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## The Business of Treaties

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## The Business Of Treaties

Melissa J. Durkee



### ABSTRACT

Business entities play important and underappreciated roles in the production of international treaties. At the same time, international treaty law is hobbled by state-centric presumptions that render its response to business ad hoc and unprincipled.

This Article makes three principal contributions. First, it draws from case studies to demonstrate the significance of business participation in treaty production. The descriptive account invites a shift from attention to traditional lobbying at the domestic level and private standard-setting at the transnational level to the ways business entities have become autonomous international actors, using a panoply of means to transform their preferred policies into law. Second, the Article analyzes the significance of these descriptive facts, identifying an important set of questions raised by business roles in treaty production. Specifically, business participation could affect the success or failure of treaties along a number of different axes that this Article identifies: participation, process, substance, and compliance. Third, observing that scholars and lawmakers could seize an opportunity to design a theoretically principled legal response to business roles in treaty production, the Article identifies both potential legal structures and reasons why law in this arena could be beneficial. Among other reasons, law could facilitate treaty effectiveness along the dimensions this Article identifies; enhance treaty legitimacy by ensuring that decisionmakers are accountable to the relevant stakeholders; and foster rule of law values such as certainty and procedural stability, which could aid public and private participants alike.

Ultimately, the facts the Article describes present a choice: International law can respond in real time to business roles in treaty production, or it can let those roles evolve as they will, with uncertain and possibly enduring results.

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## INTRODUCTION

At press time, international negotiators have just agreed to the Trans Pacific Partnership, a major trade treaty, in a process said to be heavily influenced by backroom deals with massive multinational corporations.<sup>1</sup> These corporate treaty influencers are industry giants in agriculture, pharmaceuticals, and tobacco,<sup>2</sup> and so activists and members of Congress alike have sounded alarms: Will corporate interests displace important public goods?<sup>3</sup>

Although business participation in the TPP negotiation process has drawn popular disquiet, this business role in treaty production is not unique. For example, business entities have become deeply involved in designing, negotiating, and implementing a number of treaties in the private law arena. These treaties keep cargo ships plying their trade and airplanes in the air.<sup>4</sup> And, for these treaties, business expertise can appear to be indispensable to a treaty's success.<sup>5</sup> As these examples suggest, and as this Article will describe, business entities play important roles in the making of international treaties.<sup>6</sup> However, the mechanisms,

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1. See, e.g., 158 CONG. REC. S3517 (daily ed. May 23, 2012) (statement of Sen. Wyden) (“[T]he majority of Congress is being kept in the dark as to the substance of the [Trans-Pacific Partnership] negotiations, while representatives of U.S. corporations—like Halliburton, Chevron, PHRMA, Comcast, and the Motion Picture Association of America—are being consulted and made privy to details of the agreement.”); Taylor Wofford, *What Is the Trans-Pacific Partnership and Why Are Critics Upset by It?*, NEWSWEEK (Jun. 12, 2015, 1:12 PM), <http://www.newsweek.com/what-tpp-trade-deal-342449> (“[D]rafts of the agreement [are] under lock and key, although some 700 ‘cleared advisers,’ most of them corporate lobbyists, have been able to read it and make suggestions. This, naturally, has led to speculation from a variety of sources about what’s actually in the TPP”).
  2. See 158 Cong. Rec. S3517, *supra* note 1.
  3. See, e.g., Peter K. Yu, *TPP and Trans-Pacific Perplexities*, 37 FORDHAM INT’L L.J. 1129, 1174 (2014) (examining the intellectual property activism provoked by the Trans-Pacific Partnership, and surveying concerns such as transparency, accountability, and democratic participation); Wofford, *supra* note 1 (noting the concerns of Internet privacy rights advocates, labor unions and environmentalists).
  4. See *infra* Part II (discussing business’s role in development of the Convention on International Interests in Mobile Equipment, Nov. 16, 2001, 2307 U.N.T.S. 285, and G.A. Res. 63/122, United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Dec. 11, 2008)).
  5. See, e.g., Roy Goode, *From Acorn to Oak Tree: The Development of the Cape Town Convention and Protocols*, 17 UNIF. L. REV. 599, 606 (2012) (noting that a business working group mounted a substantial campaign that proved indispensable to the development of the Cape Town Convention); see also *infra* Part II.A.
  6. This Article uses the terms “business,” “business actors,” “business entities,” “market actors,” and “industry actors” interchangeably. These are meant as umbrella terms that refer broadly to entities that exist for the purpose of generating a profit for owners or shareholders.

extent, and effects of business participation are largely understudied and underappreciated.

What are these business roles, and what effect do they have on the success or failure of international treaties? The question is both significant and ripe for examination. It is significant, at least in part, because the health of international treaties is imperiled. Critics charge that the treaty process is too slow, unwieldy, and contentious to adequately govern deeply perplexing global problems, like climate change, and important emerging ones, like cybersecurity.<sup>7</sup> Yet treaties are also indispensable.<sup>8</sup> In order to achieve better solutions to pressing global problems, legal doctrine and scholarship must address defects in treaty law. As this Article proposes, one important potential defect is treaty law's inability to respond to the deep embeddedness of business entities in the process of treaty production.

The failure, I argue, arises in part from outdated theory. Leading international legal theory begins with the premise that states are the principal actors on the international stage, and that state officials are the relevant lawmakers.<sup>9</sup> Non-state actors—like businesses—affect international lawmaking by participating in domestic political systems.<sup>10</sup> By implication, domestic laws structuring business participation in lawmaking should be sufficient to regulate at the international level as well. As this Article shows through case studies, however, businesses no

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7. See, e.g., Sungjoon Cho & Claire R. Kelly, *Promises and Perils of New Global Governance: A Case of the G20*, 12 CHI. J. INT'L L. 491, 497 nn.13–14 (collecting literature on multilateral treaty failures); Kristen E. Eichensehr, *The Cyber-Law of Nations*, 103 GEO. L.J. 317, 354–60 (2015) (evaluating and dismissing the international treaty as an appropriate form of cyberspace governance); Jonathan Baert Wiener, *Global Environmental Regulation: Instrument Choice in Legal Context*, 108 YALE L.J. 677, 740–41 (1999) (exploring limitations of the treaty as a means of responding to climate change).
  8. See Melissa J. Durkee, *Persuasion Treaties*, 99 VA. L. REV. 63, 75–77 (2013) (collecting literature that explains why treaties are necessary to structure international organizations, courts, and governance regimes, confer legitimacy, coordinate regulation, and prevent regulatory “leakage”).
  9. See L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 341 (1905) (footnote omitted) (“Since the Law of Nations is a law between States only and exclusively, States only and exclusively are subjects of the Law of Nations.”); Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 470–83 (2005) (surveying core theoretical assumptions of international legal theory including the primacy of the state); *Developments in the Law—Extraterritoriality*, 124 HARV. L. REV. 1226, 1228 (2011) (tracing this principle to the Treaty of Westphalia in 1648); see also JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 3–4 (2005) (using a rational choice model to provide an account of why states develop international law).
  10. This is a major contribution of liberal theory—the first international legal theory to “open[] the black box of the state” and consider the role of substate actors. Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1961 (2002); see also Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513, 513 (1997) (elaborating liberal theory in international relations; explaining that domestic constituencies construct state interests).

longer simply exert domestic leverage.<sup>11</sup> Instead, they form transnational coalitions, address their concerns directly to international lawmakers who are not subject to domestic political checks, and assume lawmaking roles previously held only by states.<sup>12</sup>

Yet international treaty law maintains obsolete, state-centric presumptions that hobble its response to the presence of other actors in the treaty-making process, particularly business actors.<sup>13</sup> As a result, no international law regulates business participation in the making of treaties.<sup>14</sup> U.S. domestic law, by contrast, has sophisticated campaign finance laws, requires lobbying disclosures, and features democratic checks and balances.<sup>15</sup> An international parallel is wholly absent. And the international legal scholarship has evolved to mirror the law. On the one hand, its robust analysis of treaty law has not yet fully grappled with business contributions.<sup>16</sup> On the other hand, its analysis of business roles in international lawmaking has often trained its sights on private standard-setting and informal global governance, and has not yet attended fully to treaty making.<sup>17</sup>

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11. See discussion *infra* Part II (examining business participation in lawmaking in the context of the Cape Town Convention, the Rotterdam Rules, and the Trans-Pacific Partnership).
  12. See *supra* text accompanying note 11.
  13. See *infra* Part I.A. (outlining insufficiency of legal response to business). See generally Nico Krisch, *The Decay of Consent: International Law in an Age of Global Public Goods*, 108 AM. J. INT'L L. 1, 39 (2014) (finding that the necessity of state consent to international legal rules "has remained relatively resilient in formal international law" even at the expense of greater inefficiency and marginalization of those rules).
  14. See Anthea Roberts & Sandesh Sivakumaran, *Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law*, 37 YALE J. INT'L L. 107, 113–14 (2012) (noting that officials charged with drafting international treaty law considered including rules addressing non-state actors, but ultimately excluded those rules); cf. JEAN D'ASPREMONT, PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM: MULTIPLE PERSPECTIVES ON NON-STATE ACTORS IN INTERNATIONAL LAW 294 n.33 (2011) (identifying limitations of international legal rules applying to non-state actors).
  15. For example, in the United States, the Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, 121 Stat. 735, requires frequent disclosures regarding lobbying activities, including disclosures regarding the identity of lobbyists and the source of campaign contributions; regulates gifts that may be made to members of Congress; regulates the "revolving door" whereby previous members of Congress may become lobbyists; places extensive disclosure and other burdens on members of Congress who interact with lobbyists; and imposes penalties on lobbyists and congresspersons who violate the rules. See generally Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 121 (2010) (reviewing efforts to redress the "financial vulnerabilities of democracy").
  16. For an overview of the treaty literature, see Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581 (2005).
  17. See e.g., JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS (2006) (discussing the proliferation of intergovernmental organizations, NGOs and multinational corporations, in addition to state actors, as significant governance actors); TIM BÜTKE & WALTER MATTLI, THE NEW GLOBAL RULERS: THE PRIVATIZATION OF REGULATION IN THE WORLD ECONOMY (2011) (discussing state delegation of regulatory power to international

Thus, comparatively little is known about business participation in treaty production.

Because little is known about business participation, little is known about the effect of that participation on a treaty's success. Business input could help produce better treaties. For example, it could produce more ambitious treaties; reduce transaction costs; facilitate a quicker, more effective bargain; or increase deliberation in a way that increases confidence in a treaty project.<sup>18</sup> Conversely, business involvement could also hurt treaties. It could impede consensual agreement between states; make the treaty process more lengthy or costly; inspire side bargains that undercut a treaty's aims; or reduce transparency or democratic legitimacy.<sup>19</sup> To make matters more complicated, business participation—and the effect of that participation on treaty success—could vary along several dimensions, which this Article identifies.<sup>20</sup>

Moreover, attention to business treaty making is necessary because a coherent legal response could aid business and lawmakers alike by promoting key rule of law goods, such as certainty, predictability, and efficiency.<sup>21</sup> This Article proposes, as a preliminary matter, that there are clear shortcomings to the current under-regulated space. Efficiency suffers as decisionmakers create new procedural rules to govern non-state participation in addition to crafting the terms of a treaty's substantive bargain.<sup>22</sup> Solutions

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private-sector standard setting organizations); cf. Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 20 (2005) (discerning “[f]ive main types of globalized administrative regulation” including hybrid forms that include private participation, but excluding consideration of treaty law).

18. These possibilities are explored at greater length in Part III, *infra*. They build on recent work by Paul Stephan, who used a cost-benefit analysis to determine the welfare effects of the participation of various non-state entities in law production. See Paul B. Stephan, *Privatizing International Law*, 97 VA. L. REV. 1573, 1577 (2011). Stephan also noted the increasing role of private actors (including business actors) in the making of international law and the underexplored effects of this participation, though his work did not focus on the specific valence of business actors. See *id.*
19. See *infra* Part III.A.
20. See *id.*
21. For example, Lawrence Susskind, writing in a business journal, urges businesses concerned with environmental regulation to “play an active role in promoting the most useful reforms” of the international treaty-making system in order “to achieve greater uniformity, predictability and efficiency.” Lawrence E. Susskind, *New Corporate Roles in Global Environmental Treaty-Making*, 27 COLUM. J. WORLD BUS. 62, 71 (1992); see also Natasha Affolder, *The Market for Treaties*, 11 CHL. J. INT'L L. 159, 159 (2010) (observing that business entities use treaty texts for their own purposes).
22. For example, the international working group bearing the mandate to draft a proposed UN Business and Human Rights Treaty must decide whether and how to engage business actors in the treaty development process, and formulate a procedural structure to govern that engagement before developing the substance of the treaty. See Human Rights Council Res. 26/9, U.N. Doc. A/HRC/RES/26/9 (July 14, 2014) (establishing an “intergovernmental working group . . . whose mandate shall be to elaborate an international legally binding instrument to regulate . . . the activities

are ad hoc,<sup>23</sup> and business participants go underground.<sup>24</sup> Legal rules could settle these problems, easing logjams and enhancing efficiency.<sup>25</sup> Law could also help resolve persistent concerns about legitimacy and the accountability of international decisionmakers.<sup>26</sup>

Lawmakers and scholars therefore face an opportunity and an imperative to more fully understand business effects on treaty making, and to craft a theoretically coherent response to the business role. This Article identifies two analytic models, proposed as ideal types, which might guide the development of a formal legal response. The first I call an administrative model: It preserves the current public/private dichotomy and seeks to discipline private input in order to protect the integrity of public decision making.<sup>27</sup> The second option I call a market model: It eliminates the public/private divide and views all stakeholders in the potential treaty bargain as equals in a contractually structured relationship.<sup>28</sup> But the opportunity to craft a legal approach may be fleeting. In the absence of theoretically principled prospective law making, law will not shape the facts but respond to them,<sup>29</sup> with unpredictable and possibly unsettling results.

The remainder of this Article proceeds as follows. Part I traces treaty law's outdated doctrinal assumptions about non-state actors, and its resulting ad hoc, inchoate response to business. It also shows how the scholarly landscape mirrors the legal one: While attending carefully to treaty design features, the literature has not fully considered business roles in treaty production. Part II exposes the deep embeddedness of business in treaty making by examining three contemporary

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of transnational corporations and other business enterprises"); Interview with Anita Ramasastry, Univ. of Wash. Law Found. Prof. of Law, Univ. of Wash. Sch. of Law, in Seattle, Wash. (Jan. 2015).

23. See, e.g., Interview with Anita Ramasastry, *supra* note 22 (noting that the intergovernmental working group was faced with the challenge of developing a principled approach to business participation in the development of the UN Business and Human Rights Treaty); Kal Raustiala, *NGOs in International Treaty-Making*, in *THE OXFORD GUIDE TO TREATIES* 150 (Duncan B. Hollis ed., 2012) (reviewing some ad hoc accreditation regimes constructed by environmental treaties that permit business actors to serve as consultants).

24. See *infra* Part I.A.1.

25. See *infra* Part III.A.

26. See *infra* Part III.B.

27. See *infra* Part III.D. The administrative model I propose builds on U.S. domestic administrative law scholarship. See, e.g., Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000) (surveying approaches).

28. See *infra* Part III.D.

29. For an assertion that the role of business in formal international lawmaking is growing, see Stephan, *supra* note 18, at 1597 (noting that "there exists substantial indirect evidence that the role of organized private interests [including business entities] in upstream international lawmaking has grown in recent years"). As Stephan articulates the point, "[p]rivatization is a process, not an outcome. In international law, this process proceeds apace." *Id.* at 1577 (footnote omitted).



treatymaking efforts, demonstrating that, for some treaties, business is involved at all relevant generative points: design; drafting; negotiation and adoption; ratification; and implementation. Part III identifies four significant implications of this deep business embeddedness, and outlines the prospective choices lawmakers and scholars are invited to confront.

## I. THE OBSCURITY OF BUSINESS IN TREATY LAW

### A. Business in Treaty Law

Despite great leaps forward in the past century, international law remains surprisingly stunted in an important area: It has not ordered the relationship between states and non-state entities in the treatymaking process. Specifically, international law has not elaborated a coherent legal mechanism to structure, regulate, discipline, or incorporate the contributions of non-state actors with respect to the development of treaties.<sup>30</sup> It is true that a particular subset of non-state actors have found a sort of accommodation through UN accreditation regimes.<sup>31</sup> But those regimes highlight both the lack of a comprehensive, systematic approach to non-state actors, and the lack of any regime at all that applies to market actors such as businesses. This absence of legal oversight arises from a distinctive kind of myopia in international law.

#### 1. Legal Myopia

Nation-states are lawmakers. So says the orthodoxy that has guided the development of international legal rules since 1648.<sup>32</sup> States may also lend their

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30. See *infra* Part I.A.1.

31. See *infra* Part I.A.2.

32. The year 1648 marks the Peace of Westphalia, the peace treaty that ended the Thirty Years' War in the Holy Roman Empire and introduced the concept of the nation-state. See, e.g., J.L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 1 (Sir Humphrey Waldock ed., 6th ed. 1963) (explaining that the Peace of Westphalia introduced the concept of international law as “the body of rules and principles of action which are binding upon civilized states in their relations with one another”); *Developments in the Law—Extraterritoriality*, *supra* note 9, at 1228 (“In the centuries since the Treaty of Westphalia, the tenets of state sovereignty and territorial integrity have largely defined the international legal system.”); see also David Kennedy, *International Law and the Nineteenth Century: History of an Illusion*, 17 QUINNIPIAC L. REV. 99, 112 (1997) (describing the pre-Westphalian world as “a pre-legal international world of politics, war, religion, and ideology”).

lawmaking authority to other actors, such as international organizations.<sup>33</sup> But the generosity of the orthodoxy ends there: Beyond exercising borrowed authority, non-state actors have no official capacity to make law.<sup>34</sup> This first principle of international law has led to the significantly underdeveloped legal response to non-state actors in the international legal system.<sup>35</sup>

International law's unfledged response to non-state actors stems from its Westphalian, positivist roots. The Westphalian idea is that nation-states are the only international entities that hold the privilege to determine their own fates.<sup>36</sup> As a result, states alone have rights and duties on the international stage.<sup>37</sup> The positivist idea is that law acquires its force through the consent of the governed.<sup>38</sup> Because the governed, in the international context, are nation-states, the only

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33. See ALVAREZ, *supra* note 17 (providing a comprehensive review of lawmaking by international organizations); JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW 53–73 (2d ed. 2009) (institutions with lawmaking and adjudicatory powers derive their authority from initial act of delegation); Duncan B. Hollis, *Why State Consent Still Matters—Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 BERKELEY J. INT'L L. 137, 146–71 (2005) (describing lawmaking by various kinds of international organizations pursuant to delegation of authority from states).
34. See OPPENHEIM, *supra* note 9, at 341 (footnote omitted) (“Since the Law of Nations is a law between States only and exclusively, States only and exclusively are subjects of the Law of Nations.”). *But see* KLABBERS, *supra* note 33 (noting that international organizations often reinterpret their powers in a way that is not fully controlled by that initial act of state delegation); Laurence R. Helfer, *Nonconsensual International Lawmaking*, 2008 U. ILL. L. REV. 71, 72–74 (2008) (describing international lawmaking by international organizations as “nonconsensual” because states do not consent to the particular legal rules being produced). See generally Krisch, *supra* note 13, at 39 (finding that the necessity of state consent to international legal rules “has remained relatively resilient in formal international law” even at the expense of greater inefficiency and marginalization of those rules).
35. The term “non-state actor” refers to actors that are not states, or, more specifically, “any organization that does not have a formal or legal status as a state or agent of a state, or as a constituent subunit of a state such as a province or municipality.” Kal Raustiala & Natalie L. Bridgeman, *Nonstate Actors in the Global Climate Regime 3* (UCLA Sch. of Law Pub. Law & Legal Theory Research Paper Series, Research Paper No. 07-29, 2007), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1028603](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1028603). For an example of international law's underdeveloped response to non-state actors, see generally Roberts & Sivakumaran, *supra* note 14 (observing the underdevelopment of international law's accommodation of armed groups in creating the law that applies to their own behavior).
36. See *supra* note 32 and accompanying text.
37. See BRIERLY, *supra* note 32, at 1 (defining international law as “the body of rules and principles of action which are binding upon civilized states in their relations with one another”).
38. See G. M. DANILENKO, LAW-MAKING IN THE INTERNATIONAL COMMUNITY 14–15 (1993); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(1) (1986) (rules of international law are those “that ha[ve] been accepted as such by the international community of states”); Krisch, *supra* note 13, at 39 (noting the resilience of the requirement of state consent in modern international law); Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AM. J. INT'L L. 302, 304 (1999) (noting that state consent may either be express or tacit).

norms that count as “law” are those to which states have consented.<sup>39</sup> These positivist Westphalian foundations categorically exclude non-state actors from lawmaking power.<sup>40</sup> As a corollary, not only are non-state actors unable to make formal law, but they are also absolved of the responsibility to abide by it, at least directly.<sup>41</sup> Thus, to the extent that international law governs business or other private behavior, it does so by requiring nation-states to regulate them, with only some narrow exceptions.<sup>42</sup>

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39. The statute of the International Court of Justice (ICJ), the most widely cited compendium of sources of international legal authority, demonstrates this state-centric orientation. *See* Statute of the International Court of Justice art. 38, ¶ 1, June 26, 1945, 59 Stat. 1055. The ICJ Statute offers the following as official forms of international law:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

*Id.* As the statute demonstrates, the official sources of law are explicitly linked to the consent of nation-states. Treaties, or “conventions,” are law because they articulate rules “expressly recognized by the . . . states.” *Id.* Of course, states alone may be parties to treaties. *Cf.* Vienna Convention on the Law of Treaties, art. 34, May 23, 1969, 1155 U.N.T.S. 331, 341 (entered into force Jan. 27, 1980) (establishing that treaties create obligations only on consenting state parties). Custom and general principles arise from the practice of nation-states. Judicial decisions and the writing of experts may be used to discern the law, but are not themselves law, as they are not expressions of the only relevant authors of law: nation-states. Thus, the “general rule” is that international law is the product of states, and imposes obligations only on state and supranational organizations. Carlos M. Vázquez, *Direct Vs. Indirect Obligations of Corporations Under International Law*, 43 COLUM. J. TRANSNAT’L L. 927, 930 (2005).

40. *See supra* note 39. As Michael Reisman and his coauthors articulate this, “individuals not associated with the state” are “a class that classical international law all but disenfranchised. In the past, the international lawyer’s client was, for the most part, the Prince or, put in more prosaic terms, governments, however they were organized.” W. Michael Reisman et al., *The New Haven School: A Brief Introduction*, 32 YALE J. INT’L L. 575, 576 (2007). While states are the official signatories to treaties, international organizations can also play roles in treaty drafting, ratification, or enforcement. *See* José E. Alvarez, *Governing the World: International Organizations as Lawmakers*, 31 SUFFOLK TRANSNAT’L L. REV. 591, 591–92 (2008). As this Article shows, business actors play an underappreciated role in the process as well. *See infra* Part II.
41. *See, e.g.,* Vázquez, *supra* note 39, at 930 (noting the “general rule” that international law obligations rest on states and international organizations alone; to the extent that international law governs corporate or other private behavior, it does so by requiring states to regulate those non-state actors, rather than by requiring businesses themselves to comply).
42. *See, e.g.,* KATE PARLETT, *THE INDIVIDUAL IN THE INTERNATIONAL LEGAL SYSTEM: CONTINUITY AND CHANGE IN INTERNATIONAL LAW* 27–29 (2011) (explaining that the rights, obligations and capacities of individuals under international law are dependent on the recognition of those attributes by states); Shima Baradaran et al., *Does International Law Matter?*, 97 MINN. L. REV. 743, 771 (2013) (acknowledging that compliance with international law “occurs when nations behave as their governments have agreed to under international law; conversely, violations of international law result when nations depart from agreed upon actions”; for example, states “formal[ly]” comply when they establish the regulatory system a treaty requires, although that formal

In the last century and a half, international law's positivist Westphalian character has been under siege as international organizations and individuals have been granted authority and responsibilities.<sup>43</sup> Notwithstanding these changes, the state-centric foundations of international law are still unmistakable in its present architecture. For instance, the enduring doctrine of sources continues to dictate that whether an international norm is law depends on whether that norm has secured the consent of states. And the system's state-centric roots have thwarted the growth of areas of law that address other actors besides states.<sup>44</sup> Among the underdeveloped areas is the one this Article seeks to illuminate: international laws relating to treaty making.<sup>45</sup>

What are the international laws relating to treaty making? The key starting point is the Vienna Convention on the Law of Treaties: a set of rules often referred to as the "treaty on treaties,"<sup>46</sup> which governs written international agreements

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compliance may be meaningless if private actors do not comply with those state regulations); Durkee, *supra* note 8, at 64–65 (noting that unique kinds of compliance problems arise in international law when states are responsible for ensuring that private actors comply with the state's treaty obligations). *But see* Vázquez, *supra* note 39, at 933–34 (listing some narrow exceptions which include circumstances in which private entities act on behalf of the state and those private acts are attributed to the state).

43. *See* Krisch, *supra* note 13, at 1 ("While surprisingly resilient in the face of . . . challenges, the consensual structure [of the international legal order] has seen renewed attacks in recent years."). For example, in the remarkable period of law-generation after World War II, states created international organizations and imbued them with derivative authority. *See generally* ALVAREZ, *supra* note 17 (recording the proliferation of intergovernmental organizations, NGOs and multinational corporations as significant governance actors in addition to state actors); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 675 (7th ed. 2008) (examining the basis of authority of international organizations). Over time, those international organizations acquired some forms of lawmaking power and other rights and duties previously available only to states. *See generally* ALVAREZ, *supra* note 17 (examining powers international organizations have acquired to interpret their own constitutive charters, and engage in various forms of rule making, treaty making, and adjudication). And, finally, in the past century states began to recognize that individuals have international significance, in that they can bear internationally relevant rights and international liability for crimes. *See generally* BROWNLIE, *supra* note 43, at 553, 587 (reviewing the development of the concept of internationally protected human rights and individual liability for international crimes); MALCOLM N. SHAW, *INTERNATIONAL LAW* 232–240 (6th ed. 2008) (same).
44. *See* Roberts & Sivakumaran, *supra* note 14, at 112–113.
45. *See* Larry Catá Backer, *Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board, and the Global Governance Order*, 18 *IND. J. GLOBAL LEGAL STUD.* 751, 752 (2011) (characterizing the persistent public/private divide as akin to a "color line," creating an artificial hierarchy in which one group is arbitrarily recognized as the sole "legitimate producer of regulation").
46. *See, e.g.*, ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 5 (3d ed. 2013) ("For good reason, the [Vienna] Convention has been called the 'treaty on treaties.'"); Richard D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 *AM. J. INT'L L.* 495, 495 (1970) (referencing the Vienna Convention on the Law of Treaties). *See generally* Vienna Convention on the Law of Treaties, *supra* note 39.

between states.<sup>47</sup> Thus, at the outset, the treaty erects a divide between different kinds of international agreements based on the identity of the parties to the agreement: Agreements with just state actors lie on one side of the divide, and agreements with any other kind of actor lies on the other. The Vienna Convention is only concerned with the first set.<sup>48</sup> In addition, the Vienna Convention does not include any rules that apply to non-state actors,<sup>49</sup> despite the fact that the treaty elaborates a broad compendium of rules that guide many aspects of treaty making and application of treaty provisions.<sup>50</sup> The comprehensiveness of the Vienna Convention rules is noteworthy because it contextualizes the absence of any rules relating to non-state actors. The Convention does not address, for instance, whether attempts by non-state actors to offer authoritative interpretations of treaty terms have any legal significance; whether participation by non-state actors in the drafting or negotiating of a treaty affects the significance of the treaty's legislative history; whether other stakeholders besides states have any

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47. Vienna Convention on the Law of Treaties, *supra* note 39, at art. 1, 1155 U.N.T.S. 333 (“The present Convention applies to treaties between States.”). Most of these rules have universal application because of their codification of and acceptance into customary international law. See Frederic L. Kirgis, Jr., *Custom on a Sliding Scale*, 81 AM. J. INT’L L. 146, 149 n.16 (1987) (noting “the readiness of international tribunals to accept, as custom, the major substantive provisions of the Vienna Convention on the Law of Treaties”) (citing Ian McTaggart Sinclair, *The Vienna Convention on the Law of Treaties: The Consequences of Participation and Nonparticipation*, 78 ASIL PROC. 271, 273 (1984) (providing a partial list of decisions)); see also 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 reflect the general customary international law of treaties to which all nations are bound).
48. Vienna Convention on the Law of Treaties, *supra* note 39, at art. 1, 1155 U.N.T.S. 333 (“The present Convention applies to treaties between States.”); see also Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT’L L. 281, 292 n.45 (1988) (noting that the U.S. delegation made an attempt at the outset of the negotiations of the Vienna Convention to extend the scope of the Convention to cover international organizations, but later withdrew the proposal); Roberts & Sivakumaran, *supra* note 14, at 113–14 (noting that the international law commission “when preparing a draft of what was to become the Vienna Convention . . . considered the possibility of various other subjects entering into treaties with states, but ultimately excluded the issue from the [Convention’s] purview”).
49. A survey of the text of the Vienna Convention on the Law of Treaties reveals the absence. See Vienna Convention on the Law of Treaties, *supra* note 39; see also Raustiala, *supra* note 23, at 156 (noting that the Vienna Convention “though central to many treaty issues, is silent on NGOs’ role”); see generally AUST, *supra* note 46, at 6–7 (providing a detailed examination of treaty law as established by the Vienna Convention); Kearney & Dalton, *supra* note 46 (discussing the drafting history of the Vienna Convention).
50. These rules include which state officials have authority to sign a treaty on behalf of the state, Vienna Convention on the Law of Treaties, *supra* note 39, at arts. 7–8, 1155 U.N.T.S. 334, what procedural steps are necessary for the treaty to acquire the force of law, *id.* at arts. 10–17, 24, 1155 U.N.T.S. 335–36, 338, methods of interpreting ambiguous treaty provisions, *id.* at arts. 31–33, 1155 U.N.T.S. 340, rules applying to fraud, coercion, and error, *id.* at arts. 48–52, 1155 U.N.T.S. 344, means of dissolving the agreement, *id.* at arts. 54–67, 1155 U.N.T.S. 344–48, and many others.

right to consult with state lawmakers during the treaty-making process; or anything else related to the potential and actual roles of non-state actors at any point in the generation, implementation, or enforcement of a treaty.<sup>51</sup> No treaty provides a systematic parallel set of rules governing international agreements between states and *all* other kinds of actors. The Vienna Convention on the Law of Treaties Between States and International Organizations governs, eponymously, agreements between states and international organizations.<sup>52</sup> But the existence of this treaty highlights the absence of similar laws relating to agreements between states and other kinds of non-state actors, such as businesses.<sup>53</sup>

At first blush, the lack of law structuring non-state participation in lawmaking may seem reasonable. After all, states are the lawmakers. No other actor has a *de jure* role. But that orthodox divide both masks and fails to respond to the significant *de facto* roles of various non-state entities. I outline these business roles in Part II.

## 2. A Partial Fix

One particular kind of non-state entity demanded accommodation in the international treaty-making process at the birth of the UN system.<sup>54</sup> This entity is the nongovernmental organization, or NGO. By the nineteenth and early twentieth centuries, NGOs had begun to take significant roles in agitating for new international laws.<sup>55</sup> In 1945, these organizations turned up en masse in San Francisco for the negotiation of the UN Charter.<sup>56</sup> Their presence at that

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51. See, e.g., Roberts & Sivakumaran, *supra* note 14, at 139 (citing Marco Sassòli, Possible Legal Mechanisms to Improve Compliance by Armed Groups with International Humanitarian Law and International Human Rights Law 6 (Nov. 13, 2003) (unpublished manuscript), <http://www.genevacall.org/resources/other-documents-studies/f-other-documents-studies/2001-2010/2003-13nov-sassoli.pdf> [<https://perma.cc/H8BV-74FC>] (proposing that armed groups should be given a right to consult in humanitarian lawmaking processes)).

52. The Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, *opened for signature* March 21, 1986, 25 I.L.M. 543.

53. In addition, no authoritative set of international rules governs agreements between states and substate entities (like individual states within the United States, armed groups, or state secessionists), nonprofit organizations, individuals, multinational corporations, or other kinds of market actors. Cf. D'ASPROMONT, *supra* note 14, at 294 n.33; Frankowska, *supra* note 48, at 292 n.45 (“Questions that may arise in regard to a treaty and the succession of States . . . are excluded from the scope of the Convention.”).

54. See Raustiala, *supra* note 23, at 153 (offering reasons why NGOs “grew more prominent in world politics” after World War II).

55. *Id.* at 151 (noting that “NGOs were hardly unknown” before World War II, but that their number remained limited, as did the scope of their activities).

56. *Id.* at 156 (“[A]bout 1200 NGOs attended the San Francisco conference in June of 1945 establishing the UN”); see also Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100 AM.

conference—in addition to their earlier activities—prompted the states negotiating the UN charter to find some way to accommodate them in the UN system.<sup>57</sup> As a result, NGOs were allowed to apply for “accreditation” with the United Nations and serve as consultants to the UN as it coordinates treaty making and other tasks—an opportunity that over 4000 organizations have taken to date.<sup>58</sup>

Since the UN system sponsors the majority of contemporary treaty negotiations and conferences, the UN rules and practices determine, to a significant extent, how NGOs influence treaty making.<sup>59</sup> A brief survey of the UN accreditation regime will illuminate both its nature and its limitations. Pursuant to the UN Charter, the UN’s Economic and Social Council (ECOSOC) is empowered to make arrangements to consult with organizations “concerned with matters within its competence.”<sup>60</sup> Exercising that authority, ECOSOC has established three types of consultative relationships for which NGOs may apply.<sup>61</sup> The relationships carry varying privileges, such as attending meetings, submitting written statements, and raising issues for the Council’s consideration.<sup>62</sup> Critically, accred-

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J. INT’L L. 348, 358 (2006) (noting that a “rainbow of NGOs in 1945 sought to gain such a foothold in the UN Charter”).

57. See Raustiala, *supra* note 23, at 156; see also Charnovitz, *supra* note 56, at 358 (stating that NGOs were notable for their “entrepreneurial role . . . at the San Francisco Conference in lobbying for and securing Article 71 so as to endow themselves with an official status”). The birth of the United Nations accelerated the development and significance of NGOs because it became a centralized forum for treaty making and began accrediting NGOs to participate in its work. See Raustiala, *supra* note 23, at 151. Raustiala offers other reasons for the rise in NGO activity: technological change that made cross-border communication and travel easier; the move to codification in international law, which gave NGOs opportunities to try to influence developing legal rules; the spread of democratic states, which were more likely to produce and tolerate NGOs; and the increasing scope of international law rules to areas once solely the province of domestic governments. *Id.* at 153–55.
58. *Consultative Status With ECOSOC and Other Accreditations*, U.N. DEPT ECON. & SOC. AFFAIRS: NGO BRANCH, <http://esango.un.org/civilsociety/displayConsultativeStatusSearch.do?method=search&sessionCheck=false> [<http://perma.cc/73YC-LWMS>] (last visited Dec. 16, 2015) (showing that as of July 2015, over 4000 groups had obtained accreditation); see also Raustiala, *supra* note 23, at 156 (noting that the number of accredited NGOs rose sharply in the 1990s—in 1946, ECOSOC had accredited only forty-one organizations, by 1992 the number had risen to approximately seven hundred, and reached the thousands by the end of the decade).
59. See Raustiala, *supra* note 23, at 156.
60. U.N. CHARTER art. 71.
61. Dana Brakman Reiser & Claire R. Kelly, *Linking NGO Accountability and the Legitimacy of Global Governance*, 36 BROOK. J. INT’L L. 1011, 1054 (2011).
62. See *id.*; see also Raustiala, *supra* note 23, at 156 n.25 (“General consultative status is reserved for international NGOs whose area of work covers most of the issues on the agenda of ECOSOC and its subsidiary bodies. These tend to be fairly large, established international NGOs with a broad geographical reach. Special consultative status is granted to NGOs, which have a special competence in, and are concerned specifically with, only a few of the ECOSOC fields of activity. These NGOs tend to be smaller and more recently established. Organizations that apply for consultative status but do not fit in any of the other categories are usually included in the *Roster*. These NGOs tend to have a rather narrow and/or technical focus.”).

itation entitles NGOs to participate in UN-sponsored treaty processes.<sup>63</sup> An NGO can apply to the UN Secretariat for accreditation to a particular treaty conference, indicating its areas of particular competence and the “relevance of its activities to the work of the conference.”<sup>64</sup> If the UN Secretariat grants accreditation, the NGO may attend all future sessions of the treaty conference.<sup>65</sup> For example, the NGO can participate in working groups and may participate in floor debates when allowed by the session chairperson.<sup>66</sup> The result of this accreditation process is that UN-sponsored treaty negotiations or conferences now regularly have “a sizeable, sometimes enormous, NGO component.”<sup>67</sup>

But the scope of the UN accreditation regime is limited to NGOs, and tailored to include traditional members of civil society while excluding other non-state actors, such as state-based organizations, armed groups, or market actors. The “ideal type” that the accreditation regime anticipates is a nonprofit, issue-oriented organization, such as Greenpeace or Médecins Sans Frontières.<sup>68</sup> For example, the ECOSOC accreditation criteria demand, among other things, that an accredited organization have “a democratically adopted constitution,” the “authority to speak for its members through its authorized representatives,” and “aims and purposes” that are consistent with the “spirit, purposes and principles of the . . . United Nations.”<sup>69</sup> Multinational corporations and other business

63. Peter L. Lallas, *The Role of Process and Participation in the Development of Effective International Environmental Agreements: A Study of the Global Treaty on Persistent Organic Pollutants (POPs)*, 19 UCLA J. ENVTL. L. & POLY 83, 118–19 (2000) (noting that, according to ECOSOC rules, “NGOs having consultative status with ECOSOC . . . ‘shall, as a rule be accredited for participation’” in international treaty conferences convened by the United Nations); see also Paul Wapner, *Defending Accountability in NGOs*, 3 CHI. J. INT’L L. 197, 203 (2002) (noting that participation in UN-sponsored treaty making “has been essential for NGO influence on international treaties”).

64. Lallas, *supra* note 63, at 119 (citing Economic and Social Council Res. 1996/31, ¶¶ 43–44 (July 25, 1996)).

65. *Id.*

66. See *id.* However, NGOs are not allowed a “negotiating role” in treaty making. See Economic and Social Council Res. 1996/31, *supra* note 64, at ¶ 50. (“In recognition of the intergovernmental nature of the conference and its preparatory process, active participation of non-governmental organizations therein, while welcome, does not entail a negotiating role.”).

67. Raustiala, *supra* note 23, at 7.

68. The ECOSOC website describes the groups anticipated by these criteria as “international, regional, sub-regional, national non-governmental organizations, non-profit organizations, public sector or voluntary organizations.” *Introduction to ECOSOC Consultative Status*, U.N. DEPT ECON. & SOC. AFFAIRS: NGO BRANCH, <http://csonet.org/index.php?menu=30> [<http://perma.cc/H9C5-K7HT>] (last visited Dec. 16, 2015).

69. Economic and Social Council Res. 1996/31, *supra* note 64, ¶¶ 2, 10, 11. Additional criteria require that organizations seeking accreditation be “concerned with matters falling within the competence of the Economic and Social Council and its subsidiary bodies,” *id.* ¶ 1; be “of recognized standing within the particular field of its competence or of a representative character,” *id.* ¶ 9; have established



entities are excluded from consultative status because they are not nonprofits.<sup>70</sup> They may also have trouble demonstrating that they have “aims and purposes” that involve furthering the “spirit, purposes, or principles” of the UN Charter rather than, for instance, generating revenue for shareholders.<sup>71</sup>

Other international organizations have replicated the UN accreditation regime, and usually closely track ECOSOC’s basic model, including its exclusion of businesses.<sup>72</sup> And the ECOSOC model also serves as the basis for ad hoc projects by particular treaties, which also exclude businesses<sup>73</sup> (though there are exceptions that will be explored more fully in the next Subpart).<sup>74</sup> As a result, the international system fails to accommodate business actors in the one way it has managed to accommodate other non-state actors—through accreditation regimes.

One consequence of excluding individual business entities from these accreditation regimes is that business entities have appropriated the traditional NGO format—that is, these businesses form their own NGO organizations to advance their interests within the United Nations<sup>75</sup>—and partnered with existing NGOs that serve as agents for the business entity.<sup>76</sup> Thus, the exclusion of

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headquarters, *id.* ¶ 10; have deposited its democratically adopted constitution with the UN, *id.*; and not be “established by governmental entity or intergovernmental agreement,” *id.* ¶ 12.

70. See *id.* ¶ 13 (stipulating that “[t]he basic resources of the organization shall be derived in the main from contributions of the national affiliates or other components or from individual members”).
71. *Id.* ¶ 2. Other entities besides businesses that are excluded by these criteria include governmental or intergovernmental organizations, *id.* ¶ 12, individuals (such as individual academics, state officials, philanthropists, religious figures, etc.), see *id.* ¶ 5 (stating that consultative relationships may be made with organizations), and secessionist or other armed groups with governmental ambitions, see *id.* ¶ 4 (defining the relevant organizations as nongovernmental).
72. Raustiala, *supra* note 23, at 157 (other organizations include the World Health Organization (WHO) and the World Intellectual Property Organization (WIPO), among others).
73. See *supra* Part I.A.3.
74. For example, the Global Treaty on Persistent Organic Pollutants (POPs) based its accreditation regime directly on the ECOSOC accreditation regime. See Lallas, *supra*, note 63, at 118–21 (noting that NGOs participated in the International Negotiating Committee set up to develop the terms of the POPs treaty, and the rules of procedure developed to govern that participation were “drawn up within the framework of applicable rules of the United Nations,” particularly the ECOSOC accreditation rules).
75. JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* 489 (2000) (noting that “[a] newer kind of business organization is the corporate front group which presents itself to the community as an NGO rather than a business organization,” and explaining that these NGOs take advantage of UN accreditation regimes).
76. See Nuria Molina-Gallart, *Strange Bedfellows? NGO–Corporate Relations in International Development: An NGO Perspective*, 1 DEV. STUD. RES. 42, 43–44 (2014) (noting that NGO and corporate partnerships are increasing, and attributing this growth to the need of NGOs for funding); Fairouz El Tom, *Diversity and Inclusion on NGO Boards: What the Stats Say*, THE GUARDIAN (May 7, 2013, 5:56 AM), <http://www.theguardian.com/global-development-professionals-network/2013/apr/29/diversity-inclusion-ngo-board> [<http://perma.cc/P99X-6AKT>] (finding that over half of the “top 100 NGOs” in his study had one or more board members affiliated with companies that invest in or provide services to the arms, tobacco, and financing industries); Kultida Samabuddhi,

market actors in the accreditation regimes both leaves a legal gap, and drives business participation underground.<sup>77</sup>

Significantly, the UN accreditation regime and its progeny serve as the *only* regulation or accommodation of non-state actor roles in the international treaty making process. There is simply no other set of legal rules available.<sup>78</sup> Thus, to the extent the regime is insufficient, its limitations expose the legal gap this Article seeks to highlight. There is no coherent legal regime, set of best practices, or other guidelines that govern business roles in treaty making. Specifically, there is no general UN accreditation regime for businesses, as there is for NGOs.

### 3. The Legal Void

The accommodations for business roles that do exist are ad hoc and sui generis. In fact, these legal structures make strange bedfellows under one heading. But the diverse nature of these structures may serve to highlight the absence of a consistent legal approach. After all, one way to clarify the nature of a void is to identify the things that do in fact exist.

Business entities have official, legally formalized means of shaping the content of treaties in two notable instances. The most obvious example is the International Labor Organization (the ILO), which has “a highly unusual structure in which labour unions and businesses are formal participants in the ILO’s work and deliberative processes.”<sup>79</sup> The ILO describes its structure as “tripartite,”—bringing together labor unions, businesses, and nation-states—and acknowledges that this structure makes the ILO unique among international organizations.<sup>80</sup> That uniqueness is contextualized by the ILO’s age. The organization was created in 1919 as part of the Treaty of Versailles that ended World War I—thus the organization predates the entire UN system by over 25 years. The fact that the ILO is still, almost a century after its formation, the *only* example of

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*Money Can Taint NGO’s Clean Image*, GLOB. POLICY F. (Mar. 4, 2011), <https://www.globalpolicy.org/ngos/introduction/49912-money-can-taint-ngos-clean-image.html> [<https://perma.cc/9GYN-QJDJ>] (noting that corporate partnerships can raise suspicion for NGOs, as critics worry that corporate sponsorship will produce NGO mission drift); see also Robert W. Fri, *The Corporation as Nongovernment Organization*, 27 COLUM. J. WORLD BUS. 90, 90 (1992) (recommending that business entities consider participating in UN activities by sponsoring or partnering with NGOs).

77. Kal Raustiala, *Nonstate Actors in the Global Climate Regime* 96, in INTERNATIONAL RELATIONS AND GLOBAL CLIMATE CHANGE (Urs Luterbacher & Detlef F. Sprinz, eds., 2001).

78. While it is difficult to prove a negative, it is at least possible to state with confidence that there is no other law of general applicability.

79. Raustiala, *supra* note 23, at 158.

80. *About the ILO: Structure*, INT’L LABOUR ORG., <http://ilo.org/global/about-the-ilo/who-we-are/lang-en/index.htm> [<http://perma.cc/BX5K-QBYJ>] (last visited Dec. 16, 2015).

explicit participation by business actors as official coauthors of treaties demonstrates the virtually complete exclusion of business actors from all other formal treaty-making roles.

The second official role business takes in treaty making is more attenuated. In fact, it is better characterized as a “quasi” official role and takes place through incorporation of privately created international standards into treaty law.<sup>81</sup> The World Trade Organization (WTO) subsidiary agreement related to food and agricultural safety is a prime example.<sup>82</sup> The Application of Sanitary and Phytosanitary Measures adopts the authoritative food safety standards developed by private actors.<sup>83</sup> To be clear, this example does not show a legal regime like NGO accreditation in which private entities are invited to provide input, or like the ILO, where business entities participate in setting the terms of the agreement. Rather, the treaty simply creates a presumption that member states have complied with its terms when those members follow privately elaborated standards.<sup>84</sup> The business contribution is thus attenuated, but the example shows one of the limited instances in which modern treaty law recognizes private input.<sup>85</sup>

Finally, some treaty-specific accreditation regimes that otherwise follow the UN accreditation model modify the accreditation criteria to emphasize relevant expertise rather than, for example, nonprofit status. Environmental law is a significant area where this occurs.<sup>86</sup> For example, the 1973 Convention on International Trade in Endangered Species (CITES) included language

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81. See generally BÜTHE & MATTLI, *supra* note 17 (describing a variety of areas where private standards are incorporated into international law).

82. Agreement on the Application of Sanitary and Phytosanitary Measures, Jan. 1, 1995, 1867 U.N.T.S. 493.

83. See Markus Wagner, *International Standards*, in RESEARCH HANDBOOK ON THE WTO AND TECHNICAL BARRIERS TO TRADE 238–40 (Tracey Epps & Michael J. Trebilcock eds., 2013) [hereinafter Wagner, *International Standards*] (clarifying that those international standards are often privately elaborated; “[t]his inclusion of ‘international standards’ into agreements covered by the WTO’s dispute settlement system elevates these texts from their previous status of voluntary endeavors to one which makes adherence to them virtually mandatory”); Markus Wagner, *Regulatory Space in International Trade Law and International Investment Law*, 36 U. PA. J. INT’L L. 1, 56–58 (2014) [hereinafter Wagner, *Regulatory Space*] (describing mechanism whereby the SPS Agreement incorporates international standards). Wagner also describes the similar incorporation of private standards into the WTO’s Agreement on Technical Barriers to Trade, which relates to “technical regulations, standards and conformity assessment procedures.” See Wagner, *International Standards*, *supra*, at 239.

84. See Wagner, *International Standards*, *supra* note 83, at 238–39; Wagner, *Regulatory Space*, *supra* note 83, at 56.

85. See generally BÜTHE & MATTLI, *supra* note 17 (surveying other instances); Julian Arato, *Corporations as Lawmakers*, 56 HARV. INT’L L.J. 229 (2015) (showing that business entities engage in arbitration that helps define the interpretation of terms of Bilateral Investment Treaties); Vázquez, *supra* note 39 (noting that corporations hold various kinds of authority delegated by states).

86. See Raustiala, *supra* note 23, at 160–161.

allowing the treaty secretariat to allow consultation by “suitable . . . non-governmental international or national agencies and bodies technically qualified in protection, conservation, and management of wild fauna and flora.”<sup>87</sup> The CITES treaty does not make any further restrictions that would limit business participation. Rather, the door is open to any entity with helpful technical expertise.<sup>88</sup> Later environmental treaties feature almost identical provisions. The 1987 Montreal Protocol on Ozone Depletion and 1992 UN Framework Convention on Climate Change both allow accreditation to “any body or agency” that “is qualified in matters covered by the Convention.”<sup>89</sup> Thus, these treaty regimes do not distinguish between the archetypal NGOs on the one hand, and various forms of market actors on the other. But these accreditation regimes are treaty-specific. They provide rules of engagement only for those specific treaty regimes, rather than offering a systemic accommodation or response to market actors in the treatymaking process.

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It is puzzling that the law regulating non-state actors—in particular business actors—has remained so underdeveloped, because modern treaty regimes have otherwise become increasingly sophisticated.<sup>90</sup> Treaties became the most significant means of formal international lawmaking in the twentieth century, and now govern a staggeringly broad array of international issues: climate change, international trade, laws of war, law of the sea, investment, human rights, arms trading, asylum law—the list goes on. At the same time, the proposition that treaties are an effective tool of global governance is highly contested. Critics

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87. *Id.* at 161 (providing that consultation will be allowed unless one-third of treaty parties exist).

88. Convention on International Trade in Endangered Species of Wild Fauna and Flora art. 7, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 14537.

89. See Raustiala, *supra* note 23, at 161. The full text of the provision in the UN Framework Convention on Climate Change reads as follows:

Any body or agency, whether national or international, governmental or non-governmental, which is qualified in matters covered by the Convention, and which has informed the secretariat of its wish to be represented at a session of the Conference of the Parties as an observer, may be so admitted unless at least one-third of the Parties present object.

United Nations Framework Convention on Climate Change art. 7, ¶ 6, Mar. 21, 1994, 31 I.L.M. 849, 1771 U.N.T.S. 107; see also Montreal Protocol on Substances that Deplete the Ozone Layer, art. 11, ¶ 5, Sept. 16, 1987, 26 I.L.M. 1541, 1522 U.N.T.S. 28 (rather than “matters covered by the Convention” the text reads “qualified in fields relating to the protection of the ozone layer”; otherwise the provisions of the UNFCCC and Montreal Protocol are identical).

90. Modern treaty regimes have complex multistage formation processes, opt-in and opt-out clauses, supplemental declarations, and other sophisticated design features that respond to the complex demands of groups of differently situated parties responding to multifaceted problems. See, e.g., Raustiala, *Form and Substance*, *supra* note 16 (collecting literature that evaluates the features of treaty design, implementation, and enforcement that correspond to treaty success).

complain, for example, that the treaty-making process is too slow, cumbersome, and incapable of change.<sup>91</sup> The importance of understanding non-state, particularly business, roles in treaty making is thus highlighted by the continued importance of treaties as a lawmaking tool, and the challenges treaties face in legislating effectively.<sup>92</sup>

## B. Business in Treaty Literature

The scholarship studying and evaluating international treaty making closely parallels the architecture of treaty law. That is, the treaty literature has principally focused attention on state rights and responsibilities, state behavior, and treaty design by state actors. It has also observed and critiqued the rise of NGO participation in treaty making. But its consideration of business roles in treaty-making has been more limited. Of course, liberal theory has highlighted the way non-state entities, including business actors, can shape a state's legal choices. Other literature has focused on how business creates legal norms outside the formal international lawmaking system and sets standards that are later imported into formal law. What merits further examination, this Article asserts, is the way businesses directly shape international treaty law.

### 1. States and Their Influencers

The literature that addresses treaty making has focused principally on state behavior.<sup>93</sup> This scholarship has borrowed from international relations theory to

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91. See, e.g., Cho & Kelly, *supra* note 7, at 497 & nn.13–14, 498 & nn.15–17 (collecting literature on multilateral treaty failures and identifying why treaties are ineffective at coordinating global financial regulations); see also Durkee, *supra* note 8 (identifying various critiques of treaty effectiveness). One response to this criticism of treaties is the turn away from treaties, and the blossoming of nontreaty forms of governance. See, e.g., Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171, 187–88 (2010) (defining and examining the uses of “soft law,” that is, nonbinding norms, including various forms of informal coordination and cooperation between states, substate entities, private parties, and nongovernmental organizations who pool knowledge, set standards, and coordinate responses to common problems).

92. See Durkee, *supra* note 8, at 75–77 (collecting literature explaining why treaties are necessary to structure international organizations, courts, and governance regimes, as well as to confer legitimacy, coordinate regulation, and prevent regulatory “leakage”).

93. Borrowing fruitfully from international relations scholarship, this literature inquires how state behavior and relationships give rise to agreements, and when and why those agreements become effective. The debate is longstanding and rich. For significant contributions, see generally ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 3 (1995) (setting out “managerial” theory of compliance); THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 7–9 (1995) (states will commit to and comply with regimes they perceive to be legitimate);

produce productive insights about why states comply with treaties,<sup>94</sup> and has closely analyzed the connection between treaty design features and state compliance.<sup>95</sup>

Liberal theory was the first to acknowledge the significance of non-state actors in the sense that it discarded the fiction that the state is a nonporous monolith.<sup>96</sup> It recognized that individual officials make decisions on behalf of the state, and that non-state actors influence those officials to shape state behavior internationally.<sup>97</sup> Network theory, a strand of liberal theory, recognizes that substate actors such as judges, legislators, regulators, prosecutors, and the like, communicate with their counterparts across national borders to coordinate efforts, borrow

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GOLDSMITH & POSNER, *supra* note 9, at 3 (analyzing commitment and compliance through a rational choice theory); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823, 1825 (2002) (noting that states comply with international law to preserve reputations and avoid informal and formal sanctions). One body of scholarship has centrally grappled with the core puzzle of whether, and why, in the absence of a global enforcer, sovereign states will subject themselves to binding agreements. *See generally* Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 HARV. INT'L L. J. 487 (1997) (collecting literature). A related body of literature considers how various features of treaty design contribute to treaty success. *See, e.g.*, Raustiala, *Form and Substance*, *supra* note 16, at 581 (analyzing the relationship between different types of treaty commitment: differences include, *inter alia*, whether the agreement is binding or nonbinding, whether the agreement gives jurisdiction to any institution to monitor or enforce compliance, and to whom rights of enforcement are afforded).

94. *See generally* CHAYES & CHAYES, *supra* note 93, at 3 (proposing a “managerial model” of compliance); FRANCK, *supra* note 93, at 7–8 (arguing that international rules attract compliance when they are perceived to be “fair”); HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* 3–4 (4th ed. 1967) (using realist political theory to explain compliance); Baradaran et al., *supra* note 42, at 749–51 (presenting the results of a “large-scale international field experiment” designed to test the prevailing compliance theories); Durkee, *supra* note 8, at 67–68 (noting that private sector assent affects compliance in the context of “persuasion” treaties); Hathaway, *supra* note 9, at 477–83 (separating compliance theories along a “rational actor” and “normative” divide); Keohane, *supra* note 93, at 489–94 (comparing instrumentalist and normative compliance theories); Beth A. Simmons, *Money and the Law: Why Comply With the Public International Law of Money?*, 25 YALE J. INT'L L. 323, 324 (2000) (arguing that nations commit to complying with international law when they can credibly do so).
95. *See* Raustiala, *Form and Substance*, *supra* note 16 (collecting literature directing attention to the features of international treaties, and the correlation between various treaty features and the ultimate success of the treaty regime by various measures).
96. Liberal theory was the first to “open[] the black box of the state” and consider the role of substate actors. *See* Hathaway, *supra* note 10, at 1961; *see also* Moravcsik, *supra* note 10, at 513 (elaborating liberal theory in international relations; explaining that domestic constituencies construct state interests).
97. *See* Hathaway, *supra* note 10, at 1961; *see also* Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 MICH. L. REV. 167, 168–70 (1999) (noting the inadequacy of the Westphalian paradigm and 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, 502 (2004) (international agreements are one means by which domestic interest groups attempt to set domestic policy and develop domestic law).

knowledge, and develop norms.<sup>98</sup> Non-state actors are thus understood to affect lawmaking by influencing state officials, both domestically and through cross-border networks.<sup>99</sup> As the transnational legal process account explains, these interactions between state officials and others—like international organizations, multinational enterprises, NGOs, and individuals—lead to both international lawmaking and implementation of those international norms into domestic law.<sup>100</sup>

98. Anne Marie Slaughter was the pioneer of this work. *See generally* ANNE MARIE SLAUGHTER, A NEW WORLD ORDER (2004) (asserting that the state is “disaggregated” as substate officials network across borders to pool knowledge and set policy). Even before Slaughter’s seminal work, Philip Jessup had introduced the term “transnational law” to describe the fact that many features of the international system transcend national boundaries and include elements of both public and private international law. *See* PHILIP C. JESSUP, TRANSNATIONAL LAW 106 (1956); *see also* Maya Steinitz, *Transnational Legal Process Theories*, in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 340, 341–43 (Cesare PR Romano, Karen J Alter & Yuval Shany eds., 2014) (reviewing developments in transnational legal theory).

99. Network theory is in some ways an intellectual heir of the New Haven School of Policy-Oriented Jurisprudence. *See* Reisman, *supra* note 40, at 577 (advocating for a functional analysis rather than a formalist one, seeking to map formal lawmaking and compliance—among other international legal processes—in terms of a social process in which actors with different kinds of power and strategic goals engage with each other across a variety of situations). The New Haven School has highlighted the difference between the “law-in-the-books” and the “law-in-action,” noting that the content of formal sources of international law—that is, what the relevant treaties or custom demand—do not fully explain why international actors behave the way that they do. *See id.* Notably, for our purposes, the New Haven school considers the relevant actors in this process to be not just “those formally endowed with decision competence, such as executives, legislators and judges” but also those who do not have formal roles in the international system such as “non-governmental organizations, pressure groups, interest groups, gangs, and individuals.” *Id.* at 578 (footnotes omitted).

100. *See* Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2603, 2656 (1997) (positing that government officials, NGOs, “transnational moral entrepreneurs,” and business entities are all part of “epistemic communities” that reach across national borders to entrench patterns of behavior and generate norms to solidify those patterns; state officials formalize the norms in international law and implement them in domestic law, but both public and private actors are involved in the interactions that lead to a later process of formalization and implementation).

Global legal pluralism, a recent contribution by Paul Schiff Berman and others, is in some ways a further development of the network and process accounts in that it concludes that the orthodox fixation on government regulators and territorial borders has outlived its usefulness and no longer serves as a helpful framework to craft responses to global problems. *See* Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1155–56 (2007) (“[I]nstead of trying to stifle conflict either through an imposition of sovereigntist, territorially-based prerogative or through universalist harmonization schemes, communities might sometimes seek . . . [to] manag[e], without eliminating, hybridity.”); *see also* PAUL SCHIFF BERMAN, GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS 3–13 (2012) (asserting that regulation in the global space often crosses geographic boundaries, is characterized by significant hybridity, and includes many regimes that are wholly or partly nongovernmental). Global legal pluralism rejects “sovereigntist territorialism” on the one hand, and “universalism” on the other, and instead uses procedural mechanisms as a way to solve hybridity problems. BERMAN, *supra*, at 141.

Liberal theory, including the network and process accounts, provides helpful structures to explain the influence of non-state actors on state deciders. But this literature has not yet attended to the specific role of business in treaty making, the effect of that role on the nature and success of treaties, and the appropriate legal rules that should govern that non-state behavior.<sup>101</sup>

## 2. NGOs in the Spotlight

The treaty literature has, however, devoted sustained attention to NGOs.<sup>102</sup> This literature addresses a number of conceptual and normative questions: To what extent does NGO involvement in treaty making affect traditional notions of state sovereignty? Does NGO participation facilitate better international governance, or serve to frustrate state action, and under what conditions? Significant work in both law and social science has begun the challenging task of answering these questions.<sup>103</sup> This literature sometimes includes business associations to-

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101. See, e.g., Baradaran, *supra* note 42, at 747 (criticizing the compliance literature for “inappropriately concentrat[ing] on states”). There is a growing new body of work that directs attention to the relationship between non-state actors and treaty compliance, see, e.g., *id.* at 749–51 (conducting empirical study to determine motivations that prompt individuals and firms to comply with international norms); Stephan, *supra* note 18 (providing a law and economics analysis); see generally Affolder, *supra* note 21, at 159 (demonstrating that corporations seek to comply with treaty law even when that law is directed to states and not private actors), but specific attention to business is needed. Paul Stephan has urged attention to business roles in a recent work in which he notes the growing privatization of international law and “the growing marginalization of the state” in its production. Stephan, *supra* note 18, at 1577, 1584 (collecting literature and asserting that “much of the production process can bypass states even if some state involvement may be essential at the time of application”). This Article builds on Stephan’s work in that it responds to the same gaps in the law and literature. However, the two projects vary in methodology and scope. Stephan conducts a broad examination of the welfare effects of privatization of law production and enforcement by all types of non-state actor.

102. For an overview of this extensive literature, see Charnovitz, *supra* note 56. See also Raustiala & Bridgeman, *supra* note 35, at 3 (“NGOs—private, voluntary interest groups—are the most common and the most familiar [of nonstate actors]. Many analyses and discussions of nonstate actors are explicitly or implicitly limited to NGOs.”). Charnovitz’s definition of NGOs excludes business actors. NGOs are “groups of persons or of societies, freely created by private initiative, that pursue an interest in matters that cross or transcend national borders and are not profit seeking.” Charnovitz, *supra* note 56, at 350. However, according to Charnovitz, “[e]verything about nongovernmental organizations is contested, including the meaning of the term.” *Id.* at 351; see also Raustiala & Bridgeman, *supra* note 35, at 3–4 (defining NGOs as “organized nonstate groups that seek to effect change [in policy],” but including both nonprofit interests groups such as the World Wide Fund for Nature and business and trade associations within that ambit, together with groups such as research organizations).

103. See e.g., Brewster, *supra* note 97, at 502–03 (examining the influence of domestic interest-group demands on the U.S. government’s decision to engage in treaty agreements); Gráinne de Búrca et al., *New Modes of Pluralist Global Governance*, 45 N.Y.U. J. INT’L L. & POL. 723, 723 (2013) (proposing a new mode of “experimentalist” global governance focused on collaboration, exchange, and



gether with NGOs within the analysis, though it often excludes them.<sup>104</sup> To the extent business is included, the literature has yet to describe and evaluate their distinct and unique input and impact.<sup>105</sup>

In particular, two important points are obscured by aggregating the diversity of actors involved in treaty making, and analyzing them together under a single “NGO” rubric. First, not all NGOs that seek to participate in the international process are democratically governed, public-interest oriented nonprofits. If the literature assumes that the archetypal NGO is Greenpeace, the conclusions it draws may be very different than if, for example, the ideal NGO is the International Chamber of Commerce.<sup>106</sup> Moreover, some NGOs that appear to fall within the confines of a “democratically governed, public-interest-oriented, non-profit” definition, are in fact substantially funded by businesses.<sup>107</sup> As a result, literature that examines the legitimacy or effect of NGO participation without making distinctions between various kinds of NGO will be accordingly limited.<sup>108</sup>

Second, as this Article shows in Part II, the market actors excluded by traditional analyses of NGO behavior are not absent in the treatymaking process. Rather, they are present, but flying under the radar, since their channels of influence are not as well known or studied. The literature on non-state roles in treaty making thus builds a foundation for, but does not identify or address, a crucial new area of study: Is business involvement in formal international lawmaking unique? And how does that involvement affect the resulting treaties? Does

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nonhierarchical decision making between states and civil society actors); David Gartner, *Beyond the Monopoly of States*, 32 U. PA. J. INT'L L. 595, 598 (2010) (summarizing and evaluating “theoretical objections raised by scholars to the inclusion of civil society actors in the governance of international institutions”: concerns with NGOs include accountability, representativeness, overrepresentation of voices from the global North, legitimacy, and weakening of the influence of states); Stephan, *supra* note 18 (examining effects of nonstate participation in law production). Nevertheless, Peter Spiro points out that the role of NGOs in international lawmaking “remains under-theorized.” See Peter J. Spiro, *NGOs and Human Rights: Channels of Power* 1 (Temple University Legal Studies Research Paper Series, Research Paper No. 2009-6, 2009).

104. See, e.g., Raustiala & Bridgeman, *supra* note 35, at 4 (including business and trade associations in the general definition of NGOs, but noting that this definition is out of step with the bulk of the literature on NGOs); Charnovitz, *supra* note 56, at 350 (“Although profit-seeking business entities are not NGOs, associations of business entities can be, such as the International Chamber of Commerce.”).

105. See, e.g., Raustiala & Birdgeman, *supra* note 35, at 3–4 (including business and trade associations in the general definition of NGOs rather than analyzing business contributions separately).

106. Cf. Gartner, *supra* note 103, at 600–06 (collecting critiques of NGO participation in the lawmaking process such as representativeness, accountability, and disruption of State sovereignty).

107. See note 76 and accompanying text.

108. For further analysis of these points, see Melissa J. Durkee, “Astroturf Activism”.

business involvement lead to better, worse, stronger, more costly, or less legitimate treaties, and how should international law rules develop in response?<sup>109</sup>

### 3. The Work That Remains

The scholarship that attends to business roles in international law once again follows the legal architecture: Since, under traditional conceptions, businesses do not make law, the most sustained scholarly focus has been on ways that business actors wield state authority derivatively, or form nonbinding norms.<sup>110</sup> In particular, literatures have focused attention on new forms of governance operating outside the treaty system, and on business roles in setting standards that are later adopted into treaty regimes.

For example, one of the core aims of a very significant scholarly project over the past two decades—the Global Administrative Law Project<sup>111</sup>—is to ferret out forms of administration that are not just public, but also private or public-private hybrids.<sup>112</sup> Benedict Kingsbury, Nico Krisch, and Richard Stewart, together with other scholars working in this field, have discerned that a body of legal rules and processes—similar to domestic administrative law—has spread across numerous institutions on the international stage, and that in this “administrative” space, both public and private actors have roles in the administration of law.<sup>113</sup> In the private category, the Global Administrative Law Project highlights, for example

109. For a parallel project, see Roberts & Sivakumaran, *supra* note 14 (surveying current ways armed groups participate in lawmaking and arguing for an expanded role).

110. This is not to say that the role of business in the production of international treaties has received no attention. For example, Gregory Shaffer has identified two main “mechanisms through which business shapes law,” one of which is “influencing the public institutions that make and apply law,” including treaty law. Gregory Shaffer, *How Business Shapes Law: A Socio-Legal Framework*, 42 CONN. L. REV. 147, 147 (2009). In addition John Braithwaite and Peter Drahos have conducted a supremely comprehensive qualitative empirical study of business influence in global business regulation, though their study does not focus specifically on treaties or analyze the impact of this business influence on the features of treaty regimes. See BRAITHWAITE & DRAHOS, *supra* note 75 (concluding that businesses play many roles in the globalization of regulation including “shap[ing] the actions of states and international organizations”). See also *infra* notes 120 to 123 and associated text (identifying an incipient literature addressing business roles in formal lawmaking).

111. See <http://www.iilj.org/gal> (collecting papers).

112. See Kingsbury et al., *supra* note 17. Other scholars who do not self-identify as part of the global administrative law project are pursuing similar projects. See, e.g., VIRGINIA HAUFLE, A PUBLIC ROLE FOR THE PRIVATE SECTOR: INDUSTRY SELF-REGULATION IN A GLOBAL ECONOMY (2001); see also BÜTHE & MATTLI, *supra* note 17 (describing a variety of areas where private standards are incorporated into international law); Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 VAND. J. TRANSNAT'L L. 501 (2009) (describing and advocating a transnationally linked and voluntarily promulgated system of regulatory norms).

113. See Kingsbury et al., *supra* note 17, at 18–19, 21.

the parallel roles of the International Standards Organization, a private organization that harmonizes product and process rules; NGOs that have set up standards and certification regimes for internationally traded products, such as fair-trade coffee; and business organizations that have set up regulatory regimes for their own industries, such as Fair Labor Association standards for sports apparel.<sup>114</sup> Thus, one of the Global Administrative Law Project's most significant contributions is the important insight that both public and private actors have roles in the administration of international law. Just as international law increasingly reaches inward to govern the private sector, so too does the private sector increasingly find ways to influence the administration of the laws to which it is subject.<sup>115</sup>

Yet the Global Administrative Law Project literature for the most part cabins its reach to exclude traditional international lawmaking. Global administrative law is *administrative* in that it constitutes rulemaking, administrative adjudication, and other forms of regulatory management that “operate below the level of . . . treaty-making”; the project distinguishes this activity from “*legislation*[,] in the form of treaties.”<sup>116</sup>

Related projects have viewed the private sector as lawmakers operating “below the level of . . . treaty-making” in a different way: Business entities self-regulate by engaging in regulatory arbitrage; by setting up governance regimes in under-regulated spaces such as their own supply chains,<sup>117</sup> or by engaging in “bottom-up lawmaking” by developing practices that over time evolve into “law that is just as real and just as effective, if not more effective, as the treaties that initiate the top-down process.”<sup>118</sup> Others have extended the insights of the Global Administrative Law project by noting that privately created standards

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114. *Id.* at 22–23. In the public-private hybrid space, the Global Administrative Law Project highlights the role of international bodies such as the Codex Alimentarius Commission, which sets food safety standards through a decision process that includes representatives from both the government and the private sector; or ICANN, the Internet Corporation for Assigned Names and Numbers, a once-private body that has come to include governmental representatives as well. *See id.* at 22.

115. *Id.* at 22–23; *see also*, Karsten Nowrot, *Transnational Corporations as Steering Subjects in International Economic Law: Two Competing Visions of the Future?*, 18 *IND. J. GLOBAL LEGAL STUD.* 803, 803 (2011) (asserting that transnational corporations are political actors who are increasingly involved in the progressive development and enforcement of economic law, specifically the WTO and foreign investment regime).

116. Kingsbury, *supra* note 17, at 17 (emphasis added).

117. *Id.*; *see also* Backer, *supra* note 45, at 762–72 (noting that businesses self-regulate through regulatory arbitrage, and also self-regulate through creating rules for their supply chains); Kishanthe Parella, *Outsourcing Corporate Accountability*, 89 *WASH. L. REV.* 747, 753, 755–56 (2014) (noting that corporations are increasingly responsible for regulating throughout their “global value chains”).

118. Janet Koven Levit, *Bottom-up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 *YALE J. INT'L L.* 125 (2005).

become codified in formal treaty law.<sup>119</sup> While helpful in unearthing significant private roles in public governance, these projects do not set their sights on excavating and evaluating business roles in formal international treaty making.

There is some direct work on business roles in treaty making, upon which this project builds. For instance, there has been significant analysis of the International Labor Organization's unique structure, in particular business contributions to ILO lawmaking.<sup>120</sup> Commentators evaluating non-state participation in environmental treaties frequently examine business roles alongside the roles of other participants, like traditional NGOs.<sup>121</sup> Now, with ongoing work toward forming a new treaty governing business responsibilities for human rights, popular commentators are grappling with how to structure business participation in that project.<sup>122</sup> These responses are, thus far, ad hoc and treaty-specific.

While there is no comprehensive approach, the connection between business participation in treaty regimes and state compliance is the subject of an incipient literature. In a previous work, I examined the necessity of business buy-in for the success of a category of treaties I call "persuasion" treaties.<sup>123</sup> Shima Baradaran and her coauthors have conducted a substantial empirical analysis examining motivations for private compliance with treaties, and drawing connections between individual and state compliance.<sup>124</sup> The social science literature has analyzed lobbying through a public choice lens.<sup>125</sup> Finally, Natasha Affolder has studied the way businesses appropriate treaty texts for their own ends.<sup>126</sup> These works demonstrate the growing awareness in the literature that business activity matters to international treaty making. It is time for more knowledge and a more systematic response. The work that remains is to identify the structural gaps that

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119. See e.g., Wagner, *Regulatory Space*, *supra* note 83 (describing mechanism whereby the SPS Agreement incorporates privately elaborated standards).

120. See Raustiala, *supra* note 23, at 158.

121. See, e.g., Chiara Giorgetti, *From Rio to Kyoto: A Study of the Involvement of Non-Governmental Organizations in the Negotiations on Climate Change*, 7 N.Y.U. ENVTL L.J. 201, 202 (1999); Chiara Giorgetti, *The Role of Nongovernmental Organizations in the Climate Change Negotiations*, 9 COLO. J. INT'L ENVTL. L. & POLY 115, 116 (1998); Raustiala & Bridgeman, *supra* note 35, at 8–11.

122. See, e.g., Jens Martens, *Corporate Influence on the Business and Human Rights Agenda of the United Nations* (Glob. Policy Forum Working Paper, 2014), [http://www.misereor.org/fileadmin/redaktion/Corporate\\_Influence\\_on\\_the\\_Business\\_and\\_Human\\_Rights\\_Agenda.pdf](http://www.misereor.org/fileadmin/redaktion/Corporate_Influence_on_the_Business_and_Human_Rights_Agenda.pdf) [<http://perma.cc/64ZN-7TMW>].

123. See Durkee, *supra* note 8.

124. Baradaran et al., *supra* note 42, at 747–51.

125. See generally, Brewster, *supra* note 97; BRAITHWAITE & DRAHOS, *supra* note 75.

126. Affolder, *supra* note 21, at 159 (demonstrating that "corporations are consumers of treaty law," and explaining how the "[g]rowing pressure to define acceptable standards of environmental and social behavior for companies is creating a robust market for international standards.").

leave private participation unregulated, and to address whether and how international law should develop a comprehensive response.

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This Part has implicitly asked the reader to defer two separate sets of questions. The first set is descriptive: What exactly is meant by business participation in treaty making? What kind of business actors are involved and what is the mechanism of their participation? The second set is normative: What kind of response is needed? Are new legal structures needed, and if so, on what theory? The following Parts take these questions in turn.

## II. THE BUSINESS OF TREATIES

Market actors are, in fact, deeply embedded in the making of international treaties, notwithstanding both the state-centric orthodoxy of the international system and the lack of any formal regime to facilitate or restrain their participation. Business participation is not limited to the anomalous patchwork of roles surveyed in Part I.A, such as accreditation to particular environmental treaties, or development of standards for later adoption into treaties by reference. Rather, as the examples that follow show, business roles in treaty making can be both extensive and quite varied.

This Part surveys the lawmaking processes that produced two private-law treaties—the Cape Town Convention and the Rotterdam Rules.<sup>127</sup> The two examples show that, for some treaties, business is involved at all relevant generative points: design; drafting; negotiation and adoption; ratification and implementation; and enforcement. In addition to typologizing business participation in the two private-law treaties, this Part also shows the breadth of business participation by using popular and academic responses to the Trans-Pacific Partnership as a shadow example.<sup>128</sup> This final example demonstrates that business participation extends far beyond the private-law arena and implicates treaties in which important public interests are at stake, presenting additional normative complexities.

127. Private law treaties regulate private relationships across national borders. Some prominent examples include the Hague Service Convention, *see* Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 658 U.N.T.S. 163, 20 U.S.T. 361, [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=17](http://www.hcch.net/index_en.php?act=conventions.text&cid=17) [<http://perma.cc/Y9HU-KJCM>], and the CISG, *see* United Nations Convention on Contracts for the International Sale of Goods 1489, Apr. 11, 1980, 1489 U.N.T.S. 163, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html) [<http://perma.cc/VVW8-HH5W>].

128. *See generally Overview of the Trans Pacific Partnership*, OFF. U.S. TRADE REP., <https://ustr.gov/tpp/overview-of-the-TPP> [<http://perma.cc/X7GF-7NUP>] (describing the Trans-Pacific Partnership as an “ambitious, next-generation, Asia-Pacific trade agreement”).

## A. The Cape Town Convention

### 1. Background

The Cape Town Convention has been hailed as perhaps “the most significant piece of private international law in recent history.”<sup>129</sup> The Convention facilitates financing of mobile equipment such as aircraft, spacecraft, and railway cars.<sup>130</sup> A bit of background information will frame the issues, clarify the stakes, and demonstrate the significance of business involvement. The normal rule is that financing is governed by the domestic legal regimes in which the goods to be financed are located. It turns out that these default rules are quite varied. Priority rules, substantive remedies, and the timeframe in which remedies may be granted vary substantially between different jurisdictions.

Before the Cape Town Convention, financing of mobile equipment was subject to the domestic laws of the state where the goods were located. This was consistent with financing rules for other goods, but mobile goods presented particular challenges because the equipment could be anywhere in the world at the time of default.<sup>131</sup> In other words, finance of mobile equipment like aircraft is a unique area because the equipment is just that: mobile. Say that the mobile equipment in question, such as a Boeing airplane, came to rest in Country X. Under the laws of Country X, would the investor’s loan have priority over other interests? Would the investor be able to auction the equipment and pocket the proceeds in satisfaction of the debt? Before the Convention, because investors were subject to the domestic laws of the regime in which the aircraft was located, they suffered the uncertainty of not knowing up front—at the time of making the initial financing contract—what rules would attach at the time of default.<sup>132</sup> Thus, as a result of the peculiar challenges that mobile equipment presented, and the indeterminate nature of the patchwork of national laws, financing was difficult to obtain and relatively costly.<sup>133</sup> The primary investors in mobile equipment

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129. Sandeep Gopalan, Comment, *Harmonization of Commercial Law: Lessons From the Cape Town Convention on International Interests in Mobile Equipment*, 9 *LAW & BUS. REV. AM.* 255, 255 (2003).

130. See Mark J. Sundahl, *The “Cape Town Approach”: A New Method of Making International Law*, 44 *COLUM. J. TRANSNAT’L L.* 339, 341, 344 (2006) (noting that the Cape Town Convention takes its place among a number of efforts in a “long-standing movement to create a modern and uniform international law of secured transactions”).

131. See Goode, *supra* note 5, at 600–01.

132. See Sundahl, *supra* note 130, at 345 (offering general background on default rules in security interests law).

133. See *id.*; see also Gopalan, *supra* note 129, at 261.

were highly specialized investors who were comfortable investing in this niche market.<sup>134</sup>

The Cape Town Convention was meant to open up the niche mobile equipment investment arena to nonspecialist investors, including investment funds and insurance companies, that needed a greater amount of predictability.<sup>135</sup> The Cape Town Convention sought to remedy the indeterminacy problem by prescribing internationally standardized rules. The rules govern priority of interests and enforcement, and supplant national laws.<sup>136</sup> This is a particularly striking result because most domestic regimes have priority and enforcement rules that are generally consistent across investment type.<sup>137</sup> The Cape Town Convention changed those national priority rules only with respect to one particular kind of security interest: the interest in high-value mobile equipment such as aircraft, spacecraft, and railway equipment.<sup>138</sup> Finally, in addition to providing priority and enforcement rules, the Convention attempts to cultivate the security and predictability that nonspecialists need by setting up an international registry, which provides a central clearinghouse available to anyone with interests in the relevant equipment.<sup>139</sup>

By a variety of measures, the Cape Town Convention has been enormously successful.<sup>140</sup> The Convention was adopted in late 2001, entered into force in January 2006, and has steadily acquired ratifications and accessions since then.<sup>141</sup> In late 2015, the number of state parties stood at a healthy sixty-eight.<sup>142</sup> Before

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134. Most financial institutions, of course, are reluctant to extend loans without sufficiently determinate securitization. According to Scott Scherer, Vice President and General Manager of aircraft financial services at Boeing Capital: "The lessons we learned from the US in the early 1990s were that legal rights to aircraft were ambiguous and . . . [produced] inefficiencies." *Cape Town Revisited*, AIRFINANCE J., (Dec. 2005), <http://www.airfinancejournal.com/Article/2049784/CAPE-TOWN-REVISITED.html> [<http://perma.cc/455D-APHZ>].

135. See Sundahl, *supra* note 130, at 350–51.

136. See Gopalan, *supra* note 129, at 259.

137. Thus, for example, a house, an aircraft, and a Xerox machine will be subject to the same priority and enforcement rules. In fact, most national rules do not distinguish between investment type at all, but simply set down the rules that apply to security interests in general.

138. See Sundahl, *supra* note 130, at 341.

139. 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 (2002) (commenting that priority follows a strict first-in-time registration rule and since the registry is available around the clock and world-wide, it offers all interest-holders equal opportunities to stake claims, and a clear indication of priority).

140. Goode, *supra* note 5, at 605 ("There is no question that this vast effort has been crowned with success. We now have a Convention and Protocols for all three categories of object.").

141. See *Convention on International Interests in Mobile Equipment*, UNIDROIT, <http://www.unidroit.org/status-2001capetown> [<http://perma.cc/B2K9-T3XB>] (showing the Convention's ratification status) (last visited Dec. 16, 2015).

142. *Id.*

the Convention came into force, an economic impact assessment performed by both INSEAD in Paris, and the New York University Salomon Center, revealed that on conservative assumptions, the economic gains expected to result from the Convention and Aircraft Protocol “would run to several billion U.S. dollars a year and would be widely shared among airlines and manufacturers, their employees, suppliers, shareholders and customers, and the national economies in which they are located.”<sup>143</sup>

## 2. Business Roles

Industry actors had an extensive role in developing the Cape Town Convention. According to Ray Goode of Oxford University, “[i]t would not have been possible to bring such a major project to fruition without the active participation of the various industry sectors affected.”<sup>144</sup> In particular, Goode asserts, the participation of Airbus Industrie and the Boeing Company “transformed the entire process.”<sup>145</sup> Goode concludes that one of the main lessons to emerge from the generation of the Cape Town Convention was that, at least in the context of treaties such as the Cape Town Convention, in which private sector interests are at stake, “it is critically important to involve industry experts, and build[] up their support, from the very outset.”<sup>146</sup>

Business actors were instrumental at all points in the development process of the Cape Town Convention: (i) determining the need for an international instrument in this area; (ii) drafting the text and designing the structure of the agreement; (iii) persuading governments to agree to the text and adopt the treaty; (iv) campaigning for ratification and assisting governments to implement the convention; and (v) funding the process.

(i) *Demanders*. At the outset, the private sector provided crucial input about whether there was a problem to be solved by a treaty in the first place. The governing council of the International Institute for the Unification of Private Law

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143. Goode, *supra* note 5, at 604; Lorne S. Clark, *The 2001 Cape Town Convention on International Interests in Mobile Equipment and Aircraft Equipment Protocol: Internationalising Asset-Based Financing Principles for the Acquisition of Aircraft and Engines*, 69 J. AIR L. & COM. 3, 17 (2004) (stating that another measure of the Cape Town Convention’s success might be found in the fact that the Export-Import Bank of the United States “decided to lower the cost of acquisition of certain types of aircraft on the basis of reduced risk in connection with the Cape Town instruments” and the bank extended a discount—a reduction of its exposure fee by one-third—“on financing of large commercial aircraft to buyers in countries that sign, ratify and implement the Cape Town Convention”).

144. Goode, *supra* note 5, at 606.

145. *Id.* at 603.

146. *Id.* at 606.



(UNIDROIT) had decided not to approve new private law treaties unless they were likely to receive “a substantial measure of support” from industry and other interested sectors.<sup>147</sup> Accordingly, UNIDROIT sent out a detailed questionnaire to approximately one thousand private-sector actors, principally business and financial institutions, to determine whether there were problems in the financing of mobile equipment that could be solved by a new convention.<sup>148</sup> The Cape Town Convention project was only launched when UNIDROIT had received a sufficiently affirmative answer to the question in the responses to those questionnaires.

(ii) *Drafters and Designers.* The business sector’s next substantial role was in drafting the text of the treaty. In particular, Airbus Industrie and the Boeing Company established an “Aviation Working Group,” which became “a great driving force in the project.”<sup>149</sup> The Working Group assembled a series of detailed drafts of the Framework Convention and the Aircraft Protocol, which included extremely technical definitions of aircraft and aircraft engines. According to the official drafters of the convention, these industry-generated drafts were of “inestimable value.”<sup>150</sup> This was in part because the drafts incorporated technical expertise most readily available to those within the industry.

In addition to preparing initial drafts of the convention, industry actors made crucial framing choices that relieved logjams in the drafting and negotiating process.<sup>151</sup> Beyond providing technical expertise, industry actors proposed useful default remedies and priority rules, and designed the international registry.<sup>152</sup> Perhaps most significantly, Lorne Clark, the General Counsel of the International Air Transport Association (IATA) suggested a two-instrument approach including a framework convention and specific protocols that would cover each major form of mobile equipment (aircraft, rail equipment, and spacecraft) rather than incorporating all forms of mobile equipment in one treaty.<sup>153</sup> This had significant effects on the speed of the process and the clarity of the text. Moreover, Clark proposed a quite novel solution that departed substantially from the typical “framework convention plus protocol” approach familiar to international treaty law. Instead of using the framework convention to provide the ground rules, which the protocols would then develop with more specificity,

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147. *Id.* at 600.

148. Gopalan, *supra* note 129, at 260 (“Approximately 1,000 copies of the questionnaire were sent with Professor Cuming’s report, typically to banks and financial institutions, confederations of industry, major industrial concerns, and airlines.”).

149. Goode, *supra* note 5, at 603.

150. *Id.*

151. See Sundahl, *supra* note 130, at 354.

152. Goode, *supra* note 5, at 603.

153. See *id.* at 603–04.

Clark proposed the novel solution that the protocols should be permitted to modify and override the framework convention provisions.<sup>154</sup>

(iii) *Negotiators*. Industry, through the arm of the Aviation Working Group, then launched a “major campaign,” encouraging states to adopt the Convention at the Cape Town Conference.<sup>155</sup> One of the major hurdles the agreement faced was resistance from governments that were reluctant to accept an agreement that did not respect domestic traditions.<sup>156</sup> Specifically, civil law countries were particularly interested in preserving a civil law approach, while common law countries advocated for common law norms.<sup>157</sup> This divide was particularly significant because the Cape Town Convention was meant to supplant domestic law rules for the kinds of security covered by the convention.<sup>158</sup> Thus, countries were asked to accept a departure from their domestic law priority and enforcement rules solely for mobile equipment.<sup>159</sup> Countries from different legal traditions were skittish about accepting rules that were foreign to their legal culture, treating maintenance of legal culture as a point of pride and a sovereign right.<sup>160</sup> Industry was particularly helpful in this regard, because it served as a neutral go-between, convincing states of the prudence of particular rules without serving as advocates for a particular legal culture—as state representatives would have been.<sup>161</sup> Thus, industry representatives were quite effective at convincing reluctant national representatives to adopt a text mandating a set of laws that would depart in some respects from legal cultural norms.<sup>162</sup>

(iv) *Implementers*. According to Goode, “[t]he Aviation Working Group, aided by a substantial infusion of resources and manpower [from the Aviation industry] gave high priority to . . . implementation,” and “presented the case for ratification to governments around the world.<sup>163</sup> The Aviation Working Group and its industry supporters “showed its mettle,” at this stage of the process, campaigning aggressively for ratification and implementation, and even going so far as to provide context-specific advice and best practices assistance to states.<sup>164</sup>

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154. *See id.*

155. *Id.* at 606.

156. Interview with Jeffrey Wool, Sec’y Gen., Aviation Working Group, in Seattle, Wash. (Aug. 2014).

157. *See* Gopalan, *supra* note 129, at 258.

158. *See supra* Part II.A.

159. *Id.*

160. Interview with Jeffrey Wool, *supra* note 156.

161. *Id.*

162. *Id.*

163. Roy Goode, *Transnational Commercial Law and the Influence of the Cape Town Convention and Aircraft Protocol*, 50 CANADIAN BUS. L.J. 186, 210 (2011).

164. *Id.*

(v) *Funders*. Finally, and crucially, industry backers provided the funding to ensure the success of the project. Industry funding paid for the services of lawyers who drafted the text, lobbied governments, set up the international registry, and set up mechanisms to monitor compliance.<sup>165</sup> Industry funding also eased the financial burden to South Africa of hosting the Cape Town Convention conference.<sup>166</sup>

## B. The Rotterdam Rules

### 1. Background

The Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, better known as the “Rotterdam Rules,” is a new treaty, which opened for signature in 2009 and is not yet in force.<sup>167</sup> The treaty seeks to solve an important maritime shipping problem.<sup>168</sup> Prior international conventions exposed shippers to different contractual regimes depending on whether goods were transported by land or transported by sea.<sup>169</sup> Thus, if a shipper were to chart a course for a given parcel of goods that included both a land leg and a connecting sea leg, that journey would require a separate set of contracts for each portion.<sup>170</sup> The lack of a unified regime created excess transaction costs, as each carrier was required to expend the time and resources to secure those separate contracts, and the disparate regimes created ambiguities and legal uncertainties.<sup>171</sup> The Rotterdam Rules aim to offer a unified regime with a single set of contractual rules governing both carriage by land and sea, thus enabling shippers to conduct business under a single set of contracts for the entire journey.<sup>172</sup> The intent, as the treaty’s website celebrates, is to “achieve uniformity of law in the field of maritime carriage

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165. *See id.*

166. *See id.*

167. G.A. Res. 63/122, *supra* note 4.

168. María Angélica Uribe et al., *Transport Facilitation From the Perspective of the Rotterdam Rules*, FAL BULLETIN 1 (Nov. 2, 2010), <http://www.cepal.org/Transporte/noticias/bolfall/7/42007/FAL-283-WEB-ENG.pdf> [<http://perma.cc/35SD-66A4>] (stating transport and logistics play a pivotal role in the competitiveness of globalized economies).

169. *Cf. New UN Convention Rotterdam Rules Open for Signatures*, ROTTERDAM RULES, <http://www.rotterdamrules2009.com/cms/index.php> [<http://perma.cc/V6CU-XSRV>] (last visited Dec. 16, 2015).

170. *See id.*

171. *See id.*

172. *See id.*

... [and] provide for ... door-to-door carriage.”<sup>173</sup> One of the benefits of the new unified contractual regime is that responsibility for the goods—and thus liability for mishaps—will be clearly demarcated at all points in the transport process.

In addition to stitching together the land and sea regimes, the Convention also aims to bring maritime shipping into the 21<sup>st</sup> century by facilitating e-commerce, or electronic processing of maritime shipping contracts. Treaty proponents anticipate that electronic processing will further reduce the time and transaction costs associated with maritime shipping, reduce errors, and increase the certainty and predictability of the entire process.<sup>174</sup>

The Convention has been open for signature since fall of 2009, after it was endorsed by both UNCITRAL, and the United Nations General Assembly. As of this writing, twenty-five countries have signed the convention, including the United States, France, Spain, Greece, the Netherlands, Norway, and Denmark, among others.<sup>175</sup> The current signatory countries account for over 25 percent of the current volume of international trade.<sup>176</sup> However, to date only three countries have ratified the convention, which will only enter into force after the twentieth ratifying or other acceding instrument is filed.<sup>177</sup>

## 2. Business Roles

As with the Cape Town Convention, the business sector had a significant role in developing the Rotterdam Rules, though this role has attracted little attention in the academic and popular press. In fact, the treaty’s official UN website is silent about the private input and instead emphasizes the roles played by traditional intergovernmental negotiations and the United Nations.<sup>178</sup>

173. *Rotterdam Rules Signature Ceremony*, ROTTERDAM RULES, <http://www.rotterdamrules2009.com/cms/index.php?page=general-information> [<http://perma.cc/9L4G-4XUY>] (last visited Dec. 16, 2015).

174. See Uribe, *supra* note 168, at 4 (“One of the essential principles of the Rotterdam Rules is the establishment of a globalized, uniform and modern regime for regulating the rights and obligations of stakeholders in the maritime industry, with a single contract of carriage from door to door.”).

175. See *United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, U.N. TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&cmdsg\\_no=XI-D-8&chapter=11&dlang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&cmdsg_no=XI-D-8&chapter=11&dlang=en) [<http://perma.cc/K3RN-LHQQ>] (last visited Dec. 16, 2015).

176. See *id.*; Cécile Legros, *Relations Between the Rotterdam Rules and the Convention on the Carriage of Goods by Road*, 36 TUL. MAR. L.J. 725, 726 (2012) (stating the first 24 countries that ratified the Rotterdam Rules represented 25 percent of the world’s trade).

177. See *United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, *supra* note 175.

178. See *New UN Convention Rotterdam Rules Open for Signatures*, *supra* note 169 (“The Rotterdam Rules are the result of inter-governmental negotiations that took place between 2002 and 2009. These negotiations took place within the United Nations Commission for International Trade Law

This omission could be a result of the fact that business entities primarily influenced the development of the Rotterdam Rules through intermediary organizations. The direct role of any single business actor is thus less immediately apparent. In fact, it is unclear whether any particular business actors principally drove the project forward. This of course stands in contrast to the Cape Town Convention, where the entities principally responsible for the project were a small number of interested multinational corporations and the working group that they formed together. Nevertheless, as in the Cape Town example, the principal actor in establishing the Rotterdam Rules was an organization that exists to further the interests of industry groups—here the Comité Maritime International (CMI). And the separate industry groups represented by CMI themselves took a proactive role in developing the instrument.

As with the Cape Town Convention, business interests have been involved at all relevant generative points in the life of the Rotterdam Rules. Specifically, business actors (i) determined a need for the instrument, and agreed among themselves as to the content of the instrument; (ii) enlisted an organization to draft the agreement; (iii) participated on delegations charged with negotiating the convention; (iv) urged and facilitated ratification; and (v) funded the conference in Rotterdam where the agreement was negotiated and signed.

(i) *Demanders*. In 2001, two major U.S. industry groups formulated a “joint statement” announcing that the entities had “agreed to pursue a common set of positions with respect to a new cargo liability regime for international ocean transport.”<sup>179</sup> The two U.S.-based industry groups are the National Industrial Transportation League (NITL) and the World Shipping Council (WSC). The World Shipping Council advertises itself as “a coordinated voice for the liner shipping industry.”<sup>180</sup> “The WSC and its member companies partner with governments and other stakeholders to collaborate on actionable solutions for some of

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(UNCITRAL), after the Comité Maritime International (CMI) had prepared a basic draft for the convention. On 11th December 2008, the General Assembly of the United Nations adopted the Rotterdam Rules.”)

179. *Joint Statement of Common Objectives on the Development of a New International Cargo Liability Instrument*, NAT'L INDUS. TRANSP. LEAGUE & WORLD SHIPPING COUNCIL 1 (Sept. 25, 2001), <http://www.worldshipping.org/pdf/jointstatement.pdf> [<http://perma.cc/77RB-MZVL>] (reflecting unsigned agreement by Edward Emmett, President of the NITL and Christopher Koch, President of the WSC).

180. *Home*, WORLD SHIPPING COUNCIL, <http://www.worldshipping.org> [<http://perma.cc/P5RA-LURE>] (last visited Dec. 16, 2015) (“World Shipping council members operate approximately 90 percent of the global liner ship capacity, providing approximately 400 regularly scheduled services linking the continents of the world. Collectively, these services transport about 60 percent of the value of global seaborne trade, and more than US\$ 4 trillion [sic] worth of goods annually.”).

the world's most challenging transportation problems."<sup>181</sup> Similarly, the NITL is "The Shippers' Voice Since 1907"<sup>182</sup>—an association of companies that conduct industrial and commercial shipping throughout the United States and internationally, representing six hundred member companies involved with transporting freight domestically and internationally.<sup>183</sup> The mission of the NITL is "to advance the views of shippers on freight transportation issues."<sup>184</sup> In other words, the WSC and NITL are classic industry groups that exist to further the interests of their business members. Together, they represent both ocean and land carriers. The joint statement produced by the groups reflected a negotiated agreement the two had made with each other to advocate for an international convention with specified terms.

Specifically, the two parties agreed to work through the CMI and UNCITRAL to secure an international convention, advocating the positions they had negotiated with each other. In fact, the parties built into their agreement the assumption that CMI would forward a draft convention to UNCITRAL on a particular timeline, and that the countries negotiating the instrument would have it available for signature within three years. They also agreed to "use best and timely efforts to have the U.S. government ratify the Instrument and/or adopt implementing legislation" consistent with the agreements the two parties made to each other.<sup>185</sup>

(ii) *Drafters/Designers.* CMI then drafted the initial version of the Convention, closely tracking the joint statement by the two industry groups. While CMI advertises itself as a "non-governmental not-for-profit international organization,"<sup>186</sup> it is itself an industry player that exists to solely protect the interests of the shipping industry. CMI was established in 1897 with the purpose of contributing "by all appropriate means and activities to the unification of maritime law."<sup>187</sup> According to CMI's constitution, the membership of CMI includes

181. *Id.*

182. *Membership Center*, NAT'L INDUS. TRANSP. LEAGUE, <http://www.nitl.org/meminfo.asp> [<http://perma.cc/NT9T-SK6V>] (last visited Dec. 16, 2015).

183. *See NITL Applauds Broad Support for Rotterdam Rules*, NITL NEWS (Oct. 2, 2009), [http://www.nitl.org/NITL\\_RRule.pdf](http://www.nitl.org/NITL_RRule.pdf) [<http://perma.cc/CK99-VJJF>].

184. *Membership Center*, *supra* note 182.

185. *Joint Statement on Common Objectives on the Development of a New International Cargo Liability Instrument*, *supra* note 179, at 7.

186. COMITÉ MAR. INT'L, <http://www.comitemaritime.org/Home/0,271,1132,00.html> [<http://perma.cc/Z5KU-7W4M>] (last visited Dec. 16, 2015).

187. *Comité Maritime International Constitution*, COMITÉ MAR. INT'L, art. 1, at 6, <http://www.comitemaritime.org/Uploads/Yearbooks/1992%20YEARBOOK-ANNUAIRE.pdf> [<http://perma.cc/GF7A-8EFB>]; *see also* Letter from Karl-Johan Gombrii, President, Comité Maritime Int'l, <http://www.rotterdamrules2009.com/cms/images/CMI-letter-big.jpg> [<http://perma.cc/8JHW-6AE3>] ("The CMI was established in 1897 and is the oldest international organization

national and multinational associations of individuals or business entities involved in maritime activities or specialists in maritime law.<sup>188</sup> In addition to those association members, CMI accepts international organizations “interested in the object[ive] of” CMI as nonvoting consultative members.<sup>189</sup> Currently, CMI’s consultative membership includes twenty-one different organizations, such as the Arab Society of Maritime and Commercial Law, based out of Egypt, the International Association of Independent Tanker Owners, in London, the International Chamber of Commerce, the International Union of Marine Insurance, based in Germany, and, of particular interest in this account, both the National Industrial Transportation League and the World Shipping Council.<sup>190</sup>

According to the World Shipping Council, “[t]he new Rotterdam Rules convention contains most of the elements included in the agreement WSC entered into with the [NITL] at the beginning of the UNCITRAL process.”<sup>191</sup> In other words, at least according to the WSC, the draft of the Rotterdam Rules developed by CMI and sent on to UNCITRAL closely tracked the set of agreements the WSC and NITL had made with each other, suggesting in an inferential way that those actors wielded considerable influence on the process.

(iii) *Negotiators.* The World Shipping Council itself then participated on the U.S. delegation to UNCITRAL throughout the negotiations.<sup>192</sup>

(iv) *Promoters.* CMI has a working group dedicated to promoting ratification of maritime conventions, though it is not clear exactly what this group may have done to promote the Rotterdam Rules.<sup>193</sup> In 2009, however, the International Chamber of Commerce—another private sector organization representing businesses all over the world—issued a statement in support of the new convention and asked governments to consider ratification based on a set

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concerned exclusively with maritime law and related commercial practice. Our mandate is to strive for the unification of maritime law globally . . .”).

188. See *Comité Maritime International Constitution*, *supra* note 187, art. 3, at 6.

189. See *id.* art. 3, para. e., at 8.

190. See *Consultative Members*, COMITÉ MAR. INT’L, <http://www.comitemaritime.org/Consultative-Members/0,2776,17632,00.html> [<http://perma.cc/947X-BPEK>] (last visited Dec. 16, 2015) (providing the complete list of consultative members).

191. *Collaboration*, WORLD SHIPPING COUNCIL, <http://www.worldshipping.org/industry-issues/cargo-liability/collaboration> [<http://perma.cc/4CVQ-RSDT>] (last visited Dec. 16, 2015) (stating that “[t]his carrier-shipper alliance was extremely effective in helping shape the key issues during the negotiation”).

192. See *Industry Issues*, WORLD SHIPPING COUNCIL, <http://www.worldshipping.org/industry-issues> [<http://perma.cc/R4X5-Q67L>] (last visited Dec. 16, 2015) (announcing on its website that it “has been working as part of the U.S. delegation to . . . [UNCITRAL] to achieve international cargo liability reform through the development of [the Rotterdam Rules]”).

193. See COMITÉ MAR. INT’L, *supra* note 186.

of objectives important to international business.<sup>194</sup> In addition, the WSC and the NITL issued a number of press releases celebrating various steps taken, including the endorsement of the ICC, the signing at Rotterdam, and then subsequent signing by various countries, ratification, and so on.

(v) *Funders*. The Rotterdam conference itself was funded by “sponsor partners,” including companies such as Argos Oil, Maersk Line, and Vopak.<sup>195</sup>

### C. Underexamined Others

The two private law treaties examined above illustrate some basic features of business participation in treaty making. In particular, they show the depth, variety, and mechanisms of industry participation. But they illuminate only a small portion of what is likely a much larger picture. The recent role of business in developing the Trans-Pacific Partnership (TPP) demonstrates why business participation in *public* law treaties heightens the stakes and urgency of the project. It shows in an even starker fashion why better empirical understanding of business roles in treaty making is needed, together with a guiding theory and, almost certainly, coherent law.

The possibility of business involvement in the public law arena raises the stakes for the project of developing a rational approach to business participation in treaty making because it raises the possibility—indeed, the likelihood—that market interests and public interests will not perfectly align. It is one thing to accept, or even celebrate, the participation of business entities in crafting a law that principally regulates those same entities. (Though even in the purely private law arena, it is often necessary for gatekeepers to ensure that various private interests are balanced in an appropriate way, and that the regime does not produce externalities that may harm the public interest.) However, the proposition that business is involved in crafting public law—where it is involved in developing law for others—is likely to be much more controversial. Yet business *is* involved in crafting public law. A full discussion of the features and scope of this involvement is beyond the scope of this Article.<sup>196</sup> Recent scholarly and popular attention to issues surrounding the devel-

194. *Comments on the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, INT'L CHAMBER OF COMMERCE 1 (May 27, 2009), [http://www.worldshipping.org/pdf/uncitral\\_joint\\_statement.pdf](http://www.worldshipping.org/pdf/uncitral_joint_statement.pdf) [<http://perma.cc/A7NC-U7W7>] (stating that “the ICC asks governments to consider ratification of the convention”).

195. *Sponsor Partners*, ROTTERDAM RULES, <http://www.rotterdamrules2009.com/cms/index.php?page=sponsorships> [<http://perma.cc/ELW9-CNUV>] (last visited Dec. 16, 2015).

196. See *supra* notes 120–122 (noting that no systematic attention has been paid to business roles in public treaties but reviewing, *inter alia*, attention to business roles in treaty making in the environmental law arena; the adoption by public treaties of privately elaborated standards; and roles business should take in developing a Business and Human Rights Treaty).



opment of the TPP, however, illuminates both the preliminary point that business is involved, and the larger point that this involvement raises an important set of issues that demand legal and scholarly attention.

The TPP is a recently negotiated multilateral trade agreement that is, by some accounts, the largest-ever economic treaty.<sup>197</sup> The parties to the treaty orbit the Pacific Ocean, and include Canada, the United States, Mexico, Peru, Chile, New Zealand, Australia, Malaysia, Brunei, Singapore, Vietnam, and Japan.<sup>198</sup> The treaty is intended to enhance trade and investment between these parties, and projections show that it will govern transactions amounting to 40 percent of global gross domestic product.<sup>199</sup> It is designed to eliminate tariffs on goods and services, reduce a host of nontariff barriers, and harmonize an array of regulations.<sup>200</sup> Many contentious issues, however, lurk among the regulations and nontariff barriers under scrutiny, particularly with respect to intellectual property and agricultural issues.<sup>201</sup> Thus, global health advocates, environmentalists, Internet activists, and trade unions have deep concerns about the features of the deal.<sup>202</sup>

The TPP demonstrates potential features of (and issues with) private sector participation in treaty making, in part due to the reaction that participation has produced. Critics have expressed alarm at the depth of industry involvement in the treaty-making process, especially since that involvement has come in an environment of deep secrecy.<sup>203</sup> Critics observe that industry representatives who

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197. See *Overview of the Trans Pacific Partnership*, *supra* note 128.

198. See *id.*

199. *Id.*

200. See *Trade in Goods*, OFF. U.S. TRADE REP., <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-chapter-chapter-negotiating-0> [<https://perma.cc/384V-CVNX>] (last visited Dec. 16, 2015).

201. See Carolina Rossini & Maira Sutton, *What Is Wrong With the Trans-Pacific Partnership (TPP)*, ELEC. FRONTIER FOUND. (Aug. 21, 2012), <https://www.eff.org/deeplinks/2012/08/whats-wrong-tpp> [<http://perma.cc/SJ9F-NPU6>]; Maira Sutton, *Secret TPP Negotiations—and Public Protests—to Be Held in New York City*, ELEC. FRONTIER FOUND. (Jan. 23, 2015), <https://www.eff.org/deeplinks/2015/01/secret-tpp-negotiations-and-public-protests-be-held-new-york-city> [<http://perma.cc/ZN3H-6488>].

202. See Emile Schepers, *New Trans Pacific Trade Partnership Stirs Worries*, PEOPLE'S WORLD (Nov. 14, 2013), <http://www.peoplesworld.org/new-trans-pacific-trade-partnership-stirs-worries> [<http://perma.cc/UZT7-4R6C>].

203. These critics come from all quarters, including academics, activists, and even senators. As Senator Ron Wyden stated:

[T]he majority of Congress is being kept in the dark as to the substance of the negotiations, while representatives of U.S. corporations—like Halliburton, Chevron, PHRMA, Comcast, and the Motion Picture Association of America—are being consulted and made privy to details of the agreement.

. . . More than two months after receiving the proper security credentials, my staff is still barred from viewing the details of the proposals that USTR is advancing.

have a clear stake in the outcome have had front row seats to the treaty process, and have helped shape its terms—though the mechanisms of their participation are obscure.<sup>204</sup> Advocates fear that the interests of industry actors like Monsanto and Philip Morris may be privileged at the expense of both the public<sup>205</sup> and state sovereignty.<sup>206</sup> Indeed, the U.S. public had little access to drafts of the TPP throughout the negotiating process, beyond secretive documents from WikiLeaks. And even members of Congress reported that they had very limited access to treaty texts.<sup>207</sup> Thus, one of the telling difficulties presented by the TPP is that because the negotiations were conducted in secrecy, it is difficult to find information about the precise nature and extent of industry's role in the process.<sup>208</sup> But the lack of information itself points to a potential problem with private sector participation in public law treaty making: Transparency is a principal concern. Other potential concerns include the lack of public, nonindustry involvement, and the resulting democratic deficit.<sup>209</sup> These concerns are motivated by, perhaps, justified fears that industry involvement has privileged their interests with costs to a large number of public goods that are perceived to be under threat in the trade arena—including, access to generic medicine, climate and environmental regulations, job security in the manufacturing and service industries, and agricultural standards.<sup>210</sup>

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We hear that the process by which TPP is being negotiated has been a model of transparency. I disagree with that statement.

158 CONG. REC. S3517 (daily ed. May 23, 2012) (statement of Sen. Ron Wyden); *See also* Christina Bucci, Comment, *Responsible Patent Protections: Preserving Public Health Objectives in the Trans-Pacific Partnership Agreement*, 26 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 213, 228-29 (2013) (collecting responses); Jane Kelsey, *Trans-Pacific Partnership Papers Remain Secret for Four Years After Deal*, TPP WATCH (Oct. 16, 2011), <http://tppwatch.org/2011/10/16/trans-pacific-partnership-papers-remain-secret-for-four-years-after-deal> [<https://perma.cc/8PBR-Y5JE>].

204. *See* Schepers, *supra* note 202.

205. *See Trans-Pacific Partnership Threatens a Regime of Corporate Global Governance*, PROJ. CENSORED (Sept. 30, 2013), <http://www.projectcensored.org/3-trans-pacific-partnership-threatens-regime-corporate-global-governance> [<http://perma.cc/7WW7-Y3EP>].

206. *Id.* (stating that the TPP “is actually an enforceable transfer of sovereignty from nations and their people to foreign corporations”).

207. *See id.*; *see also* Rossini & Sutton, *supra* note 201.

208. *Cf. Trans-Pacific Partnership Threatens a Regime of Corporate Global Governance*, *supra* note 205.

209. *Cf. Peter K. Yu, Six Secret (and Now Open) Fears of ACTA*, 64 SMU L. REV. 975, 998-99 (2011) (identifying four public interest concerns that arose in the context of a recently negotiated intellectual property treaty, the Anti-Counterfeiting Trade Agreement (ACTA), which also featured “secret” negotiations: “(1) lack of transparency; (2) very limited public, non-industry participation; (3) a huge democratic deficit; and (4) virtually no domestic or global accountability”).

210. *See e.g., Joseph Stiglitz, On the Wrong Side of Globalization*, N.Y. TIMES (Mar. 15, 2014, 5:06 PM), <http://opinionator.blogs.nytimes.com/2014/03/15/on-the-wrong-side-of-globalization/?ref=topics> [<http://perma.cc/3CHG-KN3M>].

Though the available information about the TPP has been limited throughout the negotiation process, it appears that industry participation is not as extensive as it was for the Cape Town Convention, where it served a crucial, perhaps controlling role at all points in the life-cycle of the treaty.<sup>211</sup> In the TPP example, industry participation appears to be more akin to the role of traditional NGOs—consulting with governmental delegates during the negotiation process, and engaging in domestic regulatory capture.<sup>212</sup> Thus, the TPP illustrates a second (though admittedly not particularly deep) point: The depth of industry participation in treaty making currently falls along a spectrum, with Cape Town on one end, a treaty with no private-sector participation at all on the other, and the TPP somewhere in the middle. Most importantly, the TPP presents a contrast to Cape Town because it has not attracted the seemingly unvarnished approval Cape Town appears to enjoy. Instead, critics worry that industry involvement in the TPP may demonstrate private sector involvement at its worst.

\* \* \*

This Part has offered preliminary answers to the descriptive questions revealed by the gap in international law and scholarship: How are business actors involved in treaty making? More specifically, what kind of business actors are involved? What kinds of treaties attract private sector interest? And what are the features of business participation? A systematic answer to these questions—and a complete typology of forms of participation—would require sustained empirical analysis that is beyond the scope of this Article. But case studies in this Part offer helpful kernels to guide that future analysis, and provoke consideration about whether an international legal response to business roles in treaty production is warranted, as Part III elaborates.

Many of the features of business's role in treaty making that have been introduced in this Part are explored more fully in Part III. One, however, is worth a preliminary note: Business entities are not deterred by lack of formal accreditation. They find ways to participate in treaty making even though they are excluded from the consultation regimes that apply to traditional NGOs. Business entities do so by finding forms of participation outside of the formal conferences where accreditation is the ticket to entry. As the examples show, they formulate and circulate their own proposed treaty texts; convince states to convene lawmaking conferences on their own initiative; persuade domestic lawmakers to include

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211. See Part II.A.

212. See Katrina Moberg, *Private Industry's Impact on U.S. Trade Law and International Intellectual Property Law: A Study of Post-TRIPS U.S. Bilateral Agreements and the Capture of the USTR*, 96 J. PAT. & TRADEMARK OFF. SOC'Y 228, 230 (2014) (discussing secrecy of TPP process and comparing Congress's lack of access with the greater access by industry actors).

market actors as part of a state's official treaty delegation; channel influence through nonprofit industry groups that qualify for the official accreditation regimes; circulate "best practices" to guide implementation; and lobby transnationally to see that those practices are followed. As the examples in this Part have demonstrated, for some treaties, business intervenes at all generative points in the lifecycle of a treaty.

### III. A CASE FOR VISIBILITY

The absence of law that structures business participation in treaty making is problematic and calls for a response. This Part argues that three kinds of responses are needed: empirical, theoretical, and legal. To unpack this argument, this Part outlines the empirical analysis and theoretical choices that will be prerequisites to an appropriate legal response, and offers reasons why a legal response is likely desirable.

Specifically, a legal regime regulating and guiding business participation in treaty making could improve the potential for treaties to function as effective lawmaking tools. It could also deepen the legitimacy of treaty regimes. It could improve certainty for both states and others affected by treaty law, such as business actors. Finally, at a broader level, the absence of a legal regime presents a timely and potentially fleeting opportunity to take a theoretically principled approach to shaping the relationship between states and business in lawmaking.<sup>213</sup>

#### A. Effectiveness

The first reason to pay attention to business roles in international treaty making is that regulating those roles could make treaties more effective. Once lawmakers have a better understanding of the means and effect of business participation in treaty making, they may regulate this participation in useful ways. Officials and onlookers know very little about how business participation impacts treaty outcomes. More work is necessary to define and quantify business roles, and to better understand the relationship between business participation and treaty success, however these terms are defined and measured. The examples offered in the previous Part suggest that there is merit to the hypothesis that such a correlation exists, and that confirming this correlation and exploring its features

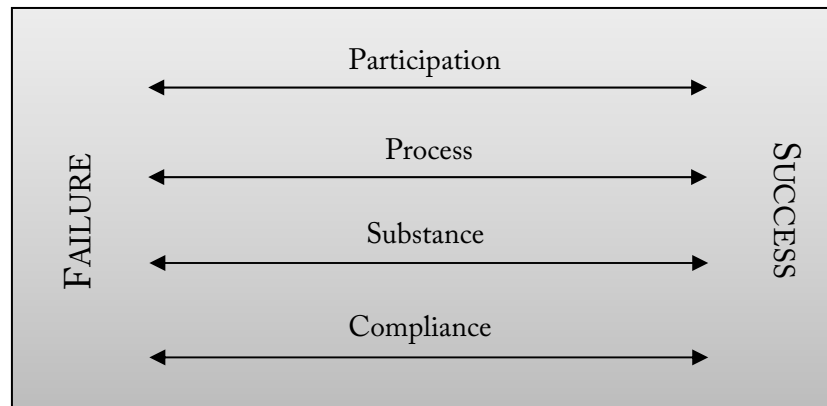
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213. Because business roles in international treaty making have not received the benefit of systematic scholarly attention, the purpose of this Subpart is to identify potential implications of that study and illustrate why it is urgently required. Thus the proposals in this Part are meant to be illustrative and not comprehensive. They invite—and lay a foundation for—more sustained scholarly analysis.

would be a productive avenue for further research. It would lead to a rich array of prescriptive implications, as this Subpart outlines.<sup>214</sup>

Treaty success might be measured with respect to breadth of participation. How many states signed and ratified, or acceded? Has the treaty entered into force? Or treaty success might be a matter of process. Was the treaty concluded after a process of reasoned deliberation in a manner that included relevant voices and advanced dignitarian values? Or the measure of success could lie in the substance of the treaty. Does the bargain balance the interests of diverse stakeholders? Does it contain meaningful measures that advance real solutions to international problems? Finally, the yardstick might be compliance. Do parties abide by their promises? These dimensions of success are illustrated in Figure 1.

FIGURE 1. DIMENSIONS OF TREATY SUCCESS



The appropriate measure of success may relate to the particular kind of treaty under scrutiny. For example, the chosen measure of success may be participation or process when a treaty's value lies principally in affirming a global commitment to certain aims rather than elaborating precise legal rules—consider the Convention on the Prevention and Punishment of the Crime of Genocide, or the United Nations Framework Convention on Climate Change as prime examples. On the other hand, a treaty concerned with furthering an important global good that requires concrete forms of domestic implementation

214. The proposals in this part elaborate and extend initial proposals by Stephan, *supra* note 18; see also STEPHEN TULLY, CORPORATIONS AND INTERNATIONAL LAWMAKING 308–10 (2007) (collecting arguments for and against corporate contributions to international lawmaking).

may be counted as “successful” only if the substance of the treaty effectively addresses the problem and the treaty attracts compliance. The Montreal Protocol on Substances that Deplete the Ozone Layer, and various free trade agreements such as the General Agreement on Tariffs and Trade, may fall into the latter category.

As the examples in the previous Part illustrate, business roles in the treaty-making process can affect treaty success along all these dimensions, in either beneficial or detrimental directions.

### 1. Participation

In the Cape Town Convention example, business actors were instrumental in lobbying domestically and transnationally before the treaty negotiation process even began, in order to ensure that states would be amenable to adopting the text they proposed. After the text was adopted, business actors were again active, engaging in a transnational process to persuade signing states to ratify, and additional states to accede to the treaty. It appears that these efforts made a difference with respect to rates of ratification and accession. Thus, if success is measured by participation rates, it is likely true that that business actors had a positive effect on the success of the Cape Town Convention. It is less clear whether business actors had a similar effect in the context of the Rotterdam Rules, or will have such an effect in the context of the Trans-Pacific Partnership. It is possible to imagine a situation in which business roles have a detrimental effect on participation rates—for instance, if business were to lobby against a treaty in the same ways that it lobbied on behalf of the Cape Town Convention. In sum, the Cape Town Convention example suggests that business can affect treaty success in either direction along the participatory dimension.

### 2. Process

The examples offered in this Article show that business actors may also have an impact on treaty success if success is measured in terms of the legitimacy (or perceived legitimacy) of the treaty-making process.<sup>215</sup> Here, the Trans-Pacific

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215. Of course, legitimacy itself is “a term much invoked but little analyzed,” and defining the terms of the debate would be an important first step. Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1789 (2005); *see also* SEYMOUR MARTIN LIPSET, POLITICAL MAN: THE SOCIAL BASES OF POLITICS 77 (1960), <https://archive.org/stream/politicalmansoci00inlips#page/76/mode/2up/search/engender+and+maintain> [<https://perma.cc/73PB-KCSZ>] (“Legitimacy involves the capacity of the system to engender and maintain the belief that the existing political institutions are the most appropriate ones for the society.”); TOM R. TYLER, WHY PEOPLE OBEY

Partnership is the starkest example, since one persistent critique of the TPP process is that the role business actors have been afforded is inappropriate, and that their input is privileged at the expense of public input.<sup>216</sup> The Cape Town Convention and Rotterdam Rules provide a counterexample, however, in that business actors enhance process legitimacy when they are the actors who are, or will be, the prime consumers of the law articulated in those treaties. A critic concerned with whether a process is adequately deliberative may agree that participation by such stakeholders enhances the legitimacy of the lawmaking process.

### 3. Substance

Involving business actors in a treatymaking process could lead to better or worse bargains. Again, a key critique of the TPP is that business involvement—especially when married with an absence of public knowledge and input—raises the concern that business interests will be privileged at the expense of important public interests. On the other hand, in the context of the Cape Town Convention, business involvement produced innovative, practical solutions such as the computerized global registry to be used to settle first-in-time disputes. Business participation also assisted states to overcome bargaining stalemates, such as the conflict over whether to incorporate rules from civil or common law traditions. Thus, business participation may supply information, ideas, resources, and workable solutions.<sup>217</sup> Business actors may also serve as facilitators, cutting through negotiating perseverance, and providing agenda guidance. These features of business participation could help states get to a better final product. The downside, of course, is that, left unchecked, business actors can also use their powers to frustrate important public goods. In addition, more powerful business players could use their influence to choke out the interests of competitors or other players.<sup>218</sup>

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THE LAW 26 (1990) (defining legitimacy by reference to “a conception of obligation to obey any commands an authority issues so long as that authority is acting within appropriate limits”); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 307 (2003) (“Legitimacy is the property that a rule or an authority has when others feel obligated to defer voluntarily.”); John C. Yoo, *In Defense of the Court’s Legitimacy*, 68 U. CHI. L. REV. 775, 776 (2001) (“Legitimacy is a word often used in our political debate, but seldom defined precisely.”).

216. See discussion *supra* Part II.C.

217. See also TULLY, *supra* note 214, at 307.

218. See Roger Hailey, *Questions of Balance in the Rotterdam Rules*, ROTTERDAM RULES, <http://www.rotterdamrules.com/sites/default/files/Questions-of-balance-in-the-Rotterdam-Rules-Lloyd%27s-List-27-08-2009.pdf> [<http://perma.cc/G8NV-ZW4E>] (last visited Dec. 16, 2015) (noting that critics assert that the Rotterdam Rules are weighed in favor of shipping carriers and biased against cargo owners because regime shifts liability to the cargo owners).

It is possible that the answer to the question of whether business participation helps or hurts the substance of a treaty bargain will depend on the extent to which business and public interests are aligned. Private law treaties might fall on one end of the spectrum, where the interests of business and the international community are most fully aligned, and both benefit from business input. The public benefit, in this instance, would be a beneficial outgrowth of industry benefit, as in the Cape Town example. On the other end of the spectrum would be treaties that are meant to further traditionally “public” interests, like those that require environmental regulations; here, business participation is at the most risk of disrupting publicly beneficial treaty outcomes.<sup>219</sup> In between lie treaties that advance a mixed set of public and private interests and entail both the risks and benefits of coordinated participation.<sup>220</sup> The Arms Trade Treaty, the Law of the Sea Treaty, the Energy Charter Treaty, and the TPP, as well as any future cyber-law treaty, would likely fall in this category.

#### 4. Compliance

Just as in the other three categories, business participation could cut for or against better treaty compliance. On the one hand, involving key private sector stakeholders in treaty development could help persuade a state’s domestic constituents to accept any future regulations the treaty may require, and thus smooth the way for more successful domestic implementation of treaty commitments.<sup>221</sup> This could, in turn, lead to better rates of compliance. On the other hand, if private sector participation leads states to abandon the regime because of legitimacy or deliberative deficits, that participation could harm compliance.<sup>222</sup>

All of these questions require empirical scrutiny. Empirical work could also examine whether business participates in different ways with respect to different treaty regimes. It might be possible to simplify the data and find useful patterns by organizing the features of business participation according to type of treaty, and then tracing the effect of these patterns of influence according to the chosen

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219. See, e.g., Upendra D. Acharya, *Globalization and Hegemony Shift: Are States Merely Agents of Corporate Capitalism?*, 54 B.C. L. REV. 937, 937 (2013) (asserting that “the fall of the Soviet Union, the spread of technology, and the advent of multinational corporations have led to a new order wherein corporate capitalism has become a primary force in international law and states mostly serve corporate interests”).

220. But there is a blurring between all of these categories. The Cape Town convention affects ticket prices, human rights treaties help set a minimum standard that is beneficial to private actors, and more and more treaties fall into a middle category where they have the potential to advance a mixed set of public and private interests.

221. This is one of the key arguments I make in *Persuasion Treaties*. See Durkee, *supra* note 8.

222. For a discussion of reasons motivating compliance, see Baradaran, *supra* note 42.



measures of success. The payoff is meaningful enough to justify the significant scholarly effort this would require, as it would produce important guidance as to what kind of legal regime would most effectively encourage the beneficial aspects of business participation and restrain the detrimental ones.

The argument of this Subpart is, in essence, that law could do more. Once lawmakers understand the effect of business roles in treaty making sufficiently to craft appropriate legal rules, those rules could help produce more successful treaty outcomes along the four dimensions this Subpart has identified.

## B. Legitimacy

A second reason to pay attention to business roles in international treaty making is that the existing legal regime is built on an outdated theory of accountability and legitimacy. That outdated theory—identified as liberal theory in international legal scholarship—begins from the premise that all actors besides the state itself channel their influence through state lawmakers.<sup>223</sup> As a result, states may restrain business influence over international lawmaking by implementing domestic laws that protect state lawmakers from those business influencers. This Article proposes that the theory is outdated because it has been outstripped by the facts—it does not account for the new ways international treaties are made.

In the liberal theory account, state behavior internationally is the product of domestic interactions between individuals and groups. Before bargaining on the international stage, states define their international preferences through domestic political processes. As a corollary, domestic constituents use the nation-state as an instrument to accomplish their international goals.<sup>224</sup> For example, assume the chemical company DuPont seeks to influence the scope of the Montreal Protocol on Substances that Deplete the Ozone Layer by proposing that certain chemicals be included or excluded, or that various provisions come into force on a certain timeline. The liberal theory model assumes that DuPont would bring these proposals to the attention of the international community by bringing them to the attention of DuPont's own domestic lawmakers—specifically U.S. officials.

Because domestic interests are passed along to the international level via domestic legislative gatekeepers, domestic law can ensure that those gatekeepers remain accountable to their constituents. Accordingly, in the United States, domestic laws require “sunlight” disclosures of lobbying activity; limit campaign

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223. See Peter J. Spiro, *NGOs in International Environmental Lawmaking: Theoretical Models 2–3* (Temple University Legal Studies Research Paper Series, Research Paper No. 2006-26, 2006), <http://ssrn.com/abstract=937992> [<http://perma.cc/ZS8C-8AWQ>].

224. See, e.g., Brewster, *supra* note 97, at 502–03.

contributions and other gifts to regulators; and restrain the flow through the “revolving door” between legislators and lobbyists.<sup>225</sup> These laws supplement and bolster the fundamental structural check on misuse of authority by legislators that is created by a system of democratic elections. In our example, if officials act according to DuPont’s interests, DuPont can reward them with campaign contributions and other support. Presumably, however, if a sufficiently informed democratic citizenry disagrees with the choices DuPont has encouraged lawmakers to make, it will vote those lawmakers out of office. So because international lawmakers are also domestic lawmakers, they are accountable to domestic constituents through the domestic political process, and domestic legal measures support and police that accountability.

The liberal model, however, insufficiently describes the current situation because it does not account for two features of international lawmaking. These features are described both broadly in the literature and narrowly with respect to business in the case studies in Part II. First, business actors assert their interests transnationally as well as domestically. Second, business participates directly in forming international treaties, outside of any domestic process and not mediated through domestic lawmakers.

*Transnational Actors.* The first point, that business actors assert their interests transnationally, is one I have made at greater length elsewhere.<sup>226</sup> Here is the short version: One of the major contributions of network theorists like Anne Marie Slaughter and Harold Koh is the idea that private entities<sup>227</sup> do not just influence their own domestic governments but they also network across national borders to influence officials in foreign governments as well.<sup>228</sup> DuPont can directly lobby lawmakers in Europe, and it can work with foreign counterparts to bring pressure through foreign domestic lawmakers. Business actors can also engage in regulatory arbitrage to exert leverage, since different countries have inconsistent legal regimes for holding lawmakers accountable and structuring non-state actor partic-

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225. For a review of U.S. lobbying laws, see *supra* note 15; see also Richard Briffault, *The Anxiety of Influence: The Evolving Regulation of Lobbying*, 13 ELECTION L.J. 160, 160 (2014) (“Our legal system has long been of two minds about lobbying. As far back as the Jacksonian Era, courts anxiously viewed the use of paid agents to influence government decision-making as a source of corruption. Yet courts have also long recognized a legitimate interest in having professional assistance when trying to affect government.”).

226. See Durkee, *supra* note 8 (examining transnational lobbying efforts in the context of European chemical regulations).

227. See Koh *supra* note 100, at 2612 (including entities such as “moral entrepreneurs” and private business entities).

228. See Durkee, *supra* note 8, at 84–85 (citing, *inter alia*, Anne-Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFF. 183, 184 (1997); Koh, *supra* note 100, at 2603; Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 183–84 (1996)).

ipation in lawmaking. The combination of transnational activity and inconsistent domestic regimes produces a situation in which lines of domestic accountability are attenuated and inconsistently policed.

*International Actors.* The second point is that business participates directly in the formulation of treaties. Many decisions about the content of a treaty text are made before a domestic legislator's ultimate choice about whether to ratify the text, and often even before a government's treaty negotiator becomes involved. As the Cape Town Convention example illustrated with most clarity, business entities can act independently of state decisionmakers to formulate treaty texts; generate worldwide interest in a treaty governing a particular problem; negotiate with state decisionmakers; participate as delegates to treaty conferences; and a number of other direct lawmaking acts unmediated by domestically accountable gatekeepers. To the extent that the United Nations or another international organization serves as the coordinating body, business actors can interact directly with those bodies. This point was illustrated in Part II.B. in the context of the Rotterdam Rules, specifically the industry group CMI's relationship with UNCITRAL. Of course, lines of accountability for those international officials reach back to domestic constituents only in a very attenuated fashion through the initial state delegation of authority. On the whole, international officials are not subject to political expulsion on the grounds of capture. Thus, to the extent that business actors are interacting directly with those international officials, domestic laws that were developed to restrain capture of domestic officials are not sufficient to police the relationship.

The international community has implicitly recognized the limitations of the liberal model, but has done so in an inconsistent way that ignores business roles. In particular, the UN's accreditation regime and others signal that the international community has recognized the importance of some gatekeeping with respect to non-state actor participation in the treaty-making process. But the principal United Nations accreditation regime is designed to exclude business actors, and most other accreditation regimes are patterned on this UN regime. The fact that business is nevertheless participating, both through accredited NGOs and by alternate channels, suggest that this partial accommodation is outdated and merits rethinking as well.<sup>229</sup> One possible response would be to erect a parallel accreditation regime designed specifically for business actors.

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229. In the U.S. domestic arena, nonprofit lobbying is highly regulated. A nonprofit may not make lobbying "a substantial part" of its activities, and risks excess taxes and revocation of their tax-exempt status if it does. See Treas. Reg. §§ 1.501(c)(3)-1; (c)(3)-1(b)(B)(ii-iv) (stating that in order for an organization to maintain its tax-exempt status under § 501(c)(3), no substantial part of its activities may include the carrying on of propaganda, or otherwise attempting to influence legislation); Treas.

Finally, the strong form of this argument is not required to justify more legal and academic attention to the problem of business participation in treaties. Further scholarly work could produce the conclusion that the domestic law is sufficient to police accountability and legitimacy. Even so, the question persists in another form: Are the *existing* domestic regulations—developed in the context of domestic lawmaking—sufficient to properly structure business roles in international treaty making? What additional domestic law is needed?

### C. Efficiency

The third reason to pay attention to business roles in international treaty making is that the current regime lacks certainty and predictability. Not only are the values of certainty and predictability fundamental to the rule of law in general,<sup>230</sup> they are particularly important in the context of regulating business behavior.<sup>231</sup> Legal certainty helps business actors plan their activities without fear of interference.<sup>232</sup> As Peter Spiro notes, “[c]orporations hate being regulated, but they hate uncertainty more.”<sup>233</sup> In Spiro’s account, public regulation is “self-entrenching and less vulnerable to the sort of competitive displacement that can undermine private schemes.”<sup>234</sup> Public regulation can also benefit businesses because it levels the playing field, evening out burdens between the

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Reg. § 1.501(h) (stating that if § 501(h) election is made, “no substantial part” is determined by an expenditure test for both direct and grassroots lobbying). This U.S. domestic regime is a fascinating inversion of the international arena where nonprofits are one of a few non-state actors officially permitted to lobby lawmakers through the UN accreditation regime and the other regimes that follow the UN model. *See supra* Part I.A.2. and accompanying notes. The distinction may arise in part from the U.S. government’s desire not to subsidize lobbying by nonprofits through tax-exempt status, where no such regime exists internationally.

230. For general discussions of rule of law values, see, for example, BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* (2004); Richard H. Fallon, Jr., “*The Rule of Law*” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 51 (1997); Joseph Raz, *The Rule of Law and Its Virtue*, 93 L.Q. REV. 195–202 (1997) reprinted in JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* (1979). For a basic review of this fundamental point, see Lawrence B. Solum, *Legal Theory Lexicon 017: The Rule of Law*, LEGAL THEORY LEXICON, [http://solum.typepad.com/legal\\_theory\\_lexicon/2004/01/legal\\_theory\\_le\\_3.html](http://solum.typepad.com/legal_theory_lexicon/2004/01/legal_theory_le_3.html) [<http://perma.cc/H87R-TWRG>] (last visited Dec. 16, 2015).
231. Anthony D’Amato, *Legal Uncertainty*, 71 CALIF. L. REV. 1, 5 (1983) (“[L]egal certainty is necessary for capitalist progress.”) (citing MAX WEBER, *ECONOMY AND SOCIETY* 883 (G. Roth & R. Wittich eds., 1968)); Irina Sivachenko, *Corporate Victims of “Victimless Crime”: How the FCPA’S Statutory Ambiguity, Coupled With Strict Liability, Hurts Businesses and Discourages Compliance*, 54 B.C. L. REV. 393, 395, 411–12 (2013) (explaining that businesses dislike and are often injured by ambiguous laws and insufficient legal guidance).
232. *See* Peter J. Spiro, *supra* note 217 (“Corporations abhor uncertainty.”).
233. Peter J. Spiro, *Constraining Global Corporate Power: A Short Introduction*, 46 VAND. J. TRANSNAT’L L. 1101, 1118 (2013).
234. *Id.*

“big, visible corporations” that are more often targeted for public and regulatory scrutiny, and everyone else.<sup>235</sup> The general point extends to business roles in treaty making: Business actors are served by knowing in advance how they may advance their interests, and they are also served by the kind of regulatory stability that is furthered by effective treaty regimes.<sup>236</sup>

States individually, and the international community as a whole, may benefit from legal certainty as well. As Anthony D’Amato has argued, “uncertain law may deter activity that the state wants to encourage.”<sup>237</sup> In the case of treaty making, the state (or the international community of states) may want to encourage business actors to channel their influence in a transparent fashion rather than through secretive meetings with treaty decisionmakers, or by funding NGOs who can receive official accreditation and then serve as mouthpieces to advance business aims.<sup>238</sup> Conversely, a state, or the community of states, may want to encourage business actors to take a more robust role in forming treaties, for example by offering the kind of industry data, best practices, and other expertise that will help states develop the most effective treaties.<sup>239</sup>

Certainty and predictability also benefit the international regime because they foster efficiency. Without laws, standards, or set guidelines structuring the treaty-making relationship between states and business entities, international decisionmakers must design these procedures anew whenever they engage in law making, a process that could itself produce contestation. The necessity of developing procedure—in addition to substance—taxes additional lawmaking resources. This problem is on display currently in the context of a newly proposed treaty regulating business and human rights.<sup>240</sup> Before developing the content of

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235. *Id.*

236. *Id.* For example, Lawrence Susskind, writing in a business journal, urges business to “play an active role in promoting the most useful reforms” of the international treaty-making system in order “to achieve greater uniformity, predictability and efficiency,” which can lead to greater global regulatory certainty in the environmental law context. Susskind, *supra* note 21, at 71; *see also* Affolder, *supra* note 21, at 521–22 (observing that business entities use treaty texts for their own purposes; for example, even if business actors do not bear rights or responsibilities under a particular treaty regime, they may use that regime as the best available articulation of a regulatory standard, in order to demonstrate that their conduct is acceptable even in absence of an applicable legal rule).

237. D’Amato, *supra* note 231 at 5 (1983) (“If rules relating to sales, commercial paper, negotiable instruments, deeds, wills, and the like approach the 0.5 level of complete uncertainty, the underlying commercial activities will be deterred if not stifled.”).

238. *See supra* note 76 and accompanying discussion; *see also* Fri, *supra* note 76, (recommending that corporations participate in the international treaty-making process by forming or funding NGOs).

239. *See* Susskind, *supra* note 21, at 69 (reviewing a “Salzburg Initiative” proposal which concludes, *inter alia*, that “[a]n International League of NGOs should review relevant scientific, technical and legal material in advance of full conference negotiations”). This is a very real issue in the context of the private law treaties surveyed in Part II.A–II.B, since states must construct workable rules.

240. *See* Interview with Anita Ramasastry, *supra* note 22.

the treaty, treaty designers must expend time and other resources developing an approach to obtaining input from business actors. Will they formulate an accreditation regime for business? If so, how should such a regime be designed? This preliminary set of questions is currently requiring considerable negotiation and discussion and requires answers before treatymakers can move on to generating the content of the treaty rules. Thus, a legal regime—or even a soft law blueprint—that elaborates set procedures defining the treaty-making relationship between states and business entities could help foster certainty and predictability for both state and business actors. It could facilitate, in addition to other goods, a more efficient treaty negotiation process.

#### D. Coherence

The fourth reason to pay attention to business roles in international treaty making is that the absence of law presents a unique opportunity to select a theoretically coherent approach and apply it prospectively.<sup>241</sup> The opportunity is not only to make laws that are systematic rather than ad hoc, but also principled rather than reactive. And that opportunity is likely fleeting.

Two theoretic models present themselves as plausible candidates, worthy of further scrutiny and development. I will call the first an “administrative” model, and the second a “market” model.<sup>242</sup> The essential difference between the two is that the administrative model preserves an essential dichotomy between public and private actors. By contrast, the “market” model would view the various participants in the treaty-making process as equal stakeholders.<sup>243</sup> The two models are meant to function as ideal types, or pure analytic categories. An actual legal model or set of legal structures would likely fall somewhere on a spectrum between these pure models, taking on some features of both.

*Administrative Model.* The focus of the administrative model is on structuring and restraining *private* participation in what is conceived of as a principally *public* lawmaking function. Domestic U.S. administrative law

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241. The opportunity to develop a theoretically coherent legal architecture is in addition to the two other kinds of opportunities surveyed previously in this Part: to use the law as a tool to increase the effectiveness of treaties (Part III.A), and to provide legal certainty and predictability for the benefit of both state and private actors (Part III.C). While both of those articulations of the opportunity focus on the beneficial prospects of more *law*, this Subpart focuses on the why it would be beneficial to develop a coherent *theory*.

242. A note at the outset: This conceptual framework is a vast oversimplification. Because the coherence problem has not received systematic attention, however, even the basic framework illuminates important features of the public/private relationship and frames existing questions.

243. This overall architecture builds on an important conceptual apparatus erected by Jody Freeman. See Freeman, *supra* note 27.

scholarship provides a helpful guide. For example, public interest theories conceive of administrative agencies as bodies of experts who should be insulated from the pressure of private actors so that they may apply their expertise undisturbed by the melee of politics and the market.<sup>244</sup> Civic republican theories imagine a deliberative process in which private input is useful in order to enable decisionmakers to weigh various public goods in an informed way, but is ultimately not coupled with pressure.<sup>245</sup> Pluralism advocates for a democratized decisionmaking process that includes many different interest groups and produces rules through an essentially political process over which administrative officials “simply preside.”<sup>246</sup> Public choice theory builds on the central insights of pluralism but imagines administrators as fundamentally subject to the desires of the private groups who capture those administrators, and then extract bargained-for “deals” through the administrative system.<sup>247</sup> As Jody Freeman has pointed out, in each of these frames, administrative law theory responds to private roles by seeking to restrain their danger.<sup>248</sup> Law follows theory, attempting to constrain private input in the administrative rulemaking process.

International legal scholarship has borrowed fruitfully from administrative models in other contexts. As Part I.B. noted, the Global Administrative Law Project has undertaken a sweeping attempt to understand a varied set of international acts as forms of administrative governance, and to use administrative law tools to evaluate that behavior. The lens would also be helpful in the context of crafting a structured relationship between state and non-state actors in treaty making. It provides conceptual models by which to understand the relationship between the two kinds of actors and elaborates the legal choices that flow from those models. The principal question this model must confront is whether the public/private dichotomy is still fundamentally salient.

*Market Model.* The market model reassesses the old dichotomy between public and private decisionmakers in light of shifting balances of power. The market model suggests that we should consider whether there is any value in maintaining the hierarchical formalism that privileges states as sole lawmakers and obscures the significance of non-state roles in the process. In a situation in which the only role of states is to essentially rubber stamp a treaty presented by business actors, as was the case in the context of the Cape Town Convention, the

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244. *See id.* at 636–37.

245. *See id.* at 637.

246. *Id.* at 560.

247. *See id.* at 561–62.

248. *See id.* at 562–63.

traditional hierarchical structure of international lawmaking seems outdated. Is this lawmaking really properly “public”?<sup>249</sup> If so, its public nature would seem to persist in only the most formalistic sense.<sup>250</sup>

The market model adapts to this changing reality by conceiving of states and private parties as equal stakeholders in a lawmaking process. It would be patterned on contract principles rather than public law principles, and conceived of in terms of private rather than public ordering. One of the principal limitations of the market model is the fact that the state’s role as mediator is obsolete in this model, and so the question of accountability becomes most pressing. To whom are business entities accountable, and what are the legal safeguards to mediate between public and private interests?

The two models lead to divergent prescriptive implications. Each has costs and benefits that warrant academic attention. But the opportunity to choose a frame is exigent. It is ripening because the extent of business involvement in international lawmaking is coming into focus. Both the depth of participation and its implications for international treaty making will likely increase going forward.<sup>251</sup> The opportunity is fleeting because both public and private parties will adopt practices that shape the global milieu going forward. The chance to set a theoretically principled course using legal tools will fall away as the system grows increasingly elaborate and entrenched. Thus, international actors—lawyers, scholars, officials, and private entities—face a lawmaking moment. We can seize the opportunity to think prospectively about how to shape the relationship between states and non-state actors by choosing a guiding paradigm to structure future laws. Or we can decline that opportunity and let the facts unfold as they will, with less predictable and possibly problematic results.

### E. Prescriptive Implications: The Tabula Rasa

This Part makes a case for “visibility” because the argument is that business roles should not remain in the shadow of legal and scholarly neglect. This argu-

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249. See Stephan, *supra* note 18, at 1584 (noting that “much of the [law] production process can bypass states even if some state involvement may be essential at the time of application”).

250. See *id.*; see generally Jose E. Alvarez, *Are Corporations “Subjects” of International Law?*, 9 SANTA CLARA J. OF INT’L L 1 (2010) (noting means by which corporations “make and enforce law,” and observing that the conclusion may be drawn that “only a formalist blind to reality would deny that they are ‘persons’ or ‘subjects’ of international law”); Jonathan I. Charney, *Transnational Corporations and Developing Public International Law*, DUKE L.J. 748 (1983) (asserting that while corporations should not have full international personality, they ought to be permitted to participate in the making of international law).

251. See Stephan, *supra* note 18.



ment is both more and less ambitious than the basic assertion that more law is needed. It is more ambitious because it calls for many types of response. As this Article has asserted, business roles in treaty law should receive the benefit of empirical scrutiny; scholars should choose and defend a theoretical model on which to elaborate a principled response; the relevant considerations include the “success” of a treaty by a number of different measures that this Article identifies; and the considerations also include certainty, predictability, accountability, and legitimacy. Thus, the argument is ambitious because each of the scholarly tasks it identifies is formidable. But the argument is not so ambitious (or foolhardy) as to propose, at this early stage, what form a new law should take.

It is a reasonable hypothesis that the scholarly tasks this Article has proposed will lead to the conclusion that more law is required. But that is not the only plausible conclusion. Rather, there may be benefits to the current ad hoc, unregulated system. After all, the current system is flexible enough to allow various actors to adapt it to their own ends, as the examples in Part II demonstrate. This might be a desirable state of affairs for business actors. It could also benefit the international system and the public goods it seeks to protect. This is because the unregulated space could lead to innovation and creativity—a flowering of different lawmaking forms. In the United States, this kind of experimentation is celebrated as scholars and lawmakers draw learning from a “laboratory of states.” Business actors might contribute productively to this creative process, as they did in the Cape Town example, by breaking logjams,<sup>252</sup> and contributing innovative new lawmaking tools.<sup>253</sup> But, as this Article has also argued, the ad hoc, unregulated space may also contribute to treaty failings, by making the process slow and cumbersome, and burdening parties with fashioning and agreeing on procedural rules as well as substantive rules for every new treaty-making effort.

Assuming further study confirms the hypothesis that law is needed—a stable and systematic legal regime that governs the treaty-making relationship between business and state actors—there are a number of forms this law could take. One possibility is a new international treaty elaborating a set of procedural rules that govern the process of international treaty making, akin to the Vienna Convention on the Law of Treaties, but elaborating rules that apply specifically to the relationship between states and non-state actors. The treaty could address all

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252. In that instance one important sticking point was the debate over whether to adopt civil law or common law oriented default rules. The debate implicated issues of state sovereignty and national pride, and seemed intractable, threatening to derail the proceedings. The evidence suggests that business actors were instrumental in resolving the situation by serving as neutral third party referees. *See supra* Part II.A.

253. For instance, in the Cape Town example, business actors proposed both the international registry and the innovative type of framework convention and protocol form. *See supra* Part II.A.

would-be participants in the treaty process, or it could confine its ambit to a certain subset of actors, such as businesses.<sup>254</sup>

Short of a comprehensive new treaty, another possibility is a new UN accreditation regime that explicitly includes business entities, and offers procedural rules to help gatekeepers weigh the distinct costs and benefits of business participation. Just as in the NGO context, this UN accreditation regime could serve as a blueprint for similar regimes within other international lawmaking bodies. Alternatively, the current UN accreditation regime could be overhauled and updated to take a more comprehensive approach to the current participants in the treaty-making system, including business actors.

A less formal but potentially useful option would be an elaborated set of soft law guidelines, or best practices to guide decisionmakers and business entities. While nonbinding, such a guide could help coordinate conduct and, if successful, mature into customary international law. A final option is a formal or informal international agreement that commits states to updating their domestic laws to include rules that govern international and transnational lobbying activity. This approach would suffer from a number of limitations outlined in Part III.B., and may fail to capture some of the benefits business participation could offer, but could operate fruitfully in tandem with other approaches.

Whether or not more law is needed, the inchoate nature of the current regime demands scholarly attention in order to resolve the array of important questions this Part has identified. If, as seems likely, adoption of a set of legal rules emerges as the best course of action, scholars and lawmakers face the rare opportunity to select a suitable form and regulate on a *tabula rasa*.

## CONCLUSION

The purpose of this Article is to crack the lid on a Pandora's box of issues relating to underappreciated business roles in the international treaty making process. The problems in this arena flow from the lack of a legal structure to govern an increasingly complex relationship between state and non-state actors in treaty making. The international system appears to be drifting toward lawmaking patterns that incorporate business input in increasingly significant ways. At the same time, there is little knowledge about these patterns, and a lack of systematic analysis of the costs and benefits of business roles. Moreover, the international treaty-making system operates in an ad hoc fashion when it comes to business

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254. A treaty or series of treaties regulating non-state actors in the lawmaking process could also potentially address armed groups, secessionists, or NGOs.

roles, with no legal structure—not even a set of standard operating procedures—to define who participates or what process should facilitate and restrain business roles in lawmaking. Thus, as this Article has argued, the ad hoc, unsystematic, unregulated international treaty-making system presents both potential danger and a great opportunity.

The danger is that business entities will obstruct, delegitimize, or weaken lawmaking that is meant to protect important global public goods. Conversely, the international community may fail to take advantage of the significant benefits business can offer. Or, international law may fail to respond at all and suffer from illegitimacy or dysfunctional obsolescence. These dangers are real, and demand a legal response.

The opportunity is equally significant. Because the current legal regime is not broken, but rather nonexistent, lawmakers face a blank slate, which offers the potential for empirically sound, theoretically principled, prospective lawmaking. The question that remains is whether, and how, the international community will seize the fleeting chance to exploit it.