

12-18-2018

Domestic Law Creating International Regimes: How Legal Formalism Is Hobbling U.S. Foreign Policy

Christopher Mirasola

Follow this and additional works at: <https://repository.law.miami.edu/umiclr>



Part of the [International Law Commons](#), and the [Law and Politics Commons](#)

Recommended Citation

Christopher Mirasola, *Domestic Law Creating International Regimes: How Legal Formalism Is Hobbling U.S. Foreign Policy*, 26 U. Miami Int'l & Comp. L. Rev. 1 (2018)

Available at: <https://repository.law.miami.edu/umiclr/vol26/iss1/3>

This Article is brought to you for free and open access by University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami International and Comparative Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

DOMESTIC LAW CREATING INTERNATIONAL
REGIMES:
HOW LEGAL FORMALISM IS HOBBLING U.S. FOREIGN
POLICY

International law has always been contested. In recent years, however, competition between States to influence the trajectory of international law has intensified. Unfortunately, most international lawyers and policy makers still employ an impoverished understanding of the way in which international law is created (i.e., through formal international negotiations or as developed through custom). In this article, I argue that this formalist perspective neglects the foundational role of domestic lawmaking and regulation in the development of international law. Indeed, this paper shows that domestic action has historically been a direct causal antecedent to international legal regimes, and concludes that States must fundamentally reconsider the underpinnings of international law if they hope to effectively advance their national interests in international politics. These findings are born out through four case studies, which analyze the development of international legal regimes for the continental shelf, bribery of foreign officials, data privacy, and artificial intelligence. In each case study, I apply an analytic model rooted in Aristotelian understandings of causation, and expanded upon through the constructivist legal literature. Throughout, the paper provides concrete suggestions as to how States can re-imagine their approach towards international law to better advance their interests in the increasingly fragmented, yet still highly interconnected, world of international politics.

Christopher Mirasola

TABLE OF CONTENTS

I.	INTRODUCTION.....	2
II.	DEFINITIONS, ASSUMPTION, AND CAUSAL THEORY.....	9
	A. DEFINING KEY TERMS	9
	B. ASSUMPTIONS REGARDING INT'L POLITICS.....	12
	C. CAUSATION IN INT'L LAW	14
	D. CRITICAL REALISM AND THE DOMESTIC ROOTS OF INT'L REGIMES.....	23
III.	CASE STUDIES	26
	A. CONSTITUTING THE CONTINENTAL SHELF.....	27
	B. HARRY TRUMAN'S PRESIDENTIAL PROCLAMATION	30
	C. RESPONSE FROM THE INT'L COMMUNITY	35
	D. TAKEAWAYS: THE CONTINENTAL SHELF	42
	E. BRIBERY OF FOREIGN GOVERNMENT OFFICIALS	43
	F. FROM WATERGATE TO THE FCPA.....	45
	G. THE OECD ANTI-BRIBERY AND CRITICAL REALISM	52
	H. TAKEAWAYS: ANTI-BRIBERY AND CRITICAL REALISM...	55
IV.	MODERN CHALLENGES.....	60
V.	CONCLUSION	70

I. INTRODUCTION

International law is generally understood to be created by treaty or custom developed over time and adhered to out of a sense of international legal obligation.¹

¹ Or in more detail, as outlined by the Statute of the International Court of Justice "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international

Formally, this may be the received wisdom. Practically, this definition obscures much of what actually comes to constitute international law. In this paper, I build on scholarship regarding the diffusion and socialization of international norms to argue that (1) domestic legal action can be a tool for creating international legal regimes and, therefore, (2) the foreign policy establishment should more directly engage in domestic lawmaking to shape the trajectory of international law.

Legal formalism fundamentally informs the U.S. foreign policy establishment's understanding of international law. Take, for example, the development of norms for State conduct in cyberspace. In 2004, the United Nations (UN) General Assembly established a Group of Governmental Experts tasked with considering "existing and potential threats in the field of information security, as well as possible measures to limit the threats emerging in this field."² This group held five sessions from 2004 to 2017, two of which ended with consensus reports on international law regarding operations in cyberspace.³ In the summer of

custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, 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." Statute of the International Court of Justice art. 38, ¶1, June 26, 1945, 33 U.S.T. 993.

² G.A. Res. A/Res/59/61, at 2 (Dec. 16, 2004),

http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/59/61.

³ Ann Valjataga, *Back to Square One? The Fifth UN GGE Fails to Submit a Conclusive Report at the UN General Assembly*, NATO COOPERATIVE CYBER DEFENCE CENTRE OF EXCELLENCE (Sept 1, 2017), <https://ccdcoc.org/back->

2017, however, the Group was unable to agree on (1) the right of response to internationally wrongful acts, (2) the right to self-defense, and (3) the applicability of the laws of war to cyber operations.⁴ Reactions to this failure reflect the extent to which legal formalism dominates in the foreign policy establishment. Ann Valjiataga at NATO's cyber center, for example, wrote that, "The reasons for the failure undermine the very foundations of any meaningful legal debate over international cyber security."⁵ She went on to conclude that, "norm-based universal consensus has worked for nuclear disarmament but proven to be a rocky road in almost all other fields, and cyber is no exception."⁶ Michael Schmitt and Liis Vihul similarly noted that, "Since no international lawyer can, in 2017, deny [international law's] applicability to cyber activities, the failure of the GGE [Group of Governmental Experts] can only be interpreted as the intentional politicization in the cyber context of well-accepted international norms."⁷ Michele Markoff, then U.S. Deputy Coordinator for Cyber Issues, remarked that, "our work has been in vain" and that "this is particularly disappointing given the work this Group has done . . . to reach common understandings on the implementation of stabilizing measures, including voluntary, non-binding

square-one-fifth-un-gge-fails-submit-conclusive-report-un-general-assembly.html.

⁴ Michael Schmitt & Liis Vihul, *International Cyber Law Politicized: The UN GGE's Failure to Advance Cyber Norms*, JUST SECURITY (June 30 2017), <https://www.justsecurity.org/42768/international-cyber-law-politicized-gges-failure-advance-cyber-norms/>.

⁵ Valjiataga, *supra* note 3.

⁶ *Id.*

⁷ Schmitt & Vihul, *supra* note 4.

norms of responsible State behavior in cyberspace.”⁸ More recently, UN Secretary General António Guterres told the Munich Security conference that, “It’s high time to have a serious discussion about the international legal framework in which cyberwars take place.”⁹ Taking on this charge, Tim Maurer and Kathryn Taylor outline only three options – restarting the Group process, negotiating a Digital Geneva Convention, or negotiating more tailored bilateral or multilateral agreements.¹⁰

Setting the necessity and utility of establishing international norms for State conduct in cyberspace aside,¹¹

⁸ U.S. Dep’t of State, Explanation of Position at the Conclusion of the 2016-2017 UN Group of Governmental Experts (GGE) on Developments in the Field of Information and Telecommunications in the Context of International Security, remarks by the Department of State Deputy Coordinator for Cyber Issues (June 23, 2017), <https://www.state.gov/s/cyberissues/releasesandremarks/272175.htm>.

⁹ U.N. Secretary-General, Address at the Opening Ceremony of the Munich Security Conference (Feb. 16, 2018), <https://www.un.org/sg/en/content/sg/statement/2018-02-16/secretary-general%E2%80%99s-address-opening-ceremony-munich-security>.

¹⁰ Tim Maurer & Kathryn Taylor, *Outlook on International Cyber Norms: Three Avenues for Future Progress*, JUST SECURITY (March 2, 2018), <https://www.justsecurity.org/53329/outlook-international-cyber-norms-avenues-future-progress/>.

¹¹ Others have argued, for example, that, “the GGE put the cart before the horse by calling for an affirmation of legal principles without detailing them or understanding their consequences for military strategies.” Arun Sukumar, *The UN GGE Failed. Is International Law in Cyberspace Doomed As Well?*, LAWFAREBLOG (July 4 2017), <https://lawfareblog.com/un-gge-failed-international-law-cyberspace-doomed-well>. Others have also argued that, “Beijing [widely understood to have been one of the recalcitrant States, along with Russia and Cuba]

these statements and proposals reveal a common presumption that formal negotiations are the only meaningful route towards creating international norms and law. By stepping away from this formalistic view, however, we can see that such a perspective is at least counterintuitive. Why is it that norms can only be meaningfully developed in formal multilateral fora? The literature on norms diffusion certainly does not make this presumption. Yet it remains widely held. Brad Smith, President and Chief Legal Officer at Microsoft, for example, has called on States to negotiate a Digital Geneva Convention to “protect[] civilians from nation-state attacks in times of peace.”¹² State and non-governmental organization (NGO) efforts to address (or ban) lethal autonomous weapon systems have focused almost exclusively on multilateral negotiations within the Convention on Certain Conventional Weapons.¹³ This

has never liked the idea that international law applies to cyberspace, and began walking back the 2013 report almost as soon as the ink was dry.” Adam Segal, *The Development of Cyber Norms at the United Nations Ends in Deadlock*.

Now What?, COUNCIL ON FOREIGN RELATIONS (June 29, 2017), <https://www.cfr.org/blog/development-cyber-norms-united-nations-ends-deadlock-now-what>.

¹² Brad Smith, *The need for a Digital Geneva Convention*, MICROSOFT ON THE ISSUES (Feb. 14 2017), <https://blogs.microsoft.com/on-the-issues/2017/02/14/need-digital-geneva-convention/>.

¹³ See, e.g., *Killer robots: World's top AI and robotics companies urge United Nations to ban lethal autonomous weapons*, MEDIANET (Aug. 21 2017), <http://www.medianet.com.au/releases/141447/>; See also, Josh Dorsin, U.S. DEPT. OF STATE, *Statement on the way forward - STATEMENT BY THE DEPARTMENT OF STATE AT THE CONVENTION ON CERTAIN CONVENTIONAL WEAPONS GROUP OF GOVERNMENTAL EXPERTS ON LETHAL*

consistent assumption that only international, formal processes can create international rules of the road needlessly restricts a State's ability to advance its national interests.

Before outlining the rest of this paper, a quick note to clarify my argument. I am not arguing that an enactment of domestic law, alone, can formally bind other States. Domestic law, alone, creates neither conventional nor customary international law.¹⁴ I am arguing, instead, that the formalist vision of international law entirely misses the point. States create international legal regimes to advance national interests and further a given set of values. When policymakers want to develop international law, they are saying that an issue set exists for which present practices insufficiently advance national interests. Domestic law, even and especially when not grounded in existing international law or practice, can advance national interests in the international arena. Stated another way, domestic legislative enactments can have a first mover effect on the creation of international legal regimes. Formal international negotiations are needed to make these new practices (more) binding, but they are not required to establish those new practices in the first instance.

Perhaps unwittingly, the United States has used domestic law in the creation of many international legal

AUTONOMOUS WEAPONS SYSTEMS (Nov. 17 2017),
<https://geneva.usmission.gov/2017/11/17/ccw-gge-meeting-on-laws-u-s-statement-on-the-way-forward/>.

¹⁴ Of course, domestic law enacted pursuant to a sense of international legal obligation would be evidence of customary international law. Here, however, we are dealing with circumstances in which the concerned State does not believe that there is an applicable rule of international law.

regimes. I will highlight two examples in this paper: (1) the effect of Harry Truman's 1945 Presidential Proclamation on the creation of a regime for the continental shelf in the UN Convention on the Law of the Sea (UNCLOS), and (2) the effect of Congress passing the Foreign Corrupt Practices Act (FCPA) on the creation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Bribery Convention). Both cases begin with domestic legal enactments not grounded in a sense of international legal obligation. Those domestic legal enactments meaningfully advanced the creation of a formal international legal regime, subsequently formalized through international negotiation. They differ in the extent to which they have been generalized globally. UNCLOS, as a comprehensive set of legal regimes governing maritime activities during peacetime, entered into force in 1982 and is adhered to by 116 States Parties.¹⁵ The OECD Bribery Convention entered into force in 1999 and is adhered to by 43 countries.¹⁶ A historic analysis of each case will show that domestic policymakers should more seriously consider using domestic legal instruments in the creation of international legal regimes.

Part I begins by outlining the definitions, assumptions, and theory underpinning my analysis. As Keohane and Nye once remarked, "theory is inescapable Pragmatic policymakers may think that they need pay no more heed to

¹⁵ United Nations Convention on the Law of the Sea art. 76(1), Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

¹⁶ OECD, OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS (2018), <http://www.oecd.org/corruption/oecdantibriberyconvention.htm>.

theoretical disputes over the nature of world politics than they pay to medieval scholastic disputes over how many angels can dance on the head of a pin. Academic pens, however, leave marks in the minds of statesmen with profound results for policy.”¹⁷ In this spirit, Part I clarifies key terms interchangeably and often imprecisely used in the policy, and academic, communities. I then briefly outline my assumptions regarding the nature of international politics before explaining the causal mechanisms by which domestic law creates international legal regimes. Part II then shows how the historic record supports my causal theory. I first present the continental shelf and FCPA case studies before taking on contemporaneous examples – data privacy and artificial intelligence (AI). Based on this analysis, Part III concludes by providing policy recommendations for the U.S. government, though many of these lessons can be generalized to other States.

II. DEFINITIONS, ASSUMPTIONS, AND CAUSAL THEORY

a. DEFINING KEY TERMS

Scholars of international relations and international law use a dizzying amount of jargon. All too often, the terms used lack rigorous meaning. For example, international regimes have been notably defined as “sets of implicit or explicit principles, norms, rules and decision-making procedures around which actors’ expectations converge in a

¹⁷ ROBERT KEOHANE & JOSEPH NYE, POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION 4 (2d ed. 1989).

given area of international relations.”¹⁸ But what differentiates principles, norms, rules, and decision-making procedures? Indeed, on the next page the author admits that “The rules of a regime are difficult to distinguish from its norms; at the margin, they merge into one another.”¹⁹ Yet another page later the conceptual picture gets more confused, “Principles, norms, rules, and procedures all contain injunctions about behavior; they prescribe certain actions and proscribe others.”²⁰ Unanswered, however, is why we would use so many different terms to refer to the same conceit.

Drawing largely from constructivist literature, I will instead use three terms – agents, rules, and regimes. Agents are entities that “act in society to achieve goals.”²¹ They both observe patterns of behavior and, if existing patterns of behavior are disadvantageous, “will act to change them.”²² In the international arena, these agents include “individuals and a variety of functional groups, as well as national and

¹⁸ ROBERT KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* 57 (1984).

¹⁹ *Id.*, at 58. Keohane goes on to argue that “Rules are, however, more specific; they indicate in more detail the specific rights and obligations of members.” This distinction, however, is largely unhelpful. How much more specific? Need rules be technical? Can we say that there is an international norm against female genital mutilation, or is this too concrete?

²⁰ *Id.*, at 59.

²¹ NICHOLAS GREENWOOD ONUF, *Constructivism, in MAKING SENSE MAKING WORLDS* 5, (2013).

²² *Id.*, at 6.

subnational units.”²³ Neoclassical realists, and the realist tradition more broadly, “posits that territorial states are the primary units in the international system.”²⁴ While I do not presume an equality of capacity or importance between agents, especially regarding national security, I include non-State actors and supranational organizations in my analysis.

Rules are “statements that tell people what we should do.”²⁵ This more general definition encompasses both “norms” and formal legal rules – both of which exist on a spectrum of formality and bindingness. As more agents adhere to a particular rule, it becomes normatively stronger.²⁶ There are incentives for rules to become formalized through the legal process – legally constituted rules more clearly identify “what the rules are, how much they matter to other agents, and what consequences they can expect from not following them.”²⁷ While this distinction between more and less formal rules may be important in international politics, it is less important when thinking about the diffusion of patterns of behavior (which in much of the literature is called norms diffusion). It is important to note that, for constructivists, rules and agents are mutually constitutive. Onuf argues that, “rules tell us who the active participants in a society are. Constructivists call these

²³ K.J. HOLSTI, *Change in the International System: Interdependence, Integration, and Fragmentation* in CHANGE IN THE INTERNATIONAL SYSTEM 25 (Ole Holsti, Randolph Siverson, & Alexander George, eds. 1991).

²⁴ NORRIN RIPSAN, JEFFREY TALIAFERRO, & STEVEN LOBELL, NEOCCLASSICAL REALIST THEORY OF INTERNATIONAL POLITICS 35 (2016).

²⁵ Onuf, *supra* note 21, at 4.

²⁶ *Id.*, at 13.

²⁷ *Id.* Emphasis omitted.

participants *agents*.”²⁸ This seemingly metaphysical insight is actually quite intuitive. Women, as political agents in American politics, were simultaneously redefined by the 19th Amendment and essential to the creation and passage of the 19th Amendment.

Finally, “families of rules and related practices [are often called] *regimes*.”²⁹ Regimes are typically organized around a certain set of issues, on the theory that the issues are “so closely linked that they should be dealt with together.”³⁰ They can be more or less stable, though regimes are never fixed.³¹ Agents cannot entirely control the nature of regimes through their constituent rules – “unintended consequences frequently form stable patterns with respect to their effect on agents.”³²

Armed with this lexicon, I’ll restate the thesis. Agents in international politics, and States in particular, can constitute international regimes, on any given issue, by creating rules at the domestic level. As will be shown below, this causal chain is always contested – regimes are never fixed. And not all agents will be equally empowered in the creation of international regimes – the rules of international law empower, for example, States over even the most well endowed multinational corporations. Before getting too far

²⁸ *Id.*, at 4.

²⁹ *Id.*, at 13.

³⁰ KEOHANE, *supra* note 18 at 61.

³¹ ONUF, *supra* note 21 at 5.

³² *Id.*, at 6. Onuf takes the example of the price of a commodity in a perfect market. Based on a particular set of rules, and given an adequately large number of agents, any one agent loses the ability to set price in the market.

into this analysis, a few comments on the assumptions I make about the nature of international politics.

b. ASSUMPTIONS REGARDING THE INTERNATIONAL POLITICAL ENVIRONMENT

As a baseline, I assume that uncertainty pervades international politics.³³ This includes uncertainty about the intentions of other agents, the actions other agents might take, their present and future capacity, etc. Notwithstanding this uncertainty, the post-Cold War world has become strikingly interdependent. Keohane and Nye provide a useful framework for understanding this complex interdependence. First, multiple channels connect societies, from formal relations between States to less formal contacts between transnational organizations.³⁴ Importantly, there is considerable variability in the extent to which individual agents are connected. A State's degree of connectivity is correlated with its vulnerability or sensitivity to actions taken by other international agents.³⁵ Second, there is an "absence of hierarchy among issues."³⁶ This means both that (1) military security is not always the most important issue for a State and (2) military power will not always be determinative in advancing a State's interests.³⁷

³³ KEOHANE, *supra* note 18 at 257.

³⁴ KEOHANE, *supra* note 18 at 26.

³⁵ *Id.*, at 12. This dichotomy between sensitivity and interdependence will be discussed at greater length in the next subsection.

³⁶ *Id.*, at 25.

³⁷ Keohane and Nye also present a third pillar of complex interdependence - that "military force is not used by governments toward other governments within the region, or on the issues, where

Interdependence in an uncertain world is not necessarily beneficial. As Holsti notes, "increased transaction flows can lead to dependency, exploitation, conflict, and violence as well as to more collaboration and mutual knowledge."³⁸ In this regard, I do not deviate too far from the realist tradition, which sees international politics as being characterized by anarchy.³⁹

International law cannot be separated from the political realities of this international environment. Hans Morgenthau, who trained first as a lawyer, was critical of so-called legalism, "the artificial separation of the juridical sphere from not just the normative spheres of mores and morals considerations, but also of all insights from the social sciences and psychology."⁴⁰ So while I acknowledge that international relations is a legal (or at least rule-infused) environment,⁴¹ we must be cognizant of the political conditions within which any international regime exists.⁴²

c. CAUSATION IN INTERNATIONAL LAW

complex interdependence prevails." *Id.* While the first two pillars, noted above, are assumptions of complex interdependence, this third pillar is more of a conclusion. As such, I do not use it to describe my understanding of international politics.

³⁸ Holsti, *supra* note 23, at 28.

³⁹ Jack Snyder, *Introduction: New Thinking About the New International System*, in *COPING WITH COMPLEXITY IN THE INTERNATIONAL SYSTEM* 11 (Jack Snyder & Robert Jervis, eds. 1993) (characterizing Waltz's theory of structural realism).

⁴⁰ OLIVER JÜTERSONKE, *MORGENTHAU, LAW AND REALISM* 146 (2010).

⁴¹ ONUF, *supra* note 21, at 13.

⁴² JÜTERSONKE, *supra* note 40, at 159.

I take what Milja Kurki calls a critical realist approach to causation (notwithstanding the fact that the roots of this approach are primarily Aristotelian). Kurki finds that most social science scholarship treats “ideas, rules, norms and discourse as non-causal.”⁴³ This understanding of cause is unduly narrow, particularly in the study of international relations, where observation and controlled experimentation to determine that A action produces B outcome is exceedingly difficult. Instead, Kurki explains that, “certain aspects of the Aristotelian account of causation can be useful in elucidating the nature of different senses in which we might apply the concept of cause.”⁴⁴ A few notes of caution before we proceed. For Aristotle, causation was an expansive concept – objects as well as events had causes.⁴⁵ Indeed, Aristotle’s understanding of cause was more akin to our understanding of explanation – why something is the way it is.⁴⁶ In *Physics*, Aristotle identifies four types of cause:

- (1) Material Cause – “that out of which a thing comes to be and which persists” (e.g., the bronze of a bronze statue);
 - (2) Formal Cause – “the form or the archetype, i.e. the statement of the essence, and its genera” (e.g., schematics for the statue);
 - (3) Effective Cause – “the primary source of the change or coming to rest” (e.g., the sculptor who makes the statue);
- and

⁴³ MILJA KURKI, CAUSATION IN INTERNATIONAL RELATIONS: RECLAIMING CAUSAL ANALYSIS 12 (2008).

⁴⁴ *Id.*, at 13.

⁴⁵ S. Marc Cohen, *The Four Causes*, THE UNIV OF WASHINGTON (Sept. 23, 2016), <https://faculty.washington.edu/smcohen/320/4causes.htm>.

⁴⁶ Mindful of this distinction, I will continue to use the word “cause” for the sake of simplicity.

(4) Final Cause - "the sense of end or 'that for the sake of which' a thing is done" (e.g., the sculptor's intent in creating the statue).⁴⁷

Let's put it more simply. The material cause is the tangible factors out of which something is constituted, those parameters which enable and constrain action.⁴⁸ The formal cause is definitional - the set of rules that give meaning to some end product.⁴⁹ The effective cause is closest to what we usually call causation - it is the action undertaken to actually craft the end product.⁵⁰ The final cause is intent - the subjective purpose for which the end product is made.⁵¹

Much of the existing literature on causation in international law comprehends aspects of critical realist causation, though not in these terms. The remainder of this subsection expands on each of these four causes, and their treatment (or lack thereof) in traditional international law scholarship.

The material cause, for our purposes, is those factors that enable and constrain action. In one sense, this can be understood as the attributes of national power. These attributes are emphasized most prominently in the realist tradition.⁵² Kenneth Waltz, the father of structural realism, is

⁴⁷ARISTOTLE, PHYSICS, (RP Hardie & RK Gaye trans., MIT), <http://classics.mit.edu/Aristotle/physics.2.ii.html>.

⁴⁸ KURKI, *supra* note 43, at 27.

⁴⁹ *Id.*; Cohen, *supra* note 45.

⁵⁰ KURKI, *supra* note 43, at 27.

⁵¹ *Id.*

⁵² Other scholarly traditions also consider material factors, though they are less likely to use these factors as deterministically. For example, Dina Zinnes noted that the most important "composite" variable for understanding change in the international system is the "number of

famous for arguing that the relative distribution of capabilities among units is the primary causal variable of international politics.⁵³ Typically, capability (and therefore power) is understood to include a State's Gross Domestic Product (GDP), levels of annual defense spending, the size and composition of its armed forces, military research and development, population (and other demographic trends), natural resource endowments, and geography.⁵⁴ These capabilities are seen as most important in understanding "the range of possible bargaining outcomes among states."⁵⁵ If one were looking to understand the series of unequal treaties negotiated between the late Qing Dynasty and western powers (e.g., the United Kingdom and France) from the perspective of material causation, for example, one would focus on their military technical advantage and economic leverage, particularly through the opium trade.

Other scholars have usefully complicated this straightforward notion of material cause. Holsti, for

nations within the system and the distribution of power over those nations." Dina Zinnes, *Prerequisites for the Study of System Transformation*, in *CHANGE IN THE INTERNATIONAL SYSTEM* 9 (Ole Holsti, Randolph Siverson, & Alexander George eds., 1991). Keohane similarly stated that, "we should focus first on the [material] constraints imposed on actors before examining their choices." KEOHANE, *supra* note 19 at 71. Keohane and Nye remarked that, "The structure of the system (the distribution of power resources among states) profoundly affects the nature of the [international] regime (the more or less loose set of formal and informal norms, rules, and procedures relevant to the [international] system" and "Changes in regime reflect shifts in the distribution of power within the issue area." KEOHANE, *supra* note 18, at 21 & 137.

⁵³ RIPSAN, TALIAFERRO, & LOBELL, *supra* note 24, at 38.

⁵⁴ *Id.*, at 43.

⁵⁵ *Id.*

example, argues that other agents' perception of a State's capabilities is important in the definition of those same capabilities.⁵⁶ Similarly, Kurki cautions that material resources should "not . . . be understood in a mere military sense," but also "recognised as constituted through social processes involving social actors and socialising principles (formal causes)."⁵⁷ Given the fact that military might will not be uniformly dispositive across issue areas, it is important to be mindful of elements of national power less emphasized in the realist tradition (e.g., soft power).

In another sense, material causation includes the degree to which an agent is linked to other agents. As noted above, agents in international politics are not equally connected to each other. From the perspective of regime creation, one agent's connection to other agents can have both negative and positive effects.⁵⁸ On the one hand, more links to other agents present more avenues through which an agent might instantiate its preferred set of rules. On the other hand, more links can increase an agent's sensitivity (responsiveness) to changes wrought by other agents.⁵⁹

⁵⁶ Dina Zinnes, *supra* note 52, at 12. Keohane also highlights the importance of perception. He argues that "actors subject to bounded rationality cannot maximize in the classical sense, because they are not capable of using all the information that is potentially available." KEOHANE, *supra* note 18, at 111-12.

⁵⁷ KURKI, *supra* note 44, at 238.

⁵⁸ For an example in the human rights framework, Goodman and Jinks argue that after a certain quantity of links are made "domestic political authorities [may] abjure international [human rights] norms and refrain from participation in international [human rights] organizations." RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW* 43 (2013).

⁵⁹ KEOHANE, *supra* note 19, at 12.

Keohane and Nye also argue that an agent highly sensitive to change will not necessarily be vulnerable to that change, so long as there are sufficient internal protections to mitigate costs or propose less burdensome alternatives.⁶⁰ An agent's internal protections, again, are tied to its material capabilities.

The formal cause posits that ideas and rules "define or constitute meaning."⁶¹ Dominant ways of conceiving an issue "come to inform the intentions and the actions of agents, that is, the meanings that constitute social life 'condition' agents' intentions and actions."⁶² This is consonant with the constructivist perspective, which highlights the importance of language in constituting the social world.⁶³ Kurki is quick to point out that formal causes do not directly bring about a particular effect – they "condition" and "shape" social practices.⁶⁴ This distinction is what separates the critical realist understanding of formal cause from most of the existing literature. Take, for example,

⁶⁰ KEOHANE & NYE, *supra* note 18, at 13.

⁶¹ KURKI, *supra* note 43, at 224.

⁶² *Id.*

⁶³ ADRIANA SINCLAIR, INTERNATIONAL RELATIONS THEORY AND INTERNATIONAL LAW: A CRITICAL APPROACH 8 (2010). There is, however, an important philosophical difference between the constructivist and critical realist perspectives. For constructivists, discourses themselves constitute the objects that are observed – the objects have no definition outside changing discourses. KURKI, *supra* note 43 at 203. Critical realists, however, accept that there is something real that is being perceived, independent of a given discourse. Instead, "they argue that concepts, meanings and rules also give rise to materially unfolding *structures of social relations*, that is, they give rise to materially embodied 'internal relations' between agents." *Id.*, at 210.

⁶⁴ *Id.*, at 224–25.

Keohane and Nye's discussion of unilateral initiative, a mechanism for changing regimes by which "large state[s] may not be able or willing to police the behavior of other states, but because of [their] size and importance, [their] actions may determine the regimes that govern situations of interdependence, both because of its direct effects and through imitation."⁶⁵ One example of Keohane and Nye's unilateral initiative would be the fact that China established, in 1998, the Chinese Center for Disease Control (CDC), patterned almost exactly on the U.S. CDC.⁶⁶ Within our framework, this proposition blends material, formal, and effective cause. A States' size and importance is given causal effect (material cause - or in our CDC example, the United States' position as a leading authority in public health). They also intimate that "direct" tools are used to coerce compliance (effective cause - while it's unclear whether the U.S. coerced compliance, there are pressures to create institutions that can easily liaise with international counterparts). The closest Keohane and Nye get to the formal cause is by positing that other agents may imitate the larger State's new pattern of behavior. Issue definition is a necessary predicate to imitation. So, in a way, the formal cause underpins this entire causal chain. But even imitation is blended with the effective cause, insofar as other agents have to engage in a process of learning.⁶⁷

⁶⁵ KEOHANE, *supra* note 18, at 230.

⁶⁶ *China CDC*, INT'L ASSOC. OF NAT'L PUB. HEALTH INST., <http://www.ianphi.org/membercountries/memberinformation/china.html>.

⁶⁷ Ernst Haas' writing on learning underscores why it should be understood as an effective cause. He argues that when learning occurs "new knowledge is used to redefine the content of the national interest.

Hints of critical realism can be seen in Goodman and Jinks' work on the promotion of human rights through international law. Goodman and Jinks identify three mechanisms for influencing a State's human rights practice - material inducement, persuasion, and acculturation.⁶⁸ In material inducement, "actors are influenced to change their behavior by the imposition of material costs or the conferral of material benefits."⁶⁹ This is a blending of the material and effective causes - the instruments of State power are used to coerce compliance, even if compliance does not accord with a State's perception of its own interests.⁷⁰ Persuasion is similar to Keohane and Nye's understanding of learning, as "target actors are convinced of the truth, validity, or appropriateness of a norm, belief, or practice."⁷¹ Unlike Keohane and Nye, however, Goodman and Jinks are more explicit about the formal causality embedded in this process. They argue that persuasion occurs through framing (increasing the extent to which a practice resonates with already accepted norms) and cuing (providing new information, which forces an agent to rethink a prior position). Both of these processes are definitional, and therefore examples of formal causation. Goodman and Jinks get the closest to approximating the formal cause through what they term acculturation, "the general process by which actors adopt the beliefs and behavior patterns of the

Awareness of newly understood causes of unwanted effects usually result in the adoption of different, and more effective, means to attain one's ends." KEOHANE, *supra* note 18 at 264-65.

⁶⁸ GOODMAN & JINKS, *supra* note 58, at 2.

⁶⁹ *Id.*, at 22.

⁷⁰ *Id.*

⁷¹ *Id.*

surrounding culture. . . . this mechanism induces behavioral changes through pressures to assimilate—some imposed by other actors and some imposed by the self.”⁷² Acculturation relies on changed definitions, but is understood by the authors as much more direct than critical realists would believe the formal cause to be.⁷³ An example of acculturation they point out is the fact that the number of constitutions specifically providing for a right to education increased dramatically throughout the 19th century with no concomitant increase in local social organizations pushing for such a right.⁷⁴

Before considering the effective cause, it is important to note that this blending of causes is not necessarily problematic – all social outcomes have multiple causes within the critical realist framework. Kurki notes that “in practice different causes often ‘mesh together’ or ‘coincide.’”⁷⁵ Nevertheless, it is useful to more precisely understand the pathways through which these effects are produced.

The efficient cause has been most completely addressed by the academic and policy communities. Strategies that call for enrolling allies into decision-making

⁷² *Id.*, at 4.

⁷³ For example, Goodman and Jinks argue that this framework can be used to “generat[e] concrete, empirically falsifiable propositions about the role of the international legal regime in transforming state preferences and behaviors.” *Id.*, at 3. A Humean understanding of that is at least in tension with the more metaphysical understanding of cause advanced by Aristotle.

⁷⁴ Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 649–50 (Dec. 2004).

⁷⁵ KURKI, *supra* note 43, at 28 & 227.

processes are examples of thinking in terms of efficient causation (doing x to create y effect).⁷⁶ So too is imposing “negative as well as positive inducements.”⁷⁷ For example, think of a State providing defense materiel in exchange for a security partner adhering to the laws of war as that partner fights against an insurgent group. The final cause, on the other hand, has been less completely appreciated as an independent source of causation. It posits that agents’ intentions, and other agents’ perception of an agents’ intentions, have real causal power.⁷⁸ This type of causal effect can be seen when Keohane and Nye, for example, argue that unilateralism “disrupt[s] cooperation in international relationship and cast[s] doubt on American motivations . . . such approaches may destroy the basis for legitimate international regimes.”⁷⁹

d. CRITICAL REALISM AND THE DOMESTIC ROOTS OF INTERNATIONAL REGIMES

I argue that critical realist causation best explains how domestic legal action can create international legal regimes. While all four types of causation will play a role in the case studies presented in Part II, formal causation is the key to many of these stories. Indeed, it is the underappreciated, independent causal effect of ideas and rules that may largely account for the fact that foreign policymakers neglect

⁷⁶ KEOHANE, *supra* note 18, at 34.

⁷⁷ *Id.*, at 53 & 79. Note that, as stated above, this also includes leveraging capabilities, and therefore is blended with material causation.

⁷⁸ KURKI, *supra* note 43, at 217 & 226.

⁷⁹ KEOHANE, *supra* note 18, at 236.

domestic policy tools. Before using this framework to advance my thesis, a few implications of this theory should be noted.

First, the concept of a formal cause implies that rules are inherently political. By this I mean that rules necessarily advance particular interests, and embody a particular set of values. This harkens back to Morgenthau's critiques of legalism as the "instrumentalization of a formalistic conception of law by political powers that seek to clothe their aspirations in the language of universality."⁸⁰ This should not be surprising. Rules created by one agent necessarily limit the freedom of other agents.⁸¹ While policymakers working on behalf of current hegemony may profit from speaking about law apolitically, to create new rules thinking in the same terms is entirely to their detriment.

Second, and furthermore, the fact that rules instantiate values means that rules also instantiate a particular hierarchy of power and influence.⁸² Onuf recognized that "starting with rules, as constructivists often do, leads quickly enough to patterns of relations that we can only describe as a condition of rule."⁸³ He goes on to say that while rules appear to rule, "agents actually do the ruling by getting other agents to accept their ideas and beliefs. They do so by example and indoctrination. Rule in this form is *hegemony*."⁸⁴ Again, this fact can be lost on States that have

⁸⁰ JÜTERSONKE, *supra* note 40, at 147-48 & 173.

⁸¹ ONUF, *supra* note 21, at 9.

⁸² SINCLAIR, *supra* note 63, at 18.

⁸³ ONUF, *supra* note 21, at 7.

⁸⁴ *Id.*, at 18.

grown comfortable in their hegemonic status. Hegemony in any given issue space is an inherently contested and political status. Efforts to maintain, or gain, hegemony will then necessarily be focused on the contest of ideas (a battle of formal causation).

Third, formal causation suggests that there are substantial benefits to being the first agent to define a given issue space. Finnemore and Sikkink, for example, identified a three-stage cycle for norm creation - emergence, acceptance, and internalization.⁸⁵ For our purposes, norm emergence is important insofar as Finnemore and Sikkink note the role of "norm entrepreneurs," agents that call attention to or create issues through the "construction of cognitive frames."⁸⁶ The degree to which a norm entrepreneur (or in our lexicon, a rule entrepreneur) is effective in instantiating a particular norm (rule) will depend on the other patterns of causation noted above. Again, it is important reiterate Finnemore and Sikkink's reminder that this is always a contested process - "new norms [rules] never enter a normative vacuum but instead emerge in a highly contested normative space where they must compete with other norms and perceptions of interest."⁸⁷ Causation, therefore, is not unidirectional - regimes once created remain contestable.

Fourth, and last, this framework does not assume that any given cause will have an *a priori* knowable effect. Unintended consequences are inherent to any activity in an

⁸⁵ Martha Finnemore and Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 4 895, 887-915 (1998).

⁸⁶ *Id.*

⁸⁷ *Id.*, at 897.

international environment characterized by uncertainty.⁸⁸ Jervis argues that unintended consequences stem from two sources - (1) the fact that "outcomes are often produced through a chain of actions and reactions" and (2) "the result of trying to move directly toward a goal may be movement in the opposite direction."⁸⁹ As to this second point, Keohane and Nye note that, "strategies of manipulating interdependence are likely to lead to counterstrategies."⁹⁰ This again raises issues of perception and intent (even in the creation, or redefinition, of ideas).

III. CASE STUDIES

Substantively, the continental shelf, international corruption, data privacy, and AI have little in common. The international legal regimes that have developed (or are coming into being) around them, however, raise similar critical realist insights. First, in each case a rule entrepreneur redefined an issue by unilaterally establishing domestic law and/or policy that would powerfully influence positive international law (again, noting that this process has not yet been completed in the case of data privacy and AI). Second, in each case this redefinition sparked counter-strategies from agents whose interests diverged from that of the rule

⁸⁸ KEOHANE, *supra* note 18, at 10-11.

⁸⁹ Robert Jervis, *Systems and Interaction Effects*, in *COPING WITH COMPLEXITY IN THE INTERNATIONAL SYSTEM* 31 (Jack Snyder & Robert Jervis eds., 1993).

⁹⁰ KEOHANE, *supra* note 18 at 16. Of course, the degree of risk that military counterstrategies will occur depends on the interests and consequences at stake in a given example of international regime creation.

entrepreneur. These unintended consequences shaped the contours of the eventual international legal regime – not always in ways agreeable to the rule entrepreneur. Lastly, and nevertheless, the rule entrepreneur's interests are better advanced by taking action than they would have been if the agent had insisted on formal, international processes from the very beginning. I do not mean to suggest that this will always be the case – a critical realist approach to foreign policy must be attuned to context. And as will be shown in the case of the continental shelf, domestic action taken out of short-term interest can be coopted by rivals to advance international rules at odds with the rule entrepreneur's long-term interests. But this should at least indicate the utility of domestic action as an opening gambit in the creation of international legal regimes. For each of the following cases, I first provide a narrative historical overview of the issue before applying the critical realist framework.

a. CONSTITUTING THE CONTINENTAL SHELF

Maritime law is defined by the tension between State sovereignty and free access to the sea and its resources. This tension was most plainly laid bare by a pair of texts published in the 1600s. Hugo Grotius' *Mare Liberum*, published in 1609 on behalf of the Dutch East India Company, argued that, "Every nation is free to travel to every other nation, and to trade with it" as a matter of natural law.⁹¹ John Selden, responding in support of British

⁹¹ HUGO GROTIUS, THE FREEDOM OF THE SEAS: OR THE RIGHT WHICH BELONGS TO THE DUTCH TO TAKE PART IN THE EAST INDIAN TRADE 7 (James

claims to maritime sovereignty in 1652, argued instead that, “the SEA, by the LAVV OF NATURE, or NATIONS is not common to all men, but capable of PRIVATE DOMINION or Proprietie, as well as the LAND.”⁹²

The legal history of the continental shelf is yet another instantiation of this age-old debate between Grotius and Selden. In the modern law of the sea, UNCLOS Part VI governs the continental shelf. It provides that the continental shelf:

comprises the seabed and subsoil of the submarine areas that extend beyond [a coastal State’s] territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.⁹³

Over this land mass, “the coastal State exercises . . . sovereign rights for the purpose of exploring it and exploiting its natural resources.”⁹⁴ This is an exclusive right, “if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these

Brown Scott ed., Ralph van Deman Magoffin trans., 2001) (“licere cuivis genti quamvis alteram adire, cumque ea negotiari”).

⁹² JOHN SELDEN, *MARE CLAUSUM SEU* (Marchmont Nedham trans., 1652), available at

<https://quod.lib.umich.edu/e/eebo/A59088.0001.001/1:2?rgn=div1;view=fulltext>.

⁹³ UNCLOS art. 76(1), Dec. 10, 1982, 1833 U.N.T.S. 397.

⁹⁴ *Id.* at Art 77(1).

activities without the express consent of the coastal State.”⁹⁵ These provisions have real weight. In 2007, 14% of the United States’ natural gas and 27% of its oil production were derived from drilling on its continental shelf.⁹⁶ When the United States laid claim to the continental shelf, then-Secretary of the Interior Harold Ickles stated that, “the Continental Shelf ranks with the lands which we acquired by the Louisiana Purchase, or by the opening of the West, or by the purchase of Alaska.”⁹⁷

UNCLOS’ articulation of a State’s rights to the continental shelf was taken almost verbatim from the 1958 Geneva Convention on the Continental Shelf.⁹⁸ This is

⁹⁵ *Id.* at Art 77(2).

⁹⁶ U.S. DEPT. OF THE INTERIOR, RESOURCES OF THE OUTER CONTINENTAL SHELF - REMARK BY THE DIRECTOR OF OFFSHORE ENERGY AND MINERALS MANAGEMENT, MINERALS MANAGEMENT SERVICE, March 17 2009, https://www.doi.gov/ocl/hearings/111/ResourcesOnTheOCS_031709.

⁹⁷ Harold Ickles, *Annual Report of the Secretary of the Interior (1945)*, 40 LAWS AND REGULATIONS OF THE REGIME OF THE HIGH SEAS VOLUME I, U.N. Doc. ST/LEG/SER.B/1 (Jan. 11, 1951).

⁹⁸ Article 2 of the Geneva Convention provided that “The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources” and that these rights “are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal State.” Convention on the Continental Shelf art. 2, April 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 311. This is almost identical to language in UNCLOS Article 77(1-2). The two conventions differ primarily in their definition of the outer boundary of the continental shelf (compare, for example, UNCLOS Art 76 with Geneva Convention Art 1). This was largely due to technological developments that had expanded the depths of the sea amenable to exploitation and General Assembly resolutions calling for the resources of the deep

particularly striking given that it was only in 1945, thirteen years before this Convention was signed, that President Harry Truman first introduced the concept of the continental shelf. The remainder of this subsection will describe Truman's Presidential Proclamation, outline other States' reactions to it, and explain why it can be seen as the cause of today's regime for the continental shelf.

b. HARRY TRUMAN'S PRESIDENTIAL PROCLAMATION

Proclamation 2667 on the "Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf" stated for the first time that "the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction

seabed to be mined for the "benefit of all mankind." DONALD ROTHWELL & TIM STEPHENS, *THE INTERNATIONAL LAW OF THE SEA* 112 (2d ed., 2016). These policy imperatives required a new formula for defining the outer limits of the continental shelf. A number of alternatives were considered throughout the Third Conference on the Law of the Sea. Third U.N. Conference on the Law of the Sea, *Preliminary study illustrating various formulae for the definition of the continental shelf*, U.N. Doc. A/CONF.62/C.2/L.98 and Add.1-3 (Official Records of the Third United Nations Conference on the Law of the Sea, Volume IX) (April 18, 1978), http://legal.un.org/docs/?path=../diplomaticconferences/1973_los/docs/english/vol_9/a_conf62_c2_198_and_add1_3.pdf&lang=E. The Conference's Second Committee eventually settled on a more geologically-based formula that left open the possibility of national entitlements beyond 200 nautical miles. ROTHWELL & STEPHENS, *supra* note 98 at 113.

and control.”⁹⁹ This extension of jurisdiction was not grounded in any international legal right. Instead, President Truman argued that, “the exercise of jurisdiction over the natural resources of the subsoil and sea bed of the continental shelf by the contiguous nation is reasonable and just” and that “the continental shelf may be regarded as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it.”¹⁰⁰

In these few short paragraphs we can identify three causes of the incipient continental shelf regime. First, there is a recognition of material cause – advances in technology transformed this submarine area into a monetizable resource.¹⁰¹ Changing technology lifted constraints on the extent to which a State might plausibly assert rights to this vast undersea area and its resources. Other States, also forwarding a variety of claims to the continental shelf, would point out this same change in circumstances.¹⁰²

⁹⁹ Proclamation No. 2667, 10 Fed. Reg. 12303 (Sept. 28, 1945).

¹⁰⁰ *Id.*

¹⁰¹ U.S. Press Release accompanying the proclamation (“The rapid development of technical knowledge and equipment occasioned by the war now makes possible the determination of the resources of the submerged lands outside the three-mile limit.”). Harry Truman, *Concerning the Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf* (1945), 39 LAWS AND REGULATIONS OF THE REGIME OF THE HIGH SEAS VOLUME I, U.N. Doc. ST/LEG/SER.B/1 (Jan. 11, 1951).

¹⁰² Saudi Arabia noted that, “by God’s providence valuable resources may underlie parts of the Persian Gulf off the coasts of Saudi Arabia, and that modern technology by the grace of God makes it increasingly practicable to utilize these resources.” Abdul’Aziz ibn’Abdul Rahman Al Faisal Al Sa’ud, *Royal Pronouncement Concerning the Policy of the Kingdom of Saudi Arabia with Respect to the Subsoil and Sea Bed of Areas in the Persian*

Second, Proclamation 2667 is quite explicit about the final cause (national interests) motivating the U.S. claim. In particular, the proclamation cited “the long range world-wide need for new sources of petroleum and other minerals,” the need “to utilize or conserve these resources,” and the State’s concomitant security interest in “keep[ing] close watch over activities off its shore which are of the nature necessary for utilization of these resources.”¹⁰³ Again, subsequent States would also aver to many of the same interests (though, as we will see below, States would also use the Proclamation to justify preexisting claims).¹⁰⁴

Gulf Contiguous to the Coasts of the Kingdom of Saudi Arabia, 22 LAWS AND REGULATIONS OF THE REGIME OF THE HIGH SEAS, VOLUME I, U.N. Doc. ST/LEG/SER.B/1 (Jan. 11 1951), [hereinafter, Saudi Declaration]; Abu Dhabi noted that “valuable resources underlie parts of the Persian Gulf off the coasts of Abu Dhabi and it has become increasingly possible to utilize such submerged resources.” *Proclamation with respect to the seabed and the subsoil of the high seas of the Persian Gulf* (June 10 1949), 23 LAWS AND REGULATIONS OF THE REGIME OF THE HIGH SEAS, VOLUME I, U.N. Doc. ST/LEG/SER.B/1 (Jan. 11 1951), [Hereinafter, Abu Dhabi Declaration]. Similar statements were made by other Arab States under the Protection of the United Kingdom, including Ajman, Bahrain, Dubai, Kuwait, Qatar, Ras al Khaimah, Sharjah, and Umm al Qaiwain; Mexico found that, “growing need for States to conserve those natural resources which, throughout the ages, and for various reasons, have been beyond their control and have not been fully utilized.” *Presidential Declaration with respect to continental shelf* [sic] (Oct. 29 1945), 13 LAWS AND REGULATIONS OF THE REGIME OF THE HIGH SEAS, VOLUME I, U.N. Doc. ST/LEG/SER.B/1 (Jan. 11, 1951), [hereinafter, Mexican Declaration].

¹⁰³ Proclamation No. 2667, *supra* note 99.

¹⁰⁴ The Chilean Presidential Declaration considered that, the United States, Mexico, and Argentina had claimed the continental shelf “within the limits necessary to preserve for the said States the natural riches belonging to them.” *Presidential Declaration concerning continental shelf* [sic] (June 23 1947), 6 LAWS AND REGULATIONS OF THE REGIME OF THE

Third, Proclamation 2667 was a definitional instrument, and therefore a formal cause of what would eventually come to be the continental shelf regime. This is most readily evident by the extent to which the Proclamation changed the terms of international discourse regarding State claims to submerged resources. Through the end of World War II, most maritime powers (the United States and United Kingdom in particular) recognized coastal State sovereignty only over a three nautical mile band of sea immediately adjacent to the coast.¹⁰⁵ This included subsea resource

HIGH SEAS, VOLUME I, U.N. Doc. ST/LEG/SER.B/1 (Jan. 11, 1951), [hereinafter, Chilean Declaration]. Costa Rica stated that, ("the fishing resources and the minerals existing under the submarine shelf, are of capital importance for the nation and the State as food and industrial wealth." *Maritime Fishing and Hunting Act* (Sept. 28 1948), 9 LAWS AND REGULATIONS OF THE REGIME OF THE HIGH SEAS, VOLUME I, U.N. Doc. ST/LEG/SER.B/1 (Jan. 11, 1951), [hereinafter, Costa Rican Declaration]. The Mexican government made a similar point - "the shelf contains natural resources, liquid and gaseous minerals, phosphates, calcium, hydrocarbons, etc., of inestimable value whose legal incorporation into the national property is urgent and cannot be delayed" Mexican Declaration, *supra* note 103 at 13; As did Peru, "the shelf contains certain natural resources which must be proclaimed as our national heritage," *Presidential Decree No. 781 Concerning Submerged Continental or Insular Shelf* (Aug. 1 1947), 16 LAWS AND REGULATIONS OF THE REGIME OF THE HIGH SEAS, VOLUME I, U.N. Doc. ST/LEG/SER.B/1 (Jan. 11, 1951), [hereinafter Peruvian Declaration]. Similar statements were made by a variety of Arab States under the Protection of the United Kingdom - "it is desirable in the interests of protection, conservation and orderly development that the exploitation of such resources should be properly limited." Abu Ilhabi Declaration, *supra* note 103, at 23.

¹⁰⁵ See, e.g., SAYRE ARCHIE SCHWARTZRAUBER, *THE THREE-MILE LIMIT OF TERRITORIAL SEAS* (1972).

rights.¹⁰⁶ Examples of subsea resource rights exercised beyond three nautical miles were seen as historic, prescriptive exceptions (e.g., the British claimed all of Palk Bay in present-day Sri Lanka based on uninterrupted sovereign claims by local rulers over chank fisheries beyond three nautical miles).¹⁰⁷ The clearest sign that a change was afoot came in 1942, when the United Kingdom and Venezuela signed a treaty delimiting jurisdiction over the Gulf of Paria. Subsequent to this treaty, both Venezuela and the United Kingdom, on behalf of the Colony of Trinidad and Tobago, annexed "the submarine areas of the Gulf of Paria."¹⁰⁸ Venezuela and the United Kingdom defined this submarine area as "the sea-bed and sub-soil outside of the territorial waters of the High Contracting Parties."¹⁰⁹ Proclamation 2667 and the Gulf of Paria documents are certainly similar. They both address, for example, the seabed and subsoil beyond the territorial sea. But Proclamation 2667 was definitional insofar as it (1) generalized the claim

¹⁰⁶ An 1858 Act of the British Parliament, for example, affirmed the Crown's right to mines and minerals "under the open Sea below Low-water Mark" off the coast of Cornwall. An Act to declare and define the respective Rights of Her Majesty and of Her Royal Highness the Prince of Wales and Duke of Cornwall to the Mines and Minerals in or under Land lying below High-water Mark, within and adjacent to the County of Cornwall, and for other Purposes 1858, 21 & 22 Vict. C. CIX,

¹⁰⁷ 163 Parl Deb HC (5th ser.) (1923) col. 1418 (UK); PHILIP C. JESSUP, *THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION* 15-16 (1927).

¹⁰⁸ *Submarine Areas of the Gulf of Paria (Annexation) Order* (Aug. 6 1942), Laws of Trinidad and Tobago.

¹⁰⁹ Treaty between His Majesty in respect of the United Kingdom and the President of the United States of Venezuela relating to the Submarine Areas of the Gulf of Paria, Feb. 26, 1942, U.K.-Venezuela, GR. BRIT. T.S. NO. 10 (1942).

beyond a specific location (here, the Gulf of Paria), (2) recast the claim as one limited to resource rights, (3) extended the claim to the entire continental shelf, which previously did not have legal character, and (4) made the claim one of natural right (i.e., jurisdiction emerged from the continental shelf's appurtenance to the coastal State, and did not require a treaty to exist). As the sharp change in subsequent international practice will show, these definitional shifts had real bite.

c. RESPONSE FROM THE INTERNATIONAL
COMMUNITY

At its core, the United States' rules for the continental shelf had three elements: (1) rights beyond the territorial sea apply only as to the subsoil and seabed *of the continental shelf*; (2) the coastal State only enjoys *jurisdiction and control* over the continental shelf; and (3) a State is entitled only to *the natural resources (i.e., gas and minerals)* of the continental shelf. From 1945 to 1950, ten Arab states (nine of them under United Kingdom protection), nine Latin American States, the Bahamas (through a United Kingdom Order-in-Council), Iceland, and the Philippines all issued unilateral declarations on the continental shelf. And while these declarations took their inspiration from Proclamation 2667, they proffered rules that contradicted each of the three tenets put forth by the United States.

Geographically disadvantaged States (i.e., those with no or a narrow continental shelf) differed from the U.S. rule primarily regarding the first tenet. The Saudi Royal Pronouncement, for example, does not mention the continental shelf. It instead declares that "the subsoil and sea bed of those areas of the Persian Gulf seaward from the

coastal sea of Saudi Arabia but contiguous to its coasts, are declared to appertain to the Kingdom of Saudi Arabia and to be subject to its jurisdiction and control."¹¹⁰ Abu Dhabi (and similarly situated Arab States under the protection of the United Kingdom) similarly announced "the right of any littoral state to exercise its control over the natural resources of the seabed and subsoil adjacent to its coasts."¹¹¹ Other States were more creative. Chile, for example, laid claim only to the continental shelf, but contended that, as a legal concept, the continental shelf extended to depths the United States considered beyond the pale.¹¹²

A second group of States asserted that the continental shelf was a zone of complete sovereignty, not mere jurisdiction and control. This was the position of most Latin American States. Argentina, for example, declared that it was "the right of each nation to consider as national territory

¹¹⁰ Saudi Arabian Declaration, *supra* note 102, at 22.

¹¹¹ Abu Dhabi Declaration, *supra* note 102, at 23.

¹¹² Chile, for example, declared that, "(1) The Government of Chile confirms and proclaims its national sovereignty over all the continental shelf adjacent to the continental and island coasts of its national territory, whatever may be their depth below the sea") Chilean Declaration, 6. Costa Rica's law stated that "National sovereignty is confirmed and proclaimed in the whole submarine platform or continental and insular shelf adjacent to the continental and insular coasts of the national territory, *at whatever depth it is found*," [emphasis added] Costa Rican Declaration, 9. At the time, many geologists understood the continental shelf to extend only to the point "where the sea covering the continental shelf reaches a depth of 200 meters." ARTHUR WATTS, THE INTERNATIONAL LAW COMMISSION 1949-1998 98 (vol. I, 1999). This criteria would eventually be incorporated into Article 1 of the Geneva Convention on the Continental Shelf.

the entire extent of its . . . continental shel[f].”¹¹³ Other States extended the State’s sovereignty by implication. A United Kingdom Order-in-Council, for example, “extend[ed] the boundaries of the Colony of the Bahamas so as to include the continental shelf contiguous to the coasts of the Colony.”¹¹⁴

¹¹³ *Decree No. 14708 Concerning National Sovereignty over the Epicontinental Sea and the Argentina Continental Shelf* (Oct. 11 1946), 4 LAWS AND REGULATIONS OF THE REGIME OF THE HIGH SEAS, VOLUME I, U.N. Doc. ST/LEG/SER.B/1 (Jan. 11, 1951), [hereinafter, Argentine Declaration]. Other Latin American States to declare sovereignty included Chile - “(1) The Government of Chile confirms and proclaims its national sovereignty over all the continental shelf adjacent to the continental and island coasts of its national territory, whatever may be their depth below the sea,” Chilean Declaration, *supra* note 105 at 6; Costa Rica - “National sovereignty is confirmed and proclaimed in the whole submarine platform or continental and insular shelf adjacent to the continental and insular coasts of the national territory,” Costa Rican Declaration, *supra* note 105 at 9; Peru - “1. To declare that national sovereignty and jurisdiction can be extended to the submerged continental or insular shelf adjacent to the continental or insular shores of national territory, whatever the depth and extension of this shelf may be,” Peruvian Declaration, *supra* note 104 at 16.

¹¹⁴ Also note provision from Honduras, “Article 4. ‘The limits of Honduras and its territorial division shall be determined by law. The submarine platform or continental and insular shelf, and the waters which cover it, in both the Atlantic and Pacific Oceans, at whatever depth it may be found and whatever its extent may be, forms a part of the national territory,” *Congressional Decree No. 102 Amending the Political Constitution* (March 7 1950), 11 LAWS AND REGULATIONS OF THE REGIME OF THE HIGH SEAS, VOLUME I, U.N. Doc. ST/LEG/SER.B/1 (Jan. 11, 1951), [hereinafter Honduran Declaration]; Nicaragua - “Article 5. The national territory. . . also comprises . . . the continental shelf, the submerged foundations (*zocalos submarinos*), the air space and the stratosphere,” *Political Constitution* (Nov. 1 1950), 15 LAWS AND REGULATIONS OF THE REGIME OF THE HIGH SEAS, VOLUME I, U.N. Doc. ST/LEG/SER.B/1 (Jan. 11, 1951), [hereinafter, Nicaraguan Declaration]; and Panama - “Article

By leaving the precise legal status of the continental shelf more ambiguous, these pronouncements presaged the compromise that would eventually be codified in UNCLOS (i.e., that a coastal State exercised "sovereign rights" only as to the resources of the continental shelf).

Lastly, a number of States asserted that rights to the continental shelf extended to the living resources in the above water column. Some went so far as to claim sovereignty over the superjacent water column, extending their territorial reach many hundreds of miles beyond the three nautical mile limit preferred by major maritime powers. Chile, for example, proclaimed sovereignty "over the adjacent seas within the limits necessary to preserve . . . the natural riches belonging to them."¹¹⁵ Similar declarations were made by Argentina,¹¹⁶ Costa Rica,¹¹⁷ Honduras,¹¹⁸

209. The following belong to the State and are of public use . . . (4) The aerial space and the submarine continental shelf which appertain to the national territory," *Constitution* (March 1 1946), 15 LAWS AND REGULATIONS OF THE REGIME OF THE HIGH SEAS, VOLUME I, U.N. Doc. ST/LEG/SER.B/1 (Jan. 11, 1951), [hereinafter, Panamanian Declaration].

¹¹⁵ Chilean Declaration, *supra* note 104, at 6.

¹¹⁶ Argentina Declaration, *supra* note 113, at 5.

¹¹⁷ "Article 2. The rights and interests of Costa Rica are proclaimed over the seas adjacent to the continental and insular coasts of the national territory, whatever their depth, and to the extent necessary to protect, conserve, and utilize the natural resources and wealth which exist or shall come to exist on, in, or under said seas," Costa Rican Declaration, *supra* note 104, at 10.

¹¹⁸ "The submarine platform or continental and insular shelf, and the waters which cover it, in both the Atlantic and Pacific Oceans, at whatever depth it may be found and whatever its extent may be, forms a part of the national territory," Honduran Declaration, *supra* note 114, at 11.

Panama,¹¹⁹ and Peru.¹²⁰ These more extensive claims were based on an interest, shared with countries like Iceland, in preserving near-abroad fish stocks for domestic use.¹²¹ The United States and other maritime powers, which depended more heavily on far-seas fishing, naturally resisted this extension of authority.

Taken together, this ferment of conflicting rules bear out two of my theoretic conclusions. First, unintended consequences are an important aspect of regime formation. While Washington could not have foreseen the myriad ways in which other States might leverage its redefinition of the continental shelf, it was foreseeable that the nascent rules would be contested. Second, States fully understand that rules are inherently political, and work vigorously to advance rules that best accord with their national interests. By 1950, for example, the United States had demarched

¹¹⁹ "Article 3. For the purposes of fisheries in general, national jurisdiction over the territorial waters of the Republic extends to all the space above the sea bed of the submarine continental shelf," Panamanian Declaration, *supra* note 114, at 16.

¹²⁰ "2. National sovereignty and jurisdiction are to be extended over the sea adjoining the shores of national territory whatever its depth and in the extension necessary to reserve, protect, maintain and utilize natural resources and wealth of any kind which may be found in or below those waters," Peruvian Declaration, *supra* note 104, at 17.

¹²¹ ROTHWELL & STEPHENS, *supra* note 98, at 10; *see also*, "Article 1. The Ministry of Fisheries shall issue regulations establishing explicitly bounded conservation zones within the limits of the continental shelf of Iceland, wherein all fisheries shall be subject to Icelandic rules and control," *Iceland Law No. 44 Concerning the Scientific Conservation of the Continental Shelf Fisheries* (April 5 1948), 12 LAWS AND REGULATIONS OF THE REGIME OF THE HIGH SEAS, VOLUME I, U.N. Doc. ST/LEG/SER.B/1 (Jan. 11, 1951).

Chile, Argentina, Peru, and Saudi Arabia, objecting to what it saw as rules “unsupported by accepted principles of international law.”¹²²

The period from 1950 to 1958 saw the proliferation of agents contesting for supremacy in the creation of an international regime for the continental shelf. The International Law Commission, for example, was called upon to draft proposals for the codification of a State’s right to the continental shelf. The Commission did not engage in a passive reflection of *lex lata* (the law as it currently exists). The Commission rapporteur, JPA Francois, for example, contended that, “It was more difficult to amend a law that had already been established by States, than to guide it into the desired channel by the enunciation of certain rules and principles.”¹²³ The Commission was quite successful in this regard. Articles 67 and 68 of its 1956 report to the General Assembly became, verbatim, Articles 1 and 2(1) of the 1958 Geneva Convention. These Articles provided, respectively, that (1) the continental shelf extended to a depth of 200

¹²² Regarding Chile, Argentina, and Peru, the United States objected to proclamations of “national sovereignty . . . over the continental shelf and over the seas adjacent to the coast” given that they fail “with respect to fishing, to accord appropriate and adequate recognition of the rights and interests of the United States in the high seas off the coast”) JOHN NOYES, ERIK FRANCKX, & KRISTEN JURAS, *CASES AND MATERIALS ON THE LAW OF THE SEA* 519 (2d ed., 2014). Regarding Saudi Arabia, the United States objected to “All provisions to the effect that the coastal sea, i.e., the marginal sea, of the Kingdom extends seaward of a belt of three nautical miles along its coast or around its islands,” ALI A. EL-HAKIM, *THE MIDDLE EASTERN STATES AND THE LAW OF THE SEA* 215 (1979).

¹²³ Int’l Law Comm’n, Yearbook Vol. I: Law of the sea – regime of the high seas 66th Plenary Meeting, U.N. Doc. A/CN.4/SR.66, at 215, (July 12 1950).

meters or where “the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas” and (2) “The coastal State exercises . . . sovereign rights for the purpose of exploring [the continental shelf] and exploiting its resources.”¹²⁴ It’s not that these provisions were uncontested. Many States, including the United States, objected to the International Law Commission’s formulations during the Geneva Convention negotiations.¹²⁵ But a combination of being the first to get a crack at devising a compromise text, as well as accurately understanding the verbiage States on both sides would be willing to accept,

¹²⁴ Int’l Law Comm’n, Report of the International Law Commission covering the work of its eighth session, 23 April-4 July 1956, U.N. Doc. A/3159, at 296-97 (Nov. 1956).

¹²⁵ See, e.g., statements by Argentina - “it was a pity that the Commission was reluctant to accept the principle of sovereignty of the coastal State over the continental shelf,” U.N. Conference on the Law of the Sea, *Official Records Volume VI Fourth Committee (Continental Shelf) Summary records of meetings and Annexes*, 2, U.N. Doc. A/CONF.13/42; China - “the term ‘sovereign rights’ in article 68 should be replaced by ‘rights of control and jurisdiction’”) *Id.*, at 4; Denmark - “it would prefer the words ‘sovereign rights’ in article 68 to be replaced by ‘control and jurisdiction’; any reference to sovereignty, even if followed by a restrictive clause, might cause difficulties during international armed conflicts or with regard to scientific research”) *Id.*, at 13; Chile - “the best course would be to recognize the sovereignty of the coastal State over the continental shelf and then attempt to specify the status of the superjacent waters,” *Id.*, at 16; Italy - “it was incorrect to speak of the coastal State exercising sovereign rights over the continental shelf, as did article 68,” *Id.*; United States - “In order to make it clear that the waters above the continental shelf were not affected, the United States delegation would like to see the word ‘sovereign’ deleted, while agreeing to the retention of the word ‘rights’,” *Id.*, at 20.

powerfully affected the final regime that, largely, exists today.

d. TAKEAWAYS: THE CONTINENTAL SHELF AND
CRITICAL REALISM

In the end, how well were United States interests served by unilaterally asserting jurisdiction and control over the continental shelf in 1945? By almost any metric, very well. The regime for the continental shelf was restricted to the subsoil and seabed of the ocean floor. Tellingly, Proclamation 2667 did not provide precise boundaries for the extent of the continental shelf, which over time changed with improved technology. Coastal State rights were restricted to natural resources, which included mineral and non-living resources as well as “sedentary species.” This is largely in line with the original proclamation, which suggested that a State only had rights to petroleum and minerals. And codified international law came to reject the contention that a State exercises sovereignty over the continental shelf.¹²⁶

From a theoretic perspective, we can identify all four of our critical realist causes in this story. A contest of interests characterized the entire regime-building process, motivating States to advance or stymie the rules first proffered by the United States (final cause). The United States, as the predominant maritime power throughout this period, had significant capacity to induce other States to

¹²⁶ Any difference one might impute into “sovereign rights” versus “jurisdiction and control” has mattered little insofar as the actual practice of States is concerned.

accept its version of the rule (material cause). It is important to note, however, that military might did not allow Washington to impose its view on other States (or even the International Law Commission). The United States actively engaged with other States after the Proclamation was issued, objecting to practices that were contrary to its interests and actively participating in negotiations leading up to the 1958 Geneva Convention (effective cause). Finally, and most importantly, the United States redefined a geographical entity that, previously, had little monetary or security value. None of the subsequent jockeying over language or particular interests would have mattered without that first, crucial step.

We can derive three policy lessons from this case study. First, rules are not created in a vacuum. The Proclamation's ingenuity was in its ability to harness opportunities presented by changing technology and recasting preexisting international practice to better accord with U.S. national interests. Exceptional entitlements to chank beds and the division of the seabed in the Gulf of Paria could easily have been recast in terms of absolute sovereignty over the continental shelf (ala Chile, Argentina, etc.). Second, domestic legal action does not need to apply to extraterritorial agents to have an international effect or to create an international regime. The Proclamation does not purport to bind any entity other than the United States, although all exercises of jurisdiction are necessarily exclusionary. Policymakers should not cabin themselves, therefore, to policy solutions that focus on effective causation (i.e., acting directly on other agents). Finally, domestic action was only the opening gambit in a whole-of-government approach to regime creation. The United States paired domestic legal action with a robust campaign of

international engagement, ranging from bilateral demarches to participation in formal, international negotiations. This multi-pronged strategy is essential when there is more lead-time between domestic action and international codification, as will be seen in the case of international corruption.

e. BRIBERY OF FOREIGN GOVERNMENT OFFICIALS

The Foreign Corrupt Practices Act (FCPA) was enacted by President Jimmy Carter in 1977, and was the first piece of domestic legislation to criminalize giving bribes to foreign officials. It was followed 20 years later by the OECD's Anti-Bribery Convention and the United Nations' Convention Against Corruption (CAC) in 2003. Since 2003, a number of States have enacted domestic anti-bribery statutes in furtherance of these international obligations. For our purposes, this has most notably included the United Kingdom's 2010 Bribery Act.

This section will trace the causal chain from Watergate, through the FCPA, to the modern, increasingly dense international anti-bribery regime. This history will show the active role that Congress can play in creating international legal regimes and the utility of pairing domestic action with international engagement.

f. From Watergate to the FCPA

In the widening wake of Watergate, Senator Frank Church led a less well-known Subcommittee on Multinational Corporations that investigated U.S. corporate

political contributions to foreign governments.¹²⁷ The subcommittee's investigations sparked a series of revelations that seriously destabilized governments friendly to the United States. Many of the earliest revelations centered around Lockheed Aircraft Corporation, an important American defense manufacturer. The Italian Communist Party, for example, almost came to power after it was discovered that the former Chief of the Italian Air Force received \$1.6 million in bribes from Lockheed.¹²⁸ Japanese Prime Minister Kakuei Tanaka was forced to step down, and subsequently arrested, for accepting \$1.7 million from Lockheed.¹²⁹ Prince Bernhard of the Netherlands, consort of the Queen, had to resign his official posts after receiving \$1.1 million in Lockheed payoffs.¹³⁰ But Lockheed was far from the only American corporation that bribed foreign officials. By 1977, the Securities and Exchange Commission (SEC) had uncovered 300 instances in which U.S. companies bribed foreign officials, to the tune of at least \$300 million.¹³¹ Gulf

¹²⁷ David Leigh & Rob Evans, *The Lockheed scandal*, THE GUARDIAN (June 8, 2007), <https://www.theguardian.com/world/2007/jun/08/bae35>.

¹²⁸ *Italians Arrest An Ex-Air Chief*, N.Y. TIMES (March 23, 1976), <http://www.nytimes.com/1976/03/23/archives/italians-arrest-an-exair-chief-general-fanali-charged-in-lockheed.html>; *Foreign Corrupt Practices Act: Hearings on H.R. 3815 and H.R. 1602, before the Subcommittee on Consumer Protection and Finance of the Committee on Interstate and Foreign Commerce, 95th Cong. 173 (1977)* (statement of Representative Stephen Solarz).

¹²⁹ *Japan Arrests 17th Official in Lockheed Bribe Scandal*, N.Y. TIMES (Aug. 21, 1976), <http://www.nytimes.com/1976/08/21/archives/japan-arrests-17th-official-in-the-lockheed-bribe-scandal.html>.

¹³⁰ *Hearings on H.R. 3815, supra* note 128, at 172.

¹³¹ *Foreign Corrupt Practices Act: Hearings on S. 305, before the Comm. on Banking, Housing, and Urban Affairs, 95th Cong. 1 (1977)* (opening

Oil, for example, illegally contributed \$4 million to the ruling South Korean Democratic Republican Party's campaign war chest.¹³² General Telephone lost out on an Indonesian telecommunications contract after the Hughes Aircraft Company, allegedly, agreed to pay \$40 million in bribes.¹³³

These reports led to a widespread belief that the public was losing faith in American capitalism. Senator William Proxmire, for example, stated that, "Public confidence in the business community, the heart of our free enterprise system, has been seriously affected by these revelations."¹³⁴ Secretary of the Treasury Michael Blumenthal attested that, "the Carter Administration

statement of Senator Proxmire). The exact amount of money tendered in bribes is disputed. Professor Nicholas Wilfson, in his Statement before the Senate Committee on Banking, Housing, and Urban Affairs, testified that, "More than 300 corporations have admitted to the payment of more than \$400,000,000 in questionable payments." *Id.*, 215. On the other end of the spectrum, Representative Robert Eckhardt, Chairman of the House Subcommittee on Consumer Protection and Finance of the Committee on Interstate and Foreign Commerce, stated that, "Since 1974, approximately 200 American corporations have admitted making questionable foreign payments exceeding \$300 million." *Hearings on H.R. 3815, supra* note 128 at 1. Notwithstanding these numerical discrepancies, the scale of this corruption is striking (\$300 million in 1977 was approximately \$1.2 billion in 2017).

¹³² *Hearings on H.R. 3815* (statement of Dr. Gordon Adams), *supra* note 128, at 28.

¹³³ Seymour Hersh, *Hughes Aircraft Faces Allegation that it Used Bribery in Indonesia*, N.Y. TIMES, Jan. 25, 1977. Hughes Aircraft Company denied the allegations. The Export-Import Bank, a U.S. Government entity, eventually provided \$50 million in guaranteed loans to Hughes "despite knowledge of the allegations of a payoff and conducted no inquiry into the allegations." *Id.*

¹³⁴ *Hearings on S. 305, supra* note 131, at 1.

believes that it is damaging both to our country and to a healthy world economic system for American corporations to bribe foreign officials.”¹³⁵ Revelations of untoward corporate conduct generated other domestic and foreign policy concerns. SEC Chairman Roderick Hills wrote that bribery’s greatest ill was “the defiance or circumvention of the system of corporate accountability on which the securities laws – and indeed our system of mass capital formation – rest.”¹³⁶ Representative Michael Harrington noted how “Both Chilean President Allende and Venezuelan President Perez broke off talks with U.S. officials on compensation for nationalized property when they learned of corporate payments.”¹³⁷

These domestic and international policy concerns motivated the Senate and House to pass the FCPA by the end of 1977. For our purposes, the FCPA has three relevant parts. Section 102 mandated accounting practices such that publicly traded corporations would have internal accounting controls sufficient “to provide reasonable assurances” that transactions are executed pursuant management’s general or specific authorization.¹³⁸ Sections 103 and 104 provide that

¹³⁵ *Id.*, at 67.

¹³⁶ *Id.*, at 121.

¹³⁷ *Hearings on H.R. 3815, supra* note 129, at 169.

¹³⁸ Foreign Corrupt Practices Act, Pub. L. No. 95-213, 91 Stat. 1494 (“(2) Every issuer which has a class of securities registered pursuant to section 12 of this title and every issuer which is required to file reports pursuant to section 15(d) of this title shall— (A) make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer; and (B) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that— (i) transactions are executed in accordance with management’s general or specific authorizations”).

publicly traded corporations and other U.S. “domestic concerns,” respectively, would not provide bribes to foreign officials, political parties, or other persons when there is reason to know that all or part of the bribe would be conveyed to a foreign official, political party, or candidate.¹³⁹

¹³⁹ More specifically, both §103 and §104 provided that it is unlawful “to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to— (1) any foreign official for purposes of— (A) influencing any act or decision of such foreign official in his official capacity, including a decision to fail to perform his official functions; or (B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist . . . in obtaining or retaining business for or with, or directing business to, any person; (2) any foreign political party or official thereof or any candidate for foreign political office for purposes of— (A) influencing any act or decision of such party, official, or candidate in its or his official capacity, including a decision to fail to perform its or his official functions; or (B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist . . . in obtaining or retaining business for or with, or directing business to, any person; or (3) any person, while knowing or having reason to know that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office.” *Id.*

Foreign officials include “any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of such government or department, agency, or instrumentality. Such term does not include any employee of a foreign government or any department,

Congress recognized that the FCPA would both extend to non-U.S. citizens and have extraterritorial reach. The conference report, for example, states that “the conferees determined that foreign nationals or residents otherwise under the jurisdiction of the United States would be covered by the bill in circumstances where an issuer [of stock] or domestic concern engaged in conduct proscribed by the bill.”¹⁴⁰ Similarly, the House Report noted that the definition of “domestic concern” was constructed such that it would “reach not only all U.S. companies other than those subject to SEC jurisdiction, but also foreign subsidiaries of any U.S. corporation.”¹⁴¹ This is, of course, in addition to the fact that companies publicly traded on U.S. exchanges do not necessarily have their principal place of business in the United States.¹⁴²

The FCPA, however, was always understood to be one prong of a multidimensional strategy for combating

agency, or instrumentality thereof whose duties are primarily ministerial or clerical.” *Ibid.*, §103A(b)

Domestic concerns are defined as “(A) any individual who is a citizen, national, or resident of the United States; or (B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States” *Id.*, §104(d).

¹⁴⁰ H.R. Rep. No. 95-831, at 14 (1977) (Conf. Rep.).

¹⁴¹ *Hearings on H.R. 3815, supra* note 129, at 12.

¹⁴² In 2015, for example, 923 non-U.S. companies representing 53 jurisdictions filed reports with the SEC due to their listing on U.S. exchanges. U.S. SECURITY AND EXCHANGE COMM’N, MARKET SUMMARY (2015),

<https://www.sec.gov/divisions/corpfin/internatl/companies.shtml>.

bribery of government officials. President Carter's signing statement noted that "These efforts . . . can only be successful in combating bribery and extortion if other countries and business itself take comparable action. Therefore, I hope progress will continue in the United Nations toward the negotiation of a treaty on illicit payments."¹⁴³ Secretary Blumenthal was more specific in testimony before the Senate. He noted that the Carter Administration had proposed a treaty that would (1) enforce a State's criminal laws, (2) facilitate information exchanges to aid enforcement, and (3) provide uniform disclosure requirements.¹⁴⁴ Blumenthal also highlighted the 1976 OECD Guidelines for Multinational Enterprises, which, though non-enforceable, stated that corporations should not render bribes to public officials.¹⁴⁵ The U.S. Chamber of Commerce and National Association of Manufacturers, though unsupportive of the FCPA, echoed these calls for international negotiations.¹⁴⁶ More interestingly, certain U.S.

¹⁴³ Jimmy Carter, Signing Statement,

<http://www.presidency.ucsb.edu/ws/?pid=7036>.

¹⁴⁴ *Hearing on S. 305* (statement by Sen. Blumenthal), *supra* note 131 at 69.

¹⁴⁵ *Hearing on S. 305* (Sen. Blumenthal colloquy with Sen. Tower), *supra* note 131 at 103.

¹⁴⁶ *Hearing on S. 305* (U.S. Chamber of Commerce statement for the record), *supra* note 131 at 187 ("The Chamber endorses the efforts of the U.S. Government to bring about a treaty in this area under the auspices of the United Nations Economic and Social Council (ECOSOC)"); *Id.* (National Association of Manufacturers statement for the record), 208 ("The negotiation of an international agreement to eliminate improper payments worldwide would help assure that U.S. industry is not placed at a competitive disadvantage by unfair foreign practices as well as place world commerce on a better, market oriented trade and investment basis").

Government officials were quite strategic about how the FCPA might be leveraged internationally. Senator Harrison Williams, for example, argued that “An affirmative action by our Government will facilitate, what I believe is generally agreed is necessary, an international solution. Once the bill becomes law our Government will be in a position to argue forcefully, with integrity and credibility, for bilateral and multilateral agreements.”¹⁴⁷ SEC Chairman Roderick Hills similarly noted that, “If we had treaties executed with the Germans, Dutch, Italians, Japanese, the other major industrial countries, we could practically, it seems to me, wipe out the temptation to substitute competitive bribery for fair competition.”¹⁴⁸

g. The OECD Anti-Bribery Convention and Beyond

These statements turned out to be quite prescient, albeit two decades too early. In the intervening years, American industry became convinced that the FCPA, as a unilateral measure, was hurting its international competitiveness. President Bill Clinton suggested as much in a letter to the Senate, “Since the enactment in 1977 of the Foreign Corrupt Practices Act (FCPA), the United States has been alone in specifically criminalizing the business-related bribery of foreign public officials.”¹⁴⁹ This frustration had first peaked

¹⁴⁷ *Hearing on S. 305, supra* note 131, at 2.

¹⁴⁸ *Id.* at 114.

¹⁴⁹ Message from the President of the United States Transmitting Convention on Combatting Bribery of Foreign Officials in International Business Transactions, Adopted At Paris on November 21, 1997, by a Conference held under the Auspices of the Organization for Economic

in 1988, when Congress directed the executive to more actively pursue an OECD convention against bribery modeled after the FCPA.¹⁵⁰ Three factors appear to have motivated a change in European and Japanese positions against such action. First, American business, led by General Electric's General Counsel Fritz Heimann, organized Transparency International to reshape the international conversation around bribery.¹⁵¹ The United States, even in the early days of the post-Cold War era, was limited in the extent to which it could name and shame corporations closely linked to its alliance networks in Europe and Asia. Second, a series of domestic political scandals in Europe mobilized domestic audiences to be more accepting of an international, supply-side bribery treaty.¹⁵² Lastly, capitalizing on these revelations, reports indicate that the Clinton Administration had threatened to publicly disclose the names of OECD corporations that had engaged in bribery.¹⁵³

It is remarkable how similar the Bribery Convention is to the FCPA, notwithstanding the fact that they are separated by over two decades. The State Department's

Cooperation and Development (OECD). Convention Signed in Paris on December 17, 1997, by the United States and 32 Other Nations, Treaty Doc 105-43, 105th Cong. (1998), III [hereinafter, Letter of Transmittal].

¹⁵⁰ *Id.*

¹⁵¹ Elizabeth Spahn, *Implementing Global Anti-Bribery Norms: from the Foreign Corrupt Practices Act to the OECD Anti-Bribery Convention to the U.N. Convention Against Corruption*, 1 INDIANA INT'L & COMP. L. REV. 23 (2013): 4-5; Edmund Andrews, *29 Nations Agree to Outlaw Bribing Foreign Officials: Ratification is Required*, THE NEW YORK TIMES, (Nov. 21, 1997).

¹⁵² Spahn, *supra* note 151, at 6.

¹⁵³ *Id.*

Letter of Submittal for the Bribery Convention identifies only three points of departure, two of which actually went beyond the FCPA's requirements. First, the OECD Convention covers bribes by "any person" not just issuers of securities or directors of "domestic concerns."¹⁵⁴ This required the United States to expand its jurisdiction to include foreign nationals in the United States, as well as U.S. citizens operating outside the United States.¹⁵⁵ Second, Article 1(4) of the OECD Convention expands the definition of foreign public officials to include "any official or agent of a public international organization," incorporating supranational organs like the European Community into the anti-bribery framework.¹⁵⁶ The only substantive way in which the OECD Convention did not meet FCPA standards related to foreign political parties or party officials. In many OECD countries, foreign contributions to domestic political

¹⁵⁴ Letter of Transmittal, *supra* note 150, at VI ("to comply fully with the Convention, which covers bribes by 'any person,' the United States will have to expand the scope of the FCPA to encompass bribes paid by foreign persons who are not affiliated with issuers that have securities registered under the Exchange Act").

¹⁵⁵ *Id.*, at VII ("To implement fully the Convention, the United States will have to expand the FCPA to encompass acts within its territory by other foreign persons. The United States also proposes to assert jurisdiction over the acts of U.S. persons outside the United States.").

¹⁵⁶ *Id.*, at VI (Paragraph 17 of the Commentaries notes that public international organizations "include[]any international organization formed by states, governments, or other public international organizations, including a regional economic integration organization such as the European Community. The FCPA does not cover bribery of officials of 'public international organizations.'").

parties continue to be legal.¹⁵⁷ The State Department noted, however, that the Convention covers “business-related bribes to foreign public officials made through political parties or party officials, as well as bribes directed by corrupt foreign public officials to political parties or party officials.”¹⁵⁸

Additional steps have been taken to strengthen this nascent international anti-bribery regime since the OECD Convention entered into force in 2009. The United Nations CAC, for example, entered into force in 2005, focusing on demand-side prohibitions of corruption.¹⁵⁹ 183 countries are States-Parties to the CAC, though enforcement of its provisions varies widely. In 2010 the United Kingdom passed the Bribery Act, which in certain respects imposes even stricter anti-bribery requirements than the FCPA. For example, the Act prohibits facilitation payments, meaning that money paid to government clerical staff to expedite paperwork would also be prohibited.¹⁶⁰

¹⁵⁷ For example, it was only in 2017 that Australia began to consider legislation prohibiting foreign donations to political parties. Jonathan Pearlman, *Australia bans foreign donations to political parties after China controversy*, THE TELEGRAPH (Dec. 5, 2017), <http://www.telegraph.co.uk/news/2017/12/05/australia-bans-foreign-donations-political-parties-china-controversy/>.

¹⁵⁸ Letter of Transmittal, *supra* note 149, at VI.

¹⁵⁹ Spahn, *supra* note 151, at 31.

¹⁶⁰ *Id.*

h. TAKEAWAYS: ANTI-BRIBERY AND CRITICAL REALISM

Unlike the continental shelf, U.S. policymakers were better attuned to the fact that the FCPA could lay the foundation for an international anti-bribery regime. Dr. Gordon Adams, Director of Military Research at the Council on Economic Priorities, testified during a House hearing that, "One purpose of [the FCPA] is to set an example which other countries will hopefully follow."¹⁶¹ Dr. Adams also argued that the FCPA would allow "the U.S. Government . . . participating in international talks on this issue [to have] a clear, strong policy opposing such practices, giving it a leadership position rather than that of being a reluctant participant."¹⁶² The critical realist framework allows us to more fully appreciate the causal mechanisms that allowed the United States to be so successful in crafting an international anti-bribery regime.

From the perspective of material causation, we must acknowledge the extent to which the United States' economic supremacy, particularly in the immediate aftermath of the Cold War, allowed it to instantiate anti-bribery rules. In 1977, when the FCPA was adopted, U.S. GDP was more than twice that of Japan, the second largest economy at the time, and nearly four times that of Germany, the third largest economy.¹⁶³ Nearly exactly the same was

¹⁶¹ *Hearings on H.R. 3815, supra* note 129, at 37.

¹⁶² *Id.*

¹⁶³ WORLD BANK, *Data*, https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?end=2016&locations=US-JP-GB-CN&start=1977&year_low_desc=true.

true in 1998 when the Bribery Convention was adopted.¹⁶⁴ United States dominance in terms of market capitalization is even more striking. In 1977 the market capitalization of U.S. listed domestic companies was almost 1.5 times greater than that of all other countries for which the World Bank currently has data.¹⁶⁵ By 1998 it still just exceeded that of all other countries combined.¹⁶⁶ In terms of capitalization, liquidity, and diversification, U.S. stock markets are consistently the most attractive for public corporations seeking to raise capital.¹⁶⁷ This structural supremacy aided the United States, here, in two ways. First, it extended the FCPA's reach, since amending the Securities Exchange Act allowed anti-bribery prohibitions and accounting standards to be applied to all firms publicly traded in the United States. The FCPA would have been much less influential if American stock exchanges were less important internationally. Second, financial supremacy gave the United States more leverage in creating international rules. Even amongst OECD countries, the United States far outstripped any other State in terms of economic prowess. The material cause, therefore, significantly explains why the United States was able to craft an international anti-bribery regime that accorded with its interests.

¹⁶⁴ WORLD BANK, *Data*,
https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?end=2016&locations=US&start=1998&year_low_desc=true.

¹⁶⁵ WORLD BANK, *Data*,
https://data.worldbank.org/indicator/CM.MKT.LCAP.CD?end=2016&locations=US&start=1977&year_low_desc=true.

¹⁶⁶ *Id.*

¹⁶⁷ *Why the U.S. Market*, CHARLES SCHWAB,
http://www.schwab.com.hk/public/hk/us-investing/why_the_us.

The FCPA was less of a revolutionary, definitional act (formal causation) than Proclamation 2667 on the continental shelf. Even in 1977, many States had laws against bribery, and popular opposition to corruption were widely shared in a variety of States. Instead, the FCPA acted as a formal cause of the current international anti-bribery regime in two, more limited ways. First, it recast the fight against corruption as a supply-side problem. While criminal prohibitions on receiving bribes were relatively commonplace, States had not previously contemplated criminalizing giving bribes. This freed up a degree of extraterritorial enforcement that would not have been possible if corruption were only be to understood as a demand-side problem. It would be a stark imposition against comity for the United States, for example, to exert jurisdiction over a foreign government official accused of taking bribes. Indicting the U.S. held company that provided the bribe, however, less directly threatens another State's sovereignty. Second, the FCPA as a text provided an outline for the OECD Convention. As evidenced by the State Department's Letter of Submittal, the OECD Convention was so similar in substance that few U.S. domestic legislative changes were needed.

The effective and final causes of the OECD Convention are readily apparent from statements made on the record both in 1977 and 1998. Both the executive and legislative branches were explicit in their desire to persuade European and Asian allies to adopt U.S. anti-bribery rules. Non-State agents also played a role – Transparency International and the American business community more broadly were essential in pressuring the U.S. Government to force international action and shaming other States where bribery was taken less seriously. Indications that the Clinton Administration was willing to disclose unsavory deals in OECD member States

shows the extent to which coercion played an integral role in the creation of the anti-bribery regime. The final causes (national interests) underlying these rules are also clear. Congress wanted to restore faith in capitalist systems and create a level playing field, based on quality and actual price, for economic competition. The lack of normative contestation between States over the U.S. rules may indicate that many developed States were aligned in pursuing these interests. In this regard, the New York Bar Association may have been proven correct when it wrote that, "Because the membership of the OECD is comprised of only Western developed countries, it has the advantage of making it easier to achieve consensus among its members."¹⁶⁸

Policymakers today can extract five lessons from the FCPA. First, Congress has a role to play in creating international legal regimes. The FCPA originated in revelations stemming from the Church Subcommittee, and its language was largely drafted by members of Congress. Legislators, therefore, should think broadly as to the possible international effects of even domestically oriented bills. Second, the executive should think critically about how international policies can be coordinated with domestic action. From the beginning, the FCPA was understood to be only one part of a whole-of-government strategy to combat global corruption. Promised international action helped assuage domestic concerns that U.S. firms would be disadvantaged by the FCPA. By the same token, the FCPA's existence allowed the United States to better publicly pressure other OECD States and impose anti-bribery rules on non-U.S. firms listed on American exchanges. Third, and

¹⁶⁸ *Hearings on H.R. 3815, supra* note 129, at 102.

relatedly, policymakers should think of cross-national linkages as an element of national power. Here, the fact that the United States was a financial nexus for multinational corporations allowed the FCPA to have outsized international effect. Non-State agents can be powerful conduits of domestic rules to other jurisdictions, creating expectations about rules of the road that become sticky, or at least the basis for international negotiations. Similarly, fourth, venue matters. Given the unequal global distribution of economic power, a United Nations treaty on supply-side bribery was less important than a convention between States that account for the lion's share of international economic activity. Of course, this does not discount the importance of universally shared standards – China, for example, is not a party to the Bribery Convention and accounts for a substantial and increasing share of global investment. Lastly, unilateral domestic action can be costly. By the late 1980s there was a consensus in the business community that unilateral adherence to the FCPA made U.S. firms less competitive.¹⁶⁹ Rules, if adhered to, necessarily limit the universe of possible actions that agents may permissibly undertake. This imposes costs, which must be internalized by some agent either domestically or internationally. Policymakers need to balance these costs, and the

¹⁶⁹ Note that some empirical research has tended to show that while bribery may help win foreign contracts, it does not increase profits. Daniel Fisher, *Corporate Bribery May Bring In The Business, But Not Profits, Study Suggests*, FORBES (April 11, 2016), <https://www.forbes.com/sites/danielfisher/2016/04/11/corporate-bribery-may-bring-in-the-business-but-not-profits-study-suggests/#31d841f3102e>.

distribution of cost, against the prospective gains to be had in eventually crafting an international legal regime.

IV. MODERN CHALLENGES: DATA PRIVACY AND ARTIFICIAL INTELLIGENCE

The pace of technological change has only quickened since regimes for the continental shelf and bribery were developed in the 20th century. These technological revolutions create new issues for which rules must be applied. The two most pressing manifestations of this phenomenon concern digital privacy and AI. In both, States have already, or soon will, enact domestic rules that, through the same causal mechanisms seen above, begin to constitute international legal regimes.

Take, for example, the European Union (EU)'s General Data Protection Regulation (GDPR). First, a methodological note. Unlike our previous cases, the UE is a supranational organization. As such, the GDPR story is necessarily more complicated than that of the FCPA or Proclamation 2667.¹⁷⁰ The fact that the EU is constituted differently than the U.S. as an agent in international politics, however, does not change the causal story presented here. The GDPR creates an EU-wide set of standards for the protection of personal data relating to online or real world

¹⁷⁰ To present this causal story, for example, I don't address the Member State data privacy antecedents to EU-wide data protection (e.g., the fact that the German State of Hesse enacted the country's first data privacy law in 1970). *Online Privacy Law*, THE LIBRARY OF CONGRESS (June 5 2015), <https://www.loc.gov/law/help/online-privacy-law/germany.php>.

behavior conducted in the EU.¹⁷¹ Importantly, these standards apply to the personal data of EU internet users regardless of the location of the entity holding their data. In this sense, the standards have significant extraterritorial reach.¹⁷² The GDPR defines personal data as “information relating to an identified or identifiable natural person.”¹⁷³ This understanding of personal data goes well beyond what is protected under U.S. law, to include IP address, device ID, and customer reference number.¹⁷⁴ Additionally, the GDPR imposes restrictions on transferring personal data outside of the EU. Data may only be transferred if (1) the European Commission determines that the receiving jurisdiction “ensures an adequate level of protection” consistent with the GDPR,¹⁷⁵ (2) the processing entity has provided “appropriate safeguards,”¹⁷⁶ or (3) the individual concerned has provided specific consent for the transfer.¹⁷⁷ Furthermore, the GDPR guarantees a number of privacy rights to EU internet users, including mandatory, prompt notification of data breaches likely to “result in a risk for the

¹⁷¹ *EU General Data Protection Regulation – Key Changes*, DLA PIPER, <https://www.dlapiper.com/en/us/focus/eu-data-protection-regulation/key-changes/>.

¹⁷² *Frequently Asked Questions about the incoming GDPR*, GDPR PORTAL, <https://www.eugdpr.org/gdpr-faqs.html>

¹⁷³ General Data Protection Regulation 2016 O.J. (L119/1), Art 4(1) [hereinafter, GDPR].

¹⁷⁴ C. Ryan Barber, *Apple Lawyer Warns of ‘Heavy’ Burden from Europe’s New Privacy Rules*, LAW.COM (Oct. 19, 2017), <https://www.law.com/sites/nationallawjournal/2017/10/19/apple-lawyer-warns-of-heavy-burden-from-europes-new-privacy-rules/>.

¹⁷⁵ GDPR, *supra* note 173, Art 45.

¹⁷⁶ *Id.*, at Art 46.

¹⁷⁷ *Id.*, at Art 49.

rights and freedoms of individuals,” access to one’s personal data, the ability to instruct an entity to erase one’s personal data (consistent with the “right to be forgotten”), and the ability to move one’s personal data from one processing entity to another.¹⁷⁸ Together, these rights are at the heart of the regulation’s purpose—to give citizens control over their personal data.”

These rules, of course, have historical precedents. The GDPR builds on a long history of European concern about data privacy dating back to the OECD’s 1980 Guidelines on the Protection of Privacy and Transborder Flows of Personal Data.¹⁷⁹ The Guidelines, for example, similarly define personal data as “any information relating to an identified or identifiable individual.”¹⁸⁰ Importantly, however, the Guidelines are explicit in their concern about the effect of national privacy laws on transborder data flows. The Guidelines’ preface, for example, recommends, “that Member countries endeavour to remove or avoid creating, in the name of privacy protection, unjustified obstacles to transborder flows of personal data.”¹⁸¹ One year later, the Council of Europe successfully negotiated the Convention for the Protection of Individuals with regard to Automatic

¹⁷⁸ GDPR Key Changes, *EU GDPR Portal*, last visited March 5, 2018, <https://www.eugdpr.org/key-changes.html>.

¹⁷⁹ *How did we get here?*, GDPR PORTAL, <https://www.eugdpr.org/how-did-we-get-here-.html>.

¹⁸⁰ *OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, <http://www.oecd.org/sti/ieconomy/oecdguidelinesontheProtectionofPrivacyandTransborderFlowsOfPersonalData.htm#guidelines>.

¹⁸¹ *Id.*

Processing of Personal Data, which codified many of the OECD's recommendations.¹⁸² There were hints, however, that the EU was already gradually subverting some of the OECD Guidelines' business-friendly provisions. The 1981 Convention, for example, only provided that Member States not impede the flow of personal data *as between Member States* in the name of privacy.¹⁸³ This change in emphasis was made more clear in 1995 with Directive 95/46/EC "on the protection of individuals with regard to the processing of personal data and on the free movement of such data."¹⁸⁴ The Directive, while not creating uniform enforcement across EU jurisdictions, expanded the rights of EU citizens to control their data.¹⁸⁵ Article 25 on cross-border data flows was the clearest signal of the Directive's pro-privacy stance on cross-border transfer of personal data. It provides that Member States must guarantee that transferred personal

¹⁸² Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, E.T.S. 108 (Jan. 10, 1985), <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680078b37>.

¹⁸³ *Id.*, at Art 12(2). Note, however, that States were allowed to derogate from this principle with specific legislation regarding certain types of more sensitive personal information.

¹⁸⁴ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, 1995 O.J. (L281), [hereinafter, Data Privacy Directive].

¹⁸⁵ *See, e.g., Id.*, at Section IV (Within this section, for example, Article 10 requires that "Member States shall provide that the controller or his representative must provide a data subject from whom data relating to himself are collected with" information concerning the identity of the controller (i.e., the corporate point of contact for privacy matters), the purpose for which data is being processed, and what the data is being used for.).

data will enjoy an “adequate level of protection” outside the EU. In making this adequacy determination, the Directive specifically instructs Member States to consider, *inter alia*, “the rules of law, both general and sectoral, in force in the third country in question and the professional rules and security measures which are complied with in that country.”¹⁸⁶ This adequacy framework is a far cry from the OECD’s 1980 trade oriented support for the free movement of data, and shows the extent to which the EU has, through internal policies, changed the rules regarding data privacy.

GDPR rules have already had a significant effect on data privacy practices in non-EU jurisdictions. Google, for example, has stated that it is “working hard to prepare” for the GDPR and that, as a data processor, it “will update our agreements to reflect the obligations of controllers and processors and offer data-processing agreement where required in time for May 2018.”¹⁸⁷ Google also cites its membership in the EU-US Privacy Shield as a sign of its adherence to GDPR rules on the cross-border transfer of personal data.¹⁸⁸ Privacy Shield is a set of privacy standards and protocols, negotiated and implemented by the U.S. Department of Commerce and European Commission, “to provide companies on both sides of the Atlantic with a mechanism to comply with data protection requirements,”

¹⁸⁶ *Id.*, at Art 25

¹⁸⁷ *We are committed to complying with applicable data protection laws*, GOOGLE, https://privacy.google.com/businesses/compliance/#?modal_active=none.

¹⁸⁸ *Id.*

including the GDPR.¹⁸⁹ Importantly, however, the European Commission must review Privacy Shield, and the U.S.'s implementation of it, annually to determine whether it continues to adequately protect EU citizen privacy. The Commission renewed Privacy Shield's mandate in its first review (October 2017), but made a number of notable recommendations. The Commission stated that it "would welcome if [the] U.S. Congress would consider favourably enshrining in the Foreign Intelligence Surveillance Act the protections for non-Americans offered by Presidential Policy Directive 28."¹⁹⁰ The Commission also urged the Department of Commerce to undertake regular compliance checks and actively search for companies falsely claiming to participate in Privacy Shield. These recommendations carry real weight – as of this first review, 2,400 U.S. companies have signed up for Privacy Shield, including some of the largest U.S. tech firms (e.g., Google, Facebook, and Microsoft).¹⁹¹ In 2015, the United States had to scramble when the European Court of Justice found that a previous, less restrictive cross-border data regime (Safe Harbor) was inadequately protective of

¹⁸⁹ U.S. DEPT. OF COMMERCE INT'L TRADE ADMIN., *Privacy Shield Program Overview*, <https://www.privacyshield.gov/Program-Overview>.

¹⁹⁰ *First Annual Review of the EU-U.S. Privacy Shield*, EUROPEAN COMMISSION (Oct. 18, 2017), http://europa.eu/rapid/press-release_MEMO-17-3967_en.htm. PPD-28 states that, as a matter of U.S. policy, U.S. surveillance activities must include appropriate safeguards for the personal information of all individuals, regardless of their nationality or residence.

¹⁹¹ Natasha Lomas, *EU uses Privacy Shield review to press for reform of U.S. foreign surveillance law*, TECHCRUNCH (Oct. 18, 2017), <https://techcrunch.com/2017/10/18/eu-uses-privacy-shield-review-to-press-for-reform-of-u-s-foreign-surveillance-law/>.

privacy.¹⁹² The economic fallout from a non-compliance determination, therefore, gives the EU impressive leverage to influence data privacy practices in the United States.¹⁹³

While we are far from a formal international legal regime for data privacy, there are important causal analogues to our prior case studies. In many ways, the GDPR is most similar to our discussion of the FCPA. From the perspective of material causation, the EU is leveraging its outsized importance in the digital economy. As a combined entity, its GDP is second only to that of the United States.¹⁹⁴ Its population is greater than that of the United States¹⁹⁵ and a greater share of its population uses the Internet.¹⁹⁶ In fact, outside of China and India, the EU has more Internet users

¹⁹² U.S. DEPT. OF COMMERCE INT'L TRADE ADMIN., *Welcome to the U.S.-EU Safe Harbor*, (Jan. 12, 2017), https://2016.export.gov/safeharbor/eu/eg_main_018365.asp.

¹⁹³ It is important to note, however, the potentially limited degree to which these more privacy-oriented safeguards are generalized beyond the data of EU citizens. Google, for example, notes that only EU users are asked “for permission to use data to personalize ads.” GOOGLE, *supra* note 189. Technology now allows more granular differentiation of users by jurisdiction, potentially forestalling the expansion of EU-style privacy protections to non-EU data subjects. This is especially true given the extent to which GDPR data protection may impede the use of Big Data for commercial purposes.

¹⁹⁴ WORLD BANK, *Data*, https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=EU-US-CN&year_high_desc=true.

¹⁹⁵ WORLD BANK, *Data*, <https://data.worldbank.org/indicator/SP.POP.TOTL?locations=EU-IN-CN-US>.

¹⁹⁶ WORLD BANK, *Data*, <https://data.worldbank.org/indicator/IT.NET.USER.ZS?locations=EU-US-CN>, (As of 2016, 81% versus 76% for the United States).

than any other jurisdiction.¹⁹⁷ This gives the EU incredible influence over U.S. tech firms, who are strongly incentivized to maintain access to this important market. The FCPA similarly leveraged the United States' unmatched status as a locus of capital markets to instantiate anti-bribery rules. From the perspective of formal causation, the GDPR (and its antecedent directives) has literally redefined data privacy and, perhaps more importantly, the balance to be struck between privacy and free trade. Again, the FCPA also explicitly created new definitions for bribery and changed the balance of interests as between corruption and business efficacy. The final causes (interests) underlying these changes are readily apparent – the GDPR is explicitly placed in a philosophical tradition regarding the right to privacy extending from Article 12 of the Universal Declaration of Human Rights¹⁹⁸ to Article 8 of the European Convention on Human Rights.¹⁹⁹ The FCPA was similarly universalist in its ambition, advancing a normative understanding that corruption is undesirable. Given the degree to which GDPR

¹⁹⁷ WORLD BANK, *Data*, https://data.worldbank.org/indicator/IT.NET.USER.ZS?year_high_desc=true.

¹⁹⁸ G.A. Res. 217A, *Universal Declaration of Human Rights*, U.N. Doc. A/810 (Dec. 10, 1948), (“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks”).

¹⁹⁹ Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14, E.T.S. No. 5 (March 9, 1953), <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680063765> (“1. Everyone has the right to respect for his private and family life, his home and his correspondence.”).

has already redefined the data privacy space, even before formal implementation, it is likely too late for the United States to create an international data privacy regime that would differ appreciably from the European model.

Regulation of AI is a more protean example of international regime creation by domestic rulemaking. China has embarked on a concerted, whole-of-government effort to support and regulate AI.²⁰⁰ China's "New Generation Artificial Intelligence Development Plan" declares that China seeks to be at the forefront of AI development by 2030.²⁰¹ This is being underwritten by an unprecedented outlay of government funding, to the tune of \$1 billion in 2017 alone.²⁰² Importantly for our purposes, the Chinese government also states that, "Laws and regulations about AI should be formulated."²⁰³ It is unclear how quickly such rules might be developed, or what their content might be. But, only considering material causation, we can expect that any Chinese rules will have important international effects. China has almost twice as many Internet users as the

²⁰⁰ Elsa Kania, *China Is On a Whole-of-Nation Push for AI. The US Must Match It*, DEFENSEONE (Dec. 8, 2017), <http://www.defenseone.com/ideas/2017/12/us-china-artificial-intelligence/144414/>.

²⁰¹ THE STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA, *China issues guideline on artificial intelligence development*, (July 20, 2017), http://english.gov.cn/policies/latest_releases/2017/07/20/content_281475742458322.htm.

²⁰² Yue Wang, *Will the Future of Artificial Intelligence Look Chinese?*, FORBES (Nov. 6, 2017), <https://www.forbes.com/sites/ywang/2017/11/06/will-the-future-of-artificial-intelligence-look-chinese/#4a173657fdcf>.

²⁰³ THE STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 203.

United States, many of whom use the Internet for far more of their daily life than the average American.²⁰⁴ This creates a larger pool of data with which algorithms can be tested, tweaked, and improved. As of 2016, the number of academic papers on artificial intelligence published in China outpaced that of the European Union, though it still has not matched that of the United States.²⁰⁵ The more China becomes a hub for AI innovation, the greater influence its regulations in this space will have on the international community. The Obama Administration may have realized this insight in 2016, when it released a report articulating principles for governing AI.²⁰⁶ Since 2016, however, little seems to have been done to advance these principles either domestically or internationally.

Unilateral action by the EU and China regarding data privacy and AI yield important takeaways for U.S. policymakers. The process of regime creation through domestic legal processes is alive and well. Regardless of whether other jurisdictions are overt in their attempts to create international regimes, the causal parallels to our 20th Century case studies show that recent domestic initiatives have the potential to powerfully shape and create future, formalized international regimes. The United States cannot wait until formal negotiations, one day, begin on an

²⁰⁴ Louise Lucas, *China seeks dominance of global AI industry*, FINANCIAL TIMES (Oct. 15, 2017), <https://www.ft.com/content/856753d6-8d31-11e7-a352-e46f43c5825d>.

²⁰⁵ *Id.*

²⁰⁶ NAT'L SCI AND TECH. COUNCIL COMM. ON TECH., *Preparing for the Future of Artificial Intelligence* (Oct. 2016), https://obamawhitehouse.archives.gov/sites/default/files/whitehouse_files/microsites/ostp/NSTC/preparing_for_the_future_of_ai.pdf.

international agreement (or norms or whatever new moniker is used) regarding cross-border data flows, data privacy, or AI. It will already have been too late. The contest over rules, and therefore rule, is happening now.

V. CONCLUSION

Rules, and the international regimes they constitute, are powerful conduits for expressing and exercising national interests. We see this recognized in the 2018 U.S. National Defense Strategy, which decries increasing global disorder “characterized by decline in the long-standing rules-based international order”²⁰⁷ and calls for engaging with allies to “defend[] freedom, deter[] war, and maintain[] the rules which underwrite a free and open international order.”²⁰⁸ Given the importance of international regimes, it is particularly unfortunate that the foreign policy community has been operating with an impoverished understanding of rule creation in international politics. Legal formalism has created a deeply ingrained set of assumptions that prevent policymakers from crafting international regimes that would be best positioned to advance American interests. The above case studies show that a different approach, recognizing the role of domestic rulemaking, is available. And it has been used before. We have seen how domestic legal enactments are causal antecedents of the international regimes that

²⁰⁷ U.S. DEPT. OF DEFENSE, *Summary of the 2018 National Defense Strategy of the United States of America*

1, <https://www.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf>.

²⁰⁸ *Id.*, at 8.

currently govern the continental shelf and international corruption. Indeed, the same tactics are being used right now to begin constructing international rules around data privacy and AI. Taken together, these case studies suggest that all forms of critical realist causation (material, formal, effective, and final) must be mobilized if the United States is to compete in an increasingly fractured world.

This is not to say that domestic rulemaking is the only, or always preferable, method for creating international regimes. First, as the number of agents active in international politics proliferates, the potential for unintended consequences increases. A number of States, for example, used President Truman's proclamation on the continental shelf to claim much broader maritime sovereignty. At that time, there were only 51 other agents (UN Member States) that could contest the United States' position.²⁰⁹ There are currently 193 UN Member States.²¹⁰ Divining the causal effects of domestic legislation on an international regime for data privacy, therefore, has only become more difficult. Relatedly, and second, the proliferation of agents in international politics suggests that there will be more rule fractionation before harmonization. Moreover, this proliferation of contesting rules on any given issue is more likely to be sticky as the relative distribution of power between agents in international politics becomes more diffuse. But the fact that effects have become more indeterminate does not mean that the causal mechanisms

²⁰⁹ U.N., *Growth in United Nations membership, 1945-present*, <http://www.un.org/en/sections/member-states/growth-united-nations-membership-1945-present/index.html>.

²¹⁰ *Id.*

should be ignored. As we saw with the FCPA, a well-rounded strategy can pair domestic rulemaking with international engagement over the course of decades to craft an international regime that best advances a State's interests. Third, the strategy outlined in this paper has a bias towards rulemaking. However, in some issue areas, and particularly for status-quo powers, it may be in the State's interest to prevent the creation of new rules. For these States, it is important to remember that rules (even if unspoken) always exist. It is the job of these status quo agents, therefore, to make the rules explicit. This can be achieved through domestic legislation, executive proclamations, or other public statements. Endorsing the status quo does not require ceding the initiative.

Moreover, there have been a number of historical scenarios in which it was advantageous to begin with negotiations at the international level and not rely on prior domestic legal enactments. The Antarctic Treaty and Moon Treaty provide good case studies. In both, the international community came together to decide that extraterrestrial objects and the Antarctic should be removed from national jurisdiction, and instead preserved for the benefit of all humankind into perpetuity. A similar desire to restrict State action underpinned the entire nuclear nonproliferation regime. While addressing quite different policy spaces, these areas of international law are similar in that there is a collective action problem. It is not in the interest of any State to unilaterally, as a matter of domestic regulation, limit their territorial jurisdiction or discontinue developing nuclear weapons. It is only when other agents, important in that issue area, jointly agree to limit their freedom of action that it is safe, as a matter of domestic practice, to enact restraints. This suggests that the domestic-first strategy outlined in this

paper would not be appropriate for issue sets in which the policy objective is to limit a State's capacity.

Taken together, these caveats combined with the insights above suggest that policymakers should be mindful of the following considerations when deciding whether to use my domestic-first approach. First, do you aim to limit State capacity, as opposed to expanding its jurisdiction or ambit of authority? If so, domestic solutions are unlikely to be helpful (unless your State is able to bear the costs of such action for a potentially prolonged period of time, as was true of the United States in the case of the FCPA). Second, how materially capable is your State in this issue space? Given the increasingly fractured landscape of international politics, a State needs to be quite capable for domestic rules to have real international effect. Otherwise, it may be more beneficial to create a coalition of like-minded States to enact a similar set of rules from the outset. Third, are you prepared to manage the range of reasonably foreseeable reactions by rivals? As discussed above, it is not possible to fully anticipate the ways in which a given set of domestic rules will be used by other agents contrary to one's interests. But that does not mean that it is impossible to game out likely reactions (for example, the United States could have reasonably foreseen that Latin American States would use any opportunity to expand their claims to maritime sovereignty). If the range of likely reactions cannot be managed, it may be wise to modify the proposed rule set to better accord with the interests of other. Or act in concert with like-minded States from the beginning. Fourth, and finally, is it domestically feasible to advance your proposed rule set? The answer to this question will differ depending on the issue space and current state of politics. For the

United States, this issue is complicated by significant bureaucratic coordination problems.

Within the executive branch, domestic and foreign policies are designed by separate agencies using, largely, separate staffs. Perhaps more insidiously, law in the executive branch's foreign policy bureaucracy is more often treated as a compliance mechanism rather than a tool of foreign policy. In Congress, committees that deal with foreign relations or defense policy largely do not engage with enacting laws that would have domestic effect (other than supervision over or funding for their respective agencies). Coordination between lawmaking in Congress and foreign engagement by the executive is, if possible, even more rare. Each of these silos must be bridged to formulate innovative legal strategies that leverage domestic rulemaking to create international regimes. Because as international regimes become increasingly contested, it is a great disservice to craft foreign policy with only half a toolkit.