

Revoked, Restructured or Retained:
Examining the effect of external shifts on norm compliance

by

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Thesis submitted in partial fulfillment of the requirements for the degree of Master of Arts in the
Department of Political Science in the Graduate School of Duke University

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ABSTRACT

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Abstract: In this work, I use case study analysis to examine the response by states to exogenous shifts in international norms. Specifically, I examine the behavior of states when unforeseen technological advances make the norm previously established between states insufficient to ensure the security needs that were the onus for creating the original norm. I argue that altering the specific clauses of the norm to honor the intention of the norm maintains the habit of compliance and international credibility of the norm, yielding a greater level of acceptance and rate of compliance than if the norm is either discarded and a new norm is sought or if the norm retains in place without being renegotiated.

This work is dedicated to my parents Greg and Kay Frances VanHo, in gratitude for their selfless and constant focus on education for their children, and to my siblings, Adam and Tara VanHo for setting such a high standard to follow in and believing in me.

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List of Abbreviations:

ABM – Anti-Ballistic Missile Defense

CIA – Central Intelligence Agency

G-77 – Group of 77 States

ICAO – International Civil Aviation Organization

ICBM – Inter-Continental Ballistic Missiles

IMF – International Monetary Fund

FONOPS – Freedom of Navigation Operations

SALT – Strategic Arms Limitations Treaty

UN – United Nations

UNCLOS – United Nations Convention on the Law of the Sea

US – United States

USCYBERCOM – United States Cyber Command

USSTRATCOM – United States Strategic Command

USSR – United Soviet Socialist Republic

WWI – World War One

WWII – World War Two

Introduction

The previous thirty years of discussion on norms by the political community established and clarified our understanding of many important aspects of norms. Theories have been developed and accepted that explain how, and by whom, norms are created (See Kratochwil, 1989; Keck and Sikkink, 1998; and Reimann, 2006), how norms emerge (See Finnemore and Sikkink, 1998), and actions that make the norm more likely to gain international acceptance (See Klotz, 2002; Sudstrom 2005; Peterson 2006; and Tarrow 1994). Although the above research has provided solid evidence that norms exist and considerable consensus on their emergence, the debate on international norms has failed to reach consensus on if norms matter and what makes a norm matter.

Traditional realist thought would argue that states enter into a norm only if it accommodates the preferences of the state. This theory places very little value on international agreements, and would anticipate that when a state experiences a change which alters the benefits of the norm, states would abandon the norm and seek a new course of action to produce the international conditions favorable to the state. Both Idealists and Constructivists state norms matter, but advocate different reasons for why norms matter. Idealists believe the international agreement matters because of the importance of the norm itself. Constructivist theory contends norms matter because states have invested in creating the environment of the norm, and establishing the world order provided by the norm. In this theory, states have devoted resources and political capital creating the norm and the international agreement which supports the norm.

The central purpose of this paper is to increase the understanding of international norms by qualitatively testing how the presence of a norm effects state behavior and what

causes a norm to be more efficient at affecting state behavior. In order to do this, the paper will introduce a new method of examining a norm, then assess three case studies of international agreements, whether the agreement is codified in treaty or expressed through actions and customary agreements, designed to support or codify a normative environment. Each case study will examine what occurs when an external, unanticipated stressor to the international agreement occurs which alters the ability of the international agreement to meet the purpose of the norm or provide the benefits anticipated when the state entered the agreements. States encountering this shift which alters the value of the norm have three available courses of action: the state can abandon the international agreement, the state can continue to comply with the international agreement despite the change, or the state can renegotiate the agreement to retain the anticipated benefits and costs of compliance in the new environment. Historically states have engaged in each of these behaviors, as demonstrated in the three case studies. While engaging in these actions the characteristics of a norm are displayed by the effect, or lack of effect, of the norm on the actors involved in the international agreement. Presuming states are rational actors who entered the international agreement to create a favorable international environment, once the agreement fails to provide the previously anticipated benefits, states will seek to re-establish an international environment that is as or more favorable than previously enjoyed before the exogenous shift changed the effectiveness of the agreement. The hypothesis of this paper is that states will experience varying levels of success creating a favorable international situation depending on the course of action the state enters upon experiencing a shift in the benefits of the norm. The efficacy of each course of action will reveal if the presence of the international norm is significant, and

what makes the norm matter. Establishing these facts will not only provide important policy understanding for states, but also provide a deeper, empirical insight into the characteristics of international norms.

In order to test if norms are significant and what makes a norm have weight in the international community, research must begin to move to the mid-life of a norm. Realist, idealist and constructivist theories have accepted that states may enter into international agreements and establish international norms, but these theories vary in the explanations and predictions of what will happen if the norm is no longer in the best interests of the state or if it no longer meets the normative ideal the initial agreement(s) sought to produce. In order to isolate the benefits provided by the norm from the benefits expected when the state entered the international norm, this paper concentrates on three case studies in which states experienced an exogenous shift in the form of a specific advance, or series of advances, in technology that could not be anticipated prior to the international agreement. Isolating these case studies to technological shifts minimizes the risk of omitted variable bias by geopolitical concerns. In order to address the realist priority on national security, each of these three case studies involves norms relating to national security – specifically border agreements and the protection of borders from enemies.

The importance of moving this debate to the mid-life of a norm is evident from the disagreement between Beth Simmons and Jana von Stein regarding the effect of becoming a signatory to Article VIII of the International Monetary Fund (IMF) Treaty on state compliance. Simmons (2000) introduced a quantitative study contrasting the behavior of states that were signatories to Article VIII and those states that were not. Simmons determined that becoming a signatory to Article VIII of the IMF Treaty

influenced state behavior in favor of compliance. Von Stein questioned these findings, creating a statistical formula designed to test the theory of screening presented by Downes, Roche and Barsboom (1996), which argues that states enter agreements that they have determined will be in the national interests of the state, making the international agreement little more than a formalized expression of behavior states already intending to follow. Von Stein (2005) determined that, once outside factors encouraging the state to act in accordance with Article VIII of the IMF Treaty were accounted for, signatory states were not significantly more likely to comply with the treaty than non-signatories. Grieco, Gelpi and Warren (2009) disagreed after analyzing relative partisan shifts that would account for changes in national interest, and found Article VIII of the IMF Treaty both screened and constrained signatories. Simmons and Hopkins (2005) and Grieco, Gelpi and Warren (2009) both criticized von Stein over the statistical methods she used, which significantly question the validity of her findings. The debate of the impact of international agreements on screening or constraining remains a key issue in assessing the importance of international norms. By selecting behavior at the mid-life of a norm, the discussion about screening or constraining can be eliminated and the discussion may focus of whether states believe the international agreement will effectively continue to provide the state behavior previously demonstrated by norm acceptance.

Before continuing, a few definitions must be addressed. For the purpose of this paper, international agreements refer to hard and soft law, as defined by Abbott and Snidal (2000). Hard law encompasses international treaties, while soft international law addresses customary international law and other agreements not codified by treaty that create a normative environment. Abbott and Snidal identify different benefits provided

by selecting either hard or soft international law, which will be addressed in the case study sections; however, in this paper, both types of law will be referred to as international agreements. In defining a norm, this paper will use the prescriptive definition of a norm identified by Gelpi (1997) and define a norm as a legitimate international agreement that defines the way an actor ought to behave.

In measuring effectiveness of the state in producing an environment as or more favorable as existed before the technological shift altered the benefits of compliance with the international agreement, I must first return to the anticipated benefits for the state when it entered the international agreement supporting the norm. For this, I utilize Tannenwald's assessment of the effect of norms on state behavior. Tannenwald (1999) finds norms may affect states in three regards: by constraining states through imposing rules and costs on violators; by creating an identity associating the norm with a broader identity in the states, described by Tannenwald as a constitutive effect; by coordinating state behavior on the topics that will be identified within the norm, called permissive effects. In short, by coordinating states' understanding of the issue and attaching the norm to the identity of the state, a norm would create an expectation that a state will act in accordance with the agreed upon international rules regarding a certain behavior. For a state to establish an environment as or more beneficial to the state, it must be able to create an understanding of the behaviors the state will and will not engage in and behaviors it expects other states to engage or not engage in. This coordinated understanding will also indicate associated costs, either through reputation or identity costs or through tangible costs to states for non-complying.

This paper discusses each of the three case studies in turn before assessing if any or all of the three courses of action are effective in providing the same benefits and security protections as those which encouraged the states to enter the norm initially. The first case study is on espionage laws for individuals and states and the ability of these international agreements to provide protection of sovereign territory from covert attack or reconnaissance. The second case study examines the national and territorial boundaries at sea through customary international law and the United Nations' Law of the Sea Treaty ("UNCLOS") and the ability of these norms to provide protection of the nation from attacks on the shores launched at sea. The third and final case study assesses the normative constraints of national airspace and outer space law in providing protection from attack of state territory from above land.

Case Study One: Espionage

One of the most established norms in international relations is the norm of sovereignty (see Bodin, 2006; Hobbes, 1920; Treaty of Westphalia, 1648). States have the absolute, exclusive and independent right to govern their state and have indivisible authority over the lands of the state. Violations of the territorial borders of a state by another state are hostile acts of aggression. When performed openly, these actions are an open act of war. When performed covertly, these actions are espionage which is against the standards of the international community and violate international norms. This case study will examine the norm of espionage.

Major-General Henry Wager Halleck's, in his work dated approximately 1872, traces the definition of espionage used during the American Civil War. Espionage was

defined, forbidden and guidance on judgment was established in General Order Number 100 to the United States Armies, issued in 1863, commonly referred to as the Lieber Code, after German-American jurist and theorist Doctor Lieber, who assisted in drafting the order. Under the Lieber Code, a spy was defined as a person who “secretly, in disguise or under false pretenses seeks information with the intention of communicating it to the enemy” and orders the punishment of death for spying (Halleck and Davis, 1911: 591). The only change in the modern definition of espionage is consistent with the definition of espionage in international law. The Declaration of Brussels Concerning the Customs of Law, which, although not ratified, is recognized as the cornerstone of the law of armed conflict states

no one shall be considered as a spy but those who, acting secretly or under false pretenses, collect, or try to collect, information in districts occupied by the enemy with the intention of communicating it to the opposing force (Russia, 1874).

This definition was codified in The Hague Convention of 1907 and the Geneva Conventions of 1949.

Espionage in a time of war has been punishable by death dating prior to the 1600’s. Lieutenant Colonel Geoffrey Demarest (1996) traces the history of espionage in international law to Hugo Grotius, a prominent Dutch jurist from the sixteenth century. In Grotius’s third book of *The Rights of War and Peace*, he notes that it is convention to kill spies. Grotius comments upon an important distinction between the individual committing espionage and the state supporting espionage. Halleck also traces the history of espionage in the field during the American Civil War and provides two case studies of spies tried during the American Civil War: Spencer Kellog, tried in 1872, and Major John André, tried in 1870, both convicted and sentenced to death (Halleck and Davis, 1911).

In discussing the sentence of death, Halleck agreed with his contemporary Emmerich de Vattel who found that death by hanging is the only appropriate response available to the state when it encounters espionage, given the egregious nature of the offense. These accounts provide evidence of customary international law identifying espionage as a crime worthy of death. This standard of punishment by execution for spies is codified in The Hague Convention of 1907 and the Geneva Conventions of 1949 with the caveat that a spy must be afforded a fair trial.¹

The Geneva Conventions of 1949 identify a special place outside of the traditional rules for Prisoners of War for accused spies, providing guidelines for the treatment of accused and convicted spies. The Geneva Convention retains the definition and protections, such as the requirement for a fair trial for accused spies, listed in the Hague Convention of 1907. The Geneva Convention extends the requirements on the trial to provide the protection of the right to counsel for spies. The Geneva Convention does not grant all the rights of a Prisoner of War to spies, however, as it explicitly revokes the rights of a spy to communicate individually.

The Lieber Code creates a distinction for those military in uniform, as opposed to those without, who gather information on the enemy within enemy territory. The Code identifies these advanced military reconnaissance assets, referred to as scouts, as customary military practice and determines that if captured, scouts are considered prisoners of war (Demarest, 1996). This protection is guaranteed under both The Hague Convention of 1907 and the Geneva Conventions of 1949. From Grotius to Halleck, the there is an expectation states during war will attempt to gather information on another

¹ The Geneva Conventions of 1949 require legal counsel for the accused in order to guarantee a fair trial and require a state wait six months before executing a spy unless under exceptionally grave circumstances.

state, and this action is held distinct from espionage, and is viewed as legitimate. The Final Act of the International Peace Conference alleges that the “rules of war and employment of methods necessary to obtain information about the enemy and the country, are considered allowable” (Schindler and Toman, 1988). Grotius states it is understandable, thus consistent with international norms in the seventeenth century, for states to use information provided by spies, and that is not unjust (Demarest, 1996: 331).

The understanding of the necessity for reconnaissance and the protection for military in uniform are only a portion of the strong distinction drawn in international law between the individual and the state that uses the information gathered by the spy. Vattel is extremely lenient on states and the rulers of states, determining that although states cannot require a person to act as a spy, as espionage is illegal, if a ruler is able to entice a mercenary to act as a spy, he may “take advantage of their exertions, without any violation of justice or honour.” Halleck questions this distinction, articulating that while the “odium and punishment of the crime must fall on the spy himself... it may be doubted whether the employer is free from the moral responsibility of holding out inducements to treachery and crime” (Halleck and Davis, 1911: 592). Davis agrees with Halleck, finding that encouraging or rewarding espionage requires the state to advocate conducting war in a manner that violates the strictest rules of morality is against the current standards for states². The latter two definitions, although not establishing the use of information gathered by disguise of false pretenses illegal, establish the basis for a prescriptive norm against endorsing espionage. Treaty law is notably silent on the issue of the responsibility of states with regard to information gathered by spies.

² The “current standard” being the standard between states in 1911.

Another complication in understanding the precise boundaries of the espionage norm is the silence of international law on espionage conducted in peacetime. The legal consequences of espionage are limited in scope to actions occurring during a time of war and to the individual who commits the act of spying. Richard Falk noted this gap in 1962, however the problem has not been corrected (Radsan, 2007). Some scholars propose this silence in international law regarding peacetime espionage is an endorsement of the right, and possible necessity, of states to accept, and possibly sponsor, the covert collection of from other states on the sovereign territory of that state. These scholars find espionage violates only domestic laws, not international standards (see Baker, 2007; Fleck, 2007). Although international law has remained silent on the topic of peacetime espionage, in case studies of states suspected of sponsoring espionage during peacetime the offending nation suffered considerable international criticism and sought to avoid criticism by claiming plausible deniability. The necessity to justify the state's presence under the guise of an action other than reconnaissance is particularly evident when the actors conducting espionage were in state or military vessels. Military vessels are afforded the highest degree of immunity from domestic laws of foreign governments and are solely responsible to the parent nation and international community³. Two particularly relevant case studies are the Soviet submarine, caught inside the territorial waters of Sweden in 1981 (see Delupis, 1984), and the American U-2 plane was shot down in United Soviet Socialist Republic ("USSR") airspace (see Demarest, 1996). In both instances the state claimed it was an innocent mistake, citing navigational error and weather, respectively. This was particularly embarrassing for the United States ("US"), as the state was unaware the pilot had survived the crash and

³ See Delupis, 1984, for a full discussion on the immunity afforded to warships

disagreed with the claim of the United States government. In each of these instances, the offending nation responded in a manner that verified it was aware of a prescriptive norm against encouraging espionage.

With these facts in mind, it is clear that the international crime of spying and the prescriptive norm against states sponsoring espionage exists for the protection of the sovereignty of a state from a deceitful violation of national borders. The punishment of death for the individual guilty of spying, and the political and reputational costs for the nations supporting espionage, are designed to encourage respect for national territory. This norm experienced an exogenous shock beginning in 1956 when unmanned aerial vehicles eliminated the need for human beings to be linked to espionage.

In 1956, the United States launched 516 balloons with radio tracking beacons and automatic cameras. Although these balloons were advertised as “weather balloons,” the Soviet Union and eastern European nations strongly protested the flight as a violation of national sovereignty and accused the United States of using the balloons to gather information on foreign states actions (Terrill Jr., 1999). The following year, *Sputnik I* was launched by the Soviet Union. The United States began to actively pursue the ability to use satellites for photoreconnaissance in 1955 with the Corona project by the US Air Force (Chapman, 2008). Although the United States’ first satellite was labeled as a “weather” satellite, the satellite was used for valuable Cold War reconnaissance. Since *Sputnik*, satellite technology has significantly increased the quality and timeliness of the images received. Near real-time imaging is possible with current satellites and the quality of image allows tracking and targeting (Carter, 1986). This imagery has advanced to the

degree that it may be used for targeting and assessment of damage, as demonstrated by the United States during Operation Desert Storm.

The value of these images can be estimated by the establishment of agencies to exploit satellite imagery, such as the United States National Reconnaissance Office, which was established in 1960 and maintains a classified budget. Satellite reconnaissance is heavily used by military commanders, as evidenced from the establishment of the operational commanders, such as United States Space Command (“USSPACECOM”) established in 1985 and United States Strategic Command, established in 1991, both of which were provided authority over military satellites. Despite the obvious use of satellites for reconnaissance, most satellites operate under the auspices of navigation or communications satellites. This deception as to its purpose and intention of the satellite, combined with the reconnaissance of activities inside the territorial boundaries of another state meets the historical definition of espionage.

Espionage norms experienced another shock when cyber warfare techniques became available to governments. Satellites, and later the internet, created the ability of the state actors to communicate through the air. Enemies of the state could intercept or “hack,” signals, telephones and computers located inside the territorial boundaries of an unsuspecting state without ever violating the physical borders of said country. Cyber warfare could be waged from the comfort, and security, of the home country. This form of warfare became so prevalent during the late twentieth and early twenty-first century, the United States established the a subordinate warfare commander to USSTRATCOM, called United States Cyber Command (“USCYBERCOM”), specifically dedicated to

preventing enemy cyber attacks, and the United States Navy created a Navy Net Warfare Command in 2009.⁴

To date, international law has failed to address these new forms of spying conducted by non-human entities. Tare Brisibe (2009) argues that because satellite and intelligence gathering from outer space is such a rapidly developing and changing field, international law is not equipped to respond to the legality or illegality of actions conducted by states. Brisibe claims the tradition of international law being derived from customary international law makes it slow to adapt to technological advances. This inability of states to quickly adapt states to new technologies, identified by Brisibe, may derive from the expense of continually renegotiating an international agreement. This supports constructivist theory that the fiscal, political and reputational costs to a state in negotiating a new international agreement may result in a hesitancy to change the current agreement, or a habit of compliance. Brisibe's argument does not excuse a slow response from the normative constructs for espionage, however, under idealist theory. The norm of the sovereignty, and by extension the prescriptive norm against espionage, is not just a series of actions designating the territorial borders of a state, but a spirit of action that protects the exclusive authority of a state over its territory. It is clear the spirit of prescriptive norms against endorsing espionage were not internalized by states and applied to satellite and network warfare. As a result to the changes in technology being ignored by the international community and supporting international agreement, acts of sovereignty by states have continued unchecked in space and through the internet.

⁴ Subordinate commanders control a subfield of a broader type of warfare. In this example USCYBERCOM controls the cyber warfare aspect of strategic command.

Case Study Two: National Boundaries at Sea

The norm of states being afforded protection from enemy attack from the sea developed in the early eighteenth century. The concept was introduced by Dutch Jurist Cornelius van Bijnkershoek in response to a debate between advocates of a concept known as freedom of the sea and those claiming a closed sea. Freedom of the sea advocates, such as Grotius (1618) claimed the seas were the inheritance of all mankind and thus were not subject to territorial claims. Proponents of a closed sea concept (see Selden, 1635) claimed every inch of the sea should be protected and enforced by a state, and the borders of a given state at sea should extend until it met the border of another state. Although more states favored freedom of the seas, a general consensus among states acknowledged a need to defend their nation, producing an understanding that there must be a certain buffer from the nation to the high seas. In 1702, van Bijnkershoek introduced a concept known as the “cannon shot rule” in his work *De dominio maris*. This rule defined the territorial waters of a state as three nautical miles from the coast of the shore, which is equal to the distance a cannon shot could be fired. Freedom of passage through these areas were preserved, provided the passage was “innocent” and not prejudicial to the “good order and security” of the state to whom the waters belonged (Borgerson, 2009: 7). Due in large part to a combination of the impracticability of enforcing a claim to ownership on a vast space of water, the rise in power of colonial powers, and the protection the three nautical mile clause granted states from attack at sea, closed seas failed to establish international acceptance. The norm of freedom of the seas and the sovereign right of states to a territorial sea extending three nautical miles from the coast gained international acceptance and became the heart of international agreements

and understandings on ocean law. Although the three nautical mile baseline for territorial waters of a state became the norm for international law, it was never confirmed through treaty and remained in the form of soft law, as defined by Abbott and Snidal (2000).

The first noted dissent on the three nautical mile territorial waters norm came in 1909 from Tsarist Russia. In December 1904, the United States deployed twenty-eight ships, nicknamed The Great White Fleet, with the mission to circumnavigate the globe. In the sailing of the Great White Fleet around the world, the United States was highlighting several new types of ships, most notably four 1904 Virginia Class battleships, four 1902 Maine Class battleships, and two 1901 Illinois Class battleships. Each of these new battleships, as well as the six Bainbridge-class destroyers that accompanied the battleships, featured torpedoes, smaller caliber guns and machine guns. The new weapons deployed on these ships were an exogenous technological shift to the norm of territorial waters; the weapons of the Great White Fleet reached well beyond three nautical miles. The range of weapons had advanced past those that could be anticipated when van Bijnkershoek declared the cannon shot rule. For Russia, this raised the question of whether the “cannon shot rule” would still meet the intention of national waters. Cornelis van Bijnkershoek’s rule, and the subsequent international norm, was structured around the ability of a state to defend against vessels from other nations that threatened the security of the coastal state. In 1909, the same year the Great White Fleet finished its mission of circumnavigating the globe, Russia claimed a twelve nautical mile limit to its territorial waters (Galdorisi, Bandow and Jarman, 1994: 22). The standard of twelve nautical miles corresponds to the horizon distance at sea level, which is the maximum distance a person is expected to be able to see, and thus shoot, another vessel.

This new standard was not accepted by the international community in 1909, but is the beginning of a period of dissent in the international community regarding what should be the maximum boundaries of territorial waters.

The years immediately following 1909 produced no real change in the international norms regarding maritime boundaries, due in part to the general global instability resulting in World Wars I and II. The concept of Freedom of Navigation was included in United States President Woodrow Wilson's Fourteen Points issued in 1918, and received criticism from England and rejection by Germany, though the latter rejected all of the Fourteen Points, so a specific conclusion about the Freedom of Navigation is not as easily deducible. England's criticism should have raised international discussion on the law of the sea, however discourse on the norm regarding territorial waters remained quiet until the completion of the Second World War ("WWII").

By the end of WWII, advances in oil drilling and mineral mining indicated to the United States the economic and national security value of the continental shelf. The continental shelf contained strategic minerals including cobalt, iron, nickel, zinc, sulfur, copper and platinum (Galdorisi, et al, 1994: 16). The first four minerals are used in producing steel while sulfur is used in explosives and copper and platinum are used for electronics. The United States viewed access to oil under the continental shelf, which supported a wide range of national security needs, as well as the polymetallic nodules and polymetallic sulfides that contain the minerals in the continental shelf, as critical to the national security of the country. In 1945, the United States issued the Truman Proclamations claiming the entire continental shelf attached to the United States as the exclusive economic territory of the nation. President Truman specifically identified this

area as belonging to the high seas, acknowledging the navigational rights associated with the high seas, but declared that the mineral and natural resources of the continental shelf contiguous to the United States were the exclusive rights of that state (White House, 1945).

Despite President Truman's best attempt to carefully craft his continental shelf proclamation so as to not undermine the norm of three nautical miles for territorial waters, other nations failed to draw the same distinction as the United States. Although the Truman Proclamations were not a direct challenge to the territorial waters norm because the United States was not claiming greater than three nautical miles in national seas, identified the continental shelf area outside of three nautical miles as a portion of the high seas, and guaranteed freedom of navigation in this area, the proclamations strengthened international conviction that the previous norm was no longer satisfactory in dealing with the recent advances in technology. Nations began claiming excessive boundaries. While many times these claims were limited to the twelve nautical miles previously introduced by Russia, in Central and South America the claims reached up to 200 nautical miles (David and Digeser, 1990: 4). The international community was again at a crossroads in their understanding of international maritime law.

The response by the international community was to call for a convention on the law of the sea through the United Nations ("UN"). This was an interesting and noteworthy step as the international community sought to move maritime law from soft to hard law. Abbott and Snidal (2000) identify five conditions in a soft law that should encourage states to seek hard legal commitments: high cost of obedience; compliance is difficult to detect; a desire to signal intense commitment; a desire to unite competing

domestic international agendas to an international agenda; and a strong commitment to reducing sovereignty exists. Soft legal agreements should be sought, according to Abbott and Snidal, when there are high contracting costs, high sovereignty costs, and detail is too great for hard law and/or the issues are ill defined. The failure of states to codify the international maritime law prior to the twentieth century is most consistent with the desire to reduce contracting costs. Prior to the twentieth century, nations were abiding by the three nautical mile rule, and the issue at hand – national security in a fairly low technology environment – and the resulting agreement actually supported national sovereignty. The choice for soft law prior to the twentieth century appears to rest on a desire to reduce transaction costs. The alternative to seek hard international law after WWII is not due to a difficulty in detecting compliance, as national boundaries are easily defined, nor is it likely due to a strong desire to reduce sovereignty. The remaining reasons Abbott and Snidal identify as most likely explanations for seeking hard law – a high cost of obedience, desire to signal intense commitment and a desire to unite competing domestic agendas to an international agenda – are most accurate with the situation at hand. The high cost of obedience can primarily be attributed to the inadequacy of the three nautical mile rule to providing a buffer between a state and the weapons of other states navies. The desire to signal intense commitment may come from the history of nations with maritime law, or it may be due to the high costs associated with failing to have effective protection from the maritime weapons of other states. A high cost was also anticipated by states relating to navigation of international seas as 116 national straits would be closed if a twelve nautical mile baseline was established. Straits are chokepoints in maritime traffic where nations must pass to move from one

large body of water to another body of water. As evident from the many nations claiming excessive national waters, and the variety in the width of those claims, there was a significant amount of conflict between domestic and international agendas regarding maritime law.

The United Nations Convention on the Law of the Sea I (“UNCLOS I”) was held in 1958. Although it created agreements in many areas, such as affirming freedom of navigation, establishing the right of aircraft to fly above the areas identified as the high seas⁵, made progress on establishing the rights of a state to the continental shelf out to a 200 meter depth, establishing a contiguous zone for enforcement of customs, the Convention was not successful in defining the breadth of territorial waters. States anxious about the growing western naval weapons capabilities continued to push for a twelve nautical mile baseline. States advocating freedom of the sea were concerned with the ability of merchant and military crafts to efficiently transit between ports. The agreements were also weakened by the structure of the Convention, which separated the law of the sea into four distinct subject matter areas covering territorial sea and contiguous zones, the high seas, fishing and the continental shelf (Verani, 2005). This structure allowed states to pick and chose which agreements the state would agree to, creating a lack of general consensus. One issue that the states did agree upon was the fact the business of settling maritime law was not finished with UNCLOS I and established another convention date.

United Nations Convention on the Law of the Sea II (“UNCLOS II”) was convened in 1960. UNCLOS II produced very little consensus, and is most noteworthy for its near accomplishment. The Convention proposed a middle ground between the

⁵ The high seas are defined as any area that is not within the territorial waters of another state.

states that advocated maintaining a three nautical mile territorial water claim and the states supporting the twelve nautical mile claim, offering a six nautical mile baseline. The treaty failed by one vote (David and Digeser, 1990: 6). This proposal did not meet the desire for national defense sought by nations advocating a twelve nautical mile claim, such as the Soviet Union, because weapons technology allowed enemies to reach farther than six nautical miles. Neither did it assure nations, particularly the United States, concerned with straight transit. The only two resolutions passed at UNCLOS II established funding to publish the records of the Convention and one to encourage technical assistance for developing countries.

UNCLOS II did not establish another convention, however by the late 1960's the importance of clarifying maritime law were again the topic of discussion at the United Nations General Assembly. In 1967, the General Assembly unanimously passed "The Declaration of Principles Governing the Sea-bed and Ocean Floor Beyond the Limits of National Jurisdiction" and a companion resolution calling for a third United Nations Convention on the Law of the Sea ("UNCLOS III") with the mandate to cover all issues of maritime law. In response to the difficulties experienced in UNCLOS I, when UNCLOS III was convened in December 1973 it had a new structure that signatory states must agree to a single comprehensive treaty that would require states to sign on to all aspects of the treaty. UNCLOS III also included a contingent of states with no maritime border. These states, identified as the "Group of 77 States" or "G-77", were a testament of the commitment by the international community to the Grotius concept that the high seas were the inheritance of all mankind. This group also extended the norm beyond

states with maritime borders and identified it as a commitment by all states to a universal guidance established by the international community as a whole.

One noteworthy change in politics between UNCLOS II and UNCLOS III came in the form of a shift in policies advocated by the Soviet Union. The Soviet Union, previously a lead advocate of a twelve nautical mile baseline for territorial waters, experienced a national shift in technology and military capabilities. Between 1958 and 1968, the Soviet Union significantly advanced their submarine capability and their ability to sustain surface ships at a longer distance (Galdorisi, Bandow and Jarman, 1994). The Soviet Union did not back down from its previous support of a twelve nautical mile baseline for territorial waters, but became an advocate of a new concept of transit passage. Transit passage allowed military vessels to pass through international straits without the restrictions of innocent passage. Specifically, the Soviet Union was interested in the ability of submarines to stay submerged. In exchange for this transit passage, the Soviet Union agreed to accept the 200 nautical mile economic zone, a key point of interest for the United States.

UNCLOS III negotiations were completed in 1982, nine years after the convention began. The resulting treaty successfully established a twelve nautical mile border, or baseline, for national, or territorial, waters, an additional twelve nautical miles beyond the national waters identified as a contiguous zone for enforcement of customs and immigration, and a 200 nautical mile exclusive economic zone. The treaty also identified that a continental shelf extending from a state's baseline for up to 300 nautical miles was the exclusive economic right of the state. UNCLOS III entered into force when the sixtieth country ratified the treaty in 1994. The agreement has been ratified by

157 countries. Nineteen countries, including the United States, have signed but not ratified the treaty.

Despite being active in the Conventions until the very end, the United States failure to sign the treaty due to a disagreement on portions relating to seabed mining. The “all or nothing” structure of the convention does not enable the United States to ratify the provisions on territorial waters without also ratifying the other maritime laws established at UNCLOS III, so the United States elected to not ratify the treaty. Galdorisi, Bandow and Jarman (1994) address the considerable amount of political capital the United States lost, and the expense in reputational costs to the United States, by the decision to not signing the treaty. Although the United States has not ratified the agreement, the United States has recognized the twelve nautical mile baseline for territorial waters in the United States Coast Guard publication governing maritime law (United States Department of Transportation, 1992). The United States Navy continues a program of Freedom of Navigation Operations (“FONOPS”), where it conducts transit inside borders claimed by states that are deemed excessive under the standard set in UNCLOS III. The United States views the treaty as a codification of customary international law and affirms it will abide by the territorial waters and high seas due to the customary international law.

The history of this case study demonstrates that in modifying the original norm, states referenced both the intention and the standard of the original norm. Van Bijnkershoek intention, and that of the international community, was to allow states to protect against the leading naval weapon at the time, the cannon. The standard established was three nautical miles. When an exogenous technological shift occurred,

the states negotiated a new border that accommodated the advances in technology both in the distance of offensive weapons, and the vulnerability of requiring submarines to surface when transiting international straits. The resultant agreement gained broad support from nations, both those with and without a maritime border. The political censure experienced by United States when it failed to ratify the treaty provides strong evidence of a constitutive identity as a member of a community of states which agreed upon, and supported, international. This case study also provides solid evidence of a prescriptive quality of the norm so strong the United States still acknowledges and defends the twelve nautical mile baseline through FONOPS. The claim of the United States that the treaty is a codification of customary international law, as well as the continual references to the original intentions and standard of the previous norm, confirms the purpose of the three UNCLOS conventions was to renegotiate the norm. This renegotiation came in direct response to the advances in naval weaponry and seabed mining, which supported construction of military equipment.

Case Study Three: National Airspace and Outer Space

Advances in flight, beginning at the end of the nineteenth century with gliders and expanding with the first flight of a manned aircraft in December 1903, and further advances in the twentieth century in both manned and unmanned aerial flight, introduced a new consideration in national sovereignty. In the early 1900's, states began to address the right of the state to the airspace above the sovereign territory of a nation. The first treaty addressing the right of a state to territorial air was the 1919 Convention Relating to

the Regulation of Aerial Navigation, otherwise known as the Paris Treaty of 1919 (“Paris Treaty”). The preamble summarizes the need for the convention as follows:

Recognising the progress of aerial navigation, and that the establishment of regulations of universal application will be to the interest of all; appreciating the necessity of an early agreement upon certain principles and rules calculated to prevent controversy; desiring to encourage peaceful intercourse of nations by means of aerial communications; [the States Parties] have determined for these purposes to conclude a convention (Paris Treaty, 1919)

The first article of the Convention recognizes the right of every power, or state, to “the complete and exclusive right of sovereignty over the airspace above its territory” (Paris Treaty, 1919). Although the treaty provides the right of innocent passage through national airspace for civilian aircraft during times of peace, it also protects the rights of a state concerned with national security or military operations to prohibit private aircraft from another state from entering its sovereign airspace. The right of innocent passage for military aircraft is strictly prohibited without the special authorization of the state it is flying over. The Paris Treaty defined national airspace as the airspace above the territory of a state, both on shore and at sea.

The right of a state to national airspace above the land of a state never experienced considerable criticism, and was further acknowledged at the 1944 Convention on International Civil Aviation, also known as the Chicago Treaty of 1944 (“Chicago Treaty”). The first article of the Chicago Treaty again states “that every State has complete and exclusive sovereignty over the airspace above its territory.” The timing and scope of the treaty are noteworthy, as the Second World War was in progress when this treaty was signed. In the midst of war, this treaty identified that:

the future development of international civil aviation can greatly help to create and preserve friendships and understanding among the nations of the world, yet its abuse can become a treat to the general security; and whereas it is desirable to

avoid friction and to promote that cooperation between nations and peoples upon which the peace of the world depends (Chicago Treaty, 1944: Preamble).

The scope of the Convention is limited to civilian aircraft, extending the exclusion of innocent passage to all aircraft representing the state or state officials. The Chicago Treaty also included a new rule that unmanned aircraft may not overfly another country without special authorization. These new additions may be the result of lessons learned in WWII, specifically from Germany's advanced use of rockets. Germany introduced the V-1 rocket in June of 1944 and the V-2 in August 1944. The V-1 and V-2 rockets, which would later be identified as the first ballistic missiles, contained a conventional warhead and were little more than an unmanned plane with a remote guidance system (Chapman, 2008 and Karp, 1984). The Chicago Treaty recognized and expanded the rules governing civilian aircraft flight in national and international airspace and established a commission, known as the International Civil Aviation Organization ("ICAO") to continue to monitor rules relating to national and international airspace.

The Paris Treaty, the Chicago Treaty, and the actions of states clearly delineate and protect the prescriptive norm that a state has the right to the sovereign ownership of the airspace above its land. The exclusion of military aircraft in the Paris Treaty and the exclusion of all state aircraft and unmanned aerial vehicles in the Chicago Treaty affirm the fact that national airspace was designed to provide protection to the state. Similar to national borders and the protection provided by territorial seas, the ability to exclude aircraft from any nation for national security and protection against state and military aircraft established the norm of national defense through the protection of the land, air and waters belonging to the state.

The initial major technological shock to the norm of national airspace came in 1956 with the first operational flight of the U-2 aircraft. The U-2 flies at greater than 70,000 feet (Sampson Low, Marston & Co, 1985). This flight path placed the aircraft above the capability of most air search radars at the time and above the defense of surface to air missiles. The U-2 was specifically designed to fly above detection and beyond reproach. The plane was successful, frequently flying into Soviet territory without detection between 1956 and 1960 (Demarest, 1996: 340). During this time, the Soviet Union responded to this emergent threat by developing new, and more, jet aircraft and new surface to air missiles, including the S-75, designed to intercept at the higher altitude of the U-2. In 1960, the Soviet Union successfully detected and shot down an American U-2 airplane with an S-75 surface-to-air missile. The U-2 pilot was an US Central Intelligence Agency (CIA) contract employee named Gary Powers who was recovered by the Soviet Union and stood trial for espionage (Demarest, 1996). The United States was unable to deny that the U-2 plane, classified as a state aircraft, and its pilot, a contractor for the CIA, were flying above sovereign territory of the United Soviet Socialist Republic, and experienced significant diplomatic and political consequences violating international norms on airspace (Bechloss, 1986). The response of condemnation for the United States by the international community, and the United States' lack of justification, attests to the belief that the state should not have been flying above the territorial land of the USSR, and thus upheld the international norm despite advances in technology. The incident, however, was a glimpse at the problems advancing technology in engine capabilities would continue to provide for the norm of sovereign airspace.

The creation of engines capable of extremely high altitude flight, which made the U-2 flight possible, also led to three new pieces of technology: orbiting satellites, the spaceship and ballistic missiles. The first satellite, the Russian *Sputnik I*, was launched into orbit in October of 1957, hailing the first presence of a manmade object in “outer space” (Chapman, 2008: 8). Outer space, although not a new concept, was a new domain. No country claimed that *Sputnik I* violated their national airspace, despite a flight path that travelled over the United States and Europe. Outer space was viewed as a new frontier, inspiring both excitement and fear in the international community. Exploration of this new world of zero gravity and celestial bodies, previously known only from the distant eye of the earth’s surface, created a vibrant excitement and became viewed as a matter of scientific necessity. The public response to *Sputnik I* was not entirely positive, however. The American response to the concept of a Soviet satellite overhead was strong and evoked public fear for security. The American public began to demand their government protect the state from Soviet military capabilities in the sky. The United States government attempted to return to this concept of space as a new frontier of scientific discovery and meet national demands by launching its first satellite in the International Geophysical Year (IGY), 1958 (Gallagher, 2005: 4).

The launch of *Sputnik I* immediately caught the attention of the president of ICAO, Walter Binaghi, who wrote a letter to the US representative to ICAO asking if ICAO legally could and should consider boundaries in outer space. The 1956 ICAO Convention considered the matter of outer space, determined ICAO had the authority to study space; however, it determined regulating space technology was premature because technology was still in its infancy (Terrill Jr., 1999: 30-32). This event is important because it

establishes that even the organization which governs air space regulations endorsed outer space as a distinct domain from air space, although the boundaries were undefined and remain undefined to this day. Regulation of outer space would be its own series of agreements which could be established when the capabilities of the new technology were established. The decision of the Convention did not excuse outer space to violate national sovereignty, but simply determined that how outer space and sovereignty would be married would be determined at a later date.

As protection of borders was no longer guaranteed by norms on national airspace, and outer space was carved into its own realm without protection, regulation, clear rules or guidelines regarding acceptable state behavior, states sought offensive and defensive capabilities for outer space in order to protect national interests. Advanced satellite uses for reconnaissance, launching missiles, and other military support were dreamed, researched and thought to be coming shortly. The advantages of these weapons, as well as concerns that enemy nations would develop or otherwise possess these weapons, drew added emotions of fear, urgency and danger to the debate on outer space. States sought and achieved significant advances in the research and development of ballistic missiles and anti-satellite weapons. As mentioned above, Germany first used short-range ballistic missiles in WWII; however, “outer space” was not a factor in this launch, and the missile was merely seen as an advanced rocket launch through air space (Karp, 1984). Ballistic missiles are missiles that enter space and transit in space tangential to the earth’s surface, before reentering space above the target and descending. New research was creating long range and intercontinental ballistic missiles, capable of reaching from the Soviet bloc to the United States.

In addition to the problems of weapons in space, the potential for manned vehicles capable of entering and departing space, added another problem when defining and protecting space. Although the first formal space shuttle was not launched until the 1970's, nations were already strongly considering the role of astronauts and men in outer space in the late 1950's. The United States began to develop plans in 1958 to colonize the moon and other aspects of outer space (Chapman, 2008: 9). Manned orbiting laboratories, or manned crafts orbiting the earth, were successfully launched in 1966 (Chapman, 2008: 20). Humans in space were viewed in dual and competing dimensions; they were both heroic scientists and ambassadors to a foreign land and military threats collecting reconnaissance on a state and capable of launching war in or from outer space.

The debate about the limits of national airspace and outer space, left unsolved by ICAO in 1956, continued through the 1950's and early 1960's. Despite the over-flight of the United States and Europe by *Sputnik I*, the Soviet Union later stated it believed the Paris and Chicago Treaties guaranteed the USSR, and by extension all states, right to all space above its territories, regardless of whether the space was in air or outer space. The United States advocated a freedom of space policy, claiming only the air space above a state was sovereign, not including outer space. As evidence to this distinction, the United States interpreted the French words used in the Paris Treaty as atmospheric space, and used this to support the claim outer space was beyond the atmosphere (Terrill Jr., 199: 27). In the process of promoting their respective stance regarding the limit of sovereign space, each nation referencing the previous treaties on national and international airspace, both countries confirmed the presence of a norm defining that there was a sovereign airspace which belonged exclusively to each state. The Soviet Union's supported the

spirit of the norm, which was designed to protect the sovereignty of a state, while the United States policy supported the literal interpretation of the boundary.

The United Nations sought to solve the absence of law regarding outer space by forming the Committee on the Peaceful Uses of Outer Space in 1961. In October 1963, the UN passed Resolution 1884 making it illegal to station weapons of mass destruction in outer space. This was followed in 1964 by UN Resolution 1962 entitled “Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space.” The non-binding resolution was designed to encourage scientific exploration and development in outer space, both by governments and civilian organizations, by defining how governments and corporations could split profits. The resolution makes frequent reference to the sovereignty of states, but fails to identify if the state has territorial space in outer space (UN, 1964).

In 1966, United States President Lyndon B. Johnson urged the international community to take immediate action to ensure the safety of astronauts, preserve space for peaceful purposes and protect space for all mankind. President Johnson submitted a proposal for a treaty defining outer space law, and wrote the chairman of the UN Committee on the Peaceful Uses of Outer Space requesting an early session of the convention to consider his treaty (Dembling and Arons, 1967: 426). The committee agreed to meet in June and through negotiations created the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, otherwise known as the Outer Space Treaty. The treaty was unanimously recommended by the committee and passed by a unanimous vote in the United Nations General Assembly two days later. The Outer Space Treaty

established outer space belonged to all mankind, and the exploration of outer space must be peaceful. It prohibits colonizing space, placing weapons of mass destruction in space, stationing any weapons on celestial bodies and states all celestial bodies must be used for peace. It also protected astronauts and held states responsible for the equipment and activities, which occur by vessels it launches into space. This liability includes financial and international obligations.

The intention of the Outer Space Treaty was to continue to protect all states from attack. If national airspace was sovereign and protected by the state and outer space was a peaceful zone of scientific exploration free of weapons, the state was still protected from attack by other states. Creating the Outer Space Treaty separate from ICAO, the Paris Treaty and the Chicago Treaty, however, firmly established a new norm for international agreements about space. The protection of states from attack via outer space was exclusively linked to the Outer Space Treaty. In practical effect, the Outer Space Treaty formally removed a portion of space above the territorial boundaries of a state and established it as belonging to a new norm, and then formed an international agreement designed to establish this norm as a place of peace, harmless to the sovereignty of states. The Outer Space Treaty was formalized as the agreement to protect states from attack in this new domain.

The failure of the Outer Space Treaty to provide protection from attack became obvious shortly after the agreement. New ballistic missiles were being developed by China. The United States continued to aggressively pursue “Multiple Independently-targeted Re-entry Vehicles,” or MIRVs, which were a single ballistic missile with multiple independent warhead release capabilities. The Soviet Union increased its arsenal

of heavy and land based ballistic missiles and both the United States and the Soviet Union continued developing antiballistic missiles. Antiballistic missiles are missiles designed to destroy or counter ballistic missiles. In 1967, the United States announced that in response to the possibility of Chinese ICBMs, the US was deploying an Antiballistic Missile Defense System (US State Department, 2010).

The advent of a new state actor with ballistic missiles was a significant threat to the US and USSR, but the evolution and advance in capabilities of anti-ballistic missiles was significant and threatening to all states. Antiballistic missiles created the first real possibility of both offensive and defensive war being conducted in outer space since the conclusion of the Outer Space Treaty. Antiballistic missiles create debris that threatens the outer space environment since the lack of gravity would allow debris to float in outer space for an immeasurable amount of time. Antiballistic missiles also increased debris on earth and the threat of falling debris on innocent third party states, as some antiballistic missiles could intercept ballistic missiles while in the boost phase and still in the earth's atmosphere. Finally, many new ballistic missiles and several antiballistic missiles included a multi-stage booster jet, which may fall away and to the earth after it finished its stage of propulsion.

A space war and space arms race was still viewed as a significant threat. States began seeking outside agreements to protect against these scenarios. The first Strategic Arms Limitation Talks ("SALT I") between the Soviet Union and United States began in 1969 and extended until 1972. The purpose was to limit the number of missiles and missile defense system options each state could own in order to reduce the probability of war. SALT I produced the 1971 Treaty on the Limitations of Anti-Ballistic Missile

Systems, or ABM Treaty, and the 1972 Interim Agreement on Certain Measures with Respect to the Limitation of Strategic Offensive Weapons. In 1986, the United States proposed a treaty with the Soviet Union to ban ballistic missiles at the Reykjavik Summit, however this agreement never occurred.

Due to the advanced technology and unique materials required to build ballistic and antiballistic missiles, scientists assessed third world countries would not be able to indigenously repeat the technology, thus and bilateral or three-way negotiations provided efficient protection from attack (see Karp, 1984). Bilateral negotiations between the United States and the Soviet Union, such as the ABM Treaty and strategic arms limitation agreements became the solution to ensuring national security and protection. The fact nations continued to seek outside agreements to deal with increases in technology after the Outer Space Treaty establishes that the Outer Space Treaty failed to protect states because it was unable to control the weapons in outer space in light of the exogenous technological shifts in weaponry.

To be clear, the Outer Space Treaty was not a complete failure. The Outer Space Treaty is ratified by 100 countries, has another 29 signatories and only 69 states who have not agreed to the Outer Space Treaty, none of which are major players in outer space exploration. It established many international norms. The rules regarding celestial bodies and protection of astronauts remain valid, creating the consensus definition of astronauts as scientists, not war fighters. The treaty successfully codified a norm that space was unique from air space, a source of scientific discovery and that celestial bodies are a place of peace. Even peaceful artificial celestial bodies, such as satellites, are afforded a certain degree of protection from harm under this treaty. However, in regard to

creating a peaceful frontier, free of threats to states, the Outer Space Treaty failed and the international community has been unable to establish any normative agreements on the use of ballistic missiles, antiballistic missiles and satellites.

In the case of national airspace, the advent of new technology caused states to alter their expectations for the norm. No longer did the norm provide a zone of exclusive sovereignty and impregnable protection from foreign assets. Expectations of the protection of a border above the territory of a state were no longer a part of the international agreement and protection from foreign military attack was sought in another international agreement. A new area was established out of area previously contained in air space. The new area was given a new name and states sought to establish entirely new international agreements and norms, separate from those rules and guidelines applied to air space. By providing an expectation that space would be free of weapons, states sought protection from attack by other states from the Outer Space Treaty. This protection, although promised, was not provided by the new international agreement. When faced with resistance from states, the Outer Space Treaty failed to constrain on the states to establishing a peaceful zone free of weapons in outer space. No similar problems exist in the norm on national airspace; states do not advocate that military aircraft should be able to transit above other states. Each of these security concerns could provide valuable reconnaissance and offensive strike capability, however only the norm of a peaceful outer space is ignored. The difference in effectiveness of the norm in constraining states points to a difference in older agreements compared to newer agreements. Constructivist theory attributes this difference to a habit of compliance and

an identity as a state which honors national airspace. Realist and idealist theory do not have an explanation for why the age of an agreement should matter.

Judging Effectiveness

With the facts of the three case studies established, this paper turns to an examination of the success of the states involved in establishing an international environment as or more beneficial after the technological shift as previously enjoyed when the norm met the security concern. In judging if the international environment experienced by a state after responding or failing to respond to the technology shift, this paper returns to Tannenwald's (1999) expected benefits of a norm: constraining, constitutive and permissive. I will use current examples where applicable and will seek to determine if the different courses of action produce varying effects on the norm.

In constraining normative effects, the state seeks to ensure that the participating states and competing domestic agendas are constrained to an agreed behavior on a given topic. In the case of espionage, the states created the international norms to provide protection of national sovereignty and integrity of national borders from infiltration by enemy spies. Presuming states are still seeking to constrain other states from spying, the failure of the espionage norm to adapt to advances in technology renders the norm ineffective in protecting a country from unmanned reconnaissance or cyber attacks on the territory of the state. The publicized hack of Google Corporation in January 2010 by the Chinese government is one example of recent news stories demonstrating the potential hazards of cyber and satellite warfare (Nakashima, 2010). In ten of the eleven cases in

the United States since 2000 resulting in convictions for domestic espionage, the spies used the internet to gather intelligence (Associated Press, 2008).

In the case of territorial waters, the state seeks to protect the shores of a nation from a sneak attack by enemy weapons at sea. The current international law providing twelve nautical miles of territorial waters provides substantial protection against attack at sea. This protection is not absolute, as advances in sea-launched ballistic missiles, cruise missiles and over-the-horizon targeting, have moved the potential reach of some enemies beyond twelve nautical miles. In terms of constraining the states, however, this norm continues to constrain states from launching weapons from sea to shore except during declared wars. Claims exist that states have entered the territorial waters of another state without permission, and these claims are dealt with in the international community. Outrage by the international community establishes the effective constraining power of this norm in establishing a prescriptive or expected behavior of vessels at sea.

In the case of preventing attacks from either air or outer space, the Outer Space Treaty and its ancillary agreements have failed to constrain ballistic missiles, antiballistic missile defense or anti-satellite weapons. The norm of national airspace is still effective at constraining military aircraft from transiting in the territorial air of a given nation up to approximately 60,000 feet. This 60,000 feet limit is the *de facto* border for national airspace honored by states, and is linked to Annex 11 of the Chicago Treaty, adopted in 1991. Airspace above 60,000 feet remains uncontrolled. With the advances in the height of flight possible by aircraft and missiles, this border does not provide protection from aerial attack. Advances in technology have been ignored by the international norm and are not mentioned in the international agreement. Global outcry over the Chinese

deployment of ballistic missiles to destroy a satellite in January 2007 failed to discourage either China or the United States who destroyed a satellite in similar circumstances in (see Watson, 2007 and Spiegel, 2008).

Constitutive effects of norms provide states with the benefits of creating an identity of behaving in accordance with the international agreement. In the case of espionage norms, states would expect the person or object conducting espionage to be viewed as treacherous and ignoble, and states would be given an identity as noble if they did not support espionage. In regard to the first portion of this norm, humans and objects known to be spies are not viewed in the same manner as they were during the times of Grotius, Halleck and Davis. The International Spy Museum in Washington, DC, invites people to explore the mystery and intrigue of the underground world of espionage. Popular television shows and crime novels have removed the villain stereotype of spies in many areas of the world. Satellites and cyber warfare “hackers” are viewed with more wariness than disdain. Regarding states who endorse espionage, China rebuked a proposal by the United States for an investigation into the alleged hack of Google and other multinational corporations, claiming allegations China would support this sort of activity as groundless and insulting (Wines, 2010). The criticism by the United States and the rebuke by China demonstrate that China clearly preferred to associate with those states that are not publicly associated with espionage, supporting the existence of a prescriptive norm that states should not support espionage. In the case study of territorial waters, a constitutive effect would create an identity of states that respect territorial waters versus those who do not. The international criticism of the United States for failing to sign the Law of the Sea Treaty, and the response by the United State to actively

acknowledge and support the norm of twelve nautical mile territorial waters creates a compelling case there are two group identities at issue: that associated with belonging to the Convention; and with a separate identity for those following the twelve nautical mile baseline for territorial waters. States claiming excessive baselines are subject to international censure and foreign navies, such as the United States, actively patrolling at the twelve nautical mile border.

In the final case study, a constitutive effect would create an identity for states that place weapons in outer space and those that do not. This constitutive effect does not appear to exist. There is no widely accepted positive identity associated with being a state that denounces the use or creation of ballistic missiles or anti-satellite weapons. Only two nations currently claim the capability of antiballistic missile defense, the United States and China, and this does not appear to provide a negative international identity for either country.

Permissive effects of a norm would create a common international understanding of the actions identified under the norm and constrain the behavior associated with the norm. Relating to the first case study, permissive effects would create a specific understanding of espionage and behaviors associated with espionage. As previously addressed in this paper, there is not currently a clear understanding of what actions by satellites or “hackers” constitutes espionage, and what behaviors by a state are acceptable in the realm of espionage or reconnaissance. Regarding the second case study, permissive effects would clearly identify the border of territorial waters and define acceptable behavior inside territorial waters. The Law of the Sea Treaty clearly delineates these borders and practices. In the case of space, permissive effects would

identify the border of air space and outer space and define acceptable actions performed in each space. There is no accepted definition of outer space in the international community. The Fédération Aéronautique Internationale defines the border of outer space to be 100 kilometers above land. The United States National Aeronautics and Space Administration classify an astronaut as a person who has traveled above 50 feet in the air. As previously addressed, ICAO does not define national airspace, but classifies the space up to 60,000 feet as under the control of the state. There is no clearly delineated standard for outer space. An international understanding of actions expressly forbidden in outer space is partially effective. Actions such as the colonization of celestial bodies are clearly understood as taboo. The permissibility of other actions, such as the use antiballistic missile defense, are not widely understood or agreed upon.

In examining the constraining, constitutive and permissive effects of the three case studies above, it is clear the process of renegotiating a norm retains the strongest force on states. Renegotiating the norm, as in the case of the territorial waters norm, establishes clearly delineated guidance for new technology while retaining the habit of compliance which both establishes the norm as a part of the identity of the state and increases the political and reputational costs of not complying with the other parties of the agreement. Retaining the norm, as in the case study on espionage, preserves the same political and reputational costs for the previously identified behaviors, but does not expand the constraining effects to new actors. Revoking the norm may occur either through withdrawing from the agreement or stripping the norm of the expectation to provide the protection which was the onus of the norm. The later occurred when states eliminated the exclusive responsibility of national airspace boundaries to provide

protection of territorial borders from penetration by foreign weapons. New international norms agreed upon by states for the protection no longer afforded by the abandoned norm do not carry the same habit of compliance, the same constitutive identity.

Conclusion

After examining three case studies of security norms that experienced advances in technology that negatively impacted the ability of the norm to provide the protection previously afforded states under the norm, it is clear states engage in multiple courses of action and these courses of action yield different effects on the norm and the international environment. This paper finds that in the case study of national airspace and outer space, states abandoned the expectation that national airspace would provide protection from attack by foreign states. Although no state formally withdrew from the treaty, participant states effectively abandoned the security aspect of the norm, stripping the protection of national airspace to a matter of traffic control and safety provisions. States established a new international agreement, The Outer Space Treaty, designed to provide protection from attack by foreign states using the advanced weapons technology. This treaty failed to constrain states. Although certain constitutive and permissive effects were experienced because of the Outer Space Treaty, these effects were not experienced in the realm of national security concerns. In the case study of espionage, the norm ignored the new technological environment of the later twentieth and twenty-first centuries. Although this norm has a constitutive and constraining effect on the previously delineated actions, this understanding does not spill over to create a clear permissive or constitutive effect on the new technology. Only in the case study of the law of the sea, where states

renegotiated the customary international law through an international treaty to account for advances in military technology and explicitly structured the agreement as a modification on the previous norm, did the norm enjoy the same or greater degree of constraining, constitutive and permissive effects as previously enjoyed before the technological shift.

These findings identify characteristics of norms primarily consistent with constructivist theory, which holds both the international agreement and the norm generated by the agreement work together to classify behavior and constrain state behavior. The effect of creating a desired identity as a member of the community that supports and abides by the norm is one reason for the power of the norm. The process of renegotiating the norm also creates a shared agenda and understanding of actions associated with the norm. The case studies of espionage and the law of the sea provide support for the understanding that states have a habit of compliance with actions clearly delineated as a part of the norm. There is no evidence this understanding expands to include new technology and behaviors unless the actions are clearly identified during the process of renegotiation. The espionage norm and the law of the sea norms date to approximately the same time and both moved from soft to hard law. The espionage norm does not enjoy the same permissive, constitutive or constraining effects on new technology as it experiences for actions defined when the norm was established. The case studies provide weak support for the notion that the age of a treaty affects compliance rates. Compliance rates with espionage norms are unable to be effectively measured due to the innate difficulty in measuring the frequency of spying. The Outer Space Treaty failed to provide protection to the signatory states, whereas national airspace and

territorial waters experience substantial compliance, however this compliance rate is not able to be isolated to the age of the treaty. Finally, a certain degree of difficulty in changing the expectations of prescriptive norms exists. In the law of the sea case study it took decades for states to reach a consensus that the intention of the norm was not being honored by the currently established rules.

In conclusion, examination by case studies provides the strongest support for constructivist predictions that states invest in the norm and the international agreement. States may be initially hesitant to change the international agreement, likely due to transaction costs and a habit of compliance with the previously defined actions or borders. International norms that adjust to advances in technology should experience equal or nearly equal effectiveness of the norm on the new technology and is more likely to produce the effects states desired when initially establishing the international norm.

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