

Rethinking Stakeholder Participation in Global Governance  
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Ayelet Berman, Tim Büthe, Martino Maggetti, and Joost Pauwelyn

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## 1. Introduction

In the past two decades international institutions have introduced reforms to include stakeholders that hitherto had been excluded from their rule or standard-setting processes and/or operational activities. This project has examined such reforms and assessed whether and the extent to which such participation reforms have provided voice and influence to marginalized stakeholders. The project focuses on and distinguishes between two kinds of marginalized stakeholders: developing countries and non-state actors representing non-commercial interests, especially diffused social interests. The project further assesses the consequences of the reforms for the effectiveness and legitimacy of global governance. Empirically, the project zooms in on two policy fields: finance and health. It focuses on reforms which have been undertaken in a variety of global financial institutions and global health institutions. To assess the role of the institutional reforms in enhancing participation, the project proceeds through paired comparisons between large emerging v. smaller and/or lower income developing countries (China v. Vietnam; Brazil v. Argentina; India v. Bangladesh/the Philippines).

This project builds on and contributes to the literature on global governance,<sup>1</sup> and more specifically, the literature (in both international law and international relations) on the accountability and legitimacy of global governance.<sup>2</sup> As global governance has become more authoritative, one of the important questions that have emerged is how to keep global institutions accountable and legitimate. The traditional literature on the legitimacy and accountability of international institutions has, by and large, focused on the responsiveness of intergovernmental organizations towards member states. Yet, in this project we advance the argument that international institutions should also be responsive towards external stakeholders. That is, stakeholders who have an interest in or are affected by those institutions' policies and rules, but do not have a meaningful say, if any, in their making. Historically, those most disregarded and marginalized have been developing countries and diffuse social or non-

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<sup>1</sup> Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 *American Political Science Review* 29 (2005). Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 *Vanderbilt Journal of Transnational Law* 501 (2009); *International Organizations as Orchestrators* (Kenneth W. Abbott et al. eds., Cambridge University Press, 2015). Tim Büthe & Walter Mattli, *The New Global Rulers: The Privatization of Regulation in the World Economy* (Princeton University Press, 2011). *Transnational Legal Ordering and State Change* (Gregory Shaffer and Terence Halliday, eds. Cambridge University Press, 2013). Anne-Marie Slaughter, *A New World Order* (Princeton University Press, 2004). Miles Kahler & David A. Lake, *Governance in a Global Economy: Political Authority in Transition* (Princeton University Press, 2003).

<sup>2</sup> *Informal International Lawmaking* (Joost Pauwelyn, et al. eds., Oxford University Press, 2012). Benedict Kingsbury, et al., *The Emergence of Global Administrative Law*, 68 *Law and Contemporary Problems*, issue 2-3 (2005). *The Exercise of Public Authority by International Institutions – Advancing International Institutional Law* (Armin von Bogdandy, et al. eds., Springer 2010). *The Constitutionalization of International Law* (Jan Klabbers, et al. eds., Oxford University Press, 2009). *Conflict of Interest in Global, Public and Corporate Governance* (Anne Peters ed. Cambridge University Press, 2012), *Transparency in International Law* (Andrea Bianchi & Anne Peters eds., Cambridge University Press, 2013).

commercial interests,<sup>3</sup> and we focus on them. In this age of growing interdependence and interconnectedness, the growing authority of international institutions as well as the resulting externalities of their policies, responsiveness towards such external stakeholders is important. This project has sought to contribute to this end.

The paper is organized as follows: We set out the project's main findings (section 2), followed by methodology (section 3). We then set out the typology of participation reforms (sec 4). Building on this typology, we then describe the participation reforms which have been introduced (sections 5-7). We then assess whether these reforms have improved the influence of developing countries (section 8). We then describe the problem of continued imbalanced participation (section 9) and go on to explain the two factors which determine participation: institutional factors (section 10), and stakeholder factors (section 11). We end with a note on managing risks of non-state actor engagement (section 12), and conclude (section 13).

## 2. The Project's Main Findings

Our main findings are summarized as follows:

### General Trends

#### 1. Developing Countries

International institutions in both global finance governance and global health governance have opened up towards developing countries – through membership (e.g. ICH, IMDRF, GlobalG.A.P., Global Fund, GAVI and MARTINO please add examples from finance), redistribution of voting rights (e.g. IMF and World Bank), strengthening of existing members' participation rights (e.g. Codex), or non-decisional participation rights (e.g. ICH, IMDRF MARTINO please add examples).

#### 2. Non-State Actors

Global health governance has also extensively opened up to non-state actors. Treaty based IOs have granted non-decisional participation rights (e.g. Codex and WHO), whereas new forms of informal governance have granted membership rights (e.g. Global Fund, GAVI, ICH, GlobalG.A.P.).

In contrast to global health, global financial governance, with some modest exceptions, has not granted non-state actors membership rights. Notably, multi-stakeholder partnerships are absent from global finance. That said, non-state actors participate through non-decisional means, such as consultations (World Bank, IMF) or notice and comment. MARTINO, agreed? Please add examples.

### Typology of Reforms

We introduce the distinction between reforms, which give the right or opportunity to participate, and good participation reforms which seek to advance fairer and/or more balanced participation.

Further, we distinguish between formal participation and participation in practice. Irrespective of the *formal* rights granted, stakeholders may not be able or not interested in taking advantage of their participation rights, resulting in de facto dominance by developed countries or commercial stakeholders.

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<sup>3</sup> Richard Stewart, 'Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness' (2014) 108 *The American Journal of International Law* 211.

### **Participation: For what purpose?**

Our claim has been that stakeholders should be heard if they are affected by a policy or interested in it. Building on the case studies, it becomes clear, however, that stakeholder participation reforms have been driven by two different purposes: normative ideas or enlightened self-interest. These purposes may overlap or be distinct. The “normative” purpose is to hear stakeholders affected or interested, because that is the fair or right thing to do. This approach builds on theories of justice common in domestic administrative law, such as principles of natural justice. Quite often, however, stakeholder engagement is driven by enlightened self-interest, that is the dependency of the organization on the expertise or knowledge held by stakeholders, or by its desire to include strategic actors for effectively diffusing policies globally.

### **Influence of Stakeholders**

Building on the country case studies, we have circumstantial, anecdotal, evidence that the reforms have improved the participation of some stakeholders in specific cases.

### **Imbalanced Participation**

- Despite the general openness trend towards developing countries, and despite some of the anecdotal evidence on improved participation and influence, participation is often far from balanced between developed and developing countries (e.g. Codex, ICH, IMDRF **MARTINO** please add examples from finance.)
- Nor is participation equal and balanced between commercial and non-commercial interests (e.g. Codex, ICH, GlobalG.A.P., GAVI, **MARTINO** please add examples from finance.).

### **Participation Factors: Institutional and Stakeholder Factors**

What factors determine participation, or how balanced or imbalanced it is? We find that two main factors determine whether and how stakeholders participate: Institutional factors and stakeholder factors. Institutional factors, notably, institutional participation rights, are a precondition to participation, but whether or how stakeholders take advantage of the rights, depends on stakeholder preferences and characteristics. Thus, participation of marginalized stakeholders through institutional reforms alone will not be achieved, as long as stakeholder factors are not addressed.

### **Institutional Factors**

Institutional design determines the participation rights. Here we’ve identified several relevant matters creating imbalances:

1. *Differences in participation rights depends on organization type and/ or it’s purpose*
  - Health related standard-setting bodies (ICH, IMDRF, GlobalG.A.P.), and global financial bodies **MARTINO** please add examples from finance.) have improved the formal participation rights of large emerging countries (Brazil, China and India), but not, or to a lesser extent, of lower income or smaller developing countries (Argentina, Bangladesh, Vietnam and the Philippines). This skewed pattern is a testament of the role of trade and financial concerns as the main drivers behind expansion. Being most concerned with spreading their international or harmonized standards to strategic countries, standard setting bodies have expanded towards them while excluding the rest.
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- In contrast, the global health partnerships – Global Fund and GAVI – seeking to deliver health goods in developing countries, most often in low-income countries, are formally inclusive of lower-income countries. However, being regionally represented rather than individually, developing countries have lost the one country one vote power they have in the IOs.
- Intergovernmental organizations are based on the principle of universality and with one country one vote are most inclusive (WHO, Codex). However, in finance MARTINO

## 2. *Executive Board Decision Making*

Notwithstanding membership rights granted to large emerging countries, in some cases, global institutions have maintained the founding states' advantage, such as by shifting executive bodies decision making from consensus to majority voting and veto rights (e.g. ICH and IMF). MARTINO do you want to expand?

## 3. *Imbalances in Non-State Actor Participation:*

In standard setting bodies in health (ICH, IMDRF, Global.GA.P.) and in global finance in general (Martino, examples please), commercial interests dominate. In some cases they receive more formal rights (as in the case of ICH or GAVI), and in other cases they dominate *de facto* (Codex) (Martino, examples please). The global health partnerships tend to be most inclusive of civil society.

## **Stakeholder Factors**

The institutional right to participate is only a precondition to actual and effective participation. Whether and the extent to which stakeholders take advantage of their rights depends on stakeholder characteristics and preferences. We have identified several such factors: foreign policy, importance/saliency, resources, capacity, policy learning, expertise, national policy autonomy, and domestic legal regime.

## **Differences between Large Emerging and Small Developing Countries**

Two main factors explain differences in participation between the large emerging economies and small low income countries: First, the institutional factors addressed above. Depending on the organization's form/its mission, there are variations in participation rights. Second, stakeholder factors. In any given situation where both large and small countries have participation rights, there will still be variations in participation, and these are linked to the stakeholder factors. They explain the differences in participation between large emerging countries (Brazil, China, India) and lower income or smaller developing countries (Argentina, Bangladesh, Vietnam and the Philippines). Thus, stakeholder factors continue playing an important role in whether and how marginalized stakeholders participate. Many of the stakeholder factors listed are associated with size and economic capabilities, such as resources, capacity and the increased saliency of international topics for large emerging economies. However, some topics such as expertise are independent and explain small country participation even in the absence of resources.

## **Risks of Non-State Actor Participation**

While international governance has democratized by opening up, the engagement of non-state actors introduces risks – of capture and conflict of interest -- which must be managed. So far, the WHO is the only organization which has adopted a comprehensive framework for managing the risks of non-state actor engagement, and it may serve as an inspiration for other organizations, though the jury is still out as to its effectiveness in curbing undue influence. This is an area where more work needs to be done.

## Differences between Global Finance and Global Health

The biggest difference concerns non-state actors. Whereas in global health governance, non-state actors have joined as members in the new, informal governance models (trans-governmental regulatory networks, private standard setting bodies and public private partnerships), in global finance, non-state actors have not been entitled to such membership, and remain active behind the scenes. It is telling that multi-stakeholder partnerships are absent from global financial governance, albeit incredibly popular in global health governance. As regards developing countries, we found that global finance has opened up towards large emerging countries, continuously excluding small, low-income countries. In health, that has only been the case in standard setting organizations (both trans-governmental regulatory networks and private standard setting bodies), whereas public private partnerships have been more balanced and inclusive as are the intergovernmental organizations. The tendency of global finance and health related standard setters to open up to large emerging countries is driven by their desire to include those countries strategic for trade (harmonization) and finance, while maintaining their effectiveness. Partnerships, on the other hand, seek to provide solutions in developing countries, and inclusion of low-income countries serves this purpose. Finally, IOs are bound by the universality principle and this explains their inclusiveness (even when standard setting is concerned, as in Codex).

### 3. Methodology

To examine institutional reforms that have been introduced to include stakeholders that hitherto had been excluded in global financial institutions and global health institutions, the project examines the range of typical global governance models. First, it maps the organizational environment and distills a typology of governance institutions based on their key features. Second, it applies a number of comparative case studies to grasp the consequences of reforms for previously marginalized stakeholders.

As regards stakeholders, the project focus is on ‘marginalized stakeholders’, that is stakeholders who are interested in the work of the global institution or affected by it but lack a voice or participation rights. It distinguishes between marginalized governmental actors and non-state actors. Within the group of marginalized governmental actors, we distinguish between large emerging countries and other developing countries. Within the group of marginalized non-state actors, we distinguish between commercial versus public interest/social interest entities or groups.

As regards the selection of governance institutions, alongside the traditional treaty-based intergovernmental organizations, new forms of global governance are developing rapidly, most notably transgovernmental regulatory networks, multi-stakeholder partnerships and private standard-setting bodies. As such emerging forms of governance are rapidly becoming powerful global venues, their study is increasingly important. Accordingly, cases were selected – for each of the policy fields – to provide variation on each of these four types.<sup>4</sup> For global health, the case studies are the WHO, Codex Alimentarius, International Conference on Harmonization (ICH), the International Medical Devices Regulators Forum (IMDRF), The Global Fund to Fight AIDS, Tuberculosis and Malaria, GAVI Alliance, and GlobalG.A.P.<sup>5</sup> For global finance, the main case studies are the International Monetary Fund (IMF), the World Bank, the Group of Twenty (G20), the Basel Committee (BCBS/BIS), the Financial Action Task Force (FATF), the

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<sup>4</sup> Framing paper

<sup>5</sup> Ayelet Berman, ‘Institutions and Reforms in Stakeholder Engagement in Global Health Governance’ in Joost Pauwelyn Ayelet Berman, Tim Buthe, Martino Maggetti (ed), *Rethinking Stakeholder Participation in Global Governance: Challenges and Reforms in Financial and Health Institutions* (forthcoming) (OUP Oxford).

Financial Stability Board (FSB), the International Organization of Securities Commissions (IOSCO) and the International Accounting Standards Board (IASB).<sup>6</sup>

As regards the comparative case studies, in order to examine the effect the institutional reforms have had on the participation of marginalized stakeholders and to assess their consequences for the effectiveness and legitimacy of the rule-making or operational process, the project focuses on three pairs of developing countries: Brazil and Argentina, China and Vietnam, as well as India, Philippines/ Bangladesh. For each of these pairs, one country is a country from the Global South whose greater role in global governance is expected as a function of its large domestic market, sustained high levels of economic growth, and generally rising political and economic power (Brazil, India, China). Each of these countries is paired with a country from the same geographic region that is highly comparable on theoretically relevant variables, but which cannot rely on its fast-growing market size, and consequent political and economic power, to be included in global governance (Argentina, Philippines/Bangladesh, Vietnam).

#### **4. Typology of Stakeholder Participation Reforms**

Stakeholder participation reforms take several forms. We distinguish between two types of reforms, based on their purpose:<sup>7</sup>

##### ***A. Reforms Setting out the Right or Opportunity to Participate:***

The first kind of reforms set out the right or the opportunity to participate. Building on Richard Stewart's work, we distinguish between *decisional* and *non-decisional* participation rights.<sup>8</sup>

There are roughly two kinds of decisional participation reforms:

- (1) the granting of membership rights,
- (2) the redistribution of voting quotas..

Non-decisional participation takes many different forms and includes:

- (1)observer status,
- (2)associate membership,
- (3)outreach bodies,
- (4)consultations
- (5)notice and comment/public consultations
- (6) expert committees

We distinguish, accordingly, between three types of reforms setting out the right or the opportunity to participate: membership, redistribution of quota rights, and non-decisional participation reforms.

##### ***B. Good Participation Reforms***

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<sup>6</sup> Martino Maggetti and Olga Kovarzina, 'Institutions and Reforms in Stakeholder Engagement in Global Financial Governance: An Overview' in Ayelet Berman, Tim Buthe, Martino Maggetti, Joost Pauwelyn (ed), *Rethinking Stakeholder Reforms in Global Governance: Challenges and Reforms in Financial and Health Institutions (forthcoming)* (OUP Oxford).

<sup>7</sup> Ayelet Berman, Global Health chapter

<sup>8</sup> Stewart (n 3).

These reforms seek to achieve equitable or fair participation, and secure rule-making in the public's interest. These reforms support stakeholders in overcoming financial or capacity barriers to participation or manage the risks associated with non-state actor participation.

In what follows, based on this typology, we distinguish between reforms for the participation of developing countries and reforms for the participation of non-state actors, in the selected global finance and global health bodies. We will address “good participation” reforms towards the end of the paper, following the discussion of the problems that give rise to the need for such reforms.

## 5. Membership

### A. *Developing Countries*

In both global health and global financial governance, there have been significant reforms for the inclusion of developing country members.

In global finance, the Basel Committee on Banking Supervision was established in 1974 by central bankers from twelve countries from North America and Europe (Belgium, Canada, France, Germany, Italy, Japan, the Netherlands, Sweden, Switzerland, United Kingdom, Luxembourg and the United States). In 2009, following the global financial crisis, it expanded its membership to include Australia, Brazil, China, India, Korea, Mexico and Russia, as well as Argentina, Indonesia, Saudi Arabia, South Africa, Turkey, Hong Kong and Singapore. It currently has 28 members, and Chile, Malaysia and the United Arab Emirates have joined as observers.<sup>9</sup> The Financial Action Task Force (FATF) was established in 1989 by 16 members and has expanded to 37 members, including most major financial centres in the world. It also includes observers and associate members.<sup>10</sup> The Financial Stability Forum was established in 1999 by G7 finance ministers and Central Bank governors. After the financial crisis, it was renamed the Financial Stability Board (FSB) and expanded its membership to 25 countries: Argentina, Australia, Brazil, Canada, China, France, Germany, Hong Kong SAR, India, Indonesia, Italy, Japan, Korea, Mexico, the Netherlands, Russia, Saudi Arabia, Singapore, South Africa, Spain, Switzerland, Turkey, UK, US, and the EU. The FSB also integrated six “Regional Consultative Groups”, who are invited to attend meetings.<sup>11</sup> The G20 was established in 1999 as a forum for finance ministers and central bankers. Following the 2008 financial crisis, the G20 became a forum for heads of state (in lieu of the G8), becoming “the premier forum for international economic cooperation.” The G20 comprises 19 countries and the European Union.<sup>12</sup> Finally, private standard-setting bodies – such as the IASB since 2009 – have also been expanding their membership to ensure a certain geographical balance.<sup>13</sup>

In global health, in 2016 the ICH introduced a major governance reform with the goal of becoming a “genuinely global forum” and expanding decision-making beyond the original, ‘club’ ICH members (U.S., EU and Japan) to include also those regional initiatives and drug regulatory authorities which had been, until that point, members of the Global Cooperation Group and the Regulators Forum. To this end, the ICH established an association under Swiss law, with an assembly (where guideline topics are selected and final guidelines adopted), a management committee (which oversees all of the operational aspects of the ICH), and working groups (where draft guidelines are being developed). The new ICH association enables regional

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<sup>9</sup> Maggetti and Kovarzina (n 6).

<sup>10</sup> *ibid.*

<sup>11</sup> *ibid.*

<sup>12</sup> *ibid.*

<sup>13</sup> *ibid.*



initiatives and drug regulatory authorities to apply for membership or observer status. Alongside the founding regulators (“founding regulatory members”), it introduced new categories of membership and of observer status: So far, Switzerland and Canada have joined as “Standing Regulatory Members”, and Brazil, China, Singapore and South Korea as “regulatory members”.

The International Medical Devices Regulators Forum (IMDR), which harmonizes medical device regulatory guidelines and practices, was established in 1999 by medical device regulators from the U.S., the EU, Japan, Australia and Canada and expanded its membership in 2011 to regulators from Brazil, China, Russia, and Singapore. India has also been invited but has not yet confirmed its membership. Private standard-setting bodies – such as the GlobalG.A.P., was originally established by European retailers and producers and now includes members from Asia, South America and Africa.<sup>14</sup>

Finally, the two multi-stakeholder partnerships – the Global Fund and GAVI – have been inclusive of developed and developing countries, from both ‘big’ and ‘small’ countries.<sup>15</sup> The GlobalG.A.P. too has included firms from developing countries.<sup>16</sup> In contrast, in global finance, partnerships are not a prevalent mode of governance.<sup>17</sup>

### ***B. Non-State Actors***

The question of non- state actor membership alongside governments is one of the most important differences between global health and global finance governance. Whereas non-state actors have been included as members alongside governments in new governance forms in global health, that has not been the case in global finance, where membership has remained mostly limited to states. Examples of non-state actor membership in global health are the Global Fund to Fight AIDS, Tuberculosis and Malaria or GAVI. In these partnerships, the private sector, foundations, and civil society, collaborate with governmental actors as equal members (at least formally—see below).<sup>18</sup> While partnerships are extremely popular in global health governance, it is telling that they are absent from global finance. Non-state actors have also been included as members in certain trans-governmental regulatory networks – the ICH’s members were originally government agencies and pharmaceutical industry associations. Finally, there has also been a rise in entirely private standard setting bodies such as the GlobalG.A.P. where industry is a member.<sup>19</sup>

## **6. Redistribution of Voting Quotas in Governing Bodies**

In global finance, the IMF and World Bank have redistributed voting quotas. The IMF has 188 members, yet the unequal distribution of quota votes on the executive committee gave a selected group of western countries the power to dominate the agenda (especially the U.S. which is the only country with veto power). Criticized for this imbalance, following the financial crisis, in 2008 and 2010, the IMF introduced ‘quota and voice’ reforms which transferred voting power from the dominant, developed countries, to hitherto marginalized emerging and developing countries, by rebalancing the quotas to better reflect the countries’ economic weight, and by increasing the basic votes to give low income countries more voice. Accordingly, the quota of 54 countries was increased, and the top ten countries with the highest shares now represent the top ten countries in the world economy – U.S., four European countries, Japan, as well as Brazil,

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<sup>14</sup> Ayelet Berman, Stakeholder Participation reforms in Global Health Governance

<sup>15</sup> Ayelet Berman paper, Gulen Atay paper, David Gartner paper

<sup>16</sup> Ayelet Berman paper

<sup>17</sup> Maggetti and Kovarzina (n 6).

<sup>18</sup> Ayelet Berman paper, Gulen Atay paper, David Gartner paper

<sup>19</sup> Ayelet Berman paper

China, Russia and India.<sup>20</sup> In 2010, the World Bank underwent a similar quota reform.<sup>21</sup>  
MARTINO please expand.

## 7. Non-Decisional Participation Rights

### A. *Developing Countries*

All trans-governmental regulatory networks – in both health and finance-- have set up measures for engaging stakeholders on a non-decisional basis. Often these mechanisms are in addition to the membership rights mentioned above, yet sometimes, only non-decisional rights are offered. While membership rights in health related transgovernmental regulatory networks, private standard setting organizations and global finance, are largely given to strategic, large emerging economies (see above), non-decisional participation rights are typically granted to smaller or low-income countries or regional organizations representing them.

In global finance, for example, Israel and Saudi Arabia are observers at the FATF, and several other countries or regional organizations are associate members. In the FATF, regional groups, such as the Asia/Pacific Group on Money Laundering (APG), the Caribbean Financial Action Task Force (CFATF) are Associate Members. Observers are mostly intergovernmental organizations or large development banks. These include the European Bank for Reconstruction and Development (EBRD), Europol, Eurojust, and the IMF. Regional development banks from less developed regions are included, as well, such as the African Development Bank and the Asian Development Bank.<sup>22</sup>

In the Basel Committee, Chile, Malaysia and the United Arab Emirates have joined as observers, as have several supervisory groups, international agencies, and other bodies such as the Bank for International Settlements (BIS), Basel Consultative Group, European Banking Authority, European Commission and the IMF. Additionally, the Basel Committee started the International Conference of Banking Supervisors (ICBS) serving as a forum for discussions and information-sharing among senior supervisors from many countries – over 100 in 2004, which convenes every other year.<sup>23</sup> The FSB has set up “Regional Consultative Groups”.<sup>24</sup>

Sometimes non-decisional participation ends up being a stepping stone for decisional participation: Before introducing the membership reform in 2016, the ICH gradually introduced, since 2005, non-decisional participation rights for developing countries. At first, the ICH set up the ‘Global Cooperation Group’ to collaborate with regional harmonization initiatives such as Asia-Pacific Economic Cooperation (APEC), ASEAN, Pan American Network for Drug Regulatory Harmonization (PANDRH), Southern African Development Community (SADC), the Cooperation Council for the Arab States of the Gulf (GCC), and the East African Community (EAC). In 2009, the Global Cooperation Group expanded to include drug regulatory authorities (DRAs) from Australia, Brazil, China, Chinese Taipei, India, Russia, Singapore and South Korea. In 2007, the ICH then set up a ‘Regulators Forum’ with these regulatory authorities from mostly emerging countries. In all cases, participation has been on a

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<sup>20</sup> Maggetti and Kovarzina (n 6).

<sup>21</sup> *ibid.*

<sup>22</sup> *ibid.*

<sup>23</sup> *ibid.*

<sup>24</sup> *ibid.*

non-decisional basis. The Regional Harmonization Initiatives (RHIs) and DRAs have also been allowed to participate as observers in working groups and steering committee meetings, yet such participation has been non-decisional. It was only in 2016 that some of these countries became members (see above), though most of the regional initiatives (APEC, ASEAN, EAC, GHC, PANDRH and SADC) and drug regulators (India, Cuba, Mexico, Colombia, Russia, South Africa, Kazakhstan, Chinese Taipei, Australia) have opted to join as observers.<sup>25</sup>

### **B. Non- State Actors**

All of the organizations in both finance and health have procedures in place for engaging non-state actors. Indeed, in the past three decades, international bodies in a broad range of fields<sup>26</sup> have formally opened-up their rule-making and/or operational processes to non-state actors.<sup>27</sup> The tools used include consultations,<sup>28</sup> online notice and comment,<sup>29</sup> public meetings,<sup>30</sup> advisory or expert committees,<sup>31</sup> granting of observer status,<sup>32</sup> etc. Essentially all intergovernmental organizations (IOs) have transformed from exclusive member state organizations to organizations which engage non-state actors (in a non-decisional manner).<sup>33</sup> As Jonas Tallberg and colleagues demonstrate, from the 1990s onwards there has been a very sharp increase in formal, non-state stakeholder access.<sup>34</sup> While the share of openness was at 20% in 1950, this doubled to about 40% in 1990, and then almost doubled again over the next 20 years, to 70 % in 2010. A OECD survey of fifty international organizations supports Tallberg's work, demonstrating that all surveyed international organizations have some form of stakeholder engagement measures in place.<sup>35</sup>

In global health, non-state actors' non-decisional participation rights are extensive, on the basis of a variety of procedures. They participate as observers (e.g. WHO, Codex, ICH, IMDRF), as

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<sup>25</sup> Ayelet Berman, Stakeholder Participation reforms in Global Health Governance

<sup>26</sup> Anne Peters, Till Förster and Lucy Koechlin, 'Towards Non-State Actors as Effective, Legitimate, and Accountable Standard Setters' in Anne Peters and others (eds), *Non-State Actors as Standard Setters* (Cambridge University Press) <<http://ebooks.cambridge.org/ref/id/CBO9780511635519A034>> accessed 18 May 2017.

<sup>27</sup> E.g. Kenneth W Abbott, et al., *Organizational Ecology and Institutional Change in Global Governance*, 70 INTERNATIONAL ORGANIZATION 247(2015). Tim Büthe and Walter Mattli, *The New Global Rulers : The Privatization of Regulation in the World Economy* (Princeton University Press 2011).

<sup>28</sup> E.g. Codex 8-step decision making procedure which includes consultation "Step procedure for developing standards and related texts" See Codex Procedural Manual, <http://www.fao.org/fao-who-codexalimentarius/procedures-strategies/procedural-manual/en/>; Consultations with civil society organizations : general guidelines for World Bank staff 2000 1. FATF, Consultation and Dialogue with Non-Profit Organizations, <http://www.fatf-gafi.org/publications/fatfrecommendations/documents/npo-consultation-march-2015.html>.

<sup>29</sup> E.g. OECD "Guidelines for Online Public Consultation", <http://www.oecd.org/about/civil-society/guidelinesforonlinepublicconsultation.htm>; ISO, IASB, IEC, Basel Committee, ICH, IMDRF

<sup>30</sup> e.g. World Bank and IMF Civil Society Policy Forum, The International Monetary Fund, Factsheet, The IMF and Civil Society Organizations, April 5, 2016, <http://www.imf.org/external/np/exr/facts/civ.htm>; ICANN, 'Beginner's Guide to Participating in ICANN'.

<sup>31</sup> e.g. the OECD Business and Industry Advisory Committee to the OECD (BIAC), the Trade Union Advisory committee to the OECD, <http://www.oecd.org/about/civil-society/the-oecd-and-civil-society.htm>

<sup>32</sup> e.g. Codex observers, see Codex Procedural Manual; United Nations Environmental Program (UNEP), Rules of Procedure for the Governing Council; Financial Action Task Force observers FATF Members and Observers, <http://www.fatf-gafi.org/about/membersandobservers/>

<sup>33</sup> P. 4-9.

<sup>34</sup> His survey covers 298 IOs. See also Steve Charnovitz, 'Two Centuries of Participation: NGOs and International Governance', 18 Michigan Journal of International Law (1996-1997) 183, at 265-268.

<sup>34</sup> Id.

<sup>35</sup> OECD, *International Regulatory Co-Operation: The Role of International Organisations in Fostering Better Rules of Globalisation* (OECD Publishing 2016). P. 85

experts (e.g. WHO, Codex, ICH, IMDRF), in notice and comment procedures (e.g. ICH, IMDRF, GlobalG.A.P., WHO), through national consultations (e.g. Codex, Global Fund, GlobalG.A.P.), as donors (e.g. WHO, GAVI), partnerships (e.g. WHO) and sitting on national delegations (e.g. Codex and WHO).<sup>36</sup>

In contrast, non-state actors' non-decisional participation rights in global finance are much more restricted, especially in the newer forms of informal governance, or in transgovernmental regulatory networks, where most influence remains at the state level. [Martino, given the openness of the IMF and WB, is this conclusion correct? And what about participation behind the scenes which is known to be very influential?] While stakeholder reforms engaging non-state actors have been very significant in global health, it has been minor in global finance. Even though financial bodies have made some effort to include non-state actors, in most cases improvements have been marginal and very indirect, with some exceptions, such as the Basel Committee notice-and-comment procedure.<sup>37</sup> When non-state actors have been included, they disproportionately represent business interests, while NGOs and other nonprofit actors are almost fully excluded. Thus, while reform intensity towards non-state actors in global finance has been low and uneven, it has been high in global health.

That said, the traditional IOs in finance, such as the IMF and World Bank, have developed some instruments for non-state actor engagement, and introduced various mechanisms for participation by civil society organizations (CSOs). The IMF definition of civil society includes “business forums, faith-based associations, labor unions, local community groups, nongovernmental organizations (NGOs), philanthropic foundations, and think tanks” and excludes anything governmental, media, or individual businesses.<sup>38</sup> At the global level, CSOs are involved via communication with the IMF management, in meetings and forums. The public is allowed to participate in consultations run by the IMF; it can also participate in meetings and seminars on specific policy or country issues, or to review existing IMF policies. CSOs can also attend seminars and provide comments. Additionally, the IMF and the World Bank together organize a Civil Society Policy Forum occurring alongside the Annual and Spring Meetings of the organizations. CSOs can participate, as well as organize their own sessions. There is also a CSO Fellowship Program during those Meetings. The Independent Evaluations Office (IEO) has collaboration platform with CSOs. At the country level, the involvement occurs via the IMF Managing Director or surveillance mission meetings with CSOs, for instance, at country visits. When dealing with developing countries on issues of poverty reduction, such meeting options also exist, notably for consultation purposes when designing IMF programs. Finally, the resident representatives of the IMF interact with the local CSOs.<sup>39</sup>

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To conclude, international institutions in both global finance and global health have opened up towards developing countries – through membership, redistribution of voting rights or non-decisional participation rights. While global health governance has also extensively opened up to non-state actors (through membership or non-decisional participation rights), global finance, with some exceptions, has not granted significant non-state actors participation rights, or has done so very modestly. (Martino: are we certain about this conclusion, given that IMF and WB engage civil society quite broadly?)

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<sup>36</sup> Ayelet Berman, Stakeholder Participation reforms in Global Health Governance

<sup>37</sup> Martino Maggetti, ‘The Effects of Stakeholder Reforms on Global Financial Governance’, *Rethinking Stakeholder Participation in Global Governance: Challenges and Reforms in Financial and Health Institutions*.

<sup>38</sup> The International Monetary Fund, Factsheet, The IMF and Civil Society Organizations, April 5, 2016, <http://www.imf.org/external/np/exr/facts/civ.htm>

<sup>39</sup> Maggetti and Kovarzina (n 6).

In what follows we assess whether these reforms have improved influence.

## 8. Why have Organizations Reformed Stakeholder Engagement Practices?

International institutions have come under attack for excluding stakeholders, and their democratic legitimacy has been questioned.<sup>40</sup> Intuitively we may be drawn to an explanation which links the reforms to this legitimacy crisis. While this has certainly played a role in some organizations, especially those that are in the public light such as the World Bank and the WHO, we find that for many organizations, reforming has been in their enlightened self-interest. Following the 2008 financial crisis, governments understood that in an interconnected and interdependent world they could no longer remain closed before strategic countries in the global financial market, resulting in the expansion of most global finance bodies (e.g. Basel, IMF, Martino please add).<sup>41</sup> Moreover, in a competitive global economy, governments and their industries seek to diffuse their standards, and integrating the new economic actors serves that purpose. Thus, ultimately, in the standard -setting bodies in both finance and health, expansion has predominantly been driven not by concerns about fairness towards affected countries, but by the original members' self-interest in staying relevant and governing effectively in a globalized economy.<sup>42</sup>

The same holds true regarding the integration of non-state actors. In many cases, their growing inclusion has not been driven by concerns about being fair towards affected stakeholders, but by the growing dependency of governments on their resources and expertise. That is why we see a tendency to engage the private sector (e.g. Codex, ICH), and to receive donations from philanthropic donations (Gates and WHO/GAVI) Martino please add examples.

## 9. The Evidence on Improved Participation

As described above, global financial bodies and global health bodies have opened up towards developing countries, and in the case of global health, also towards non-state actors. Have marginalized stakeholders, thanks to these reforms, been able to better influence the decision or policy-making outcomes?

In what follows, on the basis of the country case studies on Brazil's, Argentina's, Vietnam's, China's, India's, Philippines' and Bangladesh's participation in global finance and global health bodies, we assess the impact these reforms have had on their influence and impact. As we shall see below, in some cases, the reforms have indeed allowed previously excluded stakeholders to influence outcomes. Thus, there is anecdotal evidence of such influence, in at least some cases.

The empirical country case studies demonstrate that in certain cases the reforms have boosted the participation of previously excluded countries. Henrique Moraes and Facundo Aznar, in their in-depth examination of Brazil's and Argentina's participation in the G20, IMF, FSB and FATF demonstrate that the reforms have enabled increased participation by both Brazil and Argentina, and that largely, both countries have taken advantage thereof, have been voicing their opinions, and advancing their initiatives, resulting in a greater (yet varying) degree of influence.<sup>43</sup> In her

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<sup>40</sup> Framing paper

<sup>41</sup> Maggetti and Kovarzina (n 6).

<sup>42</sup> Ayelet, Accordion Governance paper

<sup>43</sup> Henrique Choer Moraes and Facundo Perez Aznar, 'Brazil and Argentina's Participation in Global Financial Governance', *Rethinking Stakeholder Participation in Global Governance: Challenges and Reforms in Financial and Health Institutions* (2017).

study of China's participation in global finance, Weiwei Zhang illustrates China's increased participation in the G20, FATF, and the Basel Committee, though having joined late in the process, China's impact on the making of Basel III bank capitalization rules has been limited.<sup>44</sup>

In global health, André de Mello e Souza and Facundo Aznar find that that ICH reforms have allowed for more input and a greater diversity of perspectives, including by Brazil.<sup>45</sup> Peter Payoyo illustrates how the Codex Trust Fund (CTF) has improved the Philippines' participation in Codex on matters of national saliency. Thanks to the CTF, the Philippines first active involvement in the technical work of Codex took place in the 1990s, concerning 'carrageenan', a leading export product. Moreover, thanks to the CTF, the national codex committee in the Philippines was launched, building capacity and enabling the Philippines to attend meetings and develop country positions on technical matters, such as its scientific contribution in 2006 on the proposal on 'maximum level of lead in fish' on the Committee on Food Additives and Contaminants.<sup>46</sup>

Moreover, an effect typically ignored in the literature, yet emerging from the case studies, is that the Global Fund and GAVI have had positive effects on the participation of previously excluded stakeholders – at the *national* level. For countries to receive Global Fund grants they must demonstrate that civil society and other excluded groups have been included in country coordinating mechanisms.<sup>47</sup> According to Souza's and Aznar's paper, this has resulted in better civil society and NGO involvement in Brazil, and the improvement of national health governance. According to Cheng and Do's paper, GAVI has supported the establishment of a Chinese office, thereby improving local health governance and improving access of different players to the Chinese health system.

Martino please add examples.

## 10. Imbalanced Participation Remains a Problem

As described above, the general trend in both global health and global finance is of opening up towards developing countries and non-state actors, and we have evidence of improved influence. The devil is, however, in the details, and a close inspection reveals that imbalances in participation – between developed and developing countries, as well as between commercial and non-commercial interests – often remain. How can this be explained?

We find that there are two factors which determine participation: Institutional factors and stakeholder factors. As we shall see below, notwithstanding institutional participation rights, stakeholders may not be able and may not want to take advantage of their rights due to stakeholder preferences and characteristics. We look at each next.

## 11. Institutional Factors

Institutional factors encompass the institutional rules and other institutional dynamics.

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<sup>44</sup> Weiwei Zhang, 'China and Vietnam in the Emerging Global Financial Architecture' in Joost Pauwelyn Ayelet Berman, Tim Buthe, Martino Maggetti (ed), *Rethinking Stakeholder Participation in Global Governance: Challenges and Reforms in Financial and Health Institutions* (forthcoming) (2017).

<sup>45</sup> Interview with Brazilian regulatory official, cited in Andre de Mello e Souza and Facundo Perez Aznar, 'The Participation of Brazil and Argentina in Global Health Governance', *Rethinking Stakeholder Participation in Global Governance: Challenges and Reforms in Financial and Health Institutions* (2017).

<sup>46</sup> Peter Payoyo, 'Philippine Participation in International Health Governance Institutions' in Joost Pauwelyn Ayelet Berman, Tim Buthe, Martino Maggetti (ed), *Rethinking Stakeholder Participation in Global Governance: Challenges and Reforms in Financial and Health Institutions* (forthcoming) (OUP Oxford 2017).

<sup>47</sup> Berman (n 5).

### ***A. Differences in Participation Rights Depends on the Form of the Organization and/or its Purpose<sup>48</sup>***

Institutional participation rules are a precondition for participation, and quite often they maintain imbalanced participation between the original developed country members and the large emerging countries, or with the small income countries.

As regards *formal* participation rights, there is a variation in institutional participation rights depending on the organizational type and the organization's mission:<sup>49</sup>

#### *1. Standard setting bodies and regulatory networks (health) and global finance*

The most significant expansion in health-related trans-governmental regulatory networks (ICH, IMDRF) and private standard setting bodies (GlobalG.A.P.), and in global finance (Base, IMF etc. MARTINO please add) has been towards large emerging economies – leading to the inclusion of Brazil, China and India – and continuously excluding smaller and/or lower income developing countries – leaving Argentina, Vietnam and Philippines/Bangladesh out in most cases. Smaller and/or lower income countries have either been completely excluded or have received weaker participation rights than large emerging countries. In some cases, they are represented indirectly through regional organizations, yet such regional organizations typically lack decision-making rights, and often their main purpose is implementation of the standards in the region concerned rather than representing the interests of the region's members in the rule-making process. Thus, the general trend has been that most of the expansion (with some exceptions) has been towards large emerging economies (Brazil, China and India) and not or to a lesser extent towards smaller and/or lower income developing countries (Argentina, Bangladesh, Vietnam and Philippines).<sup>50</sup>

As standard-setting bodies are concerned with the global diffusion of their standards to relevant market actors, most of the standard-setting bodies observed in both finance and health (Basel Committee, FATF, ICH, IMDRF, GlobalG.A.P), have expanded to integrate emerging economies or economies of strategic market importance, yet continue to exclude smaller and/or lower income countries, which are also less influential in terms of political and economic power.

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In global health, the ICH's reforms have integrated emerging pharmaceutical markets. André de Mello e Souza and Facundo Aznar find that ICH reforms have allowed for more input by Brazil. While the reforms have not put Brazil on entirely equal footing with the founding members (see below), it has, as de Mello and Aznar illustrate, improved Brazil's voice.<sup>52</sup> Similarly, as Cindy Cheng and Anh Do illustrate, being the largest drug market and having the largest active pharmaceutical ingredient market, China's role in the ICH has increased.<sup>53</sup> In contrast, the smaller countries – Argentina, Vietnam and the Philippines/Bangladesh, have not been invited to participate directly in the ICH, and they do not fulfill the criteria for inclusion. Most of their participation is indirect, through regional organizations such as ASEAN or PANDRH. We see a

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<sup>48</sup> Joost and Ayelet paper

<sup>49</sup> Joost and Ayelet paper

<sup>50</sup> Joost and Ayelet paper

<sup>51</sup> Joost and Ayelet paper

<sup>52</sup> Souza and Aznar (n 44).

<sup>53</sup> Cindy Cheng and Anh Do, 'Getting a Seat at the International Health Table: A Case Study Comparison of China and Vietnam', *Rethinking Stakeholder Participation in Global Governance: Challenges and Reforms in Financial and Health Institutions* (2017).

very similar dynamic in the IMDRF, with the inclusion of Brazil, China and India, but the exclusion of Argentina, Vietnam and Philippines/Bangladesh.

The GlobalG.A.P., which sets private food standards, is a further example. Although formally open to firms from around the globe compliance with GlobalG.A.P. standards is a precondition of membership. While export-oriented countries or companies seek to comply with such standards, implementing them can be very costly, and this too creates a barrier to participation by smaller developing countries, as well as small or medium sized companies. As a result, while formally open to everyone, the GlobalG.A.P. remains dominated by European firms.<sup>54</sup> For example, although Brazilian and Argentine firms have joined GlobalG.A.P. they still have much fewer representatives than European companies. Moreover, GlobalG.A.P. makes more efforts to engage bigger markets such as China, while giving smaller markets such as Vietnam less attention.<sup>55</sup>

In finance, the Basel Committee too has expanded to include Brazil, India and China, yet Argentina, Bangladesh, Philippines and Vietnam remain excluded. And the FATF has expanded to include Brazil, China and India, yet Vietnam and Bangladesh remain outsiders. Regional development banks from less developed regions are only included as observers, such as the African Development Bank and the Asian Development Bank.<sup>56</sup> In the FSB, expansion has included Brazil, China and India, as well as Argentina, yet the Philippines, Bangladesh, and Vietnam remain excluded. The G20 also continues to exclude these developing countries (though Argentina is included).<sup>57</sup>

Likewise, while the IMF quota reforms have given developing countries more voting rights than hitherto, proportionally some countries still have small weight in comparison to their economic weight. Notably, China, with 17.2% of the world GDP, now has 6.16% of the shares, though the U.S., with 15.7% of world GDP, has 16.73% of shares.<sup>58</sup> Critics have, questioned the effectiveness of this reform to shift the balance of power. As Maggetti and Kovarzina highlight, industrialized European countries and the US continue to hold a disproportionately high amount of power.<sup>59</sup>

Notwithstanding formal participation rights, underlying power asymmetries still affect participation. Even when all stakeholders are formally given equal participation rights, underlying power asymmetries remain a problem. In the Basel Committee, despite equal participation rights and consensus-based decision making, the U.S., Europe and Japan are said to play outsized roles in the Basel Committee and the FSB.<sup>60</sup>

To overcome such exclusion and increase their voice, in some cases, small states and/or low-income states have established coalitions or regional organizations. For example, discontented about their exclusion, several regional organizations (such as ASEAN or the African Union) and the “Global Governance Group (3G)”, a group of low-income and small countries outside the G-20 led by Singapore, demanded in 2010 that the G-20 engage with them to facilitate “greater

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<sup>54</sup> Souza and Aznar (n 44).

<sup>55</sup> Cheng and Do (n 52).

<sup>56</sup> Maggetti and Kovarzina (n 6).

<sup>57</sup> *ibid.*

<sup>58</sup> Zhang (n 43). (Numbers are from 2015).

<sup>59</sup> Maggetti and Kovarzina (n 6).

<sup>60</sup> DA Singer, *Regulating Capital: Setting Standards for the International Financial System* (Cornell University Press 2007). 36-66.



legitimacy”,<sup>61</sup> and they have been invited on an *ad hoc* basis. Argentina has indirect access to the ICH through PANDRH, and Vietnam and Indonesia through ASEAN (both regional organizations have observer status).<sup>62</sup> At the same time, the main role of these organizations is to support ICH standard implementation in the region rather than voice the interests of the region’s members. On the other hand, as shown by Henrique Choer Moraes, the FATF and the FSB have successfully expanded their organizational reach by establishing regional branches as a means to engage jurisdictions that are not members of the central institution.<sup>63</sup>

## 2. *Global Health partnerships*

While initially there may have been slight imbalances (with developed countries holding one more seat than developing countries in GAVI), currently, the global health partnerships examined (GAVI, Global Fund) have been given equal board membership to developed and developing countries.<sup>64</sup> However, as board membership is representative of recipient or implementing regions (rather than individual states), developing countries have lost some of the power they have in the intergovernmental organizations such as the WHO and Codex, where a one country one vote rules.

## 3. *Intergovernmental organizations*

The intergovernmental organizations (WHO, Codex), given their universality principle –are *formally* inclusive of developing countries.<sup>65</sup>

### ***B. Executive Board Decision-Making: Shift from Consensus to Veto Rights***

Notwithstanding the inclusion of new state members, through decisional rules, some of the standard-setting bodies preserve inequality between the founding members and the new members. One such tool has been to give founders *veto rights*. For example, before the reforms, decisions in the ICH were made by way of consensus. As part of the reform which expanded membership rights, the ICH introduced a distinction between types of membership and introduced majority voting as well as veto rights for the founding members (U.S., EU and Japan) on the ICH’s management committee, which has most of the agenda setting power on matters to be harmonized and approves the final guidelines. New members such as Brazil, China and India lack such power, which reduces their capacity to influence outcomes.<sup>66</sup>

Martino, please add on the IMF

Other ways to maintain inequality are giving new members *non-decisional* participation rights. For example, some of the Brazilian and Argentinian firms that joined GlobalG.A.P. have been limited to a membership category that does not have decisional rights.<sup>67</sup>

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<sup>61</sup> G20, ‘Invitation to Non-Members of the G20 to the G20 Summit of Cannes’ (2011) <<https://ca.ambafrance.org/Invitation-to-non-members-of-the>>. M. Singapore, Press Statement by the Global Governance Group (3G) on the Outcomes of the G20 Summit in Hamburg, Germany, 7 to 8 July 2017.

<sup>62</sup> Souza and Aznar (n 44). Payoyo (n 45).

<sup>63</sup> Henrique paper

<sup>64</sup> Ayelet Berman, Stakeholder Participation reforms in Global Health Governance; Gulen paper, David Gartner paper.

<sup>65</sup> Ayelet Berman, Stakeholder Participation reforms in Global Health Governance; Gulen paper, David Gartner paper.

<sup>66</sup> Ayelet paper; Souza and Aznar (n 44).

<sup>67</sup> *ibid*.

### ***C. Imbalances in Non-State Actor Participation***

Although as a general trend global health bodies have opened up to non-state actors, participation is quite often skewed towards business interests.<sup>68</sup> Governments often lack the technical or scientific expertise needed for standard-setting, and this information asymmetry and dependency drives the inclusion of business and commercial groups. In contrast, public interest groups (representing consumers or patients) remain largely excluded.

As noted below, this may be a result of formal participation rules or simply how things are playing out in practice. In health-related transgovernmental regulatory networks (ICH, IMDRF) and private standard setting bodies (GlobalG.A.P.), participation has been formally targeted at including business and industry bodies. As a recent OECD study shows, selective engagement is quite common, and in most of many of our cases, business stakeholders were selected. Also in GAVI, industry has more seats on the board than civil society.<sup>69</sup> In some cases, the IOs do not distinguish between commercial and not-for profit interests in their definition of NGOs (as in the WHO or Codex), yet in practice, most stakeholders end up being from the business sector (as in Codex, or in the notice and comment procedure in Basel), or NGOs are from western countries (WHO).<sup>70</sup>

This has also been the case in global finance. When non-state actors have been included, they disproportionately represent business interests, while NGOs and other nonprofit actors are almost fully excluded. **Martino please expand on this topic in global finance.**

Despite formal equal participation rights, there have also been tensions between commercial and not for profit participation in global health partnerships. In such cases, imbalanced participation is a result of stakeholder characteristics and preferences (addressed below).

### ***D. Institutional Reforms for Addressing Imbalanced Participation***

Despite underlying imbalances plaguing most organizations (the source of which we address in greater detail below under stakeholder factors), only few have introduced reforms to support balanced participation of low income developing countries or marginalized stakeholders. These are what we refer to as “good participation” reforms.<sup>71</sup> Codex and the Global Fund are two such exceptions:

To support developing countries in their effective participation, Codex introduced the Codex Trust Fund (CTF). Initially, this fund provided financial support to attend meetings, and thanks to these reforms, thousands of developing country representatives have attended Codex meetings. At a second stage, CTF funds are being used to build knowledge and capacity in developing countries, to allow them to participate more effectively and in a meaningful manner.<sup>72</sup>

The Codex Trust Fund’s eligibility criteria are, however, so restrictive that most of the countries examined in this project do not qualify. To qualify, the country must be a low or middle-income country, a small island or landlocked developing country. As such, Brazil, Argentina, China,

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<sup>68</sup> Berman (n 5).

<sup>69</sup> Ayelet Berman,

<sup>70</sup> Ayelet paper

<sup>71</sup> Ayelet Berman

<sup>72</sup> Berman (n 5).

Vietnam and India have largely not benefited from the CTF as they do not (or no longer<sup>73</sup>) qualify for grants.<sup>74</sup> Be that as it may, imbalances between ‘small’ and ‘big’ developing countries (and developed countries), persist. For example, in their analysis of China and Vietnam’s participation, Cheng and Do demonstrate that China participates more than Vietnam.<sup>75</sup>

The Global Fund to Fight AIDS, Tuberculosis and Malaria has likewise introduced capacity-building reforms for its developing country members. Addressing this problem, the Global Fund introduced a “Strategic Roadmap to Enhance Implementer Voice” reform. This reform aims to mitigate these barriers and proactively support meaningful participation. The reform sets out strategies and guidance to improve participation on the board and makes funds available to support coordination among constituencies and strength their input.<sup>76</sup>

MARTINO, Any examples from global finance?

## 12. Stakeholders Factors

While the institutional participation reforms introduce the right to participate, there have been variations in the extent to which stakeholders – be it developing countries or non-state actors -- have taken advantage of this opportunity. While variations may depend on institutional factors discussed above, they often depend also on stakeholder characteristics. In what follows, we address the stakeholder characteristics and preferences that may influence whether, how and the extent to which stakeholders take advantage of their right to participate. Some of the factors are relevant to both developing countries and non-state actors, and some are specific to one group only. These factors also generally explain the variation in the participation of the big emerging economies (Brazil, China, India) versus the smaller and/or lower income economies (Argentina, Bangladesh, Vietnam and Philippines). These factors will often overlap, or reinforce each other, yet for analytical purposes we distinguish between them.

Building on the country case studies in this volume on Brazil and Argentina,<sup>77</sup> China and Vietnam,<sup>78</sup> and India<sup>79</sup> and Philippines,<sup>80</sup> we lay out the main stakeholder characteristics and preferences: foreign policy, importance/salience of the topic, resources, capacity, expertise, policy learning, national policy autonomy, domestic legal regime.<sup>81</sup>

### A. Foreign Policy

The foreign policy of a country regarding international institutions affects whether and how countries take advantage of their participation rights. For example, Brazil’s strategy is to increase its participation in international institutions. Moreover, due to the HIV/AIDS crisis, health in particular has been an important part of its foreign policy, and Brazil has prioritized the WHO as a venue for negotiations. In contrast, while being a WHO member, Argentina, due to its continuous internal crises, has been less active on the global stage (and has less resources – addressed below).<sup>82</sup> Seeking to compete in the global economy, China and Vietnam have

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<sup>73</sup> Brazil and Argentina initially qualified but outgrew their qualification. Souza and Aznar (n 44).

<sup>74</sup> Philippines is the exception, see Payoyo (n 45).

<sup>75</sup> Cheng and Do (n 52).

<sup>76</sup> Berman (n 5). Gulen Atay paper

<sup>77</sup> Souza and Aznar (n 44).

<sup>78</sup> Cheng and Do (n 52).

<sup>79</sup> Ravi Srinivas, ‘Participation of India in Global Health Governance’ in Joost Pauwelyn Ayelet Berman, Tim Buthe, Martino Maggetti (ed), *Rethinking Stakeholder Participation in Global Governance: Challenges and Reforms in Financial and Health Institutions* (Oxford University Press).

<sup>80</sup> Payoyo (n 45).

<sup>81</sup> Ayelet and Joost paper. Covers all of these factors in detail regarding global health governance.

<sup>82</sup> Souza and Aznar (n 44).

liberalized their economies and become more active Codex participants, joining Codex in 1984 and 1989 respectively.<sup>83</sup>

Martino please add examples from global finance.

### ***B. Importance/Saliency***

Importance of the global body or of a policy determines whether and how stakeholders take advantage of their participation rights, and explains variations in participation among different stakeholders.<sup>84</sup>

The agricultural export sector accounts for much of the exports of Brazil, Argentina,<sup>85</sup> China, Vietnam,<sup>86</sup> the Philippines<sup>87</sup> and India.<sup>88</sup> With the binding and enforceable nature of Codex standards through the WTO TBT and SPS Agreements and its accompanying dispute settlement mechanism, seeking to improve their global competitiveness, these countries see Codex as very important. The importance of agricultural exports also explains the incentive of China and Vietnam to participate in GlobalG.A.P. Similarly, given their growing medicines market, and their desire to compete on that market, ICH has become an important organization for China, Brazil and India.<sup>89</sup> As the world's second largest medical devices market, China has sought to participate in IMDRF to improve competitiveness and build regulatory capacity. In contrast, Vietnam and Philippines have a much smaller medical devices market, leading to lower issue saliency. For that reason, Vietnam's and Philippines participation in IMDRF is mediated through ASEAN.<sup>90</sup>

Martino please add examples from global finance.

Finally, although issue saliency explains variations in participation, resources and capacity, which we address next, create barriers to participation, especially for the small, low-income countries (Vietnam, Argentina, Philippines, Bangladesh). For example, despite issue saliency for both China and Vietnam on many of the topics mentioned above such as food, agriculture and certain diseases— China's participation has been more substantive than Vietnam's. Thus, while certain topics are salient for both large and small countries, variations in participation are often a result of the factors laid out below – notably resources and capacity. We discuss these factors next.

### ***C. Resources***

The availability of financial resources has a significant impact on whether or how stakeholders take advantage of their participation rights. Funds are needed, first, to physically attend meetings and to send delegates. For example, Brazil has been able, thanks to improved resources, to increase the number of permanent diplomats stationed abroad and Brazilian ministers attending WHO meetings, but a recent economic recession in Brazil led to budgetary cuts which undermined Brazil's ability to effectively promote its position in Codex.<sup>91</sup> Similarly, Argentina's participation in the WHO since 2016 has been poor due to limited funds. Argentina has also been

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<sup>83</sup> Cheng and Do (n 52).

<sup>84</sup> Tim Büthe and Mercy DeMenno, 'Voice and Influence in Global Governance', *Rethinking Stakeholder Participation in Global Governance: Challenges and Reforms in Financial and Health Institutions* (forthcoming).

<sup>85</sup> Souza and Aznar (n 44).

<sup>86</sup> Cheng and Do (n 52).

<sup>87</sup> Payoyo (n 45).

<sup>88</sup> Ravi Srinivas (n 78).

<sup>89</sup> Cheng and Do (n 52).

<sup>90</sup> *ibid.* Payoyo (n 45).

<sup>91</sup> Souza and Aznar (n 44).

unable to send representatives to Codex meetings, despite Codex' importance.<sup>92</sup> For the same reason, Vietnam has had to rely on regional ASEAN representation in ICH and IMDRF (in comparison to China which has more resources and acted independently).<sup>93</sup>

Moreover, despite formal universality and equality, de facto inequalities sometimes continue to exist not through membership in IOs but through key organizational positions which often remain occupied by high income countries who have the resources. The WHO's Secretariat, which is autonomous and powerful in shaping negotiations, is dominated by employees from high-income countries. In Codex, having a committee chair requires financial and organizational resources, resulting in most chairs being held by developed countries.<sup>94</sup>

Financial resources not only impact physical participation, but also the content of the discussions. Technical and scientific discussions require data and research, and many developing countries lack the resources for carrying out such research. Consequently, most of the presented data industry financed (industry from developed countries), as has been the case in Codex,<sup>95</sup> which increases the likelihood of information imbalances that and that the standards align with their interests.<sup>96</sup>

A lack of resources reinforces marginalization. Implementation of the standards is typically a precondition for membership (as in the ICH and GlobalG.A.P.). Low income countries or small farmers or producers lack the resources to implement costly western standards, in turn preventing their inclusion, and ultimately further marginalizing them. Cheng and Anh Do illustrate how Vietnamese farmers do not have the financial resources to comply with GlobalG.A.P. standards, in turn leading to less participation by Vietnamese firms.

Martino please add examples from global finance.

#### ***D. Capacity***

To participate meaningfully, stakeholders must have the organizational, human, regulatory, scientific and technical capacity to make a meaningful contribution to the discussion.

For example, Argentina's economic crisis has had a significant impact on its scientific research and its capacity to participate in international institutions (though it has contributed on specific issues in its area of expertise, such as immunization or free health care—see below). Today, economic improvements have enhanced its scientific and institutional capacity leading to better participation.<sup>97</sup> Brazil's improved participation in the WHO is a result, since the 1990's, of Brazil's greater resources and foreign policy interests, which have translated into greater technical expertise and capacity to act as a regional leader.<sup>98</sup> Differences in capacity also explain, the differences in the participation of China and Vietnam in the IMDRF.<sup>99</sup>

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<sup>92</sup> *ibid.*

<sup>93</sup> Cheng and Do (n 52).

<sup>94</sup> Souza and Aznar (n 44).

<sup>95</sup> *ibid.*

<sup>96</sup> Ayelet Berman, 'Industry, Capture and Transnational Standard Setting' (2017) 111 *American Journal of International Law Unbound*.

<sup>97</sup> Souza and Aznar (n 44).

<sup>98</sup> *ibid.*

<sup>99</sup>

Even the ability of partnerships— often considered as the most equal governance model – to eliminate the underlying power asymmetries between developed and developing countries is increasingly called into question due to resource and capacity gaps. Despite equal participation rights among developed and developing country members on the Global Fund’s board, language barriers, inadequate access to technology, the complexity of materials and so forth form structural barriers, hindering meaningful participation by developing countries so that developing countries remain relatively passive. Major developed country donors continue having significant influence over the agenda, the choice of projects and countries that receive funds, and the allocation of funds.<sup>100</sup>

Intergovernmental organizations suffer from a similar problem. Thanks to their universal nature, the participation range in intergovernmental organizations is, at least formally, very broad, including developed and developing countries, both ‘big’ and ‘small’. Nevertheless, developing country participation remains often less effective. In Codex, for example, with developing countries becoming major food producers and exporters, their interest in Codex standards has naturally increased. Since the 1990s, therefore, more developing countries have joined Codex, with membership growing from 30 to 183 members. Nevertheless, many developing countries, due to insufficient resources and capacity and expertise gaps, have not participated in a meaningful way, and have remained *de facto* marginalized.<sup>101</sup>

**Martino please add examples from global finance.**

To overcome resource and capacity barriers to participation, smaller states have resorted to two strategies which allow them to learn from the standard-setting organizations. A first strategy has been – as already mentioned above -- to be indirectly represented through regional organizations. Brazil and Argentina have resorted to the Codex Coordinating Committee for Latin America and the Caribbean.<sup>102</sup> The ICH has also admitted many regional organizations – PANDRH, APEC, ASEAN and others—through which countries such as Argentina, Vietnam or the Philippines are represented.<sup>103</sup> Similarly, Vietnam’s participation in IMDRF is mediated through ASEAN.

**Martino please add examples from global finance.**

A second strategy, given the mismatch between international standards and developing country resources and capacities, has been to set up domestic bodies that adapt the standards to local capacities. Cheng and Anh Do, for example, demonstrate how Vietnam and China have created national VietGAP and ChinaGAP.<sup>104</sup> **Martino please add examples from global finance.**

### ***E. Expertise***

Expertise in a certain policy area also drives participation. Though low income countries tend to participate less due to the resource and capacity constraints listed above, low income countries tend to be active on matters which are within their expertise (their expertise is often linked to the high saliency of the topics). For example, thanks to its expertise on matters such as Universal Child and Pregnancy Allowance, the promotion of less salt in diets, and mental health, Argentina, , has participated in the WHO and shared its expertise.<sup>105</sup>

**Martino please add examples from global finance.**

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<sup>100</sup> Berman (n 5); Souza and Aznar (n 44).

<sup>101</sup> Berman (n 5).

<sup>102</sup> Souza and Aznar (n 44).

<sup>103</sup> Ayelet paper

<sup>104</sup> Cheng and Do (n 52).

<sup>105</sup> Souza and Aznar (n 44).

### ***F. Policy Learning***

Policy learning impacts variation in participation too. Countries driven to learn from more expert peers may seek to participate more. Indeed, the participation of large emerging economies in standard setting bodies has been profoundly driven by their desire to learn so as improve their capacity to compete internationally and to build their national regulatory capacity. For example, China's participation in the Global Fund has largely been driven by the country's desire to learn from other countries about their fight against AIDS, or the epistemic authority of Global Fund members on the matter. As Cheng and Do indicate, this policy learning is evident from the spillovers to domestic law and policy – in both China and Vietnam.<sup>106</sup>

Martino please add examples from global finance.

### ***G. National Policy Autonomy***

Concerned about maintaining their national policy autonomy, some countries hesitate to accept the invitation to become members. As a member state they would be expected to adopt and implement the standards, whereas as observers, they are free to learn (see above), without limiting their autonomy. This, for example, is the reason behind India's reluctance to join the ICH.<sup>107</sup>

Martino please add examples from global finance.

### ***H. Domestic Legal Regime***

As regards the participation of domestic non-state actors on the international plane, the domestic legal regime also plays a role. As Cheng and Do indicate, in China and Vietnam, the state is quite restrictive of non-state actor involvement, resulting in minimal engagement.<sup>108</sup> Further, the availability of domestic procedures also plays a role. Brazilian civil society has proper access to national procedures, resulting in increased national participation rather than being internationally active.<sup>109</sup>

Martino please add examples from global finance.

## **13. Managing the Risks of Stakeholder Engagement**

As we have seen above, non-state actor engagement has increased significantly. Although such participation has the potential to improve democratic legitimacy – by giving voice and by improving the knowledge and expertise base of policy making -- stakeholder engagement also introduces new risks to legitimacy, notably the risk of regulatory capture and conflict of interest.<sup>110</sup>

Although the problem is well-known in the national context,<sup>111</sup> and despite the dominant position of the business sector in international institutions, very few, if any, international institutions have seriously tried to regulate the associated risks. Policy making always entails a trade-off and has distributional consequences, and various case studies have illustrated this

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<sup>106</sup> Cheng and Do (n 52).

<sup>107</sup> Ravi paper .

<sup>108</sup> Cheng and Do (n 52).

<sup>109</sup> Souza and Aznar (n 44).

<sup>110</sup> Berman (n 95).

<sup>111</sup> Brian Libgober and Daniel Carpenter, 'Lobbying with Lawyers: Financial Market Evidence for Banks' Influence on Rulemaking | Equitable Growth' <<http://equitablegrowth.org/working-papers/lobbying-with-lawyers-financial-market-evidence-for-banks-influence-on-rulemaking/>> accessed 17 January 2018. Daniel P Carpenter and David A Moss, *Preventing Regulatory Capture : Special Interest Influence and How to Limit It*. George J Stigler, 'The Theory of Economic Regulation' (1971) 2 *The Bell Journal of Economics and Management Science* 3 <<http://www.jstor.org/stable/3003160?origin=crossref>> accessed 8 June 2017.

problem, be it in the efforts of the beverage,<sup>112</sup> tobacco,<sup>113</sup> or vaccine industry,<sup>114</sup> to influence WHO policy making, or how big banks captured Basel committee standards.<sup>115</sup>

At the national level, countries have policies in place to address these problems (whether or not this is done effectively is another issue).<sup>116</sup> With the growth in non-state actor participation in international policy-making and standard-setting, this legal vacuum poses an important risk to the public interest as well as to the public trust in international institutions.

The WHO has been an exception. To better manage such non-state actor engagement, in 2016 the WHO introduced a “Framework for Engagement with Non-State Actors” (the “Framework”).<sup>117</sup> The Framework’s purpose is to manage the risks of engaging with non-state actors, such as conflict of interest, undue influence on the WHO, negative impact on the WHO’s integrity, and competitive advantage for the non-state actors.<sup>118</sup> To manage these risks, the Framework distinguishes between four types of non-state actors: non-profit NGOs, commercial entities, private sector entities, philanthropic foundations and academic institutions. For each of these groups, the overarching framework and a group-specific policy applies. The Framework then sets out general and group-specific tools for managing these risks: due diligence, risk assessment, risk management and transparency.<sup>119</sup>

It is still too early to tell if this framework will be effective in managing the risks of engagement and in keeping the WHO accountable to the public interest, though it has several shortcomings which raise doubts,<sup>120</sup> and its implementation so far by the Secretariat has not been stringent.<sup>121</sup> Be that as it may, the WHO has been a pioneer and the Framework may serve as a source of inspiration for other institutions to build on in the future..

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<sup>112</sup> Sandeep P. Kishore & Kavitha Kolappa, Unlikely Allies (14 February 2014 )

[http://www.huffingtonpost.com/sandeep-p-kishore-phd/healthy-living-news\\_b\\_4781300.html](http://www.huffingtonpost.com/sandeep-p-kishore-phd/healthy-living-news_b_4781300.html); Third World Network, Keep a Strong FENSA: Safeguard WHO’s Independence From Private Interests

<http://www.twn.my/title2/health.info/2015/hi150506.htm>

<sup>113</sup> Heide Weishaar and others, ‘Global Health Governance and the Commercial Sector: A Documentary Analysis of Tobacco Company Strategies to Influence the WHO Framework Convention on Tobacco Control’ [2012] PLOS Medicine

<<http://journals.plos.org/plosmedicine/article/file?id=10.1371/journal.pmed.1001249&type=printable>> accessed 28 June 2017. P. 8

<sup>114</sup> Deborah Cohen and Philip Carter, « Conflicts of Interest : WHO and the pandemic flu ‘conspiracies’ », *BMJ* (3 June 2010. Zosia Kmietowicz, WHO admits to “inconsistencies” in its policy on conflicts of interest, *BMJ*, (15 June 2010),

<sup>115</sup> Michael S. Barr Geoffrey P. Miller, ‘Global Administrative Law: The View from Basel’ 15. Maurizia De Bellis, ‘Global Financial Standards and Networks: The Global Administrative Law Perspective’ (2013). P. 14-15; Kevin L Young, ‘Transnational Regulatory Capture? An Empirical Examination of the Transnational Lobbying of the Basel Committee on Banking Supervision’ (2012) 19 *Review of International Political Economy* 663 <<http://www.tandfonline.com/doi/abs/10.1080/09692290.2011.624976>> accessed 18 May 2017. p. 666. Daniel Tarullo, *Banking on Basel. The Future of International Financial Regulation*, Washington D.C., Peterson Institute 2008, p. 104. Duncan R. Wood, *Governing Global Banking*, at 150. Adam William Chalmer, ‘When Banks Lobby: The Effects of Organizational Characteristics and Banking Regulations on International Bank Lobbying’ (2017) 19 *Business and Politics* 107.

<sup>116</sup> E.g. OECD, ‘Independence of Regulators and Protection against Undue Influence’

<<http://www.oecd.org/governance/regulatory-policy/independence-of-regulators.htm>> accessed 16 May 2017.

<sup>117</sup> Berman (n 5). FENSA paper

<sup>118</sup> 69th World Health Assembly Framework of Engagement with Non-State Actors 2016., Section 7.

<sup>119</sup> Berman (n 5). FENSA paper

<sup>120</sup> *ibid.*

<sup>121</sup> FENSA paper



Finally, global finance is considered to be quite captured by business interests. Such capture takes place through participation 'behind the scenes' and not through direct participation in the global financial bodies. MARTINO would you like to elaborate on this point?

#### 14. Conclusion

The general trend in both global financial governance and global health governance has been of opening up towards developing countries, through— through membership, redistribution of voting rights or non-decisional participation rights. While global health governance has also extensively opened up to non-state actors (through membership or non-decisional participation rights), global finance, with some exceptions that mostly concern the inclusion of business representatives, has not granted non-state actors participation rights, or has done so very modestly. [MARTINO, is this a right conclusion?]. We also have anecdotal evidence that some of the newly engaged countries have successfully influenced policy outcomes.

Nevertheless, imbalances between developed and developing countries and between commercial and non-commercial interests remain. We have identified two main factors which determine whether, how and to what extent stakeholders participate: institutional factors and stakeholder factors.

Institutional factors are a precondition for participation and they determine who gets to participate, when and how. We found that differences in participation rights between large emerging and small developing countries were linked to the kind of the organization and/or its purpose. Further, in some cases, the global institutions have maintained a founding members' advantage by giving themselves veto rights. Underlying power asymmetries also often continue playing a role resulting in imbalanced participation, even when participation rules are in place. There also remain imbalances between commercial and non-commercial stakeholders.

Institutional factors are a precondition to participation but do not determine participation. Once the right to participate exists, whether, the extent to which and how effectively stakeholders take advantage of their rights depends on stakeholder characteristics and preferences. We have identified several main stakeholder factors: foreign policy, importance/saliency, resources, capacity, policy learning, expertise, national policy autonomy and domestic legal regime.

Thus, ultimately, the participation of marginalized stakeholders depends on these two factors and explains the variation in participation between large emerging countries (Brazil, China, India) and smaller and/or lower income developing countries (Argentina, Bangladesh, Vietnam, Philippines).

Finally, while non-state actor engagement has further democratized international governance and introduces much needed resources and expertise to policy making, it also introduces risks of capture and conflict of interest -- which must be managed. So far, the WHO is the only organization which has adopted a comprehensive framework for managing the risks of non-state actor engagement. For all international institutions working in the public interest or in the delivery of public goods, this tension must be reconciled and the WHO's Framework may serve as an inspiration for other organizations, though the jury is still out as to its effectiveness in curbing undue influence.