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Journal

UCLA School of Law Public Law & Legal Theory Series, 17

Author

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Publication Date

2017-08-25



UCLA | SCHOOL OF LAW

PUBLIC LAW & LEGAL THEORY RESEARCH PAPER SERIES

RESEARCH PAPER NO. 17-26

PUBLIC POWER AND PRIVATE STAKEHOLDERS

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PUBLIC POWER AND PRIVATE STAKEHOLDERS

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Final Draft for SNIS project on Rethinking Stakeholder Participation

August 2017

Introduction

The guiding principle of postwar global governance was multilateralism. As John Ruggie famously defined it, multilateralism “is an institutional form which coordinates relations among three or more states on the basis of ‘generalized’ principles of conduct.”² From the grandest multilateral project—the United Nations—to the many international organizations created in the years following the end of the Second World War, global governance followed a familiar template. States, which stood at the center, negotiated a multilateral constitutive treaty. This in turn created a formal international organization to govern a specified issue-area. These organizations had buildings, staff, and letterhead. And they exhibited many of the features of mid-century governance in the advanced industrial world generally: the belief in expertise, in scale, in centralized bureaucracy, and in legal foundations and process. While some states clearly had more power than others within erstwhile multilateral institutions—whether the Permanent Five of the Security Council or the skewed voting allocations in the World Bank and IMF—the equality of sovereigns and the central role of states remained core guiding principles.

¹ Professor, UCLA Law School & Director, UCLA Burke Center for International Relations. I thank Sydney Sherman and Patrick Hulme of UCLA Law School for research assistance with this draft, and participants at the SNIS workshops at the Graduate Institute in Geneva in 2016 and at the Technical University of Munich in 2017 for their feedback.

² John Gerard Ruggie, *Multilateralism: The Anatomy of an Institution*, *International Organization*, 46, 3 1992 at 574. See also *Multilateralism Matters*, (John Ruggie, ed, 1993); Robert Z. Lawrence, *Regionalism, Multilateralism, and Deeper Integration* (2000)

21st century global governance continues to reflect multilateral principles. But it is increasingly characterized by flexible structures, greater tolerance for informality, and, most strikingly, an openness to public-private partnerships and an increasingly active role for a wide range of non-state actors. While the embrace of non-state actors is not uniform—the governance of global trade differs markedly on this score from the governance of the global environment, for instance—many international regimes now feature substantial participation by private actors. In short, traditional multilateralism remains alive and well. But multilateral governance is increasingly supplemented, and in some cases even supplanted, by *multistakeholder* governance. Civil society, corporations, social and political groups, religious organizations, and indigenous peoples are all potential stakeholders in many issue areas, and the move to meaningfully and directly include them alongside governments in the sharing of power is one of the most striking contemporary trends in global governance.³

This ongoing embrace of multistakeholder governance raises a host of important questions. Is multistakeholderism more effective at achieving its ends than “mere” multilateralism? Is it more legitimate—or perceived as more legitimate—by the relevant and impacted actors? Is more inclusive governance more efficient, and if it is not, do its benefits outweigh its costs? Regardless, how can multistakeholder governance be improved across any of these dimensions?⁴

At a more fundamental level, however, is a very basic question. Why is the shift to greater inclusion occurring? States remain the primary and most powerful actors in world politics, and as organizations like the World Trade Organization and the UN Security Council show, they can readily cabin the role of private stakeholders when they choose to. Moreover, even in the most novel examples of the new global governance, such as the Global Fund for AIDS, Tuberculosis, and Malaria, public funding and support tend to remain dominant over private resources; indeed, some 95% of funding in the Global Fund comes from sovereign sources. Nonetheless, it is undeniable that in a range of important global issues *public* entities are increasingly granting access and influence to *private* entities in core governance arrangements. Why this is happening is the focus of this chapter.

³ For other recent treatments see Jonas Tallberg et al, *The Opening Up of International Organizations* (Cambridge 2013); Raustiala, *NGOs in International Treaty-making*, in *The Oxford Guide to Treaties* (Oxford, 2012); Avant, Finnemore, and Sell, *Who Governs the Globe?* (Cambridge, 2010), Chapter 1;

⁴ Pauwelyn et al, this volume, raise many important questions in this regard.

My core argument is that public power can be and often is strengthened by private power. The rise of private actors has not come at the expense of public actors, but instead often works to the benefit of those public actors. This symbiotic relationship between public and private actors is insufficiently appreciated and helps to explain the striking rise of multistakeholderism in global governance.

In what follows I sketch out the basis of this claim, and, drawing on the role of private actors in domestic governance, suggest some concrete benefits that public actors gain from the inclusion of private actors. These benefits help explain the rising commitment to stakeholder participation in global governance, though there is no reason to believe that they are the only force propelling this trend forward. There is surely some degree of mimicry across regimes that takes place, as well as a widespread (though clearly not universal) sense that governance involving a broad array of stakeholders is simply more just, fair, and appropriate. But the concrete benefits inclusion provides are widespread and important to recognize, and the broad patterns of inclusion are consistent with an interests-based understanding of this transformation. I bolster my argument with examples drawn from the core areas of focus in this volume—global health and finance—as well as others, such as environment, intellectual property, and Internet governance.

The commitment to multistakeholderism—whether explicitly termed that, as in contexts such as Internet governance, or instead pursued more as practice rather than a policy, as in climate change—varies markedly across issue areas. While more research is needed to move beyond the impressionistic, the overall pattern is broadly consistent. The inclusion of private power, far from threatening public power, often helps it to thrive.

States and Non-State Actors in Global Governance

A century ago at the Paris peace talks of 1919 leading states (and empires) hammered out some truly novel governance arrangements, including the landmark League of Nations. Woodrow Wilson had famously campaigned against secret agreements and sought to ensure that after the Great War covenants would be openly arrived at. Indeed, it was not a coincidence that he made this Point 1 of

his Fourteen Points.⁵ Yet there was still substantial secrecy in Paris, and while several NGOs—then still a novel concept—sent delegations, their level of participation was minimal. Indeed, all working sessions were closed to the public.⁶ Still, the Paris peace talks were a high point for inclusion compared to the diplomatic practices of the past, and in their own way they augured a new form of global governance in which non-state actors and governments would begin to work together more closely.

As this suggests, private actors have been a part of the international landscape for some time, even if their direct participation in global governance (a relatively recent concept, to be sure) was often minimal. Corporations likewise existed a century ago and sometimes had interests in the emerging international structures. Associations of various kinds were also common. And the nineteenth century saw the formation of many NGOs, some of which—such as the British and Foreign Anti-Slavery Society, formed in 1839—focused expressly on reforming or influencing international law. At a deeper level, diverse stakeholders have existed as long as leaders have sought to govern. But in the past, at the global level, these stakeholders were often not organized, not present for negotiations or debates, and, above all, not welcome as peer governors to states.⁷

The first noteworthy exception was the International Labor Organization, which from its inception in 1919 has employed a unique tripartite structure of government, business, and labor representatives. The ILO's corporatist origins are unusual and reflected the prevailing politics of the time, in which socialism was ascendant in many nations. Comparatively powerful unions were often pitted against employers, and economic life between capital and labor was understood as a form of cooperation structurally laced with conflict. The ILO system embedded that complex and often antagonistic relationship quite directly by including all the major relevant parties. As the ILO itself describes the approach,

The ILO aims to ensure that it serves the needs of working women and men by bringing together governments, employers and workers to set labour standards, develop policies and devise programmes. The structure of the ILO, where workers and employers together have an

⁵ 'President Woodrow Wilson's Fourteen Points' (8 January 1918) <http://avalon.law.yale.edu/20th_century/wilson14.asp>.

⁶ S Charnovitz, 'The Emergence of Democratic Participation in Global Governance (Paris, 1919)' (2003) 10 *Ind J Global L Stud* 45, 62.

⁷ On the concept of "global governors" see Avant, Finnemore, and Sell, eds, *Who Governs the Globe?* (CUP, 2010) at 2.

equal voice with governments in its deliberations, attempts to create a social dialogue. It ensures that the views of the social partners are closely reflected in ILO labour standards, policies and programmes.⁸

As groundbreaking as the ILO was, structurally it was largely a dead end.⁹ For decades there was no real parallel to it, and today's existing multistakeholder governance systems are more pluralistic and flexible in their approach. After 1945 the UN quickly became an important, if not the central, forum for treaty-making as well as for the creation of new international organizations and secretariats. The UN Charter was and remains quite state-centric. It says relatively little about non-state actors and never uses the term stakeholder. But in practice, in the postwar era the UN soon began accrediting NGOs for participation in its governance processes. By the 1980s and 1990s civil society groups of various kinds had become central to many UN-led governance efforts. Huge conferences filled with private actors became the norm.

The environment is one of the chief exemplars of this trend. At the final meeting of the 2015 Paris Accord on climate change, for example, there were 198 parties and observer states in attendance, but over 1000 NGOs.¹⁰ This is typical for many global environmental efforts, which have tended to draw ever larger numbers of private actors into the fold over time.¹¹ Running alongside the increasing presence of NGOs were a few more explicitly multistakeholder environmental governance processes. The Forest Stewardship Council is one of the earliest examples. After a series of failed efforts at the creation of a comprehensive and legally binding international forests regime, including at the UN Conference on Environment and Development in Rio in 1992 and in subsequent years, efforts moved toward a less state-centric approach to forest protection. The Forest Stewardship Council was created in 1993 by 130 representatives from 26 countries, none of whom were government representatives. The Council has an ILO-like structure with a tripartite General Assembly divided into Environment, Social, or Economic chambers. These are further divided into Northern and Southern sub-chambers.¹²

⁸ <http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/lang--en/index.htm>

⁹ But see the Forest Stewardship Council, discussed below, which also uses a tripartite scheme, further divided into North and South (for six parts total).

¹⁰ <http://unfccc.int/resource/docs/2015/cop21/eng/inf03p01.pdf> at pg 2

¹¹ See Raustiala, States, NGOs, and International Environmental Institutions, *International Studies Quarterly* (1997)

¹² See <https://us.fsc.org/en-us/who-we-are/governance>

This arrangement is noteworthy, but reflects a broader tendency in global environmental governance. Inclusive if not fully multistakeholder governance is widely seen as both necessary and appropriate. As the UN Development Programme argues, “the development of a multi-stakeholder governance framework at the national, regional, and/or municipal levels is crucial for creating ownership, capacity, and consensus about long-term sustainable development objectives and results, and is similarly critical for effective action to combat climate change.”¹³

This evolution in participation can be seen in other arenas as well—even in international organizations of long-standing. The World Bank is emblematic. The early Bank was decidedly not inclusive. As the Bank itself recently noted, “The World Bank Group has significant knowledge and experience of working with non-state stakeholders, including MSIs [(multi-stakeholder initiatives)]. This has not always been the case, though. Historically, our core expertise has been in working directly with governments. But this changed more than 20 years ago, spurred by the World Bank’s work on participation, and subsequently by the Poverty Reduction Strategies, which mandated broader engagement.”¹⁴ At the annual World Bank/IMF meetings, private actors now play a large role and are officially welcomed and incorporated via the Civil Society Policy Forum, “a program of events to promote policy dialogue between Civil Society Organizations (CSOs), the IMF and the World Bank Group, their peers, and government delegations on a wide range of topics.”¹⁵ In short, while private stakeholders may have had some modicum of participation in the early decades of the Bretton Woods institutions, today far greater inclusion is structured, formalized, and lauded.

For newer global governance bodies the embrace of multistakeholder participation is even greater, and often more overt. Founded in 2000, the Global Alliance for Vaccines and Immunization (GAVI), for example,

is somewhat unique in the significant role that it gives to non-state actors including partner foundations, the private sector and technical experts. The GAVI Alliance Board sets overall policies and monitors programs. The Bill and Melinda Gates Foundation holds one of four “renewable” seats on the GAVI Alliance Board. In addition, there are several other seats for

¹³ UNDP, *Multi-stakeholder Decision-Making*, (2012) at pg 8. Much the same can be said of environment, see e.g. the report of the European Environment Agency, *Global Governance: The Rise of Non-State Actors* (2011); <http://www.eea.europa.eu/publications/global-governance>

¹⁴ <http://blogs.worldbank.org/governance/multi-stakeholder-initiatives-platforms-collective-governance-development>

¹⁵ <http://www.imf.org/external/am/2016/participants.htm>

non-state actors among the 12 rotating seats on the board. Of these, one is designated for civil society groups while the others are allocated to research and technical health institutes, the developing country vaccine industry and the industrialized country vaccine industry. In 2005, the GAVI Alliance Board determined that it needed to strengthen the participation of civil society constituencies in its governance and programs and allocated expanded resources to enhance civil society representation at the country level. In 2010, the GAVI Partners forum created the GAVI Alliance Civil Society Constituency, a group of civil society representatives to support members of GAVI's governance bodies.¹⁶

Similarly, the Global Fund to Fight AIDS, Tuberculosis and Malaria employs a multistakeholder model that includes rich and poor states as well as private industries and civil society. To be sure, the organization remains largely state-centric: governments control 15 of the 20 of the seats on the Global Fund board. But the five remaining seats are set aside for, respectively, an NGO from a developing country, an NGO from a developed country, an NGO representing persons living with the diseases, the private sector, and private foundations. As Berman argues, this structure was “groundbreaking, deviating from the traditional intergovernmental model at the time, embodied by the WHO and World Bank.”¹⁷ Not only does the Global Fund include private actors in its central governance, it requires it in the national structures that implement Global Fund programs on the ground:

Every recipient country has “Country Coordinating Mechanisms” which submit grant applications to the Global Fund and oversee implementation of Global Fund programs. Such [mechanisms] must, as a condition of funding, be a partnership. Rather than being a purely governmental structure, they must include civil society, the private sector, technical partners, and representatives of people living with or affected by the three diseases.¹⁸

¹⁶ David Gartner, *Beyond Consultation, Civil Society and the Governance of International Institutions*, Brookings Working Paper (2010) at 10. https://www.brookings.edu/wp-content/uploads/2016/06/09_civil_society_gartner.pdf

¹⁷ Ayelet Berman, *Stakeholder Participation Reforms in Global Health Governance*, this volume, at 10.

¹⁸ Berman, *supra*.

Governance of the Internet is likewise premised on the broad participation of private actors. Internet governance from its inception was multistakeholder in its process, even if the term was not used until recently.¹⁹ As the Internet grew dramatically in scope and scale in the 1990s the original and often ad hoc governance structures fell under strain. The US government, which had helped to create the original Internet, sought a more formalized structure. The International Corporation for Assigned Names and Numbers, or ICANN, established in 1998 as a nonprofit under California law, created a finely-wrought structure of multistakeholder governance which persists, with some tweaks, today.²⁰ States are present in ICANN—via a Governmental Advisory Committee—but the GAC is only one of several deliberative bodies that can offer recommendations to the ICANN board, the ultimate decision-maker. Numerous other stakeholder bodies exist in ICANN and offer various constituencies access and influence in ICANN’s decisionmaking. The result is a wide array of opportunities for private sector participation, and a core commitment to ensuring that all major, relevant stakeholders are represented and heard in ICANN decision-making.

There are many other examples of inclusive, participatory global governance one could canvas. Multistakeholder governance is arguably becoming the aspirational standard for legitimate global governance.²¹ While there is nothing wholly new about incorporating private actors—as one can see from the ILO—there is also no real dispute that inclusive governance, whether under the rubric of multistakeholder governance or some other term, is far more prominent today than even in the 1990s. Indeed, many international organizations and governance bodies describe their own engagement with incorporating private actors as an evolution. The IMF reflects this well. The IMF recently stated that “Over the years, the IMF has become more transparent and accountable—not only to member countries but also to the broader public. When the IMF began to engage with CSOs [civil society organizations] in the 1980s, it was usually at a global level, in response to advocacy by groups concerned with economic and social justice.”²²

¹⁹ Kal Raustiala, *Governing the Internet*, *American Journal of International Law* (2016).

²⁰ The major difference today is that in the fall of 2016 the US Commerce Department ended its nearly two decade long contract with ICANN to manage Internet addresses, essentially freeing ICANN to operate independently as a formal matter. Kal Raustiala, *An Internet Whole and Free: Why Obama Was Right to Give Up Control*, *Foreign Affairs* (March/April 2017)

²¹ See e.g. Luc Fransen, *Multi-stakeholder governance and voluntary programme interactions: legitimization politics in the institutional design of Corporate Social Responsibility*, *Socio-Economic Review* 10, 1 (2012)

²² The IMF and Civil Society Organizations, 2016: <http://www.imf.org/external/np/exr/facts/civ.htm>

Still, it is important to underscore that the movement toward more inclusive governance is not uniform. This is important empirically but also theoretically, as it makes clear the important ways states continue to control the terms of engagement and to meter out—and block—non-state actor participation when they choose to. The two chief areas of focus in this volume provide a useful contrast. While global health governance is increasingly inclusive and often avowedly-multistakeholder in structure, global finance is far more closed, even though it too has undergone evolution. The IMF, as discussed above, has opened up considerably to private actors in recent years. But many other finance bodies have taken only minimal steps. For example, Margetti and Kovarzina note with regard to the Basel Committee on Banking Supervision,

The preparation of so-called Basel I (1988) was a closed meeting with limited transparency and no public input. Basel II (2004), on the other hand, was developed with the use of notice-and-comment procedure allowing for public input. The procedure consisted of the Basel Committee publishing a number of papers on their website for the public to be able to consult. It also allowed the public to make comments which were then collected and given feedback.²³

These are useful steps, but a far cry from the sort of direct decisional roles for non-state actors we see in the Global Fund or GAVI. Likewise, the Financial Action Task Force, created in 1989, has incorporated some non-state actors, but almost none are private: participants include Interpol, the Organization for Security and Cooperation in Europe, and the UN Office on Drugs and Crime. IOSCO, the International Organization of Securities Commission, similarly has only government regulators as members and little to no opportunity for engagement with private actors.²⁴ The contrast with global health is striking and highlights that states continue to control access and meter out participation in varied ways. Still, even in a very state-centric arena such as global financial regulation there has been change over time—sometimes marked, as in the IMF—and that change is broadly in one direction: toward greater, even if quite uneven, inclusion of private actors.

The core argument of this chapter is that this evolution in approach broadly reflects political incentives that contemporary governments face. Public power is often enhanced by private actors, and states thus have sought to incorporate diverse stakeholders because their wider participation serves their interests. But before turning to the political imperatives of governments, it is important

²³ This volume at X

²⁴ *Id.*

note that many other variables are at play in this evolution, and these also help explain why multistakeholder governance is more prominent today. At least four broad factors can be identified that have permitted or encouraged greater participation by varied stakeholders in global governance.²⁵

First, and at a very basic level, technological change has made inclusion easier by making travel and communication easier. Phones and faxes and eventually internet and mobile connections have made it feasible for small groups and even individuals to participate in global governance. Jet travel has had a similar, and maybe even more profound, effect, enabling frequent meetings that in turn opened up the door to greater stakeholder participation. These developments have varied impact; stakeholders in wealthy societies obviously can leverage them more effectively. But the overall effect remains. Technological change has dramatically enhanced the possibility of access and inclusion.

A second factor, already noted, was the creation of the UN itself and the entrenchment of multilateralism as the default form for postwar cooperation. Multilateralism established a profound principle: participation in international affairs should not rest simply on power.²⁶ By moving to a system grounded in notions of (sovereign) equality and broad participation, which entailed some quite small and weak states sitting nominally as equals with the great powers it became easier to argue that other, non-sovereign, actors might also have something to offer.

The UN itself provided a focal point and a formalized means of access—NGO accreditation—that spurred significant civil society involvement. The UN is of course only the most important of a myriad of postwar forums for governance. And in a broad sense, the twentieth century proliferation of international organizations was conducive to widening participation in global governance. As Jose Alvarez writes:

Matters of interstate diplomacy were, at least in the 19th century, regarded as confidential interstate matters. Modern treaty-making under IO auspices, by contrast, is characterized by a much greater openness to the accumulated wisdom, shared experiences, and institutional biases and blind spots, of a variety of actors beyond the government representatives set to negotiate . . . Certain structural aspects of IOs, including provision for access to documents and for ‘observer’ or other forms of

²⁵ This section draws on Kal Raustiala, NGOs in International Treaty-making, in *The Oxford Guide to Treaties* (Duncan Hollis, ed., 2012).

²⁶ For a broad sweep of the history of international order and its relation to power, see Kissinger, *World Order* (Penguin, 2014)

non-voting status, have provided entry points for NGOs' growing participation in various forms of inter-state diplomacy, including treaty-making.²⁷

A third factor promoting multistakeholder participation was the postwar growth in democratic states, which, thanks to their more vibrant and open domestic civil societies, often birth domestic organizations and social movements that in turn may address international issues. Democratic states also unsurprisingly tend to be much more comfortable than autocratic regimes with the active involvement of a wide array of stakeholders in governance, whether it be global or local. And in practice, many democracies are wealthy, with well-developed administrative states. These domestic regulatory processes often incorporate wide participation via notice and comment processes, advisory committees, legislative hearings, and the like. This broad model is easily replicable at the global level, and directly relates to the next factor.

Fourth is the increasing tendency to govern globally those arenas that were traditionally governed nationally or even locally. Many issues, such as tobacco regulation, banking, and transboundary air pollution, were long thought of as subjects for national, not international, policy. Over the course of the last several decades, however, global governance has embraced these topics and more. A much wider concept of regulation has blurred the lines between traditionally 'domestic' and 'international' topics. Consequently, many private actors have moved from a purely domestic orientation to an embrace of international forums, as global governance itself has expanded its ambit.

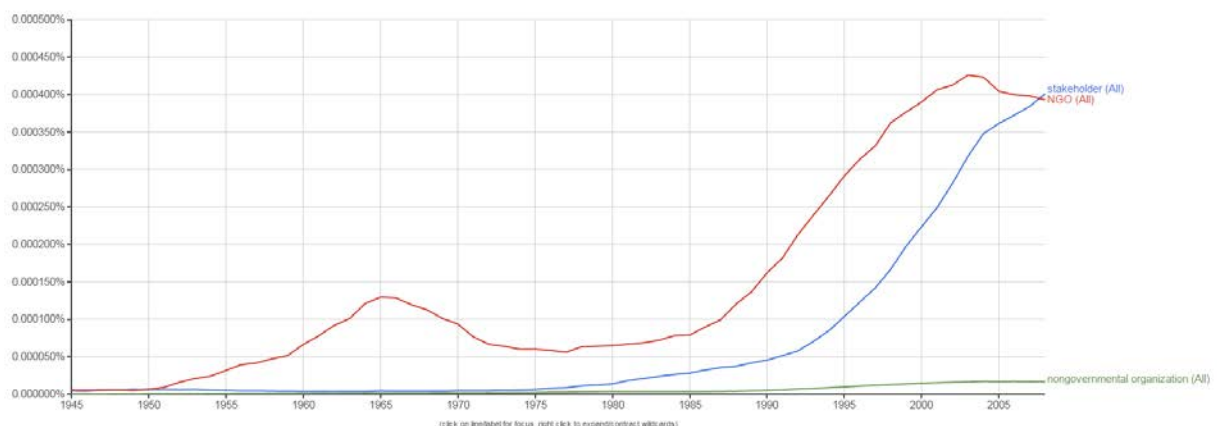
Multinational firms and trade associations that traditionally lobby parliaments and executives, for example, are now more active in trade, labor, and environmental treaty negotiations, which often produce rules and norms that in turn determine national regulatory policies. This is even true for issues of international security: once the UN began negotiations on a small arms treaty, the powerful American NGO the National Rifle Association became an active player in global regulation.²⁸ The shift to greater global governance of traditionally domestic issues has led to more extensive demands by domestic actors for inclusion. Arguably it has also led to a change in the style of global processes,

²⁷ JE Alvarez, *International Organizations as Law-Makers* (OUP, New York 2005) 277, 284. This may be because NGOs help provide an alternative power and legitimacy base to IOs. On this point see K Anderson, 'What NGO Accountability Means—And Does Not Mean' (2009) 103 AJIL 170, 170 (reviewing L Jordan and P van Tuijl (eds), *NGO Accountability: Politics, Principles & Innovations* (Earthscan, London 2006)).

²⁸ After effectively conquering American politics via its stranglehold on much of the Republican Party, the NRA turned to the UN when the issue of small arms became a global focus. See Clifford Bob, *Packing Heat: Pro Gun Groups and the Governance of Small Arms*, in Avant et al, 2010.

as these stakeholders bring expectations and tactics forged in domestic settings into the diplomatic arena.

The confluence of all these factors (and surely others) yielded a very large increase in the postwar era in the number and range of stakeholders engaged in global governance. Many terms are used to capture this change, and indeed one can see this broad rise through some telling changes in the nomenclature used to discuss global governance. According to a Google Ngram search of over 5 million published books in English,²⁹ the term “stakeholder” was uncommon in the immediate postwar era, and surged in use in the 1990s and 2000s. By contrast, the term “NGO” has a much longer pedigree, and indeed had an early peak of usage in the 1960s which was not surpassed till the end of the Cold War. Strikingly, as of about 2008 stakeholder had become a more common phrase than NGO.



The term “multistakeholder” is even more novel. In English the term first appears in the mid 1970s.³⁰ By 1988 multistakeholder was used in .0000000460% of the sources searched. By 2008, 20 years later, the frequency had grown to .0000061487%—a remarkable increase of well over 10,000%.

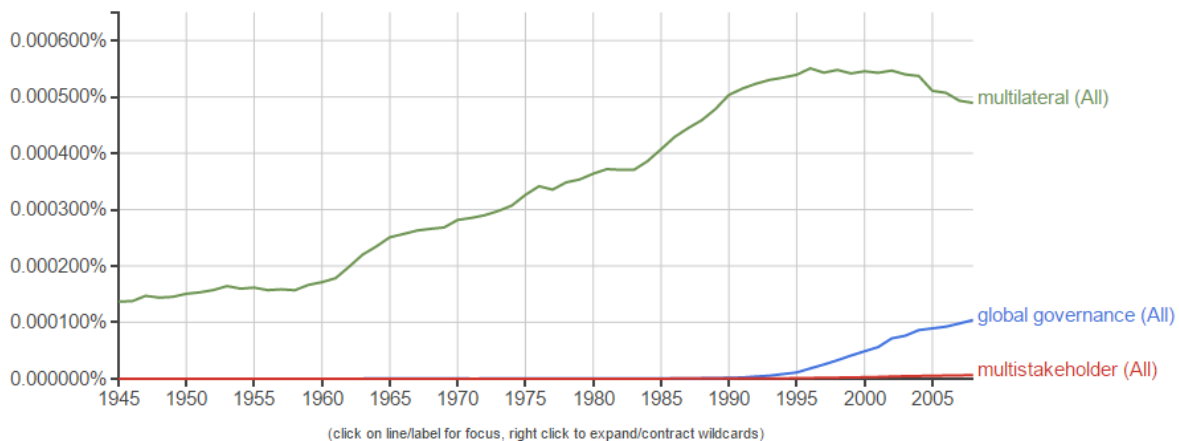
“Multilateral,” by contrast, exhibits a quite different pattern. Common even in the 1940s, by 1976—the first year multistakeholder appears in the Ngram search--multilateral was used in .0003414383% of sources searched. Multistakeholder, by contrast, was used in only .0000000032%

²⁹ Unfortunately I cannot limit the results to those relevant for global governance only.

³⁰ Again, these results are not limited to discussions of global governance. Nonetheless, it seems implausible that multistakeholder is used much outside the context of governance of some kind; it is inherent in the term that some governance process, in which multiple actors have a “stake,” is the referent. So while a more fine-grained (and currently technically infeasible) search of only usages pertaining to global governance might reveal different patterns, I see little reason based on these data to believe those patterns will be markedly different.

of sources. In short, in the 1970s for every one use of multistakeholder, multilateral was used 107,000 times.

Three decades later, in 2008, the situation was quite different. Multilateral was used in .0004932586% of sources (interestingly, a drop from the peak usage year of 1996.) But multistakeholder had grown to .0000061487% of sources. For every one usage of multistakeholder in 2008, in short, there were now only 80 usages of multilateral.



As these data make clear, the discourse around global governance is dramatically different today, compared to even a couple of decades ago. Multistakeholder remains far less common a term than multilateral. But the gap has narrowed enormously, with the most dramatic change being the steep uptick in usage in the 1990s and 2000s.

It is hard to draw precise inferences from this data. But it is clear—and interesting—that discussion of participation has changed, in many ways dramatically. The more inclusive and broad concept of global governance was simply unknown in the early postwar years, though the state-centric term multilateral was common (and remains so.) “NGOs” were well known, “stakeholders” less so; “multistakeholder” not at all. Today, all these terms are in wide use and, indeed, “stakeholder” has overtaken “NGO” as the preferred phrase in many settings. Terms like “stakeholder” and “governance” are inclusive, process-oriented, and seem to elide the role of power,

rules, and law. “Multistakeholder governance” is friendly and open; “multilateral negotiations” have a harder, less cooperative edge.

Explaining the Inclusion of Private Actors

The wide participation that private actors now enjoy in many global governance processes is not a hijacking of the process of international organization. Nor is it a major displacement of the central role traditionally, and still, played by governments. Rather, patterns of private participation are *shaped by* public actors and this participation is often *beneficial to* those public actors. There are clearly an array of background factors—just discussed above—that have facilitated stakeholder participation. But the political incentives modern governments face frequently compel them to work with a wide array of stakeholders, especially those that possess specialized and useful resources and political power. That private stakeholders often (intentionally or not) serve the interests of governments is one reason—and I argue the most important one—that multistakeholder governance has become so pervasive in contemporary international affairs.

Consequently, the relationship between public and private actors is in many respects mutually-reinforcing. Private actors bring much to the governance process. Yet the sovereign state remains the leading actor in the international system, and private actors generally need the coercive power of governments to realize the social and legal changes they seek. Because states remain the core of the international order and multilateralism the default approach to global governance, governments still largely control the terms of the relationship, even if in some newer governance processes—such as GAVI or ICANN—multistakeholderism is built in from the start.

Why then do governments permit private actors to participate so extensively in many arenas of global governance? There are several distinct benefits for governments in doing so. Although not all governments enjoy or value these benefits, and some oppose wider participation by private stakeholders in particular cases or even more generally, in the aggregate governments benefit often enough that broad, general rules and practices that include varied stakeholders make sense. I divide these benefits in two broad categories: those related to information provision, and those related to political incentives.

Information Provision

Perhaps the chief benefit for governments of broad-based participation is the provision of information. This information can come in several forms. Most centrally, private actors can provide

important information about policy options and outcomes. This is especially true and valuable in issue-areas with high levels of uncertainty and considerable technical or scientific complexity.

Consider the challenge of global climate change. There are many large, expertly staffed private groups that devote considerable resources to climate policy research and development—research that can help governments (and others) develop and evaluate often-complex regulatory options. NGOs, academic institutions, and think tanks commonly provide such information to government policy-makers freely. Indeed, they typically compete to do so. Many such groups exist, and the competition among them provides not only a varied array of options and analyses but also a check on accuracy, analytic quality, and the like. The result is that governments can gain useful and creative policy advice from many independent sources—and typically at no cost.

To be sure, a substantial portion of the world's policy expertise on climate change rests within governments or is funded by them. States have also created the Intergovernmental Panel on Climate Change (IPCC) as a way to gather and channel the best scientific advice. But private policy research provides perspectives and ideas that may not have emerged from a bureaucratic review process, whether within a given state or the IPCC. Like lobbyists or experts testifying in a domestic rule-making or legislative setting, private actors act as conduits for ideas and information.

Global health provides another excellent example. Global health policy was traditionally viewed as a virtual monopoly of specialists in the health sciences. Over time, however, the important role of local governments, of cultural and social practices, and of the experience of those individuals and communities living with specific diseases and conditions were recognized as critical to the creation and implementation of any effective policy. The inclusion of non-state actors into GAVI, the Global Fund, and other governance institutions reflected the ascendance of this view: that effective global health intervention could not rely on conventional expertise alone.

While civil society often receives the bulk of attention, the same logic applies to private firms and their organizations. The industrialized country pharmaceutical industry has a seat on GAVI as it, thanks to its technical vaccine expertise, supports the time and cost effective provision of vaccines in GAVI-supported countries.³¹ Likewise, the International Conference on Harmonization (ICH) relies on the scientific expertise of the pharmaceutical industry in the development of harmonized pharmaceutical standards. The World Health Organization also cites “the contribution of non-state actors to the Work of the WHO”, and “the additional resources non-state actors can contribute to

³¹ <http://www.gavi.org/about/partners/industrialised-country-vaccine-industry/>

the WHO's work” among the reasons it engages with a wide range of private actors.³² Including a more varied array of stakeholders in decisionmaking is politically and morally appealing to many, to be sure; but it also provides a broader and sounder basis for decisionmaking.

Other global governance bodies are similar. Codex Alimentarius, a standard-setting body, expressly states that “The purpose of collaboration with International NGOs is to secure for the Codex Alimentarius Commission, expert information, advice, and assistance from international NGOs...”³³ The IMF proclaims that it “recognizes the benefits of a transparent and wide engagement with [civil society organizations], as a means for improving its policy advice and analysis.”³⁴ Similarly the OECD Business and Industry Advisory Committee conveys “business perspectives and expertise on a broad range of global economic governance and policy issues”.³⁵ The World Intellectual Property Organization, which has shepherded some two dozen international agreements to completion, incorporates private actors widely. Consider a report, chosen at random, of the WIPO Standing Committee on the Law of Patents from 1999. The various government delegations were debating the then-draft Patent Law Treaty, which was adopted the following year. Yet NGOs such as the American Bar Association, the Federation of German Industry, the Korean Patent Attorneys Association, and the World Association for Small and Medium Enterprises were also introducing proposals and raising objections to the draft Patent Treaty text.³⁶ These actors wielded substantial expertise on patent law and conveyed that expertise (and opinion) to the assembled negotiators.

In sum, a wide array of governance bodies include private actors, these private actors provide substantial and specialized expertise, and there is at least some evidence that the provision of information that private actors possess is an important reason for this pattern of incorporation. The incorporation of expertise and information goes furthest in avowedly multistakeholder processes, in which private actors are not merely participants but also decisionmakers. For example, groups such as the Internet Engineering Task Force within ICANN play a key (and legally-defined) role in the Internet governance process precisely because they possess so much information about critical

³² Article 6, WHO Framework of Engagement with Non-State Actors, http://www.who.int/about/collaborations/non-state-actors/A69_R10-FENSA-en.pdf?ua=1

³³ <http://www.fao.org/fao-who-codexalimentarius/members-observers/ngo-participation/en/>

³⁴ IMF, 2015 Guidelines on the IMF Staff Engagement with Civil Society Organizations

³⁵ <http://biac.org/quick-facts/>

³⁶ WIPO Standing Committee on the Law of Patents, ‘Third Session—Report Adopted by the Standing Committee’ (6–14 September 1999) <http://www.wipo.int/edocs/mdocs/scp/en/scp_3/scp_3_11.pdf>.

technical elements of the Internet. Likewise, the Global Fund and GAVI are partnerships in which private actors – the pharmaceutical industry and civil society – are not only participants but important decision-makers.

Broader participation is not always normatively preferable, however. There is no reason to think that governance processes are necessarily better when inclusive governance is practiced. While inclusion may improve governance—and plausibly does in many settings—more voices may simply lead to more deadlock. More participation may yield more capture. In the domestic administrative law context, these dynamics are well known.³⁷ Concern with regulatory capture is high, and a substantial literature exists on how and why it occurs. NIMBYism³⁸ is also well known in many contexts. Industry capture, or at least the semblance of such, likely affects a wide range of global bodies, including those surveyed in this project.

Codex Alimentarius, for example, is formally open to both commercial and public interest NGOs. But in practice it is dominated by commercial NGOs. Likewise, the ICH is widely perceived as being influenced by pharmaceutical industry interests.³⁹ This pattern exists in other fields as well. Many comments submitted in the context of the Basel Committee’s public consultation in the development of its accords were from the banking industry, suggesting that even when procedures are formally open to the public, commercial interests dominate them.⁴⁰ And even the Global Fund, whose multi-stakeholder model suggests equality among participants, has been criticized for the *de facto* power imbalances between the commercial and public interest sector in its consultative processes.⁴¹ Despite the risk of capture by regulated industries or particularistic interests with outsized resources, very few global bodies have enacted regulatory frameworks for managing participation.⁴²

In short, inclusive processes of participation do not necessarily mean balanced or fair processes. Often participation will be skewed toward those private actors with the greatest resources, the

³⁷ The classic cite is Samuel Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, Yale Law Journal (1952)

³⁸ In American politics, NIMBY stands for “Not in my back yard”, and is shorthand for the idea that parochial, local interests can often block desirable change.

³⁹ Cite

⁴⁰ Cite

⁴¹ Ayelet Berman, *Towards Better Participation* paper.

⁴² The WHO is the rare exception. The WHO straightforwardly addresses these risks of capture in its “Framework of Engagement with Non State Actors,” adopted in 2016: “WHO’s engagement with non-state actors can involve risks which need to be effectively managed...Risks relate.. in particular to.. (a)conflicts of interest, (b) undue or improper influence exercise by a non-State actor on WHO’s work, especially in... policies, norms and standard setting, (c) a negative impact on WHO’s integrity (...).”⁴² . Id.

greatest interest, or both. Often, they are one and the same: as substantial domestic experience shows, regulated actors will have the greatest incentive to shape regulation, and these actors may also have the greatest resources to do so. That is the heart of the long-standing concern with the capture in domestic administrative law.⁴³ My argument does not depend on stakeholder participation yielding better governance, though that can be a happy and desirable byproduct. It only depends on it being valuable to governments when they govern globally.⁴⁴

In addition to providing valuable information about policy options, private actors also may provide useful information on compliance with global rules and regulations. Groups like Human Rights Watch, for example, have a worldwide reach and they expend significant resources documenting problems around the world. Much of this effort uses a legal frame and often identifies specific international commitments that are being violated or improperly implemented. These reports can be influential and may garner significant media attention. (And given that many international accords lack meaningful review of implementation, or rely merely on self-reporting by parties about their compliance, private monitoring can be an important addition to what little occurs via more official channels.)⁴⁵

The role of private stakeholders in monitoring implementation is clearly contentious, and governments differ on how much of a role, even informal, they are comfortable with private actors playing. But it also reflects some political realities that make private monitoring of commitments attractive to many governments. Principles of sovereignty and general political disinterest in monitoring in some states make it relatively costly to create direct, formal evaluation by other parties or by international organizations. Due to their informal, decentralized nature, private efforts are less readily blocked; private actors would have to be kept out of the process altogether, for even formal bans on compliance discussions or papers can be circumvented around the fringes of meetings and

⁴³ See e.g. Daniel Carpenter and David Moss, eds, *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (Cambridge: 2004).

⁴⁴ Another important caveat must be noted: it is not always necessary to admit private actors into negotiating sessions or decision processes to convey the kind of information I have described above. Perhaps some of these ideas can emerge without their presence. But it seems likely that inclusive processes foster a broader portfolio of positions and arguments than do exclusive processes. Expertise transcends official position papers, and private actors can and do speak informally with many decisionmakers to flesh out details and provide commentary on other ideas.

⁴⁵ On this phenomenon see Raustiala, Reporting and Review Institutions in Ten Multilateral Environmental Agreements, UNEP 2001, <http://apps.unep.org/redirect.php?file=/publications/pmtdocuments/-Report%20and%20Review%20Institutions%20in%2010%20Multilateral%20Environmental%20Agreements-20011196.pdf>

negotiations. In short, in many instances private actors “supply the personnel and resources for managing compliance that States have been increasingly reluctant to provide”.⁴⁶ Again, not all governments welcome this role. But once private stakeholders are actively participating in global governance, even if they are initially welcomed for other reasons, such as technical expertise, they may gravitate toward monitoring, implementation, and enforcement efforts.

Private stakeholders may also provide another important form of information: information about the behavior of government delegations and participants in meetings. Governments want to control the decisions of their national delegations and appointed officials. Treaty negotiations in particular often create tensions between branches of government, where important aspects of foreign affairs may not be directly controlled or overseen by legislatures or political officials in the executive branch. Governments may fear that delegates will exceed their mandates or create political headaches through their positions. Direct participation by private actors is one means by which other government officials can enable outside parties to alert them to undesired delegation actions. In other words, private actors can help minimize a principal–agent problem. As interested parties, at least some private stakeholders have an incentive to both monitor delegates’ actions and inform governmental principals of their findings. Because groups of many persuasions exist, movement in many directions can be covered. This decentralized process is both effective and low-cost. Delegates that move too far away from the preferences of their principals are more likely to be identified and checked.⁴⁷

Political Incentives

Bringing private stakeholders directly into processes of global governance also has political benefits. Private actors get a closer look at the positions of the relevant parties with regard to decisionmaking—especially the positions, preferences, and assumptions of other states. Specific areas of controversy are more apparent, as are the areas where compromise is possible. Problems are more readily identified and, perhaps, analyzed and addressed.

⁴⁶ Chayes and Chayes (n 18) 250–1.

⁴⁷ Unless the NGOs present agree more with the delegates than their principals. But from the principal’s point of view, creating a fire alarm of this kind that is only occasionally pulled in the presence of a fire is still superior to having no alarm at all. On this analogy see Raustiala, *Police Patrols and Fire Alarms in the NAAEC*, 2004 at 256–73.

Negotiating positions have sometimes been described by scholars in spatial terms, with various positions corresponding to points in a multidimensional ‘policy space’. The set of points acceptable to all parties is the bargaining zone. As active participants, private actors become more aware of the shape and location of the bargaining zone. Revealing the structure of the international bargaining process in this way may help to diffuse criticism and placate at least some unsatisfied interests, as stakeholders become more knowledgeable about obstacles—and perhaps more invested in the success of the process. As with many bureaucracies, outsiders often go native—internalizing dominant views and prevailing assumptions. This is most powerful when the private actors involved in global governance are also powerful actors domestically, but that need not be the case. Bringing in a more diverse set of stakeholders may also lead to new ideas about how to reach desirable points in that bargaining space, since private actors have many incentives to provide practical proposals that overcome apparent deadlocks in negotiations, discussions, and decisions. These effects are probably most pronounced in negotiations over new rules and processes. But they can also appear in other settings; virtually any decision about implementation, for example, will contain some degree of bargaining.

Private party participation in global governance may also facilitate the approval and implementation of international rules at the domestic level. This is especially true for new international agreements. Most states have some constitutionally-mandated process of review and consent that is required prior to treaty ratification. In many cases this involves the legislature. Legislatures (and other domestic actors who are veto players) may well reject an international agreement that has been painstakingly negotiated—think of the famous rejection by the US Senate of the Treaty of Versailles settlement in 1919. To use Robert Putnam’s famous concept, there are two levels of the negotiating game, and successful cooperation requires alignment between the two.⁴⁸ One way to secure alignment is to bring some of the important domestic players directly to the international table, thereby effectively “bridging” the levels. Problems can be rectified early, during the negotiation process, rather than late, when renegotiation may be extremely difficult.

This is especially valuable when private actors are powerful domestically. Global governance regimes typically must have some domestic support to succeed. Private interest groups can provide this support or they can withhold it. Thus bridging the two-level game is an attractive strategy for minimizing ratification risk and improving implementation. By bringing these important societal

⁴⁸ RD Putnam, ‘Diplomacy and Domestic Politics: The Logic of Two-Level Games’ (1988) 42 Intl Org 427.

actors into the negotiations process directly, information flow is enhanced, and more importantly, potential opponents may be turned into supporters or at least abstainers.

Global governance bodies are not unaware of this process. For example, in explaining its commitment to working with civil society organizations, or CSOs, the International Monetary Fund argues that "engagement with CSOs can, especially over time, enhance and help translate IMF policy advice to member countries into successful policy."⁴⁹ The WHO's Framework of Engagement with Non-State Actors justifies the WHO's engagement with non-state actors on the basis of the benefits such engagement brings to the work of the WHO, including "the influence that WHO can have on non-state actors' compliance with WHO's policies, norms and standards" and "the wider dissemination of and adherence by non-State actors to WHO's policies, norms and standards."⁵⁰ The inclusion of the R&D pharmaceutical industry – the target of ICH regulation – as ICH members, likewise counters potential resistance at the implementation stage.

This in turn may help explain why participation is often unequally distributed amongst private actors. Pauwelyn, et al note that while "new forms of global governance are often *de jure* broadly open to participation by a broad range of stakeholders, most are *de facto* inaccessible to non-commercial, diffuse interests."⁵¹ The latter type of stakeholder is typically less politically potent than concentrated commercial interests.

Similar dynamics exist in financial regulatory bodies. Bradlow argues that

[T]he Basel Committee is likely to consult, directly or indirectly, with large private banks and organizations representing banks and other entities that it sees as relevant to its work. Thus, informally these consultations are likely to create opportunities for participation by certain entities from outside the Basel Committee member countries in the work of the Basel Committee. However, since the Basel Committee has the discretion in deciding with whom to consult, it is less likely to consult with consumer groups and other civil society groups that may have an interest in the Committee's work. This will be true for civil society groups both from Basel Committee member countries and from elsewhere.⁵²

⁴⁹ IMF guidelines, id.

⁵⁰Article 6 "Benefits of engagement", WHO Framework of Engagement with Non-State Actors

⁵¹ Pauwelyn et al, "Rethinking Stakeholder Governance" *supra*, at 5.

⁵² Daniel Bradlow, Assessing International Financial Reform, "International Economic Law, Globalization and Developing Countries", edited by Julio Faundez & Celine Tan, (2010) at 86-7

Private actors may also have a direct role in implementing global rules. Among other reasons, the WHO justifies its engagement with non-state actors because such actors “support implementation of the [WHO’s] policies and recommendations as decided by the governing bodies, as well as the application of WHO’s technical norms and standards.”⁵³ Likewise, civil society organizations, thanks to their local knowledge and networks, play a key role in implementing Global Fund and GAVI policies and projects. Civil society organizations deliver most of GAVI’s immunization services, train health workers, and support logistics.⁵⁴

In earlier research focused on treaty negotiations I argued that if the skills, resources, and political power private actors wield are useful to state actors, demand for these resources should increase when the scope, complexity, and obligations of a treaty regime grow.⁵⁵ The major new governance initiatives of the 1990s and 2000s, and 2010s—such as the International Criminal Court, chemical weapons control, climate change, tobacco control, and disability rights—are generally more complex and more technically demanding than earlier treaties. And indeed the rules and practices governing participation by private actors in global governance have generally become more inclusive—sometimes much more so.⁵⁶

Moreover, the ways in which non-state actors have been included in treaty processes are broadly consistent with a symbiotic understanding of public and private power. Private actors possess many resources, but those resources and skills are not uniformly useful over time. Policy expertise is most useful at the early stages of negotiations, monitoring most useful in the implementation phase. When governments desire secrecy to air possible compromises, or are at the stage of political horse-trading once positions have solidified, they may find participation undesirable or not useful. And when implementation becomes essentially, private actors may again prove useful. In short, governments face incentives to keep private actors out at some times, and bring them in at others. By this logic, they ought to attempt to meter or calibrate the participation of private actors.

In practice, states have achieved this calibration through the proliferation of working groups and informal meetings that occur in global governance. The negotiations of the WHO’s 2003 Framework Convention on Tobacco Control is representative. This was a major health treaty

⁵³ WHA69.10, WHO Framework of Engagement with Non-State Actors, Article 4

http://www.who.int/about/collaborations/non-state-actors/A69_R10-FENSA-en.pdf?ua=1

⁵⁴ <http://www.gavi.org/about/partners/cso/>

⁵⁵ Raustiala, NGOs in International Treaty-making, in *The Oxford Guide to Treaties* (OUP 2012); Raustiala, The “Participatory Revolution” in International Environmental Law, *Harvard Environmental Law Review*, 1998

⁵⁶ *Id.*

initiative, one of the most important advances of the era. As one close observer notes, a group of stakeholders called the Framework Convention Alliance “encompassed more than 180 NGOs from over 70 countries and had established itself as an important lobbying alliance.” However, its impact in the final negotiations was “hampered by the imposition of restrictions on NGO access to the negotiating sessions. Most sessions of the final INB [the chief negotiating body] were designated as informal, thus providing a pretext for the exclusion of NGO participants.”⁵⁷

This general pattern is not atypical. As in many other negotiations, the Tobacco Convention featured wider access and participation early on—as the basic structure of the regime was being defined and core policy prescriptions debated—and less access later, when the details of essentially fixed positions were being hammered out. This pattern is consistent with the basic claim that private participation does not come at the expense of public power, but instead is often symbiotic with it. Inclusive governance is often—though not always—helpful to governments, even if particular actors may oppose the interests of many governments.

Conclusion

States have traditionally been the central players in global governance. Despite a host of changes that have brought in both new modes of organization and new players, they remain central today. Governments retain substantial power and when they chose, they can wield that power to ensure that governance is multilateral, not multistakeholder, in nature. One need only look to the international trading order to see the strength of the commitment to “members-only” multilateral governance. Still, global governance in the 21st century has distinctive features when compared to the models developed in the postwar period. Most noteworthy is the tremendous increase in private actors participating in governance and the rise of avowedly-multistakeholder forums and processes. To understand what this change toward more inclusive global governance means, and what its future portends, we must understand why it has occurred.

In this chapter I have argued that some fundamental exogenous trends—such as the rise of cheap air travel and the increase in the number of democracies-- have encouraged and facilitated greater participation by private actors in global governance bodies. But a deeper cause of the increase has been the benefits that accrue to governments themselves from a more inclusive and

⁵⁷ J Collin, ‘Tobacco Politics’ (2004) 47 Dev 91, 93.

open process. This is particularly true for governance of highly complex and technical issues, where governance is especially challenging and expertise especially valuable. By bringing valuable resources, networks, and information to the table, multistakeholder processes have allowed for more effective and sometimes more efficient regulation of a host of critical global issues. Private power, in short, has often served public power.

This apparently-symbiotic relationship, though in need of more study, should not be not surprising. We observe it often in domestic regulatory settings. In complex administrative states detailed rules exist to give private actors notice and the ability to comment on proposed regulations. Legislative hearings and other mechanisms allow even greater engagement. Private actors often play a host of important roles in domestic regulation, and they provide extensive input to governance decisionmaking—and at times even act as direct decisionmakers. Yet the rise of powerful regulatory states has gone hand-in-hand with greater inclusivity. Wider participation enabled more and often more effective domestic regulation, and wider participation reflected that the regulatory power of the state was growing.

The armies of lobbyists and private associations in London, Washington, and other major national capitals reflects not the weakness of the modern administrative state, but its power. As global governance increasingly tackles a wider array of complex regulatory challenges, there is no reason to think the international domain will be any different.