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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.

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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

¹ Clayton M. Christensen, Michael E. Raynor & Rory McDonald, *What Is Disruptive Innovation?*, *Harv. Bus. Rev.*, Dec. 2015, <https://hbr.org/2015/12/what-is-disruptive-innovation> [<https://perma.cc/S84Z-8RE5>] (“‘Disruption’ describes a process whereby a smaller company with fewer resources is able to successfully challenge established incumbent businesses.”); see also André Spicer, *Disruptor Has Become a Dirty Word. And Not Just When Applied to Donald Trump*, *The Guardian*, (June 11, 2019), <https://www.theguardian.com/commentisfree/2019/jun/11/disruptor-dirty-word-donald-trump-scientists-engineers> [<https://perma.cc/P34D-HGY5>] (“Now being [a] ‘disruptor’ is a positive. Entrepreneurs such as Elon Musk are lauded when they seek to ‘disrupt’ established industries . . .”).

² See Elizabeth Pollman & Jordan M. Barry, *Regulatory Entrepreneurship*, 90 *S. Cal. L. Rev.* 383, 398 n.63 (2017) (describing how Uber relied on changing the law as part of its business plan).

³ *Id.*

⁴ *Id.* at 401–02.

⁵ 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.

⁶ See discussion *infra* Subsection II.A.1.

⁷ See discussion *infra* Subsection II.A.2.

⁸ See discussion *infra* Section II.C.

development is through the lobbying that surrounds new lawmaking efforts.⁹ Interpretive entrepreneurship is the *ex post* companion to these *ex ante* lobbying efforts. While legal scholarship has focused on the *ex ante* lobbying,¹⁰ 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.¹¹ 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.¹² This is due to the growing importance of

⁹ See, e.g., William N. Eskridge, Jr., *Federal Lobbying Regulation: History Through 1954*, in *The Lobbying Manual* 5 (William V. Luneburg, Thomas M. Susman & Rebecca H. Gordon eds., 4th ed. 2009) (history of U.S. federal lobbying laws); Samuel Issacharoff, *On Political Corruption*, 124 *Harv. L. Rev.* 118, 121, 134–42 (2010) (reviewing efforts to redress the “financial vulnerabilities of democracy,” including through campaign-finance reform efforts); Thomas M. Susman & William V. Luneburg, *History of Lobbying Disclosure Reform Proposals Since 1955*, in *The Lobbying Manual*, supra, at 23 (history of U.S. federal lobbying reform proposals).

¹⁰ See, e.g., Heather K. Gerken & Alex Tausanovitch, *A Public Finance Model for Lobbying: Lobbying, Campaign Finance, and the Privatization of Democracy*, 13 *Election L.J.* 75, 87–90 (2014) (proposing reforms that would subsidize lobbying activity by public interest groups); Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 *Stan. L. Rev.* 191, 226–36 (2012) (proposing a “national economic welfare” rationale for lobbying regulation); Maggie McKinley, *Lobbying and the Petition Clause*, 68 *Stan. L. Rev.* 1131, 1199 (2016) (asserting that current lobbying regulation and practice violates the First Amendment’s Petition Clause); Zephyr Teachout, *The Forgotten Law of Lobbying*, 13 *Election L.J.* 4, 6 (2014) (noting that the scope of the constitutional lobbying right is unclear).

¹¹ See, e.g., discussion *infra* Subsection II.A.1 (describing how industry efforts to develop the Cape Town Convention on International Interests in Mobile Equipment began at the drafting stage and continue with efforts on implementation, interpretation, and compliance).

¹² 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.¹³

Conventional accounts of international legal interpretation focus on interpretive doctrine rather than on the process of interpretation and the multiplicity of actors involved.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).

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).

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.¹⁵ 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.¹⁶ 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.¹⁷ The case studies are based on both original research and a cross-disciplinary literature review. They cast a wide net, ranging from aircraft financing¹⁸ to the meaning of “modern slavery”¹⁹ for the purpose of supply chain due diligence. They address private sector interpretations in trade and investment law²⁰ as well as the Outer Space Treaty’s application to commercial mining.²¹

The case studies show how, why, and by whom interpretive entrepreneurship unfolds.²² 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),²³ and on the best methods to apply those rules.²⁴ A "retrievalist" view suggests that applying the rules correctly will produce a correct interpretation.²⁵ But the Vienna Convention rules themselves require interpretation,²⁶ 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.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.²⁸ Interpretation is a contest, a game, or a staging ground for bargaining.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,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*.³¹ The project

(“[T]he open texture of law leaves a vast field for creative activity which some call legislative.”).

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).

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.

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”).

³⁰ See *infra* Part III.

³¹ See Eyal Benvenisti, Exit and Voice in the Age of Globalization, 98 Mich. L. Rev. 167, 170–71 (1999) (conceiving of the sovereign state as an agent of small interest groups); Rachel Brewster, The Domestic Origins of International Agreements, 44 Va. J. Int’l L. 501, 539 (2004) (noting that governments make international agreements in response to domestic needs); Melissa J. Durkee, International Lobbying Law, 127 Yale L.J. 1742, 1747 (2018) (describing the “quotidian reality of international lobbying”). The fact that international

therefore contributes to literatures that investigate how multinational entities wield their power to shape international law.³² It is also in conversation with a literature that explores the role of “regulatory intermediaries” in developing international law,³³ and a literature that conceives of international law as the product of “norm cascades” produced in part by norm entrepreneurs.³⁴ 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).

³² These conversations are playing out in multiple disciplines. See, e.g., John Braithwaite & Peter Drahos, *Global Business Regulation* 5–7, 27–33 (2000) (sociology); Walter Mattli & Ngaire Woods, *Introduction to The Politics of Global Regulation*, at ix, x–xii (Walter Mattli & Ngaire Woods eds., 2009) (political science); A. Claire Cutler, Virginia Haufler & Tony Porter, *Private Authority and International Affairs*, in *Private Authority and International Affairs* 3, 4 (A. Claire Cutler, Virginia Haufler & Tony Porter eds., 1999) (international relations); Tim Büthe & Walter Mattli, *The New Global Rulers: The Privatization of Regulation in the World Economy* 5 (2011) (law); Joshua Barkan, *Corporate Sovereignty: Law and Government Under Capitalism* 8–14 (2013) (political geography).

³³ Kenneth W. Abbott, David Levi-Faur & Duncan Snidal, *Theorizing Regulatory Intermediaries: The RIT Model*, 670 *Annals Am. Acad. Pol. & Soc. Sci.* 14 (2017). 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.” Shaubin 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).

³⁴ Martha Finnemore & Kathryn 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,³⁵ 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.³⁶ 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.³⁷ The

³⁵ Rahim Moloo, *Changing Times, Changing Obligations? The Interpretation of Treaties Over Time*, 106 *Am. Soc'y Int'l L. Proc.* 261, 261, 264 (2012) [hereinafter Moloo, *Changing Times?*] (noting that while treaties are hard to amend, treaty interpretation can adapt treaties to changing circumstances).

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.³⁸ 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.³⁹

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.⁴⁰ 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.”⁴¹ 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.”⁴² 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.”⁴³ 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/ca162cc03b3261ff608ab7d8cfc31a25> [<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”).

⁴¹ Harlan Grant Cohen, *The Death of Deference and the Domestication of Treaty Law*, 2015 *BYU L. Rev.* 1467, 1469 (2015) [hereinafter Cohen, *Death of Deference*].

⁴² Restatement (Third) of the Foreign Relations Law of the United States § 326 (Am. L. Inst. 1986).

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 theory⁴⁴ and canons of construction.⁴⁵ When, for example, is a question too “political” for judicial resolution?⁴⁶ 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.⁴⁷ 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.⁴⁸ There is no official system of precedent to carry judicial interpretations forward as law.⁴⁹ The authoritative interpreters of law are

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 Pleszka 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.⁵⁰ Nations sometimes delegate their interpretive authority to courts or international organizations.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”).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.⁵³ Whether nations may place warning labels on cigarette packages depends on how one reads relevant bilateral investment treaties.⁵⁴ Whether the commercial space industry can legally mine asteroids or the moon depends, in turn, on how one interprets the Outer Space Treaty.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

⁵⁰ Ulrich Fastenrath, *Relative Normativity in International Law*, 4 *Eur. J. Int'l L.* 305, 335 (1993).

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.”).

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).

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 . . .”).

⁵⁴ See David N. Cinotti, *How Informed is Sovereign Consent to Investor-State Arbitration?*, 30 *Md. J. Int'l L.* 105, 113 (2015) (discussing Philip Morris’s arbitrations against Uruguay for requiring graphic images on the warning labels on cigarette cartons).

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,⁵⁶ even though many interpretive questions never reach these tribunals, and the tribunals produce interpretations that are not authoritative beyond the matter at hand.⁵⁷

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.⁵⁸ This

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,”⁵⁹ 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 interpretation⁶⁰: The rules have “an established meaning which the interpreter must discover ‘as in a hunt for buried treasure.’”⁶¹ Some, but not all, of this literature could be characterized as formalist.⁶² Whatever 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”).⁶³ 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.”⁶⁴ They give some additional instructions as well, defining the treaty’s “context,”⁶⁵ allowing

the Vienna Convention rules and special circumstances where it is necessary to diverge from them); Christian J. Tams, Antonios Tzanakopoulos & Andreas Zimmermann, *Research Handbook on the Law of Treaties*, at xi–xii (Christian J. Tams, Antonios Tzanakopoulos & Andreas Zimmermann eds., 2014).

⁵⁹ Peat & Windsor, *supra* note 14, at 6–7.

⁶⁰ Raz, *supra* note 25, at 264.

⁶¹ Peat & Windsor, *supra* note 14, at 9 (quoting Raz, *supra* note 25, at 241–64).

⁶² It should be noted that some who advance purposive or evolutive theories of treaty interpretation may chafe at being placed in the “formalist” camp. These thinkers consider only stricter textualists to be formalists and call themselves something else, perhaps “functionalists.” The point of lumping all these positions together here is not to eliminate these important distinctions, but to show that much of the international legal scholarship on interpretation focuses on how to apply the rules of the game, the Vienna Convention rules, as each of these positions does. See *infra* notes 69–78 and accompanying text.

⁶³ Vienna Convention on the Law of Treaties, *supra* note 23, 1155 U.N.T.S. at 340. Even states that have not joined the Vienna Convention, like the United States, usually consider the treaty’s rules to be legally binding through customary international law. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights and Conditional Consent*, 149 U. Pa. L. Rev. 399, 424 (2000) (noting that U.S. scholars and executive branch officials accept that many provisions of the Vienna Convention have entered into custom). The International Court of Justice has also treated the Vienna Convention’s interpretive rules as binding through custom. Frederic L. Kirgis, Jr., *Custom on a Sliding Scale*, 81 Am. J. Int’l L. 146, 149 n.16 (1987) (observing “the readiness of international tribunals,” including the ICJ, “to accept, as custom, the major substantive provisions of the Vienna Convention on the Law of Treaties”).

⁶⁴ Vienna Convention on the Law of Treaties, *supra* note 23, 1155 U.N.T.S. at 340.

⁶⁵ *Id.* (defining the context to include the preamble and annexes, among other things).

interpreters to refer to the “preparatory work of the treaty,”⁶⁶ and permitting interpreters to consider agreements and practice that have developed since the treaty was finalized.⁶⁷

Scholarship on the Vienna Convention rules is “voluminous.”⁶⁸ It considers how much weight to give to the intention of the treaty parties;⁶⁹ how to follow the “object and purpose” instruction (developing textual, teleological, and purposive approaches, among others);⁷⁰ whether treaty meaning can evolve over time;⁷¹ what counts as “subsequent practice” and how to weigh it;⁷² how to handle the preparatory work;⁷³ and whether to take different approaches to interpretation in different areas of international law, such as human rights,⁷⁴ criminal,⁷⁵ trade,⁷⁶ tax,⁷⁷ and

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.

⁶⁹ See, e.g., Isabelle Buffard & Karl Zemanek, The “Object and Purpose” of a Treaty: An Enigma?, 3 *Austrian Rev. Int’l & Eur. L.* 311, 315 (1998); David S. Jonas & Thomas N. Saunders, The Object and Purpose of a Treaty: Three Interpretive Methods, 43 *Vand. J. Transnat’l L.* 565, 577 (2010).

⁷⁰ See Rebecca Crootof, Change Without Consent: How Customary International Law Modifies Treaties, 41 *Yale J. Int’l L.* 237, 252 (2016) (identifying these as the “three primary schools of thought on treaty interpretation”).

⁷¹ See, e.g., Julian Arato, Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations, 38 *Yale J. Int’l L.* 289, 294 (2013) (discussing approaches to treaty interpretation based on the original and subsequent intent of state parties).

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).

⁷⁵ E.g., Neha Jain, Interpretive Divergence, 57 *Va. J. Int’l L.* 45, 47–48 (2017) (challenging an “orthodox” position of treaty interpretation through an examination of the Rome Statute of the International Criminal Court).

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.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?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 untilled ground.

2. 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.⁸⁰ Indeed, critical approaches point out that the idea that the Vienna Convention rules can “retrieve” stable meanings is false and dangerous.⁸¹ The critique stems from “[c]oncerns about the

⁷⁸ E.g., Joanna Jemielniak, *Legal Interpretation in International Commercial Arbitration* 61–64 (2014).

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?

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.

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.

rules are “not the determining cause[s] of judicial decision, but the form in which the judge cloaks a result arrived at by other means”).

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 TWAAIL 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

⁹⁰ Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85 *Am. J. Int’l L.* 613, 614–15 (1991).

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.

⁹² See Moshe Hirsch, *The Sociology of International Law: Invitation To Study International Rules in Their Social Context*, 55 *U. Toronto L.J.* 891, 929–30 (2005) (summarizing this literature).

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.”⁹⁵ While Chimni principally addresses his critique to the substance of international legal rules, which he says are “biased in favour of the first world,”⁹⁶ 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.”⁹⁷

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.⁹⁸

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

⁹⁵ B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 *Int'l. Cmty. L. Rev.* 3, 15 (2006).

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,”⁹⁹ because they are interpreted through stable social practices.¹⁰⁰ Shared understandings within communities determine whether an interpretation succeeds.¹⁰¹ 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.¹⁰² Owen Fiss transplanted this idea to law,¹⁰³ identifying judges as those populating its interpretive community.¹⁰⁴ 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”;¹⁰⁵ and second, a broader group consisting of “all experts and officials engaged in the various professional activities associated with treaty practice.”¹⁰⁶ These groups are interpretive communities to the extent that they share interpretive “practices and conventions,”¹⁰⁷ and a successful interpretation involves following those conventions.¹⁰⁸

⁹⁹ Ian Johnstone, *Treaty Interpretation: The Authority of Interpretive Communities*, 12 *Mich. J. Int’l L.* 371, 378 (1991) [hereinafter Johnstone, *Interpretive Communities*].

¹⁰⁰ See *id.*; cf. J.M. Balkin & Sanford Levinson, *Interpreting Law and Music: Performance Notes on “The Banjo Serenader” and “The Lying Crowd of Jews,”* 20 *Cardozo L. Rev.* 1513, 1519–20 (1999) (discussing the role of the audience in determining whether an interpretation of a text is “authentic or faithful”).

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.¹¹⁴ 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.¹¹⁵ Yet customary international law, just like any other kind of law, “presents the question of interpreting [and] applying” it.¹¹⁶ The interpretive questions reviewed in the prior Subsections are relevant here too.¹¹⁷

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.¹¹⁸ Custom develops as nations consistently follow a particular practice and demonstrate that they consider that practice to be legally binding.¹¹⁹ 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.”¹²⁰

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.¹²¹ 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?¹²² In other

theoretical debates are often channelled into questions about whether a customary international legal norm exists rather than debates about how to interpret an existing norm. See, e.g., B.S. Chimni, Customary International Law: A Third World Perspective, 112 Am. J. Int'l L. 1, 7 (2018) (claiming that “CIL rules embody ‘hegemonic’ ideas and beliefs”); Daniel H. Joyner, Why I Stopped Believing in Customary International Law, 9 Asian J. Int'l L. 31, 39 (2019) (“[A]ll of us—international courts, the ILC, and academics—in fact use our corrupted methodologies for determining the presence of CIL in order to serve our own instrumentalist ends.”); Bradley, *supra* note 115 (collecting critiques).

¹¹⁸ 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”).

¹¹⁹ 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”).

¹²⁰ Schauer, *supra* note 114, at 13.

¹²¹ *Id.* at 15 (arguing that interpretive questions are “no less relevant when the question is the interpretation . . . of customary law”).

¹²² *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.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."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.

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 abstraction and hypothesis¹²⁵ or

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").

¹²⁴ Schauer, *supra* note 114, at 16.

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 organizations¹²⁶ 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?¹²⁷ 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.¹²⁸

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”).

¹²⁶ 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*”).

¹²⁷ 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.

¹²⁸ 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-stakeholder governance.¹²⁹ Another strand focuses on tools for corporate accountability.¹³⁰ Domestically, there has been scholarly attention to lobbying and campaign contributions and complaints about the insulating and deregulatory effect of corporate personhood.¹³¹ Internationally, there has been a push for corporate accountability and the articulation of an as-yet incomplete research agenda that would unearth levers of private influence.¹³² If business entities are setting the rules of the game in some arenas, how does that happen? What are the international legal rules that facilitate and structure this behavior? Understanding business roles in legal interpretation would help describe the topography of business influence in international law.

Norm cascades. A process-based account of international legal interpretation would build on and contribute to a literature that understands international law as the product of transnational legal advocacy networks. In Martha Finnemore and Kathryn Sikkink's influential articulation, norms take hold through "norm cascades," which are triggered in part by private actors.¹³³ Those private actors are "norm entrepreneurs."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 eds., 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 Deficit*, 42 *Vand. J. Transnat'l L.* 501, 504–06 (2009) (cooperative public-private mechanisms and projects).

¹³⁰ See generally Kishnathi Parella, *Treaty Penumbra*, 38 *U. Penn. J. Int'l L.* 275, 303–11 (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 (2018) (personhood).

¹³² See Gregory C. Shaffer, *How Business Shapes Law: A Socio-Legal Framework*, 42 *Conn. L. Rev.* 147, 150 (2009) (proposing this area of research); Paul B. Stephan, *Privatizing International Law*, 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.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.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.¹³⁷ Some recognize that non-governmental organizations and other entrepreneurs also participate at later points, such as by helping states internalize norms.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.

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.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.”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.¹⁴¹ The regulatory intermediary frame invites questions about how these regulatory intermediaries affect legal meaning as they

¹³⁵ *Id.*

¹³⁶ *Id.* at 899; see also Erica Sandhu, *Completing the Norm Life Cycle: The Post-Treaty Involvement of NGOs in the Mine Ban Treaty and Chemical Weapons Convention 5–7* (Aug. 2014) (M.A. thesis, University of British Columbia), <https://open.library.ubc.ca/cIRcle/collections/ubctheses/24/items/1.0166964> [<https://perma.cc/4K4C-4BDB>].

¹³⁷ See Sandhu, *supra* note 136, at 1.

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).

¹³⁹ See, e.g., Abbott, Levi-Faur & Snidal, *supra* note 33, at 14.

¹⁴⁰ *Id.*

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

¹⁴² Talesh, *supra* note 33, at 4 (2015).

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.*

¹⁴⁷ See Karen J. Alter, *The Future of International Law*, in *A New Global Agenda: Priorities, Practices, and Pathways of the International Community*, at 25, 30–31 (Diana Ayton-Shenker ed., 2018) (tracing a variety of forms of backlash against the international liberal order).

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 governments¹⁴⁹ and international institutions,¹⁵⁰ and contribute to treaty-making,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”).

¹⁵¹ See generally Melissa J. Durkee, *The Business of Treaties*, 63 *UCLA L. Rev.* 264 (2016) [hereinafter Durkee, *Business of Treaties*] (describing business influence in international treaty making).

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”).¹⁵²

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.¹⁵³ 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.¹⁵⁴ A potential financier 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.¹⁵⁵ The treaty was a standardization project aimed to fix this and democratize financing.¹⁵⁶ Its intentions were to ensure consistent priority rules, to facilitate enforcement of contracts,¹⁵⁷ and to clarify who has a claim to which equipment.¹⁵⁸ Understandably, the treaty is of great interest to participants in these market transactions, such as sale-seeking

¹⁵² Convention on International Interests in Mobile Equipment, Nov. 16, 2001, 2307 U.N.T.S. 285.

¹⁵³ See Roy Goode, *From Acorn to Oak Tree: The Development of the Cape Town Convention and Protocols*, 17 *Unif. L. Rev.* 599, 599–601 (2012) (providing aims of Cape Town Convention).

¹⁵⁴ See Mark J. Sundahl, *The “Cape Town Approach”: A New Method of Making International Law*, 44 *Colum. J. Transnat’l L.* 339, 345 (2006) (offering background on the default rules in security interests law).

¹⁵⁵ *Id.* at 345–46.

¹⁵⁶ See Sandeep Gopalan, *Comment, Harmonization of Commercial Law: Lessons from the Cape Town Convention on International Interests in Mobile Equipment*, 9 *Law & Bus. Rev. Ams.* 255 (2003) (discussing the role of the Cape Town Convention in harmonizing regulatory law for the aviation industry).

¹⁵⁷ See Roy Goode, *The Cape Town Convention on International Interests in Mobile Equipment: A Driving Force for International Asset-Based Financing*, 7 *Unif. L. Rev.* 3, 7–9 (2002) (describing the priority rules and international registry).

¹⁵⁸ *See id.* at 7.

manufacturers of aircraft—like Boeing and Airbus—and the lenders and potential lenders seeking to finance these sales.¹⁵⁹

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.¹⁶⁰ 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.¹⁶¹ 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,¹⁶² and proponents describe it as enormously significant in content.¹⁶³

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.¹⁶⁴ 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.¹⁶⁵ 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

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).

¹⁶⁰ See Durkee, *Business of Treaties*, supra note 151, at 294; Goode, supra note 153, at 606.

¹⁶¹ See Durkee, *Business of Treaties*, supra note 151, at 295–96.

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).

¹⁶³ See Gopalan, supra note 156, at 255.

¹⁶⁴ Inside AWG: Members, Aviation Working Group, <http://www.awg.aero/inside-awg/members/> [<https://perma.cc/3J5X-LWM8>] (last visited Jan. 31, 2021).

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 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

¹⁶⁶ Inside AWG: Members, Aviation Working Group, <http://www.awg.aero/inside-awg/members/> [https://perma.cc/3J5X-LWM8] (last visited Jan. 31, 2021).

¹⁶⁷ Our Projects: Cape Town Convention, Aviation Working Group, <http://www.awg.aero/project/cape-town-convention/> [https://perma.cc/FC3F-AL6W] (last visited Jan. 31, 2021).

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).

¹⁷¹ Aviation Working Group, Self-Instructional Materials 15 (1st ed. 2014), <http://awg.aero/wp-content/uploads/2019/10/Self%20Instructional%20Materials.pdf> [https://perma.cc/DTW2-235D] (emphasis added).

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,”¹⁷⁴ 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.*”¹⁷⁵

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.¹⁷⁶

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.¹⁷⁷ Law firms also assist in translating materials to Arabic, Chinese, French, Portuguese, Russian, Spanish, and Turkish.¹⁷⁸ 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.¹⁷⁹

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

¹⁷⁴ Id. at 19.

¹⁷⁵ Id. at 28 (emphasis added).

¹⁷⁶ Id. at 15.

¹⁷⁷ Id. at Foreword.

¹⁷⁸ Id. at Foreword.

¹⁷⁹ Id. at 15.

itself.¹⁸⁰ 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.”¹⁸¹ The Group does not offer information about how it will assess the “terms and intent” of the treaty for the purposes of scoring.¹⁸² It does disclose that it is “work[ing] with over 200 law firms worldwide . . . to obtain all compliance-related data and experience.”¹⁸³

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.¹⁸⁴ The Group advertises that it has submitted briefs in actions in the United States, Brazil, India, Nigeria, Russia, and Turkey.¹⁸⁵ Finally, the Group works on “prevention of non-compliance” by preparing “materials, educational outreach and events,” which “focus on the treaty in practice.”¹⁸⁶

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.¹⁸⁷ The treaty provides that “[o]uter space, including the moon

¹⁸⁰ Cape Town Convention Compliance Index, Aviation Working Group, <http://www.awg.aero/wp-content/uploads/2019/10/CTC-Compliance-Index-Website-updated-October-2019.pdf> [<https://perma.cc/36FY-CLA3>] (last visited Feb. 21, 2021).

¹⁸¹ *Id.* (noting that the index is expected to come online in early 2020).

¹⁸² The Group has released a methodology summary, but this does not offer information as to how the Group defines the terms and intent of the treaty for the purposes of its assessment. See *Our Projects: Cape Town Convention*, Aviation Working Group, <http://www.awg.aero/project/cape-town-convention/> [<https://perma.cc/2ARS-99XD>] (last visited Feb. 21, 2021).

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ See, e.g., *Private Sector Lunar Exploration: Hearing Before the Subcomm. on Space of the H. Comm. on Sci., Space, & Tech.*, 115th Cong. 75, 87 (2017) (exploring, inter alia, debate about international law that applies to private sector lunar exploration); *Reopening the American Frontier: Reducing Regulatory Barriers and Expanding American Free Enterprise in Space: Hearing Before the Subcomm. on Space, Sci., & Competitiveness of the S. Comm. on Com., Sci., & Transp.*, 115th Cong. 37 (2017) (same, with an expanded focus on various outer space activities); *Comm. on the Peaceful Uses of Outer Space, Rep. on Its Sixtieth*

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.”¹⁸⁸ The debate concerns the word “appropriation.” Does “appropriation” include mining by commercial actors for precious minerals?¹⁸⁹ Or, does it bar nations from claiming ownership of territory, but permit use of resources?¹⁹⁰ The stakes are high, as the interpretation determines the legality of private industry in space.¹⁹¹

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.¹⁹² Implicitly, they secure billions of dollars of investment money and build businesses

Session, ¶¶ 227–37, U.N. Doc. A/72/20 (2017) (recording debate between nations in an international forum).

¹⁸⁸ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies art. II, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205 [hereinafter *Outer Space Treaty*] (emphasis added).

¹⁸⁹ See, e.g., Zachos A. Paliouras, *The Non-Appropriation Principle: The Grundnorm of International Space Law*, 27 *Leiden J. Int'l L.* 37, 50 (2014) (“[A]s a matter of international law, the appropriation of any part of outer space . . . by private individuals is precluded by Article II of the Outer Space Treaty. Hence, any state that confers proprietary rights in outer space would commit an internationally wrongful act . . .”); Int'l L. Ass'n, *Space Law*, in *Report of the Fifty-Fourth Conference Held at The Hague* 405, 429 (1971) (“[T]he draftsmen of the principle of non-appropriation never intended this principle to be circumvented by allowing private entities to appropriate areas of the Moon and other celestial bodies.”); Leslie I. Tennen, *Enterprise Rights and the Legal Regime for Exploitation of Outer Space Resources*, 47 *U. Pac. L. Rev.* 281, 288 (2016) (“State recognition of claims to extraterrestrial property by its nationals is national appropriation ‘by any other means’ prohibited by Article II, no matter what euphemistic label is employed to mask the obvious.”). See generally Abigail D. Pershing, Note, *Interpreting the Outer Space Treaty’s Non-Appropriation Principle: Customary International Law from 1967 to Today*, 44 *Yale J. Int'l L.* 149, 154–57 (2019) (gathering sources to argue that the non-appropriation principle was originally intended to be construed broadly and to unambiguously prohibit any appropriation of outer space resources).

¹⁹⁰ See, e.g., Virgiliu Pop, *Who Owns the Moon?: Extraterrestrial Aspects of Land and Mineral Resources Ownership* 48–58 (2009) (suggesting that the treaty intended to bar only *national* appropriation of outer space resources); Leslie I. Tennen, *Towards a New Regime for Exploitation of Outer Space Mineral Resources*, 88 *Neb. L. Rev.* 794, 799 (2010) (claiming that use of resources does not require appropriation of property, but can instead be based on a right to engage in a particular enterprise—enterprise rights, not ownership rights). See generally Julie Randolph, *Fly Me to the Moon and Let Me Mine an Asteroid: A Primer on Private Entities’ Rights to Outer Space Resources*, 59 *For Defense*, Dec. 2017, at 41, 43–47 (collecting sources).

¹⁹¹ See *supra* note 189.

¹⁹² 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.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.”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.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.”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.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.”¹⁹⁸

¹⁹³ See *infra* notes 199–209 and accompanying text.

¹⁹⁴ See Pollman & Barry, *supra* note 2, at 385.

¹⁹⁵ Reopening the American Frontier: Reducing Regulatory Barriers and Expanding American Free Enterprise in Space: Hearing Before the Subcomm. on Space, Sci., & Competitiveness of the S. Comm. on Com., Sci., & Transp., 115th Cong. 40–41 (2017).

¹⁹⁶ *Id.*

¹⁹⁷ Private Sector Lunar Exploration: Hearing Before the Subcomm. on Space of the H. Comm. on Sci., Space, & Tech., 115th Cong. 76 (2017) (statement of Bretton Alexander, Director of Business Development and Strategy, Blue Origin).

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.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.”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.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.

Id. (emphasis added).

¹⁹⁹ Reopening the American Frontier: Reducing Regulatory Barriers and Expanding American Free Enterprise in Space: Hearing Before the Subcomm. on Space, Sci., & Competitiveness of the S. Comm. on Com., Sci., & Transp., 115th Cong. 22 (2017) (statement of George Whitesides, CEO, Galactic Ventures).

²⁰⁰ *Id.* at 13 (statement of Robert Meyerson, President, Blue Origin).

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.²⁰² Moon Express has publicized its intention to “prospect for materials on the Moon as candidates for economic development.”²⁰³ Before its later demise, Planetary Resources intended to mine asteroids for water, platinum, and other precious metals.²⁰⁴ The company was very public about these plans²⁰⁵ and attracted substantial investments from prominent investors.²⁰⁶ Tokyo-based company iSpace²⁰⁷ intends to “locate, extract and deliver lunar ice to space agencies and private space companies.”²⁰⁸ iSpace has raised \$95 million, secured launch space on SpaceX rockets, and attracted commercial partnerships and major funding partners such as Japan Airlines.²⁰⁹

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).

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.).

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>].

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”).

²⁰⁶ Kenneth Chang, If No One Owns the Moon, Can Anyone Make Money Up There?, *N.Y. Times* (Nov. 26, 2017), <https://www.nytimes.com/2017/11/26/science/moon-express-outer-space-treaty.html> [<https://perma.cc/2D4Q-FHUB>] (reporting that investors included a co-founder of Google, a former chief software architect at Microsoft, and the Grand Duchy of Luxembourg).

²⁰⁷ Jamie Carter, A Japanese Startup is Set To Go Hunting for Ice . . . on the Moon, *Techradar* (Feb. 22, 2019), <https://www.techradar.com/news/japanese-startup-set-to-go-hunting-for-ice-on-the-moon> [<https://perma.cc/5XHL-LSK2>] (noting the company intends to “kick-start a new commercial space industry” by laying groundwork for other countries to engage in activities on the moon).

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”).

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/54NU-DRS7>] (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.²¹⁰ The Institute is the “global association for space law,” whose “key mission is the promotion of further development of space law.”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.²¹² The white paper builds a creative case, analogizing its interpretation to accepted interpretations in the law of the sea,²¹³ opining that its commerce-friendly interpretation is “generally accepted,”²¹⁴ and building an aggressively commerce-friendly read of what may satisfy the treaty’s requirement that society must benefit from outer space activities.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.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.²¹⁷ These comments based their objections on particularly aggressive

²¹⁰ International Institute of Space Law, <https://iislweb.org/> [<https://perma.cc/TSR7-7BLY>] (last visited Jan. 31, 2021).

²¹¹ *Id.*

²¹² 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).

²¹³ *Id.* at 30–31.

²¹⁴ *Id.* at 31–35.

²¹⁵ *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”).

²¹⁶ Tim Dorlach & Paul Mertenskötter, *Interpreters of International Economic Law: Corporations and Bureaucrats in Contest over Chile’s Nutrition Label*, 54 *Law & Soc’y Rev.* 571 (2020).

²¹⁷ 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,

²¹⁸ Id. at 590–91.

²¹⁹ Id. at 571.

²²⁰ Id. at 571, 583.

²²¹ Id. at 585.

²²² Id. at 586.

²²³ Id. at 586–87 (explaining that the Chilean health ministry launched the consultation procedure by giving notice of its draft implementing regulations to the World Trade Organization, as required by the WTO's Technical Barriers to Trade Agreement).

²²⁴ Id. at 587.

²²⁵ Id.

²²⁶ Id. at 587 n.12.

²²⁷ Id. at 586.

²²⁸ Id. at 587, 587 n.12.

often repetitious, allegations of Chile violating [World Trade Organization (“WTO”)] law.”²²⁹

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.²³⁰ For example, the comments suggested that WTO law prohibits all nutrition labels unless they are affirmatively permitted by the Codex Alimentarius.²³¹ 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.²³² 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.²³³

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.’”²³⁴ They lobbied other foreign governments to try to convince them to put pressure on Chile over the regulations.²³⁵ 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.²³⁶

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

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.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.”²³⁸ The result of these laws, Sarfaty observes, is to demand that private actors interpret “ill-defined legal norms.”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 *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

²³⁷ Id. at 593.

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).

²³⁹ Id.

slavery as a single, cohesive, and global cause continues despite the debate over its legal definition²⁴⁰

Despite this interpretive debate, some jurisdictions have used disclosure regulations to direct business attention to modern slavery.²⁴¹ These regulations require companies to “disclose their efforts to ensure that their supply chains are free from slavery and human trafficking.”²⁴² However, the pieces of legislation Sarfaty considers leave “critical gaps in interpretation”²⁴³ since “the legal norms around modern slavery are undefined.”²⁴⁴ These laws leave it “to corporations to determine how they apply [them] to their supply chains.”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.²⁴⁶ To do this, Sarfaty finds, companies often turn to a third-party service provider such as the Supplier Ethical Data Exchange (“Sedex”).²⁴⁷ Sedex is a non-profit “platform” company, which has attracted “over fifty thousand buyer and supplier members in 150 countries.”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.”²⁴⁹ In so doing, Sarfaty concludes, the company is “exercis[ing] considerable power over decision-making and the interpretation of legal norms.”²⁵⁰

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

²⁴⁰ Id. at 1031–32 (footnotes omitted).

²⁴¹ Id. at 1032.

²⁴² Id. at 1033.

²⁴³ Id. at 1035.

²⁴⁴ Id. at 1036. Sarfaty 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.

²⁴⁵ Id. at 1036.

²⁴⁶ See id. at 1029 (noting that modern slavery is undefined both under international law and within the legislative definitions).

²⁴⁷ Id.

²⁴⁸ Id. at 1028–29.

²⁴⁹ Id. at 1043.

²⁵⁰ Id. at 1045.

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).

²⁵² Id. at 1039.

“definite, strong, and possible” indications of forced labor.²⁵³ 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.”²⁵⁴ Sedex will evaluate data provided by its clients and prepare a “forced labor risk score” based on its own weighted calculation of the indicators.²⁵⁵

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.²⁵⁶ Sedex converts ambiguous “legal norms around modern slavery into quantitative indicators and numerical risk scorecards”²⁵⁷ In so doing, the organization is exercising “considerable power over decision-making and the interpretation of legal norms.”²⁵⁸ The result, Sarfaty fears, is to “cement[] a particular definition of modern slavery” outside of normal channels of public participation and debate.²⁵⁹

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.²⁶⁰ This is so even though formal authority to interpret investment treaties is

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 1030.

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 1045.

²⁵⁹ *Id.* at 1029.

²⁶⁰ Anthea Roberts, *State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority*, 55 *Harv. Int’l L.J.* 1, 6 (2014) [hereinafter Roberts, *State-to-State*]; see also Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 *Am. J. Int’l L.* 179, 179 (2010) (“As investment treaties create broad standards rather than specific rules, they must be interpreted before they can be applied. Investor-state tribunals have accordingly played a critical role in interpreting, hence developing, investment treaty law.”).

reserved to the states that have made or joined them.²⁶¹ This is because the treaties offer broad standards instead of narrow rules²⁶² and the tribunals have informally created a system of precedent.²⁶³ These features add up to a situation where authority has shifted away from states and toward tribunals, Roberts asserts.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.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

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.*

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”).

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”).

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.”).

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).

ways that were overly protective of investors' commercial interests and insufficiently sensitive to states' regulatory needs.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."²⁶⁷ Without state "control over potential claims and arguments made by investors,"²⁶⁸ tribunals can "assert and establish new legal norms, often in unintended ways."²⁶⁹ States are responding to this interpretive dynamic by developing treaties that are more precise.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.

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

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).

²⁶⁷ *Id.*

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

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

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

²⁷¹ Michael L. Barnett, *One Voice, But Whose Voice? Exploring What Drives Trade Association Activity*, 52 *Bus. & Soc’y* 213, 221 (2012).

²⁷² See *id.* at 213–14 (describing trade associations). See generally Sarah Dadush, *The Internal Challenges of Associational Governance*, 111 *AJIL Unbound* 125, 125 (2017) (analyzing relationships between trade associations and their members).

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.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.²⁷⁷ In the modern slavery example, the association engages its membership by offering its interpretive services for sale as a non-profit business.²⁷⁸ Sarfaty calls Sedex a “platform” company, which “create[s] value by facilitating exchanges of information and creating networks of users.”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.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.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.

²⁷⁶ See discussion *supra* at Subsection II.A.1.

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.

²⁷⁸ See discussion *supra* at Subsection II.A.4.

²⁷⁹ Sarfaty, *supra* note 238, at 1028.

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.*

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 Sarfaty, *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:

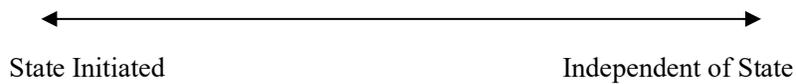


Figure 1

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:

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

Figure 2

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.”²⁸⁷ According to commentators, this is “a most important element”²⁸⁸ or the “best evidence”²⁸⁹ 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.²⁹⁰ 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.²⁹¹ Given these processes, treaties may be described as “departure points for further bargaining among implementers as constraints and opportunities reveal themselves over time.”²⁹² 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.²⁹³

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.”²⁹⁴ Obstacles to multilateral treaty making and enforcement seem more intractable than ever.²⁹⁵ In a context such as this, interpretive contests over existing treaty law may do more work in

²⁸⁷ Vienna Convention on the Law of Treaties, *supra* note 23, at art. 31, ¶ 3(b).

²⁸⁸ Aust, *supra* note 58, at 241.

²⁸⁹ Gardiner, *supra* note 58, at 253. Subsequent practice is also “well-established in the jurisprudence of international tribunals.” *Kasikili/Sedudu Island (Bots./Namib.)*, Judgment, 1999 I.C.J. 1045, ¶ 49 (Dec. 13) (quoting Int’l L. Comm’n, *Reps. on the Work of Its Seventeenth and Eighteenth Sessions*, U.N. Doc. A/CN.4/SER.A/1966/Add.1, ¶ 15 (1966)).

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.

²⁹³ Outer Space Treaty, *supra* note 188 (entered into force Oct. 10, 1967).

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.²⁹⁶ 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.²⁹⁷

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.²⁹⁸ 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.²⁹⁹ 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).

²⁹⁷ See Durkee, *supra* note 31, at 1788–96 (exploring proposals for lobbying reform by the Organisation for Economic Co-operation and Development and other sources).

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.³⁰⁰ 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.”³⁰¹

Understanding interpretation as lobbying also challenges the once-popular conception that non-state actor participation is a “democratizing” influence on global governance.³⁰² 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.³⁰³ In this view global governance is more representative and democratic when non-

³⁰⁰ See *supra* Subsection II.A.3.

³⁰¹ A Private Sector View of International Trade Negotiations, 91 *Am. Soc’y Int’l. L. Proc.* 89, 91 (1997) (remarks of Maureen Smith, Vice President for International Affairs, American Forest and Paper Association).

³⁰² See Durkee, *supra* note 31, at 1742.

³⁰³ *Id.* at 1759 (citing Kenneth Anderson, *Global Governance: The Problematic Legitimacy Relationship Between Global Civil Society and the United Nations* 16 (*Am. Univ. Wash. Coll. L. Rsch. Paper Series*, Working Paper No. 2008-71, 2013), <https://ssrn.com/abstract=1265839> [<https://perma.cc/PE76-5ZL8>] (for a description of this position)).

governmental organizations participate in rulemaking processes.³⁰⁴ 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.³⁰⁵ 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.³⁰⁶ 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.

B. Research Agenda

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.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.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.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.³¹⁰ By opening the black box of

³⁰⁷ See *supra* Subsection II.A.2.

³⁰⁸ See *id.*

³⁰⁹ See *supra* Subsection II.A.1.

³¹⁰ See, e.g., Abbott & Gartner, *supra* note 129, at 26 (examining these questions); Daniel Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 *Yale L.J.* 1490, 1498 (2006) (same); Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 *Law & Contemp. Probs.* 15, 18 (2005) (same).

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.³¹¹ 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.³¹² They also include the New Haven School, which conceives of international law as decision processes unconstrained by classic tests of legality;³¹³ global legal pluralism, which views law as a contest between competing normative orders, which are both publicly and privately generated;³¹⁴ and transnational legal ordering, which uses a socio-legal approach to investigate the life cycles of normative orders.³¹⁵ 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.³¹⁶ 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 how 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.

³¹³ See, e.g., W. Michael Reisman, Siegfried Wiessner & Andrew R. Willard, *The New Haven School: A Brief Introduction*, 32 *Yale J. Int'l L.* 575, 575–77 (2007) (offering a brief primer on the New Haven School approach).

³¹⁴ See, e.g., Ralf Michaels, *Global Legal Pluralism*, 5 *Ann. Rev. L. & Soc. Sci.* 243, 243–45 (2009) (reviewing literature).

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.³¹⁷ 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”).

³¹⁷ See, e.g., Anthea Roberts, *Is International Law International?* 1 (2017) (examining how “different national communities of international lawyers construct their understandings of international law”); Lianne J.M. Boer & Sofia Stolk, *Backstage Practices of Transnational Law*, in *Backstage Practices of Transnational Law* 1, 2 (Lianne J.M. Boer & Sofia Stolk eds., 2019) (exploring the “practices, habits and routines that make up the lives of those involved in the field of transnational law”).

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.