A Theory of Boilerplate in International Agreements

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Abstract

In international agreements, states use language that has stood the test of time. Such settled language may be efficient and further legal certainty but may also have a dark side. In private contracts, boilerplate is Janus-faced: efficiency and certainty; but also take-it-or-leave-it unilateralism. In that context, boilerplate has been found to confer significant advantages on companies at the expense of consumers. By contrast, we know little about boilerplate's role in public international law, despite its theoretical and practical importance. How boilerplate operates in international law could differ substantially from domestic law.

This paper develops a theory on boilerplate in public international law and asks: (1) how does boilerplate affect bargaining, and (2) why do states use boilerplate? (3) where does boilerplate come from and what are the patterns of its diffusion; and (4) how does boilerplate contribute to international law making. It challenges the conventional wisdom that international agreements are closely negotiated and highly responsive to varying constellations of national interests and country circumstances. The implications for the negotiation of agreements and for international cooperation could be significant.

Introduction

It is often thought that all agreements between states are *negotiated* line-by-line. A leading example of a negotiated agreement is the United Nations Convention on the Law of the Sea, which contains detailed rules for the world's oceans, and which more than 150 states painstakingly negotiated over five years (Sebenius 1984). However, the content of important segments of international agreements may not be negotiated, but rather borrowed or copy-pasted – in short, it is boilerplate.

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In private contracts, the use of boilerplate has been found to confer significant advantages on companies at the expense of consumers. In that context, extensive work demonstrates that boilerplate is Janus-faced: efficiency and certainty; but also take-it-or-leave-it unilateralism. Similarly, boilerplate could allow powerful states to set the agenda. It is also common: we know that drafters of international agreements routinely use language from existing agreements, rather than start with a blank slate. Yet our understanding of the role of boilerplate in international law is limited.

Boilerplate could be a different modality of making international law. If boilerplate were common, it could disrupt the conventional wisdom that international agreements are closely negotiated and highly responsive to the circumstances of the parties. Such a finding would require revisiting some of the key assumptions of how international law operates, with important implications for its consent-based character and interpretation.

This paper develops a framework theory of boilerplate based on four research questions and 11 hypotheses set out below. Future work will test the hypotheses that this paper develops using a synthetic approach that blends qualitative and quantitative approaches, particularly computational methods. The answers to these four research questions will also provide the building blocks for a normative assessment of boilerplate's implications for negotiating agreements, for interpretation, and for international law-making.

Defining boilerplate: identical or very similar terms across agreements

This paper first considers what constitutes 'boilerplate' in international agreements ('agreements'), and if and how this concept differs from boilerplate in private and corporate law, as well as from the related, but distinct, concepts of 'standard form', 'model' and 'template' that overlap with boilerplate. Delineating these concepts is important, considering the variation in how the literature uses these terms and in how they are understood across countries.

Boilerplate refers to terms that are identical or very similar across agreements (Peacock, Milewicz and Snidal 2019, 2). Gulati and Scott (2013, 10) define boilerplate as 'standardized contract terms', and Ahdieh (2006, 1034) as 'persistent contracting norms'. The opposite is 'dickered' (negotiated) terms. Dickered terms 'constitute the dominant and only real expression of agreement' (Llewelyn 1960, 371). In contrast, the parties often ignore the fine print on pre-printed, standardized forms. In private law, boilerplate terms usually modify default rules such as implied warranties, remedies, choice of law or choice of forum.

The term boilerplate originated in prewritten items that US news syndicates supplied on metal plates to local newspapers in the late 19th century. Such standardized newspaper components became known as boilerplate because they resembled boiler metal plates. Decades later, boilerplate acquired the meaning of

formulaic language in the law. After the US Supreme Court used it for the first time in 1964, it became common US legal terminology (Clapp, Thornburg, Galanter and Shapiro 2011, 52).

Three related concepts need to be distinguished from boilerplate: (i) standard form contracts; (ii) templates; and (iii) models. Standard form contracts are prepared in advance for thousands (or millions) of identically worded agreements based on take-it-or-leave-it offers (Slawson 1971; Braithwaite 2012; Kellner 2013; Dari-Mattiacci and Marotta-Wurgler 2019). The resulting agreements are identical. Templates provide a general structure or list the types of terms. Models provide blocks of text for the parties to choose from and adapt to their specific circumstances. Some terms in a model may be boilerplate. The negotiations on the future relationship between the EU and the UK highlight the important distinction between negotiated terms and models: the EU sees the post-Brexit relationship as a choice between existing models. The UK looks for a 'bespoke' agreement.

Boilerplate typically refers to the standardization of terms *within* agreements (Coates 2016; Jennejohn 2018). In international agreements, both operative terms that set out the rights and obligations of the parties, and final terms (on entry into force, duration, or withdrawal) can be boilerplate. Koremenos (2016) and Pelc (2016) focus on final terms for which the use of boilerplate is more intuitive. The larger project focuses on operative (substantive) terms for which we could expect the parties to tailor agreements to their circumstances, rather than using boilerplate (unlike final or peripheral terms). Boilerplate in central operative provisions of agreements would be far more significant, because they are consequential and/or concern important state interests.

The term boilerplate points to the 'contractual' character of international agreements. Lauterpacht (1927, 161) emphasized the 'fundamental identity of contracts and treaties' and considered international law to be 'private law writ large'. Rules common to national contract laws have long influenced the law of treaties (Posner and Sykes 2013; Roberts 2013; Waibel 2018). The extent to which the analogy between contracts and agreements is appropriate is much debated (e.g. Raftopoulos 1990; Bjorge, Lang and Smith 2018).

It is likely that boilerplate affects bargaining. There is no clear dichotomy between agreements that involve boilerplate (and limited bargaining) and agreements that involve intense bargaining over all terms. Intense bargaining may well precede the use of boilerplate. The bargaining could be about which boilerplate to include, or whether to include a boilerplate or a tailored term. Either can require as much negotiating as a new term. There is room for negotiation and choice.

Drawing the line between boilerplate and dickered terms in international law is difficult. Important definitional questions include: after how many incorporations is a term boilerplate? How much negotiation

and change are consistent with the result being boilerplate? There is an element of quality associated with changing quantities: it is likely different when a few negotiators purposively include a term from elsewhere a handful of times, or if many use the same term in hundreds of agreements.

Three categories of agreements: treaties, non-treaties and contracts

The term 'agreement' is ill-defined in international law. This paper adopts the definition of 'agreement' in the 2018 Draft Guidelines of the Organization of American States. Accordingly, agreements involve 'mutual consent of participants to a normative commitment' (Hollis 2018, 7). Central to agreements are shared expectations of future behavior (Guzman and Meyer 2010, 174). Agreements come in three forms: treaties, non-treaties and contracts. Whereas a treaty is binding and governed by international law, non-treaties are not governed by law and hence not binding (Klabbers 1996, 18). They have exclusively political or moral effect. Contracts, by contrast, are governed by domestic law. Yet the boundary between the two is porous, resulting in a lack of clarity which agreements are binding, and which are not. Entire agreements as important as the Iran-Nuclear Deal, or parts of agreements on nuclear disarmament, or of the Paris Agreement on Climate Change may be non-binding (Bodansky 2016; Hollis 2018). Non-treaties are an important subcategory of 'soft law' (e.g. Baxter 1980; Chinkin 1989; Abbott and Snidal 2000; Shelton 2000). Recent decades have seen a trend towards non-treaties which are understudied (Pauwelyn, Wessel and Wouters 2012).

The broader project will study the potentially varying role of boilerplate across these three categories of agreements that states (and their agencies) conclude with other states. The focus is on 'concluded' agreements (*i.e.* adopted by the parties), even if they never entered into force or are no longer in force. The current trend towards fewer formalities in making agreements could imply a greater role for boilerplate in future agreements. For example, states can and do conclude agreements by email (Aust 2013, 16). For feasibility reasons, the larger project will not empirically study the large universe of transnational agreements governed by domestic law between states and private parties.

The classification of agreements has practical relevance for agreement makers, parliaments, and people affected by them: it determines who has the capacity to conclude them (central governments, government agencies, or subnational entities) and who has a say in their conclusion (e.g. parliaments) under domestic law (which vary considerably on these two dimensions). Domestic laws usually provide for far fewer constraints for non-treaties and contracts as compared to treaties (Hollis 2018), which has raised serious questions about accountability and legitimacy (Pauwelyn, Wessel and Wouters 2012; Baker 2013). Experienced legal advisors in foreign ministries may well not be consulted about non-treaties and contracts.

A good example are currency swaps between central banks. A network of 160 central bank swaps, the most important cross-border policy response to the global financial crisis, has involved hundreds of billions of euros, and now exceeds the resources of the IMF (Pistor 2013; Reis and Bahaj 2019; Steil 2019). Notwithstanding the importance of this policy instrument, its legal status is unclear. Executives may choose non-treaties and contracts in part to avoid the need for legislative involvement in the making of these agreements (which in many countries applies only to treaties), and/or to keep the terms of the agreements out of the public domain (Aust 2010, 54; Donaldson 2017). This lack of transparency and checks and balances could be problematic for democratic governance.

Hypotheses

The starting point is ample evidence of boilerplate elsewhere in the law, particularly in *contracts* between private parties. Boilerplate is the mainstay of domestic and transnational contracting (Cordero-Moss 2011). Companies routinely use boilerplate in diverse contracts including airline tickets, bonds (Gulati and Scott 2013), derivatives (Braithwaite 2012; Horst 2019), insurance, mortgages, software clickwrap licenses (Marotta-Wurgler 2009), and supply chains (Ben-Shahar and White 2006). Most of the boilerplate literature is concerned with standardized contracts between a strong party (e.g. seller) and a weak party (e.g. buyer/consumer) – transactions that are usually not negotiated.

The literature on boilerplate and standard forms in private law has focused on bonds and corporate charters, as well as business-to-consumer transactions (Rakoff 1983; Radin 2013). The first strand has examined why it is rational to use standard forms and why stickiness makes sense (or not) (Goetz and Scott 1985; Kahan and Klausner 1997). From that perspective, one would not expect to see international agreements full of boilerplate. Yet, they seem to be. Studying boilerplate in agreements between states offers an innovative way of studying two defining characteristics of the real world that are often overlooked: the large universe of bilateral agreements, for which boilerplate may play a more important role than for multilateral and regional agreements (which the larger project will also study), and power asymmetries between states (Simpson 2004).

Boilerplate likely has benefits such as efficiency and predictability for all parties, irrespective of its content. Yet strong states could also use boilerplate strategically to set the agenda; alternatively, negotiators could repeat boilerplate simply out of 'habit and practicality' (Bourdieu 1977; Dewey 1983; Lyke 2017); because it reflects a normative settlement (Shaffer and Halliday 2014); or due to bureaucratic dysfunction. Negotiators are likely boundedly rational (Bottom 2003; Poulsen 2015) and do not appreciate the consequences *ex ante* – just like the elite lawyers specialized in international finance did not give much thought to what the ubiquitous *pari passu* clauses in sovereign bonds meant before a New York judge

interpreted them as requiring ratable payment (Buchheit and Gulati 2017). Not only weak parties could fail to scrutinize boilerplate.

Copying boilerplate could also be risky. For example, only in recent years have governments and the public started to appreciate the important and far-reaching obligations that states have assumed under investment treaties, some of which have boilerplate character (e.g. fair and equitable treatment (Mortenson 2018; Waibel 2019). These treaties grant broad protections to foreign investors. Compensation claims can run into hundreds of millions of euros, as arbitrations relating to rolling back subsidies for solar energy against the Czech Republic, Italy and Spain show (Bonnitcha, Poulsen and Waibel 2017). These, and many other agreements, deserve negotiation and careful appreciation of their consequences before they are concluded, not just copy-and-paste.

Boilerplate could be inefficiently sticky even when conditions change. States may be locked into agreements that function differently from what their negotiators anticipated *ex ante*. While international law allows states to (unilaterally) withdraw from treaties that are no longer fit for purpose, withdrawing from boilerplate could be more difficult, particularly if it deploys effects for third parties or if it crystallized into customary international law (Bradley and Gulati 2010; Roberts 2010). For example, the contemporary tax treaty network is still hardwired on the blueprint of the League of Nations dating back to the 1920s (Jogarajan 2017). Updating this network of interlocking agreements has proved difficult and highly contentious, particularly with respect to 'rules for the taxation of highly digitalised businesses [creating] value by activities closely linked with a jurisdiction without needing to establish a physical presence' (OECD 2019, para. 12). Taxes on digital companies, such as the 3 percent French digital services tax, are incompatible with a boilerplate provision derived from Article 5 of the OECD and the UN models (Michel 2019; Pistone and Weber 2019) that is found in many tax treaties. Accordingly, the source country cannot tax the income because the companies lack a permanent establishment in the source country. The insistence that digital companies pay a 'fair share' of tax has led to looming tax wars (Grinberg 2020).

The theoretical objectives of the broader project are to understand boilerplate's impact on bargaining; why states use boilerplate; its diffusion and its impact on international law-making. Crucially, there are no comparable standardized contracts in international law, though models are common. How boilerplate operates in international law likely differs from private law, possibly substantially. The broader project asks four research questions. They are: (i) how does boilerplate affect bargaining; (ii) why do states use boilerplate; (iii) where does boilerplate come from and what are its patterns of diffusion; and (iv) how does boilerplate contribute to international law-making?

The large literature on law-making and the sources of international law is silent on boilerplate as a potentially different way of making agreements (e.g. Thirlway 2014; d'Aspremont and Besson 2017; Roberts and Sivakumaran 2018). Boilerplate is also at odds with sociological institutionalism (Meyer, Boli,

Thomas and Ramirez 1997) and with the influential rational design view of agreements (e.g. Koremenos 2016). Koremenos' pioneering empirical work on agreement design confirmed the 'rationality and efficiency of the continent of international law' (Koremenos 2013). Existing research on models has yielded important insights but limited to treaties and to specific areas (Alschner and Skougarevskiy 2016; Allee and Elsig 2019; Ash and Marian 2019; Peacock, Milewicz and Snidal 2019). We do not know whether its findings generalize to agreements in other areas.

Boilerplate is Janus-faced: powerful actors could use it strategically to affect outcomes (boilerplate as a tool). On the flip side, boilerplate could just evolve by accident and tie the hands of negotiators because it would too risky or too costly to change language (boilerplate as a constraint). The 11 hypotheses below (**H1-H11**) are framed around factors that the existing literature emphasizes. The result will be a framework theory of boilerplate that allows for multiple pathways, motivations and mechanisms.

First research question: How does boilerplate affect bargaining?

While the use of boilerplate likely affects negotiations, its specific impact remains unknown. The starting point for building a framework theory of boilerplate is the rich literature on domestic and international negotiations. Questions include: the impact of boilerplate on bargaining power; when do states accept boilerplate put forward by another state and when they insist on customized terms, including 'battles of boilerplate'; the impact of the composition of negotiating teams (lawyers vs. non-lawyers; common vs. civil lawyers; male vs. female; native vs. non-native speakers) on the use of boilerplate; and the impact of boilerplate on negotiation outcomes. For this research question, future empirical work will primarily use qualitative methods (archival research, interviews and non-participant observations of negotiations). It will use text-as-data for negotiation outcomes.

Hypothesis 1: Negotiators use boilerplate to set the agenda

Boilerplate could be a tool of strategy, power, and hegemony (Braithwaite and Drahos 2000) and benefit powerful states that are the rule makers. Boilerplate could exacerbate differences in bargaining power. It may tilt the negotiating table in favor of its proponent by setting the agenda for current or future negotiations or by staking out the maximal position in negotiations (Badawi and de Fontenay 2019). In the current negotiations, a powerful state tells a less powerful one, the rule-taker, 'this is how we always do it'.

Inequality of bargaining power that disadvantages the weaker party is the first of two main concerns that the literature has about boilerplate in the domestic context (the other is lack of informed consent (Kennedy 1982; Zamir 1997; Riles 2011; Radin 2013). This literature sees the erosion of consumer rights as the most significant downside of boilerplate. It also criticizes the ability of parties with superior

bargaining power to exploit behavioral biases (Bar-Gill 2012) and to impose vexatious terms on weaker parties that are at variance with default rules, especially consumer protection law. Such power differentials are not confined to firm-consumer transactions. They also exist in contracts between sophisticated parties in business-to-business transactions (Ben-Shahar and White 2006).

However, the imbalance between states is likely smaller than in these two domestic contexts. Even small states are likely to have access to some legal advice and are unlikely to face the same pressures and/or manipulative environment than consumers encounter in standardized transactions. Peacock, Milewicz and Snidal (2019) found that power and distributional considerations were not important for boilerplate in trade agreements.

Counterintuitively, boilerplate could also constrain powerful states. It may offer a protective shield for states with little bargaining power, particularly if a 'neutral' actor such as an international organization originated the boilerplate or model (e.g. the United Nations model on tax). 'Tried-and-tested' language in order to draw on experience may be more advantageous to weaker states than negotiating from scratch with a powerful state.

Hypothesis 2: States with limited capacity accept boilerplate more readily than states with high capacity

Limited capacity and lack of expertise to critically scrutinize new language may explain why states are prepared to readily accept boilerplate. If a state cannot tell due to its limited capacity whether something is 'good' or 'bad' boilerplate (e.g. a trap by a powerful drafter), it is more likely to accept boilerplate. In this context, the project will tackle how to disentangle boilerplate's effect from the bargaining endowments and power differentials with which the parties started the negotiations. States may assume obligations, such as not to tax certain income, not because of boilerplate but due to inequality of bargaining power and/or fewer resources to put into the review exercise.

Second research question: Why do states use boilerplate?

This question is concerned with reasons for why states and their officials use boilerplate, including agenda-setting/bargaining power (**H1** above); efficiency; uncertainty; stickiness; and a desire to construct new rules of customary international law. Future work will test these hypotheses primarily using qualitative methods (archival research, interviews and non-participant observations of negotiations). **H5** (stickiness) will be tested through text-as-data analysis in future work.

Hypothesis 3: Boilerplate is efficient

Efficiency and the hope to reduce transaction costs may explain why negotiators adopt boilerplate. In corporate and private law, saving transaction costs does much to explain why boilerplate is used. Boilerplate terms that survive in the marketplace are the fittest and presumptively optimal (e.g. Gillette 2019). As Suchman (2003, 101) writes: corporations 'hire specialized contractors (outside counsel to perform initial design and development work (legal research and drafting); staff technicians (inside counsel) then use the resulting templates (boilerplate) as prototypes for assembly-line production'.

Similarly, concluding agreements based on boilerplate may reduce transaction costs for international agreements (Peacock, Milewicz and Snidal 2019). Negotiating from scratch is costly and unnecessary (Frankenberg 2010). Two important questions in this respect are: how relevant are transaction costs between states, and do countries care about time, effort, and advisor fees? The inclusion of boilerplate could also be unproblematic because it benefits all parties due to transaction costs savings and is suitable for the new relationship.

As reducing transaction costs will speed up a set of negotiations, this suggests that states that want to conclude an agreement quickly, or that are least able to wait, will put forward boilerplate (or be willing to accept the other side's boilerplate) in the hope of moving things along. In some cases, time matters a lot to countries. A good example is the UK's attempt to replicate the EU's existing network of agreements. Brexit offers a possible natural experiment (Born, Müller, Schularick and Sedláček 2019). The UK aims to conclude many agreements in areas such as aviation and trade with third states in order to replace the EU's existing networks of agreements (which cover the UK until the end of the transition period). We would expect post-Brexit agreements concluded by the UK to include more boilerplate language than comparable pre-Brexit agreements, or comparable agreements of other countries, given the time pressure (Lipson 2009). This external shock can assist with establishing causality. Interviews with UK negotiators and non-participant observations of UK negotiations will be a priority for future qualitative analysis.

For international law, it is a strong presumption that boilerplate is efficient, but still an important baseline hypothesis. The character and the role of transaction costs may differ substantially from the private law setting. First, countries rarely seem to use external advisors for agreements. There is some cost for government officials to develop new language, but much lower than if states routinely used external advisors. Second, the costs may be primarily bureaucratic costs, *i.e.* negotiating the content of the agreement inside and across departments. Third, the number of agreements that even the most active states sign each year is in the hundreds, rather than in the thousands or millions. For example, an energy provider in a major city likely signs many more agreements in a single month than even the most active states in a whole year. Transaction costs may thus not be as important a consideration for states as for private actors.

Boilerplate may have been around for a long time and reflect the combined wisdom of past drafters. Current negotiators may employ boilerplate and models in reliance on the many able treaty negotiators who came before. As Paul Cravath, co-founder of the eponymous New York law firm noted in 1916 in the context of corporate reorganization agreements:

> 'The provisions of the modern reorganization agreement and the modern corporate mortgage are the result of the experience and prophetic vision of a great many able lawyers … it would indeed be a courageous man who would say that any of the provisions which some of these lawyers have conceived to be wise should be rejected simply because he cannot for the moment think when or how it will become useful.'(Gulati and Scott 2013, 10).

Current negotiators may thus employ boilerplate because boilerplate is the distilled wisdom of previous negotiators, and as such likely of better quality. At the same time, such reliance carries the risk of repeating the same mistakes (e.g. Vermeule 2009).

Hypothesis 4: Boilerplate increases legal certainty

Legal certainty could increase as a result of boilerplate. Certainty is valuable, regardless of the quality of content. Boilerplate could be a technique of "uncertainty absorption" (March and Simon 1958) and stabilize uncertain environments (Kratochwil 1984; Wendt 2001; Nelson and Katzenstein 2014). Boilerplate may foster predictability by using the same types of terms to describe the same issues (Suchman 2003).

Boilerplate furthers legal certainty in contract and corporate law. The meaning of a term becomes settled based on past judicial interpretations. By contrast, in international law, there is considerable variation in the incidence and the type of litigation. At the one end of the spectrum, arbitration is common under investment treaties. At the other end of the spectrum, status-of-forces agreements are very rarely litigated, and the same applies to non-treaties. In the middle are agreements that are frequently litigated in domestic courts, such as extradition or tax treaties.

Hypothesis 5: Boilerplate is sticky

As an empirical regularity, terms in international agreements appear to be sticky, *i.e.* they change, if at all, only slowly over time (Alschner 2018; Nyarko 2019). States could become locked to boilerplate and lose agency as a result. A first explanation for stickiness could be path dependence. Changing terms

becomes harder over time (Pierson 2011; Granovetter 2017; St. John 2018). Terms are resistant to change even when amendment seems desirable. The lack of legal innovation could result from status quo bias (van Aaken 2014; Broude 2015), or the endowment effect (Jolls, Sunstein and Thaler 1998; Rabin 1998; Schwartz and Scott 2003).

Signaling costs associated with boilerplate may be a second explanation for stickiness. States may agree to boilerplate not because they believe the content is desirable but because they worry about the signal that departure from boilerplate would send. Once a term is boilerplate, it may be costly for a country to omit it. It could send a negative signal that it differs from other countries (e.g. Tomz 2007). The party that wants to deviate would have to disclose information (analogous to penalty default rules, see Ayres and Gertner (1989).

Agency costs may also explain path dependence (Choi, Scott and Gulati 2019). The personal costs associated with negotiating an agreement from scratch may incentivize negotiators to rely on boilerplate, especially if negotiators erroneously believe that the agreement will never be applied, or that most the effects of the agreement will fall on future generations (which they may care little about) (Poulsen and Aisbett 2016).

Boilerplate may not only stymie accurate contracting but could also slow down legal innovation (Hollway, Morin and Pauwelyn 2020). Network analysis in future work will shed light on whether this is the case. It will be particularly valuable to examine how boilerplate responds to external shocks and when it stops being diffused, which may vary by issue area (Choi, Scott and Gulati 2019). Such shocks could lead to a rapid shift to new boilerplate, or slower, more evolutionary processes (Pierson 2011). To analyze the impact of such shocks, the larger project will exploit natural experiments such as Brexit and German reunification (Fuchs-Schündeln and Schündeln 2005; Redding, Sturm and Wolf 2011). Both led to an urgency to conclude or revise many agreements within a short period.

Third research question: Where does boilerplate come from and what are the patterns of its diffusion in networks of international agreements?

The third research question concerns the origins of boilerplate and patterns of its diffusion which could resemble legal transplants (e.g. Watson 1974; Alter and Helfer 2014) or global norm diffusion (e.g. Börzel and Risse 2012). States are parties to thousands of agreements that represent networks (e.g. Goyal 2017; Duque 2018; Baqaee and Farhi 2019). This question is concerned with where boilerplate comes from – the anchor agreement (Alschner and Skougarevskiy 2016); and how it diffuses within and across fields, across countries, and over time. Future empirical work will use computational methods (text-as-data and

network analysis). The corpus will allow studying dyads, so that patterns in adoption and content of boilerplate can be examined not only as a function of issue area but also as a function of pairings of countries.

The larger project will seek to understand which states use boilerplate; whether they share any relevant characteristics; whether there are countries/regions/legal families with a particular 'taste' for boilerplate; who brings boilerplate to a set of negotiations; and whether the source affects whether other states accept boilerplate; and how the role of boilerplate changes over time (for example in the practice of rising states such as China or India).

Hypothesis 6: Shared language predicts diffusion

This hypothesis concerns the importance of a common language for diffusion (Braithwaite and Drahos 2000, 584).

Hypothesis 7: Civil law negotiators have a stronger taste for boilerplate

Civil lawyers might be more inclined than common lawyers to use boilerplate because it is like a code. Central to the 'civil law mentality' is a 'strong preference for legal uniformity and concomitant dislike of legal diversity – which civil lawyers quickly associate with chaos' (Halberstam and Reimann 2014, 44).

Hypothesis 8: Boilerplate is more common in North-South agreements, relative to South-South/North-North agreements

If boilerplate were used to set the agenda (**H1**), we would expect it to be more prevalent in North-South Agreements where differentials in bargaining power are likely to be greater. Conversely, we would expect negotiated terms to be more common in South-South/North-North Agreements.

Other interesting questions in this context are: are clauses deployed always identical or are minor variations introduced? Are the changes random or is there some sort of pattern, such as favoring the party with more bargaining power (**H1**)? Do states in practice negotiate away those parts of the boilerplate that they dislike or is boilerplate too sticky (**H5**)? All these questions can be answered using text-as-data and network analysis in future work.

Fourth research question: How does boilerplate contribute to international law-making?

This fourth research question is concerned with the relative incidence of boilerplate in treaties, non-treaties and contracts; how transaction costs affect the choice of the type of agreement; and with whether states use boilerplate to create new rules of international law; the character of law-making based on

boilerplate; whether a state may not have given consent as a result of boilerplate; how boilerplate fits into the theory of sources, especially whether and how boilerplate could crystallize into customary international law; whether boilerplate could lead to the invalidity of a treaty; whether boilerplate terms ought to be interpreted differently from negotiated terms; and whether a state might become internationally responsible to the other contracting party for boilerplate it propagated.

Boilerplate in non-treaties and contracts may have important constitutional/democratic implications. There is growing unease among governments and the public about these two types of agreements. A significant number of countries are trying to improve the decision and review process to respond to legitimacy and accountability concerns, and to manage the risks arising from these agreements. Despite their importance, scholars have not been able to study them due to their inaccessibility. Unlike treaties, they are not routinely published.

Hypothesis 9: Boilerplate is more common in non-treaties/contracts than in treaties

States should be readier to include boilerplate in agreements that are not legally binding (non-treaties) or that provide only for obligations under domestic law (contracts), than in treaties which provide for obligations under international law. It may be expected that less care goes into drafting non-treaties, and correspondingly states are more willing accept boilerplate. Non-treaties and contracts are more of a pastiche of past language than treaties. Consequently, boilerplate may also be more common in Trump-style, ad hoc deals.

Hypothesis 10: If transaction costs are high, states opt for non-treaties or contracts

Related to **H3** on the efficiency of boilerplate, the existing literature predicts that transaction costs prompt states to opt for non-treaties rather than treaties (Guzman and Meyer 2010, 716; Shaffer and Pollack 2010, 720; Voigt 2012).

Hypothesis 11: Boilerplate is a tool to create new rules

Beyond a single agreement (see **H1** on agenda setting above), a state may propose language because its content is what that the state wants (customary) international law to be. States could aim to construct new rules of customary international law through boilerplate. However, boilerplate could be influential even if does not become customary international law.

Boilerplate could also be an important mechanism for powerful states to seek departures from default rules in customary international law or from established multilateral rules, shifting the bargaining endowments of weaker states (Mnookin and Kornhauser 1979; Helfer 2004; Deere 2009).

Sequential negotiations could help set the agenda for future negotiations (Castle 2017). State A and B may write language into an agreement with the goal of it being used against C, who they anticipate will be part of a future agreement that uses the A-B agreement as a model. For example, the United States signed an economic treaty that included wide-ranging intellectual property protections with Poland in 1990. Similar agreements with other states followed during the negotiations for multilateral intellectual property protections within the future WTO framework (Boylan 1990; St. John 2018, 223-25).

The larger project will investigate how common it is for powerful states to use boilerplate strategically by attacking the weakest link first, and then moving onto other, less vulnerable states. The literature on strategic fragmentation posits that 'serial bilateralism' can be a means to advance the interest of powerful, hegemonic states, remniscient of empire (Anghie 2004). These states can negotiate bilaterally first with less powerful ones, reducing opportunities for coalitions (Habeeb 1988; Benvenisti and Downs 2007; Ranganathan 2014) – as China's divide-and-rule tactic along the new silk road and in the 16+1 format in Central and Eastern Europe suggests (European Parliament, 2018).

Concluding non-treaties could be an alternative strategy of setting the agenda, and could benefit powerful states (Weil 1983; Voigt 2012); alternatively, weak states may use non-treaties to counteract (multilateral) treaties (Shaffer and Pollack, 2008, 737); or powerful states may use them to overcome domestic constraints and obstacles to implementation (Shaffer and Pollack, 2008, 780).

Boilerplate as an accelerator of the formation of customary international law

State practice accompanied by *opinio juris* can lead to the emergence of customary international law ('CIL'). It is the accumulation of state practice and *opinio juris* instigated by the treaty-making process which leads to the crystallization of the rule.

The orthodox position is that there is no presumption that a series of treaties gives rise to CIL (International Law Association 2000, 45-48; *Diallo* 2007, para. 90; Dumberry 2018, 179; International Law Commission 2018). Yet **H11** is that boilerplate in treaties may create CIL because it is repeated and reaffirmed so many times. '[N]ear-universal acceptance may be seen as particularly indicative' to reflect customary international law (International Law Commission 2018, para. 3). Similar clauses in a series of agreements of the same type could point to the emergence of CIL. Even if boilerplate does not constitute CIL, it could be influential as soft law (Bjorklund and Reinisch 2012).

Boilerplate and the consent-based character of international law

It is the consent of states that creates CIL (Crawford 2019, 18). Consent is also central to treaties (Lauterpacht 1955, 15-25; Klabbers 2017, 45). If boilerplate were common, it would raise serious questions

about international law as a consent-based system (*Barcelona Traction* 1970). An alternative basis other than consent might need to be found (Goldsmith and Posner 2005, 189-93; Helfer 2008; Guzman 2012; Krisch 2014; Besson 2016).

It is an unquestioned premise of international law that states, be they developed or developing, scrutinize international agreements before committing to them. Traditionally, international law only cared about *formal* consent, which has been binary. Whether there is *informed* consent has been irrelevant (Garcia, 2018). However, in the presence of boilerplate, a state may not have provided informed consent to boilerplate, but just signed on the dotted line for potentially far-reaching commitments. What degree or quality of consent is needed may differ by area (cf. peace/boundary agreements vs. investment/tax agreements).

One of the two main concerns of the boilerplate literature on firms and consumers is the lack of informed consent due to information asymmetries (e.g. Stiglitz 2002) (the other is inequality of bargaining power, see above). Similarly, state representatives may be boundedly rational and sometimes incapable of understanding certain terms (Poulsen 2015), or they consider that boilerplate is the done thing, following a logic of appropriateness. Either way, they may not scrutinize boilerplate as much as they should, considering how much may be at stake. Conversely, officials may also read and understand boilerplate but conclude that there is no practical point if a dominant counterparty insists on it.

Consequences of boilerplate for interpretation

Boilerplate raises a series of questions for interpretation, such as whether agreements that share boilerplate be interpreted consistently across agreements. While there is some literature on the interpretation of boilerplate contracts, there is virtually nothing on interpreting boilerplate agreements (Gardiner 2015, 486). Vandevelde (1988) suggested a rudimentary approach for how to interpret boilerplate terms in agreements between states.

When courts interpret boilerplate terms in contracts, they interpret them as intentionally standardized (Smith 2006). However, Choi and Gulati (2006) suggest a statutory approach to interpreting boilerplate. Accordingly, interpreters should give weight to the drafters' original intent, thereby minimizing error costs. Yet this approach to interpretation rubs up against the *contra proferentem* principle, an influential principle in interpretation. Accordingly, a text is interpreted *against* the drafting party (Boardman 2006; d'Argent 2019). This principle can limit the influence of the drafting party and could counteract boilerplate (Waibel 2019).

A novel corpus of 12 issue areas representative of international law

To answer these four research questions, the broader project will create a new a corpus of around 12,500 agreements that covers 12 areas such as aviation, development aid, central banks, extradition, financial supervision, investment, the deployment of soldiers abroad, and tax. It also includes non-binding agreements that are common in contemporary practice. The qualitative and computational methods will focus on the same 12 areas. For the three qualitative methods the countries will overlap to obtain the full benefit of this project's synthetic approach.

The corpus' span of up to 150 years will allow the project to study the evolution of boilerplate over time. Several major types of agreements were excluded for feasibility reasons. First, human rights agreements were not included because the number of these agreements is too small for quantitative analysis. Second, transnational contracts between states and private parties, such as oil and gas contracts, or sovereign bonds.

Where no datasets exist, I will obtain the full texts from the following sources through scraping: (i) for treaties, the UN Treaty Series; national treaty databases (e.g. the Dutch, Swiss); and OUP's Historical Treaties database among others; (ii) non-treaties, for which no datasets currently exist, will be collected through established contacts with (foreign) ministries and central banks in various countries.

The non-treaties and contracts included in this corpus are crucial to the contemporary practice of international law. The number of non-treaties concluded apparently exceeds the number of treaties. It is a first for non-treaties and contracts to be collected systematically. They can be as important as treaties. Good examples are swap agreements between central banks.

Column 2 in Table 1 below provides the estimated total number of agreements globally based on a scoping exercise. Column 4 indicates which type of agreement is common in the area. Column 5 indicates whether states use known models, and the model's origin. The expectation is that boilerplate is more likely when models are used. For at least some of the six other areas, it would be surprising if boilerplate were common given the varying circumstances that these agreements often address (e.g. boundaries, environment or peace).

Issue area	Estimated number	Period	Type	Known models
Aviation	2000	1913-2020	Treaty	Yes (int'l)
Boundary/Maritime Delimitation	350	1855-2020	Treaty	No
Cooperation between Financial Supervisors	1000	1990-2020	Non-Treaty	Yes (national)
Currency Swaps	160	1990-2020	Contract	No
Development Loans/Grants	1500	1945-2000	Contract	Yes (national)

Environment/Energy	2000	1944-2020	Treaty and Contract	No
Extradition and Mutual Legal Assistance	1400	1856-2020	Treaty and Non-Treaty	Yes (int'l)
Investment	3600	1959-2020	Treaty	Yes (national)
Peace	1000	1945-2020	Non-Treaty	No
Status of Forces/Deployment of Troops	700	1945-2020	Treaty and Non-Treaty	Yes (int'l)
Tax	3500	1868-2020	Treaty	Yes (int'l)
Trade	1000	1958-2020	Treaty	No
Total	17,210	Total in corpus: **12,500**		

Table 1 Corpus of International Agreements.

1) Archival research. The project will study records from four selected archives (France, Germany, Switzerland, and UK). Archival research will be particularly useful for research question (i) on bargaining and (ii) on the reasons why states use boilerplate.

2) Semi-structured interviews with current and former negotiators. The research team will carry out 160 semi-structured interviews with current and former negotiators from 32 countries, 8 from four continents. This number of interviews results from the desirability of interviewing two negotiators from at least five countries for each of the 12 issue areas.

Countries for the interviews were selected using theoretically informed sampling (Seawright and Gerring 2008; Herron and Quinn 2014; Linos 2016). The 32 countries in Table 1 below vary in terms of their geography, level of development and legal family. The countries have also been chosen with practical considerations in mind (language competence (English, German, French, and Spanish) and network of contacts). The UK is included because it offers a unique natural experiment as it seeks to replicate the EU's agreements after Brexit.

Americas	**Africa**	**Asia**	**Europe**
Argentina	Egypt	Australia	Austria
Bolivia	Ghana	India	Cyprus
Canada	Gambia	Japan	Estonia
Mexico	Mauritius	Malaysia	European Union*
Nicaragua	Namibia	New Zealand	France
Peru	Madagascar	Singapore	Spain

Uruguay	Seychelles	Sri Lanka	Switzerland
United States	Tanzania	Thailand	United Kingdom

Table 2. Case Selection. *The EU has agreements only in some areas (aviation, central bank swaps, financial supervision, investment, and trade).

3) Non-participant observation. As much of negotiation is informal and without written record, negotiation scholars typically directly observe negotiations (e.g. Halliday and Carruthers 2009). 25 non-participant observations of negotiations will provide additional valuable, qualitative insight, particularly for research question (1) on boilerplate's effect on bargaining.

4) Computational methods (incl. text-as-data and network analysis). The application of computational methods to economics, politics, and law is still in its infancy (Gentzkow, Kelly and Taddy 2019). A major advantage of computational methods compared to hand coding variables is that a large corpus – such as the 12,500 agreements that will be assembled – can be analyzed. The need to hand code limits the scale of the corpus (Koremenos 2016), leads to potentially useful information being discarded because of the need to rely on a limited number of binary characterizations and creates the well-known problems of inter-coder reliability (DiMaggio 2015). Computational methods are geared towards prediction and classification rather than establishing causality (Mullainathan and Spiess 2017). The resulting patterns do not equal causation.

Conclusion

We can distinguish between a "logic of consequences" (law & economics arguments about efficiency, rational choice in international relations) and a "logic of appropriateness" (constructivism in international relations – the idea that boilerplate is used because it is seen as appropriate, taken-for-granted). Both have in common that negotiators do not scrutinize the language in international agreements as much as they should, given how much is at stake. The logic of appropriateness is linked to the bounded rationality argument that government officials do not scrutinize agreements as much as they should. Officials may not scrutinize agreements carefully because the provision looks like a standard provision that officials have seen before, they take heuristic shortcuts (bounded rationality), because the text was an accepted norm (constructivism) or because the text was written by an actor with recognized expertise.

If boilerplate were crucially important, it would have profound implications for international law, which is traditionally assumed to be carefully negotiated. Thinking about international agreements in boilerplate terms is likely to paint a picture of international negotiations that differs substantially from standard accounts, and have important consequences for negotiating international agreements, for their interpretation, and for international law-making.

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