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 ("TSI") seeks to assist the development of permanent communities on the last frontier on earth: the ocean.[1] Seasteaders would 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] Current events continue to illuminate the same ferocity in the sea that ancient texts have long described; thus, this type of undertaking will require massive technological prowess to safely and profitably overcome the ocean's obstacles.[4] Clearly, ocean-pioneers must seek to fully

1. *Vision/Strategy*, TSI, http://www.seasteading.org/about/visionstrategy/ (last visited June 12, 2012).

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."); *BP Oil Spill*, NOAA (2012), http://www.gulfspillrestoration.noaa.gov/oil-spill/; *see also FAQ*, TSI, http://www.seasteading.org/about/faq/ (last visited June 12, 2012); PATRI FRIEDMAN & WAYNE GRAMLICH, SEASTEADING: A PRACTICAL GUIDE TO HOMESTEADING THE HIGH SEAS (2009), *available at*

comprehend the nature of the sea and the risks it would present.[5]

TSI appears to approach the risks of homesteading on the high seas with pragmatism.[6] Counter-intuitively, TSI declares that the physical threats to seasteading, such as tsunamis, typhoons, and piracy, actually pose relatively little danger.[7] What causes TSI greater trepidation in assisting seasteaders plan their endeavors is "[t]he tangled morass of international maritime politics and law."[8] A significant part of this tangled morass is American admiralty and maritime law. Thus, a complete assessment of the legal obstacles to seasteading must include an analysis of potential risks and liabilities under United States criminal law in admiralty because the United States exercises broad power over the high seas.

II. BACKGROUND & RELATED ACTIVITIES

The implementation of homesteads as semi-autonomous residential and political communities on the high seas is not completely novel. Enterprising idealists have relied on the doctrine of the freedom of the high seas to promote social autonomy by using ships to help people escape the application of domestic laws to enforce societal mores.[9] Moreover, the assertions of independence through "micronations," claims of sovereignty (generally unrecognized by other nations) over small territories for the purpose of self-determination, date back at least to 1811.[10] And the sea has been considered as a permanent host for other technological and business

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http://seasteading.org/seastead.org/book_beta/full_book_beta.pdf.

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

6. *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.").

7. *Id.*; *see* NIKOS PAPADAKIS, THE INTERNATIONAL LEGAL REGIME OF ARTIFICIAL ISLANDS 37 (1977) ("The technical problems, which would appear to refer mainly to safe construction, structure, anchorage and protection . . . seem to be no major obstacle to seaward advancement.").

8. *Id.*

9. *See infra* Part II.A.

10. LAWRENCE R. WALKER & PETER BELLINGHAM, ISLAND ENVIRONMENTS IN A CHANGING WORLD 34 (2011); *see Tristan d'Acunha, &c.*, 4 BLACKWOOD'S EDINBURGH MAGAZINE 280, 282 (1819) (recounting the claim of sovereignty by Jonathan Lambert over the islands of Tristan da Cunha in 1811); *infra* Part II.B.

ventures.[11]

A. The Use of Vessels to Help People Escape Domestic Social Mores

1. Gambling on the High Seas off the American Coastline

For four hundred years, competing cultural values about gambling have engendered "a deep-rooted ambivalence . . . in American law and public policy."[12] Gambling was firmly ensconced in colonial American culture, much as it has been a "feature of all cultures."[13] North America's first racetrack was built on Long Island in 1665, and many of the nation's most prestigious universities were established using civic lotteries.[14] Puritan groups, meanwhile, questioned the morality of gambling, and the first laws of the Massachusetts Bay Colony outlawed all gambling implements.[15] Casinos began to appear in the 1800s, and as the country expanded westward, the spirit of risk-taking and adventure that impelled frontier expansion lent itself to risk-taking in settlers' other activities.[16] French and Spanish settlers imported more sanguine views about gambling to the territories of Louisiana and New Spain, which had lasting influence on American mores in the west.[17] By the late nineteenth century, gambling had spread to the far west as a major pastime, while opponents of gambling were calling for limitations because of allegations of higher associated incidences of vigilantism, fraud, organized crime, political skullduggery, and smuggling.[18] By 1910 almost all forms of gambling were illegal in the United States.[19]

As of 1926, to satisfy continuing cultural demand for gambling,

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11. *See infra* Part II.C.

12. John Dombrink, *Gambling and the Legalisation of Vice: Social Movements, Public Health and Public Policy in the United States*, *in* GAMBLING CULTURES: STUDIES IN HISTORY AND INTERPRETATION 44 (Jan McMillen ed., 1996) [hereinafter GAMBLING CULTURES].

13. Dombrink, *supra* note 12, at 44; Jan McMillen, *Introduction*, *in* GAMBLING CULTURES, *supra* note 12, at 1.

14. ROGER DUNSTAN, CALIFORNIA RESEARCH BUREAU, GAMBLING IN CALIFORNIA II-2–II-3 (1997), *available at* http://www.library.ca.gov/CRB/97/03/97003a.pdf.

15. *Id.* at II-1; Dombrink, *supra* note 12, at 44.

16. DUNSTAN, *supra* note 14, at II-3.

17. *Id.*; JOHN M. FINDLAY, PEOPLE OF CHANCE: GAMBLING IN AMERICAN SOCIETY FROM JAMESTOWN TO LAS VEGAS 53 (1986).

18. DUNSTAN, *supra* note 14, at II-4–II-8.

19. *Id.* at II-7.

entrepreneurs were transporting patrons in excursion boats to casino vessels off the West Coast just beyond the three-mile limit of the United States' territorial sea (and California state waters).[20] Casino vessels were groups of anchored barges that could hold as many as 600 gambling guests at a time.[21] Although they were well lit and observable from the coastline, the barges avoided legal reprisal simply by their location on the water.[22] Offshore gambling continued for another two decades, frustrating California's attempts to limit the activity.[23]

At least one gambling shipowner even asserted his operation was "an offshore independent sovereignty."[24] This prompted U.S. Senator William F. Knowland of California to urge the Department of Justice to begin "treat[ing] it as such" by enforcing customs and immigration laws against the operators to drive up costs so as to put them out of business.[25] In 1948, Senator Knowland introduced legislation, known colloquially as the Gambling Ship Act, to prohibit American citizens (or residents) from owning or running gambling ships and to prohibit American-flagged ships from being gambling ships.[26]

The Act defined gambling ships as those "used principally for the operation of one or more gambling establishments."[27] Further, the 1948 law defined a gambling establishment as "any common gaming or gambling establishment operated for the purpose of gaming or gambling, including accepting, recording, or registering bets, or carrying on a policy game or any other lottery, or playing any game of chance, for money or thing of

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20. WILLIAM N. THOMPSON, GAMBLING IN AMERICA: AN ENCYCLOPEDIA OF HISTORY, ISSUES, AND SOCIETY 144 (2001); *see id.* at II-8 (discussing floating casinos); *infra* notes 201–06 and accompanying text (describing U.S. jurisdictional reach over its territorial sea); *cf. infra* notes 115–20 and accompanying text (describing how Google's proposed water-based data center could operate outside of state control).

21. THOMPSON, *supra* note 20, at 144.

22. *Id.*; *Gambling Ship Bar by Customs Urged*, N.Y. TIMES, Sept. 3, 1946.

23. *See* sources cited *supra* note 22.

24. *See* sources cited *supra* note 22.

25. *Id.*

26. 18 U.S.C. §§ 1081–1083 (2006); THOMPSON, *supra* note 20, at 144; Robert M. Jarvis, *Gambling Ships: The Antiterrorism and Effective Death Penalty Act of 1996 Does Not Extend the Territorial Sea of the United States for the Purposes of the Gambling Ship Act. United States v. One Big Six Wheel, 987 F. Supp. 169, 1998 AMC 934 (E.D.N.Y. 1997)*, 29 J. MAR. L. & COM. 449, 450 (1998).

27. Gambling Ship Act, Pub. L. No. 80-500, 63 Stat. 92 (1949) (codified as amended in 18 U.S.C. §§ 1081–1083 (2010)) (prohibiting operation of gambling ships).

value."[28] The law also prohibited the ferrying of passengers to and from gambling ships beyond the three-mile limit.[29] Because the fines for transporting gamblers to and from gambling ships were as high as $300 per passenger, and because the penalty to shipowners included seizure and forfeiture of their vessels *in rem*, the instances of gambling off the coast of California subsided quickly.[30]

But the cultural dialectic of gambling shifted again: Americans had never really wanted to stop gambling, and vessel owners continued to want to provide a lucrative service to willing patrons. Thus, they eventually convinced Congress to relax federal regulation of offshore gambling in the early 1990s.[31] The amendment to the Gambling Ship Act created a considerable exception by referencing the Internal Revenue Code's definition of a "covered voyage." Covered voyages included and still include the voyage of any cruise ship on which passengers spend at least one night, or that of any "commercial vessel transporting passengers engaged in gambling aboard the vessel beyond the territorial waters of the United States" so long as the passengers embarked or disembarked in the United States.[32]

Although the exception excludes coastal passenger trips between two ports lasting less than half a day as well as passenger vessels that can only berth sixteen passengers or fewer, it nearly swallows the whole prohibitive rule and purpose of the original Gambling Ship Act.[33] The amendment allowed for gambling on cruises going to or coming from a foreign port as well as gambling cruises that began and ended in the same port, so long as the gambling occurred outside the former United States territorial sea limit of three miles.[34] Thus, many Americans could gamble again beyond the

28. *Id.*

29. 18 U.S.C. § 1083(a) (2006).

30. *See id.* at §§ 1082(c)(3), 1083(b); DUNSTAN, *supra* note 14, at II-7; *see also* FED. R. CIV. P. SUPP. R. ADM. G (governing vessel forfeiture actions arising from a federal statute).

31. *See* § 1081, *as amended by* Pub. L. No. 103-322, § 320501, 108 Stat. 1796, 2114–15 (1994) (excepting "covered voyage[s]" defined by I.R.C. § 4472 as of Jan. 1, 1994); United States-Flag Cruise Ship Competitiveness Act of 1991, 15 U.S.C. § 1175(b)(1)(B) (2006) (creating an exception for "the repair, transport, possession, or use of a gambling device on a vessel" outside any state or territorial boundaries).

32. *See* 26 U.S.C. § 4472 (2006) (defining "covered voyage" for the purposes of water transportation excise taxes).

33. *Id.* at §§ 4472(1)(B), (2). *Compare* Gambling Ship Act, Pub. L. No. 80-500, 69 Stat. 200, *with* 18 U.S.C. § 1081, *and* § 4472(1)(A).

34. *See* Jarvis, *supra* note 26, at 449, 451–52 (noting the effect of the amendments to the

three-mile limit—this time with the sanction of the U.S. government. It is unclear whether a dormant gambling lobby legislatively captured Congress or Congress co-opted a widespread underground cultural feature to increase the collection of excise taxes. It is, however, notable that the new instances of assertions of independent sovereignty for the purpose of supporting gambling did not reappear with the relaxation of federal draconian prohibitions.[35]

2. Pirate Radio off the Coastlines of Europe

European governments tightly regulated radio programming in the 1950s through the '70s.[36] European desire to listen to British and American rock and pop music drove colorful people to begin illegally broadcasting signals landward from the oceans directly to the public, often risking great peril to themselves.[37] These "pirate radio" DJs—accused of pirating radio spectrum which governments had accorded to themselves—employed different technological and legal solutions to provide unsanctioned radio to the peoples of Europe with varying levels of success.[38]

Post-war European governments aimed to use radio for acculturative "enlightenment" to satisfy a wide range of objective tastes—a mission that certainly did not include pop entertainment; as such, they granted monopolies to national corporations who broadcast on one or just a few channels.[39] Two Danes, Ib Fogh and Peter Jansen, recognized that the nations of the world were planning to ratify the Convention on the Territorial Sea and the Contiguous Zone, which would limit a nation's influence to its territorial seas and, to a more restrictive extent, its

Gambling Ship Act included the repeal of the prohibition on American gambling outside the territorial sea on "cruises-to-nowhere").

35. *See supra* notes 24–30 and accompanying text. In a Shakespearean turn of events worth noting for literary irony, Senator Knowland found himself embroiled in scandal when he divorced his wife of forty-five years to marry a mistress he met while gambling in Las Vegas in 1972. ETHAN RARICK, CALIFORNIA RISING: THE LIFE AND TIMES OF PAT BROWN 373 (2005). His trajectory continued downward until he lost his fortune and became indebted to bookmakers. *Id.* Tragically, Knowland took his own life in 1974. *Id.*

36. ANDREW YODER, PIRATE RADIO STATIONS: TUNING IN TO UNDERGROUND BROADCASTS IN THE AIR AND ONLINE 13 (2002).

37. *Id.*

38. BARRY KERNFELD, POP SONG PIRACY: DISOBEDIENT MUSIC DISTRIBUTION SINCE 1929, at 108 (2011).

39. *Id.* at 107, 110.

contiguous zone.[40] On the day the treaty concluded, April 29, 1958, Fogh and Jansen purchased a Liechtenstein ship, christened it CHEETA, and registered it in Panama.[41]

Fogh and Jansen's operation began broadcasting pop music and commercials into Denmark as Radio Mercur, and high public opinion led Fogh to establish Skanes Radio Mercur to broadcast into Sweden.[42] In the early 1960s, another Swedish venture created Radio Nord in consultation with American radio programming expertise.[43]

Sweden reacted before Denmark and worked with the flag-state of Radio Nord's ship, Nicaragua, to cancel the registration. Undaunted, Radio Nord renamed the ship and re-registered in Panama.[44] In 1962 all four Scandinavian countries passed legislation making it illegal to broadcast from or assist the broadcast of radio from offshore locations, or to advertise with unlicensed operators.[45] The Scandinavian pirate radio operations soon went defunct.[46] In one instance, the Danish were able to seize a ship because its registration had lapsed and could be considered "stateless."[47]

Meanwhile, Dutch businessmen began offshore radio broadcasting into the Netherlands in 1960 as Radio Veronica on a ship registered in Guatemala.[48] Radio Veronica, too, catered to the youth of its country, but in a typically Germanic way Veronica paid "scrupulous attention to . . . the payment of licensing fees to the standard Dutch authorities" even though it was operating without a license.[49] In response to overwhelming public opinion in favor of Radio Veronica and the station's shrewd choice to pay licensing fees, the Netherlands ignored Radio Veronica even though it was managing operations from inside the country.[50]

Radio Veronica's offshore operation continued to compete with

40. *Id.* at 108–09.

41. KERNFELD, *supra* note 38, at 109–10; *see infra* notes 180–85 and accompanying text (describing the use of flags of convenience such as Panama to avoid first-world legal strictures).

42. KERNFELD, *supra* note 38, at 110.

43. *Id.*

44. *Id.*

45. *Id.* at 111.

46. *Id.*

47. *Id. See infra* notes 156–57, 166–67, and accompanying text (describing the risks and consequences of vessel statelessness).

48. KERNFELD, *supra* note 38, at 112.

49. *Id.*

50. *Id.*

sanctioned stations until it found itself in an imbroglio created by a rivalry between it and another offshore pirate radio station. Some of Veronica's employees were convicted of attacking Radio Northsea International with firebombs.[51] That proved disastrous to Veronica's cause as a pirate radio outfit. The Dutch finally followed Scandinavia's suit and passed legislation banning offshore broadcasting of radio by Dutch enterprises.[52] Veronica, unlike some of its counterparts, did not wind down but moved all operations onto land, eventually sparking a boom of pop stations.[53]

One of the most famous pirate radio entrepreneurs was Ronan O'Rahilly, an Irishman who acquired a ship, registered it in Panama, installed a radio transmitter, and began broadcasting British rock on an unused frequency into Britain from an anchorage in the North Sea in April 1964.[54] O'Rahilly christened the ship CAROLINE after seeing a photo of U.S. President Kennedy's young daughter Caroline, according to him, "disrupting the serious business of government" and operated the station as Radio Caroline.[55] Britain reacted fairly quickly to the pirate radio broadcasts and dispatched H.M.S. VENTUROUS in May 1964 to board CAROLINE and suppress transmission.[56] Relying on legal assertions that its foreign ship registry and its location in international waters gave Britain no authority to board CAROLINE, the crew refused permission for VENTUROUS to board while simultaneously giving the British public updates about the stand-off in real time.[57] The British government backed down for a time, and Radio Caroline was safer from interference.[58]

Competition sprang up.[59] This included the famous American funded

51. *Id.* at 113.

52. CLIVE R. SYMMONS, THE MARITIME ZONES OF ISLANDS IN INTERNATIONAL LAW 27 (1979). Notably, the Dutch purported to criminalize radio installations outside their territorial waters but on their continental shelf.

53. KERNFELD, *supra* note 38, at 113.

54. ROGER PARRY, THE ASCENT OF MEDIA: FROM GILGAMESH TO GOOGLE VIA GUTENBERG 263 (2011). The frequency was 199 m. *Id.*

55. *Id.*; Peter Moore, *Caroline's History, Don't Get Mad, Get Even*, RADIO CAROLINE, http://www.radiocaroline.co.uk/ #history_part_2.html (last visited June 12, 2012).

56. KERNFELD, *supra* note 38, at 114.

57. *Id.*

58. *Id.*

59. KERNFELD, *supra* note 38, at 116; Peter Moore, *Caroline's History, The Glory Years*, RADIO CAROLINE, http://www.radiocaroline.co.uk/#history_part_3.html (last visited June 12, 2012).

Radio London, which broadcasted from its ship, GALAXY, a converted U.S. Navy minesweeper.[60] Competition among pirate radio stations and the constant threat of losing listeners increased the quality of programming.[61]

To the British public's horror, however, some of the competition between British pirate radio stations turned violent such as had happened with Radio Veronica's rivalry.[62] One pirate radio operator, Oliver Smedley, in an attempt to preserve ownership over a transmitter he had installed on Reginald Calvert's station, stormed the station and shot Calvert at close range with a shotgun, killing him.[63] The British Government responded to the whole enterprise of pirate radio by passing the Marine Broadcasting Offences Act, which made it illegal to supply ships broadcasting illegally into Britain, effectively cutting off British pirate radio from the mainland.[64] Only O'Rahilly and Radio Caroline defiantly remained, seeing themselves as stalwart against British rule and hoping to capitalize on a larger share of listeners now that their pirate radio competition was extinct.[65] In fact Radio Caroline, the last of the pirate radio stations, played a cat and mouse game of jurisdictional and political resistance with Britain for the next twenty-five years.[66]

B. Micronations

Micronations are claims or assertions of sovereignty, typically by small groups of people, with differing *raisons d'être* and justifications as to those claims.[67] Some have laid claims to sovereignty through secession, others through private property, still others by conquest. Also, some are

60. *See* sources cited *supra* note 59.

61. *The Glory Years*, *supra* note 59.

62. *See Britain Slain After His Pirate Radio Is Seized*, N.Y. TIMES, Jun. 3, 1966 at 1.

63. *W. Granger Blair, British Open Hearing on Killing Of Pirate Radio Station's Chief*, N.Y. TIMES, Jul. 19, 1966 at 10; *Britain Slain After His Pirate Radio is Seized*, *supra* note 62.

64. *Clyde H. Farnsworth, Britain Turns Off Her Pirate Radio Stations, but One Owner Won't Give Up His Ships*, N.Y. TIMES, Aug. 15, 1967 at 17.

65. *Id.*; *Last Pirate Radio Continues to Defy New British Law*, N.Y. TIMES, Aug. 17, 1967 at 10; *see* Peter Moore, *Caroline's History, Defiance, Defeat, and Retribution*, RADIO CAROLINE, http://www.radiocaroline.co.uk/#history_part_4.html (last visited June 12, 2012).

66. *Last Pirate Radio Continues to Defy New British Law*, N.Y. TIMES, Aug. 17, 1967 at 10; *see Defiance, Defeat, and Retribution*, *supra* note 65.

67. *See* JOHN RYAN ET AL., MICRONATIONS: THE LONELY PLANET GUIDE TO HOME-MADE NATIONS (2006); Adam Clanton, *The Men Who Would Be King: Forgotten Challenges to U.S. Sovereignty*, 26 UCLA PAC. BASIN L.J. 1 (2008) (discussing micronations and their varying qualities).

manifestations of political protest, and some have been attempts to create new countries in uninhabited places.[68] Besides their small size, the two other common characteristics of micronations are, obversely, assertions of or genuine beliefs in independence and, reversely, their lack of recognition by other nations of the world.[69]

1. The Islands of Refreshment

One of the earliest recorded attempts at the creation of a micronation was Jonathan Lambert's claim of the uninhabited group of three islands known as Tristan da Cunha in the remote South Atlantic.[70] After landing and occupying the main island, on February 4, 1811, Lambert declared himself sovereign under the precept that "'no European, or other power whatever, has hitherto publicly claimed the said islands."[71] Lambert's reasons for asserting dominion over his "Islands of Refreshment" were rooted in

> 'the desire and determination of preparing for myself and family a house where I can enjoy life, without the embarrassments which have hitherto constantly attended me, and procure for us an interest, and property, by means of which a competence may be ever secured, and remain, if possible, far removed beyond the reach of chicanery and ordinary misfortunes.'[72]

Not unlike would-be seasteaders, Lambert sought individual autonomy away from the "chicanery" of society, apparently looking for a way to start life over.[73] Notably, Lambert insisted his Islands of

68. *Id.*

69. Micronations, perhaps because of their size and lack of connections to an identifiable historical or ethnic people group, should also not be confused with nations with limited or recognition. Examples of states with limited recognition are Taiwan (the Republic of China), which the People's Republic of China purports to control and vice versa; Palestine, which seeks control of territory inside the State of Israel; the Republic of Somaliland, which declared independence from Somalia in 1991 as the successor to British Somaliland; the Republic of Abkhazia, which declared independence from Georgia in 1999; and the Sahrawi Arab Democratic Republic, which claims control of the Western Sahara in opposition to a claim by Morocco. Micronations should also not be confused with microstates, which have small land area but which enjoy full recognition by the international community. Examples of microstates are Vatican City, Monaco, San Marino, Liechtenstein, Malta, Andorra, and the Federated States of Micronesia.

70. *Tristan d'Acunha, &c.*, *supra* note 10, at 281.

71. *Id.* at 281–82.

72. *Id.* at 282.

73. *Id.*

Refreshment would be governed by a minimum of laws except as might arise by contract:

> 'I hold myself and my people, in the course of our traffic and intercourse with any other people, to be bound by the principles of hospitality and good fellowship, and the laws of nations (if any there are), as established by the best writers on that subject, and by no other laws whatever, until time may produce particular contracts, or other engagements.'[74]

Lambert's tentativeness about receiving the law of nations indicated a suspicion about authority that would infringe upon his own independence.[75] Yet, his ambivalence was also an implied recognition that the law of nations could be invoked to protect a sovereignty as small as his own.[76] Lambert must have also understood that to not acknowledge basic laws of human behavior as "deducible by natural reason, and established by universal consent among the civilized inhabitants of the world"—as Blackstone described the law of nations—would invite reprisal.[77] Furthermore, his declaration that the islands should be governed by "hospitality and good fellowship" paralleled an understanding that the law of nations was built

> upon the broad principle, that true happiness, whether of a single individual or of several, can only result from each adopting conduct influenced by a sincere desire to increase the general welfare of all mankind.[78]

Lambert accordingly purposed to devote himself peacefully to husbandry, agriculture, and trade. However, his dream was cut short when he drowned in a fishing accident off-island and "disappear[ed] from the seat of government."[79]

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74. *Id.*

75. *See id.*

76. *See* EMER DE VATTEL, THE LAW OF NATIONS liii n.1 (Joseph Chitty ed., 1883) ("The laws of nations . . . establish that principle and rule of conduct which should prevent the *strongest* nation from abusing its power. . . .").

77. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *66, *71 (defining the law of nations and justifying reprisal for crimes against the "universal law of society" such as piracy, by calling upon all mankind to "declare war against him" who had "declar[ed] war against all mankind.").

78. *Compare Tristan d'Acunha, &c.*, *supra* note 10, at 282, *with* DE VATTEL, *supra* note 81, at liii n.1.

79. Letter from A. Sinnot to the Editor, *in* JOHN NICHOLS, 130 THE GENTLEMAN'S

2. The Principality of Sealand

During World War II, the British military constructed seven artificial islands in and around Harwich and the River Thames and installed anti-aircraft defenses on them to protect the British Isles from air attack and invasion through the estuary of the Rivers Thames and Mersey.[80] The British Navy occupied the most famous of these tower forts, H.M. Fort Roughs, with 150 to 300 personnel until it abandoned the structure in 1956.[81]

Because Fort Roughs (or Roughs Tower) was built seven nautical miles from the British coastline, it was outside of British legal control over its territorial waters, which at that time extended three miles from the coastline.[82] The British pirate radio stations had eyed the Maunsell forts (eponymously named after their designer Guy Maunsell) as more or less permanent places from which to broadcast.[83] Each radio pirate purposed to broadcast from a fixed location outside the reach of British law, and Fort Roughs provided the only non-vessel based solution.[84]

One such radio pirate, Paddy Roy Bates of Radio Essex, had also been broadcasting from one of the Maunsell forts in the Thames Estuary.[85] But because the tower was within the territorial sea of Britain, a local court issued a criminal summons against him for broadcasting without a license and tried and convicted him.[86] The court fined Bates £100 and enjoined

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MAGAZINE 24 (Sylvanus Urban ed., 1821); *Tristan d'Acunha, &c.*, *supra* note 10, at 282–85.

80. 1 SEAS AND WATERWAYS OF THE WORLD: AN ENCYCLOPEDIA OF HISTORY, USES, AND ISSUES 563 (John Zumerchik & Steven L. Danver eds., 2010) [hereinafter SEAS AND WATERWAYS]; STEPHEN WENTWORTH ROSKILL, 2 THE WAR AT SEA, 1939–1945, at 148 (1954); KEN WAKEFIELD, 3 THE BLITZ THEN AND NOW 178 (1990).

81. SEAS AND WATERWAYS, *supra* note 80, at 563.

82. PAPADAKIS, *supra* note 7, at 36; SEAS AND WATERWAYS, *supra* note 80, at 563; *see* Cunard S.S. Co. v. Mellon, 262 U.S. 100, 122 (1923) (holding the three-mile territorial sea to be settled law).

83. SEAS AND WATERWAYS, *supra* note 80, at 563. In fact, Reginald Calvert, the man whom Oliver Smedley murdered, had been broadcasting from a Maunsell tower in the Thames Estuary. *See British Open Hearing on Killing of Pirate Radio Station's Chief*, *supra* note 63; *Briton Slain After His Pirate Radio is Seized*, *supra* note 62. It was on a Maunsell fort that Smedley killed Calvert. *See id.*

84. RYAN ET AL., *supra* note 67, at 9; Gould, *supra* note 63.

85. *See British Widen Fight on Pirate Stations* (London), N.Y. TIMES, Sept. 28, 1966.

86. *Id.*; Simson Garfinkel, *Welcome to Sealand. Now Bugger Off.*, WIRED (July 2000), http://www.wired.com/wired/archive/8.07/haven.html.

him from further broadcasts.[87]

Because of Fort Roughs's location beyond the three-mile limit, Bates sought to occupy it for his pirate radio station.[88] Meanwhile, Ronan O'Rahilly asserted a claim over Roughs Tower for Radio Caroline, and had installed personnel there.[89] Undaunted, Roy Bates went to the fort and ousted the Radio Caroline personnel with his own brigade.[90]

O'Rahilly returned with his own group of men and attempted to retake it, but Bates's people successfully defended the fort with firearms and gasoline bombs.[91] Although in full possession of the fort, Bates abandoned the idea of broadcasting pirate radio in light of the Marine Broadcasting & Offenses Act, newly in force as of August 14, 1967.[92]

Within three weeks, however, Roy Bates declared the independence of H.M. Fort Roughs on September 2, 1967 and styled his new micronation the Principality of Sealand, raising his flag, and calling himself Prince Roy and his wife Princess Joan.[93] The Bateses asserted that because Britain had abandoned H.M. Fort Roughs, they were entitled to claim it under the doctrine of *terra nullius*.[94]

Sealand issued stamps, coins, and passports "adopting the trappings of nationhood," while Britain ignored the micronation until 1968.[95] Conflicting reports indicate that either sea workers happened to be

87. Garfinkel, *supra* note 86.

88. *See id.*

89. *See id.*; RYAN ET AL., *supra* note 67, at 9.

90. *See supra* note 89; *see also* PAPADAKIS, *supra* note 7, at 37 (noting the Bates' occupation of Fort Roughs).

91. RYAN ET AL., *supra* note 67, at 8–9.

92. Garfinkel, *supra* note 86; *History of Sealand*, SEALAND, http://www.sealandgov.org/history (last visited June 12, 2012); *Compare* RYAN ET AL., *supra* note 67, at 9, *with Last Pirate Radio Continues to Defy New British Law*, *supra* note 65, *and Britain Turns Off Her Pirate Radio Stations, but One Owner Won't Give Up His Ships*, *supra* note 64.

93. PAPADAKIS, *supra* note 7, at 37; RYAN ET AL., *supra* note 67, at 9; Garfinkel, *supra* note 86.

94. *History of Sealand*, *supra* note 92. *Terra nullius* is one of the five modes of sovereign territorial acquisition, according to one line of international legal scholars. Barry Hart Dubner, *The Spratly "Rocks" Dispute—A "Rockapelago" Defies Norms of International Law*, 9 TEMP. INT'L & COMP. L. J. 291, 306, 306 n.110 (1995) (citing IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 123–24 (4th ed. 1990); LASSA OPPENHEIM, 1 INTERNATIONAL LAW: A TREATISE 546 (8th ed. 1955); MALCOLM SHAW, INTERNATIONAL LAW 284 (3d ed. 1991)).

95. RYAN ET AL., *supra* note 67, at 8; Garfinkel, *supra* note 86; *see* James Grimmelmann, *Sealand, HavenCo, and the Rule of Law*, 2012 U. ILL. L. REV. 405, 406 (2012).

repairing a navigational buoy near Fort Roughs, or the British Royal Marines had approached the platform.[96] What is clear is that Bates's teenage son, Michael, fired warning shots over the bow of a vessel in order to assert Sealand's territorial sea.[97] The next time Roy and Michael stepped onto land, they were arrested for violation of British weapons laws.[98]

Surprisingly, British court did not convict the Bateses, ruling that British firearms laws were inapplicable in international waters, and that because Sealand was beyond Britain's territorial waters, the laws were not applicable to the Bates family at the time of the incident.[99]

Other strange events incrementally bolstered Prince Roy's claim to sovereignty in spite of Her Majesty's Government's official nonrecognition of Sealand.[100] In 1977, several investors pretended to arrange a business meeting with Roy and Joan in Austria to trick them into leaving Sealand so they could take over the micronation.[101] While his parents were away, Roy's son Michael unsuspectingly allowed a helicopter to land on the platform, at which point Dutchmen and Germans captured Fort Roughs.[102] They ejected Michael, putting him alone on a boat pointed toward the Netherlands.[103] By the time Roy figured out what had happened, he arranged an assault team of five and took back Sealand by helicopter.[104]

The Bateses held the "junta" captive for several days, causing the Netherlands and West Germany to complain of piracy.[105] Britain considered intervening but waited long enough for Prince Roy to let all but one prisoner go.[106] This German had a prior relationship with Roy Bates

96. *Compare* Grimmelmann, *supra* note 95, at 422 (recounting the navigational buoy workers story), *with* RYAN ET AL., *supra* note 67, at 9 (recounting the British commandos story), *and History of Sealand*, *supra* note 92 (asserting that a navy tug carrying a demolition crew passed by and made threatening statements to the Bateses).

97. RYAN ET AL., *supra* note 67, at 9; *accord* Garfinkel, *supra* note 86.

98. RYAN ET AL., *supra* note 67, at 9–10; Garfinkel, *supra* note 86.

99. RYAN ET AL., *supra* note 67, at 10; Garfinkel, *supra* note 86.

100. Garfinkel, *supra* note 86.

101. *Id.*; Grimmelmann, *supra* note 95, at 427.

102. Grimmelmann, *supra* note 95, at 427.

103. *Id.*

104. *Id.* at 428. They attacked at dawn and nearly exchanged gunfire, but when Michael accidentally discharged his sawed-off shotgun, the invaders surrendered. *Id.*

105. *Id.* at 428–29.

106. *Id.*; RYAN ET AL., *supra* note 67, at 10.

and Sealand, which had previously issued a passport to the prisoner.[107] The Bateses tried the man for treason, but not without appointing one of their men as the prisoner's advocate and applying a semblance of due process.[108] The German pled guilty, was fined £18,000 and was imprisoned until he paid his debt.[109]

Eventually, West Germany sent an embassy lawyer to investigate; he found the prisoner to be in good spirits and was shocked to see him happily shaking hands with the Bateses, leading the diplomat to conclude the whole matter was a publicity stunt.[110] Regardless, this was a pivotal moment for Sealand, which considered the entire affair further *de facto* recognition of its status as a principality.[111]

Sealand was attacked or occupied numerous times, each being met with successful resistance by Roy Bates and his son Michael.[112] With such a violent history in the short time the Bateses earnestly resided on the platform, it is surprising the British Government never ventured beyond embarrassment into decisive action. Perhaps in spite of official nonrecognition, Britain really did respect the ruling of its local court regarding the extraterritoriality of Sealand. Or maybe Britain just wanted to act conservatively in the face of a complete unknown in international law. Or perhaps Sealand really was so small that Her Majesty's Government forgot about it most of the time and only remembered it when its colorful ruling family did something noteworthy.

In 2000, Prince Roy and Princess Joan left the fort permanently to accommodate Roy's failing health.[113] Prince Michael has exercised control since 1999, presumably now as the ultimate sovereign since his father passed away in October 2011.[114]

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107. Grimmelmann, *supra* note 95, at 428; RYAN ET AL., *supra* note 67, at 10.

108. Grimmelmann, *supra* note 95, at 429.

109. *Id.* at 429–30.

110. *Id.* at 429. On the other hand, a journalist who knew Bates well asserted he had been sincere and that this was not a stunt. *Id.*

111. *History of Sealand*, *supra* note 92.

112. *Id.*; RYAN ET AL., *supra* note 67, at 10–11. *See also* Grimmelmann, *supra* note 95, at Part I.

113. Grimmelmann, *supra* note 95, at 435.

114. *Paddy Roy Bates*, WIKIPEDIA, http://en.wikipedia.org/wiki/Paddy_Roy_Bates (last modified Apr. 4, 2012, 12:55).

C. Other Ventures on the High Seas

In 2007, Google Inc. filed for a patent for "[a] system, comprising a computer data center proximate to a body of water[;] . . . a sea-based electrical generator in electrical connection with the . . . computing units; and . . . sea-water cooling units."[115] The patent provides for novel technological solutions to ensure the ongoing viability of a data center out at sea by using motion and tidal waves to power the machines and sophisticated water-cooling techniques.[116] But naturally it also provides for "amenities that support system operations" including crew and staff living accommodations, transportation docks, and tender mechanisms not conceptually dissimilar to those used on semisubmersible drilling apparatuses.[117]

Thus, seasteaders may find inspiration in Google's technological advancements as well as in what appears to be a nod to regulatory freedom: Google's patent asserted that at least one implementation of its oceanic data center technology was capable of operating three to seven miles from shore.[118] Each coastal state in the United States exercises proprietary and regulatory control (subject to federal exceptions) over water resources within three miles from their coastlines.[119] While the band 3–7 miles from shore is still well within the United States jurisdiction over the territorial sea, a vessel using a system described by Google's patent could nonetheless operate on a semi-permanent basis outside the regulatory or jurisdictional reach of its home state, California, or most other American

115. Water-Based Data Center, U.S. Patent No. 7,525,207, at [73], [0087] (filed Feb. 26, 2007), *available at* http://www.google.com/patents/US20080209234.

116. *See* '207 Patent figs. 1*a*, 1*b*, 1*c*, 3, 5.

117. *Compare* '207 Patent, at [0048] ("[P]latform 102 may include living accommodations. . . . A helipad may also be provided. . . . The platform 102 may . . . accommodate a ship tender."), *with* Semi-Submersible Drill Barge, U.S. Patent No. 4,015,552 col.2 ls.26–28 (filed Aug. 25, 1975) (providing for an optional heliport), Single Column Semisubmersible Drilling Vessel, U.S. Patent No. 3,771,481 col.1 ls. 37–39 (filed May 3, 1971) (providing for equipment and crew tendering), *and* '481 Patent col.12 ls. 9–11 (specifying deck houses for housing machinery, crew quarters and auxiliary equipment).

118. *See* '207 Patent, at [0025].

119. 43 U.S.C. §§ 1301(a)(2), (b), 1311–12 (2006) (establishing state control, subject to exceptions, over the waters and resources three miles from the coastline). Under § 1312, which allowed states to make historical claims beyond three miles, Texas and Florida have been able to successfully establish historical entitlement to control over the band three marine leagues (nine miles) from their coastlines. United States v. Florida, 363 U.S. 121, 129 (1960); United States v. Louisiana, 363 U.S. 1, 84 (1960).

coastal states.[120]

Perhaps more akin to how TSI describes seasteading, but with a complementary profit-oriented focus, Blueseed also seeks to build a technology startup incubator on the high seas.[121] Unlike TSI, which seeks to promote the seasteading concept by lending practical assistance in the form of accretive expertise to other adventurers, Blueseed appears to be an organization that exists for the primary purpose of building its own for-profit seastead.[122] In fact, Blueseed's narrower goal is to "[attract] top entrepreneurial and technology talent . . . to Silicon Valley" even though Blueseed is planned as a platform outside the jurisdictional reach of the territorial United States.[123] Hoping to foster a model similar to that of Silicon Valley incubators such as Y Combinator, Founders Fund, or AngelPad, Blueseed would help foster startups by converting a theoretically lower cost and regulatory structure into savings that lead to reinvestments of time, equity, and profit into new businesses.[124] The opportunity lies in the tension between the San Francisco Bay Area's high operational, business start-up, and living costs and its unmatched network effects and development opportunity for technologists.[125] But instead of focusing on quasi-autonomy within the context of new societies, Blueseed would direct its energies on the development of companies and the making of profit by incrementally solving some of the technical and policy problems likely to affect seasteads writ large.[126]

120. *See infra* notes 201–06 and accompanying text (describing U.S. jurisdictional reach over its territorial sea); *see also Company*, GOOGLE, http://www.google.com/intl/en/about/company/ (last visited June 12, 2012) (stating Google's headquarters are in Mountain View, California). *Compare* '207 Patent, at [0025] (demonstrating water-based server viability further than three miles from the coastline), *with infra* note 214 (noting the jurisdictional reach of all states except Florida and Texas to be three miles from the coastline).

121. *Blueseed FAQ*, BLUESEED, http://www.blueseed.co/faq.html (last visited June 12, 2012).

122. *Compare id.*, *with Vision/Strategy*, *supra* note 1.

123. *Blueseed FAQ*, *supra* note 121 ("We plan to be located outside the territorial seas.").

124. *Id. See, e.g.*, Y COMBINATOR, http://www.ycombinator.com (last visited June 12,2012); FOUNDERS FUND, http://www.foundersfund.com (last visited June 12, 2012); ANGELPAD, http://www.angelpad.org (last visited June 12, 2012).

125. *See id*.

126. *See id*.

III. AMERICAN ADMIRALTY & INTERNATIONAL HIGH SEAS JURISDICTION

A. United States Admiralty Jurisdiction, Generally

United States federal courts derive their exclusive subject-matter jurisdiction over admiralty and maritime cases from the Constitution and the Judiciary Act of 1789.[127] For federal jurisdiction to attach to a case in admiralty, the underlying controversy must occur or be located on navigable waters or retain admiralty "locality."[128] Navigable waters comprise the high seas and the lakes and navigable rivers of the United States.[129] The definition of navigable waters can be a fact-intensive inquiry because the standard of navigability asks whether the waterway is, in fact, used or capable of being used as an interstate commercial highway.[130] The locality test for admiralty jurisdiction, however, should rarely be at issue with respect to seasteads because seasteading definitively will be an oceanic endeavor.[131]

There is another threshold question of admiralty jurisdiction, namely,

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127. 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 (2006); *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).

128. The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870); THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 1-3 (West 4th ed. 2004).

129. 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"); *The Daniel Ball*, 77 U.S. at 563; 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* United States v. Smith, 18 U.S. 153 (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).

130. *The Daniel Ball*, 77 U.S. at 563; LeBlanc v. Cleveland, 198 F.3d 353, 359 (2d Cir. 1999) (rejecting a historic navigability standard in favor of a fact-inquiry into whether waterways are "presently used, or . . . presently capable of being used, as an interstate highway for commercial trade or travel"); SCHOENBAUM, *supra* note 128, at § 1-3; *see Foremost*, 457 U.S at 682 (Powell, J., dissenting) (noting that navigable waters include an immense number and type of water bodies).

131. *See* FRIEDMAN & GRAMLICH, *supra* note 4; *but see* TSI Annual Report 2008, TSI, http://seasteading.org/files/annualreportfinal.pdf (describing the near-term use of "calm waters" for recreational seasteading in events to promote oceanic seasteading).

whether the case involves a *vessel*. It is so fundamental an element that federal case law either implicitly assumes the presence of a vessel to find admiralty jurisdiction or expressly denies jurisdiction when it finds a case bears no relationship to a vessel.[132] A vessel includes "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."[133] 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.[134] A vessel does not have to move with its own motive power.[135] By contrast, structures permanently attached to the land, either over or underwater, are generally not vessels unless they serve as navigational aids.[136] Moreover, permanent structures that are tantamount to artificial islands are not vessels and do not invoke admiralty law.[137]

132. *See, e.g.*, Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 261 (1972) (citing The Crawford Bros. No. 2, 215 F. 269, 271 (W.D. Wash. 1914) (declining 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. v. Sieracki, 328 U.S. 85, 87 (1946) (principally asking whether a shipowner 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 and establishing the notorious so-called "*Jensen* line"); The Hamilton, 207 U.S. 398 (1907) (holding that a fund for liability for a vessel's crew was in admiralty).

133. 1 U.S.C. § 3 (2006).

134. Stewart v. Dutra Constr. Co., 543 U.S. 481, 484–85, 497 (2005) (holding that the SUPER SCOOP, a massive floating platform used for dredging the Big Dig, Boston's Central Artery/Tunnel Project, was a vessel even though it lacked its own motive power and had to be towed or moved short distances via the manipulation of anchors and cables); Cope v. Vallette Dry Dock Co., 119 U.S. 625, 629 (1887).

135. *See* Nelson v. United States, 639 F.2d 469, 473 n.4 (9th Cir. 1980) (implying that a barge is a vessel); Offshore Co. v. 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. E.D. 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").

136. *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).

137. *See Rodrigue*, 395 U.S. at 360; Terry v. Raymond Int'l, Inc., 658 F.2d 398, 405 (5th

This is good news for seasteads that would employ stationary platform or underwater designs.[138] 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.[139] 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 and services for seasteads.[140]

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.[141] What this preference does not account for is that the broad definition of vessel in American maritime law is very likely to subsume any free-floating seastead.[142] Thus, assuming additional elements of maritime jurisdiction are met—based on whether the controversy is contractual, in tort, or criminal—the United States could exercise jurisdiction over any free-floating seastead or related supply-chain vessel nearly anywhere on seventy-one percent of the surface of the earth.[143]

The United States' immense extraterritorial jurisdiction, however, is subject to important limits under international law.[144] The jurisdiction of a nation over a vessel in admiralty hangs on whether the vessel is registered ("flagged") with a country, whether the vessel is domestic or foreign, and upon the sea zone on the high seas in which the vessel is found.[145] TSI already understands that a seastead's location with respect to the differing

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Cir. 1981); *but see* The Admiralty Extension Act, 46 U.S.C. § 30101 (2006) (placing in admiralty cases of damage or injury caused by a vessel on navigable water even if the harm occurs on land).

138. *See* FRIEDMAN & GRAMLICH, *supra* note 4, 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).

139. *See supra* notes 136–37.

140. *See* FRIEDMAN & GRAMLICH, *supra* note 4, at 107, 138, 146, 164, 200 (discussing the advantages of shipping goods, energy and fuel sources, food, and waste to and from seasteads).

141. FRIEDMAN & GRAMLICH, *supra* note 4, 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).

142. *See supra* note 133 and accompanying text.

143. *See Oceans and Seas*, THE ENCYCLOPEDIA OF EARTH, http://www.eoearth.org/topics/view/49523/ (last visited June 12, 2012); *supra* notes 14–31 and accompanying text. *See* SCHOENBAUM, *supra* note 128, at §§ 1-4, 1-5, 1-7–1-12.

144. SCHOENBAUM, *supra* note 128, at § 1-3, n.4.

145. *See infra* Part III.B, C.1.

sea zones and its registration status are paramount when considering how admiralty jurisdiction is likely to interfere with efforts to remain politically autonomous.[146] TSI also recognizes that certain types of activity are more likely to invite government interference than others.[147] 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.[148]

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

Under longstanding principles of customary international law tracing its lineage back to the Roman Empire, seafaring nations provide administrative means of registration for vessels, which accords a ship's legal nationality.[149] Vessels demonstrate their nationality by flying the registry's flag while sailing the high seas.[150] In exchange, registered vessels become subject to the laws and regulations of those respective nations but also receive the states' protection.[151] 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.[152] Thus, international

146. *See* FRIEDMAN & GRAMLICH, *supra* note 4, 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).

147. *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").

148. *See infra* notes 149–395 and accompanying text.

149. H. Edwin Anderson III, *The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives*, 21 TUL. MAR. L.J. 139, 143 (1997).

150. *See id.* at 144–45; Dierdre M. Warner-Kramer & Krista Canty, *Stateless Fishing Vessels: The Current International Regime and a New Approach*, 5 OCEAN & COASTAL L.J. 227, 229 (2000).

151. Anderson III, *supra* note 149, at 143.

152. 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 150, 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 (1991) (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).

law prescribes that vessels flagged by one state should enjoy freedom on the high seas without interference from other states, save in exceptional circumstances.[153]

The principle of non-interference, however, is subject to a more fundamental Westphalian principle of standing under international law, namely that only states may bring legal action against other states.[154] This principle practically nullifies the ability of a vessel to sail the high seas without registering with a nation.[155] If a vessel is not registered, i.e., retains no nationality, there is no state to advocate for it inside the international legal system.[156] Unrelated nations can interfere with, i.e., search and seize, these so-called *stateless vessels* with impunity because vessels do not have direct standing under international law to protest the interference, and stateless vessels have no nation on an equal footing with the interfering nation to advocate for them.[157]

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.[158] Statelessness may be imputed if a vessel flies one flag but produces contradictory documents or no documents.[159] In this case, a state

153. UNCLOS, *supra* note 152, 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 & Canty, *supra* note 150, at 228 ("[N]o state has the right to prevent other states' vessels from using the high seas for any lawful purpose."); HSC, *supra* note 152, 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 152, at art. 22(1) (specifying the exceptional circumstances for interference); UNCLOS, *supra* note 152, at art. 110(1) (recapitulating and adding to the exceptional circumstances for interference).

154. *See* Matlin, *supra* note 152, at 1025.

155. *See id.*

156. *Id.*

157. *See id*.; Warner-Kramer & Canty, *supra* note 150, at 230.

158. UNCLOS, *supra* note 152, at art. 92(1)–(2); HSC, *supra* note 152, at art. 6(1)–(2).

159. 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 (2002); 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*

performing a search will contact the flag state. If the flag state acknowledges registration, the vessel will enjoy jurisdictional protection from that state. However, if the flag state denies a vessel's registration or disavows the vessel, it becomes stateless.[160] A vessel also may be assimilated as stateless if a nation does not recognize the state whose flag a vessel is flying.[161] Finally, a vessel that refuses to claim any nationality is considered stateless.[162]

International law promotes the policing of statelessness by subjecting 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 having no nationality and to verify the vessel's right to fly its flag.[163] This procedure is also known as *verification du papillon*.[164] The display of a flag grants a vessel the presumption of formal registration, but only the ship's documents are dispositive, since the documents prove the right to fly the flag.[165] Once a nation declares a vessel to be 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.[166] As nature abhors a vacuum, international law abhors the nonexistence of jurisdiction with respect to

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High Seas: An Appraisal Under Domestic and International Law, 13 J. Mar. L. & Com. 323, 340 (1982).

160. Scalfani, *supra* note 159, at 375–76; Roos, *supra* note 159, at 280; Anderson, *supra* note 159, at 340; *see also* McDorman, *supra* note 153, at 534.

161. *See Molvan v. Attorney-General for Palestine*, 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).

162. *See* Anderson, *supra* note 159, 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.").

163. *See* UNCLOS, *supra* note 152, at art. 110(1)(d), (2) (explicitly allowing reasonable suspicion of statelessness as a justification for a warship's "right of visit"); HSC, *supra* note 152, 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).

164. Roos, *supra* note 159, at 279 n.49.

165. *See id*. at 279–80; *see also* UNCLOS, *supra* note 152, at art. 91(1); HSC, *supra* note 152, 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.").

166. *See* Warner-Kramer & Canty, *supra* note 150, 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 153, at 540.

vessels.[167] Therefore, to avoid the vagaries and dangers of this vacuum, owners flag their vessels in reliance on the principle of non-interference and the hopes that their flag states will vie for them when enforcement goes awry.

International convention as affirmed in *Muscat Dhows* holds that each nation alone determines its own requirements by which an owner may register his vessel and fly the state's flag.[168] American jurisprudence under *Lauritzen v. Larsen* comports with the *Muscat Dhows* case and holds this so-called law of the flag in paramount regard.[169] The law of the flag, i.e., the proposition that a nation solely controls its own requirements for registration of vessels, free from interference from other nations, has strong widespread legal precedence.[170] Accordingly, since each state's registry requirements may differ from another, the systems are often described as falling into three main categories.[171]

Legal theorists principally categorize a state's vessel registration system as closed (or "national"), open, or compromised (or "second," or "balanced").[172] Closed nationalist registries operate more restrictively than

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167. *See* Canty, *supra* note 166, at 126; Anderson III, *supra* note 149, at 141; McDorman, *supra* note 153, at 539; William Kenneth Bissel, *Intervention on the High Seas: An American Approach Employing Community Standards*, 7 J. MAR. L. & COM. 718, 725 (1975–76) (discussing the legal vacuum constituted by stateless vessels); *see also* Matlin, *supra* note 152, at 1026 ("[S]eized ships engender little sympathy in the transnational arena."); *but see* McDorman, *supra* note 153, 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).

168. *See* UNCLOS, *supra* note 152, 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 152, 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) ("[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.").

169. 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.").

170. Anderson III, *supra* note 149, at 146; Matlin, *supra* note 152, at 1031.

171. 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); Matlin, *supra* note 152, at 1027.

172. Wing, *supra* note 171, at 174; Anderson III, *supra* note 149, at 151; Matlin, *supra* note

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.[173] 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.[174] Often used pejoratively, *flag of convenience* also connotes the registry of a country (1) with no domestic industrial need for the volume of shipping that occurs under its flag; (2) which derives a disproportionate benefit to its treasury because of its sheer tonnage; (3) which makes it very easy, often through consuls strategically located abroad, for foreign nationals to register; or (4) which may not have the wherewithal or desire to impose any so-called *bona fide* regulations on its ships.[175]

Closed registry nations criticize flags of convenience especially for this last characteristic: They assert that a relative lack of regulation or enforcement by open registries leads to ills on the high seas.[176] 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, which normally accompanies open registration.[177] They also

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152, at 1027, 1039.

173. *See* Anderson III, *supra* note 149, at 151–56; Matlin, *supra* note 152, at 1027, 1044–45.

174. *See* Anderson III, *supra* note 149, at 157.

175. *See id*. at 157–58; Matlin, *supra* note 152, at 1044–45; *see also* Bissel, *supra* note 167, 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).

176. *See* Anderson III, *supra* note 149, at 162–67 (countering assertions by critics of open registries that flags of convenience lead to environmental, safety and labor problems).

177. *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

accuse owners, as non-nationals, of being able to avoid *in personam* jurisdiction necessary for effective prosecution or inquiry by the flag state.[178] 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.[179]

Shipowners have been flagging their vessels with foreign flags for at least 300 years.[180] 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.[181] 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.[182] 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 in Panama.[183] Today, open registries, especially those of Panama and Liberia, thrive in spite of criticism.[184] Ironically, the United States, the exemplar of closed registries, still maintains the strictest flagging requirements of any seafaring nation even though it has witnessed

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that the most costly vessel oil spill of all time (at the time) was caused by the running aground of a closed registry ship, the United States M/V EXXON VALDEZ).

178. *Id.* at 164.

179. Matlin, *supra* note 149, at 1049–50.

180. *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).

181. Wing, *supra* note 171, at 175; Anderson III, *supra* note 149, at 156.

182. Wing, *supra* note 171, at 175; Anderson III, *supra* note 149, at 159.

183. Wing, *supra* note 171, at 175; Anderson III, *supra* note 149, at 159.

184. 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 comprised 55.6% of the world's total deadweight tonnage in 2009. *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.* As of 2011, these flags of convenience comprise 56.1% of the world's deadweight tonnage. United Nations Conference on Trade and Development, *Review of Maritime Transport 2011*, ch. 2, tbl. 2.8, http://www.unctad.org/en/docs/rmt2011_en.pdf [hereinafter *RMT 2011*].

a significant decline in its own merchant marine fleet.[185]

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."[186] 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.[187] In *Nottebohm*, Guatemala had seized the property of a former citizen of Germany, upon whom Liechtenstein had conferred citizenship, which Guatemala refused to recognize.[188] 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 the existence of reciprocal rights and duties" between Liechtenstein and Nottebohm.[189]

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 have argued that the case is inapposite to vessel registration.[190] 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.[191] Given that a genuine link appears to arise merely upon registration and that no international accord on a definition of the concept exists, the requirement remains vacuous, or at most impotent.[192] It is noteworthy that United States and previous international jurisprudence on the sanctity of the law of the flag are in opposition to the genuine link

185. Wing, *supra* note 171, at 175; Anderson III, *supra* note 149, at 151–52.

186. HSC, *supra* note 152, at art. 5(1). The United Nations reiterated the requirement in the Convention on the Law of the Sea. UNCLOS, *supra* note 152, at art. 91(1).

187. *See* (Liech. v. Guat.), 1955 I.C.J. 4 (Apr. 6); Matlin, *supra* note 152, at 1031–33.

188. *Nottebohm Case*, 1955 I.C.J. at 6–7, 13, 18.

189. *Id.* at 12, 23.

190. Matlin, *supra* note 152, at 1033–34; *see Nottebohm Case*, 1955 I.C.J. at 22.

191. Anderson III, *supra* note 149, at 149–50.

192. *See id.* at 149–51; Matlin, *supra* note 152, at 1035.

concept.[193] Flag nationality "remains a well-defended preserve of the sovereignty of the States" and an "axis of the law of the sea."[194]

Yet, closed registry nations may still interfere with flag of convenience by citing or arresting them pretextually for violations of domestic regulations or international law.[195] Vessels flying under an open flag do incur greater inspection harassment at ports in ways that may reflect the political biases of closed registry states.[196] Port states may also choose to ban entry to conveniently-flagged vessels or detain them for violation of the genuine link requirement despite the risk that such actions tend to hinder trade.[197]

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.[198] 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 they still provide the benefit of low taxes and the ability to man a foreign, less expensive crew.[199] Nevertheless, while compromise registries have seen some success, flags of convenience have continued to increase their market share of the world's deadweight tonnage.[200]

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193. *See supra* notes 180–85 and accompanying text.

194. Tullio Treves, *Flags of Convenience Before the Law of Sea Tribunal*, 6 SAN DIEGO INT'L L.J. 179, 189 (2004).

195. *See* Anderson III, *supra* note 149, at 167.

196. *See id.* at 167–69.

197. *Id.* at 167; Matlin, *supra* note 152, at 1037–38.

198. Anderson III, *supra* note 149, at 156.

199. *Id.*; Matlin, *supra* note 152, at 1027–28.

200. *Compare RMT 2009*, *supra*, note 184, 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 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). As of 2011, UNCTAD appears to be presenting related data differently, so a very recent comparison is not possible from its latest *Review of Maritime Transport*. *See generally RMT 2011*, *supra* note 184, at ch. 2. Still, it is noteworthy that the top five flags of convenience (Panama, Liberia, the Marshall Islands, the Bahamas, and Malta) comprise 59.2% of the deadweight tonnage of the world's six major countries of vessel ownership (Greece, Japan, Germany, China, Republic of Korea, and the United States). *See id.* at ch. 2, fig. 2.6.

C. 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.[201] The inland waters, such as San Francisco Bay, Puget Sound, or the Mississippi River, are treated as the land of the nation itself, subject to complete jurisdiction of the United States.[202] 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.[203] Innocent passage is freedom from unreasonable interference by a coastal state.[204] 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.[205] Beyond the territorial sea are the high seas, which no nation, at least in theory, may subject to sovereign control.[206]

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.[207] In the contiguous zones, which are 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.[208] Exclusive economic zones, established by the United Nations Convention on the Law of the Sea, are

201. United States v. Louisiana, 394 U.S. 11, 22 (1969).

202. *See id.*

203. *Id.*

204. 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 (1996); *see* United Nations Convention on the Territorial Sea and the Contiguous Zone arts. 14–23, Apr. 29, 1958, 15.2 U.S.T. 1606, 516 U.N.T.S. 205 [hereinafter TSC or Territorial Sea Convention].

205. Merriam, *supra* note 204, at 449–50.

206. *Louisiana*, 394 U.S. at 22; UNCLOS, *supra* note 152, at art. 89 ("No State may validly purport to subject any part of the high seas to its sovereignty."); HSC, *supra* note 152, at art. 2.

207. *See* UNCLOS, *supra* note 152, at arts. 55–75; TSC, *supra* note 204, at art. 24.

208. TSC, *supra* note 204, at art. 24(1).

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.[209]

While the United States technically is not a party to UNCLOS, President Ronald Reagan declined to sign the treaty only because of the provisions of the Convention relating to deep seabed mining, which the president believed to be contrary to U.S. interests.[210] 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.[211] At that time, the United States formally adopted jurisdiction over a 200 nautical mile EEZ.[212] 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.[213] Congress followed suit by enacting the proclamation into law in 1996.[214] Likewise, in 1999, again in accordance with UNCLOS, the United States proclaimed its contiguous zone extended twenty-four miles from its coastlines.[215]

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209. UNCLOS, *supra* note 152, at arts. 56–57.

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

211. *Id.*; Canty, *supra* note 166, 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).

212. Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 10, 1983).

213. *Compare* Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988) [hereinafter The Reagan Proclamation], *with* UNCLOS, *supra* note 152, at art. 3, Act of June 5, 1794, ch. L., § 6, 1 Stat. 381, 384 ("[T]he district courts shall take cognizance of complaints . . . in cases of captures made within the waters of the United States or within a marine league of the coasts."), Cunard S.S. Co. v. Mellon, 262 U.S. 100, 122 (1923) (holding the three-mile territorial sea to be settled law), *and* Henry M. Arruda, Comment, *The Extension of the United States Territorial Sea: Reasons and Effects*, 4 CONN. J. INT'L L. 697, 698–700, 700 n.17 (1989) (noting that Secretary of State Thomas Jefferson provisionally adopted the three-mile territorial sea limit before the United States adopted it as law granting federal courts subject matter jurisdiction to hear prize cases arising within that three mile limit).

214. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 901, 110 Stat. 1214, 1317 ("The Congress declares that all the territorial sea of the United States, as defined by [the Reagan Proclamation] for purposes of Federal criminal jurisdiction is part of the United States, subject to its sovereignty, and is within the special maritime and territorial jurisdiction of the United States for the purposes of title 18, United States Code.").

215. *Compare* Proclamation No. 7219, 64 Fed. Reg. 48,701 (Sept. 2, 1999), *with* UNCLOS, *supra* note 152, at art. 4(2); *but see* The Territorial Sea Convention, to which the United States is

The authority of the United States inside the territorial waters is plenary.[216] 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.[217] Customs officers are vested with similar authority.[218] Theoretically, the authority over foreign vessels in the contiguous zone is limited to certain interests such as the enforcement of customs laws, but the Coast Guard in reality retains plenary power to stop any vessel inside the contiguous zone.[219] 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.[220] Together, the jurisprudence and statutes constitute a grant of national police power that is almost without comparison in the historical land-based jurisprudence of the United States.[221]

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

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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 204, at arts. 3, 4, 24(2).

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

217. 14 U.S.C. § 89(a) (2006).

218. 19 U.S.C. § 1581(a) (2006).

219. *Compare* TSC, *supra* note 204, 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 204, 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.").

220. United States v. Villamonte-Marquez, 462 U.S. 579 (1983).

221. *See* Merriam, *supra* note 204, at 461; Howard S. Marks, *The Fourth Amendment: Rusting on the High Seas?*, 34 MERCER L. REV. 1537, 1537–38 (1983).

the United States assumes extraterritorial jurisdiction pursuant to one of the international bases of criminal jurisdiction.[222]

To reiterate, vessels include every form of watercraft that can be used as a means of transportation on water.[223] 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.[224] Congress has granted the Coast Guard nearly absolute power to board any American vessel.[225] With respect to smuggling enforcement, U.S. vessels also include vessels that are *foreign flagged* but that are substantially controlled, even if indirectly, by an American citizen or corporation.[226] For 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.[227]

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.[228] International law already provides the right of approach—or at least the pretext for approach—to a warship captain if he reasonably suspects the vessel in question to be stateless or of the same national origin as the warship.[229] If the vessel cannot prove its country of registry, and the Coast Guard assimilates the vessel as stateless, then the vessel becomes subject to the United States' unfettered jurisdiction as if it were an American vessel.[230] On the other hand, if the vessel successfully

222. Canty, *supra* note 166, 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 159, at 376.

223. *See supra* notes 133–35 and accompanying text.

224. 18 U.S.C. § 9 (2006).

225. *See* 14 U.S.C. § 89(a) (2006); *see also* 19 U.S.C. § 1581 (2006) (describing the broad grant of power to customs officials to board, inspect, search, and seize American vessels).

226. 19 U.S.C. § 1703(b) (2006).

227. 46 U.S.C. § 70502(b)(3) (2006); 16 U.S.C. § 1802(48) (2006).

228. United States 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").

229. UNCLOS, *supra* note 152, at art. 110(1)(d)–(e).

230. *Id.* at 152 (holding that a vessel "acknowledging obedience to no government whatsoever . . . are proper objects for the penal code of all nations."); United States v. Marino-Garcia, 679 F.2d 1373, 1382–83 (11th Cir. 1982) ("Vessels without nationality are international

proves its national origin, regardless of whether the nation's registry is open, closed, or a compromise registry, the United States, eschewing the genuine link requirement, will generally respect foreign jurisdiction according to the law of the flag.[231]

However, what this respect often entails in reality 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.[232] Sometimes, these requests, particularly to smaller flag of convenience states, are really forms of diplomatic pressure.[233] This is especially true for vessels flagged by Caribbean nations, with which the United States has patron-client relationships.[234] 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.[235]

Furthermore, the United States relies on or asserts five bases for criminal jurisdiction under international law.[236] The five principles are:

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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* United States v. Victoria, 876 F.2d 1009, 1010 (1st Cir. 1989); United States v. Alvarez-Mena, 765 F.2d 1259, 1265 (5th Cir. 1985); United States v. Pinto-Mejia, 720 F.2d 248, 261 (2d Cir. 1983); United States v. Howard-Arias, 679 F.2d 363, 371 (4th Cir. 1982), *cert. denied*, 103 S.Ct. 165; United States v. Cortes, 588 F.2d 106, 109 (5th Cir. 1979); United States v. Rubies, 612 F.2d 397, 403 (9th Cir. 1979), *reh'g denied*, 101 S.Ct. 28.

231. *See supra* notes 168–71 and accompanying text.

232. *See, e.g.*, United States v. Green, 671 F.2d 46, 49 (1st Cir. 1982), *cert. denied*, 102 S.Ct. 2962 (discussing how the United Kingdom granted permission to the United States to board and search a vessel).

233. *See* Matlin, *supra* note 152, 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 (1989); *see also* Warner-Kramer & Canty, *supra* note 150, at 227; Anderson III, *supra* note 149, at 160–61; *see, e.g.*, United States 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).

234. *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).

235. *Id.* at 388.

236. Rivard v. United States, 375 F.2d 882, 885–86 (5th Cir. 1967); *accord* United States v. MacAllister, 160 F.3d 1304 (11th Cir. 1998); United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991); United States v. Benitez, 741 F.2d 1312, 1316–17 (11th Cir. 1984), *cert denied*, 105 S.Ct. 2679; Chua Han Mow v. United States, 730 F.2d 1308, 1311–12 (9th Cir. 1984), *cert denied*, 105 S.Ct. 1403.

(1) territorial, based on the location of the criminal act; (2) national, based on the nationality of the offender; (3) protective, based on whether national interests are at stake; (4) passive personality, based on the nationality of the victim; and (5) universal, which allows jurisdiction against any person anywhere for crimes against humanity, i.e., crimes that are universally condemned such as piracy and slavery.[237] U.S. courts have extended the territorial principle to include an "objective territorial" principle, in 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.[238] The United States heavily relies on both the objective territorial principle and the protective principle to assert extraterritorial jurisdiction over foreign vessels on the high seas, particularly to combat drug smuggling.[239]

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").[240] 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.[241] Prosecuting the crew, however, was difficult without a statute establishing jurisdiction *in personam*.[242]

The MHSA specifically authorized the prosecution of American citizens on any vessel and the prosecution of foreigners on stateless

237. *Rivard*, 375 F.2d at 885–86; UNCLOS, *supra* note 152, 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 152, at arts. 13–22 (providing for jurisdiction by all nations over slavery and piracy); *accord* United States v. Klintock, 18 U.S. (5 Wheat.) 144, 152 (1820) (determining that all nations may take jurisdiction and punish crimes such as piracy).

238. United States v. Smith, 680 F.2d 255, 258 (1st Cir. 1982), *reh'g denied*, *cert. denied*, 103 S.Ct. 738; United States v. Pizzarusso, 388 F.2d 8, 10–11 (2d Cir. 1968).

239. Davies, *supra* note 222, at 118; *see* United States v. Baker, 136 F. Supp. 546, 547–48 (S.D.N.Y. 1955) (stating the proposition of protective criminal jurisdiction: "Certain crimes directed toward the sovereign itself may be tried within the jurisdiction even though committed without.").

240. Maritime Drug Law Enforcement Act of 1986 [hereinafter MDLEA], 46 U.S.C. §§ 70501–07 (2006); *see* Marijuana on the High Seas Act, Pub. L. No. 96-350, 94 Stat. 1159 (1980).

241. *See* United States v. One (1) 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 159, at 378–79; Roos, *supra* note 159, at 281.

242. Sclafani, *supra* note 159, at 378–79; *see* Roos, *supra* note 159, at 281.

vessels.[243] 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.[244] While 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 obtained in contravention to the tenets of international law.[245] Only a foreign nation (not even the defendant himself) has standing to complain about the impropriety of U.S. action under MDLEA with respect to arresting and prosecuting foreign nationals.[246] Impropriety does not "divest a court of jurisdiction or otherwise constitute a defense" to MDLEA.[247] The statute effectively allows the Coast Guard to ignore international law regarding foreign vessels on the high seas so long as the vessels are arrested under suspicion of drug smuggling.[248]

This is only a slight departure from previous federal circuit court jurisprudence. In *Ker v. Illinois*,[249] appellant, who had been convicted for theft and embezzlement, challenged the personal jurisdiction of the Illinois state courts because a federal official acting as a bounty hunter had kidnapped him in Peru and returned him to the United States. The Court held that the kidnapping was equivalent to a "mere irregularit[y] in the manner in which he [was] 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.[250] The Court

243. Tousley, *supra* note 211, at 377.

244. Sclafani, *supra* note 159, at 379; Tousley, *supra* note 211, at 377–78.

245. *Compare* 46 U.S.C. app. § 1903(b)(2) (2006) (allowing a vessel to escape the definition of a vessel of the United States so long as it was registered pursuant to the HSC), *id.* at § 1903(c)(1)(B) (calling on the definition of an assimilated stateless vessel pursuant to the HSC), *and id.* at § 1903(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.").

246. 46 U.S.C. § 70505.

247. *Id.*

248. *See* Merriam, *supra* note 204, at 471 ("The United States essentially ignores there noninterference principles and stops and boards ships several miles off the United States coast.").

249. 119 U.S. 436, 437–39 (1886).

250. *Id.* at 440.

abstained from ruling on the issue of whether Illinois properly retained jurisdiction 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.[251]

The Court upheld and solidified the *Ker* rule in *Frisbie v. Collins*, a case in which Michigan officers kidnapped a man in Chicago to stand trial for murder in Michigan.[252] The Court held that it

> [H]as 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.[253]

It is still a tenet of U.S. 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.[254]

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.[255] The *Ker-Frisbie* doctrine, however, is only a jurisdictional doctrine: It cannot perfect evidence obtained in illegal searches and seizures on the high seas that are rendered inadmissible by the

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251. *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).

252. 342 U.S. 519, 520, 522 (1952).

253. *Id.* at 522.

254. *See* Riesenfeld, *supra* note 233, at 244.

255. *See* 46 U.S.C. § 70505 (2006).

Fourth Amendment.[256] 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 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."[257]

Therefore, foreign smugglers can be arrested illegally and tried even under protest of a foreign government in contravention of a ratified treaty, but illegally seized evidence would be inadmissible against them.[258] On the other hand because vessels are treated like floating pieces of territory under the exclusive jurisdiction of the flag state, if the flag state grants the United States permission to search and seize, evidence obtained may be admissible—precisely because the domestic law of the foreign flag country will not contemplate the Fourth Amendment.[259]

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.[260] The Fifth

256. 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 (1980).

257. 585 F.2d 1252, 1262–63 (1978) (citing United States v. One (1) 43 Foot Sailing Vessel Winds Will, 405 F. Supp. 879 (S.D. Fla. 1975), *aff'd*, 538 F.2d 694 (5th Cir. 1976) (quoting United v. Warren, 578 F.2d 1058, 1065 (5th Cir. 1978)) (footnote omitted and emphasis added).

258. Connolly, *supra* note 256, at 255, 327–28; *see* HSC, *supra* note 152, at art. 2.

259. Connolly, *supra* note 256, at 328; *see* HSC, *supra* note 152, at art. 6(1); *see, e.g.*, United States 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).

260. 617 F.2d at 1073, 1084 (referencing 14 U.S.C. § 89(a) and 19 U.S.C. § 1581(a)).

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.[261] 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.[262] 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."[263] Under Fifth Circuit jurisprudence, foreign vessels are granted minimal protection from search and seizure, and American citizens and vessels are actually granted *fewer* protections than foreigners on the high seas.[264]

The Fifth Circuit's decisions regarding the Fourth Amendment are highly influential because the court has rendered more of them than the other appellate circuits due to its proximity to both drug smuggling routes from Mexico and South America and to the United States' *de facto* client states in the Caribbean and Central America.[265] The First Circuit agrees with the Fifth Circuit that only reasonable suspicion is necessary to stop a foreign vessel and that there is no articulable suspicion requirement to stop and board an American vessel.[266] The Eleventh Circuit also agrees.[267] 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 may take jurisdiction over these "international pariahs."[268] Importantly in context to philosophical purpose of seasteading, the

261. *Id.* at 1075 (quoting *Warren*, 578 F.2d at 1064).

262. *See* Marks, *supra* note 221, at 1541–42.

263. United States v. Conroy, 589 F.2d 1258, 1265 (5th Cir. 1979), *cert. denied*, 100 S.Ct. 60 (emphasis added).

264. *See supra* notes 255-60, and accompanying text.

265. *See* Marks, *supra* note 221, at 1539.

266. United States 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); United States v. Arra, 630 F.2d 836, 841–42 (1st Cir. 1980).

267. United States v. Glen-Archila, 677 F.2d 809, 813 (11th Cir. 1982); United States v. Clark, 664 F.2d 1174, 1174–75 (11th Cir. 1981), *reh'g denied.*

268. 679 F.2d 1373, 1382–83 (11th Cir. 1982).

Eleventh Circuit denounced flagless vessels because "they represent 'floating sanctuaries from authority' and constitute a potential threat to the order and stability of the navigation on the high seas."[269]

Meanwhile, the Ninth, Second, Fourth and Third Circuits have not been quite as sanguine about federal power as the Fifth, First and Eleventh in their interpretations of 14 U.S.C. § 89(a) and 19 U.S.C. § 1581(a).[270] In *United States v. Piner*, the Coast Guard stopped a boat in U.S. territorial waters during the evening, citing a randomized document and safety check as the reason for the detention.[271] The Coast Guard officer eventually found marijuana in plain view and arrested the occupants.[272] Holding that the reasons underlying the government's justification to board after dark—to check documents and ensure 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.[273] Thus, the Ninth Circuit was the first to circumscribe 14 U.S.C. § 89(a) with Fourth Amendment limits by actually weighing the interests of the government against the interests of the vessel's occupants.[274]

The Ninth Circuit subsequently addressed the Fourth Amendment requirements for boarding, searching, and seizing a foreign national on a foreign vessel in *United States v. Davis*.[275] The Coast Guard approached a British vessel thirty-five miles southwest of Point Reyes, California because it suspected the vessel of smuggling.[276] When the vessel's captain denied the Coast Guard's request to board, the Coast Guard sought permission from the United Kingdom, which granted it.[277]

The Ninth Circuit did not, however, end its analysis at the grant of permission by the United Kingdom.[278] Instead, the court engaged in a three-

269. *Marino-Garcia*, 679 F.2d at 1382.

270. *See* Marks, *supra* note 221, at 1551–60.

271. 608 F.2d 358, 359 (9th Cir. 1979).

272. *Id.*

273. *Id.* at 361.

274. *See* 608 F.2d 358; Marks, *supra* note 221, at 1552–53; *but see* United States v. Watson, 678 F.2d 765, 768 (9th Cir. 1982), *reh'g denied* (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).

275. 905 F.2d 245, 248–49 (9th Cir. 1990).

276. *Id.* at 247.

277. *Id.*

278. *Id.*

part inquiry.[279] 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.[280] 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.[281] Next, the court evaluated whether Congress intended for the statute in question to have extraterritorial effect.[282] The Ninth Circuit found that Congress did intend this for MDLEA.[283] 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.[284] 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.[285] The "sufficient nexus" language, however, was a sharp departure from the majority circuit rule, which requires no nexus whatsoever.[286]

Note that the Ninth Circuit still follows the other circuits with respect to stateless vessels apprehended on the high seas.[287] 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.[288] Although the vessel had jettisoned one ton of cocaine before being boarded, 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.[289] Despite these facts, the Ninth Circuit distinguished *Caicedo* from *Davis* and rejected the application of "sufficient nexus"

279. *Id.* at 248.

280. *Id.*

281. *Id.* (quoting U.S. Const. art. I, § 8, cl. 10).

282. *Id.* ("We require Congress make clear its intent to give extraterritorial effect to its statutes." (citing United States v. Pinto-Mejia, 720 F.2d 248, 259 (2d Cir. 1983)).

283. *Id.* (citing 46 U.S.C. app. § 1903(h) (1986)).

284. *Id.* at 248–49.

285. *Id.* at 247, 249.

286. *See supra* notes 259–63 and accompanying text.

287. *See supra* notes 230, 268, and accompanying text; *infra* notes 288–90 and accompanying text.

288. 47 F.3d 370, 371 (9th Cir. 1995).

289. *Id.*

simply because the vessel was stateless.[290]

The Second Circuit's Fourth Amendment jurisprudence seems to concur with the Fifth Circuit's results, but not with its reasoning.[291] In *United States v. Streifel*, the Coast Guard seized a vessel flagged in Panama on the high seas and searched it.[292] The court opined that land-based search and seizure principles were applicable on the high seas, but likened a vessel 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.[293]

The Fourth Circuit has also applied land-based search and seizure principles in its jurisprudence for the high seas.[294] 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 800 miles away from North Carolina.[295] 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.[296] Strangely, this stop occurred well outside the customs waters of the United States, which comprise navigable waters most analogous to patrolled borders.[297] This makes the Fourth Circuit's jurisprudence about 14 U.S.C. § 89(a) functionally equivalent to the Fifth Circuit's doctrine regarding American vessels on the high seas.[298] But, in a departure from the Fifth Circuit's view, 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."[299] A further search could only be supported upon probable cause.[300]

Finally, the Third Circuit agrees with the Eleventh and Fifth Circuits in their result that there is no nexus requirement for capturing a stateless

290. *Id.* at 371–73; *accord* United States v. Marino-Garcia, 679 F.2d 1382, 1383 (11th Cir. 1982).

291. *See* Marks, *supra* note 221, at 1555.

292. 665 F.2d 414, 418 (2d Cir. 1981).

293. *Id.* at 419–20 (citing Terry v. Ohio, 392 U.S. 1 (1968)).

294. *See* Marks, *supra* note 221, at 1557–60.

295. 617 F.2d 35, 35 (4th Cir. 1980).

296. *Id.* at 37–39.

297. Marks, *supra* note 221, at 1558.

298. *See supra* notes 260-65, 294–97, and accompanying text.

299. Blair v. United States, 665 F.2d 500, 504–05 (4th Cir. 1981).

300. *Id.* at 504.

vessel on the high seas suspected of drug smuggling under MDLEA.[301] The court stated that the statute superseded a nexus requirement that it had previously required in *United States v. Wright-Barker*.[302]

> 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 defined in the [MDLEA].[303]

It appears that the Third Circuit concurs with the Eleventh and Fifth Circuits' rule regarding the boarding and capture of stateless drug smuggling vessels, only because it is forced to do so through its interpretation of overriding statutory authority.[304] Otherwise, the Third Circuit would prefer to require a nexus for stateless vessels, which would run contrary to the overwhelming consensus in the other circuits.[305]

4. Hot Pursuit and the Mothership Doctrine

International law provides other exceptions to the freedom of the high seas doctrine, namely the mothership doctrine and the doctrine of hot pursuit.[306] 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.[307] The right of hot pursuit ends at another nation's territorial waters.[308]

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301. United States v. Martinez-Hidalgo, 993 F.2d 1052, 1056 (3d Cir. 1993).

302. *Id.* (citing 46 U.S.C. app. § 1903(d)). *Contra* United States v. Wright-Barker, 784 F.2d 161, 168–69 (3d Cir. 1989) (necessitating a demonstration that the smugglers intended to affect the United States).

303. *Martinez-Hidalgo*, 993 F.2d at 1056.

304. *Id*.

305. *But see* Sclafani, *supra* note 159, at 394. This would even run contrary to the Ninth Circuit's jurisprudence on the stateless vessel issue, notable because of the court's divergence from the Fifth Circuit's rejection of a nexus requirement to detain and search foreign vessels under the MDLEA.

306. UNCLOS, *supra* note 152, at art. 111; HSC, *supra* note 152, at art. 23.

307. UNCLOS, *supra* note 152, at art. 111(1); HSC, *supra* note 152, at art. 23(1).

308. UNCLOS, *supra* note 152, at art. 111(3); HSC, *supra* note 152, at art. 23(2).

The treaties also recognize that smaller or non-seagoing vessels 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.[309] 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.[310] Given this international legal backdrop, it is clear Congress enacted MDLEA and its predecessor, MHSA, with hot pursuit and constructive presence in mind.[311] It is also clear that Congress and the Judiciary have extended the enforcement power of the United States well beyond the limits of customary international law.[312]

IV. AMERICAN JURISDICTION AS APPLIED TO SEASTEADS

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).[313] Moreover, despite the international principles that theoretically attenuate the authority of a coastal nation inside its contiguous zone to enforcement of customs, fiscal, immigration, and sanitary laws, the United States exercises *de facto* plenary authority twenty-four nautical miles from its coastline.[314] Therefore, a seastead also cannot realistically exercise autonomy inside a contiguous zone.[315]

The 200-nautical mile EEZ also poses problems for both fixed-location and floating seasteads.[316] Fixed-location seasteads in the EEZ, although not *ipso facto* under admiralty jurisdiction (save some further relation to vessels), would still fall under the jurisdiction of the United

309. UNCLOS, *supra* note 152, at art. 111(4); HSC, *supra* note 152, at art. 23(3).

310. UNCLOS, *supra* note 152, at art. 111(4); HSC, *supra* note 152, at art. 23(3).

311. *See* Sclafani, *supra* note 159, at 378–79. For a history of American treatment of motherships and hot pursuit, see Connolly, *supra* note 256, at 263–70.

312. *See supra* notes 232–311 and accompanying text.

313. *See supra* notes 201–05 and accompanying text.

314. *See supra* notes 206–08, 211, 213–21, and accompanying text.

315. *See supra* notes 206–08, 211, 213–21, and accompanying text.

316. *See supra* notes 209, 211–12, and accompanying text.

States.[317] Floating seastead vessels fishing in the EEZ would certainly come under the jurisdiction of the United States.[318] Even though 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.[319] Exclusive economic zones, as grants of resources in and below the sea within the designated 200-nautical-mile limit, could be interpreted broadly by U.S. courts also to subsume the types of resources that may be grown or developed by a seastead in its attempt to eke out life.[320] No laws currently indicate that resources raised, as opposed to captured, by a seastead semi-permanently or fortuitously passing through the American EEZ are subject to American control, but broad grants of power in other areas indicate that this is a possibility, and one that would necessarily interfere with a seastead's autonomy.[321]

Beyond the EEZ are the true high seas.[322] Given the United States' penchant for exercising jurisdiction thousands of miles from its coastlines, not even the territorial seas of other nations may be sufficient to protect a seastead from American jurisdiction.[323] Besides, homesteading on the *territorial* seas of another country also would run counter to the stated purpose of TSI's principles regarding political autonomy.[324] 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.[325] The crux of a free-floating seastead's maximum autonomy, therefore, is in remaining on the high seas to minimize (but not completely derogate) exposure to the United States' jurisdiction.[326]

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317. *See* Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331–1356a (2006).

318. *See supra* note 209 and accompanying text; *see* FRIEDMAN & GRAMLICH, *supra* note 4, at 170 (mentioning the problems that an EEZ presents to fishing inside the zone).

319. *See* FRIEDMAN & GRAMLICH, *supra* note 4, at 170–71; *supra* note 209 and accompanying text.

320. *See supra* notes 316–19 and accompanying text.

321. *See supra* notes 316–20 and accompanying text.

322. *See supra* notes 201, 207, 209, and accompanying text.

323. *See supra* notes 234–35, 246–55, and accompanying text.

324. *See supra* notes 2, 203, and accompanying text.

325. *See supra* notes 323–24 and accompanying text.

326. *See supra* notes 323–25 and accompanying text. *But see* FRIEDMAN & GRAMLICH, *supra* note 4, at 256–57 ("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

2. American Seasteads

Without question, American-flagged seastead vessels would be subject to American jurisdiction.[327] 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, with little to no protection under the Fourth Amendment.[328] The exception to this would arise when American seastead vessels were located near the west coast of the United States, subject to the law in the Ninth Circuit, which weighs the government's interest in the document and safety check leading to a detention, search, and seizure, with the privacy interest of the vessel and its crew.[329]

3. Stateless Platforms versus Vessels as 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 the United States can almost always—and often will—take jurisdiction over a stateless vessel and its occupants upon discovery.[330] The United States is also likely to look askance at a stateless vessel's activities because of its statelessness.[331] Despite TSI's concern about a nation seeking to unilaterally claim physical jurisdiction over a given area on the high seas and any artificial islands along with it, the principle of the freedom of the high seas indicates this scenario is unlikely.[332] 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.[333] It behooves seasteaders to avoid long-term vessel-based solutions. In spite of the

during seasteading's early years.").

327. *See supra* notes 149–53, 221–25, and accompanying text.

328. *See supra* notes 264–67 and accompanying text.

329. *See supra* notes 270–86 and accompanying text.

330. *See supra* notes 269, 287–90, 301–03, and accompanying text.

331. *See* United States v. Marino-Garcia, 679 F.2d 1373, 1382 (11th Cir. 1982), *reh'g denied*; *supra* note 266 and accompanying text.

332. *But see* FRIEDMAN & GRAMLICH, *supra* note 4, at 126 (hypothesizing a greater likelihood of risk due to political insecurity arising in any given fixed location).

333. *See supra* notes 132–39, 142, 326–27, and accompanying text.

comparatively enormous technological challenges to creating fixed-location seasteads, they are preferable to floating seasteads if the goal is indeed greater autonomy, at least jurisdictionally speaking.[334]

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 not found to possess contraband or be in violation of any applicable American law.[335] 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 not possess contraband or to not be in violation of American law.[336]

So while it may be of interest to some seasteaders to promote long-term autonomy by sailing stateless, they must be exceedingly careful to avoid the contraband laws of all nations, since every nation can assume jurisdiction over their vessels.[337] This is especially true with respect to the United States, given its aggressive drug war policies.[338] While the United States can retain jurisdiction over stateless vessels as if they were American vessels, even the courts that mandate Fourth Amendment protection to American vessels deny it to stateless vessels.[339] To this end, stateless seasteads would necessarily have to avoid the places and routes where the Coast Guard is most likely to patrol, i.e., the Western Hemisphere.[340] Of course, statelessness invites interference by all nations anyway, making it a wholly inadvisable solution.[341]

4. Conveniently Flagged Seastead Vessels

To avoid constant suspicion and repeated boarding by the Coast Guard (or any other nation's warships), a mobile seastead's owner would be wise

334. *See supra* note 246 and accompanying text; *supra* notes 132–39, 142 and accompanying text; *infra* note 212 and accompanying text: *see also* PAPADAKIS, *supra* note 7, at 37, 60 (arguing the desirability and legality of artificial islands for seaward expansion of "new independent 'States' or for expansion of territory and sovereignty by existing States in the open seas").

335. *See supra* notes 237–48, 260–305, and accompanying text.

336. *See supra* notes 237–48, 260–305, and accompanying text.

337. *See supra* notes 155–167 and accompanying text.

338. *See supra* notes 237–48, 260–305, and accompanying text.

339. *See supra* notes 260–305 and accompanying text.

340. *See supra* notes 260–305 and accompanying text; MONROE DOCTRINE (1823).

341. *Id.*

to register it with a seafaring nation.[342] Flagging seasteads in open registries where low regulation and low taxes are the norm would at first pass promote some measure of autonomy.[343] Nonetheless, the United States has a significant number of bilateral relationships with open and closed registries giving it the authority, or at least the influence, to request and easily gain consent to board vessels flagged in those coastal states.[344] Not only are the United States' claims to jurisdiction broad, but so is its diplomatic reach.[345] Seasteaders could consider registering their vessels with compromise states, if they are able to meet the national character requirements for the owner(s).[346] 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 boarding requests by the United States.[347]

Establishing a close relationship with a flag of convenience state over time 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.[348] In certain cases, a complaint by another nation-state will not automatically divest American courts of jurisdiction over a vessel or person, but it *might* prompt their release (so long as they aren't Americans).[349] 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, i.e., a greater tax rate or a royalty for a term of years on the patents that seasteaders are sure to develop in their quest to make living on the sea technologically viable.[350]

342. *See supra* notes 168–71 and accompanying text.

343. *See supra* notes 2, 174–75, and accompanying text.

344. *See supra* notes 232–35 and accompanying text.

345. *See supra* notes 232–35 and accompanying text.

346. *See supra* notes 198–200 and accompanying text.

347. *See supra* notes 195–200, 232–35, and accompanying text.

348. *See* Treves, *supra* note 194, at 184–85 (discussing the ability for states to advocate for the prompt release of vessels and crews under international law); *supra* notes 154–55, 175, and accompanying text; *see also supra* notes 188–189, and accompanying text.

349. *See supra* notes 249–51 and accompanying text.

350. *See supra* notes 4–5, 174–79, 232–35, and accompanying text; *but see* FRIEDMAN & GRAMLICH, *supra* note 4, 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).

Assuming a seastead is foreign flagged, it will retain the most protection when detained by Coast Guard and Customs officers who are stationed out of the west coast of the United States, over which the Ninth Circuit Court of Appeals sits.[351] 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 could rely on the Ninth Circuit's requirement that the United States have a nexus to the vessel to be able to board it, search it, and seize evidence.[352] Overall, the risk of interference by the U.S. government appears to be lower in the Pacific Ocean than the Atlantic.[353]

Seasteaders should also carefully monitor the ownership interests in vessels so that they are not substantially controlled by American citizens or corporations.[354] 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.[355] 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.[356] 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.[357]

5. Drug Use

Given the longstanding policy of the United States to interdict narcotics thousands of miles from its shores with jurisdictional impunity, it behooves a seastead to avoid drug trade and transport.[358] Politically autonomous communities naturally invite activity that is otherwise taboo in other (most) parts of the world.[359] Assuming that seasteads grow in size and

351. *See supra* notes 276–86 and accompanying text.
352. *See supra* notes 270–86 and accompanying text.
353. *See supra* notes 350–51 and accompanying text.
354. *See supra* note 226 and accompanying text.
355. *See supra* note 226 and accompanying text.
356. *See supra* note 227 and accompanying text.
357. *See supra* note 227 and accompanying text.
358. *See supra* notes 226–27, 243–48, and accompanying text.
359. *See* FRIEDMAN & GRAMLICH, *supra* note 4, at 87–88.

stature over time because they are likely to serve as homesteads for an increasing number of people seeking various measures of personal freedom, drug use is also likely to increase.[360] Even if all drugs used on board a seastead are grown or manufactured on board, increasing quantities concomitant with larger populations are more likely to invite interference by the United States.[361] Mere size of a drug cache serves as evidence of intent to distribute in the United States and sets guidelines for sentencing.[362] And as already discussed, articulated suspicion of drug smuggling significantly lowers the domestic legal barriers to the United States taking jurisdiction over foreign flagged vessels.[363]

6. Trade

To avoid civil admiralty jurisdiction, seasteads may consider avoiding trading or contracting with American persons or vessels.[364] Most TSI principals are U.S. citizens, and undoubtedly many first seasteaders will be American, making a principle of non-interaction with others in the United States a difficult choice.[365] In those cases, avoidance of domestic trade with Americans would be moot, as American seasteaders would be subject to American jurisdiction anyway.[366]

Conveniently-flagged seasteads will run the risk of more inspections, port detentions, or *de facto* regulatory obstacles for lacking a genuine link

360. *See supra* note 359 and accompanying text; *see also* FRIEDMAN & GRAMLICH, *supra* note 4, at 220.

361. *See supra* notes 226–27, 243–48, and accompanying text; *infra* notes 367–68, 381, and accompanying text.

362. *See* Turner v. United States, 396 U.S. 398, 423 (1969) (relating size of drug cache to an assessment of an intent to distribute); Chapman v. United States, 500 U.S. 453, 455 (1991) (relating size of drug cache to sentencing guidelines).

363. *See supra* notes 260, 264, 266, 292–93, and accompanying text; *but see supra* notes 270–86 and accompanying text.

364. *See supra* note 140 and accompanying text.

365. *See* TSI *Staff / Board / Advisors*, TSI, http://www.seasteading.org/about/staff-board-advisors/ (last visited June 12, 2012); *supra* notes 140, 201–21, and accompanying text.

366. *See* Blackmer v. United States, 284 U.S. 421, 437 (1932) (determining that the question whether a national public law had extraterritorial effect on an American was merely "one of construction, not of legislative power"); United States v. Bowman, 260 U.S. 94, 97–98 (1922) (asserting the power of the government to punish crimes committed by Americans against the United States, even if on the high seas or in foreign countries); *cf.* Vermilya-Brown Co. v. Connell, 335 U.S. 377, 381 (1948) (extending to civil cases the rule that Congress has the power to regulate Americans' actions "outside the territorial jurisdiction of the United States whether or not the act punished occurred within the territory of a foreign nation").

with the vessel flag state.[367] To avoid this problem, a 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.[368] 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.[369] Chartered trade ships and lighters may alleviate this concern.[370]

Regardless, the seastead would have to be extremely vigilant about the activities occurring on board any vessel associated with it. For instance, a vessel may charter to transport goods and persons back and forth between a seastead lying just beyond the EEZ or contiguous zone of the United States.[371] If the Coast Guard suspected the chartered vessel to be engaged in drug smuggling or other crimes (in most cases without articulable suspicion), the United States could pursue and arrest the seastead under the mothership doctrine.[372] Mere association could be enough for the United States to pursue the seastead, if not arrest it *in rem* and the residents *in personam*, for conspiracy to distribute.[373] Seasteads need to institute diagnostic mechanisms to prevent ignorant association with vessels or crews that the United States may otherwise tie to the seastead.[374]

7. Other Bases of Criminal Jurisdiction as Relating 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.[375] Similarly, the protective principle allows the United States to arrest activity for national interests.[376] Most of the bases for American law enforcement jurisdiction over a seastead discussed so far fall into one of these

367. *See supra* notes 195–97 and accompanying text.
368. *See supra* notes 195–97 and accompanying text.
369. *See supra* notes 132–39, and accompanying text.
370. *See supra* notes 195–97 and accompanying text.
371. *See supra* notes 195–97 and accompanying text.
372. *See supra* notes 306, 309–11, and accompanying text.
373. *See supra* notes 306, 309–11, and accompanying text.
374. *See supra* notes 371–73 and accompanying text.
375. *See supra* notes 237–38 and accompanying text.
376. *See supra* note 237 and accompanying text.

categories.[377] But what of the other bases?[378]

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.[379] Nationality may include ownership of a vessel even if the vessel is registered in another country.[380] The passive personality principle indicates that seasteads or residents who harm an American may find themselves haled into federal court to face criminal charges for wrongdoing.[381]

Last is the universal principle of jurisdiction, which allows for any nation anywhere to take jurisdiction over a vessel engaged in what amounts to crimes against humanity.[382] Piracy is the prime example.[383] It is not an activity in which a transparent, freedom-oriented community is likely to intentionally engage.[384] 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.[385] Torts and crimes happen. Even in a community system eschewing outside authority in the hope of making a better utopia, victims will suffer harm, some at the hands of their neighbors, and it is likely they would seek redress for that harm.[386] If there is no viable juridical system of claim and relief in place, a seasteader suffering harm—or his family or friends acting on his behalf—might seek justice by physical reprisal.[387]

The international legal definition of piracy incorporates an illegal act of violence, detention, or depredation, committed by the crew or passengers

377. *See supra* notes 236–39 and accompanying text.

378. *See supra* note 237 and accompanying text.

379. Blackmer v. United States, 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. United States, 375 F.2d 882, 885–86 (1967); *see supra* notes 236–237 and accompanying text.

380. Anderson, *supra* note 159, at 339.

381. *See supra* notes 236–37 and accompanying text.

382. *See supra* note 237 and accompanying text.

383. *See supra* note 237 and accompanying text.

384. *See* FRIEDMAN & GRAMLICH, *supra* note 4, at 196, 251, 254, 260.

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

386. *See supra* note 2 and accompanying text.

387. *See supra* note 2 and accompanying text.

of a vessel on the high seas against another vessel.[388] In seeking justice but avoiding pre-existing nation-state jurisdictional authority, some seasteaders could unwittingly commit acts arguably categorizable as piracy, subjecting the entire seastead to universal jurisdiction by any nation, including the United States.[389]

B. Forestalling American Jurisdiction with Transparency and Openness

TSI is to be commended because it believes that transparency and openness, particularly with governments, is likely to prevent interference in the long run.[390] 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]."[391]

Because seasteading is politically agnostic, any seastead may have a set of rules vastly different from the laws of a nation-state or even from those of another high-seas community.[392] 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 ongoings.[393] 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.[394] If a seastead can operate with the verifiable appearance of due process and adjudicatory fairness, the international community is more likely to trust the good faith of that seastead and seasteading in general.[395] If a seastead government's disclosed actions demonstrate that the community's activities comport with basic norms of international rights, governments may be less likely to interfere.[396]

388. Mellor, *supra* note 234, at 377–78.

389. *See supra* notes 383–88 and accompanying text.

390. *See* FRIEDMAN & GRAMLICH, *supra* note 4, at 30–31, 43, 251, 257, 260.

391. *Id.* at 31, 257.

392. *See id.* at 7–8.

393. *See supra* notes 2, 392, and accompanying text.

394. *See supra* notes 392–93 and accompanying text.

395. *See supra* notes 392–94 and accompanying text.

396. *See supra* notes 392–95 and accompanying text.

Finally, good behavior leads to trust. Early seasteads will need coastal interaction, at least indirectly, to be successful. The laws attendant to control of the coastal zones deal with the essentials of life: fishing for food, disposal of waste so that the community members do not contract illness, engagement in trade at ports to successfully continue life at sea, immigration, and emigration.[397] In this sense, the scope of American interference with the basic parts of life for a seastead could be very great.[398] On the other hand, assuming a seastead respects the authority of the United States when it comes into contact with it, once the seastead parts ways with the Coast Guard or customs officers, it practically will be left to do as it pleases.[399] If its activity bears no relation to drug use, a seastead could be left alone indefinitely.[400]

V. CONCLUSION

The conundrum of seasteading is that leaving the authority of nation-states behind may be a harder task than sailing headlong into the throes of the sea. The irony is that the nation proclaimed as the "land of the free" could shackle these twenty-first century frontiersmen in their quest for greater autonomy with broad pre-existing assertive notions of jurisdiction. American jurisdiction over the high seas is plenary. Not only does it contravene parts of international law, courts do not necessarily relinquish it 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' EEZ, and so long as the seastead enters the contiguous zone while fully disclosing its cargo and manifest, it should incur a minimum of ongoing interference from the United States.

In the long run, however, avoiding the global nature of American admiralty jurisdiction will require far greater patience and creativity of seasteaders than will conquering a platform-sized area of the ocean. To be

397. *See supra* notes 205, 208–09, and accompanying text.

398. *See supra* note 397 and accompanying text.

399. *See supra* note 398 and accompanying text.

400. *See supra* notes 358–63, 399, and accompanying text.

successful, seasteaders should work toward a fixed-location solution as soon as possible, sail under a flag state willing to advocate for them in international fora, avoid the Atlantic Ocean near the United States, and without question, avoid illicit drug use. For now, seasteaders should focus on incremental gains in freedom rather than purist advances and should approach an incredible set of technological and legal obstacles with pragmatism and ingenuity.