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A Transnational Law of the Sea

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Abstract

It is widely accepted that we are presently struggling to govern the vast expanse of the ocean effectively. This Article finally gets to the real cause of much of the failures of the law of the sea: Westphalian sovereignty. In particular, it evidences that certain features of our obstinate model of public international law—such as sovereign exclusivity, equality, and territoriality—can be linked with a large majority of the governance “gaps” in the global ocean context. It thereby exonerates the falsely accused Grotius’s mare liberum doctrine and flag state regulation, which both still continue to receive an unmerited level of condemnation. This Article also argues that worldwide searches for new integrated systems of ocean management are, in fact, a search for a new paradigm of governance, well-known among lawyers, but yet to be thoroughly analyzed in the law of the sea context, that of transnational law and governance. The study supports this conclusion by showing that two principal features of a transnational law of the sea—in the form of multi-stakeholder participation and multi-level governance—have already proven essential in ameliorating many of the routine weaknesses in our present international system of ocean governance.

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I. ADDRESSING THE LEGAL SYSTEM; NOT JUST THE LEGAL RULES

The law of the sea is failing. Wherever one looks, whether it be ecosystem damage and biodiversity decimation, overfishing, seabed trawling, coral destruction, human rights abuses, human trafficking, piracy, smuggling, crime, wreck looting, noise pollution, land-based pollution, vessel-source pollution, health and safety failures, or major maritime disasters, one can witness recurring deficiencies in regulatory oversight.1 In consideration of the ocean’s ecological, social, economic, and cultural value, this increasing visibility of poor regulatory management has led to a recent proliferation of research dedicated to improving our protection of the seas. For example, in 2001, an expert international committee submitted a report that at the turn of the twentieth century, “the state of the world’s seas and oceans [was] deteriorating.”2 Furthermore, “most of the problems identified decades ago have not been resolved, and many are worsening.”3 Twenty years later, things still have not changed.

As James Harrison said in 2017:

[As] the twentieth century progressed, the rapid industrialization of the oceans has meant that any lingering belief that the seas were “inexhaustible” gave way to a growing sense of crisis. This trend has continued to the extent that, today, there are warning signs that the oceans are at tipping point, owing to the impacts of pollution and other environmental stresses caused by anthropogenic activity.4

This has led to calls from every corner of the international community to transform our approach to ocean management away from the traditional “zonal” system of ocean management toward a more integrated and inclusive system.5 The development of such “Integrated Ocean Management” (IOM) processes, in various forms, can be increasingly witnessed on local, national, regional, and global

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2 Group of Experts on the Scientific Aspects of Marine Environmental Protection, A Sea of Troubles 1 (Geoffrey Lean et al. eds., 2001).

3 Id.


5 See Section V.
scales. Additionally, many international, governmental, and non-governmental organizations are increasingly exploring the need for a new IOM paradigm, including the International Union for the Conservation of Nature, the U.N. Food and Agricultural Organization, the U.S. National Oceanic and Atmospheric Administration, the World Wildlife Fund, the U.N. Educational, Scientific and Cultural Organization (UNESCO), and the Conference of the Parties under the 1992 Convention on Biological Diversity. Research is also becoming more active in the search for the precise meaning of such “integrated” systems of ocean management, sporadically and fragmentedly spotting the need for ecosystems-based approaches, stakeholder participation, regional governance, or proposals for a more holistic system of regulation across ocean space.

Despite these well-intended efforts, humankind is still failing to get a grip on ocean governance. This Article demonstrates that the real root cause of this failure is our devotion to a Westphalian system of international law. It suggests that it is not—as has been previously suspected—the fault of Hugo Grotius’s 1609 thesis propounding a supposed “Freedom of the Seas” or the widespread use of flag state regulation per se. Instead, responsibility lies squarely with a dogmatic reliance

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6 See generally Scott, supra note 4.
7 World Commission on Protected Areas, Incorporating Marine Protected Areas into Integrated Coastal and Ocean Management: Principles and Guidelines (Charles Ehler et al. eds., 2004).
16 Gabriela A. Oanta, Protection and Preservation of the Marine Environment as a Goal for Achieving Sustainable Development on the Rio+20 Agenda, 16 INT’L COMM. L. REV. 214, 219 (2014); see also Section V.
on a horizontal and inter-state system of international law in the ocean context. As will be evidenced, the failure of the legal system to effectively steward the oceans can really be principally linked to three different traits of Westphalian sovereignty: *exclusivity*, *equality*, and *territoriality*. This Article also provides a detailed explanation and introduction to transnational law, including an account of the dormant *lex maritima*, in order to (1) highlight the richness of this field and (2) point to its lacking connection with the search for a new paradigm of ocean governance. Finally, it concludes with the view that we should reduce our emphasis on sovereign rights and duties and instead recognize the prevalent and longstanding calls to legal plurality, multi-scalarity, multi-stakeholderism, and post-nationalism.

Section II introduces the concept of transnational law as it stands in contrast to the Westphalian system of public international law, highlighting the worldwide movement to recognize and encourage law beyond the state, as well as the blurring of “public” and “private” sources and systems of law. Section III then critically examines the public international law system that has governed ocean management up to now, illustrating the ways in which Westphalianism can be linked to many failures of ocean stewardship. Section IV at last exonerates the scapegoats for failed ocean governance over the past decades—Grotius’s *Mare Liberum* and the notion of flag state regulation. In fact, this Article shows that Westphalianism itself caused both well-meaning doctrines to fail in practice. Section V connects the search for new “integrated” models of governance in the marine environment with the need for a model that dispenses with strict notions of national sovereignty and horizontal intergovernmental relations. This Section demonstrates that two features of an effective transnational system of ocean management are: (1) the expanded governance role for multiple and varied stakeholders and (2) the arrangement of diverse normative frameworks across multiple geographical scales. The Article concludes by calling for a greater recognition of the need for a transnational law of the sea.

II. INTRODUCING TRANSNATIONAL LAW

A. Westphalianism

Westphalian sovereignty refers to our familiar system of *inter-national* law resolved during thirty years of negotiations over the Münster and Osnabrück treaties, concluded between numerous European nations in 1648, and effectively ending the European wars of religion—a point in history known as the “Peace of Westphalia.” But most recognize that Westphalianism was not necessarily *created*

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at this moment, but rather organically developed over many centuries around the world. The overall effect was the formal legitimation of the nation-state as the exclusive legal authority for all territorially internal matters and the understanding that all nation-states are equal and unitary for all external matters.

A corollary to achieving temporary peace across Europe within this emergent multi-state system was the widespread constitutionalization of polities and quelling of competing internal claims to power. International governance between the 17th and 20th centuries thus centered on both the strengthening of zonal political boundaries and the demarcation of sovereignty within territories—in which monolithic states possessed absolute independence to determine their own internal laws free from outside influence and interference. The evermore rigid political borders around states and the modeling of states as entirely unitary and equal has, over the centuries, given birth to our modern system of inter-national law—founded upon the principle of sovereign territorial independence, the conclusion of positive international treaties, and the resolution of customary norms between nations. Today, we remain firmly within this Westphalian system of international law and thinking.

National sovereignty has, therefore, been at the heart of our understanding of law and jurisprudence for several centuries. Most legal philosophers in this time have explicated law’s basis as being positively determined by a higher authority, whether through the canon of natural law, or as achieved functionally through the formal use of power. Even as recently as the 1960s, both H.L.A. Hart’s famous primary and secondary rules and Hans Kelsen’s Grundnorm theories espoused that law’s ultimate source of power is derived from its production through

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19 See generally FRANCIS HARRY HINSLEY, SOVEREIGNTY (2d ed., Cambridge Univ. Press 1986); DIETER GRIMM, SOVEREIGNTY: THE ORIGIN AND FUTURE OF A POLITICAL AND LEGAL CONCEPT (Belinda Cooper trans., 2015).
20 Croxton, supra note 17; Philpott supra note 17, at 73–150.
24 Expressed, for example, by early scholars such as Thomas Hobbes, John Locke, Jeremy Bentham, John Austin, and Immanuel Kant.
foundational law-making infrastructure, invariably found in the nation-state.\textsuperscript{25} Such positivist accounts of law remain or have become—unconsciously, at least—widely subscribed to among people today; most of us do not believe that any law is “law” unless a nation-state formally posits it through domestic legislative and judicial processes.\textsuperscript{26} However, as discussed below, the multiple and ever-intensifying processes of globalization over the past half-century have triggered a revisiting of the positivist and nationalist account. Indeed, as will be shown, in an increasingly transnational world, there has been movement toward more pluralistic and sociological accounts of law, taking a broader view of law’s underlying quality as a norm.

Whether the identification of non-state law is achieved, for example, by Brian Tamanaha’s Labelling System,\textsuperscript{27} Armin von Bogdandy’s Systems Theory,\textsuperscript{28} Gunther Teubner’s Autopoietic Theory,\textsuperscript{29} William Twining’s Levels Theory,\textsuperscript{30} or Gralf-Peter Calliess’s Running Code Theory,\textsuperscript{31} the direction of recent thinking has been predominantly consonant: not all law does, nor should, originate from the nation-state. Law can be written or unwritten, and its sources can be local, communal, religious, supranational, or global, as well as public, private, or hybrid, and can possess normativity on a spectrum between the extremities of hard and soft.\textsuperscript{32} In the globalization context, such accounts of global legal pluralism open the possibility that we can be subject to multiple legal obligations, many of which can originate within or without the domestic legal system of the nation-state.\textsuperscript{33} Naturally, there remain traditionalists who dispute this perspective. In some ways, 


\textsuperscript{29} See generally GLOBAL LAW WITHOUT A STATE (Gunther Teubner ed., 1997).

\textsuperscript{30} WILLIAM TWINING, GENERAL JURISPRUDENCE: UNDERSTANDING LAW FROM A GLOBAL PERSPECTIVE 362–75 (2009).

\textsuperscript{31} Gralf-Peter Calliess, Reflexive Transnational Law: The Privatisation of Civil Law and the Civilisation of Private Law, 23 ZEITSCHRIFT FÜR RECHTSSTOLOGIE 185, 185–216 (2002).


the battle lines are presently drawn between the legal positivists, who maintain an account of law built upon “national” sovereignty, and legal pluralists, who recognize and, in many cases, actively seek to expand additional laws “beyond the state.”34 The pluralist account has certainly been welcomed in the globalized era.35

B. Transnational Law

Over the past half-century, the pluralist account of law has contemporaneously led to the advancement of a new discourse in transnational law.36 Transnational law, as widely understood, seeks to comprehend and even encourage the complex configuration of legal rules and norms, both within and without the state.37 Its appeal lies in its pluralist recognition that numerous actors beyond the nation-state can be a source of legal norms or the principal shapers of the legal system.38 Whether the law takes the form of supranational regulation, global standards derived by non-state bodies, industry self-regulation, private dispute settlement, or community norms, all trans-nationalists recognize that individuals are often subject to rules through a variety of compliance-inducing forces, such as positive, moral, communal, virtual, physical, internal, or natural.39 Yet, it is important to recognize that international law and order still remains state-centric. The vast majority of legal objects obey the legal rules of a singular domestic legal system, whether by territorial situation, contractual choice, or imposition through private international law, and most actors rationalize themselves as so subject.40 As such, transnational law is more of an emerging


36 See, e.g., TRANSNATIONAL LAW: RETHINKING EUROPEAN LAW AND LEGAL THINKING (Miguel Maduro et al. eds., 2014).

37 Id. See generally NEGOTIATING STATE AND NON-STATE LAW, supra note 33.


40 See generally Dalhuisen, supra note 26.
diversification and fragmentation in sources and subjects of law, rather than a persuasive account of *lex lata.*

In 1956, in his visionary introduction to transnational law, Philip Jessup defined transnational law as “*all* law which regulates actions or events that transcend national frontiers. Both public and private international law are included, *as well as* other rules which do not wholly fit into such standard categories.” This definition, though an early formulation, still commands an impressive level of subscription among thinkers today. It also exemplifies the potential vastness of the subject. Based on this idea, this Article defines transnational law as the global legal system that recognizes and promotes all legal norms of public, private, and hybrid origin, that vary between hard and soft and that apply to the multiplicity of actors interacting across and between multiple governance levels—local, national, regional, and global. In other words, both transnational law and governance emphasize the multi-faceted, multi-level, and multi-stakeholder nature of the global civil order and of the challenges facing it, as well as seek to look beyond a state-based approach to law and accountability.

By contrast, the Westphalian account of international law has created an unfortunately limited dualistic account of law: public international law, which covers agreements *between* states, and municipal law, which encompasses national law *within* states. This has resulted in the apparent neglect of a growing number of legal norms—outside multilateral treaties and national law—which carry normative force without sole reliance on state power, such as: (1) industry self-regulation and standards; (2) supranational law; (3) standards and rules developed by international governmental, non-governmental or epistemic bodies; (4) cooperation in law development and enforcement between public and private partners; (5) other local, religious, or global standards; and (6) all forms and scales of “governance,” *between* hard and soft.

Through internal enforcement mechanisms—such as peer pressure, media scrutiny, economic sanctions, loss of trade access, diminution in consumer demand, and loss of network access—transnational rules can drive high levels of direct compliance by stakeholders, often being witnessed in the form of industry

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44 See, e.g., Carrie Menkel-Meadow, *Why and How to Study Transnational Law,* 1 UC Irvine L. Rev. 97, 103–05 (2011); Cotterrell, *supra* note 38, at 501.

45 TRANSNATIONAL LEGAL ORDERS 3 (Terence C. Halliday & Gregory C. Shaffer eds., 2015); JAMES CRAWFORD, *BRONNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 48–61 (9th ed. 2019).
standards, certification schemes, internal adjudicative processes, community agreed rules, or other non-state derived laws. To great effect, nation-states can also loan their domestic enforcement architecture to external private, regional, or global legal systems in co-regulatory processes which bolster the external network’s internal power of enforcement.\(^\text{46}\)

Transnational law thus grapples with the transition from global “government” to “governance”\(^\text{47}\), ongoing fragmentation of international law\(^\text{48}\), intensifying processes of globalization\(^\text{49}\), increased role of non-state actors in the administration of global public governance\(^\text{50}\), blurring between private and public stakeholders, and public and private law, in the transboundary context\(^\text{51}\), growing conceptual uncoupling of states from monolithic units into complex administrative agents\(^\text{52}\), expanded role of transboundary normative and policy networks\(^\text{53}\), postcolonial recognition of the incongruity between indigenous or traditional laws with centralized state authority\(^\text{54}\), increasing use of negotiation, mediation, arbitration, expert opinion, and other private mechanisms of dispute


resolution in transnational settings; ongoing demands and uses for regulatory harmonization;\textsuperscript{55} mounting interconnectedness of global society, enabling decisions in one state to impact other states’ internal interests;\textsuperscript{56} and the generally observed decline in the role of the nation-state, as traditionally understood, in resolving cross-border challenges.\textsuperscript{57}

C. Lex Maritima

Transnational law’s appeal lies particularly in the romantic notion of finding overlapping international “communities” or networks who subject themselves to a self-crafted legal system built around internal legal rules (self-defined or based on community custom) and external legal rules (state, supranational, and global laws), replete with their own dedicated machinery for internal norm resolution or enforcement (including by negotiation, arbitration, or adjudication).\textsuperscript{58} The most famous such global system is the supposed medieval lex mercatoria, or merchant law. This system has arguably been revived in the modern context with commercial customs and usages, state and non-state in origin, to which transnational commercial actors subject themselves today.\textsuperscript{59} This is largely supported by the almost unquestioning recognition of the legality of arbitration awards and the very high level of internal compliance with them,\textsuperscript{60} as well as new methods of internal coercion across the business community,\textsuperscript{61} with strong reputational, mutual obligation, and internalization mechanisms occasioning


\textsuperscript{58} See generally \textit{Transnational Legal Orders}, supra note 45.


\textsuperscript{60} Ralf Michaels, \textit{The True Lex Mercatoria: Law Beyond the State}, 14 IND. J. GLOB. LEGAL STUD. 447, 455 (2007).

compliance. Similarly, one can look at how the sovereign state has acquiesced its role in deciding transnational commercial matters and readily recognizes and enforces applications of non-state law. This picture of a transnational legal system, most idealistically found in the commercial context, has also found expression in numerous other visions of global legal communities, the most interesting of which for present purposes is the lex maritima, or maritime law.

The lex maritima envisages that, long before nation-states appropriated the law of the sea and transcribed it into domestic legislation, much maritime activity was self-governed by the maritime community themselves. The networking of mariners across continental ports in previous centuries arguably necessitated the development of mariners’ own systems of rules and customs. These customs and rules were often enforced internally or via available town councils, merchant courts, and guild consuls. Indeed, it seems well accepted that prior to the embedding of the Westphalian ideology from the 17th century, many of the maritime community’s rules had derived from widely shared codes and customary principles, such as the Lex Rhodia, Rôles d’Oléron, Laws of Wisby, and the Consolata del Mare. For example, one historian noted how maritime law was regarded as a universal and “common system of law,” given that “[t]here was . . . in those days nothing strange in laws that were not national.” Therefore, the extent to which these maritime codes actually formed a unified common law, in preference to local

63 Stone Sweet, supra note 59, at 638; Michaels & Jansen, supra note 34, at 872; Thomas E. Carbonneau, Cases and Materials on International Litigation and Arbitration 293 (2005).
65 Such as the lex sportiva (sports law), lex informatica (information law or cyber law), lex constructionis (construction law), lex financiaria or argentaria (finance law), and lex petrolea (oil law).
70 Senior, supra note 68, at 260.
custom and decentered regulation, has for some time been a question of academic interest.

More recent and detailed historiographical scholarship on the matter, however, has put considerable doubt on whether such a common maritime law ever existed.\textsuperscript{71} Indeed, many have correctly pointed out that the dearth of social bonds and interdependencies between regional actors in the pre-globalization age makes it inevitable that divergent customs and interests would have undermined any efforts at establishing unified laws across continents.\textsuperscript{72} A great deal of research has, therefore, attempted to disprove the transnational account by disproving the historical account.\textsuperscript{73} Yet, whether a common maritime law existed in the medieval period does not detract from the essential hypothesis that unified systems carry normative advantages in denationalized contexts. As Ralf Michaels has aptly summarized, “whether there ever was a true lex mercatoria . . . [is] relatively secondary.”\textsuperscript{74}

Along this more precise line of inquiry, the commentary is far more unanimous. For example, a system of maritime community-led law should carry additional advantages of efficiency through the utilization of stakeholder resources, lower transaction costs, and strong compliance incentivization.\textsuperscript{75} By penalization, suspension, or ostracism of community members, it would also be possible to effectively punish rule-breakers and to improve trade access by utilizing reputational mechanisms, trust-building, and clearing houses.\textsuperscript{76} Furthermore, there is an argument that such communities of mariners would hold greater esteem toward legal rules that were crafted and enforced by and among


\textsuperscript{74} Michaels, supra note 60, at 449.


III. WEAKNESSES OF THE INTERNATIONAL LAW OF THE SEA

It is becoming increasingly clear that there is something wrong with the system of the international law of the sea, rather than merely the content of the laws themselves. However, while law of the sea scholars have made ad hoc or casual references to issues such as zonality, territorial sovereignty, and state compliance, commentary has rarely pointed at the Westphalian system of international law as the root cause of failed ocean management. This section suggests that three integral and interlinked manifestations of the Westphalian system—sovereign exclusivity, sovereign equality, and territorial sovereignty—represent the fundamental weaknesses in our international law of the sea.

A. Sovereign Exclusivity

Sovereign exclusivity refers to the unrestricted authority of states to assume absolute rule over their own subjects. It regards nation-states as entirely unitary systems, where everything that relates to regulatory governance of a nation’s citizens is under the self-determination of a discrete and centralized authority. In the maritime context, as elsewhere, this exclusive sovereignty manifests itself by nation-states freely deciding whether to enter into international treaties. Negotiations, therefore, habitually lead to diluted, ambiguous, and hortatory commitments between states. What is more, assuming that a recalcitrant state even agrees to enter into a resulting treaty, it still possesses discretion as to the

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78 See Section V.
79 See Section III.A.
interpretation and implementation of the treaty against its own citizens in the domestic realm. Further, for most global public goods—such as the protection of the ocean environment—states often have more to gain individually and less to lose by weak compliance.

Although rarely linked, these manifestations of sovereign exclusivity are important criticisms of the present model of ocean management. First, the majority of international ocean management treaties suffer from the trade-off between invoking strong commitments and the need for widespread ratification. A good example is the United Nations 1982 Convention on the Law of the Sea (LOS). Although a remarkable achievement in terms of comprehensive and consensus-based treaty making, the LOSC did not receive support and ratification from most key maritime powers until an implementation agreement in 1994—in effect, a rewrite of Part XI—neutered the original vision of fairly sharing the resources of the deep seabed. Formal treaties, therefore, also end up with weak and precatory language, such as requiring states to “cooperate” or that they “should” follow a course of action. Often, the only way to get states to enter into international commitments is by adopting hollow language or developing


88 For example, a duty of “cooperation” is also incumbent on states under the LOSC with regard to protecting living resources in the high seas, LOSC, supra note 86 art. 117, and protecting the marine environment, LOSC, supra note 86 art. 197. This has led to research which has puzzled over the precise obligations of states. See, e.g., YOSHINOBU TAKEI, FILLING REGULATORY GAPS IN HIGH SEAS FISHERIES: DISCRETE HIGH SEAS FISH STOCKS, DEEP-SEA FISHERIES, AND VULNERABLE MARINE ECOSYSTEMS 52–68 (2013).

89 For example, the Convention on the Protection of the Underwater Cultural Heritage, art. 7, ¶ 3, Nov. 2, 2001, 2562 U.N.T.S. 3 (entered into force Jan. 2, 2009) [hereinafter UNESCO Convention], merely requires that coastal states “should” inform flag states when their sunken warships are discovered in the coastal state’s territorial waters.
international “soft law.”\textsuperscript{90} Naturally, however, such rules have numerous difficulties, including weaknesses in enforceability and the lack of vigor in compliance.\textsuperscript{91} Even through a constructivist lens—that sees the gradual hardening of norms by facilitated learning and coordination\textsuperscript{92}—compliance can be damagingly poor for extended time periods. This is often the case until a media fallout from a catastrophic event that at last foments regulatory motivation and action, which is all too frequently after the event.\textsuperscript{93}

Second, states can hold treaty negotiations for ransom, driving forward the hegemonic and politicized nature of ocean law. It is no coincidence that the most powerful maritime nations tend to espouse legal rules that are most closely aligned with international custom.\textsuperscript{94} Such multilaterally defined laws usually favor those nations found higher in the pecking order of global power. The excessive reliance upon flag state enforcement has suited the most powerful flag states\textsuperscript{95}—just as a “first-come, first-served” system of managing resources in the high seas has suited the most industrialized nations.\textsuperscript{96} A driving factor in the sudden expansion of state claims in the aftermath of World War II is perhaps that the U.S., U.K., Russia, France, Japan, Canada, and Australia are each in the worldwide top ten of


\textsuperscript{95} See Section IV.

\textsuperscript{96} See generally Nico Schrijver, Managing the Global Commons: Common Good or Common Sink?, 37 THIRD WORLD Q. 1252 (2016).
exclusive economic zone (EEZ) size. The subsequent conclusion of an international convention that permits these states to exclusively extract the wealth of resources hundreds of miles offshore, but with little meaningful legal responsibility to steward the protection of their EEZ’s natural environment, is perhaps unsurprising. As Gregory Shaffer says in another context, international law has “failed to constrain power when power chose to belittle and ignore it, and it served to legitimatize power when power deigned to deploy it.” Seen in this light, the burgeoning naval strength of China in the Southwest Pacific and its growing friction with both the LOSC and the rule of law is as unsurprising as it is predictable.

An essential result of this politicization of the law of the sea and of the freedom of states to reject or dilute international agreements is the inability to compel or coerce states into assuming additional obligations or burdens. With its flawed reliance upon states primarily agreeing to be bound by consent, international law allows for commitments between states, which maximizes the opportunity to externalize losses and minimize economic risks from ocean-based activities. The most visible example is the continual reinvocation of the system of flag state enforcement. This system for regulating ocean stakeholders—relying on the exclusive enforcement of a flag state’s national legal rules within its domestic courts—is widely felt to be a poor system of ocean supervision and accountability. The deficient enforcement of the “genuine link” requirement—


101 See generally Martin, supra note 92; JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005); SCOTT BARRETT, WHY COOPERATE? THE INCENTIVE TO SUPPLY GLOBAL PUBLIC GOODS (2007); PROVIDING GLOBAL PUBLIC GOODS: MANAGING GLOBALIZATION (Inge Kaul et al. eds., 2003); REFLEXIVE GOVERNANCE FOR GLOBAL PUBLIC GOODS (Eric Brousseau et al. eds., 2012).

requiring that there be a “genuine link” between vessels and the states where they are registered, which is discussed further below—and the fact that most flag states are distant from and indifferent to the true activities of vessels bearing their flag has led many to argue that sole reliance upon flag state enforcement is a formula for failure.\textsuperscript{103} Indeed, many “flags-of-convenience” specialize in maximizing the internalization of financial gains and the externalization of environmental or health and safety harms.\textsuperscript{104}

Another manifestation of sovereign exclusivity is the complete freedom of states to interpret, implement, and enforce resulting treaties. Such commitments between states are not only weak in compliance pull, but create international agreements that are deliberately vague and ambiguous.\textsuperscript{105} Examples abound in the maritime context, including phrases such as “maximum sustainable yield” in both Article 119 of the LOSC\textsuperscript{106} and Article 5 of the 1995 U.N. Fish Stocks Agreement,\textsuperscript{107} and also “purposes of scientific research” in the 1946 International Convention for the Regulation of Whaling.\textsuperscript{108} Such equivocal phrases are intentionally included to provide sufficient latitude in self-interpretation and self-discipline, so as to incentivize objecting or free-riding states to join the treaty regimes.\textsuperscript{109} While this practice is often coined “constructive ambiguity,” an alternative term could be “destructive ambiguity,” given how states often flout such well-intentioned phrases and interpret them in a self-interested manner that is destructive to the wider community.\textsuperscript{110}

\textsuperscript{103} Mansell, supra note 102; Dorota Englender et al., Cooperation and Compliance Control in Areas Beyond National Jurisdiction, 49 MARINE POL’Y 186, 186 (2014). See generally Patricia Birnie, Reflagging of Fishing Vessels on the High Seas, 2 REV. EUR. COMMT. INT’L ENV’T L. 270 (2006); Tamo Zvirag, Duties of Flag States to Implement and Enforce International Standards and Regulations—and Measures to Counter Their Failure to Do So, 10 J. INT’L BUS. & L. 297 (2011).


\textsuperscript{105} See generally supra notes 82, 88–91, 93 and accompanying text.

\textsuperscript{106} LOSC, supra note 86, art. 119(1)(a).


\textsuperscript{109} See generally Dražen Pehar, Use of Ambiguities in Peace Agreements, in \textit{Language and Diplomacy} 87 (Jovan Kurbalija & Hannah Slavik eds, 2001).

This unrestricted freedom of states to interpret, implement, and enforce the laws governing their citizens is at the heart of the struggling system of ocean stewardship. Its weakness is perhaps most vividly manifested in the unconditional freedom of states to self-interpret and enforce the genuine link requirement for registering vessels under Article 91 of the LOSC.111 As flag states assume the central responsibility for managing offshore operations, it is vital that those operations possess a meaningful relationship with the supervising flag state and, more so, that they are residents of or hold identifiable assets in that country against which sanctions can be enforced. Unfortunately, open registry states—states providing flags-of-convenience—are almost entirely free to self-interpret the genuine link requirement according to their own standards.112 Ironically, international efforts to close this critical loophole through the U.N. 1986 Convention on Conditions for Registration of Ships113 failed because the intended addressees—by ultimately using this very same freedom to act autonomously—were free to reject the treaty.114 In 1999, the International Tribunal on the Law of the Sea revisited this loophole in the M/V “Saiga” case.115 Unfortunately, the Tribunal held that the strength of a genuine link between vessel and flag state is not a matter that can be contested by others (outside the flag state itself) nor a question of the quality of state regulatory oversight, but rather is purely an administrative question of whether the flag state has been formally appointed as the registered flag state.116

This failure of unencumbered internal sovereignty goes much further. For example, it enables offshore tax havens, money laundering, asset moving, forum-shopping, and the creation of impenetrably complex, multi-front company

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structures across multiple jurisdictions.\textsuperscript{17} Thus, the freedom of states to craft their own regulations fails in a system that allows ocean stakeholders—legal or natural persons of a truly transnational quality—to freely select a jurisdiction to hide assets, register front companies, hear foreign claims, align their environmental standards, access markets, and pay taxes.\textsuperscript{18}

What is more, each national legal system is free to interpret and implement their commitments across all sectors in an endless variety of ways. One method is to create a complex “horrendogram” of multiple overlapping and conflicting policies that make it even more challenging to identify clear norms and ensure their observance.\textsuperscript{19} This intensive fragmentation of law creates not only a great uncertainty of ocean law, but also gives wide berth for different interpretations. The further result of this lack of certainty is that state obligations are rarely opaque, leaving room for despondency when it comes to implementation.\textsuperscript{20}

Given that international commitments are arranged horizontally between political sovereigns, their subsequent implementation relies on a complex, costly, and arguably cumbersome system of interstate bilateral and diplomatic enforcement. In other words, an “injured” state needs to invest valued political resources—including civil service time, finance, and goodwill—to direct enforcement against an evidently “culpable” state.\textsuperscript{21} All transnational ocean users


\textsuperscript{18} See generally Victor Galaz et al., Tax Havens and Global Environmental Degradation, 2 NATURE ECOLOGY & EVOLUTION 1352 (2018); Jane Marc Wells, Comment, Vessel Registration in Selected Open Registries, 6 MAR. L. 221 (1981); Fink, LEON, SWEATSHOPS AT SEA? MERCHANT SEAMEN IN THE WORLD’S FIRST GLOBALIZED INDUSTRY, FROM 1812 TO THE PRESENT (2011).


must therefore petition their own nation-state to take on their litigative mantle, creating a constrained and indirect route between two “foreign” stakeholders.122

Nollkaemper refers to an un cites case which perfectly illustrates this quandary.123 Here, fishermen in the North Sea brought a claim against the German government alleging that a permit authorizing a factory to dump acid in the North Sea—which killed and deformed many of the fish stocks they relied on—was in breach of the London Convention124 and the Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft, ratified by Germany.125 Despite clear evidence of contravention of these agreements, however, the Federal Administrative Court of Hamburg rejected the claim on the basis that these international agreements were between states and did not create private rights for the ocean users themselves.126

The horizontal nature of sovereign equal-state relations also effectively minimizes available sanctions and further neutralizes the effectiveness of the adjudicatory process. This emphasis on state interests and state responsibility provides states with the freedom to discount the external interests of the international community or the internal interests of one’s national community. It also leads to a problematic mismatch in the allocation of governance authority and, often, to self-centered decision making in areas with transnational impacts.127 Certainly, there are movements in the right direction toward new,128 cosmopolitan,129


123 This case is referred to in Nollkaemper, supra note 46, at 177–78.


126 Nollkaemper, supra note 46, at 177–78.


interdependent,

relational,

responsible

post-Westphalian,

and contingent or conditional forms of sovereignty. But these developments are a slowly emerging byproduct of globalization and gradual universal integration. They do not, therefore, excuse traditional norms of nonintervention and firm sovereign boundaries as culprits for our presently failing global environmental stewardship.

What is more, at their core, these alternative forms of sovereignty are merely idealized or aspirational concepts of international relations, rather than depictions of the true allocation of legal authority that we rely on today. This is particularly the case with international agreements to divide up the ocean’s wealth. Thus, they only reflect the slow and tired process of states reacting to political crises that routinely occur after the event, once disasters finally attract sufficient media coverage to generate political currency. The Westphalian expectation of exclusivity of national jurisdiction, along with its intense distrust of systems of shared responsibility, therefore, forces the hand of the law of the sea and its arbiters toward maintaining the status quo.

Critically, this stringent doctrine of sovereign exclusivity promotes the widespread norm of noninterference. Robert Jackson even described nonintervention as a Grundnorm of Westphalian sovereignty and, certainly, the


customary norm that flagrant rule-breakers can only be interdicted under narrow circumstances is a feature that provides our oceans with an aura of lawlessness. In the EEZ, the number of circumstances under which a coastal state can intercept or regulate nonstate vessels is somewhat greater than that of the High Seas, but it is still limited to specific and discrete conflicts that center on the coastal state’s economic interests. Consequently, many wider security issues are left out, such as military operations, organized crime, and environmental crime. Regulation is further restricted to prescriptive rules set at the international table, such as those negotiated by the International Maritime Organization.

This guarding of flagged vessels roaming the oceans from any interference is not the underlying notion of the *mare liberum*, as is frequently misunderstood. Rather, it is a wholly Westphalian idea that national governments exclusively govern their respective citizens with no other nation or institution permitted to intervene or share supervision. This system results in flag states undertaking regulatory “supervision” from jurisdictions with no practical connection to activities and located thousands of miles away. It also permits flag states wide latitude in the design and enforcement of the standards against which their fleet are monitored, thereby bringing a vital source of income to that state. As a result, there are countless reports of underenforcement and poor supervision by flag states. These systems of flag state supervision are so defective that


142 See Section IV.

143 See generally supra note 137 and accompanying text.

144 See generally LANGEWIESCHE, supra note 1; GEORGE, supra note 117.

145 See High Seas Task Force, supra note 85, at 52–54.

oceangoing vessels have been referred to as “neglectful,”147 “outlaws,”
“lawless,”148 “mobile pockets of sovereignty,”150 “sovereign islands,”
delinquent,”152 and “a law unto themselves.”153 Moreover, given strong links
between organized crime and poor flag state supervision, rogue vessels are
frequently synonymized with piracy.154

B. Sovereign Equality

Like sovereign exclusivity, sovereign equality holds that all states are self-
governing and unitary. It is principally concerned, however, with the horizontal
nature of state relations.155 As an important principle for preventing a world
ordered by military or economic power, the equal treatment of states accords
identical legal rights and responsibilities to each state.156 In reality, however, the
strict interpretation of sovereign equality and the routine treatment of all states as
equals further propagate the consent-based order of international law. This is
because such an order removes the opportunity to create any over-arching
authority and, with it, any capacity to compel or coerce noncompliant states into

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148 See generally Langewiesche, supra note 1.
149 Carmen Casado, Vessels on the High Seas: Using a Model Flag State Compliance Agreement to Control Marine
Pollution, 35 CAl. W. Int’l L.J. 203, 204 (2005); Rose George, Flying the Flag, Fleeing the State, N.Y.
150 High Seas Task Force, supra note 85, at 35.
151 Douglas Frantz, SOVEREIGN ISLANDS: A Special Report; On Cruise Ships, Silence Shrouds Crimes,
N.Y. TIMES (Nov. 16, 1998), https://perma.cc/5NBN-9PVM.
152 Robin M Warner, Conserving Marine Biodiversity in Areas Beyond National Jurisdiction: Co-Evolution and
Interaction with the Law of the Sea, in THE OXFORD HANDBOOK OF THE LAW OF THE SEA, supra note
4, at 752, 755.
153 Kimberley Peters, Sinking the Radio Pirates: Exploring British Strategies of Governance in the North Sea,
Productions 1968)).
154 See Llácer, supra note 114, at 516; Gal Luft & Anne Korin, Terrorism Goes to Sea, 83 FOREIGN AFF.
REGENT J. INT’L L. 17 (2006); CAROLIN LISS, OCEANS OF CRIME: MARITIME PIRACY AND
TRANSNATIONAL SECURITY IN SOUTHEAST ASIA AND BANGLADESH (2011).
OF STATES: AN INQUIRY INTO THE FOUNDATIONS OF INTERNATIONAL LAW (1964); Benedict
Kingsbury, Sovereignty and Inequality, 9 EUR. J. INT’L L. 599 (1998); Thomas H. Lee, International Law,
International Relations Theory, and Preemptive War: The Vitality of Sovereign Equality Today, 67 L. &
CONTEMP. PROBS. 147 (2004).
Law, 18 ETHICS & INT’L AFF. 1 (2006); Behrooz Moslemi & Ali Babaeimehr, Principle of Sovereign
Equality of States in the Light of the Doctrine of Responsibility to Protect, INT’L J. HUMANS. & CULTURAL
STUD. 687 (Dec. 2015); Peter M. R. Stirk, The Westphalian Model and Sovereign Equality, 38 REV. INT’L
STUD. 641 (2012).
producing global public goods.\textsuperscript{157} Indeed, such a principle could secure for states the equality of responsibility, opportunity, and rights to self-governance despite actual asymmetries in these areas.\textsuperscript{158} Ironically, sovereign equality therefore arguably derailed distributive justice and sustains illiberal democracies by permitting all nations to enjoy equal authority, even if their internal systems are corrupt or harmful to social and environmental interests.\textsuperscript{159}

Horizontalism—while intended to minimize anarchy and hegemony—still results in ineffective enforcement powers, thus ensuring that international law centers around the same power politics and is habitually undermined by its realist limitations.\textsuperscript{160} Recent and notorious examples of this freedom of the system’s intended subjects to reject unfavorable interpretations of the law include: Japan’s continued refusal to follow the rulings of the International Whaling Commission\textsuperscript{161} the Russian Federation’s refusal to recognize the compulsory jurisdiction and ruling of the Permanent Court of Arbitration in the Arctic Sunrise case in 2015,\textsuperscript{162} and China’s refusal to recognize the arbitration panel’s compulsory jurisdiction and ruling 2016, which rejected China’s amassing territorial claims in the South China Sea.\textsuperscript{163}

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{159}] See generally Roth, supra note 157; Michael Blake, Distributive Justice, State Coercion, and Autonomy, 30 PHIL. & PUB. AFF. 257 (2001).
\end{itemize}
\end{footnotesize}
Horizontalism’s equality requirement also opens space for conflict over the potential hierarchization of international norms, thus potentially bulwarking defenses against anything beyond a narrow interpretation of peremptory or *erga omnes* norms intended to provide for universal responsibility. In its external manifestation, as with exclusivity, this equality requirement also gives states the power to ritually contest the jurisdiction, or worse—the legitimacy of external institutional processes. As a result, states also habitually prefer to avoid politically transparent and expensive adjudicatory processes and, instead, resolve matters through drawn out and obstacle-ridden diplomatic channels. This not only breeds uncertainty and indecision, but also reduces the opportunities to clarify or develop international legal jurisprudence. This lack of adjudication is then compounded by the narrow focus of states upon economic or political interests when justifying the pursuit of international claims, which further limits the opportunity for hearing and advancing the rules of responsibility for producing global goods, such as those protecting the international environment.

A horizontal system of *international* relations also promotes a system of constant competition between states. One state’s inalienable right to undertake a course of action free from interference permits that state to freely produce externalities, which can only be absorbed by another state. Given the harmful interoperation of free riding and the prisoner’s dilemma in addressing collective action challenges, states operating as equal bargaining agents usually treat international relations as a zero or negative-sum game. At the same time, selfish decision making can still be rewarded, and altruism—causing short-term socioeconomic loss to one’s own citizens—risks punishment. A system of *international* relations in which states can, consciously or unconsciously, externalize losses and maximize gains provides the perfect environment for regulatory “races

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167 Oanta, supra note 16, at 230. *ELLEN HEY, ADVANCED INTRODUCTION TO INTERNATIONAL ENVIRONMENTAL LAW 122 (2016).*
168 See sources cited supra note 163.
to the bottom,” where states are forced to compete for limited available resources.\textsuperscript{170} It also locks states into zero-sum games where they fear that a strategy of abatement, such as from the presently unsustainable subsidization of industrial-scale fishing, will lead to considerable economic losses for them in exchange for gains to free riders.\textsuperscript{171} In other words, the Westphalian system is built entirely around a false belief of independence, while the shared use of a globalized and transnational ocean can only ever be interdependent.

The drive to attract ship registrations, processing fees, company registrations, and legal fees incentivizes competition among states to offer more effective flags or ports of convenience.\textsuperscript{172} The more that a state can externalize losses—such as ensuring that environmental degradation takes place overseas or that foreign citizens are unable to pursue economic claims against its nationals—the more it can profit.\textsuperscript{173} States locked in this competition for maritime business are treated as equals, regardless of whether they actually possess the necessary resources, expertise, or regulatory infrastructure to properly supervise their flagged vessels or enforce legislation. In fact, in the majority of cases, they do not.\textsuperscript{174}

Underenforcement and turning a blind eye, therefore, become the norm for popular ports and flag state regulators.\textsuperscript{175} As research has consistently shown, states locked in such negatively-reinforcing spirals will find it immensely difficult to break out of such patterns of behavior within a consent-based legal system.\textsuperscript{176} Only by hundreds of ongoing interactions can actors engage in “repeat games,” thus building up the trust and goodwill that enables them to agree to more meaningful rules or better systems of enforcement. Nevertheless, when each state

\begin{itemize}
\item[\textsuperscript{172}] See generally supra note 146 and accompanying text; Shaughnessy & Tobin, supra note 104; Wells, supra note 118.
\item[\textsuperscript{173}] See generally supra note 101.
\item[\textsuperscript{175}] See generally supra note 169 and accompanying text.
\end{itemize}
has the equal and unrestricted freedom to externalize losses—particularly by avoiding “unequal” regulatory oversight from a higher order or a collective of foreign states—the temptation to free ride or withdraw from efforts at regulatory integration can continue to undermine collaborative efforts. This is particularly true where states lack true political or economic incentives to constrain their own sovereign freedoms.\footnote{177}

These harmful effects of horizontalism are pervasive—even between politically friendly nations. For example, regional fisheries management organizations were specifically designed to remove comparative trade-offs between states in a regional context and to ensure coordination and the collective raising of regional standards. Yet, even here, there is strong international competition and pathologies of free riding.\footnote{178} Indeed, Donald Rothwell reports how—even between regional neighbors—the achievement of effective cooperation patterns is still entirely contingent on:

[the] overall political relationship between the States concerned, cultural and socio-economic divergences, the presence or absence of pervasive territorial or maritime disputes, the significance accorded to and prioritizing of oceans management by individual States, the effective implementation of regional instruments by individual States, the nature and extent of sea-based activities and financial resources and capacity.\footnote{179}

Indeed, the rejection by U.K. voters of regionally integrated collective gains in the 2016 Brexit referendum demonstrates just how vividly much of society still perceives their entitlement to self-government and self-advancement under the veil of national sovereignty, even after evidence of sustained collective gains between politically friendly nations.\footnote{180}

C. Sovereign Territoriality

Territorial sovereignty—the idea of segregated “zones” upon ocean space—is another symptom of Westphalianism, which has already been recognized as a

\begin{itemize}
  \item \footnote{177}{See generally supra note 171.}
  \item \footnote{179}{Donald R. Rothwell et al., \textit{Charting the Future of the Law of the Sea}, in \textit{THE OXFORD HANDBOOK OF THE LAW OF THE SEA} 888, 904 (Donald Rothwell et al. eds., 1st ed. 2015).}
\end{itemize}
key regulatory weakness in ocean governance.\textsuperscript{181} It is also possible, as with the other two characteristics of sovereignty, to see territoriality as overlapping and interlinked with the other traits. For example, through sovereign equality, all states demand reciprocal rights to any claimed resources in the ocean, which ultimately leads to a global allocation of resource zones. Similarly, through sovereign exclusivity, there is a necessary presumption that one state must be positioned to assume regulatory jurisdiction over each subject matter, with the result that all states have carved up the entirety of the ocean in pursuit of a fair allocation of juridical responsibility for every factual circumstance. While this zonal approach has grown predominantly by creeping unilateral claims to offshore resources, it has also been viewed as a strategic opportunity to propertize all ocean space, with the hope that coastal states will internalize environmental degradation and so guard “their” environmental assets in offshore regions.\textsuperscript{182} This strategy, however, ultimately failed given that states could now focus on exploiting their newly acquired resources in these distant offshore spaces, while conveniently treating the protection of the environment “out there” as an externality.\textsuperscript{183}

The global patchwork of maritime zones, which results from this inter-state territoriality, has created hundreds of diverse regulatory systems that are cut-off and distinct from neighboring zones.\textsuperscript{184} Further, it results in interactions between transnational actors that—moving casually and fluidly across the entire ocean space—must necessarily take place through tired inter-national lines,\textsuperscript{185} which also leads to forum-shopping between enforcement agencies and regulatory systems.\textsuperscript{186}

Ocean ecosystems, humans included, therefore witness constant regulatory gaps and overlaps, despite taking little practical notice of artificially-constructed


\textsuperscript{182} SCOTT BARRETT, ENVIRONMENT AND STATECRAFT: THE STRATEGY OF ENVIRONMENTAL TREATY-MAKING 70 (2003).

\textsuperscript{183} Barnes, supra note 91, at 236–37, 241–42; High Seas Task Force, supra note 85, at 41; TANAKA, supra note 15, at 8.

\textsuperscript{184} See, e.g., Stuart Kaye, A Zonal Approach to Maritime Regulation and Enforcement, in ROUTLEDGE HANDBOOK OF MARITIME REGULATION AND ENFORCEMENT 3 (Robin Warner & Stuart Kayne eds., 2016).

\textsuperscript{185} See generally supra note 116 and accompanying text.

\textsuperscript{186} High Seas Task Force, supra note 85, at 33–37; The Volga (Russ. v. Austl.), Case No. 11, Judgment of Dec. 23, 2002, 6 ITLOS Rep. 66, 72 (Shearer, J. ad hoc, dissenting). See generally supra note 116 and accompanying text.
political borders. Perhaps the biggest driving force behind the development of transnational law in other fields has been the desire to avoid the cost, complexity, unpredictability, apprehension, and inefficiency associated with private international law. Unless a cross-border claim is particularly strong and carries a significant payoff, it is rarely worth the risk and cost of pursuing. This failure of law between borders is further compounded by: (1) the near-phantom legal nature of many maritime actors, who operate within multi-front and multinational companies; (2) the lack of transparency of national actors and agencies, whose efforts to produce global goods can be safely shrouded in hortatory language; and (3) the use of a complex system of multifarious national legal systems, which are randomly allocated by technocratic and idiosyncratic conflict of law rules.

Furthermore, given the absolute freedom of states to self-regulate and reject foreign interference, the use of civil liability regimes—aiming to facilitate cross-border enforcement by harmonization and reciprocation—also fail on account of their ritual rejection or wholesale dilution. Ocean stakeholders can, therefore, avoid the force of private liability between overseas actors. Moreover, as highlighted earlier, transnational stakeholders must also rely on foreign states to implement effective public and private legislation and have no path to appeal to foreign governments for deficient regulation and enforcement. The result could be a sense of detachment and disassociation of regulatory actors from the regulatory systems under which they find themselves, and the disassociation of those regulatory systems from the actors.

These permitted cutoffs between regulatory systems in the ocean environment propagates a “Not-In-My-Backyard” attitude in which regulators naturally focus on investing in protection over internal or local interests and are

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190 See generally supra note 117 and accompanying text.


192 See generally supra note 122 and accompanying text; supra note 125 and accompanying text.
tempted to disregard external matters. Perhaps most fundamentally, the artificial fragmentation of ocean space into pockets of national interest prevents an efficient integration of capacities. As such, the considerable security resources, data, equipment, skills, and rules needed to achieve effective ocean management and protection are habitually and inefficiently duplicated side-by-side—rather than harmonized together in effective and coordinated regional systems between all actors and agencies. Thus, even if states work together to achieve collective action, the underlying belief system built around exclusive sovereign “rights” and “ownership” in each maritime zone continues to undermine any sense of joint and several responsibility. This is at the heart of demands for a more integrated, regionally-coordinated, and ecosystems-oriented model of ocean governance.

D. Westphalian Ocean Management: A System of Recurrent “Gaps”

Many of the findings surrounding the ocean’s reliance upon Westphalian intergovernmentalism, therefore, highlight an endemic recurrence of “gaps.” First, we witness recurrent knowledge gaps. This relates to the lack of communication between stakeholders and regulators, meaning that local or private actors’ knowledge or interests have not been effectively incorporated into regulatory decision making. It also refers to the lack of informed decision making by market actors, the lack of data exchange, resource pooling, and surveillance cooperation between regulators and enforcement agencies, the lack of accurate scientific data, and the need for marine stakeholders to effectively cooperate


197 See generally supra note 194 and accompanying text.

and communicate regarding each other’s relative activities, resources, and interests.  

Second, the geographical gaps inherent in ocean governance are widely known, and—as discussed in the context of sovereign territoriality—the fragmented nature of ocean management is a familiar opprobrium. Not only do these gaps relate to the weakness and inefficiency of completely segregated regulation, but also to the fluid movement of persons, species, and other objects between political borders; the lack of regulatory regimes in many regions around the world, and the failure of multilevel coordination and cooperation between regulatory systems.

Third, closely interrelated, but less obvious, are the prevalent regulatory, incentive, normative, and compliance gaps in transnational ocean management. Regulatory gaps occur where legislation or regulatory processes are lagging or suffer from poor coordination. For example, there is a particular concern with divided schemes of regulation where disconnected organizations and actors operate within regulatory silos. Critics also regularly point to the lack of coordination and regulatory cooperation between international organizations, regulators, national legislatures, and enforcement agencies. What is more, we witness a languid pace of regulation, especially when it is negotiated through political inter-state

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199 See generally Oran R. Young et al., Solving the Crisis in Ocean Governance: Place-Based Management of Marine Ecosystems, Environment, 49 ENV’T 21 (2007); Beverley Clarke et al., Enhancing the Knowledge-Governance Interface: Coasts, Climate and Collaboration, 86 OCEAN & COASTAL MGMT. 88 (2013).

200 See generally supra notes 184–194 and accompanying text.


bargaining processes that fail to keep pace with constantly shifting and intensifying human activities in the ocean or with new threats and opportunities.\footnote{206}

Fourth, and related, \textit{normative gaps} describe deficiencies in accountability and the widespread lack of mandatory compliance-inducing obligations, with a recurring reliance upon ambiguous language or hortatory commitments, including within unenforceable rules or industry self-regulation.\footnote{207}

Fifth, \textit{compliance gaps} refer to the issue of compliance by states with their international commitments and with the poor level of implementation and enforcement by national regulators when dealing with externally valued public goods.\footnote{208} It also refers to the lack of compliance by stakeholders with national law, as they freely select between, or distance themselves from, traditional regulatory structures.\footnote{209}

Sixth, closely related to normative and compliance gaps are the \textit{incentive gaps}, which acknowledge the gap between a desired regulatory object and the incentive on the part of political actors to comply. Only by enabling consensus-made law to actually reign over consent-based self-enforcement, along with the eradication of horizontalism by the building of more powerful enforcement mechanisms, can regulators be incentivized to invest in much-needed cooperation and to break down the harmful interoperation of the prisoner’s dilemma and free riding, as discussed above.\footnote{210}

The consent-based, horizontal, and zonal system of public international law has thus weakened the effectiveness of ocean management for so long that an entirely new approach to ocean law and governance is needed. In order to bridge all these “gaps,” such a new approach—which is discussed in Section V—must operate as a truly multi-stakeholder system which is arranged with true power reallocated across the global, regional, local, and transnational scales. In other words, we need a true and real attainment of a \textit{transnational} law of the sea.

\footnote{206}Ardron et al., supra note 202, at 101; Gjerde et al., supra note 1, at vii.
\footnote{210}See supra note 169 and accompanying text.
Despite all the evidence that Westphalianism is centrally to blame for our struggling law of the sea, this has been hardly noticed or noted in existing academic discussions. In 2006, Richard Barnes, David Freestone, and David Ong did tell us that:

> the underlying emphasis of prescriptive and enforcement authority [of the law of the sea] is in the hands of individual States. This reflects the more fundamental nature of international law as a horizontal legal system in which States are sovereign equals under no higher authority than that of international law.\(^{211}\)

In 2010, Thomas Gammeltoft-Hansen and Tanja Aalberts also observed that the present-day conception of the ocean as a liberal free-for-all creates a space in which “participating states may successfully barter off and deconstruct responsibilities by reference to traditional norms of sovereignty and international law. Thus . . . the *Mare Liberum* [sic] becomes the venue for a range of competing . . . disclaims to sovereignty.”\(^{212}\) Similarly, Barnes only briefly noted in 2015 that while the flag state system, to him at least, has not failed, it “is far from effective”\(^{213}\) and was “facilitated by the emergence of the modern political State after the peace of Westphalia.”\(^{214}\)

In 1992, Philip Allott provided a welcomed and perceptive criticism of both the *Mare Liberum* and *Mare Clausum* doctrines. He proposed the need for a new socially inclusive system: the *Mare Nostrum*, or “Our Sea.”\(^{215}\) Importantly for Allott, the law of the sea had become a system which:

> while still seeming to the uninitiated to be a process for the collective formation of social objectives, turned itself in practice into a system that gives effect neither to universal social objectives of all humanity nor to the social objectives of all human individuals collectivized through the state systems. It came to be dominated by an independent dialectic at the median level between the two, the level of relations between so-called states. Humanity had formed itself into a society whose social process was interstate relations.\(^{216}\)

Nevertheless, there appears to be a discernible lack of focus specifically on public international law’s failures in the ocean’s transnational ecosystem. Instead, the vast majority of literature and research in marine governance focuses on Grotius’s doctrine of the “freedom of the seas” and the problems with relying upon flag states to regulate global concerns.


\(^{213}\) Barnes, *supra* note 102, at 321.


\(^{215}\) See generally Allot, *supra* note 207.

\(^{216}\) Allot, *supra* note 207, at 775–76.
IV. THE SCAPEGOATS OF OUR FAILING OCEAN LAW

A. Mare Liberum: Res Communis or Res Nullius?

After four centuries of compressing Grotius’s 1609 *Mare Liberum* into a dogma that propagates the interests of powerful flag states, this utopian vision for ocean governance has become frequently misinterpreted. Grotius’s now-famous monograph was originally written as a legal brief supporting the Dutch East India Company’s capture and sale of the Portuguese vessel, *Santa Catarina*, in the Malacca Strait.217 Its adept integration of wider literature from Ancient Rome and Greece, and from the views of natural and canonical law, along with Grotius’s posthumous fame as an international legal theorist, have caused it to have considerable influence—in name, at least—on our view of ocean law in the centuries that followed.218 Most commentators on the law of the sea today still hold considerable disdain for the supposed concept it introduced: the so-called and now infamous “Freedom of the Seas.”219 This concept allegedly sought to view the ocean’s resources as *res nullius* and open to appropriation and exploitation.220 Unfortunately, however, Grotius stands falsely accused. His original “Free Sea” did not promote the systemic free-for-all that we can still detect in global marine lore today but, as will be shown, was actually much more progressive.

Primarily, this loss in translation has been caused by the convenient simplification of ocean management into a binary system of competing strategies—that between the *Mare Liberum* and the *Mare Clausum*. On the one hand, there is the argument for increased territorialization, which would enable coastal states to more successfully control and effectively regulate large swaths of the


220 See generally supra note 219.
This argument is said to have arisen from John Selden’s equally famous rejoinder to Grotius in 1635, titled *Mare Clausum*, or “Closed Sea.” On the other hand, there is the argument that the ocean should not be territorially appropriated by anybody but should be open for free and unrestricted access by all—supposedly exemplified by the *Mare Liberum*.

These two doctrines have been contorted over the years to try and represent two binary Westphalian approaches to solving ocean governance. The *Mare Clausum* represents the view that coastal and port states should have more power, given that flag states are often too disconnected from distant ocean activities. Meanwhile, the *Mare Liberum* has been inappropriately interpreted by the most powerful flag states of the day—such as the Netherlands, France, the U.K., and the U.S. —to support the view that the ocean should be “free” from regulation as far as possible and that, instead, states should primarily regulate their own fleets through flag state law. In reality, as argued in Section IV.B, both are systems prone to failure because both entail states acting in exclusive national interest and, hence, externalization of losses to the international community.

Much of the misplaced blame upon the *Mare Liberum* seems to arise from the word “freedom.” Grotius did indeed argue that the ocean’s vastness, fluidity, and unsuitability to physical dominion should render it free from territorialization. Crucially, however, he never posited that the ocean and its resources should be “free” property to be appropriated or exploited. Rather, quite oppositely, he argued that the ocean’s resources cannot be appropriated without prior permission from the international community to which they belong. In other words, he saw its resources as *res communis*—rather than *res nullius*—which was to be shared among all humankind with “a common right [of usage] over which no other right could be asserted.” It was, therefore, a rejection of our contemporary understanding of private dominion over ocean property, in that

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222 JOHN SELDEN, MARE CLAUSUM, SEU DE DOMINIO LIBRI DUB (1635).


such ownership means the ocean is “incapable of belonging to someone else as well.”\textsuperscript{227} This common ownership model was premised on the fact that “there [is] nothing to prevent a number of persons from being joint owners . . . of one and the same thing.”\textsuperscript{228} He argued, thus, that the ocean was a gift from God and “not to this or that individual, but to the human race,”\textsuperscript{229} and “that all that which has been so constituted by nature that although serving some one person it still suffices for the common use of all other persons, is today and ought in perpetuity to remain in the same condition as when it was first created by nature.”\textsuperscript{230} As a result, only those activities which can be done “without loss to anyone else” are tacitly permitted by the global community.\textsuperscript{231}

On this basis, Grotius was able to argue that certain “freedoms” should be automatically available because they are not prima facie causing loss to humankind. For example, his primary argument was actually that maritime navigation can only be free and unrestricted because—at his time at least—ships leave “no more than a ‘track in the sea,’”\textsuperscript{232} and the ocean “is not exhausted by that use.”\textsuperscript{233} This unrestricted freedom of access was based on the tacit permission given by humankind—as the ocean’s communal owners—given that (pollution-free) navigation benefits wider community interests.\textsuperscript{234} In another example, he posited that coastal development is permitted because “it is lawful to build upon the shore if it may be without the hurt of the rest.”\textsuperscript{235} Therefore, he did not promote a general “freedom” of high seas fishing under some kind of liberal system permitting the private accumulation of unclaimed property, but rather that fishing might be tacitly accepted by the international community as a free activity, given that fish stocks were—at that time, at least—seen as essentially inexhaustible.\textsuperscript{236} Naturally, in the face of industrial-scale fishing and the decimation of global fish

\textsuperscript{227} GROTIUS, supra note 226, at xiv–xv (“[Laws have been set down so] that all surely might use common things without the damage of all and, for the rest, every man contented with his portion should abstain from another’s.”); HUGO GROTIUS, MARE LIBERUM 1609–2009 55 (Robert Feenstra ed., 2009) (1609); Rossi, supra note 225, at 19.

\textsuperscript{228} GROTIUS, supra note 227, at 53.

\textsuperscript{229} Id.


\textsuperscript{231} Id.

\textsuperscript{232} Schrijver, supra note 96, at 1254.

\textsuperscript{233} GROTIUS, supra note 230, at 26–27 (“[I]f any of those things by nature may be occupied, that may so far forth become the occupant’s as by such occupation the common use be not hindered.”).

\textsuperscript{234} Id. at 33 (“I f any should forbid another to take fire from his fire . . . and light from his light, by the law of human society I would accuse and sue him to condemnation.”).

\textsuperscript{235} Id. at 27.

\textsuperscript{236} Schrijver & Prislan, supra note 226, at 176; GROTIUS, supra note 230, at 38 (“If a man were to enjoin other people from fishing, he would not escape the reproach of monstrous greed.”).
stocks four hundred years later, this tacit approval of unrestricted appropriation of fisheries would patently no longer exist.

Recent reinterpretations of the *Mare Liberum* therefore suggest that pro-flag state theorists have, over the years, considerably skewed the concept of the freedom of the seas.\(^237\) As Vid Prislan and Nico Schrijver put it, Grotius’s arguments “later digressed into ‘first come, first served’ advantages for industrialized nations.”\(^238\) It is, therefore, not surprising that the two dominant-maritime nations, that have held hegemonic regulatory power over the oceans since 1805, have promoted a distinctly Anglo-American model of liberal regulation. This model relies on minimal state intervention and the promotion of anarchic self-governance, thus permitting U.K. and U.S. interests to profit considerably from this “free” maritime domination.\(^239\) This is the unfortunate entrenchment of the “free-for-all” interpretation of ocean law, which will continue to suit the dominant maritime powers in each regional ocean zone. It has also been suggested that the misinterpreted “freedom of the seas” did not actually come to dominate until the Industrial Revolution in the mid-19th century.\(^240\) Before this, it was actually John Selden’s argument in favor of territorial appropriation and intensive national regulation that ruled international thinking.\(^241\) Unsurprisingly, this was throughout the era that witnessed the ascendency and indoctrination of Westphalianism and the centering of all regulatory power in the hands of nation-states. Wherein, as a necessary corollary, all law without national territory was viewed as *lex nullius*.

U.S. Supreme Court Justice Story exemplified this liberal model of law in 1826, when he adjudged that “[u]pon the ocean, in time of peace, all possess an entire equality. It is the common highway of all, appropriated to the use of all, and


\(^{238}\) Schrijver & Prislan, supra note 226, at 206. For example, in 1950, Lauterpacht defined it as ensuring “freedom of navigation, unhampered by exclusive claims of individual states, and freedom of utilization of the resources of the sea to a degree to which they can be equitably utilized by all.” Hersch Lauterpacht, *Sovereignty over Submarine Areas*, 27 *B.R. Int’l L. Y.B. Int’l L. 376*, 407 (1950).

\(^{239}\) R.P. Anand, *Origin and Development of the Law of the Sea*, 152–53 (1983). Anand notes that the “hallmark of this law, ever since its acceptance in the early nineteenth century, has been, in accordance with the spirit of the time, ‘freedom’ meaning essentially non-regulation and *laissez-faire*.” *Id.* at 152.

\(^{240}\) *Id.* at 151.

\(^{241}\) *Id.* at 228–29. Anand notes how Selden “won this protracted ‘battle’ not by the brilliance of his arguments, but by the ‘louder voice’ of the powerful British Navy.” *Id.* at 229. In fact, the idea and concern that the ocean can be enclosed by dominant maritime powers is one which has existed for millennia. See e.g., Rossi, *supra* note 225, at 39–41.
no one can vindicate to himself a superior or exclusive prerogative there.”242 And, a century later, the Permanent Court of Justice, in the Lotus Case, still understood that:

> vessels on the high seas are *subject to no authority* except that of the State whose flag they fly. In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them.243

In other words, if there is no territorial or non-flag state that is permitted to impose unilateral regulation in open ocean waters, then the only alternative under an international system must be the state that is embodied in the vessel itself. This understanding that either territorial states or flag states govern the seas continues to the present day.244 As R.P. Anand states, over the past two centuries, it became “accepted as an indisputable, almost sacred, dogma which was supposed to be in the interest of all mankind and which nobody would dare challenge.”245 Its total transmogrification can, for example, be witnessed in Bo Johnson Theutenberg’s words, who understood it as meaning that the ocean is “open and free for the use of all nations,” where “[n]o nation could prevent another from carrying on traditional activities at sea”:246 a far cry from the system of common society and pooled interests promoted by Grotius.

These accounts of the freedom of the seas became corrupted for one very simple reason: if only nation-states have exclusive and unencumbered regulatory power, but coastal states do not have territorial dominion, then only flag states are left as the option for national legal control of the high seas. By its very design, Westphalianism is innately antagonistic to any possible suggestions of “shared” governance over a territorial space. Furthermore, given that states are “equals” and free to act in self-interest, they cannot be *compelled* to accept shared ownership of the ocean’s resources. Therefore, under the Westphalian “inter-state” regulatory system, the only two choices for the “sovereign-free” high seas were either lawlessness or regulation by distant flag states.

In sum, by promoting a system that sees the ocean as a gift to the global community and shared by all, Grotius’s argument in favor of turning the ocean into a global commons was in fact highly analogous to Arvid Pardo’s famous 1967 appeal to turn much of the seas into the “Common Heritage of Mankind” and to foreclose the ocean from ever-increasing national territorialization and

242  *See generally* The Marianna Flora., 24 U.S. 1 (1826).
243  S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (Ser. A) No. 10, ¶ 64 (Sept. 7) (emphasis added).
244  U.N. Secretariat, *supra* note 237, at 2–3 (“The idea of the freedom of the high seas is, paradoxically, a survival of the idea . . . that the high seas are subject to dominion and sovereignty, just like any territorial dominion.”).
245  ANAND, *supra* note 239, at 255.
unilateralism.\textsuperscript{247} This engaging vision aimed to bring the entire community of humankind within the frame of ocean governance and, out of necessity, sought to redefine and mollify the territoriality of ocean space and the politically exclusive nature of all the ocean’s interconnected zones, including the territorial sea.\textsuperscript{248} Such a new and holistic global commons management model has thus been covered, with some social scientists concurring that the failed understanding of Grotius seems to come in failing to distinguish between “common access” and “common property.”\textsuperscript{249} As a result, the nation-state should no longer be seen as the only representative agent of humankind’s shared ocean and as the only source of transnational legal power.

B. The Fault of “Flag” States or Flag “States”?

The political tug-of-war between states to resolve the exclusive sovereign rights and freedoms inside hard borders in ocean space is primarily built on the economic ambitions of sovereign states and often plays out through diplomacy, political posturing, and displays of military power.\textsuperscript{250} As Daniel Cheever puts it, “[n]owhere is the indissoluble relationship between politics and law demonstrated more cogently than in the law of the sea.”\textsuperscript{251} The outmoded debate between the two original competing systems of governance—between flag state regulation or territorial state encroachment—is often couched in the language of a normative debate over the more suitable, effective, and customary system for managing the seas. A closer look at the contested negotiations, however, makes clear that the debate has never been about which mode of governance is more effective, but about which ultimately delivers the propounding state the greatest amount of wealth, opportunity, and power. Indeed, the growing tension between the U.S. and China in the South China Sea is really a defense of the right of states to navigate trade, commerce, and freedom of navigation.


conduct military operations, and prevent coastal exploitation of a resource-rich region, rather than any justified defense of the quality of flag state regulation as the most effective system of marine governance.\textsuperscript{252}

The same can be seen in reverse, where arguments promoting the rightful placement of coastal state “jurisdiction” are really a masked promotion of coastal state power and ownership of distant resources, regardless of the environmental protection challenges this entails. For example, negotiations over the UNESCO 2001 Convention on the Protection of the Underwater Cultural Heritage were hopelessly distracted by this same contest between the flag states and the coastal states.\textsuperscript{253} The negotiators hardly touched the subject of “which is more effective” in terms of protecting the cultural heritage of the ocean. Instead, most of the time and political energy was focused on suspicions about the underhanded motivations and power aspirations of the “opposing” side.\textsuperscript{254} As a result, despite increased coastal state jurisdiction for protecting underwater cultural heritage in the EEZ being better on practical grounds, it was ultimately blocked by flag states who were distrustful of the motivations of coastal states, referring to their proposals disparagingly as “taking another bite at the jurisdictional apple.”\textsuperscript{255}

In many senses, flag state regulation—built around the aforementioned notion of liberalism and laissez-faire regulation of broad ocean space—has been the preferred ocean governance model for the states who stand to gain the most. Those powerful Western maritime nations—who accumulated considerable wealth and opportunity through colonial expansion and domination of the world’s transcontinental trade networks—are the same powerful nations who have conveniently designed today’s liberal flag state-based model of ocean management. The result is that, when levelling criticisms against the failing law of the sea, the vast majority of international law scholars have, up to now, aimed their cannons upon the over-reliance on “flag state jurisdiction” or upon the areas where this flag state regulation needs tweaking. Consequently, in recent decades, many theorists and policymakers have promoted a system with far greater


\textsuperscript{254} See generally Ariel W. González, The Shades of Harmony: Some Thoughts on the Different Contexts that Coastal States Face as Regards the 2001 Underwater Cultural Heritage Convention, in ART AND CULTURAL HERITAGE: LAW, POLICY AND PRACTICE 308 (Barbara T. Hoffman ed., 2006).

\textsuperscript{255} Id, Blumberg, supra note 253, at 499.
prescriptive and enforcement jurisdiction for coastal and port states in order to overcome the weaknesses of distant flag state regulation.256

This approach—which increases coastal and port state regulation in the international law of the sea framework—has certainly provided a number of important improvements. For example, it has put much greater pressure upon the dominant flag states or upon flags-of-convenience to raise their standards in order to maintain access for their fleets to certain ports.257 The difficulty, however, remains that coastal and port states also suffer from the same symptoms of Westphalian sovereignty—such as inter-state competition, races to the bottom, and the exclusive freedom to externalize global responsibility.258 In other words, the risk of further territorialization and encroachment by coastal states is just as undesirable as a laissez-faire model of distant and disinterested regulation by disconnected flag states.

Indeed, the emphasis on internal interests rather than the collective interests of humankind means that public laws governing port and coastguard authorities usually emphasize criminal activities of national interest, such as inward smuggling, market distortion, and migrant trafficking, above distant environmental concerns.259 As the Task Force on Illegal, Unreported, and Unregulated Fishing on the High Seas reported, not only are domestic enforcement agencies unaware of the true global costs, but any public expenditure by a state on criminal prosecution for activities having an impact beyond national jurisdiction is not recouped.260 Other practical factors also make non-flag states equally awkward as regulators, such as the physical challenges of interdiction and


259 See High Seas Task Force, supra note 85, at 24, 30; König, supra note 256, at 7.

260 See High Seas Task Force, supra note 85, at 33.
inspection, the difficulty with surveillance, and the pressure to avoid additional delays and disruption in port.\(^\text{261}\)

For the very same reasons, market and transit states also make uncomfortable and ineffective regulators.\(^\text{262}\) What is more, particularly on account of processing supply chain and transshipment practices, it is difficult to isolate imports that breach environmental standards.\(^\text{263}\) They also have considerable difficulty regulating grey or black markets and are at constant risk of falling foul-of-trade protectionism rules.\(^\text{264}\) Home states, that have jurisdiction over their own nationals when in home-state territory, are also too distanced from the specific activities and are unsuitable prosecutorial enforcers or receptors of incriminating evidence.\(^\text{265}\) Indeed, in recent unverified reports of looting from the Battle of Jutland wrecks by converted trawlers in the North Sea, it appears that numerous port, coastal, and flag states are implicated, but none have shown a willingness to fully invest in the security of wrecks more strongly valued by Britain and Germany.\(^\text{266}\) Even in their position as a home state, the British authorities did not appear to have prosecuted a U.K. national reported to have been involved in the


\(\text{\textsuperscript{264}}\) See CALLEY, supra note 262; ROHEIM, supra 263 and accompanying text. See generally Margaret A. Young, International Trade Law Compatibility of Market-Related Measures to Combat Illegal, Unreported and Unregulated (IUU) Fishing, 69 MARINE POL’Y 209 (2016); GILLES HOSCH, Trade Measures to Combat IUU Fishing: Comparative Analysis of Unilateral and Multilateral Approaches (2016).


illicit activities, despite this state having recognized the need to proactively protect such underwater cultural heritage.

Critically, therefore, none of these states—whether flag, port, coastal, market, transit, or national—can avoid the same weaknesses of national sovereignty. They can commonly refuse consent to any international law which does not provide them—and only them—with a political gain on balance. In other words, they require considerable political or economic incentives before they invest the political and economic resources in the punishment of offenders or in restricting their own economic activity in deference to external interests. Furthermore, even if these states did accept maximal jurisdictional responsibility, they would still stand to gain from competing in the provision of lax regulation and apathetic enforcement.

Understood from this perspective, the sovereign freedom of deficient flag state systems to profit from lax regulation, rather than the use of flag state systems, lies at the heart of the law of the sea’s underlying weakness. Certainly, increased regulation across all the governance nodes would significantly notch-up standards in specific areas and force flag states to join collective standards’ arrangements. The underlying fault, however, lies in the inability to coerce states, flag or otherwise, to modify their behavior in a manner against their own interests, as well as prohibiting states from externalizing global “losses” and not in the use of flag state regulation per se.

V. A Transnational Law of the Sea

The focus of this article has been to pinpoint the causes of the legal system’s failure to manage the oceans, as opposed to introducing every element of a new paradigm of governance. As such, it is beyond its purview to give a comprehensive account of a needed transnational law of the sea. While a detailed global vision of transnational ocean governance would be too large for the current discussion, this Section provides an overview of some important elements within such a system, exploring some of their advantages when productively eclipsing or interoperating with existing inter-state legal systems. Subsection A highlights recent academic efforts to explicate a model of Integrated Ocean Management (IOM), which many have regarded as merely a search for an ecosystems-oriented model of governance. It should, in fact, be largely understood, more simply, as a search for a post-


269 See generally Shaffer, supra note 98; GLOBAL PUBLIC GOODS: INTERNATIONAL COOPERATION IN THE 21ST CENTURY, supra note 101 and accompanying text.
Westphalian model of ocean management. Then, building on previous sections, Subsection B suggests that multi-stakeholder inclusivity and multi-level governance are two primary features of such a transnational law of the sea.

A. Understanding Integrated Ocean Management as a Demand for a Transnational Law of the Sea

While the root causes are rarely examined, it in fact appears well-accepted that the problem with ocean governance lies with the system itself, rather than with the legal rules contained within. For example, during detailed studies between 2010 and 2015 by the Ad Hoc Open-ended Informal Working Group to Study Issues Relating to the Conservation and Sustainable Use of Marine Biological Diversity Beyond Areas of National Jurisdiction (BBNJ Working Group), there was consistent pessimism about the inevitably poor implementation or the likely dilution of any resulting commitments between states, rather than the content of any agreed rules.\(^{270}\) As a result, the BBNJ Working Group urged the need for better cooperation and coordination between “all sectors and all levels,” conceding that “a global universal governance structure remained the best way to promote sustainable marine biodiversity beyond areas of national jurisdiction.”\(^{271}\)

This gloomy allusion to the present system of law—highlighting concern for compliance, implementation, and enforcement of international agreements, or with pervasive regulatory, normative, or geographical gaps—has also become an increasingly vocalized issue among academics more broadly. For example, David Vousden says that “many leading experts on high seas and ocean governance are now convinced that . . . there is now an urgent need for a transformation to a more suitable legal regime which is more cross-sectoral and integrated in its management approaches and strategies.”\(^{272}\) As Freestone summarizes, therefore, “virtually all are in agreement . . . that we need far more effective means of enforcing compliance with the norms and structures than we have.”\(^{273}\) In effect,

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\(^{271}\) Id. ¶ 12.


it appears to be almost unanimous that there is a need for better institutional structures, systems, and processes in the governance model itself.274

In response to these widely reported systemic issues in the present model, there has been increasingly widespread calls for an approach built around far greater “integration” or, in other words, for IOM.275 It is not just global institutions and accords that are relaying these calls for integration across the legal landscape but also academics.276 For example, in 2008, Yoshifumi Tanaka wrote how “international documents tend to stress the importance of a holistic approach by referring to [IOM].”277 Many others have been equally clear on the need for a new paradigm within IOM.278 As Wright and his colleagues recently reported, “[m]any States, scientific experts and civil society groups have . . . repeatedly highlighted the need for integrated ocean governance.”279 Yet, despite its undisputed central placement on the global agenda, the actual meaning, content, and envisioned structure of this new integrated approach to ocean management remains remarkably undefined and under-examined.280

It certainly appears that IOM is at least concerned with the holistic management of the ocean as one large interdependent—and, indeed, transnational—ecosystem.281 By understanding the placement of humans as an integral aspect of this interconnected ocean network, many see IOM as almost a


275 Although various different phrases have been used over the years, often with different emphases, the term “Integrated Ocean Management” has perhaps become most widely adopted. See, e.g., Jakobsen, supra note 201, at 297–98.


277 See TANAKA, supra note 15, at 16.


279 Wright et al., supra note 208, at 9.

280 See TANAKA, supra note 15, at 17; Scott, supra note 4, at 466; Jakobsen, supra note 201, at 297.

SYNONYM FOR “ECOSYSTEMS-BASED MANAGEMENT.” This, in essence, demands that all governance be founded upon a highly relational (interdependent), eco-centric, and cumulative understanding of long-term impacts of marine activities upon all stakeholders. Most also concur that IOM’s meaning is rarely fixed, but is actually highly context-dependent. It is, therefore, better understood as an amassing collection of principles and processes to be called upon depending on the specific context, challenge, or circumstance in focus. Karen Scott, for example, draws upon various environmental principles and marine planning processes being used in various regions and nations across the world. Similarly, Elizabeth Kirk argues that an approach is needed which “combines both principle and process.” A brief review of the literature, however, suggests that IOM is likely to include many of the general environmental principles, such as sustainable development, intergenerational and intragenerational equity, ecosystem services, common but differentiated responsibilities, access and benefit sharing, precautionary management, and the polluter pays principle—as well as containing other more general principles such as public participation, transparency, and accountability. In addition to these principles, numerous governance processes can be utilized in order to achieve better integration, such as marine spatial planning, marine protected areas, environmental impact assessments, integrated coastal zone management, co-management, and various collaborative models of governance.

Many authors also understand IOM’s purpose as ultimately bridging the specific “gaps” in ocean governance which continuously appear. Barnes’s approach, for example, classified IOM as providing normative, spatial, sectoral, temporal, disciplinary, and user integration. Similarly, the BBNJ Working Group viewed IOM as bridging regulation, implementation, governance, coordination, and information sharing gaps. Further, although Tanaka broke IOM down into ecological, normative, and implementation vectors, his definition narrowly focused on institutional or agency coordination and, thus, largely excluded the

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282 See Jakobsen, supra note 201, at 293–96; see also Scott, supra note 4, at 465; TANAKA, supra note 15, at 18. See generally Kirk, supra note 274; Stephen Jay, Marine Space: Maneuvering Towards a Relational Understanding, 14 J. ENV’T POL’Y & PLAN. 81 (2012); cf. Oanta, supra note 16, at 226 (suggesting that IOM necessitates end-to-end regulation, in order to improve cohesion and harmony across the regulatory framework).

283 See supra note 15 and accompanying text.

284 See Scott, supra note 4, at 466–67.

285 See generally id.; Kirk, supra note 274.

286 See generally Scott, supra note 4.

287 Kirk, supra note 274, at 33.

288 See Barnes, supra note 278, at 860–62.

various gaps that arise when looking more closely at the vital stakeholder level. As demonstrated in Section III.D, however, most ocean governance gaps can, in fact, be clearly linked back to the international system of law. Moreover, studies into transnational law and governance are often seen as a means to improve upon these same weaknesses of the international legal system itself. Ergo, in order to address the gaps in ocean governance, a focus on achieving effective transnational law and governance is needed.

Nevertheless, despite some commentators casually noting the transnational characteristics of the oceans and calling for solutions that capture transboundary activity from end-to-end, there has been a dearth of literature in the law of the sea field making the crucial connection between transnational law, as a broad discipline and field of study, with the coveted principles and processes of IOM. This is surprising and regretful given that the same weaknesses of the international law of the sea that are universally lamented—such as the need for an expanded role of supranational, private, and non-state laws, actors, and systems operating more fluidly at transnational scales—are almost identical to those same weaknesses that the transnational legal discipline seeks to address. More so, given that, in its normative guise, transnational law seeks to achieve a multi-level, holistic, and inclusive system of law in response to global regulatory challenges. As a result, any proposed model of IOM should incorporate the theories, processes, and approaches of transnational law and governance.

B. A Transnational Law of the Sea: Multi-Stakeholder Inclusivity and Multi-Level Governance

At the very heart of the coveted “integrated” model of ocean governance is the consistent desire for both greater stakeholder inclusivity and for increased multi-level regime-building. In other words, the desire to truly bring the global community of persons beyond states—the unfortunately titled “non-state actors”—into positions of governance authority, as well as to release some of the grip on legal authority by national governments and displace it to governance networks found at local, national, regional, and global scales. In fact, this ideal of post-national

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290 See TANAKA, supra note 15, at 18–21.
291 See supra Section II.C.
294 For example, a standard and unfiltered Google search by the author in May 2020 for “transnational law of the sea” returns zero results; whereas “transnational human rights” returns 98,200 results, “transnational environmental law” returns 42,600 results, “transnational criminal law” returns 95,000 results, and even “transnational family law” returns 26,500 results.
governance accords neatly with Elisabeth Mann Borgese’s visionary 1998 monograph, *The Oceanic Circle: Governing the Seas as a Global Resource*, which promoted a new global approach to ocean governance.295 The same recognition could perhaps also be attributed to Allott’s thesis on the *Mare Nostrum* in 1992, which touched on the case for a human-centered and post-Westphalian approach to ocean governance—indeed, as well as Grotius’s *Mare Liberum* over four centuries ago.

1. Multi-stakeholder inclusivity

In every case, one can locate stakeholder participation—and the capacity of ocean users at all levels both within and without the state to effectively and productively communicate, cooperate, coordinate, and collaborate—at the heart of the IOM approach. For example, even under those headings that are discernibly regulatory in focus, such as the need for normative frameworks which cross political boundaries, the same underlying motive is to address the conflicting and overlapping interests of fragmented and dissociated communities.297 Barnes, therefore, rightly summarizes that a “truly integrated approach” would empower stakeholders to be engaged in the regulation process.298 It is possible to detect these same common themes throughout social scientific research that seeks to improve upon the presently beleaguered model of Westphalian law.299 Research and associated policies dedicated to expanding public participation have, therefore, proliferated in recent years, with the principle of civil-society inclusivity becoming something of a revolutionary movement.300

Environmental public participation can range from small-scale local resource management to the representation of global communities and interest groups at

296 See Freestone et al., supra note 211, at 13. See generally Allott, supra note 207.
297 See supra note 211 and accompanying text.
298 See Barnes, supra note 278, at 862.
international fora.\textsuperscript{301} It can also come in many forms: from a simple requirement to improve public information and transparency of decisionmakers to consultations with affected individuals and communities in the development of new legislation, to full-scale regulatory management of public goods by private actors.\textsuperscript{302} There are also many representative forms of the global \textit{demos}, such as: non-governmental organizations (NGOs), including charities, advocacy networks, and interest groups all operating at the national, regional, and global levels; corporations and other enterprises, also operating at or across the local, national, regional, and global scales; epistemic (or “expert”) communities and standards bodies, across all levels; and all communities and individual humans themselves.\textsuperscript{303}

In all cases, there is clear evidence that an expanded \textit{demos} has been effective in enhancing the protection of the ocean. There are numerous examples where the progress toward post-national representation in global governance is at last providing solutions to the ocean’s paradigmatic transnational context. Such examples include: the increased stakeholder participation in marine planning or environmental protection systems;\textsuperscript{304} enhanced subsidiarity of biodiversity management and protection;\textsuperscript{305} expansion of international legal standing to private actors and NGOs;\textsuperscript{306} integration of stakeholder groups into governance networks; public-private partnerships or advisory bodies;\textsuperscript{307} utilization of private communities and NGOs within the governance mix;\textsuperscript{308} utilization of maritime

\textsuperscript{301} See C. Aloni et al., \textit{The Importance of Stakeholders Involvement in Environmental Impact Assessment}, 5 RES. \\ & ENV’T 146, 148–49 (2015); Tamara Tschentscher, \textit{Promoting Sustainable Development Through More Effective Civil Society Participation in Environmental Governance: A Selection of Country Case Studies from the EU-NGOs Project 8} (2016).

\textsuperscript{302} See supra notes 299–301 and accompanying text.


\textsuperscript{306} See generally Torrens, supra note 214.


communities in improving security measures; and the facilitation of coordination and information exchange across epistemic communities or private and subnational actor networks.  

2. Multi-level governance

It similarly becomes essential, therefore, that multi-level governance (MLG)—governance that is intentionally arranged as interlinking and overlapping regimes at different spatial levels or scales at the global, regional, national, and local community level—should provide both the descriptive and normative frame for understanding the coveted stakeholder-inclusive model. Not only does MLG provide an appealing vision for a simple response to the complex challenges of transnational governance and provide avenues toward greater stakeholder inclusivity, but it also helps clarify the roles and functions of the state and of non-state actors within the governance framework. In fact, a multi-stakeholder approach naturally calls for a multi-level approach, given that most actors beyond the state are characteristically found above or below the national level. It appears clear that such a multi-level approach is sought in the attainment of integrated governance. Indeed, the International Union on the Conservation of Nature Draft

(1997); Barbara Gemmill & Abimbola Bamidele-Izu, The Role of NGOs and Civil Society in Global Environmental Governance, in Global Environmental Governance: Options and Opportunities 77 (Daniel C. Esty & Maria H. Ivanova eds., 2002).


310 Peter M. Haas, Epistemic Communities, Constructivism, and International Environmental Politics (2015).


International Covenant,314 Rio Declaration,315 and Agenda 21316 each call unequivocally for action at all levels—international, regional, national, and local—in order to effectively achieve sustainable development. MLG thus becomes a necessary byproduct of the worldwide search for governance beyond government.

Indeed, the interdependence of all stakeholders in the shared ocean commons leads to a widespread tradition of externalities and spillover effects, resulting in underproduction by nation-states in work toward global objectives. MLG can therefore resolve these collective action failures by integrating states into regimes or processes that delegate decision making authority and accountability to more suitable levels, such as through local, regional, or global regimes, where international law is failing to produce global public goods.317 It also permits states to pass technical management and administrative responsibility for global goods onto more appropriate external agents and non-state actors,318 or even to pass on the blame for stringent social and environmental policies.319 Furthermore, the centralization of responsibility can actually enhance, rather than diminish, the capacity of civil society to press for changes to policies, by creating a clearer and more familiar target for political lobbying.320

The above can be evidenced in the ocean governance context. An illustrative example is the sustainable management of global fish stocks. It is true that certain epistemic communities (for example, the International Council for the Exploration of the Sea or the International Union on the Conservation of

314 See generally IUCN ENVIRONMENTAL LAW PROGRAMME, DRAFT INTERNATIONAL COVENANT ON ENVIRONMENT AND DEVELOPMENT (5th ed., 2017).
319 See Wälti, supra note 317, at 414.
standards bodies (for example, the Marine Stewardship Council or the U.N. Food and Agricultural Organization), or advocacy NGOs (for example, Oceana, Greenpeace or the World Wildlife Fund) are more efficiently organized by providing data, technical rules, standards, schemes, and political pressure at a global level. However, it is also necessary to leave sufficient latitude to local communities to develop their own rules and systems for preventing or recycling bycatch or allocating fishing zones between local stakeholders with the efficient use of the guidance, tools, enforcement architecture, and resources which are provided from higher levels. Thus, higher levels can be used to overcome the accepted limitations of national enforcement, by encouraging or sidestepping state-level implementation.

In addition to having the global governance level bolstered by strategic public-private partnerships expanded participative democracy, it is particularly the regional level that has continuously proven itself to be indispensable within effective ocean governance models. Regional-level governance carries many advantages, by lowering the critical mass needed before significant commitments can be made in cross-border negotiations, as well as providing for a more harmonized and coherent system of management for a large body of water. As such, there are countless success stories in the protection of the marine environment driven by regional networks and organizations, such as through the Barcelona Convention, Antarctic Treaty System, Baltic Marine Environment

326 See supra notes 301–11 and accompanying text.
Protection Commission (or Helsinki Commission), the OSPAR Commission, and numerous other regimes, such as those under the U.N. Regional Seas Programme. There is also the enhanced level of protection and stock management derived by regional fisheries management organizations and global improvements in general flag state compliance as a result of closed regional systems of port state measures, such as the Paris Memorandum of Understanding. Furthermore, based on the analyses above, the more that states are willing to acquiesce national sovereignty across regional contexts, the more effective and powerful the resulting regimes can become. For example, the highly supranational European Union has made several noteworthy achievements in the marine governance context and is regarded as a world-leader in this field, including extensive improvements in pollution and waste management, fisheries, transboundary spatial planning, maritime security, and biodiversity protection. This makes sense when one considers that the creation of an overarching system of accountability above states will have the capacity to drive higher levels of state compliance and a wider servitude to regional objectives.

For all these reasons, it is understandable that the present negotiations over an international legally-binding instrument to protect biodiversity beyond national jurisdiction (BBNJ) have included discussions on a “hybrid” global-regional approach. An efficient system of MLG would therefore handle the complexity and polycentricity of different governance polities, with numerous public, private, and hybrid actors operating at different levels and playing different roles.

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331 See OSPAR COMMISSION (May 6, 2020), https://perma.cc/FN6W-SWWC.
depending on the precise issue in question.\textsuperscript{338} To be effective, MLG must also use an appropriate mix of centralization and decentralization, to permit autonomous and meaningful community self-governance at the right levels.\textsuperscript{339}

MLG is thus understood as the vital provision of polycentric coordination within Transnational Environmental Governance, given this field’s concern “with the migration and impact of legal norms, rules and models across borders.”\textsuperscript{340} As Campbell and her colleagues suggested in 2016, an explanation for failed oceans governance is scalar mismatch; that is, a governance intervention . . . not well matched to the ecological scale of the feature or process being governed . . . . The concern for scalar mismatch fuels support for governance at global or regional scales and coordination among scales.\textsuperscript{341}

However, rather than viewing MLG as merely the realignment of scalar mismatch between eco-systems and governance systems, we must be clear that the marine environment continues to suffer severe scalar mismatch across normative, regulatory, jurisdictional, collaborative, and compliance systems as well.

\textbf{VI. CONCLUSION: LOOKING BEYOND THE HORIZONTALISM}

Ascending up the rigging to the crow’s nest atop our new globalized world order and peering through the spyglass, it is clear that coming into view beyond the horizon is a new paradigm of ocean governance. While sovereignty and territoriality may continue to rule the waves for some time, any suggestion that this system of global legal accountability is working for the protection of our shared global ocean must at last be jettisoned. Instead, it is time to consciously expand beyond the horizontalism and decentralism of the present \textit{inter-national} law of the sea, by focusing on building more forceful systems of legal accountability \textit{above, below, within, and without} the nation-state. The failure to govern the oceans has less to do with Grotius’s \textit{res communis} or flag state regulation per se, as it does with our gripped obsession with legal positivism and the eternal truism of sovereign exclusivity, equality, and territoriality. All three of these features of national sovereignty—which remain resolute and ever-present in our global legal order for the seas—have manifested a list of critical weaknesses in the management of an incredibly complex, multi-leveled, prototypically transnational,

\begin{itemize}
\item \textsuperscript{339} See Dunoff, supra note 320, at 88–100.
\item \textsuperscript{341} See Lisa M. Campbell et al., \textit{Global Oceans Governance: New and Emerging Issues}, 41 ANN. REV. ENV’T & RESOURCES 517, 522 (2016); \textit{see also} Fikret Berkes, \textit{From Community-Based Resource Management to Complex Systems: The Scale Issue and Marine Commons}, 11 ECOLOGY & SOC’Y 45 (2006).
\end{itemize}
intergenerational, fluid, interdependent, and reflexive global commons, that itself remains accessible and open to rivalry from all directions.

There has been a distinct lack of criticism of our present international legal system for governing the seas, despite the huge expanse of research which has flourished in the fields of transnational law and governance, global legal pluralism, global governance, and multi-level governance. Fortunately, the time is ripe to adapt the principles, findings, and theories across these subject fields for use within the marine environment. The time for reflecting on our presently Westphalian “constitution for the oceans”—as epitomized by the 1982 LOSC—therefore appears to have been upon us for some time. While some law of the sea experts have dispassionately inferred that this may require a “new paradigm beyond positivism,” there has been a lack of conviction and concerted research towards this end. Perhaps the best effort thus far has been Tanaka’s 2008 monograph on a regionally oriented understanding of “integrated” management for the oceans that, although appearing to have slipped past the radar of wider academic discussions, did at last highlight the weaknesses of a sole reliance on the LOSC.

Yet, it is clear that ocean jurisprudence continues to proceed along the same tired inter-national lines. For example, the current negotiations over an internationally binding legal instrument on the protection of BBNJ appear to carry the same weaknesses of inter-state consent-based bargaining and lowest common denominator weaknesses which were lamented throughout this article. More investment is needed in the mobilization and advancement of private and hybrid actors, such as NGOs, transnational corporations, subnational actors, and standards bodies, as well as effective supranational and regional institutions, which are able to force meaningful consent and compliance across ocean space.

Far more can be discussed on the expansion of pluralistic, multi-stakeholder, and multi-level systems of maritime law and governance, as well as the means of achieving such a global system of regulation. Nevertheless, this article has focused an early critical point in these discussions, by arguing that the worldwide search among academics and experts over the past three decades for new “integrated” modes of ocean governance has, in fact, been merely a calling for a new post-Westphalian, multi-level, and stakeholder-inclusive governance regime. In other words, the coveted search for an integrated ocean governance is a search for a new transnational law of the sea. The principal feature of this new transnational governance model is an advanced level of stakeholder participation in the

342 See, e.g., Freestone et al., supra note 211.
343 See generally Allott, supra note 207; Barnes, supra note 102; Tanaka, supra note 15; Borgese, supra note 295.
344 See generally Tanaka, supra note 15.
governance framework, as well as the migration of normative regimes from a stubbornly horizontal system toward a multi-layered and polycentric network of legal rule-makers and takers.

The integration and coordination between the traditional inter-national order of the oceans, as epitomized and constitutionalized through the LOSC, with the emerging seaward migration of a new transnational understanding of global governance, is a ripe area for future research. The first port of call would be to finally identify our outmoded devotion to Westphalianism as being at the heart of our failing system up to now. If we are ever to govern this blue planet effectively, a transnational law of the sea is not just desirable—it is indispensable.