountability for NGOs is notoriously difficult.<sup>270</sup> Moreover, it is difficult to determine the mission of an organization and to ensure that the organization maintains a stable mission over time.<sup>271</sup> The Economic and Social Council has implemented some safeguards, such as requiring organizations to report

---

<sup>268</sup> As described in Part II, *supra*, I use the term astroturf activism to refer to the phenomenon whereby businesses access international lawmakers by directing the agenda of business or trade associations; escaping gatekeeper notice by gaining accreditation as a for-profit entity; or capturing or creating sham or front NGOs to advance their interests within the international system.

<sup>269</sup> See *Basic Facts about ECOSOC Status*, *supra* note 233 (noting that in 2014-2015, 632 organizations applied for consultative status).

<sup>270</sup> There is a robust literature on this point. See, e.g., Anderson, *supra* note 20; Reiser & Kelly, *supra* note 222; Blitt, *supra* note 45; see also Charnovitz, *The Illegitimacy of Preventing NGO Participation*, *supra* note 45, at 893 (collecting literature).

<sup>271</sup> See *supra* note 222 and accompanying text.

---

---

income streams and governance structures.<sup>272</sup> 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.<sup>273</sup> 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 UN aims and purposes.<sup>274</sup>

The functionalist, efficiency explanation arises from the observation that avoiding the astroturf activism phenomenon at the accreditation or reporting stages would be more costly than the structure that currently exists. The existing structure relieves the burden on accreditation gatekeepers and monitors to assess the bona fides of would-be consultants and instead shifts that burden to the lawmakers who are later at the receiving end of that consultant lobbying. 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.<sup>275</sup>

The efficiency account leads to a normative prescription that would focus reform efforts on the bounded capacity of NGO Committee gatekeepers and Economic and Social Council reporting monitors. One approach would be to address not the initial gatekeepers and monitors, but those downstream lawmakers who will later “consult” with the 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. They might also be

---

<sup>272</sup> See discussion *supra* Part I.B.2.

<sup>273</sup> 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?

<sup>274</sup> Cf. Dadush, *supra* note 263, at 144–47 (noting potential harms that flow from mission drift).

<sup>275</sup> 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 Economic and Social Council and its NGO Committee gatekeepers, and thus allow the Economic and Social Council to have more control over which associations will be admitted as consultants than a more highly developed set of rules would allow.

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, first, make these disclosures available to the lawmakers themselves. However they would also equip third parties to more effectively assist those lawmakers. Third parties could help to 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.<sup>276</sup>

### *C. Theory: Pluralistic Equality*

While the previous sections offered historical and functional critiques of the consultancy legal rules, this section 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, which is beyond the scope of this paper. However, a preliminary examination suggests that the consultancy regime is conceptually incoherent, exhibiting characteristics of both pluralism and a “mediating institutions” view. A consistently pluralist legal structure would eschew distinctions between associational groups (such as between profit-seeking and non-profit organizations). On the other hand, a legal structure organized on the principle that associations mediate between states and individuals must at least evidence *consistent* instrumentalism. In other words, a coherent “mediating institutions” legal structure would exhibit principled consistency in the distinctions it makes between associations. The consultancy rules do neither.

The basic thesis of pluralism is that “the State is but one of a number of associations within society.”<sup>277</sup> By extension, international organizations constituted by States are on the same footing as the State and other associational groups.<sup>278</sup> Because the pluralist thesis puts the State on the same ground as all other associations, it is not the State's role to choose between organizations and elevate some over others.<sup>279</sup> Rather, in the pluralist conception, “[e]ach of these groups is organized for a purpose, and each is an

---

<sup>276</sup> 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. The proposal is preliminary, however, and merits more sustained analysis.

<sup>277</sup> Snyder, *supra* note 61, at 389.

<sup>278</sup> *See id.*

<sup>279</sup> *See id.*

end in itself, not merely a piece of the ‘State’s machinery.’”<sup>280</sup> In fact, the State—and, in turn, international organizations constituted by States—are not even “the sole originator[s] and interpreter[s] of law.”<sup>281</sup> 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.”<sup>282</sup> There will of course be conflict between these associational groups, and any society will develop “mechanisms to mediate the conflicts” between these groups.<sup>283</sup> The pluralistic thesis does not offer guidance as to how to mediate those conflicts and order relationships among associations.<sup>284</sup> It just clarifies that the method we choose does not ultimately affect the formal status of those human associations as formally equal.

By contrast to the pluralistic thesis, in the “mediating institutions” view, non-state associations serve instrumental purposes. In this account, voluntary associations exist to mediate conflicts in state/non-state relationships,<sup>285</sup> for instance, “to influence, ‘channel, or mask the power of the State.’”<sup>286</sup> 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.<sup>287</sup>

The literature on NGOs usually proceeds from an instrumental premise, Snyder asserts, and “asks what beneficial ends mediating institutions serve in their interactions with the State,” in order to develop a theory of the legitimacy

---

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> *Id.* at 389.

<sup>283</sup> *Id.*

<sup>284</sup> *Id.* at 391.

<sup>285</sup> *Id.* at 366 (the “mediation” model 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.”).

<sup>286</sup> *Id.* at 396.

<sup>287</sup> *Id.* at 399.

or value of these associations' participation in the process.<sup>288</sup> 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.”<sup>289</sup>

Consider how the consultancy legal structure fits within this theoretical structure. The structure appears to be in large part pluralist in that its gatekeeping threshold is low and 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.”<sup>290</sup> 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 distinction between business entities and other types of voluntary associations. All are “aggregations of people and property working together to accomplish particular purposes.”<sup>291</sup> 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 (which seems to be out of step with the “triple bottom line” approaches of many modern business entities), the decision itself exhibits an instrumental preference for some associational inputs over others.

The consultancy legal structure thus seems to be incoherently theorized, with tendencies towards both pluralism and instrumentalism; or, that is, a “mediating institutions” account. A consistently pluralist legal structure would eschew any distinctions between associational groups. 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

---

<sup>288</sup> *Id.* at 366.

<sup>289</sup> *Id.* at 378.

<sup>290</sup> Charnovitz, *Nongovernmental Organizations and International Law*, *supra* note 21, at 362 (“NGOs compete with other actors in a dynamic marketplace of ideas.”) (citing Dan Esty, *Non-governmental Organizations at the World Trade Organization: Cooperation, Competition or Exclusion*, 1 J. INT’L ECON. L. 123, 135–37 (1998) for the proposition that “nongovernmental ‘competition’ could lead to a richer WTO politics, which could help improve the effectiveness of the WTO.”).

<sup>291</sup> *Id.* at 378.

---

---

aims and purposes of the United Nations; that exhibit good internal governance; and that offer a balanced set of perspectives between the global north and south. Beyond that, they stray towards pluralism, admitting all associations except business entities.<sup>292</sup> The exclusion of business organizations as the only category of excluded associational group aside from states themselves suggests an inconsistent instrumentalism based on outdated conceptions of the nature of associational groups.

This normative, theory-based critique points toward reforms that would permit 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 towards pluralism.

*D. Legal Reform: More Access, More Control*

To what reforms does this critical analysis of the astroturf activism phenomenon point? While a fully developed proposal is beyond the scope of this Article, the foregoing analysis does offer a set of guiding principles. To be clear, the aim here is not to close the conversation, but to open it: to identify productive avenues for systematic empirical research and point the way toward constructive analysis and reform.

1. Principles

*First*, covert business access is harmful. It is harmful to 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. 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). Covert business access is 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, heightening concerns expressed throughout the literature about the legitimacy and accountability of their participation as consultants. 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 is potentially harmful to small businesses, whose trade associations

---

<sup>292</sup> 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. (discussing the political nature of the gatekeeping process).

are coopted by major multinational players in search of a consultant association to pass along messages to lawmakers.

*Second*, forcing businesses to consult through non-profits facilitates—and in fact requires—capture, mission distortions, and covert behavior. The historical analysis of the previous Part shows that while this constraint might have made sense in the early 20th century, it now causes the astroturf activism distortions identified within this Article. Many businesses are now fully capable of acting on their own. 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 have a coherent voice as determined by organizational attributes and operational specialization.”<sup>293</sup>

*Third*, businesses should be allowed access to international lawmakers. Perhaps most importantly, it is clear from the case studies presented above that excluding them leads to covert access, with all the harms identified. 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. Moreover, as a matter of normative theory, excluding business would move away from the pluralistic approach to admitting associations that the UN access rules appear to affirm. This exclusion would require a coherent defense. Also, businesses have valuable benefits to offer, including offering expertise, neutral resolutions to geopolitically sensitive problems, and an understanding of the practicality of proposed rules. And, finally, enlisting business input at the lawmaking stage can facilitate compliance down the line.<sup>294</sup>

The conclusion that these principles produce is that the international system would benefit by offering more access to business entities while also exerting more control over the consultancy process, directed toward minimizing the astroturf activism phenomenon.

---

<sup>293</sup> TULLY, *supra* note 83, at 221.

<sup>294</sup> See *supra* note 238 and accompanying text.

## 2. Implementation

One potential way to implement the “more access, more control” approach would be to open a separate regulatory pathway for organizations that have “aims and purposes” that include a profit motive. This pathway could include individual business entities as well as non-profit associations that support profit-seeking entities.<sup>295</sup> The characteristics and costs and benefits of such an approach would require further study. Here are some preliminary considerations:

- A separate regulatory pathway offers the possibility for a separate application process, accreditation criterion, and admission procedures,<sup>296</sup> all of which are 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—they could have more or fewer forms of access or quantities of access (e.g., speaking time, agenda items, written submissions). A dual track approach would also allow different monitoring rules, including type, quantity, and frequency of reports and disclosures.

- Opening a separate access pathway may also help 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.

- Some commentators have observed an emerging “right to consult” with international organizations or a duty of international organizations to consult

---

<sup>295</sup> 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. However, it departs from the UNFCCC 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 UNFCCC, Non-governmental Organization Constituencies, at [http://unfccc.int/files/parties\\_and\\_observers/ngo/application/pdf/constituencies\\_and\\_you.pdf](http://unfccc.int/files/parties_and_observers/ngo/application/pdf/constituencies_and_you.pdf) (last accessed May 2, 2016) (outlining UNFCCC accreditation admission criteria and constituency groups).

<sup>296</sup> Cf. TULLY, *supra* note 83, at 207 (noting that “entry hurdles could always be lifted,” by, for example, information disclosure requirements (such as reporting or financial accounting), enhanced transparency requirements or further accountability (including democratic decisionmaking or independent oversight”).

with the public;<sup>297</sup> others have proposed a right to consult as a normative matter.<sup>298</sup> 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 *Citizens United* extended expressive rights to corporate persons in the United States. A separate regulatory pathway could prevent this otherwise 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.

There are a number of potential difficulties and regulatory challenges that the separate regulatory pathway would present. The area is ripe for further analysis. For example, could the pathway open the door to a flood of new would-be consultants, overwhelming gatekeepers and lawmakers? If so, that tide could be stemmed by access hurdles that would encourage (or require) smaller players to aggregate into associations. Could the new business consultants crowd out the contributions of other members of civil society? The 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. Similarly would the separate track allow businesses to exert too much pressure on lawmakers by, for example, flooding them with an “obfuscatory level of detail”?<sup>299</sup> The beauty of a dual stream approach is, again, that access rights for each group of actors can be controlled separately. Theoretically, inputs by business entities and other actors could be balanced.

Another concern is that there is often a very deep blending between business interests and other interests, with associations promoting goals like clean energy or sustainable development, which also produce a profit. 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 profit track, thereby exposing and rendering

---

<sup>297</sup> Charnovitz, *Nongovernmental Organizations and International Law*, *supra* note 21, at 368–72.

<sup>298</sup> See generally Charnovitz, *The Illegitimacy of Preventing NGO Participation*, *supra* note 45.

<sup>299</sup> TULLY, *supra* note 83, at 207.

---

---

explicit the motive animating that entity's contributions. Wouldn't businesses simply register in the alternative track while continuing their current behavior using the existing consultancy pathways, engaging in both astroturf activism and direct advocacy at the same time? The answer to this mirrors the one above. A separate track gives lawmakers a clear path to eliminate this behavior when it is discovered. It also eliminates the requirement that businesses act through associations, and so diminishes the *incentive* toward that covert behavior. In sum, the proposal is preliminary, and requires further development and study, but offers the promising prospect of reversing perverse incentives toward covert behavior.

#### 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 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. The result is the astroturf activism phenomenon I have described, 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.