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FALSE PERCEPTIONS ON LIMITATION: WHY IMPOSING A NEXUS REQUIREMENT UNDER THE MARITIME DRUG LAW ENFORCEMENT ACT WOULD NOT SIGNIFICANTLY DISCOURAGE EFFORTS TO PROSECUTE MARITIME DRUG TRAFFICKING

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The Maritime Drug Law Enforcement Act ("MDLEA") is the principal statute through which the United States prosecutes smugglers of narcotics on ocean-going vessels in international and territorial waters and remains one of the most important weapons in America's arsenal in the ongoing war on drugs. Most of the Federal Circuits require only that the MDLEA statutory jurisdictional requirements be met in order for suspected smugglers to stand trial in the United States. The Ninth Circuit, however, has required an additional provision that Fifth Amendment constitutional due process concerns be met by demonstrating a "nexus" of activity linking the smugglers and their ship to the United States. Critics of the Ninth Circuit approach claim that the added Fifth Amendment due process requirements are unnecessary because the international law principle of universal jurisdiction applies to the internationally condemned practice of narcotics trafficking. If the Supreme Court were to mandate that the Ninth Circuit model be adopted, the critics further argue, then the ability of the United States to secure convictions under the act would be significantly impeded and the MDLEA's value as a potent weapon against the war on drugs diminished. This Note examines the potential impact of adopting the Ninth Circuit nexus model as the de facto standard for satisfying jurisdiction under the MDLEA and concludes that full adoption of the nexus model would not significantly restrict U.S. efforts to secure convictions under the MDLEA nor the broader international effort against the narcotics trade provided that the U.S. Coast Guard makes minor adjustments in their maritime interdiction procedures.

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I. INTRODUCTION

*"[T]he Americas face the world's biggest drug problem whether . . . measure[d] . . . in hectares of cultivation, tons of production, . . . market value, or . . . the gruesome number of people killed."*¹

On March 11, 2009, Rear Admiral Wayne E. Justice of the United States Coast Guard appeared before a House Subcommittee on Coast Guard and Maritime Transportation to offer testimony about the success of the Coast Guard's drug interdiction missions, in the hope of securing additional funding from Congress to maintain and expand the capabilities of his fleet.² It had been almost two years since the Coast Guard executed the single largest drug seizure in its history when it confiscated nearly twenty tons of cocaine from a Panamanian freighter,³ and Justice wanted to assure the subcommittee that maritime drug interdiction efforts were continuing smoothly.⁴ Although he emphasized several factors

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¹ *Overview of Coast Guard Drug and Migrant Interdiction: Hearing Before the Subcomm. on Coast Guard and Mar. Transp. of the H. Comm. on Transp. and Infrastructure*, 111th Cong. 34 (2009) [hereinafter *Coast Guard and Mar. Transp. Subcomm. Hearing*] (statement of Rear Admiral Wayne E. Justice, Assistant Commandant for Capabilities, U.S. Coast Guard).

² *Id.* at 37 ("I am immensely proud of our interdiction efforts and the superior performance of Coast Guard men and women. However, . . . Coast Guard personnel have been saddled with significant maintenance challenges associated with maintaining an aging deepwater fleet . . . [resulting in] lost operational delays and degraded readiness due to unscheduled maintenance and casualty repair. . . . Significant structural deficiencies resulting from advanced age have resulted in considerable unplanned maintenance onboard several cutters . . . that prompted cancellation of several patrols and the loss of 149 operational days to counterdrug operations.").

³ News Release, *DEA, Coast Guard Make Record Maritime Cocaine Seizure*, U.S. DRUG ENFORCEMENT ADMIN. (Mar. 21, 2007), <http://www.justice.gov/dea/pubs/states/newsrel/wdo032107.html>.

⁴ See *Coast Guard and Mar. Transp. Subcomm. Hearing*, *supra* note 1, at 35, 36 (statement of Rear Admiral Wayne E. Justice) (detailing the effectiveness of new Coast Guard tactics and the success of recent interdiction efforts).

instrumental in the Coast Guard's interdiction successes,⁵ he made special mention of the importance of the Maritime Drug Law Enforcement Act in allowing the Department of Justice to capitalize on those successes and prosecute offenders interdicted far from U.S. soil in federal courts.⁶

Signed into law in 1986, the Maritime Drug Law Enforcement Act ("MDLEA")⁷ is the principal statute through which the United States prosecutes those suspected of engaging in maritime smuggling of narcotics. Specifically, the Act prohibits an individual from "manufactur[ing] or distribut[ing], or possess[ing] with intent to manufacture or distribute, a controlled substance on board . . . a vessel subject to the jurisdiction of the United States."⁸ A critical component of the Act's resounding success over the years,⁹ however, has been the manner in which Congress constructed and defined "jurisdiction of the United States" to subject smugglers to federal jurisdiction when seized in international waters or within the maritime jurisdictional boundaries of foreign nations. As defined by the statute, a vessel "subject to the jurisdiction of the United States" includes any: (1) stateless vessel or "vessel without nationality," (2) "vessel registered in a foreign nation if that nation has consented or waived objection to the enforcement of United States law by the United States," (3) vessel in the maritime waters or contiguous zone of the United States, or (4) "vessel in the territorial waters of a foreign nation if that nation consents to the enforcement of United States law by the United States."¹⁰ In the case of the Panamanian freighter interdicted by the Coast Guard in 2007, fourteen crewmembers were detained and brought to Florida to stand trial even though the ship was

⁵ Namely, the contributions of the Joint Interagency Task Force South ("JIATF South"), Organized Crime Drug Enforcement Task Forces ("OCDETF"), and the development of armed counterdrug helicopter capabilities. *See id.*

⁶ *Id.* at 37 ("Congress also plays a critical role supporting Coast Guard efforts by providing legislation to combat illicit drug smuggling. . . . [T]he Maritime Drug Law Enforcement Act has proven to be a powerful tool for prosecuting drug smugglers in U.S. courts that were interdicted far from our shores.").

⁷ 46 U.S.C. §§ 70,501–07 (2006).

⁸ *Id.* § 70,503(a)(1).

⁹ *See* Office of Law Enforcement, *Coast Guard Drug Removal Statistics*, U.S. COAST GUARD, <http://www.uscg.mil/hq/cg5/cg531/Drugs/stats.asp> (last visited Mar. 11, 2011). In 2008 the Coast Guard seized and removed a record combined total of almost 368,000 pounds of marijuana and cocaine from maritime vessels. *Id.* Since 2004, the Coast Guard has seized and removed a combined annual total of at least 200,000 pounds of marijuana and cocaine. *Id.*

¹⁰ 46 U.S.C. § 70,502(c). Much of the MDLEA's success in exerting jurisdiction over foreign nationals stems from the willingness of foreign nations to consent to United States enforcement of United States law aboard the foreign vessel in question. Nearly all of the 122 smuggling attempts disrupted by the Coast Guard in fiscal year 2010 involved some type of foreign cooperation through direct participation, the exercise of a direct bilateral agreement, granting permission to board, or logistical support. U.S. DEP'T OF STATE, BUREAU FOR INT'L NARCOTICS AND LAW ENFORCEMENT AFFAIRS, VOLUME I: DRUG AND CHEMICAL CONTROL, INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT 49 (Mar. 2011), available at <http://www.state.gov/documents/organization/156575.pdf> [hereinafter U.S. DEP'T OF STATE, 2011 REPORT].

detained in Panamanian waters some one thousand nautical miles from Miami, none of the crewmembers were American citizens, and none of the cocaine was destined for the United States.¹¹ The United States was able to easily satisfy jurisdiction under the MDLEA because of a bilateral agreement it signed with Panama that granted authority to the U.S. Coast Guard to board and search Panamanian-registered ships suspected of smuggling narcotics.¹²

Despite its effectiveness as a potent weapon in the United States' war on drugs, the MDLEA and its jurisdictional provisions are not without controversy. The multitude of bilateral treaties between the United States and other countries combined with the continued willingness of foreign nations to consent to American application of the MDLEA has resulted in a statute with a very broad jurisdictional reach.¹³ Consequently, defendants convicted of charges under the MDLEA have frequently attacked the statute on constitutional grounds claiming that their due process rights are violated when insufficient or non-existent contacts between themselves or the ship and the United States are lacking to justify prosecution under the statute in an American court.¹⁴ This controversy remains a source of continual debate and has resulted in a circuit split among the Federal Courts between the Ninth Circuit, which requires an added showing of nexus in addition to the statutory jurisdictional elements, and the First, Third, Fifth, and Eleventh Circuits, which require no added showing of nexus outside of fulfilling the statutory jurisdictional elements.

The Ninth Circuit has required that the United States must show a "nexus between the United States and the defendant's activities before exerting jurisdiction over foreign vessels" and the nexus analysis is "a constitutional requirement analogous to 'minimum contacts' in personal jurisdiction analysis."¹⁵ Those who support the Ninth Circuit nexus model claim that it better ensures due process rights of defendants, provides proper notice, and protects against hailing a defendant into an inconvenient

¹¹ Eugene Kontorovich, *Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction over Drug Crimes*, 93 MINN. L. REV. 1191, 1191–92 (2009).

¹² Kathia Martinez, *Panama Will Let U.S. Search Ships for Arms*, SAN DIEGO UNION TRIB., May 12, 2004, http://legacy.signonsandiego.com/uniontrib/20040512/news_1n12panama.html.

¹³ U.S. DEP'T OF STATE, 2011 REPORT, *supra* note 10, at 48 ("A crucial element in [the success of recent Coast Guard interdiction efforts] was the system of agreements with many countries around the world which permit enforcement officers to stop, board, and search vessels suspected of transporting narcotics.").

¹⁴ See *United States v. Estrada-Obregon*, 270 F. App'x 978, 980 (11th Cir. 2008).

¹⁵ *United States v. Zakharov*, 468 F.3d 1171, 1177 (9th Cir. 2006). The Ninth Circuit conducts two separate analyses when determining if jurisdiction is established under the MDLEA. First, it determines if jurisdiction is met in accordance with the requirements set forth in the statute itself. This is known as "statutory jurisdiction." Next, it determines if a sufficient nexus between the activity aboard the ship and the United States is satisfied. This is known as "constitutional jurisdiction." Only when both statutory and constitutional jurisdiction are met can the Ninth Circuit exert jurisdiction over a prosecution under the MDLEA. *Id.* at 1175–76.

forum in the United States when a more appropriate one may be available abroad.¹⁶ Critics of the Ninth Circuit approach assert that the nexus requirement is an unnecessary barrier that hinders the ability of the United States to prosecute offenders who participate in the universally recognized and condemned criminal enterprise of drug trafficking.¹⁷ Instead, the critics argue, the principles articulated by the First, Third, Fifth, and Eleventh Circuits are sufficiently sound to justify non-compliance with a nexus requirement.¹⁸

The First, Third, Fifth, and Eleventh Circuits, on the other hand, require no showing of a nexus. Instead, jurisdiction under the MDLEA will be granted as long as the statutory jurisdictional requirements are satisfied. These Circuits rely on the territorial, protective, and universality principles of international law to exercise jurisdiction over foreign defendants.¹⁹ In addition to the arguments that the non-nexus approach for determining jurisdiction deprives defendants of fundamental Fifth Amendment due process rights, critics also fear that a continued unrestricted application of this model will improperly extend the jurisdictional reach of the United States to such an extent that it would effectively be acting as a world police force against all instances of drug trafficking throughout the world.²⁰

Although both advocates and critics of the nexus model present persuasive arguments in support of their respective positions,²¹ the Supreme Court has yet to grant certiorari to decide whether or not the nexus model adopted by the Ninth Circuit should become the de facto standard for determining jurisdiction under the MDLEA in all federal courts. This Note will assess the impact of adopting the nexus model as the federal standard for determining jurisdiction under the MDLEA.

¹⁶ Stephanie M. Chaissan, Comment, "Minimum Contacts" Abroad: Using the International Shoe Test to Restrict the Extraterritorial Exercise of United States Jurisdiction Under the Maritime Drug Law Enforcement Act, 38 U. MIAMI INTER-AM. L. REV. 641, 665-66 (2007) ("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 grants to domestic defendants in state courts under the rule put forth in *International Shoe*.").

¹⁷ See James A. Tate, Comment, *Eliminating the Nexus Obstacle to the Prosecution of International Drug Traffickers on the High Seas*, 77 U. CIN. L. REV. 267, 296 (2008) ("Due to the universal criminality of drug trafficking, the values of notice, fairness, and convenience—normally protected by requiring a nexus—need not be sacrificed to achieve greater participation in the interdiction of this and other universally criminal acts."). Acts recognized as universally criminal in the international community are often afforded less protection "from a foreign state's jurisdictional reach" than other types of common criminal activity. *Id.* at 270-71.

¹⁸ *Id.* at 292-94.

¹⁹ See *id.* (defining and describing how the First and Fifth Circuits apply the territorial principle and how the Third, Fifth, and Eleventh Circuits rely on the protective and universality principles when conducting jurisdictional inquiries under the MDLEA.).

²⁰ See Chaissan, *supra* note 16, at 665 ("The effect of the [MDLEA] is to make the United States a police force against drug trafficking in the entire Western Hemisphere, and potentially the entire world.").

²¹ See *supra* notes 16 and 17 and accompanying text.

Ultimately, given the limited context in which the nexus is applied and the nature of the methods employed by drug traffickers in the maritime setting, adoption of the Ninth Circuit nexus model would not significantly restrict the ability of the United States to assert jurisdiction under the MDLEA nor would a nexus requirement hinder international efforts in the broader war on maritime drug trafficking. Part II of this Note details how the Ninth Circuit currently conducts and applies the nexus-model inquiry to the facts in a particular case at bar. Part III suggests how adoption of the Ninth Circuit nexus standard will not significantly discourage efforts to secure jurisdiction under the MDLEA. Finally, Part IV discusses how extradition treaties between the United States and foreign nations might bridge the remaining gap and satisfy the jurisdictional requirements in cases where a nexus could not be initially established.

II. THE NINTH CIRCUIT NEXUS MODEL

A. *Elements and Application of the Ninth Circuit Nexus Model: United States v. Zakharov*

In order for the Ninth Circuit to exert jurisdiction over a claim brought under the MDLEA the court must determine that both statutory and constitutional nexus jurisdiction have been satisfied.²² “Unlike statutory jurisdiction, the constitutional nexus requirement is not an express element of the crime” as defined under the MDLEA, but is instead “a judicial gloss applied to ensure that a defendant is not improperly hailed before a court for trial.”²³ Therefore, a Ninth Circuit court must find the existence of a sufficient nexus “even when the flag nation has consented to the application of United States law.”²⁴ Determination of constitutional jurisdiction, however, is similar to a determination of statutory jurisdiction in the sense that both are ultimate determinations to be decided by a court instead of a jury.²⁵

In *United States v. Zakharov*, the Ninth Circuit offers a concise summary of conducting a nexus analysis. First, the court must approach the determination of a nexus in an analogous manner as it would approach a “minimum contacts” analysis when determining personal jurisdiction.²⁶ Under this standard, nexus is established if it can be shown that “an attempted transaction is aimed at causing criminal acts within the United States” or that “the plan for shipping the drugs was likely to have effects in

²² *United States v. Zakharov*, 468 F.3d 1171, 1176 (9th Cir. 2006).

²³ *Id.* at 1177 (quoting *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1257 (9th Cir. 1998)).

²⁴ *Zakharov*, 468 F.3d at 1177 (citing *United States v. Perlaza*, 439 F.3d 1149, 1168 (9th Cir. 2006)).

²⁵ *Klimavicius-Viloria*, 144 F.3d at 1257.

²⁶ *Zakharov*, 468 F.3d at 1177 (citing *Klimavicius-Viloria*, 144 F.3d at 1257).

the United States.”²⁷ The court then referenced considerations from *United States v. Klimavicius-Viloria* to illustrate how these concepts had been previously applied to establish a nexus between the activity on the ship and the United States. In *Klimavicius-Viloria*, the court considered three threshold questions to establish nexus: (1) whether or not the markings on the cocaine seized aboard the vessel in question matched the markings in a database of other cocaine seized in the United States, (2) whether or not the United States was the likely destination for the seized cocaine, and (3) whether or not the location of the vessel and the maps on board were consistent with a course bound for the United States.²⁸

In *Zakharov*, the *Svesda Maru*, a fishing vessel registered in the country of Belize, was interdicted by the U.S. Coast Guard five hundred miles off of the coast of Mexico in international waters.²⁹ A Coast Guard law enforcement attachment subsequently boarded the ship and discovered more than 9,200 kilograms of cocaine hidden behind one of the fuel tanks.³⁰ The Coast Guard obtained express permission from the Belizean government to seize the *Svesda Maru* pursuant to a bilateral treaty between Belize and the United States thereby satisfying statutory jurisdiction under the MDLEA.³¹ The *Zakharov* court ultimately determined that all of the three nexus threshold questions posed in *Klimavicius-Viloria* were satisfied based upon a showing of a preponderance of evidence.³² First, of the twelve cocaine bundles seized aboard the ship, four contained markings matching other bundles found previously in the United States.³³ Next, based upon the testimony from a government Drug Enforcement Administration (DEA) agent, the fact that the *Svesda Maru* was a fishing

²⁷ *Zakharov*, 468 F.3d at 1177–78 (quoting *United States v. Medjuck*, 156 F.3d 916, 919 (9th Cir. 1998)).

²⁸ *Klimavicius-Viloria*, 144 F.3d at 1258–59. The court ultimately found that all three of the nexus threshold questions were satisfied with the analysis of the markings remaining the most persuasive evidence of nexus. Five of the cocaine markings had been found only in the United States and five others had been found predominantly in the United States and in other countries involved in the shipping of cocaine. *Id.* at 1258. Twelve tons of cocaine were seized and a DEA expert testified that the United States was the only country that had the infrastructure to handle such a large shipment, therefore making it more likely that the United States was the likely destination. Finally, the ship contained sixty navigational maps covering the South American coasts, the eastern Pacific, the southeast Caribbean, Central America, portions of the United States, and Sicily. This evidence, combined with the fact that the ship was discovered off the coast of the Galapagos Islands in the Caribbean (in a major commercial fishing area) and was ill-equipped for fishing were deemed sufficient to satisfy the second and third nexus threshold questions. *Id.* at 1258–59.

²⁹ *Zakharov*, 468 F.3d at 1174.

³⁰ *Id.* at 1174–75.

³¹ *Id.* at 1175.

³² *Id.* at 1182.

³³ *Id.* at 1178. The court admitted that the number of matching markings on the cocaine bundles between the ship and the United States was not as substantial in establishing nexus as the ten bundles seized in *Klimavicius-Viloria*. Three of the markings from the bundles aboard the ship, however, contemporaneously matched markings on bundles recently seized in the United States. The court determined that this was sufficient to show a connection that satisfied the first threshold question. *Id.* at 1179.

vessel located five hundred miles from Mexico when it was interdicted, the amount of cocaine seized, and the types of navigational charts on board, the court determined that the United States was the likely destination for the cocaine and that Russia and Europe were unlikely destinations.³⁴ The court did not delve into any detail about the nature of the navigational charts discovered onboard the ship, but, given the court's assertion that "[t]he only . . . distinction between the facts establishing nexus in *Klimavicius-Viloria* and those in the instant case is that here there are fewer cocaine bundle markings that match bundles found previously in the United States," it was safe to infer that the maps did not present any conclusive evidence that the ship was likely destined for Russia or Europe.³⁵ Perhaps the strongest single piece of evidence establishing a nexus to the United States, and not to Russia or Europe, was the sheer volume of the cocaine seized. At the time of the interdiction, the seizure of the 9,200 kilograms was one of the largest cocaine seizures in United States maritime history.³⁶ This fact, combined with the fact that the ship was interdicted just five hundred miles off the coast of Mexico, created a situation analogous to *Klimavicius-Viloria*, where the court determined that the discovery of a large amount of cocaine combined with proximity to the United States was a strong indication that the smuggling was likely to have criminal effects in the United States.³⁷ Thus *Zakharov*, in conjunction with its analysis of *Klimavicius-Viloria*, offers a clear three-pronged analysis that Ninth Circuit courts can follow when determining if the nexus threshold has been met.

B. Establishing Nexus When Narcotics Are Not Destined Directly for the United States: United States v. Medjuck

In *United States v. Medjuck*, the Ninth Circuit found that nexus with the United States could still be established when it was known that smuggled narcotics were not directly destined for the United States, but were likely to eventually find their way into the United States through

³⁴ *Id.* at 1178. The defendant offered testimony from his own expert witness, a former DEA agent, to support his assertion that Russia and Europe both had substantial drug markets therefore making it just as likely that the cocaine was destined for Russia or Europe as it was the United States. The trial court, however, found the testimony of the government's DEA agent to be more credible and persuasive because of his background as a DEA intelligence analyst with over eighteen years of experience. *Id.*

³⁵ *Id.* at 1178–79.

³⁶ Scott Sutherland, *Navy Assists Coast Guard, U.S. Customs with Record Maritime Cocaine Seizure*, U.S. NAVY, <http://www.defenselink.mil/specials/drugawareness/usnnews04a.html> (last visited Mar. 14, 2011).

³⁷ *Zakharov*, 468 F.3d at 1174, 1178–79. For a discussion of the court's analysis on the relationship between proximity and the presence of a large amount of narcotics seized as sufficient evidence in establishing nexus, see *supra* note 28 and accompanying text.

other means.³⁸ Medjuck was charged with participating in a conspiracy to ship and distribute approximately seventy tons of hashish from Pakistan to Canada and the United States aboard a ship named the *Lucky Star*.³⁹ The *Lucky Star* was interdicted by the United States Navy in international waters in the Pacific Ocean after some of the conspirators had transferred two tons of the hashish into a separate vessel and were arrested upon reaching their destination in California.⁴⁰

Although Medjuck was not onboard the ship, he was directly linked to the smuggling conspiracy⁴¹ and the district court found that the conspirators did not intend to deliver the remaining drugs onboard the *Lucky Star* into the United States.⁴² On appeal, Medjuck argued that the district court erred in determining that the Government had demonstrated a sufficient showing of nexus between the conspiracy, the hashish aboard the ship, and the United States.⁴³ The Ninth Circuit held that the district court had properly determined the nexus requirement and did not err in finding that the nexus was sufficient to satisfy constitutional jurisdiction under the MDLEA.⁴⁴ The testimony of Sergeant Jean Martin of the Royal Canadian Mounted Police convinced the district court that "economics and geography dictat[ed] that at least some portion of the hashish would at some point be found in the United States" thereby diminishing the importance of the Canadian-bound shipment onboard the *Lucky Star*.⁴⁵ Martin testified that a seventy ton shipment of hashish could not be readily absorbed into the Canadian market for economic reasons. At the time the shipment was to be imported, hashish prices in Canada had stabilized and Martin believed that dealers were unlikely to flood the market with a large supply for fear of lowering the price.⁴⁶ Because of the economics in the Canadian market, Martin concluded that it was likely that the majority of the shipment would have to be smuggled into the United States for the dealers to maximize profits.⁴⁷

In addition to the nature of the economics and geography of the

³⁸ United States v. Medjuck, 156 F.3d 916, 919 (9th Cir. 1998).

³⁹ *Id.* at 917.

⁴⁰ United States v. Medjuck, 937 F. Supp. 1368, 1369 (N.D. Cal. 1996).

⁴¹ See *Medjuck*, 156 F.3d at 919 (illustrating the various contacts that Medjuck maintained with the United States throughout his participation in the conspiracy).

⁴² *Medjuck*, 937 F. Supp. at 1394.

⁴³ *Medjuck*, 156 F.3d at 917.

⁴⁴ See *id.* at 919 ("Because entry of the drugs into the United States and the coordination and control of the conspiracy in the United States . . . there is a sufficient basis to find that the government established nexus.").

⁴⁵ *Id.* (quoting *Medjuck*, 937 F. Supp. at 1394).

⁴⁶ *Medjuck*, 937 F. Supp. at 1393.

⁴⁷ *Id.* Medjuck had arranged for trucks to meet the shipment in British Columbia and then haul it across the country to Montreal as part of his plan. *Id.* at 1394 n.35. Martin testified that this further increased the likelihood that the shipment would eventually find its way into the United States because the main highway connecting Montreal with the United States border was a major and well-known thoroughfare for importing hashish from Canada to the United States. *Id.* at 1394.

Canadian drug market that made it likely that the majority of Medjuck's shipment would eventually find its way into the United States, the court also noted several additional direct and indirect contacts that Medjuck maintained with the United States as part of his conspiracy to further justify jurisdiction under the nexus model. Medjuck sent an agent to the United States to deliver money to a boat captain for the purposes of arranging a boat and a crew to meet the *Lucky Star* on the high seas and unload the hashish for smuggling.⁴⁸ Medjuck also made telephone calls and conducted in-person meetings in the United States in furtherance of his conspiracy.⁴⁹ These contacts, combined with the likelihood that the narcotics would find their way onto American soil, were deemed sufficient by the Ninth Circuit to satisfy the nexus requirement.⁵⁰

C. Failing To Establish Jurisdiction Under the Nexus Model and Jury Determinations of Statelessness: United States v. Perlaza

United States v. Perlaza further clarifies determinations of nexus application and analysis as the Ninth Circuit found that the nexus between smuggling activity and the United States was not properly determined by the lower court's jurisdictional analysis.⁵¹ A Colombian fishing vessel, the *Gran Tauro*, was suspected of providing trafficking assistance as a logistical support vessel ("LSV")⁵² and Coast Guard radar had detected that the ship had rendezvoused with a smaller "go-fast" vessel shortly before it was interdicted.⁵³ A Coast Guard helicopter tracked one of the "go-fast" vessels and pursued it until the vessel crashed into the *Gran Tauro* in a reckless attempt to outmaneuver the pursuing helicopter.⁵⁴ The "go-fast" vessel subsequently capsized and the interdicting Coast Guard vessel, the *De Wert*, rescued and detained the "go-fast" crew along with seventy-seven bales of cocaine (approximately 1,964 kilograms).⁵⁵ The Coast Guard interdicted and boarded the *Gran Tauro* finding conclusive evidence that it had the necessary means to provide refueling assistance to the "go-fast" vessel that capsized.⁵⁶

⁴⁸ *Medjuck*, 156 F.3d at 919.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *United States v. Perlaza*, 439 F.3d 1149, 1169 (9th Cir. 2006).

⁵² LSVs are large vessels used by smugglers as refueling and re-supply points for smaller, faster, and more maneuverable "go-fast" vessels that are used to actually transport the illegal narcotics. *Id.* at 1153 nn.2-3.

⁵³ *Id.* at 1155.

⁵⁴ *Id.* at 1152-53.

⁵⁵ *Id.* at 1155-56.

⁵⁶ *Id.* at 1156-57. The Coast Guard boarding party discovered a two hundred gallon fuel tank near the aft of the *Gran Tauro* and noticed that hoses connected to a nearby bilge pump smelled of gasoline thereby suggesting that the hoses had been recently disconnected from the pump and used to deliver fuel. The boarding party was able to connect the hoses to the tank and noticed that one of them was long enough to reach over the side of the boat for refueling purposes. One of the *Gran Tauro*'s

Certain crewmembers aboard the *Gran Tauro* and all the crew aboard the “go-fast” vessel were charged and convicted in a California federal district court for violating the MDLEA. Both parties appealed their convictions to the Ninth Circuit claiming that the United States lacked jurisdiction because no sufficient nexus existed to tie their actions to the United States.⁵⁷ The Ninth Circuit held that the lower court erred in determining jurisdiction over the *Gran Tauro* and “go-fast” defendants because it did not properly conduct the nexus analysis.⁵⁸

The first error by the lower court was the judge-made determination that the “go-fast” vessel was stateless. The Ninth Circuit held that a determination of statelessness is an issue of fact to be determined solely by a jury, is totally separate from a finding of nexus, and that the issue should be remanded back to the lower court if the prosecution still sought to convict the defendants under the MDLEA.⁵⁹ The lower court committed an additional error in exerting jurisdiction over the *Gran Tauro* through an aiding and abetting charge—due to the strong evidence indicating the likelihood that the *Gran Tauro* had refueled the “go-fast” vessel—instead of conducting an independent nexus analysis to first determine if the *Gran Tauro* itself had sufficient ties to the United States for jurisdiction to be proper.⁶⁰ Thus, *Perlaza* helps more clearly define the limitations and procedural requirements of the Ninth Circuit’s jurisdiction by requiring each ship suspected of violating the MDLEA to independently satisfy the nexus requirement and mandating that determinations of a vessel’s statelessness be presented to a jury for a conclusive determination.

III. ADOPTING THE NINTH CIRCUIT MODEL WILL NOT SIGNIFICANTLY DISCOURAGE SECURING JURISDICTION UNDER THE MDLEA

The Ninth Circuit holdings on nexus in *Zakharov*, *Medjuck*, and *Perlaza* provide a framework of the elements that must be met for a federal court to find that the nexus and jurisdictional requirements under the MDLEA have been satisfied. Satisfying the nexus requirement as illustrated in *Zakharov* and *Medjuck* would likely be feasible for most other similar vessels suspected of maritime smuggling activity.

crewmembers denied ever using the tank for refueling purposes, but an expert witness later testified that the gasoline in the tank onboard the *Gran Tauro* matched the gasoline recovered in a fifty-five gallon drum recovered amidst the debris of the “go-fast” vessel wreckage. The gasoline contained motor oil and was suitable for use in twin-stroke engines, such as the ones used by the “go-fast” vessel, but could not be used to power the *Gran Tauro*’s own engines since they required diesel fuel. *Id.*

⁵⁷ *Id.* at 1157–58.

⁵⁸ *Id.* at 1169.

⁵⁹ *Id.* at 1167.

⁶⁰ *Id.* at 1169.

A. *The Zakharov and Medjuck Contacts as Applied to Common Maritime Smuggling Activity*

The *Zakharov* and *Medjuck* holdings articulated several contacts that, if found, would satisfy the nexus requirement and allow a federal court to exert jurisdiction over a MDLEA violation. A nexus between the vessel and the United States is established when “an attempted [criminal] transaction is aimed at causing criminal acts within the United States” or “the plan for shipping the drugs was likely to have effects in the United States.”⁶¹ Tangible evidence supporting a link between the smuggling activity and the United States can include: matching markings between the drugs discovered on the vessel and those previously seized within the United States, maps onboard the ship or the location of the ship at the time it was boarded that indicated the ship was destined for the United States, whether or not the United States was the likely ultimate destination for the cocaine, or any other direct or incidental contacts maintained between the vessel and the United States.⁶² Furthermore, the *Medjuck* court illustrated that a determination of the United States as the “ultimate destination” for the narcotics is not automatically ruled out if another country serves as the terminal point for the voyage of the vessel itself.⁶³

Under the Ninth Circuit model, a ship destined for a U.S. port that is smuggling a large amount of narcotics with markings matching previously seized narcotics would easily meet the nexus requirements for U.S. jurisdiction under the MDLEA. The nexus requirement, however, will render the MDLEA largely ineffective, the critics argue, in situations where, despite irrefutable evidence of smuggling activity, jurisdiction cannot be established because contacts linking the ship to the United States are lacking or too insignificant. In situations where contacts are lacking, the actual amount of seized narcotics combined with the vessel’s location upon interdiction will likely prove determinative in the court’s ultimate decision regarding jurisdiction.⁶⁴ Simply put, the larger the amount of narcotics seized and the closer the proximity of the vessel to the United States at the time of interdiction, the greater the likelihood that nexus can be demonstrated and jurisdiction established—even when all other contacts may be lacking or altogether non-existent.⁶⁵

⁶¹ See *United States v. Medjuck*, 156 F.3d 916, 919 (9th Cir. 1998).

⁶² See *supra* notes 28, 33–34 and accompanying text.

⁶³ See *supra* notes 44–46 and accompanying text.

⁶⁴ See *United States v. Zakharov*, 468 F.3d 1171, 1178–79 (9th Cir. 2006). The vessel was interdicted five hundred miles off the southern coast of Mexico in international waters. *Id.* at 1174.

⁶⁵ According to the DEA, the United States drug market remains “one of the most profitable in the world.” *Drug Trafficking in the United States*, U.S. DRUG ENFORCEMENT ADMIN., http://www.justice.gov/dea/concern/drug_trafficking.html (last visited Mar. 15, 2011). It could therefore be reasonable for a court to conclude that a significant amount of narcotics seized in close proximity to one of the world’s most profitable drug markets would be sufficient to establish nexus.

B. Implications of Adopting the Nexus Model as the National Jurisdictional Standard

Interestingly, official statistics compiled by the U.S. Coast Guard indicate that the average amount of narcotics seized in individual interdiction efforts in recent years have been of substantial proportions. In 2007, for example, thirty-seven vessels were seized containing a combined 166,983 kilograms⁶⁶ of narcotics.⁶⁷ In 2008, forty-three vessels were seized containing a combined 176,946 kilograms in narcotics.⁶⁸ Finally, in 2009, fifty-eight vessels were seized containing a combined total of 192,367 kilograms of narcotics.⁶⁹ Thus, the average amount of narcotics seized for each individual successful Coast Guard interdiction was 4,513 kilograms, 4,115 kilograms, and 3,317 kilograms in 2007, 2008, and 2009 respectively. Unfortunately, Coast Guard records stating the actual amount of narcotics seized during the interdiction of an individual vessel are not readily available to the public. Admittedly, averaging the total amount of narcotics seized from the number of individual interdictions offers a general estimate of the amount of narcotics being trafficked on a given vessel in a given year in Coast Guard-patrolled waters, but it does not account for the fluctuations that can occur between unusually large or small narcotic shipments that tend to occur.

The large amount of maritime narcotics trafficking, however, takes on a greater significance when analyzed in conjunction with the fact that the Ninth Circuit has never conclusively found the existence of insufficient contacts for nexus-jurisdictional purposes in any published opinion involving alleged violations of the MDLEA.⁷⁰ While many of these cases likely consist of instances where a broad array of direct contacts to the United States makes the nexus existence obvious, the sheer amount of narcotics being trafficked in Coast Guard-patrolled waters would likely help to perpetuate the current trend toward a finding of nexus even when

⁶⁶ The original seizure statistics are in pounds. I converted the values to kilograms to more readily compare the amount of seized narcotics to the other Ninth Circuit cases where nexus had been established.

⁶⁷ Office of Law Enforcement, *supra* note 9.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Perlaza* is the closest that the Ninth Circuit has come to finding against nexus. However, in that case the court never held that a sufficient nexus did not exist. Instead, the charges were dismissed because the lower court skipped over the nexus analysis altogether and exerted jurisdiction over the *Gran Tauro* solely on an aiding and abetting theory. See *United States v. Perlaza*, 439 F.3d 1149, 1168 (9th Cir. 2006) (discussing that a finding of aiding and abetting does not vitiate the need to find an underlying basis for jurisdiction.). Additionally, the Coast Guard continues to report record seizures thereby suggesting that overall maritime drug trafficking in the Western Hemisphere transit zone is increasing. *Transit Zone Interdiction Operations*, OFF. OF NAT'L DRUG CONTROL POL'Y, http://www.whitehousedrugpolicy.gov/publications/international/factsht/transit_zone_interdic_op.html (last visited Mar. 15, 2011) [hereinafter *Transit Zone*].

other contacts may be lacking.⁷¹ Such a trend toward favoring the establishment of nexus should continue if the Ninth Circuit model is adopted as the national de facto standard for satisfying jurisdiction under the MDLEA.

Implementing the Ninth Circuit jurisdictional requirements as the national standard, however, will necessarily result in substantially more vessels being subject to the stringent nexus-contacts analysis, thereby increasing the likelihood that at least some vessels will fail the nexus test and elude U.S. jurisdiction altogether. Should adoption of the nexus model become a widespread problem in hindering the ability of the United States to exert jurisdiction over narcotics traffickers, law enforcement could alter their interdiction behavior to maximize their chances in establishing nexus. The most efficient and expedient way of doing this would be to have the Coast Guard restrict their interdiction efforts to within close proximity of the shores of Mexico and the United States instead of patrolling international waters well out in the Pacific, Atlantic, and Caribbean oceans. Most narcotics trafficking in the Western Hemisphere originates from South America and is trafficked along three major routes: along the eastern Pacific coasts of Mexico and the United States, along the western Caribbean coast into Mexico, and through the Caribbean islands where it changes hands and is smuggled either directly into the United States or through Mexico and into the United States via the Mexican-American border.⁷² Interdiction along any of these three routes while in close proximity with the United States and Mexico should greatly increase the chances of securing nexus given the fact that almost ninety percent of cocaine trafficked into the United States enters transit through Mexico.⁷³

C. The Advantages of Judge-Made Determinations of Nexus and the Adaptability of the Nexus Model

Although satisfying the nexus requirement presents an additional requirement for federal prosecutors to meet before they can seek convictions of maritime drug traffickers, the fact that determinations of nexus and contacts are questions for the presiding federal district court

⁷¹ In 2007 the Office of National Drug Control Policy reported an increase in maritime smuggling activity in the Western Hemisphere transit zone from 1,022 metric tons in 2006 to 1,421 metric tons in 2007. *Transit Zone*, *supra* note 70.

⁷² *Coast Guard and Mar. Transp. Subcomm. Hearing*, *supra* note 1, at ix (summary of subject matter). Of the total amount of cocaine interdicted by the U.S. Coast Guard in 2008, ninety-five percent was interdicted in the Eastern Pacific Ocean. *Id.*

⁷³ U.S. DEP'T OF STATE, BUREAU FOR INT'L NARCOTICS AND LAW ENFORCEMENT AFFAIRS, VOLUME 1: DRUG AND CHEMICAL CONTROL, INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT 383 (Mar. 2009), available at <http://www.state.gov/documents/organization/120054.pdf> [hereinafter U.S. DEP'T OF STATE, 2009 REPORT] ("Approximately 95 percent of the estimated cocaine flow toward the United States transits the Mexico-Central America corridor from its origins in South America.").

judge⁷⁴—and not the jury—to decide, is beneficial to law enforcement that conduct maritime narcotics interdictions. A judge is more likely to give strong precedential deference toward contacts that were deemed sufficient to satisfy nexus in prior cases (such as proximity to the United States, amount of narcotics seized, presence of navigational charts indicating a course bound for the United States, and matching markings between the seized narcotics and narcotics seized in the United States, etc.) thereby giving maritime law enforcement authorities specific examples of evidence that they should actively take notice of when boarding a vessel to maximize their chances of securing jurisdiction when the smuggling charges are later brought against the traffickers.⁷⁵

On the other hand, because the general requirement of establishing nexus is only that the smuggling activity must be aimed at the United States or is likely to have effects in the United States,⁷⁶ any contacts offered in support of such activity would be plausible factors in determining the existence of nexus. This implies that judicial precedent listing the commonly accepted collection of contacts presented to prove nexus are by no means to be considered exhaustive. Instead, the existence of other contacts demonstrating activity directed toward the United States could still be considered for nexus purposes. This would prove especially important should narcotics smugglers actively attempt to destroy known contacts for nexus shortly before an imminent interdiction or if they adopt new smuggling tactics that minimize the existence of known contacts that are sufficient for the authorities to establish jurisdiction. Thus, the nexus model does not mandate only a rigid application of known contacts to satisfy jurisdiction; it has an added flexibility and can be adapted to incorporate the changing nature and tactics employed by smugglers engaging in maritime trafficking.

D. *The Non-Applicability of the Nexus Requirement to Stateless Vessels*

Finally, stateless vessels are not subject to the Ninth Circuit nexus requirement thereby giving the United States complete jurisdiction over any stateless maritime vessel suspected of narcotics smuggling. The statutory language of the MDLEA defines a stateless vessel as “a vessel without nationality” and explicitly grants the United States statutory

⁷⁴ 46 U.S.C. § 70,504 (2006) (“Jurisdiction of the United States with respect to a vessel subject to this chapter is not an element of an offense. Jurisdictional issues arising under this chapter are preliminary questions of law to be determined solely by the trial judge.”); *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1256 n.1 (9th Cir. 1998) (“United States jurisdiction over vessels is no longer an element of the offense, but is a question of law for the trial court.”).

⁷⁵ This is especially important and helpful for maritime law enforcement when a vessel is about to be interdicted as United States authorities usually form the basis for jurisdiction based upon what is subsequently found aboard the ship.

⁷⁶ See *United States v. Zakharov*, 468 F.3d 1171, 1177–78 (9th Cir. 2006).

jurisdiction over smuggling activity onboard all stateless vessels.⁷⁷ Furthermore, as noted in *United States v. Perlaza*, “if a vessel is deemed stateless, there is no requirement that the government demonstrate a nexus between those on board and the United States before exercising jurisdiction over them.”⁷⁸ Determinations of statelessness are questions of fact to be decided by a jury. A jury can make a determination of statelessness if it finds: (1) that a claim of registry was denied by the claimed nation, (2) if the master, or person in charge of the vessel, failed to make a claim of nationality or registry when asked, or (3) if the master or person in charge made a claim of registry, but the claimed nation did not affirmatively or unequivocally confirm the vessel’s nationality.⁷⁹

Although stateless vessels constitute a minority of the overall vessels that are interdicted at sea, many of them constitute the “go-fast” vessels that are used in conjunction with LSVs as was the case in *Perlaza*. Stateless vessels engaged in such activity would not be subject to the nexus requirement under the MDLEA and jurisdiction over their prosecution would be automatically granted once evidence of smuggling activity was detected.⁸⁰

More importantly, the non-application of the nexus requirement to stateless vessels would permit the securing of full jurisdiction over the ever-increasing smuggling activity aboard Self-Propelled Semi-Submersible watercraft (“SPSS”).⁸¹ Built and used primarily by the wealthy and powerful Colombian drug cartels, these vessels currently constitute a significant percentage of overall maritime trafficking with the current trend suggesting that the number is only likely to increase in coming years.⁸² A recent law passed by the Colombian government has outlawed the use of such vessels for smuggling purposes and sentences

⁷⁷ 46 U.S.C. § 70,502(c)(1)(A).

⁷⁸ 439 F.3d 1149, 1167 (9th Cir. 2006) (quoting *United States v. Moreno-Morillo*, 334 F.3d 819, 829 (9th Cir. 2003)).

⁷⁹ *Id.* at 1165.

⁸⁰ 46 U.S.C. § 70,502(c)(1)(A).

⁸¹ “Known as SPSS, self-propelled semi-submersibles are something like submarines, but they cannot fully submerge . . . [t]hey are difficult to detect . . . [and] can travel up to 5,000 miles and use fuel tanks for ballast. They can carry some seven to 10 tons of drugs, and because of their low profiles and low radar signatures, the vessels are popular.” Deborah Feyerick et al., *Drug Smugglers Becoming More Creative, U.S. Agents Say*, CNN.COM (Apr. 16, 2009), <http://www.cnn.com/2009/CRIME/04/16/creative.drug.smugglers/index.html>.

⁸² Wade F. Wilkenson, *A New Underwater Threat*, MILITARY.COM (Oct. 14, 2008), <http://www.military.com/forums/0,15240,177265,00.html>. The five-year period between 2001 and 2006 saw a record increase in the rate of maritime cocaine seizures by the Coast Guard. *Id.* In 2007, however, the rate fell sharply by thirty-seven percent. Analysts believe that a substantial contributing factor to this decline is the “dramatic rise in the use of SPSS vessels to transport drugs.” *Id.* Information contained in the Consolidated Drug Database also suggests that the total number of SPSS vessels is only likely to increase and constitute an ever-expanding share of the vessels used for narcotics trafficking. *Id.*

anyone found engaging in their construction to a twelve-year prison term.⁸³ Since the vessels are essentially banned by the Colombian government, maritime registration is therefore not feasible and the vessels take on a stateless status rendering them subject to jurisdiction under the MDLEA should a vessel be discovered and interdicted. Interestingly, although the U.S. State Department reported that the number of SPSS vessels interdicted by the Coast Guard had decreased in 2010,⁸⁴ major drug trafficking organizations (“DTOs”) are increasingly turning away from flying “flags of convenience” in favor of using stateless vessels.⁸⁵

Furthermore, the United States recently passed the Drug Trafficking Vessel Interdiction Act in 2008,⁸⁶ which makes it a federal offense to operate any stateless SPSS vessel in international waters with the intent to avoid detection. Most interdictions of SPSS vessels will likely be prosecuted in conjunction with this statute or independently under the MDLEA. Whichever the case, if current projections are correct and smuggling aboard stateless SPSS vessels are likely to constitute an ever-increasing percentage of overall maritime narcotics trafficking in the years to come, then concerns about the Ninth Circuit MDLEA nexus model would become less significant as vessels subject to the nexus requirement would make up a shrinking percentage of overall trafficking.

IV. TREATY PROVISIONS AND EXTRADITION AGREEMENTS BETWEEN THE UNITED STATES AND ACTIVE DRUG TRANSIT COUNTRIES IN THE WESTERN HEMISPHERE

Suppose a suspicious vessel is interdicted by the U.S. Coast Guard along the heavily travelled Eastern Pacific trafficking route⁸⁷ that hugs the coasts of Central America and Mexico. The vessel is likely to be of Colombian, Peruvian, Venezuelan, Ecuadorian, Panamanian, or Costa

⁸³ Jeremy McDermott, *Colombia out to Sink Cocaine Barons by Banning “Drug Subs,”* THE SCOTSMAN (June 20, 2009), <http://thescotsman.scotsman.com/world/Colombia-out-to-sink-cocaine.5385360.jp>.

⁸⁴ In 2010 after a period of rapid growth, the use of SPSS vessels appeared to decrease considerably. From a total of sixty operations involving the use of semi-submersibles in 2009, semi-submersible use decreased to eighteen events in FY 2010. U.S. DEP’T. OF STATE, 2011 REPORT, *supra* note 10, at 48. The fact that fewer SPSS vessels were interdicted in 2010 does not necessarily mean that their use has become less widespread; indeed, it may be the case that smugglers are enjoying a higher success rate in evading Coast Guard patrols.

⁸⁵ “[DTOs have] sharply reduc[ed] the use of flags of convenience in favor of stateless go-fast and similar style vessels, as well as investing in more technologically advanced self-propelled semi (SPSS) and fully submersible (SPFS) vessels. The result has been . . . greater risk of prosecution to smugglers interdicted on stateless vessels, since stateless vessels are subject to U.S. jurisdiction.” *Id.* at 48.

⁸⁶ 18 U.S.C. § 2285(a) (2006) (Supp. III).

⁸⁷ The Eastern Pacific trafficking route is the most heavily traveled for all cocaine smuggling originating from South America. See *supra* note 72 and accompanying text.

Rican⁸⁸ origin. After securing permission from the origin country to board and search the ship, thereby satisfying the statutory jurisdiction requirement mandated by the MDLEA,⁸⁹ the Coast Guard discovers and seizes several hundred kilograms of cocaine cleverly hidden among various compartments on board the ship. The vessel, however, is completely devoid of any tangible evidence (maps, navigational charts, etc.) indicating that the vessel is bound for the United States or that the cocaine is likely to reach the United States as a plausible destination. Owing to the amount of narcotics discovered aboard the ship, the Coast Guard questions the crew and detains those crewmembers they feel are responsible for orchestrating the smuggling. The Coast Guard, believing there to be a good chance that the nexus jurisdictional requirement can be satisfied by matching the markings on the seized cocaine with the markings of narcotics in the DEA database of previously seized cocaine within the United States, transports the seized cocaine and the suspected crewmembers to San Diego⁹⁰ where they are turned over to the Department of Justice and detained until the U.S. Attorney is ready to press charges. Despite their initial optimism, it turns out that none of the markings on the seized narcotics match any of the markings contained in the national database. At this point, the U.S. Attorney has two main options with several possible outcomes. He could decide to file charges against the suspects and take the chance that the presiding judge can be persuaded that the nexus requirement is satisfied because of the amount of cocaine seized, and the fact that the ship was traveling along the primary cocaine maritime smuggling route within close proximity to the United States. If successful in this regard, the trial will proceed and will likely result in a conviction. On the other hand, the judge might plausibly find that the nexus contacts with the United States are insufficient and that jurisdiction over the defendants is lacking. The judge would then order the authorities to release the defendants and transport them back to their native countries or to the flag nation of the vessel under which the suspects were sailing. The suspects, however, would not be absolved of all criminal prosecution since the incriminating evidence gathered by U.S. authorities could be transferred to the authorities of the flag nation under which the vessel was

⁸⁸ I incorporate these countries into the hypothetical because of their proximity to the Eastern Pacific smuggling route and because all are designated by the U.S. State Department as either major drug-transit or major drug-producing countries. U.S. DEP'T. OF STATE, 2011 REPORT, *supra* note 10, at 4.

⁸⁹ Securing permission from the vessel's country of origin to board and inspect the ship is necessary to satisfy statutory jurisdiction under the MDLEA and is commonly granted by the origin nation. *See id.* at 49.

⁹⁰ The MDLEA provides that the appropriate venue for prosecution is the port at which the defendant enters the United States or the District of Columbia. Thus, if the ship is interdicted in the Eastern Pacific before reaching the U.S. coast, San Diego is likely to be the appropriate venue given its proximity. 46 U.S.C. § 70,504(b) (2006).

sailing. The flag nation could subsequently use that evidence, provided it was properly obtained and documented subject to that country's particular evidence code, to secure a conviction in accordance with that country's narcotic trafficking laws.⁹¹

Alternatively, if the prosecutor believes that he does not stand a satisfactory chance of establishing nexus he may refrain from pressing charges for fear of losing on the nexus jurisdictional issue.⁹² Although he might be content to simply extradite the suspects back to the flag nation of the vessel to stand trial and put the case behind him entirely, he also may feel that, given more time to investigate plausible connections between the trafficking activity and the United States, he may be able to satisfy the nexus requirement at some later point. Should these later efforts in establishing nexus prove fruitful, existing treaties and extradition agreements between the United States and the vessel or offender(s)' country of origin may still make it possible for the offender(s) to be summoned from their native country to later stand trial in the United States.⁹³ Such extradition arrangements would therefore play an important role since it can buy the prosecutor some more time to investigate contacts that may satisfy the nexus requirement. Of the twenty "major illicit drug transit countries" and/or "major illicit drug producing countries" identified around the world by the U.S. Department of State, fifteen are situated in the Western Hemisphere.⁹⁴ This Note will focus on the extradition agreements currently enjoyed by the United States between Colombia, Peru, Venezuela, Brazil, Ecuador, and Panama.⁹⁵

⁹¹ Nearly all South American countries are parties to the 1988 U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. U.S. DEP'T OF STATE, 2011 REPORT, *supra* note 10, at 141, 151, 184, 194, 234, 284, 442, 447, 503, 567, 577. Even Venezuela, the country with the most tumultuous diplomatic relationship with the United States in South America, passed the "Law against the Trafficking and Consumption of Narcotics and Psychotropic Substances" which went into effect on October 26, 2005. *Id.* at 123.

⁹² If the prosecutor decides to bring the case to trial but cannot meet the nexus requirement, it is very plausible that the Fifth Amendment's Double Jeopardy Clause would bar the United States from filing suit again should stronger evidence of nexus be discovered in the future. U.S. CONST. amend. V, cl. 2.

⁹³ To be sure, the United States must be able to show that the trafficking in question was aimed toward or had effects in the United States to satisfy personal jurisdiction before initiating extradition proceedings with a given country. Matthew W. Henning, Note, *Extradition Controversies: How Enthusiastic Prosecutions Can Lead to International Incidents*, 22 B.C. INT'L & COMP. L. REV. 347, 350 (1999).

⁹⁴ U.S. DEP'T OF STATE, 2011 REPORT, *supra* note 10, at 4.

⁹⁵ I focus on Columbia, Venezuela, Peru, Ecuador, Brazil, and Panama because of their direct access to the Eastern Pacific smuggling route that accounts for ninety-five percent of overall maritime drug trafficking. See *supra* note 72 and accompanying text. Each country, except for Brazil, is also designated by the state department as either a major drug-producing or major drug-transit country. U.S. DEP'T OF STATE, 2011 REPORT, *supra* note 10, at 4.

A. Columbia, Peru, and Venezuela

With ninety percent of cocaine that is trafficked to the United States originating in Colombia, the United States has secured strong extradition arrangements for prosecuting Colombian smugglers.⁹⁶ The current extradition agreement allows the United States to request extradition of a Colombian national who commits a crime outside of the jurisdiction of the United States so long as the laws of the requested state would provide for the punishment of such an offense in similar circumstances.⁹⁷ Narcotics trafficking is an offense recognized by Colombia and, as a result, some 855 individuals have been extradited to the United States ever since Colombia amended its constitution to allow extradition of its national citizens in 1997.⁹⁸

Similar to Colombia, Peru maintains an extradition agreement with the United States that allows for extradition for conduct that is recognized as criminal in both countries.⁹⁹ Additionally, extradition is available for an offense regardless of where the offense actually occurs, but Peruvian law requires that an individual serve his sentence in Peru before he can be extradited to the United States.¹⁰⁰ Currently, there are eleven pending U.S. extradition and provisional arrests for Peruvian citizens with four relating to narcotics trafficking.¹⁰¹

Unlike Colombia and Peru, Venezuela maintains a much more rigid and restrictive extradition agreement with the United States along with one of the overall worst foreign relationships in the Western Hemisphere. Both countries have maintained an extradition agreement since 1923, but extradition of Venezuelan citizens to the United States is forbidden by Venezuela's constitution.¹⁰² Although non-Venezuelan citizens can be extradited, such extradition typically attaches additional judicial provisions (such as placing a firm limit on the amount of years that a defendant may serve a prison term) thereby rendering extradition largely useless and ineffective.¹⁰³ Furthermore, Venezuela's weak judicial system is enticing more and more drug smugglers from Colombia to smuggle their narcotics from Venezuelan ports as Colombia continues to apply significant legal pressure to the cartels operating within its own borders. Despite such weaknesses, however, Venezuela has on occasion extradited Colombian

⁹⁶ *Id.* at 194.

⁹⁷ Extradition Treaty with the Republic of Colombia, U.S.-Colom., art. 1, Sept. 14, 1979, S. TREATY DOC. NO. 97-8 (1981) (entered into force Mar. 4, 1982).

⁹⁸ U.S. DEP'T OF STATE, 2009 REPORT, *supra* note 73, at 203.

⁹⁹ Extradition Treaty with the Republic of Peru, U.S.-Peru, art. 2, cl. 1, July 26, 2001, S. TREATY DOC. NO. 107-6 (2002); U.S. DEP'T OF STATE, 2009 REPORT, *supra* note 73, at 475.

¹⁰⁰ Extradition Treaty with the Republic of Peru, *supra* note 99, at art. 2, cl. 3; U.S. DEP'T OF STATE, 2009 REPORT, *supra* note 73, at 475.

¹⁰¹ U.S. DEP'T OF STATE, 2011 REPORT, *supra* note 10, at 448.

¹⁰² U.S. DEP'T OF STATE, 2009 REPORT, *supra* note 73, at 620.

¹⁰³ *Id.*

drug traffickers back to Colombia, thereby making extradition to the United States feasible.

B. *Brazil, Ecuador, and Panama*

The Brazilian Constitution currently forbids its citizens from being extradited abroad, but it does permit naturalized Brazilian citizens to be extradited, subject to review by the President, for crimes committed prior to their naturalization.¹⁰⁴ The current treaty allows for non-Brazilian citizens living in the country to be extradited to the United States, and this provision takes on an even greater significance when one considers that Brazil borders Colombia, Bolivia, and Peru—three of the most prolific cocaine-producing countries in the world.¹⁰⁵ Thus, should Colombian, Bolivian, or Peruvian citizens engage in maritime drug trafficking aboard a Brazilian vessel, or engage in trafficking aboard a vessel of some other national registry while having a residence in Brazil, they will be eligible for extradition. In 2009, Brazil extradited one Haitian and one Colombian to the United States on narcotics-related charges.¹⁰⁶

Similar to Brazil, Ecuador's extradition treaty with the United States prohibits extradition for Ecuadorian citizens due to constitutional limitations, but often cooperates in extraditing third-country nationals.¹⁰⁷ Ecuador is also situated between two major cocaine-producing countries, as it shares a border with Colombia to its north and Peru to its south.¹⁰⁸ Again, such a geographical position could prove helpful for securing extradition over third-country nationals caught trafficking drugs on board an Ecuadorian vessel should those offenders be brought back to Ecuador to stand trial.

Finally, Panama maintains an extradition treaty with the United States that also forbids the extradition of its citizens for constitutional reasons, but permits extradition for foreign nationals.¹⁰⁹ The significance of allowing third-nation citizens to be extradited may have even more impact in Panama than it does in either Ecuador or Brazil because Panama is "a major logistics and transshipment point for both legal and illegal products due to its geographic position and well-developed maritime and transportation infrastructure."¹¹⁰ Should traffickers from South America arrive in Panama to use the country as a waypoint for conducting their

¹⁰⁴ U.S. DEP'T OF STATE, BUREAU FOR INT'L NARCOTICS AND LAW ENFORCEMENT AFFAIRS, VOLUME 1: DRUG AND CHEMICAL CONTROL, INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT 162 (Mar. 2010), available at <http://www.state.gov/documents/organization/137411.pdf>.

¹⁰⁵ *Id.* at 160, 162.

¹⁰⁶ *Id.* at 162.

¹⁰⁷ *Id.* at 258.

¹⁰⁸ *Id.* at 256.

¹⁰⁹ *Id.* at 494.

¹¹⁰ *Id.*

smuggling aboard Panamanian vessels destined for the United States, such offenders could later be eligible for extradition.

C. Implications of Extradition Agreements on Their Impact on Prosecutorial Decision-Making

Admittedly, while several of the aforementioned major drug-transit and drug-producing countries maintain restrictive extradition arrangements with the United States that prohibit the extradition of their respective citizens, the other two major exporters of narcotics in South America maintain strong and robust extradition agreements with the United States¹¹¹—thereby increasing the likelihood that smugglers aboard vessels flagged from these countries might still be able to stand trial in the United States should strong evidence of a nexus be brought to light. Nevertheless, such information regarding the conditions and restrictions placed upon extradition would be of immense benefit to a prosecutor deciding whether or not to file charges within the restrictions imposed by a mandatory nexus requirement. If a suspected MDLEA violation arose where the existence of contacts with the United States were dubious and all the suspected offenders were citizens of the flag nation of the vessel where the trafficking occurred and that nation prohibited extradition of its nationals, then the prosecutor would likely feel compelled to bring charges anyway. Any potential benefit in waiting to file charges at a later time in the hope of identifying and securing stronger evidence of nexus would be irrelevant in light of the ban on extradition. At best, the existing contacts prove sufficient and a conviction is secured; at worst, the case is dismissed for lack of jurisdiction and the offenders are transported back to the flag nation of the vessel under which they were sailing where they will likely stand trial and be convicted for trafficking.¹¹²

Under the same set of circumstances, however, should the offenders all be of a different nationality than that of the flag nation under which the vessel is sailing, then the prosecutor would have greater flexibility with the extradition option should he discover strong indications of nexus in the immediate future. Because the suspected offenders would likely be sent back to the vessel's flag nation to face charges,¹¹³ a treaty between the flag nation and the United States banning extradition on the basis of constitutional protection of its citizens would not apply since the offenders

¹¹¹ Extradition Treaty with the Republic of Colombia, *supra* note 97, at art. 1; Extradition Treaty with the Republic of Peru, *supra* note 99, at art. 1–2.

¹¹² Passengers and crew aboard a vessel on the high seas are subject to the jurisdiction of the vessel's "flag nation" or the country where the ship is registered. United Nations Convention on the High Seas, art. 6, Apr. 29, 1958, 13 U.S.T. 2315.

¹¹³ This assumes that the flag nation wishes to prosecute them for trafficking or possession of narcotics while aboard a vessel subject to that country's jurisdiction.

are foreign to the flag nation. Thus, extradition would have a strong chance of being granted provided that the prosecutor has discovered sufficient contacts to establish nexus in the elapsed time period between when the offenders were deported from the United States and the time that extradition back to the United States was requested.

The preceding analysis thus demonstrates that the extradition treaties between the United States and some of the major drug-transit and drug-producing nations are not as restrictive as they may initially appear on their collective faces. Although most of the agreements prohibit extradition of native citizens, a prosecutor who has utilized the extra time to discover new contacts sufficient to establish nexus would not be unduly restricted by these extradition agreements unless an offender happens to be a citizen of the flag nation under which the vessel was registered.

V. CONCLUSION

Adopting the Ninth Circuit nexus model as the national standard for securing jurisdiction under the MDLEA is not likely to discourage efforts in combating maritime narcotics trafficking. Maritime drug trafficking activity continues to increase, and as long as the United States can conduct interdiction efforts within reasonable proximity to its shores, then nexus is likely to be established. Additionally, stateless SPSS drug-smuggling vessels are not subject to the nexus requirement and are projected to constitute an ever-increasing percentage of overall maritime narcotics trafficking between South America and the United States in the years to come.¹¹⁴ Should this trend continue unabated, the significance of the nexus requirement will continue to diminish as smuggling shifts to these stateless SPSS vessels where jurisdiction under the MDLEA will automatically be conferred once the narcotics are discovered.¹¹⁵

Finally, the United States maintains robust extradition agreements with some of the largest drug-exporting countries in South America. The agreement with Colombia, in particular, is especially important as it allows for extradition of Colombian nationals who violate the MDLEA in international waters. The fact that approximately ninety percent of all cocaine headed toward the United States originates in Colombia,¹¹⁶ and that hundreds of Colombian nationals have been extradited to the United States on narcotics trafficking charges in recent years,¹¹⁷ indicates that this agreement will continue to play an important role in incarcerating

¹¹⁴ See *supra* notes 83 and 85 and accompanying text.

¹¹⁵ Even if no narcotics are discovered, those aboard the stateless SPSS could still be prosecuted under the Drug Trafficking Vessel Interdiction Act. See 18 U.S.C. § 2285(a), (c) (2009).

¹¹⁶ U.S. DEP'T OF STATE, 2011 REPORT, *supra* note 10, at 194.

¹¹⁷ At least 855 Colombian nationals have been extradited to the United States since 1997. U.S. DEP'T OF STATE, 2009 REPORT, *supra* note 73, at 203.

Colombians who may initially escape jurisdiction under the MDLEA due to an insufficient nexus.

While a required Ninth Circuit-type nexus model will surely result in instances where jurisdiction cannot be established, the evolving nature of drug trafficking aboard stateless vessels combined with existing international legal mechanisms will help ensure that such instances remain uncommon. In situations where prosecutions fail to move forward in the United States because nexus cannot be established and the extradition agreement with the vessel's flag nation does not allow for extradition of an offender because he is a citizen of that nation, the offender is still likely to be punished in the flag nation for his crimes. Ultimately, a full nationwide adoption of the nexus model would not significantly reduce the potency of the MDLEA in its current iteration and the added protections it affords against unfairly subjecting foreign citizens to United States jurisdiction would place it in more appropriate accord with our constitutional safeguards of fairness and due process.

