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Channeling Unilateralism

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When crime reaches across borders to threaten human security or undermine democracy, states often respond by adopting multilateral treaties that obligate each of them to suppress the transnational crime at home. These treaties help, but only to the extent that parties comply with them. Because states generally cannot enforce their laws outside their own territory, transnational criminals can evade prosecution as long as some states are unable or unwilling to meet these treaty commitments. One solution for improving compliance with these treaties may be, counterintuitively, more unilateralism. Using case studies on transnational bribery and drug trafficking, this Article develops a theory of "channeled unilateralism" to explain how multilateralism and unilateralism can reinforce one another to further the same ends. Treaties that channel unilateralism are structured to help motivated states apply their laws to crimes that reach beyond their borders. Specifically, the treaties endorse extraterritorial extension of prescriptive jurisdiction and encourage the use of bilateral agreements for enforcement cooperation. These treaty provisions lower reputational and transaction costs for motivated states to expand their enforcement efforts as long as those efforts remain within the framework set by the treaty. Over time, these expanded unilateral efforts may promote broader compliance with the treaty regime by improving information, peer-to-peer contacts, and technical capacity. When channeled effectively, strong unilateral policies may strengthen rather than weaken multilateral regimes.

INTRODUCTION

Transnational crime is more than just a law enforcement problem. In his 2010 National Security Strategy, President Barack Obama identified transnational crime as a "key global challenge" because it "undermine[s] the stability of nations, subverting government institutions through corruption and harming citizens worldwide."[1] It is these structural harms to democracy, development, and human rights that distinguish transnational crime from more routine offenses that coincidentally have foreign elements.[2]

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1. THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 49 (May 2010), http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

2. I start from the understanding that transnational crime—which I define as networked crime that reaches across borders and threatens state or human security—is a real (rather than rhetorical) problem that harms civilians both directly (*e.g.*, through exploitation) and indirectly (*e.g.*, through local instability in the form of murders and kidnappings). Some sociologists who study transnational policing are more skeptical of the concept of transnational crime. *See, e.g.*, MATHIEU DEFLEM, POLICING WORLD SOCIETY: HISTORICAL FOUNDATIONS OF INTERNATIONAL POLICE COOPERATION 221–24 (2002) (suggesting that the problem of transnational crime has been developed in part to justify the internationalization of policing); J.W.E. Sheptycki, *Law Enforcement, Justice and Democracy in the Transnational Arena: Reflections on the War on Drugs*, 24 INT'L J. SOC. L. 61, 64–65 (1996) (terming the litany of transnational crime as the

Transnational criminals sell human beings, corrupt government officials, arm dangerous groups, subvert financial systems, steal natural and cultural resources from impoverished populations, and subject civilians to wanton violence through organized crime, piracy, and terrorism.[3]

States' ability to respond to these threats is limited, however, by the basic tenet of international law that prohibits each state from enforcing its laws beyond its territory without the permission of the other state.[4] In other words, a state cannot physically investigate or seize evidence or suspects in foreign countries, even though transnational crime by definition extends across borders. On their own, states concerned about a particular transnational crime and willing to invest resources in suppressing it—what this Article terms "motivated states"—can pursue those efforts only so far. Cross-border cases are costly and time-consuming to investigate, and transnational criminals can easily move their operations beyond the reach of cooperative states.[5] Meanwhile, other states that are affected—sometimes egregiously—by transnational crime may lack the institutional or economic capacity to respond effectively.

This is the enforcement gap in transnational criminal law: the space in the international order where states that have jurisdiction are unable or unwilling to enforce laws against transnational crime and where other states with the means and motivation to do so cannot reach.[6] States have attempted to address this problem with multilateral treaties that require each state to suppress the crime within its own territory.[7] These so-called "suppression conventions" cover everything from terrorism[8] to money laundering[9] to firearms trafficking.[10] Suppression conventions can only help narrow the enforcement gap, however, if states fulfill their treaty commitments to

"folk devils" that "sustain[ ] the transnational law enforcement enterprise"). The debate over the construction of "transnational crime," though of critical importance, is ultimately larger than the scope of this project. The focus here is instead more practical: accepting that transnational crime is a problem, and given existing power disparities, how can both weaker and stronger states use international law to reduce its occurrence?

3. *See, e.g.*, Hans-Jörg Albrecht, *The UN Transnational Crime Convention: An Introduction*, *in* THE CONTAINMENT OF TRANSNATIONAL ORGANIZED CRIME 1, 1–2 (Hans-Jörg Albrecht & Cyrille Fijnaut eds., 2002). For a popular account, emphasizing the economic context of these crimes, see MOISÉS NAÍM, ILLICIT (2005).

4. *See, e.g.*, VAUGHAN LOWE, INTERNATIONAL LAW 184 (2007).

5. *See* Tomer Broude & Doron Teichman, *Outsourcing and Insourcing Crime: The Political Economy of Globalized Criminal Activity*, 62 VAND. L. REV. 795, 830–31 (2009) (discussing the displacement of transnational crime to weaker states, as well as the negative externalities created by states unwilling to suppress these crimes domestically); Mariano-Florentino Cuéllar, *The Mismatch Between State Power and State Capacity in Transnational Law Enforcement*, 22 BERKELEY J. INT'L L. 15, 28 (2004) (noting ability of criminal finance offenders in particular to shift resources to weaker jurisdictions).

6. *See* Suzanne Katzenstein, *Dollar Unilateralism: The New Frontline of National Security*, 90 IND. L.J. 293, 302–03 (2015) (describing challenge of transnational crime).

7. *See, e.g.*, NEIL BOISTER, AN INTRODUCTION TO TRANSNATIONAL CRIMINAL LAW 275 (2012).

8. *See, e.g.*, International Convention for the Suppression of the Financing of Terrorism, *opened for signature* Dec. 9, 1999, 2178 U.N.T.S. 229 [hereinafter Financing of Terrorism Convention].

9. *See, e.g.*, United Nations Convention Against Transnational Organized Crime, *opened for signature* Nov. 15, 2000, 2225 U.N.T.S. 275.

update their laws and cooperate in investigations. This leads to a second-order problem that has generated an extensive literature: how to ensure that states comply with their treaty obligations.[11]

Treaties typically do not include coercive enforcement mechanisms. Instead, as with much of international law, enforcement of treaty obligations is diffused and indirect.[12] International organizations can help "manage" states towards greater compliance.[13] They can also increase the costs—particularly the reputational costs—of noncompliance.[14] Networks of experts, bureaucrats, and activists can foster normative commitments[15] and build domestic capacity for more compliant behavior.[16] Strong states invested in a particular treaty regime may use sanctions, or other coercive interventions, to pressure weaker states into compliance.[17] These unilateral sanctions may also help develop and spread underlying norms over the long run.[18] This focus on coercion, however, obscures the work being done by "soft" unilateralism, or unilateral acts not directed against other states *qua* states, in promoting treaty compliance.

This Article proposes that one solution to both the enforcement and the compliance problem is to structure treaties to channel this soft unilateralism. "Unilateralism" can be a loaded term, tainted by its more pejorative use in the political realm.[19] It is used here in its more traditional, legal sense to mean the independent actions of a state taken without any expectation that other states will reciprocate. I am not alone in suggesting that unilateralism can be a boon rather than a bane for the international order. For example, unilateral acts can help generate international law when multilateral

10. Protocol Against the Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention Against Transnational Organized Crime, *opened for signature* May 31, 2001, 2326 U.N.T.S. 237; Arms Trade Treaty, *opened for signature* Mar. 28, 2013, U.N. Doc. A/Conf.217/2013/L.3 (entered into force Dec. 24, 2014).

11. For a recent summary of this literature, see Jana von Stein, *The Engines of Compliance*, *in* Interdisciplinary Perspectives on International Law and International Relations: The State of the Art 477 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013).

12. *See, e.g.*, Robert O. Keohane, After Hegemony: Cooperation and Discord in the World Political Economy 98 (2d ed. 2005).

13. *See* Abram Chayes & Antonia Handler Chayes, The New Sovereignty: Compliance with International Regulatory Agreements (1995) (describing managerial model of building compliance with international commitments).

14. *See, e.g.*, Keohane, *supra* note 12, at 103–06; Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 Calif. L. Rev. 1823 (2002).

15. *See generally* Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 Yale L.J. 2599 (1997).

16. *See* Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 Va. J. Int'l L. 1, 7 (2002).

17. *See generally, e.g.*, Alexander Thompson, *Coercive Enforcement in International Law*, *in* Interdisciplinary Perspectives on International Law and International Relations, *supra* note 11, at 502, 504.

18. *See* Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 Yale J. Int'l L. 1, 6–7 (2001).

19. On the more standard, skeptical account of unilateralism vis-à-vis the international order, see, for example, Christine Chinkin, *The State That Acts Alone: Bully, Good Samaritan or Iconoclast?*, 11 Eur. J. Int'l L. 31 (2000).

processes fail,[20] promote the internalization of international norms,[21] coerce reluctant states to comply with international commitments,[22] and generate convergence around higher regulatory standards.[23] The argument here, however, goes beyond recognizing that unilateralism and multilateralism can be compatible, or even that they can be directed against the same problem.[24] Instead, it emphasizes how unilateralism and multilateralism can reinforce one another in a dynamic, productive relationship.[25] When treaties channel unilateralism, they invite unilateral actions that in turn support the treaty regime, creating a positive feedback loop that improves both compliance and effectiveness over time.

Located somewhere between theory and practice, this Article draws on case studies of two suppression conventions and thick descriptions of several more to identify mechanisms, mostly rational in the short term but also normative in the long term,[26] that explain how treaties and unilateralism

20. *See* Daniel Bodansky, *What's So Bad about Unilateral Action to Protect the Environment?*, 11 EUR. J. INT'L L. 339, 340, 344–45 (2000) ("In such cases, another less pejorative term for unilateralism is *leadership*."); Monica Hakimi, *Unfriendly Unilateralism*, 55 HARV. INT'L L.J. 105 (2014); Gregory Shaffer & Daniel Bodansky, *Transnationalism, Unilateralism and International Law*, 1 TRANSNAT'L ENVTL. L. 31, 38–39 (2011).

21. *See* Cleveland, *supra* note 18.

22. *See* Cuéllar, *supra* note 5, at 32–33.

23. *See, e.g.*, Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV. 1, 9 (2012); *see also* DAVID VOGEL, TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY (1995) (describing how national regulations can have transnational effect in instigating a "race to the top").

24. *See* Cleveland, *supra* note 18, at 69 ("But unilateralism is not inherently hegemonic, and unilateral measures which are crafted with proper respect for international law principles can complement, rather than compete with, the development of a multilateral system."); Hakimi, *supra* note 20, at 110 (noting that state power can be good for international law).

25. In her transnational legal process account of the development and spread of human rights norms, Professor Sarah Cleveland focuses on one dimension of this relationship: how unilateral actions can promote multilateral standards. *See* Cleveland, *supra* note 18, at 90. Professor Monica Hakimi has more recently explored how unilateralism can constructively create and strengthen international law, particularly when other states are intransigent. *See* Hakimi, *supra* note 20, at 107–08. Professors Gregory Shaffer and Daniel Bodansky have identified a similar law-making dynamic in the context of environmental law, with the added insight that international law "has a critical but delicate role to play. . . in disciplining unilateral action" by forcing the unilateral actor to clarify and justify its goals. *See* Shaffer & Bodansky, *supra* note 20, at 40; *see also* Bodansky, *supra* note 20, at 342–43 (describing different ways in which unilateralism spurs, enforces, or embodies international law). This Article emphasizes the opposite direction—how multilateral instruments can also promote certain unilateral actions—in describing an iterative, self-reinforcing cycle between the multilateral and the unilateral. While Professor Kal Raustiala has identified a synergistic relationship between multilateral treaties and state action, he has focused on the role of transnational government networks. *See* Raustiala, *supra* note 16, at 6. The dynamics he analyzes involve not so much unilateralism and multilateralism, but rather different forms of multilateral cooperation.

26. The Article thus acknowledges that both rational and normative perspectives provide important insights into how international law works. *See, e.g.*, Kenneth W. Abbott & Duncan Snidal, *Values and Interests: International Legalization in the Fight Against Corruption*, 31 J. LEGAL STUDIES S141, S142 (2002); Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887, 888 (1998) ("[R]ationality cannot be separated from any politically significant episode of normative influence or normative change, just as the normative context conditions any episode of rational choice."); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1944 (2002); Peter J. Katzenstein, Robert O. Keohane & Stephen D. Krasner, *International Organization and the Study of World Politics*, 52 INT'L ORG. 645, 682–83 (1998) (insisting solely on a rationalist or a normative framework

can reinforce one another. First, states make rational trade-offs in deciding to establish a treaty targeting a transnational crime. Motivated states join the treaty regime because it will reduce the cost of actions they already plan to pursue. Other states will join because they share the normative commitment to suppressing the crime in question but lack the capacity to do so themselves ("limited states"). Additional states with similar normative commitments will join but then free ride on the motivated states' efforts regardless of their own capacity to help ("lagging states"). And still other states may join due to inducements, such as aid or linkage to other issues, but lack the normative commitment or motivation to take any additional action ("reluctant states").

Second, the treaty makes some unilateral efforts targeting the transnational crime easier for motivated states and others harder. Specifically, the treaty can harmonize domestic laws, endorse extraterritorial exercises of prescriptive jurisdiction,[27] and make bilateral cooperation cheaper and more efficient. All of this helps motivated states pursue more unilateral efforts within the parameters of the multilateral regime. At the same time, however, the treaty raises the cost of pursuing unilateral efforts that are not specifically endorsed by the treaty. When options are excluded from the multilateral consensus, they appear less-than-legal, contrary to international law in spirit even if not in technicality. Domestically, this aura of illegality empowers opponents of aggressive unilateral efforts to argue for restraint. Internationally, it can cause other states to deny cooperation, if not protest the apparent overreaching of the motivated state. In short, the treaty changes the conversation: some options now look more legal and others less so.[28] Since legality matters to liberal states—either because of their normative commitment to legality or because legality changes their rational calculations, but probably due a bit to both—the treaty channels the motivated state's actions at the same time that it legitimates them.

Third, unilateral efforts reinforce the compliance pull of the treaty. This process takes place over a longer time horizon, providing more opportunities

would be a "sterile intellectual exercise" as "[n]either project can be complete without the other"); *see also generally* James Fearon & Alexander Wendt, *Rationalism v. Constructivism: A Skeptical View*, in HANDBOOK OF INTERNATIONAL RELATIONS 52 (Walter Carlsnaes et al. eds., 2002) (critiquing framing of international relations debate by Katzenstein et al., *supra*, as between normative and rational perspectives).

27. In the context of jurisdiction, the term "extraterritorial" can have many connotations, most of them negative. *See, e.g.*, CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 6–9 (2008). This Article uses the term to refer to conduct occurring primarily outside the territory of a given state, as well as to that state's efforts to reach such conduct.

28. *Cf.* Kenneth W. Abbott & Duncan Snidal, *Law, Legalization, and Politics: An Agenda for the Next Generation of IL/IR Scholars*, *in* INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS, *supra* note 11, at 33, 35 (noting the "distinctive politics" of legalization as "shaped and constrained by law and legal institutions"); Bodansky, *supra* note 20, at 342 ("[F]ew 'unilateral' decisions are taken by a state in complete isolation—usually, a state must at least consider the views of other states and how they will react. . . . [T]he unilateral character of a decision is not all or nothing, but rather more or less.").

for normative mechanisms to shape the preferences on which states make rational decisions.[29] Scholars have previously identified how multilateral institutions (treaties, organizations, and networks) can promote treaty compliance by (i) increasing information, (ii) providing for repeated interactions among sub-state actors, and (iii) directing technical assistance towards states that wish to comply but lack the capacity to do so.[30] This Article argues that unilateral efforts aligned with a treaty can have similar effects. For example, cross-border investigations led by motivated states will entail repeated interactions among peers and the sharing of technical expertise. Bilateral cooperation agreements may come with aid for institution building and training. High profile cases pursued by motivated states can shed light on the inertia of lagging states, much to their domestic and international embarrassment. By helping to build the capacities of limited states, raising the reputational stakes for lagging states, and spreading norms that may over time sway even reluctant states, unilateral efforts can strengthen the treaty regime. And as more states are motivated and empowered to suppress transnational crime within their borders, the end result should be a self-reinforcing cycle of treaty promotion and domestic reform that shrinks the enforcement gap over time.

Admittedly, this model of channeled unilateralism relies on privileging already powerful states; the motivated state will typically be a wealthier nation with extra resources at its disposal, and its extraterritorial efforts—even if invited by a multilateral regime—will serve to export its law enforcement policies and priorities.[31] Still, channeled unilateralism may be a second-best solution in a world of unequal states. Whether viewed from a human rights, economic development, or security perspective, the problem of transnational crime is a significant challenge that needs to be addressed. And less powerful states are not passive takers of norms and policies; this Article's description of channeled unilateralism draws attention to the inputs, priorities, and cooptation strategies of these states. Channeled unilateralism should enable most states to experience benefits even if the distribution of those benefits is uneven.

The Article proceeds as follows. Part I expounds on the enforcement gap in transnational criminal law. It sets out the basic principles of jurisdiction under international law, describes how these principles limit domestic law enforcement efforts, explains why the system of international criminal law is not well suited for addressing transnational crime, and identifies the shortcomings of relying solely on a multilateral approach. Part II develops the

29. *See* Abbott & Snidal, *supra* note 26, at S155–57 (emphasizing the interplay between normative values and rational interests over time).

30. *See* discussion in Part II.C., *infra*.

31. *See, e.g.*, Andrew Goldsmith et al., *Making Sense of Transnational Police-Building: Foreign Assistance in Colombian Policing*, *in* CRAFTING TRANSNATIONAL POLICING: POLICY CAPACITY-BUILDING AND GLOBAL POLICING REFORM 73, 74 (Andrew Goldsmith & James Sheptycki eds., 2007) (acknowledging that transnational policing relationships carry "inevitable structural inequalities").

concept of channeled unilateralism in the context of transnational crime. Part III uses case studies on transnational bribery and drug trafficking to illustrate aspects of the model in practice. To be clear, these case studies were selected to explore a possible explanation of state behavior, not to test it; the project is not positive so much as descriptive and theoretical. Part IV acknowledges that channeled unilateralism privileges powerful states but argues that it is not merely epiphenomenal of hegemony. Because the problems of enforcement and treaty compliance are not limited to transnational crime, Part V concludes by offering some preliminary thoughts about the applicability of channeled unilateralism to other transboundary harms.

I. The Enforcement Gap in Transnational Criminal Law

The need for a solution like channeled unilateralism arises from the well-established limits on any one state's power to prescribe and enforce its laws. This Part describes those limits, and it explains why unilateral enforcement efforts, international criminal law, and multilateral treaties cannot, on their own, work around those jurisdictional limits to resolve the enforcement gap for transnational crime.

A. *Jurisdiction under International Law*

For purposes of international law, a state's jurisdiction is typically divided into the power to prescribe, the power to enforce, and the power to adjudicate.[32] The first allows the state to apply its laws to a particular subject.[33] The second allows the state "to induce or compel compliance" with its laws,[34] power that encompasses criminal investigations, arrests and seizures, and punishment.[35] And the third allows it "to subject persons or things to the process of its courts or administrative tribunals."[36]

Each state has the undeniable right to exercise all three grounds of jurisdiction within its own territory.[37] Indeed, given the fundamental link between a state's territory and its sovereignty, each state has the *exclusive* right to exercise enforcement jurisdiction within its own borders.[38] As a corollary,

32. *See e.g.*, Restatement (Third) of Foreign Relations § 401 (1987); James Crawford, Brownlie's Principles of Public International Law 456 (8th ed. 2012); *see also id.* at 456 n.2 (noting possible division of adjudicative jurisdiction between prescriptive and enforcement jurisdiction).

33. Restatement (Third) of Foreign Relations § 401(a) (1987).

34. *Id.* § 401(c).

35. *See, e.g.*, *id.* § 432.

36. *Id.* § 401(b).

37. A state's territory includes not just its land, but also its airspace, its internal waters, and its "territorial sea," the twelve-mile strip of ocean along its coastline. Lowe, *supra* note 4, at 173–74. The state may also exercise limited jurisdiction over particular types of activities in its maritime exclusive economic zone ("EEZ"), which stretches for two hundred miles from the state's coastline. United Nations Convention on the Law of the Sea arts. 55–57, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

38. *See* Crawford, *supra* note 32, at 478–79.

the law enforcement officials of one state cannot legally operate in the territory of another state without the latter's permission.[39] This is the practical source of the enforcement gap.

A state may exercise its prescriptive jurisdiction more broadly, however.[40] Under modern international law, a state can justify extending its laws to reach conduct outside its borders on five grounds.[41] This permissive rule is meant to minimize interstate conflict over jurisdictional claims while protecting states' sovereign interests, which do not always stop at their borders.[42] Thus the closer that one state gets to the outer limits of the permissive grounds, the more likely it is that other states will feel threatened. For this reason, even though these five grounds of prescriptive jurisdiction are widely recognized, their application in practice can be controversial if pushed too far beyond the core zone of accepted state practice.[43]

Consider, for instance, the first and primary basis of prescriptive jurisdiction, territoriality. No state could object to another state asserting its prescriptive jurisdiction over all conduct that begins and ends within its borders. But there are also more expansive understandings of territorial jurisdiction: A state may extend its laws to conduct that starts within its borders but is consummated or has its primary effects abroad ("subjective territoriality").[44] It may also extend its laws in the other direction, to conduct that occurs outside its territory but "has or is intended to have substantial effect within its territory."[45] Such "objective territoriality," often referred to as the "effects principle," can be controversial when the link between the extraterritorial conduct and the territorial effect is attenuated or complex.[46]

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39. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 432 cmt. b (1987); LOWE, *supra* note 4, at 184.

40. *See* Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 3, 169 (Feb. 14) (distinguishing enforcement jurisdiction, which is limited to a state's territory, from prescriptive jurisdiction, which may be asserted extraterritorially).

41. This is the modern rule, allowing a state to exercise its prescriptive jurisdiction only if *permitted* by one of these five grounds. The classic rule allowed a state to exercise its power to prescribe as long as no rule of international law explicitly *prohibited* it. Stated most famously by the Permanent Court of International Justice in *The Case of the S.S. Lotus*, the classic rule has now largely been replaced by the modern rule. *See, e.g.*, CRAWFORD, *supra* note 32, at 457–58; RYNGAERT, *supra* note 27, at 21–22.

42. *See* RYNGAERT, *supra* note 27, at 21 (noting that the modern approach to prescriptive jurisdiction is meant to divide up States' "spheres of action and thus reduc[e] conflicts between States").

43. *See id.* at 31–33 (arguing that, given the breadth of permissible bases for asserting jurisdiction under international law, the legality of a particular assertion will depend on the reactions of other states). One approach to minimizing jurisdictional conflict is for courts to exercise self-restraint through affirmative comity. LOWE, *supra* note 4, at 183. In the United States, for example, the *Restatement (Third) of Foreign Relations* has proposed that courts apply a rule of reasonableness when evaluating U.S. assertions of extraterritorial prescriptive jurisdiction. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 403 (1987).

44. *See* CRAWFORD, *supra* note 32, at 458.

45. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402(1)(c) (1987).

46. LOWE, *supra* note 4, at 173; *see also, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402 cmt. d (1987); *id.* n.2 (noting the controversy over the U.S. invocation of the effects principle to regulate foreign nationals' economic activities); CRAWFORD, *supra* note 32, at 463 (describing that U.S. assertions

Second, a state may extend its laws to reach the activities of its nationals beyond its borders.[47] (For purposes of nationality jurisdiction, a corporation is a national of the state in which it is incorporated.[48]) To this extent, nationality jurisdiction is not disputed. It is less settled, however, whether and when a state can assert nationality jurisdiction over the conduct of its corporations' foreign subsidiaries,[49] an issue of particular relevance in the transnational bribery context.[50]

Closely related to nationality jurisdiction, though not entirely equivalent, is a state's jurisdiction over ships and aircraft that fly its flag, no matter where that vessel is located in the world.[51] A ship on the high seas that flies no flag is considered a "stateless vessel" (that is, it has no nationality) and is thus subject to the prescriptive and enforcement jurisdiction of all states.[52] Ships that fly more than one flag or that fraudulently fly the flag of a state in which they are not registered are "assimilated" to stateless vessels and are likewise subject to the jurisdiction of all states.[53] Although these concepts are well-established, it is less clear how one determines that a ship is stateless or should be assimilated to a stateless vessel.[54]

Third, a state may extend its laws to reach extraterritorial conduct if that conduct threatens the state's "essential security interests"[55] or "the integrity of governmental functions."[56] This "protective principle" has traditionally been applied narrowly, primarily to counterfeiting and espionage,[57] which are crimes directed against the very entity of the state.[58] Recent U.S. prac-

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of jurisdiction under the effects principle "have provoked a strong reaction from a number of foreign governments," including retaliatory legislation and diplomatic protests).

47. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402(2) (1987).

48. Barcelona Traction Light & Power Co. (Belg. v. Spain), 1970 I.C.J. 3, 168 (Feb. 5); RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 213 (1987).

49. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 414(2) (1987).

50. *See* Part III.A., *infra*.

51. LOWE, *supra* note 4, at 175; Robert C. F. Reuland, *Interference with Non-National Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag-State Jurisdiction*, 22 VAND. J. TRANSNAT'L L. 1161, 1164–66 (1989). Flag state jurisdiction is often compared to territorial jurisdiction, with ships cast as "floating islands" of a state's territory, but that comparison breaks down in the context of enforcement powers: while a state's enforcement jurisdiction within its territory is truly exclusive, its enforcement jurisdiction over its vessels is subject to some limitations. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402 cmt. f (1987) (flag state jurisdiction distinct from territorial jurisdiction); Thomas M. Brown, *For the "Round and Top of Sovereignty": Boarding Foreign Vessels at Sea on Terror-Related Intelligence Tips*, 59 NAVAL L. REV. 63, 68 (2010).

52. UNCLOS, *supra* note 37, art. 110(1).

53. *Id.* art. 92(2); *see also* Reuland, *supra* note 51, at 1202–05.

54. The United States has taken a particularly broad view of the conditions under which a ship can be assimilated to a stateless vessel, *see* Reuland, *supra* note 51, at 1200 n.140, a view that has been the subject of some criticism, *see, e.g.*, Eugene Kontorovich, *Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction over Drug Crimes*, 93 MINN. L. REV. 1191, 1200 (2009).

55. *See, e.g.*, LOWE, *supra* note 4, at 176.

56. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402 cmt. f (1987).

57. *See id.*; LOWE, *supra* note 4, at 176.

58. *See* CRAWFORD, *supra* note 32, at 462 & n.53.

tice in particular, however, has stretched the protective principle to reach acts of terrorism and, more questionably, drug smuggling.[59]

The remaining two grounds of prescriptive jurisdiction are applied infrequently and are the most likely to provoke debate. Under the passive personality principle, states may sometimes assert jurisdiction over crimes based on the nationality of the victim.[60] And under universal jurisdiction, states may assert jurisdiction over a narrow set of crimes regardless of whether they can establish any nexus to the conduct.[61] There is broad agreement that piracy is subject to universal jurisdiction.[62] War crimes, crimes against humanity, genocide, torture, and slave trading are often included as universal jurisdiction crimes as well,[63] though exercise of universal jurisdiction over such crimes may still be contentious and is limited in practice.[64]

In sum, international law allows a state to assert prescriptive jurisdiction over some conduct that occurs beyond its borders, albeit with varying degrees of acceptance by other states. But a state may not send its law enforcement officials abroad to investigate those crimes, arrest suspected offenders, or seize forfeited assets absent the consent of the state where those offenders, assets, or evidence are located.

B. The Limits of Domestic Law Enforcement

Given these limitations, motivated states have three primary options for reaching criminal conduct emanating from outside their borders: they can claim broad prescriptive jurisdiction to extend the coverage of their laws over the extraterritorial conduct or foreign actors; they can seek the assistance of other states in enforcing those laws abroad; and they can pressure other states to increase their own domestic law enforcement efforts. Far from being mutually exclusive, these options are typically used concurrently. But each is subject to significant shortcomings when exercised in the absence of a multilateral treaty.

First, broad assertions of prescriptive jurisdiction carry a range of costs. Other states may object to invested states' efforts to push the outer bounds

59. *See* LOWE, *supra* note 4, at 176–77. While acts of terrorism may be (but are not always) directed against the state itself, it is hard to see how drug trafficking could fit this paradigm.

60. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402 n.3 (1987). On criticisms of this principle, see, for example, CRAWFORD, *supra* note 32, at 461 (identifying passive personality as "much criticized" and "considerably more controversial" than territoriality); LOWE, *supra* note 4, at 176 (referring to the passive personality principle as "a form of legal imperialism"). An increasingly accepted use of passive personality jurisdiction, however, is in the prosecution of terrorism offenses. *See* CRAWFORD, *supra* note 32, at 461.

61. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 404 (1987).

62. *See, e.g.*, Maggie Gardner, *Piracy Prosecutions in National Courts*, 10 J. INT'L CRIM. JUST. 797, 802 (2012).

63. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 404 (1987); CRAWFORD, *supra* note 32, at 468.

64. *See, e.g.*, RYNGAERT, *supra* note 27, at 115–17.

of their jurisdictional authority.[65] Even if protests are not forthcoming, the motivated state may fear being perceived as unreliable in its international commitments, or it may wish to avoid undermining jurisdictional principles from which it otherwise benefits.[66]

Second, motivated states can—and often do—ask other countries to use their own law enforcement apparatus to assist with cross-border investigations. Such assistance usually takes one of three forms. First, states may agree to extradite individuals accused of serious crimes, typically through bilateral treaties and subject to limitations.[67] Second, states may agree to gather evidence within their territory and transmit it to the requesting state. Such requests are traditionally submitted through letters rogatory, but this is a slow and cumbersome process: the letters must pass through multiple diplomatic and bureaucratic channels and are acted upon solely as a matter of comity.[68] Increasingly, states are obviating the need for letters rogatory by establishing mutual legal assistance treaties (MLATs), in which they commit to providing each other with such assistance as seizing evidence, freezing bank accounts, and interviewing witnesses.[69] The United States and Switzerland signed the first MLAT in 1977;[70] the number of MLATs has since grown exponentially.[71] Third, growing transnational networks of police, prosecutors, and law enforcement agencies provide both formal and informal support in cross-border investigations. This assistance can range from the personal contacts of a liaison officer stationed in a foreign country[72] to the international fugitive alerts broadcast by Interpol, the International Criminal Police Organization.[73]

65. *See id.* at 133. For a recent example, consider the French outcry over the U.S. investigation of the French bank BNP Paribas for violating U.S. sanctions against Iran and Sudan. *See* Ben Protess et al., *French Officials Twist U.S. Arms in Bank Inquiry*, N.Y. Times, June 2, 2014, http://dealbook.nytimes.com/2014/06/02/french-officials-twist-u-s-arms-in-bank-inquiry.

66. This concern partly explains the reticence of the U.S. Congress to test the limits of international jurisdictional rules. For examples, see the discussion of the legislative history of the Marijuana on the High Seas Act, *infra* Part III.B., and the Foreign Corrupt Practices Act, *infra* Part III.A.

67. *See, e.g.*, Ilias Bantekas, International Criminal Law 373–76 (4th ed. 2010). Relatedly, states may enter into prisoner transfer treaties, which allow convicted offenders to complete their prison terms in their home state. *See id.* at 363–66; *see also* Benjamin Levin, *Inmates for Rent, Sovereignty for Sale: The Global Prison Market*, 23 S. Cal. Interdisc. L.J. 509 (2014) (evaluating implications of paid prisoner exchanges between countries).

68. *See* Ethan A. Nadelmann, Cops Across Borders: The Internationalization of U.S. Criminal Law Enforcement 318–19 (1993).

69. *See* Bantekas, *supra* note 67, at 356.

70. Nadelmann, *supra* note 68, at 325, 334.

71. For example, the United States alone has at least fifty MLATs in place. David Luban et al., International and Transnational Criminal Law 376 (2010).

72. See, for example, Nadelmann's detailed description of the work of agents for the U.S. Drug Enforcement Agency in Europe and Latin America. *See generally* Nadelmann, *supra* note 68.

73. *See* Red Notices, Interpol, http://www.interpol.int/notice/search/wanted (last visited Apr. 7, 2015).

These channels of cross-border enforcement assistance have greatly aided domestic law enforcement efforts and continue to deepen and expand.[74] But how effective this assistance is depends, not surprisingly, on the two states' diplomatic relationship as well as the requested state's capabilities and resources.[75] To the extent that transnational criminals seek out weak states, ostracized states, or liminal spaces in the international order, these bilateral channels will not help. The effectiveness of these general channels of assistance can also decrease when the crime being investigated is complex, rapidly evolving, high profile, or time sensitive—as the transnational criminal conduct under consideration here typically is. For such crimes, states may disagree on the illegality of the conduct,[76] or they may find the crime politically or diplomatically sensitive.[77] As a result, extradition treaties' political offense exceptions and requirements of dual criminality can block the extradition of suspects,[78] while MLAT requests may simply take too long.[79] And the lack of transparency and accountability of informal cooperation can, particularly when time is short and stakes are high, encourage human rights or due process abuses.[80] These problems can be ameliorated through clear definitions, political consensus, and specific commitments to cooperate regarding a particular crime—all of which can be supplied by a multilateral treaty.

Finally, motivated states may try to overcome the enforcement gap by using economic incentives (or sanctions) to influence other states' law en-

74. *See, e.g.*, Sean K. Driscoll, *The Colombia Connection: An International Solution for an International Problem* (Harvard Law School Case Study 2014) [hereinafter *Operation Bean Pot*] (describing close working relationship between U.S. Drug Enforcement Agency officials and Colombian police in investigating, arresting, and extraditing major Colombian drug traffickers to the United States from 2005 to 2010).

75. *See* Cuéllar, *supra* note 5, at 28 (noting difficulties faced by law enforcement agencies attempting to cooperate with counterparts abroad).

76. This is not an uncommon occurrence. A couple of decades ago, most states did not recognize money laundering as a crime, and bank secrecy laws prohibited some states from disclosing information or seizing assets necessary for prosecuting financial crimes. *See* Mariano-Florentino Cuéllar, *The Tenuous Relationship Between the Fight Against Money Laundering and the Disruption of Criminal Finance*, 93 J. CRIM. L. & CRIMINOLOGY 311, 378 & n.262 (2003). States face similar troubles today over differing definitions of cybercrime. *See* Oona A. Hathway et al., *The Law of Cyber-Attack*, 100 CALIF. L. REV. 817, 880–83 (2012). And even if both states agree in general that certain conduct is illegal, dual criminality provisions in extradition treaties can block extraditions if the states differ in how they define the crime. *See, e.g.*, Joan Allain, *No Effective Trafficking Definition Exists: Domestic Implementation of the Palermo Protocol*, 7 ALB. GOV'T L. REV. 111, 137 (2014).

77. *Cf.* David Kennedy, *The Extradition of Mohammed Hamadei* (Kennedy School of Gov't Case Study C15-88-835.0 1988) (describing German hesitancy to extradite suspected terrorist to United States, despite treaty commitments, given ongoing hostage situation).

78. *See* BOISTER, *supra* note 7, at 218, 223.

79. *See* JÖRG FRIEDRICHS, FIGHTING TERRORISM AND DRUGS: EUROPE AND INTERNATIONAL POLICE COOPERATION 160 (2008); Org. Econ. Co-operation & Dev. [OECD], *Typology on Mutual Legal Assistance in Foreign Bribery Cases* 25–27, 36 (2012) [hereinafter OECD *Typology*], *available at* http://www.oecd.org/daf/anti-bribery/TypologyMLA2012.pdf.

80. *See, e.g.*, ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 100 (2d ed. 2010) (noting recourse to abduction or rendition where formal extradition arrangements are missing, inapplicable, or "seen as ineffective," and acknowledging such informal measures may violate human rights); *cf.* Katzenstein, *supra* note 6, at 301 (describing accountability concerns arising from informal cooperation arrangements with private actors regarding transnational financial crimes).

forcement efforts. These pressures might be invoked directly by, for example, linking economic assistance to the receiving state's enforcement efforts against a particular criminal threat.[81] Or the process may be more gradual, like the exporting of law enforcement culture (*e.g.*, enforcement priorities and investigative tactics) to other countries through technical assistance and the use of liaison officers.[82]

Reliance on coercive tactics, however, is vulnerable to standard criticisms of power imbalance, especially when the motivated state acts in the absence of a multilateral consensus.[83] It can instigate backlash in the pressured state against perceived infringements on its sovereignty, particularly if the state has had no input into the content of the prohibition or the prioritization of its enforcement.[84] Such opposition is counterproductive if the end goal is increased coordinated enforcement against transnational crime.[85] By giving too much weight to the motivated state's domestic preferences and too little consideration to the globally optimum level of enforcement,[86] these tactics also raise concerns about both democratic accountability and efficiency. From the motivated state's perspective, coercive tactics are also costly, and any influence may be circumscribed if the state is acting alone.

In sum, motivated states face reputational and political costs if they stretch their prescriptive jurisdiction too far. They are also constrained in their ability to gather evidence or seize perpetrators located beyond their borders, and the standard channels for providing enforcement assistance may not be quick, direct, or reliable enough to reach that evidence or those perpetrators in cases of sensitive transnational crime. Unilateral efforts to coerce other states into providing greater assistance, even if they work in the short term, can backfire. Besides which, cross-border investigations and extraditions are expensive, and the political capital to convince other states to cooperate is costly, imposing practical limits on any one state's efforts to counter transnational crime.

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81. *See, e.g.*, Broude & Teichman, *supra* note 5, at 845; *cf.* Cleveland, *supra* note 18 (analyzing the use of unilateral sanctions to promote human rights compliance).

82. *See generally* NADELMANN, *supra* note 68, at 12.

83. *See, e.g.*, Cleveland, *supra* note 18, at 48–49 (summarizing criticisms of unilateral sanctions regimes).

84. *See* Broude & Teichman, *supra* note 5, at 846. As an example, the U.S. decision to decertify aid to Colombia in 1996 and 1997 has been credited with increasing, in the short term, the domestic standing of President Samper, whom the United States had concluded was linked to the Cali drug cartel. *See* Goldsmith et al., *supra* note 31, at 90.

85. Thus, for example, Professor Cleveland argues that unilateral sanctions are only beneficial in the human rights context to the extent they align with multilateral standards. *See* Cleveland, *supra* note 18, at 85.

86. *See, e.g.*, Broude & Teichman, *supra* note 5, at 845–46; *see also* David Bach & Abraham L. Newman, *Transgovernmental Networks and Domestic Policy Convergence: Evidence from Insider Trading Regulation*, 64 INT'L ORG. 505, 520–21 (2010); William Magnuson, *International Corporate Bribery and Unilateral Enforcement*, 51 COLUM. J. TRANSNAT'L L. 360, 411–13 (2013) (noting in the context of transnational bribery the risk of enforcement bias against foreign companies and over-enforcement due to lack of coordination across countries).

Given these shortcomings, motivated states have turned to multilateral responses to global criminal threats. But as the remainder of this Part explains, these multilateral responses are not panaceas either.

C. The Limits of International Criminal Law

If transnational crime is a global threat and a cause of great human suffering, why not apply the existing structure of international criminal law to suppress it? This is a common proposal,[87] but ultimately a misguided one.

International criminal law refers primarily to the supranational system of adjudication that has developed over the last twenty years and covers a narrow set of crimes: genocide, war crimes, crimes against humanity, and aggression.[88] During its recent period of rapid development, international criminal law was the subject of extensive scholarly inquiry, both enthusiastic and critical. There is no denying that international criminal trials are costly and slow, nor that their supranational status often separates them both geographically and politically from the community affected by the crime.[89] They are also limited by the same basic principle of international law that a state has exclusive enforcement jurisdiction over its territory. Thus the International Criminal Court (ICC) must still rely on individual states to seize evidence, compel witnesses, search crime scenes, and arrest and transfer suspects to The Hague.[90] Indeed, the ICC may be worse positioned than individual states to address the enforcement gap, given that it must depend for resources and diplomatic capital on member states that have competing priorities.[91]

Despite these limitations, however, international criminal law may provide the best solution for adjudicating certain types of crimes. In particular, international criminal law was developed to address the unique challenges of adjudicating crimes that implicate the state itself (conceived broadly to en-

87. *See, e.g.*, Molly McConville, Note, *A Global War on Drugs: Why the United States Should Support the Prosecution of Drug Traffickers in the International Criminal Court*, 37 AM. CRIM. L. REV. 75 (2000); Regina Menachery Paulouse, *Beyond the Core: Incorporating Transnational Crimes into the Rome Statute*, 21 CARDOZO J. INT'L & COMP. L. 77 (2012); *cf.* Sonja Starr, *Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations*, 101 NW. U. L. REV. 1257 (2007) (calling for a selective broadening of international criminal law while acknowledging the practical and normative limits of international criminal trials).

88. This limited list is drawn from the Statute of the International Criminal Court (ICC). The ICC has recently adopted a definition of the crime of aggression, but its jurisdiction over the crime is not yet in effect.

89. *See, e.g.*, CRYER, *supra* note 80, at 36; Stuart Ford, *Complexity and Efficiency at International Criminal Courts*, 29 EMORY INT'L L. REV. 1, 3–4 (2014) (collecting criticisms); Alex Whiting, *In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered*, 50 HARV. INT'L L.J. 323, 323–25 (2009) (same).

90. *See, e.g.*, ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 346, 442 (2d ed. 2008); William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT'L L.J. 53, 65 (2008); Mirjan Damaska, *What is the Point of International Criminal Justice?*, 83 CHI.-KENT L. REV. 329, 330 (2008).

91. *See* CRYER, *supra* note 80, at 528–29.

compass not only state officials, but also organized rebel groups and the collective population of a state).[92] For example, the supranational authority of international criminal law avoids immunity issues or amnesty laws that typically block the prosecution of state officials in domestic courts.[93] It also helps overcome political hurdles, like the state's protection of still-powerful leaders or its reluctance to appear to pick sides between large segments of its population; even if these hurdles can be overcome domestically, supranational adjudication can still provide greater impartiality, both in appearance and in reality.[94] These are not concerns that are typically raised by transnational crimes like money laundering or human trafficking. While state officials may be implicated in transnational crimes, primarily through corruption, such participation is in derogation of their political offices rather than a public and collective effort to use state power for illegal ends.[95] And without the need for the structural benefits of supranational adjudication, the costs and limitations of international criminal law weigh more heavily in the balance.

The link between the state and international crimes has also informed the institutional design of international criminal courts, particularly their focus

92. *See, e.g.*, Robert J. Currie, International and Transnational Criminal Law 10, 17 (2010) (International crimes "will often have an element of state involvement in the criminal act, making the suppression and prosecution of the crime more difficult and justifying a significantly higher level of condemnation than would otherwise be necessary."); Helmut Satzger, International and European Criminal Law 180 (2012) (international crimes usually involve "macro-delinquency," meaning the culpability of state authorities); Edward Wise, Ellen Podgor & Roger Clark, International Criminal Law: Cases and Materials 41–42 (2009) (international crimes "involve a misuse of power, of the monopoly of violence commanded by state or quasi-state officials"); Neil Boister, *'Transnational Criminal Law'?*, 14 Eur. J. Int'l L. 953, 965 (2003) ("International criminality is also characterized by state involvement, which makes it impossible to expect justice to be carried out by the state itself and requires the exceptional measure of international law superseding national law."). This focus on the state traces back to the genesis of modern international criminal law in the Nuremberg and Tokyo Trials following World War II.

93. *See* Cassese, *supra* note 90, at 437; Bing Bing Jia, *The Immunity of State Officials for International Crimes Revisited*, 10 J. Int'l Crim. Just. 1303, 1318 (2012).

94. *See* Cassese, *supra* note 90, at 433, 438; *cf.* Burke-White, *supra* note 90, at 62–63 (criticizing states for self-referring cases to the ICC to avoid politically costly domestic trials).

95. *See* Cassese, *supra* note 90, at 12–13 (distinguishing international from transnational crimes on the basis that the latter "are normally perpetrated by private individuals . . .. [A]s a rule these offences are committed *against* states. They do not involve states as such or, if they involve state agents, these agents typically act for private gain, perpetrating what national legislation normally regards as ordinary crimes."). *But see* Starr, *supra* note 87 (developing argument for including corruption on the level of kleptocracy as an international crime). When state involvement in transnational crime does become significant, international criminal law may be the preferable solution. For example, most acts of terrorism are domestic or have a primarily domestic effect. From time to time, however, an act of terrorism can be so serious that it implicates entire states or threatens the stability of the international order. Thus when former Lebanese Prime Minister Rafik Hariri was killed in a terrorist attack in 2005 and it appeared that Syria might have been involved, the U.N. Security Council established an internationalized tribunal in The Hague, which combined aspects of Lebanese law with aspects of international criminal law. *See* Statute of the Special Tribunal for Lebanon, S.C. Res. 1757, Annex, U.N. Doc. S/RES/1757 (May 30, 2007); *see also* Maggie Gardner, *Reconsidering Trial in Absentia at the Special Tribunal for Lebanon*, 43 Geo. Wash. Int'l L. Rev. 91, 93–95 (2011).

on selective prosecutions of senior officials.[96] State involvement or collective criminality increases the scale and gravity of these crimes, leading many observers to conclude that the primary purpose of international criminal trials should be expressivism: these trials are meant to "affirm respect for law, reinforce a moral consensus, narrate history, and educate the public."[97] Thus international criminal tribunals have provided victims a larger role in proceedings and have attempted at times (though perhaps mistakenly[98]) to contribute to the historical record. The result has been lengthy trials of only a handful of individuals for only a handful of crimes. Transnational criminal law, on the other hand, is a much more mundane endeavor. It does not need symbolic and historic trials, but rather efficient investigations and relatively routine prosecutions.

For the same reason, there would be no economies of scale or effort in expanding or replicating international criminal law institutions to address transnational crime. The need for more investigations and prosecutions alone would require an exponential increase in resources, staff, and facilities[99]—not to mention the difficult question of where to house the exponentially larger number of defendants and convicted prisoners.[100] It is not simply a matter of expanding the ICC's jurisdiction to include certain transnational crimes; extending international criminal law to reach transnational crime would require an undertaking of an entirely different magnitude. Indeed, even though Trinidad and Tobago first called for an international criminal court in 1989 as a solution for illicit drug trafficking,[101] transnational crimes like drug trafficking were ultimately left out of the ICC's ambit in part for these same practical reasons.[102] And the same practical reasons may have caused the U.N. Security Council more recently to shelve proposals for a supranational judicial solution to the problem of Somali piracy.[103] The

96. *See* José E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 377–78 (1999).

97. MARK DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 12 (2007); *see also, e.g.*, CASSESE, *supra* note 90, at 438–40; Damaska, *supra* note 90, at 345–46.

98. *See, e.g.*, Damaska, *supra* note 90, at 360.

99. *See* Burke-White, *supra* note 90, at 66–67 (noting severely limited resources of ICC).

100. It is difficult enough to find placement for the handful of prisoners convicted in the international criminal law system. *See, e.g.*, Róisín Mulgrew, *On the Enforcement of Sentences Imposed by International Courts: Challenges Faced by the Special Court for Sierra Leone*, 7 J. INT'L CRIM. JUST. 373 (2009); Mary Margaret Penrose, *No Badges, No Bars: A Conspicuous Oversight in the Development of an International Criminal Court*, 38 TEX. INT'L L.J. 621, 636–39 (2003).

101. *See* Ant. & Barb. et al., International Criminal Responsibility of Individuals and Entities Engaged in Illicit Trafficking in Narcotic Drugs Across National Frontiers and Other Transnational Criminal Activities: Establishment of an International Criminal Court with Jurisdiction Over Such Crimes (Draft Resolution), U.N. Doc. A/C.6/44/L.18 (Nov. 20, 1989) [hereinafter Draft Resolution].

102. *See* Patrick Robinson, *The Missing Crimes*, *in* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: COMMENTARY 497, 499–500, 503 (Antonio Cassese et al. eds., 2002) (listing, among other reasons the drafters excluded drug crimes from the ICC's jurisdiction, the concern that they "would overburden and flood the ICC" and "would be more effectively dealt with at the national level on the basis of cooperative agreements").

103. *See* Douglas Guilfoyle, *Prosecuting Somali Pirates: A Critical Evaluation of the Options*, 10 J. INT'L CRIM. JUST. 767, 779–82 (2012); U.N. Secretary-General, *Rep. on Possible Options to Further the Aim of*

system of international criminal law is not a practical solution for transnational crime.

D. The Limits of Multilateralism

Short of asserting supranational authority through international criminal law, the community of states can still address transnational crimes collectively through multilateral treaties. Indeed, the standard response to transnational crime in recent decades has been the adoption of suppression conventions that oblige member states to outlaw certain conduct, actively enforce those laws, and cooperate with other states in doing so.

The potential benefits of developing widely ratified, multilateral treaties have been thoroughly canvassed elsewhere. Multilateral negotiations allow all states an opportunity to influence the content and scope of the new rule.[104] Although "stronger states will remain strong in any setting,"[105] less powerful states may still be able to shape the final outcome of a multilateral treaty through coalition building or normative persuasion.[106] Multilateral solutions also promote uniformity across domestic laws, which improves coordination in addressing global problems.[107] Uniformity in turn builds a sense of universality and solidarity, which lends the multilateral consensus greater normative weight[108] and may therefore increase state compliance with the underlying norm.[109] Finally, multilateral processes force greater disclosures of information on both the front and the back end: broader negotiations may reveal more information to more players about individual state preferences,[110] while monitoring mechanisms built into multilateral regimes can increase transparency and thus accountability of state efforts to implement the agreement.[111]

The drawbacks of a purely multilateral approach are also well canvased.[112] Most relevant here is the gap between treaty commitment and treaty com-

Prosecuting and Imprisoning Persons Responsible for Acts of Piracy and Armed Robbery at Sea off the Coast of Somalia, ¶¶ 100–01, U.N. Doc. S/2010/394 (July 26, 2010).

104. *See* Gabriella Blum, *Bilateralism, Multilateralism, and the Architecture of International Law*, 49 HARV. INT'L L.J. 323, 341 (2008) (discussing perceived benefits of multilateral treaties).

105. *Id.* at 343.

106. *See* CHAYES & CHAYES, *supra* note 13, at 6.

107. *See* Melissa J. Durkee, *Persuasion Treaties*, 99 VA. L. REV. 63, 75–76 (2013).

108. *See* Blum, *supra* note 104, at 343–44.

109. *See* CHAYES & CHAYES, *supra* note 13, at 7.

110. *See* Abbott & Snidal, *supra* note 26, at S151 (2002) ("The very process of creating and implementing legal arrangements can generate information, helping actors to achieve joint gains immediately or to strike interest-based agreements down the road.").

111. *See* CHAYES & CHAYES, *supra* note 13, at 154–55.

112. For example, achieving consensus across a broad spectrum of states can require watered-down or vague commitments capable of accommodating diverse local values and legal systems. *See* José E. Alvarez, *International Organizations: Then and Now*, 100 AM. J. INT'L L. 324, 327 & n.18 (2006); Blum, *supra* note 104, at 350 (vagueness of multilateral treaties can reduce their normative weight); *cf.* Shaffer & Bodansky, *supra* note 20, at 33 (noting shortcomings of multilateral treaties in the context of environmental law, including slow development, weak requirements, and uneven implementation). To the extent this generalizing pressure is avoided and meaningful rules are adopted, the multilateral regime may instead

pliance. States may not implement their multilateral obligations for any number of reasons: perhaps because they lack the capacity to do so,[113] or because implementation provides them with no greater benefit than they have already gained through ratification,[114] or because they can free ride on the enforcement efforts of motivated states,[115] or because they perceive benefits from allowing the criminal conduct to continue within their borders.[116] Under-enforcement by these states in turn generates negative externalities for other states.[117]

In sum, even when multilateral conventions can strike the right balance between precision and flexibility, they still suffer from under-compliance. Meanwhile, a purely unilateral approach raises serious accountability problems and is limited by the finite resources, jurisdictional reach, and diplomatic capital of individual states. But each approach can provide what the other lacks: unilateral actions can increase pressure on other states to comply with multilateral commitments, while multilateral treaties can spread the financial burden and decrease the reputational costs of motivated states' law enforcement efforts. Unilateralism within the context of multilateralism can achieve more than either can alone.

II. A Model of Channeled Unilateralism

This Part outlines the potential dynamic relationship between unilateralism and multilateralism; the next Part explores the plausibility of this description through case studies on transnational bribery and drug trafficking.

A. Stage 1: Establishing the Multilateral Treaty

Channeled unilateralism starts with the adoption and widespread ratification of a multilateral treaty. I accept here states' existing preferences regarding a given transnational crime, and I assume these preferences are static within the immediate time frame of the treaty's negotiation and adoption, an assumption to which I return in Part IV.[118]

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be subject to criticisms of democratic deficit, for breaking the link between decision-makers and the populations they represent. *See* Broude & Teichman, *supra* note 5, at 830. If a multilateral treaty establishes a rule with real content, that content may also prove too rigid. In the context of transnational crime, conditions evolve and new threats emerge: multilateral solutions may prove inflexible, locked-in and difficult to adapt to changing circumstances. *See* Durkee, *supra* note 107, at 73.

113. *See generally* Chayes & Chayes, *supra* note 13.

114. *See* Hathaway, *supra* note 26, at 2020; Daniel K. Tarullo, *The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention*, 44 Va. J. Int'l L. 665, 709 (2004).

115. *See* von Stein, *supra* note 11, at 480.

116. *See* Broude & Teichman, *supra* note 5, at 813–14; Magnuson, *supra* note 86, at 388.

117. *See* Broude & Teichman, *supra* note 5, at 830 (citing crime diffusion studies).

118. Other important preliminary questions are beyond the scope of the present project, such as whether particular transnational criminal regimes are normatively desirable, *see, e.g.*, Boister, *supra* note 92, at 956, or whether increased enforcement would lead to the most appropriate level of deterrence or

At the outset, some states will have a strong preference for enforcing a particular criminal prohibition as well as the means to invest in doing so. As previously noted, purely unilateral efforts by such motivated states will have practical limits.[119] A motivated state may still choose to bear these costs, particularly when it deems complete freedom of action to be critical. But often it will be willing to compromise around the edges in order to make its unilateral efforts cheaper. In exchange for some amount of compromise, a treaty can provide motivated states with greater legitimacy for their extraterritorial efforts, as well as improved bilateral cooperation and *ex ante* agreement on the scope and prioritization of the criminal prohibition.[120] In addition, domestic constituencies may urge the adoption of a treaty in order to constrain the policy choices of future leaders[121] or to strengthen their position vis-à-vis other domestic or foreign interests.[122]

Other states may share the normative commitment to suppressing the crime but may lack the technical capacity or resources to do so themselves. By entering into a treaty regarding a particular crime, these "limited" states may benefit from shifting the primary cost of enforcement to motivated states in the short term and from the transmission of aid and knowledge in the long term.[123] Limited states may also be concerned about the displacement of transnational criminal activity: if a motivated state is committed to suppressing particular criminal conduct but is only able to do so within its own territory, it could push more of that criminal conduct to other states less prepared to prevent it.[124] Thus limited states may want to encourage motivated states to apply their criminal laws *more* broadly, including over extraterritorial conduct and foreign nationals, in order to minimize this risk of displacement.[125] In exchange, limited states may be willing to agree to relatively low-cost commitments, such as updating their criminal laws and cooperating with motivated states to suppress crimes about which they are already concerned.[126]

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incapacitation, *see, e.g.*, Koh, *supra* note 15, at 2641 (noting that "securing greater compliance with treaties [is not] always good per se. Indeed, securing compliance may even be undesirable if the treaties are themselves unfair or enshrine disingenuous or coercive bargains.").

119. *See* Part I.D., *supra*.

120. For further discussion, see Part II.B., *infra*.

121. *See, e.g.*, Rachel Brewster, *The Domestic Origins of International Agreements*, 44 VA. J. INT'L L. 501, 512–13 (2004); Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217, 220 (2000).

122. *See, e.g.*, Tarullo, *supra* note 114, at 675.

123. *See, e.g.*, LeRoy G. Potts, Jr., *Global Trafficking in Human Beings: Assessing the Success of the United Nations Protocol to Prevent Trafficking in Persons*, 35 GEO. WASH. INT'L L. REV. 227, 247–48 (2003); Elizabeth Spahn, *Local Law Provisions under the OECD Anti-Bribery Convention*, 39 SYRACUSE J. INT'L L. & COM. 249, 297 (2012) [hereinafter Spahn, *Local Law*] (noting with approval prosecutions of transnational bribery by "stronger legal regimes" following outcries by constituencies in the state where the bribe was paid).

124. Broude & Teichman, *supra* note 5, at 831.

125. *Id.* at 839.

126. *Cf.* KEOHANE, *supra* note 12, at 96 (noting phenomenon of states eager to join international regimes because "they expect to gain more, proportionately, than they contribute"). For Professor Keo-

In contrast, "lagging" states have the technical capacity and resources to enforce the criminal prohibition more actively, but they stand to benefit—at least in the short run—by encouraging the motivated states' efforts without undertaking any of their own. Updating laws and increasing enforcement efforts carry some costs; inertia can also benefit domestic industry, which can take advantage of questionable opportunities that are off-limits to businesses based in motivated states.[127] For example, when the United States barred its companies from bribing foreign officials to secure business contracts, European companies gained a business advantage as long as their home states did not adopt (and enforce) similar laws.[128] For lagging states, the multilateral treaty comes with immediate benefits and delayed costs.

This leaves states that are agnostic towards or even skeptical of the proposed criminal prohibition. Some of these "reluctant" states may see a benefit in participating in the treaty negotiations in order to protect their own interests, at least to some degree. Others may join the treaty, especially if it appears to lack a strong monitoring mechanism, in order to gain approval from other states or international organizations, even if they have no present intention of implementing or enforcing the requisite domestic laws.[129] Indeed, motivated states can encourage this nominal level of participation by linking treaty ratification to other issues of greater concern to reluctant states, like trade preferences or economic assistance.

Thus for differing reasons, states may find it in their interest, on balance, to negotiate and join a suppression convention. The main purpose of these suppression conventions is to harmonize domestic laws related to the transnational crime of concern.[130] In the short term, implementation by even a few states has immediate benefits. States cannot enforce a law that is not on their books (at least not consistently with international human rights standards). In addition, the more that states' laws differ, the more likely it is that courts and officials will refuse extradition or conclude that MLAT obligations do not apply. By providing a basic definition around which states can coordinate their laws, the treaty will help states avoid unintentional discrepancies that block or slow enforcement efforts.

Nonetheless, initial implementation will be only partial. It takes time to write and adopt laws,[131] and states may delay implementation due to lack of resources, lack of interest, or calculations that non-action is in their self-

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hane, this free-riding can be resolved through improved information provided by international regimes about state conduct. The proposition here is instead that motivated states may accept the risk of such free-riding in the short term in order to gain multilateral approval for domestically motivated policies, and that this initial imbalance of compliance can evolve over time into a more equally enforced regime.

127. *Cf.* Bradford, *supra* note 23, at 6 (noting competitive imbalance when firms in different states are subject to different rules).

128. *See* Tarullo, *supra* note 114, at 687–88.

129. *See* Cuéllar, *supra* note 5, at 43; Hathaway, *supra* note 26, at 2020.

130. *See, e.g.*, BOISTER, *supra* note 7, at 14–15.

131. *See* CHAYES & CHAYES, *supra* note 13, at 15.

interest.[132] This is where the value of channeled unilateralism comes into play: the extraterritorial efforts of motivated states, supported by the treaty, can help narrow the enforcement gap in the short term and increase other states' compliance with the treaty in the long term.

B. Stage 2: Empowering and Constraining Unilateral Action

The suppression conventions typically invite greater unilateral efforts in three ways: by harmonizing laws, endorsing jurisdictional claims, and encouraging bilateral cooperation.

First, by establishing an agreed-upon definition of the crime and prioritizing its enforcement, the treaty signals broad support for motivated states' efforts to suppress that crime aggressively. States, as rational actors, benefit from maintaining a reputation for keeping their treaty commitments because it allows them to make more credible commitments in the future.[133] Simply by codifying the multilateral consensus on the content and priority of the criminal norm, the treaty can reduce the reputational risk to a motivated state for pursuing transnational investigations. Indeed, when treaties obligate states to cooperate in suppressing the target crime, they increase the reputational costs of *opposing* motivated states' efforts because such opposition can now be cast as a form of non-compliance.

Second, the treaty legitimates broader assertions of prescriptive jurisdiction. Although the suppression conventions are typically conservative in *requiring* states to assert jurisdiction on certain grounds, such as territoriality or nationality, they also explicitly *permit* states to rely on additional jurisdictional grounds.[134] Since these additional jurisdictional grounds are still derived from established principles of international law, such permissive provisions may seem largely rhetorical. But the outer bounds of a state's jurisdictional authority are contentious: states dispute, for example, how broadly jurisdiction based on objective territoriality can be applied, or when the assertion of jurisdiction based on passive personality is justified.[135]

Thus it matters, for example, that the terrorism treaties approve states' exercise of jurisdiction when their citizens or their government are the target of a terrorist act.[136] States party to the suppression convention are es-

132. *See, e.g.*, *id.* at 10 (lack of resources); Hathaway, *supra* note 26, at 2020 (lack of additional benefit); Tarullo, *supra* note 114, at 687–88 (pay-offs from non-action and power of inertia).

133. *See, e.g.*, Rachel Brewster, *Reputation in International Relations and International Law Theory*, *in* Interdisciplinary Perspectives on International Law and International Relations, *supra* note 11, at 524, 526 [hereinafter Brewster, *Reputation*]; von Stein, *supra* note 11, at 481.

134. *See, e.g.*, U.N. Convention Against Corruption art. 42, *opened for signature* Dec. 9, 2003, 2349 U.N.T.S. 41 [hereinafter UNCAC] (requiring states to establish jurisdiction based on territoriality and ship registration, while permitting states to establish jurisdiction based on passive personality, nationality, and the protective principle).

135. *See, e.g.*, Lowe, *supra* note 4, at 173, 176; *see also* Part I.A., *supra*.

136. *See, e.g.*, Financing of Terrorism Convention, *supra* note 8, art. 7(2); *see also* Lowe, *supra* note 4, at 176–77 (noting how passive personality and the protective principle are invoked in jurisdictional provisions of the terrorism conventions).

topped from objecting to other states parties' applying these explicitly permitted grounds of jurisdiction.[137] More broadly, by affirmatively acknowledging states' right to assert jurisdiction based on passive personality or the protective principle, the treaty signals to other countries that the motivated state's extraterritorial reach is not a rogue or reckless act, but the conduct of a responsible member of the international community confronting an acknowledged transnational threat. And it does seem that these jurisdictional provisions have a practical effect: the case studies in Part III suggest that the United States relies on suppression conventions when expanding the scope of its prescriptive jurisdiction.[138]

Third, the treaty can encourage greater bilateral cooperation. The suppression conventions are replete with calls for states to assist each other in investigating crimes, seizing evidence, freezing assets, and transferring suspects.[139] By providing points of reference, these provisions can make bilateral cooperation more efficient.[140] Most importantly, the suppression conventions call on states to enter into formal, supplemental bilateral agreements that allow for closer and more tailored cooperation. Absent the treaty, negotiating such bilateral enforcement agreements would be costly: the initiating state must expend diplomatic capital to broach the subject and convince the other state of its importance, and developing specific, workable terms can involve expensive and lengthy negotiations.[141] And without the multilateral treaty, countries may be wary of entering into enforcement agreements with motivated states; they might view the request as an unjustified incursion on their sovereignty, or they may not perceive any reciprocal benefit, or they may simply have more pressing priorities.

A suppression convention can ease the negotiation of such agreements in two significant respects. First, the treaty reduces transaction costs by establishing prior agreement on baseline issues, including the definition of the crime and the importance of its repression.[142] Many of the suppression conventions also suggest specific types of agreements and provide terms for in-

137. *See* BOISTER, *supra* note 7, at 137–38.

138. *See* Part III.A. and III.B., *infra*. An alternative interpretation is that the United States seeks out multilateral treaties in order to justify predetermined decisions to expand its prescriptive jurisdiction. But that interpretation still presupposes that the multilateral treaty provides meaningful legitimacy.

139. *See, e.g.*, UNCAC, *supra* note 134, chs. IV (international cooperation), V (asset recovery) & VI (technical assistance and information exchange).

140. Continuing with the example of UNCAC, consider Article 46, which commits states parties to providing mutual legal assistance; provides twenty-eight paragraphs of detailed provisions regarding what such assistance should look like; and then instructs states to consider "concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions of this article."

141. See, for example, the account of the decade-long negotiation of the first MLAT with Switzerland in NADELMANN, *supra* note 68, at 324–34.

142. *See* Blum, *supra* note 104, at 372 ("In most cases, the existence of a prior [multilateral treaty], which signals a broad recognition of the underlying norms and interests, makes it easier and at times even possible to conclude a complementary [bilateral treaty].").

clusion,[143] while an international organization charged with monitoring the treaty may also consolidate early state practice and create model agreements for states to use.[144] All of this additional information and these pre-established points of agreement lower the cost for the initiating state to approach possible partners while improving the efficiency of the subsequent negotiations.

Second, the consensus established by the treaty shifts the reputational calculations for states considering bilateral agreements. The treaty will reduce reputational risks for the contracting states by assuring third party observers that the agreement is well within the bounds of international law and is not an instance of overreaching by the initiating state (or of capitulation by the responding state). At the same time, the treaty can increase the affirmative reputational benefits of entering into bilateral agreements. In particular, states approached by motivated states can appear more compliant with their international legal obligations without having to invest significantly more of their own resources in enforcement.

These bilateral (or occasionally regional) agreements hold great potential for narrowing the enforcement gap for transnational crime. As a practical matter, given the sensitive nature of a state permitting any other state's law enforcement personnel to operate within its territory, these bilateral agreements allow for "more daring and more generous" experiments in enforcement cooperation than states could achieve multilaterally.[145] Bilateral agreements can also be tailored to reflect the relationship and tolerances of individual states in ways that multilateral treaties simply cannot.[146]

In exchange for these benefits of harmonized laws, legitimated extraterritorial reach, and increased bilateral cooperation, motivated states agree to the constraints (albeit "soft" constraints) of the multilateral treaty. The treaty may not be able to stop a strong state from acting in excess of the multilateral framework, but the framework can still influence the motivated state's behavior. For most states, a decision to violate international law—or to risk operating in a gray zone of legality where one could be perceived as violating international law—is an informed decision; even when they choose

143. In addition to Article 46 of UNCAC, *see* note 140, *supra*, consider the additional forms of cooperation that the U.N. Drug Trafficking Convention encourages states to formalize through bilateral agreements. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances art. 9, *opened for signature* Dec. 20, 1988, 1582 U.N.T.S. 164.

144. *See, e.g.*, *Model Laws and Treaties*, UN Office of Drugs & Crime [UNODC], http://www.unodc.org/unodc/en/legal-tools/model-treaties-and-laws.html (last visited Apr. 7, 2015); *The Legal Library on Drug Control*, UNODC, http://www.unodc.org/enl/index.html (last visited Apr. 7, 2015).

145. *See* Blum, *supra* note 104, at 372.

146. *Cf. id.* at 360 (particularly in the context of security issues like extradition and intelligence sharing, bilateral treaties "allow countries to accommodate their specific interests and strike the right balance between national and international considerations. Uniformity in such cases would be neither desirable nor efficient."). For an example of a failed attempt to negotiate specific enforcement cooperation multilaterally instead of bilaterally, see the discussion in Part IV.A., *infra*, regarding the 2005 Protocol to the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA) Convention.

to act despite international law, they do so because the desired outcome is worth the international and domestic costs.[147]

In particular, from either a rationalist or a constructivist perspective of state behavior, reputations for abiding by international law matter. A state's decision to act contrary to international law can make it harder for the state to make credible commitments in the future,[148] and it may bring social opprobrium from allies—opprobrium internalized in particular by the officials who set and execute foreign policy.[149] Further, in liberal democracies, leaders are responsive to the public, and publics often care whether their country is perceived as law-abiding.[150] Consider the U.S. policies of targeted killings, renditions, and indefinite detention: all are of questionable legality under international law, but because of the aura of illegality, they are controversial domestically as well as internationally, and their use remains limited relative to U.S. capacity. As a particularly powerful state, the United States can choose to violate international law, but international law still sets the parameters of the conversation.

When a powerful state buys into a regime of channeled unilateralism, it accepts the resulting shift in conversation: some courses of action become more legal, others—by implication—less so. And where that line is drawn is not entirely up to the stronger states, as multilateral negotiations will always involve some concessions.[151] In exchange for greater legitimacy for the bulk of the motivated state's actions, then, the motivated state will accept some compromises on the scope of legitimated action, as well as soft constraints on its ability to pursue actions beyond that legitimated scope.

In sum, the multilateral treaty helps motivated states expand their extraterritorial efforts by harmonizing laws across states, endorsing broad prescriptive jurisdiction, and supporting greater bilateral cooperation. The resulting increase in unilateral efforts can help narrow the enforcement gap in the short term by reaching more transnational crime. Still, some gap will remain as long as limited, lagging and reluctant states lack capacity or will to fulfill their treaty obligations to enforce the criminal norm.

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147. *See, e.g.*, Bodansky, *supra* note 20, at 342 (noting that few unilateral decisions "are taken by a state in complete isolation—usually, a state must at least consider the views of other states and how they will react").

148. *See, e.g.*, Brewster, *Reputation*, *supra* note 133, at 540–41; Guzman, *supra* note 14, at 1823, 1849–50.

149. *See, e.g.*, von Stein, *supra* note 11, at 489.

150. *Cf.* Abbott & Snidal, *supra* note 26, at S151 (noting that international legalization leverages the normative weight of the international legal system).

151. On the inevitability of compromise generally, see CHAYES & CHAYES, *supra* note 13, at 7 (with international treaty-making, "not even the strongest state will be able to achieve all of its objectives, and some participants may have to settle for much less."). For an example of such compromise, consider the negotiations of the Drug Trafficking Convention discussed in Part III.B, *infra*.

C. Stage 3: Building Compliance with the Multilateral Regime

The third stage of channeled unilateralism initiates a self-reinforcing cycle that may extend over years, if not decades. With this longer time horizon, the preferences of states can no longer be presumed static, providing space for more normative mechanisms of compliance to shape states' behavior. The compliance literature has already examined how multilateral treaties can promote compliance from both rationalist and constructivist perspectives,[152] in particular the importance of increasing available information, generating repeated interactions, and channeling technical assistance.[153] Less studied is how these same effects can be generated by unilateral actions in the service of a multilateral regime.[154]

Consider first the predicted effects of multilateral treaties. Rationalist theories of state behavior treat states as rational actors who use international law to further their interests,[155] although what constitutes the state's interests can be broadly defined.[156] From this perspective, multilateral treaties will improve the quantity and quality of information available to states, in particular due to secretariats and review mechanisms that collect data on states' conduct. This improved information increases transparency into degrees of compliance and thus states' reliability regarding treaty commitments.[157] Multilateral regimes also promote repeated interactions among states through review mechanisms, conferences, and plenary sessions.[158] More information and repeated interactions in turn diminish incentives to cheat: states will more likely be exposed for failing to keep their commitments, leaving them with weakened reputations when offering to make new commitments in the future.[159] Other scholars emphasize the transnational networks fostered by treaties, through which sub-state actors interact and develop relationships that serve as conduits for exchanging information and providing technical assistance.[160] These inputs are then filtered by the sub-state actors back up through domestic structures to influence state behavior from the inside out.[161]

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152. For an overview of the differences between rationalist and constructivist perspectives, see generally Hathaway, *supra* note 26.

153. *See, e.g.*, Bach & Newman, *supra* note 86, at 522 (identifying how the International Organization of Securities Commissions (IOSCO) fosters these effects in the context of securities reform).

154. For a notable exception, *see* Cleveland, *supra* note 18.

155. Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 HARV. INT'L L. J. 487, 488 (1997).

156. *See, e.g.*, Hathaway, *supra* note 26, at 1944 (listing as potential state interests "improving . . . reputation, enhancing . . . geopolitical power, furthering . . . ideological ends, avoiding conflict, or avoiding sanction by a more powerful state").

157. *See* KEOHANE, *supra* note 12, at 94; Katzenstein et al., *supra* note 26, at 662.

158. *See* Kenneth W. Abbott & Duncan Snidal, *Why States Act Through Formal International Organizations*, 42 J. CONFLICT RESOLUTION 3, 10, 17 (1998).

159. *See* KEOHANE, *supra* note 12, at 97, 101.

160. *See, e.g.*, ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 3–4 (2004); Raustiala, *supra* note 16, at 5–7, 27.

161. *See* SLAUGHTER, *supra* note 160, at 24–25.

Constructivist accounts of state behavior instead explain states' compliance with international law by emphasizing the spread of norms through processes of persuasion and socialization.[162] From this perspective, the repeated interactions fostered by multilateral forums promote discourse through which norms are developed and nonconforming states are persuaded to internalize them.[163] Meanwhile, the information generated by treaty regimes increases transparency into state actions, thereby enabling socialization, or the shaping of state behavior through the approval or opprobrium of other states and nonstate actors.[164] Professors Abram and Antonia Chayes' managerial model predicts that multilateral forums will promote compliance in part by building states' practical capacity to comply.[165] And Professor Harold Koh's transnational legal process model points to the norms generated by repeated interactions in multilateral forums that sub-state and private actors then carry back home and promote from within the state.[166]

Whether one gives more weight to rationalist or constructivist accounts of state behavior, increased unilateralism within the context of a multilateral regime may have similar effects. First, motivated states' investigations of extraterritorial misconduct will increase available information about the transnational criminal problem and generate possible solutions that other states can mimic.[167] They also shed light on other states'—particularly lagging states'—lack of enforcement effort. When a motivated state investigates transnational criminal activity that another state party with stronger jurisdictional ties has ignored despite its treaty obligations, the motivated state increases the reputational cost of the other state's noncompliance, both in terms of rational credibility and normative social standing. In addition, domestic constituencies may increase internal pressure for reform once their state's inaction has been juxtaposed against the action of the motivated state.[168]

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162. *See* Finnemore & Sikkink, *supra* note 26, at 902, 905, 915.

163. *See, e.g.*, Alvarez, *supra* note 112, at 338; Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 635–37 (2004).

164. *See* Finnemore & Sikkink, *supra* note 26, at 902; *see also* Goodman & Jinks, *supra* note 163, at 645 (discussing "acculturation").

165. *See* CHAYES & CHAYES, *supra* note 13, at 13–15, 197–201.

166. *See* Koh, *supra* note 15, at 2602, 2655.

167. *See* Kevin E. Davis et al., *Transnational Anti-Corruption Law in Action: Cases from Argentina and Brazil* 10 (N.Y.U. School of Law Int'l L. & Just. Working Paper 2014/1, Apr. 7, 2014), *available at* http://www.iilj.org/documents/IILJGALWP1_2014.pdf (noting "demonstration effects" of transnational bribery cases); Shaffer & Bodansky, *supra* note 20, at 33 (noting states' mimicry of complex environmental laws); *cf.* Beth A. Simmons et al., *Introduction: The International Diffusion of Liberalism*, 60 INT'L ORG. 781, 795–96 (2006) (summarizing literature on policy diffusion through processes of learning from other state's experiences).

168. The best known example of this dynamic is the U.S. investigation of the British company BAE for transnational bribery, discussed in Part III.A., *infra*. *See also* Sarah C. Kaczmarek & Abraham L. Newman, *The Long Arm of the Law: Extraterritoriality and the National Implementation of Foreign Bribery Legislation*, 65 INT'L ORG. 745, 746, 750 (2011) (noting that extraterritorial cases can alter the political economy of the target state, particularly by increasing the salience of the issue and by serving as a "political resource" for those working domestically to increase enforcement); Davis et al., *supra* note 167,

The motivated state's aggressive enforcement efforts can also have informational effects beyond highlighting other states' inaction: For example, increased enforcement can signal to other countries that the motivated state will remain committed to the regime, which can reassure those countries that enforcing their own laws will not put them at a disadvantage.[169] And motivated states' investigations of foreign firms can cause those firms to press for reform back home; once multinational firms alter their internal policies to align with the motivated state's heightened standards, they stand to benefit from similar restrictions being imposed on their domestic competitors.[170] These reputational, signaling and domestic effects should be most pronounced in lagging states that already share the normative commitment and the capacity to suppress the transnational crime but have not yet invested the resources to do so.

Second, the bilateral enforcement agreements pursued by the motivated state should lead to repeated interactions among sub-state actors. These interactions start during the course of negotiations and continue through the agreement's formal channels of cooperation.[171] For example, the agreements may establish points of contact for information sharing; arrange for the secondment of military or law enforcement officials; or lay the groundwork for joint training operations.[172] And repeated cooperation on investigations under the auspices of these agreements can lead to more informal peer-to-peer relationships as well,[173] resulting in more efficient cooperation as well as the potential development of a shared ethic.[174] Shifts in the practice and beliefs of domestic institutions due to such partnerships can in turn improve

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at 10, 50 (noting similar effect in Argentina); Elizabeth K. Spahn, *Multijurisdictional Bribery Law Enforcement: The OECD Anti-Bribery Convention*, 53 VA. J. INT'L L. 1, 39 (2012) [hereinafter Spahn, *Multijurisdictional*] (noting similar effect in Indonesia).

169. *See* Tarullo, *supra* note 114, at 694 (discussing assurance games in the context of the OECD Bribery Convention); *see also* Tonya L. Putnam, *Courts Without Borders: Domestic Sources of U.S. Extraterritoriality in the Regulatory Sphere*, 63 INT'L ORG. 459, 484 (2009) (noting how the exercise of extraterritorial jurisdiction by U.S. courts informs other states and private actors of U.S. priorities and capabilities).

170. *See* Magnuson, *supra* note 86, at 407–08 (discussing this effect in the context of transnational bribery); *see also* Bradford, *supra* note 23, at 6 (discussing this effect more generally in context of European Union regulations); *cf.* Simmons, *supra* note 167, at 794 (summarizing literature on policy diffusion caused by states' competition for firms and investment).

171. *See, e.g.*, Simmons, *supra* note 167, at 798 ("It is well documented in the international literature that the process of negotiating and maintaining institutional affiliations may create opportunities to learn and persuade.").

172. See, for example, the discussion of maritime boarding agreements in Part III.B., *infra*.

173. *See* Frédéric Lemieux, *Tackling Transnational Drug Trafficking Effectively: Assessing the Outcomes of the Drug Enforcement Administration's International Cooperation Initiatives*, *in* INTERNATIONAL POLICE COOPERATION: EMERGING ISSUES, THEORY AND PRACTICE 260, 264 (Frédéric Lemieux ed., 2010) ("Exchanging information gathered during criminal investigations establishes networks and links between police professionals, but it also goes a long way to building trust (with reciprocity and communication).").

174. *See* Goldsmith et al., *supra* note 31, at 78–79. That such an ethic is likely to emerge does not mean that it will always be a normatively desirable one; that depends in part on the internalization of human rights and transparent governance norms, as well as the critical monitoring work of civil society. *Cf. id.* at 105–06 (concluding that transnational support for Colombian policing has improved accountability and human rights awareness but also encouraged the continued militarization of the national police and its independence from civilian oversight).

the state's overall compliance with treaty obligations.[175] Finally, particularly where these bilateral agreements are employed between states with differing resources, they can be conduits for technical knowledge and assistance—or even more simply, learning-by-doing—that can help limited states achieve their own enforcement priorities.[176]

These observations are subject to important caveats, however. Although there is some evidence of these third-stage dynamics in practice, causation is difficult to prove in such complex contexts. The discussion here is thus preliminary and necessarily tentative. Further, the potential impact of power disparity is greatest at this third stage, with the motivated state conducting investigations and pushing bilateral cooperation that may be contrary to the interests of affected states; such concerns are explored further in Part IV. The insight here is simply that channeled unilateral efforts, like multilateral forums, can generate more information, peer-to-peer encounters, and technical assistance. These effects should in turn help build broader compliance with the underlying treaty regime, whether through normative diffusion, improved capacity, or reputational leverage. And as more states undertake independent efforts to suppress transnational crime, they will amplify the combined effects of multilateralism and unilateralism on the remaining noncompliant states. In the long run, no one state should need to champion the multilateral regime because most (even if not all) states will be engaged in the formation and enforcement of transnational criminal law.

III. Channeled Unilateralism in Practice

This Part maps the theory to practice by identifying the dynamics of channeled unilateralism at work in the transnational bribery and drug trafficking regimes. Though the fit between theory and practice is not always perfect, these case studies support the plausibility of the model as a viable path for narrowing the enforcement gap in transnational criminal law.

175. *See id.* at 105–06 (following close cooperation with U.S. law enforcement, "Colombian laws now more fully reflect international standards in respect of areas such as anti-money laundering measures, extradition and criminal procedure, though their implementation is imperfect and inadequate according to many foreign assessments. Nonetheless, a substantial degree of harmonization has taken place."); *cf.* Bach & Newman, *supra* note , at 514 (finding, in the absence of a multilateral framework, that a state with a bilateral agreement with the U.S. Securities and Exchange Commission (SEC) was four times more likely to adopt insider trading laws than states without one).

176. *See* Bach & Newman, *supra* note 86, at 510, 521 (summarizing literature on transgovernmental cooperation and applying it in the context of securities regulation); Davis et al., *supra* note 167, at 10, 58–59 (noting benefits of transnational corruption investigations in developing domestic enforcement capacity).

A. Transnational Bribery

Between 1996 and 2003, five international organizations adopted suppression treaties targeting the bribery of foreign officials.[177] Nearly every state has joined at least one of these treaties,[178] yet observers have worried that they are only paper tigers:[179] States have been slow to adopt laws implementing the treaties, and even with laws in place, states seemed reluctant to enforce those laws in any meaningful manner.[180]

But the tide may be turning. The Organisation for Economic Cooperation and Development (OECD) convention's forty-one states parties, for example, have all adopted domestic implementing legislation.[181] Given that these states account for "nearly 90 percent of global outward flows of foreign direct investment," their companies are the prime supply-side target for the suppression of transnational bribery.[182] And enforcement is also increasing. Ten years ago, only one state (Canada) other than the United States had initiated a prosecution for foreign bribery;[183] today, at least seventeen members of the OECD convention have criminally sanctioned individuals and companies for transnational bribery, and twenty-four states report investiga-

177. Inter-American Convention Against Corruption, *opened for signature* Mar. 29, 1996, 35 I.L.M. 724 [hereinafter OAS Convention]; OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *opened for signature* Dec. 17, 1997, 37 I.L.M. 1 [hereinafter OECD Convention]; Council of Europe Criminal Law Convention on Corruption, *opened for signature* Jan. 27, 1999, Europ. T.S. No. 173, 38 I.L.M. 505; African Union Convention on Preventing and Combating Corruption, *opened for signature* July 11, 2003, 43 I.L.M. 5 [hereinafter African Union Convention]; UNCAC, *supra* note 134.

178. Only fourteen U.N. member states have not joined a transnational bribery treaty. Of the twenty or so states that have not ratified UNCAC, New Zealand and Japan are parties to the OECD Convention; Gambia is party to the African Union Convention; and Belize, Grenada, Saint Kitts & Nevis, Saint Vincent & the Grenadines, and Suriname are parties to the OAS Convention. *See United Nations Convention Against Corruption Signature and Ratification Status*, UNODC (Nov. 12, 2014), http://www.unodc.org/unodc/en/treaties/CAC/signatories.html; *Ratification Status*, OECD (May 21, 2014), http://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf; Advisory Board on Corruption, African Union, http://www.auanticorruption.org/auac/en (last visited Apr. 7, 2015); Dep't of Int'l Law, *Signatories and Ratifications*, Org. of Am. States [OAS], http://www.oas.org/juridico/english/Sigs/b-58.html (last visited Apr. 7, 2015).

179. *See, e.g.*, Tarullo, *supra* note 114, at 666, 682.

180. *See, e.g.*, Rachel Brewster, *Stepping Stone or Stumbling Block: Incrementalism and National Climate Change Legislation*, 28 Yale L. & Pol'y Rev. 245, 309 (2010) [hereinafter Brewster, *Stepping Stone*] (suggesting that "[c]ompliance with the OECD treaty is lacking because governments see an advantage to cheating on the agreement"); Magnuson, *supra* note 86, at 388 (asserting that the OECD Convention "has suffered from severe under-enforcement by its member-states").

181. Nonetheless, improvements could be made to many of these laws, which is the topic of ongoing discussion between the OECD and member states. *See, e.g.*, OECD Working Group on Bribery, *Phase 2 Report on Implementing the OECD Anti-Bribery Convention in the Russian Federation* 95 (Oct. 2013), *available at* http://www.oecd.org/daf/anti-bribery/RussianFederationPhase2ReportEN.pdf (recommending amendments to Russia's anti-bribery laws).

182. OECD Working Group on Bribery, *Annual Report on Activities Undertaken in 2012*, at 7 (2013), http://www.oecd.org/daf/anti-bribery/AntiBriberyAnnRep2012.pdf [hereinafter OECD *Annual Report 2013*].

183. Magnuson, *supra* note 86, at 392–93.

tions in progress.[184] Indeed, countries actively enforcing their transnational bribery laws now account for nearly eighty percent of the world's exports.[185] Meanwhile, more major economies are adopting or strengthening transnational bribery laws: the United Kingdom significantly reformed its bribery laws in 2010,[186] China and Russia both adopted their first laws criminalizing the bribery of foreign officials in 2011,[187] and China has started prosecuting multinational corporations for bribery.[188] Channeled unilateralism can help explain both the sudden flurry of multilateral activity in the 1990s, as well as this more recent trend towards broader enforcement of transnational bribery laws.

Recall that the first stage of channeled unilateralism occurs when many states recognize an instrumental benefit to joining a multilateral regime. The United States had long viewed an anti-bribery convention as in its best interest.[189] The U.S. Congress had unanimously adopted the Foreign Corrupt Practices Act (FCPA) in 1977 following overseas bribery scandals that Congress feared had tarnished the foreign policy and economic reputation of the United States.[190] But the United States remained alone in the world for nearly twenty years in prohibiting its domestic corporations from bribing foreign officials.[191] U.S. businesses complained that they were left at a competitive disadvantage against foreign firms; if they could not reverse the FCPA domestically, they at least wanted an international standard that would impose similar restrictions on their foreign competitors.[192] However, U.S. efforts to secure such an international agreement in the 1980s came up short.

What changed in the 1990s? Many factors were likely at play. First, following a wave of democratization around the world, new regimes recog-

184. OECD Working Group on Bribery, *Annual Report of the OECD Working Group on Bribery 2014*, at 15 (2014), http://www.oecd.org/daf/anti-bribery/WGB-AB-AnnRep-2014-EN.pdf [hereinafter OECD *Annual Report 2014*].

185. *Id.* at 9.

186. F. Joseph Warin, Charles Falconer, & Michael S. Diamant, *The British Are Coming!: Britain Changes its Law on Foreign Bribery and Joins the International Fight Against Corruption*, 46 TEX. INT'L L.J. 1, 6 (2010).

187. OECD *Annual Report 2013*, *supra* note 182, at 24; *OECD Invites Russia to Join Anti-Bribery Convention*, OECD (May 25, 2011), http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/oecdinvitesrussiatojoinanti-briberyconvention.htm.

188. *See* Keith Bradsher & Chris Buckley, *Glaxo Fined $500 Million by China*, N.Y. TIMES B1 (Sept. 20, 2014) (describing $500 million fine imposed on British multinational GlaxoSmithKline for admitted bribery scheme in China that generated more than $150 million in illegal revenue).

189. *See, e.g.*, Kevin E. Davis, *Why Does the United States Regulate Foreign Bribery: Moralism, Self-Interest, or Altruism?*, 67 N.Y.U. ANN. SURV. AM. L. 497, 502 (2012) (citing Congress's direction to the President to negotiate an OECD anti-bribery convention as part of the 1988 FCPA amendments); Tarullo, *supra* note 114, at 671–75.

190. *See* Davis, *supra* note 189, at 498–501; Tarullo, *supra* note 114, at 673.

191. *See* Brewster, *Stepping Stone*, *supra* note 180, at 309; Tarullo, *supra* note 114, at 673.

192. *See, e.g.*, Brewster, *Stepping Stone*, *supra* note 180, at 307–08; Tarullo, *supra* note 114, at 675; *see also* William J. Clinton, Presidential Statement on Signing the International Anti-Bribery and Fair Competition Act of 1998 (Nov. 10, 1998), www.justice.gov/criminal/fraud/fcpa/docs/signing.pdf (noting U.S. business losses to unconstrained foreign competitors as motivation for OECD bribery convention).

nized—and objected to—the harm caused by foreign corporations bribing their officials. Not only did the Organization of American States (OAS) adopt the first convention targeting transnational bribery, but pressure from developing states was also a significant impetus for the OECD treaty.[193] Second, some high-profile bribery scandals in Europe, combined with a new and particularly credible transnational advocacy network,[194] created domestic pressure in those states to do something about transnational corruption.[195] For these countries, signing onto the transnational bribery conventions was a relatively low cost way to illustrate their commitment to the issue, even if they had little present intention of undertaking domestic reform.[196] Finally, the new Clinton Administration in the United States prioritized transnational bribery enforcement within its foreign policy, linking cooperation on this front to progress on other international trade issues.[197] Some states that were agnostic or even resistant to a transnational bribery regime were thus induced to participate, at least nominally.[198]

In sum, whether due to domestic politics, lack of domestic capacity, or linkage to other issues, states converged on a multilateral response to bribery in the 1990s. The end result was a slew of treaties that states were quick to adopt but slow to implement. In keeping with the second stage of channeled unilateralism, however, the treaties provided space for increased unilateral enforcement of transnational bribery prohibitions—an opportunity most enthusiastically embraced by the United States.

Upon ratification, the United States relied on the OECD convention to expand significantly its claims of prescriptive jurisdiction. When Congress first drafted the FCPA in 1977, the House considered extending the law to any entity owned or controlled by U.S. nationals, including foreign subsidiaries of U.S. corporations.[199] This proposal was dropped in conference, however, based on the Senate's objection that it would push the limits of international law, generating undesirable "jurisdictional, enforcement, and diplomatic difficulties."[200]

When amending the FCPA in 1998 to implement the OECD convention, however, Congress felt empowered—perhaps even obligated—to expand the

193. *See* Tarullo, *supra* note 114, at 679.

194. Transparency International was founded by a former World Bank development expert in 1993; it documents public perceptions of corruption around the world through well-publicized annual reports. *See* Abbott & Snidal, *supra* note 26, at S165; *see also* Paul B. Stephan, *Regulatory Competition and Anticorruption Law*, 53 VA. J. INT'L L. 53, 62 (2012) (noting the possible impact of "canny transnational norm entrepreneurs" in "produc[ing] a widespread demand for anticorruption measures").

195. *See* Abbott & Snidal, *supra* note 26, at S159; Tarullo, *supra* note 114, at 678–79.

196. *See* Tarullo, *supra* note 114, at 680.

197. *See id.* at 676–77.

198. *See id.*

199. *See* H. Lowell Brown, *Extraterritorial Jurisdiction Under the 1998 Amendments to the Foreign Corrupt Practices Act: Does the Government's Reach Now Exceed its Grasp?*, 26 N.C. J. INT'L L. & COM. REG. 239, 291–92 (2001) (citing H.R. REP. NO. 95-640, at 4, 12 (1977)).

200. H.R. REP. NO. 95-831, at 13–14 (1977) (Conf. Rep.).

FCPA's jurisdictional reach even further than the House had contemplated in 1977.[201] The OECD convention requires each state party "to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole *or in part* in its territory,"[202] a provision intended to be "interpreted broadly so that an extensive physical connection to the bribery act is not required."[203] Based on this admonition,[204] Congress extended U.S. jurisdiction to cover any act related to foreign bribery that has any territorial connection with the United States, regardless of the actor's nationality or the location where the bribe was actually plotted or offered.[205] Thus any use of the mails or the wires of the United States, including the flow of funds through U.S. bank accounts or a phone call placed to a U.S. number, can provide a jurisdictional hook for U.S. prosecution of foreign nationals for conduct that occurs primarily overseas.[206] Congress also extended jurisdiction based on nationality to cover any conduct by U.S. nationals (including businesses organized under U.S. law) anywhere in the world.[207]

Since these amendments, FCPA enforcement has increased significantly, peaking in 2010.[208] Between 2006 and 2010, for example, U.S. prosecutors brought more FCPA cases than they had in the prior two decades combined.[209] And many of these cases have targeted foreign actors for foreign conduct;[210] in 2010 alone, "non-U.S. corporations accounted for 94% of the total penalties paid by corporations for FCPA violations."[211]

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201. *See* Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775, 1830 (2011).

202. OECD Convention, *supra* note 177, art. 4(1) (emphasis added).

203. OECD, Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ¶ 25 (Nov. 21, 1997), *available at* http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.

204. *See, e.g.*, H.R. REP. NO. 105-802, at 21 (1998) (discussing § 4 of Pub. L. No. 105-366 as implementing Article 4(1) of the OECD Bribery Convention).

205. *See* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, § 4, 112 Stat. 3302, 3306 (codified at 15 U.S.C. § 78dd-3).

206. *See* Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 552–53 (2011) (collecting examples of tenuous jurisdictional bases of recent FCPA cases).

207. International Anti-Bribery and Fair Competition Act § 2(c)(1) (codified at 15 U.S.C. § 78dd-1) (issuers); *id.* § 3(d)(1) (codified at 15 U.S.C. § 78dd-2) (domestic concerns).

208. *See FCPA Digest: Recent Trends and Patterns in the Enforcement of the Foreign Corrupt Practices Act*, SHEARMAN & STERLING (Jan. 2015), http://shearman.symplicity.com/files/681/68116f1efbbd6263878094fb31b31339.pdf.

209. Warin et al., *supra* note 186, at 69; *see also* Nicholas M. Mclean, Note, *Cross-National Patterns in FCPA Enforcement*, 121 YALE L.J. 1970, 1972–73 (2012) (collecting sources).

210. Garrett, *supra* note 201, at 1832–33 (estimating that about a third of FCPA investigations involve foreign business organizations).

211. Magnuson, *supra* note 86, at 400. These figures could suggest that the United States is using the FCPA to protect U.S. business against foreign competitors, but that is not an entirely satisfactory explanation. One empirical analysis of FCPA cases, for example, found that the SEC and Department of Justice did not target foreign companies in countries where U.S. firms do more business, as would be expected if these agencies were motivated by protectionism. *See* Stephen J. Choi & Kevin E. Davis, *Foreign Affairs and Enforcement of the Foreign Corrupt Practices Act* 43 (N.Y.U. L. & Econ. Research Paper No. 12-15, Dec. 30, 2013), *available at* http://ssrn.com/abstract=2116487; *see also* Stephan, *supra* note 194, at 65–67 (considering and rejecting hypothesis of protectionist bias in U.S. enforcement practice).

These investigations have been aided by growing cooperation with other states' law enforcement agencies. In particular, the United States has benefitted from memoranda of understanding that the Securities and Exchange Commission (SEC) has established with securities regulators around the world.[212] Although they are not legally binding, the memoranda are phrased like MLATs and allow regulators to share information that can be passed on to law enforcement officials investigating related crimes.[213] And these memoranda have affirmatively eased U.S. efforts to conduct cross-border investigations: whether the United States pursues an FCPA investigation in another country is correlated *not* to whether it has a generic MLAT with that country, but with whether it has one of these memoranda of understanding in place.[214] Another study has found a more general correlation between FCPA enforcement actions and whether the defendant's home state "has a longstanding bilateral cooperation agreement with the SEC, a Mutual Legal Assistance Treaty with the U.S., and strong local anti-bribery institutions."[215]

Still, the model of channeled unilateralism described in this Article contemplates more subject-specific and more in-depth forms of bilateral cooperation. One underutilized avenue is joint investigations based on Article 49 of U.N. Convention Against Corruption.[216] Joint investigations transcend the mere coordination of parallel investigations; they are integrated law enforcement efforts that enable one state's officials to be present on another state's territory to observe (even if not actively participate in) enforcement activities like searches and witness interviews. European states, for example, have successfully used joint investigations in transnational bribery cases, albeit under a framework established through the European Union.[217]

Turning to the third stage of channeled unilateralism, there is mounting evidence that the increased unilateral efforts of the United States have encouraged other states to update and enforce their own laws in conformity with the transnational bribery treaties.[218] In one well-documented example,

212. *See* OECD *Typology*, *supra* note 79, at 69; Mclean, *supra* note 209, at 1988.

213. *See* OECD *Typology*, *supra* note 79, at 68–69. These individual MOUs have largely been replaced by the International Organization of Securities Commissions' Multilateral Memorandum of Understanding (MMOU), now signed by 105 states. *Current Signatories*, IOSCO, https://www.iosco.org/about/?subSection=mmou&subSection1=signatories (last visited Apr.7, 2015). In 2013 alone, the MMOU was invoked in more than 2600 requests for information. *About the Multilateral Memorandum of Understanding*, IOSCO, https://www.iosco.org/about/?subsection=mmou (last visited Apr. 7, 2015).

214. *See* Mclean, *supra* note 209, at 2003.

215. *See* Choi & Davis, *supra* note 211, at 43.

216. A bilateral framework agreement established under Article 49 might address, inter alia, "disclosure and confidentiality obligations, data privacy issues, and privilege issues," OECD *Typology*, *supra* note 79, at 50, as well as evidentiary standards, cost sharing, division of confiscated goods, and liability issues, *id.* at 54–55.

217. *Id*. at 51–55.

218. *See* Spahn, *Multijurisdictional*, *supra* note 168, at 41–42 ("Broader jurisdictional claims among stronger enforcing states, notably the United States and the United Kingdom, have been used in practice to strengthen, or pressure, depending on your politics, jurisdictions perceived as lagging, unable, or unwilling to prosecute their own national champions."); *Developments in the Law—Extraterritoriality*, 124

the U.S. Department of Justice prosecuted a case avoided by the British, highlighting the United Kingdom's failure to pursue "one of the largest and most extensive bribery schemes in history"[219] and sparking significant legal reform.[220] BAE, a British company, had obtained immensely lucrative contracts to sell airplanes to Saudi Arabia by funneling hundreds of millions of dollars' worth of bribes to senior Saudi officials.[221] The United Kingdom started an investigation into these allegations but dropped it due to pressure from Saudi Arabia.[222] The United States then initiated its own investigation, even though BAE was not a U.S. corporation and was not listed on a U.S. exchange, and even though most of the relevant conduct took place outside the United States.[223] In February 2010, BAE's U.S. subsidiary pled guilty to a number of crimes and agreed to pay a $400 million fine.[224]

Particularly in light of the high-profile U.S. investigation, the British capitulation to Saudi pressure was a public relations disaster both at home and abroad, and it spurred reform of the United Kingdom's outdated foreign bribery laws.[225] The new law's coverage is even more far-reaching than the FCPA;[226] the United Kingdom is now positioned to become another "motivated state," with its transnational enforcement efforts "prodding [additional] states that consider themselves international economic forces, such as China, Japan, and other countries of the European Union, to ramp up their anti-corruption efforts."[227] The British law is also causing firms that do business in the United Kingdom to update their internal compliance policies.[228] As these corporations shift their behavior and policies to align with the strict British law, they may pressure their home governments to impose similar requirements on their domestic competitors.

Similarly, the U.S. investigation of Daimler AG has been credited with overcoming German prosecutors' resistance to enforcing foreign bribery rules: since the Daimler investigation in 2004, "Germany has increased its enforcement from 1 antibribery case and 12 investigations in 2005 to a total of 117 cases and 150 investigations by 2009," including the coordinated U.S.-German investigation of Siemens that resulted in a record-breaking

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HARV. L. REV. 1226, 1287 (2011) ("[U]nilateral American enforcement of the OECD Convention's anticorruption policy on a global scale has encouraged other convention signatories to observe the treaty.").

219. Magnuson, *supra* note 86, at 363.

220. *See, e.g.*, Garrett, *supra* note 201, at 1840–42; Warin et al., *supra* note 186, at 3–5.

221. Garrett, *supra* note 201, at 1840; Warin et al., *supra* note 186, at 3.

222. Garrett, *supra* note 201, at 1831; Magnuson, *supra* note 86, at 363; Warin et al., *supra* note 186, at 3.

223. Magnuson, *supra* note 86, at 403.

224. Garrett, *supra* note 201, at 1842. In the end, BAE's subsidiary did not plead guilty to any FCPA violations, but instead acknowledged responsibility on other charges of wrongdoing stemming from the bribery scheme. *Id.*

225. *See* Warin et al., *supra* note 186, at 3–5, 45.

226. *See* Spahn, *Multijurisdictional*, *supra* note 168, at 42; Warin et al., *supra* note 186, at 28.

227. Warin et al., *supra* note 186, at 70.

228. *See id.* at 8.

$1.3 billion settlement.[229] The German and U.S. investigation of Siemens in turn created political pressure in Argentina to "revive the Argentine criminal proceedings that had stalled in the face of resistance from powerful local actors."[230] Indonesia brought bribery charges against Indonesian citizens following investigations by British and American authorities and subsequent pressure from Indonesian NGOs for domestic prosecutions.[231] Sweden brought criminal charges against Volvo executives following a U.S. investigation, and Nigeria and South Korea have also pursued domestic investigations in parallel with U.S. cases.[232] Indeed, an empirical analysis of enforcement trends in OECD member states found that "U.S. enforcement has a positive and statistically significant association with a country's likelihood of enforcing their own national laws."[233] "Holding all other variables constant, the odds of a country enforcing its first case are *twenty times greater* if a country has experienced extraterritorial application of the FCPA as compared to countries that have not."[234]

Of course, these "unilateral" efforts are not taking place in a vacuum.[235] The transnational bribery treaties have their own informational, network, and capacity-building effects that encourage compliance and amplify the impact of the efforts of motivated states like the United States. The treaties' review mechanisms—particularly that of the OECD convention—track the status of domestic legislation and enforcement efforts, increasing transparency into states' compliance and fostering discourse through rounds of recommendations and state responses.[236] These organizations have also published technical guides collecting best practices for reforming laws and con-

229. Kaczmarek & Newman, *supra* note 168, at 755.

230. Davis et al., *supra* note 167, at 50. A December 2013 indictment in the Argentine proceedings "explicitly recognized that the investigation only seriously considered a bribery charge after receiving the information from the US and Germany and, in fact, around 80% of the evidence used to support the indictment was collected abroad." *Id.* Nonetheless, Argentina's domestic efforts have not yet come to full fruition, and Argentina has seen little of the fines and forfeitures collected by the United States and Germany. *See id.* at 27, 51.

231. *See* Spahn, *Multijurisditional*, *supra* note 168, at 39.

232. *See id.* at 27–30 (Nigeria); *Developments in the Law—Extraterritoriality*, *supra* note 218, at 1288 & n.73 (Sweden and South Korea).

233. Kaczmarek & Newman, *supra* note 168, at 760.

234. *Id.* (emphasis added).

235. *But see* Magnuson, *supra* note 86, at 376 (suggesting aggressive U.S. enforcement of the FCPA can be "an effective alternative to multilateral cooperation").

236. *See* Abbott & Snidal, *supra* note 26, at S173 (describing the OECD Working Group's review process as employing both "the threat of exposure and criticism to ensure that national prosecutors prosecute vigorously" and "discursive approaches to ensure that national legal bureaucracies internalize and mobilize anticorruption values"); *see also generally* CHAYES & CHAYES, *supra* note 13, at 26. The OECD publishes these reviews online; UNCAC reports are also partially available online. *See Country Monitoring of the OECD Anti-Bribery Convention,* OECD, http://www.oecd.org/daf/anti-bribery/countrymonitoringoftheoecdanti-briberyconvention.htm (last visited Apr. 7, 2015); *Country Profiles*, UNODC, http://www.unodc.org/unodc/en/treaties/CAC/country-profile/index.html (last visited Apr. 7, 2015).

ducting bilateral investigations,[237] and they routinely organize networking opportunities that bring together law enforcement and corruption experts from around the world.[238] In the end, the success of the transnational bribery regime may be due not to the corruption conventions or to aggressive enforcement efforts by individual states, but rather to a combination of the two.

B. Drug Trafficking

International cooperation to control the drug trade dates back more than a century.[239] But for most of that time, the major drug conventions were focused on regulating the licit drug market; these were not law enforcement treaties.[240] That changed in 1988 with the adoption of the UN Drug Trafficking Convention, which focuses almost exclusively on law enforcement cooperation.[241] Although the United States' commitment to suppressing the drug trade is notorious, the Convention is not solely an American project. Rather, in the mid-1980s, in line with the first stage of channeled unilateralism, numerous states determined that greater cooperation and enforcement against the escalating drug trade was in their common interest.[242]

In the United States, domestic constituencies were demanding greater drug enforcement, resulting in a dramatic increase in the scope and funding of the War on Drugs in the 1980s.[243] Meanwhile, the U.S. Coast Guard reported a significant uptick in maritime drug smuggling starting in the 1970s, particularly of marijuana through the Caribbean.[244] Already by 1978, the Coast Guard had seized three hundred vessels and more than $2.4 bil-

237. *See Prevention and Fight Against Corruption: Documents, Publications and Tools*, UNODC, http://www.unodc.org/unodc/en/corruption/publications.html (last visited Apr. 7, 2015) (index of reports and guides); *Anti-Bribery Typology Reports*, OECD, http://www.oecd.org/daf/anti-bribery/anti-briberytypologyreports.htm (last visited Apr. 7, 2015).

238. *See* OECD *Annual Report 2013*, *supra* note 182, at 23, 30, 38; *cf.* Raustiala, *supra* note 16, at 7, 27 (arguing that transnational networks, through technical assistance and capacity building, help promote policy convergence and thus treaty compliance).

239. The first international convention regarding the drug trade was signed in 1912. *See* International Opium Convention, Jan. 23, 1912, 38 Stat. 1912, 8 L.N.T.S. 187.

240. The dozen or so preexisting conventions on drug control were merged and streamlined through the aptly named Single Convention on Narcotic Drugs in 1961, which regulates cannabis, opium, coca, and additional narcotic drugs and currently has 154 states parties. *See* Single Convention on Narcotic Drugs, as amended by the Protocol amending the Single Convention on Narcotic Drugs art. 44, *opened for signature* Mar. 30, 1961, 18 U.S.T. 1407, 520 U.N.T.S. 204; *Treaty Status*, UN TREATY COLLECTION, https://treaties.un.org (follow "Status of Treaties" hyperlink; then follow "Chapter VI" hyperlink; then follow treaty hyperlink). Its regulatory regime was extended to cover hallucinogens, stimulants, and sedatives by the Convention on Psychotropic Substances, *opened for signature* Feb. 21, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 175, which now has 183 states parties. *Treaty Status*, UN TREATY COLLECTION, https://treaties.un.org (follow "Status of Treaties" hyperlink; then follow "Chapter VI" hyperlink; then follow treaty hyperlink).

241. *See* Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *opened for signature* Dec. 20, 1988, 1582 U.N.T.S. 164 [hereinafter Drug Trafficking Convention].

242. *See* text accompanying notes 259–263.

243. *See, e.g.*, Anti-Drug Abuse Act, Pub. L. No. 99-570, 100 Stat. 3207 (1986).

244. H.R. REP. NO. 96-323, at 3–4 (1979).

lion of contraband.[245] Yet the United States was finding traditional methods of state-to-state cooperation, like MLATs and informal arrangements, to be inadequate to stem the flow of drugs, particularly in the maritime context.[246] The Coast Guard was also hampered by limited enforcement powers against non-U.S. ships, and federal prosecutors were stymied by a statutory loophole that made it difficult to convict any drug smugglers, even those aboard U.S.-flagged vessels, seized outside U.S. territorial waters.[247]

Congress tried to close that loophole in 1980 with the Marijuana on the High Seas Act (MHSA).[248] The MHSA asserted prescriptive jurisdiction over maritime drug smuggling within U.S. territorial and customs waters, by U.S. nationals, on U.S.-flagged ships, on stateless vessels, or when the contraband was destined for U.S. markets—all traditional bases for jurisdiction under international law.[249] Congress and the Administration worried, however, about pushing jurisdictional claims too far,[250] in particular by extending the MHSA to reach conduct by foreign citizens on board foreign-flagged vessels when the foreign state had consented to the United States' boarding and searching the ship.[251]

In implementing the MHSA, the United States developed a practice of securing informal, ad hoc consent from other states to search and seize their flagged vessels suspected of drug trafficking.[252] The United Kingdom, through an exchange of notes in 1981, gave blanket consent for the U.S. Coast Guard to board ships flying the British flag or the flag of any of its Caribbean dependencies.[253] But other states were unwilling to formalize these arrangements, despite keen interest from Congress and the Executive Branch to secure more systematic consent.[254] Negotiating such agreements would also be a slow and difficult process, given all the issues the agree-

245. *Id.* at 4.

246. *See* Senate Caucus on Int'l Narcotics Control, Rep. on the Status of the Draft Convention, the U.S. Negotiating Position, and Issues for the Senate 2 (Comm. Print 1987).

247. H.R. Rep. No. 96-323, at 4–5 (1979). A statute prohibiting the use of narcotics on board U.S. vessels on the high seas was "inadvertently repealed" by the Comprehensive Drug Abuse Prevention and Control Act in 1970. *Id.* at 4. As of 1977, "over 80 percent of U.S. citizens apprehended by the Coast Guard for drug smuggling on the high seas were not being successfully prosecuted." *Id.* at 5.

248. Marijuana on the High Seas Act, Pub. L. No. 96-350, 94 Stat. 1159 (1980).

249. *Id.*; *see also* Part II.A., *supra*.

250. *See, e.g.*, H.R. Rep. No. 96-323, at 7 (1979) ("Recognition of exclusive flag state jurisdiction as the premise underlying the concept of freedom of the high seas compels the most circumspect and judicious consideration before exercising any sovereign right of unilateral action.").

251. *See id.* at 16–17 (Department of Justice views); *id.* at 20 (Department of Transportation views). The House amended the bill in response to these concerns. *See id.* at 9–10 (explaining that an amended version "eliminates any possible conflict with international law by limiting the scope of the bill to situations where the U.S. has clear jurisdiction" and describing those clear bases of jurisdiction under international law).

252. *See Defining Customs Waters for Certain Drug Offenses: Hearing before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 99th Cong. 35 (1985) [hereinafter *Defining Customs Waters*].

253. Narcotic Drugs: Interdiction of Vessels, Exchange of Notes, U.S.-U.K., Nov. 13, 1981, 33 U.S.T. 4224.

254. *See Defining Customs Waters*, *supra* note 252, at 61–62.

ments would need to cover.[255] At the same time, U.S. courts were struggling to find jurisdiction to prosecute the foreign nationals seized on foreign-flagged ships following ad hoc consent. By 1984, courts were interpreting the MHSA's reference to "customs waters" to include the location of any foreign-flagged ship for which the United States had secured consent for search.[256] Although Congress considered amending the MHSA in 1985 to adopt this interpretation more explicitly, this interpretation does not seem to have been the original intention of the "customs water" provision in the 1980 law.[257] A new multilateral treaty would provide explicit justification for extending U.S. prescriptive jurisdiction to cover these consent-based seizures, and it could also help the United States secure broader and more formal cooperation with other states.

Meanwhile, drug producing and transit states shared many of the same concerns as the United States and its European allies,[258] particularly regarding the links between drug trafficking and organized crime.[259] Venezuela

255. *See id.* at 61.

256. *See* United States v. Loalza-Vasquez, 735 F.2d 153, 157 (5th Cir. 1984); *see also* United States v. Bent-Santana, 774 F.2d 1545, 1549–51 (11th Cir. 1985), *abrogated on other grounds by* Horton v. California, 496 U.S. 128 (1990). The MHSA asserted jurisdiction over any vessel "within the customs waters of the United States" and cross-referenced 19 U.S.C. § 1401(j) to define "customs waters." Marijuana on the High Seas Act, Pub. L. No. 96-350, §§ 1–2, 94 Stat. 1159, 1159–60 (1980). Section 1401(j) in turn provides in full:

> The term "customs waters" means, in the case of a foreign vessel subject to a treaty or other arrangement between a foreign government and the United States enabling or permitting the authorities of the United States to board, examine, search, seize, or otherwise to enforce upon such vessel upon the high seas the laws of the United States, the waters within such distance of the coast of the United States as the said authorities are or may be so enabled or permitted by such treaty or arrangement and, in the case of every other vessel, the waters within four leagues of the coast of the United States.

19 U.S.C. § 1401(j). That is, the customs waters typically extended for twelve miles from the U.S. coast, reflecting the U.S. understanding of customary international law prior to the 1988 Law of the Sea Convention. During Prohibition, the United States had entered into anti-smuggling agreements with other countries like the United Kingdom to reach "hovering ships" that were within an hour's sailing time of the U.S. coast, even if not technically within the twelve-mile limit; Congress amended the customs jurisdiction to reflect those agreements. *Defining Customs Waters*, *supra* note 252, at 41. Courts in the 1980s, however, used the "treaty or other arrangement" language of § 1401(j) to extend U.S. customs waters to reach any ship on the high seas for which the United States had been granted consent to search. *See, e.g.*, *Loalza-Vasquez*, 735 F.2d at 157.

257. *Compare* H.R. REP. NO. 96-323, at 10 (1979) (describing § 955a(c) as "predicated upon the assertion of U.S. jurisdiction over its Customs Zone by virtue of the Convention on the Territorial Sea and Contiguous Zone, 1958 . . . . This section is intended to encompass all vessels and persons actually or constructively present within the Customs waters [out to a distance of twelve nautical miles], thereby incorporating by reference the accepted international law doctrine of hot pursuit and the domestic statutory provision governing hovering vessels . . . ."), *with Defining Customs Waters*, *supra* note 252, at 14 ("It is my strong opinion that in 1980, when these words were put into the statute, that it was congressional intent that [verbal consent for search] was an arrangement [for purposes of § 1401(j)].").

258. *See, e.g.*, FRIEDRICHS, *supra* note 79, at 161–68 (describing the anti-drug trafficking efforts of Germany and France in the 1970s and 1980s).

259. *See, e.g.*, ASEAN Foreign Ministers Joint Statement on the International Problem of Drug Abuse and Trafficking (July 9, 1985), http://www.asean.org/communities/asean-political-security-community/item/asean-foreign-ministers-joint-statement-on-the-international-problem-of-drug-abuse-and-traffick-

introduced the U.N. General Assembly resolution that initially called for a drug trafficking convention, which was adopted unanimously in 1984.[260] This resolution followed two formal declarations by Latin American states urging an increased multilateral response and arguing that drug trafficking be labeled a crime against humanity.[261] Caribbean states in particular were worried about the negative externalities caused by the drugs being trafficked through their waters, yet they lacked the resources to counter the rising tide.[262] These concerns ultimately led Trinidad and Tobago, with the support of its regional allies, to call for an international criminal court that could help enforce the Drug Trafficking Convention.[263]

While there was widespread international support for a drug trafficking convention, its negotiation was not without tension. The final product represents a compromise between, loosely speaking, drug producing states like Mexico and drug consuming states like the United States.[264] While the consumer states wanted the convention to focus on eradicating the cross-border trade in drugs, Mexico and other producing states insisted the convention also recognize the demand side of the problem: the market for illicit drugs in rich, western countries.[265] Mexico and other Latin American states also worried that the United States would use the convention to interfere in producing and transit states[266]—a not outlandish concern given the U.S. invasion of Panama in 1989. Drug producing and transit states did obtain some concessions in the final convention, such as Article 2's general affirma-

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ing-kuala-lumpur-9-july-1985. Of course, the United States may have influenced these changing views of other states, *see* Part IV.A., *infra*.

260. William C. Gilmore, *Drug Trafficking by Sea: The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 15 Marine Pol'y 183, 183 (1991).

261. *See* U.N. Secretary-General, Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, ¶ 6, U.N. Doc. E/CN.7/590, U.N. Sales No. E.98.XI.5 (1998) (noting the Quito Declaration against Traffic in Narcotic Drugs, signed in 1984 by Bolivia, Colombia, Ecuador, Nicaragua, Panama, Peru, and Venezuela; and the New York Declaration against Drug Trafficking and the Illicit Use of Drugs, also signed in 1984 by Argentina, Bolivia, Brazil, Ecuador, Peru, and Venezuela).

262. *See generally* Baytoram Ramharack, *Cooperation in Narco-Trafficking: The United States and the English-Speaking Caribbean*, 46 Soc. & Econ. Stud. 83 (1997) (discussing U.S.-Caribbean cooperation on drug trafficking efforts in the 1980s and 1990s).

263. *See* Draft Resolution, *supra* note 101 (proposal submitted by sixteen Latin American and island nations (plus Libya) calling for an international criminal court that could prosecute transnational drug traffickers; asserting "the established link between the illicit trafficking in narcotic drugs and other organized criminal activities which endanger the constitutional order of States and violate basic human rights"; and noting the recent adoption of the U.N. Drug Trafficking Convention); *see also* Permanent Rep. of Trinidad & Tobago to the U.N., Letter addressed to the Secretary-General, U.N. Doc. A/44/195 (Aug. 21, 1989) (explaining the need for an international criminal court to help effectuate the new U.N. Drug Trafficking Convention). This interest in a supranational enforcement body in part reflected wariness of aggressive unilateral enforcement by the United States; Caribbean states in particular have walked a fine line in managing U.S. zeal in countering drug trafficking.

264. *See* D.W. Sproule & Paul St. Denis, *The UN Drug Trafficking Convention: An Ambitious Step*, 27 Can. Y.B. Int'l L. 263, 266 (1989).

265. *Id.* at 266 & n.18

266. *Id.* at 267 n.18.

tion of state sovereignty,[267] the inclusion of personal possession as a crime to be penalized by member states,[268] and a weaker role for the International Narcotics Control Board in naming and shaming states deemed noncompliant with the regime—typically the producing states.[269]

The resulting treaty has now been ratified by all but seven countries.[270] In keeping with the second stage of channeled unilateralism, the treaty has encouraged transnational enforcement by motivated states by affirming a broad scope of prescriptive jurisdiction and calling for bilateral agreements on enforcement cooperation.

The Drug Trafficking Convention's jurisdictional provision explicitly permits states to apply their laws to conduct on board foreign-flagged ships as long as the two states have a ship-boarding agreement in place.[271] This resolved any remaining qualms the United States might have had about asserting jurisdiction based solely on consent. In 1986, as the core provisions of the Drug Trafficking Convention were being circulated for comment,[272] Congress adopted this broader jurisdictional basis in the Maritime Drug Law Enforcement Act (MDLEA).[273] Perhaps the draft Convention was the final justification the United States needed, or perhaps shifting U.S. practice informed the draft Convention. Regardless, the emerging multilateral consensus that such jurisdictional claims were legitimate under international law eased U.S. reform and made it more difficult for other states to object to the expanded U.S. law.[274]

The Convention also invited greater bilateral enforcement cooperation. It rejects bank secrecy laws as an excuse to deny cross-border confiscation requests[275] and encourages the use of controlled delivery,[276] both of which had

267. *See id.* Article 2 provides that "[t]he Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States." Drug Trafficking Convention, *supra* note 241, art. 2(2).

268. Sproule & St. Denis, *supra* note 264, at 269. Ironically, Mexico may be in violation of the convention because of its recent decriminalization of marijuana possession. *See* BOISTER, *supra* note 7, at 59 (citing INT'L NARCOTICS CONTROL BD., REP. OF THE INTERNATIONAL NARCOTICS CONTROL BOARD FOR 2009, ¶ 408, U.N. Doc. E/INCB/2009/1, U.N. Sales No. E.10.XI.1 (2010)).

269. *See* Sproule & St. Denis, *supra* note 264, at 288, 290.

270. The exceptions are Equatorial Guinea, Kiribati, Palau, Papa New Guinea, the Solomon Islands, South Sudan, and Tuvalu. *See Treaty Status*, UN TREATY COLLECTION, https://treaties.un.org (follow "Status of Treaties" hyperlink; then follow "Chapter VI" hyperlink; then follow treaty hyperlink); U.S. DEP'T OF STATE, BUREAU FOR INT'L NARCOTICS & LAW ENFORCEMENT AFFAIRS, 1 *International Narcotics Control Strategy Report* 28–31 (2013), *available at* http://www.state.gov/documents/organization/204265.pdf.

271. Drug Trafficking Convention, *supra* note 241, art. 4(1)(b)(ii).

272. Gilmore, *supra* note 260, at 183–84.

273. *See* Maritime Drug Law Enforcement Prosecution Improvements Act of 1986, Pub. L. No. 99-950, § 3202, 100 Stat. 3207-95 (codified at 46 U.S.C. § 70502(c)(1)(C)).

274. For one thing, other states parties to the treaty cannot object to the U.S. exercise of prescriptive jurisdiction that is affirmatively sanctioned by the treaty. *See* BOISTER, *supra* note 7, at 137–38.

275. *See* Drug Trafficking Convention, *supra* note 241, arts. 5 & 7(5).

276. *See id.* art. 11.

been stumbling blocks in earlier transnational investigations.[277] The Convention further calls on states to enter into supplemental bilateral or regional agreements on topics like extradition, the transfer of prisoners, mutual legal assistance, information sharing, joint investigation teams, the placement of liaison officers, and maritime interdictions.[278] Some of these provisions suggest specific content that can serve as a starting point for bilateral negotiations.[279]

States have heeded this call for supplemental bilateral agreements. Canada, for example, has a series of bilateral agreements regarding forfeiture of drug trafficking assets.[280] Argentina has concluded bilateral agreements regarding technical cooperation in treating drug addiction, eradicating drug cultivation, and suppressing illicit trafficking and money laundering.[281] And the European Union has concluded nearly a dozen bilateral agreements on controlling drug precursors.[282]

Most significant, however, are the ship-boarding agreements described in Article 17 of the Drug Trafficking Convention. The United States has been the greatest user of Article 17, with forty-five maritime boarding agreements now in place.[283] A few other states have followed suit,[284] and two regional Article 17 agreements are also now in force: one in Europe[285] and the other in the Caribbean.[286] Although the United States applied signifi-

277. Controlled delivery was a controversial law enforcement tactic within some legal systems, and bank secrecy laws had been a significant hurdle in money laundering investigations and asset forfeiture proceedings. *See* Sproule & St. Denis, *supra* note 264, at 281–82, 287. Both of these provisions were victories for the United States during negotiations, as it had long championed controlled delivery and the repeal of bank secrecy laws as law enforcement tools.

278. *See* Drug Trafficking Convention, *supra* note 241, arts. 6, 7, 9(1), 17.

279. *See id.* art. 6 (extradition); art. 7 (MLATs); art. 17 (maritime interdiction).

280. *See, e.g.*, Agreement Regarding the Sharing of Forfeited or Confiscated Assets and Equivalent Funds, Can.-Ant. & Barb., Oct. 14, 1999, 1999 Can. T.S. No. 36.

281. *See, e.g.*, Convention on the Abuse and Illicit Trafficking of Narcotics, Arg.-Bol., Apr. 18, 1991, Law No. 23.933, *available at* http://www.oas.org/Juridico/mla/sp/traites/sp_arg_bol_23933.html.

282. *See* Eur. Comm'n Press Release, Fight Against Illicit Drugs: EU Signs New Agreement with Russia (June 4, 2013), http://europa.eu/rapid/press-release_IP-13-499_en.htm.

283. *See* U.S. Dep't of State, Bureau of Int'l Narcotics & Law Enforcement Affairs, 1 *International Narcotics Control Strategy Report* 49 (2014) [hereinafter 2014 International Narcotics Control Strategy Report], *available at* http://www.state.gov/documents/organization/222881.pdf.

284. *See, e.g.*, Treaty to Combat Illicit Drug Trafficking at Sea, Spain-It., Mar. 23, 1990, 1776 U.N.T.S. 229; Treaty to Combat Illicit Drug Trafficking at Sea, Spain-Port., Mar. 2, 1998, 2149 U.N.T.S. 3. According to reports collected from seventy-four countries in 2011, about a dozen states affirmatively reported that they had entered into bilateral or regional agreements under Article 17. *See* Exec. Dir. of Comm'n on Narcotic Drugs, *Action Taken by Member States to Implement the Political Declaration and Plan of Action on International Cooperation Towards an Integrated and Balanced Strategy to Counter the World Drug Problem*, ¶ 63, U.N. Doc. E/CN.7/2012/14 (Feb. 3, 2012).

285. Council of Europe Agreement on Illicit Traffic by Sea, Implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *opened for signature* Jan. 31, 1995, Europ. T.S. No. 156 [hereinafter Council of Europe Agreement]. The Agreement has fifteen states parties and has been in force since 2000. *See Treaty Status*, Council of Eur. Treaty Office, http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=156&CM=1&DF=&CL=ENG (last visited Apr. 7, 2015).

286. Agreement Concerning Co-operation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area, *opened for signature* Apr. 10, 2003, Mari-

cant pressure on many Caribbean countries to sign maritime boarding agreements,[287] the variation among these agreements suggests that they reflect, at least to some degree, the particular concerns and priorities of each state.[288] For example, the agreements differ as to whether the flag state's consent to board its flagged vessel must be expressly obtained in each instance,[289] whether consent is assumed if the flag state does not respond to a request within a certain number of hours,[290] or whether consent is automatically granted under the agreement.[291] Similarly, some agreements allow the United States to enter the territorial waters of the other state in certain instances,[292] while others prohibit any entry into territorial waters without express authorization.[293]

In sum, states are using the background consensus of the Drug Trafficking Convention to contract around the traditional limits on extraterritorial enforcement jurisdiction. And as the United States in particular has used these bilateral agreements to expand its enforcement efforts, it may also have broader effects in line with the third stage of channeled unilateralism. The United States has provided economic and technical assistance, training, and equipment to many of its maritime partners,[294] the groundwork for which is set by the maritime boarding agreements.[295] In addition, many (but not all) of the maritime boarding agreements provide for "ship riders," law enforcement personnel stationed on the other state's government vessels who can

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time and air counter narcotics agreement in Caribbean, 2005 DIGEST § 21 [hereinafter San Jose Agreement], *available at* http://www.state.gov/s/l/2005/87198.htm. The Agreement has eight states parties (including the United States) and has been in force since 2008. *See Treaty Database*, GOV'T OF THE NETH., MINISTRY OF FOREIGN AFFAIRS, http://www.minbuza.nl/en/key-topics/treaties/search-the-treaty-database/2003/4/010467.html (last visited Apr. 7, 2015).

287. *See, e.g.*, Thomas D. Lehrman, Note, *Enhancing the Proliferation Security Initiative: The Case for a Decentralized Nonproliferation Architecture*, 45 VA. J. INT'L L. 223, 237 (2004) (noting as an example of U.S. pressure the Foreign Aviation Administration's downgrading of Barbados's airport when Barbados initially declined to sign an Article 17 agreement).

288. *Cf.* Ramharack, *supra* note 262, at 101 (describing the Bahamas as more receptive to entering into an Article 17 agreement with the United States than Antigua and Barbuda, Barbados, and Jamaica, which were more concerned about aggressive U.S. law enforcement tactics).

289. Council of Europe Agreement, *supra* note 285, arts. 6–7.

290. *See, e.g.*, Agreement Concerning Cooperation to Suppress Illicit Traffic by Sea and Air, U.S.-Nicar., art. 9(1), June 1, 2001, T.I.A.S. No. 13153 [hereinafter U.S.-Nicaragua Agreement] (two-hour time limit); Agreement Concerning Cooperation in Suppressing Illicit Maritime Drug Trafficking, U.S.-Jam., art. 14, May 6, 1997, T.I.A.S. No. 98-310 (three-hour time limit); Agreement Concerning Cooperation to Suppress Illicit Traffic in Narcotic Drugs and Psychotropic Substances by Sea, U.S.-Malta, art. 5(3)(d), June 16, 2004, T.I.A.S. No. 08-110 [hereinafter U.S-Malta Agreement] (four-hour time limit).

291. Agreement Concerning Maritime Counter-Drug Operations, U.S.-Trin. & Tobago, art. 11, Mar. 4, 1996, T.I.A.S. No. 12732 [hereinafter U.S.-Trinidad & Tobago Agreement].

292. *See id.* art. 8.

293. Agreement Concerning Cooperation to Suppress Illicit Traffic in Narcotic Drugs and Psychotropic Substances by Sea, U.S.-Cook Islands, art. 4, Nov. 8, 2007, T.I.A.S. No. 07-1108 [hereinafter U.S.-Cook Islands Agreement].

294. *See, e.g.*, 2014 International Narcotics Control Strategy Report, *supra* note 283, at 34–39, 42–43.

295. *See, e.g.*, U.S.-Nicaragua Agreement, *supra* note 290, art. 13; Agreement Concerning Operational Cooperation to Suppress Illicit Transnational Maritime Activity, U.S.-Nauru, art. 13, Sept. 8, 2011, T.I.A.S. No. 11908.

authorize ship boardings or entry into territorial waters.[296] These programs require routine integration of government representatives on board coast guard vessels, providing another channel for transferring technical knowledge and developing professional networks.

In the end, it is difficult to measure the impact of law enforcement efforts on a problem as large and complex as the global drug trade, and U.S. aid in the War on Drugs is often a double-edged sword. There are, however, indications that the enforcement gap is narrowing for drug traffickers in general. Global seizures of cocaine, heroin, morphine, and cannabis nearly doubled between 1998 and 2009, and seizures of stimulants more than tripled.[297] This increase in seizures cannot be explained by an increase in supply: the U.N. Office of Drugs and Crime concluded in 2007 that the overall production of drugs had stabilized; as a result, "the share of total drug production that is seized by law enforcement ha[d] . . . increased" significantly since 2000, with close to half of global cocaine production and a quarter of global heroin production never reaching consumers.[298] Today, the majority of cocaine seizures are made by South American, Central American, and Caribbean states; Colombia has seized more cocaine than the United States every year since 2007.[299] The U.N. Office of Drugs and Crime has credited this interdiction success to "[i]mproved cooperation among law enforcement bodies in and across countries."[300]

IV. The Question of Power

As these case studies suggest, channeled unilateralism has the effect of legitimating strong states' unilateral acts and structuring interstate cooperation to support those efforts. Channeled unilateralism looks even more unilateral and less channeled when we consider that strong states like the United States typically set the agenda, shape the norms, and obtain many of the benefits of increased cooperation over transnational crime. It thus would not be difficult to critique the model developed here as an apology for U.S. hegemony, or more generally for the continuing power imbalance in international relations.

This Part acknowledges these limitations. It attempts, however, to complicate that critique by suggesting how other states benefit, too. Given the

296. *E.g.*, U.S.-Trinidad & Tobago Agreement, *supra* note 291, art. 8.

297. UNODC, World Drug Report 2011, at 15, U.N. Sales No. E.11.XI.10 (2011), *available at* http://www.unodc.org/documents/data-and-analysis/WDR2011/World_Drug_Report_2011_ebook.pdf.

298. UNODC, World Drug Report 2007, at 7, 12, U.N. Sales No. E.07.XI.5 (2007), *available at* http://www.unodc.org/pdf/research/wdr07/WDR_2007.pdf. More recently, opium poppy cultivation has rebounded in Afghanistan due to regional instability, but coca bush cultivation has continued to decline and is now at its lowest levels since 1990. UNODC, World Drug Report 2014, at 21, 35, U.N. Sales No. E.14.XI.7 (2014), *available at* http://www.unodc.org/documents/wdr2014/World_Drug_Report_2014_web.pdf.

299. *See* UNODC, World Drug Report 2014, at 34 fig. 31.

300. UNODC, World Drug Report 2007, at 7, 12.

reality of power disparities and the importance of addressing transnational crime, channeled unilateralism may be the best practical solution to the enforcement gap. Further, channeled unilateralism does not depend on the involvement of a hegemon; the Part thus concludes by exploring the role of channeled unilateralism in a multipolar world.

A. Setting Agendas

In developing a model of channeled unilateralism in the context of transnational criminal law, this Article accepted states' initial preferences—the preferences that lead them to seek a multilateral treaty—as predetermined. But those initial preferences came from someplace; they developed over time, often under the influence of strong states. With power comes the ability to set agendas,[301] and transnational criminal law is no exception. According to a standard account, transnational criminal regimes directed against moral harms like illicit drug use and "white slavery" have typically originated with norm entrepreneurs from Europe and the United States.[302] Money laundering, now a globally recognized crime, is likewise an American invention.[303]

Less powerful states, however, are not just passive "takers" of international law;[304] norm entrepreneurs from peripheral states also play a role in the formation and diffusion of global norms.[305] Indeed, even if the United States is a driving force behind most transnational criminal regimes, its interest alone cannot explain the nearly universal adoption of the suppression conventions. Strong states can move issues to the top of the agenda, normatively sway some countries, and bring other countries on board through linkages, payouts, and threats of sanctions. But the issue must still resonate with enough other states to justify their investment in international conferences, negotiations, and domestic processes of ratification.[306] It is not surprising that transnational criminal issues do resonate broadly, as transnational crimes by definition affect many countries, and many (even if

301. *See, e.g.*, Simmons et al., *supra* note 167, at 791 (describing diffusion of policies through "soft" coercion by powerful states that are able to frame policy debates and construct "ideational channels").

302. *See generally* Ethan A. Nadelmann, *Global Prohibition Regimes: The Evolution of Norms in International Society*, 44 INT'L ORG. 479 (1990).

303. *See* NADELMANN, *supra* note 68, at 388–89.

304. *See* Kathryn Sikkink, *Latin American Countries as Norm Protagonists of the Idea of International Human Rights*, 20 GLOBAL GOVERNANCE 389, 390 (2014) ("There is a need for scholars of international norms to pay greater attention to the potential agency of states outside the Global North despite important structural inequality in the international system.").

305. *See id.* (discussing role of Latin American states in formation of international human rights standards).

306. *Cf.* Shaffer & Bodansky, *supra* note 20, at 41 ("The impact of unilateral action ultimately depends on whether it is persuasive in shaping norms of behaviour. Perceptions of legitimacy will often determine its effectiveness. Where a rule or norm advanced unilaterally is deemed to be illegitimate, it will spur greater resistance, including challenges under . . . international law, undermining its effectiveness.").

not all) of those countries will want to see the crime suppressed.[307] Thus, for example, while the United States pushed for multilateral treaties that mirrored its FCPA, pressure to adopt these treaties also came from Latin American states that were frustrated by their inability to prevent foreign corporations from bribing their officials.[308] And regardless of the U.S. preoccupation with the War on Drugs, Caribbean states supported the U.N. Drug Trafficking Convention (as well as the ICC) out of concern that organized crime spawned by the drug trade was undermining state security and human rights.[309]

In contrast, the United States could not single-handedly generate a similarly broad level of support for its recent effort to define a new transnational crime: the illicit trafficking of weapons of mass destruction (WMD) and related material. The United States, concerned after September 11, 2001, that terrorists and rogue states could transport WMD easily by sea,[310] sought to legitimate maritime interdictions of suspect cargo ships through three multilateral forums. But in the absence of a strong multilateral consensus, none of these efforts have resulted in a truly global crime regime like those for corruption and drug trafficking.

First, at the International Maritime Organization (IMO), the United States took a leadership role in updating the IMO's primary terrorism treaty.[311] Although the IMO eventually adopted an ambitious protocol that included the new crime of illicitly transporting WMD and a multilateral scheme of maritime interdiction, the final product did not have broad sup-

307. *See* Broude & Teichman, *supra* note 5, at 812–14 (considering reasons why countries might tolerate or desire the "insourcing" of transnational crime).

308. *See, e.g.*, Tarullo, *supra* note 114, at 679; *see also* Philip M. Nichols, *The Fit Between Changes to the International Corruption Regime and Indigenous Perceptions of Corruption in Kazakhstan*, 22 U. PA. J. INT'L ECON. L. 863, 893–94 (2001) (gathering evidence that countries other than the United States were concerned about the problem of transnational bribery).

309. *See* Part III.B., *supra*; *see also* Draft Resolution, *supra* note 101 (Caribbean states calling for an international criminal court to help enforce the Drug Trafficking Convention); Nadelmann, *supra* note 302, at 509–10 (acknowledging that U.S. efforts to globalize drug control regimes depended on other states sharing similar perspectives on drug control). Some of the Caribbean support for a multilateral treaty, however, was driven not just by concern about the drug problem, but also by the specter of U.S. intervention.

310. *See* John R. Bolton, *The Bush Administration's Forward Strategy for Nonproliferation*, 5 CHI. J. INT'L L. 395, 395 (2005).

311. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, *opened for signature* Mar. 10, 1988, 1678 U.N.T.S. 222, 27 I.L.M. 668 [hereinafter SUA Convention]. The SUA Convention was inspired by a terrorist attack against a cruise ship in the 1980s, which drew attention to a gap in international law regarding violence at sea that was not piratical. *See, e.g.*, Helmut Tuerk, *Combating Terrorism at Sea: The Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 15 U. MIAMI INT'L & COMP. L. REV. 337 (2008); Christopher Young, *Balancing Maritime Security and Freedom of Navigation on the High Seas: A Study of the Multilateral Negotiation Process in Action*, 25 U. QUEENSL. L.J. 355, 357 (2005). On the U.S. leadership role in updating the SUA Convention, see Young, *supra*, at 358 & n.12. Specifically, the United States volunteered to lead the correspondence group responsible for drafting treaty language, and it first proposed the inclusion of the new crime of "transport[ing] items related to weapons of mass destruction and their means of delivery in violation of applicable international non-proliferation agreements." *Id.* at 357–58 (quoting IMO Leg. Comm'n, 84th Sess., IMO Doc. LEG 84/6/1 (Mar. 22, 2002) (alteration in original) (internal quotation marks omitted)).

port: According to the IMO's Secretary General, the final conference was one of the most politically charged in IMO history.[312] The final draft was also not adopted consensually—as is typically the case—due to the concerns of India, Pakistan, and Russia.[313] Ten years later, only thirty-three states have ratified the Protocol (the United States is not one of them).[314]

Second, the United States used its position on the U.N. Security Council to secure a resolution that obligates all states to increase their counter-proliferation efforts.[315] Given the unusually legislative scope of the resolution,[316] the Security Council held an open debate to appease states without a vote; more than a quarter of the U.N. member states participated.[317] Although most states had no meaningful ability to oppose Resolution 1540, the United States and its allies did have to take into account the concerns of other permanent members, particularly China and Russia. Thus Resolution 1540 did not include the definition of WMD trafficking sought by the United States: it addresses only nonstate actors as potential proliferators (rather than rogue states, as the United States would have preferred), and China insisted there be no reference to maritime "interdiction."[318] Further, while the resolution calls generally "upon all States . . . to take cooperative action to prevent illicit trafficking" in WMD, it does not impose any obligation on states to do so.[319]

Third, the United States formed an ad hoc coalition to support the definition of WMD trafficking that it *did* want, as well as its desired means for enforcing it (*i.e.*, maritime interdictions). When President George W. Bush announced the Proliferation Security Initiative (PSI) in May 2003, it comprised a network of eleven countries.[320] Achieving even this level of consensus, however, required pledging that the PSI would operate within the bounds of existing international law.[321] The PSI may be contributing to the gradual development of a stronger regime against WMD trafficking—one

312. Young, *supra* note 311, at 384.

313. *See* Young, *supra* note 311, at 384 n.145.

314. IMO, *Status of Multilateral Conventions and Instruments* 422–25 (Mar. 10, 2015), http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20-%202014%20New%20Version.pdf.

315. S.C. Res. 1540, U.N. Doc. S/RES/1540 (Apr. 28, 2004).

316. *See* José E. Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 873, 874–75 (2003) (summarizing concerns about legislating through the U.N. Security Council).

317. *See* U.N. SCOR, 59th Sess., 4950th mtg. at 2, U.N. Doc. S/PV.4950 (Apr. 22, 2004).

318. *Id.* at 6.

319. S.C. Res. 1540, para. 10, U.N. Doc. S/RES/1540 (Apr. 28, 2004). Resolution 1540 does require states to adopt and enforce laws to prevent non-state actors from acquiring or transporting WMD and related material; states must also ensure the physical security of existing WMD, police borders, and establish export controls. *Id.* at paras. 2 & 3.

320. J. Ashley Roach, *Proliferation Security Initiative (PSI): Countering Proliferation by Sea*, *in* RECENT DEVELOPMENTS IN THE LAW OF THE SEA AND CHINA 351, 351–52 (Myron H. Nordquist et al. eds., 2006).

321. *See* Emma Belcher, *The Proliferation Security Initiative: Lessons for Using Nonbinding Agreements* 8 (Council for Foreign Relations Working Paper, 2011).

hundred states now support the PSI, at least nominally[322]—but significant countries like China, Pakistan, India, Indonesia, Egypt, and Malaysia continue to oppose the effort.[323]

In sum, when it came to WMD proliferation at sea, the United States could set the agenda and shape the debate, but it could not necessarily cajole, pressure, or buy both the outcome it wanted and broad multilateral agreement to support it.[324] The point is not that the United States requires broad multilateral agreement in order to act, but that even at the height of the United States' hegemonic heft after September 11, it could not will a multilateral treaty regime based on channeled unilateralism into being. Broad multilateral agreement requires more than the flexing of U.S. power. Once a broad consensus is formed and a multilateral treaty adopted, however, can the United States nonetheless coopt it to further its own purposes?

B. Defining Criminality

To the extent that multilateral agreements trade generality for consensus, they will leave room for variation in implementation around the margins. In a system of channeled unilateralism, motivated states like the United States can exploit these margins to promote their preferences from within the multilateral framework. For example, during negotiations for the Protocol against Human Trafficking, states were divided over whether to include consensual sex work within the definition of human trafficking.[325] Ultimately, no consensus formed; the decision was left to the discretion of individual states.[326] Though the matter is not free from controversy even within the United States, current U.S. foreign policy includes consensual prostitution within the framework of sex trafficking—and it has exported that definition through a unilateral sanctions regime instituted around the same time as the Protocol's adoption.[327] Thus, even though the Protocol leaves to states the decision of whether or not to criminalize the transporting of consensual sex workers, the threat of lost aid from the United States has caused some states to adopt the United States' preferred definition.[328] Professor

322. Bureau of Int'l Security & Nonproliferation, *Proliferation Security Initiative Participants*, U.S. DEP'T OF STATE (Nov. 20, 2012), http://www.state.gov/t/isn/c27732.htm.

323. *See* Belcher, *supra* note 321, at 9; Charles Wolf, Jr., et al., *Enhancement by Enlargement: The Proliferation Security Initiative* viii (Rand Nat'l Defense Research Inst. 2008).

324. *But see* Alvarez, *supra* note 316, at 875 (suggesting that similar U.N. Security Council legislation has implemented U.S. hegemonic policies).

325. *See* ANNE T. GALLAGHER, THE INTERNATIONAL LAW OF HUMAN TRAFFICKING 25 (2010).

326. *See* Janie Chuang, *The United States As Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT'L L. 437, 445 (2006).

327. *See id.* at 439–40, 444 n.24, 450 (2006); Anne T. Gallagher & Janie Chuang, *The Use of Indicators to Measure Government Responses to Human Trafficking*, *in* GOVERNANCE BY INDICATORS: GLOBAL POWER THROUGH CLASSIFICATION & RANKINGS 317, 335–38 (Kevin E. Davis et al. eds., 2012). U.S. law does distinguish, however, between sex trafficking generally and "severe" forms of sex trafficking that involve force, fraud, or coercion, and it limits core operative provisions of its sanctions regime to the latter category of conduct. *See* Chuang, *supra* note 326, at 450.

328. *See* GALLAGHER, *supra* note 325, at 486.

Philip Alston has similarly criticized U.S. trade preferences for invoking the terminology of International Labour Organization conventions but without incorporating the concomitant international standards.[329] The United States, he argues, "is, in reality, imposing its own, conveniently flexible and even elastic, standards upon other states."[330]

This criticism is valid, but it is not the full story. First, the United States is not insensitive to this problem; Professor Sarah Cleveland has described, for example, the United States' evolving attention to international standards in the context of human rights and economic sanctions.[331] The United States has more recently exhibited a similar effort in the human trafficking context, with a "dramatic shift" in its reporting regime's "treatment of the relationship between trafficking and prostitution, bringing the current position much more in line with accepted international standards."[332]

Furthermore, it is not entirely clear whether these U.S.-defined standards are displacing international standards or are instead just another input in a continuing discursive process. Returning to the human trafficking example, scholars who have been critical of U.S. unilateralism in this field nonetheless acknowledge the positive role that U.S. policy has played in the "progressive normative development" of victim-oriented standards.[333] In their words, "[a]necdotal evidence strongly suggests that the {U.S.} Reports have contributed to raising the profile of trafficking at the international, regional, and national levels; that they have nudged compliant governments to move further and faster; and that they have compelled recalcitrant ones to take steps that would otherwise have been unthinkable."[334]

Meanwhile, a recent survey of domestic legislation implementing the Protocol found that "no two definitions of trafficking in persons are identical."[335] Interpretive flexibility at the margins of multilateral treaties can empower peripheral states by leaving more space for "localization," or the building of "congruence" by domestic actors between international norms and local beliefs and practices.[336] Consider in this light the OECD's transnational bribery convention, which leaves room for states to except culturally

329. *See generally* Philip Alston, *Labor Rights Provisions in U.S. Trade Law: "Aggressive Unilateralism"?*, *in* HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE 71 (Lance A. Compa et al. eds., 1996).

330. *See id.* at 79; *see also* Bach & Newman, *supra* note , at 521 (identifying how, in the absence of a multilateral consensus regarding securities regulation, the SEC has used bilateral agreements to pressure foreign regulators to reform domestic laws to mirror U.S. laws).

331. *See* Cleveland, *supra* note 18, at 71–72.

332. Gallagher & Chuang, *supra* note, at 338.

333. *Id.* at 339–40.

334. *Id.* at 340; *see also* Joan Fitzpatrick, *Trafficking and a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking*, 24 MICH. J. INT'L L. 1143, 1147 (2003).

335. Allain, *supra* note 76, at 137.

336. *See* Amitav Acharya, *How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism*, 58 INT'L ORG. 239 (2004); *cf.* Bodansky, *supra* note 20, at 345–46 (invoking principle of subsidiarity in arguing that multilateral responses to environmental problems should still leave room for state-specific "values and politics").

appropriate gift exchanges from the prohibition against bribery, as long as those exceptions are codified. Professor Elizabeth Spahn has argued that by allowing states to define their own line between bribes and gifts, the OECD convention enables states struggling with systemic corruption to harness other states' legal systems in enforcing those distinctions.[337] The ability to shape the development of criminal prohibitions is not a prerogative that resides solely with the stronger state.

C. *Who Benefits?*

Motivated states also see a broad and deep range of benefits from these transnational criminal regimes. Consider just a few examples: Motivated states may suffer disproportionately from the transnational crime in question and thus benefit more significantly from increased cooperation to suppress it. More aggressive enforcement efforts may placate domestic constituencies, as with the U.S. War on Drugs. Encouraging other states to update their laws can restore the competitive advantage of the motivated state's industries to the extent that they are already subjected to the stricter standards domestically.[338] And not to be underestimated, in return for their law enforcement investments, motivated states may collect significant fines and forfeitures from foreign firms or actors for criminal conduct that occurred primarily in other states.[339]

Even though the distribution of benefits may be uneven, however, other states also stand to benefit from increased harmonization and cooperation. For limited states, which share the motivated state's concern about the underlying crime but not its resources, channeled unilateralism helps shift costs to the motivated state by encouraging it to shoulder the initial brunt of law enforcement and political capital outlay. Indeed, limited states particularly vulnerable to transnational crime, whose institutions risk corruption or outright attack if criminal networks are targeted, may sometimes prefer exporting sensitive prosecutions to stronger states.[340] By helping states harmonize their laws and increase their law enforcement cooperation, the treaty also increases interoperability of law enforcement efforts. Over time, this

337. *See* Spahn, *Local Law*, *supra* note 123, at 249.

338. This is a dynamic often cited to explain U.S. interest in concluding an anti-bribery convention, though it is more generally applicable to regulatory regimes. *See* Bradford, *supra* note 23, at 6.

339. To take one exceptional FCPA case, Siemens paid $800 million to the Department of Justice and the SEC, and another $800 million to the Munich Public Prosecutor's Office. Garrett, *supra* note 201, at 1786.

340. In a recent joint U.S.-Colombian drug trafficking investigation, for example, Colombian police encouraged their U.S. counterparts to request extradition for twelve additional suspects out of concern that corruption would prevent their prosecution in Colombia; when the United States did not request their extradition, all twelve cases were indeed dismissed by allegedly corrupt local judges. *See Operation Bean Pot*, *supra* note 74, at 11–12. As this example suggests, "supranational normative regimes" can also empower domestic police forces to distance themselves from corrupt governments and align themselves with collaborative transnational efforts. *See* Goldsmith et al., *supra* note 31, at 79.

coordination makes transnational investigations cheaper and thus more feasible for resource-constrained states.

Less powerful states can also use the bilateral agreements encouraged by the suppression conventions to obtain technical assistance and other aid from their wealthier counterparts.[341] It is possible that states could secure greater payouts in the absence of the multilateral treaty; for the same reason that the treaty lowers the transaction costs for motivated states to negotiate these agreements, it reduces the leverage weaker states have for extracting payments. This assumes, however, that the motivated state would pay more for these agreements in the absence of the treaty—the alternative might instead be no agreements. And the existence of the treaty can also cut in the opposite direction: by formalizing the multilateral consensus, it can empower weaker states to push back on overreaching by motivated states.[342]

The calculation of comparative benefit is complex and context-specific. There is a risk that states with poor human rights records may use this dynamic of channeled unilateralism to justify and obtain support for questionable practices.[343] Or investigations by motivated states may displace rather than complement the domestic efforts of limited, lagging, and reluctant states.[344] The observation here is simply that channeled unilateralism is not a zero-sum game: even if the motivated state comes out furthest ahead, other states will also have made progress down the field.

D. Channeled Unilateralism in a Multipolar World

Channeled unilateralism relies on the participation of a powerful state, as the motivated state's assertion of extraterritorial prescriptive jurisdiction must be backed by some amount of resources, clout, or force (if not all three) in order to be effective. But given the multilateral framework, the powerful state need not be a hegemon. In fact, channeled unilateralism should work well in a multipolar world as a tool for sharing the burden of building transnational criminal law regimes.

Consider Canada. Whether for normative or instrumental purposes, Canada will care about a range of transnational criminal threats, but some of these threats will be of greater concern than others. Channeled unilateralism allows Canada to help shape transnational criminal regimes for all of these crimes but then choose which crimes it will focus on suppressing as a moti-

341. *See* Blum, *supra* note 104, at 340 (acknowledging potential of bilateral treaties to favor the stronger state, but noting that "[p]ackage deals, adjustments, and side-payments that may compensate for discriminatory application" are easier to arrange in bilateral context).

342. *Cf.* Sikkink, *supra* note 307, at 391 (noting Latin American countries' use of multilateral processes to counter U.S. intervention). *But see* Ramharack, *supra* note 262, at 101 (noting that some Caribbean states initially balked at signing Article 17 agreements with the United States, despite domestic concerns about escalating drug trafficking, due to sovereignty concerns).

343. *See* Alvarez, *supra* note 316, at 876.

344. *See* Davis et al. *supra* note 167, at 12 (summarizing critiques of institutional complementarity theory).

vated state. Other states may, in the meantime, shoulder the enforcement burden for the remaining transnational crimes.

A rough example of this sort of burden-sharing can be seen in the growing regime to combat illegal, unreported and unregulated (IUU) fishing,[345] a problem at the intersection of regulatory and criminal law.[346] Regional fishery management organizations (RFMOs) protect particularly sensitive fish stocks in specific geographic regions, with enforcement efforts spearheaded by regionally strong states that have a vested economic interest. These regional efforts are backed by the U.N. Convention on the Law of the Sea (UNCLOS)[347] and by the obligation to cooperate in protecting migratory and straddling fish stocks established by the 1995 Fish Stocks Agreement.[348] The end result is broad multilateral support for the suppression of all IUU fishing but a division of labor in monitoring high seas fishing based on fish stock and location.

Thus Australia, France, South Africa and the United Kingdom have increased unilateral and bilateral enforcement efforts in the Antarctic region to tackle IUU fishing of Patagonian toothfish (more pleasantly known as Chilean sea bass), efforts that have been at least partly successful.[349] In the northeast Atlantic, the European Union, Denmark, Iceland, Norway, and Russia board and inspect each other's fishing vessels to ensure regulatory compli-

345. IUU fishing includes such illegitimate fishing practices as "noncompliance with fishing seasons, fishing without proper permits, catching prohibited species, using illegal fishing gear, catching more than the allowable quota, and not reporting or underreporting the amount of fish caught." Kevin W. Riddle, *Illegal, Unreported, and Unregulated Fishing: Is International Cooperation Contagious?*, 37 Ocean Dev't & Int'l L. 265, 266 (2006).

346. IUU fishing is often hard to detect and can be highly lucrative, but it also requires significant resources to outfit deep sea fishing vessels. *See, e.g.*, *id.* at 266, 273. Thus it has increasingly attracted organized crime. Some IUU fishing, however, remains more of a regulatory problem, due either to incomplete adoption of regulatory norms or to defections from collective agreements made possible by the challenge of monitoring and enforcing these agreements across vast oceans.

347. *See* UNCLOS, *supra* note 37, part V & art. 117.

348. Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, *opened for signature* Dec. 4, 1995, 2167 U.N.T.S. 88 [hereinafter Fish Stocks Agreement]. The Fish Stocks Agreement is intended to help implement Articles 63 and 64 of UNCLOS. While 166 states have ratified UNCLOS, membership of the Fish Stocks Agreement is more limited with only 82 states parties. *See Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements as at 3 October 2014*, U.N. Off. of Legal Aff., Div. for Ocean Aff. & the Law of the Seas (last updated Jan. 7, 2015), http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm. The FSA includes default provisions for maritime interdictions of fishing vessels by RFMOs; though the RFMOs have not been adopted these provisions verbatim, they may still serve as a useful starting point for future regional or bilateral negotiations. *See* Douglas Guilfoyle, Shipping Interdiction and the Law of the Sea 104, 108–10 (2009).

349. *See* Guilfoyle, *supra* note 348, at 144–54 (describing Australian and French bilateral and unilateral enforcement efforts against IUU fishing of Patagonian toothfish); Warwick Gullett & Clive Schofield, *Pushing the Limits of the Law of the Sea Convention: Australian and French Cooperative Surveillance and Enforcement in the Southern Ocean*, 22 Int'l J. Marine & Coastal L. 545 (2007) (same); *see also* Riddle, *supra* note 345, at 267, 283 tbl. 7, 284 (citing RFMO estimates that, due to increased enforcement efforts, IUU fishing of Patagonian toothfish has dropped by a third, although it still comprises more than half the annual harvest of the fish stock).

ance.[350] For suspicious vessels flagged by other states, they coordinate to use diplomatic action, trade sanctions, and import restrictions on illicit catches to pressure the flag states into fuller compliance with their obligations under UNCLOS and the Fish Stocks Agreement.[351] Meanwhile, Canada, Japan, Russia, South Korea, and the United States, with significant cooperation from China, patrol the North Pacific against high seas drift net fishing of salmon.[352] Members of this RFMO also board and inspect each other's fishing vessels on suspicion of fishing violations; although China is not a member of the RFMO, it has a long-standing and successful shiprider agreement with the United States that enables the United States to monitor and inspect Chinese-flagged vessels as well.[353] Japan meanwhile has tried to influence the fishing practices of non-members Taiwan, China, and South Korea through a unilateral documentation scheme meant to prevent importation of illegally caught salmon into Japan.[354]

An alternative outcome to this sort of division of labor is that states will compete for jurisdiction over transnational crimes. Such competition can waste scarce law enforcement resources and strain otherwise good diplomatic relations. Furthermore, because there is no rule of double jeopardy or *non bis in idem* under international law—separate sovereigns can generally prosecute a defendant for a crime for which he or she has already been tried in another country[355]—it puts defendants at risk of multiple prosecutions and multiple punishments.[356]

While a real likelihood, and a real challenge, the number of cases that will instigate jurisdictional conflicts is likely to be small.[357] For most transnational criminal cases, cost is a limiting factor. If the value of pursuing these cases typically outweighed the costs, there would be no need for channeled unilateralism in the first place.[358] The risk of jurisdictional conflict will therefore be greatest when significant fines or forfeitures are at stake (for

350. *See* GUILFOYLE, *supra* note 348, at 124; ROSEMARY GAIL RAYFUSE, NON-FLAG STATE ENFORCEMENT IN HIGH SEAS FISHERIES 213–14 (2004).

351. *See* GUILFOYLE, *supra* note 348, at 130.

352. *See* Riddle, *supra* note 345, at 276–79. Enforcement efforts against stateless vessels on the high seas are based on UN General Assembly Resolution 44/225, which called for a moratorium on high seas drift net fishing effective in 1991. *See id.* at 276. The United States has prosecuted at least two stateless fishing vessels for high seas driftnet fishing. *See id.* at 273–74; *see also* GUILFOYLE, *supra* note 348, at 120–24 (discussing enforcement activity).

353. *See* GUILFOYLE, *supra* note 348, at 118–19.

354. *See id.*

355. *See* SATZGER, *supra* note 92, at 9; Anthony J. Colangelo, *Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory*, 86 WASH. U. L. REV. 769, 806–07 (2009). However, extradition treaties often include a provision barring extradition if the suspect has already been tried by the state receiving the extradition request, and some states like Canada and the Netherlands, as a matter of national law, will not retry individuals already judged by another state's courts. *See* Colangelo, *supra*, at 809–10, 817–18.

356. *See, e.g.*, Garrett, *supra* note 201, at 1839, 1844–52.

357. *See* Stephan, *supra* note 194, at 54.

358. *Cf. id.* at 68 (arguing in the context of foreign bribery that "the long record of prosecutorial inaction outside the United States puts the burden on critics to explain why we should anticipate a sudden switch to over-prosecution").

example, with foreign bribery) or political valence is high (for example, with terrorism).

In these cases, some aspects of channeled unilateralism will help minimize conflicts. Thanks to the multilateral treaty, states should be in general agreement about the content of the criminal prohibition, reducing the risk of discord over whether the conduct is in fact illegal. Some of the suppression conventions also include duties to notify other potentially interested states and to consult with them regarding which state will exercise jurisdiction first.[359] In addition, bilateral cooperation agreements often identify which state has preferential jurisdiction in different circumstances,[360] and they can be used to encourage the sharing of any resulting forfeitures.[361] The networks fostered by increased bilateral cooperation also encourage open dialogue about the division of cases and any resulting fines.[362] The more that states cooperate with each other, the easier it will be to resolve these issues on an ad hoc basis.

Ad hoc solutions, however, tend to be better at protecting the interests of states than defendants. Like-minded states may be able to agree in advance on a transsubstantive, multilateral framework—embodied perhaps in a memorandum of understanding—that enshrines both a duty to consult and the consideration of defendant interests. Such a framework might require, for example, that due process-type factors be weighed alongside pre-identified state interests, with provisions for mediation when disagreements cannot be resolved.[363] But what about jurisdictional conflict with non-like-

359. *See* Colangelo, *supra* note 355, at 855–57 (noting, inter alia, similar provisions included in UNCAC and the OECD bribery convention).

360. *See, e.g.*, U.S.-Nicaragua Agreement, *supra* note 290, art. 10; U.S.-Malta Agreement, *supra* note 290, at art. 6; U.S.-Cook Islands Agreement, *supra* note 293, at art. 6; *see also* Christopher A. Whytock & Yimeng Dou, *Continuity in Transatlantic Relations: Policy Convergence and the Domestic Internationalization of EU-U.S. Antitrust Cooperation* 12–13 (Am. Pol. Sci. Ass'n Ann. Meeting Paper, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2299608 (describing EU-U.S. agreements to coordinate antitrust enforcement activities).

361. See, for example, Canada's bilateral forfeiture agreements. *E.g.*, Agreement Regarding the Sharing of Forfeited or Confiscated Assets and Equivalent Funds, Can.-Ant. & Barb., Oct. 14, 1999, 1999 Can. T.S. No. 36; Agreement Regarding the Sharing of Forfeited or Confiscated Assets and Equivalent Funds, Can.-Trin. & Tobago, Sept. 4, 1997, 1997 Can. T.S. No. 26; *see also, e.g.*, U.S.-Malta Agreement, *supra* note 290, art. 12.

362. *See* Kate Brookson-Morris, *Current Developments: Public International Law - Conflicts of Criminal Jurisdiction*, 56 INT'L & COMP. L.Q. 659, 660–61 (2007) (describing nonbinding "guidance" adopted by United States and United Kingdom that directs prosecutors to consult in instances of concurrent jurisdiction); Colangelo, *supra* note 355, at 850 (noting that enforcement networks can enable early and informal resolutions of concurrent jurisdiction); Whytock & Dou, *supra* note 360, at 10, 19 (describing coordination of antitrust enforcement activities through increasingly close interaction of U.S. and EU regulators).

363. The European Commission has suggested this sort of framework for European states. *See* Brookson-Morris, *supra* note 362, at 663 (discussing EC Green Paper, *On Conflicts of Jurisdiction and the Principle of* Ne Bis In Idem *in Criminal Proceedings*). On what such due process-type factors might look like, see Brookson-Morris, *supra* note 362, at 665, and Colangelo, *supra* note 355, at 845 (proposing a reasonableness standard for evaluating an individual's right to avoid repeated prosecutions). *See also* SATZGER, *supra* note 92, at 40–41 (noting emergence of a new "principle of distribution of competences" meant to account for these types of considerations).

minded states? China's recent anticorruption campaign increases the salience of these questions.[364] Currently the absence of a concrete framework for protecting defendant rights is not an insurmountable hurdle to using channeled unilateralism, but left unaddressed it may soon be.

V. Beyond Transnational Criminal Law

This Article has argued that unilateralism operating within a multilateral framework can further collective goals (such as the suppression of transnational crime) while promoting greater treaty compliance. Given the strictures of international law, channeled unilateralism may be the most practical workaround to the enforcement gap in transnational criminal law. But the enforcement gap is not limited to transnational crime, and channeled unilateralism may be relevant to other transboundary harms. In regulatory contexts, civil or administrative sanctions can provide an opportunity for channeled unilateralism comparable to criminal law enforcement.[365] When might channeled unilateralism be effective in such regulatory contexts?

First, there must be a broad, multilateral consensus about the underlying norm. This emphasis on convergence of interests distinguishes channeled unilateralism from accounts of unilateralism as a law-making mechanism[366] and as a source of unintended transnational regulation.[367] Second, the consensus should be embodied in a formal treaty, or at least in a formalized multilateral framework. There are many reasons why states may opt for different forms of agreement, but the theory of channeled unilateralism developed here relies upon the effects of legalization. For example, formalized commitments increase the sense of constraint experienced by the motivated state; they also heighten the dissonance for lagging states when their inertia is contrasted to the efforts of others.

Third, the enforcement target should be a private or economic actor, which may include state-owned entities. It is possible for a treaty regime to leverage unilateral enforcement efforts directly against states, but the causal dynamics would differ from those analyzed here. Instead of states punishing other states *qua* states, channeled unilateralism relies on indirect mechanisms for promoting compliance. Fourth, there must be a motivated state with significant resources and a dominant role in the relevant market. Fifth and finally, there should be opportunities for structured bilateral cooperation to address the harm. This bilateral cooperation provides additional vectors for promoting compliance indirectly, such as the transfer of technical

364. *See* Andrew Jacobs & Chris Buckley, *Presumed Guilty in China's War on Corruption,* N.Y. Times, Oct. 20, 2014, at A1.

365. Indeed, much FCPA enforcement by the United States is carried out by the SEC through civil penalties.

366. *See, e.g.*, Hakimi, *supra* note 20.

367. *See, e.g.*, Bradford, *supra* note 23.

expertise and increased efficiency in investigations, both of which help resource-strapped states participate in transnational enforcement.

Given these considerations, some likely candidates for channeled unilateralism include the regulation of banks and other financial institutions;[368] policing of labor conditions based on International Labour Organization conventions; promotion of aviation and maritime safety standards; and protection of environmental interests[369]—especially where there is broad normative commitment, such as with the Convention on International Trade in Endangered Species (CITES).[370] In all of these areas, there are market-dominant states with an interest in shoring up transnational standards; the targets of regulations are primarily private actors; broad international consensus about a problem and its potential solution has been embodied in a multilateral framework; and the needed reforms are just costly enough that many states will require an extra impetus to adopt and implement them.[371]

All that may be missing in many of these cases are treaty provisions that make appropriate unilateral efforts cheaper and more feasible. When multilateral treaties provide tools that help concerned states reach further and cooperate more intensively, the resulting dynamic relationship between unilateralism and multilateralism can advance both individual state interests and compliance with the treaty regime.

368. *See* Katzenstein, *supra* note 6, at 310–11 (describing similar dynamics in context of economic sanctions and bank regulation).

369. *See* Shaffer & Bodansky, *supra* note 20, at 32–35, 40 (describing transnational environmental law in terms of dialogue between international and unilateral processes).

370. *See* Bodansky, *supra* note 20, at 346 (noting U.S. Pelly Amendment, which authorizes trade sanctions in response to CITES violations); *see also* James W. Coleman, *Unilateral Climate Regulation*, 38 HARV. ENVTL. L. REV. 87 (2014) (discussing how well-considered unilateral regulation of carbon emissions could encourage regulatory action by other states even in the absence of a multilateral convention).

371. Similar dynamic effects between unilateral policies and international organizations can also be identified even in the absence of a multilateral treaty; in those cases, the motivated state plays more of a law-development role. *See* Bach & Newman, *supra* note 86, at 521 (discussing insider trading laws and IOSCO); *cf.* Whytock & Dou, *supra* note 360 (discussing bilateral cooperation and policy convergence in antitrust enforcement).