The True Obstacle to the Autonomy of Seasteads: American Law Enforcement Jurisdiction over Homesteads on the High Seas

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I. INTRODUCTION

Like the pilgrims who fled the Old World in search of religious freedom, or like the homesteaders who left the Eastern Seaboard, the South, and the Northwest Territories to find economic freedom in the west, The Seasteading Institute seeks to develop permanent communities on the last frontier on earth: the ocean.[1] The Seasteading Institute (TSI) would assist others to eschew old world political and social systems in favor of new, voluntary systems of living in the hope that the high seas will maximize their autonomy.[2] TSI defines seasteading as the creation of "permanent dwellings on the ocean — homesteading on the high seas."[3] Ancient texts and current events illuminate the ferocity of the sea.[4] Without question, the undertaking that TSI envisions will require massive technological prowess to safely and profitably overcome the obstacles the ocean presents.[5] Clearly, TSI must seek to comprehend fully the nature of the sea and the risks it would present to ocean-pioneers.[6]

Fortunately, The Seasteading Institute approaches the risks of homesteading on the high seas with a healthy pragmatism.[7] Counter-intuitively, TSI declares that the physical threats to seasteading, such as tsunamis, typhoons and piracy, actually pose relatively little danger.[8] What causes The Seasteading Institute far greater trepidation in planning its endeavors is "[t]he tangled morass of international maritime politics and law."[9] A significant part of this tangled morass is

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[1] The Seasteading Institute, *A Brief Introduction to the Seasteading Institute*, http://www.seasteading.org/learn-more/intro/ (last visited July 25, 2010).

[2] *Id*.

[3] *Id*.

[4] *See, e.g.*, Psalm 29:3; Jonah 1:4–5 ("[A]nd there was a great storm on the sea, so that the ship was thought to be broken up. And the seamen were afraid, and each one cried out to his mighty one. . . ."); National Oceanic and Atmospheric Administration, Damage Assessment, Remediation & Restoration Program, Southeast Region, *Case: Deepwater Horizon Oil Spill* (2010), http://www.darrp.noaa.gov/southeast/deepwater_horizon/index.html.

[5] *See generally* The Seasteading Institute Frequently Asked Questions, http://www.seasteading.org/mission/faq/ (last visited July 25, 2010); PATRI FRIEDMAN WITH WAYNE GRAMLICH, SEASTEADING: A PRACTICAL GUIDE TO HOMESTEADING THE HIGH SEAS (2009), http://seasteading.org/seastead.org/book_beta/full_book_beta.pdf.

[6] FRIEDMAN WITH GRAMLICH, *supra* note 5, at 4 ("[I]t behooves us to understand the ocean environment.").

[7] *Id*. ("Far from being dreamy-eyed utopians, we are serious planners with realistic principles for bringing this strange vision to life. This realism dictates an incremental approach, modest political goals, reliance on mature technology, self-financing, and a willingness to make compromises.").

[8] *Id*.

[9] *Id*.

American admiralty and maritime law.[10] Thus, a pragmatic assessment of TSI's legal obstacles must include an analysis of potential obligations and liabilities under United States criminal law in admiralty, because the United States exercises broad power over the high seas.[11]

United States federal courts derive their exclusive subject-matter jurisdiction over admiralty and maritime cases from the Constitution and the Judiciary Act of 1789.[12] For federal jurisdiction to attach to a case in admiralty the underlying wrong must occur or be located on navigable waters (the locality test), and it must substantially relate to traditional maritime activity (the maritime activity test).[13] Navigable waters comprise the high seas as well as the lakes and navigable rivers of the United States.[14] While the definition of navigable waters is inherently complex due to the use of various idiosyncratically different notions of navigability throughout United States law, the locality test for admiralty jurisdiction with respect to seasteads should rarely be at issue, because seasteading ultimately will be an oceanic endeavor.[15]

Whether a case bears a substantial relationship to maritime activity (also described as maritime "flavor" or a "nexus to maritime activity"), is a question subject to "criteria . . . so imprecise as to defy description by either a formula or an objective standard."[16] Historically, commercial shipping has constituted prototypical maritime activity.[17] In fact, before the Supreme Court's decision in *Foremost*, some practitioners considered commerce to be a necessary prerequisite to the attachment of admiralty jurisdiction.[18] The *Foremost* Court,

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[10] *See infra* notes 59–60, 90–198 and accompanying text.

[11] *See supra* notes 7–10 and accompanying text; *infra* notes 104–98 and accompanying text.

[12] U.S. Const. art. III, § 2, cl. 1. ("The judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction."); 28 U.S.C. § 1333; *see also* Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 359–81 (1959) (broadly discussing the history and nature of federal admiralty and maritime jurisdiction).

[13] Executive Jet Aviation, Inc. v. Cleveland, 409 U.S. 249, 268 (1972).

[14] Foremost Ins. Co. v. Richardson, 457 U.S. 668, 672 (1982) ("assuming the propriety of [admiralty] jurisdiction merely because the accident occurred on navigable waters"); *id*. at 682 (Powell, J., dissenting) (noting that navigable waters include an immense number and type of water bodies); The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870) (holding that the navigable waters of the United States include rivers that are navigable in fact); Fretz v. Bull, 53 U.S. 466, 468 (1851) ("[T]he constitutional jurisdiction . . . in admiralty . . . was extended to the lakes and navigable rivers of the United States."); The Propeller Genesee Chief v. Fitzhugh, 53 U.S. 443, 452, 454 (1851) (presuming admiralty jurisdiction over the high seas, noting that the English common law tidewater doctrine, which limited admiralty to waters in the ebb and flow of the tide, was arbitrary, and extending U.S. admiralty jurisdiction to include lakes and inland rivers); *see also* U.S. v. Smith, 18 U.S. (5 Wheat.) 71 (1820) (discussing the application of the common law notion of felonies to the jurisdiction of the federal courts in criminal admiralty over the high seas).

[15] THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 1–3 (West 4th ed. 2004). *See generally* FRIEDMAN WITH GRAMLICH, *supra* note 5. *But see* The Seasteading Institute Annual Report 2008 6, http://seasteading.org/files/annualreportfinal.pdf (describing the near-term use of "calm waters" for recreational seasteading in events to promote oceanic seasteading); Ephemerisle, http://www.ephemerisle.org (last visited July 25, 2010) (The now-canceled Ephemerisle 2010, a recreational seasteading event, was slated to occur in the Sacramento River Delta, part of the navigable waters of the United States).

[16] Molett v. Penrod Drilling Co., 826 F.2d 1419, 1426 (5th Cir. 1987).

[17] Sisson v. Ruby, 497 U.S. 358, 362 (1990) ("protecting commercial shipping is at the heart of admiralty jurisdiction").

[18] *See* 457 U.S. at 674–75 ("Although the primary focus of admiralty jurisdiction is unquestionably the protection of maritime commerce, petitioners take too narrow a view of the federal interest . . . [and] ignore[] the potential effect

however, citing a traditional maritime concern in navigation of boats, explicitly held admiralty jurisdiction to cover events that may bear only an indirect, "potential[ly] disruptive," relationship to commerce for the sake of uniform treatment of vessels and parties on navigable waters.[19] The Supreme Court has also stated its belief that where different parties are engaged in "similar types of activity," its holdings in *Executive Jet* and *Foremost* should be sufficient to resolve the maritime nexus question.[20]

There is another element of admiralty jurisdiction, namely whether the case involves a *vessel*; it is so fundamental an element that federal case law either implicitly assumes admiralty jurisdiction because a vessel is present and expressly denies jurisdiction if it finds the case bears no relationship to a vessel.[21] A vessel includes "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."[22] Broadly, vessels comprise "all navigable structures intended for transportation" even if a structure's primary purpose is not for transportation or even if the structure is not moving at the time of the relevant event.[23] A vessel does not have to move with its own motive power.[24] On the other

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of noncommercial maritime activity on maritime commerce."); *id.* at 681 n.5 (noting that whether maritime activity included noncommercial activity was a question of first impression for the Court).

[19] *Id*. at 674–75 (a collision between two pleasure boats is sufficient to invoke federal admiralty jurisdiction).

[20] *Sisson*, 497 U.S. at 366 n.4. The lower circuits do not seem to share the Supreme Court's confidence about what constitutes maritime flavor, at least when the "relevant entities" are *not* engaged in similar activities. *See supra* note 16 and accompanying text; *Sisson*, 497 U.S. at 366 n.4. The Fifth Circuit has interpreted *Foremost* and *Executive Jet* to mandate a three-part inquiry to determine a case's maritime flavor. *Molett*, 826 P.2d at 1426 (evaluating maritime flavor is via a measurement of impact on shipping and commerce, a determination of whether a case requires a uniform national rule and a determination of whether the case requires admiralty expertise). In addition, the Fifth Circuit believed it was simultaneously justified to use a four-part test for maritime nexus it previously developed, because the Supreme Court had declined to review its decision in *Kelly v. Smith*. *Id.* (citing 485 F.2d 520, 525 (5th Cir. 1973) (the four factors to determine maritime nexus comprise "the functions and roles of the parties; the types of vehicles and instrumentalities involved; the causation and the type of injury; and traditional concepts of the role of admiralty law."), *cert. denied*, 416 U.S. 969 (1974)). While the Fifth Circuit seemingly has incorporated a seven-factor test for maritime flavor, the First, Fourth, Ninth and Eleventh Circuits have more closely followed the Fifth Circuit's original four-factor test in *Kelly* than the Supreme Court expected. *See Sisson*, 497 U.S. at 366 n.4; Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 544 (1995). Meanwhile, the Second Circuit has narrowly and faithfully applied the Supreme Court's language, but the Seventh Circuit has held fast to the idea that activity must be commercial or involve navigation to have maritime flavor. *Sisson*, 497 U.S. at 366 n.4. If maritime nexus is at issue in a case involving wrongdoing at or near a seastead, the lack of clarity surrounding maritime flavor and the inconsistency among the circuits makes it difficult to predict whether American courts will retain jurisdiction over a particular event. *See also supra* notes 16–19 and accompanying text.

[21] *See, e.g.*, *Executive Jet*, 409 U.S. at 261 (citing The Crawford Bros. No. 2, 215 F. 269, 271 (W.D. Wash. 1914) (the federal court declined to assume admiralty jurisdiction because an airplane was not a maritime vessel)); Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352, 355 (1969) (admiralty law applies to structures that are vessels); Romero, 358 U.S. at 358 (discussing whether a husbanding agent retained operation and control over the vessel), Seas Shipping Co., Inc. v. Sieracki, 328 U.S. 85, 87 (1946) (principally asking whether a ship owner owes an obligation of seaworthiness to a stevedore); S. Pac. Co. v. Jensen, 244 U.S. 205 (1917) (discussing whether an injury occurring on the gangway bore sufficient nexus to a vessel for admiralty jurisdiction to attach); The Hamilton, 207 U.S. 398 (1907) (holding that a fund for liability for a vessel's crew was in admiralty).

[22] 1 U.S.C. § 3.

[23] Stewart v. Dutra Constr. Co., 543 U.S. 481, 497 (2005); Cope v. Vallette Dry Dock Co., 119 U.S. 625, 629 (1887).

[24] *See* Nelson v. U.S., 639 F.2d 469, 473 n.4 (9th Cir. 1980) (implying that a barge is a vessel); Offshore Co. v.

hand, structures permanently attached to the land, either over or underwater, are generally not vessels unless they serve as navigational aids.[25] Moreover, permanent structures that are tantamount to artificial islands are not vessels and do not invoke admiralty law.[26]

This is good news for seasteads that would employ stationary platform or underwater designs.[27] Once seasteads are constructed and attached or anchored to the seabed, they largely would avoid United States admiralty jurisdiction, because they would not qualify as vessels.[28] Still, American admiralty jurisdiction may attach to vessels associated with fixed-location seasteads, such as shipping vessels owned or hired to manage supply chains of goods.[29]

Nevertheless, TSI has stated a preference for free-floating designs over fixed-position designs, because floatation allows for migration away from a particular location destabilized by a nation-state's claim over the area.[30] What TSI's initial analysis does not contemplate is that the broad definition of vessel in American maritime law is very likely to subsume any free-floating seastead.[31] Thus, assuming maritime flavor exists in a given circumstance, the United States could exercise jurisdiction over any free-floating seastead or related supply-chain vessel nearly anywhere over seventy-one percent of the surface of the earth.[32]

The United States' immense extraterritorial jurisdiction, however, is subject to important legal limits under international law.[33] The jurisdiction of a nation over a vessel in admiralty hangs on whether the vessel is registered with a country ("flagged"), whether the vessel is

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Robinson, 266 F.2d 769 (5th Cir. 1959) (a floating drilling platform, so long as it can still move, is a specialized vessel); McRae v. Bowers Dredging Co., 86 F. 344 (C.C. Wash. 1898) (a dredge is subject to maritime jurisdiction). Muntz v. A Raft of Timber, 15 F. 555 (C.C. La. 1883) (assuming admiralty jurisdiction attaches to salvage of a raft); *But see* Knapp, Stout & Co. v. McCaffrey, 177 U.S. 638, 643–44 (1900) ("[T]he authorities, as to how far a raft is within the jurisdiction of admiralty, are in hopeless confusion").

[25] *See Rodrigue*, 395 U.S. at 359–60 (permanent structures erected primarily as navigational aids would invoke admiralty jurisdiction); Cleveland Terminal R.R. v. Steamship Co., 208 U.S. 316, 320–21 (shore docks, bridges, pilings, and piers are not vessels); *Cope*, 119 U.S. at 627 (comparing a dry-dock to a wharf or floating warehouse and holding that none are vessels in admiralty).

[26] *See Rodrigue*, 395 U.S. at 360; Terry v. Raymond Int'l, Inc., 658, F.2d 398, 405 (5th Cir. 1981). *But see* the Admiralty Extension Act, 46 U.S.C. § 740 (2010) (placing in admiralty cases of damage or injury caused by a vessel on navigable water even if the harm occurs on land).

[27] *See* FRIEDMAN WITH GRAMLICH, *supra* note 5, at 106–08, 120–22, 125 (assessing the design features and risks of underwater seasteads, stationary pillar platforms, tension leg platforms anchored to the seafloor, and used oil platforms).

[28] *See supra* notes 21, 26 and accompanying text.

[29] *See supra* notes 21–22 and accompanying text; *see also* FRIEDMAN WITH GRAMLICH, *supra* note 5, at 107, 138, 146, 164, 200 (discussing the advantages of shipping goods, energy and fuel sources, food, and waste to and from seasteads).

[30] FRIEDMAN WITH GRAMLICH, *supra* note 5, at 126; *see id.* at 109–16, 122–25 (contemplating the design features and risks of floating seasteads such as flotillas of sailboats, large tankers, floating platforms and small waterplane area twin hulls).

[31] *See supra* notes 21–26 and accompanying text.

[32] *See* The Encyclopedia of Earth, http://www.eoearth.org/article/ocean/ (last visited July 26, 2010); *supra* notes 14–31 and accompanying text.

[33] SCHOENBAUM, *supra* note 15, at § 1–3 n.4; *see infra* notes 38–39 and accompanying text.

domestic or foreign, and in which sea zone on the high seas the vessel is found.[34] The Seasteading Institute already understands that a seastead's location with respect to the differing sea zones and its registration status are paramount when considering how admiralty jurisdiction is likely to interfere with efforts to remain politically autonomous.[35] TSI also recognizes that certain types of activity are more likely to invite government interference than others.[36] The following analysis expounds the specific ways in which American criminal admiralty jurisdiction, subject to principles of international law, is likely to interfere with TSI's ideal of autonomous seasteads.[37]

II. BACKGROUND

A. The Principles of International Law Regarding Vessel Nationality & Registration

Under longstanding principles of international law, seafaring nations provide administrative means of registration for vessels.[38] Vessels demonstrate their nationality of registration by flying the nation's flag while sailing the high seas.[39] Registered vessels become subject to the laws and regulations of those respective nations in exchange for the ability to fly their nations' flags and the state's protection.[40] A significant part of this protection is jurisprudential: a vessel on the high seas is generally subject to the exclusive jurisdiction of the state whose flag it flies.[41] Thus, international law prescribes that vessels flagged by one state should enjoy freedom on the high seas without interference from other states, save in exceptional circumstances.[42]

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[34] *See infra* notes 38–109 and accompanying text.

[35] *See* FRIEDMAN WITH GRAMLICH, *supra* note 5, at 89–94 (briefly discussing the advantages and disadvantages of locating a seastead in the various sea zones and of registering vessels—or not—in various ways).

[36] *See id*. at 57–58, 87–88 & 213 (discussing the likelihood of government interference with respect to broadcasting, drug use, and other so-called "sin industries").

[37] *See infra* notes 38–278 and accompanying text.

[38] H. Edwin Anderson III, *The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives*, 21 TUL. MAR. L.J. 139, 143 (1996–97).

[39] *See* Anderson III, *supra* note 38, at 145; Dierdre M. Warner-Kramer and Krista Canty, *Stateless Fishing Vessels: The Current International Regime and a New Approach*, 5 OCEAN & COASTAL L.J. 227, 229 (2000).

[40] Anderson III, *supra* note 38, at 143.

[41] United Nations Convention on the Law of the Sea, art. 92(1), Dec. 10, 1982, 133 U.N.T.S. 397 [hereinafter UNCLOS]; United Nations Convention on the High Seas, art. 6(1), Apr. 29, 1958, 13 U.S.T. 2313, 450 U.N.T.S. 82 [hereinafter HSC]; *see* Warner-Kramer and Canty, *supra* note 39, at 229 (discussing the floating territory doctrine, which holds that vessels are tantamount to a floating piece of territory of the flag state); *see also* David F. Matlin, Re-evaluating the Status of Flags of Convenience Under International Law, 23 VAND. J. TRANSNAT'L. L. 1017, 1022–23 & 1023 n.27 (1990–91) (explaining that a vessel's flag determines the exclusive jurisdiction over it under the floating territory doctrine, but also noting dissent by scholars who reject the floating territory principle for vessels in favor of the nationality principle, by which a nation retains jurisdiction over its nationals in spite of extraterritorial actions).

[42] UNCLOS, *supra* note 41, at art. 87(1)–(2) ("Freedom of the high seas . . . comprises . . . freedom of navigation . . . to lay submarine cables and pipelines . . . to construct artificial islands . . . of fishing . . . of scientific research. . . . These freedoms shall be exercised by all States with due regard for the interests of other States."); Warner-Kramer and Canty, *supra* note 39, at 228 ("[N]o state has the right to prevent other states' vessels from using the high seas

The principle of non-interference, however, is subject to a more fundamental principle of standing under international law, namely that only states may bring legal action against states.[43] This principle keenly affects the practical ability of a vessel to sail the high seas without registering with a nation.[44] If a vessel is not registered, i.e., retains no nationality, there is no state to advocate for it inside the international legal system.[45] Therefore, unrelated nations have the practical ability to interfere with, i.e. search and seize, these so-called *stateless vessels* with impunity, because the vessels have no standing under international law to protest the interference.[46]

Moreover, if a vessel attempts to fly two different flags so as to impute to itself different nationalities during a voyage "according to convenience," or if the vessel switches its flag without actually changing the underlying registration or ownership, it may be treated as stateless.[47] Statelessness may be imputed if a vessel flies one flag but produces contradictory documents or no documents.[48] In this case, a state performing a search will contact the flag state; if the flag state acknowledges registration, the vessel will enjoy jurisdictional protection of the flag state, but if the flag state denies a vessel's registration or disavows the vessel, it becomes stateless.[49] A vessel also may be assimilated as stateless under the *Molvan v. Att'y-Gen. for Palestine* doctrine, if a nation does not recognize the state whose flag a vessel is flying.[50] Furthermore, a vessel that refuses to claim any nationality becomes stateless.[51]

International law subjects vessels sailing the high seas to the *right of approach*, which allows any nation's warship to approach and investigate a vessel for reasonable suspicion of

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for any lawful purpose."); HSC, *supra* note 41, at art. 2(1)–(2) (proclaiming nearly the same rights as under UNCLOS, *id*. at art. 87(1)–(2)); *see* Ted L. McDorman, *Stateless Fishing Vessels, International Law and the U.N. High Seas Fisheries Conference*, 25 J. MAR. L. & COM. 531, 538 (1994) (referencing the principle of non-interference); *see also* HSC, *supra* note 41, at art. 22(1) (specifying the exceptional circumstances for interference); UNCLOS, *supra* note 41, at art. 110(1) (recapitulating and adding to the exceptional circumstances for interference).

[43] *See* Matlin, *supra* note 41, at 1025.

[44] *See id.*

[45] *Id.*

[46] *See id*.; Warner-Kramer and Canty, *supra* note 39, at 230.

[47] UNCLOS, *supra* note 41, at art. 92(1)–(2); HSC, *supra* note 41, at art. 6(1)–(2).

[48] Kyle Salvador Sclafani, *If the United States Doesn't Prosecute Them, Who Will? The Role of the United States as the 'World's Police' and Its Jurisdiction over Stateless Vessels*, 26 TUL. MAR. L.J. 373, 375 (2001–02); Laura L. Roos, Comment, *Stateless Vessels and the High Seas Narcotics Trade: United States Courts Deviate from International Principles of Jurisdiction*, 9 MAR. LAW. 273, 280 (1984); Andrew W. Anderson, *Jurisdiction over Stateless Vessels on the High Seas: an Appraisal Under Domestic and International Law*, 13 J. Mar. L. & Com. 323, 340 (1981–82).

[49] Scalfani, *supra* note 48, at 375–76; Roos, *supra* note 48, at 280; Anderson, *supra* note 48, at 340; *see also* McDorman, *supra* note 42, at 534.

[50] *See* 1948 A.C. 351 (Privy Council) (holding that a nation may assimilate to statelessness a vessel flying the flag of a state not recognized by that nation and that no state under international legal principles has standing to complain on behalf of an assimilated stateless ship).

[51] *See* Anderson, *supra* note 48, at 341 ("It is not enough that a vessel have a nationality; she must claim it and be in a position to provide evidence of it.").

having no nationality and to verify the vessel's right to fly its flag.[52] This procedure is also known as *verification du papillon*.[53] The display of a flag gives a vessel the presumption of registration with a flag state, but only the ship's documents are dispositive, since the documents prove the right to fly the flag.[54] After a nation commences flag verification upon reasonable suspicion, if it recognizes a vessel as stateless, the vessel can no longer plead diplomatic protection under the exclusive jurisdiction of a flag nation, and it becomes subject, *de facto*, to the simultaneous jurisdiction of all nations.[55] It is clear, thus, that as nature abhors a vacuum, international law abhors the nonexistence of jurisdiction with respect to vessels.[56]

To avoid the vagaries of statelessness, owners flag their vessels under a system of customary international law that traces its lineage back to the Roman Empire.[57] International convention and jurisprudence hold that each nation alone determines its own requirements by which an owner may register his vessel and fly the state's flag.[58] American jurisprudence under *Lauritzen v. Larsen* also holds this so-called law of the flag in paramount regard.[59] *The Muscat Dhows Case* and *Lauritzen* are strong international legal precedent for the law of the flag, i.e., the proposition that a nation solely controls its own requirements for registration of vessels, free

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[52] UNCLOS, *supra* note 41, at art. 110(1)(d), (2) (explicitly allowing reasonable suspicion of statelessness as a justification for a warship's "Right of visit"); *see* HSC, *supra* note 41, at art. 22(1)(c), (2) (implying reasonable suspicion of statelessness as a justification for a warship's approach); *see also* The Marianna Flora, 24 U.S. (11 Wheat.) 1 (1826) (finding an assertion of the nonexistence of the "right to approach" to be novel and without authority).

[53] Roos, *supra* note 48, at 279 n.49.

[54] *See* i*d*. at 279–80; *see also* UNCLOS, *supra* note 41, at art. 91(1); HSC, *supra* note 41, at art. 5(1). ("Each state shall fix the conditions for the grant of nationality to ships . . . and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly.").

[55] *See supra* notes 40–46 and accompanying text; Warner-Kramer and Canty, *supra* note 41, at 230; *see* Rachel Canty, *Limits of Coast Guard Authority to Board Foreign Flag Vessels on the High Seas*, 23 TUL. MAR. L.J. 123, 126 (1998–99); McDorman, *supra* note 42, at 540.

[56] *See* Canty, *supra* note 55, at 126; Anderson III, *supra* note 38, at 141; McDorman, *supra* note 42, at 539; William Kenneth Bissel, *Intervention on the High Seas: an American Approach Employing Community Standards*, 7 J. MAR. L. & COM. 718, 725 (discussing the legal vacuum constituted by stateless vessels); *see also* Matlin, *supra* note 41, at 1026 ("[S]eized ships engender little sympathy in the transnational arena."). *But see* McDorman, *supra* note 41, at 537–38 (asserting that international law does not expressly require a vessel to have any nationality and that statelessness does not, *ipso facto*, breach international law).

[57] *See supra* notes 38–56 and accompanying text; Anderson III, *supra* note 38, at 144.

[58] *See* UNCLOS, *supra* note 41, at art. 91(1) ("Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly."); HSC, *supra* note 41, at art. 5(1) ("Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag."); The Muscat Dhows Case, GEORGE GRAFTON WILSON, THE HAGUE ARBITRATION CASES 71–73 (Ginn & Co. 1915), http://goo.gl/xDjt ("[I]t belongs to every Sovereign to decide to whom he will accord the right to fly his flag and to prescribe the rules governing such grants. . . .").

[59] 345 U.S. 571, 584 (1953) ("Perhaps the most venerable and universal rule of maritime law relevant to our problem is that which gives cardinal importance to the law of the flag. Each state under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship . . . evidenced to the world by the ship's papers and its flag. The United States has firmly and successfully maintained that the regularity and validity of a registration can be questioned only by the registering state.").

from interference from other nations.[60] Accordingly, the different registration systems are often described as falling into three main categories, as one state's system necessarily may not be similar to another's.[61]

Legal theorists principally categorize a state's vessel registration system as closed (or national), open, or compromise (or second or balanced).[62] Closed nationalist registries operate more restrictively than the other types: the owner of a ship must be a citizen of the state; often, the crew or some large percentage of the crew must be citizens of the state; the state may require its flagged vessels to be manufactured within its borders; the closed system may require significant formality for registration; and taxes in a closed system may be relatively high.[63] Open registries, by contrast, generally do not require the owner to be a national; do not specify requirements for crew citizenship; do not require manufacture of the vessel with their borders; operate with relatively little formality; and excise few taxes on the vessels.

Open registries are often called *flags of convenience*, because they provide vessel owners economic benefit as well as reprieve from stricter standards of registration in their countries of origin.[64] Often used pejoratively, *flag of convenience* also connotes the registry of a country with no domestic industrial need for the volume of shipping that occurs under its flag; which derives a disproportionate benefit to its treasury because of its sheer tonnage; which makes it very easy, often through consuls strategically located abroad, for foreign nationals to register; or which may not have the wherewithal or desire to impose any *bona fide* regulations on its ships.[65]

Closed registry nations criticize flags of convenience especially for this last characteristic: they assert that a relative lack of regulation and enforcement by open registries leads to ills on the high seas.[66] Notably, critics accuse owners of conveniently flagged vessels of allowing their masters and crew to take more risks while hiding behind the secrecy and anonymity that normally accompanies open registration, and, as non-nationals, of being able to avoid *in personam* jurisdiction necessary for effective prosecution or inquiry by the flag state.[67]

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[60] Anderson III, *supra* note 38, at 146; Matlin, *supra* note 41, at 1031.

[61] Maria J. Wing, *Rethinking the Easy Way Out: Flags of Convenience in the Post-September 11th Era*, 28 TUL. MAR. L.J. 173, 174 (2003–04); Matlin, *supra* note 41, at 1027.

[62] Wing, *supra* note 61, at 174; Anderson III, *supra* note 38, at 151; Matlin, *supra* note 41, at 1027 & 1039.

[63] *See* Anderson III, *supra* note 38, at 151–56; Matlin, *supra* note 41, at 1027, 1044–45.

[64] *See* Anderson III, *supra* note 38, at 157.

[65] *See id*. at 157–58; Matlin, *supra* note 41, at 1044–45; *see also* Bissel, *supra* note 56, at 722 (criticizing flags of convenience as a "notorious gambit . . . for the purpose of avoiding responsibilities to the true owner's State"). *But see* L.F.E. Goldie, *Environmental Catastrophes and Flags of Convenience—Does the Present Law Pose Special Liability Issues?*, 3 Pace Y.B. Int'l L. 63, 64 n.5 (1991) (noting that the term *flag of convenience* is also used by commentators in a commendatory fashion).

[66] *See* Anderson III, *supra* note 38, at 162–67 (countering assertions by critics of open registries that flags of convenience lead to environmental, safety and labor problems).

[67] *Id*. at 164. *Contra id*. at 165 (arguing that the specter of safety problems of open registries may be overstated by critics and explained by the fact that industrial safety standards in developing countries, which preponderantly constitute open registries, are simply uniformly lower than those of developed nations, which tend to have closed registries); *cf*. *id*. at 163 (noting that the mostly costly vessel oil spill of all time was caused by the running aground of a closed registry ship, the United States M/V EXXON VALDEZ).

Flags of convenience, in some cases, appear to have acted as a shield to "nefarious activities," allowing shipowners to circumvent international or foreign laws against whaling, illegal broadcasting, and drug smuggling.[68]

Shipowners have been flagging their vessels with foreign flags for at least three hundred years.[69] Modern flags of convenience, owe their beginnings to the creativity of American statesmen in the 1920s who sought to circumvent Prohibition laws which banned the sale of alcohol on American flagged ships.[70] American consuls represented the interests of Panama, and freely issued *patentes de navegacion* (vessel registries) on behalf of Panama to previously-U.S. flagged vessels so the vessels could smuggle and purvey alcohol under the Panamanian flag.[71] A decade later, former Secretary of State Edward Stettinius and American entrepreneurs worked with the government of Liberia to establish an open registry there with even fewer restrictions than were required by Panama.[72] Today, open registries, especially those of Panama and Liberia, thrive in spite of criticism.[73] Ironically, the United States, the exemplar of closed registries, still maintains the strictest flagging requirements of any seafaring nation even though it has witnessed a significant decline in its own merchant marine fleet.[74]

Meanwhile, the international community began attempting to attenuate the prevalence of flags of convenience in the 1950s when the United Nations inserted a clause into the Convention on the High Seas requiring a "genuine link between the State and the ship."[75] The definition of "genuine link" is vague, partly because it appears to be an analogous application of international precedent arising under the *Nottebohm* case, which had to do with the nationality of persons, not vessels.[76] In *Nottebohm*, Guatemala had seized the property of a former citizen of Germany, upon whom Liechtenstein had conferred citizenship, but which Guatemala refused to recognize.[77] Liechtenstein brought an action against Guatemala in the International Court of Justice on behalf of Nottebohm, but the court held that Liechtenstein did not have standing, because there was no "genuine connection of existence, interests and sentiments, together with

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[68] Matlin, *supra* note 41, at 1049–50.

[69] *Id*. at 1018–19 (explaining that Genovese merchants flew the flag of France to avoid conflict on the high seas and that United States slave traders flew the flags of countries who were non-signatories to a slavery suppression treaty).

[70] Wing, *supra* note 61, at 175; Anderson III, *supra* note 38, at 156.

[71] Wing, *supra* note 61, at 175; Anderson III, *supra* note 38, at 159.

[72] Wing, *supra* note 61, at 175; Anderson III, *supra* note 38, at 159.

[73] In 2009, 39.8% of all registered merchant ships in the top thirty-five industrialized seafaring countries (13,462 of a total 33,824) flew the flags of the ten largest open registries. United Nations Conference on Trade and Development, *Review of Maritime Transport 2009*, ch. 2, tbl. 15, http://www.unctad.org/en/docs/rmt2009_en.pdf [hereinafter *RMT 2009*]. Ships flying these flags of convenience comprise 55.6% of the world's total deadweight tonnage. *Id*. The ten major open registries (in descending order of deadweight tonnage) are: Panama, Liberia, the Marshall Islands, the Bahamas, Malta, Cyprus, the Isle of Man, Antigua and Barbuda, Bermuda, and Saint Vincent & the Grenadines. *Id*.

[74] Wing, *supra* note 61, at 175; Anderson III, *supra* note 38, at 151–52.

[75] HSC, *supra* note 41, at art. 5(1). The United Nations reiterated the requirement in the Convention on the Law of the Sea. UNCLOS, *supra* note 41, at art. 91(1).

[76] *See* (Liech. v. Guat.), 1955 I.C.J. 4 (Apr. 6); Matlin, *supra* note 41, at 1031–33.

[77] *Nottebohm Case*, at 6–7, 13, 18.

the existence of reciprocal rights and duties" between Liechtenstein and Nottebohm.[78]

Since the factors for a genuine connection in *Nottebohm* included a "habitual residence," "the centre of [a person's] interests", the family's current and historical residence, and patriotic attachment of a person and his children to a particular country, opponents to the application of *Nottebohm* to vessels argued that the case is inapposite to vessel registration.[79] Furthermore, because the only way a vessel can establish reciprocal rights and duties is by registration with a flag country, it appears that a vessel tautologically establishes a genuine link upon registration anyway.[80] Given that a genuine link appears to arise merely upon registration and that no international accord on a definition of the concept exists, the genuine link requirement remains impotent.[81] It is also noteworthy that United States and previous international jurisprudence on the sanctity of the law of the flag is in opposition to the genuine link concept.[82] Flag nationality "remains a well-defended preserve of the sovereignty of the States" and an "axis of the law of the sea."[83]

Yet, closed registry nations may still interfere with flag of convenience vessels if they choose to cite them pretextually for violations of regulations or for international regulations proper.[84] Vessels flying under an open flag do incur greater inspection harassment at port in ways that may reflect political biases.[85] Port states may also choose to ban entry to conveniently flagged vessels or may detain them for violation of the genuine link requirement despite the risk that such actions tend to hinder trade.[86]

Other states have attempted to fill the niche between closed and open registries by compromising between the needs of merchant ships that use open registries to remain competitive and the stigma that may accompany flags of convenience.[87] Compromise registries such as Luxembourg, Norway, Denmark, and the Canary Islands usually require majority domestic ownership or a stronger (genuine) link between the vessel and the state, but still provide the benefit of low taxes and the ability to man a foreign, less expensive crew.[88] Nevertheless, while compromise registries have seen some success, flags of convenience have continued to increase their market share of the world's deadweight tonnage.[89]

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[78] *Id.* at 12, 23.

[79] Matlin, *supra* note 41, at 1033–34; *see Nottebohm Case*, at 22.

[80] Anderson III, *supra* note 38, at 149–50.

[81] *See id*. at 149–51; Matlin, *supra* note 41, at 1035.

[82] *See supra* notes 58–61 and accompanying text.

[83] Tullio Treves, *Flags of Convenience Before the Law of Sea Tribunal*, 6 San Diego Int'l L.J. 179, 189 (2004–05).

[84] *See* Anderson III, *supra* note 38, at 167.

[85] *See id.* at 167–69.

[86] *Id*. at 167; Matlin, *supra* note 41, at 1037–38.

[87] Anderson III, *supra* note 38, at 156.

[88] *Id*.; Matlin, *supra* note 41, at 1027–28.

[89] *Compare RMT 2009*, *supra*, note 73, at ch. 2, tbl. 15 (showing that ships flying the top seven flags of convenience comprise 53.3% of the deadweight tonnage of the top thirty-five seafaring nations at the end of 2008) *with* United

B. United States Law Enforcement Jurisdiction

1. Sea Zones

The United States, pursuant to international law, historically has recognized the division of the navigable sea into three principal zones, the inland waters, the territorial sea, and the high seas.[90] The inland waters, such as Puget Sound, the Mississippi River, or San Francisco Bay are treated as the land of the nation itself, subject to complete jurisdiction of the United States.[91] The second major zone, the territorial waters or territorial sea, is the band of ocean measured a number of miles from the coastline over which the coastal nation exercises nearly sovereign jurisdiction, but through which foreign vessels retain the right of innocent passage.[92] Innocent passage is freedom from unreasonable interference by a coastal state.[93] Under international law, territorial sea jurisdiction includes control over warships, merchant vessels, the right to establish and enforce customs, taxation, and fishing regulations and the right to establish military defense.[94] Beyond the territorial sea are the high seas, which no nation, at least in theory, may subject to sovereign control.[95]

Yet, there are also zones within the high seas over which a nation may exercise some but not complete control, namely the contiguous zone and the exclusive economic zone.[96] In the contiguous zones, oceanic belts adjacent to territorial seas, coastal nations "may exercise the control necessary to . . . [p]revent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea" or "punish infringement" of the same regulations.[97] Exclusive economic zones, established by the United Nations Convention on the Law of the Sea, are areas extending 200 nautical miles from the coastline of a coastal state in which that state has the exclusive right to capture natural resources, living and non-living in the water and the seabed.[98]

While the United States technically is not a party to UNCLOS, President Reagan declined to sign the treaty only because of the provisions of the Convention relating to deep seabed

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Nations Conference on Trade and Development, *Review of Maritime Transport 1997*, ch. II, tbls. 15–17, http://www.unctad.org/en/docs/rmt1997_en.pdf (showing that ships flying the top seven flags of convenience comprised 44.8% of the deadweight tonnage of the top thirty-five seafaring nations at the end of 1996).

[90] U.S. v. Louisiana, 394 U.S. 11, 22 (1969).

[91] *See id*.

[92] *Id.*

[93] Michael J. Merriam, *United States Maritime Drug Trafficking Search and Seizure Policy: An Erosion of United States Constitutional and International Law Principles*, 19 SUFFOLK TRANSNAT'L L. REV. 441, 450 (1995–96); *see* United Nations Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, arts. 14–23., 15 U.S.T. 1606, 516 U.N.T.S. 205 [hereinafter TSC or Territorial Sea Convention].

[94] Merriam, *supra* note 93, at 449–50.

[95] *Louisiana*, 394 U.S. at 22; UNCLOS, *supra* note 41, at art. 89 ("No State may validly purport to subject any part of the high seas to its sovereignty."); HSC, *supra* note 41, at art. 2.

[96] *See* UNCLOS, *supra* note 41, at arts. 55 – 75; TSC, *supra* note 93, at art. 24.

[97] TSC, *supra* note 93, at art. 24(1).

[98] UNCLOS, *supra* note 41, at arts. 56–57.

mining, which the president believed to be contrary to U.S. interests.[99] The United States accepted UNCLOS's provisions regarding the territorial sea, contiguous zones, and exclusive economic zones (EEZ), which the United States believed to represent customary international law, binding on all nations.[100] At that time, the United States formally adopted jurisdiction over a 200 nautical mile EEZ.[101] Later in 1988, in accordance with UNCLOS, the United States proclaimed its territorial sea to be twelve nautical miles from its shores after holding for two centuries that its territorial sea extended only three miles from the coastline.[102] Likewise, in 1999, again in accordance with UNCLOS, the United States proclaimed its contiguous zone extended twenty-four miles from its coastlines.[103]

Courts have ruled that the power of the United States inside the territorial waters is plenary.[104] Inside the United States contiguous zone ("customs waters"), the United States Coast Guard is authorized by statute to board any vessel, American *or foreign*, to examine the manifest and other documents and to examine and search the vessel, every part of it and every person on board and to use all necessary force to ensure compliance.[105] Customs officers are vested with similar authority.[106] Theoretically, the power over foreign vessels in the contiguous zone is limited to certain interests such as the enforcement of customs laws, but the power to stop any vessel even in the customs zone is, in reality, plenary as well.[107] The Supreme Court has held that the United States has the authority to board a vessel inside American waters, even if foreign flagged, for so-called safety and document checks even if there is no articulable suspicion that a crime has been or is being committed.[108] Together, the jurisprudence and statutes constitute a grant of police power that is almost without comparison in the history of the United States.[109]

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[99] *See* President's Statement on United States Oceans Policy, 19 WEEKLY COMP. PRES. DOC. 383 (Mar. 10 1983).

[100] *Id.*; Canty, *supra* note 55, at 130; Michael Tousley, *United States Seizure of Stateless Drug Smuggling Vessels on the High Seas: Is It Legal?*, 22 CASE W. RES. J. INT'L L. 375, 376 (1990).

[101] Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 10, 1983).

[102] *Compare* Reagan Proclamation, 54 Fed. Reg. 777 (Dec. 27, 1988) *with* UNCLOS, *supra* note 41, at art. 3 *and* Cunard S.S. Co. v. Mellon, 262 U.S. 100, 122 (1923) (holding the three-mile territorial sea to be settled law).

[103] *Compare* Proclamation No. 7219, 3 C.F.R. 1684 (Sep. 2, 1999) *with* UNCLOS, *supra* note 41, at art. 4(2). But see the Territorial Sea Convention, to which the United States is a ratified signatory, which limited a contiguous zone to be no greater than twelve miles from the coastline of a coastal nation. TSC, *supra* note 93, at arts. 3, 4 & 24(2).

[104] U.S. v. Warren, 578 F.2d 1058, 1065 n.4 (5th Cir. 1978); *Cunard S.S. Co.*, 262 U.S. at 122.

[105] 14 U.S.C. § 89(a) (2010).

[106] 19 U.S.C. § 1581(a) (2010).

[107] *Compare* TSC, *supra* note 93, at art. 24(1) *and Warren*, 578 F.2d at 1065 n.4 ("The power of the United States over foreign vessels in the contiguous zone is limited to the preservation of specific interests, *e.g.*, the enforcement of customs and safety laws.) *with* United States v. Stanley, 545 F.2d 661, 664–67 (9th Cir. 1976) (likening a customs stop in the contiguous zone to a border search, an exception to the probable cause requirement of the Fourth Amendment) *and* Merriam, *supra* note 93, at 450–51 ("According to international law, a state's laws do not extend into the contiguous zone. As a matter of practice and international custom, however, a sovereign's powers extend beyond the territorial sea into the contiguous zone.").

[108] U.S. v. Villamonte-Marquez, 462 U.S. 579 (1983).

[109] *See* Merriam, *supra* note 93, at 461; Howard S. Marks, *The Fourth Amendment Rusting on the High Seas?*, 34

2. Extraterritorial Jurisdiction Over Vessels on the High Seas

The United States technically may exercise jurisdiction in an enforcement capacity over a vessel outside its territorial or inland waters in only one of three ways: 1) when the vessel is American, 2) when it is stateless, 3) if foreign, when the flag state consents, or 4), if foreign when the United States assumes extraterritorial jurisdiction pursuant to one of the international bases of criminal jurisdiction.[110]

To reiterate, vessels include every form of watercraft that can be used as a means of transportation on water.[111] For law enforcement purposes, American vessels, i.e., "vessels of the United States," generally are vessels belonging to any government in the United States, any American citizen and any corporation, and the United States Coast Guard is granted nearly absolute statutory power to board any American vessel.[112] With respect to smuggling enforcement, vessels of the United States also include vessels that are *foreign flagged* but which are substantially controlled, even if indirectly, by a citizen or corporation of the United States.[113] For the purposes of combating drug smuggling and fisheries protection, the definition also extends to a foreign vessel that was once a vessel of the United States but improperly transferred to a new foreign owner.[114]

If the vessel on the high seas is foreign flagged, the United States Supreme Court has held that it is the vessel's burden to prove its own nationality, and the foreign flag state must also avow the vessel if the United States inquires.[115] International law already provides the right of approach—or at least the pretext for approach—to a nation's warship if the captain reasonably suspects the vessel in question to be of the same national origin as the warship or stateless.[116] If the vessel cannot prove its country of registry, and the United States Coast Guard assimilates the vessel as stateless, then the vessel becomes subject to the United States' unfettered control as if it were an American vessel.[117] On the other hand, if the vessel successfully proves its national

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MERCER L. REV. 1537, 1537–38 (1982–83).

[110] Canty, *supra* note 55, at 136; Martin Davies, *Obligations and Implications for Ships Encountering Persons in Need of Assistance at Sea*, 12 PAC. RIM L. & POL'Y J. 109, 116, 118 (2003); Sclafani, *supra* note 48, at 376.

[111] *See supra* notes 22–24 and accompanying text.

[112] 18 U.S.C. § 9 (2010); *see* 14 U.S.C. § 89(a); *see also* 19 U.S.C. § 1581 (describing the broad grant of power to customs officials to board, inspect, search, and seize American vessels).

[113] 19 U.S.C. § 1703(b) (2010).

[114] 46 U.S.C. § 70502(b)(3) (2010); 16 U.S.C. § 1802(48) (2010).

[115] U.S. v. Klintock, 18 U.S. (5 Wheat.) 144, 151 (1820); *see id*. at 152 (implying that jurisdiction does not "extend to persons under the acknowledged authority of a foreign State,").

[116] UNCLOS, *supra* note 41, at art. 110(1)(d)–(e).

[117] *Id*. at 152 (holding that a vessel "acknowledging obedience to no government whatsoever . . . are proper objects for the penal code of all nations."); U.S. v. Marino-Garcia, 679 F.2d 1373, 1382–83 (11th Cir. 1982) ("Vessels without nationality are international pariahs. . . . [I]nternational law permits any nation to subject vessels on the high seas to its jurisdiction. Such jurisdiction neither violates the law of nations nor results in impermissible interference with another sovereign nation's affairs. Jurisdiction exists solely as a consequence of the vessel's status as stateless."); *accord* U.S. v. Victoria, 876 F.2d 1009, 1010 (1st Cir. 1989); U.S. v. Alvarez-Mena, 765 F.2d 1259, 1265 (5th Cir. 1985); U.S. v. Pinto-Mejia, 720 F.2d 248, 261 (2d Cir. 1983); U.S. v. Howard-Arias, 679 F.2d 363, 371 (4th Cir. 1982); U.S. v. Cortes, 588 F.2d 106, 109 (5th Cir. 1979); U.S. v. Rubies, 612 F.2d 397, 403 (9th Cir.

origin, regardless whether the nation's registry is open, closed or a compromise registry, the United States, eschewing a genuine link requirement, generally will respect foreign jurisdiction according to the law of the flag.[118]

What this respect often entails, however, is that the United States simply will exercise diplomatic processes with friendly states to secure permission to board, search and seize vessels proved to be foreign.[119] Sometimes, these requests, particularly with smaller flag of convenience states, are really forms of diplomatic pressure.[120] This is especially true for vessels flagged by Caribbean nations, with which the United States has patron-client relationships.[121] In these cases, the United States has entered into "ship rider" treaties which allow the United States to enter the territorial waters of signatory countries to interdict vessels without obtaining prior express permission, so long as one of the respective island state's law enforcement officers is on board the Coast Guard cutter.[122]

Furthermore, the United States relies on the five bases for criminal jurisdiction under international law.[123] The five principles are: territorial, based on the location of the criminal act; national, based on the nationality of the offender; protective, based on whether national interests are at stake; passive personality, based on the nationality of the victim; and universal, which allows jurisdiction against any person anywhere for crimes against humanity, i.e., crimes that are universally condemned such as piracy and slavery.[124] United States courts have extended the territorial principle to include an "objective territorial" principle, by which the United States may assume extraterritorial jurisdiction if an act on the high seas is likely to produce deleterious effects inside the territory of the United States.[125] The United States heavily relies on the objective territorial principle and the protective principle to assert extraterritorial jurisdiction over foreign vessels on the high seas, particularly to combat drug smuggling.[126]

1979); *see supra* notes 45–56 and accompanying text; *see infra* note 155 and accompanying text.

[118] *See supra* notes 59, 81 and accompanying text.

[119] *See, e.g.*, United States v. Green, 671 F.2d 46, 49 (1st Cir. 1982) (discussing how the United Kingdom granted permission to the United States to board and search a vessel).

[120] *See* Matlin, *supra* note 41, at 1050; Stefan A. Riesenfeld, *Jurisdiction Over Foreign Flag Vessels and the U.S. Courts: Adrift Without a Compass?*, 10 MICH. J. INT'L L. 241, 247; *see also* Warner-Kramer and Canty, *supra* note 45, at 227; Anderson III, *supra* note 38, at 160–61; *see, e.g.*, U.S. v. Suerte, 291 F.3d 366, 368 (5th Cir. 2002) (noting that Malta waived objection to the United States' planned boarding and search of a freighter).

[121] *See* Justin S.C. Mellor, *Missing the Boat: The Legal and Practical Problems of the Prevention of Maritime Terrorism*, 18 AM. U. INT'L L. REV. 341, 389 (2002–03).

[122] *Id*. at 388.

[123] Rivard v. U.S., 375 F.2d 882, 885–86 (5th Cir. 1967); *accord* U.S. v. McAllister, 160 F.3d 1304 (11th Cir. 1998); U.S. v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991); U.S. v. Benitez, 741 F.2d 1312, 1316–17 (11th Cir. 1984); Chua Han Mow v. U.S., 730 F.2d 1308, 1311–12 (9th Cir. 1984).

[124] *Rivard*, 375 F.2d at 885–86; UNCLOS, *supra* note 41, at arts. 99–110(1) (providing for jurisdiction by all nations over universally condemned activity such as slavery, piracy and unauthorized broadcasting); HSC, *supra* note 41, at arts. 13–22 (providing for jurisdiction by all nations over slavery and piracy); *accord Klintock*, 18 U.S. at 152 (determining that all nations may take jurisdiction and punish crimes such as piracy).

[125] U.S. v. Smith, 680 F.2d 255, 258 (1st Cir. 1982); U.S. v. Pizzarusso, 388 F.2d 8, 10–11 (2d Cir. 1968).

[126] Davies, *supra* note 110, at 118.

In the same vein, Congress passed the Maritime Drug Law Enforcement Act of 1986 (MDLEA), a successor to the Marijuana on the High Seas Act of 1980 (MHSA).[127] Before both acts, the United States had a relatively easy burden of proof to search and seize foreign or stateless vessels *in rem* under the protective principle and the objective territorial principle under then-current statutes.[128] Prosecuting the crew, however, was difficult without a statute establishing jurisdiction *in personam*.[129]

The MHSA specifically authorized the prosecution of American citizens on any vessel and the prosecution of foreigners on stateless vessels.[130] Despite criticism of the MHSA alleging that the expansion of jurisdiction violated the freedom of the sea, Congress later amended the MHSA by further expanding the power of the United States to approach, seize, board and prosecute vessels and crews on the high seas.[131] While it appears that Congress made explicit reference to international law, it also incredibly added broad language preserving federal jurisdiction over a foreign national even if it was improperly claimed in contravention to the tenets of international law.[132] Only a foreign nation has standing to complain about the impropriety of United States action under MDLEA with respect to arresting and prosecuting foreign nationals.[133] Irrespective of any formal complaint by a foreign state, the United States still retains jurisdiction over the foreigner.[134] The statute effectively allows the Coast Guard to disregard international law regarding foreign vessels on the high seas, because the courts retain jurisdiction of a foreign crew so long as they are arrested under suspicion of drug smuggling.[135]

This is only a slight departure from previous federal circuit court jurisprudence. In *Ker v. Illinois*, the appellant, who had been convicted for theft and embezzlement, challenged the personal jurisdiction of the Illinois state courts, because a federal official-cum-bounty hunter had kidnapped the appellant in Peru and returned him back to the United States.[136] The Court held that the kidnapping was equivalent to a "mere irregularit[y] in the manner in which he [was]

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[127] Maritime Drug Law Enforcement Act of 1986 (MDLEA), 46 U.S.C. app. §§ 1901–1904 (2010); *see* Marijuana on the High Seas Act, Pub. L. Nol. 96-350, 94 Stat. 1159 (1980).

[128] *See* United States v. One 43 Foot Sailing Vessel "Winds Will," 405 F. Supp. 879 (S.D. Fla. 1975), *aff'd* 538 F.2d 694 (5th Cir. 1976); Sclafani, *supra* note 48, at 378–79; Roos, *supra* note 48, at 281.

[129] Sclafani, *supra* note 48, at 378–79; *see* Roos, *supra* note 48, at 281.

[130] Tousley, *supra* note 100, at 377.

[131] Sclafani, *supra* note 48, at 379; Tousley, *supra* note 100, at 377–78.

[132] *Compare* 46 U.S.C. § 1903(b)(2) (2010) (allowing a vessel to escape the definition of a vessel of the United States so long as it was registered pursuant to the HSC) *and* (c)(1)(B) (calling on the definition of an assimilated stateless vessel pursuant to the HSC) *and* (c)(3) (calling on the definition of the production of manifests listed in Article 5 of the HSC) *with id*. at § 1903(d) ("Any person charged with a violation of this section shall not have standing to raise the claim of failure to comply with international law as a basis for a defense. A claim of failure to comply . . . may be invoked solely by a foreign nation, and a failure to comply . . . shall not divest a court of jurisdiction or otherwise constitute a defense to any proceeding under this chapter.")

[133] 46 U.S.C. app. § 1903(d).

[134] *Id*.

[135] *See* Merriam, *supra* note 93, at 471 ("The United States essentially ignores there noninterference principles and stops and boards ships several miles off the United States coast.").

[136] 119 U.S. 436, 437–39 (1886).

brought into the custody of the law," because any person may arrest another for "a heinous crime" and because due process was not at issue so long as the indictment and trial were fair.[137] The Court abstained from ruling on the issue of whether Illinois' retained jurisdiction was proper in light of international law, because it held that the Illinois Supreme Court was equally as competent to address the question, and because Peru still retained the ability to extradite and try the federal officer for kidnapping.[138]

The *Ker* rule was upheld and solidified in *Frisbie v. Collins*, a case in which Michigan officers kidnapped a man in Chicago to stand trial for murder in Michican.[139] The Court held that it

> has never departed from the rule announced in *Ker v. Illinois* . . . that the power of a court to try a person for a crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a "forcible abduction." . . . [D]ue process of law is satisfied when one present in court is convicted of crime after having been fairly apprised of the charges against him and after a fair trial. . . . There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will.[140]

It is still a tenet of United States law that a person abducted and brought to trial in violation of the sovereignty of the nation from where he is taken has no independent right to challenge the jurisdiction later assumed by the country to which he is brought.[141]

The MDLEA simply codified the necessary personal jurisdiction over foreign crews for the *Ker-Frisbie* doctrine to take hold with respect to boarding, searching and seizing foreign vessels for suspicion of drug smuggling on the high seas.[142] The wrinkle with respect to the *Ker-Frisbie* doctrine is that it cannot perfect evidence obtained in illegal searches and seizures on the high seas, but rendered inadmissible by the Fourth Amendment.[143] In *United States v. Cadena*, for example, the Fifth Circuit stated that:

> In general, warrantless searches are unlawful even if made with probable cause. . . . However, in a variety of exceptional circumstances, a warrant is not prerequisite to a valid search. We have specifically sustained the constitutionality of an

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[137] *Id.* at 440.

[138] *Id*. For a modern example of this principle, see Regina v. Kear, 51 C.C.C.3d 574 (Can. 1989) (Canadian court holding, after Canada lodged a complaint with the United States to extradite an American bondsman for kidnapping an American defendant in Toronto who failed to appear for trial in Florida, that the bondsman had no common law power to arrest the American defendant).

[139] 342 U.S. 519, 520, 522 (1952).

[140] *Id*. at 522.

[141] *See* Riesenfeld, *supra* note 120, at 244.

[142] *See* 46 U.S.C. app. § 1903(d).

[143] Christopher Connolly, *"Smoke on the Water": Coast Guard Authority to Seize Foreign Vessels Beyond the Contiguous Zone*, 13 N.Y.U. J. INT'L L. & POL. 249, 255 (1990–91).

> inspection, made without a warrant or probable cause pursuant to 14 U.S.C. § 89(a), of United States flag vessels, but *implied that this exception is permissible only with respect to domestic vessels* because of the special interest of the nation in the conduct and operation of its citizens' vessels. . . . Additionally, we have indicated that the Coast Guard has authority to search a domestic vessel for safety, documentary purposes, and "to look for obvious customs and narcotics violations."[144]

Therefore, foreign smugglers can be arrested illegally and tried even under protest of a foreign government in contravention of ratified treaty, but the evidence of an illegal seizure would be inadmissible against them.[145] On the other hand, because vessels are treated like floating pieces of territory of the flag state, if the flag state grants the United States permission to board, search, and seize under its exclusive jurisdiction, because the domestic law of the flag country will not contemplate the Fourth Amendment, evidence obtained may be admissible (at least under Fifth Circuit jurisprudence).[146]

3. Survey of the Circuits' Fourth Amendment Treatment of Vessels

In *United States v. Williams*, the Fifth Circuit held that reasonable suspicion was the sufficient standard to justify the search and seizure of a foreign flagged vessel on the high seas pursuant to the statutory authority of Coast Guard and customs officials to search and seize.[147] The Fifth Circuit also reiterated the *Warren* rule allowing the Coast Guard to board and search any vessel of the United States anywhere on the high seas without any articulable suspicion of criminal activity.[148] Because the Fifth Circuit did not interpret the broad statutory grant of power in 14 U.S.C. § 89(a) and 19 U.S.C. § 1581(a) through the prism of "land-based" Fourth Amendment jurisprudence, it gave Coast Guard and customs officers unqualified power to stop American vessels under a pretext of a documentation and safety check.[149] Furthermore, the Fifth Circuit subsequently held that "the Coast Guard has implicit power to search an American vessel in *foreign* waters even in the absence of express statutory authority."[150] Under Fifth Circuit jurisprudence, it is clear that foreign vessels are granted minimal protection from search and seizure and that American citizens and vessels are actually granted *fewer* protections than foreigners on the high seas.[151]

The Fifth Circuit's decisions regarding the Fourth Amendment are highly influential,

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[144] 585 F.2d 1252, 1262–63 (1978) (citing *One 43 Foot Sailing Vessel "Winds Will,"* 405 F. Supp. 879) (citation omitted) (quoting U.S. v. Warren, 578 F.2d 1058, 1065 (5th Cir. 1978)) (emphasis added).

[145] Connolly, *supra* note 143, at 255, 327–28; *see* HSC, *supra* note 41, at art. 2.

[146] Connolly, *supra* note 143, at 328; *see* HSC, *supra* note 41, at art. 6(1); *see also, e.g.*, U.S. v. Williams, 617 F.2d 1063, 1075 (5th Cir. 1980) (pointing out that Panamanian consent to search a Panamanian flagged vessel is sufficient authorization to search in the absence of domestic statutory authority).

[147] 617 F.2d at 1073, 1084 (referencing 14 U.S.C. § 89(a) and 19 U.S.C. § 1581(a)).

[148] *Id*. at 1075 (quoting *Warren*, 578 F.2d at 1064).

[149] *See* Marks, *supra* note 109, at 1541–42.

[150] U.S. v. Conroy, 589 F.2d 1258, 1265 (5th Cir. 1979) (emphasis added).

[151] *See supra* notes 112, 115–18, 147–50 and accompanying text.

because that court has rendered the most as compared to any other circuit court of appeals due to its proximity to drug smuggling routes from Mexico and South America and to the United States *de facto* client states in the Caribbean and Central America.[152] The First Circuit has agreed with the Fifth Circuit with respect to the level of suspicion necessary to stop a foreign vessel and that there is no suspicion required to stop and board an American vessel.[153] The Eleventh Circuit has taken the same views as the Fifth Circuit with respect to the suspicion sufficient to stop and board a foreign vessel and the fact that American vessels are left without Fourth Amendment protections from detention on the high seas.[154] Additionally, the Eleventh Circuit's decision in *U.S. v. Marino-Garcia* has become the leading case throughout the circuits on detaining, boarding, searching and seizing stateless vessels on the high seas, holding that the United States could take jurisdiction over these "international pariahs" simply by a vessel's status as stateless.[155]

Meanwhile, the Ninth, Second, Fourth and Third Circuits have not been so sanguine as the Fifth, First and Eleventh in their interpretations of 14 U.S.C. § 89(a) and 19 U.S.C. § 1581(a).[156] In *United States v. Piner*, the Coast Guard had stopped a boat in United States territorial waters during the evening, citing a randomized document and safety check as the reason.[157] The Coast Guard officer eventually found marijuana in plain view and arrested the occupants.[158] Holding that the reasons underlying the government's justification to board after dark—to check documents and vessel safety—did not outweigh the privacy interests of the boat's occupants at night, the Ninth Circuit affirmed the lower district court's suppression of the marijuana as evidence.[159] Thus, the Ninth Circuit was the first to circumscribe 14 U.S.C. § 89 with the some of the limits of the Fourth Amendment by actually weighing the interests of the government against the interests of the vessel's occupants.[160]

Later, the Ninth Circuit addressed the Fourth Amendment requirements for boarding, searching, and seizing a foreign national on a foreign vessel in *United States v. Davis*.[161] The Coast Guard approached a British vessel thirty-five miles southwest of Point Reyes, California, because it suspected the vessel of smuggling.[162] When the vessel's captain denied the Coast

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[152] *See* Marks, *supra* note 109, at 1539; *supra* notes 119–22 and accompanying text.

[153] U.S. v. Hilton, 619 F.2d 127, 131–33 (1st Cir. 1980) (noting that the Coast Guard has broad discretion in deciding which vessel to board); U.S. v. Arra, 630 F.2d 836, 841–42 (1st Cir. 1980).

[154] U.S. v. Glen-Archila, 677 F.2d 809, 813 (11th Cir. 1982); U.S. v. Clark, 664 F.2d 1174, 1174–75 (11th Cir. 1981).

[155] 679 F.2d at 1382 – 83; *see supra* note 117 and accompanying text.

[156] *See* Marks, *supra* note 109, at 1551–60.

[157] 608 F.2d at 359.

[158] *Id*.

[159] *Id*. at 361.

[160] *See* 608 F.2d 358 (9th Cir. 1979); Marks, *supra* note 109, at 1552–53. *But see* U.S. v. Watson, 678 F.2d 765, 768 (9th Cir. 1982) (upholding a search and seizure of a vessel at night, because the boarding was pursuant to a regularized administrative plan rather than a random decision of the Coast Guard officer).

[161] 905 F.2d 245, 248–49.

[162] *Id*. at 247.

Guard's request to board, the Coast Guard contacted the United Kingdom, which gave the United States permission to board.[163] The Ninth Circuit did not, however, end its analysis at the grant of permission by the United Kingdom.[164] Instead, the court engaged in a three-part inquiry.[165] First, the court stated that prosecution of a foreign national requires a preliminary analysis as to whether the Constitution allowed Congress to give extraterritorial effect to the criminal statute in question (MDLEA).[166] Finding that the Constitution expressly grants Congress the power to "define and punish . . . felonies on the high seas," the court found that MDLEA met this test.[167]

Next, the court evaluated whether Congress intended for the statute in question to have extraterritorial effect.[168] The Ninth Circuit found that Congress did intend the MDLEA to have extraterritorial effect.[169] Finally, and most importantly, the court stated that there must be an inquiry into whether there is a "sufficient nexus between the defendant and the United States" to avoid fundamental unfairness.[170] In this specific case, the Ninth Circuit found that there was a sufficient nexus given the defendant's sudden change of course upon detection, the size of his ship versus his stated point of departure, and the other factors that gave the Coast Guard reasonable suspicion.[171] The "sufficient nexus" language, however, was a sharp departure from the majority rule, which requires no nexus whatsoever.[172]

It is important to note that the Ninth Circuit follows the others with respect to stateless vessels apprehended on the high seas.[173] In *United States v. Caicedo*, the Coast Guard boarded and seized a stateless vessel off the coast of Nicaragua, two thousand miles from San Diego.[174] The vessel had jettisoned one ton of cocaine before being boarded, but the Coast Guard admitted that there was no evidence that the crew intended to sail to the United States or that any of the drug-related activities occurred in the United States.[175] Despite these facts, the Ninth Circuit distinguished *Caicedo* from *Davis* and rejected the application of "sufficient nexus," simply because the vessel was stateless.[176]

The Second Circuit's Fourth Amendment jurisprudence seems to concur with the Fifth

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[163] *Id*.

[164] *But see supra* note 146 and accompanying text.

[165] 905 F.2d at 248.

[166] *Id*.

[167] *Id*. (quoting U.S. CONST. art. I, § 8, cl. 10).

[168] *Id*. ("We require Congress make clear its intent to give extraterritorial effect to its statutes." (citing U.S. v. Pinto-Mejia, 720 F.2d at 259)).

[169] *Id*. (citing 46 U.S.C. app. § 1903(h) (1986)).

[170] *Id*. at 248–49.

[171] *Id*. at 247, 249.

[172] *See supra* notes 146–52 and accompanying text.

[173] *See supra* notes 117 & 155 and accompanying text; *infra* notes 174–76 and accompanying text.

[174] 47 F.3d 370, 371 (9th Cir. 1995).

[175] *Id*.

[176] *Id*. at 371–73; *accord Marino-Garcia*, 679 F.2d at 1383.

Circuit's results, but not its reasoning.[177] In *United States v. Steifel*, the Coast Guard seized a vessel flagged in Panama on the high seas and searched it.[178] The court held that land-based search and seizure principles were applicable on the high seas, but likened a stop on the high seas to a traffic stop under *Terry v. Ohio* and remained unconvinced by the government's argument that the Coast Guard was exempt from a reasonableness requirement.[179]

The Fourth Circuit has also applied land-based search and seizure principles in its jurisprudence for the high seas.[180] In *United States v. Harper*, the court addressed the Fourth Amendment limits on a 14 U.S.C. § 89(a) seizure of an American vessel eight hundred miles away from North Carolina.[181] Comparing the detention of the vessel to a border patrol stop, the court determined that it was reasonable since border stops are *per se* reasonable.[182] Strangely, this stop occurred well outside the customs waters of the United States, which constitute a sea zone most analogous to patrolled borders.[183] Functionally speaking, this makes the Fourth Circuit's jurisprudence very similar to the Fifth Circuit's doctrines regarding American vessels on the high seas at least with respect to 14 U.S.C. § 89(a).[184] But, later in *Blair v. United States*, the Fourth Circuit held that a 19 U.S.C. § 1581(a) customs stop is limited by the Fourth Amendment in that it should be a "brief investigatory stop upon a reasonable suspicion of illegal activity."[185] A further search could only be supported upon probable cause.[186]

Finally, the Third Circuit agrees with the Eleventh and Fifth Circuit in their result that there is no nexus requirement for capturing a stateless vessel on the high seas suspected of drug smuggling under the MDLEA.[187] The court stated that the statute superseded a nexus requirement that the court itself had required previously in *United States v. Wright-Barker*.[188]

> There is, of course, no doubt the Congress may override international law by clearly expressing its intent to do so. . . . Inasmuch as Congress . . . expressed no such intent, we felt obligated in *Wright-Barker* to apply the nexus test as required by international law. But 46 U.S.C. app. § 1903(d) expresses the necessary congressional intent to override international law to the extent that international law might require a nexus to the United States for the prosecution of the offenses

[177] *See* Marks, *supra* note 109, at 1555.

[178] 665 F.2d 414, 418 (2d Cir. 1981).

[179] *Id*. at 419–20 (citing 392 U.S. 1 (1968)).

[180] *See* Marks, *supra* note 109, at 1557–60.

[181] 617 F.2d 35, 35 (4th Cir. 1980).

[182] *Id*. at 37–39

[183] Marks, *supra* note 109, at 1558.

[184] *See supra* notes 147–52, 180–83 and accompanying text.

[185] 665 F.2d 500, 504–05 (4th Cir. 1981).

[186] *Id*. at 504.

[187] U.S. v. Martinez-Hidalgo, 993 F.2d 1052, 1056 (3d Cir. 1993).

[188] *Id*. (citing 46 U.S.C. app. § 1903(d)). *Contra* 784 F.2d 161, 168–69 (necessitating a demonstration that the smugglers intended to affect the United States).

defined in the [MDLEA].[189]

It appears that the Third Circuit concurs with the Eleventh and Fifth Circuits' rule regarding the boarding and capture of stateless drug smuggling vessels, but it also seems that the Third Circuit would require a nexus in the absence of overriding statute, which contrary to the majority rule.[190] This even would run contrary to the Ninth Circuit's jurisprudence on the stateless vessel issue.[191]

4. The Mothership Doctrine and Hot Pursuit

International law does itself allow for other exceptions to the freedom of the high seas doctrine, including the mothership doctrine and the doctrine of hot pursuit.[192] Hot pursuit occurs when the coastal state has "good reason to believe" that a vessel has violated its laws and when the state begins pursuit of the vessel while the vessel is still in its contiguous zone or territorial sea.[193] The right of hot pursuit ends at another nation's territorial waters.[194] The treaties also recognize that smaller boats may be working together as a team or even in concert with a larger "mother ship" hovering just outside of a nation's enforcement zones or territorial sea.[195] The mothership doctrine, also known as the doctrine of constructive presence, allows a state to pursue all the vessels involved so long as one of them is inside the contiguous zone of the state.[196] Clearly, Congress enacted MDLEA and its predecessor, MHSA, with hot pursuit and constructive presence in mind.[197] It is also clear, that Congress and the courts have extended the enforcement power of the United States well beyond the dictates of customary international law.[198]

III. ANALYSIS

A. American Admiralty Jurisdiction Over Seasteads

1. Sea Zones

Seasteads cannot be politically autonomous inside the inland waters or territorial sea of the United States (or any coastal nation).[199] Moreover, despite the international principles that theoretically attenuate the authority of a coastal nation inside its contiguous zone to enforcement

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[189] 993 F.2d at 1056.

[190] *But see* Sclafani, *supra* note 48, at 394.

[191] *See supra* notes 173–76, 187–90 and accompanying text.

[192] UNCLOS, *supra* note 41, at art. 111; HSC, *supra* note 41, at art. 23.

[193] UNCLOS, *supra* note 41, at art. 111(1); HSC, *supra* note 41, at art. 23(1).

[194] UNCLOS, *supra* note 41, at art. 111(3); HSC, *supra* note 41, at art. 23(2).

[195] UNCLOS, *supra* note 41, at art. 111(4); HSC, *supra* note 41, at art. 23(3).

[196] UNCLOS, *supra* note 41, at art. 111(4); HSC, *supra* note 41, at art. 23(3).

[197] *See* Sclafani, *supra* note 48, at 378–79. For a history of American treatment of motherships and hot pursuit, see Connolly, *supra* note 143, at 263–70.

[198] *See supra* notes 119–98 and accompanying text.

[199] *See supra* notes 90–94 and accompanying text.

of customs, fiscal, immigration, and sanitary laws, the United States exercises *de facto* plenary authority twenty-four nautical miles from its coastline.[200] A seastead also realistically cannot exercise autonomy inside a contiguous zone.[201]

The two hundred nautical mile exclusive economic zone (EEZ) also poses problems for both floating and fixed-location seasteads.[202] Fixed-location seasteads in the EEZ, although not in admiralty, would fall under the jurisdiction of the United States.[203] Floating seastead vessels fishing in the EEZ would certainly come under the jurisdiction of the United States.[204] Even though The Seasteading Institute (TSI) suggests aquaculture—farming aquatic life for food and others staples—as an alternative to fishing directly, it is possible that a seastead inside an EEZ could find itself running afoul of the conservation laws of the applicable coastal state.[205] Exclusive economic zones, as grants of resources in and below the sea within the designated 200 nautical mile limit, could be interpreted broadly by United States courts to subsume the types of resources that may be grown or developed by a seastead in its attempt to eke out life.[206] While no laws currently indicate that resources raised, as opposed to captured, while a seastead is passing through the American EEZ are subject to American law, broad grants of power in other areas indicate that this is a distinct possibility, liable to interfere with a seastead's autonomy.[207]

Beyond the EEZ are the true high seas.[208] Given the United States' penchant for exercising jurisdiction thousands of miles from its coastlines, not even the territorial sea of other nations may be sufficient to protect a seastead from American jurisdiction.[209] Besides, homesteading on the *territorial* seas of another country also would run counter to the stated purpose of The Seasteading Institute's principles regarding political autonomy.[210] Thus, there is no manner in which a floating seastead altogether can avoid the locational or territorial jurisdictional authority of a coastal state, particularly the United States of America.[211] The crux of a free-floating seastead's maximum autonomy, therefore, is in remaining on the high seas while minimizing exposure to the United States on other axes.[212] Meanwhile, it behooves The

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[200] *See supra* notes 95–97, 100, 103–09 and accompanying text.

[201] *See supra* notes 95–97, 100, 103–09, 200 and accompanying text.

[202] *See supra* notes 98, 100–01 and accompanying text.

[203] *See generally* Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331–1356a (2010).

[204] *See supra* note 98 and accompanying text; *see* FRIEDMAN WITH GRAMLICH, *supra* note 5, at 170 (mentioning the problems that an EEZ presents to fishing inside the zone).

[205] *See* FRIEDMAN WITH GRAMLICH, *supra* note 5, at 170–71; *supra* note 98 and accompanying text.

[206] *See supra* notes 202–05 and accompanying text.

[207] *See supra* notes 202–06 and accompanying text.

[208] *See supra* notes 90, 96, 98 and accompanying text.

[209] *See supra* notes 121–22, 133–42 and accompanying text.

[210] *See supra* notes 2, 92 and accompanying text.

[211] *See supra* notes 209–10 and accompanying text.

[212] *See supra* notes 209–11 and accompanying text; *infra* notes 214–71 and accompanying text. *But see* FRIEDMAN WITH GRAMLICH, *supra* note 5, at 256–7 ("Because being close to existing countries is so beneficial to the success of early seasteads, [the risk of intervention from existing governments] requires careful attention during seasteading's early years."

Seasteading Institute to prefer and develop fixed-location seasteads as soon as possible.[213]

2. American Seasteads

It goes without question that American-flagged seastead vessels would be subject to American jurisdiction.[214] Further, American vessel registration would plight the seastead with the possibility of being approached by a Coast Guard cutter, boarded, and possibly searched and seized, ironically with little to no protection under the Fourth Amendment.[215] The exception to this would take hold when American seastead vessels were located near the west coast of the United States, subject to the law of the Ninth Circuit, which would evaluate a detention, search or seizure by weighing the government's interest in the document and safety check with the privacy interest of the vessel and its crew.[216]

3. Stateless Seasteads

This analysis does not address whether and how the United States might exercise jurisdiction over a putatively stateless fixed-location artificial island seastead, but it is unquestionable that the United States can almost always—and often will—take jurisdiction over a stateless vessel and its occupants upon discovery.[217] Despite TSI's concern about a nation seeking to unilaterally claim physical jurisdiction over a given area on the high seas, the principle of the freedom of the high seas indicates this is not a likely scenario.[218] The use of vessels as seasteads, i.e. floating structures that move along the sea with or without motive power and have the ability to transport people and goods, will subject seasteaders to the admiralty jurisdiction of the United States where a fixed-location would be less likely to fall under the jurisdiction of any current legal framework.[219]

The caveat to plenary American jurisdiction over stateless vessels is that the Coast Guard will not be able or care to retain jurisdiction over a stateless vessel once it is searched and found to possess no contraband or be in violation of any applicable American law.[220] Given the United States' drug enforcement policies, a stateless vessel will be approached far more often than a flagged vessel, even if it is repeatedly found to possess no contraband or not to be in violation of American law.[221]

So while it may be of interest to some seasteaders to promote long-term autonomy by sailing stateless, they must be exceedingly carefully to avoid the contraband laws of all nations,

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[213] *See supra* notes 21–28, 31 and accompanying text; *infra* note 212 and accompanying text.

[214] *See supra* notes 38–42, 110–14 and accompanying text.

[215] *See supra* notes 151–54 and accompanying text.

[216] *See supra* notes 156–72 and accompanying text.

[217] *See supra* notes 155, 173–76, 187–89 and accompanying text.

[218] *See* FRIEDMAN WITH GRAMLICH, *supra* note 5, at 126 (hypothesizing a greater likelihood of risk due to political insecurity arising in any given fixed location); *but see supra* notes X–X and accompanying text.

[219] *See supra* notes 21–28, 31, 212–13 and accompanying text.

[220] *See supra* notes 124–35, 147–91 and accompanying text.

[221] *See supra* notes 124–35, 147–91 and accompanying text.

since every nation could presume jurisdiction over their vessels.[222] This is especially true with respect to the United States given its aggressive drug war policies.[223] While the United States can retain jurisdiction over stateless vessels as if they were American vessels, no court cares to provide stateless vessels with any sort of Fourth Amendment protection whatsoever.[224] To this end, stateless seasteads should avoid the places and routes where the Coast Guard is most likely to patrol, which practically means stateless seasteads should eschew the Western Hemisphere.[225]

4. Conveniently Flagged Seastead Vessels

To avoid immediate suspicion and constant hassle from the Coast Guard (or any other nation's warships), a mobile seastead's owner(s) would be wise to register it with a seafaring nation.[226] TSI's desire to promote autonomy appears to comport best with flagging seasteads in open registries where low regulation and low taxes are the norm.[227] Of course, the United States has a significant number of bilateral relationships with open and closed registries giving it the authority, or at least the relationships, to request consent to board vessels flagged in those coastal states.[228] Not only are the United States' claims to jurisdiction broad, but so is its diplomatic reach.[229] Seasteaders could consider registering their vessels with compromise states, if they are able to meet the national character requirements for the owner(s).[230] This may help them avoid the stigma of a flag of convenience, harassment at ports, the regularity with which Coast Guard appears to stop vessels from Caribbean and Central American states and the tendency of open registry states to acquiesce to any boarding requests by the United States.[231]

Establishing a close relationship with a flag of convenience state over time, if possible, could allow a seastead growing in population and respect to give a smaller nation incentive to advocate for it under international legal principles should the United States seize a vessel or its crew.[232] In certain cases, a complaint by another nation-state will not automatically divest American courts of jurisdiction over a vessel or person, but may prompt their release.[233] Seasteads could also work toward the long-term goal of persuading an open registry state *not* to acquiesce in the boarding of seasteads in exchange for some type of incentive, e.g., a greater tax rate or a royalty for a term of years on the patents seasteaders are sure to develop in their quest to

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[222] *See supra* notes 44–56 and accompanying text.

[223] *See supra* notes 124–35, 147–91 and accompanying text.

[224] *See supra* notes 147–91 and accompanying text.

[225] *See supra* notes 147–91 and accompanying text; MONROE DOCTRINE (1823).

[226] *See supra* notes 57–61 and accompanying text.

[227] *See supra* notes 2, 64–65 and accompanying text.

[228] *See supra* notes 119–22 and accompanying text.

[229] *See supra* notes 119–22 and accompanying text.

[230] *See supra* notes 87–89 and accompanying text.

[231] *See supra* notes 84–89, 119–22 and accompanying text.

[232] *See supra* notes 43–44, 65 and accompanying text; Treves, *supra* note 83, at 184–85 (discussing the ability for states to advocate for the prompt release of vessels and crews under international law); *see also supra* notes 65, 77–78 and accompanying text.

[233] *See supra* notes 136–38 and accompanying text.

make living on the sea technologically viable.[234]

Assuming a seastead is foreign flagged, it is, again, guaranteed the most protection from detentions by Coast Guard and Customs officers who are stationed out of the west coast of the United States, the home of the Ninth Circuit Court of Appeals.[235] While American vessels enjoy a modicum of protection in the form of a balancing test used to weigh the government's interests versus the vessel's interests, foreign vessels require a nexus for the United States to be able to board, search and seize.[236] Overall, attenuation of the risk of interference by the United States government appears to require locating and moving seasteads in the Pacific Ocean as opposed to the Atlantic.[237]

Seasteaders should also carefully monitor the ownership interests in vessels so that they are not substantially controlled by American citizens or corporations.[238] Even where a vessel is foreign flagged and subject to the law of the flag under international law and *Lauritzen*, the United States may be able to invoke jurisdiction over a seastead, simply because it is sufficiently American for the purposes of a given statute.[239] Seasteaders also must be very careful when buying American ships and reflagging them, since any administrative mistake in the transfer of an American ship to a foreign flag could still render it subject to American laws.[240] Similarly, seasteaders must also be wary of any foreign ship that once may have been flagged in the United States even if it has been transferred or reflagged several times since its American registration.[241]

5. Drug Use

It behooves a seastead, given the continuing policy of the United States to interdict narcotics thousands of miles from its shores with jurisdictional impunity, to avoid drug trade and transport.[242] Even TSI acknowledges that politically autonomous communities invite activity which is otherwise taboo in other (most) parts of the world.[243] Assuming that seasteads grow in size and stature over time, because they are likely to serve as homesteads for an increasing number of people, any allowed drug use is also likely to rise.[244] Even if all drugs used on board a seastead are grown or manufactured on board, increasing quantities concomitant with larger

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[234] *See supra* notes 5–6, 64–68, 119–22 and accompanying text; *but see* FRIEDMAN WITH GRAMLICH, *supra* note 5, at 285 (demonstrating a desire not to make money on patents, but to ensure the continuity and freedom of use of the developments by the seasteading community).

[235] *See supra* notes 162–72 and accompanying text.

[236] *See supra* notes 156–72 and accompanying text.

[237] *See supra* notes 234–35 and accompanying text.

[238] *See supra* note 113 and accompanying text.

[239] *See supra* note 113 and accompanying text.

[240] *See supra* note 114 and accompanying text.

[241] *See supra* note 114 and accompanying text.

[242] *See supra* notes 113–14, 130–35 and accompanying text.

[243] *See* FRIEDMAN WITH GRAMLICH, *supra* note 5, at 87–88.

[244] *See supra* note 243 and accompanying text; *see also* FRIEDMAN WITH GRAMLICH, *supra* note 5, at 220.

populations are more likely to invite interference by the United States.[245] Mere size of a drug cache serves as evidence as to intent to distribute in the United States and sets guidelines for sentencing.[246] And as discussed above, articulated suspicion of drug smuggling significantly lowers the barriers to the United States under its domestic law taking jurisdiction over foreign flagged vessels.[247]

6. Trade

To avoid civil admiralty jurisdiction, seasteads may consider avoiding trading or contracting with American persons or vessels.[248] Most of The Seasteading Institute principals are United States citizens, and undoubtedly many first seasteaders will be American, making a principle of non-interaction with others in the United States a difficult choice.[249] Regardless, should a seastead choose to trade directly with other nations, it will run the risk, if conveniently flagged, of incurring inspections, port detentions, or *de facto* punishments for lacking a genuine link with the vessel flag state.[250]

To avoid this problem, the seastead may consider employing crews on subsidiary vessels or contracting with other vessels and crews by charter party to transport goods or serve to go between the larger, lumbering seastead and a nearby port of call.[251] Subsidiary vessels and crew as part of a seastead's family presumably hope to avoid all the same jurisdictional problems the main vessel is attempting to avoid.[252] Chartered trade boats may alleviate this concern.[253]

In both cases, especially with respect to the United States, the seastead would have to be extremely vigilant about the activities going on board any vessel associated with it. For instance, a charter party vessel may contract to transport goods and persons back and forth between a seastead lying just beyond the EEZ or contiguous zone of the United States.[254] If the Coast Guard suspected the contracted vessel to be engaged in drug smuggling or other crimes, the United States could pursue and arrest the seastead under the mothership doctrine.[255] Mere association would be enough for the United States to pursue the seastead, if not indict it *in rem*

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[245] *See supra* notes 113–14, 130–35 and accompanying text; *infra* notes 255–56, 264 and accompanying text.

[246] *See* Turner v. U.S., 396 U.S. 398, 423 (relating size of drug cache to an assessment of an intent to distribute); Chapman v. U.S., 500 U.S. 453, 455 (1991) (relating size of drug cache to sentencing guidelines).

[247] *See supra* notes 147, 151, 153 178–79 and accompanying text. *But see supra* notes 156–72 and accompanying text.

[248] *See supra* note 20 and accompanying text.

[249] *See* The Seasteading Institute, TSI Management Team, http://seasteading.org/about-tsi/managementteam (last visited August 2, 2010); *supra* notes 20, 90–109 and accompanying text.

[250] *See supra* notes 84–86 and accompanying text.

[251] *See supra* note 250 and accompanying text.

[252] *See supra* notes 11, 21–29 and accompanying text.

[253] *See supra* note 250 and accompanying text.

[254] *See infra* note 253 and accompanying text.

[255] *See supra* notes 192, 195–97 and accompanying text.

and the residents *in personam* for conspiracy to distribute.[256] Seasteads need to institute diagnostic mechanisms to prevent ignorant association with vessels or crews that the United States may tie to the seastead.[257]

7. Other International Bases of Criminal Jurisdiction Applied to Seasteads

The territoriality principle is implicated by the seastead's location and the objective territoriality principle is implicated by the United States' own assessment of how the vessel's activity will affect the country.[258] The similar protective principle allows the United States to arrest activity for national interests.[259] Most of the bases for American law enforcement jurisdiction over a seastead discussed so far fall into one of these categories.[260] But what of the other bases?[261]

The nationality principle indicates that Americans on seasteads are still subject to the laws of the United States even while they may seek political autonomy.[262] Nationality may include ownership of a vessel, even if the vessel is registered in another country.[263] The passive personality principle indicates that seasteads or residents who harm an American may find themselves haled into federal court in admiralty in order to face criminal charges for wrongdoing.[264]

Last is the universal principle of jurisdiction, which allows for any nation anywhere to take jurisdiction over a vessel engaged in what amount to crimes against humanity.[265] Piracy is the prime example of an activity that will subject a vessel or a person to universal jurisdiction.[266] It is not an activity in which a transparent, freedom-oriented community is likely to intentionally engage.[267] On the other hand, because seasteaders no longer would be bound by "previous constitution[s]," the community would need to find a way to obtain redress of grievances.[268] Torts happen; even in a community system eschewing outside authority a victim suffering harm

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[256] *See supra* notes 192, 195–97 and accompanying text.

[257] *See supra* notes 254–56 and accompanying text.

[258] *See supra* notes 124–25 and accompanying text.

[259] *See supra* note 124 and accompanying text.

[260] *See supra* notes 123–26 and accompanying text.

[261] *See supra* note 124 and accompanying text.

[262] Blackmer v. U.S., 284 U.S. 421, 438 (1932) ("The jurisdiction of the United States over its absent citizen, so far as the binding effect of its legislation is concerned, is a jurisdiction *in personam*, as he is personally bound to take notice of the laws that are applicable to him and to obey them."); *accord* Rivard v. U.S., 375 F.2d at 885–86; *see supra* notes 123–24 and accompanying text.

[263] Anderson, *supra* note 48, at 339; *see supra* notes X–X and accompanying text.

[264] *See supra* notes 123–24 and accompanying text.

[265] *See supra* note 124 and accompanying text.

[266] *See supra* note 124 and accompanying text.

[267] *See* FRIEDMAN WITH GRAMLICH, *supra* note 5, at 196, 251, 254 & 260.

[268] *See* U.S. CONST. amend. I; THE DECLARATION OF INDEPENDENCE para. 30 (U.S. 1776)

at the hands of another will want and need to seek redress for the harm.[269] When a seasteader suffers harm from a person external to the community, it will also be tempting for the seasteader or a number of his comrades to seek justice by physical reprisal.[270]

The international legal definition of piracy incorporates an illegal act of violence, detention or depredation, committed by the crew or passengers of a vessel on the high seas against another vessel.[271] In seeking justice but avoiding jurisdictional authority, some seasteaders could unwittingly commit piracy, making the entire seastead subject to universal jurisdiction by any nation, including the United States.[272]

B. Forestalling American Jurisdiction with Transparency and Openness

The Seasteading Institute is to be commended, because it believes that transparency and openness, particularly with governments, is likely to prevent interference in the long run.[273] TSI hopes that openness will allow it to negotiate with governments in good faith, because "if a seastead tries to hide something from a government, [it] will almost certainly find out eventually anyway, and be angrier when [it does]."[274]

Given that seasteading is politically agnostic, any seastead may have a set of rules vastly different from the rules of another high seas community or vastly different from the laws of a nation-state.[275] Although disclosure in a great sense runs counter to autonomy, a seastead's disclosure of its community rules, enforcement mechanisms and adjudicatory proceedings are more likely to put governments at ease about its goings-on.[276] Just as juridical entities here in the United States tend to publicize their actions in registers, reporters, newspapers, the internet and other sources, seasteads may consider doing the same using the internet.[277] Assuming a seastead has never given the United States government reason to disbelieve the community's leaders, if the Coast Guard can view a continuously updated listing of the seastead government's actions, it is more likely to trust the good faith of that seastead and seasteading in general.[278] If a seastead government's disclosed actions demonstrate that the community's activities generally comport with those generally accepted by humanity, governments are also less likely to interfere.[279]

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[269] *See supra* note 2 and accompanying text.

[270] *See supra* note 269 and accompanying text.

[271] Mellor, *supra* note 121, at 377–78.

[272] *See supra* notes 266–71 and accompanying text.

[273] *See* FRIEDMAN WITH GRAMLICH, *supra* note 5, at 30 – 31, 43, 251, 257 & 260.

[274] *Id*. at 31 & 257.

[275] *See id*. at 7–8.

[276] *See supra* notes 2, 275 and accompanying text.

[277] *See supra* notes 275–76 and accompanying text.

[278] *See supra* notes 275–77 and accompanying text.

[279] *See supra* notes 275–78 and accompanying text.

IV. CONCLUSION

The conundrum of seasteading is that leaving the authority of nation-states behind may be a harder task in the long run than sailing headlong into the throes of the violent sea. The irony is that the nation proclaimed as the "land of the free" by Francis Scott Key—often held up as the historical paragon of the right of revolution—will shackle these twenty-first century frontiersmen with admiralty and maritime law. American jurisdiction over the high seas is plenary. It shamelessly contravenes parts of international law, and will attach even when American officers arrest a vessel or a person on the high seas illegally.

On the other hand, the United States is least likely to interfere with a vessel that does not engage in the activities it is trying to prevent. So long as a seastead does not attempt to illegally take the resources in or violate the health regulations of the United States' exclusive economic zone, and so long as the seastead enters the contiguous zone while fully disclosing its cargo and manifest, it should enjoy a minimal amount of ongoing interference from the United States. Early seasteads will need coastal interaction, at least indirectly, to be successful. The laws attendant to the coastal zones deal with the essentials of life: catching fish for food, disposing of waste so that the community members do not contract illness, engaging in trade at ports to successfully continue life at sea, immigrating, and emigrating.[280] In a sense, the scope of American interference with the basic parts of life for a seastead could be very great.[281] On the other hand, assuming a seastead respects the authority of the United States when it comes into contact with this nation, once it parts ways with the Coast Guard or customs officers, the seastead practically will be left to do as it pleases.[282] If that activity bears no relation to drug use, seasteads could be left alone indefinitely.[283]

In the long run, however, avoiding the global nature of United States admiralty jurisdiction will require far greater patience and creativity of seasteaders than will conquering a platform-sized area of the ocean someday in the future.[284] To be successful in far future, seasteaders should work toward a fixed-location solution as soon as possible, sail under a flag state willing to advocate for them in international forums, avoid the Atlantic Ocean, and, without question, avoid illicit drug use. For now, The Seasteading Institute is to be commended for focusing on incremental gains rather than purist advances, and for approaching an incredible set of technological and legal problems with American pragmatism and ingenuity.[285]

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[280] *See supra* notes 94, 97–98 and accompanying text.

[281] *See supra* note 280 and accompanying text.

[282] *See supra* note 281 and accompanying text.

[283] *See supra* notes 242–47, 282 and accompanying text.

[284] *See supra* notes 6–9 and accompanying text.

[285] *See* FRIEDMAN WITH GRAMLICH, *supra* note 5, at 28–33.