

# Cyberspace Jurisdiction and the Implications of Sealand

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*"Cyberspace is not a solid structure located in a certain place, but a collection of digital technologies that together create an increasingly believable illusion of place."*<sup>1</sup>

## I. INTRODUCTION

By definition, the Internet is in a persistent state of flux. As new modes of communication continue to evolve, new problems will continue to pose numerous questions to lawmakers. Chief among these are questions regarding the nature of jurisdiction in an increasingly internationalized and diversified technological environment. In particular, what are the legal implications of a rogue sovereign that has no treaties with other countries and, in fact, does not exist for purposes of international law? In such a circumstance, how would the United States obtain personal jurisdiction over citizens of this nation if it is being used as a front to house computer servers operating to circumvent domestic laws?

This is the case of the Principality of Sealand, a contemporary, man-made, pirate island subject to no laws except its own—and if the rumors are true that peer-to-peer file sharing systems like Napster are or were contemplating relocating there—then the legal questions raised above will become increasingly relevant to governments and practitioners.<sup>2</sup>

The legal questions raised by the activities of Sealand—principally, its incipient willingness to aid corporations and individuals bent on flouting

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1. LARRY DOWNES & CHUNKA MUI, UNLEASHING THE KILLER APP 30 (1998).

2. See James Coates, *Vulture Capitalism Dot-Bomb Fire Sales*, CHI. TRIB., Mar. 12, 2001, at B1, available at 2001 WL 4050831:

With the music pirates at Napster forced to walk the figurative plank by a federal District Court injunction, die-hard Internet denizens led by what they call the "fair tunes" movement say they are raising funds to set up an offshore installation of Napster-type music servers that the U.S. government cannot shut down.

The installation would operate out of an abandoned North Sea military base called Sealand, where bootleg radio broadcasts are beamed into Europe by unlicensed stations. Sealand would duplicate Napster's banks of server computers that list the addresses of thousands of music file-sharing participants.

*Id.*; John Davidson, *Napster-Clones Can Run, but Not Hide*, AUSTRALIAN FIN. REV., Mar. 7, 2001, at 2001 WL 2730089 (discussing various possible havens where Napster offspring might locate and the problems associated with doing so). File sharing networks are not the only illegal activities for which "safe havens" like Sealand are being used, however. Sealand's primary source of income to date has been hosting illegal gambling operations. See Kim Gilmour, *Wish You Were Here? The Principality of Sealand Is a Self-Proclaimed Sovereign State in the North Sea. It's Also the Place to Host Your Site if You Want to Escape Draconian Internet Privacy Laws*, INTERNET MAGAZINE, Dec. 1, 2002, at 48, available at 2002 WL 7702248:

So, who on earth uses HavenCo? Is Sealand home to dodgy money-laundering schemes, defamatory content and vast amounts of online pornography? "Fifty per cent are online gambling customers," Ryan reveals. "Maybe 20 per cent are Internet payment systems customers. The rest are miscellaneous, [sic] such as security infrastructure companies, or they're sold through resellers."

the laws of other countries—are somewhat novel. Sealand demonstrates in practical terms what the Internet has long been doing: making notions of geographic jurisdiction a meaningless tool for dealing with a digital environment.

This Article explores some of the issues raised by the existence of such a rogue state, starting with a careful consideration of the history of Sealand and its self-dubbed prince, Roy Bates. After discussing the validity of its claims as a sovereign, I examine the current contours of the law regarding acquiring jurisdiction over traditional defendants in the United States. Next, I discuss how this law is being applied in U.S. courts and legislative bodies to reach defendants in cyberspace.<sup>3</sup> I then turn to the particular situation of Sealand, as an extreme model of rogue nations generally, and consider whether corporations making use of the uninhibited potential of Sealand could be subject to jurisdiction in U.S. courts, and if so, what Sealand could potentially do to limit this eventuality. Finally, I discuss the possibility of enforcing judgments or court orders against Sealand or entities interacting with it.

## II. THE PRINCIPALITY OF SEALAND

### A. A BRIEF HISTORY OF SEALAND

Sealand's geographic birth occurred during World War II as one of many British, man-made sea forts erected as part of the national defense.<sup>4</sup> These forts were little more than platforms supported by hollow concrete tubes sunk into the ocean bed and located off the British coast to repel German air attacks.<sup>5</sup> While most of these fortresses were dismantled after the War, one base, known as Roughs Tower,<sup>6</sup> was left in tact because it lay outside of Britain's territorial waters.<sup>7</sup> Paddy Roy Bates, a former Major in

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3. I focus specifically on the United States for a number of reasons. First, the United States has a relatively strong copyright protection scheme in place, and continues to show its support for protecting large media corporations. *See generally* *Eldred v. Ashcroft*, 123 S. Ct. 769 (2003) (upholding the constitutionality of the Copyright Term Extension Act of 1998). Second, the United States has numerous media plaintiffs who would likely avail themselves under American law because of convenience.

4. *See* Gilmour, *supra* note 2 (noting that "Sealand is actually an old World War II gun fortress about 10km off the east coast [of Britain]").

5. Danny Penman, *Fortress for Secret Net Deals*, THE EXPRESS ON SUNDAY, Oct. 7, 2001, available at 2001 WL 26903813 ("Sealand began life in the Second World War as Roughs Tower, one of several concrete gunneries built to shoot down German bombers.").

6. This base is sometimes referred to as "Rough Tower" in the literature. I use them interchangeably.

7. *See* Penman, *supra* note 5; *see also* *The Principality of Sealand: History*, at <http://www.sealandgov.org/history.html> (last visited Apr. 9, 2003) [hereinafter *Sealand History*] ("Roughs Tower . . . was situated at a distance of approximately 7 nautical miles from the coast, which is more than double the then applicable 3 mile range of territorial waters; to put it briefly, this island was situated in the international waters of the North Sea.").

the English military forces, "occupied the island and settled there with his family."<sup>8</sup> Proclaiming himself prince, he gave his wife the title of princess and declared his authority as an absolute sovereign.<sup>9</sup>

Shortly after this declaration, Sealand faced its first test of sovereignty when the Royal Navy approached the structure to evict the Sealanders. Convinced of his sovereignty, Bates fired a series of defensive warning shots at the ships to protect the structure and was subsequently summoned into British court on criminal charges for his actions.<sup>10</sup> Arguing that the British court lacked jurisdiction over Sealand, Bates was successful in having the charges against him dropped.<sup>11</sup> This victory reinforced Sealand's claim of sovereignty.

After this initial legal victory, Bates continued to pursue a strategy of establishing certain characteristics typical of a new country by writing a

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8. *Id.* The specific circumstances under which this occupation occurred are in dispute. Bates alleged that Roughs Tower was "deserted and abandoned." *Id.* A somewhat contradictory view emerges from the British courts:

On 17th January 1967, his appeal was heard at Chelmsford Quarter Sessions, and rejected. He had gained control of Fort Knock John [another military installation] in October 1965 by fighting *Radio City* staff who then had control, and after losing his appeal, Bates picked a fight with *Radio Caroline* staff that lasted into September 1967, in order to throw them off Rough Tower. He then packed up his equipment at Fort Knock John and took it to Fort Roughs, but because the *Marine & Etc Broadcasting (Offences) Act* had already become law in August, he did not recommence his broadcasts.

Paul John Lilburne-Byford, *Random Notes for Information Against Roy Bates, Chelmsford Magistrates' Court*, ROUGH SANDS GAZETTE, at <http://freebornjohn.com/RSG-1C.htm>, Oct. 6, 2000 (last visited Apr. 10, 2003) (on file with the Iowa Law Review).

9. Scott Simon, *Profile: Sovereign Principality of Sealand* (National Public Radio broadcast, Aug. 11, 2001), available at 2001 WL 7771276.

10. Gary Slapper, *How a Law-Less "Data Haven" Is Using Law to Protect Itself*, TIMES (London), Aug. 8, 2000, at LAW3, available at 2000 WL 2912624; see also *Sealand History*, *supra* note 7.

By late 1968, the British navy had become aware of the new situation off the coast of England. They were interested in terminating the state of affairs brought about by an error committed by the most senior military authorities without causing too much uproar.

Units of the navy entered the territorial waters claimed by Roy of Sealand. As he was aware of his sovereignty, Roy of Sealand threatened the navy by undertaking defensive activity. Shots were fired from Sealand in warning.

Since Roy of Sealand was still an English citizen, he was thus accused of extensive crimes in Britain and was summoned to an English court.

*Id.*

11. See Slapper, *supra* note 10.

national anthem, adopting a Constitution,<sup>12</sup> designing a national flag, issuing passports,<sup>13</sup> and minting coins and stamps.<sup>14</sup>

The second major test of Sealand's sovereignty occurred in August 1978 when it experienced the disadvantages of being a nation first hand. At that time, German and Dutch invaders, having lured Prince Roy and his wife away from the island on business, kidnapped their son, Michael.<sup>15</sup> Bates successfully retook the tower, freed his son, and held the invaders as "prisoners of war."<sup>16</sup> The legal effect of this incident was twofold. First, when Germany requested British intervention to assist in recovery of the German national, Britain responded that "the fortress was beyond [its] jurisdiction."<sup>17</sup> Second, Germany's acceptance of the British position and its concomitant decision to send a diplomat to negotiate the release of the German individual arguably provided "de facto recognition" of Sealand's status as an independent state.<sup>18</sup> Eventually, pursuant to the requirements of the Geneva Convention, Bates released all prisoners and declared victory in the "war."<sup>19</sup>

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12. SEALAND CONST. (1967). See *infra* Appendix for the full text of the Sealand Declaration of Independence and Constitution.

13. Passports were issued by Sealand to "those who had helped Sealand in some way, though they were never for sale." Sealand History, *supra* note 7. This last caveat on Sealand's site likely pertains to criminal activity perpetuated by individuals operating with allegedly forged Sealand passports. See Marjorie Miller & Richard Boudreaux, *A Nation for Friend and Faux: More Mind-Set Than Country, Sealand Has Drawn Admirers, Entrepreneurs and Invaders in Its Brief, Colorful History in the North Sea*, L.A. TIMES, Jun. 7, 2000, at A1, available at 2000 WL 2248584.

But while the couple were defending their borders in a spirit of adventure and tax-free living, the Principality of Sealand was hijacked on the Internet by an alleged international fraud ring with interests in weapons trading, drug smuggling and money laundering.

The rival Sealanders, based in Germany and Spain, sold their own passports, designed uniforms for a phantom army and printed labels for a Sealand-brand whiskey before police raided their "embassy" in Madrid this spring and detained their Spanish "regent." His self-styled government and diplomatic corps are under criminal investigation.

*Id.*

14. See Simon, *supra* note 9 (noting that the images of Bates and his wife "adorned Sealand coins and stamps"); see also Sealand History, *supra* note 7 ("Over time, other national treasures were developed, such as the flag of the principality of Sealand, its national anthem, stamps, as well as gold and silver coins launched as Sealand dollars.").

15. See Simon, *supra* note 9 (discussing the kidnapping of Michael and the successful resolution of the attempted coup).

16. Sealand History, *supra* note 7.

17. Slapper, *supra* note 10.

18. Sealand History, *supra* note 7.

19. *Id.*

B. NATIONMAKING

Before delving into the contemporary jurisdictional questions facing Sealand, its basic status as an independent nation needs to be evaluated against a normative legal framework. For purposes of modern international law, the starting point for such a discussion is the Montevideo Convention of 1933, which established<sup>20</sup> four basic characteristics as the foundation of any claim respecting statehood.<sup>21</sup> These characteristics include the existence of a permanent population, a defined physical territory, a government, and a capacity to enter into relations with other states.<sup>22</sup> I now turn to a brief discussion of the relevance of each of these main characteristics in making a legal determination of sovereignty.

Although no minimum number of inhabitants is necessary to the ascertainment of nationhood, the requirement of fixity is essential. The general legal requirement regarding population is that there be a "significant number of permanent inhabitants."<sup>23</sup> While size may be relevant for determination of this factor, the litmus test is likely to be the permanence of the population. For instance, Vatican City has a population of approximately 300 citizens and is a recognized sovereign nation. Antarctica, on the other hand, may have a much larger scientific community; however, due to the population's transience, it does not meet the permanence requirement of statehood.<sup>24</sup>

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20. The principles adopted in the Montevideo Convention were derived from the international legal principle of *jus gentium*, which is defined as:

The body of law, taken to be common to different peoples, and applied in dealing with the relations between Roman citizens and foreigners.—Also termed *jus inter gentes*.

"The early Roman law (the *jus civile*) applied only to Roman citizens. It was formalistic and hard and reflected the status of a small, unsophisticated society rooted in the soil. It was totally unable to provide a relevant background for an expanding, developing nation. This need was served by the creation and progressive augmentation of the *jus gentium*. This provided simplified rules to govern the relations between foreigners, and between foreigners and citizens. . . . The progressive rules of the *jus gentium* gradually overrode the narrow *jus civile* until the latter system ceased to exist. Thus, the *jus gentium* became the common law of the Roman Empire and was deemed to be of universal application."

BLACK'S LAW DICTIONARY 865 (7th ed. 1999) (citing MALCOLM N. SHAW, INTERNATIONAL LAW 15 (4th ed. 1997)).

21. Rights and Duties of States, Dec. 26, 1933, art. 1, 3 Bevens 145, 147; see also Rights and Duties of States, Jan. 18, 1935, art. 1, 49 Stat. 3097, available at 1935 WL 30023 (proclaimed by the President of the United States).

22. *Id.*; see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 201 (1987) (requiring that the population and territory in question be under the control of the government).

23. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 201 cmt. c.

24. LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASE AND MATERIALS 234 (2d ed. 1987).

The second relevant indicator of statehood is that the state must possess territory. The precise boundaries of the particular territory, however, need not be fixed in order to satisfy this requirement. Indeed, many countries have acquired statehood while their borders have remained fluid, including the United States.<sup>25</sup> Furthermore, there is no minimum size requirement necessary to achieve statehood, as in the case of Monaco, the area of which is a mere 1.5 square kilometers.<sup>26</sup> In practice, however, a critical aspect of the territory requirement is that the government is able to exercise full, independent control over the territory.<sup>27</sup>

Government is the third relevant indicator. In order to function, a government must be able to effectively exercise control over both its territory and population.<sup>28</sup> The lack of a coherent government, absent other supporting factors, militates against statehood.<sup>29</sup> As such, it is an essential precondition to statehood that some form of effective government be in place in order to achieve recognition as a state because, without such a system in place, a state cannot be bound by treaty.<sup>30</sup> Mere continuity of personality, be it racial, religious, or ethnic coherence, is insufficient to constitute a government. Thus, while Tibet maintains its continuity of personality, it lacks statehood.<sup>31</sup> Nonetheless, Finland acquired statehood only after Germany was defeated in the First World War and Russian forces were driven out by Sweden.<sup>32</sup>

Furthermore, though not required of the Montevideo Convention, the *Island of Palmas Case* addressed the necessity of independence to the function of any state.<sup>33</sup> In addition to achieving internal control, a nation state must also maintain independence from external actors. For instance, the mere formal independence of the former Soviet Socialist Republics was insufficient to constitute statehood.<sup>34</sup> In order to be a truly independent

25. See HENKIN, *supra* note 24, at 233; see also James Crawford, *The Criteria for Statehood in International Law*, 48 BRIT. Y.B. OF INT'L L. 93, 112 (1976-1977) (noting that numerous states have gained admission to the United Nations despite claims to territory, including Israel, Kuwait, and Mauritania).

26. See HENKIN, *supra* note 24, at 234.

27. See Crawford, *supra* note 25, at 111.

28. See *id.* at 116.

29. Crawford *supra* note 25, at 118.

30. *Id.* at 118-19.

31. See generally Robert D. Sloane, *The Changing Face of Recognition in International Law: A Case Study in Tibet*, 16 EMORY INT'L L. REV. 107 (2002).

32. See Crawford, *supra* note 25, at 117-18.

33. *Island of Palmas Case (U.S. v. Neth.)*, 2 R.I.A.A. 829, 846 (Perm. Ct. Arb. 1928).

34. See generally Richard C. Visek, *Creating the Ethnic Electorate Through Legal Restorationism: Citizenship Rights in Estonia*, 38 HARV. INT'L L.J. 315 (1997) (discussing the Baltic states' reclamation of independence in the wake of the dismantling of the Soviet Union); Elizabeth F. Defeis, *Armenian Constitutional Referendum: Towards a Democratic Process*, 9 TEMP. INT'L & COMP. L.J. 269 (1995) (discussing Armenia's declaration of independence from the U.S.S.R.).

state, it must be *actually* independent rather than simply designated independent.

The final factor to consider when analyzing claims of statehood is whether the alleged nation has the capacity to enter into relations with other states. Functionally, the potential to negotiate with other states is critical to the future of any state. In the seminal *Island of Palmas Case*,<sup>35</sup> Judge Huber noted that, “[s]overeignty in the relations between States signifies independence.”<sup>36</sup> However, this condition has been subject to scholarly criticism due to the fact that the ability to interact with other nations is not a precondition of statehood so much as a consequence of it.<sup>37</sup> The problematic aspect of this characteristic is further evident in that its logic is circular: A self-proclaimed nation cannot be a state until it interacts with other nations; however, other nations will not interact with a non-state. The probable consequence of such reasoning is that a nation can only become a nation by forcing other sovereigns to take it seriously.

A further consideration of whether a nation has *actually* achieved *de facto* acceptance in the international community is whether it has been recognized. It typically occurs in the form of official recognition by an international body, such as the United Nations. As a purely formalistic matter, recognition is not required to achieve statehood. Although it may signal that a new state has come into being, recognition has no binding, legal effect.<sup>38</sup> Nevertheless, withholding recognition may play a role in the failure to find statehood.<sup>39</sup> For instance, a nation born of an illegal act produces an affirmative obligation on members of the international community not to recognize such a state.<sup>40</sup> Under normal circumstances, however, an unrecognized state is due international rights and is responsible for meeting its obligations under international law.<sup>41</sup>

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35. *Island of Palmas Case*, 2 R.I.A.A. at 829.

36. *Id.* at 838.

37. *See* Crawford, *supra* note 25, at 119.

38. LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 14 (1995).

39. *Id.*

40. RESTATEMENT (SECOND) OF FOREIGN RELATIONS § 202 (1965). A situation similar to this one occurred in 1965 when the United Nations refused to recognize the establishment of a dissident, white supremacist government in Southern Rhodesia. *See* J.G. STARKE, *AN INTRODUCTION TO INTERNATIONAL LAW* 102 (7th ed. 1972) (citing the 1970 U.N. Security Council Resolution urging all states not to recognize the illegal regime).

41. HENKIN, *supra* note 24, at 232. Taiwan is an excellent example of this concept; although China did not recognize its independence, Taiwan has entered into many international agreements. *See* KATHERINE C. SPELMAN, *TRADEMARK AND COPYRIGHT ENFORCEMENT IN SOUTHEAST ASIA AND AUSTRALIA* 352 (1994) (acknowledging Taiwan's reciprocal protection of trademarks in various agreements).



## C. THE LEGAL STATUS OF SEALAND

Not surprisingly, Sealand's status as an independent nation is contested. While a number of factors militate in favor of a finding that Sealand is an independent state, this claim has never been fully tested under the law. This Section briefly considers the merits of Sealand's claim in light of the Montevideo factors and one of the supplemental factors.

## 1. Population

It is little debated that the population of Sealand is quite small. Even during World War II, when the structure then known as Roughs Tower achieved its peak occupancy, the platform held only 200 men.<sup>42</sup> The current census places the number somewhere in the teens.<sup>43</sup> Nevertheless, the dispositive factor, as mentioned earlier, is not the population's size, but rather its stability.<sup>44</sup>

In this regard, factors are somewhat mixed. Cutting in Sealand's favor is the fact that its founders spent most of the last thirty years inhabiting the island.<sup>45</sup> In addition, Bates has recently entered into a business relationship with HavenCo, a "company that offers customers a place in which to locate their computer servers that's safe."<sup>46</sup> As a result, a number of the technicians live at the site, including "cyberpunk pioneer Ryan Lackey," who "tries to spend half his time on Sealand."<sup>47</sup>

In spite of this, the only court to consider whether the population of Sealand was sufficiently stable to constitute a fixed citizenry rejected the claim. In 1978, a German national filed a declaratory action to confirm that, by virtue of his attainment of citizenship in the Principality of Sealand, he had lost his German citizenship. Rejecting the claim, the court noted that

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42. See Simon, *supra* note 9 (noting that during the war, "[t]wo hundred men were bunkered down in the fort's concrete pillars, along with food and bullets, while canons blazed on top").

43. See *Nationette*, 25 WILSON Q., Oct. 1, 2002, at 12, available at 2001 WL 13157014:

Resist the urge to make Sealand your next vacation getaway. Access is restricted to the 11 "techies" who live there, Prince Roy and his wife, Princess Joan (whose face is on the currency), and other government-sanctioned officials. Even customers cannot come on board uninvited. Still, citizenship isn't an impossible goal. According to another "official" Web site ([www.principality-sealand.net](http://www.principality-sealand.net)), Sealand, as of September 1998, had a citizen population of 160,000 (and a national surface area an eighth the size of a football field). Most of the citizens are businesspeople, and all of them reside elsewhere.

*Id.*

44. See *supra* notes 23–24 and accompanying text.

45. Simon, *supra* note 9.

46. *Id.*

47. Gilmour, *supra* note 2.

only 106 nationals of unknown permanence resided on Sealand, and as a consequence, "the requisite communal life [was] lacking."<sup>48</sup>

Also problematic to the claim of a fixed population is the recent decision by the founders of the alleged nation to retire to the mainland for health reasons.<sup>49</sup> In addition, the technicians hired by HavenCo turn over rapidly due to the extremely primitive nature of the accommodations. "We have hundreds of people send in resumes," says Lackey, "but it's hard to get people to stay once they show up, because then they realize they're stuck here for a couple of weeks at a time."<sup>50</sup>

Thus, while there is some stability in an extremely small segment of the Sealand population, the vast majority of the inhabitants at any given time tend to be transients.

## 2. Territory

Geographically, the man-made land mass that constitutes Sealand is well defined. It occupies a discernable, physical space on the globe. The problems that Sealand faces, however, in meeting the territory requirement of the Montevideo factors are twofold. First, it is unclear whether man-made structures constitute physical territory for the purpose of international law. Second, presuming that man-made structures can be territory, there is a standing question as to whether Britain's abandonment of the structure included a relinquishment of the footholds of the continental shelf on which Roughs Tower was originally erected.

In response to the first question, a legal opinion prepared by Dr. Walter Leisner on behalf of Sealand suggested that artificial structures can constitute territory. In Leisner's opinion, the critical factor was that the structure be "immovably fixed to the surface of the earth."<sup>51</sup> Furthermore, he argued that "'national territory' . . . is a legal, not a geographical term, a 'spatial area in which a state becomes active' exists in the case of the Principality of Sealand."<sup>52</sup>

Additional support for Sealand's position was provided by a second legal opinion prepared by Dr. Bela Vitanyi.<sup>53</sup> In his paper, Vitanyi compared

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48. Status of the Principality of Sealand, VG Cologne, *Deutsches Verwaltungsblatt* [DVBl] (1978), 510, *cited in* David D. Caron, *International Law: Cases and Materials*, at vii-1 (May 2, 2003) (unpublished manuscript, on file with the Iowa Law Review) [hereinafter *Sealand Status*].

49. *See* Simon, *supra* note 9 ("Roy and Joan Bates moved off of Sealand a year and a half ago. They're growing old, and it's a rough and rusty way to live. They're looking for a retirement home in Florida.").

50. Gilmour, *supra* note 2.

51. Walter Leisner, *Legal Expert Opinion on Jus Gentium Situation of the Principality of Sealand* (Feb. 5, 1975) (unpublished manuscript, on file with the Iowa Law Review).

52. *Id.*

53. Bela Vitanyi, *Legal Opinion About the International Status of the Principality of Sealand* (May 1978) (unpublished manuscript, on file with the Iowa Law Review).

the position of Sealand to a number of small sovereigns described in a United Nations resolution on emerging micro-sovereigns.<sup>54</sup> He argued that the U.N.'s statement—"the questions of territorial size, geographical isolation and limited resources should in no way delay the implementation of . . . the Granting of Independence . . . with respect to these Territories"—proves that international law is prepared to accept an independent state like Sealand.<sup>55</sup>

Vitanyi's argument, however, is deeply flawed in at least two ways. First, the countries discussed in U.N. Resolution 2709 are all real geographic land masses situated on terra firma. Second, and far more vexing, Vitanyi appears to deliberately take the U.N.'s reasoning out of context. The unedited quotation states that the U.N. "[e]xpresses its conviction that the question of territorial size, geographical isolation and limited resources should in no way delay the implementation of *the Declaration on the Granting of Independence to Colonial Countries and Peoples* with respect to these Territories."<sup>56</sup>

The words omitted from Vitanyi's quotation change the character of his argument substantially. In particular, it is clear from the full quotation, as well as the surrounding document, that the purpose of U.N. Resolution 2709 is to provide former colonies fast-track recognition for the purpose of redressing the harms of colonization. Thus, the U.N.'s statement could actually be read to undermine the claim of Sealand: While normally the factors contemplated by the international community might include territorial size, geographical isolation, etc., in the particular case of former colonies, these questions need not be considered. However, since Sealand is not a former colony, this argument is not applicable.

Leisner's argument is somewhat more attractive, but equally problematic. Although it is true that sovereignty is a legal fiction, it is also true that no sovereign has ever been created out of artificial land.<sup>57</sup> In fact, such a possibility was explicitly rejected in the German citizenship case, when the court found that man-made installations did not constitute territory under international law.<sup>58</sup> Furthermore, creating such a precedent could pose huge international legal problems, particularly if new structures began to impede navigable waterways.

54. *Id.*

55. *Id.* (quoting G.A. Res. 2709, U.N. GAOR, 25th Sess., at 2, U.N. Doc. A/RES/2709 (1971)).

56. G.A. Res. 2709, *supra* note 55, at 2 (emphasis added to the words which Vitanyi elided from the original text).

57. Nations have, however, expanded their physical holdings artificially. Most notably, Japan has recently created an artificial island on which it is locating its new airport. See *Kansai Airport Can Expand Traffic Drastically*, JAPAN TRANSP. SCAN, July 29, 2002 (noting that the airport is built on an artificial island in Osaka bay).

58. Sealand Status, *supra* note 48.

Bracketing, for the moment, the question of whether a man-made structure can qualify for sovereignty, the question still remains whether Britain abandoned its footholds on the continental shelf when it abandoned the physical structure of Roughs Tower. Not surprisingly, Britain asserts that it has not relinquished sovereignty over the sea bed.

The U.K. now states that under U.K. law the Crown has lost title to Rough Tower itself, but since it is within U.K. territorial waters[,] U.K. sovereignty over the sea bed beneath Rough Tower is still vested in the Crown. Therefore[,] Roy Bates cannot claim ownership other than the right of a squatter to squat lawfully on former Crown property that is within the UK and subject to all U.K. laws.<sup>59</sup>

Vitanyi's answer to this argument relies on a theory of the continental shelf first expressed by President Truman on September 28, 1945, when he remarked that "the Government of the United States regards the . . . continental shelf beneath the high seas but contiguous to the coasts of the United States as . . . subject to its jurisdiction and control. . . . The character as high seas of the waters above the continental shelf . . . are in no way thus affected."<sup>60</sup>

After a number of other states made similar proclamations, a compromise was reached over the definition of the property interests in Article 1 of the Continental Shelf Convention of April 29, 1958.<sup>61</sup> This compromise provided that

the term "continental shelf" is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.<sup>62</sup>

According to this definition, Vitanyi argues that "[i]t follows therefore from the Convention that neither the continental shelf nor the superjacent water forms part of the territory of the coastal state."<sup>63</sup> He further characterizes the coastal state's rights to the continental shelf as a kind of

"functional sovereignty"; the State only acts as a sovereign in exercising the above-mentioned functions. The same conclusion

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59. Lilburne-Byford, *supra* note 8.

60. Proclamation No. 2667, 10 Fed. Reg. 12,303 (Sept. 28, 1945).

61. Convention on the Continental Shelf, Apr. 29, 1958, art. 1, 15 U.S.T. 471, 473, 499 U.N.T.S. 311, 312.

62. *Id.*

63. Vitanyi, *supra* note 53.

applies to the construction and the ownership of the installations on the continental shelf. The coastal State does not enjoy the exclusive right to construct and own such installations except for those necessary for the exploration and exploitation of the natural resources of the continental shelf.<sup>64</sup>

Nevertheless, Vitanyi's argument appears to ignore the express provisions of Article 2 of the Continental Shelf Convention, when noting the following:

1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.
2. The rights referred to in paragraph 1 of this article are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, *or make a claim to the continental shelf, without the express consent of the coastal State.*
3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.<sup>65</sup>

Assuming that Vitanyi's argument is correct, that authority of the coastal state over the continental shelf is limited to some kind of mineral property right, it nevertheless loses sight of the fact that an aspect of that right is the ability to limit claims of ownership over territory to which the state has legal access.

Additional persuasive authority from a court decision in the United States seems to bolster Britain's claim. At approximately the same time that Roy Bates was declaring Sealand an independent nation, on the other side of the Atlantic, several corporations in the United States sought to approximate the same thing.

*United States v. Ray* involved attempts by several businessmen to create independent states. They planned to dredge and fill two artificial islands on coral reefs just outside the territorial waters of the United States—approximately four and one-half miles southeast of Florida.<sup>66</sup> This was to be a major project involving 2600 acres and associated waterfront property that would have been valued at approximately one billion dollars.<sup>67</sup> Concerned about potentially causing irreparable damage to the reefs, the U.S. filed its

64. *Id.*

65. Convention on the Continental Shelf, *supra* note 61, 15 U.S.T. at 473, 499 U.N.T.S. at 312, 314.

66. 423 F.2d 16, 17–18 (5th Cir. 1970).

67. *Id.* at 18.

first count for injunctive relief claiming trespass. The second count charged the entrepreneurs with unlawful conduct for lacking permission from the Secretary of the Army to effectuate the scheme.<sup>68</sup>

The trial court held that the outer continental shelf was a natural resource under the definitions of the Continental Shelf Convention and its enacting legislation. It granted the injunction on the basis of the government's second count while denying the common law trespass claim.<sup>69</sup>

On appeal, the Fifth Circuit reversed the district court's ruling on the second count on the grounds that even if the coastal state is inactive in pursuing its rights to explore and exploit its rights under the Convention, it is nevertheless entitled to restrict other parties from availing themselves of these rights without express consent.<sup>70</sup> The same reasoning adopted by the Fifth Circuit would appear to apply to Britain's claim as well.<sup>71</sup> As such, there is a plausible argument to be made that Sealand does not constitute territory in the sense that the Montevideo factors require.

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68. *Id.*

69. *Id.* at 18–19.

70. On this subject, the court remarked that

the only relief requested is restraint from interference with rights to an area which appertains to the United States and which under national and international law is subject not only to its jurisdiction but its control as well. . . .

Neither ownership nor possession is, however, a necessary requisite for the granting of injunctive relief. . . .

. . . .

. . . [T]he evidence shows that protective action by the Government to prevent despoliation of these unique natural resources is of tantamount importance. There was convincing evidence that the activities of defendants in dredging and filling the reefs has and would continue to kill the sensitive corals. . . . Obviously the United States has an important interest to protect in preventing the establishment of a new sovereign nation within four and one-half miles of the Florida Coast.

*Id.* at 22–23.

71. Sealand might assert a number of possible legal theories to get around this line of argumentation, none of which are particularly compelling. One theory is that the American case is not factually on point because Britain erected Roughs Tower and then chose to abandon it; thus, while it may have had an interest in the seabed, it abdicated that interest when it chose to abandon the property. This is, essentially, Vitanyi's position. *See Vitanyi, supra* note 53. Another factual distinction between the two cases is that whatever irreparable damage is caused by Roughs Tower occurred before Bates took control of the property. Because there is no indication of ongoing harm, Sealand can argue that Britain does not have the same interests at stake as the United States did. Of course, this argument would become less compelling if Sealand began to crumble and pose a greater threat to the navigation of vessels. Another distinction between the two cases is the fact that the United States took immediate action to prevent the further development of the independent nations while Britain failed to assert its rights. At some point, it seems that Britain's failure to act ripens into explicit acceptance of the independence of Sealand.

### 3. Government

Sealand has a fairly strong claim that its government has been enduring and stable. As discussed earlier, it has a Constitution, money, postage, and a royal family, and it issues passports.<sup>72</sup> Likewise, it has historically exercised its authority over its citizens, as it did during the hostage crisis.<sup>73</sup>

Other factors, however, undermine the notion of Sealand as having an enduring government. In 2001, Sealand made a business decision that, if successful, essentially would have ceded its government to HavenCo.<sup>74</sup> Another consideration is the fact that the "Office of the Head of State" of Sealand lists its postal address as, "Sealand 1001, Sealand Post Bag, Felixstowe IP11 9SZ, U.K."<sup>75</sup> This fact seems to undermine the notion that Sealand truly operates independently of Britain.

### 4. International Relations

Sealand has had precious little interaction with foreign governments. The high water mark of its foreign policy came in the wake of the hostage crisis when Germany sought to recover one of its citizens.<sup>76</sup> Arguably, requiring Germany to negotiate with Sealand provided some legitimacy to the government in the eyes of the international community.

Nevertheless, one of the legal opinions prepared on Sealand's behalf expressly rejects this claim, stating that

[i]t is . . . questionable whether the Principality of Sealand can be deemed to have been recognized by the Federal Republic of Germany on the basis of the acts of the government of a municipal administration authority [since] they acted vis-à-vis a German national and not vis-à-vis an authority of the Principality of Sealand.<sup>77</sup>

Thus, the true ability of Sealand to interact with foreign nations remains, at best, untested. Nevertheless, Sealand has arguably been subject to some implicit recognition by foreign governments, which may tend to strengthen a claim of independence.

Sealand, arguably, has received a limited amount of official recognition as an independent nation. For example, there are two court cases against

72. See *supra* Part II.A.

73. *Id.*

74. Telephone Interview with the Chief of the Bureau of Internet Affairs, Sealand (Apr. 27, 2003) [hereinafter Interview]. In all conversations with this spokesperson, the author was only able to conduct the interview if the actual name of the interviewee was not disclosed, even to the interviewer.

75. *Principality of Sealand—Fact File*, at <http://www.fruitsofthesea.demon.co.uk/Sealand/factfile.html> (last visited Apr. 1, 2003) (on file with the Iowa Law Review).

76. See *supra* Part II.A.

77. Leisner, *supra* note 51.

Roy Bates in which British courts ruled that they had no jurisdiction to hear the case.<sup>78</sup> Other arguable indicators of de facto sovereign recognition include (1) the decision by the British Department of Health and Social Security to exempt Bates from paying National Insurance while in Sealand; (2) Britain's failure to ever physically repossess Sealand; and (3) the decision by British law enforcement not to act on complaints that Sealand had fired warning shots at the crew of a vessel of unknown origin.<sup>79</sup>

In his opinion that Sealand is, in fact, sovereign, Dr. Walter Leisner pointed to two particular factors that tended to demonstrate recognition by the international community. The first of these factors is the acceptance of passports issued by Sealand in the international community at large. Nevertheless, Leisner recognizes that

[o]fficial endorsement with a visa and associated recognition of (diplomatic) passports of the Principality of Sealand by Great Britain, France and the Federal Republic of Germany . . . is [a] doubtful [ground on which to assert] . . . recognition on the part of these states . . . because it was not the Foreign Office authorities of these states that became active to this end.<sup>80</sup>

Then, in the alternative, Leisner argues that “[a]t the [same] time, however, the United Nations cautioned against recognising Manchukuo passports which means that recognition of passports is associated with a certain legal effect.”<sup>81</sup> Consequently, he argues that because

England and France . . . refused to officially endorse the passports of the German Democratic Republic with a visa as long as and on the grounds that the German Democratic Republic had not been recognised by their governments[,] . . . England and France can therefore be deemed to have recognized the Principality of Sealand as a state.<sup>82</sup>

This argument rests, however, on the tenuous assumption that the negative, historical non-recognition necessarily implies positive recognition of Sealand today.

The second factor that Leisner heavily relies on in making his determination that Sealand is a sovereign state is a letter from the British Embassy in Bonn, Germany, to Sealand dated July 4, 1973.<sup>83</sup> Recounting the contents of the letter, Leisner opines that it

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78. *Sealand History*, *supra* note 7.

79. *Id.*

80. Leisner, *supra* note 51.

81. *Id.*

82. *Id.*

83. No copy of this letter is available to the author; it is only mentioned by reference in Dr. Leisner's legal opinion. *See id.*



contains clear indicators for the British Foreign Office authorities recognising the Principality of Sealand as a state: It was expressly ascertained that the state was founded, sovereign rights could be safeguarded without the authority protesting. Due to the geographical closeness of the Principality of Sealand to Great Britain and the fact that special interests are affected which for Great Britain results in its existence, the state can be deemed to have a certain 'duty to respond': If the state did not intend to recognise the Principality of Sealand, it would have to make negative statements instead of expressly noting the existence of the Principality of Sealand. But the latter has happened.<sup>84</sup>

Yet, despite Dr. Leisner's opinion and the alleged letter, the official position of the United Kingdom Foreign Office is that it "does not recognize Sealand as an independent state and we believe no other country does either."<sup>85</sup> Furthermore, the British law enforcement agency Home Office has publicly stated that "it expects Sealand and any other business operating on it to follow British laws."<sup>86</sup> Across the Atlantic, the U.S. Department of State has also publicly declared that there are "no independent principalities in the North Sea; they are just Crown dependencies of Britain."<sup>87</sup> As such, it would appear that the current position of both the United States and the United Kingdom is that there is no such thing as the Principality of Sealand.

Given the legal circumstances of Sealand, it is unlikely that it satisfies the requisite criteria for sovereignty under modern international law. Nevertheless, the quasi-legal halo that surrounds the island continues to pose potential jurisdictional problems for plaintiffs in the United States and elsewhere. The next Part discusses some of these problems in search of a solution.

### III. ESTABLISHING JURISDICTION IN CYBERSPACE

The touchstone for establishing jurisdiction to hear a case is acquisition of personal jurisdiction. Personal jurisdiction over a defendant is required for a court to enter a valid judgment imposing a personal obligation against the defendant or to create a duty in favor of the plaintiff.<sup>88</sup> The existence of personal jurisdiction depends upon "a sufficient connection between the

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84. Leisner, *supra* note 51.

85. Mara D. Bellaby, *Sealand Offers Online 'Data Haven'*, USA TODAY, June 28, 2000, at 12A, available at <http://www.usatoday.com/life/cyber/tech/ctil62.htm> (on file with the Iowa Law Review).

86. *Id.*

87. Matt Rosenberg, *Sealand Is Not a Country*, ABOUT.COM, Aug. 11, 2000, at <http://geography.about.com/library/weekly/aa081100a.htm?terms=Sealand> (on file with the Iowa Law Review).

88. *Kulko v. Super. Ct. of Cal.*, 436 U.S. 84, 91 (1978).

defendant and the forum state to make it fair to require defense of the action in the forum."<sup>89</sup> In an international context,

"jurisdiction, to be rightfully exercised, must be founded either upon the person being within the territory, or the thing being within the territory; for, otherwise, there can be no sovereignty exerted . . . no sovereignty can extend its process beyond its own territorial limits to subject either persons or property to its judicial decisions."<sup>90</sup>

Currently, the burdens for obtaining federal personal jurisdiction in most cases require the same kinds of contacts demanded by the individual states.<sup>91</sup> Under the Federal Rules of Civil Procedure, service of process can only be made "pursuant to the law of the state in which the district court is located, or in which service is effected."<sup>92</sup> This rule has been interpreted as "limit[ing] the federal courts' ability to subject defendants to long-arm jurisdiction to the same circumstances in which a state court . . . could do so."<sup>93</sup>

Additionally, in the *Omni Capital* case, the United States Supreme Court held that a federal court is limited by Rule 4(e) to the amenability standards of the state in which they sit. Thus, courts cannot rely on national contacts alone unless there is a federal statute, a state statute, or a rule that explicitly authorizes service outside of the state in which the federal court sits.<sup>94</sup> Therefore, federal courts can acquire personal jurisdiction only over defendants who are subject to "jurisdiction in the state in which the district court is located"<sup>95</sup> unless a federal statute authorizes the exercise of jurisdiction on a wider basis.<sup>96</sup>

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89. *Id.*

90. See Sean K. Hornbeck, Comment, *Transnational Litigation and Personal Jurisdiction over Foreign Defendants*, 59 ALB. L. REV. 1389, 1391 (1996) (quoting JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 539 (Arno Press, Inc. 1972) (1834)).

91. Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 TEX. L. REV. 1589, 1593 (1992).

92. FED. R. CIV. P. 4(e)(1).

93. Casad, *supra* note 91, at 1594; see *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 715 n.6 (1982) (stating a federal court must rely upon the long-arm statute of the state in which it sits to reach a foreign defendant). For a scholarly criticism of this case, see Peter A. Diana & Michael Register, *Personal Jurisdiction in Flux: Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 69 CORNELL L. REV. 136 (1983). See also *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 111 (1987) (rejecting the proposition that federal courts can exercise personal jurisdiction in federal question cases using the federal common law standard of amenability).

94. *Omni Capital*, 484 U.S. at 105.

95. This statement is accurate except as provided for by the 100-mile bulge provision of Rule 4(k)(1)(B).

96. See Casad, *supra* note 91, at 1595 (arguing that federal courts should not be bound by contacts to the state in which they sit).

The standard for federal question cases in which a foreign corporation is served under Rule 4(h)(3) is somewhat unclear. The general rule is that the foreign corporation must have sufficient contact with the state in which the court sits to be amenable to personal jurisdiction.<sup>97</sup> Some courts, however, suggest that there is an independent federal minimum contacts standard against which foreign corporations may be judged. Under this requirement, personal jurisdiction can be asserted over a foreign corporation if the foreign corporation's contacts with the United States, as a whole, are sufficient.<sup>98</sup>

Furthermore, even in situations in which there is a statute explicitly authorizing service of process outside of the state in which the court sits, some "federal courts have held that the defendant nevertheless must have contacts with the state in which the federal court sits" in order to satisfy the requirements of *International Shoe*.<sup>99</sup> Thus, in almost all cases, including those in which a foreign corporation is involved or a statute expressly authorizes service of process outside of the state, a federal court will require sufficient minimum contacts with the state in which it sits in order to assert federal personal jurisdiction.

#### A. REQUIREMENTS FOR ASSERTING GENERAL PERSONAL JURISDICTION

General personal jurisdiction allows a plaintiff to bring a suit against a foreign defendant in a particular forum state (federal court sitting in a particular state) for any act of the foreign defendant, whether specifically related to the acts in the forum state or not. A federal court can assert general personal jurisdiction over a foreign corporation on one of two different theories. First, a federal court can assert jurisdiction over a foreign corporation or individual if that entity has "continuous and systematic" contacts with the state in which the federal court sits.<sup>100</sup> A second theory provides that general personal jurisdiction may be asserted if a foreign corporation has "appointed an in-state agent for service of process as a condition of qualifying to do business in the state" in which the federal court sits.<sup>101</sup> Each of these two theories is applied differently by the lower

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97. See *Maruzen Int'l, Co. v. Bridgeport Merchandise, Inc.*, 770 F. Supp. 155, 160 (S.D.N.Y. 1991) (citing *World-Wide Volkswagen Corp., v. Woodson*, 444 U.S. 286, 297-98 (1980)).

98. See *First Flight Co. v. Nat'l Carloading Corp.*, 209 F. Supp. 730, 740 (E.D. Tenn. 1962).

99. *Casad*, *supra* note 91, at 1596 (referring to *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945)).

100. Pierre Riou, *General Jurisdiction over Foreign Corporations: All that Glitters Is Not Gold Issue Mining*, 14 REV. LITIG. 741, 742 (1995) (citing *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 438 (1952)); see also *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 416 (1984) (requiring the same nature of contacts as those found in *Perkins*).

101. Riou, *supra* note 100, at 742-43.

courts, and the constitutionality of the latter has been questioned by some courts.<sup>102</sup> I briefly discuss each of these theories in turn.

1. Asserting General Personal Jurisdiction Based on the Presence of “Continuous and Systematic Contacts”

There is a split among the circuit courts over the theory that “systematic and continuous” contacts with a forum state are sufficient to assert general personal jurisdiction. The Tenth Circuit holds that a foreign corporation or individual is amenable to general personal jurisdiction *solely* on the basis of the foreign entity’s “continuous and systematic” contacts with the foreign state.<sup>103</sup> The Fourth and Fifth Circuits follow the baseline approach adopted by the Tenth Circuit.<sup>104</sup> These courts, however, require an additional step to determine if the assertion of general personal jurisdiction is “fair and reasonable.”<sup>105</sup> Thus, under the Fourth and Fifth Circuits’ approach, general personal jurisdiction can be asserted only if the foreign corporation meets the “continuous and systematic” contacts test from *Perkins* and if it is also found to be “fair and reasonable” under the factors listed in *World-Wide Volkswagen*.

2. Asserting General Personal Jurisdiction Based on an Appointment by the Foreign Corporation of an In-State Agent for Service of Process

The majority of courts have held that the appointment of an agent for service of process by the foreign corporation in the forum state is sufficient to render the foreign corporation amenable to general personal jurisdiction.<sup>106</sup> The First, Third, and Eighth Circuits have adopted this view,

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102. *Id.*

103. *Id.* at 769; *see Behagen v. Amateur Basketball Ass’n of U.S.*, 744 F.2d 731, 733 (10th Cir. 1984) (stressing that service of process on the foreign corporation’s appointed agent in the forum state was not sufficient to assert general personal jurisdiction); *Schreiber v. Allis-Chalmers Corp.*, 611 F.2d 790, 793–94 (10th Cir. 1979) (holding that “continuous and systematic” contacts are necessary for the assertion of general personal jurisdiction).

104. *Riou, supra* note 100, at 770.

105. *Id.* (discussing the fact that these circuits apply the “fair and reasonable” standard from *World-Wide Volkswagen*). *World-Wide Volkswagen* held that “a state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist ‘minimum contacts’ between the defendant and the forum state,” and when it would be reasonable to require the defendant to defend suit there in light of factors including: “the forum state’s interest in adjudicating the dispute; the plaintiff’s interest in obtaining convenient and effective relief; the interstate judicial system’s interest in obtaining the most efficient resolution of the controversies; and the shared interest of the several States in furthering fundamental substantive social policies.” *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291–92 (1980) (citations omitted); *Lee v. Walworth Valve Co.*, 482 F.2d 297, 300–01 (4th Cir. 1973); *Ratliff v. Cooper Lab., Inc.*, 444 F.2d 745, 748 (4th Cir. 1971); *Follette v. Clairol, Inc.*, 829 F. Supp. 840, 844–47 (W.D. La. 1993).

106. *Riou, supra* note 100, at 772.

as has the *Restatement (Second) of Conflict of Laws*.<sup>107</sup> Although some commentators suggest that acquisition of jurisdiction under these circumstances strains constitutionality, this issue has not yet been resolved.<sup>108</sup>

#### B. REQUIREMENTS FOR ASSERTING SPECIFIC PERSONAL JURISDICTION

The notion of specific personal jurisdiction is based upon the conduct of the defendant within the forum state that directly relates to the cause of action upon which the suit is founded. Traditionally, the Supreme Court based its assertion of specific personal jurisdiction on a theory of physical power over a defendant.<sup>109</sup> Thus, in *Pennoyer v. Neff*, the Court held that personal jurisdiction could only be asserted over persons or property located within that state.<sup>110</sup> However, as a result of the Industrial Revolution and the concomitant emergence of transnational corporations, the Court had to find new ways to expand jurisdictional principles.<sup>111</sup>

This expansion was articulated in *International Shoe Co. v. Washington*,<sup>112</sup> in which the Court held that the assertion of specific personal jurisdiction was proper when the defendant had sufficient minimum contacts with the forum state, "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"<sup>113</sup> The Court offered two for consideration in making this determination: the frequency of the defendant's contact with the forum state, and the connection between the

107. *Id.*; see *Bane v. Netlink, Inc.*, 925 F.2d 637, 640-41 (3d Cir. 1991); *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1199 (8th Cir. 1990); *Holloway v. Wright & Morrissey, Inc.*, 739 F.2d 695, 696-97 (1st Cir. 1984). As noted above, the Fourth, Fifth, and Tenth Circuits reject this view and require "continuous and systematic" contacts with the forum state. In support of the proposition that the appointment of an agent for service of process by the foreign corporation in the forum state is sufficient to render the foreign corporation amenable to general personal jurisdiction, the courts that adopt this position cite to *Gold Issue Mining & Milling Co. v. Pennsylvania Fire Insurance Co.*, 243 U.S. 93 (1917), *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165 (1939), *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982), *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988), or the RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 44 (1971). *Riou, supra* note 100, at 743.

108. However, many commentators state that these cases either (1) do not stand for the proposition that general personal jurisdiction may be asserted against a foreign corporation that appoints an agent for service of process in the state, or (2) argue that acquiring general personal jurisdiction in this manner is unconstitutional. See *Riou, supra* note 100, at 742 (arguing that the cases used in support of allowing jurisdiction on these grounds do not actually stand for the proposition and that the correct test should exclusively be "continuous and systematic" contacts); D. Craig Lewis, *Jurisdiction over Foreign Corporations Based on Registration and Appointment of an Agent: An Unconstitutional Condition Perpetuated*, 15 DEL. J. CORP. L. 1 (1990) (arguing that the assertion of general personal jurisdiction based on the appointment of an agent to receive service of process in the forum state is unconstitutional).

109. Hornbeck, *supra* note 90, at 1395.

110. 95 U.S. 714, 722 (1878).

111. Hornbeck, *supra* note 90, at 1396.

112. 326 U.S. 310 (1945)

113. *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

cause of action and those contacts.<sup>114</sup> As noted above, if the contacts with the forum state are “continuous and systematic,” then the foreign corporation or individual will be subject to general personal jurisdiction. If the contacts do not meet this standard, then the defendant’s contact with the forum state must be related to the cause of action upon which the suit was based.

The evolution of *International Shoe* has developed in such a way that courts must now determine whether the assertion of specific jurisdiction offends the Due Process Clause and whether the assertion would be fair and reasonable to the parties involved.<sup>115</sup> I now turn to how these tests have been specifically articulated by the Supreme Court.

### 1. Asserting Specific Personal Jurisdiction Under *World-Wide Volkswagen*

The Court in *World-Wide Volkswagen* further articulated the two-prong test offered in *International Shoe*. In describing what is required to satisfy the minimum contacts requirement, the Court emphasized whether it was foreseeable to the defendant that the suit would be brought in the forum state in light of the defendant’s purposeful availment of the privileges of the forum state.<sup>116</sup> In determining whether the suit was foreseeable under this definition, the Court looked to four factors: the defendant’s intent, his knowledge, his expectations, and his financial benefit.<sup>117</sup> The fourth prong, financial benefit, however, is not sufficient to maintain personal jurisdiction absent the presence of the other three factors.<sup>118</sup> The key questions that must be asked to determine the presence of these four factors are whether the defendant planned, assisted, or promoted activities within the forum state, and whether the defendant purposefully availed himself of the activities.<sup>119</sup>

Thus, under *World-Wide Volkswagen* the “stream of commerce” theory alone is not sufficient to assert personal jurisdiction unless the product arrived in the forum state in a calculated manner. If the defendant expected consumers to purchase his products in the forum, then the defendant can “reasonably anticipate being hailed into court.”<sup>120</sup>

The Court also offered an extremely lengthy list of factors that supplement the second prong of the *International Shoe* test—whether the

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114. *Id.* at 316–19.

115. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980); see David C. Tunick, *Up Close and Personal: A Close-Up Look at Personal Jurisdiction*, 29 CREIGHTON L. REV. 1157, 1157 (1996) (offering an excellent in-depth analysis of the evolution of personal jurisdiction from *Pennoyer* until 1996).

116. *World-Wide Volkswagen*, 444 U.S. at 297–98.

117. *Id.*

118. Hornbeck, *supra* note 90, at 1403.

119. *Id.*

120. *World-Wide Volkswagen*, 444 U.S. at 297.

assertion of personal jurisdiction offends “traditional notions of fair play and justice.”<sup>121</sup> Included in the list are

[t]he forum State’s interest in adjudicating the dispute; the plaintiff’s interest in obtaining convenient and effective relief, at least when that interest is not adequately protected by the plaintiff’s power to chose the forum; the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.<sup>122</sup>

This list is not exhaustive and courts must make judicial determinations based on the totality of the circumstances in order to determine if it is reasonable to assert personal jurisdiction over the foreign defendant.<sup>123</sup>

## 2. Asserting Specific Personal Jurisdiction Under *Asahi*

In the plurality opinion of *Asahi*, four Justices, led by Justice O’Connor, proffered a “stream of commerce plus” test to determine whether a defendant had purposefully availed herself of the forum state.<sup>124</sup> Under this test, the plurality stated that

[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State . . . or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.<sup>125</sup>

Thus, the defendant must have intent or purpose to avail herself of the benefits of the forum state, as exemplified by the defendant’s conduct.

Four Justices, led by Justice Brennan, adopted a more relaxed “stream of commerce” test than the O’Connor group. Under Brennan’s test, the dispositive factor is whether the product had “arrived in the forum state through the fortuitous circumstances of one isolated occurrence of consumer use, or through a steady stream of contacts of which the defendant was or should have been aware.”<sup>126</sup> Thus, “foreseeability,” defined as an awareness of where the product is traveling, becomes a key factor.

121. *Id.* at 297–98.

122. *Id.* at 292.

123. *Id.*

124. Hornbeck, *supra* note 90, at 1412.

125. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987).

126. Hornbeck, *supra* note 90, at 1416 (citing *Asahi*, 480 U.S. at 120 n.3).

Three of the Justices, led by Justice Stevens, refused to determine whether there were sufficient minimum contacts in the case because they felt the assertion of personal jurisdiction in this case was unreasonable. However, they did agree that if they were to determine whether there were sufficient contacts, there would have to be a “constitutional determination that is affected by the volume, the value, and the hazardous character of the components.”<sup>127</sup>

In total, eight Justices held that the assertion of personal jurisdiction in *Asahi* was unreasonable.<sup>128</sup> The Court’s holding “answered the question left open by *Perkins v. Benguet Consolidated Mining Co.* and *Helicopteros Nacionales de Colombia, S.A. v. Hall*. . . . [t]hat . . . the same limitations on personal jurisdiction should apply to foreigners as are applied to U.S. citizens.”<sup>129</sup> The Court examined the five issues offered in *World-Wide Volkswagen* in determining reasonableness, stating that “the unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.”<sup>130</sup>

However, the Court went on to say that in most cases, “the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant.”<sup>131</sup> In asserting personal jurisdiction over a foreign defendant, “a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by the minimal interests on the part of the plaintiff or the forum State” is necessary.<sup>132</sup> While the Court leaves many factors to be balanced, it is clear, at the very least, that the interest of the plaintiff and forum state must be greater than those of the plaintiffs and forum state in *Asahi*.

### C. ASSERTING PERSONAL JURISDICTION IN CYBERSPACE

Although it is important to bear in mind that cyberspace is not a physical location for purposes of jurisdiction, it is nevertheless relevant that the Internet makes it very easy and convenient for outsiders to *target* a forum externally. The exponential growth in *spam* mail is an instructive example and demonstrates a very real occurrence that anyone with a computer, modem, and email account can appreciate.

Based on *Asahi*, this kind of contact likely exceeds merely placing goods into the stream of commerce, and in fact places the extrinsic actor in

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127. *Asahi*, 480 U.S. at 122 (Stevens, J., concurring).

128. *Id.* at 113–16.

129. Hornbeck, *supra* note 90, at 1417 (citations omitted).

130. *Asahi*, 480 U.S. at 114.

131. *Id.*

132. *Id.* at 115.



intentional contact with a forum.<sup>133</sup> As such, it is highly likely to subject the actor to personal and general jurisdiction in that forum.<sup>134</sup>

This fact is confirmed by Congress's willingness to enact broad-sweeping jurisdictional laws that cover "whoever" and "any party" directed precisely at foreign Internet hosts and Internet Service Providers (ISPs). These legislatively imposed jurisdictions are limited solely by the due process clause of the Fourteenth Amendment and *Asahi*. Though these personal and prescriptive jurisdictions are theoretically limited by international law, even if Congress does violate international law regarding enforcement jurisdiction, a strong presumption exists that indeed it has not.<sup>135</sup> This trend does not bode well for Sealand and HavenCo regarding U.S. jurisdiction.

The courts of the United States, addressing Internet jurisdiction, have tended, thus far, to focus on domestic interstate activity. Nevertheless, if one extrapolates from the trends in the interstate cases, it seems that future international jurisdiction will be based on the degree, type, and nature of commercial activity conducted by an entity on the World Wide Web directed at a forum state.

The domestic personal jurisdiction Internet cases establish that the "degree" of business usage is critical—a more certain likelihood of jurisdiction will be found if a foreign company clearly knows and enters contracts with U.S. residents on a repeated basis.<sup>136</sup> The easiest cases of jurisdiction are ones in which interactive sites allow users to access and exchange data with the host Web server.<sup>137</sup> These cases analyze the interactivity levels of the site and the basis of commerce of the information exchanged. The most difficult jurisdictional scenario is when a passive Web site merely places information on the Web, allowing access to those interested in the subject matter.<sup>138</sup> This too may be changing, as is evidenced

133. A prime example of this is demonstrated in *CompuServe, Inc. v. Patterson*, a case in which the Sixth Circuit held that the affirmative actions of Patterson, a Texas resident, engaging in commercial activities with CompuServe, an Ohio corporation, were sufficient to give the court personal jurisdiction over the matter. 89 F.3d 1257 (6th Cir. 1996).

134. Intent is the key element here; merely maintaining a Web site would probably not be construed as targeting a specific forum, though this could change with future court rulings. The site may specifically enumerate which fora it will deal with and which it will not. It may filter and block interaction from states in which it does not choose to risk jurisdiction. Evidence of eagerness to transact with persons within a known forum state is a high indication of intent.

135. See *Murray v. Schooner Charming Betsy*, 6 U.S. 64 (1804) (finding a strong presumption against the U.S. for violating a citizen's right when the citizen has availed himself to a foreign jurisdiction).

136. *CompuServe*, 89 F.3d at 1265.

137. See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124–26 (W.D. Pa. 1997) (finding that the creation of an interactive Web site in order to do business across state lines constitutes purposeful availment for the purposes of acquiring jurisdiction).

138. *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 419–20 (9th Cir. 1997) (finding that Cybersell of Florida's passive Web page was not a sufficient contact with Arizona to justify being hailed into court there).

by the Federal Trade Commission's recent acquisition of a Temporary Restraining Order (TRO) directed at passive Web sites hosted on foreign computer servers.<sup>139</sup>

One recent ruling in this area occurred in *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, a case in which a French court ordered that the ISP completely eliminate access to certain types of content for French citizens visiting the Yahoo! Web site.<sup>140</sup> Yahoo! sought a declaratory judgment in a U.S. court arguing that the French court order was unenforceable as repugnant to the U.S. Constitution.<sup>141</sup> The French defendants tried to have the action dismissed for lack of personal jurisdiction.<sup>142</sup> The District Court denied the defendants request, holding that personal jurisdiction was proper.

Citing California's long arm statute, whose only limitation is the Due Process Clause of the U.S. Constitution, the court found that the written demand letter to Yahoo!, use of the U.S. Marshals, and the French court order, all directed to Yahoo!'s operations in California, met the purposeful availment requirement.<sup>143</sup> The court determined that attempts by a foreign nation to apply its law extraterritorially to restrict the freedom of expression of U.S. based online speakers, who are protected by the First Amendment, was unconstitutional.<sup>144</sup>

Thus, it would appear from this decision that even agents of foreign governments may be hailed into U.S. court for attempting to interact with domestic entities. This fact does not bode well for Sealand, as it would be subject to jurisdiction in the United States merely for attempting to contact a foreign defendant to enforce its domestic law.

Another instance of this widening net of U.S. personal jurisdiction in international fora was demonstrated early last year with the grant of a TRO by a federal district court against TLD Network, Inc. in connection with the advertisement and sale of domain names at the non-existent Top-Level Domain of ".usa." The court stated:

Since approximately October, 2001, Defendants have sold domain names ending in the suffix ".usa." . . . Defendants send, or authorize others to send on their behalf, unsolicited commercial email to customers . . . in the United States, advertising the

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139. See *FTC v. TLD Network Ltd.*, No. 02C-1475 (N.D. Ill. Feb. 28, 2002) (temporary restraining order), available at <http://www.ftc.gov/os/2002/03/tldtro.pdf> (on file with the Iowa Law Review).

140. *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181, 1184 (N.D. Cal. 2001) [hereinafter *Yahoo! II*].

141. *Id.*

142. *Yahoo! Inc. v. La Ligue Contre Racisme et L'Antisemitisme*, 145 F. Supp. 2d 1168, 1171 (N.D. Cal. 2001).

143. *Id.* at 1174-75.

144. *Yahoo! II*, 169 F. Supp. 2d at 1193.

availability of their domain names [on Internet Web sites] . . . . Defendants sell their domain names for \$59 each . . . . [C]onsumers in the United States have purchased such domain names . . . . [T]he Internet Corporation for Assigned Names and Numbers . . . currently does not recognize any of the domain names being sold by Defendants, and has no plans to introduce domain names with suffixes sold by Defendants.<sup>145</sup>

Again, broadly sweeping jurisdictional language is used in the TRO that requires “any party hosting any Web pages or Web sites for Defendants . . . [to] [i]mmediately take whatever steps may be necessary to ensure that Web pages . . . cannot be accessed by the public.”<sup>146</sup> As we will see, spam and child pornography are the only uses of HavenCo’s Web servers not allowed under the alleged sovereignty of Sealand.

Furthermore, a recent decision by the Ninth Circuit, finding that service by e-mail was adequate to find a defendant in a default judgment due to failure to comply with discovery orders, provides another means by which United States courts might acquire jurisdiction over inhabitants of Sealand.<sup>147</sup> In that case, the defendant, Rio International Interlink (RII), was an offshore operation for Internet gambling that was sued for trademark infringement. Though RII did not have a physical location, it did have an e-mail address and a Web site. As the Court explained,

We acknowledge that we tread upon untrodden ground. The parties cite no authority condoning service of process over the Internet or via email, and our own investigation has unearthed no decisions by the United States Courts of Appeals dealing in the federal courts. Despite this dearth of authority, however, we do not labor long in reaching our decision. Considering the facts presented by this case, we conclude not only that service of process by email was proper—that is, reasonably calculated to apprise RII of the pendency of the action and afford it an opportunity to respond—but in this case, it was the method of service most likely to reach RII.

To be sure, the Constitution does not require any particular means of service of process, only that the method selected be

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145. See *FTC v. TLD Network Ltd.*, No. 02C-1475, at 4 (N.D. Ill. Feb. 28, 2002) (complaint for injunctive relief), available at <http://www.ftc.gov/os/2002/03/tldcmp.pdf> (on file with the Iowa Law Review).

146. *FTC v. TLD Network Ltd.*, No. 02C-1475 (N.D. Ill. Feb. 28, 2002) (temporary restraining order), at <http://www.ftc.gov/os/2002/03/tldtro.pdf> (on file with the Iowa Law Review).

147. *Rio Properties v. Rio Int'l Interlink*, 284 F.3d 1007 (9th Cir. 2002).

reasonably calculated to provide notice and an opportunity to respond.<sup>148</sup>

Based on this decision, it seems likely that a plaintiff seeking to curtail the activities of Sealand could serve process using e-mail and pursue legal action within the United States.

*D. STATUTORY BASES FOR ACQUIRING JURISDICTION IN CYBERSPACE*

Additional means of acquiring jurisdiction in cyberspace continue to evolve. For instance, the House Judiciary Committee's Subcommittee on Crime unanimously approved the Combating Illegal Gambling Reform and Modernization Act<sup>149</sup> that was introduced on November 1, 2001.

This bill would expand the Interstate Wire Act definitions, and the prohibition<sup>150</sup> to ban Internet gambling, including gambling communications with foreign countries. While ostensibly maintaining the concept that gambling is the jurisdiction of state law, it criminalizes interstate or foreign communications used for gambling.<sup>151</sup> It also closes a loophole in the Wire Act that previously failed to cover certain types of Internet gambling that were not transmitted over wires.<sup>152</sup>

The new bill, if enacted into law, would provide for fines and imprisonment of anyone "engaged in a gambling business, knowingly . . . for the transmission in interstate or foreign commerce . . . or between the U.S. and abroad . . . of bets or wagers."<sup>153</sup> More importantly, it would amend the definition of a "communications facility" to mean

any and all instrumentalities, personnel, and services (among other things, the receipt, forwarding, or delivery of communications) used or useful in transmission of writings, signs, pictures and sounds of all kinds by aid of wire, cable, satellite, microwave, or other like connection (whether fixed or mobile) between the points of origin and reception of such transmission.<sup>154</sup>

Such broad language will ensure a direct collision course between the United States, Sealand, and HavenCo since gambling is expressly allowed on

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148. *Id.* at 1017.

149. Combating Illegal Gambling Reform and Modernization Act, H.R. 3215, 107th Cong. (2001).

150. Interstate Wire Act, ch. 139, 63 Stat. 92 (1949) (codified as amended at 18 U.S.C. §§ 1081, 1084 (2000)) (defining gambling establishment and prohibiting the transmission of wagering information by wire).

151. H.R. 3215 107th Cong. § 3(a) (2001).

152. *Id.*

153. *Id.*

154. 18 U.S.C. § 1081 (1949).

HavenCo's servers.<sup>155</sup> One U.S. citizen recently discovered that his off-shore gambling Web site based in Antigua netted him a twenty-one month federal prison sentence and a \$5000 fine, despite substantial legal and accounting advice from several law firms and consulting firms.<sup>156</sup> Jay Cohen, thirty-four years old, was indicted by a New York grand jury under the U.S. Wire Act.<sup>157</sup> He decided to face trial in the U.S. rather than remain a fugitive like seven others.<sup>158</sup> A jury convicted him in the summer of 2000 and a federal appeals court upheld the conviction.<sup>159</sup> He has appealed to the U.S. Supreme Court and is waiting to see if this nation's highest court will agree to hear the case.<sup>160</sup>

Thus, it would appear that acquiring jurisdiction over a foreign corporation or individual from a foreign country that the United States does not recognize is nevertheless possible, so long as the Supreme Court's amorphous requirements for general or specific personal jurisdiction are met, or as provided by federal statute. In light of the trend to expand the jurisdiction of courts, Sealand is unlikely to escape unscathed if the United States is bent on limiting the Internet operations of its primary inhabitant, HavenCo.

In the next Section, I consider the practical realities of collecting a judgment against an entity such as HavenCo in litigation before turning to alternative political solutions.

#### E. COLLECTING ON SEALAND

Even if a court of competent jurisdiction can adjudicate a claim, a practical problem persists: How would one collect a judgment against such a quasi-entity, or for that matter, enjoin its actions? The answer to these questions are complex and fact specific, and it is with this in mind that I turn first to the general legal questions involved and then to the specifics of Sealand and its corporate sponsor, HavenCo.

##### 1. Collecting Judgments Against Foreign Entities

One commentator has noted that a judgment against a foreign defendant whose sovereign government finds the assertion of personal jurisdiction offensive "is worth nothing more than the paper on which it is

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155. Declan McCullagh, *HavenCo: Come to Data*, at <http://www.wired.com/news/politics/0,1283,36756,00.html> (last visited Apr. 3, 2003) (on file with the Iowa Law Review) (noting that "everything but spamming, obscenity, and child pornography is legal" on HavenCo's servers).

156. Kevin McCoy, *Online Gamble Pays off for Internet Sports Books*, USA TODAY, Mar. 29, 2002, at B01, available at 2002 WL 4723075.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

printed.”<sup>161</sup> As such, if the foreign sovereign that houses the corporation or individual in question is not recognized by the United States government, has no internal legal system, and is not party to any treaties with the United States, collecting a judgment against that entity could be a near Sisyphean task. This is true for two reasons.

First, because there is no domestic legal system, a suit cannot be brought in the courts of the foreign sovereign to enforce the judgment.<sup>162</sup> Second, putting political pressure on the alleged sovereign creates a catch-22. As there exist no formal channels for doing so, the very act may actually improve the quasi-sovereigns claim of legitimacy.

The best possible solution for collecting a judgment against a person or corporation of this type would be to attach any assets of the entity present in the United States. Barring that possibility, one would have to look to other countries in which the entity had stored its assets to determine whether one of those legal systems would be amenable to collecting a foreign judgment. With this in mind, we turn to the specific case of HavenCo.

## 2. Collecting from HavenCo

What is HavenCo? It is a simple question with no simple answer. At the most basic level, HavenCo Limited appears to be a U.K. corporation, with a Registered Office at 11 Kintyre House, Cold Harbour, London, E149NL.<sup>163</sup> Since it has a Registered Office in London, under British law all lawsuits filed are accepted at that address. Essex Police claimed jurisdiction over the inhabitants of Sealand starting in 1987, the same year that Britain extended its international waters to encompass Sealand.<sup>164</sup>

Since May 2000, HavenCo's corporate principals have included Michael Bates,<sup>165</sup> Sean Hastings, and Ryan Lackey.<sup>166</sup> Bates was born in England and claims a dual British-Sealand citizenship. Hastings and Lackey were both born in the United States, and it is unclear if they also claim dual citizenship with Sealand.

All of this seems fairly straightforward, but in an interview with the author, HavenCo reports that it is an off-shore corporation based in Cyprus and licensed to do business in Sealand.<sup>167</sup> If this is indeed true, the

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161. Hornbeck, *supra* note 90, at 1394.

162. See generally Rachel B. Korsower, Note, *Matusovich v. Telnikoff: The First Amendment Travels Abroad, Preventing Recognition and Enforcement of a British Libel Judgment*, 19 MD. J. INT'L L. & TRADE 225 (1995).

163. *UK Under Terrorist Threat: Terrorists Occupy Former UK War Base Less Than 8 Miles from Essex*, ROUGH SANDS GAZETTE, Sept. 16, 2001, at <http://www.freebornjohn.com> (on file with the Iowa Law Review) [hereinafter *UK Under Terrorist Threat*].

164. *Id.*

165. He is Prince Roy Bates' son.

166. *UK Under Terrorist Threat*, *supra* note 163.

167. Interview, *supra* note 74.

remaining question is whether Cyprus is amenable to enforcing a judgment of a U.S. court.

According to Global Money Consultants (Global) based in Nicosia, Cyprus, “[t]he relevant procedure for registration of an offshore company can be completed within a period of 10 days” or within forty-eight hours if urgently required.<sup>168</sup> The island of Cyprus gained its independence in 1960. Upon becoming an independent republic, it adopted English law for its civil code “with many English Common Law influences.”<sup>169</sup> “Most laws are officially translated into English.”<sup>170</sup> It has double taxation agreements with twenty-four countries, including the United States.<sup>171</sup> Its European jurisdictions include the United Kingdom. For example, Global’s clients are able to obtain “[t]he Certificate of Incorporation of such companies [that] shows their place of incorporation as being London.”<sup>172</sup> This may explain the discrepancy in HavenCo’s address and country of corporate origin and jurisdiction.

Cyprus has been a member of the UN since its independence in 1960 and “contributes to the promotion of the purposes and principles of the United Nations.”<sup>173</sup> In 1990, Cyprus applied for full membership in the European Union (EU).<sup>174</sup> Accession negotiations were complete in December 2002 and Cyprus has been “invited to join the [EU] on the 1st May, 2004.”<sup>175</sup>

It would seem that since Cyprus adheres to the UN Charter, international law, and in the near future, European Union law, U.S. court orders and judgments would be enforceable against HavenCo via the Cypriot judicial system. If HavenCo’s assets are in Cypriot banks, they could be attached by a U.S. plaintiff under existing international treaties and laws.

Regardless of whether Sealand is found to be a sovereign nation by any tribunal, there are many pitfalls in HavenCo’s business model. Since there are no “pure” Sealand citizens (no live births have ever been recorded in

168. Global Money Consultants, at <http://www.global-money.com/item.php?id=1> (last visited Apr. 13, 2003) [hereinafter Global Money 2003] (on file with the Iowa Law Review).

169. Global Money Consultants, at <http://www.global-money.com/offshore/europe-cyprus.html> (last visited Apr. 20, 2002) [hereinafter Global Money 2002] (on file with the Iowa Law Review).

170. *Id.*

171. Global Money 2003, *supra* note 168.

172. Global Money 2002, *supra* note 169.

173. *Cyprus and the United Nations*, The Republic of Cyprus, at [http://www.pio.gov.cy/ir/cy\\_and\\_un.htm](http://www.pio.gov.cy/ir/cy_and_un.htm) (last visited Apr. 18, 2003) (on file with the Iowa Law Review).

174. *Ministers of Justice and the Interior-Brussels-EU*, CYPRUS NEWS AGENCY, Sept. 22, 1998, available at [http://www.hri.org/news/cyprus/cna/1998/98-09-22\\_1.cna.html](http://www.hri.org/news/cyprus/cna/1998/98-09-22_1.cna.html) (on file with the Iowa Law Review).

175. *Cyprus & European Union Accession Negotiations*, at <http://www.cyprus-eu.org.cy/eng/home.htm> (last visited Apr. 19, 2003) (on file with the Iowa Law Review).

Sealand),<sup>176</sup> all of Sealand's current residents shall always be subject to the jurisdiction of their homeland, at least when off the platform and in any country with a corresponding extradition treaty.

Since there are no "pure" Sealand corporations,<sup>177</sup> HavenCo could be brought into U.S. jurisdiction and U.S. court orders could be enforced through treaties between the United States and various other nations, including Cyprus. Furthermore, since there is no negotiable Sealand currency (it is only used internally on the platform and is banned from export), and since there are no Sealand banks,<sup>178</sup> assets of HavenCo and its customers could be attached in the respective countries in which the assets are held.

There is a chance that Sealand's and HavenCo's dream could work. The first requirement would be to have "pure" citizens, those born in Sealand having no dual-citizenship with any other country. Second, Sealand's internal legal framework would need to be reorganized to allow validly recognized, "pure" Sealand corporations under Sealand and international law. Third, Sealand would have to establish its own internationally traded currency and banking system so as to become financially self-sufficient—barring that, it could adopt the U.S. Dollar like some other countries have done, and use it exclusively. This would be a large task for the limited population of Sealand, but it would not be impossible.

### 3. Alternative Remedies

If collecting funds from HavenCo is not required, other legal remedies may prove useful. Specifically, an American plaintiff could use U.S. Trade Law section 337 and its prescription enforcement jurisdiction of the U.S. International Trade Commission (ITC) to obtain injunctive relief, exclusion orders, and cease and desist orders against HavenCo and any of its customers—particularly U.S. customers.<sup>179</sup> Although *in rem* jurisdiction has traditionally not been available as an enforcement weapon against foreign parties, section 337 provides a valuable tool in the intellectual property lawyer's arsenal. This is particularly true because it only requires the importation of property into the U.S. forum, not affirmative acts or presence required by personal jurisdiction.<sup>180</sup> The ITC injunctive orders are more expansive than a U.S. district court and can provide a powerful enforcement mechanism to limit infringement of intellectual property.

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176. Interview, *supra* note 74.

177. *See id.* (divulging no pure Sealand corporations).

178. *Id.*

179. Bryan A. Schwartz, *Where the Patent Trials Are: How the U.S. International Trade Commission Hit the Big Time as a Patent Litigation Forum*, 20 No. 2 INTELL. PROP. L. 1, 1, 5–6 (citing U.S. Trade Law § 337 and discussing when broad remedies can be applied).

180. *Id.* at 3–4.



To date, most actions filed using the ITC have involved the importation of patented articles of manufacture into the U.S. However, with the recent recognition of business method patents, such as those granted to Priceline.com<sup>181</sup> for its reverse-auction concept, and to Amazon.com for its one-click ordering concept,<sup>182</sup> the ITC could provide leverage for dealing with rogue Web sites and businesses.

The *State Street Bank & Trust Co.*<sup>183</sup> ruling in the U.S. Court of Appeals for the Federal Circuit may further pave the way to combat bad citizens in cyberspace by providing patent protection to intangible products that could be imported into the U.S. borders via Web sites.<sup>184</sup> Trademarks<sup>185</sup> and design patents<sup>186</sup> are legitimate subject matter for the ITC, and ultimately, the breadth of the ITC's jurisdiction could allow parties a means to resolve a veritable cornucopia of disputes in cyberspace.

#### 4. Options of Last Resort

Assuming the failure of all legal options, a couple of possibilities remain for dealing with a rogue quasi-nation such as Sealand. One of these possibilities would be physical or economic sanctions against the island.

Even more so than nations like Cuba and Iran, Sealand is easily susceptible to an embargo. Should the U.S., U.K. or other navy surround the platform and hold it under siege, time would slowly seal Sealand's (and HavenCo's) fate. Although Mr. Lackey has mentioned that Sealand has supplies to hold out for a year or more, such an endeavor would be psychologically and emotionally very difficult. More problematic is HavenCo's real strategic weakness: Its two Internet lifelines, fiber optic cable connections to London and Amsterdam, could be easily terminated if the situation demanded it. Without its Internet presence, Sealand would lose more than its connection to the world; it would lose its *raison d'être*.

A final option against Sealand and HavenCo would be the use of military force. Unless Sealand develops its own military or aligns itself with a "big brother," it will always be subject to military domination, whether it is a sovereign nation or not. If the U.S. ever had credible evidence of Sealand

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181. U.S. Patent No. 6,230,147 (issued May 8, 2001), available at <http://patft.uspto.gov/patft/index.html>.

182. U.S. Patent No. 5,960,411 (issued Sept. 28, 1999), available at <http://patft.uspto.gov/patft/index.html>.

183. *State St. Bank & Trust v. Signature Fin. Servs.*, 149 F.3d 1368 (Fed. Cir. 1998).

184. *Id.* at 1377.

185. See OFFICE OF UNFAIR IMP. INVESTIGATIONS, U.S. INT'L TRADE COMM'N, OUII 337 INVESTIGATIVE HISTORY, at <http://info.usitc.gov/337> (linking to Investigation No. 337-TA-424, a Nov. 2000 trademark infringement case involving "Cigarettes and Packaging Thereof").

186. *Id.* (linking to Investigation No. 337-TA-416, a Sept. 1999 patent infringement case involving "Compact Multipurpose Tools").

hosting terrorist activities, it is doubtful that the United States would think twice about utilizing force.

Admittedly, these solutions are highly unlikely. Sealand is well aware that its tenuous claim of sovereignty rests on a policy of tolerance by the eight hundred pound gorilla whose coast lies so precariously close. Nevertheless, should such an event become necessary, it is doubtful that Sealand would resist.

#### IV. CONCLUSION

While the hope of a truly independent nation, freed from the laws of various states, rings eternal, the practical reality is that establishing such a nation would be extremely difficult. Although it is something that Sealand could do, it is unlikely that such an event will occur because the physical remoteness of the island and its lack of natural resources deter permanent residents.

Even if Sealand were to establish the requisite necessities to become a real "nation," the struggle would not end there. The expansion of jurisdiction, as reflected by the limits of the U.S. Constitution, various statutes, and international agencies provides a means for holding individuals accountable, even when those individuals hail from other nations.

At best, even if Sealand were able to establish itself as an independent nation, one of the ways that it would have to gain respect in the eyes of other nations would largely be to play by the common rules. As such, it is questionable whether it would or could remain as a lawless data haven for very long. This fact highlights the paradox of Sealand's status: It wants to both benefit from the protections of international law, and disregard the laws of the very nations to whom it hopes to endear itself. In this respect, the words of John Donne ring eerily true:

No man is an island entire of itself; every man is a piece of the Continent, a part of the main. . . . Any man's death diminishes me because I am involved in Mankind; and therefore never send to know for whom the bell tolls; it tolls for thee.<sup>187</sup>

Until Sealand takes the steps that are necessary to develop its domestic law in specific, demonstrable ways, it will only retain the façade of true nationhood, akin to the elderly man in the Wizard of Oz, who commanded Dorothy to "pay no attention to that man behind the curtain."<sup>188</sup> Like the wizard, Sealand seeks to keep a low profile in the hopes that no one will notice it, eventually expecting the passage of time to cure the defects in its title as sovereign. However, if Sealand elevates itself on the world stage by serving as an outpost for the world's Internet renegades, it can only expect

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187. JOHN DONNE, DEVOTIONS UPON EMERGENT OCCASIONS, MEDITATION 17 (1624).

188. THE WIZARD OF OZ (Warner Brothers Pictures 1939).

that countries, particularly the United States, will take notice, finding ways to bring Sealand and its inhabitants to justice, possibly crumbling whatever hope of true independence the country might have.

## APPENDIX

## DECLARATION OF INDEPENDENCE OF SEALAND

I, Roy, being for the time being Sovereign over all the lands and other territories hereinafter known as the Principality of Sealand, hereby attest:

That from the Day of Declaration of Independence on 2 September 1967, The Principality has been wholly independent of any other State or other external force and as a token of this independence all matters both national and international have been determined solely by the Sovereign empowered from time to time;

That the Principality was established for the betterment of mankind and to further that endeavour was set as a place where all men, regardless of personal background or persuasion, might undertake such activities as they see fit as appropriate to their beliefs and custom taking into account those action upon their fellow men;

That from the Day of Independence a framework Constitution of fairness and equity has prevailed often against many odds but always with the attempt to respect the right of individuals and to further the Principles of the Declaration of Independence above;

And now do declare:

That current factors now dictate that it is due time to place in force this the formal Constitution of Sealand better to secure Order within the Principality and thereby harmony and security all.

## CONSTITUTION OF THE PRINCIPALITY OF SEALAND

## ARTICLE 1. Principles and Structure of Government

The nature of the Government of the Principality shall be, in all areas of its exercise of its powers, that of a Constitutional Monarchy.

The Sovereign shall be the Authority for all matters civil and criminal national and international which affect or are likely to affect or are likely to affect in the judgment of the Sovereign the Order or security of the Principality.

The Sovereign shall empower as in the judgment of the Sovereign is appropriate such persons or groups of persons as seen fit with devolved

authority to effect such matters as may arise to pursue the welfare of the Principality; amongst these may be Bureaux concerned with external matters, internal matters, matters of concern to the Head of State, and matters concerned with the Principality Treasury and the other institutions constituted to serve particular needs of the Principality.

The details of such organs constituted from time to time and their powers and jurisdictions shall be at the sole discretion of the Sovereign.

The Sovereign shall in addition set out procedures appropriate to the resolution of dispute and the keeping of the Common Order to the benefit of all.

#### ARTICLE 2. Senate and Its Duties

The Sovereign shall determine whether and if so to what extent to constitute to convene and to preside over the activities of a formal Senate which shall sit in an advisory capacity to consider various matters of State.

It shall upon instruction of the Sovereign or by collective consensus of need perceived by Senate prepare those Laws seen appropriate for the maintenance of Order and to sustain the Common Good.

Such Laws as may be prepared by Senate shall be presented to the Sovereign for bringing into effect or for such other disposition as the Sovereign in sole discretion shall see fit.

Such Laws as are enacted by the Sovereign shall form the only basis upon which matters of any kind are undertaken in the Principality and shall be published for the information of all Citizens who will be held responsible for their implementations as appropriate.

Members of Senate shall be appointed by the Sovereign who shall at all times use best judgment to ensure a balance of representation of the interests of the Principality.

#### ARTICLE 3. Judicial Powers

Subject to the conditions in Clause 5 of Article 1 above, a tribunal shall be constituted to consider matters of dispute within the Principality or between the Principality or its Citizens and others and to advice on the resolution of such disputes. The tribunal shall be no less than 3 in number and be formed of those persons seen to be expert in the Process of Law and in the matter brought forward for consideration and independent of the interests of the parties concerned.

Any tribunal shall at all times take into the account the content of the Declaration of Human Rights and Judgements of those Courts concerned with the administration of the content of the Declaration of Human Rights as a first priority in its deliberations.

The opinion of the tribunal shall be conveyed to the Sovereign who shall issue a Decision as appropriate said Decision to be subject to enforcement as seen appropriate.

The Sovereign shall have sole discretion as to devolvement of any or all powers [or cancellation of such devolution] in respect of such legal matters as are seen fit.

#### ARTICLE 4. Matters of State

All relations with other States shall be at the sole discretion of the Sovereign who may seek advice from Senate as appropriate.

The Sovereign shall be the sole authority for all representatives to other States or to entities constituted or active outside the Principality and all matters concerning or likely to concern such representations shall be referred to Senate or directly to the Sovereign as appropriate.

No Citizen resident or other person whether personal or corporate shall make nor imply to be able to make any representation to any external person concerning any matter of State.

#### ARTICLE 5. The Maintenance of Order

The Sovereign shall constitute such forces as are considered appropriate to sustain Order and to preserve the integrity of the Principality.

Such forces shall be termed Sealand Guard and shall have the powers to enforce such Law as may from time to time be in force. The Guard shall report to the Sovereign who shall have absolute discretion as to the nature and extent of how and by which methods Law and Order are maintained.

No member of Sealand Guard shall be a member of Senate as set out in Article 2 above.

No persons other than those members of Sealand Guard whether Citizens of Sealand or of any other description or persuasion shall be normally be

permitted to carry arms of any kind within the territories of the Principality for any purpose.

The Sovereign shall detain any person according to the Sovereign's pleasure should it be considered essential to the maintenance of Order and the Common Good. Such detention shall be consistent with the content of the Good. Such detention shall be consistent with the content of the Declaration of Human Rights and the interests of the Principality.

**ARTICLE 6. Succession of Sovereign powers**

The Sovereign for the time being shall vest ultimately all powers in a Successor who shall be determined according to Custom and Practice associated with Paternal succession of the Sovereign.

Divestiture of Sovereign powers shall be at the discretion of the Sovereign for the time being and may be exercised by abdication for reasons of convenience or death.

**ARTICLE 7. Variation or Addition to the Constitution**

The Constitution of Sealand shall be subject to such variation addition or modification as the Sovereign considers appropriate.

Senate may present to the Sovereign proposals for variation given due and careful consideration of the reasons therefor [sic] and the Sovereign shall take the most careful note of the presentation in determining an appropriate Decision as a result of those considerations.

Delivered to the Citizens of the Principality this \_\_\_\_\_ day of \_\_\_\_\_ .

**ROY OF SEALAND**

