ARTICLES

INTERPRETIVE ENTREPRENEURS

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Private actors interpret legal norms, a phenomenon I call “interpretive entrepreneurship.” The phenomenon is particularly significant in the international context, where many disputes are not subject to judicial resolution and there is no official system of precedent. Interpretation can affect the meaning of laws over time. For this reason, it can be a form of “post hoc” international lawmaking, worth studying alongside other forms of international lobbying and norm entrepreneurship by private actors. The Article identifies and describes the phenomenon through a series of case studies that show how, why, and by whom it unfolds. The examples focus on entrepreneurial activity by business actors and cast a wide net, examining aircraft finance, space mining, modern slavery, and investment law. As a matter of theory, this process-based account suggests that international legal interpretation involves contests for meaning among diverse groups of actors, giving credence to critical and constructivist views of international legal interpretation.

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As a practical matter, the case studies show that interpretive entrepreneurship is an influence tool and a driver of legal change.

INTRODUCTION

I. DOES IT MATTER WHO INTERPRETS THE LAW? ........................... 440
   A. Interpretation Matters in Practice........................................... 440
   B. Interpretation Matters in Theory............................................ 444
      1. Retrievalism: Interpretation Can Confirm or Distort Meaning...... 444
      2. Critical Approaches: Interpretation Is a Tool of Power............ 447
      3. Constructivism: Interpretation Can Determine Meaning............ 450
      4. The Special Problem of Custom ........................................ 453
   C. The Value of Attention....................................................... 455

II. INTERPRETIVE ENTREPRENEURSHIP............................................ 460
   A. Interpretation Beyond the Courts.......................................... 460
      1. Aircraft Financing............................................................. 461
      2. Outer Space....................................................................... 465
      3. Nutritional Labeling............................................................ 470
      4. Modern Slavery................................................................. 473
   B. Interpretation in the Courts.................................................. 475
   C. Analysis............................................................................... 477
      1. Who Interprets?................................................................. 478
      2. To What Audiences?............................................................ 479
      3. With What Tools?............................................................... 480
      4. With What Effects?............................................................. 483

III. POST HOC LAWMAKING AND OTHER IMPLICATIONS.......................... 484
   A. Post Hoc Lawmaking........................................................... 484
      1. Interpretation as Lawmaking............................................... 484
      2. Interpretation as Lobbying................................................... 486
      3. Interpretation as Disruptive Influence.................................. 488
   B. Research Agenda................................................................. 489
   C. Reforms............................................................................... 492

CONCLUSION.................................................................................. 493
INTRODUCTION

Uber is a “disruptor.”\(^1\) While the term generally refers to disruption of a business model, Uber’s disruption extends to the law.\(^2\) Rather than submit to the restrictive rules of the taxicab industry, Uber read itself out of them, relying on its own aggressive legal interpretations to justify its plans.\(^3\) It then launched its business, entrenched itself in popular culture, gathered political power, and became “too big to ban.”\(^4\) Uber’s success in defining itself out of taxicab regulations is a high profile example of a phenomenon I call “interpretive entrepreneurship.”\(^5\)

Interpretive entrepreneurship is the act of developing the law by interpreting it. Interpretive entrepreneurs might exploit legal uncertainty to pursue business plans, as Uber did, and change the regulatory environment along the way.\(^6\) Or they may shop around favorable interpretations to regulators, or publicize reputation-friendly interpretations to investors and the public.\(^7\) Through each mode, interpretive entrepreneurs seek to influence legal development.\(^8\) A more familiar way to think about private sector influence over legal

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\(^3\) Id. at 401–02.

\(^4\) While Uber’s interpretations have often been successful in the United States, these results have not consistently been replicated elsewhere. See, e.g., Case C-434/15, Asociación Profesional Elite Taxi v. Uber Sys. Spain SL, ECLI:EU:C:2017:981 (Dec. 20, 2017) (defining Uber as a “service in the field of transport” under European Union Law and thus subject to normal regulation as a taxi). This observation builds on and departs from an account developed by Elizabeth Pollman and Jordan Barry, who define “regulatory entrepreneurship” as “[w]ell-funded, scalable, and highly connected startup businesses” who “target state and local laws and litigate them in the political sphere instead of in court.” Pollman & Barry, supra note 2, at 383. This Article identifies Pollman and Barry’s legal disruption as one mode of entrepreneurial interpretation.

\(^5\) See discussion infra Subsection II.A.1.

\(^6\) See discussion infra Subsection II.A.2.

\(^8\) See discussion infra Section II.C.
development is through the lobbying that surrounds new lawmaking efforts. Interpretive entrepreneurship is the ex post companion to these ex ante lobbying efforts. While legal scholarship has focused on the ex ante lobbying, the ex post interpretative role is underappreciated. As this Article shows, both activities deserve attention.

To sharpen the account and clarify the stakes, the Article makes two framing choices. First, while many actors can participate in legal interpretation, the Article focuses on interpretive entrepreneurship by business actors. This choice directs attention to the fact that some of the same actors may participate in both lobbying and interpretation as separate portions of a unified influence campaign to advance business agendas. Second, the Article focuses its account on interpretation of international legal norms. While interpretive entrepreneurship may take place at any level of legal ordering, from the municipal to the international, interpretive entrepreneurship is particularly significant as a transnational phenomenon. This is due to the growing importance of

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11 Consider the problem of interpretation in the international context. For example, the key operative provision of the Paris Agreement on climate change provides that “[e]ach Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.” Paris Agreement art. 4, ¶ 2, Dec. 12, 2015, T.I.A.S. No. 16-1104 (emphasis added). What is the meaning of the italicized portion? Have parties obligated themselves to engage in mitigation measures? For a careful defense of this interpretation, see Daniel Bodansky, Jutta Brunée & Lavanya Rajamani, International Climate Change Law 231 (2017) (arguing that the imperative “shall” relates both to the national
transnational commerce combined with the lack of courts with general jurisdiction and a system of precedent on the international level.\footnote{\textsuperscript{13}}

Conventional accounts of international legal interpretation focus on interpretive doctrine rather than on the process of interpretation and the multiplicity of actors involved.\footnote{\textsuperscript{14}} But related literatures show that interpretive participants and processes matter. For example, debates in the contributions and the pursuit of mitigation measures. Or have parties merely committed to “pursuing” measures, with no obligation to actually carry them out? See, e.g., Richard Falk, “Voluntary” International Law and the Paris Agreement, Commentary on Global Issues (Jan. 16, 2016), https://richardfalk.wordpress.com/2016/01/16/voluntary-international-law-and-the-paris-agreement/ [https://perma.cc/ZTH6-C3UV] (arguing that the Paris Agreement is “voluntary” international law with no binding commitments). Which reading is best? Which is law? The Paris Agreement does not designate any international court or tribunal as a neutral arbitrator of disputes. Even if it had done so, international law has no official system of precedent to carry one tribunal’s interpretation forward with the force of law. See Harlan Grant Cohen, Theorizing Precedent in International Law, in Interpretation in International Law 268, 269 (Andrea Bianchi, Daniel Peat & Matthew Windsor eds., 2015) [hereinafter Cohen, Theorizing Precedent].

In the United States, federal courts will interpret treaties, deferring in some instances to the executive branch. Curtis A. Bradley & Jack L. Goldsmith, Presidential Control over International Law, 131 Harv. L. Rev. 1201, 1204 (2018) (observing that “Presidents . . . have come to dominate the creation, alteration, and termination of international law for the United States”); see also Restatement (Third) of the Foreign Relations Law of the United States § 326(2) (Am. L. Inst. 1986) (noting that courts “give great weight to an interpretation made by the Executive Branch”). But many treaties do not offer private rights and so their meanings are not litigated in the United States. See id. § 907 cmt. a (“International agreements . . . generally do not create private rights or provide for a private cause of action in domestic courts . . . .”); see also United States v. Emuegbunam, 268 F.3d 377, 389 (6th Cir. 2001) (“As a general rule, however, international treaties do not create rights that are privately enforceable in the federal courts.”). Even if they are litigated in the United States, the interpretation produced by a U.S. court is just one competing interpretation on the international stage. Treaty meaning is not often litigated before international tribunals like the International Court of Justice. See Eric A. Posner, The Decline of the International Court of Justice 5 (Univ. Chi. John M. Olin L. & Econ., Working Paper No. 233, 2004), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1499&context=law_and_economics [https://perma.cc/77P8-RYK3] (noting that states frequently refuse to submit to the jurisdiction of the International Court of Justice).

\footnote{\textsuperscript{13}} Cohen, Theorizing Precedent, supra note 12, at 268, 269–70 (“International law today . . . generally denies international precedents doctrinal force.”); see also sources cited infra Section I.A. (developing these points).

\footnote{\textsuperscript{14}} Daniel Peat & Matthew Windsor, Playing the Game of Interpretation: On Meaning and Metaphor in International Law, in Interpretation in International Law, supra note 12, at 3, 3–4, 8 (identifying these gaps and setting out to remedy this shortcoming by “highlight[ing] the practice and process of interpretation as well as the professional identity of those involved”); see also James Crawford, Foreword to Interpretation in International Law, supra note 12, at v, v (“Legal scholarship has tended to tackle the issue of interpretation either from an abstract, quasi-philosophical perspective, or by focusing on the Vienna Convention on the Law of Treaties . . . ."
United States concern which questions are too “political” for the judiciary to resolve, and which branch of government is best suited to decide matters of foreign affairs. They rest on the assumption that the interpreter and the forum can affect the outcome.

The Article directs attention to processes of international legal interpretation, and particularly to private sector influences in that process. It relies on the socio-legal method of grounding theoretical insights in descriptive analysis. Its analysis suggests that business entities are involved in a potentially vast amount of international interpretive activity which helps shape the development of international legal norms.

The Article makes three principal contributions. First, it describes and analyzes the interpretive entrepreneurship phenomenon through a collection of case studies relating to diverse areas of public and private international law. The case studies are based on both original research and a cross-disciplinary literature review. They cast a wide net, ranging from aircraft financing to the meaning of “modern slavery” for the purpose of supply chain due diligence. They address private sector interpretations in trade and investment law as well as the Outer Space Treaty’s application to commercial mining.

The case studies show how, why, and by whom interpretive entrepreneurship unfolds. The methods of interpretation are both formal and informal; they are sometimes facilitated by the apparatus of the state, and sometimes take place in purely private fora. Targets of persuasive campaigns, the “audiences” for these private sector interpretations, can be state parties to a treaty, domestic courts or international tribunals, subnational regulators, shareholders, or the public. The case studies show

15 See Jesse H. Choper, Introduction to The Political Question Doctrine and The Supreme Court of the United States 1, 1–2 (Nada Mourtada-Sabbah & Bruce E. Cain eds., 2007) (outlining debates about the political question doctrine); Bradley & Goldsmith, supra note 12, at 1252–56 (examining consequences of presidential control over international lawmaking and interpretation).
16 The approach places this Article within the “empirical turn” in international legal scholarship, which focuses on “midrange theorizing,” or building theory from the study of facts. Gregory Shaffer & Tom Ginsburg, The Empirical Turn in International Legal Scholarship, 106 Am. J. Int’l L. 1, 1 (2012).
17 See infra Sections II.A & B.
18 See infra Subsection II.A.1.
19 See infra Subsection II.A.4.
20 See infra Subsection II.A.3 & Section II.B.
21 See infra Subsection II.A.2.
22 For all the points in this paragraph, see the discussion in Section II.C.
that private actors can engage in interpretive entrepreneurship for a variety of purposes, including to entrench commerce-friendly interpretations, forestall regulation, secure reputational benefits, or demonstrate compliance.

The Article’s second contribution is to show how the interpretive entrepreneurship phenomenon contributes to and re-frames existing debates on international legal interpretation. Many debates focus on interpretive rules found in the Vienna Convention on the Law of Treaties (“VCLT” or Vienna Convention), and on the best methods to apply those rules. A “retrievalist” view suggests that applying the rules correctly will produce a correct interpretation. But the Vienna Convention rules themselves require interpretation, and critical theorists

23 Vienna Convention on the Law of Treaties arts. 31–33, opened for signature May 23, 1969, 1155 U.N.T.S. 331; see, e.g., Duncan B. Hollis, The Existential Function of Interpretation in International Law, in Interpretation in International Law, supra note 12, at 78, 80 (“Conventional wisdom focuses almost entirely on... a single interpretive method—Articles 31 and 32 of the VCLT.”); Peat & Windsor, supra note 14, at 4 (noting that the “state of play” when it comes to interpretation in international legal scholarship and practice “is characterized by a myopic focus on the rules of treaty interpretation in Articles 31–33 of the VCLT”).

24 As any international lawyer can explain, the Vienna Convention rules instruct that treaties should be “interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.” Vienna Convention on the Law of Treaties, supra note 23, at art. 31, ¶ 1. The vast majority of legal scholarship on international legal interpretation addresses the proper use of these rules. See discussion infra Subsection I.B.1. Their apparent simplicity masks myriad questions, which have spawned a variety of interpretive approaches, including textualism, purposivism, and a teleological approach, among others. See Hollis, supra note 23, at 81 (noting that “proponents of different interpretive methods claim that the VCLT accommodates, or privileges, their method”).

25 Joseph Raz, Between Authority and Interpretation: On the Theory of Law and Practical Reason 241–64 (2009) (“Interpretation is therefore often thought to be retrieval, a process of retrieving and elucidating the meaning the original has.”).

26 See Hollis, supra note 23, at 84 (noting that the VCLT rules themselves require interpretation); see also John Tobin, Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation, 23 Harv. Hum. Rts. J. 1, 3 (2010) (“[The Vienna Convention] is ultimately unable to resolve the question of how to choose a meaning... from among the inevitable range of potential meanings.”).

Indeed, twentieth century American legal realists observed that all law might be indeterminate. See, e.g., Karl Lewellyn, Some Realism About Realism—Responding to Dean Pound, 44 Harv. L. Rev. 1222, 1237 (1931) (arguing that one of the hallmarks of realism is “distrust of the theory that traditional prescriptive rule-formulations are the heavily operative factor in producing court decisions”); Felix S. Cohen, Transcendental Nonsense and the Functional Approach, 35 Colum. L. Rev. 809, 843 (1935) (“A truly realistic theory of judicial decisions must conceive every decision as... a product of social determinants and an index of social consequences.”); see also H.L.A. Hart, The Concept of Law 204 (2d ed. 1994)
reject the formalist project as blinkered, observing that legal interpretation is infused with ideology and reflects and embeds power.\textsuperscript{27} A third, “constructivist,” approach proposes that interpretation is necessarily a creative process, as interpreters use various tools to try to persuade others within interpretive communities.\textsuperscript{28} Interpretation is a contest, a game, or a staging ground for bargaining.\textsuperscript{29} This Article re-focuses these debates, showing how, for each of the dominant theoretical approaches to international legal interpretation, the process of interpretation has real stakes. It also gives credence to critical and constructivist understandings that the identity of the interpreter matters to the interpretation.

Third, the Article frames these interpretive processes as a form of post hoc lawmaking,\textsuperscript{30} which develop the meaning of laws over time. The phenomenon is worth studying alongside activities like lobbying and agency capture that exert pressure on lawmaking ex ante.\textsuperscript{31} The project

\textsuperscript{27} See, e.g., Phillip Allott, Interpretation—An Exact Art, in Interpretation in International Law, supra note 12, at 373, 375 (noting that “[t]o anyone who knows anything about . . . epistemology” the idea that treaties have meaning “may seem comical in its naivety”); Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument 8 (2006) (“Meaning is not . . . present in the expression itself.”); Ian Johnstone, Introduction, 102 Am. Soc’y Int’l L. Proc. 411, 411 (2008) (noting debates over whether interpreters are “making law, based on values and policy choices”); see also Note, ’Round and ’Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship, 95 Harv. L. Rev. 1669, 1678 (1982) (noting that critical scholars recognize the “historical contingency of law” and doctrinal first principles “represent mere choices of one set of values over another”); discussion infra Subsection I.B.2 (developing these points).

\textsuperscript{28} Crawford, supra note 14, at v (“[I]nternational lawyers think that their interpretations are right, and they play the game [of interpretation] by trying to convince others of this.”). The term “constructivist” is appropriate here because the term “epistemic community” arose out of constructivist international relations theory. Michael Waibel, Interpretive Communities in International Law, in Interpretation in International Law, supra note 12, at 147, 149.

\textsuperscript{29} See Waibel, supra note 28, at 148 (calling interpretation a “contest”); Crawford, supra note 14, at v (calling interpretation a “game”); Andrea Bianchi, The Game of Interpretation in International Law: The Players, the Cards, and Why the Game is Worth the Candle, in Interpretation in International Law, supra note 12, at 34, 34 (calling interpretation a “game”); Yanbai Andrea Wang, The Dynamism of Treaties, 78 Md. L. Rev. 828, 837 (2019) (calling treaties “departure points for further bargaining”).

\textsuperscript{30} See infra Part III.

therefore contributes to literatures that investigate how multinational entities wield their power to shape international law. It is also in conversation with a literature that explores the role of “regulatory intermediaries” in developing international law, and a literature that conceives of international law as the product of “norm cascades” produced in part by norm entrepreneurs. Understanding interpretive entrepreneurship as one way private actors influence the law clarifies the practice of international legal interpretation, helps evaluate its effects on the legitimacy and effectiveness of international law, and develops a foundation for potential reforms.

The practical context is important. Despite existential global threats like climate change, the risk of pandemic, and regional conflicts, the early lawmakers face pressures from domestic constituencies has long been a matter of interest within international relations. See, e.g., Andrew Moravcsik, Taking Preferences Seriously: A Liberal Theory of International Politics, 51 Int’l Org. 513, 518 (1997) (arguing that in liberal international relations theory, domestic constituencies construct state interests); Robert D. Putnam, Diplomacy and Domestic Politics: The Logic of Two-Level Games, 42 Int’l Org. 427, 433–34 (1988) (theorizing that the negotiating behavior of national leaders reflects the dual and simultaneous pressures of international and domestic political games).


This literature seeks to understand how “state actors, private organizations, and civil society actors mediate the meaning of legal rules in regulatory governance arrangements that they participate in.” Shauhin Talesh, Rule-Intermediaries in Action: How State and Business Stakeholders Influence the Meaning of Consumer Rights in Regulatory Governance Arrangements, 37 Law & Pol’y 1, 2 (2015).

Martha Finnemore & Katheryn Sikkink, International Norm Dynamics and Political Change, 52 Int’l Org. 887, 893 (1998) (introducing the idea that norms “cascade” through an international system after a sufficient number of states adopt the norm; advocacy groups can help initiate this process by serving as “norm entrepreneurs”). The “norm cascade” literature has focused on advocacy groups, id., rather than private sector norm entrepreneurs, and has focused on the role of non-governmental organizations in the emergence of a norm rather than the interpretation of that norm once a treaty has been adopted. See Heidi Nichols Hadad, After the Norm Cascade: NGO Mission Expansion and the Coalition for the International Criminal Court, 19 Glob. Governance 187, 187 (2013) (noting the assumption that “NGOs exercise their greatest impact on norm change during the early stages of norm emergence”).
twenty-first century is not an era of multilateral lawmaking. Rather, the tools at hand are principally the laws on the books. As the Article shows, because interpretation can develop those laws over time, they attract contests for meaning by those who would develop or erode them. Interpretive entrepreneurship can drive legal change.

Part I develops the argument that a process-based account of international legal interpretation has both theoretical and practical salience. Part II describes the interpretive entrepreneurship phenomenon through a series of case studies and organizes and analyzes this activity. Part III characterizes interpretive entrepreneurship as post hoc lawmaking and identifies its implications.

I. DOES IT MATTER WHO INTERPRETS THE LAW?

Interpreting a legal text requires creativity, rigor, and, at times, specialized knowledge. For this reason, the identity of the interpreter can affect interpretive outcomes. The political and judicial branches in the United States recognize this fact, as they have long debated which is better suited to interpret particular areas of law. But there is no parallel conversation on the international stage. Instead, scholars have focused almost exclusively on interpretive doctrines. Even the rare accounts that focus on the process of interpretation do so from the theoretical confines of jurisprudential, literary, or critical theory, or focus on the courts. As this Part shows, while the process of international legal interpretation is important for both practical and theoretical reasons, it remains largely a black box.

A. Interpretation Matters in Practice

Does it matter who interprets a statute, constitutional provision, or treaty? In the United States, the popular answer is clearly yes. Political wrangling over the constitution of the federal judiciary is revealing.


36 See infra Section I.A. (reviewing this debate).

37 See Joseph J. Ellis, The Supreme Court Was Never Meant to Be Political, Wall St. J. (Sept. 14, 2018), https://www.wsj.com/articles/stop-pretending-the-supreme-court-is-above-politics-1536852330 [https://perma.cc/TU2G-95XW] (examining the importance of presidential nominations of Justices to the Supreme Court by pointing to the growth of
popular assumption is that disputes over controversial issues will be resolved according to the political predilections of the judges. Indeed, American legal realism has suggested that decision making is not a process fully determined by texts and constrained by precedents, but, rather, infused with politics and ideology.

The three branches of the U.S. government certainly care which among them interprets. In the foreign affairs context, Presidents have increasingly asserted the authority to both make obligations for the United States and interpret those obligations and commitments. At the same time, courts have sometimes pushed back, “whittling away the deference [they] traditionally granted to political branches in foreign relations by . . . tightening [their] control over treaty interpretation.” The Restatement (Third) of the Foreign Relations Law of the United States indeed gives U.S. courts “final authority to interpret an international agreement,” but it instructs that courts should “give great weight to an interpretation made by the Executive Branch.” This deference “reflects a common wisdom” that Presidents “have special knowledge” about the meaning of treaty texts and know “what interpretations will best forward U.S. interests in the world.” This dialogue between the executive and seemingly political 5-4 decisions since 1954); see also Carl Hulse, Political Polarization Takes Hold of the Supreme Court, N.Y. Times (July 5, 2018), https://www.nytimes.com/2018/07/05/us/politics/political-polarization-supreme-court.html [https://perma.cc/P6SK-KNGR] (observing perceptions that the Supreme Court is becoming more politically polarized and less neutral).

38 E.g., Most Americans Trust the Supreme Court, but Think It Is ‘Too Mixed Up in Politics,’ Associated Press (Oct. 16, 2019), https://apnews.com/PR%20Newswire/ca162cc03b3261ff08ab7d8cfc31a25 [https://perma.cc/7U2X-VURA] (reporting on surveys that reflect that a growing number of the American public views the Supreme Court as partisan).

39 Joseph William Singer, Legal Realism Now, 76 Calif. L. Rev. 465, 470 (1988) (book review) (“Social context, the facts of the case, judges’ ideologies, and professional consensus critically influence individual judgments and patterns of decisions over time. The realists felt that study of such factors could improve predictability of decisions.”); Lewellyn, supra note 26, at 1237 (arguing that one of the hallmarks of realism is “distrust . . . that traditional prescriptive rule-formulations are the heavily operative factor in producing court decisions”); Cohen, supra note 26, at 843 (“A truly realistic theory of judicial decisions must conceive every decision as . . . a product of social determinants and an index of social consequences.”).

40 Bradley & Goldsmith, supra note 12, at 1203 (arguing that “Presidents have come to dominate the making, interpretation, and termination of international law for the United States”).


43 Cohen, Death of Deference, supra note 41, at 1467.
the courts suggests that the identity of the interpreter of the law matters to the interpretation.

Indeed, interpretation is not a deterministic task. It is not ministerial, like processing paperwork at the department of motor vehicles. Rather, it involves a creative process of applying a suite of interpretive tools and philosophies to a particular text. The inherent complexity and creativity of this task has provoked a set of longstanding debates in the United States. Beyond institutional competence to interpret, debates surround interpretive theory and canons of construction. When, for example, is a question too “political” for judicial resolution? Is it reasonable to assume that Congress did not intend its legislation to contradict international law?

Since Marbury v. Madison, debates have not generally turned on whether judicial interpretation is authoritative. With a system of general jurisdiction and precedent, most questions of interpretation in U.S. law are ultimately susceptible to final resolution.

On the international plane, by contrast, the process of interpretation is both more complex and less understood. It is more complex because it is decentralized. Most interpretive questions are not submitted for adjudication. There is no official system of precedent to carry judicial interpretations forward as law. The authoritative interpreters of law are

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44 See, e.g., Linda D. Jellum, The Theories of Statutory Construction and Legislative Process in American Jurisprudence, in Logic in the Theory and Practice of Lawmaking 173, 174 (Michał Araszkiewicz & Krzysztof Płeszka eds., 2015) (introducing the competing theories of statutory interpretation as applied in American jurisprudence). Debates implicate theories like originalism, textualism, and intentionalism, and include familiar questions about whether interpretation should privilege the specific intent of the drafters or render the text adaptable to new circumstances. See id. at 181–94.

45 See id. at 180 (explaining that judges use canons of construction to discern legislative meaning; some of these have at times been highly controversial, and their use has changed over time).

46 See Choper, supra note 15, at 1–2 (describing debates, perspectives, and issues).

47 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); see also Bernard W. Bell, Marbury v. Madison and the Madisonian Vision, 72 Geo. Wash. L. Rev. 197, 197 (2003) (“[T]hat the Court in at least some instances has the power to enforce the Constitution by invalidating the actions of all government officials, even Congress and the [P]resident acting through the legislative process—is no longer seriously contested.”).

48 See Posner, supra note 12, at 1–2 (examining potential theories for why the ICJ’s light caseload has declined over the long term relative to the number of states).

49 See Cohen, Theorizing Precedent, supra note 12, at 269 (“International law today . . . generally denies international precedents doctrinal force. . . . [J]udicial decisions construing international law are not in and of themselves law—decisions are not binding on future parties in future cases, even before the same tribunal.”).
the nations that have entered into a treaty, either individually (when a provision is “self-judging”) or collectively.\textsuperscript{50} Nations sometimes delegate their interpretive authority to courts or international organizations.\textsuperscript{51}

Despite the complexity and decentralization of this process, interpretive questions animate very important debates in international law. Can international trade law accommodate environmental concerns, and, if so, to what extent? This depends on the proper interpretation of the General Agreement on Tariffs and Trade (“GATT”).\textsuperscript{52} Can nations turn away migrants at national borders for fleeing violence or economic conditions? This depends on how expansively one reads the Refugee Convention.\textsuperscript{53} Whether nations may place warning labels on cigarette packages depends on how one reads relevant bilateral investment treaties.\textsuperscript{54} Whether the commercial space industry can legally mine asteroids or the moon depends, in turn, on how one interprets the Outer Space Treaty.\textsuperscript{55}

Because interpretation decides important questions in international law, it is important to understand how these interpretive debates are resolved. What is the international interpretive process? Who participates in it? Which interpreters are most competent to address particular questions in what contexts? To the extent the scholarship addresses these

\textsuperscript{50} Ulrich Fastenrath, Relative Normativity in International Law, 4 Eur. J. Int’l L. 305, 335 (1993).

\textsuperscript{51} See Curtis A. Bradley & Judith G. Kelley, The Concept of International Delegation, 71 Law & Contemp. Probs. 1, 1, 14 (2008) (“[T]he individual state surrenders some autonomy to international bodies . . . by authorizing them to participate in decision-making processes and to take actions that affect the state. . . . A regulatory delegation grants authority to create administrative rules to implement, fill gaps in, or interpret preexisting international obligations.”).

\textsuperscript{52} See, e.g., Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, ¶ 3, WTO Doc. WT/DS58/AB/RW (adopted Nov. 21, 2001) (deciding whether the United States could prohibit the importation of certain shrimp and shrimp products under Article XX(g) of the GATT 1994).

\textsuperscript{53} Convention Relating to the Status of Refugees art. 1, July 28, 1951, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954) (defining “refugee”); see also M. Akram Faizer, America First: Improving a Recalcitrant Immigration and Refugee Policy, 84 Tenn. L. Rev. 933, 953–54 (2017) (“Refugees are entitled to claim protection under the Refugee Convention while economic migrants are excludable and deportable . . . .”)


\textsuperscript{55} Melissa J. Durkee, Interstitial Space Law, 97 Wash. U. L. Rev. 423, 452 (2019) (noting that the answer to whether companies may legally make commercial use of outer space resources depends on interpretation of the Outer Space Treaty).
questions, attention focuses on international tribunals, even though many interpretive questions never reach these tribunals, and the tribunals produce interpretations that are not authoritative beyond the matter at hand.

B. Interpretation Matters in Theory

The process of interpretation and the identity of the interpreters should matter to theories of international legal interpretation as well. There are, I propose, three main theoretical approaches: the dominant formalist or “retrievalist” approach, and critical and constructivist approaches that react to that formalism. Although interpretive process questions are underappreciated, each of these approaches should attend to them. Formalists should want to know if that process responsibly delivers the meaning of the text. Critics should care whose ideology and power determines international legal meaning. Constructivists should care who populates the interpretive communities that define the meaning of a text and whether interpretation consolidates or fragments meaning across communities. All these questions implicate the legitimacy and effectiveness of international law.

1. Retrievalism: Interpretation Can Confirm or Distort Meaning

The vast majority of the scholarship that considers interpretation in international law focuses its attention on a set of interpretive rules. This

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56 Jeffrey L. Dunoff & Mark A. Pollack, Reviewing Two Decades of IL/IR Scholarship: What We’ve Learned, What’s Next, in Interdisciplinary Perspectives on International Law and International Relations 626, 637–38 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013) (“[M]ost legal interpretation takes place outside of courts. . . . But this activity has largely fallen outside the purview of IL/IR scholarship. . . . The methodological challenges of studying dispute settlement outside the judicial arena are substantial . . . .”). But see Ingo Venzke, How Interpretation Makes International Law: On Semantic Change and Normative Twists (2012) (exploring how actors who hold semantic authority can shift the meanings of international legal texts through discourse about them).

57 See Cohen, Theorizing Precedent, supra note 12, at 269 (international judicial decisions lack precedential value); Posner, supra note 12, at 1 (international courts do not decide many cases).

58 See, e.g., Anthony Aust, Modern Treaty Law and Practice 233 (2d ed. 2007) (“[W]hatever the mechanism by which a dispute about the interpretation or application of a treaty is determined, the body will be guided by the principles and rules in Articles 31 and 32 [of the Vienna Convention].”); Richard K. Gardiner, Treaty Interpretation 9 (2d ed. 2015) (“This book is not about theory. It is about the practical use of the Vienna rules.”); The Oxford Guide to Treaties 475–550 (Duncan Hollis ed., 2012) (focusing three chapters on interpretation on
“voluminous” body of scholarship is largely “descriptive and practical,”
rather than theoretically oriented. That is, this work is not particularly
concerned with offering an account of what interpretation is and how it
functions in the international system. Implicitly, however, it exhibits what
Joseph Raz would call the “retrieval” view of interpretation. The rules
have “an established meaning which the interpreter must discover ‘as in
a hunt for buried treasure.’” Some, but not all, of this literature could be
characterized as formalist. Whether the label, at the heart of the project
is the view that interpretation matters because it will either correctly or
incorrectly deliver the meaning of a text.

The interpretive rules appear in Articles 31–33 of the Vienna
Convention on the Law of Treaties (the “Vienna Convention”). They
instruct interpreters to interpret “in good faith in accordance with the
ordinary meaning to be given to the terms of the treaty in their context
and in the light of its object and purpose.” They give some additional
instructions as well, defining the treaty’s “context,” allowing
interpreters to refer to the “preparatory work of the treaty,” and permitting interpreters to consider agreements and practice that have developed since the treaty was finalized.

Scholarship on the Vienna Convention rules is “voluminous.” It considers how much weight to give to the intention of the treaty parties; how to follow the “object and purpose” instruction (developing textual, teleological, and purposive approaches, among others); whether treaty meaning can evolve over time; what counts as “subsequent practice” and how to weigh it; how to handle the preparatory work; and whether to take different approaches to interpretation in different areas of international law, such as human rights, criminal, trade, tax, and

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66 Id. Note that the preparatory work of the treaty is the international version of legislative history.
67 Id.
68 Peat & Windsor, supra note 14, at 6.
72 See, e.g., Georg Nolte, Introduction to Treaties and Subsequent Practice 1–2 (Georg Nolte ed., 2013); Crootof, supra note 70, at 240; Rahim Moloo, When Actions Speak Louder Than Words: The Relevance of Subsequent Party Conduct to Treaty Interpretation, 31 Berkeley J. Int’l L. 39, 57 (2013) [hereinafter Moloo, Subsequent Party Conduct] (discussing the type of subsequent conduct relevant to treaty interpretation according to the Vienna convention).
73 See, e.g., Yahli Shereshevsky & Tom Noah, Does Exposure to Preparatory Work Affect Treaty Interpretation? An Experimental Study on International Law Students and Experts, 28 Eur. J. Int’l L. 1287, 1310 (2017) (finding that “preparatory work can play a significant role in decision making”).
74 See Julian Arato, Accounting for Difference in Treaty Interpretation Over Time, in Interpretation in International Law, supra note 12, at 205, 205–06 (collecting evidence that courts have taken a distinctive approach to the interpretation of human rights treaties).
76 E.g., Isabelle Van Damme, Treaty Interpretation by the WTO Appellate Body, at lxiii (2009) (examining interpretive methods in WTO jurisprudence).
77 E.g., Rebecca M. Kysar, Interpreting Tax Treaties, 101 Iowa L. Rev. 1387, 1389–91 (2016) (arguing that because of the distinctive features of tax treaties, courts are justified in relying on extrinsic materials when interpreting them).
commercial disputes.\textsuperscript{78}

The argument of a retrievalist should be that interpretation matters to legitimacy. A better, more legally sound interpretation is more legitimate as binding law. Poorer interpretations can erode legal meaning. Performing the task of interpretation accurately is important because it safeguards the bargains treaties embody. Scholarship in this vein has focused on ensuring that interpretation is done well by working on a substantive level, ensuring that the interpreters have a good grasp on how the rules work.

Another way to ensure good legal interpretations is to understand how the process of interpretation unfolds, and whether procedural safeguards might preserve substantive integrity. A retrievalist should therefore care about this process and about the identities of the interpreters. Are interpreters performing their job well? Are some interpreters better suited to do this than others? Does the involvement of some actors in interpretative processes harm the legitimacy of international law by producing bad interpretations?\textsuperscript{79} Persuasive tactics and mixed motives could hypothetically have a corrosive effect, leading to poorer interpretations. Testing these hypotheses requires a descriptively grounded analysis, which is substantially untiiled ground.

2. \textit{Critical Approaches: Interpretation Is a Tool of Power}

The problem with the retrievalist approach is that it appears to fail on its own terms. Different interpreters can use the same rules to “discover” different meanings. In fact, the Vienna Convention rules themselves are underdeterminate.\textsuperscript{80} Indeed, critical approaches point out that the idea that the Vienna Convention rules can “retrieve” stable meanings is false and dangerous.\textsuperscript{81} The critique stems from “[c]oncerns about the

\textsuperscript{78} E.g., Joanna Jemieli\’niak, Legal Interpretation in International Commercial Arbitration 61–64 (2014).

\textsuperscript{79} Another question formalists may care about, which lies beyond the scope of this project, is whether real-world processes of international legal interpretation moves take place outside of the ambit of national sovereignty or delegated authority. Are non-state interpreters competing with sovereigns or displacing authoritative interpretations?

\textsuperscript{80} After all, as the previous discussion illustrated, questions about how properly to apply the Vienna Convention are what fuel the voluminous scholarly debates. See supra Subsection I.B.1.

\textsuperscript{81} The critical legal studies movement has developed and amplified the critique, but it began much earlier. See Hersch Lauterpacht, Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties, 26 Brit. Y.B. Int’l L. 48, 53 (1949) (noting that
ineradicability of ideology and politics in international legal interpretation . . . .”82 The motivation for an interpretative choice does not flow independently from the text but instead from the politics and ideology of the interpreter.83 What lawyers and scholars call interpretation is actually the process of justifying a particular approach to the text with arguments. Those arguments are “camouflaged attempts to impose the speaker’s subjective, political opinions on others.”84 Interpretation, according to Martti Koskenniemi, “creates meaning rather than discovers it.”85

Because interpretation creates meaning, in this view, it is “a battleground” where “interpretation involves a potential exercise of power.”86 In Ingo Venzke’s description of this approach, “actors struggle for the law and thereby make the law. They try every trick in the book in order to pull the law onto their side . . . [and] try to influence what is considered (il)legal.”87 Actors who succeed in this interpretive battle, “decide[] what the law is and how the game should be played.”88 For this reason, “[a]ll law is masked power.”89

Subgroups within critical legal studies, like feminist legal theory and the third world approach to international law (“TWAIL”), offer proposals as to who may be winning this battle for meaning on the international stage.

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82 Peat & Windsor, supra note 14, at 12; see also, Johnstone, supra note 27, at 411 (2008) (querying whether interpreters are “making law, based on values and policy choices”).
83 Owen Fiss famously called this the “nihilist challenge” to law. See Owen M. Fiss, Objectivity and Interpretation, 34 Stan. L. Rev. 739, 741 (1982) (“The nihilist would argue that for any text . . . there are any number of possible meanings, that interpretation consists of choosing one of those meanings, and that in this selection process the judge will inevitably express his own values.”).
84 Koskenniemi, supra note 27, at 18.
85 Id. at 531 (emphasis added).
86 Ingo Venzke, Is Interpretation in International Law a Game?, in Interpretation in International Law, supra note 13, at 352, 353.
87 Id. at 359.
88 Id. at 353. See also id. at 352–53 (describing three common ways of understanding “what it means to play the interpretive game”).
89 Fiss, supra note 83, at 741; see also Martti Koskenniemi, International Law and Hegemony: A Reconfiguration, 17 Cambridge Rev. Int’l Affs. 197, 199 (2004) (finding that international actors use legal meaning as a tool to “challenge each other by invoking legal rules and principles on which they have projected meanings that support their preferences and counteract those of their opponents”).
The feminist critique is that “both the structures of international lawmaking and the content of the rules of international law privilege men . . .”90 International rules have been developed by institutions in which women are not represented or are under-represented.91 Law would likely develop differently if women had equal decision-making power.92 While the feminist literature has not produced a robust conversation on the process of treaty interpretation, it does recognize that there is room in treaty interpretation to make normative choices.93 A feminist lens on interpretation would likely show that interpretive choices have been shaped by the legacy of male-dominated decision making; it would certainly suggest that the identity of the interpreter matters.94

Similarly, the TWAIL approach levies the critique that those in control of meaning on the international stage are the former colonial powers and that international law is a tool of injustice and domination. B.S. Chimni, a prominent voice in this literature, has proposed that international law “places meaning in the service of power”: “[D]ominant social forces in society maintain their domination . . . through having their worldview

91 See id. at 621–22 (“In both states and international organizations the invisibility of women is striking. . . . [W]omen have significant positions of power in very few states, and in those where they do, their numbers are minuscule.”). This results in legal regimes where “issues traditionally of concern to men become seen as general human concerns” and “women’s concerns” are marginalized. Id. at 625.
93 For example, feminist thinkers have proposed that treaty interpretation should recognize the omission of women in lawmaking. Since men have held privileged positions in developing treaty texts, the interpretation of treaties should favor women, as the weaker parties. Id. at 930. For example, “treaty rules that protect women’s rights . . . should be interpreted expansively, and rules that prejudice women’s legal interests should be narrowly construed.” Id.
94 A recent volume on “Feminist Judgments in International Law” makes both the explicit and implicit point that identity of the interpreter shapes the legal interpretation. Editors of the volume claim that a feminist chamber may, among other things, “place greater emphasis on the context of a dispute; highlight the impact of power and politics on international law decision-making; foreground the experiences of individuals; [or] offer a different interpretation of rules and rights . . . .” Feminist Judgments in International Law 14 (Loveday Hodson & Troy Lavers eds., 2019). The authors make this point implicitly as well, as the conceit of the book is to rewrite a number of different judicial decisions in international law from a feminist perspective, demonstrating that the perspective of the interpreter matters. See id. at 8 (explaining that “the aim of the project . . . [is] to take the feminist re-writing methodology and apply it to the decisions of international tribunals,” thereby “telling the story differently”).
accepted as natural by those over whom domination is exercised. International law legitimizes and translates a certain set of dominant ideas into rules and thus places meaning in the service of power. While Chimni principally addresses his critique to the substance of international legal rules, which he says are “biased in favour of the first world,” he notes that the critique also extends to the unjust interpretation of those rules. Treaty interpretation has been used as a tool to “upset the balance of rights and obligations agreed to by third world States.”

In sum, the critical approaches observe that treaty interpretation is not a neutral, dispassionate science but a value-laden one. It is the staging ground for politically and ideologically motivated conflicts. These conflicts can exclude some voices and empower others.

The critical approaches should care about the process of interpretation in order to understand who is included in and excluded from the process of developing meaning. For those who think that interpretation reflects the agenda of the interpreters and entrenches power, it will be relevant to know the identities and agendas of those interpreters. Understanding the process of interpretation is one way to excavate the levers of power.

3. Constructivism: Interpretation Can Determine Meaning

A third approach to interpretation addresses the problems the prior two approaches identify: the indeterminacy of the interpretive rules and the contingency of legal meaning. In light of these problems, how can treaties (or any legal texts) function as stable law? A collection of approaches I will label “constructivist” address this puzzle.

The constructivist approaches view interpretation as a creative process of meaning construction that takes place within communities. Legal texts

96 Id. at 12–13.
97 See id. at 13 (noting that “the WTO Appellate Body has interpreted the texts in a manner as to upset the balance of rights and obligations agreed to by third world States”). Chimni offers as an example the Appellate Body’s interpretation of the balance between trade and environmental concerns, an interpretation that, he claims, “was never envisaged by third world States” and has brought detrimental consequences. Id.
98 Id. at 22 (“[B]oth feminist and third world scholarship address the question of exclusion by international law.”).
are not “radically indeterminate,” but because they are interpreted through stable social practices. The idea is a transplant from literary theory: Stanley Fish famously proposed that interpretive communities, rather than authors or individual readers, produce a text’s meaning. Owen Fiss transplanted this idea to law, identifying judges as those populating its interpretive community. In the international context, Ian Johnstone identified two separate interpretive communities: first, legal advisors and other officials “directly responsible for the conclusion and implementation of a particular treaty”; and second, a broader group consisting of “all experts and officials engaged in the various professional activities associated with treaty practice.” These groups are interpretive communities to the extent that they share interpretive “practices and conventions,” and a successful interpretation involves following those conventions.

101 See Waibel, supra note 28, at 147.
102 See Stanley Fish, Is There a Text in This Class? The Authority of Interpretive Communities 14 (1980) (offering a literary theory argument that it is interpretive communities who determine the meanings of texts); see also Peat & Windsor, supra note 14, at 10 n.48. The idea is that “[t]he text is not an object entirely independent of its reader, nor is interpretation an entirely individual and subjective activity; meaning is produced by neither the text nor the reader but by the interpretive community in which both are situated.” Johnstone, Interpretive Communities, supra note 99, at 378.
103 Johnstone, Interpretive Communities, supra note 99, at 374 (noting Fiss’s proposal that, as in the case of literary interpretation, “legal interpretation is constrained by a set of disciplining rules recognized as authoritative by an interpretive community”).
104 See id. at 375 (“Fiss emphasizes that the interpretive community of judges has authority to confer on particular interpretations because judges belong to the community . . . .”). Judges do not claim that their interpretation is authoritative by arguing for its superior merits as an intellectual matter but rather by “by virtue of their office[s]” as judges. Id. “[T]he interpretive community of judges has authority to confer on particular interpretations because judges belong to the community” that holds the societal mandate to make authoritative interpretations. Id.
105 Id. at 385.
106 Id.
107 Id. at 378 (noting that it is these practices and conventions that constrain interpretive discretion).
108 See id. at 380. The interpretive process is relational, as parties “generate, elaborate and refine shared understandings and expectations.” Id. at 381. That idea that interpretation is a
The idea of interpretive communities, filtered through late twentieth century globalist optimism, led human rights scholars to study how actors might best convince the relevant communities to adopt their views. For example, John Tobin offered a rosy view of the potential for non-judicial actors such as non-governmental organizations, academics, treaty monitoring bodies, and special rapporteurs to join interpretive communities involved in interpreting human rights norms. 109 Tobin observed that interpretation is, ultimately, an “an act of persuasion: an attempt to persuade the relevant interpretive community that a particular interpretation is the most appropriate meaning to adopt.” 110 Thus, Tobin concluded, human rights proponents should play the game of persuasion in the most effective way possible. 111 He offered instructions. 112

For the constructivists, the identity of the interpreters should matter because legal meaning is developed in the context of interpretive communities, and so will reflect the understandings, agendas, and normative priors of that community. A constructivist should want to know who populates the relevant interpretive community to have an idea of the norms within that community. Moreover, constructivists view interpretation as a persuasive endeavour. If an interpretation becomes authoritative because the relevant community accepts it, then how are those levers of persuasion pushed? An interpretive community populated by industry and trade associations and government officials may offer a different interpretation than an interpretive community populated by advocacy networks, legal academics, and international organizations. Constructivists have been attentive to the latter kind of community, but the activity of the former is underappreciated. 113 Moreover, divergent

persuasive endeavor blossomed inevitably into the idea that interpretation is a game with players, strategies, objectives, and rules of play. A recent edited volume on interpretation by Andrea Bianchi and coauthors explicitly adopts the metaphor of the game. Bianchi, supra note 29.

109 Tobin, supra note 26, at 9.

110 Id. at 3–4.

111 Id. at 49 (“The task of interpretation must therefore be seen not simply as the attribution of meaning to a legal text but also as an attempt to persuade the relevant interpretive community that a particular meaning from within a suite of potential meanings should be adopted.”).

112 Id. at 14–48 (offering suggestions for how non-judicial actors might persuasively interpret human rights norms for audiences such as domestic government officials).

113 See generally id. (focusing on non-governmental organizations, academics, and international organizations as among the non-judicial actors concerned with human rights norms).
interpretive communities may not always be in conversation with each other. A constructivist will want to understand how legal meaning may fragment and consolidate within and across interpretative communities.

4. The Special Problem of Custom

To conclude this discussion on theoretical approaches to interpretation, it is worth spending just a moment on customary international law. While custom is also susceptible to interpretation, this has not been an area of much scholarly attention. Attention has focused instead on how to identify customary international law through its elements, its legal status, or its legitimacy or effectiveness as a source of law, among other debates. Yet customary international law, just like any other kind of law, “presents the question of interpreting [and] applying” it. The interpretive questions reviewed in the prior Subsections are relevant here too.

114 See Frederick Schauer, Pitfalls in the Interpretation of Customary Law, in The Nature of Customary Law: Legal, Historical and Philosophical Perspectives 13, 13 (Amanda Perreau-Saussine & James Bernard Murphy eds., 2007) (“Much has been written on the legal status of customary law, but considerably less attention has been devoted to the question of determining the content of the customary law whose legal status (or not) is at issue.”); Orfeas Chasapis Tassinis, Customary International Law: Interpretation from Beginning to End, 31 Eur. J. Int’l L. 235, 235 (2020) (“International lawyers seldom think of customary law and interpretation under the same heading.”).

115 See, e.g., Chasapis Tassinis, supra note 114, at 236 (“[T]he dominant approach has largely reduced the analysis of customary international law to its identification through the collection of appropriate evidence.”); Curtis A. Bradley, Customary International Law Adjudication as Common Law Adjudication, in Custom’s Future: International Law in a Changing World 34, 34–39 (Curtis A. Bradley ed., 2016) (collecting debates, including whether custom requires both elements of practice and opinio juris; how it is possible to discern opinio juris; that there is no standard as to how much state practice is necessary; how to weigh various evidences of custom formation; how much evidence is necessary to determine whether custom has formed; whether custom is undemocratic; and so forth); Monica Hakimi, Making Sense of Customary International Law, 115 Mich. L. Rev. 1487, 1505 (2020) (arguing that a proposed customary international legal rule acquires force based on “how the group of actors who participate in a given domain of global governance interact with the position”); J. Patrick Kelly, The Twilight of Customary International Law, 40 Va. J. Int’l L. 449, 452 (2000) (contending that the use of customary international law should be disfavored); Joel P. Trachtman, The Growing Obsolescence of Customary International Law, in Custom’s Future, supra, at 172, 172 (noting that many areas once covered by custom should now be codified in treaties); Andrew T. Guzman, Saving Customary International Law, 27 Mich. J. Int’l L. 115, 119 (2005) (weighing relative usefulness of custom and treaties).

116 Schauer, supra note 114, at 13.

117 In practice, critical, formal, or constructive views tend to focus on the identification rather than the interpretation of custom. Chasapis Tassinis, supra note 114, at 236. That is, the
Interpretive questions involving custom have an additional layer of complexity because custom is uncodified. Custom develops as nations consistently follow a particular practice and demonstrate that they consider that practice to be legally binding. Thus, interpreting a customary norm requires both establishing the existence of the norm and determining its meaning and application. The process is “arguably more complex” than interpreting written forms of law like “statutes, regulations, treaties, and even the common law.”

The difference ends there, however. Debates and theories about interpretation of treaties or other legal texts should apply equally to the process of interpreting customary international law. The questions surround the respective roles of the creator and the interpreter of the norm: How much freedom do authoritative interpreters actually have? Are they retrieving norms or are they doing something more creative?


Custom therefore offers parallels to the common law in the United States and Commonwealth nations. See Bradley, supra note 115, at 34 (developing the theory that “[t]he application of CIL by an international adjudicator . . . is best understood in terms similar to the judicial development of the common law”); see also Chasapis Tassinis, supra note 114, at 237 (noting that “interpretation . . . can be applied not just to words and text but also to social practices and unwritten rules”).

Thus, one way to describe custom is as “the generalization of the practice of States,” as Judge Read did in the ICJ’s Fisheries Case. Fisheries (U.K. v. Nor.), Judgment, 1951 I.C.J. Rep. 116, 191 (Dec. 18) (Read, J., dissenting); see also Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 207 (June 27) (“[F]or a new customary rule to be formed, not only must the acts concerned ‘amount to a settled practice,’ but they must be accompanied by the opinio juris sive necessitatis. . . . [Relevant States] must have behaved so that their conduct is ‘evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.’”); North Sea Continental Shelf (Ger./Den.; Ger./Neth.), Order, 1969 I.C.J. Rep. 3, ¶ 77 (Feb. 20) (“The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even the habitual character of the acts is not in itself enough.”); Statute of the International Court of Justice art. 38(1)(b) (providing that the Court “shall apply . . . international custom, as evidence of a general practice accepted as law”).

Schauer, supra note 114, at 13.

Id. at 15 (arguing that interpretive questions are “no less relevant when the question is the interpretation . . . of customary law”).

Id. at 16.
words, the debate between formalists, critics, and constructivists is relevant in the context of custom and is perhaps even more significant in light of custom’s indeterminacy.\textsuperscript{123} As Frederick Schauer has argued, customary international law also requires grappling with whether legal interpretation should privilege the intent of its makers or “the demands of morality and democracy and policy.”\textsuperscript{124}

Because customary international law should be susceptible to the same debates about the authority and functions of the interpreter, it should also invite questions about who participates in the process of interpretation.

\textbf{C. The Value of Attention}

The process of legal interpretation and the identity of the interpreters matter for both practical and theoretical reasons, as the previous two Sections have argued. To review: On a practical level, they matter because interpretation develops the law, and different interpreters can produce different interpretations. On a theoretical level, the process of interpretation matters because it can discover or corrupt meaning, construct meaning, or entrench power. Despite these potential implications, international legal literatures have not yet directed sustained attention to international legal interpretation as a practice, or to developing process-based accounts of this practice. The project would promise an array of meaningful payoffs. Studying interpretation in practice can help evaluate the high-level theories of interpretation. It can also help advise potential participants in the process about how the game of interpretation is actually played and won, identify the functions that interpretation serves in international affairs, and evaluate potential reforms.

A process-based approach would help fill knowledge gaps. Literatures that remain in the realm of academic abstractions and hypothesis\textsuperscript{125} or

\textsuperscript{123} Custom is also susceptible to the critique from American legal realism that law may not substantially constrain decision makers; it is also susceptible to questions about whether interpretation is a coherence-based process that develops within communities or a deductive one that produces a single correct answer. Chimni, supra note 117, at 15–16; see also Chasapis Tassinis, supra note 114, at 237–38 (pointing out that acknowledging that using customary international law requires “interpretive choices at every juncture of custom’s life” reveals the challenge of plasticity, or the idea that “legal analysis may theoretically yield rules of different . . . scope while using the exact same evidence”).

\textsuperscript{124} Schauer, supra note 114, at 16.

\textsuperscript{125} See, e.g., Andrea Bianchi, The International Regulation of the Use of Force: The Politics of Interpretive Method, 22 Leiden J. Int’l L. 651, 653–54 (2009) (proposing that interpretive
consider interpretation in the narrow context of nations, courts, and international organizations leave open an array of questions: What actors are part of the relevant interpretive communities? How do contests for meaning take place? What levers of influence do they use and what difference does all of this make for the determination of law? These questions require analysis based on study of facts on the ground. They require the “midrange theorizing” that is the focus of the “empirical turn” in international law, which focuses on building theory from the study of facts.

A process-based account of international legal interpretation would build on and contribute to existing literatures on the influence of non-state actors on international lawmaking. The literature characterizes non-state influences in a variety of ways: as lobbying, regulatory intermediation, and norm entrepreneurship, among others.

Lobbying and corporate influence. A growing strand of international scholarship over the past several decades casts corporate entities as formidable allies or opponents to international public interests. Some of this scholarship focuses on ways that business actors influence communities can include “the handful of academics” that specialize in a particular rule’s application, “non-governmental organizations, lobbies, and pressure groups that may have an interest in particular instances, and intellectuals and opinion-makers who influence public opinion by publicly voicing their position on any given matter”); Johnstone, Interpretive Communities, supra note 99, at 385 (identifying two interpretive communities for treaties: first, officials directly responsible for treaty interpretation; and second, the broader international legal community consisting of “all experts and officials engaged in the various professional activities associated with treaty practice”).

See, e.g., Gardiner, supra note 58 (focusing on international entities that hold formal or delegated authority to interpret, such as international organizations, international courts and tribunals, and national legal systems; omitting mention of non-state actors); Dunoff & Pollack, supra note 56, at 637 (noting international legal scholarship’s “almost exclusive emphasis on judicial behavior and its relative neglect of legal interpretation per se”).

Daniel Peat and Matthew Windsor have proposed a similar set of questions, including: What is the “purpose of interpretation in the international legal system”? Do “actors’ interpretations differ according to their professional identities”? Does “strategy motivate[] interpretive choice”? Peat & Windsor, supra note 14, at 4.

E.g., Shaffer & Ginsburg, supra note 16, at 1 (“What matters now is the study of the conditions under which international law is formed and has effects.”). The lack of attention to these questions on the international stage contrasts with attention to these interpretive questions in the domestic context, as in U.S. domestic law. See, e.g., Kent Greenawalt, Statutory and Common Law Interpretation 4 (2013); Lawrence M. Solan, The Language of Statutes: Laws and Their Interpretation 1–3 (2010); Adrian Vermeule, Judging Under Uncertainty: An Institutional Theory of Legal Interpretation 1 (2006). It also contrasts with scrutiny of these questions in other disciplines. See, e.g., Fish, supra note 102, at 13–14 (literary theory).
lawmaking, develop nonbinding norms, or participate in multi-

129 Another strand focuses on tools for corporate

130 Domestically, there has been scholarly attention to

131 Internationally, there

132 If business entities are setting the rules of the game in some

133 Those private actors are “norm
e
trepreneurs.”

134 The entrepreneurs define a norm and actively

129 See, e.g., Paul Schiff Berman, Global Legal Pluralism: A Jurisprudence of Law Beyond

Borders 7–9 (2012) (global legal pluralism); Büthe & Mattli, supra note 32, at 1–2 (private

sector standard setting organizations); Terence C. Halliday & Gregory Shaffer, Transnational

Legal Orders, in Transnational Legal Orders 3, 3 (Terence C. Halliday & Gregory Shaffer

ed., 2015) (transnational legal orders); Kenneth W. Abbott & David Gartner, Reimagining

Participation in International Institutions, 8 J. Int’l L. & Int’l Rel. 1, 4 (2012) (multi-

stakeholder structures); Kenneth W. Abbott & Duncan Snidal, Strengthening International

Regulation Through Transnational New Governance: Overcoming the Orchestration


projects).


(2017) (reviewing the robust literature that responds to institutionalized efforts to engage the

business sector through the Global Compact, the Ruggie Principles, and other efforts); see also

supra note 32 and accompanying text (gathering a multidisciplinary literature on global

corporate influence).

131 See generally sources cited supra notes 9–10 (lobbying and campaign contributions);

Adam Winkler, We the Corporations: How American Businesses Won Their Civil Rights 62


Conn. L. Rev. 147, 150 (2009) (proposing this area of research); Paul B. Stephan, Privatizing

International Law, 47 Va. L. Rev. 1573, 1595–1601 (2011) (noting a lack of information about

the degree and effect of corporate participation in international lawmaking).

133 Finnemore & Sikkink, supra note 34, at 893–94.

134 Id. at 893–98.
proselytize for it, playing a key role in disseminating it, until they persuade enough states to take it on, at which point a norm cascade is triggered.\textsuperscript{135} In this conceptualization, norm entrepreneurs are issue framers and agenda setters. The focus in the literature has been on “transnational advocacy networks,” made up of non-governmental organizations and other civil society actors.\textsuperscript{136} Much of the norm cascade literature focuses on norm entrepreneurship prior to a treaty’s development and entry into force rather than in the post-treaty stage after the norm has taken hold.\textsuperscript{137} Some recognize that non-governmental organizations and other entrepreneurs also participate at later points, such as by helping states internalize norms.\textsuperscript{138} A process-based account of interpretation would bolster this account by characterizing post-cascade interpretation of existing norms as part of the process of developing and disseminating international law. In other words, it focuses on what happens after the treaty is broadly accepted. It would also highlight and clarify the role of business groups, such as industry and trade associations and platform company actors in this process of development.

\textit{Regulatory intermediation.} A process-based account of international legal interpretation would also build on and contribute to a literature that understands international legal regulation as a process that includes norm intermediaries.\textsuperscript{139} This literature imagines regulation as a three-party relationship where intermediaries “play major and varied roles in regulation, from providing expertise and feedback to facilitating implementation, from monitoring the behavior of regulatory targets to building communities of assurance and trust.”\textsuperscript{140} Those intermediaries can be private sector actors such as certification companies, accounting firms, or credit agencies as well as advocacy groups or international organizations.\textsuperscript{141} The regulatory intermediary frame invites questions about how these regulatory intermediaries affect legal meaning as they

\textsuperscript{135} Id.


\textsuperscript{137} See Sandhu, supra note 136, at 1.

\textsuperscript{138} Heidi Nichols Haddad, After the Norm Cascade: NGO Mission Expansion and the Coalition for the International Criminal Court, 19 Glob. Governance 187, 196 (2013).

\textsuperscript{139} See, e.g., Abbott, Levi-Faur & Snidal, supra note 33, at 14.

\textsuperscript{140} Id.

\textsuperscript{141} Id. at 15.
serve their mediation function. Some have noted that under conditions of ambiguity in the law, rule intermediaries can “act as rule-makers by constructing the meaning of ambiguous legal rules.”142 Process-based accounts of international legal interpretation will likely bolster this theoretical account and develop understanding of this meaning construction process. They should help answer questions about how and when private actors serve as intermediaries by interpreting legal norms, and about the effect of this process on legal meaning.

Indeed, many scholars have observed that treaties can be susceptible to evolving interpretations over time.143 Some have proposed that this malleability can help treaties adapt to changing circumstances.144 It can also sacrifice the legitimacy or effectiveness of international law. For example, Andrea Wang has suggested that because treaty meanings can change at the implementation stage, treaties function as “departure points for further bargaining.”145 This understanding raises questions about who may be empowered by treaty implementation and interpretive processes: will these powers “[undermine] the initial consent of state parties” or give “a greater voice to disempowered actors,” or both?146 Understanding the process of interpretation will help assess these risks and benefits, and erect guardrails to avoid potential harms.

It is a particularly important time to address questions about how international law functions in practice. The twenty-first century is a time of global instability, populist retrenchment, and retreats from multilateralism. We are not making new multilateral treaties to govern important global problems, and the treaties that do exist face skepticism, defiance, and withdrawals.147 Major geopolitical rifts divide former allies and make possibilities for new international agreements remote.148 At the same time, borderless problems need international solutions. One of the

143 Crootof, supra note 70, at 252 (identifying as “[a]daptive interpretations” those that are “not immediately suggested by the treaty, but which attempt to reconcile outdated text with actual (or sometimes desired) state action”).
144 Moloo, Changing Times?, supra note 35, at 261 (noting that treaties are hard to amend and suggesting “we look to treaty interpretation tools to adapt treaties to evolving circumstances”).
145 Wang, supra note 29, at 837.
146 Id.
148 See id.
promises and perils of a time like this is that actors look to existing tools, like laws that already exist, to accomplish important agendas.

II. INTERPRETIVE ENTREPRENEURSHIP

At the heart of this Article is a descriptive claim with two components: First, there is a process of interpretation that takes place after a treaty enters into force or after a customary law develops that is directed at influencing the meaning of these laws. Second, this process of interpretation includes an array of participants including private business actors and groups. What this adds up to is an underappreciated, sometimes underground, story about business influence. Scholarship has observed that businesses lobby governments\(^\text{149}\) and international institutions\(^\text{150}\) and contribute to treatymaking\(^\text{151}\), but the story of business influence in interpretation remains obscure in legal scholarship.

As the case studies in this Part show, business influence over legal meaning continues after the treaty is adopted or ratified or the customary law crystallizes. This Part defends this descriptive claim, then offers conceptual tools to analyze it by organizing and taxonomizing its features. These descriptive and analytical contributions lay the groundwork for the final Part, which identifies implications.

A. Interpretation Beyond the Courts

The case studies draw on original research as well as a cross-disciplinary literature review. They cover a wide ambit, ranging from rules on the financing of aircrafts to the meaning of “modern slavery” for the purposes of supply chain due diligence. They cover examples of private sector interpretations in trade and investment, as well as the Outer Space Treaty’s application to commercial mining. The reader should be alert at the outset to the following features of each story: Which actors are involved in the process of interpretation? For what reasons do they engage

\(^{149}\) See generally Eskridge, supra note 9, at 5 (developing a history of U.S. federal lobbying regulation through 1954); Susman & Luneburg, supra note 9, at 23 (offering a history of U.S. lobbying law since 1955).

\(^{150}\) See generally Durkee, supra note 31, at 1747 (describing the “quotidian reality of international lobbying”).

in interpretive processes? To what audiences are they directing their effort, and how does the law require, facilitate, or restrain this process?

1. Aircraft Financing

The first example is striking because business actors use a multipronged strategy to ensure that a treaty receives consistent interpretations worldwide. This effort is transnational, organized, and creative, involving multiple contexts and audiences. The effort relates to the Convention on International Interests in Mobile Equipment (the “Cape Town Convention”).

The Cape Town Convention is of particular interest to private actors: The treaty relates to financing of equipment that can move across national borders, such as aircraft, spacecraft, and railway cars, in order to expand access beyond niche financiers and reduce the cost of capital. The problem it was meant to solve is that with a complex patchwork of financing laws around the world, mobile equipment was regulated by different rules every time it crossed a border. A potential financer had to be ready to master these diverse laws, sue for damages in jurisdictions around the world, and absorb the risk of this uncertain legal landscape. The treaty was a standardization project aimed to fix this and democratize financing. Its intentions were to ensure consistent priority rules, to facilitate enforcement of contracts, and to clarify who has a claim to which equipment. Understandably, the treaty is of great interest to participants in these market transactions, such as sale-seeking.

155 See id. at 345–46.
158 See id. at 7.
manufacturers of aircraft—like Boeing and Airbus—and the lenders and potential lenders seeking to finance these sales.\footnote{159}{See Durkee, Business of Treaties, supra note 151, at 294 (describing how business actors were involved in drafting language and structure of the treaty as well as a ratification campaign); Goode, supra note 153, at 606 (noting that a business working group mounted a substantial campaign that proved indispensable to the development of the Cape Town Convention).}

In fact, market participants have such a keen interest in the treaty that they were significantly involved in developing it, as I have previously described.\footnote{160}{See Durkee, Business of Treaties, supra note 151, at 294; Goode, supra note 153, at 606.}

Significantly, Boeing and Airbus formed an industry group, the Aviation Working Group, which they tasked with helping to develop the treaty and then campaigning around the world to encourage states to join it.\footnote{161}{See Durkee, Business of Treaties, supra note 151, at 295–96.}

The Group vigorously pursued these tasks and had a significant role in producing a very successful treaty. It has been ratified by 82 states as of this writing,\footnote{162}{Convention on International Interests in Mobile Equipment (Cape Town, 2001) – Status, International Institute for the Unification of Private Law (UNIDROIT), https://www.unidroit.org/status-2001capetown [https://perma.cc/PL5L-UGDJ] (last visited Feb. 20, 2021).} and proponents describe it as enormously significant in content.\footnote{163}{See Gopalan, supra note 156, at 255.}

The interpretive story that is the concern of this paper picks up where the treaty-making campaign leaves off. Remarkably, the Cape Town Convention’s entry into force in 2006 did not end the industry’s concern over the treaty or its careful attempts to develop and cultivate it. Rather, the Aviation Working Group is the key player in continuing efforts to implement and interpret it. While the Group was founded by Boeing and Airbus, it now boasts a broad array of “members,” including banks, insurers, aircraft manufacturers, and lessors.\footnote{164}{Inside AWG: Members, Aviation Working Group, http://www.awg.aero/inside-awg/members/ [https://perma.cc/3J5X-LWM8] (last visited Jan. 31, 2021).} The Group’s website defines itself as a “not-for-profit legal entity comprised of major aviation manufacturers, leasing companies and financial institutions” which aims to help develop “policies, laws and regulations” about international aviation financing.\footnote{165}{Inside AWG: Who We Are, Aviation Working Group, http://www.awg.aero/inside-awg/who-we-are/ [https://perma.cc/ZU8T-4B7G] (last visited Jan. 31, 2021).}

The Group’s 40 members range from household names like Deutsche Bank, Morgan Stanley, Goldman Sachs, and the Mitsubishi Corporation, to a whole gamut of regional aircraft lessors like
the Dubai Aerospace Enterprise, the Wings Capital Partners, and more obscure entities.166

The Aviation Working Group pursues four current projects to facilitate the success of the Cape Town Convention, including “ratification and implementation of,” “compliance with,” “economics of,” and “international registry under” the Convention.167 Through the first two modes, the Group engages in a process of interpreting international law for international law’s producers and consumers: nation states.

For its implementation project, the Aviation Working Group “consults with governments . . . including on the declarations to be made and the relationship between the Cape Town Convention and national law.”168 The Group’s central concern is to ensure that the treaty is implemented in each national jurisdiction in such a way as to prevail over conflicting national law.169 It also touts the array of voluntary declarations which the Group recommends that countries adopt.170 To facilitate these goals, the Group has prepared model implementation language, together with various commentaries. In a hefty document it titles “Self-Instructional Materials,” the Group explains that although the treaty is “an undisputed success,” “[m]uch work remains to be done in . . . ensur[ing] that the Convention and Protocols are implemented correctly as a matter of . . . domestic law.”171

To ensure this “correct” implementation, the Self-Instructional Materials offer a detailed explanation of the content, aims, and proper interpretation of the treaty. The materials explain, for example, that “the Convention was designed to override national law as to its applicability, but not necessarily as to all of its effects.”172 The materials do not cite any source for this assertion.173 The materials also offer unsubstantiated

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168 Id.
169 See id.
170 See, e.g., id. (encouraging states to ensure that any declaration under the Convention restricts preferred non-consensual liens and rights to those that are customary).
172 Id. at 28 (emphasis added) (clarifying that the Convention may not override national law on remedies).
173 See id.
interpretive guidance for implementation of the treaty, such as, “[a]ny inconsistency is to be resolved in favor of the Protocol,” and it is “not sufficient to create an interest under the Convention that . . . can be identified as falling within the scope of the security agreement. It is necessary that the object be specifically identified in the agreement itself.”

The Group boasts that it has formed “relationships” with governmental actors to press this case:

The Aviation Working Group (AWG) . . . has established relations with a wide range of governments, intergovernmental bodies and industry groups to educate governments and key industry stakeholders as to the purpose, framework and terms of the Convention and Aircraft Protocol and to promote the benefits that may be derived from its implementation.

The Group has convened a “legal advisory panel” to help it guide governments on the correct implementation of the treaty, which includes attorneys from major law firms in the United States and around the world. Law firms also assist in translating materials to Arabic, Chinese, French, Portuguese, Russian, Spanish, and Turkish. In addition to preparing instructional materials and working with governments directly through these “relations,” the Aviation Working Group has also “work[ed] closely with” the International Institute for the Unification of Private Law (“UNIDROIT”) to convene a seminar to guide EU member states about how to implement the treaty.

The second Aviation Working Group project that serves to interpret international law for states is its compliance project. The Group uses a multipronged strategy. One of its means of encouraging compliance is to monitor it, specifically through a formulaic compliance index, which will score each country’s “actual and anticipated compliance with the terms and intent of the treaty” based on criteria determined by the Group.
itself. To do this, the Group evaluates whether the treaty is implemented, and whether it is implemented in such a way as to give the treaty priority over municipal law, and, significantly, whether it “is being interpreted and applied in accordance with its terms and intent.” The Group does not offer information about how it will assess the “terms and intent” of the treaty for the purposes of scoring. It does disclose that it is “work[ing] with over 200 law firms worldwide . . . to obtain all compliance-related data and experience.”

The Aviation Working Group also has other elements in its multipronged strategy aimed at compliance. These include writing amicus briefs to intervene in domestic court cases. The Group intervenes on behalf of members and for the purposes of “seeking compliance with the requirements of the treaty” as it defines those. The Group advertises that it has submitted briefs in actions in the United States, Brazil, India, Nigeria, Russia, and Turkey. Finally, the Group works on “prevention of non-compliance” by preparing “materials, educational outreach and events,” which “focus on the treaty in practice.”

2. Outer Space

A phrase in the Outer Space Treaty has provoked an entrenched and enduring interpretive debate, which is existential for the emerging space industry. The treaty provides that “[o]uter space, including the moon...
and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.” The debate concerns the word “appropriation.” Does “appropriation” include mining by commercial actors for precious minerals? Or, does it bar nations from claiming ownership of territory, but permit use of resources? The stakes are high, as the interpretation determines the legality of private industry in space.

Understandably, for a matter of such high stakes, commercial space enterprises have been shopping around an interpretation of the treaty that permits commercial use. This is an explicit and implicit project. Explicitly, they lobby at national and international fora. Implicitly, they secure billions of dollars of investment money and build businesses


See supra note 189.

See supra note 187 (legislative debates in the United States and at the United Nations Committee on the Peaceful Uses of Outer Space).
around the prospect that their preferred interpretations will prevail.\textsuperscript{193} The latter kind of activity is more of a nudging or forcing behavior than a persuasive endeavor: building a business model on a wager that a preferred interpretation will prevail. It is the kind of legally disruptive activity that Pollman and Barry call “regulatory entrepreneurship.”\textsuperscript{194} The point of spotlighting the activity in this paper is to show that private actors use this nudging or forcing behavior as one among a suite of tools to push entrepreneurial interpretations of existing law.

Testimony in the U.S. Congress offers one glimpse into both the explicit interpretive efforts and the implicit interpretation-forcing activity. For example, Bigelow Aerospace proposed that the U.S. Senate should “update” the Outer Space Treaty to more clearly permit mining, while asserting that such an update is consistent with a responsible interpretation of the Outer Space Treaty.\textsuperscript{195} A treaty “update” would not be “inconsistent with most of the language provided in the Treaty,” Bigelow’s president said, but would merely clarify the correct interpretation: “I think this is not inconsistent. The 1967 Treaty provides . . . that all foreign bodies should be used in the interest of the common welfare of mankind. That doesn’t exclude free enterprise by any means.”\textsuperscript{196}

A director of another outer space company called Blue Origin affirmed this commerce-friendly interpretation of the Outer Space Treaty but recognized that some countries may not agree with it.\textsuperscript{197} He urged the U.S. government to affirm the proposed interpretation with foreign counterparts: “I think it’s important from a government perspective that we go out and explain what our interpretation of the treaty is and the framework that we’re establishing and lead by example.”\textsuperscript{198}

\textsuperscript{193} See infra notes 199–209 and accompanying text.
\textsuperscript{194} See Pollman & Barry, supra note 2, at 385.
\textsuperscript{196} Id.
\textsuperscript{198} Id. (emphasis added). Alexander quite explicitly urged the U.S. government to shop around his industry’s favored interpretation of the Outer Space Treaty to international counterparts:

I think it’s important for the U.S. government through the State Department to be talking internationally with its counterparts, particularly in the U.N. Committee on
As for the implicit interpretative positions asserted through nudging or forcing behavior, the testimony gives evidence of these as well. The CEO of Galactic Ventures told the U.S. Senate in 2017 that his companies are part of a growing group of companies making active plans to use space resources:

[We] are a part of a robust and growing domestic commercial space industry . . . made up of companies with private financial backing working on a myriad of missions . . . [including] asteroid mining . . . . The commercial space industry is well underway and poised to continue its growth.\textsuperscript{199}

The president of Blue Origin also claimed that his companies were supporting commercial plans to exploit space resources: “[w]e are building the next generation of transportation infrastructure: reliable, affordable, frequent rides to space for everything from . . . resource mining to microgravity manufacturing.”\textsuperscript{200} Similarly, the CEO of Moon Express reviewed an array of plans the company has made to engage in collection of lunar resources for a House of Representatives subcommittee.\textsuperscript{201}

Companies have also publicized their intention to engage in commercial resource appropriation in space beyond the U.S. Congress. The argument, again, is that these companies are fighting the interpretive battle in the court of public opinion, launching a business on the prospect of legal change, and then using public pressure as one tool to accomplish Peaceful Uses of Outer Space about what the Space Treaty, Outer Space Treaty, allows and how we’re interpreting that. It’s important for us as an industry to have the certainty that . . . it’s founded in the Outer Space Treaty, which basically say[s] that those resources are available to everybody so that when we go, let’s say, to the Moon and discover water ice there, we’re not saying now we own every piece of resource on the Moon and every bit of water ice on the Moon; we’re saying, you know, we are able to utilize what we are able to extract and be able to sell that and have property rights over that but not rights to the entire Moon.


\textsuperscript{200} Id. at 13 (statement of Robert Meyerson, President, Blue Origin).

\textsuperscript{201} Private Sector Lunar Exploration: Hearing Before the Subcomm. on Space of the H. Comm. on Sci., Space, & Tech., 115th Cong. 23–35 (2017) (statement of Bob Richards, Founder and CEO, Moon Express, Inc.).
that change.\textsuperscript{202} Moon Express has publicized its intention to “prospect for materials on the Moon as candidates for economic development.”\textsuperscript{203} Before its later demise, Planetary Resources intended to mine asteroids for water, platinum, and other precious metals.\textsuperscript{204} The company was very public about these plans\textsuperscript{205} and attracted substantial investments from prominent investors.\textsuperscript{206} Tokyo-based company iSpace\textsuperscript{207} intends to “locate, extract and deliver lunar ice to space agencies and private space companies.”\textsuperscript{208} iSpace has raised $95 million, secured launch space on SpaceX rockets, and attracted commercial partnerships and major funding partners such as Japan Airlines.\textsuperscript{209}

\textsuperscript{202} See Pollman & Barry, supra note 2, at 384–85 (describing “regulatory entrepreneurship” as advancing a business model on the prospect of legal change, and then pushing for that change).
\textsuperscript{203} Private Sector Lunar Exploration: Hearing Before the Subcomm. on Space of the H. Comm. on Sci., Space, & Tech., 115th Cong. 26 (2017) (statement of Bob Richards, Founder and CEO, Moon Express, Inc.).
\textsuperscript{204} See Mike Wall, Asteroid Mining May Be a Reality by 2025, Space (Aug. 11, 2015), https://www.space.com/30213-asteroid-mining-planetary-resources-2025.html [https://perma.cc/92C2-9PPN].
\textsuperscript{205} Todd Bishop, Mining a $20 Trillion Asteroid? New Clues Emerge About Space Robot Startup, GeekWire (Apr. 19, 2012), https://www.geekwire.com/2012/mining-20-trillion-asteroid-clues-space-robot-startup/ [https://perma.cc/EVW9-W5WN] (reporting on plans announced by Planetary Resources Chairman Peter Diamandis in a TED talk to “go out and grab one of these [asteroids],” which he estimated to be “worth something like $20 trillion”).
\textsuperscript{208} Id. (reporting that the company wants “to identify where water ice exists and map that out so that we can eventually learn how to use it as a resource . . . to create basic rocket fuel for spacecraft”).
\textsuperscript{209} Id. Another example is a UK startup called the Asteroid Mining Corporation, which seeks “to extract resources from asteroids to boost the Earth’s economy and kick start the Space Based Economy.” Our Values, Asteroid Mining Corp., https://asteroidminingcorporation.co.uk/our-vision [https://perma.cc/YP34-ZXAM] (last visited Feb. 21, 2021). The company is currently seeking investors and lobbying in the UK for introduction of legislation “clarifying” private rights over outer space resources. UK Space Resources Activities Bill, Asteroid Mining Corp., https://asteroidminingcorporation.co.uk/uk-space-resources-activities-bill [https://perma.cc/S4NU-DR87] (last visited Feb. 21, 2021).
These explicit and implicit treaty interpretive efforts by commercial actors are supported by the efforts of private associations like the International Institute of Space Law.\textsuperscript{210} The Institute is the “global association for space law,” whose “key mission is the promotion of further development of space law.”\textsuperscript{211} Among other projects, the Institute has prepared a white paper offering an interpretation of the Outer Space Treaty that supports commercial use of resources.\textsuperscript{212} The white paper builds a creative case, analogizing its interpretation to accepted interpretations in the law of the sea,\textsuperscript{213} opining that its commerce-friendly interpretation is “generally accepted,”\textsuperscript{214} and building an aggressively commerce-friendly read of what may satisfy the treaty’s requirement that society must benefit from outer space activities.\textsuperscript{215}

3. Nutritional Labeling

The next case study highlights an interpretive contest within a particular national jurisdiction that attracted transnational attention from industry actors and groups. The case study is drawn from work by Tim Dorlach and Paul Mertenskötter.\textsuperscript{216} As Dorlach and Mertenskötter show, Chile’s attempt to introduce a new nutrition labeling regulation attracted an onslaught of business responses at the notice-and-comment stage.\textsuperscript{217} These comments based their objections on particularly aggressive

\textsuperscript{211} Id.
\textsuperscript{212} Id.
\textsuperscript{213} International Institute of Space Law Directorate of Studies, Does International Space Law Either Permit or Prohibit the Taking of Resources in Outer Space and on Celestial Bodies, and How Is This Relevant for National Actors? What Is the Context, and What Are the Contours and Limits of This Permission or Prohibition? 31 (Stephan Hobe ed., 2016), https://iislweb.org/docs/IISL_Space_Mining_Study.pdf [https://perma.cc/387R-5L3L] (industry group white paper on debate).
\textsuperscript{214} Id. at 30–31.
\textsuperscript{215} Id. at 31–35.
\textsuperscript{216} Id. at 35 (acknowledging that there must be some sort of societal benefit to commercial use but proposing creative understandings of how these societal benefits might accrue; for example, they could “flow to all sectors of society through spinoffs” or “a greater and deeper understanding of space”).
\textsuperscript{218} See id. at 586–87.
interpretations of international trade law, arguing that they prohibit front-of-package nutrition labeling, as proposed by Chile.218

By way of background, Chile developed warning label regulations for packaged food that contains a high level of sugar, saturated fat, sodium, or calories.219 The legislation proposed that foods with the warning labels be subject to a series of sales and marketing restrictions, such as restrictions of sale in schools and advertising to children.220 The bill faced resistance in the Chilean Senate and drew opposition from lobbying groups, but it ultimately passed and went to the health ministry for implementation.221 Dorlach and Mertenskötter’s story picks up at the administrative implementation level, after the passage of this legislation, when Chile’s health ministry began a notice-and-comment period.222 Specifically, the Ministry launched an “international public consultation procedure,” as required by world trade law.223

The authors observe that the consultation procedure opened the door to myriad transnational food industry actors, who made aggressive use of the consultation procedure to offer their interpretations of international trade law.224 Excluding submissions by private persons, the health ministry received 111 comments, 92 of which were from the food industry.225 The submissions came from industry associations, including FoodDrinkEurope, the U.S. Grocery Manufacturers Association, ABChile, and ConMexico, as well as individual corporations.226

The comments revealed a concerted influence campaign. They universally sought to “achieve a weak or postponed implementation.”227 Their legal interpretations “often mirrored each other,” and the “dominant theme” was that the proposed regulations would violate international economic law, most frequently trade law.228 “In total, industry made 39,
often repetitious, allegations of Chile violating [World Trade Organization ("WTO") law."

These interpretations of WTO law were creative outliers, "at odds with the dominant views in the WTO’s adjudication-focused, interpretive community," according to Dorlach and Mertenskötter. For example, the comments suggested that WTO law prohibits all nutrition labels unless they are affirmatively permitted by the Codex Alimentarius. Since the Codex at the time had no guidance on "front-of-pack nutrition labeling," the argument was that all such labels would be prohibited. In the authors’ analysis, this interpretation of WTO law is not widely shared, and the better argument was that the proposed Chilean regulations did not violate the law.

The food industry did not stop at the notice-and-comment process but also launched a lobbying campaign. They made "many personal visits to [the Chilean health ministry] and other Chilean regulatory officials, during which they would put forward their ‘legal concerns.'" They lobbied other foreign governments to try to convince them to put pressure on Chile over the regulations. And they had some success in their transnational lobbying efforts: Dorlach and Mertenskötter found that foreign countries adopted the food industry’s outlying trade law interpretations, revealing this by closely “echoing industry’s interpretations” in their exchanges with the Chilean government.

Ultimately, the Chilean health ministry rejected the food industry interpretations. The authors conclude that the Ministry “resist[ed] interpretive capture by the food industry” by mustering its own legal

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229 Id. at 587 (including the Trade-Related Aspects of Intellectual Property Rights Agreement and the Technical Barriers to Trade ("TBT") Agreement).
230 Id. (opining that the nutrition label “would most likely survive a formal challenge”).
231 Id. at 590 (referring to TBT Article 2.4).
232 Id.
233 Id. at 591. The authors explain that other outlying interpretations include that the “TRIPS Agreement grants a property right in trademarks,” meaning that any regulation to restrict them would “effectively expropriate trademark holders and therefore violate TRIPS,” id. at 588, and that Article 2.2 of the TBT Agreement requires regulators to “affirmatively disqualify all existing alternative[’] regulations that may be less trade restrictive, rather than putting the burden of proof on any ultimate challenger to offer evidence of a suitable alternative that is less trade restrictive, id. at 590.
234 Id. at 591.
235 Id.
236 Id. at 591–92 (observing that these outlying interpretations appeared in submissions by foreign governments to Chile’s public consultation process, and in submissions to the TBT Committee’s Specific Trade Concerns mechanism).
expertise and coordinating with other Chilean governmental agencies to assess whether their draft regulations comply with international law.\textsuperscript{237}

4. Modern Slavery

The modern slavery context is unlike the prior three examples in that, in this case study, companies interpret international law in a reactive posture. They are required to make an interpretation in order to fulfill regulatory requirements. This contrasts with the assertive posture of the prior examples, in which private actors developed interpretations in an attempt to persuade others of a particular legal interpretation. The case study also diverges from the prior examples in that the laws the private actors are interpreting are customary international laws instead of treaty provisions. It is included to demonstrate the breadth of circumstances in which private actors take a role in interpreting international law.

The study is drawn from work by Galit Sarfaty on supply chain due diligence. Sarfaty observes that companies have been put in a tough spot: There is no “coherent and internationally sanctioned definition of ‘modern slavery,’” but a number of jurisdictions require companies to “report on their efforts to curb modern slavery within their supply chains.”\textsuperscript{238} The result of these laws, Sarfaty observes, is to demand that private actors interpret “ill-defined legal norms.”\textsuperscript{239} The interpretive difficulty arises because there is wide consensus that customary international laws against slavery exist but debate about their breadth and scope:

Although the prohibition against slavery has the status of a \textit{jus cogens} norm under international law, there is considerable debate over the definition of modern slavery. While each of the component practices that may be included under modern slavery are defined within international law, the broad concept is not covered under a separate legal framework. As a result, some advocates have pushed for a flexible interpretation that is overinclusive. . . . The popularity of modern

\textsuperscript{237} Id. at 593.

\textsuperscript{238} Galit A. Sarfaty, Translating Modern Slavery into Management Practice, 45 Law & Soc. Inquiry 1027, 1027 (2020) (noting that these jurisdictions include, inter alia, the United Kingdom, California, and Australia).

\textsuperscript{239} Id.
slavery as a single, cohesive, and global cause continues despite the debate over its legal definition . . . .\textsuperscript{240}

Despite this interpretive debate, some jurisdictions have used disclosure regulations to direct business attention to modern slavery.\textsuperscript{241} These regulations require companies to “disclose their efforts to ensure that their supply chains are free from slavery and human trafficking.”\textsuperscript{242} However, the pieces of legislation Sarfaty considers leave “critical gaps in interpretation”\textsuperscript{243} since “the legal norms around modern slavery are undefined.”\textsuperscript{244} These laws leave it “to corporations to determine how they apply [them] to their supply chains.”\textsuperscript{245}

The focus of the case study for the purposes of this Article is on how the companies affected by these laws perform this interpretive work.\textsuperscript{246} To do this, Sarfaty finds, companies often turn to a third-party service provider such as the Supplier Ethical Data Exchange (“Sedex”).\textsuperscript{247} Sedex is a non-profit “platform” company, which has attracted “over fifty thousand buyer and supplier members in 150 countries.”\textsuperscript{248} The company offers products to help its members comply with modern slavery legislation by helping them “identify, measure, and manage risks in their supply chains.”\textsuperscript{249} In so doing, Sarfaty concludes, the company is “excercis[ing] considerable power over decision-making and the interpretation of legal norms.”\textsuperscript{250}

For example, Sedex has prepared a guidance document that acknowledges ambiguity,\textsuperscript{251} then offers a variety of “operational indicators” it has developed.\textsuperscript{252} These indicators are meant to suggest

\textsuperscript{240}Id. at 1031–32 (footnotes omitted).
\textsuperscript{241}Id. at 1032.
\textsuperscript{242}Id. at 1033.
\textsuperscript{243}Id. at 1035.
\textsuperscript{244}Id. at 1036. Safarty notes that some governments do provide a measure of guidance on how to define this norm and are now being pushed to provide more. For example, the United Kingdom agreed to offer more guidance on what must be disclosed. Id. at 1047.
\textsuperscript{245}Id. at 1036.
\textsuperscript{246}See id. at 1029 (noting that modern slavery is undefined both under international law and within the legislative definitions).
\textsuperscript{247}Id.
\textsuperscript{248}Id. at 1028–29.
\textsuperscript{249}Id. at 1043.
\textsuperscript{250}Id. at 1045.
\textsuperscript{251}See id. at 1039 n.6 (noting that Sedex acknowledges the ambiguity in authoritative international sources for the “modern slavery” norm like guidance by the International Labor Organization).
\textsuperscript{252}Id. at 1039.
“definite, strong, and possible” indications of forced labor. Sedex uses this guidance document as the foundation for its “forced labor indicator reports,” which are reports it prepares on behalf of its customers to “provide[] a high-level overview of the likelihood of forced labor being present in a company’s supply chain.” Sedex will evaluate data provided by its clients and prepare a “forced labor risk score” based on its own weighted calculation of the indicators.

As Sarfaty observes, the process of taking raw data from supply chain suppliers and translating it into a risk report and score requires a process of legal interpretation. Sedex converts ambiguous “legal norms around modern slavery into quantitative indicators and numerical risk scorecards.” In so doing, the organization is exercising “considerable power over decision-making and the interpretation of legal norms.” The result, Sarfaty fears, is to “cement[] a particular definition of modern slavery” outside of normal channels of public participation and debate.

B. Interpretation in the Courts

This Article has so far focused on interpretation beyond the courts. This is in part because interpretation in the courts has received much more attention than the larger processes of interpretation outside of the courts. However, it turns out that even interpretation by international tribunals can be the product of interpretive entrepreneurship by private actors.

Consider the context of arbitral tribunals resolving investment disputes. Anthea Roberts has observed that the tribunals have come to exercise a de facto interpretive power over the treaties they apply. This is so even though formal authority to interpret investment treaties is

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253 Id.
254 Id.
255 Id.
256 Id. at 1030.
257 Id.
258 Id. at 1045.
259 Id. at 1029.
reserved to the states that have made or joined them.\textsuperscript{261} This is because the treaties offer broad standards instead of narrow rules\textsuperscript{262} and the tribunals have informally created a system of precedent.\textsuperscript{263} These features add up to a situation where authority has shifted away from states and toward tribunals, Roberts asserts.\textsuperscript{264}

What is less considered, but forms an essential part of this interpretive story, is that tribunals are selecting interpretations offered to them by the litigants. The fact that tribunals have been deferential toward private investors means that they are selecting the interpretations offered by those private investors instead of the interpretations proffered by the state party to the dispute.\textsuperscript{265} As Roberts observes, arbitrators have been predisposed to understand and accept the investor-side interpretations:

Many of the arbitrators that were appointed, particularly by investors, evidenced a distinct commercial orientation in their profile and/or approach, particularly compared to judges selected for other international courts and tribunals. This led to concerns that investor-state tribunals were interpreting broad and vague treaty language in

\begin{itemize}
  \item \textsuperscript{261} Roberts, State-to-State, supra note 260, at 11–13. Investment treaties include Bilateral Investment Treaties (BITs) and Free Trade Agreements (FTAs). See id.
  \item \textsuperscript{262} Anthea Roberts, Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System, 107 Am. J. Int’l L. 45, 76–77 (2013) [hereinafter Roberts, Clash of Paradigms] (arguing that because “investment treaties traditionally coupled short and broadly worded obligations with strong enforcement mechanisms . . . (for example, the promise to treat investors fairly and equitably) . . . the tribunal charged with interpreting and applying the standard is given wide discretion”).
  \item \textsuperscript{263} Roberts, Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States, supra note 260, at 179 (finding that the jurisprudence of the tribunals “resembles a house of cards built largely by reference to other tribunal awards and academic opinions, with little consideration of the views and practices of states in general or the treaty parties in particular”); Roberts, Clash of Paradigms, supra note 262, at 77 (noting how this “lead[s] to much investment treaty law being developed through a body of de facto precedents”).
  \item \textsuperscript{264} Anthea Roberts, Recalibrating Interpretive Authority I (Columbia FDI Persps., Working Paper No. 113, 2014), http://ccsi.columbia.edu/files/2014/01/FDI_No113.pdf [https://perma.cc/A8BK-NWQF] (“As a result, much of the content of investment treaties was forged by tribunals, often in ways going beyond the intentions of the treaty parties.”).
  \item \textsuperscript{265} See, e.g., Julian Arato, Corporations as Lawmakers, 56 Harv. Int’l L.J. 229, 247 (2015) (finding that the effort of multinational corporations to secure protection of favorable investment terms “has been helped along, to be sure, by a great many favorable interpretations of the broad and malleable provisions incorporated in BITs and FTAs”); Roberts, State-to-State, supra note 260, at 25 (noting concerns that “investor-state tribunals were interpreting broad and vague treaty language in ways that were overly protective of investors’ commercial interests”). Note that the investment disputes offer a unique context in international law in which private parties may bring disputes against nations directly. See generally Roberts, State-to-State, supra note 260, at 2 (reviewing these circumstances).
\end{itemize}
ways that were overly protective of investors’ commercial interests and insufficiently sensitive to states’ regulatory needs.\textsuperscript{266}

Thus, private parties have often succeeded in persuading the tribunals to adopt investor-friendly interpretations. Moreover, investors have, in Roberts’s estimation “push[ed] for broad interpretations of investment protections that went beyond what the treaty parties intended or would have supported.”\textsuperscript{267} Without state “control over potential claims and arguments made by investors,”\textsuperscript{268} tribunals can “assert and establish new legal norms, often in unintended ways.”\textsuperscript{269} States are responding to this interpretive dynamic by developing treaties that are more precise.\textsuperscript{270} Thus, although the literature on investment arbitration focuses on the interpretive role of the tribunal, there is an underappreciated story here about the role of corporate lawyers doing the interpreting.

\textbf{C. Analysis}

What do the case studies show about the practice of international legal interpretation? How do they help us understand it? A treaty’s meaning and effect are not stable at the moment the treaty enters into force. That

\textsuperscript{266} Roberts, State-to-State, supra note 260, at 25 (also noting that arbitrators were “selected by the disputing parties, rather than the treaty parties, which meant that the tribunals often were not conscious that they were agents of the treaty parties” in performing these interpretive functions).

\textsuperscript{267} Id.

\textsuperscript{268} Id. at 25 n.111 (paraphrasing Gus Van Harten, Investment Treaty Arbitration and Public Law 96–99 (2007)).

\textsuperscript{269} Id. (quoting Robert O. Keohane, Andrew Moravcsik & Anne-Marie Slaughter, Legalized Dispute Resolution: Interstate and Transnational, 54 Int’l Org. 457, 459 (2000)).

\textsuperscript{270} Roberts, Clash of Paradigms, supra note 262, at 78 (characterizing these more precise treaties as “second generation” investment treaties, “characterized by states seeking to recalibrate this balance of power by increasing the specificity of their treaty commitments and reasserting their interpretive rights as treaty parties”).

The fact that investment treaty arbitration offers considerable room for interpretive contests by the litigants has also inspired non-governmental organizations and respondent states to try to introduce outside norms into the interpretive process, demonstrating that the interpretations that prevail are products of lively contests for meaning. See, e.g., Stephen W. Schill, The OECD Guidelines for Multinational Enterprises and International Investment Agreements: Converging Universes, in 40 Years of the OECD Guidelines for Multinational Enterprises 63, 70–76 (Nicola Bonucci & Catherine Kessedjian eds., 2018) (exploring how respondent states and non-governmental organizations as amici have raised environmental, human rights, and corporate accountability standards in investment arbitrations to try to convince investment tribunals to interpret investment treaty obligations in reference to those standards).
moment simply ends one chapter in a process of legal development and begins the next. As the case studies show, actors engage in the interpretive process to try to shape how an international law is interpreted in domestic legislation, regulations, judicial proceedings, popular opinion, or all of the above. The case studies show that business actors and groups are among the participants in these interpretive processes. They also show a range of intended audiences, or targets of this interpretation, and an array of ways that actors use legal tools to participate in the interpretive contest. The following Subsections take these features in turn.

1. Who Interprets?

The case studies offer information about at least some of the actors involved in interpretive contests. The industry or trade organization is a major actor across several of our case studies. Industry and trade organizations are usually formally organized as not-for-profit entities.271 They exist to serve their membership, which is a group of business entities organized around a particular identity, usually a sector, region, or both.272 Previous research has suggested that trade associations are organized to ensure that “collective action can be taken on common problems.”273 Our case studies show that legal interpretation is one of the common problems to which these entities direct effort.

Our case studies feature many instances of industry associations coordinating an interpretive campaign. For example, in the food labeling context, the interpretive campaign advanced through “nationally cloaked industry associations all around the world.”274 The associations were existing groups used as mouthpieces to “allow[] corporations to amplify their self-interested interpretations” through the notice-and-comment process.275 In the aircraft financing context, the Aviation Working Group was not an existing industry group but was instead founded by Boeing and Airbus for the express purpose of developing law in this area. The Group now serves a wider range of members in the aircraft finance sector.

273 Barnett, supra note 271, at 214 (internal citation omitted).
274 Dorlach & Mertenskötter, supra note 216, at 600.
275 Id.
but maintains its link to the founders and the agenda they set, and it has turned its attention to interpretation.\textsuperscript{276} The outer space case study also features an industry association articulating a business-friendly international legal interpretation, but in a more passive mode than some of the other case studies. In this context, individual business actors lobby on their own behalves rather than through an association. Perhaps this is because the industry is less established than industries in the other case studies.\textsuperscript{277} In the modern slavery example, the association engages its membership by offering its interpretive services for sale as a non-profit business.\textsuperscript{278} Sarfaty calls Sedex a “platform” company, which “create[s] value by facilitating exchanges of information and creating networks of users."\textsuperscript{279} The company employs technical experts rather than legal experts, enlarging the interpretive community addressing modern slavery beyond lawyers to “business professionals,” mostly from the United Kingdom.\textsuperscript{280}

2. To What Audiences?

The audiences in our case studies are almost exclusively legislative and administrative officials, judges, and the public rather than the audience one might expect—the treaty parties themselves, through their executive branch officials, whose statements about treaty meaning are entitled to significant weight in international and domestic law.\textsuperscript{281} The audiences are those who have power to give meaning to the treaty in specific narrow contexts or to confer reputational benefits on the interpreter.

\textsuperscript{276} See discussion supra at Subsection II.A.1.
\textsuperscript{277} This would be a productive question for further research. After all, “we have little systematic understanding” of trade associations and “[t]he lack of research . . . is lamentable.” Barnett, supra note 271, at 214.
\textsuperscript{278} See discussion supra at Subsection II.A.4.
\textsuperscript{279} Sarfaty, supra note 238, at 1028.
\textsuperscript{280} Id. at 1029. The impact of platform businesses is an emerging area of scholarly attention; this case study shows that one productive target for further analysis is their impacts on law through legal interpretation. See id.
\textsuperscript{281} See Moloo, Subsequent Party Conduct, supra note 72, at 57–78 (evaluating what subsequent conduct is relevant to treaty interpretation according to the Vienna Convention); Restatement (Third) of the Foreign Relations Law of the United States § 326 (Am. L. Inst. 1987) (instructing U.S. courts to “give great weight to an interpretation made by the Executive Branch”); Johnstone, Interpretive Communities, supra note 99, at 385 (defining the principal interpretive community for a treaty as “interpreters directly responsible for the conclusion and implementation of a particular treaty”).
National Legislators. The Aviation Working Group wants national legislators to implement the Cape Town Convention according to its guidelines, ensuring in particular that the treaty takes priority over national law. In the outer space context, business actors lobby legislators to adopt domestic legislation that takes an aggressive interpretive position on whether mining of outer space materials is permitted under the treaty.

National Administrative Regulators. In the food labeling context, the multinational food industry wanted Chilean regulators to adopt an interpretation of international trade law that would cause them to drop a labeling requirement. In the modern slavery example, Sedex helps firms interpret international legal norms in order to disclose to regulators that they have performed with adequate diligence.

Arbitral Tribunals and National Courts. In the context of investment disputes, investors are in the unusual position of being able to advance an interpretive position about the meaning of the treaty directly before an international tribunal. In the aviation financing context, part of the working group’s strategy is to file amicus briefs before national courts advancing its view of the “correct” interpretations of the Cape Town Convention in given matters.

Public Opinion. A final set of interpretive audiences in our case studies comprises peers, consumers, potential regulators, or others who may give a reputational or economic benefit to the interpreter.282 For example, the Aviation Working Group is preparing a compliance index to advertise national compliance.283 The working group has not disclosed the intended audience for this index, but one may assume it is meant to function through reputational effects. In the modern slavery context, the audiences for required disclosures are not just national regulators but also a firm’s shareholders and other members of the public who have access to the disclosures.284

3. With What Tools?

How do these interpretations interact with the apparatus of the law? That is, how do legal tools facilitate these interpretive processes or how

282 See Kishanthi Parella, The Information Regulation of Business Actors, 111 AJIL Unbound 130, 130 (2017) (finding that business actors associate with reputable organizations as they seek to avoid negative reputational consequences).
283 See supra Subsection II.A.1.
284 See Sarfatty, supra note 238, at 1048 (noting that the disclosures are meant to allow stakeholders to “evaluate and compare corporate performance”).
does this interpretation affect the law? This question offers the most purchase for questions about what potential reforms and responses may be possible. The case studies identified in this Article cast a wide net, including both diverse subjects and diverse tools of interpretation. That diversity encompasses a range of points of intersection with legal processes. There are likely additional modes of interpretation in case studies not collected in this Article, but this Article captures four.

First, in the modern slavery context, a regulatory disclosure scheme that requires compliance reporting requires private actors to make interpretive choices about content of an ambiguous international legal norm. This is an interpretation required or initiated by the state.

Second, the investment dispute and aviation financing examples both show private actors advancing their interpretations before courts. In the investment dispute context, this is as a party in an international tribunal, and in the aviation financing example, this is as a friend of the court in cases before domestic courts. In both circumstances, the interpretation is facilitated or empowered by the state through the apparatus of the courts. Similarly, in the food labeling context, private interpreters are targeting an administrative agency through its notice-and-comment procedure to try to get the agency to adopt the private sector interpretation in order to defeat disfavored domestic regulations. This also reflects state-facilitated interpretive behavior.

Third, the aviation financing and outer space examples show lobbying of domestic legislators or administrative officials. In these case studies, private interpreters use traditional tools of lobbying to share views with the legislature in order to make sure that domestic law interprets and implements the international treaty in a particular way. This is interpretation aimed at state response.

Finally, a last mode of interpretation is interpretation that is fully independent of the state. It may serve to change the regulatory environment in which a state operates, but it is neither aimed at complying with the law nor is it explicitly aimed at developing or changing the law. For example, in the outer space context, private space companies are launching disruptive business models that depend on a particular interpretation of the Outer Space Treaty. They broadcast these business plans in the popular press, on their websites, and through an industry association. These modes of publicizing this activity could, as in the Pollman and Barry model, help bring public support to an interpretation,
changing the regulatory environment in which any further interpretations are made. 285

To organize the four modes of interpretation it may be helpful to conceptualize them as arranged along a spectrum that reflects the degree of interaction with the state. 286 Interpretive processes that take place purely in response to state interpretation would fall to one end. They are “state initiated.” Interpretive processes that seem to be purely or largely indifferent to state regulation would take place at the other end of the spectrum. While these interpretations may ultimately affect state behavior, they do not immediately interact with the state:

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**Figure 1**

In between those two extremes lie interpretations that have various degrees of interaction with the state, like state-empowered interpretations and those directed at the state. We can organize our case studies along this spectrum:

<table>
<thead>
<tr>
<th>Modes</th>
<th>Case studies</th>
</tr>
</thead>
<tbody>
<tr>
<td>State Initiated</td>
<td>Modern slavery (to comply with regulation)</td>
</tr>
<tr>
<td>State Empowered</td>
<td>Investment disputes (for investment tribunal)</td>
</tr>
<tr>
<td></td>
<td>Aviation financing (via amicus briefs in domestic court)</td>
</tr>
<tr>
<td></td>
<td>Food labeling (in a notice-and-comment procedure)</td>
</tr>
<tr>
<td>Targeted at State</td>
<td>Aviation financing (to domestic legislature)</td>
</tr>
<tr>
<td>Independent of State</td>
<td>Outer space (to domestic legislature)</td>
</tr>
<tr>
<td></td>
<td>Outer space (in court of public opinion)</td>
</tr>
</tbody>
</table>

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285 Pollman & Barry, supra note 2, at 384–85.
286 Note that this spectrum is not intended to suggest that some strategies are more effective than others, but merely to simplify and organize a wide range of activity.
These observations about how the interpretation interacts with the apparatus of the state help organize and evaluate implications.

4. With What Effects?

Finally, what is the effect of interpretive entrepreneurship by business actors? In other words, how effective are business actors at establishing the interpretations they seek, and what do we know about when they are more and less effective? While the case studies do not offer sufficient information to develop a systematic answer to this question, they do permit some preliminary observations and hypotheses.

First, we know that business actors are not always successful at establishing their preferred interpretation. In the food labeling context, Dorlach and Mertenskötter attribute their failure to the education and training of the officials who were the targets of the interpretive campaign. This lack of success may also have to do with the narrowness of the context. In other words, did the food industry lose the battle but win the war? The authors suggest that other governments may have already adopted the food industry interpretation, as evidenced by their own submissions in the Chilean notice-and-comment procedure.

In other contexts, such as aviation financing and the dispute over the meaning of “appropriation” in the Outer Space Treaty, interpretive entrepreneurs appear to have achieved much more success. In the former context, there is no evidence of any organized resistance to the aviation industry’s interpretive campaign. In the latter example, the acceleration of private space programs suggests that resistance to the interpretation has been ineffective. These successes permit hypotheses about the usefulness to interpretive entrepreneurs of a multi-pronged persuasive strategy, the significance of organized resistance, and perhaps the importance of persistence over time.

In other contexts, while private interpretations may have initially taken hold, those private interpretive campaigns have led to reactions by governments that diminish the space for interpretive debates. In the context of bilateral investment treaties, states have increased the precision of many “second generation” treaties so that there is less interpretive space for private parties to exploit. In the context of modern slavery, some governments have begun to issue guidance about what falls within that rubric, diminishing the role of private parties in constructing that norm in their mandated disclosures. These examples support the hypothesis that interpretive entrepreneurship will be a more common phenomenon in
circumstances of ambiguity and that the precision of a norm will diminish the prevalence or effectiveness of that behavior.

There is much more work to be done in determining the effect of these interpretive campaigns and studying the factors that contribute to their success or failure. Nevertheless, because interpretive entrepreneurship has not received systematic attention as a discrete phenomenon, even a brief introduction may help guide further analysis and suggest an array of implications. The next Part turns to those.

III. POST HOC LAWMAKING AND OTHER IMPLICATIONS

As this Article has shown, there is a potentially vast amount of underexplored interpretive activity that contributes to the development of international law. Because this interpretive behavior has not received sustained attention, it is ripe for further analysis. Yet even this preliminary treatment reveals an array of potential implications. The account contributes to our understanding of the process of international lawmaking. In doing so, it contributes to analysis of the contributions and challenges of non-state actors, particularly business actors, and suggests that the interpretive process likely matters to the construction of international law. It informs and challenges theoretical positions on the process of interpretation, and finally, helps identify potential reforms.

A. Post Hoc Lawmaking

One way to understand the interpretive activity in the case studies is as an extended process of lawmaking that reaches beyond the legislative moment. This in turn suggests that lobbying is not only a pre-legislative concern but also a post-legislative phenomenon.

1. Interpretation as Lawmaking

The interpretive activity in the case studies shows an extended process of lawmaking that continues after a treaty enters into force or a customary norm is crystalized. I call this “post hoc” lawmaking. In other words, the intention of interpretive entrepreneurship in at least some of the case studies is to further develop the meaning of international legal rules.

Part of the reason that lawmaking processes continue after the legislative moment is that international legal doctrine facilitates this continuation. Specifically, the Vienna Convention on the Law of Treaties specifies that treaties may be interpreted in light of “any subsequent
practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.  

According to commentators, this is “a most important element” or the “best evidence” of treaty interpretation. To determine the meaning of a treaty, interpreters can thus consider evidence of the intention of the parties that arises after the treaty is concluded. This includes activity at the implementation stage as well as the interpretation stage. Andrea Wang has recently described how treaty implementation is a dynamic process that can cause informal change to treaty meaning. Given these processes, treaties may be described as “departure points for further bargaining among implementers as constraints and opportunities reveal themselves over time.” The descriptive account of this Article confirms and extends that hypothesis. For example, the aviation financing example shows the Aviation Working Group directing attention to the implementation process by working with governments around the world. This Article also enlarges Wang’s account by showing that these lawmaking efforts do not end even at the implementation stage but rather continue on to interpretive struggles occurring much later. The outer space case study is the best example of this, as actors address their interpretive efforts to a treaty that entered into force over half a century ago.

While post hoc lawmaking could be significant at any point in history, it may be particularly significant in the current moment of “uncertainty, contest, and change.” Obstacles to multilateral treaty making and enforcement seem more intractable than ever. In a context such as this, interpretive contests over existing treaty law may do more work in

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288 Aust, supra note 58, at 241.
290 Gardiner, supra note 58, at 253 (noting that subsequent practice in treaty interpretation “is one of the features of the Vienna rules which marks out a difference from the approach taken in some legal systems to interpretation of legal texts of purely domestic origin”).
291 Wang, supra note 29, at 834–35.
292 Id. at 879.
294 Hakimi, supra note 115, at 1492.
295 Alter, supra note 147, at 30–31 (tracing a variety of forms of backlash against the international liberal order).
updating the law for current circumstances than major new multilateral agreements. It is especially important in this context to understand how these interpretive contests unfold, and who participates in them, for what purposes, and with what effects.

2. Interpretation as Lobbying

If interpretation is part of the process of international lawmaking, it is not entirely surprising that it is also a target of focused lobbying efforts. Recognizing that international legal interpretation is also subject to lobbying efforts expands current accounts of lobbying, offers analytical clarity, and suggests regulatory responses borrowed from national lobbying theory and jurisprudence, as well as frameworks for reform developed by international bodies.

While the case studies in this analysis do not focus on the intentions of the interpretive entrepreneurs, these intentions seem clear from the nature of their activity, at least in some circumstances. Interpretive entrepreneurs seek to ensure their interpretations will prevail in various contests for meaning. Consider aircraft financing. The Aviation Working Group’s intention is to disseminate its interpretations as broadly as possible around the world to ensure a particular and consistent interpretation of the Cape Town Convention. The Group’s strategies as well as the breadth of its efforts reveal this purpose. The Group offers implementation guidance, model legislation, and free consultations to government officials who choose to take advantage of them, and it has formed relationships with governments and law firms around the world to advance these goals. The Group’s compliance project and use of amicus briefs in domestic court cases serve as further efforts to advance its interpretations of the treaty worldwide.

Ensuring that an interpretation is widely accepted can bring regulatory stability and certainty, and it can allow the industry a permissive regulatory environment in which to develop a business model. The outer space example best demonstrates this point. Industry actors have lobbied Congress to ensure that their definition of “appropriation” in the

296 See Moloo, Changing Times?, supra note 35, at 261 (suggesting that treaty interpretation can adapt treaties to changing circumstances).
298 See supra Subsection II.A.1.
299 See supra Subsection II.A.2.
Outer Space Treaty prevails in U.S. legislation and policy, and they push the United States to advance this interpretation with international counterparts. At the same time, these actors litigate their case in the court of public opinion. The interpretive campaign in the outer space context may appear less concerted than the campaign in the aviation financing example because it is conducted by a range of actors rather than coordinated through a central industry group. But even if the effort is not coordinated, its message is: Outer Space Treaty interpreters should adopt a commerce-friendly reading of “appropriation.”

As these case studies show, the lobbying efforts are directed toward a range of officials, including domestic legislators, regulators, and judges at both the international and domestic levels. The food labeling example rounds out the set. It is aimed at persuading a particular group of ministerial regulators to adopt a reading of the law. The transnational nature of this campaign implies that food industry actors saw the campaign as a global one. Perhaps they feared a wider spread of the Chilean regulators’ interpretive choices.

While legal scholarship has not focused on international legal interpretation as a site of lobbying influence, the opportunity it presents has not been lost on the business community. As the vice president of a large trade association observed, “You can often accomplish through implementation what you were not able to accomplish through negotiation of the actual agreement.”

Understanding interpretation as lobbying also challenges the once-popular conception that non-state actor participation is a “democratizing” influence on global governance. This view, which I have called the “legitimacy optimist” view, asserts that non-state actors can contribute to the legitimacy of international legal rules by representing a “global constituency” not mediated through particular governments. In this view global governance is more representative and democratic when non-

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300 See supra Subsection II.A.3.
302 See Durkee, supra note 31, at 1742.
governmental organizations participate in rulemaking processes. The case studies in this Article show that beyond rulemaking, non-state actors are also involved in interpretive campaigns, and these actors are not always the public interest organizations one may expect. What the case studies show is that at least some actors in the interpretive contests do not even purport to represent some conception of “the public” but instead the interests of a particular industry sector. This is lobbying activity and should be analyzed and potentially regulated for what it is.

3. Interpretation as Disruptive Influence

Scholars of the gig economy have observed that some startups stake out their business models on the prospect of legal change, and then set about trying to accomplish that change. These companies are not just business disruptors but also legal disruptors. The case studies show that these efforts at legal disruption take place internationally as well. For example, space companies are currently broadcasting their plans to launch, extract, and sell outer space resources based on a controversial interpretation of the Outer Space Treaty. They are trying to ensure this interpretation prevails by marketing the benefits of their business plans to nations, the market, and in the court of public opinion. By so doing, they force their home states and others into a reactive posture. Any new regulations that take a position on the meaning of the Outer Space Treaty do so with heightened stakes because these regulations will either facilitate or quash the intentions of an array of active businesses. If the U.S. experience with Uber, Airbnb, and other platform disruptors offers any guidance, those heightened stakes may increase the likelihood that the disruptors will prevail. This question is worthy of further investigation. In any case, when private actors assert an interpretation and very publicly act on it, they change the status quo against which states make any further interpretive choices.

304 Durkee, supra note 31, at 1759.
305 See Tobin, supra note 26, at 1–4 (recognizing that public interest non-governmental organizations participate in interpreting human rights treaties; proposing ways for them to do so more effectively).
306 Pollman & Barry, supra note 2, at 384–85.
The case studies highlighted in this Article show a variety of different methods by which private actors get involved in advancing interpretations of international law. They tend to confirm the critical and constructivist views that, in practice, the meaning of a text is constructed through power or persuasion within communities. However, these case studies likely represent only the tip of an iceberg of interpretive behavior lurking below the surface of scholarly attention, which should be of interest to a variety of scholarly approaches.

Critical Approaches. For those who think interpretation reflects the agenda and power of the interpreters, the identities and agendas of the interpreters are important characteristics that help determine the outcome of the interpretive process. In other words, for critical theorists, the identity of the interpreters should matter if interpretation is a tool of power. Critical theorists will want to know whose voices dominate and what are the levers of persuasion. The case studies offer fodder for the critical insight that corporate power has influence within international law and also bring that insight out of theoretical abstraction into real-world contexts. In a world where financial power can translate into persuasive power and financial power is frequently located in the Global North and in the private sector, the meanings that stick might be the meanings backed by capital, which are also the meanings that entrench capital.

Retrievalism. The case studies tend to challenge the retrievalist notion that the meaning of a text can be discovered, as in a hunt for buried treasure. In practice, actors behave as though meaning is constructed through a process of persuasion. In any case, for a retrievalist, the identities of the interpreters and non-judicial sites of interpretation should matter if the process of interpretation corrupts meaning or moves it out of the ambit of national sovereignty or delegated authority. A retrievalist will want to know: Are private interpreters playing by the rules, or are they degrading the integrity of international law by promoting corrupt interpretations? Are they competing with sovereigns or displacing authoritative interpretations? The case studies offer some initial observations that might satisfy these questions, but they are preliminary and anecdotal. The principal value of this analysis to a retrievalist is in its suggestion regarding where further research may help address these questions.

Constructivism. For the constructivists, the identity of the interpreters should matter because legal meaning develops within interpretive
communities, and so that meaning will reflect the understandings, agendas, and normative priors of that community. A constructivist should want to know who populates the relevant interpretive community to have an idea of the norms within that community. Moreover, constructivists view interpretation as a persuasive endeavor. If an interpretation becomes authoritative because the relevant community accepts it, then who is persuading, and how? What this Article shows is that the interpretive community may also include private actors, and these tools of persuasion may also be used to lobby for corporate causes.

A constructivist will also want to understand how legal meaning may fragment and consolidate within and across interpretative communities. The case studies show that divergent interpretive communities are not always in conversation with each other. In the space law context, for example, two sets of interpretive communities have produced different answers as to how the non-appropriation norm of the Outer Space Treaty should be interpreted.\textsuperscript{307} Since these interpretations are occurring in different communities largely siloed from each other, advocates on both sides affirm that there is no longer any debate.\textsuperscript{308} Conversely, the presence of private sector actors in interpretive communities can also consolidate legal meaning. In the aircraft financing example, the Aviation Working Group has undertaken to ensure a consistent worldwide interpretation of the Cape Town Convention.\textsuperscript{309}

Each of these conclusions is preliminary, but they suggest productive avenues for future research and the importance of this area of study. Further research could also address questions about whether private sector interpreters offer a pure public good in developing international legal meaning or corrupt meaning for individual private ends. It could address whether the participation of private groups might increase or decrease the input and output legitimacy of legal rules, building on literatures that address these questions in the context of non-governmental organizations and lawmaking.\textsuperscript{310} By opening the black box of

\textsuperscript{307} See supra Subsection II.A.2.
\textsuperscript{308} See id.
\textsuperscript{309} See supra Subsection II.A.1.
international legal interpretation, this Article lays the groundwork for systematic approaches to these questions.

Other Approaches. Those approaches should be of interest to scholars working in a variety of traditions. One of the intellectual forebears of this Article’s approach is the liberal theory movement in international law and relations, which conceives of the state as the agent of interest groups, but which has focused on lawmaking and compliance, and not on interpretation. Other approaches that concern themselves with the relationship between private behavior and the law include the transnational legal network and regulatory intermediary accounts reviewed earlier in this Article. They also include the New Haven School, which conceives of international law as decision processes unconstrained by classic tests of legality; global legal pluralism, which views law as a contest between competing normative orders, which are both publicly and privately generated; and transnational legal ordering, which uses a socio-legal approach to investigate the life cycles of normative orders. This Article’s approach also fits within a new, emerging literature that has not yet attracted an organizing label but that is concerned with how legal processes function in practice, how actors affect those processes, and, generally, how international law is constituted by the behavior and interactions of its participants. It also relates to the

311 See, e.g., Moravcsik, supra note 31, at 513 (explaining liberal theory in international relations); Brewster, supra note 31, at 502 (showing interest group lobbying at the national level shapes national approaches to international law); see also Benvenisti, supra note 31, at 170–72 (conceiving of the sovereign state as an agent of small interest groups).
312 See supra notes 133–42 and accompanying text.
315 Halliday & Shaffer, supra note 129, at 3, 11.
316 See generally International Law as Behavior (Harlan Grant Cohen & Timothy Meyer eds., 2021) (highlighting a “behavioral approach” to legal scholarship); Hakimi, supra note 115, at 1489 (taking a process-based approach to customary international law); Wang, supra note 29, at 828 (analyzing treaty implementation as a product of domestic interactions); Harlan Grant Cohen, International Precedent and the Practice of International Law, in Negotiating State and Non-State Law: The Challenge of Global and Local Legal Pluralism 172, 174–75 (Michael A. Helfand ed., 2015) (taking a “communities of practice” approach to accounts of international precedent); Yahli Shereshevsky, Back in the Game: International Humanitarian Lawmaking by States, 37 Berkeley J. Int’l L. 1, 4 (2019) (showing how states sometimes adopt non-state actors’ strategies to influence lawmaking processes); Susan Block-Lieb & Terence C. Halliday, Global Lawmakers: International Organizations in the Crafting of World Markets
recent surge of scholarly interest in international law as the product of a professional cadre of lawyers. Interpretive contests that involve private actors should be of interest to each of these schools.

C. Reforms

A final reason to pay attention to the actual on-the-ground processes of interpretation is that this descriptive analysis helps to identify and evaluate potential responses. Interpretive entrepreneurship in each of its instantiations fundamentally offers its audiences three options: to adopt, reject, or refrain from responding to the privately developed meaning. Unless those audiences reject an interpretation, as the national regulators did in the context of the nutritional labeling case study, interpretive entrepreneurship can lead to formal or informal entrenchment of the entrepreneurial interpretation.

Even if governmental officials do reject a private interpretation, their choice to do so can sometimes unfold in the context of altered stakes and the entrepreneurial shadow. For example, any new national-level interpretations of the Outer Space Treaty now unfold in the context of a substantial, entrenched space industry, which has developed on the prospect of commercial use of outer space resources.

How, then, might officials respond to interpretive entrepreneurship? The available responses depend on the context. Nations can hypothetically wrest control of the interpretive process by clarifying the text of a treaty itself, but this will only be possible in some contexts. It will likely be much more possible in the context of bilateral agreements like investment treaties than in the context of multilateral treaties like the Outer Space Treaty, where the prospects for a new agreement are remote.

In the context of new treaty projects, the case studies clarify that treaty texts begin, but do not end, the process of lawmaking. Treaty drafters should pay attention to the potential interpretive battles a treaty will attract when they make drafting choices like selecting a rule or standard. In any

13 (2017) (examining the UN Commission on International Trade Law as the “site of struggles for influence and power”).

context, of course, nations can take a proactive role in asserting their chosen treaty interpretations by passing national legislation or making public statements through state departments or at international institutions like the United Nations, thus contributing to the “subsequent practice” that helps define a treaty over time.

In the context of the food labeling regulations, Dorlach and Mertenskötter propose that governments could ensure that their administrative or ministerial level regulators are trained in relevant international laws so they are able to critically evaluate the interpretations directed their way. In the modern slavery context, the reform seems rather simple: regulators could refrain from demanding compliance with a norm they do not define. Such a reform would ensure that legal meaning is developed in democratic contexts with rule of law protections such as transparency and reason-giving rather than in the contexts of commercial expediency. In short, the case studies show an array of potential responses, though this, too, is a productive area for further study.

CONCLUSION

The moments subject to serious scrutiny in international law are the major lawmaking moments, when a treaty is adopted, or a customary international legal norm is identified. This Article has revealed a potentially vast array of more subtle lawmaking moments that occur when interpreters battle over the meaning of a rule. This Article argues that these moments matter too.

The process of interpretation is important because interpretation drives legal development. It is particularly important in the twenty-first century context in which multilateral lawmaking is a vanishing art but global problems persist and intensify. In this context, interpretive entrepreneurship is likely to continue and grow as private actors try to define and redefine the laws on the books. Interpretive entrepreneurs engage in interpretive campaigns to claim legitimacy, avoid legal scrutiny, and use the power of the state to secure their aims. At the same time, conventional arguments over interpretive rules and doctrines miss, and will tend to mask, these messy real-world interpretive battles. So, too, will accounts of legal interpretation that focus on the courts. As this Article shows, law also develops through these obscure, untidy, quotidian interpretive struggles, which nevertheless determine the fate of important legal norms.