



THE SEASTEADING INSTITUTE

Charting the Course: Toward a Seasteading Legal Strategy

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www.seasteading.org

Our Mission: To further the establishment and growth of permanent, autonomous ocean communities, enabling innovation with new political and social systems.

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I. Introduction : Seasteading and the Adjacent Possible

What is Seasteading and Why Do We Think it is Worth Working Towards?

Governments have claimed all of the land on Earth. Apart from the ocean, there are no potentially-habitable places left where people can peacefully test new forms of government. Seasteading is the idea of creating permanent societies living at sea—societies outside the auspices of established governments. As homesteading allowed many settlers peacefully to transition land from an unowned state to an owned state, seasteading does that—in some sense—for the open waters.

We at The Seasteading Institute believe seasteads can provide a space where innovative, competing political systems can emerge. Indeed, we believe innovative political systems will serve humanity far better than our governments do today. That's why we are working to establish the conditions under which “seasteads,” floating city-states, will spring up and thrive. These city-states will offer people the opportunity to peacefully test new ideas about how to live together. The most successful will become thriving new societies—and inspire change around the world.

What an amazing opportunity seasteading can be for innovative legal theorists and practitioners. As we will discuss, the sea is not *tabula rasa* when it comes to new law. But there is certainly enough space to innovate. So we welcome a new legal industry of the sea—one that evolves alongside new lifestyles, new ventures and new industries that benefit humanity.

Government institutions have a profound effect upon every aspect of our lives. Improving institutions can unlock enormous human potential. That is why we hope to see millions of people living in seasteads before the end of the century. These settlers will choose to live in floating city-states because they will offer advanced forms of social organization and innovative forms of governance. These new institutions will give rise to robust job markets, better living conditions, and a new entrepreneurial spirit.

What is Our Objective for This Two-Paper Legal Strategy Series?

At the Seasteading Institute, we are committed to helping seasteaders achieve the following three objectives in the near-to-medium term:

1. Establish *de facto*¹ political autonomy for residents;
2. Create new markets for commercial and residential seastead real estate; and
3. Settle thousands of people on the sea within ten years.

¹ Note: not yet *de jure* sovereignty which would mean that seasteaders would be fully recognized by the international community of nations. This is one of our long-term goals.

Towards those ends, the primary objective of these papers is to assist with the formation of a legal strategy that will be useful to seasteaders around the world. What does this mean from a practical standpoint? First and foremost seasteaders will have to understand international law as it relates to seasteading. The success of this paper—in conjunction with other, more targeted legal research papers—will be determined by the extent to which people can start up their seastead ventures armed with relevant legal information.

An Incremental Legal Strategy

Like putting a man on the moon, putting cities on the sea is a clear and audacious vision. One must only imagine Hong Kong, Hamburg, or Monaco afloat in the Pacific. Such a clear vision makes it inspiring. But the steps to get there from here are not as clear. Does one start small? Does one build a floating superstructure or modular platforms? How much will it cost? Will these floating structures last? There is also tremendous uncertainty associated with starting ventures on the ocean: What sorts of engineering feats will this require? What sort of businesses will thrive out there? What are the risks relative to the potential rewards? Is it possible to establish communities on the world's oceans at all? What are (and what ought to be) the rules of the game upon the sea?

It's mostly with the last question that we will concern ourselves in this paper. When most people think of cities, they think of buildings, parks, cars, and so on. Yet invisible rules govern almost every aspect of life in a metropolis. From driving on the right, to ownership conventions, to queuing at the store: rules make life in the city possible. Seasteads will also need internal rules, and these rules will have to comply with existing international legal frameworks. As we'll discuss, while there is broad latitude for recognized nations to conduct internal affairs, more powerful states could use international law to undermine seasteads if they are perceived to be a threat.

On a related note, we are purposefully using the term “rules.” Although this paper is intended as a sketch of seasteading *legal* strategy, we respect the intimate connection between rules and laws. For example, laws can be mere statutes arrived at capriciously². Or laws can apply equally and fairly to all people. When laws become more arbitrary, they slowly lose their ability to bring about an overall social order as the incentives created by the system change. Specifically, when the rule of law is replaced with legislative fiat, the latter becomes a means of exploiting others for political or economic advantage, which leads to system-wide corruption. More people begin to engage in seeking political transfers than in finding opportunities to cooperate.

Equality before the law is thus a critical meta-rule for making laws and is the most fundamental sense of the term “rule of law.” Not only does concern for the rule of law animate this discussion, but we believe any legal strategy should defer to that concept as it was originally conceived. To

² As Locke reminded us, no legislature ought “assume to itself a power to rule by extemporary arbitrary decrees”

repeat: the law should not privilege any person or group, but should regularize the activities of any given person so that complex social orders can emerge.³

So why doesn't The Seasteading Institute just help would-be seasteaders make up really good rules? Why not simply view the ocean as a blank slate upon which to inscribe brand new, more ideal, laws? The short answer is that *the ocean is not a blank state as far as international law is concerned*. And the introduction of completely new, untested laws could be too jarring and counterproductive for these fledgling communities. Never mind that the rest of the world would likely resist any such efforts initially.

We at The Seasteading Institute believe we have to approach things with humility. Indeed, humility is part and parcel to the seasteading strategy. Much of the law has the wisdom of ages packaged into it. Good laws often follow the lessons of real human interaction—contrived as a means to avoid costly, even deadly, conflicts. A lot of experimentation in human relationships goes into this process. We will return to this idea later in our discussion of *lex mercatoria*, a set of evolved laws settled on by traders over hundreds of years to mitigate conflict and facilitate exchange. These legal norms become tested over time by real people interacting in real ways. In this way, the law itself becomes an emergent phenomenon. Thus, in any seasteading strategy, we have to look at what is given. What wisdom can we borrow from the past? What sorts of laws are already in place and being used? Which institutions around the world are an impediment to human flourishing and which laws and institutions provide the foundations for prosperity?

The Adjacent Possible

The Seasteading Institute is not in the business of crafting utopias. We believe that to succeed, seasteaders will have to make trade-offs. That is not to say we will jettison our ideals. It means we have to temper them enough to work within the circumstances of the age. Some might call that conservatism. Others might call it pragmatism. We prefer a term offered by the great complexity scientist Stuart Kauffman: “the adjacent possible.” To explain this idea, allow us a brief diversion.

In biology there are multiple levels of description: ecosystems, organisms, cells, proteins, more complex molecules like fatty acids, less complex molecules and various cell precursors, and then

³ To put this emphasis on rules into perspective, consider the game of basketball. The game works because the rules are not designed or changed mid-game to privilege a particular player. But what if it were possible for players to collude with referees (read: pay them) to change the rules? What if, for example, left-handed dribblers could lobby to enact a rule that forbade anyone's dribbling with the right hand? Even though the left-handed dribblers would have to play with only one hand, they would soon have a distinct advantage over right-handed players. Victories—and income—would soon accrue to the lefties. The righties (and, of course, the fans) would have to bear the costs of the regulation. The game might even have only lefties after a time. And yet when it comes to the good of the game, we know intuitively that basketball is better without such capricious regulations. Something similar can be said about the law. Only unlike basketball, society is not a zero-sum game with a time-limit.

atoms—the most basic of which must have been colliding in the so-called “primordial soup.” These levels of description are no accident. They are the layers of the adjacent possible having built up in step-wise fashion from simple to complex. “The phrase captures both the limits and the creative potential of change and innovation,” writes Steven Johnson in the Wall Street Journal.

In the case of prebiotic chemistry, the adjacent possible defines all those molecular reactions that were directly achievable in the primordial soup. Sunflowers and mosquitoes and brains exist outside that circle of possibility. The adjacent possible is a kind of shadow future, hovering on the edges of the present state of things, a map of all the ways in which the present can reinvent itself. The strange and beautiful truth about the adjacent possible is that its boundaries grow as you explore them. Each new combination opens up the possibility of other new combinations.

Moving to Johnson’s parallel for human progress, we can also note that the “march of cultural innovation follows the same combinatorial pattern: Johannes Gutenberg, for instance, took the older technology of the screw press, designed originally for making wine, and reconfigured it with metal type to invent the printing press.” So what does all this have to do with legal strategy?

As with cultural innovation, the process of legal innovation will borrow from what already exists. These conceptual re-combinations will allow enough flexibility for human beings to survive and thrive on the ocean, and like the iterative configurations found in biology, some will succeed and some will fail. But successes can be built upon, mimicked and preserved. Hopefully, seasteadingers can embrace and extend the best institutions that have run the gauntlet of human experience. There are some basic rules we already know work—what legal scholar Richard Epstein calls “simple rules for a complex world.”⁴ Fortunately for us, many of these rules have been tested by our forebears.

Consider the American Revolution. Rather than design institutions from scratch, the American Founders continued the best of the English Common Law tradition, which had evolved over centuries. They borrowed ideas from the political philosophy of Locke, Hobbes and Montesquieu. They observed the fall of the Ancient Greeks and the Romans. And, of course, they scrapped the worst of what they had inherited from the British Empire. They shored up their good rules by building constitutional checks against the accumulation of power around any branch of government. They tried to prevent Madison’s “factions,” or special interests forming through collusion with politicians⁵. Still, the Founding was a kind of weaving together—all of which was carried out with great deference to the wisdom of ages.

The creation of new societies on the water need not involve the bloody conflict that has marked past experiments in social change. Forming these new ocean societies in peaceful ways is foundational to our thinking. Indeed, peaceful transition is one of the most important contributions seasteading has

⁴ Epstein, Richard. *Simple Rules for a Complex World*. Harvard University Press; Cambridge, 1996.

⁵ We believe this has failed, as of this writing, as the special interest state is more pronounced than ever in U.S. history.

to offer the world when it comes to social change. At the same time we believe success will require the weaving together of precedents, rules, norms, existing treaties, conventions and respect for local differences. In doing so, one avails oneself of the adjacent possible. In short, we hope to settle the sea, not fly too close to the sun with wax wings.⁶

Here at the outset, the essence of our legal strategy lies in the adjacent possible.

But let us be clear: we understand the value of good institutions. When it comes to reducing risks and lowering the costs of interaction and exchange, we stand on the shoulders of giants.⁷ We also understand the desire for self-determination, the virtues of emergent, local norms, and the dignity to be found in a high degree of self-determination. So we will proceed with a view to balancing these considerations in a way that allows our ideals to mesh with contemporary realities—adapting as we go along. The goal is to build institutions—i.e., new legal rule-sets that can help transform humanity for the better. Ossification of rules, after all, has caused great civilizations to fall into torpor and even to collapse.

To wit, the goal of this two-paper series⁸ is to offer, in broad strokes, a practicable legal strategy. In this paper, we will lay out a big picture discussion in three sections. This big picture view is designed to help us set the context and consider important issues. First we will explore critical questions about seasteading and what the law means to that enterprise. Then we will discuss the legal context in which seasteaders will soon find themselves—that is, the treaties, laws, norms and political environment that already exists on the open sea. Finally we will offer the sketch of an approach to managing the international commons, particularly the high seas, from the bottom up rather than the top down.

⁶ “Before they took off from the island, Daedalus warned his son not to fly too close to the sun, nor too close to the sea.” - the Greek myth of Icarus and Daedalus.

⁷ Douglass North, Elinor Ostrom, and Ronald Coase come to mind.

⁸ In the second paper, we will focus on more specific questions such as: role of seastead vessels/platforms, so-called flags of convenience, the potential of business ventures, seasteading-friendly locations, and other major challenges where we will provide more tailored legal solutions.

II. Critical Questions on Seasteading and Law

What is the Mission of The Seasteading Institute in the Short-to-Medium Term?

The Seasteading Institute's mission is to further the establishment and growth of permanent, autonomous ocean communities thus enabling innovation with new political and social systems. In other words, we work to enable seasteading communities—floating cities—which will allow the next generation of pioneers to peacefully test new concepts in governance. It is our hope that the most successful can then inspire change in governments around the world.⁹ To that end, we will be taking steps to:

1. Inspire and engage with a growing, global seasteading community,
2. Conduct engineering research on ships and novel platform designs,
3. Carry out legal, business and political research.

These distinct but interconnected activities, if successfully implemented, will empower entrepreneurs to launch seastead-based ventures. Establishing these businesses will, at the same time, facilitate the creation of seastead-based commercial and residential real estate that will also attract residents. To ensure the long-term viability of seasteading, individuals and families must trust that it is profitable, pleasant and peaceful to live upon the ocean. And to live peacefully upon the ocean, people will need to have good rules for living together. Thus, legal research is a key aspect of our mission.

What Kinds of Legal Challenges Do Seasteaders Face?

Currently, there are numerous legal challenges for seasteading. Among the biggest uncertainties seasteaders face is the question of how existing states will treat them, particularly in their efforts to achieve de facto and de jure independence. Not only is current international law ambiguous and fractured, there is very little precedent for "new entrants." In addition, apart from virtually unaccountable legal regimes like that of the United Nations and International Court of Justice (ICJ), there is no final legal standard to which any party or state can appeal—at least not one that would allow seasteaders a clear path to their own sovereignty. The currently-recognized nations belong to a club that has rather strange rules. In order to be a fully-recognized nation, the entity has to be a member of the club of already-recognized nations. That is to say: in order to be a member of the club you have to be a member of the club. This lack of clarity on the path to sovereignty could be a formidable obstacle for seasteaders in the long term.

Another obstacle for seasteaders is that the areas of “open ocean” where seasteaders are looking to form their communities are not a legal vacuum. Although no country has claimed those areas, they

⁹ See <http://www.seasteading.org/> for further resources on The Seasteading Institute’s vision, mission and overall strategic approach.

are regarded by much of the international community as common to all of humanity. If an area is legally regarded as common, does that preclude settlement or resource harvesting?

It will also be critical to address the legal issues necessary to start seastead-based businesses sooner rather than later. After all, from the start both entrepreneurs and residents will have to be satisfied working within any legal infrastructure. Unfortunately, international law is currently so complicated that it's not always clear what the rules are. This kind of uncertainty may make starting ventures more difficult. But the challenges are not insuperable. Seasteaders will thus want to address legal impediments to entrepreneurship and everyday life as soon as possible—so as to lower the legal start up costs. According to the old adage, it is better to prevent fires than put them out. Although these near-term issues are likely to be less challenging than, say, pursuing full sovereignty, many could still be thorny.

Seasteaders will therefore want to find out what legal frameworks global firms already use. Specifically, what forms of international arbitration are available for resolving disputes? Could these mechanisms address potential difficulties in advance? Initially, seasteaders will probably use many of these existing legal frameworks. Gradually, however, they will modify them to fit their needs. In whatever ways these systems develop, it will be important to establish legal frameworks that offer maximum latitude to entrepreneurial innovation, conflict resolution, peaceful coexistence and community formation among residents.

To repeat: the open waters are not a legal vacuum. So introducing rules is not quite like starting from scratch. Let's assume, then, seasteaders will: have to operate to a significant extent within existing international legal frameworks; have to devise their own localized institutions due to their unique circumstances; and have to retain aspects of the ideals that we believe will create the conditions for prosperity and keep seasteads from stagnation or failure. To deal with these very serious challenges, we first need carefully to consider the international frameworks already in operation. It will be vital to find that critical space between the regimes that currently exist on the sea, and the legal regime to which we aspire. Only after reconciling current realities with our ideals can we create institutions that will advance the cause of seasteading.

Why do We Need to Address Some of These Legal Challenges Now?

First, as we mentioned above, we at The Seasteading Institute would like to see seastead-based ventures launched as soon as possible. But in order for any such venture to launch—much less succeed—entrepreneurs, their investors and their employees will need a clear understanding of both the rules and the risks. As we have suggested, to incorporate, design strategies, raise funds or establish partnerships, entrepreneurs must have access to established law from the start. For example, will seasteaders have access to time-tested mechanisms for resolving disputes or exacting compensation for harms? We have learned that the right legal institutions help reduce transaction costs and mitigate risks—just as we have learned that bad institutions can be doorways to corruption and economic sclerosis.

Second, we would like to see the seasteading scale over time—and eventually achieve sovereignty (or at least substantial independence). Sovereignty is not just something claimed by a new nation in an act of self-determination. Sovereignty comes in recognition by other nations. Therefore, sovereignty for seasteading will require changing laws and attitudes in relation to seasteading on a country-by-country basis, as well as in the eyes of the international law. All of this is likely to be a huge, decades-long undertaking. So the sooner we start the better.

Third, the sea's legal environment will shape other aspects of the seasteading implementation strategy. From engineering designs to a business model's viability; from finding ideal locations to avoiding dangerous locations—the legal environment will profoundly affect many key decisions for early seasteaders. We hope, therefore, a legal strategy will provide the necessary foundation for more material developments. Without a clear understanding of the rules, seasteaders could be adrift in a legal abyss. And in the absence of any legal strategy, the rest of our research in seasteading-related areas like engineering and business risks going off course.

Finally, history has taught us before and since James Madison that men are no angels. To build safeguards against political corruption, corporate venality and the collusion between the politically powerful and the greedy, we have to start now. Such is not to argue that seasteading will somehow magically be free of these problems; it is rather to underscore our belief that *competition in governance*¹⁰ reduces so-called “public choice” problems.¹¹ Such thinking may cause us to call into question sacred cows like representative democracy and even certain forms of law. Should we consider this to be the “constitutional moment” alluded to by Nobel Laureate James Buchanan? Or should we conclude that such a moment cannot exist today and move onto the sea with a framework that balances seasteading's legal pluralism and deference to existing frameworks? We cannot hope to settle these questions here. But they hover in our minds.

How Important Is Political Sensitivity To The Seasteading Institutes' Mission?

It is hard to overstate the importance of seasteading being politically sensitive. Our incremental strategic approach is very much dependent on cooperation with governments around the world. In fact, having friendly and mutually beneficial relationships with governments around the world is one

¹⁰Patri Friedman and Brad Taylor. “Seasteading and Institutional Evolution” The Seasteading Institute, 2011 (Presented at the 2011 APEE Conference, Nassau, Bahamas).

http://www.seasteading.org/files/research/governance/Friedman&Taylor_2011_Seasteading_APEE.pdf

¹¹Practitioners of public choice theory assume that, like economic actors, political actors are more or less self-interested actors. Laws are, therefore, rarely passed for the so-called “public interest.” By public choice “problems,” we mean the process by which changes to the law over time raise transaction costs. Usually these changes amount to direct or indirect transfers from one group to another, or from taxpayers to special interests. Because the costs of any individual change the law may be virtually imperceptible to voters, democracy is not constituted to deal with special interest capture and favor-seeking. Over time, however, the rules become distorted and the costs of the special interest state rise.

of the most important components of our wider strategic approach. Furthermore, any government officials seasteaders are planning to work with will likely be constrained by the political zeitgeist of their respective countries. Radical departures from cultural norms or perceived threats to a given society will force these operatives to shun seasteaders and block their efforts to achieve sovereignty. In order to maintain friendly and mutually beneficial relationships with governments around the world, seasteaders will have to offer goods and services that governments will not find overtly threatening and that the existing governments will find to be advantageous to their people.

Also, because some government officials may find the very idea of seasteading threatening, seasteaders should probably not *themselves* engage in certain types of activities that government officials might find threatening. For many, this latter point may smack of giving up on a vision of human liberty shared by many would-be seasteaders. We prefer to think of it as a responsible way to create a space for much more freedom than would otherwise be possible on land. It is limiting in some respects, but it respects the adjacent possible.

The lines between socially “desirable” and socially “threatening” activities are certainly blurry. Indeed, desirability is in the eye of the beholder. Determining—as a matter of law—what behaviors are to be tolerated among seasteaders will require an intensely political process into which a host of other considerations (legal, economic, business, cultural) will factor. In crafting a legal framework that recognizes both individual liberties and the merits of incrementalism, seasteaders will need to fine-tune their pattern recognition skills. For example, if one is doing business with the Japanese, what subjects should one avoid? Might American officials view seastead grow-houses¹² as a threat to American society? Are there dietary prohibitions besides pork for Muslims in Indonesia? Are there fish that some cultures consider taboo and others consider delicacies? High-level pattern recognition will enable seasteaders to critically engage with a variety of ethical and political systems, systems they will surely encounter in their interaction with the rest of the world. Such will help them define their own culture as a cosmopolitan destination. Think of this as cosmopolitan cultural tuning. In short, seasteaders in the process of developing relationships with people from around the world will have to adapt to the realities of global pluralism.

¹² Grow-houses are areas where people grow marijuana plants for sale.

III. Overview of the Frameworks Governing the World's Oceans

In this section, we will explain the general nature, historical background and structure of international laws regulating the world's oceans. We will also provide an overview, of the sometimes maddeningly complicated codes (or lack thereof), that are currently governing the world's oceans. To do so, we will define and explain terms such as: territorial waters, contiguous zone, exclusive economic zones (EEZ) and high seas. Finally, we will address some of the most important political considerations for would-be seasteaders. Our overarching goal for this legal context section is to educate both a general audience and future seasteaders about the existing international regulatory frameworks. At the end we will provide a legal strategy that could solve some of the most formidable obstacles seasteaders face.

The Historical Background of the Law on the Sea

International law, as it is currently structured, is a body of law whose creation was initiated, in general, by the European States in the last four hundred years or so after the emergence of independent, territorially-defined States. For most legal scholars the Treaty of Westphalia in 1648 marks the beginning of this process¹³.

The evolution of modern international legal frameworks has been a fairly slow and gradual process. Initially, the body of international law was informed by common reason, the so-called "law of nature," Biblical scripture, and Greek and Roman texts. This approach to legal scholarship was exemplified by the Dutchman Hugo Grotius (1583-1654) who is widely regarded as father of modern international law. Interestingly for seasteaders, Grotius wrote his great work "Freedom of the Seas,"¹⁴ in order to justify the Dutch East India Company's claims to trade freely in the Far East. All property, he wrote, is grounded upon occupation. "Whatever cannot be seized or enclosed is not capable of being a subject of property...meaning that the vagrant waters of the ocean are necessarily free."¹⁵ What would Grotius have said had he seen a floating platform or seasteader's enclosure?

Over time, the influence of ancient prophets, Biblical authorities and Greek and Roman forms waned, notwithstanding Grotius's methodology. The actual practice of states became the primary basis for the developments in international law even though the core of Grotian thought remained. Practitioners using this more modern approach are sometimes referred to as the "positivist school."

¹³ Leo Gross, *The Peace of Westphalia*, 42 AM. J. INT'L L. 20, 20 (1948) (Arguing that the Peace of Westphalia is of critical historical importance since it was the first treaty to establish "something resembling a world order unity on the basis of states exercising untrammelled sovereignty over certain territories and subordinated to no earthly authority").

¹⁴ Originally titled "Mare Liberum" (1609).

¹⁵ Mónica Vieira, *Mare Liberum vs. Mare Clausum: Grotius, Freitas, and Selden's Debate on Dominion over the Seas*, 64 J. HIST. IDEAS 361 (2003).

This school emphasized the voluntary assumption of obligations by states, as evidenced by their practices. Examples of this approach can be found in the rules of both customary law (rules emerging over time through traditions and customs) and treaty law (agreements or concord among nations for the sake of peace and mutual benefit). Such bodies of law came to be viewed as being of significantly more immediate importance than the dictates of natural law.

One can see this positivist approach to international law reflected in the Article 38 of the Statute of the International Court of Justice (ICJ), which directs the Court to apply, in deciding international disputes brought before it:

- a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
- b) International custom, as evidence of general practice accepted as law¹⁶;
- c) The general principles of law recognized by civilized nations;
- d) Judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

In the sequence above, the order matters. Directives “a” to “d” should be understood in a hierarchical manner, according to the Statute of the International Court of Justice. That is, the international conventions are the most important sources of international law. The teachings of the most “highly qualified publicists” are the least-influential sources. What is not fully specified, however, is the relative weight given to the above criteria in combination. For example, could “b” and “c” be combined to offer as much legal weight as “a”? However one answers such questions, there is clearly no mention of anything resembling natural law in the IJC criteria.

It is also important to mention that modern international law is in a state of a perpetual flux. The practice of individual States can and does change the nature of international legal frameworks. Indeed, the practice of States, principle “b,” is probably the most important for seastealers going forward. Seastealers should fully exploit this criterion—while operating, as we have cautioned, with a view to the adjacent possible. It is mostly good news, then, that modern international law is marked by a high degree of uncertainty; it leaves seastealers room to maneuver. Because state actors can be whimsical, international law is subject to wild gyrations meant to accommodate these actors (both in their whimsy and in their variety). Seastealers will have to be able to take advantage of this

¹⁶ The Statute of the International Court of Justice (ICJ) defines international custom as “evidence of a general practice accepted as law.” Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055. Custom includes the following constituent elements: consistency of the practice in the form of substantial uniformity, generality of the practice among states, and the conviction on the part of states that the rule embodied in the practice is binding, or *opinio juris*. See MALCOLM SHAW, *INTERNATIONAL LAW* 481 (2003). See also *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27), in which the International Court of Justice held that rigorous conformity to the rule is no longer necessary for a rule of custom to attach, but rather that general compliance is sufficient.

principle and do whatever they can to guide this process. The final goal, after all, should be for the community of nations to embrace and support the efforts of the seasteading community.

Regulatory Frameworks Governing the Worlds' Oceans

For most of the last 400 years, the world's seas had been subject to the Grotian freedom of the seas doctrine. Under this doctrine, countries had rights and jurisdiction over a narrow three-mile strip of the oceans surrounding their coastlines (using the ancient “cannon shot” approach which signified effective reach of Coastal States, that is, the reach of their military might). The remainder of the ocean was free to everyone and belonged to no single country. With the 20th century, however, came great leaps in technological progress and industrialization. Amid growing concerns over a race to exploit offshore resources—e.g., overuse of fish stocks or ocean pollution—countries began to extend their control over the seas so as to regulate ‘the commons.’

In 1945, President Harry S. Truman unilaterally extended the US jurisdiction to include all natural resources on the United States’ continental shelf. This signaled the unofficial end of the freedom of the seas doctrine, as many other countries followed the US’s lead claiming more of the sea as their own. In 1946, Argentina claimed its shelf and sea above as its own. From 1947-1950, Chile, Peru and Ecuador claimed the rights to a 200-mile zone in hopes of limiting access to distant-water fishing fleets. After World War II, Egypt, Ethiopia, Saudi Arabia, Libya, Venezuela and some Eastern European countries, all extended their territorial waters from three to twelve miles. Soon after, Indonesia and the Philippines both asserted dominion over the waters between their various islands. In 1970, Canada, in order to protect Arctic water from pollution, granted itself the right to regulate navigation in an area extending 100-miles from its shores. In short, President Truman had set off a regulatory domino effect that extended nations’ jurisdiction further into the water. The fact that the most powerful country unilaterally and dramatically changed the custom that was at least several hundreds of years old confirms the idea that the practice of states, especially the most powerful ones, is the most important determining factor with respect to international legal standards. In some sense, might still makes right. It certainly makes law.

As technological advances gave people access to resources on the ocean floor, and as fishing fleets gained the ability to fish at greater distances, at greater depths and in greater harvest volumes, seabed territorial claims became increasingly important. And as countries made competing claims to various areas of the sea, leaders agreed that treaty was required to prevent conflict and establish standards for control over these areas. It is important to emphasize that it was technological advancement, primarily, that allowed humankind to harvest ocean resources that had before been impossible to reach. This progress dramatically affected the legal cartography.

By 1967 the United Nations sought to establish “an effective international regime over the seabed and the ocean floor beyond a clearly defined national jurisdiction”.¹⁷ By 1973, the United Nations

¹⁷ The United Nations Convention on the Law of the Sea [A historical perspective], 1998.

convened the third United Nations Conference on the Law of the Sea in New York with the goal of writing “a comprehensive treaty for the oceans.” After nine years of negotiation among 160 sovereign states—bargaining and trading national rights and obligations—the delegates adopted a constitution: the United Nations Convention on the Law of the Sea¹⁸. The Convention came into force in 1994 when sixtieth state signed the Convention; so far 160 states ratified it.¹⁹

The Convention was a huge undertaking, with the UN seeking to regulate all aspects of the resources of the sea and the uses of the ocean. All of the following issues were addressed within a single treaty:

- Navigational rights,
- Territorial sea limits,
- Economic jurisdiction,
- Legal status of resources on the seabed beyond the limits of national jurisdiction,
- Passage of ships through narrow straits,
- Conservation and management of living marine resources,
- Protection of the marine environment,
- A marine research regime, and
- A binding procedure for settlement of disputes between States.

The list goes on, but these had been the most important issues that the convention countries had to negotiate.

Due to the rapid acceptance of the UNCLOS by the international community, nearly all countries have taken steps to bring their territorial claims to the ocean to be in accordance with the rules that could be found in the Law of the Sea Treaty (sometimes also called LOST).

One of the first issues that needed to be resolved was setting limits for territorial waters. Countries arrived at the conference claiming anywhere from 3 to 200 miles off their coast as territorial waters. States with smaller navies were in favor of large territorial seas to protect their coastal waters. States with powerful navies were in favor of small territorial seas to protect their fleets’ freedom of movement. Eventually all settled upon a limit of twelve miles for territorial seas with a contingency that a country may police another twelve miles beyond their territorial waters. The Convention also

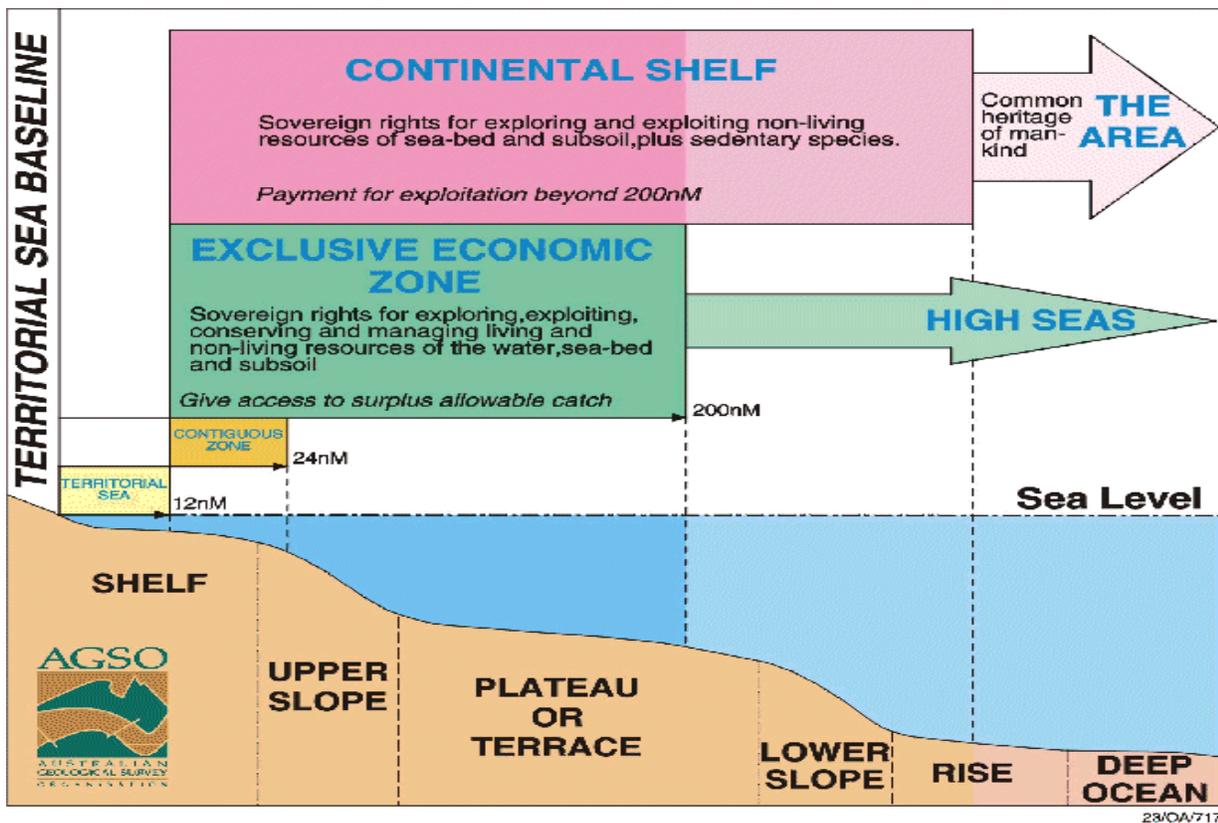
¹⁸ UNCLOS http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm

¹⁹ Ratification defines the international act whereby a **state** indicates its consent to be bound to a treaty if the parties intended to show their consent by such an act. In the case of bilateral treaties, ratification is usually accomplished by exchanging the requisite instruments, while in the case of multilateral treaties the usual procedure is for the depositary to collect the ratifications of all states, keeping all parties informed of the situation. The institution of ratification grants states the necessary time-frame to seek the required approval for the treaty on the domestic level and to enact the necessary legislation to give domestic effect to that treaty.[Arts.2 (1) (b), 14 (1) and 16, Vienna Convention on the Law of Treaties 1969]

retains the right of “innocent passage” for naval and merchant ships. This innocent passage provision allows ships the ability to pass through territorial waters unhindered, so long as their passage does not threaten a coastal country’s security or violate its laws.

Thus, layers of sovereign authority exist beyond the shores of signatory states. These layers are balanced with the needs of others in the international community. Indeed, one of the most revolutionary ideas to come out of the Convention was the creation of Exclusive Economic Zones (EEZ); a brainchild of President Truman’s State Department that essentially extended a state’s control far into the sea. Under the Convention’s rules, coastal states are given the rights to “exploit, develop, manage and conserve all resources...to be found in the waters, on the ocean floor and in the subsoil of an area extending 200 miles from its shore.” With coastal states having essentially an additional 200 miles of territory beyond their shorelines, there was an immediate incentive for these states to claim offshore islands, atolls, or islets. Even uninhabitable rocks allow for the extension of the EEZ. The Convention also resolved the issue of continental shelf exploitation, by establishing that seabed and subsoil exploitation could only be carried out as far as the EEZ extended. Countries with continental shelves can petition the Commission on the Limits of the Continental Shelf (CLCS) to gain the rights to exploit their shelf beyond the limit of their EEZ up to 350 nautical miles from their coastlines.

The current and widely accepted legal framework²⁰ governing the world’s oceans looks like this:



²⁰ This framework is not without major exception, which to be discussed in Section Three.

Territorial Waters

Territorial waters, or a territorial sea, as defined by the 1982 United Nations Convention on the Law of the Sea, is a belt of coastal waters extending at most 12 nautical miles (22 km; 14 mi) from the baseline (usually the mean low-water mark) of a coastal state. The territorial sea is regarded as the sovereign territory of the state, although foreign ships (both military and civilian) are allowed innocent passage through it; this sovereignty also extends to the airspace over and seabed below.

Because the territorial waters are essentially an extension of the sovereign territory of the coastal state, this belt of coastal waters is probably the least desirable “sea-surface real estate” for seasteaders.

Contiguous Zone

The contiguous zone is a band of water extending from the outer edge of the territorial sea to up to 24 nautical miles (44 km; 28 mi) from the baseline, within which a state can exert limited control for the purpose of preventing or punishing "infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea". This will typically be 12 nautical miles (22 km; 14 mi) wide, but could be more (if a state has chosen to claim a territorial sea of less than 12 nautical miles), or less, if it would otherwise overlap another state's contiguous zone. This concept of “contiguous zone” as being an intermediate step between the territorial waters and EEZ is a fairly new idea that was formalized in the UNCLOS; the United States, for example, claimed a contiguous zone in 1999.

Although theoretically speaking the coastal state has less of a jurisdictional control over this particular band of water, effectively and in practice, the contiguous zone is almost as undesirable as the territorial waters as far as seasteaders are concerned.

It is safe to say that the band of water extending from the baseline and up to the outer edge of 24 nautical miles is more or less fully governed and controlled by the coastal states. As such, it is not really a seasteading-friendly area. The only exception to this general rule would be if the coastal state was willing to enter into some sort of agreement with seasteaders (or private entities governed by seasteaders) that would allow the seasteaders to position their ships or platforms in these waters. This would be much like a Special Economic Zone, except that the seasteaders would have the ability to physically exit by moving their seasteads to another country's waters.

Exclusive Economic Zone

An exclusive economic zone (EEZ) extends from the outer limit of the territorial sea to a maximum of 200 nautical miles (370.4 km) from the territorial sea baseline, thus it includes the contiguous zone. A coastal nation has control of all economic resources within its EEZ, including fishing, mining and oil exploration. A coastal nation cannot prohibit a vessel's passage—or its loitering above, on, or under the surface of the sea—as long as that vessel is in compliance with the laws and

regulations adopted by the coastal State in accordance with the provisions of the UN Convention. The aforementioned rules apply to the portion of coastal State's EEZ beyond its territorial sea. Before 1982, coastal nations arbitrarily extended their territorial waters in an effort to control activities now regulated by the EEZ (such as offshore oil exploration or fishing rights). Indeed, the exclusive economic zone is still popularly, though erroneously, referred to as a coastal nation's "territorial waters."

This right of coastal states to harvest natural resources in the EEZ is not absolute. The UNCLOS grants geographically disadvantaged states the right to harvest EEZ resources of other states. Other states are also entitled to the surplus of the allowable catch in cases where the coastal state does not have the capacity to harvest the *entire* allowable catch. Note, however, that geographically disadvantaged and other states only have access to *surplus* EEZ resources. And the coastal state is not obliged to accept any dispute settlement measure relating to its "discretionary powers for determining the allowable catch, its harvesting capacity and the allocation of surpluses to other states." Practically speaking, therefore, the coastal state effectively has full control of EEZ resources. Despite the fact that the coastal state controls the harvesting and management of natural resources, the EEZ regime does provide for other states to use this region for certain types of activities, such as navigation. That is, the legal right to exclusive usage by the coastal states is not necessarily spatially determined, but rather determined by a type of activity.

The following is the full versions of Article 56²¹ (Emphasis ours):

Article 56: Rights, Jurisdiction and Duties of the Coastal State in the Exclusive Economic Zone

1. In the exclusive economic zone, the coastal State has:
 - (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
 - (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
 - (i) *the establishment and use of artificial islands, installations and structures;*
 - (ii) marine scientific research;
 - (iii) the protection and preservation of the marine environment;
 - (c) other rights and duties provided for in this Convention.
2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.
3. The rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI.

²¹ Article 56 http://www.un.org/Depts/los/convention_agreements/texts/unclos/part5.htm

Article 56 of the Convention links sovereign rights to the economic development of the coastal state. There is thus a definite economic basis to a coastal state's rights in the region—one oriented toward resources.

What does this mean for seasteaders? As we mentioned, the focal point of coastal state's exclusive rights in the EEZ is natural resources. Other states, generally speaking, have a right to navigate these waters and to loiter on the surface. Therefore one could imagine an opening for seasteaders in which the ships or freely-floating (non-attached) platforms could be located within the EEZ as long as: seasteaders are not engaged in any type of resource extraction (living and non-living); are not getting their energy from waves, wind or solar sources;²² and they are not polluting the environment. Seasteading ventures based in the knowledge or services economies, for example, might be welcome in these zones. However, note that an attached platform (artificial island, installation, or structure) would be regulated by the coastal state within the EEZ, so such structures must either be located outside the EEZ, or have special dispensation from the coastal state.

High Seas

Oceans, seas, and waters outside of national jurisdiction are also referred to as the “high seas” or, in Latin, *mare liberum* (meaning *free seas*). A large segment of the community of nations holds that the High Seas are governed by the concept of Common Heritage of Mankind (also termed the common heritage of humanity, common heritage of humankind or common heritage principle). The Common Heritage of Mankind is a principle of international law, which holds that defined territorial areas and elements of humanity's purported common heritage (cultural and natural) should be held in trust for future generations and be protected by international bodies from exploitation by individual nation states or corporations. We should mention that some of the most powerful countries, e.g., the United States, have not accepted the Common Heritage of Mankind doctrine.

Due to its great importance to seasteading, we believe that it is useful to include the relevant passage from the High Seas section of the UNCLOS (Emphasis ours)²³.

²² In this zone any type of energy production that is related to natural resources in the area, for example: waves, wind, oil, gas or even solar energy, is under the jurisdiction of the coastal state

²³ http://www.un.org/Depts/los/convention_agreements/texts/unclos/part7.htm

HIGH SEAS
SECTION 1. GENERAL PROVISIONS

Article 86: Application of the Provisions of this Part

The provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State. This article does not entail any abridgement of the freedoms enjoyed by all States in the exclusive economic zone in accordance with article 58.

Article 87: Freedom of the High Seas

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:
 - (a) freedom of navigation;
 - (b) freedom of overflight;
 - (c) freedom to lay submarine cables and pipelines, subject to Part VI;
 - (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
 - (e) freedom of fishing, subject to the conditions laid down in section 2;
 - (f) freedom of scientific research, subject to Parts VI and XIII.
2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

Article 88: Reservation of the High Seas for Peaceful Purposes

The high seas shall be reserved for peaceful purposes.

Article 89: Invalidity of Claims of Sovereignty over the High Seas

No State may validly purport to subject any part of the high seas to its sovereignty.

Article 90: Right of Navigation

Every State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas.

A Red Flag For Seastealers

The Common Heritage of Mankind concept, specifically in conjunction with the above mentioned Article 89 of the UNCLOS, could be one of the most formidable obstacles seastealers face while creating permanent societies at sea (at least societies that are outside the auspices of established governments). Although by no means universally accepted, the following are some of the most salient features of this legal concept:

1. There can be no private or public appropriation; no one legally owns Common Heritage spaces.²⁴
2. Representatives from all nations must manage resources contained in such an area on behalf of all, because a commons is considered to belong to everyone (and thus no one). Such a rule necessitates a special global agency to coordinate shared management among states.²⁵
3. All nations must actively share with each other the benefits acquired from exploitation of the resources from the Commons Heritage region, thus requiring certain restraints on the profit-making activities of private entities; and linking the concept to that of a global public good.²⁶
4. There can be no weaponry, nor military installations, established in territorial commons areas.²⁷
5. The commons should be preserved for the benefit of future generations.²⁸

Let us reflect further on this Common Heritage of Mankind doctrine in the fourth section of our paper.

²⁴ Jennifer Frakes, *The Common Heritage of Mankind Principle and the Deep Seabed, Outer Space and Antarctica: Will Developed and Developing Nations Reach a Compromise?*, 21 *WIS. INT'L L.J.* 409, 411 (2003).

²⁵ *Id.* at 412.

²⁶ *Id.* at 412.

²⁷ *Id.* at 412.

²⁸ *Id.* at 413.

IV. Managing the Global Commons

One of the most heavily cited academic papers of the modern era is Garrett Hardin's "The Tragedy of the Commons."²⁹ And for good reason: Hardin introduced an important idea—one that economists have continued to unpack and one that arguably established a research agenda that led political scientist Elinor Ostrom to win a Nobel Prize. The idea is pretty simple: Common pool resources are susceptible to over-exploitation. In Hardin's example, there are cows in a common pasture. It is in each herder's interest to put the next cow(s) he acquires onto the common, even if overgrazing degrades the pasture. The herder receives all of the benefits from an additional cow, while the damage to the commons is borne by the entire group of herders. If all the herders make this individually rational economic decision, the pasture may be destroyed for everyone. And yet no one has an individual incentive to limit his cow's consumption, because his neighbor's cow will be waiting to consume the resources he forgoes.

We have seen these commons problems in a bewildering array of contexts, from African elephants becoming depleted due to ivory poachers to Amazon rain forests in which everyone rushes to exploit mahogany. Where there are no institutions in place to protect the common-pool resource, tragedies of the commons are likely to follow. This is no different in the ocean, where overfishing and pollution are serious problems.

The natural human reaction to tragedies of the commons is to propose some form of command-and-control management of the resource pool. With command and control, a central authority introduces some form of regulatory structure, which can go from an outright ban on the use of the resource to limitations on how much may be harvested. Harvesters must seek permission from this central authority to extract the resource. The troubles with bureaucratic management of resources are manifold. Let us touch on a few rather severe problems with a top-down approach:

- *Black Markets*: An unwanted, but nearly inevitable, byproduct of command-and-control resource management is a black market. Black markets are created when the profits of illegitimate resource exploitation are high enough to impel exploiters to take risks of violating the bureaucracy's regulations. In situations where demand for the resource is high and supply is relatively low, black markets are likely to appear. In the case of poaching, for example, bans often make the good scarcer and create a perverse incentive to poach more, resulting in a vicious cycle. Thus, tragedies of the commons arise under command and control management, despite the regime.³⁰

²⁹ Hardin, Garrett, "The Tragedy of the Commons", *Science*, Vol. 162, No. 3859 (December 13, 1968), pp. 1243-1248.

³⁰ History is rife with examples of this: from the severe environmental problems created in the Soviet Union, to difficulties by central authorities to control profitable black markets. See, for example,

- *Corruption*: Access to resources of the managed pool can be gained through any number of means: some legitimate and some corrupt. But when a central authority is in the position to pick winners and losers—i.e., to select who will gain access to the resource—the temptations of corruption will often be too great. Political allocation of resources has, throughout human history, rarely been carried out without venality, as those who control the resources and those who exploit them have every incentive to create unholy alliances. These alliances terminate in a kind of exchange: monopoly rents in exchange for continued political power. In more extreme cases, state monopolies simply hoard resources and restrict their flow. Such control provides ready handouts for maintaining power to leverage against opposition groups.
- *Misallocation*: When either or both of the above problems arise, resources cannot flow to their highest valued uses. Of course, from the perspective of those engaged in command and control resource management, this is the idea. Nevertheless, we should at least acknowledge that certain market efficiencies are lost under top-down resource management, and resources become misallocated to the extent they are allocated at all.

Unfortunately, we see no reason that these same problems won't arise under some Common Heritage of Mankind-type doctrine. If we accept some harvesting and allocation as a given—and we have very clear reasons to do so—then we need only compare the relative benefits and detriments of systems of resource management. Indeed, we believe alternative, bottom-up sets of institutions can go a lot further if the goal is balance among use, stewardship and husbanding of resources.

Thankfully, there are a powerful set of tried and true precedents governing the use and harvesting of resources. Indeed, the very term “seasteading” derives from it. Consider homesteading. Under a homesteading doctrine, we have a mechanism through which formerly unowned resources can come to be privately owned. While it may seem highly counter-intuitive, private ownership of resources introduce strong incentives for good resource stewardship. Before returning to discussion of UNCLOS, let us briefly touch on the idea of homesteading and the power of private property in husbanding resources.

The settling of the American West is instructive. While no one had then fully articulated the tragedy of the commons, people were already devising quasi-legal institutions both to deal with commons problems and to ensure the stability of future returns for investments in labor. We say ‘quasi-legal’ because some of these systems were informal rules at first, but western settlers contrived and observed them nevertheless. Many came later to be codified. As Terry Anderson writes in “The Not So Wild, Wild West”,

<http://www.amazon.com/Ecocide-USSR-Health-Nature-Under/dp/0465017819> and <http://www.rhino-economics.com/overview/> respectively.

For the pioneer settlers, who often moved into the public domain before it was surveyed or opened for sale by the federal government, definition and enforcement of property rights in the land they claimed was always a problem.

These marginal or frontier settlers (squatters as they were called) were beyond the pale of constitutional government. No statute of Congress protected them in their rights to the claims they had chosen and the improvements they had made. In law they were trespassers; in fact they were honest farmers.

The result was the formation of "extralegal" organizations for protection and justice. These land clubs or claims associations, as the extralegal associations came to be known, were found throughout the Middle West, with the Iowa variety receiving the most attention. Benjamin F. Shambaugh suggests that we view these clubs "as an illustrative type of frontier extra-legal, extra-constitutional political organization in which are reflected certain principles of American life and character." [22] To Frederick Jackson Turner these squatters' associations provided an excellent example of the "power of the newly arrived pioneers to join together for a common end without the intervention of governmental institutions."³¹

Subsequent to the formation of these extra-legal clubs, the law began to incorporate and codify the settlers' informal institutional arrangements.

Indeed, the settling of the American West reflects much of the kind of bottom-up law that characterizes the Anglospheric legal tradition. In this tradition, there is strong deference to the patterns of rules that emerge through human interaction. This has come to be known as "emergent law." Modern U.S. property law thus originated in the standards and practices of real settlers eager to head off conflicts. But this phenomenon is not novel among American settlers. As we suggest above, it extended back centuries.

Bruce Benson in his book *The Enterprise of Law* writes:

Although Anglo-Saxon customary law was giving way to authoritarian law, the development of medieval commercial law, *lex mercatoria*, or the "Law Merchant," effectively shatters the myth that government must define and enforce "the rules of the game."³²

Peter Leeson and Daniel J. Smith arrives at similar conclusions in an article titled "The Law Merchant and International Trade":

Medieval international merchants used the *lex mercatoria's* private system of international commercial governance instead of government for several reasons. First, they desired speedy dispute resolution. Disrupting business to resolve contractual disagreements was costly. The Law Merchant minimized costs by eschewing the formality of State court proceedings. Merchant courts' flexible rules of evidence, "[o]ral proceedings, informal

³¹ Anderson, Terry. "The Not So Wild, Wild West" Mises Daily. February 2010. <http://mises.org/daily/4108>. (Originally published in the Journal of Libertarian Studies, 1979.)

³² Benson, Bruce L. *The Enterprise of Law: Justice Without the State*, San Francisco: Pacific Research Institute for Public Policy, 1990.

testimony of witnesses and unwritten judicial decision-making” hastened the judicial process for time-pressed international traders, according to Leon Trakman’s *The Law Merchant: The Evolution of Commercial Law*.³³

Where there is any vacuum in legal rules on the sea, we believe that local forms of *lex mercatoria* are likely to emerge among seasteaders with deep interest in reducing transaction costs. Many of these private legal institutions already exist.

The most frequently used private legal institutions are related to international arbitration proceedings. In fact international arbitration is a leading method for resolving disputes arising from international commercial agreements and other international relationships. As with arbitration generally, international arbitration is a creature of contract. That is, the parties' decide to submit disputes to binding resolution by one or more arbitrators selected by, or on behalf of, the parties. Such involves applying adjudicatory procedures, usually via a provision for the arbitration of future disputes in the parties' contract. The practice of international arbitration has developed so as to allow parties from different legal and cultural backgrounds to resolve their disputes without the formalities and warts of their respective legal systems.

Conflict resolution is one thing. But what about resource management? Fully private, or at least highly localized, common property institutions are the most effective rules that have yet been devised for ensuring responsible, efficient and sustainable stewardship of resources. Consider Anderson and Hill again from a paper on the not-so-wild West theme:

Today many scholars who deal with natural resource and environmental issues understand the necessity of property rights. Yet many still do not recognize the importance of “on the ground” activity for effective rights development. Fortunately, not all scholars fall into the trap of believing that property rights must be imposed from above. The recent Nobel Laureate, Elinor Ostrom, has explored numerous situations where one would not expect effective property rights arrangements to exist. She has studied irrigation systems, common property forests, and fisheries. In all of these cases, she finds that when effective power resides with those involved in actual resource management, there are strong incentives to find institutional arrangements that solve coordination problems.³⁴

Seasteaders solving coordination problems could mark the genesis of new ocean law that arrests problems of overfishing and pollution. Private property rights, quasi-property rights in tradable quotas and other forms of common-pool resource management are most likely to evolve locally.

Seasteading is not likely to reach its full potential if the international community embraces and enforces the Common Heritage of Mankind doctrine. Alternatively, practitioners of New Institutional Economists (NIE) have detailed the positive incentive effects of local management institutions—not to mention the responsible stewardship that is possible among people who have a

³³ Peter T. Leeson and Daniel J. Smith. “The Law Merchant and International Trade” *The Freeman*, May 2011.

<http://www.thefreemanonline.org/featured/the-law-merchant-and-international-trade/>

³⁴ Hill, Peter J. “Rerun: The Not So Wild, Wild West” *PERC Reports*, Summer 2010

<http://www.perc.org/articles/article1268.php>

long-term expectation of returns from harvesting the sea's resources. Their Nobel Prize-winning research³⁵ suggests that the approaches recommended by the Common Heritage Doctrine are unwieldy and outmoded. Indeed, new social operating systems will be required if the goal is to benefit humanity for centuries to come. Because the Common Heritage doctrine is add odds with much of the contemporary literature in NIE, we recommend seasteaders take a careful look at the Common Heritage doctrine through the NIE lens, which we have tried to do a little here in Section Three. Otherwise, we can put the matter in somewhat starker terms: if the Common Heritage were to become globally enforced law, seasteading would be limited to a sea-surface, knowledge-economy phenomenon; if the international community moves away from the Common Heritage doctrine, seasteading will have the chance to flower in much more robust and diverse ways.

Specifically, you may recall the Common Heritage doctrine includes this article, that “No State may validly purport to subject any part of the high seas to its sovereignty.”³⁶

Since full local self-determination is a form of sovereignty—and potentially a claim to regions of the ocean—the Common Heritage doctrine, if adopted, would prevent seasteaders from enjoying the same self-determination as peoples on land. This strikes us as being at odds with the spirit and letter of Article 56 of the UN Charter.³⁷ In addition, seasteaders would be precluded from creating an economy based on using sustainable resources like sun, wind, waves, and the ocean itself (e.g., aquaculture).

Local owners with an expectation of future returns have a deep incentive to conserve when they gain an exclusive right to resource use. For example, according to the Food and Agricultural Organization in the report on the “State of the World’s Forest,” North American forest cover is larger than it has been in over a century. From 1990-2010, forest cover has rebounded most in the U.S.³⁸ Furthermore,

Unlike some regions in the world where deforestation is happening at a rapid pace, the US has actually maintained its forestland for the past 100 years. According to the USDA Forest Service, since 1900, forest area in the U.S. has remained statistically within 745 million acres +/-5% with the lowest point in 1920 of 735 million acres. U.S. forest area in 2000 was about 749 million acres.³⁹

If one includes the heavily forested Northern Forests of Canada, forestland in North America since 1900 has increased considerably. (If only we could say the same about fish in the ocean.) Contrast the data on North American forests with the data on forest cover in the countries of South America,

³⁵ We mentioned Elinor Ostrom above. Consider also the work of Ronald Coase, Oliver Williamson and Douglass North.

³⁶ Article 89: http://www.un.org/Depts/los/convention_agreements/texts/unclos/part7.htm

³⁷ http://www.mpepil.com/sample_article?id=/epil/entries/law-9780199231690-e873&recno=5&

³⁸ UN FAO State of the World’s Forests Report - <http://www.fao.org/docrep/013/i2000e/i2000e01.pdf>

³⁹ Columbia Forest Products, gathered from multiple government sources, including the U.S., Canada and the U.N. <http://www.columbiaforestproducts.com/Landowners.aspx/Forests>

Africa and Southeast Asia. The benefits of private resource management become exceedingly clear. While there are other factors that play into the return of forest cover in North America, private, local management is certainly a major one. And yet similar stewardship arrangements would likely be proscribed on the Common Heritage doctrine.

It's not clear whether the Common Heritage doctrine would be enforceable as an international legal agreement or treaty. From our perspective, it seems unlikely over the long term—particularly as individual states would have little incentive to enforce the agreement unilaterally and there would be strong incentives to defect. As with the Kyoto Protocol (an agreement designed to address climate change by nations reducing global carbon emissions) maintaining unanimous agreement seems like the only way the Common Heritage doctrine could be enforced. Because there were too many incentives for signatories to defect in the case of the Kyoto Protocol, long-term adherence to the doctrine as an international treaty was doomed.⁴⁰ Suppose, however, that unanimity could be achieved for the Common Heritage doctrine. If a single global body became responsible for the resources of two-thirds of the earth, that would be an unprecedented amount of power vested in a single authority — particularly one that cannot be “voted out.” Not only would the authority have to deal with attendant information problems associated with resource allocation and management, it would have also to be staffed with angels immune to corruption.⁴¹ Beyond incentives to defect, would nation states be willing for such an entity to exist—particularly if the agreement is seen over time as running counter to their national interests? It seems unlikely.

Seasteading, *a la* homesteading, could be viewed as a legal way of decentralizing power (especially relative to a single, multilateral resource management body.) At the same time, seasteads could provide the legal basis for reducing problems of overuse. After all, if I pollute waters or fish stocks you own, I have both the incentive and ability to demonstrate harm in court based on a preponderance of the evidence.⁴² For now, however, let us move past how the common law might help the ocean environment and wrap up our concerns about the Common Heritage doctrine as it applies to seasteading. Of course, it may be that no proprietarian regime evolves for the oceans as it has in many territorial societies. In such a case, seasteads will largely be viewed as vessels controlling only the sea surface they cover at any given time. In such a case, economic activity will occur almost exclusively above the water.

The good news for seasteaders, however, is that this and similar doctrines—including the Common Heritage of Mankind—have been challenged in the recent years due to a perfect storm of technological advancement, resource scarcity and good old-fashioned Westphalian behavior by powerful countries. It would be instructive for seasteaders to view the historical unfolding of issues surrounding The International Seabed Authority (ISA) as an example of this resistance.

⁴⁰ <http://wattsupwiththat.com/2011/05/29/its-all-over-kyoto-protocol-loses-four-big-nations/>

⁴¹ And as the American founder James Madison reminded us, men are no angels.

⁴² This standard is found in U.S. civil and common law in the anglosphere countries.

The International Seabed Authority (ISA), an intergovernmental body based in Kingston, Jamaica, was established by the UNCLOS (1982) to organize and control all mineral-related activities in the international seabed area beyond the limits of national jurisdiction. The ISA was given a responsibility for the distribution of economic benefits to all parties (which in this case would be both developing and developed countries), the managing the development of resources, and encouraging the transfer of technology from developed countries to the undeveloped ones. Many developed countries had concerns about the ISA from the outset, especially in relation to technology transfer. Indeed, such concerns mirror those we express above about a global resource management body. ISA could become that very authority, however formative it is today. Seasteaders will be wise to observe how countries treat the ISA—especially in the near term.

The first version of the deep seabed mining provisions of ISA, unsurprisingly, was not acceptable to the industrialized world. In 1993, with the UNCLOS poised for implementation within a year, participants prepared for the 1994 New York Agreement. This amendment changed the nature of the ISA. Mandatory technology transfer was abolished. The 1994 Agreement also changed many aspects that were unacceptable to the developed, industrialized countries so that the regime was much more compatible with robust market activity.

The United States has still not yet ratified⁴³ UNCLOS, despite the New York Agreement and the fact that it had the support of the Reagan, Clinton, and George W. Bush administrations. Until 2003, Senators outside the Foreign Relations Committee had not even reviewed UNCLOS due to opposition by a group led by Jim Inhofe, (R-Oklahoma). This opposition feared designating ocean resources as falling under the Common Heritage of Mankind would place limitations on national sovereignty as well as limitations leading to under-use of available resources. This group of U.S. Senators advocates privatizing the seabed, which would change the incentives considerably.

Because the United States is still (as of 2011) opposed to UN-led governance of high seas resources, seasteaders could credibly claim that the Common Heritage concept—in relation to harvesting high

⁴³ According to Wikipedia the “US President may form and negotiate a treaty, but the treaty must be advised and consented to by a two-thirds vote in the Senate. Only after the Senate approves the treaty can the President ratify it. Once a treaty is ratified, it becomes binding on all the states under the Supremacy Clause. While the United States House of Representatives does not vote on it at all, the requirement for Senate advice and consent to ratification makes it considerably more difficult in the US than in other democratic republics to rally enough political support for international treaties.” In the US, the President usually submits a treaty to the Senate Foreign Relations Committee (SFRC) along with an accompanying resolution of ratification or accession. If the treaty and resolution receive favorable committee consideration (a committee vote in favor of ratification or accession) the treaty is then forwarded to the floor of the full U.S. Senate for such a vote. The treaty or legislation does not apply until it has been ratified. A multilateral agreement may provide that it will take effect upon its ratification by less than all of the signatories. Even though such a treaty takes effect, it does not apply to signatories that have not ratified it. For example the US has signed the UNCLOS but it has not ratified it. Accession has the same legal effect as ratification. Accession is a synonym for ratification for treaties already negotiated and signed by other states.

seas resources—is still not fully a part of customary international law and that its validity can be called into question. Generally speaking, we believe those interested in seasteading will want to take measures to ensure the United States never ratifies UNCLOS (or if it does, that the doctrine becomes softened so that it a) accommodates sustainable resource harvesting and stewardship and b) doesn't block a people's right to self-determination). This may mean would-be seasteading ventures will have to invest in aligning with political forces opposed to 'nationalization' of the world's oceans.

In addition to such preventive measures, we would like to recommend seasteaders themselves offer solutions to the thorny issues connected to the management and legal status of the international commons—particularly the high seas. In the next section, we will sketch a potentially useful strategy that would solve some of the issues associated with the management of the international commons. This information could also serve the interests of the seasteading community as it forms.

Legal Solutions for the Future of the Management of the International Commons

Some natural resources can only be found in the international commons. In the decades ahead, the world's population may exceed nine billion⁴⁴ while industrial output will probably quadruple. Developing countries with over three quarters of the global population will see the most dramatic population increases. By 2030, energy consumption in developing countries such as China and India could double or even triple. In the developed world, increases in energy demand will strain the existing energy infrastructure and will spur demand for new sources of both non-renewable and renewable energy. Currently accessible natural resources may be inadequate to meet this demand.

Development hastened by technological change has been a driving force in the urge to regulate the international commons. At the same time, it does not take a great leap of imagination to conclude that people will want to open the international commons to some form of economic development. Even the Antarctic and outer space have already opened to tourism. The natural human drive to settle and find opportunity in new places will impel humanity to places and resources that, heretofore, have been unreachable. Such brings into question the bedrock premise of Grotius's philosophy behind *mare liberum*. The idea that some region is open to all nations as an international commons may not be a pragmatic bedrock for either seasteaders or Westphalian nation states. Living on the sea is now possible.

Does this fact render *mare liberum* defunct? Policymakers will have to face this question eventually. Should they defect and assert classic sovereignty in the long traditions of Westphalia? Or is it wiser to cooperate to create a multilateral framework for governance in the vein of realist multilateralism? Is there a third solution where seasteaders could play a prominent role by developing emergent law through seasteading practice? Seasteaders burning with a claim to self-determination may want to

⁴⁴ "[International Data Base \(IDB\)—World Population](http://www.census.gov/ipc/www/idb/worldpopinfo.php)". Census.gov. 2010-06-28. <http://www.census.gov/ipc/www/idb/worldpopinfo.php>. Retrieved 2010-08-01.

look closely at such a third way. Otherwise the nations of the world may just extend their less ideal social operating systems further into the waters—a result only slightly preferable to the realization of a Common Heritage doctrine.

Competition for the world's resources currently in the commons has already begun. One just has to look at recent developments in the Arctic region where Russia, Canada, United States and other countries are working furiously to extend their territorial reach in the Arctic region.⁴⁵ The stakes are high. Significant gas, oil and other resources have been discovered there. As some ice-covered areas are revealed by moderate warming—in conjunction with advancements in technologies enabling access — these once difficult-to-reach resources are becoming ripe for harvesting of natural resources. So far, international disagreements over Arctic territories have been civil. The main players have at least nominally used the international legal norms such as UNCLOS.

However, this competition could be but a prelude of things to come. In the not-so-distant future, battles over natural resources could become more intense. Nations may move further into the high seas. There is potential for things to get considerably more adversarial at this stage. Some sort of a solution will likely be needed—one that could be both economically beneficial to all parties and that could assuage concerns about sustainability, stewardship and conflict. Perhaps such a solution could offer equitable access among competing nations. Could seasteading itself come to be viewed as solution to these very challenging problems?

Seasteading as a Set of Solutions

There are a number of possible solutions to problems related to the management of the international commons.

In order to create an environment that would incentivize many different entrepreneurs and individuals, a temporary body with a limited purpose could auction property rights within the current international commons. Whether this body should emerge from the bottom up or would be accepted from the top down is, as yet, unclear. But any one of the following mechanisms may suffice to complete any such propertarian transfer⁴⁶:

- ☐ A multilateral body chartered by existing nations for the purposes of titling ocean property (similar to the International Seabed Authority);
- ☐ A multilateral body spun off from an existing international authority;
- ☐ A private organization contracted (by states) for the purpose of implementing a multilateral effort;
- ☐ A seasteading-based proto-national association (multi-party contract) created for the express purpose of auctioning and titling resources;

⁴⁵ <http://www.cbc.ca/news/canada/story/2009/02/27/f-arctic-sovereignty.html>

⁴⁶ For a similar idea, see also “How and Why to Privatize Federal Lands” by Vernon Smith and Terry Anderson. http://www.cato.org/pub_display.php?pub_id=1222

- A completely private, unilateral body that self-designates and manages to attract individuals and corporations, who agree to the auction, titling and the auspices thereof.

At this stage it would take us too far afield to explore the many options. For our purposes, it suffices to say that some overseeing body could theoretically be entrusted to auction⁴⁷ common pool resources among private parties.⁴⁸

If such a body became legitimized, trailblazing investors could identify and make offers on areas of potentially great value. These investors could then launch ventures, meaning they would first arrive at an as yet untouched, resource-rich area, settle on it, then improve the area. Perhaps they might even share some of the benefits of the resource via some form of Georgist tax. Whatever you think about resource taxes and citizens' dividends, such schemes are less susceptible to problems such as corruption and misallocation than command-and-control management by central authorities.

Such an arrangement is similar in spirit to the U.S.'s Homestead Act of 1862.⁴⁹ It would award adverse possession (also referred to as "squatter's rights") and would have the effect not only of allocating property rights efficiently to those entities most capable of harvesting them, but it could also raise capital sufficient to develop infrastructure, satisfy various stakeholders, and bankroll scientific studies designed to minimize environmental impact. Adverse possession is a principle of property law whereby one who possesses or uses land for an extended period of time may be able to claim legal title to that land. Such use and possession might be carried out by people, private entities (corporations) or others capable of transitioning unowned resources into the productive sector. Although it's not yet clear what authority ought to be responsible for sea-space titling, we sketch some possibilities above. Perhaps the most comprehensive set of data on the effects of awarding adverse possession comes in the research of the Institute for Liberty and Democracy, summarized in Hernando de Soto's seminal work "The Mystery of Capital" and in de Soto's work at the United Nations.⁵⁰

There are few weaknesses with this scenario, but weaknesses that are perhaps not insuperable: Developing countries might claim this arrangement to be inequitable because only corporations based in developed countries would be able to satisfy the capital requirements of carrying out such large-scale projects. At the same time, developed countries might have questions about

⁴⁷ Consider transferable fishing quotas, spectrum auctions and similar mechanisms for dealing with transfer of common pool resources to the private sphere.

⁴⁸ We are aware of the problems of where the proceeds of such an auction might go. In the interests of brevity and moving the discussion along, we will leave this topic for another day.

⁴⁹ For more information on the U.S. homestead act, visit: <http://www.archives.gov/education/lessons/homestead-act/>

⁵⁰ It is perhaps useful to note that de Soto, along with former U.S. Secretary of State Madeleine Albright, co-chaired the U.N. Commission on Legal Empowerment for the Poor from 2005-2008. See their research archived here: <http://www.undp.org/legalempowerment/reports/concept2action.html>

environmental impacts, as well as concerns about the manner in which these types of arrangements are executed—particularly with respect to the claims of competing developed countries. Perhaps Georgist taxes⁵¹ and citizens dividends^{52 53} distributed by formula could be recommended as patches. A less ideal solution might be to set aside a percentage of auctionable areas to developing countries based on their GDP quintile, so that these countries would have “first rights” to participate in any auction for the resources. Our fear is that the more one attempts to accommodate countries based on differences in GDP, a creep towards the problems outlined above (corruption, misallocation, etc.) would follow. Nevertheless, on a continuum of solutions, auctions with accommodating patches seem reasonable.

Might seasteaders help solve some of these problems? Might seasteaders developing new offshore industries contribute by offering novel solutions to the management of the international commons—all gained through their own local experience as sea settlers? Might seasteaders act, in some sense, as brokers for multilateral stewardship of the seas? (Elinor Ostrom’s research suggests it’s best more or less to let the locals sort it out)

The following is a brief sketch of how seasteading might catalyze sustainable development of common-pool resources and the ocean’s commons.

1. Seasteaders would partner with corporations and create their own private entities.
2. They would find a location on the high seas that is rich in natural resources and permanently settle it. Permanent settlement⁵⁴ will ensure that any environmental concerns that global community would have could be addressed, as it would not be in the seasteaders’ interest to pollute their homes and backyards.
3. A large segment of the population on these seasteads would very likely come from developing countries, which could assuage concerns that developing countries have about domination by developed nations⁵⁵. Additionally, as people would be able to move to these seasteads more or less freely, they would evolve into rather cosmopolitan constructs.
4. Seasteaders could act as a neutral party⁵⁶ that both developed and developing countries could work with as a kind of international broker. Of course, it will take time for seasteaders to live

⁵¹ http://www.wealthandwant.com/docs/Gaffney_TTSoLMGaGI.html

⁵² http://marginalrevolution.com/marginalrevolution/2003/12/vernon_smith_on.html

⁵³ <http://www.time.com/time/magazine/article/0,9171,819584,00.html>

⁵⁴ One of the more interesting aspects of seasteading is that seastead platforms may be able to offer modularity and mobility that a fixed parcel of land cannot. Despite this fact, we believe that some platforms will be permanent and that some heavy accretions of seasteading platforms will be at least semi-permanent due to proximity to land-based hubs and due to positive network effects of floating seastead cities emerging in some areas.

⁵⁵ One way migrants benefit their home country is through remittances, which mean workers send money back to their families in a country of origin. If seasteads are profitable enterprises, many developing countries may come to see them as more beneficial than threatening, much like the cruise ship industry today.

⁵⁶ There is no clear precedent for weak, neutral states brokering agreements among countries. However, after WWII Yugoslavia and Finland acted as brokers between the East and the West.

and work on the sea as to accrue legitimacy. And seasteaders may have, at some point, to claim a right of self-determination. The current state of affairs, however, as far as the management of international commons is concerned, is in a state of legal limbo because the United States is still rejecting the ISA's lead in managing high seas resources. Seasteaders, for all we know, could be the third way sought by competing parties.⁵⁷

5. Any approach would have to be taken with great care and with full recognition of the interests of all the stakeholders. But cooperation among companies and governments around the world is not only possible, but is of paramount performance if we are not to let predatory actors loose in the international commons.

Thus, we believe seasteaders could serve a valuable role in the development of new modes of resource management in the international commons. In fact, seasteading could be seen as the most practical solution to these problems.

⁵⁷ While we admit this point is speculative, it doesn't strike us as overtly implausible.

V. Summary

In this paper, we introduced our exposition with some background about our general strategic legal approach. Here we maintained that seasteading will require incrementalism, not only with respect to navigating international law, but with respect to developing sovereign legal institutions. We called this operating with a view to the “adjacent possible.”

In Section Two, we touched upon some of the critical questions in relation to Seasteading and Law, which we hope sets the tone for more targeted discussions in future papers. Answers to such questions included our belief that a foundational legal strategy will be necessary for the development of a healthy seasteading environment, and that we should start sooner than later because the first seasteaders will require use of legal institutions at the outset.

In Section Three we offered an overview of the international legal seascape, particularly as it relates to the project of creating new societies and businesses at sea. In particular, we discussed some of the most salient doctrines of international law—from those that might complement the ambitions of seasteaders, to those that risk torpedoing seasteaders’ efforts from the start. We expressed concerns about the untested idea of “new entrants” to the international community and we introduced a particular legal doctrine known as the “Common Heritage of Mankind.”

Finally, in Section Four, we share our concerns about the “Common Heritage of Mankind” doctrine. We then went on to discuss bottom-up approaches to management of common pool resources found both in emergent law of the Anglospheric tradition, as well as in the experiences of settlers in the American West. We suggest that such bottom-up prescriptions allow for a much more productive and potentially less corrupting resource management regime than that offered by the Common Heritage of Mankind doctrine. Indeed, we followed that discussion with a set of brief sketches about how seasteading itself might be offered as a solution to problems of international competition over common resources—especially those found in the sea.