ARTICLE

Outsourcing Enforcement

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International organizations often outsource the enforcement of international law to their member states. The International Labor Organization (ILO), for instance, has neither its own adjudicative body nor an internal system of sanctions. Instead, the ILO's maritime rules authorize states to impose costly retributive measures against noncompliant states. Conventional scholars are optimistic that these kinds of authorizations will strengthen otherwise toothless international law. During the COVID-19 pandemic, however, states neither followed nor enforced the ILO's legal rules, harming hundreds of thousands of seafarers in the process.

Where has international law gone wrong? Challenging the conventional view, this Article unearths the state-centric drawbacks linked to outsourced enforcement, including political fealties, power imbalances, and market priorities. The implications of outsourced enforcement are wide-reaching, and the stakes of compliance are high, particularly given concurrent attempts to establish similar systems of outsourced enforcement across new international instruments.

This Article proposes a theory of outsourced enforcement – specifically, one that is based on mandatory adjudicative bodies housed in international organizations. It concludes by explaining how such reform is possible and necessary to achieve the organizational mission.

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INTRODUCTION

In April 2020, a forty-five-year-old Russian seafarer working onboard a large cargo ship suffered a stroke.[1] The port state refused to allow the seafarer to disembark to receive critical medical attention, despite its international legal obligation to do so, citing concerns about the COVID-19 virus.[2] The state instead instructed the ship's captain to try a different port state over 600 km away.[3] No other state intervened. This scenario was not atypical during the pandemic,[4] when port states similarly prohibited hundreds of thousands of seafarers from disembarking.[5] Exercising their enforcement discretion, port states decided to violate international maritime law and allow other port states to do so as well.[6]

International law was not supposed to work this way.[7] In theory, international organizations craft legal rules on a multilateral platform to which states consent to be bound.[8] A flaw in this theory, long acknowledged in

1 *See Supporting Seafarers on the Frontline of COVID-19*, INT'L MAR. ORG., https://www.imo.org/en/MediaCentre/HotTopics/Pages/Support-for-seafarers-during-COVID-19.aspx (last visited June 23, 2021) (describing various COVID-19 related disembarkment emergencies).

2 The COVID-19 pandemic first emerged in Wuhan, China in 2019. It has caused over 100 million infections and more than two million deaths. *See* Marie O. Pohl et al., *SARS-CoV-2 Variants Reveal Features VRFCritical for Replication in Primary Human PHCells*, 19 PLoS Biology 1, 2 (2021).

3 *See Supporting Seafarers on the Frontline of COVID-19, supra* note 1.

4 *See* Int'l Lab. Org. [ILO], Fourth Meeting of the Special Tripartite Committee established under Article XIII of the Maritime Labour Convention, 2006, as amended – Part I ¶ 19 (2021) [hereinafter Fourth Meeting of the Special Tripartite Committee] (noting that, at its peak, some 600,000 seafarers were "stranded at sea" during the pandemic).

5 *See* Cleopatra Doumbia-Henry, *Shipping and COVID-19: Protecting Seafarers as Frontline Workers,* 19 WMU J. MAR. AFF. 279, 280-84 (2020) (describing the frequency in which port states refused to allow hundreds of thousands of seafarers to disembark during the pandemic).

6 *Id.* at 285; *see also infra*, Part I.B.3 (describing the various ways in which port states disobeyed international maritime law during the pandemic).

7 International organizations create rules and procedures to standardize practices across states in accordance with a common set of legal norms. *See* Jan Klabbers, *Two Concepts of International Organizations*, 2 INT'L ORG. L. REV. 277, 278 (2005) ("international organizations have often, perhaps always, predominantly been conceptualized as entities endowed with a single task: the management of common problems."). In the maritime context, the ILO's members created maritime legal standards to protect seafarers working on board vessels. *See* Fourth Meeting of the Special Tripartite Committee, *supra* note 4, at ¶ 10 (observing that international maritime instruments, which were designed to protect seafarers, "had failed them" during the pandemic). By acting contrary to international law, states abdicated their responsibilities and defeated the purpose of the legal regime.

8 *See* EDWARD CHUKWUEMEKE OKEKE, JURISDICTIONAL IMMUNITIES OF STATES AND INTERNATIONAL ORGANIZATIONS 237 (2018) ("International organizations emerged on the international scene to enable States to collectively tackle common problems…"); JAN KLABBERS, ADVANCED INTRODUCTION TO THE LAW OF INTERNATIONAL ORGANIZATIONS 22-25 (2015) (arguing that the powers of international organizations are those endowed by states, and that international rules "can generally only be made on the basis of state consent…").

international relations literature,[9] is that international organizations struggle to compel states to comply with their international rules.[10] That may be because international organizations such as those governing maritime law – the International Maritime Organization (IMO) and the International Labor Organization (ILO) – lack their own enforcement bodies.[11]

An emerging scholarship observes how international organizations compensate by delegating enforcement to their members, including the United States.[12] That system, which I refer to as "outsourced enforcement," enables organizations such as the IMO and ILO to penalize disobedient states by delegating retributive actions.[13] The conventional view is that those retributive actions will then be carried out by the "community" of state

9 *See, e.g.*, JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 5-6 (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1832); RONALD DWORKIN, LAW'S EMPIRE 93 (1986); H.L.A. HART, THE CONCEPT OF LAW 44-49 (2d ed. 1994); Anthony D'Amato, *Is International Law Really "Law"?,* 79 NW. L. REV. 1293, 1293 (1985); DAVID LEFKOWITZ, PHILOSOPHY AND INTERNATIONAL LAW: A CRITICAL INTRODUCTION 98-128 (2020); Robin Bradley Kar, *Outcasting, Globalization, and the Emergence of International Law*, 121 YALE L. J. ONLINE 411, 430-39 (2012) (acknowledging the longstanding debate surrounding whether international law effectively compels obeyance). *See generally* Anne van Aaken & Betül Simsek, *Rewarding in International Law*, 115 AM. J. INT'L L. 195, 195-96 (2021) (internal citations omitted) (discussing the longstanding preoccupation of legal scholars with the enforcement of international law); KLAUS DINGWERTH ET AL., INTERNATIONAL ORGANIZATIONS UNDER PRESSURE 32 (2019) ("To state that an [international] organization has legitimacy is thus identical to stating that others accept an organization as rightful.").

10 *See* Jan Klabbers & Guy Fiti Sinclair, *On Theorizing International Organizations Law: Editors' Introduction*, 31 EUR. J. INT'L L. 489, 491-92 (2020) (discussing the need for scholars to come terms with international law's "accountability deficit").

11 Giovanni Maggi & Massimo Morelli, *Self-Enforcing Voting in International Organizations*, 96 AM. ECON. REV. 1137, 1137 (2006) ("Most international organizations lack an external enforcement mechanism."); Dorota Lost-Siemińska, *Implementation of IMO Treaties into Domestic Legislation: Implementation and Enforcement as the Key to Effectiveness of International Treaties*, *in* MAR. SAFETY IN EUR. 7, 14 (Justyna Nawrot & Zuzanna Pepłowska-Dąbrowska eds., 1st ed. 2020) ("The IMO…has no enforcement power."); William A. O'Neil, *A Message from Mr. William A. O'Neil, Secretary-General, International Maritime Organization*, 3 IMO News I (1993) [hereinafter *IMO Secretary General*] ("it is Governments – not IMO – who are responsible for making sure that IMO conventions are implemented and complied with."); Int'l Lab. Org. [ILO], *Rules of the Game: A Brief Introduction to Int'l Labour Standards* 101 (23d rev. ed. 2014) [hereinafter *Rules of the Game*], http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_318141.pdf.

12 Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L. J. 252, 307 (2011) ("It is the *states*, not the legal regime of the [organization] itself, that impose the sanction. Enforcement is thus *external* to the legal regime.") (emph. in original); Kar, *supra* note 9, at 469.

13 *See* Hathaway & Shapiro, *supra* note 12, at 258.

members under the international legal regime.[14] It applauds outsourced enforcement for legitimating international law[15] or otherwise enabling an evolution away from international organizations' "toothless"[16] faculties.[17]

That view rests on two implicit assumptions. First, that states will agree to enforce rules against other states.[18] Second, that states will do so because disobedient states have been "singled out" by international authorities[19] and not by unilateral actors.[20] Implicit in this latter assumption is that unilateral enforcement is driven by multilateral standards and not by unilateral objectives.

This Article argues that both assumptions are mistaken. Their sanguine undertone belies the paradox in which states act as both subjects and enforcers of international law. Powerful states like the United States will either enforce the law against other states based on national interpretations and priorities[21] or will refuse to enforce those legal rules that they, themselves, violate.[22] In either instance, international organizations' legal interpretations and original intentions are drowned out by a melee of state-centric dynamics and unstructured enforcement.

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14 *Id.* at 308; Kar, *supra* note 9, at 469.

15 *See* Hathaway & Shapiro, *supra* note 12, at 258.

16 *See* HENNER GÖTT, THE LAW OF INTERACTIONS BETWEEN INTERNATIONAL ORGANIZATIONS 23 (2020) ("The limitation to persuasion has earned the ILO the image of a 'weak' institution."); Francis Maupain, *Is the ILO Effective in Upholding Workers' Rights?: Reflections on the Myanmar Experience*, *in* LABOUR RIGHTS AS HUMAN RIGHTS 85, 86 (Philip Alston ed., 2005) (arguing that the "root cause" of skepticism surrounding the ILO's efficacy was that the "ILO has no teeth.") (internal quotation omitted); Bob Hepple, *Does Law Matter? The Future of Binding Norms*, *in* PROTECTING LABOUR RIGHTS AS HUMAN RIGHTS: PRESENT AND FUTURE OF INTERNATIONAL SUPERVISION 221, 230 (George P. Politakis ed., 2006) (arguing that the ILO's system of enforcement should be revised because "persuasion and conciliation will not work unless there is ultimately an effective sanction that can be invoked."); Brian A. Langille, *Eight Ways to Think About International Labour Standards,* 31 J. WORLD TRADE 27, 48-49 (1997). *See generally* Suzanne Egan, *Transforming the UN Human Rights Treaty System: A Realistic Appraisal*, 42 HUM. RTS. Q. 762, 762-63 (2020) (reviewing the longstanding criticism that the UN human rights system is ineffective).

17 *See* Kar, *supra* note 9, at 465 (referring to externalized enforcement of international law as providing "the relevant evolutionary stability conditions for an emergent sense of international legal obligation….").

18 *See, e.g.*, Hathaway & Shapiro, *supra* note 12, at 258 (describing a system in which "enforcement may simply involve denying the disobedient the benefits of social cooperation and membership.").

19 *Id.* at 309.

20 *See, e.g.*, Rachel Brewster, *Pricing Compliance: When Formal Remedies Displace Reputational Sanctions*, 54 HARV. INT'L L.J. 259, 301-02 (2013) (pointing out that the conventional account presupposes a "community opprobrium" and thus fails to acknowledge other state motivations).

21 *See* Josh Martin, *A Transnational Law of the Sea*, 21 CHI. J. INT'L L. 419, 437 (2021) ("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.").

22 *See, e.g.*, Desirée LeClercq, *The Disparate Treatment of Rights in Trade*, 90 FORDHAM L. REV. 1, 38-41 (2021) (describing how the United States enforces international labor law under its trade agreements only insofar as they align with U.S. laws and jurisprudence).

Using the highly regulated[23] system of maritime labor law as a case study,[24] this Article seeks to expose the inevitable tensions between international lawmaking and its state-centric enforcement. When the ILO's maritime members designed the Maritime Labor Convention, 2006 ("MLC"),[25] they imposed new positive legal obligations[26] on port states – including obligations to permit seafarers to disembark at their ports to change crews, travel home, rest, or receive medical assistance.[27] To legitimate the convention and effectuate compliance,[28] the ILO's members outsourced enforcement to those very same states by authorizing them to inspect and detain noncompliant vessels.[29]

Despite its lofty ambitions, the MLC's system of outsourced enforcement has proven incapable of controlling port state activities during the pandemic; it has neither compelled compliance nor encouraged enforcement. Citing pandemic-related health and safety concerns and force majeure,[30]

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23 *See* Georgios Exarchopoulos et al., *Seafarers' Welfare: A Critical Review of the Related Legal Issues Under the Maritime Labour Convention 2006*, 93 MARINE POL'Y 62, 63 (2018) ("The maritime industry is one of the most highly regulated industries in the world.").

24 The law of the sea is an incredibly complex network of international laws and practices, most of which extend far beyond the scope and purposes of this Article. For a more comprehensive description of the law of the sea, including the roles and responsibilities of port states, flag states, and coastal states, see DONALD R. ROTHWELL & TIM STEPHENS, THE INTERNATIONAL LAW OF THE SEA (2d ed. 2016).

25 *See* INT'L LABOUR CONFERENCE, MARITIME LABOUR CONVENTION, 2006, Reg. 5.1.1(3) (Feb. 23, 2006) [hereinafter MLC], http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/normativeinstrument/wcms_090250.pdf. *See also infra*, Part I.B.2.

26 Positive legal obligations are obligations that require states to take action such as affirmative steps to ensure certain rights protections. *See* Dinah Shelton & Ariel Gould, *Positive and Negative Obligations*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 562-63 (Dinah Shelton ed., 2013) (internal citations omitted).

Although the MLC is not the first treaty to impose a legal obligation on port states in the universe of international maritime instruments, those instruments placed "the principal responsibility for ensuring ships' compliance with international rules and standards…with their flag State." *See* Ho-Sam Bang, *Recommendations for Policies on Port State Control and Port State Jurisdiction*, 44 J. MAR. L. & COM. 115, 117 (2013) (citing IMO instruments that had referenced port state obligations). The MLC is also the first ILO instrument to place mandatory requirements on port states. Previous ILO maritime instruments focused instead on the responsibilities of ratifying states towards "seafarers' working and living conditions in relation to any ship registered in the territory of the Member…" *See, e.g.*, Labour Inspection (Seafarers) Convention, 1996, art. 1(7)(a), *opened for signature* Oct. 22, 1996, 2108 U.N.T.S. 173 (defining the applicable "central coordinating authority"). Other ILO instruments had provided that port states "may" take certain acts, such as arranging to cover the costs of seafarer repatriation in the event that neither the shipowner nor flag state makes the necessary arrangements. *See* Repatriation of Seafarers Convention (Revised), 1987, art. 5(a), *opened for signature*, Sept. 10, 1987, 1644 U.N.T.S. 311.

27 *See infra* Part I.B.1.

28 *See* Jon Whitlow & Ruwan Subasinghe, *The Maritime Labour Convention, 2006: A Model for Other Industries?*, 7 INT'L J. LAB. RSCH. 117, 126 (2015) (referring to the MLC as a "game changer").

29 *See infra* Part I.B.

30 Under art. 23 of the ILC Articles on the Responsibility of States for Internationally Wrong Acts, the "wrongfulness of an act of a State" is "precluded" if the act is due to "force majeure," which the ILC defines as "the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation." Art 23,

port states systemically violated their obligations[31] to such an extent that the United Nations declared a "humanitarian crisis" at sea.[32] Their legal anomie exacted an emotional and physical toll on hundreds of thousands of seafarers who were prohibited from disembarking at ports.[33] Those women and men were forced to prolong their employment contracts and were refused access to medical care, welfare facilities, and a way home.[34] Seafarers' workloads increased because they had to continue manning and operating vessels without breaks or relief crews.[35] They were constantly afraid of catching the virus while stuck onboard.[36] They were tired, stressed, anxious,[37] and depressed.[38] Many tried to commit suicide;[39] some were successful.[40]

How could an international organization such as the ILO have protected the integrity of its legal rules against such widespread disobedience?

Articles on Responsibility of States for Internationally Wrongful Acts, annexed to UNGA Res. 56/83 (28 Jan. 2002).

31 *See* U.N. Conf. on Trade & Dev. (UNCTAD), *Review of Maritime Transport* 19, 2020, https://unctad.org/system/files/official-document/rmt2020_en.pdf [hereinafter UNCTAD Review of Maritime Transport] (noting that over 100 countries closed their borders, which significantly disrupted global trade and shipping); *see also* Zoumpoulia Amaxilati, *The Legal Rights of Seafarers to Health Protection Measures during the Covid-19 Pandemic*, 26 J. INT'L MAR. L. 253, 254 (2020) (documenting how seafarers were denied basic health protections, such access to personal protective equipment, during the pandemic despite international maritime laws requiring such access).

32 U.N. Secretary-General, *Statement Attributable to the Spokesman for the Secretary-General on the Repatriation of Seafarers*, UNITED NATIONS (June 12, 2020), https://www.un.org/sg/en/content/sg/statement/2020-06-12/statement-attributable-the-spokesman-for-the-secretary-general-the-repatriation-of-seafarers; Fourth Meeting of the Special Tripartite Committee, *supra* note 4, ¶ 19.

33 *See* B. PAUKSZTAT ET AL., SEAFARERS' EXPERIENCE DURING THE COVID-19 PANDEMIC 3-4 (2020).

34 *See, e.g.*, Fourth Meeting of the Special Tripartite Committee, *supra* note 4, ¶ 19 (describing the failure of states to abide by their legal commitments during the pandemic and the impact of that failure on seafarers); Christiaan De Beukelaer, *COVID-19 Border Closures Cause Humanitarian Crew Change Crisis at Sea*, 132 MAR. POL'Y 1, 1 (2021) (noting that, during the pandemic, shipowners systematically breached seafarers' employment contracts).

35 *See* PAUKSZTAT ET AL., *supra* note 33, at 9.

36 *Id.* at 10.

37 *See* Birgit Pauksztat et al., *Effects of the COVID-19 Pandemic on the Mental Health of Seafarers: A Comparison using Matched Samples*, 146 SAFETY SCI. 1, 7-8 (2022) (describing the results of a qualitative study of seafarers during the pandemic, which revealed high levels of stress and anxiety).

38 *Id. See also* PAUKSZTAT ET AL., *supra* note 33. These findings have been corroborated in a sister study, which surveyed seafarers on board and found that prolonged working periods have negatively affected seafarers' "mental, physical and social well-being." *See* Ana Slišković, *Seafarers' Well-Being in the Context of the COVID-19 Pandemic: A Qualitative Study*, 67 WORK 799, 806-07 (2020).

39 *See Indian Seafarer Stuck Onboard Ship in China Attempts Suicide*, MI NEWS NETWORK (Jan. 7, 2021), https://www.marineinsight.com/shipping-news/indian-seafarer-stuck-onboard-ship-in-china-attempts-suicide/ (describing the attempted suicide of a seafarer who had been stuck onboard a ship for 13 months, well over his 5-month employment contract, who was "[d]esperate to return to his family and ... [was] under severe mental stress…").

40 *See, e.g.*, *Seafarer Suicide Statistics Spotlighted as Coronavirus Curtails Crew Changes*, ISWAN NEWS (July 7, 2020), https://www.seafarerswelfare.org/news/2020/seafarer-suicide-statistics-spotlighted-as-coronavirus-curtails-crew-changes ("One consequence of this crisis has been an increase in the number of seafarer suicides…").

That is, how could an organization have ensured that its state enforcers continued to both comply with and enforce its rules, including when emergency conditions changed states' decision-making calculus?

This Article answers those questions by offering a theory of outsourced enforcement that would remove discretionary enforcement from states.[41] It argues that international organizations such as the ILO must find ways within their mandate, organizational structure, and constitutional design to create internal adjudicative mechanisms capable of rendering mandatory enforcement directives.

Naturally, states may be reluctant to restrain their enforcement discretion against other states.[42] Nevertheless, reform may still be possible. Powerful states turn to multilateral platforms to regulate transnational sectors and ensure a level playing field of fair competition.[43] Less powerful states turn to multilateral platforms to ensure an equitable application of international law. Nonstate actors such as workers and employers seek international standards and protections against state-centric measures and laws. While enforcement reform will undoubtedly face obstacles, the members of international organizations should agree that it is necessary to re-legitimize their rules and achieve their objectives.[44]

To unfold these central arguments, this Article proceeds in four Parts. Parts I and II contain my descriptive dimensions, using international maritime law as a case study. Part I briefly reviews how traditional maritime law classifies state obligations and responsibilities. It describes how the ILO's members imposed new positive obligations on port states and then outsourced enforcement to those same states. Enjoying broad enforcement discretion, port states disobeyed those obligations during the pandemic, declined to enforce those obligations against other disobedient states, and faced no financial penalties. Part II applies a heuristics framework to the MLC's system of outsourced enforcement to disentangle and identify its salient characteristics. It traces the weaknesses of the MLC's system to two specific characteristics: it is non-adjudicatory and permissive.

Part III draws lessons from the MLC's exposition to inform broader international governance efforts. It describes current initiatives to design a

41 *See infra*, Part IV.

42 *See* Klabbers, *supra* note 7, at 278-79 (describing the tensions between international organizations' functions and the desires of their members to limit sovereignty restrictions).

43 In discussing transnational law and transnational sectors, this Article draws from Philip Jessup, who describes transnational law as "all law which regulates actions or events that transcend national frontiers" including "[b]oth public and private international law…[and] other rules which do not wholly fit into such standard categories." PHILIP C. JESSUP, TRANSNATIONAL LAW 2 (1956).

44 *See infra*, Part IV.

new instrument regulating global supply chains and multinational corporations[45] that threatens to reproduce the MLC's enforcement weaknesses.

Part IV offers a theory of outsourced enforcement. To achieve equitable enforcement, states – both as members and governors of international organizations – must minimize state discretion by making enforcement adjudicative and mandatory. I explain how state and nonstate actors may be compelled to launch an enforcement reform necessary to legitimate the missions of their international organizations.

I. INTERNATIONAL MARITIME LAW: AN ENFORCEMENT CASE STUDY

The framework by which maritime states are delegated enforcement responsibilities originates from the 1982 UN Convention on the Law of the Sea (UNCLOS).[46] Since the adoption of UNCLOS, the maritime industry has become "one of the most highly regulated industries in the world."[47] Over 80 percent of global trade is transported by sea,[48] thus making the successful operation of merchant shipping a *sine qua non* factor of the global economy.[49] By wedging itself in the Suez Canal, for instance, the vessel *Ever*

45 *See, e.g.*, Janelle M. Diller, *Pluralism and Privatization in Transnational Labour Regulation: Experience of the International Labour Organization*, *in* RESEARCH HANDBOOK ON TRANSNATIONAL LABOUR LAW 329, 332 (Adelle Blackett & Anne Trebilcock eds., 2015) ("The [MLC] demonstrates the enhanced impact of ILO regulation in a globalized industry when states collaborate in exercising their domestic jurisdiction to regulate labour conditions affected by transnational activity."); Hepple, *supra* note 16, at 229 (citing the MLC as an example framework for new ILO binding norms regulating transnational sectors); MOIRA L. MCCONNELL ET AL., THE MARITIME LABOUR CONVENTION, 2006: A LEGAL PRIMER TO AN EMERGING INTERNATIONAL REGIME, 6-7 (2011) (arguing that some aspects of the MLC will be "transferable…to address globalized workers"). *See generally* M. Sornarajah, *The Liability of Multinational Corporations and Home State Measures*, *in* THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 144, 145 (2010) ("there is now an increasing expectation…that home states of multinational corporations should exert control over the activities of their corporate nationals operating overseas."); Huw Thomas & Peter Turnbull, *From Horizontal to Vertical Labour Governance: The International Labour Organization (ILO) and Decent Work in Global Supply Chains*, 71 HUM. REL. 536, 537 (2017) ("Few would argue that current forms of international regulation that govern the activities of firms in global supply chains can guarantee 'decent work' for all.").

46 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, U.N. Doc. A/Conf.62/122, 21 I.L.M. 161 (1982) (entered into force in 1994) [hereinafter UNCLOS].

47 *See* Exarchopoulos et al., *supra* note 23, at 63. *See generally* Jens-Uwe Schröder-Hinrichs et al., *From Titanic to Costa Concordia—a Century of Lessons not Learned*, 11 WMU J. MAR. AFF. 151, 154-63 (2012) (discussing the human factors that contributed to the sinking of the Titanic, including the decision of the ship master "to prioritize performance over safety.").

48 UNCTAD Review of Maritime Transport, *supra* note 31, at 20 ("more than 80 per cent of world merchandise trade by volume is carried by sea…"); *Shipping Facts!!,* THE MARITIME INDUSTRY KNOWLEDGE CENTRE (Mar. 11, 2020, 2:50 PM), https://www.maritimeinfo.org/en/Why-Maritime/Shipping-Facts (90 percent of international trade takes place through shipping).

49 *See* G.P. PAMBORIDES, INTERNATIONAL SHIPPING LAW: LEGISLATION AND ENFORCEMENT XI (1st ed. 1999) (discussing the critical importance of merchant shipping to the world's economy).

Given caused $9.6 billion dollars in economic damage of canal closure *per day*.[50]

The nearly two million global seafarers[51] operating merchant ships are critical to ensuring that goods, including necessary medical supplies, food, and fuel, in addition to consumer goods, arrive conveniently at our doorsteps.[52] To regulate various living and working conditions on merchant vessels, the ILO has designed maritime labor instruments compatible with the broader international maritime regime. Lacking its own enforcement bodies, it draws from the UNCLOS framework to outsource enforcement to port states.

A. Maritime Enforcement Framework

Under the UNCLOS framework, maritime states have different roles. Flag states are responsible for registering and certifying vessels within their territories.[53] Port states enjoy sovereign authority over their ports and hence, *a fortiori*, the right to exercise discretion concerning the treatment of visiting vessels.[54] UNCLOS accordingly authorizes port states to inspect foreign vessels when they arrive at port and detain[55] or impose financial

50 *See* John Lanchester, *Gargantuanisation*, 43 LONDON BOOK REV. (2021) (reviewing LALEH KHALILI, SINEWS OF WAR AND TRADE: SHIPPING AND CAPITALISM IN THE ARABIAN PENINSULA (2020)).

51 *See* Doumbia-Henry, *supra* note 5, at 280.

52 *See* UNCTAD Review of Maritime Transport, *supra* note 31, at 49 (noting that seafarers transport "essential goods" such as "medical supply and food…").

53 *See* UNCLOS, supra note 46, arts. 91-92, 94, at 58-59. Notably, flag states may then outsource this responsibility to "public institutions or other organizations…which it recognizes as competent and independent to carry out inspections or to issue certificates or to do both." *See* MLC, supra note 25, at Reg. 5.1.1(3). For further information on the private organizations used by flag states, or "recognized organizations," *see, e.g.*, Alexandros XM Ntovas, *The Enforcement Procedures of the Maritime Labour Convention 2006*, *in* THE MARITIME LABOUR CONVENTION 2006 159-60 (Jennifer Lavelle ed., 2014); *See* MCCONNELL ET AL., *supra* note 45, at 20-22.

This Article will focus solely on the first level of outsourcing; that is, the maritime legal regime's outsourcing of enforcement of flag state obligations to port states. The relationship between flag states and their responsible organizations are beyond this Article's scope.

54 *See* Ted L. McDorman, *Regional Port State Control Agreements: Some Issues of International Law*, 5 OCEAN & COASTAL L. J. 207, 210-11 (2000) (describing the legal jurisdiction of port states and the vestiges of international enforcement authorities). Notably, by the time the ILO Members discussed the draft MLC provisions, the no more favorable treatment clause was a well-recognized and accepted element of international maritime law); Cedric Ryngaert & Henrik Ringbom, *Introduction: Port State Jurisdiction: Challenges and Potential*, 31 INT'L J. OF MARINE & COASTAL L. 379, 382 (2016) (describing the main legal argument for port state jurisdictional control over foreign vessels). A state may be both a port State and a flag State. For example, the United States is both a flag State (it certifies and registers vessels that then "fly" the U.S. flag) and is also a critical port State (vessels registered in other countries access U.S. ports to ship goods).

55 *See* UNCLOS, *supra* note 46, art. 218, at 110 (authorizing port states to conduct inspections and, "where the evidence so warrants, institute proceedings in respect of any discharge from that vessel…established through the competent international organization or general diplomatic conference.").

penalties on nonconforming vessels.[56] It also authorizes port states to enforce maritime rules against flag states, which are responsible for inspecting and certifying vessels' registrations and certifications in the first place.[57] This enforcement process, conducted by port state control (PSC) systems,[58] is described below.

1. Port State Control (PSC) Systems

Many port states participate in organized regional systems.[59] There are currently nine regional memoranda of understanding (MoUs) of PSC systems.[60] Collectively, these systems standardize port state inspections of vessels that call at any of the ports within their jurisdiction. Those inspections verify compliance with applicable international regulations.[61]

See also Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 213 (June 27); Agustín Blanco-Bazán, *IMO Interface with the Law of the Sea Convention*, *in* CURRENT MARITIME ISSUES AND THE INTERNATIONAL MARITIME ORGANIZATION 277 (Myron H. Nordquist & John Norton Moore eds., 1999) (noting that port state jurisdiction was initially developed by the International Maritime Organization "as a corrective remedy – namely, as a limited set of procedures which port states can implement in order to correct deficiencies in the exercise of flag state jurisdiction … by foreign ships voluntarily in port.").

56 *See generally* Kevin X. Li & Haisha Zheng, *Enforcement of Law by the Port State Control (PSC)*, 35 MAR. POL'Y & MGMT. 61, 61 (2008) (describing port state actions in the event of noncompliance).

57 *See, e.g.*, INT'L MARITIME ORG., INTERNATIONAL SHIP & PORT FACILITY SECURITY CODE AND SOLAS AMENDMENTS 49-50, (2003 ed. Dec. 12, 2002) (authorizing port states to detain a foreign vessel for certain certification deficiencies). Final Act of the International Conference on Marine Pollution art. 5(2), Nov. 2, 1973, 1340 U.N.T.S. 61 ("A ship required to hold a certificate in accordance with the provisions of the Regulations is subject, while in the ports or offshore terminals under the jurisdiction of a Party, to inspection by officers duly authorized by that Party …") [hereinafter MARPOL].

58 Port state control "is the inspection of foreign ships in national ports to verify that the condition of the ship and its equipment comply with the requirements of international regulations and that the ship is manned and operated in compliance with these rules." *See Port State Control*, INT'L MAR. ORG., https://www.imo.org/en/OurWork/MSAS/Pages/PortStateControl.aspx#:%7E:text=Port%20State%20Control%20(PSC)%20is,in%20compliance%20with%20these%20rules (last visited Dec. 16, 2021). *See* INT'L LAB. OFFICE [ILO], GUIDELINES FOR PORT STATE CONTROL OFFICERS CARRYING OUT INSPECTIONS UNDER THE MARITIME LABOUR CONVENTION 2006, as amended, at 23-24, (2d ed. Mar. 2021), https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/normativeinstrument/wcms_772506.pdf (describing port state inspections of vessels). Ho-Sam Bang & Duck-Jong Jang, *Recent Developments in Regional Memorandums of Understanding on Port State Control*, 43 OCEAN DEV. & INT'L L. 170, 170 (2012) ("Port state control (PSC) refers to the exercise by the port state of powers of control under which vessels entering ports (or offshore terminals) are inspected to check whether the vessels meet … the relevant international conventions …and the state's local laws.").

59 *See, e.g.*, *Port State Control*, INT'L MAR. ORG. (2019), https://www.imo.org/en/OurWork/MSAS/Pages/PortstateControl.aspx#:~:text=Port%20state%20Control%20(PSC)%20is,in%20compliance%20with%20these%20rules (last visited Oct. 22, 2021) (providing background information on why and how states participate in regional PSC MoUs).

60 *See* Bang & Jang, *supra* note 58, at 171 (listing the nine regional MoUs on PSC).

61 *See* Francisco Piniella et al., *Who Will Give Effect to the ILO's Maritime Labour Convention, 2006?*, 152 INT'L LAB. REV. 59, 65 (2013).

The European countries adopted the 1982 Paris Memorandum of Understanding of Port State Control ("Paris MoU"),[62] which is considered "the most important" of these regional PSC agreements.[63] The Paris MoU harmonizes preventative and enforcement policies covering ILO maritime labor standards and IMO security, protection, and marine environmental standards.[64]

PSC enforcement measures extend to flag states as well as vessels. For instance, some PSC systems use electronic databases that store information concerning vessel nonconformities and use those databases to identify flag states that habitually register nonconforming vessels.[65] The Paris MoU maintains an intricate labeling system that categorizes flag states by black, grey, and white lists.[66] Its secretariat produces those "normative listings" based on each flag state's performance, taking into account the number of inspections of registered vessels, the number of detentions, and the significance of deficiencies.[67] Flag states subjected to more frequent inspections are less competitive than other flag states because vessel inspections cost shipowners resources such as critical delivery and transport time.[68] Vessel operators seeking to avoid those costly inspections will pay to register their vessels in other, less risky flag states.[69]

2. No More Favorable Treatment Status

Maritime law seeks to ensure universal participation and protection within the maritime sector,[70] including discouraging a proverbial "race to the bottom," whereby states attempt to gain a competitive edge by not implementing costly international standards and regulations on nationally-flagged vessels.[71] Accordingly, some maritime instruments include the "no

62 *See Memorandum*, PARIS MOU, https://www.parismou.org/inspections-risk/library-faq/memorandum (last visited June 18, 2021) [hereinafter PARIS MOU]. *See also* Piniella et al., *supra* note 61, at 64 (describing the Paris MoU's role among international and regional port state agreements).

63 *See* Piniella et al., *supra* note 61, at 71.

64 *See* PARIS MOU, *supra* note 62.

65 *Id. See* MCCONNELL ET AL., *supra* note 45, at 30-31 (describing how port state control uses electronic databases).

66 *See White, Grey and Black List,* PARIS MOU, https://www.parismou.org/detentions-banning/white-grey-and-black-list (last visited Oct. 22, 2021).

67 *Id.*

68 *See, e.g.*, Nathan Lillie, *Global Collective Bargaining on Flag of Convenience Shipping*, 42 BRIT. J. INDUS. REL. 47, 48-49 (2004) (describing the "Flag of Convenience" states that attract shipowners seeking to avoid regulatory costs).

69 *Id.*

70 *See generally* Nordquist & Moore, *supra* note 55 (describing how the IMO's treaties are designed to capture a broad array of merchant fleet and flag states).

71 *See* Moira L. McConnell, *The Maritime Labour Convention, 2006 - Reflections on Challenges for Flag State Implementation,* 10 WMU J. MAR. AFF. 127, 130 n.10 (2011) (describing the "race to the bottom" theory in maritime law).

more favorable treatment" proviso,[72] which states: "With respect to the ship of non-Parties to the Convention, Parties shall apply the requirements of the present Convention as may be necessary to ensure that no more favourable treatment is given to such ships."[73] The proviso thus authorizes port states and PSC to carry out their inspections and detain vessels irrespective of whether the vessels are flying the flag of a state party to the convention.

B. The International Labor Organization (ILO) Maritime Rules

As the UN specialized agency mandated to regulate international labor standards,[74] the ILO is not an obvious organization to regulate maritime matters – that responsibility primarily rests with the IMO.[75] Nevertheless, since its founding, the ILO has held separate maritime committee sessions to give special attention to seafarers' living and working conditions.[76] This section briefly describes the ILO's unique governance structure that enabled it to successfully design and adopt a labor convention that applies to all states participating in the transnational shipping sector. That success, as described later, was undermined by the ILO's simultaneous decision to follow the UNCLOS framework of outsourcing enforcement to port states.

1. The ILO's Governance

The ILO is a "tripartite" organization, meaning it is composed of governments and representatives of workers and employers.[77] Its Governing Body, for instance, is composed of twenty-eight government representatives, fourteen employer members, and fourteen worker members.[78] The

72 *See* Lost-Siemińska, *supra* note 11, at 7 (describing the proviso and noting that it is "[e]nshrined in many of IMO's treaties…").

73 MARPOL, *supra* note 57, at 35. *See also* Lost-Siemińska, *supra* note 11, at 7 n.21 (noting that international maritime treaties adopt the "no more favorable treatment" proviso from MARPOL and providing additional examples).

74 *See About the ILO*, INT'L LAB. ORG., https://www.ilo.org/global/about-the-ilo/lang--en/index.htm (last visited Oct. 22, 2021).

75 *See Introduction to IMO*, INT'L MAR. ORG., https://www.imo.org/en/About/Pages/Default.aspx.

76 *See* MCCONNELL ET AL., *supra* note 45, at 16 ("Establishing minimum labour standards that are universally applied irrespective of the nationality of the seafarer, the ship, or the shipowner has been a preoccupation of the ILO since its earliest sessions.").

77 *See Rules of the Game*, *supra* note 11, at 17.

78 *Id.* at 14.

ILO's legal instruments require a two-thirds majority vote among its tripartite members at the International Labor Conference.[79] Under this governance paradigm, the ILO has developed an intricate system of international labor instruments to establish minimum conditions for decent work.[80]

As global demand for shipped goods has intensified, so have the pressures placed on seafarers to work longer hours at lower wages.[81] Unlike many other workers, seafarers work where they live: on board vessels.[82] They cannot readily abandon their place of employment if they are unsatisfied with their conditions, given that they carry out most of that work at sea.[83]

The ILO's success in regulating labor conditions in the maritime sector is attributed to the close collaboration among its tripartite maritime members. For one thing, seafarers are highly organized.[84] While global participation in trade unions appears to be declining in general,[85] the International Trade Federation (ITF) has some 700 affiliated trade unions under its umbrella, representing approximately 20 million women and men in transport.[86] The ITF's scope of representation ensures significant bargaining and lobbying powers with employers and governments.[87] The ITF

79 *See* Int'l Lab. Org. [ILO] Constitution art. 19(2) (May 10, 1944), http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO ("In either case a majority of two-thirds of the votes cast by the delegates present shall be necessary on the final vote for the adoption of the Convention or Recommendation, as the case may be, by the Conference.").

80 *See Rules of the Game*, *supra* note 11, at 7 (describing the ILO's mandate to promote "opportunities for women and men to obtain decent and productive work in conditions of freedom, equity, security and dignity.").

81 *See* RAPHAEL BAUMLER ET AL., A CULTURE OF ADJUSTMENT: EVALUATING THE IMPLEMENTATION OF THE CURRENT MARITIME REGULATORY FRAMEWORK ON REST AND WORK HOURS (EVREST) 25 (2020) ("In the commercially competitive environment characteristic of the 20th and 21st centuries, shipowners tend to intensify the tempo of operations and quite often seek to reduce crew expenses.").

82 *See* LIAM CAMPLING & ALEJANDRO COLÁS, CAPITALISM AND THE SEA 161 (2021) (describing how seafarers live where they work (on board a vessel) for months at a time).

83 *See* Paul J. Bauer, *The Maritime Labour Convention: An Adequate Guarantee of Seafarer Rights, or an Impediment to True Reforms?*, 8 CHI. J. INT'L L. 643, 644 (2008) (pointing out that seafarers "are generally isolated on their ships" and therefore rely on shipowners to provide necessary services).

84 *See* Nathan Lillie, *Global Collective Bargaining on Flag of Convenience Shipping*, 42 BRIT. J. INDUS. REL. 47, 47 (2004) (describing the unique system of bargaining in merchant shipping).

85 *See, e.g.*, Gregor Murray, *Union Renewal: What Can We Learn from Three Decades of Research?*, 23 TRANSFER 9, 10 (2017) (noting the decline in union density over the past three decades).

86 *See Who We Are*, INT'L TRANSP. WORKERS' FED'N, https://www.itfglobal.org/en/about-us/who-we-are (last visited June 18, 2021).

87 *Id.*; Lillie*, supra* note 84, at 50 ("ITF influence has grown over the past three decades as a result of successful strategies to cope with the trans-nationalization of maritime labour markets.").

works closely with the organization of maritime employers, which is represented at the ILO by the International Shipping Federation (ISF).[88] Together, those organizations drove efforts to create a new legal instrument, the MLC, with twin objectives of leveling the playing field by removing any advantages to sub-par shipping standards and ensuring fundamental rights for seafarers.[89]

2. The ILO's Maritime Labor Convention (MLC)

Over five years and nine preparatory committees, the ISF, ITF, and the ILO's state members carefully negotiated the draft language of the MLC, a process that lasted from 2001 to 2006.[90] Ninety-eight countries representing 91 percent of the world's gross tonnage of ships have since ratified it.[91] The United States, which has not ratified the convention,[92] actively participated in designing the instrument[93] and has incorporated compatible language into national guidance and policies.[94]

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88 *See* Roy Nersesian & Subrina Mahmood, *International Chamber of Shipping & International Shipping Federation*, *in* HANDBOOK OF TRANSNATIONAL ECONOMIC GOVERNANCE REGIMES 778 (Christian Tietje & Alan Brouder eds., 2009) (describing the international shipowner organizations).

89 *See* Whitlow & Subasinghe, *supra* note 28, at 124-25 (arguing that the MLC's designers sought to guarantee "a level playing field for shipowners."); George P. Politakis, *Bringing the Human Element to the Forefront: the ILO's Maritime Labour Convention, 2006 Ready to Sail*, 2 AEGEAN REV. L. SEA & MAR. L. 37, 39 (2013) (describing the initial efforts to create the MLC, which began during bilateral negotiations between seafarers and shipowners at the ILO in 2001); Bauer, *supra* note 83, at 650 (describing the economic incentives for port state control under normal circumstances).

90 *See Preparatory Reports: Maritime Labour Convention, 2006*, INT'L LAB. ORG., (Mar. 22, 2011), https://www.ilo.org/global/standards/maritime-labour-convention/text/WCMS_153447/lang--en/index.htm (containing all of the ILO maritime committee reports and meetings from 2002-2006). *See also* Desirée LeClercq, *Sea Change: New Rulemaking Procedures at the International Labour Organization*, 22 ILSA J. INT'L & COMP. L. 105, 125 (2015) (discussing the origins of the "landmark" convention). The final vote tally was 314 votes in favor, with abstentions by the governments of Lebanon and Venezuela. *See* Int'l Lab. Org. [ILO], Int'l Lab. Conf. [ILC], Ninety-fourth (Maritime) Session, Provisional Record No. 17 (Feb. 23, 2006), www.ilo.org/public/english/standards/relm/ilc/ilc94/pr-17.pdf [hereinafter Ninety-fourth (Maritime) Session].

91 *See MLC, 2006: What It Is and What It Does*, INT'L LAB. ORG. https://www.ilo.org/global/standards/maritime-labour-convention/what-it-does/lang--en/index.htm (last visited Nov. 28, 2021) (noting that the MLC has been adopted "by 97 ILO member States responsible for regulating conditions for seafarers on more than 90 per cent of the world's gross tonnage of ships.").

92 The United States rarely ratifies ILO conventions. This may be due to the Treaty Clause, which requires a two-thirds senatorial consent before the Executive may enter into a treaty. U.S. CONST. art. II § 2, cl. 2. For a further discussion of the tensions between U.S. constitutional procedures, international conventions, and national laws and practices, see LeClercq, *supra* note 22.

93 *See* Ninety-fourth (Maritime) Session, *supra* note 90 (documenting the vote of the U.S. government in favor of adoption at the ILO).

94 *See also* U.S. Coast Guard, Port State Control Examiner Tactics, Techniques, and Procedures (TTP), CGTTP 3-72.12, 6-2, 14-6 (Sept. 2019), https://www.dco.uscg.mil/Portals/9/DCO%20Documents/5p/CG-5PC/CG-CVC/Guidance/CGTTP_3-72.12_Port_state_Control_Examiner.pdf (describing vessel accommodation requirements pursuant to the MLC, while recognizing that the United States is not a signatory to that convention); U.S. COAST GUARD, *Guidance Implementing the Maritime*

The MLC includes several provisions that impose new rules on port states.[95] Of relevance, the MLC regulates seafarer repatriation,[96] the provision that port states so frequently violated during the pandemic.[97] It requires that states "*shall* facilitate the repatriation of seafarers serving on ships which call at its ports or pass through its territorial or internal waters, as well as their replacement on board."[98] Next, it prohibits port states from "refus[ing] the right of repatriation to any seafarer because of the financial circumstances of a shipowner or because of the shipowner's inability or unwillingness to replace a seafarer."[99]

The MLC's enforcement system is described under Title V, which requires that flag states inspect vessels flying their flag and issue those vessels a Maritime Labor Certificate and a Declaration of Compliance.[100] The MLC then authorizes, but does not require, port states to inspect those certificates and board the vessels to conduct a more detailed inspection or address seafarer complaints.[101]

To "encourage fair competition" in a transnational sector like shipping,[102] the ILO's members incorporated the "no more favorable treatment" proviso.[103] The MLC accordingly authorizes port states to inspect and enforce the applicable international regulations even if the vessels in

Labour Convention, 2006, in NAVIGATION AND VESSEL INSPECTION CIRCULAR (NVIC 02-13) (July 2013), https://www.dco.uscg.mil/Portals/9/DCO%20Documents/5p/CG-5PC/CG-CVC/Guidance/CGTTP_3-72.12_Port_state_Control_Examiner.pdf.

95 For example, Regulation 4.4 of the MLC states that port states "*shall* ensure that seafarers on board ships in its territory who are in need of immediate medical care are given access to the Member's medical facilities on shore." *See* MLC, *supra,* note 25, at Reg. 4.1(3) (emphasis added). Those states also "*shall* ensure that shore-based welfare facilities, where they exist, are easily accessible" regardless of "nationality, race, colour, sex, religion, political opinion or social origin and irrespective of the flag State of the ship on which they are employed or engaged or work." *Id.* at Stnd. A4.4(1) (emphasis added).

Notably, the MLC also specified obligations for flag states and "labor-supplying states," which extend beyond the scope of this Article. *See* LAURA CARBALLO PIÑEIRO, INTERNATIONAL MARITIME LABOUR LAW (HAMBURG STUDIES ON MARITIME AFFAIRS) 11-12 (2015) (describing the MLC's legal innovations).

96 MLC, *supra* note 25, at Stnd. A2.5.1. The term "repatriation" refers to seafarers' longstanding right to be able to return home, either periodically or upon completion of their work contract. See MCCONNELL ET AL., *supra* note 45, at 320-321 (discussing the importance of repatriation to seafarers).

97 *See* Doumbia-Henry, *supra* note 5, at 280.

98 MLC, *supra* note 25, at Stnd. A2.5.1(7) (emphasis added).

99 *Id.* at Stnd. A2.5.1(8).

100 *Id.* at Reg. 5.1 (setting out flag state responsibilities, including the obligation to "establish an effective system for the inspection and certification of maritime labour conditions…").

101 *Id.* at Stnd. A5.2.1(1).

102 *See* McConnell, *supra* note 71, at 131 ("In order to encourage fair competition, the Convention requires port states to ensure that ships of non-ratifying states receive "'no more favourable treatment' during PSC than that given to ships of ratifying states.").

103 MLC, *supra* note 25, at Art. V(7) ("Each Member shall implement its responsibilities under this Convention in such a way as to ensure that the ships that fly the flag of any state that has not ratified this Convention do not receive more favourable treatment than the ships that fly the flag of any state that has ratified it.").

question fly the flags of states that have not ratified the convention – if those port states so wish.[104]

That system of outsourced enforcement proved a selling point for the ILO's members. At the time of the MLC's adoption, the ILO Secretary General summarized the members' views on the MLC's enforcement system as follows:

> It is a procedure that you have decided upon. This is not the imposition of powerful forces. This is not the imposition of one over the others. This is a common, collective decision that you have taken. You want to ensure that this Convention has teeth. We have heard so much that the ILO does not have teeth that it is good to make *le constat* that this is your decision. This is your will. This is the way you, as shipowners and seafarers and governments, want this Convention to be perceived.[105]

Confident in their enforcement system, the maritime drafters made no effort to establish an adjudicative body to address noncompliance. They nevertheless created a new committee,[106] called the Special Tripartite Committee (STC), to keep the convention under "continuous review."[107] By creating a dedicated body to review the convention's rules, the ILO's members recognized the benefits of supervision on a multilateral platform. They just did not go far enough. Because the STC lacked the mandate to adjudicate enforcement, it had no power to intervene with binding directives during the pandemic.

3. Port State Compliance

Maritime and international legal scholars viewed the ILO's adoption of the MLC as a watershed moment.[108] That workers, employers, and govern-

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104 *Id.* at Stnd. A5.2.1(6); s*ee also* MCCONNELL ET AL., *supra* note 45, at 31 (discussing the implications of the MLC's no more favorable treatment clause for state disobedience).

105 Ninety-fourth (Maritime) Session, *supra* note 90, at 8-9 (statement of the ILO Secretary-General of the Conference).

106 *See* Int'l Lab. Org. [ILO], Standing Orders of the Special Tripartite Committee established for the Maritime Labour Convention, 2006 art. 2 (Mandate) (2012), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/meetingdocument/wcms_183944.pdf.

107 Fourth Meeting of the Special Tripartite Committee *supra* note 4, at 5 (describing the origins of the Special Tripartite Committee under the MLC).

108 *See* Iliana Christodoulou-Varotsi, *Critical Review of the Consolidated Maritime Labour Convention (2006) of the International Labour Organization: Limitations and Perspectives*, 43 J. MAR. L. & COM. 467, 468-69 (2012) (arguing that the MLC strengthened the legal status of seafarers and also helped boost the relevance of the ILO, which whose relevance in the world of work "was probably perceived as declining.").

ments could agree to update and consolidate a vast array of maritime instruments into one "web of rules,"[109] alone, was viewed as remarkable.[110] The ILO's maritime members had successfully broadened the scope of coverage so that even hairdressers onboard cruise ships enjoy international labor protections.[111] The ILO's members thus ensured that the MLC "achieved much greater coverage than any other sector-specific Convention…."[112]

States began implementing the MLC's rules immediately after the ILO adopted the convention.[113] Within months, many governments had already "made marked progress in terms of transposing the MLC requirements into domestic law…."[114] The Paris MoU standardized its system of inspection according to the MLC's requirements.[115] Even countries that had not ratified the MLC, including the United States, aligned their PSC systems and vessel registration certificates to incorporate the ILO's maritime labor standards.[116] Ultimately, the MLC became known colloquially as the "international seafarers' Bill of Rights."[117]

The pandemic changed the obedience calculus. Compliance meant, suddenly, allowing foreign seafarers to enter port state territories despite significant virus outbreaks. Uncertainty surrounding COVID-19 and its highly infectious nature led many states to close their borders.[118] Citing *force majeure*, they refused to allow crews to disembark, the centrifugal impact of which

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109 *See* NATHAN LILLIE, A GLOBAL UNION FOR GLOBAL WORKERS: COLLECTIVE BARGAINING AND REGULATORY POLITICS IN MARITIME SHIPPING 105 (Charles MacDonald ed., 2006) (noting the "various global, regional and national elements knit together" in the MLC) (internal citations omitted).

110 *See* Christodoulou-Varotsi, *supra* note 108, at 471-72; Politakis, *supra* note 89, at 51 ("the ILO constituency may look back with satisfaction at what has already been achieved and may confidently expect the Convention to deliver on its promise for fairer labour conditions for seafarers, and socially responsible shipping operations.").

111 *See* Petra C. Milde, *The Maritime Labour Convention 2006: An Instrument to Improve Social Responsibility in the Cruise Industry*, *in* CRUISE SECTOR CHALLENGES: MAKING PROGRESS IN AN UNCERTAIN WORLD 208 (P. Gibson et al. 2011) (describing how the MLC broadened the definition of "seafarer" to include all persons working on board ships and broadened "ship" to include cruise ships).

112 *See* Thomas & Turnbull, *supra* note 45, at 555 (arguing that the MLC achieved the greatest coverage "as a percentage of the workforce" covered under the convention).

113 *See* Whitlow & Subasinghe, *supra* note 28, at 122 (noting that port states were enforcing the MLC against non-compliant vessels); *see also* Ntovas, *supra* note 53, at 151 (arguing that the MLC is "a remarkable instrument" because "it represents the successful outcome of a wide-ranging process of co-operation among numerous international and non-governmental organizations …").

114 *See* Politakis, *supra* note 89, at 49 (noting that other governments lagged).

115 *See* Whitlow & Subasinghe, *supra* note 28, at 122.

116 *See, e.g.*, U.S. Coast Guard, NVIC 02-13*: Guidance Implementing the Maritime Labour Convention, 2006* (July 2013) (establishing a voluntary certification schema under the MLC).

117 *See* Michael Kabai, *The Maritime Labour Convention and Open Registries: Hand in Glove or Chalk and Cheese*, 30 INT'L J. MAR. & COASTAL L. 189, 190 (2015) (internal citations omitted).

118 *See* Doumbia-Henry, *supra* note 5, at 281 (describing critical issues affecting seafarers during the pandemic, including border closures to airlines and port closures to cruise ships).

prevented seafarers from terminating their work contracts, accessing transportation to return home, receiving medical care, or attending welfare facilities.[119]

Although port states denied seafarers their fundamental rights under the MLC, those states suffered no financial penalties. Port states did not take enforcement action against noncompliant port states, and flag states were not authorized or capable of such action. Meanwhile, merchant vessels continued to deliver goods, medicine, and medical supplies to ports without interruption.[120]

Despite the lack of financial penalties, disobedient states faced an avalanche of public criticism by the ILO's supervisory bodies. As mentioned earlier, the ILO does not have its own adjudicative body.[121] However, it maintains an internal supervisory system that provides recommendations concerning the implementation of its conventions, including the MLC.[122] For instance, both port state and flag state compliance are examined by the ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR). However, their reports are not legally binding.[123] Based on those reports, the ILO's Conference Committee on the Application of Standards (CAS) identifies and discusses governments of concern during the annual International Labor Conference,[124] where it adopts (also non-binding) recommendations.[125]

These supervisory bodies, along with the STC, did all that they could within their non-binding mandates. They issued individual circulars and information notes calling on governments to ensure ship crew changes and

119 *See*, *e.g.*, UNCTAD Review of Maritime Transport, *supra* note 31, at 49 (describing the effects of port state refusals to allow seafarers to disembark); De Beukelaer, *supra* note 34, at 2 (describing states' recourse to *force majeure* declarations to close their borders and prohibit seafarers from disembarking).

120 *See* Carolyn A.E. Graham, *Maritime Security and Seafarers' Welfare: Towards Harmonization*, 8 WORLD MAR. UNIV. J. MAR. AFF. 71, 73 (2009) (noting that, although seafarers have been prohibited from disembarking in violation of international regulations, states have been "able to continue with their business."); Fourth Meeting of the Special Tripartite Committee *supra* note 4, at ¶ 7 (noting that although the pandemic had brought the world to a "standstill … vessels had continued to move, and the food supplies, energy, medicines and the consumer and electronic goods needed in home-offices had been delivered."); De Beukelaer, *supra* note 34, at 1 (internal citations omitted) (noting that "shipping has continued despite an initial reduction in trade, at the cost of seafarers' health and safety.").

121 *See* GÖTT, *supra* note 16, at 23 (explaining that the ILO's enforcement mechanisms lack "any means of coercive enforcement" but rather rely on persuasion).

122 *See Rules of the Game*, *supra* note 11, at 104-13 (describing the ILO's supervisory bodies).

123 *Id.* at 106 (describing how the CEACR makes "observations" and "direct requests" to governments concerning compliance).

124 *Id.* at 107.

125 *Id.*

shore access.[126] They escalated their calls to port states.[127] They were joined by other international organizations, such as the IMO and the International Civil Aviation Organization,[128] the UN Human Rights Office (OHCHR), and the UN Global Compact.[129] The UN Secretary-General lent his voice to decry "the growing humanitarian and safety crisis facing seafarers around the world" and called on governments to implement the ILO and IMO protocols.[130]

In November 2020, the UN General Assembly adopted a Resolution noting its deep concern with the lack of crew change and repatriation.[131] Later that month, the ILO's Governing Body declared that it was "deeply concerned about the significant challenges faced by the global shipping industry to effect crew change and repatriate seafarers …"[132] and urged governments to facilitate access to shore.[133] The ILO's CEACR dismissed states' *force majeure* defense. Conceding that "genuine situations of *force majeure*" may have existed initially, the CEACR found that "more than ten months have elapsed since then, which constitutes realistically sufficient time frame allowing for new modalities to be explored and applied in conformity with international labor standards."[134] Instead of accepting states'

126 *See, e.g.*, Int'l Lab. Org. [ILO], Special Tripartite Comm. of the Mar. Lab. Convention, *Statement of the Officers of the Special Tripartite Committee of the MLC on the Coronavirus Disease (COVID-19)* (Mar. 31, 2020), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/statement/wcms_740130.pdf; Int'l Mar. Org. [IMO] Circ. Letter No.4204/Add.14, Coronavirus (COVID-19) – *Recommended Framework of Protocols for Ensuring Safe Ship Crew Changes and Travel during the Coronavirus (COVID-19) Pandemic* (May 5, 2020), https://wwwcdn.imo.org/localresources/en/MediaCentre/HotTopics/Documents/COVIDCL4204adds/CircularLetterNo.4204-Add.14-Coronavirus(Covid-19)-RecommendedFrameworkOfProtocols.pdf.

127 *See* Doumbia-Henry, *supra* note 5, at 283-86 (providing additional details regarding the complementary efforts of WHO and the UN Conference on Trade and Development (UNCTAD)).

128 *See* Int'l Mar. Org. [IMO], Int'l Lab. Org. [ILO], and Int'l. Civ. Aviation Org. [ICAO], *A Joint Statement on Designation of Seafarers, Marine Personnel, Fishing Vessel Personnel, Offshore Energy Sector Personnel, Aviation Personnel, Air Cargo Supply Chain Personnel, and Service Provider Personnel at Airports and Ports as Key Workers, and on Facilitation of Crew Changes in Ports and Airports in the Context of the COVID-19 Pandemic* (May 22, 2020), https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/genericdocument/wcms_745870.pdf.

129 *See* U.N. Hum. Rts. Off., U.N. Glob. Compact, and U.N. Working Grp. on Bus. and Hum. Rts., *The COVID-driven Humanitarian Crisis of Seafarers: A Call for Action under the UN Guiding Principles on Business and Human Rights*, (Oct. 5, 2020), https://ungc-communications-assets.s3.amazonaws.com/docs/publications/Joint-statement-Covid19-and-seafarers_OHCHR_GC_WGBHR.pdf.

130 *See* Stéphane Dujarric, *Statement Attributable to the Spokesman for the Secretary-General on the Repatriation of Seafarers* (June 12, 2020), https://www.un.org/sg/en/content/sg/statement/2020-06-12/statement-attributable-the-spokesman-for-the-secretary-general-the-repatriation-of-seafarers.

131 *See* G.A. Draft Res. 75/L.37 ¶¶ 10, 12 (Nov. 24, 2020).

132 Int'l Lab. Org. [ILO], *Resolution Concerning Maritime Labour Issues and the COVID-19 Pandemic* (Dec. 8, 2020), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_760649.pdf.

133 *Id.*

134 Int'l Lab. Org. [ILO], adopted by the Comm. of Experts on the Application of Conventions and Recommendations (CEACR), *General Observation on Matters Arising from the Application of the Maritime Labour Convention, 2006, as amended (MLC, 2006) during the COVID-19 Pandemic* (Dec. 12, 2020),

defenses, the Committee declared that the current conditions of work for seafarers "could amount to forced labour."[135]

As of December 14, 2020, forty-five IMO Member states, including the United States, had issued national regulations and guidance designating seafarers as key workers.[136] At the time of this writing, many port states had not changed their positions to allow seafarers to disembark and had not enforced the rules against other states.[137] As of May 2021, some 200,000 global seafarers remained stuck at sea due to border closures.[138]

II. DRAWBACKS OF OUTSOURCED ENFORCEMENT TO STATES

The MLC's design and early success demonstrate that state and nonstate actors can agree on a sector-specific, legally binding instrument backed by potential financial sanctions. Nevertheless, the pandemic exposed fundamental drawbacks in the MLC's system of outsourced enforcement, namely, that it relies on states to take enforcement action.

Before reflecting on those drawbacks, a caveat. Port states were not the only states abdicating their legal obligations during the pandemic. The pandemic's emergency circumstances gave rise to a veritable mountain of state declarations of emergency to avoid international rights law,[139] among other international laws.[140] I am not suggesting that the maritime regime was

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https://www.ilo.org/global/standards/maritime-labour-convention/WCMS_764384/lang--en/index.htm [hereinafter, "*CEACR General Observation*"].

135 *Id.*

136 Int'l Mar. Org. [IMO], Circ. Letter No.4204/Add.35, *Coronavirus (COVID-19) – Designation of Seafarers as Key Workers* (Dec. 14, 2020).

137 Int'l Mar. Org. [IMO], *Frequently Asked Questions about How COVID-19 Is Impacting Seafarers*, https://www.imo.org/en/MediaCentre/HotTopics/Pages/FAQ-on-crew-changes-and-repatriation-of-seafarers.aspx; INT'L LAB., (noting "the situation remains complex and difficulties are still reported"); Int'l Lab. Org. [ILO], Res. Concerning the Implementation and Practical Application of the MLC, 2006 during the COVID-19 Pandemic, Fourth Meeting of the Special Tripartite Committee of the MLC, 2006 – Part I (19 – 23 April 2021), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/genericdocument/wcms_782881.pdf (urging state members to allow seafarers to access shore for repatriation, medical and dental services, obtain shore leave and welfare services, and transit).

138 *See* De Beukelaer, *supra* note 34, at 1 ("By May 2021, this number had reduced to some 200,000; which remains unacceptably high.").

139 *See, e.g.*, Alessandra Spadaro, *COVID-19: Testing the Limits of Human Rights*, 11 EUR. J. RISK REG. 317, 317 (2020) (arguing that the lockdown measures put in place by governments have placed "billions of people around the world" in lockdown and have led to concerns by the UN High Commissioner "about the impact of such measures on human rights …"); Audrey Lebret, *COVID-19 Pandemic and Derogation to Human Rights,* J.L. & BIOSCIENCES 1, 8-15 (2020) (describing the derogations of human rights in the EU during the pandemic); 2021 Int'l Trade Union Confederation, GLOBAL RIGHTS INDEX 10 (2021) (illustrating the rise in violations of international labor rights in 2020 and 2021, particularly as they concern associational rights).

140 *See, e.g.*, Geraldo Vidigal & Stephan W. Schill, *International Economic Law and the Securitization of Policy Objectives: Risks of a Schmittean Exception*, 48 LEG. ISS. ECON. INTEGRATION 109, 110 (2021) (noting the various security exceptions in international economic instruments that states are invoking while

somehow unique in that regard. Nevertheless, given the convention's focus on ensuring seafarers' fundamental rights even during instances of emergency and force majeure,[141] the MLC's inability to foster compliance with its emergency provisions warrants our attention.

To disentangle and identify the salient characteristics of the MLC's system of outsourced enforcement, this Part applies a heuristic framework previously laid out in Professor Oona Hathaway and Scott Shapiro's article, *Outcasting: Enforcement in Domestic and International Law* ("*Outcasting*").[142] In *Outcasting*, Hathaway and Shapiro identify five categories in which international organizations externally enforce international laws and regulations by delegating responsibility to various public and private actors.[143] Those categories distinguish among systems of external enforcement that are: "(1) permissive or mandatory; (2) adjudicated or nonadjudicated; (3) in-kind or non-in-kind; (4) proportional or nonproportional; and (5) first parties only or third parties as well."[144] The authors argue (and I agree) that by aptly identifying these characteristics, we may better understand how international law works or, in this case, how it *fails* to work.[145] Of relevance to the immediate case, by identifying the MLC's regime as nonadjudicatory, permissive, and subject to third-party enforcement, one may discern the drawbacks of its system of outsourced enforcement. Through that lens, this Article advances a theory that would strengthen those salient characteristics accordingly.[146]

A. Nonadjudicatory and Permissive

The *Outcasting* framework distinguishes between mandatory enforcement regimes and permissive regimes, and between those that are adjudicatory and nonadjudicatory.[147] In many contexts (including the MLC's context), these two characteristics run hand-in-hand. Some regimes, such as that

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abdicating various legal obligations); Oona Hathaway et al., *The COVID-19 Pandemic and International Law*, 54 CORNELL INT'L L.J. (forthcoming 2021) (reviewing multiple instances in which states violated their various international legal commitments during the pandemic).

141 *See* Fourth Meeting Of The Special Tripartite Committee, *supra* note 4, at ¶ 6 (noting that "it was precisely at times of crisis that the protective coverage of the MLC, 2006 assumed its full significance …"); *CEACR General Observation*, *supra* note 134 ("the Committee is of the view that it is precisely at times of crisis that the protective coverage of the MLC … assumes its full significance and needs to be most scrupulously applied.").

142 *See* Hathaway & Shapiro*, supra* note 12, at 310.

143 *Id.*

144 *Id.*

145 *Id.* at 347 ("Once we see that international law relies heavily on external enforcement, this shifts our attention to how external enforcement works – and when and why it does not.").

146 *See generally* Kar, *supra* note 9, at 416 (arguing that a better understanding of externalized enforcement helps to elucidate "a special sense of international legal obligation, which is capable of animating … an emergent international legal order.").

147 *See* Hathaway & Shapiro, *supra* note 12, at 311-13.

under Chapter VII of the UN Charter, are both adjudicatory and mandatory.[148] Under the Charter, the United Nations directs its members to impose sanctions.[149] Other regimes, by contrast, lack both an adjudicative body and authority to issue mandatory directives. I therefore treat these two characteristics jointly.

The MLC falls under the latter regime. It delegates enforcement authorities to port states but does not require any enforcement action.[150] As mentioned, the ILO lacks an internal adjudicative body.[151] Consequently, port state decisions do not depend on a neutral body's determinations "that a norm has been satisfied or violated."[152]

In leaving it to port states to decide when, where, how, and why to enforce maritime labor law against other states,[153] the MLC's system of outsourced enforcement trusts that states will take enforcement actions when the ILO's rules warrant it. As commentators have noted, that trust may be misplaced.[154] States' decisions to enforce international law against other states may be "problematic from a fairness perspective" and may call into question "the legitimacy of a legal regime, and hence its long-term effectiveness."[155] Therefore, even during ordinary circumstances, these kinds of nonadjudicatory and permissive enforcement regimes raise three legitimacy questions.

First, the MLC's system evokes a longstanding truism in international law: when states have the discretion to interpret and apply international norms, the resulting regime will favor the powerful states over the weak.[156]

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148 *Id.* There are, of course, exceptions to that regime; *id.* at 313 (citing the World Trade Organization (WTO), Hathaway and Shapiro describe how the WTO's Dispute Settlement Body (DSB) adjudicates disputes but leaves retributive action to states discretion).

149 *Id.* at 311-12.

150 *See* MLC, *supra* note 25, at Reg. 5.2.1(1) ("Every foreign ship calling, in the normal course of its business or for operational reasons, in the port of a Member *may be* the subject of inspection…") (emphasis added), and to the extent any adjudication is carried out, it is carried out by the port states while detaining a vessel at port; *id.* at app. A5-III, Standard A5.2.1(6) (describing the process in which the port state officer may accept a plan of action to rectify nonconformities and may invite the flag state to be present).

151 *See id.* Part I.B.

152 *See* Hathaway & Shapiro, *supra* note 12, at 313.

153 *See* McDorman, *supra* note 54, at 212-14 (noting that although regional port state MoUs strive to standardize inspection and enforcement practices, deviations remain given that various port state members may not have ratified the international maritime treaties and thus may, or may not, feel compelled to enforce their terms); Bang & Jang, *supra* note 58, at 184 (observing the variable quality in performance between the various regional PSC systems and the possibility that such variance may lead shipowners to opt for "weaker" port regimes).

154 *See, e.g.*, Brewster, *supra* note 20, at 301-02 (pointing out other state motivations); Martin, *supra* note 21, at 437 ("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.").

155 *See* Hathaway & Shapiro, *supra* note 12, at 342.

156 *See* Fourth Meeting of the Special Tripartite Committee, *supra* note 4, at 8 (arguing that states did not enforce the MLC against other vessels and states because some lacked "the necessary political

Imbalances between states and their respective power positions threaten to create a fragmented legal regime, one that reinforces measures in the interests of some state members over others.[157]

The United States, for instance, is a powerful maritime state[158] that enforces environmental and labor rules at its ports.[159] The U.S. Coast Guard maintains one of the most effective PSC systems in the world.[160] That system could have enabled it to enforce port state obligations against other port states, had the United States so wished.[161]

More specifically, under its International Port Security Program, the U.S. Coast Guard visits and inspects foreign ports to ensure "best practices" concerning the IMO's ISPS Code, "other international maritime security standards," and "port security measures beyond the minimum requirement of the ISPS Code."[162] Under that program, the U.S. Coast Guard has "visited nearly every coastal state in the world."[163] When its inspection identifies non-compliance, the United States issues advisories that list countries and ports that have failed to comply with the ISPS Code.[164] Its Coast Guard may deny the entry of vessels that have used one of those non-complying ports "as one of their last five ports of call."[165] This unilateral enforcement mechanism has strengthened international compliance with the ISPS Code, which

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weight to insist on the policy changes that would have helped during the pandemic."); *see also* Hathaway & Shapiro, *supra* note 12, at 341 ("It is no secret that powerful states are often offered special treatment under international law.").

157 *See* Martin, *supra* note 21, at 436 (noting "the complete freedom of states to interpret, implement, and enforce resulting treaties."); Robert Wai, *Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization*, 40 COLUM. J. TRANSNAT'L L. 209, 264 (2002) (expressing the concern that "it will be those actors with the resources, scale, and expertise to monitor a complex regulatory terrain who will be the most able to advance their interests."); JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 117 (Oxford University Press 2005) ("costly coercive enforcement of human rights treaties rarely occurs, and when it does, it usually dovetails with a powerful security or economic interest of the coercing state.").

158 *See Maritime Transport System (MTS)*, U.S. DEP'T. TRANSP. MAR. ADMIN. (Jan. 8, 2021),

https://www.maritime.dot.gov/outreach/maritime-transportation-system-mts/maritime-transportation-system-mts (providing statistics of U.S. sea trade and stating that approximately 99 percent of all overseas trade enters or leaves the United States by ship, amounting to $500 billion of waterborn cargo).

159 *See* U.S. Coast Guard, Commandant Instruction Materials 16711.12A: The Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147) and Port State Control (PSC) (1996), https://standards.globalspec.com/std/1090704/COMDTINST%2016711.12A; *see also supra* note 94.

160 *See, e.g.*, McDorman, *supra* note 54, at 207 (discussing how the United States is one of the few states that can exercise its own port laws owing to its "unique geographical, economic and political situation …").

161 *Id.*

162 *See* U.S. Coast Guard Atlantic Area, *Frequently Asked Questions*, https://www.atlanticarea.uscg.mil/Our-Organization/Area-Units/Activities-Europe/Maritime-Security/IPS-Program-FAQ/.

163 *Id.*

164 *Id.*

165 U.S. Coast Guard, Commandant Publication P16700.4, NVIC 06-03 Change 2, *Coast Guard Port State Control Targeting and Examination Policy for Vessel Security and Safety*.

"lacks its own compliance mechanisms."[166] It could have similarly strengthened compliance with the MLC.

The United States' decision not to enforce the MLC against other states may reflect that the United States, itself, does not abide by international maritime law,[167] including the obligation to allow seafarers to disembark at its ports.[168] Rather than abide by international maritime law, the United States cites national security concerns and adds various visa and eligibility criteria to seafarers wishing to access U.S. ports.[169] Second, as Hathaway and Shapiro note, "[l]aw that relies on external actors for enforcement is vulnerable in an obvious way to the independent choices of those external actors."[170] Goldsmith and Posner go further and argue that states engage in enforcement measures "depending on the economic and political interests of the enforcing state and the costs of enforcement," rather than "out of obedience to international law."[171] That is, governments may decide to take enforcement measures when the costs of doing so merit action. They may also *avoid* taking enforcement measures when they have something to gain by doing so. For example, port states may accept vessels at their ports that were turned away at U.S. ports to "exploit the business opportunities created" by transport activities.[172]

States may also avoid taking enforcement action against noncompliant states for diplomatic reasons.[173] For example, as the most reputable regional PSC system, the Paris MoU could have pressured its state members to comply with their legal obligations – but declined to do so. Instead, on December 17, 2020, the Paris MoU issued a Circular encouraging members to

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166 *See* LLOYD'S MIU HANDBOOK OF MARITIME SECURITY 42 (Rupert Herbert-Burns, Sam Bateman, & Peter Lehr, eds. 2009).

167 *See* Int'l Lab. Org. [ILO], Int'l Lab. Conf. 106TH SESS., OBSERVATION (CEACR) CONCERNING CONVENTIONS NO. 55 & 147 (2017) https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:3287816,102871,United%20states%20of%20America,2016 (criticizing U.S. national laws and practices that violate a number of standards concerning the treatment of foreign seafarers working on board U.S.-flagged vessels).

168 *See* INT'L LAB. ORG. [ILO], TRIPARTITE MEETING OF EXPERTS ON THE IMPLEMENTATION OF C185, ¶ 89 (Feb. 2015), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/meetingdocument/wcms_407638.pdf (statement of the Seafarer Vice-Chairman) (accusing the United States of violating its obligation to allow seafarers access to shores); Graham, *supra* note 120, at 71-72 (discussing various U.S. efforts to restrict access to their ports following the Sept. 11 attacks because those workers were seen "as part of the threat to security"); Bauer, *supra* note 83, at 654 ("With its requirement of D-1 visas, the United States has the most notoriously difficult shore leave standards.").

169 *See, e.g.*, Graham, *supra* note 120, at 71-72.

170 *See* Hathaway & Shapiro, *supra* note 12, at 347.

171 GOLDSMITH & POSNER, *supra* note 157, at 117.

172 *See* Patrick C.R. Terry, *Enforcing U.S. Foreign Policy by Imposing Unilateral Secondary Sanctions: Is Might Right in Public International Law?*, 30 WASH. INT'L L.J. 1, 2-3 (2020).

173 *See, e.g.*, Sean D. Murphy, *Taking Multinational Corporate Codes of Conduct to the Next Level*, 43 COLUM. J. TRANSNAT'L L. 389, 395-96 (2005).

adopt "a common approach" to resume inspection activities.[174] With express reference to the hundreds of thousands of seafarers "long overdue for repatriation and stranded on board ships," it instructed port states that "[i]f repatriation is not possible …, the possibility to divert the ship to a port where repatriation is possible should be taken into account."[175] Rather than enforce the MLC against disobedient port state members, the Paris MoU diplomatically granted its member states permission to avoid their legal requirements.

Third, increasing nationalism and populism continue to drive states away from participating in international regimes,[176] at least in a meaningful manner.[177] The United States, for example, began to decouple from international institutions and legal initiatives well before the Trump Administration famously withdrew from the Paris Climate Accord and the World Health Organization.[178] Professor Krieger argues that populist governments advance international law "as a law of coordination," yet their "practices are not coherent…." [179] Consequently, populist governments cultivate legal practices that threaten the "interpretation of international legal rules."[180] Under this theory, governments view international organizations as state servants.[181] Rendering international law and legal bodies subsidiary to national interests, Krieger argues, "may significantly increase instances of noncompliance."[182]

174 *See* Paris MoU, Temporary Guidance Related to COVID-19 for Port State Control Authorities (2020).

175 *Id.* ¶ 13.

176 *See, e.g.*, Heike Krieger, *Populist Governments and International Law*, 30 EUR. J. INT'L L. 971, 972 (2019) (observing that the election of President Trump "raised the concern that populist governments … [could] contribute to a broader crisis in international law.").

177 *See, e.g.*, Iza Ding, *Performative Governance*, 72 WORLD POL. 525, 527 (2020) (describing how authoritarian governments may exercise "performative legitimacy" by obtaining political support by promising to engage on the international platform without delivering "what citizens demand and deserve."); Andrew Levin, *Whitewashing and Extortion: Why Human Rights-Abusing States Participate in UN Peacekeeping Operations*, 46 INT'L INTERACTIONS 778, 779 (2020) (arguing that disobedient states knowingly participate in U.N. enforcement to "whitewash" their own disobedience).

178 *See* Joel R. Paul, *Holding Multinational Corporations Responsible under International Law*, 24 HASTINGS INT'L & COMP. L. REV. 285, 286-87 (2001) (discussing examples of "U.S. opposition to international institutions and legal initiatives" over the last three decades, including the United States' withdrawal from UNESCO, its withdrawal from the jurisdiction of the International Court of Justice, and its failure to pay U.N. dues).

179 *See* Krieger, *supra* note 176, at 973.

180 *Id.*

181 *Id.* at 978-79.

182 *Id.* at 982.

B. Third Parties

Under the *Outcasting* framework, enforcement is carried out either by first parties – those states that were directly harmed by the disobedient behavior – or also by third parties.[183] In the latter instance, states other than those directly harmed may suspend benefits or impose countermeasures against the disobedient state.[184] In the maritime context, regional PSC systems such as the Paris MoU maintain a blacklist of disobedient vessels. Accordingly, port states other than the harmed state may enforce the MLC.[185]

On the one hand, the implications of this third-party enforcement system are more significant under the "no more favorable treatment" proviso, given that it broadens the ability of third parties to enforce penalties against even those flag states that have not opted into the legal regime.[186] One could imagine how this regime could play out against flag states that, for diplomatic reasons, were disfavored by a state or group of states.

On the other hand, the misfeasor may be a kindred port state, in which case enforcement may be less probable, as witnessed by the Paris MoU circular mentioned earlier.

The MLC's system of outsourced enforcement is thus a menu of state decisions. States may choose whether to enforce the rules, what form of penalty to impose, which states to enforce against, and the like. The most critical of the MLC's characteristics is that its system is non-adjudicatory and permissive, thus granting that discretion in the first place.

The next Part of this Article argues that these characteristics are not unique to the MLC or the ILO. In fact, outsourcing enforcement has played "an important role in the emergence of international law over the last several centuries."[187] It is reflected in current efforts to galvanize new international legal instruments. The implications of the MLC's weaknesses are consequently important beyond the ILO's halls.

III. IMPLICATIONS FOR GLOBAL GOVERNANCE

Recourse to international "law without police" has attracted growing attention in legal academia.[188] That international organizations might

183 Hathaway & Shapiro, *supra* note 12, at 318-19.

184 *Id.*

185 *See* PARIS MOU, *supra* note 62, § 4.1(1).

186 *See* McDorman, *supra* note 54, at 212 (discussing the "superior position of the authority of the port state over visiting vessels vis-à-vis the authority of the flag state" given that port states can "apply an international treaty against a visiting vessel even though the flag state of the visiting vessel is not a party to that treaty.").

187 *See* Kar, *supra* note 9, at 467.

188 *See* Hathaway & Shapiro, *supra* note 12, at 282-83.

somehow "render noncooperation sufficiently costly relative to its alternative"[189] has seemingly answered the age-old question of whether international law can compel state obedience.[190] As Hathaway and Shapiro take pains to note, there are *so many* international organizations, legal treatises, and regimes that externalize the enforcement of international law that they were compelled to design a framework to distinguish among the various systems.[191] Outsourcing enforcement is thus not an exception to the rule; it has become the rule.[192]

Hathaway and Shapiro's approach to externalized enforcement is far more optimistic than my own (the benefits of pandemic hindsight), but it is not quixotic. The authors recognize that an external enforcement regime necessarily requires some degree of cooperation."[193] Robin Bradley Kar similarly argues that this enforcement rests on an increasingly shared and stable sense of international legal obligation."[194] Thus, the long-term effectiveness and legitimacy of an outsourced international legal regime turn on whether states, both the weak and powerful, agree to participate.[195]

The ILO's inefficacious system of outsourced enforcement thus reverberates ominously.[196] Port states stopped participating. The "humanitarian crisis" testifies to the tangible costs of regime avoidance, placing the very mission and legitimacy of the ILO s governance in doubt.[197] The MLC's lessons are therefore important for future governance efforts. They echo the cautions of state participation whispered in the literature while imparting the perils of non-adjudicatory and permissive systems of outsourced enforcement. Those lessons take on greater importance given concurrent efforts to galvanize new international treaties incorporating the same state-centric systems of enforcement[198] described next.

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189 *See* Kar, *supra* note 9, at 467.

190 *See id.*

191 *See* Hathaway & Shapiro, *supra* note 12, at 302-08.

192 *Id.* (arguing that international law "operates almost entirely through outcasting and external enforcement.").

193 *Id.* at 340.

194 *See* Kar, *supra* note 9, at 472.

195 *See* Hathaway & Shapiro, *supra* note 12, at 342.

196 *See* Doumbia-Henry, *supra* note 5, § 3.4 (describing the critical issues affecting international shipping and seafarers due to the pandemic); Fourth Meeting of the Special Tripartite Committee, *supra* note 4, at 8, ¶ 10 (discussing the ways in which the ILO's maritime system failed to protect seafarers).

197 *See, e.g.*, UNCTAD, Review of Maritime Transport, *supra* note 31, at 29 ("The pandemic is a litmus test not only for globalization but for global solidarity as well.").

That is not to suggest that the MLC is an unworkable convention. Indeed, the convention pulled together governments, workers, and employers in a complex transnational sector. Before the pandemic changed the compliance calculus, states mostly obeyed the MLC's rules and enforced those rules against disobedient vessels. Nevertheless, the palpable issues of noncompliance that arose during the pandemic signify that the convention is imperfect.

198 *See, e.g.*, Sungjoon Cho & César F. Rosado Marzán, *Labor, Trade, and Populism: How ILO-WTO Collaboration Can Save the Global Economic Order*, 69 AM. UNIV. L. REV. 1771, 1773 (2020) (arguing that

A. Global Supply Chain Governance

Scholarly and institutional efforts are underway to establish a cohesive and binding legal framework for global supply chains that would delegate enforcement to states.[199] Even without such a framework, approximately 70 percent of international trade takes place along global supply chains.[200] The number of multinational corporations and global supply chains has been steadily increasing.[201] Multinational corporations have shifted much of their production to developing countries to perform labor-intensive manufacturing and assembly of goods before reimporting those goods for sale.[202] On the one hand, the expansion of global production has created millions of jobs for global workers, including in the global South.[203] On the other hand, efforts to produce goods faster and cheaper than the global competition often lead to deteriorating labor standards such as working hours, leave, wages, and benefits.[204]

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international governance "needs an urgent update" to regulate global supply chains); Nathan Lillie, *The ILO Maritime Labour Convention, 2006: A New Paradigm for Global Labour Rights Implementation*, *in* CROSS-BORDER SOCIAL DIALOGUE AND AGREEMENTS: AN EMERGING GLOBAL INDUSTRIAL RELATIONS FRAMEWORK? 191, 196 (Konstantinos Papadakis ed., 2008) (arguing that the ILO should establish an instrument like the MLC for transnational corporations).

199 *See, e.g.*, Justine Nolan, *Human Rights and Global Corporate Supply Chains: Is Effective Supply Chain Accountability Possible?*, *in* BUILDING A TREATY ON BUSINESS AND HUMAN RIGHTS 238 (Surya Deva ed., 2017) (describing legal accountability in supply chains as "an incomplete patchwork of legal and non-legal frameworks that vary from country to country and industry to industry."); Diller, *supra* note 45, at 329 (arguing that multinational corporations and globalized production have resulted in a "transnational regulatory void") (internal citations omitted); Anne Posthuma & Arianna Rossi, *Coordinated Governance in Global Value Chains: Supranational Dynamics and the Role of the International Labour Organization*, 22 NEW POL. ECON. 186, 187 (2017) (arguing that international organizations have a role to play in regulating transnational economic sectors "given the need for strengthened governance at the supranational level…"); Paul, *supra* note 178, at 285 (acknowledging efforts to "hold multinational corporations responsible for environmental damage and violations of human rights and labor rights under international law."); Cho & Rosado Marzán, *supra* note 198, at 1173 (arguing that the regulatory structure "needs an urgent update to deal with the pressing issues of the day…").

200 UNCTAD Review of Maritime Transport, *supra* note 31, at 22.

201 *See* Posthuma & Rossi, *supra* note 199, at 186 (arguing that global supply chains "now account [] for an estimated 80 per cent of global trade."); Nolan, *supra* note 199, at 240 (discussing the increasing activities of supply chains since the 1990s).

202 *Id.* at 188; Cho & Rosado Marzán, *supra* note 198, at 1174 (describing how global supply chains have "fueled" the relocation of production from the global north to the global south).

203 *See* Valentina Grado, *Decent Work in Global Supply Chains: Mapping the Work of the International Labour Organization*, 10 EUR. Y.B. INT'L ECON. L. 53, 54 (2020) (noting the evolution of global production from "mother" companies in the global North to, eventually, subsidiaries operating in the global South).

204 *See* Cho & Rosado Marzán, *supra* note 198, at 1177 (arguing that supply chain production has harmed the working conditions of workers "from the Global South…"); *see generally* Kevin Kolben, *Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labor Regimes*, 48 HARV. INT'L L.J. 203, 206 (2007) (noting that concerns of corporate races to the bottom have driven transnational labor regulatory efforts).

Commentators have long complained that transnational regulations are too state-centric and thus fail to regulate transnational exchanges.[205] The obligations imposed by traditional international treaties cannot follow global production across national territories.[206] And yet, efforts to establish an international legal instrument in transnational sectors apart from the maritime industry have faced resistance across public and private actors. Corporations enjoy the capital advantages of unfettered business decision-making, and the developed countries that house them enjoy profitable tax revenues.[207] It is therefore not surprising that binding regulatory incentives wane.

Rather than agree to mandatory regulations, governments and private actors have adopted alternative, voluntary governance instruments.[208] Unfortunately, those instruments have proved incapable of harmonizing international standards, accountability, or enforcement.[209]

On the private level, multinational corporations have been adopting private regulations and codes of conduct since the 1990s.[210] These initiatives

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205 *See, e.g.*, Christoph Schreuer, *The Waning of the Sovereign State: Towards a New Paradigm for International Law?*, 4 EUR. J. INT'L L. 447, 448-49 (1993) (arguing that a state-centric approach to international law "served useful purposes," but that "the structures of the modern state and its legal system are not necessarily a useful model for international organization."); Janelle Diller, *The Role of the State in the Exercise of Transnational Public and Private Authority over Labour Standards*, 17 INT'L ORG. L. REV. 41, 43 (2020) ("The growing insistence of states on their own national interests is a symptom of the weakness of the state-centric conception of governance in the face of economic globalization."); Milena Sterio, *The Evolution of International Law*, 31 B.C. INT'L & COMP. L. REV. 213, 213-14 (2008) (discussing the manners in which traditional, state-centric international law is ill-fitted to the "potent forces of globalization"); Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT'L L. 485, 489 (2005) ("scholars are coming to recognize that international law itself needs an expanded focus, one that situates cross-border norm development at the intersection of legal scholarship on conflict of laws…as well as traditional international law."); Frank J. Garcia, *Globalization and the Theory of International Law*, 11 INT'L LEG. THEORY 9, 9 (2005) ("Contemporary globalization both requires *and permits* the re-casting of international law away from a "society of states" model and toward a true model of a global society, or even a global community.").

206 *See* Lillie, *supra* note 198, at 214 ("Despite the growth of private transnational industrial relations systems, ILO agreements continue to be embedded in the formal structures of an international system based on relations between sovereign States.").

207 *See* Sornarajah, *supra* note 45, at 145-46 (describing how the process of designing international rules governing corporate behavior in other countries have been delayed owing, in part, to opposition by the corporations and developed countries); Sara L. Seck, *Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?*, 46 OSGOODE HALL L.J. 565, 566-67 (2008) (describing the historical reluctance of home states to regulate transnational corporations and their activities); Diller, *supra* note 205, at 43 ("The growing insistence of states on their own national interests is a symptom of the weakness of the state-centric conception of governance in the face of economic globalization."); Grado, *supra* note 203, at 61 (describing the opposition of the ILO's employer representatives to the ILO's transnational governance initiatives); Murphy, *supra* note 173, at 395 (describing the opposition of multinational corporations towards binding international treaties).

208 *See* Sornarajah, *supra* note 45, at 145-46.

209 There is a voluminous literature documenting the failures of private initiatives to harmonize social standards. *See, e.g.*, SAROSH KURUVILLA, PRIVATE REGULATION OF LABOR STANDARDS IN GLOBAL SUPPLY CHAINS 7-11 (Cornell University Press 2021) (describing the residual failures of corporate governance and offering various explanations for the "lack of sustainable progress in improving working conditions.").

210 *Id.* at 3 (describing the proliferation of private corporate regulations since the 1990s).

set out minimum social standards concerning human and labor rights and environmental standards.[211] Once adopted, they apply to all corporate factories and operations along the chain, usually in developing countries.[212] The standards and rules are enforced by internal auditing efforts managed by the corporate headquarters themselves.[213]

Meanwhile, on the public level, there is no consensus concerning accountability along supply chains when violations of international law are carried in other countries.[214] On 17 June 2021, in *Nestlé v. Doe*, the U.S. Supreme Court rejected a complaint against corporations headquartered in the United States for international torts carried out along their supply chains abroad.[215] It held instead that the pleading did not provide sufficient facts to support the application of domestic law.[216] By contrast, courts in the Netherlands,[217] the United Kingdom,[218] and Canada[219] have recently held lead companies liable for their subsidiaries' disobedience.[220] Consequently, the liability for violations of social and environmental standards in supply chains turns on the host country, the private initiatives of the corporations involved, and the varied national legislation of the home state.

The following sections explain how the ILO and advocates have previously attempted to regulate this sector and how the MLC has become, to the possible detriment of effective enforcement, a source of inspiration for a new international legal instrument.

B. Previous International Governance Initiatives

The increasingly transnational nature of production has exposed abusive labor conditions along supply chains but has thus far failed to spur new

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211 *Id.* at 2 ("Over the past three decades, there has been a plethora of private, voluntary regulatory initiatives with regard to social (labor) and environmental issues.").

212 *See* Murphy, *supra* note 173, at 393.

213 *See* KURUVILLA, *supra* note 209, at 3 (describing various auditing initiatives).

214 *But see* Seck, *supra* note 207, at 566 for the proposition that "there is greater consensus that home states are not prohibited from regulating" transnational economic activities "where a recognized basis of jurisdiction exists…."

215 Nestlé United States, Inc. v. Doe, 141 S.Ct. 1931 (2021) (holding that the international torts carried out against children forced into slavery, and which directly profited U.S. corporations, could not be litigated under the Alien Tort Statute).

216 *Id.*

217 Vereniging Milieudefensie, et al. v. Royal Dutch Shell, C/09/571932/HA ZA 19-379 (26 May 2021).

218 Okpabi and others (Appellants) v. Royal Dutch Shell Plc and another (Respondents), 2021 UKSC 3 (12 Feb. 2021); Dominic Liswaniso Lungowe and others v. (1) Vedanta Resources Plc & (2) Konkola Copper Mines Plc (2017 EWCA Civ 1528).

219 Nevsun Resources Ltd. v. Araya, 2020 SCC 5 (28 Feb. 2020).

220 For example, the United Kingdom led efforts to adopt mandatory legislation along supply chains when it adopted the Modern Slavery Act. *See* Nolan, *supra* note 199, at 248-49.

international labor laws to improve those conditions.[221] The paradigmatic example of hazardous working conditions occurred in 2013, when at least 1,132 Bangladeshi garment workers who produced textiles for U.S. and EU corporations were killed and thousands injured when their building, the Rana Plaza, collapsed.[222] Although the Rana Plaza disaster is known as "the worst industrial accident ever recorded in the global garment industry," similar accidents occurred in Dhaka the year before[223] and had been carried out along chains of production for corporations such as Disney and Walmart for decades.[224]

To prevent future catastrophes and build a more robust infrastructure of corporate accountability, the ILO has experimented with various governance models outside of its treaty regime. Those models outsource inspection and limited enforcement to non-governmental entities and create public-private partnerships.[225] For instance, under its Better Work Program, the ILO implements a local inspection and certification system composed of member government agencies, local factories, and workers' associations.[226] In most of the participating countries, however, factory participation is voluntary. Furthermore, those programs are not cross-boundary; consequently, goods are not inspected after leaving the production chain.[227]

The ILO and the United Nations have also established various nonbinding international declarations, including the ILO's Multinational Enterprises Declaration;[228] the OECD Guidelines for Multinational Enterprises;[229] the

221 *See* Kevin Kolben, *The Consumer Imaginary: Labor Rights, Human Rights, and Citizen-Consumers in the Global Supply Chain*, 52 VAND. J. TRANSNAT'L L. 839, 854 (2019) (describing labor conditions along supply chains).

222 *Id.* (characterizing the Rana Plaza event as "the most egregious example of abusive labor conditions in modern history…").

223 *See* Posthuma & Rossi, *supra* note 199, at 197.

224 *See* Kolben, *supra* note 221, at 853-54 (describing criticism of Walmart and Disney for using suppliers in developing countries despite reports of abusive labor practices between 1996-2006).

225 *Id.* at 187 (describing three different case studies of the ILO's attempts to regulate transnational economic sectors "by using its traditional tools of social dialogue to promote labour standards … by fostering collaborations between public, private, trade union and civil society governance actors at both international and national levels.").

226 The ILO/IFC Better Work Program originated in the United States-Cambodia Textile Agreement as Better Factories Cambodia. Its success in establishing a neutral inspection body prompted the ILO and the IFC to elaborate their partnership through a more globalized Better Work Program. Although the details of this program extend beyond this Article, volumes of labor scholarship have been devoted to the subject. *See, e.g.*, Posthuma & Rossi, *supra* note 199, at 195-96.

227 *See* Thomas & Turnbull, *supra* note 45, at 550 (noting that the ILO's Better Work programs are sector specific and fail to regulate across borders). Nevertheless, through auditing and reporting, the program is able to highlight compliance issues, which have been a valuable source of information for responsible global brands. *See* Posthuma & Rossi, *supra* note 199, at 196.

228 Int'l Lab. Org., Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, ILO Doc. GN 204/4/2, U.N. Doc. E/C.10/AC.2/3 (Annex IT) (1977), *reprinted in* 17 INT'L LEGAL MATERIALS 422 (1978).

229 Org. for Econ. Coop. & Dev't, Declaration on International Investment and Multinational Enterprises, OECD Doc. C(76)99 (Final) (1976), *reprinted in* 15 INT'L LEGAL MATERIALS 967 (1976).

UN Global Compact;[230] and the UN Guiding Principles on Business and Human Rights.[231] These global initiatives call on corporations and entities to standardize their reporting, monitoring, and complaints procedures.[232] Nevertheless, critics complain that public and private compliance remains ad hoc and insufficient without binding enforcement mechanisms.[233]

The UN Human Rights Council has noted these weaknesses and has attempted to remedy them through a new international instrument. In 2014, it launched an open-ended governmental working group (IGWG) to create an international treaty regulating the human rights practices of multinational corporations "and other business enterprises."[234] A third draft of that treaty was published in August 2021.[235] Its draft articles vest all state parties with legal jurisdiction over "claims brought by victims, irrespective of nationality or place of domicile" so long as the abuse, or activities/omissions "contributing to" the abuse took place within the state.[236]

Unlike the strong domiciliary evidence required under national laws and courts as recently witnessed in *Nestlé*,[237] the draft treaty stipulates to domicile where businesses are incorporated, registered, have "principle assets or operations" or central administration, or is a "principle place of business or activity on a regular basis."[238] The treaty would thus broaden the scope of protection to worker victims considerably beyond the locus of the workers and, potentially, the work performed.

While efforts to broaden the scope of protections and business accountability to workers have given some rights advocates hope, its prospects are bleak. John Ruggie observes that the group's first session was attended by "fewer than ten delegations, including the initiative's sponsors…."[239] It has

230 U.N. Global Compact (last visited June 21, 2021), http://www.unglobalcompact.org.

231 Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (Guiding Principles), U.N. Doc. HR/PUB/11/04 (2011).

232 *See* Grado, *supra* note 203, at 59.

233 *See id*; Diller, *supra* note 45, at 329; Thomas & Turnbull, *supra* note 45, at 539 (proposing a strategy "to establish a new standard (Convention) for vertical regulation along [global supply] chains…").

234 *See* U.N. Human Rights Office of the High Commissioner, Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, A/HRC/26/L.22/Rev.1 (2014).

235 U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, LEGALLY BINDING INSTRUMENT TO REGULATE, IN INTERNATIONAL HUMAN RIGHTS LAW, THE ACTIVITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES, OEIGWG Sec. Rev. Draft 17.08.2021 [hereinafter "LEGALLY BINDING INSTRUMENT"].

236 *Id.* at art. 9.1.

237 *See* Nestlé United States, Inc. v. Doe, 141 S.Ct. 1931 (2021).

238 *See* LEGALLY BINDING INSTRUMENT, *supra* note 235, at art. 9.1.

239 *See* John L. Ruggie, *Get Real, Or We'll Get Nothing: Reflections on the First Session of the Intergovernmental Working Group on a Business & Human Rights Treaty*, BUS. & HUM. RTS. CTR., HARV. KENNEDY SCH., 1, https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/Ruggie_Get_Real.pdf (noting that although the EU initially attended, it "walked out on the second day.").

since held seven sessions, which have fared no better.[240] Most developed countries have either boycotted the sessions[241] or are proposing a framework agreement rather than a legally-binding instruments.[242] In other words, states are at a political impasse.[243]

C. The MLC's Broad Appeal

Before the pandemic, the MLC was considered the "global pilot project" for establishing a new legal approach to transnational governance,[244] including global supply chains.[245] Just as the MLC authorizes port states to inspect and enforce working conditions of seafarers on board vessels, advocates argue that a convention could authorize states along chains of production to inspect and enforce the working conditions of sectoral workers.[246]

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240 *See, e.g.*, U.N. Hum. Rts. Council., Draft Report, Report on the Seventh session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session7/igwg-7th-draft-report.pdf (noting that the draft text was still subject to a series of negotiations in various working groups).

241 *See* Business & Human Rights Resource Centre, *Day 1 Summary: UN Treaty on Business & Human Rights Negotiations Kick Off Amid Major Global Uncertainties* (Oct. 2020), https://www.business-humanrights.org/en/latest-news/day-1-summary-un-treaty-on-business-human-rights-negotiations-kick-off-amid-major-global-uncertainties/ (noting the absence of support among industrialized countries). Although the European Union and China have attended the meetings, they have criticized the initiative for lacking legal basis and broad participation. *Id.*

242 *See, e.g.*, Oral Statement on behalf of the United States Government (Oct. 25), *available at* https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session7/Pages/Session7.aspx.

243 *See* Carlos Lopez, *Struggling to Take Off?: The Second Session of the Intergovernmental Negotiations on a Treaty on Business and Human Rights*, 2 BUS. & HUM. RTS. J. 365, 365-66 (2017) (describing the political dynamics of the second committee session).

244 *See* Int'l Lab. Org., *Interview with Cleopatra Doumbia-Henry* (Feb. 24, 2014), http://www.ilo.org/global/standards/maritime-labour-convention/news/WCMS_236264/lang--en/index.htm.

245 *See* MCCONNELL ET AL., *supra* note 45, at 4 ("The international maritime regulatory system has a well-established and generally effective approach that has been developed over the last century to address the jurisdictional challenges posed by the primarily international character of this sector."); Natalie Klein, *International Law Perspectives of Cruise Ships and COVID*-19, 11 J. INT'L HUM. LEG. STUD. 282, 286 (2020); Lillie, *supra* note 198, at 194-99 (arguing that the MLC's transnational regulatory structure could be used as a model for future instruments governing transnational corporations); Whitlow & Subasinghe, *supra* note 28, at 129 ("The characteristics, principles and concepts of the MLC, 2006 can be applied to a future cross-sectoral ILO instrument promoting decent work in supply chains."); Thomas & Turnbull, *supra* note 45, at 539 (arguing that the ILO should apply the same vertical regulation to a new supply chain convention that is adopted in the MLC).

246 *See* Diller, *supra* note 45, at 332; Nathan Lillie, *The ILO Maritime Labour Convention, 2006: A New Paradigm for Global Labour Rights Implementation*, *in* CROSS-BORDER SOCIAL DIALOGUE AND AGREEMENTS: AN EMERGING GLOBAL INDUSTRIAL RELATIONS FRAMEWORK? 191-93 (Konstantinos Papadakis, ed. 2008) (discussing the "new paradigm" of the MLC, 2006, including its system of enforcement allowing states to enforce labor regulations "directly on *each other's* ships…") (emphasis in original); Whitlow & Subasinghe, *supra* note 28, at 127 ("As a next-generation ILO instrument, the MLC should be used as a model or source of inspiration for promoting decent work in other industries."); Thomas & Turnbull, *supra* note 45, at 550-53 (discussing the innovative approach of the MLC as a model for future ILO governance of global supply chains); Cho & Rosado Marzán, *supra* note 198, at 1778.

To illustrate, a global supply chain convention could follow the MLC's structure by requiring factories to maintain employment contracts with their workers. Under the convention's articles, those contracts could stipulate minimum conditions of working hours, rest, leave, benefits, and wages. To have their goods certified for compliance, factory owners would have to provide those contracts to host states for inspection and certification. Port authorities could then require proof of the certificates before permitting goods to enter their borders. Finally, a "no more favorable treatment" proviso, like that in the MLC, could ensure that inspections are carried out with respect to all goods, irrespective of whether the countries along the production chain had ratified the convention. The prospect of having goods stopped at the border – which will cost the factories by halting production and may cost states through the loss of sales tax – may disincentivize noncompliance throughout the supply chain.

Who would enforce those obligations? Although the ILO has begun taking preliminary steps to investigate the possibility of designing an instrument,[247] there are no signs that it is reevaluating its approach to outsourced enforcement. On the contrary, the ILO's report notes that, as it did with the MLC, the ILO could create "synergies" across "the whole governance scheme" that enabled "a system of checks and balances for monitoring, reporting and certifying" that all relevant actors were fulfilling their legal responsibilities.[248]

As the ILO's efforts advance, the MLC's system of outsourcing becomes more important to the discursive lawmaking process.[249] Even if negotiations are successful and the ILO's members adopt a transnational legal instrument, the efficacy of that instrument will turn on whether the ILO avoids repeating the MLC's enforcement weaknesses. Nevertheless, as I explain later, enforcement reform will not come easily.

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247 The ILO Governing Body's Workers' Group first raised the issue in 2006 and subsequently raised it in every Governing Body session between 2007 and 2013. *See* Thomas & Turnbull, *supra* note 45, at 546 (describing the history of the ILO's treatment of supply chains).

248 *See* Int'l Lab. Org., ILC, 105th Sess., *Rep. IV, Decent Work in Global Supply Chains*, at 64 (2016), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_468097.pdf. *See also* INT'L LAB. ORG., GLOB. COM. ON THE FUTURE OF WORK, WORK FOR A BRIGHTER FUTURE 44 (2019), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/publication/wcms_662410.pdf (declaring the MLC "a source of inspiration in addressing the challenges of workers, employers, platforms and clients operating in different jurisdictions.").

249 *See Decent Work in Global Supply Chains*, *supra* note 248, at 66, para 199 (noting that a future instrument would entail "the primary role of the state to ensure enforcement of legislation …" whereas it would be "the role of the ILO … to support, administration, facilitation and/or hosting of public, private and social governance systems.").

D. The MLC's Ominous Reach

The pandemic confirmed how and to what extent states may make enforcement decisions based on power balances, political fealties, and national interests and not based on compliance. Systems of outsourced enforcement, such as the MLC's system, also allow states to unilaterally interpret and apply international norms based on domestic laws and priorities. These drawbacks will not be limited to the maritime sector. Powerful states may monopolize the interpretation and enforcement of production standards just as easily.

To illustrate, just as U.S. ports are important in the maritime context, its borders are important in the trade context. And just as the United States requires compliance with some international maritime rules to enter its ports, it also requires compliance with the ILO's fundamental labor rights in its trade relations.[250] The United States recently included a provision in the United States-Mexico-Canada Agreement (USMCA) that requires all states parties to prohibit the entry of any goods made by forced labor abroad at their borders.[251] Even if goods are not coming from a trade partner country, under section 307 of the U.S. Tariff Act,[252] the U.S. Customs and Border Patrol (CBP) blocks goods at the border that it decides were produced in whole or in part by forced labor abroad.[253]

Like its enforcement of maritime law, the U.S. enforcement of the ILO's fundamental labor rights raises questions concerning its unilateral interpretations of international law and associated enforcement activities.[254] The ILO's supervisory bodies have objected to U.S. federal and state laws[255] just as they have objected to U.S. maritime laws.[256] Those objections include

250 For a comprehensive mapping of these labor requirements and the manners in which the United States has worked with its trade partners on labor matters, *see* OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, STANDING UP FOR WORKERS, SPECIAL REPORT (Feb. 2015), https://ustr.gov/sites/default/files/USTR%20DOL%20Trade%20-%20Labor%20Report%20-%20Final.pdf.

251 United States-Mexico-Canada Agreement, Can.-Mex.-U.S., Ch. 23, art. 23.6(1), Nov. 30, 2018 (effective July 1, 2020).

252 19 U.S.C. § 1307.

253 *See* Pub. L. No. 114-125, *Trade Facilitation and Trade Enforcement Act of 2015* (eliminating the "consumptive demand" requirement in Sec. 307 of the Tariff Act to broaden the prohibition of the importation of goods made by forced labor).

254 *See* LeClercq, *supra* note 22, at 38-41 (describing the tensions between U.S. interpretations of the ILO's labor standards and the ILO's interpretations); Lance Compa, *The ILO Core Standards Declaration: Changing Climate for Changing the Law*, 7 PERSPECTIVES ON WORK 24, 25 (2003) (noting how U.S. trade negotiators seem to use ILO norms to define labor rights and to interpret their meanings).

255 *See, e.g.*, ILO CEACR, WORST FORMS OF CHILD LABOUR CONVENTION, 1999 (NO. 182) – UNITED STATES OF AMERICA (2021) (noting concerns of young children engaged in hazardous work in agriculture); ILO COM. ON FREEDOM OF ASSOCIATION, Case No. 2227 (United States of America), Rep. No. 332, para. 554 (Nov. 2003); ILO COM. ON FREEDOM OF ASSOCIATION, Case No. 2547 (United States of America), Rep. No. 350, para. 804 (June 2008) (disagreeing with the exclusion of graduate students and research assistants from the protections afforded under the National Labor Relations Act).

256 *See supra*, Part II.

U.S. laws and practices concerning forced labor.[257] The United States nevertheless enforces those international labor standards against its weaker trade partners and at its borders.[258] That discretionary enforcement is carried out to the detriment of legitimacy and fairness.

Advocates make a compelling case for a binding and enforceable international legal instrument capable of standardizing production throughout supply chains. Unless a new theory of outsourced enforcement takes shape, that instrument (and others like it) will remain vulnerable to states' decision-making and compliance calculus. The next Part describes my theory of outsourced enforcement, which aims to strengthen the system by preconditioning enforcement on formal and mandatory adjudication. It also explains why the members of international organizations like the ILO might willingly restrain their own discretion by adopting such a system in their future legal instruments.

IV. A THEORY OF OUTSOURCED ENFORCEMENT

States delegate responsibility for resolving global problems to international organizations and international lawmaking.[259] By outsourcing enforcement of international law, those organizations delegate such responsibility back to states. In the maritime context, 45 states – including the United States – attempted to resolve the global "humanitarian crisis" at sea by passing national directives making it safe for seafarers to travel and disembark during the pandemic.[260] Those diplomatic efforts proved incapable of compelling other states to comply with their international legal obligations.[261] Apart from diplomacy, states were also unwilling to escalate their enforcement activities or otherwise outcast complicit states from their maritime community. Thus, the current system of outsourcing enforcement fails to resolve global issues, despite the intentions of international organizations and their members.

The members of international organizations must enable their organizations to reclaim ownership over international law. I propose they do so

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257 *See* ILO CEACR, *Abolition of Forced Labour Convention, 1957 (NO. 105) – United States of America*, Observation, published 109th ILC Session (2021), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO:13100:P13100_COMMENT_ID:4046588:NO (noting concerns with a state law that violates the convention)*; see also* Susan Kang, *Forcing Prison Labor: International Labor Standards, Human Rights and the Privatization of Prison Labor in the Contemporary United States*, 31 NEW POL. SCI. 137, 150-56 (2009) (arguing that U.S. laws and practices concerning private prison labor infringe upon the prohibitions of forced labor contained in the ILO conventions).

258 *See* LeClercq, *supra* note 22, at 38-41.

259 *See* OKEKE, *supra* note 8, at 237; Klabbers, *supra* note 7, at 279-80.

260 *See supra*, Part I.B.

261 *See* Hathaway & Shapiro, *supra* note 12, at 325.

by creating adjudicative[262] bodies within international organizations capable of issuing mandatory enforcement directives.[263] In the maritime context, those directives could require port states to subject vessels flying the flag of a disobedient state to more detailed and frequent (costly) inspections. In other contexts, particularly those that involve in-kind benefits rather than public benefits, directives could mandate monetary or other pre-determined penalties proportional to the harm caused by disobedience.[264]

International adjudication promises to be no panacea, of course. State compliance and capacities will inevitably fluctuate, and national interests and conflicts will permeate at times. Nevertheless, outsourced enforcement so authorized will ensure a more transparent, coherent, and equitable process.

How can international organizations entice their members to adopt such a body? Conceiving of outsourced enforcement as a possible vulnerability refocuses international lawmaking – among international secretariats and their members – on discussing solutions appropriate to their given institution. Space does not permit me to propose solutions appropriate to the ILO – that will be addressed in future work. Rather, the following sections take up two elements of the broader discourse.

First, international organizations are often (but not always) governed by their member states. Consequently, states will be responsible for leading efforts to restrain their own discretion. Why would they? Second, in light of the controversy surrounding the adjudicative body at the World Trade Organization (WTO), why would other international organizations want to follow suit? These questions and their various explications denote significant hurdles along the way but do not, as I argue below, seal the fate of an adjudicative mechanism.

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262 *Id.* (arguing that mandatory directive would "control and restrict" discretionary enforcement and otherwise contain "the risk" of divergent actions).

263 *Id.* at 322-24 (arguing that enforcement regimes could transition from permissive to mandatory, and non-adjudicative to adjudicative, to overcome certain weaknesses).

264 In a recent article, Oona Hathaway et al. recommend a different approach. *See* Hathaway et al., *supra* note 140, at 87. They propose that a UN coordinator should provide positive incentives such as access to vaccines or increased funding for complying with international law during health-related emergencies. *Id.* at 90-96. These "proactive outcasting tools" would "encourage States to participate in more effective, and more onerous, regulatory systems in exchange for privileged access to global assistance both prior to and during public health emergencies." *Id.* While their innovative approach might adjust states' decision-making calculus during an emergency, it may also have the effect of harming the populations of disobedient governments by depriving them of critical health and financial resources when they are at their most vulnerable. This Article thus takes a different approach by targeting the disobedient state more directly through adjudication and in-kind or associated retributive actions.

A. The (Potential) Willingness to Adopt Adjudicative Bodies

International relations scholars have illustrated how the bureaucratic pathologies of international organizations impact their decisions.[265] The members of international organizations do not like change, particularly if that change threatens to reduce their discretionary powers.[266] It is not this Article's intention to paint an optimistic picture of reform, but rather to conceptualize the possibilities.

Any suggestion that states would voluntarily restrain their own discretion to enforce international law may sound farfetched. But does international law not, necessarily, restrain states' discretion? The give and take of international law – creating international rules at the cost of state sovereignty – is axiomatic. Yet ensuring that rules are obeyed seems to cross a theoretical divide. If we accept that states intend for the international laws they have written to be followed, we must consider that states might also agree to restrain their own discretion to achieve these laws' objectives. There are at least three reasons why they may do so.

First, as mentioned, states created international organizations to solve problems that they could not solve unilaterally. Implicit in that objective is recognizing that holistic governance is preferable to state-centric activities, or at least that state-centric activities have proven incapable of otherwise achieving global governance goals. State preference for multilateral governance is evident in transnational economic sectors such as maritime and the global production of goods. In those areas, states worry about fair competition, which requires a common set of social standards.[267] For international rules to achieve their regulatory objectives, they must compel compliance or risk creating a regulatory framework that rewards disobedient state competitors.

Recall that, when states designed the MLC, even powerful states like the United States supported an enforcement system that authorized regional port state bodies to enforce rules against individual states. Those states were comfortable with ceding some degree of discretion to achieve a common regulatory objective. Those states even incorporated the "no more favorable

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265 *See generally* ROBERT W. COX & HAROLD K. JACOBSON, THE ANATOMY OF INFLUENCE: DECISION MAKING IN INTERNATIONAL ORGANIZATIONS (1973) (describing various ways in which the internal bureaucratic processes in international organizations related to decision making).

266 *See generally* KLABBERS, *supra* note 8, at 24-27 (discussing the tensions inherent in "mission creep" and the ways in which member states attempt to protect their powers by limiting the powers of international organizations).

267 *See generally* Milde, *supra* note 111, at 207 (highlighting that the MLC was designed to "force cost-saving competitors permitting poor labour conditions to improve the seafarers' lives on board."); KURUVILLA, *supra*, note 209, at 220-22 (describing how corporate responsibility developed after strategists realized that "more competitive, sustainable supply chain management could become a key source of strategic advantage in an increasingly competitive marketplace, especially from an economics point of view.").

status" proviso to further broaden the convention's regulatory reach at the expense of states' ratification discretion.

Second, weaker states have a vested interest in advocating for a new enforcement regime within their international organizations that equalizes power. Many of those states are developing countries whose vulnerable citizens suffer from labor and environmental abuses.[268] Admittedly, some may be reluctant to lose their competitive advantage reaped by fewer regulations and "societal acceptance of exploitative" conditions.[269] Nevertheless, those states also remain vulnerable to the unilateral interpretations and enforcement activities of more powerful countries. They consequently have practical reasons to vie for neutral adjudication and enforcement.

Third, as mentioned above, many international organizations are governed by both state and nonstate actors, the latter of which may support reform. Consider the important role of the organizations of seafarers and shipowners, both of which drove efforts to adopt the MLC to level the shipping playing field. Professor Laurence Helfer, more broadly, draws attention to the historical ease with which the ILO's tripartite members have collectively agreed to expand the organization's powers.[270] To Helfer, that ease stands "at odds with the principal-agent theory that many scholars use to study international delegations."[271] Instead of "tightly control[ling] the authority they confer upon" their organization's agents, the ILO's members had "repeatedly endorse[d] the efforts of ILO officials and review bodies to augment their delegated powers."[272]

As Helfer aptly recognizes, the ILO's members do not act like traditional principals because they *are not traditional principals*.[273] They are also nonstate representatives of transnational sectors, with deep interests in securing global standards that strengthen their respective constituencies. In this regard, the ILO may not be alone.

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268 The MLC's legislative history reflects concerns among various developing countries that enforcement of the maritime sector should not rest with the ILO's traditional reputational bodies, but rather with "a permanent maritime monitoring body." *See, e.g.*, ILO, *Tripartite Subgroup of the High-Level Tripartite Working Group on Maritime Labour Standards, Final Report*, STWGMLS/2002/12 (June 24-28, 2002), ¶ 8 (statement of the government representative of Liberia).

269 Ashley Feasley, *Eliminating Corporate Exploitation: Examining Accountability Regimes as Means to Eradicate Forced Labor from Supply Chains*, 2 J. HUM. TRAFFICKING 15, 18 (2016) (noting the link between country conditions and exploitative labor practices).

270 *See* Laurence R. Helfer, *Monitoring Compliance with Unratified Treaties: The ILO Experience*, 71 L. & CONTEMP. PROBS. 193, 194 (2008).

271 *Id.* (internal citations omitted).

272 *Id.* at 194-95.

273 *Compare* Helfer, *supra* note 269, at 104-95 *with* Klaus Dingwerth, *Legitimating Global Governance in a Post-National World*, *in* INTERNATIONAL ORGANIZATIONS UNDER PRESSURE 251, 251 (Klaus Dingwerth et al. eds., 2019) (describing the WTO's internal processes in which non-state actors "were amongst those pushing the most strongly for 'non-trade values'" but lacked the power to "define the new terms . . . themselves.").

Professor M.J. Durkee points out that "in the last ten to fifteen years . . . a number of organizations have adopted innovative structures offering nonstate actors robust membership rights."[274] Citing UN Women and "other specialist innovators," Durkee maps an emerging trend in which international organizations are increasingly involving interested members of civil society, nongovernmental organizations, and corporations to guide and inform policy.[275] As long as nonstate actors may meaningfully contribute to policy- and decision-making, they may be able to expose the costs of unregulated and *ad hoc* enforcement. Greater awareness of uneven enforcement measures and their costs on states' citizens and markets may bolster states' efforts to strengthen multilateral enforcement.

B. Avoiding the Pitfalls of International Adjudication

Even if the members of international organizations can agree to establish an adjudicative body in principle, an entirely separate issue concerns whether adjudication is *desirable*. Emerging literature focuses on the various pitfalls of adjudication in international law.[276] For instance, the controversy surrounding the WTO's dispute settlement body (DSB)[277] has effectively paralyzed the organization.[278] A critical question concerns whether other international organizations wish to invite those challenges into their own, complex houses.

The WTO experience has, like the pandemic, taught how *not* to govern international law. The specific challenges surrounding the WTO's DSB may be somewhat confined[279] given that its appointment procedures require

274 Melissa J. Durkee, *International Lobbying Law*, 127 YALE L.J. 1742, 1818 (2018).

275 *Id.* at 1818-820 (describing the various activities within UN Women and other organizations to increase the participation of nonstate actors).

276 *See, e.g.*, Henry Lovat, *International Adjudication and its Discontents: A Pluralist Approach to International Tribunal Backlash*, 53 ISR. L. REV. 301, 301 (2020) (noting the proliferating literature challenging international tribunals). *See generally* Karen H. Alter et al., *Backlash Against International Courts in West, East and South Africa: Causes and Consequences*, 27 EUR. J. INT'L L. 293 (2016) (exploring backlash against sub-regional courts in three cases in which the governments were attempting to eliminate unfriendly decisions).

277 Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex, 233 I.L.M. 1226, 1869 U.N.T.S. 401.

278 The various challenges and obstacles confronting the WTO, which have effectively rendered its Appellate Body "alive on paper, but nothing more," have given rise to considerable academic literature that extends beyond the scope of this project. For a recent review, see Vineet Hegde et al., *Is the Rules-Based Multilateral Trade Order in Decline? Current Practices, Trends and Their Impac*t, 10 CAMBRIDGE. INT'L L.J. 32 (2021). For an in-depth account, *see* SIVAN SHLOMO AGON, INTERNATIONAL ADJUDICATION ON TRIAL: THE EFFECTIVENESS OF THE WTO DISPUTE SETTLEMENT SYSTEM (2019).

279 For a succinct and comprehensive description of the U.S. concerns with the WTO's DSB, including allegations that the DSB exceeds its mandate, *see* CONG. RSCH. SERV., THE WORLD TRADE ORGANIZATION'S (WTO'S) APPELLATE BODY: KEY DISPUTES AND CONTROVERSIES 2-23 (2021).

state consensus.[280] At the same time, organizations with similar consensus-driven procedures may be unable to secure the support to establish, let alone maintain, an adjudicative body. The UN IGWG, for instance, could not even entice state *attendance* at its preparatory sessions to discuss adopting a mandatory enforcement system.[281] Nevertheless, at least some organizations, like the ILO, operate under a different governance paradigm that gives nonstate actors either a voice or a vote in institutional procedures, which may protect against gridlock.[282]

More inclusive voting procedures do not cure all the drawbacks associated with international adjudication, of course. Even the ILO's nonstate actors have rebelled against its supervisory bodies, accusing its committees of exceeding their respective mandates.[283] The broader literature also warns of state dissonance and subterfuge when confronted by unfriendly adjudicative decisions.[284] Questions of power, legitimacy, scope, interpretation, bias, and a host of other concerns will thus undoubtedly confront any international decision-making body.

Notwithstanding the inevitable hurdles, a reconceptualization of the theory of enforcement would help alleviate the burden on states to reconcile international norms, state relationships, and national priorities. To the extent that nonstate actors are included in decision-making, an adjudicative body would help insulate international law from myriad state-centric drawbacks. It would also ensure that enforcement of international law remains compatible with international organizations' interpretations and intentions.

When it comes to international law enforcement, each failed experience – the MLC during the pandemic, the WTO's paralysis – provides critical opportunities for improvement. Will the pandemic experience prevent port states from abdicating their obligations towards seafarers in the future? Almost decidedly not – port access will always implicate questions of national

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280 *See* Vineet Hegde et al., *supra* note 278, at 39-40 (describing how the United States blocked new Appellate Body member appointments and cut its budget); Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT'L ORG. 339, 341-42 (2002) (describing concerns raised by the WTO's consensus-based decision making and how those processes favor powerful states).

281 *See supra*, Part III.

282 *See Rules of the Game*, *supra* note 11, at 19 (discussing how the Governing Body requires a two-thirds vote to legally amend the Constitution or adopt new standards). *See generally* Kari Tapiola, *What Happened to International Labour Standards and Human Rights at Work?*, *in* INTERNATIONAL LABOUR ORGANIZATION AND GLOBAL SOCIAL GOVERNANCE 51, 65 (Tarja Halonen & Ulla Liukkunen eds., 2021) (arguing that the participation of the tripartite actors in resolving compliance of international labor rights "is crucial.").

283 For example, the ILO's employers' representatives walked out of the International Labor Conference, rendering that Conference unable to adopt formal conclusions, in 2012 over the interpretation of freedom of association in the CAS. For an explanation of this occurrence and implications, see Claire la Hovary, *Showdown at the ILO? A Historical Perspective on the Employers' Group's 2012 Challenge to the Right to Strike*, 42 INDUS. L.J. 338 (2013).

284 *See* Lovat, *supra*, note 276; Alter et al., *supra*, note 276.

security and health that will give rise to variance. Nor will adjudicative bodies render unilateral interpretations and power plays impossible. Will the WTO's drawbacks be cured in new supervisory bodies and processes? Perhaps not. Nevertheless, the various lessons gleaned from these experiences empower a more deliberative process in future international lawmaking. The point is not to somehow cure all of international law's enforcement ails but rather to signify the need to overcome its current shortcomings along a gradual path towards a more operational legal regime.

CONCLUSION

The pandemic has exposed cracks in international law's system of outsourced enforcement to states. States are both members and subjects of international organizations. When the calculus of state compliance changes or national interests intervene, states as law enforcers either refuse to enforce international law or do so according to national interpretations and interests.

Fundamentally, the question about how much discretion to outsource to states in enforcing international law turns on how far states are willing to go to legitimate the international rules that they have authored. The current system of enforcement errs too far on the side of discretion to the detriment of efficacy and legitimacy. As Michael Zürn concludes, "contestation can lead to institutional adaption, re-legitimation, and a deepening of global governance."[285] As each contestation passes, whether concerning pandemic circumstances or other crises of international law enforcement, states have an opportunity. They may do nothing and hope that the previous incident was circumstantial, or they can learn from those experiences to re-legitimize international law. This Article urges the latter, particularly given the failure of state-driven enforcement to effectuate compliance, the implications of which are wide-reaching for international law, the members of international organizations, and the vulnerable populations depending on legal protections.

285 MICHAEL ZÜRN, A THEORY OF GLOBAL GOVERNANCE 11 (2018).

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