

SURVEY OF UNITED STATES JURISDICTION OVER HIGH SEAS NARCOTICS TRAFFICKING

I. INTRODUCTION

Within the last decade, the United States has significantly expanded its jurisdiction over vessels trafficking in illegal narcotics on the high seas. The present law providing jurisdiction over vessels engaged in narcotics trafficking is the Maritime Drug Law Enforcement Act of 1986.¹ The 1986 Act was "intended to reach acts of possession, manufacture, or distribution committed outside the territorial jurisdiction of the United States."² Congress designed the 1986 Act³ to eliminate many of the problems encountered in enforcing the preceding 1980 Marijuana on the High Seas Act⁴ and the 1970 Comprehensive Drug Abuse Prevention and Control Act.⁵

This paper surveys the past and present United States law of jurisdiction over high seas narcotics traffickers. The legislative and judicial developments which led to the 1986 Maritime Drug Law Enforcement Act, as well as decisions since the 1986 Act, are reviewed and critiqued. For each jurisdiction-granting provision of the 1986 Act, the applicable basis of jurisdiction under international law is discussed. Provisions of the 1986 Act which are in apparent conflict with customary international law are presented. And finally, the author's conclusions are provided.

II. RECENT HISTORY OF HIGH SEAS JURISDICTION

Prior to the 1980 Marijuana on the High Seas Act, federal prosecutors looked to 1970 Comprehensive Drug Abuse Prevention and Control Act to obtain jurisdiction over vessels and persons engaged

¹ Pub. L. No. 99-570, 100 Stat. 3302, section 3201-3202 (codified at 46 U.S.C.A. §§ 1901-1903) (West Supp. 1988) [hereinafter 1986 Act].

² 46 U.S.C.A. § 1903(h) (West Supp. 1988).

³ S. REP. NO. 530, 99th Cong. 2d Sess. 15, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 6000.

⁴ Pub. L. No. 96-350, 94 Stat. 1159 (1980) (codified at 21 U.S.C.A. § 955a-d (West Supp. 1981)).

⁵ Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified at various sections of 21 U.S.C.) [hereinafter 1970 Comprehensive Act].

in high seas narcotics trafficking.⁶ Due to a drafting oversight, the proscriptive U.S. Code provisions which implemented the 1970 Comprehensive Act did not directly prohibit the possession of narcotics on the high seas.⁷ The most effective method of prosecution under the 1970 Act was to charge defendants with conspiracy to import illegal narcotics into the United States.⁸ The conspiracy offenses, however, required the prosecution to establish the difficult-to-prove element of intended territorial effects (intent to distribute in the United States).⁹ All too often, the Coast Guard, unable to prove intent to distribute in the United States, could confiscate the vessel and drugs but could not prosecute the crew.¹⁰ The traffickers considered the occasional loss of a vessel to be merely an acceptable cost of doing business.¹¹

To improve interdiction and prosecution efforts, Congress enacted the 1980 Marijuana On the High Seas Act.¹² The 1980 Act directly proscribed the manufacture, distribution, or possession of controlled substances aboard a vessel subject to the jurisdiction of the United

⁶ Note, *High Seas Narcotics Smuggling and Section 955a of Title 21: Overextension of The Protective Principle of International Jurisdiction*, 50 *FORDHAM L. REV.* 688, 700 (1982) [hereinafter Note, *High Seas Narcotics Smuggling*].

⁷ *Id.* at 701; S. REP. NO. 855, 96th Cong. 1, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 2785 ("[The 1970 Act] inadvertently contained a section repealing the criminal provision under which drug smugglers apprehended on the high seas were prosecuted without creating a new provision to replace it."); Anderson, *Jurisdiction Over Stateless Vessels On The High Seas*, 13 *J. MAR. L. & COM.* 323,324 (1982) [hereinafter Anderson, *Jurisdiction*].

⁸ Note, *High Seas Narcotics Smuggling*, *supra* note 6, at 703; see, e.g., *United States v. Postal*, 589 F.2d 862, 865 (5th Cir. 1979), cert. denied, 444 U.S. 832 (1979)(defendants convicted of conspiring to import marijuana into the United States in violation of 21 U.S.C. § 963 (1976), and of conspiring to possess marijuana with intent to distribute in violation of 21 U.S.C. § 846 (1976)).

⁹ S. REP. NO. 855, 96th Cong. 1, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 2785 ("In most cases, evidence to prove importation or conspiracy beyond a reasonable doubt is impossible to obtain.").

¹⁰ *Id.*; Anderson, *Jurisdiction*, *supra* note 7, at 325-326 ("The United States Attorney's Office was forced to decline prosecution in almost fifty percent of the seizures made by the Coast Guard during the period September 1, 1976 - March 28, 1979, and the number of successful prosecutions declined steadily.").

¹¹ S. REP. NO. 855, 96th Cong. 1, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 2785 ("[The] Coast Guard is able to seize and confiscate the ship and the illegal drugs, but the Government is not able to prosecute the crew or others involved in the smuggling operation. Such actions have little deterrent effect on the crews or the trafficking organizations. In the highly lucrative trade in illegal drugs such occasional seizures are considered a part of the cost of doing business.").

¹² Pub. L. No. 96-350, 94 Stat. 1159 (1980) (codified at 21 U.S.C.A. § 955a-d (West Supp. 1981)).

States with intent to distribute the substance (intent to distribute in the United States was not required).¹³ Federal courts were enabled to exercise jurisdiction over United States citizens aboard any vessel, foreign nationals aboard United States vessels, stateless vessels on the high seas, and vessels in "customs waters" of the United States.¹⁴ Though effective in improving prosecution efforts,¹⁵ the language and judicial interpretations of the 1980 Act caused sufficient difficulties that Congress replaced the 1980 Act with the 1986 Maritime Drug Law Enforcement Act.¹⁶

III. MARITIME DRUG LAW ENFORCEMENT ACT OF 1986

The 1986 Act prohibits the intentional or knowing manufacture, distribution, or possession with intent to distribute, of a controlled substance by any person on board

- (1) a vessel of the United States;
- (2) a vessel without nationality or a vessel assimilated to a vessel without nationality;
- (3) a vessel registered in a foreign nation where the flag nation consents to the enforcement of the laws of the United States;
- (4) a vessel located within the "customs waters" of the United States; and
- (5) a vessel in the territorial waters of another nation, where that nation consents to the enforcement of the laws of the United States.¹⁷

Conspiracies and attempts to accomplish prohibited acts are also proscribed by the Act.¹⁸ Though the scope of jurisdiction under the 1986 Act is essentially similar to that under the 1980 Act, numerous changes were made in the later statute to aid government prosecutors.

A. *General Considerations - The 1986 Act*

Trafficking in illegal narcotics is widely condemned in the international community.¹⁹ However, it is not yet a crime, like piracy,

¹³ *Id.*

¹⁴ *Id.*

¹⁵ S. REP. NO. 530, 99th Cong. 2d Sess. 15, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 6000 ("That law [1980 Act] significantly improved the U.S. ability to prosecute drug smugglers, particularly foreign offenders, who before its enactment were virtually all deported or repatriated to their countries of origin without punishment.").

¹⁶ *Id.*

¹⁷ 46 U.S.C.A. §§ 1903(a)-(c)(West Supp. 1988) (Appendix 1 reproduces the entire 1986 Act).

¹⁸ 46 U.S.C.A. § 1903(j)(West Supp. 1988).

¹⁹ Single Convention on Narcotic Drugs, Mar. 30, 1961, art. 35, 18 U.S.T. 1408,

over which the universality principle of international law provides jurisdiction for all nations.²⁰ Through the 1986 Act, the United States has manifested a policy of aggressive exertion of extraterritorial jurisdiction in order to reach illegal narcotics trafficking on the high seas. Sections of the 1986 Maritime Drug Law Enforcement Act which expand extraterritorial jurisdiction and facilitate prosecution efforts are discussed in the following paragraphs.

I. Standing to Raise Violations of International Law.

The intent of Congress in passing the 1980 Marijuana On The High Seas Act was to extend United States jurisdiction in this area to the maximum extent permitted by international law.²¹ Appellate courts interpreted the 1980 Act to give defendants standing to litigate the question of whether jurisdiction under the Act complied with international law, or whether international law permitted the boarding of vessels and enforcement of the law.²² Litigating issues of international law in individual cases proved to be a significant burden for the government.²³ To eliminate this burden, Congress passed

T.I.A.S. No. 6298; Law Of The Sea Convention, *opened for signature* Dec. 10, 1982, art. 108 [hereinafter 1982 LOS Convention]; *United States v. Marino-Garcia*, 679 F.2d 1373, 1382 n.16 (11th Cir. 1982), *cert. denied*, 459 U.S. 1114, 103 S.Ct. 748, (1983); *See Note, The Judiciary and Public Policy Considerations of the Marijuana On The High Seas Act*, 10 SUFFOLK TRANSNAT'L. L. J. 581, 593 n.47 (1986)(discussing the recent United Nations General Assembly Resolution on the Control of Drug Trafficking, 24 I.L.M. 1157 (July 1985)).

²⁰ 1982 LOS Convention, *supra* note 19, at art. 105, ("On the high seas . . . every State may seize a pirate ship or aircraft . . . and arrest the persons and seize the property on board."); Convention on the High Seas, *opened for signature* Apr. 29, 1958, art. 19, 13 U.S.T. 2312, T.I.A.S. No. 5200 (entered into force Sept. 30, 1962)[hereinafter 1958 Convention on the High Seas]; *See United States v. Marino-Garcia*, 679 F.2d at 1382 n.16 ("There is a growing consensus among nations to include drug trafficking as a universally prohibited crime.").

²¹ H.R. REP. NO. 323, 96th Cong., 1st Sess. 11 (1979) (The 1980 act was "designed to prohibit all acts of illicit trafficking in controlled substances on the high seas which the United States can reach under international law."); *United States v. Marino-Garcia*, 679 F.2d 1373, 1379-1380 (11th Cir. 1982), *cert. denied*, 459 U.S. 1114 (1983) ("Jurisdiction under [the 1980 Act] may not therefore exceed the bounds of international law. . . . [W]e must endeavor to interpret [the 1980 Act] in a manner consistent with international law"); *See also Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains. . . .").

²² *See, e.g., United States v. James-Robinson*, 515 F.Supp. 1340 (S.D. Fla. 1981), *vacated as moot*, 29 Crim. L. Rep. (BNA) 2545 (5th Cir. 1981); *United States v. Marino-Garcia*, 679 F.2d at 1378-79; *United States v. Marsh*, 747 F.2d 7 (1st Cir. 1984).

²³ S. REP. NO. 530, 99th Cong., 2d Sess. 15-16, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 6000-6001.

section 1903(d) of the 1986 Act which prevents defendants from raising alleged violations of international law in their defense:²⁴

A claim of failure to comply with international law in the enforcement of this chapter may be invoked solely by a foreign nation, and a failure to comply with international law shall not divest a court of jurisdiction or otherwise constitute a defense to any proceeding under this chapter.²⁵

Section 1903(d) reflects the generally accepted principles that rights and duties under international law accrue to sovereign states, and that only a state can complain of a violation of international law.²⁶ As a result, defendants do not have standing to protest alleged violations of international law, nor does the United States have to prove compliance with international law.²⁷ This paper discusses whether certain applications of section 1903(d) violate the due process clause of the Fifth Amendment.

It is interesting to note that unlike the 1980 Act, the Senate and House Reports for the 1986 Act do not state that it is the intent of Congress to expand jurisdiction in compliance with international law.²⁸ The Congress (undoubtedly with the help of the executive branch)

²⁴ S. REP. NO. 530, 99th Cong., 2d Sess. 15-16 reprinted in U.S. CODE CONG. & ADMIN. NEWS, 6000-6001 (“[d]efendants in cases involving foreign or stateless vessel boardings and seizures have been relying heavily on international jurisdictional questions as legal technicalities to escape conviction. . . . In the view of the Committee, only the flag nation of a vessel should have a right to question whether the Coast Guard has boarded the vessel with the required consent. The international law of jurisdiction is an issue between sovereign nations. Drug smuggling is universally recognized criminal behavior, and defendants should not be allowed to inject these collateral issues into their trials. . . [O]nly a foreign nation may invoke a claim of failure to comply with international law in the enforcement of the act.”).

²⁵ 46 U.S.C.A. § 1903(d)(West Supp. 1988).

²⁶ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, Part IX, Introductory Note 339 (1987) (“[M]any obligations under international law benefit private persons, . . . but the principal remedies for violation of these obligations are interstate only; international private remedies for violations of international law are still rare.”); *United States v. Hensel*, 699 F.2d 18, 30 (1st Cir. 1983), cert. denied, 461 U.S. 958 (1983) (“In brief, international law protects Honduras, not [the individual defendant]. And Honduras, as far as this record reveals, does not care.”).

²⁷ *United States v. Bierman*, 678 F.Supp. 1437,1442 (N.D. Cal. 1988) (In accordance with section 1903(d), the court held that the defendant lacked standing to raise the issue of whether the Coast Guard complied with the terms of an agreement between the United States and the United Kingdom.)

²⁸ S. REP. NO. 530, 99th Cong., 2d Sess., reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 6000; H. REP. NO. 99-547 (1986).

appears to have made a decisive effort not to allow the international law of jurisdiction to restrict United States drug interdiction activities under the 1986 Act.

2. *Intent to Distribute in the United States Not Required*

The proscriptive provision of the 1986 Act, section 1903(a), makes it illegal knowingly to manufacture, distribute or possess with intent to distribute a controlled substance on board vessels subject to the jurisdiction of the United States.²⁹ The Act proscribes possession with intent to distribute, but does not require an intent to distribute *in the United States*.

Under the provisions of the 1970 Comprehensive Act, prosecutors found it difficult to prove the required element of intent to distribute in the United States.³⁰ Congress first eliminated the need for such a specific geographic nexus (intent to distribute in the United States) in the 1980 Act.³¹ Congress concluded after hearing the testimony of interested law enforcement agencies that exercising jurisdiction without a nexus was valid under international law.³² The courts have since upheld the 1980 Act, holding that it is not necessary to prove an intent to distribute in the United States in order to exercise jurisdiction over foreign or stateless vessels.³³ The intent to distribute (presumably

²⁹ 46 U.S.C.A. § 1903(a)(West Supp. 1988).

³⁰ Note, *High Seas Narcotics Smuggling*, *supra* note 6, at 713 ("Because of the difficulty of proving such intent, many indictments were thrown out, and although the narcotics were destroyed and the ships impounded, the smugglers themselves went free.").

³¹ 21 U.S.C.A. § 955a(a) (West Supp. 1981); *See* 125 CONG. REC. H6380 (July 23, 1979)(Statement of Rep. McCloskey: "Where current law requires an intent to import a controlled substance into the United States as a necessary element of the crime this bill essentially requires only knowledge or intent to distribute with no need to establish a U.S. destination.").

³² *United States v. Howard-Arias*, 679 F.2d 363, 369-71 (4th Cir. 1982), *cert. denied*, 489 U.S. 874 ("[C]ongress, in enacting section 955a(a) was acutely aware of applicable international law and enacted that provision pursuant to its understanding that the United States had jurisdiction to create a crime proscribing possession of a controlled substance with a general intent to distribute by any person aboard a stateless vessel on the high seas." The court cited the Department of Transportation, the Drug Enforcement Administration, the Attorney Generals Office, and the Department of State as agencies whose testimony led Congress to conclude that jurisdiction could be exercised without a nexus between a stateless vessel and the United States.).

³³ *United States v. Alvarez-Mena*, 765 F.2d 1259, 1265 (5th Cir. 1985)("No showing of nexus or knowledge or intent is required where jurisdiction is predicated on the stateless status of the vessel on the high seas."); *United States v. Pinto-*

anywhere) is routinely inferred from the possession of a large quantity of illegal narcotics, combined with factors such as length of voyage, lack of provisions or equipment, and number and relation of the crew.³⁴

3. *Foreign State Consent May Be Obtained By Informal Means*

The 1986 Act³⁵ codified judicial interpretations of the 1980 Act which allowed the consent of a foreign state to the enforcement of United States law to be obtained by radio, telephone, or similar oral or electronic means.³⁶ Foreign state consent may be proved by certification from the Secretary of State.³⁷ The validity of obtaining consent through informal means according to international law is discussed in section IV of this paper.

IV. GROUNDS FOR HIGH SEAS JURISDICTION - THE 1986 ACT

1. *United States Vessels*

The law-of-the-flag principle permits a state to exercise jurisdiction over all persons aboard vessels flying the state's flag.³⁸ Authorities

Mejia, 720 F.2d 248, 261 (2d Cir. 1983) ("[I]nternational law provides no bar to an assertion of jurisdiction over a stateless vessel by the United States pursuant to 955a(a), even absent proof that the vessel's operators intended to distribute their cargo in the United States."); See *United States v. Gonzalez*, 776 F.2d 931,939 (11th Cir. 1985) (seizure of vessel of Honduran registry; "The protective principle does not require that there be proof of an actual or intended effect inside the United States.").

³⁴ *United States v. Batista*, 731 F.2d 765, 768 (11th Cir. 1984); H.R. REP. No. 323, 96th Cong., 1st Sess. 9 (1979) ("[T]he intent to distribute need not be within the United States. Moreover, the intent element may be inferred by proof of a presence of a large quantity of the narcotic or dangerous drug, giving rise to the inference of trafficking. . ."); See Note, *The Judiciary and Public Policy Considerations of the Marijuana On The High Seas Act*, 10 SUFFOLK TRANSNAT'L L. J. 581, 587 n.28 (1986).

³⁵ 46 U.S.C.A. § 1903(c)(1)(E) (West Supp. 1988).

³⁶ *United States v. Loalza-Vasquez*, 735 F.2d 153, 157-158 (5th Cir. 1984); *United States v. Gonzalez*, 776 F.2d at 933 ("[A]rrangements regarding specific vessels may be informal, as long as there is a clear indication of consent by the foreign nation.").

³⁷ 46 U.S.C. § 1903(c)(1)(West Supp. 1988); S. REP. No. 530, 99th Cong., 2d Sess. 16, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 6001 ("Such a certification should spell out the circumstances in which the consent, waiver, or denial was obtained, including the name and title of the foreign official acting on behalf of his government, the precise time of the communication, and the means by which the communication was conveyed.").

³⁸ RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 502, reporters' note 3 (1987); *Lauritzen v. Larsen*, 345 U.S. 571, 585, 73 S.Ct. 921 (1953); *United States v. Del Sol*, 679 F.2d 217 (11th Cir. 1982).

differ as to whether the law-of-the-flag theory is a corollary of the nationality principle³⁹ or of the territorial principle.⁴⁰ The better view is that it is a corollary of the territorial principle.⁴¹

Jurisdiction over the "territory" of the vessel includes within its scope all persons aboard the vessel.⁴² If the law-of-the-flag principle were considered a corollary of the nationality principle, it would be difficult to justify exercising jurisdiction over foreign citizens aboard the vessel. In practice, the United States routinely enforces its laws against all persons aboard United States flag vessels on the high seas and in foreign territories.⁴³

Section 1903(b) of the 1986 Act defines which vessels are considered a "vessel of the United States" and therefore subject to United States jurisdiction. Vessels which once were documented in the United States and subsequently were changed to a foreign registry in violation of United States law remain vessels of the United States for purposes of the Act.⁴⁴

2. *Stateless Vessels*

Congressional intent in both the 1980 and 1986 Acts was to provide for jurisdiction over foreign crew members aboard stateless vessels on the high seas.⁴⁵ Section 1903(c)(1) of the 1986 Act states that

³⁹ *United States v. Marino-Garcia*, 679 F.2d at 1380 n.12 ("Under the nationality or law of the flag principle, any nation may extend jurisdiction to all vessels flying its flag.').

⁴⁰ *Lauritzen v. Larsen*, 345 U.S. 571, 585, 73 S.Ct. 921 (1953); *The S.S. Lotus*, P.C.I.J., Series A, No. 10 at 25 (1927)("a ship on the high seas is assimilated to the territory of the State the flag of which it flies. . . what occurs on board a vessel on the high seas must be regarded as if it occurred on the territory of the State whose flag the ship flies").

⁴¹ See RIENOW, NATIONALITY OF A MERCHANT VESSEL, 189-191 (1937).

⁴² *Reg. v. Anderson*, L.R.1 C.C.R. 169 (1868) ("[T]he ship forms a part of that nation's country, and all persons on board of her may be considered as within the jurisdiction of that nation whose flag is flying on the ship, in the same manner as if they were in the territory of that nation.').; see also *United States v. Del Sol*, 679 F.2d 217, 218 (11th Cir. 1982).

⁴³ *United States v. Flores*, 289 U.S. 137, 53 S.Ct. 580 (1933) (U.S. law applied to an act aboard a United States vessel on the river Congo in Africa.); *United States v. Liles*, 670 F.2d 989, 992 (11th Cir. 1982) ("Under well established principles of international law, the jurisdiction of the United States to prosecute crimes on board ship is concurrent with the jurisdiction of the nation in whose waters the crime occurs.').; *United States v. Julio-Diaz*, 678 F.2d 1031 (11th Cir. 1982).

⁴⁴ 46 U.S.C.A. § 1903(b)(3) (West Supp. 1988).

⁴⁵ 125 CONG. REC. 20,083 (1979) (comments of Rep. McCloskey: "[T]his bill would exert jurisdiction over. . . [a]ny person, foreign or U.S. citizen, on board a U.S. vessel or one subject to U.S. jurisdiction such as a stateless vessel.')., cited in 10 MAR. LAW. 154, n.93 (1985).

stateless vessels are subject to the jurisdiction of the United States:

For the purposes of this section, a "vessel subject to the jurisdiction of the United States" includes—

(A) a vessel without nationality;

(B) a vessel assimilated to a vessel without nationality, in accordance with paragraph (2) of article 6 of the 1958 Convention on the High Seas;⁴⁶

A "vessel without nationality" includes, but is not limited to

(A) a vessel aboard which the master or person in charge makes a claim of registry, which claim is denied by the flag nation whose registry is claimed; and

(B) any vessel aboard which the master or person in charge fails, upon request of an officer of the United States empowered to enforce applicable provisions of United States law, to make a claim of nationality or registry for that vessel.⁴⁷

When a vessel is found transporting narcotics hundreds of miles from the United States, a nexus or potential threat to the United States as a forum is often difficult to prove.⁴⁸ Under present United States law, however, a finding that the vessel is stateless is itself sufficient to establish the court's jurisdiction over the vessel and its crew.⁴⁹ The appellate courts have "agreed uniformly that stateless vessels on the high seas are, by virtue of their statelessness, subject to the jurisdiction of the United States."⁵⁰ No nexus (intent to distribute in the United States) between the stateless vessel and the United States is required.⁵¹

⁴⁶ 1958 Convention on the High Seas, *supra* note 20, at art. 6(2) ("[A] ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question . . . and may be assimilated to a ship without nationality."); *See, e.g.*, United States v. Ayarza-Garcia, 819 F.2d 1043, 1046 (11th Cir. 1987); United States v. Matute, 767 F.2d 1511,1512 (11th Cir. 1985).

⁴⁷ 46 U.S.C.A. § 1903(c)(2) (West Supp. 1988).

⁴⁸ Anderson, *Jurisdiction supra* note 7, at 324-25 ("[T]he high seas smugglers soon learned that if no one said anything and all the charts and log books disappeared before a Coast Guard boarding, the chances of a successful prosecution were slim.").

⁴⁹ United States v. Marino-Garcia, 679 F.2d at 1383 ("Jurisdiction exists solely as a consequence of the vessel's status as stateless."); United States v. Pinto-Mejia, 720 F.2d 248, 261 (2d Cir. 1983); United States v. Alvarez-Mena, 765 F.2d 1259,1265 (5th Cir. 1985).

⁵⁰ United States v. Pinto-Mejia, 720 F.2d at 261.

⁵¹ *Id.* at 260-61; United States v. Howard-Arias, 679 F.2d 363,372 (4th Cir. 1982), *cert. denied*, 459 U.S. 874 (1982); United States v. Marino-Garcia, 679 F.2d at 1383 ("We further conclude that there need not be proof of a nexus between the stateless vessel and the country seeking to effectuate jurisdiction.").

The exercise of subject matter jurisdiction⁵² over the foreign *crew members* of stateless vessels without proof of a nexus to the forum has generated extensive controversy. The 1980 Act and cases interpreting it have been criticized insofar as they authorize jurisdiction of a forum over foreign crew members aboard stateless vessels when there is no potential threat to or nexus with the forum, in contravention of international law.⁵³

The critics maintain that

- 1) Congress intended the expansion of jurisdiction under the 1980 Act to conform to the international law of jurisdiction;⁵⁴
- 2) According to international law, extraterritorial jurisdiction must be based on one of the existing principles of jurisdiction;⁵⁵
- 3) The protective principle of jurisdiction (the principle most applicable to stateless vessels⁵⁶) requires a threat to the forum's security or governmental functions;⁵⁷ and

⁵² In personam jurisdiction is not an issue. The United States Supreme Court's *Ker-Frisbie* doctrine holds that a defendant can not challenge jurisdiction over his person on the grounds that his presence was unlawfully obtained. *Frisbie v. Collins*, 342 U.S. 519,522 (1952); *Ker v. Illinois*, 119 U.S. 436, 441-42 (1886).

⁵³ See Note, *High Seas Narcotics Smuggling*, *supra* note 6, at 700-16; Note, *Stateless Vessels and The High Seas Narcotics Trade: United States Courts Deviate From International Principles of Jurisdiction*, 9 MAR. LAW. 273 (1984) [hereinafter Note, *Stateless Vessels*]; Note, *The Marijuana on the High Seas Act and Jurisdiction over Stateless Vessels*, 25 WM. & MARY L. REV. 313 (1983).

⁵⁴ *Supra* note 21.

⁵⁵ Note, *High Seas Narcotics Smuggling*, *supra* note 6, at 690 ("In order to assert jurisdiction over an offense, a State must apply one of the bases of international jurisdiction: universality, nationality, passive personality, objective territoriality or the protective principle."), *citing* *Rivard v. United States*, 375 F.2d 882,885 (5th Cir. 1967), *cert. denied*, 389 U.S. 884 (1967); Note, *Stateless Vessels*, *supra* note 53, at 275.

⁵⁶ *United States v. James-Robinson*, 515 F.Supp. 1340, 1344 n.6 (S.D. Fla. 1981), *vacated as moot*, 29 Crim. L. Rep (BNA) 2545 (5th Cir. 1981) ("International law recognizes five possible theories of jurisdiction, the objective territorial, national, protective, universal, and passive personality principles.')

The objective territorial principle requires a showing that the defendant intended to harm the forum state and that such harm occurred; the nationality principle does not apply to foreign nationals; the United States does not recognize the passive personality principle as a basis of jurisdiction; the law-of-the-flag theory (a corollary of the territorial principle) does not apply because stateless vessels are not U.S. vessels; and drug smuggling is not yet recognized as a universal crime. See Note, *Drug Enforcement On The High Seas: Stateless Vessel Jurisdiction Over Shipboard Criminality By Non-Resident Alien Crewmembers*, 11 MAR. LAW. 163,171 n.54 (1986); [hereinafter Note, *Drug Enforcement On The High Seas*]; Note, *Stateless Vessels*, *supra* note 53, at 275-77.

⁵⁷ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §

4) To fulfill the intent of Congress to expand jurisdiction in accordance with international law, such a nexus between the crew member and the forum state is necessary to exercise jurisdiction under the protective principle.⁵⁸

The decision of the United States District Court for the Southern District of Florida in *United States v. Angola*⁵⁹ illustrates the commentators' criticisms. In its haste to exercise jurisdiction, the court held that a vessel carrying narcotics 350 miles from United States territory with no nexus to the United States other than its location posed such a threat to the United States that jurisdiction over the crew was justified under the protective principle.⁶⁰ The *Angola* court was apparently ready to consider every narcotics-carrying vessel on the high seas anywhere in the western hemisphere to be a potential threat sufficient for the court to exercise jurisdiction over it.⁶¹

Contrary to the court's opinion,⁶² the threat posed by a narcotics-carrying vessel 350 miles from the United States coast, when no other evidence of intent to import is present, is generalized and attenuated. Grounding jurisdiction on such a generalized potential threat creates a slippery slope which exposes the protective principle to unlimited abuse in the future. The Restatement (Third) of Foreign Relations provides that a state is authorized to exercise jurisdiction under the protective principle when "certain conduct outside its territory by persons not its nationals [is] directed against the security of the state or against a limited class of other state interests."⁶³ Thus, the defendant's conduct must be *directed against* the security of the state

402, comment (f) (1987); See, e.g., *United States v. Romero-Galue*, 757 F.2d at 1154 ("The protective principle permits a nation to assert jurisdiction over a person whose conduct outside the nation's territory threatens the nation's security or could potentially interfere with the operation of its governmental functions."); *United States v. Pizzarusso*, 388 F.2d 8,10 (2d Cir. 1968), cert. denied, 392 U.S. 936 (1968).

⁵⁸ Note, *Stateless Vessels*, supra note 53, at 293; Note, *High Seas Narcotics Smuggling*, supra note 6, at 719.

⁵⁹ 514 F.Supp. 933 (S.D. Fla. 1981).

⁶⁰ *Id.* at 936.

⁶¹ *Id.* at 935 ("To protect the nation's borders from the importation of illegal narcotics, it is necessary to attempt regulation of vessels on the high seas notwithstanding the absence of any objective proof of an intent to import into the United States.").

⁶² *Id.* ("This vessel, full of marijuana, represented a real, not an imaginary, potential for harm to the effective administration of the United States' customs and narcotics laws").

⁶³ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(3) (1987).

for the protective principle to apply. In *Angola*, however, the court exercised jurisdiction without proof that the defendant's conduct was directed against the United States (intended territorial effects).⁶⁴ The court's exercise of jurisdiction without proof of intended territorial effects was an unwarranted application of the protective principle.⁶⁵

The United States District Court for the Southern District of Florida quickly remedied the faulty jurisdictional analysis of the *Angola* case. In *United States v. James-Robinson*,⁶⁶ the court recognized that it did not have subject matter jurisdiction unless such jurisdiction was permitted under international law. The court held that under the protective principle of jurisdiction it lacked subject matter jurisdiction to hear charges against foreign nationals on a stateless vessel carrying narcotics where the ship was seized 400 miles from the United States and the government did not allege an intent to distribute or to cause any other effect in the United States.⁶⁷ The court ruled:

[T]he presence of foreign crewmen on a stateless ship carrying marijuana on the high seas 400 miles from the United States [does not] by definition represent a threat to our national security or to our government functions. . . More than that must be alleged and proven.⁶⁸

The *James-Robinson* court properly held that the protective principle requires a greater nexus between the defendant and the forum than mere presence of the defendant off the forum coast.⁶⁹

The United States law of jurisdiction over stateless vessels changed dramatically in the landmark case of *United States v. Marino-Garcia*.⁷⁰ In *Marino-Garcia*, the Eleventh Circuit held that the United States

⁶⁴ 514 F.Supp. at 936.

⁶⁵ Note, *Bringing In The Mother Lode; The Second Circuit Rides In The Wake of Marino-Garcia - United States v. Pinto-Mejia*, 10 MAR. LAW. 141,154 (1985); Note, *High Seas Narcotics Smuggling*, *supra* note 6, at 716 ("The [*Angola*] decision . . . exceeds the limit of the protective principle with its requirements of a potentially adverse effect caused by conduct directed at the security of the State.").

⁶⁶ 515 F.Supp. 1340, 1347 (S.D. Fla. 1981); *See also* *United States v. Egan*, 501 F.Supp. 1252,1257 (S.D.N.Y. 1980).

⁶⁷ 515 F.Supp. at 1347.

⁶⁸ *Id.* at 1346.

⁶⁹ *Id.* at 1345. ("Never in a published opinion of an American court has a potential generalized effect, which might or might not also be an effect on the United States, been found sufficient to invoke the protective principle of international law."); *See Note, Stateless Vessels*, *supra* note 53, at 290.

⁷⁰ 679 F.2d 1373 (11th Cir. 1982), *cert. denied*, 459 U.S. 1114, 103 S.Ct. 748 (1983).

does have subject matter jurisdiction over foreign nationals on stateless vessels where no intended territorial effect (nexus) can be proved.⁷¹ Rather than adopt the discredited practice of grounding jurisdiction in the protective principle when there is no nexus to the forum, the Eleventh Circuit fashioned a new ground for jurisdiction. The court examined the status of stateless vessels under international law and concluded that jurisdiction may be exercised over the stateless vessel and its crew members solely as a result of the vessel's stateless status.⁷²

In *Marino-Garcia*, the court engaged in an extensive analysis of international law to support the conclusion that "there need not be proof of a nexus between the stateless vessel and the country seeking to effectuate jurisdiction."⁷³ Then, in a single sentence, the court carelessly (or perhaps carefully) presumed that jurisdiction over the vessel includes jurisdiction over its crew members: "Such status makes the vessel subject to action by all nations proscribing certain activities aboard stateless vessels and *subjects those persons aboard to prosecution for violating the proscriptions.*"⁷⁴ In *United States v. Pinto-Mejia*, the Second Circuit embraced the Eleventh Circuit's decision in *Marino-Garcia* and likewise held that a finding that the vessel was stateless is by itself sufficient to establish jurisdiction over the crew members.⁷⁵

Criticism of the Marino-Garcia Decision

The *Marino-Garcia* decision, however, remains vulnerable to the criticism that according to each of the recognized principles of international jurisdiction a nexus between the *individual defendant* and the forum is required.⁷⁶ This nexus requirement should apply no less

⁷¹ *Id.* at 1383.

⁷² *Id.* at 1382 ("Vessels without nationality are international pariahs. They have no internationally recognized right to navigate freely on the high seas. . . they represent 'floating sanctuaries from authority' and constitute a potential threat to the order and stability of navigation on the high seas. . . . Thus the assertion of jurisdiction over stateless vessels on the high seas in no way transgresses recognized principles of international law."); See Note, *Drug Enforcement On The High Seas*, *supra* note 56, at 173 (reviews the authorities of international law upon which the court based its decision in *Marino-Garcia*).

⁷³ 679 F.2d at 1383.

⁷⁴ *Id.* (emphasis added).

⁷⁵ *United States v. Pinto-Mejia*, 720 F.2d at 248.

⁷⁶ Note, *Drug Enforcement On The High Seas*, *supra* note 57, at 170 ("When the [1980 Act] is applied to stateless vessels which carry alien crews, some connection between the United States and the crime of drug smuggling must be shown in order to support jurisdiction under one of the traditional jurisdictional principles."); Note,

to persons aboard stateless vessels than to those aboard a vessel registered in a foreign state. The Eleventh Circuit erred in its analysis of the international law of jurisdiction when it presumed that jurisdiction over a stateless vessel automatically provides jurisdiction over the vessel's foreign crew members.⁷⁷ Article 110(1)(d) of the Law of the Sea Convention permits a state to exercise jurisdiction over a stateless vessel, but does not provide for jurisdiction over the crew members aboard the vessel.⁷⁸ The court in *Marino-Garcia* was correct in asserting that any nation may extend its authority over a stateless ship;⁷⁹ the problem, however, concerns jurisdiction over individuals, as opposed to an in rem proceeding against the ship as a separate entity.⁸⁰

Crew members of stateless vessels are not themselves stateless, but are citizens of a foreign nation.⁸¹ The five international principles of jurisdiction might not limit a state's authority to exercise jurisdiction over a stateless vessel, as maintained in *Marino-Garcia*⁸²; however, at least one of the principles should be satisfied to exercise jurisdiction over the individuals aboard.⁸³ Each of the recognized principles of international law requires a nexus or potential threat to the forum.

Stateless Vessels, *supra* note 53, at 278 ("[E]ach of these principles requires some type of nexus or connection with the prosecuting country, for example, citizenship or the presence of a potential threat, for the extraterritorial extension of jurisdiction.").

⁷⁷ Note, *Stateless Vessels*, *supra* note 53, at 294, ("[The court] failed to distinguish between jurisdiction over a stateless vessel and jurisdiction to prosecute crewmembers found on board a stateless vessel.").

⁷⁸ 1982 LOS Convention, *supra* note 19, at art. 110(1)(d).

⁷⁹ MEYER, THE NATIONALITY OF SHIPS 323 (1967), *cited in* United States v. James-Robinson, 515 F.Supp. at 1343 n.5.

⁸⁰ United States v. James-Robinson, 515 F.Supp. at 1343 n.5 ("[t]he issue before the Court is not of such an in rem nature. Rather, the issue is whether the U.S. may extend its authority over the foreign citizen crewmembers of such a stateless ship.").

⁸¹ MEYER, THE NATIONALITY OF SHIPS 309 (1967) ("Such statelessness does not of course affect the nationality of the individuals using the ship in question.").

⁸² United States v. Marino-Garcia, 679 F.2d at 1382 ("[T]he assertion of jurisdiction over stateless vessels on the high seas in no way transgresses recognized principles of international law.").

⁸³ Note, *The Marijuana on the High Seas Act and Jurisdiction over Stateless Vessels*, 25 WM. & MARY L. REV. 313, 333-34 (1983) ("A nation's authority to seize a stateless vessel . . . does not mean that its courts automatically should hear cases involving the vessel's foreign crewmembers. Stateless vessel status is not illegal, and no court should try a case involving crewmembers of a stateless vessel unless the crewmembers violate one of the nation's laws and the nation is able to invoke a recognized principle of international law.").

The Eleventh Circuit's decision in *Marino-Garcia* to exercise jurisdiction over crew members of stateless vessels without such a nexus is in contravention of customary international law and therefore is contrary to Congressional intent in passing the 1980 Act.⁸⁴ Crew members of stateless vessels are in essence stripped of their nationality, and of the protections afforded by international law.

Two additional criticisms of the practice of exercising jurisdiction over foreign citizens on stateless vessels under *Marino-Garcia* and its progeny merit consideration:

1. Under the law of *Marino-Garcia*, the United States, or any nation, could theoretically claim jurisdiction over a stateless vessel and its crew members anywhere in the world.⁸⁵

2. Such an exercise of jurisdiction contradicts the existing presumption that the United States will conform to international law.⁸⁶ In *Murray v. The Schooner Charming Betsy*, the Supreme Court stated that "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains. . . ."⁸⁷ The Federal courts have expanded this presumption by holding that the courts may override international law only when Congress expressly intended to do so.⁸⁸

Congress apparently recognized the difficulty of obtaining jurisdiction over stateless vessels under the protective principle. In response, Congress included in the 1986 Act section 1902 which declares that drug trafficking aboard vessels "presents a specific threat to the security and societal well-being of the United States."⁸⁹ To the lay reader this declaration appears to be mere rhetoric; however, to the student of international law it raises a bright signal. This declaration of a threat to the security of the United States allows a court to

⁸⁴ Note, *Stateless Vessels*, *supra* note 53, at 295 ("This apparent unilateral extension of sovereignty over the high seas . . . constitutes a violation of customary international law and the Convention on the High Seas."); Note, *High Seas Narcotics Smuggling*, *supra* note 6, at 719 ("Only by requiring that the narcotics possessed are intended for distribution within the United States will subsection (a) of [the 1980 Marijuana On The High Seas Act] conform to principles of international law.").

⁸⁵ *United States v. Marino-Garcia*, 679 F.2d at 1383 ("[W]e hold that section 955a properly extends the criminal jurisdiction of this country to any stateless vessel in international waters engaged in the distribution of controlled substances.").

⁸⁶ See Note, *High Seas Narcotics Smuggling*, *supra* note 6, at 692 n.21.

⁸⁷ *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64,118 (1804).

⁸⁸ *Spieß v. C. Itoh & Co.*, 643 F.2d 353, 356 (5th Cir. 1981).

⁸⁹ 46 U.S.C.A. § 1902 (West Supp. 1988).

hold that a stateless or foreign vessel carrying narcotics, with no nexus to the United States, poses such a threat to the security of the United States that jurisdiction over the vessel and crew members is proper under the protective principle.⁹⁰ As observed earlier in the discussion of *United States v. Angola*,⁹¹ however, the exercise of jurisdiction over foreign crew members aboard a stateless vessel when there is no nexus is an abuse of the protective principle.

Argument For Exercising Jurisdiction Under Marino-Garcia.

An argument can be made that the United States is justified in exercising jurisdiction over crew members aboard stateless vessels where no nexus is present. International law is continuously developing and must expand in order to meet the threat of serious crimes such as high seas narcotics trafficking. The failure of existing international law to provide states with jurisdiction over such a threat need not be controlling.

The primary limitation on the reach of jurisdiction under the protective principle is that assertions of this jurisdiction must be reasonable.⁹² If the United States unreasonably extends its extraterritorial jurisdiction other nations will object.⁹³ If the United States actions are not objected to, or are followed by other nations, such practices will become accepted by the international community and over time will become customary international law.⁹⁴

⁹⁰ See *United States v. Biermann*, 678 F.Supp. 1437 (N.D. Cal. 1988) (court referred to section 1902 of the 1986 Act in holding that the protective principle provides jurisdiction over persons on foreign vessels outside U.S. territory); *United States v. Marino-Garcia*, 679 F.2d at 1378 n.4 (in dicta the court stated: "[W]e note that if drug trafficking is found to be a threat to the security of the United States this country would have jurisdiction under the protective principle over all vessels engaged in the illicit practice. . . .").

⁹¹ *Supra* notes 63-65 and accompanying text.

⁹² *Church v. Hubbard*, 6 U.S. (2 Cranch) 187, 234-35 (1804); *United States v. Hensel*, 699 F.2d 18, 28-29 (1st Cir. 1983), *cert. denied*, 461 U.S. 958 (1983).

⁹³ Internal Coast Guard Memorandum (undated) ("[T]he limits upon the exercise of prescriptive jurisdiction by the United States under the protective principle are determined not by fixed boundaries but by the acceptance or acquiescence of other nations based on the reasonableness of our actions.").

⁹⁴ See Anderson, *Jurisdiction*, *supra* note 7, at 331 citing McDougal, *The Hydrogen Bomb Tests and the International Law of the Sea*, 49 AM. J. INT'L L. 356, 358 (1955) ("[T]he international law of the sea is . . . a process of continuous interaction, of continuous demand and response, in which the decision-makers of particular nations unilaterally put forward claims of the most diverse and conflicting character to the use of the world's seas, and in which other decision-makers . . . weigh and appraise these competing claims in terms of the interest of the world community and of the rival claimants, and ultimately accept or reject them.").

The United States may also defend its practice of aggressive extraterritorial jurisdiction in light of the ever increasing international condemnation of illicit narcotics trafficking. The international community has developed a consensus concerning the need to control the illegal use and distribution of drugs.⁹⁵ Recently, the United Nations has called for even greater international cooperation and interdiction efforts.⁹⁶ Aggressive interdiction and prosecution efforts by the United States are in accord with this international call to stop narcotics trafficking.

A third argument available to the United States is that the commentators' criticisms are premised on the legal fiction of "in rem" jurisdiction which separates jurisdiction over the vessel from jurisdiction over the vessel's operators. In rem jurisdiction over a vessel is part of a lien theory which allows an action against the vessel itself to ensure that the owner's or operator's debts are paid.⁹⁷ The vessel may be seized and sold in an in rem proceeding to satisfy maritime liens.

Criminal subject matter jurisdiction should not be limited by this legal fiction designed to provide security for maritime claims. It may be argued that the Eleventh Circuit in *Marino-Garcia* correctly held that jurisdiction over the vessel includes jurisdiction over its crew members.⁹⁸ After all, the crew members and not the vessel are responsible for the vessel carrying narcotics. A vessel transporting

⁹⁵ Single Convention on Narcotic Drugs, Mar. 30, 1961, 18 U.S.T. 1407, T.I.A.S. No. 6298 (entered into force June 24, 1967) (requires signatories to take steps to control illegal narcotics trafficking); 1982 LOS Convention, *supra* note 19, at art. 108 (requires all states to cooperate in the suppression of illicit drug trafficking).

⁹⁶ See U.N. General Assembly Resolutions on the Control of Drug Trafficking and Draft Convention Against Traffic in Narcotic Drugs and Psychotropic Substances and Related Activities, art 9, *reprinted in* 24 I.L.M. 1157, 1158 (July 1985) ("The States Parties shall cooperate on a bilateral and multilateral basis to prevent and suppress the illicit activities . . . and take all necessary measures towards that end."); Note, *The Judiciary and Public Policy Considerations of the Marijuana On The High Seas Act*, 10 SUFFOLK TRANSNAT'L L. J. 581 n.47 (1986) ("The general tenor of [recent United Nations activity] is a renewed pledge to fight the plague of illicit traffic in drugs with greater cooperation among nations.").

⁹⁷ T. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 61 (1987) ("A proceeding in rem in admiralty is one against the vessel (or other maritime property) as the offending thing, although as a practical matter in most cases it is a way of obtaining security for the plaintiff's claim.").

⁹⁸ See *United States v. Alvarez-Mena*, 765 F.2d 1259, 1266 (5th Cir. 1985) ("[M]embers of the crew of a stateless vessel on the high seas have no basis on which to assert any claim to the jurisdictional exemptions of international law that are unavailable to the vessel upon which they sail.").

narcotics is but a an instrument, a structure of steel and wood, under the control and direction of its crew members.

Stateless Vessels and the International Right of Approach

To determine whether a suspect vessel is stateless, the Coast Guard relies on the international "right of approach"⁹⁹ which permits a warship to approach an unidentified vessel to determine its nationality. If a reasonable suspicion remains as to the vessel's nationality, members of the warship's crew may board the vessel to determine the vessel's identity.¹⁰⁰ Once these persons are on board, contraband may be found in plain view, or conditions may be such as to provide probable cause to suspect that the vessel is in engaging in activities in violation of United States law.

If contraband is found or probable cause is established, and the vessel makes a claim of nationality, that claim will be verified with the nation claimed to be the flag state. Should that nation deny the vessel's claim of nationality, the vessel is considered to be stateless and the United States will exercise jurisdiction.¹⁰¹ If the vessel's claim of nationality is verified by the foreign state, the United States will request the flag state's permission to enforce United States drug interdiction laws.¹⁰² The international "right of approach" doctrine plays an important role in United States interdiction efforts in that it authorizes a significant number of high seas boardings.¹⁰³

3. "Customs Waters" of the United States

Section 1903(c)(1)(D) of the 1986 Act provides that vessels within United States "customs waters" are subject to the jurisdiction of the United States.¹⁰⁴ The Act adopts the definition for "customs waters" set out in 19 U.S.C. § 1401(j):

The term "customs waters" means, in the case of a foreign vessel subject to a treaty or other arrangement between a foreign government

⁹⁹ See 1982 LOS Convention, *supra* note 19, at art. 110(1)(d); *The Mariana Flora*, 24 U.S. (11 Wheat) 1, 43 (1826).

¹⁰⁰ *United States v. Romero-Galue*, 757 F.2d 1147, 1149 (11th Cir. 1985) (Under the "right of approach", Coast Guard boarded suspected smuggling vessel not flying a flag and with no markings indicating vessel's home port.).

¹⁰¹ 46 U.S.C.A. § 1903(c)(2)(A) (West Supp. 1988).

¹⁰² 46 U.S.C.A. § 1903(c)(1)(C) (West Supp. 1988).

¹⁰³ See, e.g., *United States v. Alvarez-Mena*, 765 F.2d at 1268 n.12; *United States v. Romero-Galue*, 757 F.2d at 1149.

¹⁰⁴ 46 U.S.C.A. § 1903(c)(1)(D) (West Supp. 1988).

and the United States enabling or permitting the authorities of the United States to board, examine, search, seize, or otherwise to enforce upon such vessel upon the high seas the laws of the United States, the waters within such distance of the coast of the United States as the said authorities are or may be so enabled or permitted by such treaty or arrangement, and in the case of every other vessel, the waters within four leagues of the coast of the United States.¹⁰⁵

In effect, section 1903(c)(1)(D) provides jurisdiction over all vessels within twelve miles of the baseline of the territorial sea, and over foreign vessels on the high seas if there is an enabling treaty or arrangement between the United States and the flag state.¹⁰⁶ Within the normal customs waters, up to twelve miles from the coast, the United States may exercise jurisdiction over foreign vessels carrying narcotics without the consent of the flag state.¹⁰⁷

The doctrine of consensual "customs waters", first introduced in the 1980 Marijuana on the High Seas Act¹⁰⁸, has consistently been interpreted to allow jurisdiction over foreign citizens aboard foreign flag vessels on the high seas.¹⁰⁹ The flag state's consent creates "customs waters" on the high seas in which United States law may be enforced.¹¹⁰ Though disguised in the legal fiction of creating "customs waters", what occurs in essence is an agreement to extend the reach of the laws of the United States to persons aboard private vessels on the high seas that fly the flag of the other country. The scope of jurisdiction provided by section 1903(c)(1)(D) is identical to that under section 1903(c)(1)(C) [jurisdiction upon the consent of the flag state], except that section 1903 (c)(1)(D) provides jurisdiction within twelve miles of the coast without the flag state's consent.

The 1980 Marijuana on the High Seas Act adopted by reference the definition of "customs waters" contained in 19 U.S.C. § 1401(j).¹¹¹

¹⁰⁵ 19 U.S.C.A. § 1401(j) (West 1982).

¹⁰⁶ *United States v. Robinson*, 843 F.2d at 2.

¹⁰⁷ 1982 LOS Convention, *supra* note 19, at art. 33.

¹⁰⁸ 21 U.S.C. § 955a(c) (West Supp. 1981).

¹⁰⁹ *United States v. Romero-Galue*, 757 F.2d at 1152; *United States v. Molinarez Charris*, 822 F.2d 1213, 1216-17 (1st Cir. 1987) ("A foreign vessel can be constructively within customs waters, even though it is on the high seas, if there is a 'treaty or other arrangement between a foreign government and the United States. . . .').

¹¹⁰ *See, e.g., United States v. Loalza-Vasquez*, 735 F.2d 153, 157 (5th Cir. 1984); *United States v. Robinson*, 843 F.2d at 2 ("[I]f a foreign government 'by treaty or other arrangement' permits the United States to enforce [its laws] upon . . . [a] vessel upon the high seas the waters around the vessel become 'customs waters,' and 21 U.S.C. 955a(c) then forbids possession.'").

¹¹¹ 21 U.S.C.A. § 955b(a) (West Supp. 1981) (" 'Customs waters' means those waters as defined in section 1401(j) of Title 19.'").

Unlike the 1980 Act, the 1986 Act references the definitions in 21 U.S.C. § 802¹¹² which section does not include a definition for customs waters.¹¹³ Therefore, the 1986 Act adopts no special definition of "customs waters" when the unique definition in 19 U.S.C. § 1401(j) is essential to obtaining jurisdiction over foreign vessels on the high seas under subparagraph (c)(1)(D) of the Act. The significance of this drafting error is yet unknown.

A defendant indicted under subparagraph (c)(1)(D) could argue that since the 1986 Act adopts no special definition of "customs waters", this section provides jurisdiction only in the traditional customs waters within 12 miles of the coast. The argument does have merit, given that subparagraph (c)(1)(C) (jurisdiction upon flag state consent) clearly applies beyond 12 miles and does not require the legal fiction of creating "customs waters". Of course, the defendant's argument would provide little relief since the government would re-indict under subparagraph (c)(1)(C). To maintain the ability to exercise jurisdiction on the high seas in "customs waters" created by treaty or an arrangement, the government would argue that the intent of Congress was to adopt the special extraterritorial definition of "customs waters" referenced in the 1980 Act.

In *United States v. Peterson*,¹¹⁴ the Ninth Circuit held that the protective principle of international law provided for jurisdiction in extraterritorial "customs waters." As discussed before, however,¹¹⁵ the protective principle requires a nexus between the forum and the defendants. For foreign vessels carrying narcotics within 12 miles of the coast, such a nexus may reasonably be presumed. However, for vessels on the high seas, a nexus may not be apparent. Jurisdiction over foreign vessels without a nexus, but where the flag state's consent has been obtained, would be better justified under the territorial principle. The territorial principle applies because the flag state has jurisdiction under the law-of-the-flag theory, and by agreement allows the United States to exercise jurisdiction over persons on its territory.

¹¹² 46 U.S.C.A. § 1903(i)(West Supp. 1988) ("The definitions in the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. § 802) apply to terms used in this chapter.").

¹¹³ 21 U.S.C.A. § 802 (West 1981).

¹¹⁴ 812 F.2d at 494 (upheld jurisdiction over Panamanian vessel in "customs waters"; "Drug trafficking presents the sort of threat to our nation's ability to function that merits application of the protective principle of jurisdiction."); See also *United States v. Romero-Galue*, 757 F.2d at 1154.

¹¹⁵ See *supra* note 57.

In interpreting the 1980 Marijuana on the High Seas Act, the courts held that the "arrangement" creating "customs waters" could be an informal agreement with the flag state by cable or telephone.¹¹⁶ No treaty need be established before the United States seeks consent via an informal agreement to board a particular vessel of the flag state.¹¹⁷ Section IV.4. of this paper argues that the use of informal communications to establish the flag state's consent contravenes international law.

In *United States v. Gonzalez*, the Eleventh Circuit held that this consensual creation of "customs waters" around a specific vessel and the exercise of jurisdiction over persons thereon does not violate the due process clause of the Fifth Amendment.¹¹⁸ In *United States v. Robinson*,¹¹⁹ the First Circuit upheld the "customs waters" basis of jurisdiction against a claim that it violated the ex post facto clause of the Constitution.

4. *Flag State Consent*

Freedom of transit on the high seas is generally limited to vessels that fly the flag of a single state.¹²⁰ With few exceptions, the flag state has exclusive jurisdiction over all persons aboard its vessels on the high seas.¹²¹ One generally recognized exception to the flag state's exclusive jurisdiction is consent from the flag state to another state that allows the second state to exercise jurisdiction over a vessel registered in the flag state.¹²²

¹¹⁶ *United States v. Loalza-Vasquez*, 735 F.2d 153, 157-58 (5th Cir. 1984); *United States v. Robinson*, 843 F.2d at 5 ("Case law makes equally clear that an arrangement can include the Coast Guard's ad hoc request for permission."); *Contra United States v. Gonzalez*, 776 F.2d at 941 (Hatchett, J., dissenting).

¹¹⁷ *United States v. Gonzalez*, 776 F.2d at 937 ("Accordingly, we hold that nothing in the Marijuana on the High Seas Act requires a treaty before the United States may seek an arrangement.").

¹¹⁸ *Id.* at 941.

¹¹⁹ 843 F.2d at 7 (the ex post facto clause forbids Congress to enact any law which imposes a punishment for an act which was not punishable at the time it was committed).

¹²⁰ *Niam Molvan v. Attorney General for Palestine (The "Asya")*, (1948) A.C. 351, 368.

¹²¹ 1958 Convention on the High Seas, *supra* note 20, at art. 6(1) ("ships shall sail under the flag of one state only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas."); *see supra* note 43.

¹²² *Id.*; RESTATEMENT (THIRD) OF FOREIGN RELATIONS 522 comment e. (1987); *United States v. Romero-Galue*, 757 F.2d at 1154 ("Nothing in international law prohibits two nations from entering into a treaty, which may be amended by other arrangement, to extend the customs waters and the reach of the domestic law of one of the nations into the high seas.").

Section 1903(c)(1)(C) of the 1986 Act provides that the United States may exercise jurisdiction over a vessel registered in a foreign nation if the flag state consents or waives objection to the enforcement of United States law.¹²³ Authority for jurisdiction via the flag state's consent is grounded in the territorial principle of international law.¹²⁴ The foreign vessel is considered the territory of the flag state over which the flag state may authorize another state to exercise jurisdiction. The flag state's consent is necessary so that such an exercise will not violate the flag state's sovereignty.¹²⁵

For the purpose of obtaining jurisdiction over vessels on the high seas, section 1903(c)(1)(C) is a welcome alternative to the archaic practice of obtaining jurisdiction through the legal fiction of creating "customs waters" via an arrangement under section 1903(c)(1)(D). These two provisions (jurisdiction upon consent [1903(c)(1)(C)] and jurisdiction in "customs waters" [1903(c)(1)(D)]), are largely, but not entirely, duplicative. "Customs waters", as defined for purposes of subparagraph (c)(1)(D), includes those waters between three and twelve miles from the coast as well as "customs waters" created pursuant to an arrangement with the flag state.¹²⁶ Subparagraph (c)(1)(D), unlike (c)(1)(C) provides jurisdiction in the traditional customs waters, three to twelve miles from the coast, *without* the consent of the flag state.

In 1981, the United States and Great Britain signed an agreement¹²⁷ that permits the United States to board private vessels under the British flag on designated areas of the high seas when the United States reasonably believes that the vessel has on board a cargo of drugs for importation into the United States. There is no requirement for the advance consent of the United Kingdom for any particular boarding so long as the United States complies with the terms of the agreement.

¹²³ 46 U.S.C.A. § 1903(c)(1)(C) (West Supp. 1988).

¹²⁴ *United States v. Robinson*, 843 F.2d 1,4 (1st Cir. 1988) ("It is clear, under international law's territorial principle, that a 'state has jurisdiction to prescribe and enforce a rule of law in the territory of another state to the extent provided by international agreement with the other state.'" citing RESTATEMENT (SECOND) OF FOREIGN RELATIONS 25 (1965).

¹²⁵ See Note, *The Judiciary and Public Policy Considerations of the Marijuana on the High Seas Act*, 10 SUFFOLK TRANSNAT'L L. J. 581, 589 n.32 (1986) ("The contractual nature of subsection (c) of the Marijuana Act saves the Act from violating Article 6 of the High Seas Convention or other tenets of international law regarding state sovereignty.").

¹²⁶ 19 U.S.C.A. § 1401(j) (West 1982).

¹²⁷ Agreement to Facilitate the Interdiction of Vessels Suspected of Trafficking in Drugs, Nov. 13, 1981, United Kingdom - United States, T.I.A.S. No. 10296.

The agreement has been held to be a recognized exception to Article 22 of the 1958 Convention on the High Seas which allows a warship to board a merchant ship pursuant to "powers conferred by treaty."¹²⁸

In the process of enforcing the 1980 Act, various appellate courts held that informal communications of the flag state's consent are sufficient to create an arrangement by which the "customs waters" of the United States are extended to the high seas for the purpose of enforcing United States interdiction laws on a vessel of the flag state.¹²⁹ In the 1986 Act, Congress essentially codified these decisions in section 1903(c)(1):

Consent or waiver of objection by a foreign nation to the enforcement of United States law by the United States under subparagraph (C) or (E) of this paragraph may be obtained by radio, telephone, or similar oral or electronic means, and may be proved by certification of the Secretary of State or the Secretary's designee.

Congress failed to recognize (or was unconcerned) that the use of telephone, radio, or other informal (non-treaty) communications to establish the flag state's consent is not permitted under international law. Article 22 of the 1958 Convention on the High Seas¹³⁰ and Article 92 of the 1982 Law of the Sea Convention state that the flag state has exclusive jurisdiction over its vessels on the high seas except as agreed by *treaty* or other parts of the conventions.¹³¹ Article 110 of the LOS Convention and Article 22 of the High Seas Convention permit a warship to board a vessel suspected of carrying narcotics in accordance with powers conferred by a *treaty*. Article 110 provides:

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship . . . is not justified in boarding it unless there is reasonable ground for suspecting that: (a) the ship is engaged in piracy; (b) the ship is engaged in the slave trade; (c) the ship is engaged in unauthorized broadcasting . . .; (d) the ship is without nationality; or (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

¹²⁸ United States v. Quemener, 789 F.2d 145, 154 (2d Cir. 1986).

¹²⁹ United States v. Bent-Santana, 774 F.2d 1545,1550 (11th Cir. 1985) ("We hold that assent to board and search a foreign flag vessel by a duly authorized official of that foreign government, communicated verbally or in writing to appropriate United States Department of State personnel, is adequate to meet the terms of Section 1401(j)."); United States v. Peterson, 812 F.2d 486,493 (9th Cir. 1987).

¹³⁰ 1958 Convention on the High Seas, *supra* note 20, at art. 22.

¹³¹ 1982 LOS Convention, *supra* note 19, at art. 92.

Thus, under Article 110, unless the suspect vessel is engaged in one of the five listed activities, the vessel may not be boarded unless authority is conferred by a *treaty*. Neither radio nor teletype communications between the respective governments are a *treaty* in satisfaction of Article 110.¹³²

International law, as evidenced by Article 110, requires an existing treaty between two countries before informal communications may be used to authorize the boarding of a particular vessel.¹³³ Section 1903(c)(1) of the 1986 Act, however, provides that consent may be obtained by informal communications, and the section has no requirement of an authorizing treaty.¹³⁴ The United States has indicated that it considers practically all of the non-seabed-mining provisions of the 1982 Law of the Sea Convention to be declarative of customary international law.¹³⁵ Apparently, Article 110 is one principle of international law the United States has chosen not to follow. The United States practice of obtaining flag state consent informally is also in contravention to Article 22 of the 1958 Convention on the High Seas which the United States has ratified.¹³⁶

V. CONCLUSION

1. *Constitutional Challenge*

It is likely that certain applications of section 1903(d) of the Maritime Drug Law Enforcement Act would not stand up against a Fifth Amendment due process challenge. Section 1903(d) states:

A claim of failure to comply with international law in the enforcement of this chapter may be invoked solely by a foreign nation, and a

¹³² *Edye v. Robertson*, 112 U.S. 580, 599 (1884) ("A treaty is made by the President and the Senate.").

¹³³ *See United States v. Gonzalez*, 776 F.2d 931,941 (11th Cir. 1985) (Hatchett, J., dissenting).

¹³⁴ *See id.* at 931 (with respect to defendant's claim that an "arrangement" creating "customs waters" must be pursuant to an existing treaty, the court held: "[N]othing in the Marijuana on the High Seas Act requires a treaty before the United States may seek an arrangement.").

¹³⁵ *See* Proclamation No. 5030, 48 Fed. Reg. 10,605 (1983); Sohn, *The Law of The Sea Crisis*, 58 ST. JOHN'S L. REV. 237,265 (1984).

¹³⁶ *See United States v. Gonzalez*, 776 F.2d at 938 ("[T]he Convention is not self-executing, and. . . the United States' ratification of the treaty did not 'incorporate the restrictive language of article 6, which limits the permissible exercise of jurisdiction to those provided by treaty into its domestic law. . .'"), *citing United States v. Postal*, 589 F.2d 862,878 (5th Cir. 1979).

failure to comply with international law shall not divest a court of jurisdiction or otherwise constitute a defense to any proceeding under this chapter.

International law does provide that generally only a state may complain of a violation of international law.¹³⁷ If however, in the guise of denying an individual defendant standing to raise an issue of international law, section 1903(d) prohibits a challenge of the court's subject matter jurisdiction, the defendant's Fifth Amendment due process rights are violated. Insofar as section 1903(d) operates to prevent a defendant from challenging whether the court has subject matter jurisdiction, the statute is unconstitutional.

Section 1903(f) of the Act grants federal district courts jurisdiction over the offenses listed in the Act:

(f) Jurisdiction and Venue

Any person who violates this section shall be tried in the United States district court at the point of entry where that person enters the United States, or in the United States District Court of the District of Columbia.

Section 1903(f) should be considered along with 18 U.S.C. § 3231¹³⁸ which gives the federal district courts original jurisdiction over all offenses against the laws of the United States:

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

The 1986 Act, however, is unique in that it specifically describes which vessels are "subject to the jurisdiction of the United States." Section 1903(c)(1) provides:

- (1) For purposes of this section, a "vessel subject to the jurisdiction of the United States" includes -
- (A) a vessel without nationality;
 - (B) a vessel assimilated to a vessel without nationality, in accordance with . . . the 1958 Convention on the High Seas;
 - (C) a vessel registered in a foreign nation where the flag nation has consented or waived objection to the enforcement of United States law by the United States;
 - (D) a vessel located within the customs waters of the United States;. . .

¹³⁷ See *supra* note 26 and accompanying text.

¹³⁸ 18 U.S.C.A. § 3231 (West 1985).

The effect of section 1903(c)(1) is clear. In order for a vessel to be "subject to the jurisdiction of the United States" and for the court to have subject matter jurisdiction, the vessel must be a vessel described in one of the subsections (A through E) of section 1903(c)(1). Due process requires that the defendant be permitted to challenge whether his vessel was in fact one described by these subsections.

It is a fundamental principle of jurisdiction that the defendant is entitled to challenge the court's subject matter jurisdiction¹³⁹ and that for a court to act without subject matter jurisdiction is a denial of due process.¹⁴⁰ Accordingly, the defendant must be allowed to challenge whether the vessel is a vessel "subject to the jurisdiction of the United States" under section 1903(c)(1). Often such a challenge will involve questions of compliance with international law.¹⁴¹

If the defendant is denied standing to challenge whether the vessel is (a) a vessel without nationality, or (b) a vessel assimilated to a vessel without nationality, or (c) a vessel . . . where the flag state has consented to the enforcement of United States law . . . , under a government claim that 1903(d) prevents the defendant from challenging compliance with international law, then the defendant is denied due process.

A recent instance of unconstitutional application of section 1903(d) is the case of *United States v. Biermann*,¹⁴² In *Biermann*, the defendant was denied standing to challenge whether the United Kingdom consented to the exercise of jurisdiction by the United States under sections 1903(c)(1)(C) or 1903(c)(1)(D) of the 1986 Act.¹⁴³ The court held that according to 1903(d) only the United Kingdom could object that the United States did not comply with the agreement by which the United Kingdom granted consent to board a British vessel. In effect, the court denied the defendant the opportunity to challenge whether the consent requirement of 1903 (c)(1)(C) or (c)(1)(D) was complied with so as to make the vessel "subject to the jurisdiction of the United States." In effect, the defendant was denied due process. The defendant in *Biermann*, however, failed to argue that he was denied the opportunity to challenge subject matter jurisdiction, and this issue was not addressed

¹³⁹ *United States v. Rogers*, 23 F.2d 658 (D.C. Ark. 1885).

¹⁴⁰ *United States v. James-Robinson*, 515 F.Supp. at 1347, n.10.

¹⁴¹ 46 U.S.C.A. § 1903(c)(1)(B) (West Supp. 1988) (jurisdiction under this section requires the court to determine whether the vessel is assimilated to a vessel without nationality in accordance with the 1958 Convention on the High Seas).

¹⁴² 678 F.Supp. 1437 (N.D. Cal. 1988).

¹⁴³ *Id.* at 1442.

by the court. The defendant would be entitled to challenge jurisdiction after conviction by writ of habeas corpus.¹⁴⁴

Congress has the power to prevent defendants from litigating issues of compliance with international law. However, it is unconstitutional for Congress to prevent defendants from challenging a court's subject matter jurisdiction.

When the defendant is denied standing to challenge violations of international law, he or she will rarely obtain relief since the flag state is likely to be hesitant to challenge the narcotics interdiction efforts of the United States. Nations that maintain relations with the United States across the diplomatic and economic spectrum may overlook violations of international law in order not to endanger existing beneficial arrangements.

2. The Process of Expanding Extraterritorial Jurisdiction

The United States Congress and the federal courts have developed a boot-strap process by which they act in concert to justify the expansion of extraterritorial jurisdiction beyond the limits of customary international law. This boot-strap process is simple: Congress passes a law expanding jurisdiction which is of questionable validity under international law. The courts then interpret the law, stretching international legal principles of jurisdiction, to aggressively expand jurisdiction in accordance with the intent of Congress. Then, in a third step, Congress relies on these strained federal court interpretations of international law as authority for clarifying and revising the law to provide even greater extraterritorial reach for the jurisdiction.

Through this circular process, the Congress and the courts unilaterally, and in a vacuum, expand the extraterritorial jurisdiction of the United States beyond the reach permitted by customary international law. From the perspective of an international law jurist, the United States is building a jurisdictional house of cards that is no stronger than its foundation, which foundation is built on the unsteady grounds of strained interpretations of international law.

An example of this process is the United States' position that informal communications may be used to obtain the flag state's consent to board a foreign vessel.¹⁴⁵ In the 1980 Marijuana On The High Seas Act, Congress outlawed the possession of narcotics on vessels within "customs waters" as defined in 19 U.S.C. § 1401(j). Federal appellate

¹⁴⁴ United States v. Anderson, 60 F.Supp. 649 (W.D. Wash. 1945).

¹⁴⁵ 46 U.S.C.A. § 1903(c)(1) (West Supp. 1988).

courts approved this concept of consensual "customs waters" and further held that the "arrangement" creating "customs waters" may be by teletype or telephone communications.¹⁴⁶ Then, in the third step of the process, the 1986 Maritime Drug Law Enforcement Act directly provided that the consent of a foreign nation to the enforcement of United States law may be obtained by radio, telephone, or similar oral or electronic means.¹⁴⁷

As a result of this boot-strap process, the United States engages in a practice which contravenes international law,¹⁴⁸ and for authority supporting the validity of which the Congress and the courts refer to each other. Other examples of this circular process include (1) the judicial and congressional development of the law of jurisdiction over stateless vessels between the 1980 and 1986 Acts,¹⁴⁹ and (2) Section 1903(d) of the 1986 Act which paves the way for courts to authorize jurisdiction over the crew members of stateless and foreign vessels under a strained interpretation of the protective principle.¹⁵⁰

This authority-creating circle becomes a whirlwind given the intense political interest in appearing to be "tough on drugs" (as evidenced by the 1988 presidential and congressional campaigns). Congressmen are elected and judges are appointed with the expectation that they will promote the aggressive enforcement of drug laws. It is doubtful that the Congress will show respect for established principles of international jurisdiction in its efforts to stop illegal drugs from entering the country. Likewise, judges are subject to political and popular pressure to enforce drug laws rather than limit these laws'—effect in respect for international law.

In the Western Hemisphere, the United States has largely had a free hand in unilaterally expanding extraterritorial jurisdiction because of (1) the prominence and power of the United States relative to Central and South American countries, and (2) the general desire among nations to stop illegal narcotics trafficking. Though the United States may be losing the "war on drugs", it has apparently won the battle of expanding jurisdiction to reach drug traffickers on the high seas. Whether it is wise to expand jurisdiction in contravention of customary international law is a debatable issue.

¹⁴⁶ *Supra* note 129.

¹⁴⁷ 46 U.S.C.A. § 1903(c)(1) (West Supp. 1988).

¹⁴⁸ *Supra* notes 133-136.

¹⁴⁹ *See supra* section IV.2.

¹⁵⁰ *Supra* notes 89-91 and accompanying text.

3. *Argument Against Unilateral Expansion of Jurisdiction*

The United States' practices of exercising jurisdiction over crew members of stateless vessels where no nexus is present and of using informal communications to obtain flag state consent are in apparent contravention of customary international law. The international law of jurisdiction allows nations to extend territorial control in comity with other nations. Only through cooperation and agreement on the scope of extraterritorial power can a predictable and stable set of rules be established. In 1817, the English High Court of Admiralty stated that "a nation is not justified in assuming rights that do not belong to her merely because she means to apply them to a laudable purpose."¹⁵¹ This admonition clearly applies to the United States' unilateral expansion of high seas jurisdiction.

To the extent that its practices are in violation of international law, the United States is placing its national concerns above the need for an effective international regime capable of solving a multitude of problems. In addition, a dangerous precedent has been established for other nations which may choose to extend their control of the high seas for a less noble purpose than narcotics interdiction.

At the least, certain applications of the United States law of high seas jurisdiction are in apparent conflict with international law. The exact extent to which United States practices and international law conflict remains to be decided. The benefits gained from obtaining jurisdiction over drug traffickers, in apparent conflict with international law, are discounted as other nations view the United States as unwilling to comply with customary international law. Comity requires a nation to comply with international law in order to enjoy the benefits of this law. The effectiveness of international law and international organizations, as well as the long-term effectiveness of national interdiction efforts, would improve if the United States took the time and effort to expand jurisdiction without creating real or apparent conflicts with international law.

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¹⁵¹ *Le Louis*, 2 Dods. 210, 165 Eng. Rep. 1464, High Court of Admiralty (1817) ("Nor is it to be argued that because other nations approve the ultimate purpose, they must therefore submit to every measure which any one state or its subjects may inconsiderately adopt for its attainment.").

