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"Minimum Contacts" Abroad: Using the International Shoe Test to Restrict the Extraterritorial Exercise of United States Jurisdiction Under the Maritime Drug Law Enforcement Act

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**“Minimum Contacts” Abroad: Using the
International Shoe Test to Restrict the
Extraterritorial Exercise of United States
Jurisdiction Under the Maritime
Drug Law Enforcement Act**

Stephanie M. Chaissan*

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I. INTRODUCTION

In 1986, Congress enacted the Maritime Drug Law Enforcement Act (MDLEA),¹ stating that “trafficking in controlled substances aboard vessels is a serious international problem [that] is universally condemned. . . and presents a specific threat to the security and societal well-being of the United States.”² Congress, in enacting this provision, intended for the statute to reach acts committed outside the territorial boundaries and jurisdiction of the United States.³ The Circuit Courts of Appeals have split on whether, when applying the MDLEA extraterritorially, there is a requirement of showing a nexus between the conduct of the defendant and the United States in order for such application not to be arbitrary, fundamentally unfair, or inconsistent with due process.⁴ The 2006 Ninth Circuit decision of *United States v. Perlaza* held that such a nexus was a condition precedent to applying the MDLEA in order to ensure the application of that statute to the defendant was not arbitrary and fundamentally unfair.⁵

1. Maritime Drug Law Enforcement Act [MDLEA], 46 U.S.C. app. §§ 1901-1904 (2002). In October 2006, Congress repealed the MDLEA as it was previously codified in the appendix of Title 46 of the United States Code and recodified it as part of Title 46 itself. The new form, which maintains the same policies and prohibitions and, in fact, much of the same wording, can be found at 46 U.S.C.A. §§ 70501-70507 (2006). This new codification was effectuated by An Act To Complete the Codification of Title 46, United States Code, “Shipping”, as Positive Law, Pub. L. No. 109-304, 120 Stat. 1685 (2006). However, since all cases cited in this paper cite to the old codification of the MDLEA, this paper will do so as well. These cases still represent good law as the new codification is on point with the old.

2. *Id.* § 1902.

3. *See id.* § 1903(h).

4. *Compare* *United States v. Davis*, 905 F.2d 245, 248-49 (9th Cir. 1990) (holding that a sufficient nexus between the defendant and the United States is required) *with* *United States v. Martinez-Hidalgo*, 993 F.2d 1052, 1055 (3d Cir. 1993) (holding that jurisdiction is proper even if there is no nexus between defendant’s activities and the United States).

5. *See* *United States v. Perlaza*, 439 F.3d 1149, 1160 (9th Cir. 2006).

Applying the MDLEA to a foreign defendant apprehended on the high seas or in foreign waters who has no ties to the United States would seem to offend “traditional notions of fair play and substantial justice.”⁶ If minimum contacts with a forum state are required within the United States for a state court to exercise personal jurisdiction over a nonresident defendant,⁷ a similar and analogous idea should apply to the exercise of jurisdiction by the United States over a nonresident, noncitizen defendant in a prosecution under the MDLEA.

Part II of this paper contains an overview of trends in the law regarding the MDLEA and presents several cases that fall on other side of the debate regarding whether a nexus is required. Part III discusses international law concepts that relate to the MDLEA and the function of those concepts in the application of jurisdiction by the United States. Part IV discusses the power of the United States Congress to enact the MDLEA. Part V addresses the limits on personal jurisdiction within the United States and among the several States and analogizes those limits to prosecutions under the MDLEA. Lastly, Part VI speaks to due process, personal jurisdiction and the application of the MDLEA extraterritorially to nonresident aliens using the *Perlaza* decision as an example.

II. OVERVIEW OF TRENDS IN THE LAW REGARDING THE MARITIME DRUG LAW ENFORCEMENT ACT AND UNITED STATES JURISDICTION

Previous cases involving the MDLEA have not all been consistent regarding the need for proving a nexus to the United States as a prerequisite to a finding of proper jurisdiction. While Ninth Circuit cases such as *United States v. Davis*⁸ have required a nexus in order for a federal criminal statute to apply extraterritorially consistent with the Due Process Clause,⁹ a significant num-

6. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1941)).

7. *See, e.g. id.*; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980).

8. *See Davis*, 905 F.2d at 248-49.

9. *See Timothy M. Morrison, United States v. Suerte: The Fifth Circuit Fails to Address International Law Principles in Examining Due Process Concerns Raised Under the Extraterritorial Application of the Maritime Drug Law Enforcement Act*, 27 TUL. MAR. L.J. 631, 636-39 (2003).

ber of cases have not made such a requirement.¹⁰ Respect for the law of nations and the territorial integrity of sovereign nations would, in the opinion of this author, seem to require such a nexus in order to make the application of United States jurisdiction reasonable, logical, and just.

United States v. Davis, while ultimately finding jurisdiction to exist, explicitly stated that “[i]n order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States so that such application would not be arbitrary or fundamentally unfair.”¹¹ That case also addressed the restrictions on applying Congress’ acts extraterritorially, specifically the requirement that Congress make clear its intent that an act such as the MDLEA apply extraterritorially, and that such application does not violate the due process clause of the Fifth Amendment.¹² The court in *Davis* found that Congress did explicitly intend for the MDLEA to apply outside the territory of the United States¹³ and that a sufficient nexus existed in order to prosecute the defendant under it.¹⁴

However, as recently as 2006, the Eleventh Circuit has held in multiple cases that the MDLEA has not been “embellished” with the requirement of a nexus between a defendant’s criminal conduct and the United States.¹⁵ In *United States v. Moreno*, the Eleventh Circuit rejected the defendant’s argument that the MDLEA “represented an *ultra vires* exercise of Congressional power under the Piracies and Felonies Clause. . . .”¹⁶ That court then went on to cite *United States v. Ledesma-Cuesta*¹⁷ for the pro-

10. See, e.g. *United States v. Suerte*, 291 F.3d 366, 376 (5th Cir. 2002); *United States v. Martinez-Hidalgo*, 993 F.2d 1052, 1056 (3d Cir. 1993).

11. *Davis*, 905 F.2d at 248-49 (citing *United States v. Peterson*, 812 F.2d 486, 493 (9th Cir. 1987)).

12. See *id.* at 248.

13. *Id.*; see also Maritime Drug Law Enforcement Act [MDLEA], 46 U.S.C. app. § 1903(h) (2002) (“This section is intended to reach acts of possession, manufacture, or distribution outside the territorial jurisdiction of the United States.”).

14. See *Davis*, 905 F.2d at 249 (“Where an attempted transaction is aimed at causing criminal acts within the United States, there is a sufficient basis for the United States to exercise its jurisdiction” (quoting *Peterson*, 812 F.2d at 493)).

15. *United States v. Moreno*, 199 F. App’x 839, 840 n.1 (11th Cir. 2006) (quoting *United States v. Rendon*, 354 F.3d 1320, 1325 (11th Cir. 2003)).

16. *Id.* (quoting *United States v. Estupinan*, 453 F.3d 1336, 1338 (11th Cir. 2006)); see also U.S. CONST. art. I, § 8, cl. 10.

17. See *id.* (citing *United States v. Ledesma-Cuesta*, 347 F.3d 527, 532 (3d Cir. 2003) (holding that the district court had jurisdiction over the defendant’s crime of possession of narcotics even though defendant was found as a stow-away aboard a merchant ship while the ship was not in the United States’ customs waters)).

position that since Congress had authority to enact the MDLEA and since the trafficking of narcotics is universally condemned by law abiding nations, there is no reason to conclude that it is “fundamentally unfair” for Congress to punish those caught with narcotics on the high seas.¹⁸

The Eleventh Circuit ruled similarly in *United States v. Garcia*.¹⁹ In *Garcia*, the court upheld the conviction under the MDLEA of a Guatemalan citizen apprehended on a Guatemalan boat in international waters²⁰ and affirmed the district court’s finding that enactment of the MDLEA was a valid exercise of Congress’s power under the Piracies and Felonies Clause.²¹ The Eleventh Circuit also affirmed the district court’s findings that that Clause did not limit Congress’s extraterritorial power to only those felonies with a nexus to the United States.²² The Eleventh Circuit cited to cases from the Ninth and Third Circuits, which held similarly.²³

III. INTERNATIONAL LAW CONCEPTS APPLICABLE TO JURISDICTION UNDER THE MARITIME DRUG LAW ENFORCEMENT ACT

A. *Bases for Jurisdiction in International Law*

Under international law, there is an important distinction made between jurisdiction to prescribe and jurisdiction to adjudicate and enforce.²⁴ Jurisdiction to prescribe allows a nation to make its laws applicable to foreign nationals, whereas jurisdiction to adjudicate allows that nation to bring foreign offenders in front

18. See *id.* (citing *Ledesma-Cuesta*, 347 F.3d at 532 (quoting *United States v. Martinez-Hidalgo*, 933 F.2d 1052, 1056 (3d Cir. 1993))).

19. See *United States v. Garcia*, 182 F. App’x 873 (11th Cir. 2006) (holding that where defendant was a Guatemalan citizen aboard a Guatemalan boat that was intercepted and boarded by the United States Coast Guard in international waters, the exercise of jurisdiction by the United States District Court for the Middle District of Florida was proper).

20. See *id.* at 874.

21. See *id.* (holding that the Piracies and Felonies Clause granted to Congress “the power to define and punish offenses committed on the high seas”); see also U.S. CONST. art. I, § 8, cl. 10.

22. See *id.* (holding that a nexus between the United States and offense conduct under the MDLEA is not required).

23. See *id.* at 876 (citing *United States v. Moreno-Morillo*, 334 F.3d 819, 824 (9th Cir. 2003) and *Martinez-Hidalgo*, 993 F.2d at 1056).

24. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1987) [hereinafter RESTATEMENT] (distinguishing between jurisdiction to prescribe and jurisdiction to adjudicate).

of its national tribunals or administrative agencies, regardless of whether or not the nation is a party to the proceeding.²⁵ Jurisdiction to enforce is then the power of the nation to “compel compliance or to punish noncompliance with its laws.”²⁶ The limitations placed on a nation’s ability to subject foreigners to its laws differ from the limitations that govern a nation’s jurisdiction to adjudicate and punish those who break those laws.²⁷

There are five recognized bases under which a nation has the right to prescribe law.²⁸ The first, the objective territorial principle, allows a nation to assert extraterritorial jurisdiction²⁹ where the offense occurred in one country, but had an effect in the country asserting jurisdiction.³⁰ The nationality principle allows a nation to assert jurisdiction where the offender is a citizen of that nation.³¹ Under the passive personality principle, the nation may assert jurisdiction where the victim is a citizen of the nation.³² The last two bases for asserting extraterritorial jurisdiction are the two discussed most often in reference to prosecutions under the MDLEA: the protective principle and the universality principle, also known as universal jurisdiction.³³

After upholding the defendant’s conviction in *United States v. Garcia*, the court there discussed both the protective principle and the idea of universal jurisdiction, which had previously been cited by the Eleventh Circuit as further sources of authority to enact the MDLEA and apply it extraterritorially.³⁴ Prior case law has upheld Congress’s ability to enact legislation under the protective principle, which “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

25. See *id.* §§ (a)-(b).

26. See *id.* § (c).

27. See *id.* § 401 cmt. a.

28. See *id.* § 402.

29. In this paper, the term “extraterritorial” is presumed to mean outside a country’s territorial boundary lines; “extraterritorial jurisdiction” means the ability of a government to exercise authority beyond its national boundaries.

30. See Fed. Bureau of Investigation, Statement of Chris Swecker Before the U.S. House of Representatives Committee on Government Reform, Dec. 13, 2005, <http://www.fbi.gov/congress/congress05.htm> (follow hyperlink for Dec. 13, 2005 testimony); see also 151 CONG. REC. D1276-01, *D1278 (daily ed. Dec. 13, 2005).

31. See *id.*

32. See *id.*

33. See *id.*; see also *United States v. Garcia*, 182 F. App’x 873, 876-77 (11th Cir. 2006).

34. See *Garcia*, 182 Fed. App’x at 876-877.

of its governmental functions.”³⁵ This principle of jurisdiction does not require proof of an actual or intended effect within the territory of the United States; it is enough if the conduct “has a potentially adverse effect and is generally recognized as a crime by nations that have reasonably developed legal systems.”³⁶

“Universal jurisdiction is a doctrine of international law allowing states to define and punish certain crimes considered to be of ‘universal concern’” as recognized by the community of nations.³⁷ These crimes are typically thought to be of a finite number and an atrocious nature.³⁸ Under the concept of universal jurisdiction, a state may define and punish one of those certain offenses even where none of the other bases of international jurisdiction are present.³⁹ This basis for authority is therefore incredibly far-reaching when exercised properly. Currently, drug trafficking, even when done across national borders, is not listed in the *Restatement (Third) of Foreign Relations Law* as a crime which may be defined and punished under universal jurisdiction.⁴⁰ However, given the increase in drug trafficking and the steps taken to prevent it,⁴¹ it is not hard to concede that in the future such offense may well become a universally condemned crime properly punishable on the foundation of universal jurisdiction.⁴²

B. Limiting the Bases for Jurisdiction in International Law

While current international law takes the position that jurisdiction to prescribe is not based on minimum contacts, but instead

35. *United States v. Gonzalez*, 776 F.2d 931, 938 (11th Cir. 1985) (citing *United States v. Romero-Galue*, 757 F.2d 1147, 1154 (11th Cir.1985)).

36. *Garcia*, 182 F. App'x at 876 (quoting *Gonzalez*, 776 F.2d at 939).

37. *Id.* at 876 (quoting *Herero People's Reparations Corp. v. Deutsche Bank, A.G.*, 370 F.3d 1192, 1196 (D.C. Cir. 2004), *cert. denied*, 543 U.S. 987 (2004)).

38. See RESTATEMENT, *supra* note 24, § 404 (listing “piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism” as crimes punishable under the theory of universal jurisdiction).

39. See *id.*

40. See *id.*

41. See *e.g.* Asa Hutchinson, U.S. Dep't of State, International Drug Trafficking and Terrorism, Testimony Before the Senate Judiciary Committee Subcommittee on Technology, Terrorism, and Government Information by DEA Administrator ASA HUTCHINSON, MAR. 13, 2002, <http://www.state.gov/p/inl/rls/rm/2002/9239.htm> (stating that “[o]ne of DEA's priorities is to target the powerful international drug trafficking organizations”); see also 148 CONG. REC. S1866-01, *S1866-1867 (daily ed. Mar. 13, 2002).

42. See RESTATEMENT, *supra* note 24, § 404 cmt. a (discussing expanding the class of universal offenses by “widely-accepted international agreements and resolutions of international organizations . . . [and] as a matter of customary law”).

on a concept of reasonableness to be determined by looking at a multitude of factors,⁴³ it seems only just that one of those factors be the defendant's contacts with the forum and/or the effect his conduct will have on that nation. This seems all the more imperative when speaking of jurisdiction to adjudicate and enforce. It is one thing for the United States Congress to make a law applicable to foreign nationals, but it is quite another to then say that an offender who violates that law outside the territorial boundaries of the United States, who has no contacts with the United States, and whose conduct has no effect on the United States, can be haled into a United States court and forced to defend himself in a foreign jurisdiction.

Conceding *arguendo* that Congress was justified in extending application of the MDLEA to nonresident, noncitizen foreign nationals, the exercise of jurisdiction over such a person in a United States court is not reasonable.⁴⁴ The *Restatement (Third) of Foreign Relations Law* lists eleven conditions that make the exercise of jurisdiction over such a person reasonable.⁴⁵ These conditions correspond directly or analogously to the conditions necessary for one U.S. state to exercise jurisdiction over a citizen of another state under the rule set forth in *International Shoe*.⁴⁶ These conditions, or factors, developed to protect the defendant in the same way that the Due Process Clause protects a domestic defendant.⁴⁷ Even if the MDLEA confers seemingly worldwide jurisdiction, it would only meet the requirements of due process and of international law when one or more of these conditions are met. Along with giving adequate notice to the defendant, this would ensure fairness.⁴⁸

43. See *id.* § 403.

44. Cf. *id.* § 421(1) ("A state may exercise jurisdiction through its courts to adjudicate with respect to a person or thing if the relationship of the state to the person or thing is such as to make the exercise of jurisdiction reasonable.").

45. See *id.* § 421(2) (listing, among other things, that jurisdiction is reasonable if the person or thing is present in the territory of the state asserting jurisdiction; if the person is domiciled or is a resident of the state; if the person is a national of the state; if a ship that relates to the case is registered under the laws of the state; if the person carries on business in the state; if the person carried on an activity that had a substantial, direct and foreseeable effect within the state).

46. Compare *id.* (setting forth multiple conditions under which the exercise of jurisdiction would be proper), with *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) (stating that a corporation that conducts activities within the forum state, enjoys the benefits and privileges of that state, and has obligations connected to its activities in that state is amenable to suit in the courts of that state).

47. RESTATEMENT, *supra* note 24, § 421 reporters' note 1.

48. See *id.* reporters' note 9.

IV. CONGRESSIONAL POWER TO ENACT THE MARITIME DRUG LAW ENFORCEMENT ACT

The general rule regarding Congressional legislation is that, absent a contrary intent, United States laws are construed to apply only within the territorial jurisdiction of the United States.⁴⁹ However, when Congress passed the MDLEA, they made their intent for the statute to reach acts of defendants outside the territorial jurisdiction of the United States expressly known in the text of the statute.⁵⁰ In addition to the constraints imposed by international law, Congress, when promulgating legislation that is to apply outside the United States, is curtailed by the United States Constitution and the Bill of Rights, including the requirement of due process.⁵¹

The ability to punish drug trafficking under the MDLEA seemingly stems from the Piracies and Felonies Clause of Article I of the United States Constitution,⁵² which states that Congress has the power to “define and punish Piracies and Felonies committed on the high Seas and Offenses against the Law of Nations.”⁵³ This power has been exercised by Congress since 1790.⁵⁴ Chief Justice Marshall, in *United States v. Palmer*, even went so far as to say that since the Constitution confers such power on Congress, “there can be no doubt of the right of the legislature to enact laws punishing pirates, although they might be foreigners, and may have committed no particular offense against the United States.”⁵⁵ His view in that case is bolstered by the current understanding of universal jurisdiction, which includes piracy as one of the crimes recognized to be of universal concern by the community of

49. See *Smith v. United States*, 507 U.S. 197, 204 (1993) (citation omitted).

50. See Maritime Drug Law Enforcement Act [MDLEA], 46 U.S.C. app. § 1903(h) (2002) (“This section is intended to reach acts of possession, manufacture, or distribution committed outside the territorial jurisdiction of the United States.”).

51. See RESTATEMENT, *supra* note 24, § 402 cmt. j; see also *Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (declaring that any exercise of authority by the United States is subject to constitutional limitations); RESTATEMENT, *supra* note 24, § 721 cmt. f.

52. See *Morrison*, *supra* note 9, at 632 (“The specific reference to actions taken on the ‘high seas’ [in the Piracies and Felonies Clause] naturally extends Congress’s reach to regulate behavior outside the territory of the United States.” (citation omitted)).

53. U.S. CONST. art. I, § 8, cl. 10.

54. See *Morrison*, *supra* note 9, at 632-34. In 1790, the First Congress passed An Act for the Punishment of Certain Crimes Against the United States, which allowed for persons who committed murder or robbery on the high seas to be adjudged a pirate and felon and, if convicted, sentenced to death. This statute was intended to be applied extraterritorially. See *id.*

55. *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 630 (1818).

nations.⁵⁶

While Chief Justice Marshall's view in *Palmer* may have at one time been the prevailing view on extraterritorial jurisdiction, it seems that in light of the changes in the Supreme Court's view on personal jurisdiction among the several states,⁵⁷ there must be a corresponding change in regards to United States jurisdiction over foreigners located abroad. Since the Piracies and Felonies Clause appears to give to Congress an enormous amount of power to act outside the territorial boundaries of the United States, that power cannot be without limit or else Congress is ostensibly given a blank check to police the world.

That limit should be on the ability of the courts of the United States to hear cases under extraterritorially-applied acts like the MDLEA, namely a limit on the personal jurisdiction such courts can exercise over defendants apprehended under such acts. At the very least, the Court should adopt the position put forth in *United States v. Klimavicius-Viloria*.⁵⁸ There, the Ninth Circuit held that while the MDLEA does not textually require a nexus between the defendant and the United States, such a requirement should be considered a judicial gloss on the statute that ensures a defendant is not improperly haled into court in the United States.⁵⁹ This idea mirrors the Court's concerns in *International Shoe*.⁶⁰

V. DOMESTIC LIMITS ON PERSONAL JURISDICTION AND ANALOGIZING THOSE LIMITS TO PROSECUTIONS UNDER THE MARITIME DRUG LAW ENFORCEMENT ACT

A. *The "Minimum Contacts" Requirement Amongst the Several States*

International Shoe Co. v. State of Washington posed the issue of whether, within the limits of the Due Process Clause, a Delaware corporation rendered itself amenable to proceedings in the courts of the State of Washington by virtue of the activities it car-

56. See RESTATEMENT, *supra* note 24, § 404.

57. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *World-Wide Volkswagen Corp v. Woodson*, 444 U.S. 286 (1980). *Int'l Shoe* changed the historic rule of *Pennoyer v. Neff*, 95 U.S. 714, 733-34 (1877), which required the defendant to be actually present within the territory of the jurisdiction, to a rule that allowed personal jurisdiction to be exercised over defendants who maintained "continuous and systematic" contacts with the forum jurisdiction.

58. See *United States v. Klimavicius-Viloria*, 144 F.3d 1249 (9th Cir. 1998).

59. See *id.* at 1257; see also *Morrison*, *supra* note 9, at 637-38.

60. See *Int'l Shoe*, 326 U.S. 310 (discussed *infra* Part V.A.).

ried on in Washington.⁶¹ Ultimately, the Court, while mitigating the requirement of actual presence within the jurisdiction as required by *Pennoyer v. Neff*,⁶² held that if a defendant is not present within the territory of the forum state, he must have certain “minimum contacts”⁶³ with the forum such that “the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”⁶⁴ This limit on the jurisdiction of courts ensured that the exercise of jurisdiction was not arbitrary.

Notice of the suit in *International Shoe* was “personally served upon a sales solicitor employed by the appellant [company] in the State of Washington” and a copy was mailed to the company at its address in Missouri.⁶⁵ The appellant appeared and contested jurisdiction, arguing that it was not a corporation of the State of Washington and it was not doing business in that state.⁶⁶ The Court found that despite appellant’s arguments to the contrary, the company was in fact doing business in Washington and, because of its sufficient contacts with that State, the assertion of jurisdiction over appellant was proper.⁶⁷

In *International Shoe*, the appellant employed approximately one dozen employees in Washington; those employees’ principle activities were confined to that state and they were compensated by commission based on the amount of their sales within that state.⁶⁸ The Court found that the activities of those salesmen, which included, in addition to their actual sales, the rental of rooms in business buildings or hotels for the purpose of displaying their shoe stock, were sufficient to justify jurisdiction in Washington despite the fact that the company did not have an office there and did not maintain a stock of merchandise there.⁶⁹

International Shoe is an important case because it documents

61. *See id.* at 311.

62. *See id.* at 316 (citing *Pennoyer*, 95 U.S. at 732-34 (requiring a person’s presence within the territorial jurisdiction of a court in order for that court to render a binding judgment on the person)).

63. *Id.* at 316 (citation omitted).

64. *Id.* (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

65. *Id.* at 312.

66. *See id.*

67. *See id.* at 321 (holding that appellant rendered itself amenable to suit in Washington because of the obligations arising out of the activities of its salesmen in that state).

68. *See id.* at 313.

69. *See id.* at 313-14, 319 (“[T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protections of the laws of that state. The exercise of that privilege may give rise to obligations. . . which require[] the corporation to respond to a suit [in that state].”).

the change domestically from a requirement of actual presence within a forum to one of contact with that forum.⁷⁰ While this seems like a door-opening move by the Court to widen the net of personal jurisdiction, the Court's decision is not without a limit. "Whether due process is satisfied . . . depend[s] . . . upon the quality and nature of the activity [of a foreign defendant] in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure."⁷¹ A jurisdiction may not make binding a judgment against a defendant who has or maintains no ties with that jurisdiction.⁷²

This view of personal jurisdiction within the United States was adopted further in *World-Wide Volkswagen v. Woodson*.⁷³ That case involved a products-liability action brought by respondents against a nonresident automobile retailer and its wholesale distributor in an Oklahoma court.⁷⁴ Respondents had purchased a car from the automobile retailer in New York and subsequently left that state en route to Arizona.⁷⁵ While passing through the state of Oklahoma, the respondents were involved in an automobile accident in which they were severely injured.⁷⁶ In this case, the Court held that where the defendants, both New York corporations, carried on no activities in Oklahoma and availed themselves of no privilege or benefit of Oklahoma law, a single accident in that state did not constitute minimum contacts with Oklahoma such that the courts of that state could exercise *in personam* jurisdiction consistent with due process.⁷⁷

In *World-Wide Volkswagen*, the defendants did not conduct any business in Oklahoma; they did not ship or sell any products to or in that state; and they had no agent to receive process there.⁷⁸ As such, the defendants contended that the exercise of jurisdiction over them by a district court in Oklahoma was violative of their rights under the Due Process Clause.⁷⁹ The Court agreed, going on to state that due process requires the "defendant

70. Compare *Pennoyer v. Neff*, 95 U.S. 714 (1877), with *Int'l Shoe*, 326 U.S. 310.

71. *Int'l Shoe*, 326 U.S. at 319.

72. *See id.*

73. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

74. *See id.* at 287.

75. *See id.* at 288.

76. *See id.*

77. *See id.* at 294-95.

78. *See id.* at 289.

79. *See id.*

be given actual notice of the suit”⁸⁰ and be subject to the personal jurisdiction of the court, which requires the defendant to have “minimum contacts” with the forum, as established in *International Shoe*.⁸¹

The Court in *World-Wide Volkswagen* then explains the function and purpose of minimum contacts. First, it “protects the defendant against the burdens of litigating in a distant or inconvenient forum.”⁸² Second, it acts to ensure that States do not “reach beyond the limits imposed on them by their status as coequal sovereigns in a federal system.”⁸³

Helicopteros Nacionales de Columbia, S.A. v. Hall is a third example of the Court’s recognition of a limitation on personal jurisdiction.⁸⁴ There, *Helicopteros Nacionales de Columbia, S.A.* (Helicol) was a Columbian corporation that provided transportation via helicopter for oil and construction companies in South America.⁸⁵ One of their helicopters crashed in Peru, killing four American citizens who were on board.⁸⁶ The survivors and representatives of the decedents brought a wrongful death action in a Texas court.⁸⁷ The U.S. Supreme Court granted certiorari to determine if the corporation maintained sufficient contacts with the State of Texas such that the Texas state court could assert jurisdiction over the corporation in an action that did not arise out of or relate to the corporation’s activities in that state.⁸⁸

The Chief Executive Officer of Helicol had made one trip to Texas to discuss a possible contract for transportation with a joint-venture headquartered in Texas.⁸⁹ The contract was finalized at a later date and was executed in Peru.⁹⁰ Helicol also purchased spare parts from an American helicopter company in Texas, sent pilots to be trained in Texas and to bring the helicopters to South America, and held bank accounts in New York and Florida.⁹¹

80. *Id.* at 291 (citing *Mullane v. Cent. Hanover Trust Co.*, 339 U.S. 306, 313-14 (1950)).

81. *Id.* (citing *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

82. *Id.* at 292.

83. *Id.*

84. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984).

85. *See id.* at 409.

86. *See id.* at 410.

87. *See id.* at 412.

88. *See id.* at 409.

89. *See id.* at 410.

90. *See id.* at 410, 411 n.3.

91. *See id.* at 411.

Although Helicol would seem to have had sufficient contacts with the United States, the Court listed many contacts it did not have. Specifically, the Court stated that Helicol had never been authorized to do business in Texas; never had an agent for the service of process there; never sold any product that reached Texas; never solicited business in Texas; never signed any contract in Texas; never had or recruited an employee in Texas; never owned real or personal property in Texas; and never maintained or owned an office or establishment there.⁹² In addition, none of the deceased were domiciled in Texas.⁹³

The Court in *Helicopteros* again held that due process requires minimum contacts with the forum state.⁹⁴ However, the Court then went on to break down the minimum contacts test into a more specific test: whether or not the controversy is related to or arises out of the defendant's contacts with the forum.⁹⁵ The Court stated that the "relationship among the defendant, the forum, and the litigation' is the essential foundation of *in personum* jurisdiction."⁹⁶ Since the claims against Helicol did not arise out of the corporation's activities within Texas, the Court analyzed the nature of the corporation's contacts with the forum state to see if those contacts constituted the kind of continuous and systematic contacts necessary to make the exercise of jurisdiction reasonable and just.⁹⁷

The Court also referenced *International Shoe* for the assertion that "the commission of some single or occasional acts of the corporate agent in a state sufficient to impose an obligation or liability on the corporation has not been thought to confer upon the state authority to enforce [that obligation or liability]".⁹⁸ The Court concluded that sending personnel to Texas for training in connection with the purchase of equipment in that State was not a significant enough contact with that State to maintain the suit against Helicol.⁹⁹ Having found that Helicol's contacts with Texas were not sufficiently continuous and systematic to satisfy the

92. See *id.* at 418-19.

93. *Id.* at 411-12.

94. See *id.* at 414 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

95. See *id.*

96. *Id.* (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)).

97. See *id.* at 415-16; see also *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952).

98. See *id.* at 418 n.12 (quoting *Int'l Shoe*, 326 U.S. at 318 (citing *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516 (1923) (Brandeis, J., for a unanimous tribunal))).

99. See *id.* at 418.

requirements of due process under the Fourteenth Amendment, the exercise of jurisdiction over Helicol was improper.¹⁰⁰

B. Using the Domestic Test as an Analogous Limit to Restrict the United States' Extraterritorial Jurisdictional Reach

The rule of law provided by taking these cases together furnishes an excellent basis for analogy to cases arising under the MDLEA. Whereas in *World-Wide Volkswagen* the Court stated that the Due Process Clause of the Fourteenth Amendment limited the power of state courts to render valid, binding judgments against nonresident defendants,¹⁰¹ such a concept should be applied through the Fifth Amendment to MDLEA prosecutions. Additionally, the quoted text above from *Helicopteros* regarding the relationship among the defendant, forum and the litigation is important to limiting the extraterritorial reach of United States' jurisdiction under the MDLEA.¹⁰²

A requirement of minimum contacts in the form of a nexus between the defendant's conduct and the United States would serve to protect the defendant's interest in that he could reasonably anticipate where he could be haled into court. A nexus would immunize him from distant and inconvenient litigation.¹⁰³ It also would serve to effectuate the orderly administration of the law¹⁰⁴ and bring a degree of predictability that would allow defendants to structure their behavior accordingly.

In addition to protecting the defendant's interests, another important ground for requiring an analogous concept of minimum contacts in MDLEA jurisdiction is to protect the equality and sovereignty of nations.¹⁰⁵ As the Court pointed out in *World-Wide Volkswagen*, minimum contacts in the domestic arena serves to limit the reach of each States' courts within a federal system of coequal sovereigns.¹⁰⁶ Likewise, internationally, respect for other nations should lead U.S. courts to evaluate whether the applica-

100. See *id.*

101. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980).

102. See *Helicopteros*, 466 U.S. at 414.

103. See Kevin C. McMunigal, *Desert, Utility, and Minimum Contacts: Toward A Mixed Theory Of Personal Jurisdiction*, 108 YALE L.J. 189, 209-10 (Oct. 1998).

104. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

105. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 761 (Breyer, J., concurring) (stating that it is "notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement").

106. See *World-Wide Volkswagen*, 444 U.S. at 292.

tion of *in personam* jurisdiction over a nonresident, noncitizen defendant is proper.¹⁰⁷ As a mechanism for doing so, the courts should apply a minimum contacts test.

VI. DUE PROCESS, PERSONAL JURISDICTION, AND THE
EXTRATERRITORIAL APPLICATION OF THE MARITIME
DRUG LAW ENFORCEMENT ACT

A. United States v. Perlaza: *Facts and Procedural
Posture*

The Ninth Circuit's decision in *United States v. Perlaza* provides an excellent example of a U.S. court declining to exercise jurisdiction over a defendant in an MDLEA prosecution after thoroughly analyzing whether such jurisdiction was proper.¹⁰⁸ In the summer of 2000, the *USS De Wert*, a Navy frigate, in conjunction with other United States Navy and Coast Guard ships, was engaged in maritime drug surveillance of vessels suspected of drug trafficking in the Pacific Ocean off the coasts of Ecuador, Columbia, and Peru.¹⁰⁹ On September 11, 2000, the crew members of the *De Wert*, along with members of a United States Coast Guard Law Enforcement Detachment team aboard the frigate, were alerted by radar to suspicious activity by a speedboat and a Columbian fishing vessel, the *Gran Tauro*, which was flying the Columbian flag.¹¹⁰ The *De Wert* dispatched its helicopter to the site; once the speedboat's crew realized they had been detected, they jettisoned their cargo, which was later determined to be 2,000 kilograms of cocaine and several 55-gallon gasoline drums.¹¹¹ The Navy and Coast Guard crew members suspected the Columbian fishing vessel to be serving as a logistical support vessel for the speedboat by providing gasoline for the speedboat's run between Columbia and Central Mexico.¹¹² The five speedboat crew members and seven crew members of the Columbian vessel were apprehended and later prosecuted under the MDLEA.¹¹³

Prior to trial, the defendants sought to dismiss their indictments, arguing that the MDLEA was unconstitutional because it did not require an effect on interstate or foreign commerce; that

107. See *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1985).

108. See *United States v. Perlaza*, 439 F.3d 1149 (9th Cir. 2006).

109. See *id.* at 1152.

110. See *id.*

111. See *id.*

112. See *id.* at 1053.

113. See *id.*

the district court lacked jurisdiction over the defendants because the Government failed to allege that the speedboat was a stateless vessel; and that the Government did not have jurisdiction because no evidence demonstrating a nexus between the defendants and the United States was produced.¹¹⁴

The district court rejected these arguments.¹¹⁵ Two of the defendants pled guilty; the remaining ten were convicted after a trial by jury.¹¹⁶ Three defendants were convicted of conspiracy to possess cocaine with the intent to distribute aboard a vessel in violation of sections 1903(a)¹¹⁷, (c)¹¹⁸ and (j)¹¹⁹ of the MDLEA and of possession of cocaine with intent to distribute aboard a vessel in violation of sections 1903(a), (c)(1)(A)¹²⁰ and (f).¹²¹ The other seven defendants were convicted of only the conspiracy to possess charge.¹²²

*B. The Circuit Court's Discussion of the
Constitutionality of the Maritime Drug Law
Enforcement Act*

On appeal from the United States District Court for the Southern District of California, the Ninth Circuit reversed the convictions of the defendants and held that the district court erroneously exercised jurisdiction over the defendants without requiring the Government to prove beyond a reasonable doubt the existence of certain facts necessary to establish jurisdiction.¹²³ The circuit court first discussed the defendant's argument that the

114. *See id.* at 1157-58.

115. *See id.* at 1158.

116. *See id.* at 1153.

117. Maritime Drug Law Enforcement Act [MDLEA], 46 U.S.C. app. § 1903(a) (2002) ("It is unlawful for any person on board a vessel . . . subject to the jurisdiction of the United States . . . to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance.").

118. *Id.* § 1093(c) (setting out what a "vessel subject to the jurisdiction of the United States" includes).

119. *Id.* § 1903(j) ("Any person who attempts or conspires to commit any offense defined in this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.").

120. *Id.* § 1903(c)(1)(A) ("[A] vessel subject to the jurisdiction of the United States includes a vessel without nationality. . .").

121. *See Perlaza*, 439 F.3d at 1157-58; *see also* MDLEA § 1903(f) ("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.").

122. *See Perlaza*, 439 F.3d at 1158, 1179.

123. *See id.* at 1153.

MDLEA is “unconstitutional because it fails to require an effect on interstate or foreign commerce.”¹²⁴ The district court had rejected this argument, ruling “that the MDLEA was properly enacted . . . [under the] Piracies and Felonies Clause of the United States Constitution.”¹²⁵

The circuit court likewise rejected the defendants’ assertions by upholding its prior decisions in *United States v. Aikins*¹²⁶ and *United States v. Davis*,¹²⁷ both holding that the MDLEA is constitutional and was a proper exercise of Congressional power under the Piracies and Felonies Clause.¹²⁸ The court noted that even if these findings are to be considered *dicta* in *Aikins* and *Davis*, *United States v. Moreno-Morilla* expressly held that the MDLEA is constitutional.¹²⁹ The court concluded its analysis of the constitutionality of the Act by declaring that inasmuch as trafficking in narcotics is universally condemned, there should be no reason to conclude that it is fundamentally unfair for Congress to provide for the punishment of persons apprehended with narcotics on the high seas.¹³⁰ This reference to conduct universally condemned by law abiding nations provides an excellent foreshadowing to the court’s discussion of jurisdiction, especially jurisdiction in the international arena.¹³¹

124. *Id.* at 1158.

125. *Id.* at 1158-59; *see also* U.S. CONST. art. 1, § 8, cl. 10.

126. *See* *United States v. Aikins*, 946 F.2d 608 (9th Cir. 1991) (holding that defendants caught on the high seas by the U.S. Coast Guard southeast of the Hawaiian Islands with approximately 21,000 pounds of marijuana aboard their vessel were subject to the MDLEA and that the MDLEA was not unconstitutional as applied to those defendants because Congress intended that Act to apply to conduct on the high seas).

127. *See* *United States v. Davis*, 905 F.2d 245 (9th Cir. 1990) (finding that a defendant caught approximately 100 miles west of California with 7,000 pounds of marijuana aboard his vessel was subject to prosecution under the MDLEA and that the Constitution gave to Congress the power to give extraterritorial effect to the MDLEA through the Piracies and Felonies Clause).

128. *Perlaza*, 439 F.3d at 1158-59; *see also* U.S. CONST. art. I, § 8, cl. 10.

129. *See* *United States v. Moreno-Morillo*, 334 F.3d 819 (9th Cir. 2004), *cert. denied*, 540 U.S. 1156 (2004) (“Congress . . . was acting within its constitutionally conferred authority when it passed the MDLEA. That authority is expressly conferred by Article I, Section 8, Clause 10 [of the Constitution]”) (citing *United States v. Ledesma-Cuesta*, 347 F.3d 527 (3d Cir. 2003)).

130. *Perlaza*, 439 F.3d at 1160.

131. *See, e.g.*, RESTATEMENT, *supra* note 24, § 404; *see also* *Perlaza*, 439 F.3d at 1162-63.

C. The Requirements of Statutory and Constitutional Jurisdiction When Applying the Maritime Drug Law Enforcement Act

The *Perlaza* court then goes on to draw an important distinction between statutory and constitutional jurisdiction under the MDLEA.¹³² Section 1903(c) of the MDLEA lays out the statutory bases for jurisdiction.¹³³ Among these “[v]essel[s] subject to the jurisdiction of the United States”¹³⁴ are vessels without nationality;¹³⁵ “vessel[s] assimilated to a vessel without nationality”;¹³⁶ vessels registered to a foreign nation where the flag nation has consented to enforcement of United States law by the United States;¹³⁷ “vessel[s] located within the customs waters of the United States”;¹³⁸ and vessels located within the territorial waters of another nation where that nation has consented to enforcement of United States law by the United States.¹³⁹ The Government must satisfy at least one of these bases for jurisdiction in order to prosecute an offender under the MDLEA.¹⁴⁰

Separate and apart from the Government’s obligation of proving statutory jurisdiction, however, is the requirement of constitutional jurisdiction. The *Perlaza* court took the view that a nexus between the prohibited conduct and the United States is a condition precedent to applying the MDLEA extraterritorially in order

132. *Perlaza*, 439 F.3d at 1160.

133. See Maritime Drug Law Enforcement Act [MDLEA], 46 U.S.C. app. § 1903(c) (2002).

134. *Id.*

135. See *id.* § 1903(c)(1)(A); see also *id.* § 1903(c)(2) (defining a vessel without nationality to include vessels aboard which the master or person in charge makes a claim of registry and that claim is either denied by the flag nation whose registry is claimed or the flagged nation does not affirmatively and unequivocally assert that the vessel is of its nationality and vessels where the master or person in charge fails to make a claim of nationality when so requested to do so by an officer of the United States who is empowered to enforce provisions of U.S. law); *Perlaza*, 439 F.3d at 1160 (noting that a vessel without nationality is also commonly referred to as a stateless vessel).

136. MDLEA, § 1903(c)(1)(B); see also Geneva Convention on the High Seas, art. 6, Apr. 29, 1958, 13 U.S.T. 2312, available at <http://www.oceanlaw.net/texts/genevahs.htm> (“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 with respect to any other State, and may be assimilated to a ship without nationality.”).

137. MDLEA, § 1903(c)(1)(C).

138. *Id.* § 1903(c)(1)(D); see also 19 U.S.C.A. § 1401(j) (2006) (defining “custom waters” as the waters within four leagues of the coast of the United States). One league is equal to three miles.

139. MDLEA, § 1903(c)(1)(E).

140. See *United States v. Medjuck (Medjuck III)*, 156 F.3d 916, 918 (9th Cir. 1998).

to ensure that application of the statute to the defendant is not arbitrary and fundamentally unfair.¹⁴¹ This sentiment echoes the concerns of *International Shoe* and *World-Wide Volkswagen*.¹⁴² As between the several states, the Supreme Court has stated that the Due Process Clause does not allow for one state to put forth a binding judgment *in personam* against a defendant who has no contacts, ties or relations with that state.¹⁴³ The *International Shoe* Court went on to hold that when a defendant maintains sufficient contacts with a state or avails himself of the benefits or privileges of that state's laws, it is not unreasonable to haul that defendant into a court in that state and force him to defend a suit brought there.¹⁴⁴ This concern regarding the fairness of where the defendant should have to defend a suit is, in this author's opinion, the same concern the *Perlaza* court references when requiring a nexus.¹⁴⁵

In *Perlaza*, the district court found that because the speedboat was a "stateless vessel"¹⁴⁶ and because the Colombian government had consented to the United States' enforcement of United States law aboard the *Gran Tauro*, there was statutory jurisdiction over both vessels.¹⁴⁷ Furthermore, the district court found that because the speedboat was stateless, the United States Gov-

141. See *United States v. Perlaza*, 439 F.3d 1149, 1160 (9th Cir. 2006) (citing *United States v. Medjuck (Medjuck II)*, 48 F.3d 1107, 1111 (9th Cir. 1995); *United States v. Moreno-Morillo*, 334 F.3d 819, 828 (9th Cir. 2004); *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1256-59 (9th Cir. 1998); *United States v. Khan*, 35 F.3d 426, 429-30 (9th Cir. 1994); *United States v. Davis*, 905 F.2d 245, 248-49 (9th Cir. 1990); *United States v. Peterson*, 812 F.2d 486, 493 (9th Cir. 1987)). The court, however, notes that the exception to this rule is where a vessel is deemed stateless. See *id.*, 439 F.3d at 1161 (quoting *Moreno-Morillo*, 334 F.3d at 829). In that situation, there is no requirement of a nexus between those on board and the United States before jurisdiction may be exercised over them. See *id.*

142. See discussion *supra* Part V.

143. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) (citation omitted).

144. See *id.*

145. However, the *Perlaza* court does point out that the circuits are split on this requirement and cites to cases in the Fifth, Third and First Circuits which do not require a nexus. See *Perlaza*, 439 F.3d at 1161 (citing *United States v. Suerte*, 291 F.3d 366, 375 (5th Cir. 2002); *United States v. Perez-Oviedo*, 281 F.3d 400, 403 (3d Cir. 2002); *United States v. Cardales*, 168 F.3d 548, 553 (1st Cir. 1999) (Hall, J., sitting by designation)).

146. No flags of any kind were seen to be flying on the speedboat, nor where there any markings, hull numbers, name or home-port inscriptions observed. However, two defendants on the speedboat stated that they were "from" Colombia, as was the boat. The circuit court declared that this statement could fairly be read as a statement of nationality and that by not submitting the disputed issue of the speedboat's nationality to the jury, the district court erred. See *Perlaza*, 439 F.3d at 1165.

147. See *id.* at 1161.

ernment was not required to establish constitutional jurisdiction by the showing of a nexus between the defendants and the United States.¹⁴⁸ However, the lower court did point out that a nexus is ordinarily required for foreign-flagged vessels like the *Gran Tauro*, but since the *Gran Tauro* had been aiding and abetting the speedboat, the *Gran Tauro* defendants would “stand in the shoes of the principles, specifically the [speedboat] defendants, for jurisdictional purposes.”¹⁴⁹ In effect, the lower court waived the nexus requirement for the *Gran Tauro* defendants.

D. Constitutional Jurisdiction and International Law

The circuit court’s discussion of constitutional jurisdiction is bound up with the concepts of the protective principle¹⁵⁰ and universal jurisdiction,¹⁵¹ both concepts that the court ultimately found not to eradicate the Government’s obligation to establish both statutory and constitutional jurisdiction over the defendants.¹⁵² The majority stated that in the Ninth Circuit, the protective principle is merely part of the consideration of whether a nexus exists and is not to be considered a substitute for the nexus.¹⁵³ As discussed in *United States v. Peterson*, the protective principle is a proper basis for jurisdiction when the prohibited activity threatens the security or governmental functions of a nation.¹⁵⁴ The *Peterson* court pronounced that drug trafficking, even when no actual effect on the United States is shown, may properly be prevented under the protective principle due to the threat it presents to the United States’ ability to function.¹⁵⁵

However, there must be a limit on the extent to which the

148. See *id.* (citation omitted).

149. *Id.* (quoting the District Court).

150. The protective principle, as recognized by the Second Circuit, gives a state “jurisdiction to prescribe a rule of law attaching legal consequences to conduct outside its territory that threatens its security as a state or the operation of its governmental functions, provided the conduct is generally recognized as a crime under the laws of states that have reasonably developed legal systems.” *United States v. Pizzarusso*, 388 F.2d 8, 10-11 (2d Cir. 1968) (quoting RESTATEMENT, *supra* note 24, § 33).

151. The Government argued that the district court properly exercised jurisdiction under the United States’ universal jurisdiction to prevent piracy, slave trading and other universally condemned activities. See *Perlaza*, 439 F.3d at 1162.

152. See *Perlaza*, 439 F.3d at 1161-64; see also *United States v. Tinoco*, 304 F.3d 1088, 1114 (noting “that the Government bears the burden of establishing that the statutory requirements of . . . jurisdiction imposed by the MDLEA are met”).

153. See *Perlaza*, 439 F.3d at 1161-62.

154. See *id.* at 1162 (quoting *United States v. Peterson*, 812 F.2d 486, 493 (9th Cir. 1987)).

155. See *Peterson*, 812 F.2d at 493.

United States may exercise its jurisdiction under the guise of the protective principle. First, the *Perlaza* court notes that the language in *Peterson* regarding the applicability of the protective principle to drug trafficking is *dicta*.¹⁵⁶ Second, they note that “[a] broad reading [of the protective principle] would allow the United States to police any international conduct ‘against [any] important state interests’”¹⁵⁷ and would also allow the United States to prohibit “foreigners on foreign ships 500 miles offshore from possessing drugs that . . . might be bound for Canada, South America, or Zanzibar”¹⁵⁸ The court concluded its questioning of the applicability of the protective principle by stating that the Ninth Circuit has rejected it as an independent basis for jurisdiction and instead requires a “constitutionally sufficient nexus”.¹⁵⁹

The court then turns to consider the Government’s argument that jurisdiction was proper under the universality principle and concludes that this argument is simply a weaker version of the government’s protective principle argument.¹⁶⁰ Ultimately, the court concludes that international law principles, such as the protective principle and universal jurisdiction, should be used as a “rough guide of whether a sufficient nexus exists between the defendant and the United States” so that the application of the Act does not violate due process.¹⁶¹ But too much emphasis on such international law principles, the court cautions, might cause a court to lose sight of the decisive question: would application of the statute to the defendant be arbitrary and fundamentally unfair?¹⁶² Therefore, neither the protective principle nor universal jurisdiction vitiate the government’s obligation to establish both statutory and constitutional jurisdiction over the defendants it

156. See *Perlaza*, 439 F.3d at 1162.

157. *Id.* (quoting *United States v. Robinson*, 843 F.2d 1, 3 (1st Cir. 1988)).

158. *Id.* (quoting *Robinson*, 843 F.2d at 3 (questioning the reasonableness of a broad reading of the “protective principle”).

159. *Perlaza*, 439 F.3d at 1162 n.16 (quoting *United States v. Juda*, 797 F. Supp. 774 (N.D. Cal. 1992)).

160. See *id.* at 1162-63. *Perlaza* notes that the government’s universal jurisdiction argument rests exclusively on two Eleventh Circuit cases, *United States v. Marino-Garcia* and *United States v. Gonzalez*. See *United States v. Marino-Garcia*, 679 F.2d 1373, 1382 (11th Cir. 1982) (noting “a growing consensus among nations to include drug trafficking as a universally prohibited crime”); *United States v. Gonzalez*, 776 F.2d 931, 939-40 (11th Cir. 1985) (citing *Marino-Garcia* for the proposition that “conduct may be forbidden if it has a potential adverse effect and is generally recognized as a crime by nations that have reasonably developed legal systems”).

161. *Perlaza*, 439 F.3d at 1162 (citing *United States v. Davis*, 902 F.2d 245, 249 (9th Cir. 1990)) (emphasis in original).

162. See *id.*

seeks to prosecute under the MDLEA.¹⁶³

E. Limiting Jurisdiction Under the Maritime Drug Law Enforcement Act by Looking to Domestic Limitations

The limit that should exist to curtail such potentially far-reaching jurisdiction by the United States should be a concept analogous to the idea of minimum contacts that is used to limit the personal jurisdiction of state courts within the several States. In *Perlaza*, the defendants were not United States citizens, were not captured within United States territory, and had no contacts with the United States.¹⁶⁴ They had not availed themselves of any of the privileges or benefits of United States law and it was not proven that their cargo was headed for the United States.¹⁶⁵ Analogizing these facts to the analysis in *International Shoe* demonstrates that the exercise of personal jurisdiction over these defendants would be arbitrary, unfair, and would offend “traditional notions of fair play and substantial justice.”¹⁶⁶

Domestically, due process under the Fourteenth Amendment requires a defendant to have minimum contacts with the forum state.¹⁶⁷ In the federal court system, due process is governed by the Fifth Amendment, but incorporates ideals similar to those of the Fourteenth Amendment.¹⁶⁸ Requiring minimum contacts to satisfy due process is a form of protection afforded to the defendant so that it is not unreasonable to expect him to defend the suit in the forum where it is brought.¹⁶⁹ These contacts must be “continuous and systematic.”¹⁷⁰ Without such minimum contacts, under the *International Shoe* analysis, due process is violated and therefore, there can be no binding judgment against the defendant.¹⁷¹

Most cases prosecuted under the MDLEA involve defendants apprehended in international waters off the coast of South

163. See *id.* at 1163; see also *United States v. Medjuck (Medjuck III)*, 156 F.3d 916, 918 (9th Cir. 1998) (stating that the Government must demonstrate the existence of a nexus).

164. See *Perlaza*, 439 F.3d at 1154.

165. See *id.* at 1169, 1175.

166. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citations omitted).

167. See *id.*; see also U.S. CONST. amend. XIV.

168. See U.S. CONST. amend. V (“nor shall any State deprive any person of life, liberty, or property, without due process of law”)

169. See *Int'l Shoe*, 326 U.S. at 317.

170. *Id.*

171. See *id.* at 319 (citations omitted).

America.¹⁷² When there is either no proof that the drugs are ultimately destined for the United States or there is proof that they are destined for a different country, prosecuting these offenders in United States courts seems to go against all notions of due process and "fair play and substantial justice."¹⁷³ In *United States v. Martinez-Hidalgo*, the Third Circuit rejected the defendant's contention that the United States did not have jurisdiction when the government did not show that he intended for the drugs to ultimately reach the United States.¹⁷⁴ But allowing such jurisdiction would permit the United States to prosecute a defendant with no contacts to the United States. It is difficult to reconcile this position with the United States' rules governing personal jurisdiction as between a state and a citizen of a different state.

As between the United States and a nonresident, noncitizen defendant, the Supreme Court has held that due process is not offended when there are sufficient contacts between the state and the foreign party.¹⁷⁵ In *Perlaza*, the court cites to *Klimavicius-Viloria* for the proposition that the nexus requirement, while not a textual requirement of the MDLEA, is a "judicial gloss applied to ensure that a defendant is not improperly haled before a court for trial . . . [It] serves the same purpose as the 'minimum contacts' test in [domestic] personal jurisdiction."¹⁷⁶ Where a defendant has submitted himself to the laws of one nation (i.e. the foreign-flag nation), he would have a legitimate expectation that he would not have to defend a suit brought against him in another nation and that other nations would not be entitled to exercise jurisdiction over him without some nexus that would make such jurisdiction reasonable.¹⁷⁷

172. See, e.g. *United States v. Perlaza*, 439 F.3d 1149, 1150 (9th Cir. 2006); *United States v. Moreno*, 199 F. App'x 839 (11th Cir. 2006).

173. *Int'l Shoe*, 326 U.S. at 316 (citations omitted).

174. See *United States v. Martinez-Hidalgo*, 993 F.2d 1052, 1054-55 (rejecting as inadequate defendant's contention that the district court did not have jurisdiction over his prosecution under 46 U.S.C. app. §§ 1903(a) and (j) where the government did not show that he intended that the drugs would reach the United States because the MDLEA allows for prosecution in the United States regardless of the destination of the drugs). The court also had jurisdiction under the MDLEA because the defendant claimed his vessel was Columbian and Columbia gave consent for the Coast Guard to board and check the vessel for documentation. See *id.* at 1054.

175. See *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414 (1984); see also *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952).

176. *Perlaza*, 439 F.3d at 1168 (citing *United States v. Moreno-Morillo*, 334 F.3d 819, 830 n.8 (9th Cir. 2004) (quoting *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1257 (9th Cir. 1998))).

177. See *id.* (citing *Klimavicius-Viloria*, 144 F.3d at 1257).

Not only would due process be offended by haling a defendant into a foreign court where he maintains no ties to the forum, but it would also seem to violate the concept *forum non conveniens*.¹⁷⁸ That doctrine requires the court to take into account such factors as the choice of law applicable to the dispute and the potential for hardship to the defendant when deciding if exercising jurisdiction is reasonable.¹⁷⁹

The discussion regarding jurisdiction in *Perlaza* concludes with the holding that even if there is consent or some other basis for exerting statutory jurisdiction, the Government must prove some detrimental effect within, or nexus to, the United States.¹⁸⁰ Nexus is an essential part of the jurisdictional analysis that United States case law requires¹⁸¹ in order to ensure that the United States does not become a world police force, exerting its authority far beyond its territorial boundaries in a way that eclipses the rights of nonresident aliens.¹⁸²

VII. CONCLUSION

The Maritime Drug Law Enforcement Act, while properly enacted under Congress' constitutional powers "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations"¹⁸³ extends the jurisdiction of the United States to an improperly wide spectrum of acts and offenders. The effect of the statute is to make the United States a police force against drug trafficking in the entire Western Hemisphere, and potentially the entire world. Without something to tie these offenders' conduct to the United States, they are deprived of due process, proper notice, and a convenient forum in which to defend their cases, all things the United States judicial system

178. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249 (1981) (stating that dismissal on the grounds of *forum non conveniens* is appropriate when trial in the plaintiff's chosen forum imposes a heavy burden on the defendant (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947))).

179. See *id.*

180. *Perlaza*, 439 F.3d at 1169 (citing *United States v. Hill*, 279 F.3d 731, 739 (9th Cir. 2002) for the proposition that under the territorial jurisdiction theory, jurisdiction is proper if the conduct performed outside the United States produces detrimental effects within the United States, or in other words, produces a nexus between the defendant and the United States).

181. See *id.*

182. See RESTATEMENT, *supra* note 24, § 722 cmt. a (noting that the provisions of the Fourteenth Amendment safeguard individual rights and prescribed rights of persons, not just of United States citizens).

183. U.S. CONST. art. I, § 8, cl. 10.

grants to domestic defendants in state courts under the rule put forth in *International Shoe*.¹⁸⁴ As it stands now, Congress is able to exercise its Piracies and Felonies power in such a way that it affects foreign nationals whose conduct occurred outside the United States and has no provable link to the United States. This inequity of treatment in United States' courts between United States citizens and nonresident, noncitizens cannot continue.

184. *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).