

# COMMITTEE NEWS

## Admiralty and Maritime Law

### They're Making a Killing: The \$1 Billion Industry of War Risk Insurance

#### I. How Does It All Work?

Does it pay to bet on war? The \$1 billion war insurance market based out of London believes so.<sup>1</sup> The history behind the London insurance market is key to understanding its current position. The first recorded mention of Edward Lloyd's Coffee House on the River Thames was in 1688. Lloyd's was a gathering place for mariners, businessmen, and entrepreneurs. What started as betting on whether a ship would return from sea eventually led to the world's most sophisticated gambling system. In its humble beginnings, Lloyd's rented its cafe tables to businessmen to barter with shipowners on marine insurance policies before ships left port.<sup>2</sup> Now referred to as boxes, underwriters still rent space from the same entity—now known as Lloyd's of London—to write marine insurance risks. While the building and location have changed, the nature of the business remains the same. Lloyd's operates like a high-demand farmers' market, with various syndicates competing for rent in their respective boxes. A syndicate is made up of multiple underwriters who write their name under a specific risk on an insurance slip,<sup>3</sup> known as underwriting. Underwriters take a percentage of each risk they choose to underwrite, akin to taking

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**Editor's Note:** Cami's article was selected as the winner of the 2025 ABA TIPS AMLC law student writing competition held in conjunction with Gard N.A.



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## Chair Message

Dear Members of the ABA TIPS Admiralty and Maritime Law Committee,

To start my term as Chair, I have prioritized engaging AMLC members during our monthly meetings with the introduction of Table Talks. For the first Table Talk session on September 18, we heard from maritime attorneys and newly appointed Vice-Chairs Michael Harowski and Barrett Hails. AMLC welcomed Ashley N. Baker and Jessica Humphries as new Vice-Chairs this year as well.

AMLC was joined by members during the TIPS Conference in San Diego, CA on October 16 for an informative presentation by Camille Zuber and Lawrence Malizzi on Navigating Insurance and Vessel-Owner Liability in the Shift to Alternative Marine Fuels. AMLC attendees participated in various TIPS Conference meetings before reconvening for lively discussions at a nearby restaurant.

During the TIPS Conference, the AMLC was honored with the TIPS Award for Outstanding Contribution to the Section and the ABA beyond all expectations for 2024-2025. A special thank you to immediate past Chair Sean T. Pribyl, current Vice-Chair (and former Chair) Christopher Nolan, and all the AMLC Vice-Chairs for their work making 2024-2025 so exceptional, especially all the efforts that went into the successful Admiralty Disruption Seminar last March.

We will kick off 2026 with the AMLC's inaugural seminar in Tampa, FL on January 30, 2026. AMLC is pleased to have Laura Block, Senior Vice President and head of U.S. Marine Claims at Ascot Insurance Co. as the Keynote Speaker. The event will also feature representatives from Port Tampa Bay, OSG, Fairwater, American Arbitration Association, Society of Marine Arbitrators, The American P&I Club, and National Maritime Services to name a few!

Topics at the Tampa seminar will include: Legal and Commercial Business Interests of the Port of Tampa, Incorporation and Implementation of ADR Clauses in Marine Contracts, What's New in Marine Insurance Claims, and an Update on the Vessel Market. A featured topic will be the New Reality of U.S. Shipbuilding, which is of a particular interest considering the enthusiasm for expanding the Jones Act fleet in the current political climate.

The Tampa seminar will be followed by a reception at Davis Island Yacht Club sponsored by National Maritime Services and National Liquidators. AMLC members and guests will then enjoy festivities for Tampa's famous Gasparilla Pirate Fest the next morning. The event will be a great opportunity to learn and network with maritime industry representatives from Tampa and across the country.



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As Chair, I look forward to continuing my goal of growing AMLC. With an eye towards that goal, and with the greatly valued assistance of AMLC's Law Student Vice-Chairs, Cami Payne and Drew Mondri, we are working on developing opportunities for law students to learn more about the practice of maritime law from AMLC members. Cami has also continued her efforts in advancing the Mentorship Program. AMLC has benefitted from increased student membership thanks to the work of these Law Student Vice-Chairs.

AMLC's success has been achieved thanks to the enthusiastic involvement of its members. I encourage you to reach out to me directly with any ideas on how you would like to contribute to the AMLC in any way.

I hope to see you join us for AMLC's monthly committee meetings via Zoom on the third Thursday of every month at 12:30 PM ET.

I look forward to seeing you in Tampa in January. Please do not forget your pirate attire! ➤

Warm regards,

Kirby Aarsheim

*Chair, ABA TIPS Admiralty and Maritime Law Committee*

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Copies may be requested by contacting the ABA at the address and telephone number listed above.



## Editors Message

It is one again our pleasure to present the TIPS AMLC Fall 2025 Newsletter, which features the winner and two runner-up's from our Committee's 2025 student writing competition, sponsored in conjunction with Gard NA. Congratulations to our winners, and thank you to all the student participants who submitted thoughtful pieces on a range of maritime law topics. We also include an article prognosticating the outcome of the challenge to the Federal Maritime Commission's demurrage rule, currently pending before the U.S. Court of Appeals for the D.C. Circuit. Finally, our Trade Talk piece offers an insider's look at the industry by Kurt Odell, the Chief Legal Officer at Moran Towing Corporation. Don't forget to mark your calendars for the TIPS AMLC Inaugural Member Benefit Regional Meeting & CLE in Tampa, Florida, to be held on January 30, 2026.

If you would like to be featured in the next issue of this newsletter, we encourage committee members and non-members alike to submit article proposals directly to us at [neil@neilellislaw.com](mailto:neil@neilellislaw.com). Thank you to the authors who have contributed to this newsletter, to the Committee members for their ongoing efforts in supporting this publication, and to the maritime practitioners who continue to make waves in the maritime industry and beyond. ➤



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## Islands Afloat, Laws Adrift: The Legal Maze of the South China Sea

### I. Introduction

The South China Sea stretches over 3.5 million square kilometers, and its location makes it one of the most strategically significant and hotly disputed bodies of water in the world. It is a vital artery for global commerce, with nearly one-third of all maritime trade passing through its waters annually.<sup>1</sup>

Beneath this vast body of water lie vast reserves of oil, minerals and natural gas, while above it floats hundreds of islands, atolls, rocks, and reefs. While some are natural, and many artificially constructed, all have become the source of intense tension, litigation, and military oversight.<sup>2</sup> The South China Sea is surrounded by several Southeast Asian states, each of which has its own maritime claims. China's is the most sweeping, however; its assertion of sovereignty using its "Nine-Dash Line" theory has significantly challenged the legal framework that governs the sea, going as far as to threaten the political order too.<sup>3</sup>

Recently, China has begun extensive land reclamation, creation and militarization in the Spratly Islands, transforming submerged reefs into fortified outposts.<sup>4</sup> China's undertakings have created extensive controversy raising questions under the United Nations Convention on the Law of the Sea (UNCLOS), specifically, regarding the legitimacy of territorial claims based on the creation of islands, and the impact of militarizing those islands on the freedom of navigation guaranteed under international law.<sup>5</sup>

The controversy over the South China Sea is not simply territorial; rather, it is a reflection of the broader challenges facing maritime governance and international law in an era of rising powers, environmental stress, and the uncertain authority of international enforcement mechanisms.<sup>6</sup> UNCLOS and its legal framework were designed to regulate conduct and resolve disputes peacefully, in an effort that highlighted diplomacy and discouraged open conflict. As this paper will argue, however, these frameworks are being increasingly tested by political realities that outpace legal remedies.

The South China Sea has emerged as one of the most contentious maritime regions in the world. In this area, geopolitical ambitions, environmental degradation, and the limits of international law now collide. At the heart of the conflict lies China's expansive claim on historical assertions demarcated by the "Nine-Dash Line," which directly conflicts with the rights and maritime entitlements of other states in

[Read more on page 28](#)



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**Editor's Note:** Eduardo's article was selected as the first runner-up of the 2025 ABA TIPS AMLC law student writing competition held in conjunction with Gard N.A.



## Granting the High Seas Personhood and Quasi-State Status

### I. Introduction

According to the World Bank “[a]lmost 90 percent of global marine fish stocks are now fully exploited or overfished,” which demonstrates that urgent action is required to improve the regulation of fishing.<sup>1</sup> Under the United Nations Convention on the Law of the Sea,<sup>2</sup> the international community is working to mitigate this harm by implementing the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (BBNJ).<sup>3</sup> The BBNJ will interact with no fewer than fifty-one other treaties.<sup>4</sup> Article 5 of the BBNJ states that “[t]his Agreement shall be interpreted and applied in a manner that does not undermine relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies and that [promote] coherence and coordination with those instruments, frameworks and bodies.”<sup>5</sup> This provision could undermine the effectiveness of the treaty. Granting the high seas personhood and providing the high seas quasi-statehood may improve the BBNJ’s implementation in context with Regional Fisheries Management Organizations (RFMOs) and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) by improving enforcement.<sup>6</sup> Further, it could help increase the representation of Indigenous Peoples by giving them another avenue to speak on behalf of the high seas.

The first section of this article will analyze the BBNJ, the High Seas Fish Stock Agreement, and CITES. Finally, an implementation plan will be proposed for granting the high seas personhood and categorizing it as a quasi-state. Defining the high seas as a quasi-state under rights of nature could improve the implementation and effectiveness of the BBNJ because it could increase coordination and enforcement of all three treaties.

### II. Implementing the BBNJ with CITES and the Fish Stock Agreement to Protect Marine Wildlife

Given the migratory nature of marine life on the high seas, the most effective way to protect marine biodiversity is through an international instrument. Around each State there is an Exclusive Economic Zone (EEZ), which is defined in UNCLOS as the coastal zone that is 200 nautical miles off of a States’ coastline.<sup>7</sup> This zone grants countries exclusive economic rights regarding marine resources. The rest of the ocean is then jointly managed under UNCLOS, possibly the BBNJ, and other treaties.<sup>8</sup> The high seas equates to about 43% of Earth’s surface and

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## Predicting *Evergreen II*: Why a \$510 Cargo Claim Is Actually Worth Hundreds of Millions

### I. Introduction: Covid-19 Disrupts U.S. Supply Chains

During the Covid-19 Pandemic, Americans became all too familiar with images of logjammed ports on the nightly news.<sup>1</sup> Typically, the standardized dimensions of each container make efficient multi-modal transportation possible, but as a record number of containerized imports overwhelmed marine terminals facing acute labor shortages and reduced operating hours, the pandemic caused the symphony of coordination to fall deeply out of tune.<sup>2</sup> Because of the disruption, American shippers and cargo owners faced tens of millions of dollars in detention charges—per day late fees levied by ocean carriers for equipment unreturned to the terminal after the expiration of “free time”—and these costs ultimately reached the consumer as the highest inflation rate in 40 years.<sup>3</sup> At the same time, the world’s major ocean carriers, none of which are based in the United States, had their most profitable year ever.<sup>4</sup>

The agency tasked with regulating these carriers—the Federal Maritime Commission (FMC)—is responsible for “regulating the U.S. international ocean transportation system for the *benefit* of U.S. exporters, importers, and the U.S. consumer.”<sup>5</sup> This tension between foreign ocean carriers and domestic shippers has surfaced in *Evergreen Shipping Agency (Am.) Corp. v. Fed. Mar. Comm’n*, as a \$510 dispute over whether it was “just and reasonable” for a carrier to levy detention charges during a Memorial Day weekend and Covid-19 related closure at the port of Savannah.<sup>6</sup> But the fight in *Evergreen* is not really about a \$510 detention fee, it’s about the potential impact of a precedent that will influence tens of millions of dollars in revenue for foreign ocean carriers and how those costs are passed down to the American consumer. As the FMC attempted to support American cargo interests on the heels of the pandemic, it inconsistently applied the “incentive principle”—choosing to overlook facts in the dispute that otherwise suggest reasonableness—and in doing so it risked putting the ends before the means.<sup>7</sup>

In the Spring of 2020, Evergreen Shipping Agency Corp. and Evergreen Line Joint Service (Evergreen) entered into a “preferred trucking agreement” whereby common carrier TCW Inc. (TCW) was to transport a container of Yamaha motorcycles from the Port of Savannah to a warehouse in Newnan, GA.<sup>8</sup> Due to a Covid-19 shutdown at the Yamaha warehouse, TCW did not return the container and chassis until after its free time had expired.<sup>9</sup> Subsequently, Evergreen charged TCW \$510 in detention charges for the weekend of May 23-25, 2020, which included a temporary Saturday Covid-19 port closure, a Sunday planned closure, and a Monday Memorial Day holiday closure.<sup>10</sup> TCW (Claimant) then filed a complaint in the Small Claims Court

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**Jackson Fox**

*Tulane Law School*

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# TRADE TALK

*This issue of Trade Talk features **Kurt Odell**,  
Chief Legal Officer, Moran Towing Corporation*

**Q:** Good afternoon, Kurt. How did you first become interested in maritime law?

**R.** I didn't set out to become involved in maritime law. Early in my career, I enjoyed litigation—particularly the preparation, advocacy, and quick thinking it required. I focused on civil litigation across Connecticut, handling insurance-related claims, including personal injury and coverage disputes. In 2008, while working as panel counsel for AIG and having just finished my LL.M. in Insurance Law at UCONN, an unexpected opportunity surfaced. The program dean, serving as a reference, shared a posting from Moran Towing Corporation—seeking someone to help manage Jones Act claims, maritime litigation, and risk issues. I had never worked in maritime, but Moran's 160-year legacy, culture of safety, and reputation as a trusted partner to ports, shipowners, and energy companies immediately drew me in. It sparked a new interest, and ultimately a career path that has blended legal, operational risk, compliance, leadership, sustainability, and organizational strategy.



**Q:** Can you describe your experience working at Moran, particularly in light of your experience working both at a law firm and as corporate counsel?

**R.** My passion for the law, interest in business, and natural curiosity are all aligned with an in-house role. In private practice, you focus on resolving one matter. In-house, you are constantly asking: *What does this matter teach us about our operations, our culture, and our systems? Are there enterprise-wide implications? How do we strengthen processes, reduce risk, and prepare the company for growth?* That strategic and preventive mindset is very rewarding.

After joining Moran as counsel, my role gradually expanded across risk management, compliance, safety, training, ESG, and increasingly into corporate governance. Moran is unique in that it combines a deep maritime heritage with a forward-looking mindset—growing through acquisitions across ship docking, environmental remediation, commercial diving, and marine construction. I've been fortunate to work alongside experienced leaders across these businesses who value legal and risk as strategic partners.



***Q: What falls under your umbrella of responsibilities at Moran? What legal issues come across your desk most frequently these days?***

**R.** As Chief Legal Officer, I oversee Legal, Risk Management, Safety & Compliance, Training, and Sustainability/ESG. That means on any given day, my work could involve injury prevention, vessel and terminal compliance, ESG reporting, workforce training, crisis response, or strategic corporate matters—such as M&A, governance, digital transformation, or joint ventures in emerging sectors.

I am fortunate to lead highly capable teams across these disciplines. My role is often to ensure alignment, bring visibility to enterprise-level risks, and connect the dots across Moran's growing business lines. Increasingly, we are focused not just on mitigating risk, but on building resilience, strengthening culture, and identifying strategic opportunities—hallmarks of governance that apply across maritime and adjacent industries.

***Q: What are your views on hiring outside counsel?***

**R.** We value our outside counsel relationships deeply. We handle the majority of our routine litigation, regulatory issues, and contract review internally. But we rely on outside counsel for specialized maritime matters, complex M&A, environmental issues, and certain investigations or major casualty events. The best outside counsel understand the business context—not just the legal issue—and act as a true extension of our in-house teams. Budget discipline matters, but trusted advisory relationships matter even more.

***Q: Which industry organization(s) do you find the most helpful for your work?***

**R.** For maritime issues, the Maritime Law Association of the U.S. and the ABA provide valuable legal thought leadership and networking opportunities. From a corporate governance and in-house perspective, the Association of Corporate Counsel has been a great resource for benchmarking, professional development, and building broader business and legal leadership capabilities across industries.

***Q: In addition to the AMLC Newsletter, which industry publications do you find most useful?***

**R.** gCaptain is my go-to daily maritime headlines source. I also read the Wall Street Journal's Logistics Report and Risk & Compliance Journal, and I regularly follow Sterling Miller's *Ten Things You Need to Know as In-House Counsel*—which is



great for practical, business-focused insights. To stay connected to global context, I read *Foreign Policy*, and when I'm really curious, I enjoy *Stratechery* and *HBR Management Tips* to help explore broader strategic, digital, and leadership issues.

**Q: What's one piece of advice you would give to a new maritime attorney just breaking into the industry? And one tip for seasoned attorneys?**

**R.** For new lawyers: maritime law is fascinating, but remember that your core skills—problem solving, communication, analysis—are highly transferable. Be curious, understand how shipping connects to global commerce, energy, sustainability, and risk, and look for opportunities to add value beyond legal research or case management.

For experienced lawyers: mentorship matters—both for the profession and for the industry. As an in-house maritime counsel, it is in our collective interest to help develop the next generation of maritime lawyers. Encouraging curiosity in admiralty, risk, environmental compliance, ESG, casualty response, and international trade law strengthens the entire maritime sector. ➤

## Benefits of AMLC Membership

### Opportunities To Become Involved

- Publication in the AMLC Newsletter or TIPS Law Journal
- Networking Opportunities
- CLE and Webinar Opportunities
- Leadership Positions
- Mentoring Relationships
- Young Lawyers and Law Student Writing Competition

### Additional Information

For more information regarding the benefits that membership in the AMLC can provide to you, check out our webpage at <http://ambar.org/tipsadmiralty> and join our group on LinkedIn. The Committee is open to all, including non-lawyer maritime professionals, law students and lawyers in every practice area who want to keep abreast of developments in the field.



## **Mentorship is an Unsinkable Vessel: How the AMLC's *Mentorship Program* is Shaping the Future of the Industry**

The Admiralty and Maritime Law Committee's (AMLC) *Mentorship Program* has officially set sail, and continues to make waves by connecting law students with practicing attorneys across the nation, offering a unique opportunity to explore one of the most dynamic areas of law. Through mentorship, students and young maritime attorneys gain access to hands-on experience, professional development, and lasting relationships that provide valuable expertise and real-world insight into the industry.

The AMLC *Mentorship Program* recently launched its first rounds of mentor-mentee pairings with great success. The program pairs experienced maritime and admiralty practitioners with law students interested in maritime and admiralty law, as well as attorneys who are just starting their careers in maritime or admiralty law.

The program is spearheaded by attorneys Hailey Dennis of Jones Walker LLP, Ashleigh Higgs of Holland & Knight LLP, and law student Cami Pyne, Tulane Law '27, with the support of AMLC's immediate past chair Sean Pribyl of Holland & Knight LLP, current chair Kirby Aarsheim of Farrell Smith O'Connell Aarsheim Aprans LLP, and immediate past TIPS Chair, Christopher Nolan of Holland & Knight LLP.

Chandler Thornton, Tulane Law '26, captures what makes the program so essential for aspiring maritime lawyers: "The AMLC's *Mentorship Program* has been instrumental in bridging the gap between studying admiralty and maritime law and learning from the real-world experiences of practitioners. Through the program, I have met countless members of the maritime bar who are eager to support the next generation."

For Jackson Fox, Tulane Law '27, "[h]aving candid conversations with successful practitioners in the AMLC program gave me the tools to think about my future career with a broad lens and an open mind."

Noah Falk, Tulane Law '28, stated that his "meeting with my AMLC mentor (Aaron Greenbaum) helped solidify my interest in the field of admiralty law. Mr. Greenbaum gave me unique insight regarding healthy law school habits, job applications, and specific roles within the practice of maritime law. I enjoyed forming a professional and friendly relationship with my mentor—and I plan to stay in touch as I continue through my first year of law school."



Dennis and Higgs created the program that inspired the AMLC *Mentorship Program* during their time running Tulane's Maritime Law Society (MLS), pulling from both of their networks of maritime attorneys and contacts, and building a list of practitioners with expertise who were willing to spend their time mentoring students interested in practicing maritime law.

The mentorship program Dennis and Higgs started in 2022 (the Tulane Maritime MentorSHIP Program) continues to provide a valuable resource to students and is currently run by Tulane Law students, 3L Cami Pyne and 2L Kylie Barry.

Barry attributed her success in the job market to her participation in the program: “[w]ith my mentor’s advice and help, I was able to explore my interest in the area and get a job at a maritime firm during my 1L summer. Having a mentor was so pivotal to my law school experience that I now help run the program!”

Emma Farris, Tulane Law '26, explained that the reach of the program led to her receiving “multiple summer internship offers for my 1L summer. It also helped me to get the lay of the land of the maritime industry in each city in which I was interested in practicing.”

Inspired by the success of the Tulane program, the AMLC *Mentorship Program* aims to foster relationships within the maritime bar and among those interested in pursuing a career in the field.

Mateo Coghlan from Wake Forest University School of Law stated, “I have learned more about a niche area of maritime law while developing a relationship with my incredible mentor. I am also interested in the business of running a firm, and my mentor has been very willing to teach me.”

Drew Mondri, a student at Roger Williams University School of Law and one of the AMLC's Law Student Vice Chairs, stated that, “The AMLC mentorship program has been a huge success. My mentor works in the area I hope to pursue after graduation, so she has offered invaluable guidance about launching my career, engaging with other practitioners in the field, and setting expectations for the transition into practice. I'm deeply appreciative of the guidance I've received, which has made me feel more prepared and inspired for the road ahead.”

If you are interested in serving as a mentor for aspiring maritime attorneys, please be on the lookout for emails from the ABA TIPS AMLC Committee, or email Cami Pyne at [Cpyne@tulane.edu](mailto:Cpyne@tulane.edu). ➤



## *They're Making... Continued from page 1*

a piece of the risk pie. A syndicate will receive a portion of the premium on a given insurance policy in exchange for taking a percentage of the given risk; if there is a claim on that aspect of the insurance binder,<sup>4</sup> the syndicate will have to pay. Various syndicates sit on the ground floor of Lloyd's, with competitors just steps away from each other. Many will sign their name under the same individualized risk on any given day. All the syndicates sitting within Lloyd's are "Lloyd's Backed," meaning that all risks are reinsured by other syndicates within the market. Therefore, if a particular syndicate takes a risk with a detrimental claim, the entire market suffers.

In modern times, shipowners are located all over the world, so brokers negotiate on their behalf. Brokers operate as the middlemen between the underwriters and shipowners, taking a cut of the premium as a brokerage fee. The industry is collegial. Brokers' offices are typically within walking distance of the Lloyd's building. Most of the market operates under longstanding relationships between brokers and underwriters. These relationships are more than just colleagues; the people who work in the London insurance market are genuinely friends. The market works primarily through long lunches between brokers, underwriters, or clients. Many deals are negotiated over drinks or meals. The success of the market is dependent on this trust-based system, that a good or safe risk is brought to close colleagues or friends. Regardless, those in the market for war risks must have a healthy appetite for gambling and betting against the house.

There are various types of marine insurance, including Protection & Indemnity ("P&I") Insurance, Hull and Machinery Insurance ("H&M"), Charterparty and Cargo Insurance, and War Risk Insurance, among others. While each brokerage might define its various insurance policy options under different names, it is imperative to understand how these policies work together. Underwriters within a syndicate often specialize in different types of risk, just as brokers within a brokerage have their own distinct areas of expertise. For example, a broker that specializes in H&M and is looking to insure an H&M policy will visit several different H&M underwriters and colleagues at different syndicates to take different portions of the H&M risk.<sup>5</sup> These policies are generally a part of a larger insurance binder for a specific company.

## **II. War Risks**

The political tensions of the 1890s made war risks in the London insurance market rather unpopular, leading to a general meeting of Lloyd's in 1898, which called for the exclusion of war risks from marine insurance policies.<sup>6</sup> This led to war risks being written under a separate policy.



This “war risk” coverage is defined as “losses stemming from war, civil war, revolution, rebellion, insurrection, civil strife, and terrorism.”<sup>7</sup> Separate policies are required to protect against marine war risks. These policies are not compulsory unless traveling through an area that has been excluded by the Joint War Committee (“JWC”). The JWC, a committee of twelve underwriting representatives that underwrite marine hull war insurance, puts forth these territorial exclusions, measured by various risk factors, to decide if a separate policy would be necessary for a voyage through a specific listed area. If an owner chooses to pursue a journey through an area that the JWC has excluded, an additional war insurance policy might be necessary.<sup>8</sup> If a shipowner wants to transit through one of the designated areas, they would need to notify their underwriter and then pay a supplemental premium.<sup>9</sup> The underwriter or shipowner, if the charterer is proposing the voyage, will then have seven days to determine if an additional premium or cancellation of coverage is necessary.

A marine war risk policy can come in two forms: as an annual policy, for example, if the ship is mortgaged, lenders may require a yearly war risk policy,<sup>10</sup> or for a single voyage through an excluded area, which will come at a high premium to justify the risk. These policies can last for any time period from seven days to a year.<sup>11</sup>

### III. Current Picture

A large portion of the Red Sea has been a “listed area” of the JWC, meaning that to be protected by insurance, an additional war risk insurance policy is necessary for any voyage looking to pass through that area.<sup>12</sup> These one-off voyage war risk insurance policies require a tremendous undertaking by the marine insurance market. Creating an individualized policy for a voyage through an excluded area requires finding underwriters with the appetite for the specialized risk of war. While many insurers boast their desire to gamble on war, the market fluctuations on war risks mirror the state of world affairs.<sup>13</sup>

The JWC meets monthly, or if an emergency arises, like the invasion of Ukraine.<sup>14</sup> Before the official invasion of Ukraine, the JWC placed the Black Sea and the Sea of Azov on the list of listed areas in an attempt to brace for the potential impacts of war breaking out in Ukraine.<sup>15</sup> Since war policies have a seven-day cancellation policy, under which underwriters can change or cancel existing coverage, insurers began issuing calls for extra premiums as soon as war was declared.<sup>16</sup> For Black Sea passage, after the outbreak of war in Ukraine, war rates went as high as 10% of the total hull value of a vessel.<sup>17</sup>

#### *(1) Nordic Plan*

After the 2022 invasion of Ukraine, an estimated \$1.2 billion worth of ships were trapped in Black Sea ports; the marine insurance market reacted in a panic.<sup>18</sup> The



market attempted to pass the cost on to shipowners, and consequently, marine insurance prices increased. 2022 was expected to result in a \$1.2 billion loss to the war insurance market, but due to an offset of costs in other areas and the humanitarian grain corridor, there was a massive profit for the war market, with a 61.98% increase in profit from premiums over claims in 2022.<sup>19</sup> The humanitarian grain corridor, also known as the Black Sea grain deal, was an agreement between Russia and Ukraine to allow for a safe corridor to export Ukrainian grain through a pre-planned Black Sea Route.<sup>20</sup>

The war risk market had a profitable year in 2022, leaving war underwriters with the confidence to bet on more risks. This included the insurers of the *M/V Galaxy Leader*, a roll-on/roll-off vehicle carrier with an estimated \$65 million value, that was hijacked by Houthi rebels via helicopter in the Red Sea on November 19th, 2023.<sup>21</sup>

There are several standard war risk insurance contracts, such as the Nordic Plan and the Institute War and Strikes Clauses Hulls (“IWSC”).<sup>22</sup> The *M/V Galaxy Leader*’s war risk insurers used the Nordic Plan, which gained popularity in the last fifteen years by broadly including war-related risks.<sup>23</sup> This created much speculation about whether the Nordic Plan would cover the loss of the *M/V Galaxy Leader*, as the nature of the Houthi rebels’ attacks is not typically considered an act of war. However, due to market pressures and concerns that most shipowners would abandon the Nordic Plan in the future if the *M/V Galaxy Leader* was not covered, the loss was covered. The loss was estimated to be between \$40 and \$50 million and led to an increase in rates for voyages in the Red Sea.<sup>24</sup>

## (2) IWSC

The IWSC gained popularity in the 1980s, based on the United Kingdom’s Marine Insurance Act of 1906 and common law precedent. The IWSC leaves much of its interpretation in a grey area for insurers to determine whether a claim may be covered. The IWSC mirrors the language within the standard marine insurance contract, Institute Time Clauses (Hulls) (“ITCH”), which contains a paramount war exclusions clause. This paramount clause covers “War Exclusion; Strikes Exclusion; Malicious Acts Exclusion; and the Radioactive Contamination Exclusion Clause” and overrides any other assurances within a traditional marine insurance contract that would violate the exclusion clauses. The ITCH replaced the historically used FC&S clause with interlocutory clauses that encourage uniformity of coverage that can be placed in traditional marine insurance contracts. The FC&S clause served the same purpose but used the language under “warlike operation.” It lost popularity because of the lack of uniformity for coverage and exclusions with the war risk insurance policies. Specifically, the FC&S clause presented its structural flaws after the ruling in the *Yorkshire Dale Steamship Co., Ltd. v. Minister of War Transport, ‘Coxwold’*<sup>25</sup>



case, where a vessel that ran aground in convoy was held to be a war risk rather than a traditional marine risk.<sup>26</sup> To address this, the Institute of London Underwriters (“ILU”) developed the IWSC, ITCH, and other standard insurance contracts that collectively promoted coverage uniformity. The IWSC bases its war risk coverage on a set of clauses defining what is covered under a war risk insurance policy.<sup>27</sup> Specifically, section one of IWSC replaced the Perils covered with the exclusion of “warlike operation” language used in the FC&S clause with language providing coverage for “any hostile act.”<sup>28</sup>

#### IV. Profit & Confidence

In 2023, Lloyd’s syndicates “returned an excellent profit on [war][ ] USD85M in net premiums vs >500k in losses.”<sup>29</sup> While the war market has been historically lucrative, these massive profits increased underwriters’ appetite for risk.<sup>30</sup> Some insurance companies operate outside the typical Lloyd’s structure, like Navium, a managing general agent (“MGA”) that wrote 100% of the war risk on the bulk carrier *M/V True Confidence* before Houthi rebels attacked it on March 6th of 2024.<sup>31</sup> The *M/V True Confidence* was the first incident of loss of human life from the Houthi rebel attacks, with three crew members killed. Navium’s appetite for war obligated it to absorb the estimated \$17.6 million in hull value.<sup>32</sup> MGA’s have opened to rival Lloyd’s of London insurers, and they operate as stand-alone coverage for more dangerous voyages that some insurers inside Lloyd’s would be hesitant to underwrite. MGA’s charge premiums that can earn the firm millions if there are no incidents on the voyage.<sup>33</sup> This cover has made traversing through the Red Sea and Black Sea possible, insuring cargo valued at an estimated \$830 million per day .

These incidents, totaling more than 100 since the Houthis began their attacks in 2023, combined with the countless other threats from the Red Sea, left underwriters who had a healthy appetite for war risks after the Ukrainian invasion timid and afraid to underwrite war risks.<sup>34</sup> The Houthis claim to be acting in response to the war in Gaza, in solidarity with the Palestinians.<sup>35</sup> In an effort to avoid the Red Sea, many shipowners have taken alternative routes around the Cape of Good Hope to avoid the risk of attacks and the increased cost of war insurance. These voyages can take additional weeks to complete and require more supplies, more fuel, and extended crew wages.<sup>36</sup> Without war risk insurance for the Red Sea and Black Sea, many of the essential cargos like oil, coal, and grains would be stuck in port, as shipowners would not want to take on the additional risk with no assurances.<sup>37</sup>

After the Russian invasion of Ukraine, a series of sanctions were issued by the G7, the EU, and a few other countries. They initiated a price cap for Russian Crude oil at U.S. \$60 per barrel and diesel at \$100 per barrel, and they used the International



Group (“IG”) of P&I insurers, as well as brokers and other insurers, requiring them not to insure vessels over the price cap.<sup>38</sup> The Russians reacted by reflagging their ships on different registries, as well as starting to operate outside the bounds of normal shipping by not pulling into the ports that they traditionally would, by doing ship-to-ship (“STS”) transfers, as well as turning off their automatic identification systems (“AIS”).<sup>39</sup> A STS transfer is the process where two ships exchange cargo, usually in liquid form, while one or both of the vessels are at sea and one or both are at anchor.<sup>40</sup> Russia invented insurance companies to insure these vessels, and some Russian ships are operating without any formal insurance.

All these events have caused insurers to raise their rates for covering voyages of vessels in a designated area. The war risk premium is traditionally measured as a percentage of the ship’s total value, which during June of 2024 surged from 0.3% to 0.4% to 0.6% per voyage.<sup>41</sup> Reports have come out that at some points in 2024, the rates rose to 2% of the total hull value of a ship.<sup>42</sup> Ships with Israeli connections have trouble finding insurers who will cover them, as they are being targeted by the Houthis. Additionally, ships with links to the United States and the United Kingdom are also being targeted. In September 2024, reports emerged of ships known to be targets struggling to secure coverage and smaller insurers being unable to write war risks for the Red Sea.<sup>43</sup>

### V. Clause Interpretation Under War Risks

Each insurance clause form has two purposes “[f]irst, the clause form specifically identifies the risk covered under the policy held by the assured. Second, it limits the risks covered by the insurer. Hence, it is of the utmost importance that underwriters specifically list what a policy covers and avoid any ambiguity.”<sup>44</sup>

Determining if a risk is covered under a particular clause is imperative to the work done in the various claims departments of insurance companies. Like all specialty departments, such as hull or war, the claims process also has specialty departments in insurance. While the front end of any syndicate or brokerage deals with premiums and negotiating “what ifs,” claims departments contend with the aftermath. Once a claim is filed, the claims department on the brokerage side will start by examining the nature of the claim, specifically under the nature of the proximate cause.<sup>45</sup> The brokerage claim department will work in conjunction with the underwriters’ claims department.

#### *(1) Multiple Causes*

The Marine Insurance Act of 1906 codified English law around marine insurance but left interpretation on proximate causation and exclusions up to the courts.<sup>46</sup> The same applies to interpreting war risk clauses, as the proximate cause is still the



defining test under English law. However, there are difficulties with war exclusions as multiple factors can be at play.

At the end of the day, it is the insurer who determines if a claim is an acceptable war risk or not. Insurers have found that for damage to be covered under “war” for the Institute War Clauses (Cargo) “ITWC,” it must be done with malicious intent.<sup>47</sup> Difficulties present themselves with physical harm because of war, and multiple factors are addressed to ensure a concise cause.

For marine losses that multiple factors could cause, the insurers must address the different insurance coverages, as well as the proximate cause of the actual loss. For example, in the case of *Incorporated General Insurances Ltd v AR Shooter T/A Shooter’s Fisheries, ‘Morning Star’*, a vessel was detained by Iranian authorities on the basis of a breach of Iran’s port regulations. The owner of the *Morning Star* claimed that the loss was caused by the “detainments of all Kings, Princes and Peoples[,]” while the insurers argued that the proximate cause was found to be failing to pay the fine to release the vessel, insinuating an operational issue.<sup>48</sup> However, the Supreme Court of South Africa found that while there were multiple causes, the dominant and effective cause of the detention was the “detainments of all Kings, Princes and Peoples” of the ruling power of the country.<sup>49</sup> This presents difficulties in determining how claims made on vessels with war insurance are approached. Specifically, for claims attributable to multiple causes, insurers must determine the proximate cause of the loss to identify which insurance policy is responsible for the claim and, further, which underwriters will be paying out.

### **(2) Detainment Clause**

Clause three within the IWSC is the *Detainment* clause, which states:

“In the event that the Vessel shall have been the subject of capture seizure arrest restraint detainment confiscation or expropriation, and the Assured shall thereby have lost the free use and disposal of the Vessel for a continuous period of 12 months then for the purpose of ascertaining whether the Vessel is a constructive total loss the Assured shall be deemed to have been deprived of the possession of the Vessel without any likelihood of recovery.”

English law has confirmed the difference between “capture” meaning “capture by an enemy or belligerent” and “seizure” which includes “any act of forcible possession” which can be by a lawful entity or not.<sup>50</sup> Force is not a requirement of detainment.<sup>51</sup> This clause allows a total loss after twelve months of detainment.<sup>52</sup> There have been very few recorded detainment losses in the market. However, one notable occurrence was the seizure of the *M/V St. Nikolas* by the Iranian Navy in retaliation



for the United States' confiscation of oil on the ship in 2023.<sup>53</sup> Currently a Dutch-owned Dredger, *Zheng He*, is detained in Mexico, which some have speculated will be released within the next six months. The Dutch company that owns the Dredger claims that it has been seized under false pretenses and attributes the detainment to corruption. The vessel is worth \$130 million, and the marine war market awaits the potential impact of the claim.<sup>54</sup>

Detention losses are treated as constructive total loss. However, the proximate cause of the loss must be an insured interest under the war insurance policy. In the case of *Delos Shipholding SA & Ors v. Allianz Global Corporate and Specialty SE & Ors*, where the insured vessel *Win Win* was detained in Indonesia by Indonesian authorities, the shipowner sought to recover the insured value of the vessel at \$27.5 million. The insurers argued that they insured the vessel under false pretenses because it was not disclosed that the shipowner was subject to criminal charges in Greece. Due to inadequacies of the ship-owning companies' reporting system, the company was found not to have constructive knowledge of the pending charges.<sup>55</sup>

The *MT ZouZou* was a vessel detained in Venezuela, allegedly for smuggling diesel. *MT ZouZou* was detained for more than fourteen months. The ship was insured for \$55 million by the Hellenic Mutual War Risks Association ("HMWRA"), and it was mortgaged by Piraeus Bank, which claimed a constructive total loss for the total amount of \$71 million plus interest. The bank, which was designated as an "assignee and loss payee under the owners' insurance" policy, claimed that the policy exclusions were invalid because the detainment was unlawful under Venezuelan law.<sup>56</sup> The bank had a mortgagee interest insurance policy ("MII"), which is built on the war risk policy and read in conjunction with it. The underwriters claimed a material non-disclosure of entrance to an Additional Premium Area, which had been excluded from coverage by the JWC. Essentially, the court found that although some war insurance is compulsory if a ship is mortgaged, war insurance and a MII will not function as a backstop mortgage, allowing the mortgagee to recover regardless of cause.<sup>57</sup>

In Ukraine, as the one-year anniversary approached since the date of the original invasion, about sixty ships were still trapped in Ukraine. This news comforted the market that had initially expected this detainment loss to be around \$1.2 billion for over one hundred detained ships. Regardless, the shipowners of the sixty ships still trapped in Ukraine were confronted with having to pay additional premiums for war risks on ships that were already detained. If they do not pay the additional premium and twelve months pass, then the shipowners would be unable to recover under a detainment loss.<sup>58</sup>



### (3) Piracy

Piracy risks have altered the trajectory of coverage from H&M and influenced the shift toward more comprehensive coverage for these risks under alternative insurance. Piracy is still covered under some H&M policies for any physical damage to a vessel that is caused by a piracy incident, due to the market treating piracy as “arguably becoming viewed by the insurance companies as a well-constituted practice that functions in a business model which includes precise calculations of the ransom amount of money to be paid and the professional assurances of the security of the crew, ship[,] and cargo while the negotiations proceed.”<sup>59</sup> Adaptability from insurers is needed to contend with the other risks that piracy presents, as piracy losses can become very costly.

The *M/V Tutor* was attacked by Houthi rebels via drone on June 12, 2024, in the Red Sea, where it ultimately sank. While Gard AS was the *M/V Tutor*'s insurer against oil spills, the ship was attacked in a designated conflict zone, meaning the estimated \$37 million loss was the responsibility of the war insurer.<sup>60</sup> The Houthi attacks have presented difficulties for insurers regarding what is covered under various types of insurance. Specifically, there have been difficulties defining the Houthis as either government actors, pirates, or third-party actors. If Houthi rebels attacked with ballistic missiles and drones or weapons more associated with an act of war, these claims would potentially be covered under war risk insurance. If the Houthi rebels attack ships with smaller vessels or an act associated with traditional piracy, those risks might be covered under what is typically associated with piracy insurance. Piracy is typically associated as a commercial risk with activities undertaken for personal benefit or profit by individuals, whereas political insurgencies or military-like operations carried out by actors like the Houthis can be covered under the war clauses.<sup>61</sup>

Areas that have piracy risks are often included in the excluded areas listed by the JWC. As mentioned previously, travel through an excluded area makes most existing marine insurance invalid and requires the purchase of supplemental coverage through a vessel's P&I Club for coverage for crew injuries and deaths, as well as other third-party risks that piracy might present. If the piracy is determined to be politically motivated, war risk insurance might cover the loss. Piracy is an optional coverage for war insurance. It can commonly be covered without any additional premium payment. The characterization of the event by the insurer determines if a risk will be covered under piracy insurance, war insurance, H&M, or P&I, including if there are any sort of explosions, as some H&M and P&I insurance have explosion exclusions. Under Clause 1.3 of IWSC, which covers derelict mines, torpedoes, bombs, or other derelict weapons of war, explosions that are not mentioned in the title are covered by the marine risks policy.<sup>62</sup>



H&M will cover “physical risk to the ship, like anchoring or damage from heavy seas, collision, sinking, capsizing, fire, piracy, and discarding encumbering cargo to save other property[.]”<sup>63</sup> Most cargo insurance policies will cover cargo loss attributed to piracy. Specifically, the Institute Cargo Clauses (“ICC”) (A) were introduced in 1982 as an all-risk covered clause that included piracy insurance for cargo, as the War Exclusion Clause 6.2 under ICC excluded piracy. ICC (B) and ICC (C) only provide coverage for “named peril,” which does not include piracy.<sup>64</sup> Regarding cargo claims, the COGSA defense of Restraint of Princes highlights the challenges of characterizing the Houthi actors as a government entity. As the case of *Lekas & Drivas, Inc. v. Goulandris* illuminates, the spoilage of goods because of a government’s actions can put the onus on the carrier to show how much of the loss was caused by the excepted peril, Restraint of Princes. In *Goulandris*, the ship was attacked by the Italian government, and the delay caused the cheese to spoil in transit.<sup>65</sup>

Contrarily, the Houthis have generally been defined as non-state actors by the insurance market, and this cargo defense is likely inapplicable. Piracy risks peaked between 2008 and 2014 during the Somali pirate crisis, creating higher rates and a reliance on war insurance and kidnapping and ransom insurance. The war rates in response to the Houthi attacks far exceeded the Somali rates. Additionally, any monetary payment to the Houthis would be considered illegal because they are designated as a terrorist organization in the US, the UK, and the EU.<sup>66</sup> Regardless, the parties must look at the specific wording of each insurance clause and situation to determine what is or is not covered.

#### **(4) Charter Parties**

A charterer or shipowner can decline insurance coverage or additional war insurance. At the same time, the ship operators and shipowners can entirely decline a war risk as they manage the navigational responsibilities of the vessel. The charterer and the shipowner or operator will have to work out the cost of additional premiums amongst themselves.<sup>67</sup>

The UK Supreme Court ruled on charter liability for ransom payments in *Herculito Maritime Ltd v. Gunvor International BV (The Polar)*.<sup>68</sup> The Cargo interests disputed their liability on their portion of the ransom payment. The *MT Polar* was chartered to carry fuel oil to Singapore from St. Petersburg through the Suez Canal and the Gulf of Aden. The charter included clauses that covered war risks and Gulf of Aden transit on the understanding that the owners would take out supplemental kidnapping and ransom insurance at the expense of the charterer. During transit, Somali pirates seized the vessel and held it captive for over ten months, eventually releasing it for the exchange of a \$7.7 million ransom payment. The shipowner declared general



average, and the case was taken to the UK Supreme Court to recover \$5,914,560.75 from cargo interests. The law of general average is an equitable doctrine that holds all joint venturers, including shipowners and cargo owners, are liable for their proportionate share of the loss. The rules for general average have been codified in the York-Antwerp Rules to be calculated based on “the value at the time and place of the completion of the voyage.”<sup>69</sup>

At issue was whether an *implied* insurance fund or code existed within the charter party that could be incorporated into the bill of lading. The UK Supreme Court determined that a high threshold level must be met to establish the existence of a code, and that most cases involving an insurance code have joint names with insurance companies. In *The Polar*, the cargo interests did not pay additional premiums for insurance and, therefore, did not meet this threshold that would allow the insurance code to be incorporated into the bills of lading.<sup>70</sup> Accordingly, the cargo interests were responsible for contributions to the general average.<sup>71</sup> This case additionally affirmed that ransom payments would fall under a general average. While every charter will still need to be evaluated on an individual basis, this guidance provides charterers with the information necessary to prepare for voyages through the Red Sea and the Gulf of Aden.

BIMCO is a company with the goal of shaping global shipping policy and regulations that represents over 62% of the world’s tonnage.<sup>72</sup> BIMCO sets forth several uniform charter party forms, including the BIMCO War Risk Clause for Voyage Charter Parties (“VOYWAR”) and the BIMCO War Risk Clause for Time Charter Parties (“CONWARTIME”).<sup>73</sup> The Documentary Committee met in April of 2025 to revise their war risk clauses for the 2025 editions to incorporate the “dynamic of conflicts today, not least the war in Ukraine and recent attacks on shipping in the Red Sea,” as explained by Nicholas Fell, Chairperson of BIMCO’s Documentary Committee.<sup>74</sup> The goal of these changes is to provide clarity on the additional premiums that charterers would pay to shipowners for entering high-risk areas, as well as a new calculation method for additional freight and potential rerouting for safe passage under VOYWAR 2025.<sup>75</sup> These clauses allow owners the right not to proceed on a voyage if they reasonably believe it is unsafe.

### **(5) P&I Aspect**

P&I Clubs are shipowner-owned protection and indemnity clubs operated by shipowners who pay a premium each year and receive payments back from the club for any claims. P&I coverage protects owners from third-party liability and put simply, covers what standard H&M insurance policies do not cover. P&I insurance excludes war risks. Supplementary insurance is offered as additional coverage for passage through a JWC-excluded area. Some P&I clubs offer separate war risk



policies or recommend that the shipowner seek coverage through the traditional insurance market. There are procedures for war risks. The International Group (“IG”) has war risk coverage on a mutual basis that takes effect as excess cover after the shipowner’s hull war P&I insurance is applied, and the excess will cover up to \$500 million per single incident and \$80 million for the area around Ukraine.<sup>76</sup> P&I Clubs typically provide a seven-day notice cancellation period for coverage if a ship has entered an excluded zone marked by the JWC. If this cancellation period is put into effect, a separate war risk cover facilitated by the club might be obtained. Generally, these are standalone policies that are reinsured through the insurance market.<sup>77</sup>

## VI. Conclusion

Since the 2022 invasion of Ukraine, the war risk market has responded with ebbs and flows of confidence and fear. The original reaction of diversifying risk by passing off the cost to shipowners allowed the war risk market to anticipate a healthy profit when the humanitarian grain corridor allowed the trapped vessels to leave the Black Sea. When the estimated loss of \$1.2 billion from ships because of the Ukrainian invasion was not as dire as initially feared, the market for war underwriters gained confidence and started underwriting more war risks. The war market grew into a \$1 billion market. Then, the over seventy attacks by Houthi rebels on vessels in the Red Sea led the market to lose some of the confidence it had built with the return from the Black Sea. As attacks rose, the number of insurers comfortable with the risk shrank. As war continues to rage on, insurers must face the harsh realities of insuring such turbulent risks with uncertain outcomes. ➤

### Endnotes

- 1 Alex Longley, *The Wartime Risk Insurers Making Fortunes Keeping Trade Moving*, BNN BLOOMBERG (Jan. 6, 2025), <https://www.bnnbloomberg.ca/investing/commodities/2025/01/06/wartime-risk-takers-keep-830-million-in-trade-moving-every-day/> (hereinafter “Longley”).
- 2 LLOYD’S, <https://www.lloyds.com/about-lloyds/history/coffee-and-commerce> (last visited Apr. 22, 2025).
- 3 Slips are insurance contracts. Until COVID-19, most slips had to be physically signed by the underwriter. The pandemic drastically shifted the way the market interacted with the digital age.
- 4 Binders are what the insurance market refers to an overall insurance policy, usually consisting of several contracts “binded” together.
- 5 See Christopher M. Douse, *Combating Risk on the High Sea: An Analysis of the Effects of Modern Piratical Acts on the Marine Insurance Industry*, 36 Tul. Mar. L. J. 267, 278 (2010) (hull insurance covers property loss, for any “physical loss or damage to the vessel”).
- 6 SUSAN HODGES, CASES AND MATERIALS ON MARINE INSURANCE LAW 557 (Roy Carlile, 1999) (hereinafter HODGES); see also MICHAEL D. MILLER, THE HISTORY OF THE WAR RISKS POLICY 4 (3rd ed. 2005) (hereinafter “MICHAEL D. MILLER”).
- 7 ALLEN BLACK & CHARLIE PAPAIVAS, MARITIME LAW ANSWER BOOK 10-12 (Lori Wood ed., 2022).
- 8 *Joint War Committee*, LMALLOYDS, <https://www.lmalloyds.com/lma/jointwar>.
- 9 *War risks and mutual P&I cover*, LOCKTON | P.L. FERRARI (May 2, 2023) <https://www.locktonpferrari.com/posts/war-risks-and-mutual-p-i-cover>.
- 10 Microsoft Teams Interview with Tom Bomford, Director, Marine Hull, Global, AON (Mar. 4, 2025).
- 11 Longley, *supra* note 1.
- 12 *The Red Sea Crisis: Impacts on global shipping and the case for international co-operation*, INTERNATIONAL TRANSPORT FORUM 15 (2024).
- 13 See *The Red Sea Crisis: Impacts on global shipping and the case for international co-operation*, INTERNATIONAL TRANSPORT FORUM 15 (2024); see also *WAR RISKS Trusted by clients and markets alike, Miller is the leading maritime war risks (re)insurance broker in the world.*, MILLER, <https://www.miller-insurance.com/sectors/marine/marine-war-insurance/> (last visited Apr. 22, 2025).
- 14 Interview with Tom Bomford, *supra* note 10.



- 15 David Osler, *War risk insurers list Black Sea and Sea of Azov*, LLOYD'S LIST (Feb. 16, 2022) <https://www.lloydslist.com/LL1139886/War-risk-insurers-list-Black-Sea-and-Sea-of-Azov>.
- 16 Kassandra Jimenez-Sanchez, *Marine markets facing large total loss claims from ships trapped in Ukraine*, REINSURANCE NEWS (Nov. 7, 2022) <https://www.reinsurance.ws/marine-markets-facing-large-total-loss-claims-over-ships-trapped-in-ukraine/> (hereinafter "Jimenez-Sanchez").
- 17 Paul Peachey, *'Step change' in Russian attacks on shipping pressures Black Sea war risk premiums*, TRADE WINDS (Oct. 8, 2024), <https://www.tradewindsnews.com/insurance/step-change-in-russian-attacks-on-shipping-p pressures-black-sea-war-risk-premiums/2-1-1721307> (hereinafter "Peachey").
- 18 See Peachey, *supra* note 17; see also Olena Harmash, *Ukraine announces 'humanitarian corridor' for ships stuck in Black Sea ports*, REUTERS (Aug. 10, 2023), <https://www.reuters.com/world/europe/ukraines-navy-announces-black-sea-humanitarian-corridor-says-russian-threat-2023-08-10/>.
- 19 Interview with Tom Bomford, *supra* note 10; see also Marine Hull- War Risks, Piracy & The Red Sea Crisis, AON Presentation (2024) (hereinafter "AON Presentation"); see also *Building resilience 2016-*, LLOYD'S, <https://www.lloyds.com/about-lloyds/history/driving-greater-resilience> ("2022: 'AsOne' Ukrainian grain facility [...] The conflict in Ukraine demonstrated the devastating toll a systematic event has on the global risk landscape. The Lloyd's market quickly mobilized to ensure shipments of grain from Ukraine to Africa could continue, averting a humanitarian crisis.")
- 20 *Russia-Ukraine Black Sea grain deal: All you need to know*, ALJAZEERA (Jul. 17, 2023), <https://www.aljazeera.com/news/2023/7/17/russia-ukraine-black-sea-grain-deal-all-you-need-to-know>.
- 21 AON Presentation, *supra* note 19.
- 22 HODGES, *supra* note 6, at 557 (Roy Carlile, 1999).
- 23 The Nordic Marine Insurance Plan of 2013, Version 2023, <https://www.nordicplan.org/the-plan>. (The Nordic Plan is not based on traditional common law interpretation but instead operates in black-and-white terms, meaning that all risks are included unless they are expressly excluded.)
- 24 Interview with Tom Bomford, *supra* note 10.
- 25 *Yorkshire Dale Steamship Co., Ltd. v. Minister of War Transport, 'Coxwold'* 73 LI L Rep 1, HL (1942).
- 26 HODGES, *supra* note 6, at 567.
- 27 *Id.* at 569.
- 28 *Id.* at 567.
- 29 AON Presentation, *supra* note 19.
- 30 Interview with Tom Bomford, *supra* note 10.
- 31 David Osler, *Navium had 100% of war risk on True Confidence*, LLOYD'S LIST (Mar. 7, 2024), <https://www.lloydslist.com/LL1148484/Navium-had-100-of-war-risk-on-True-Confidence>.
- 32 *Id.*
- 33 Longley, *supra* note 1.
- 34 *Id.*
- 35 Jonathan Saul & Carolyn Cohn, *Red Sea insurance costs soar as Houthi shipping threats loom, sources say*, REUTERS (Sept. 19, 2024), <https://www.reuters.com/world/middle-east/red-sea-insurance-costs-soar-houthi-shipping-threats-loom-sources-say-2024-09-19/> (hereinafter "Saul & Cohn").
- 36 Lori Ann LaRocco, *Tanker transits plunge 20% in Red Sea: Lloyd's List*, FREIGHT WAVES (Feb. 7, 2024), <https://www.freightwaves.com/news/tanker-transits-plunge-20-in-red-sea-lloyds-list>.
- 37 *Id.*
- 38 See WHAT'S GOING ON WITH SHIPPING, *Why Should We Care About Dark Fleets | WGOW Shipping on Why Should You Care About the Indo-Pacific?*, (YouTube, Mar. 23, 2025) [https://www.youtube.com/watch?v=4GLhQIC\\_pk](https://www.youtube.com/watch?v=4GLhQIC_pk).
- 39 Russia's 'shadow fleet': Bringing the threat to light, European Parliament, (Nov. 2024), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2024/766242/EPRS\\_BRI\(2024\)766242\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2024/766242/EPRS_BRI(2024)766242_EN.pdf).
- 40 *Ship to ship transfer safety*, SKULD, (Nov. 13, 2020), <https://www.skuld.com/topics/cargo/liquid-bulk/ship-to-ship-transfer-safety/>.
- 41 *Tutor Sinking Takes Red Sea Perils to New Level*, GCAPTAIN, June 20, 2024, <https://gcaptain.com/houthis-ship-seizure-is-a-threat-to-international-trade/>.
- 42 *The Red Sea Crisis: Impacts on global shipping and the case for international co-operation*, INTERNATIONAL TRANSPORT FORUM 15 (2024); see also Saul & Cohn, *supra* note 35.
- 43 Sameer Mohindru & Takeo Kumagai, *Ship, cargo insurers reluctant to cover Red Sea transit until ground level threat near-zero*, S&P GLOBAL (Jan. 21, 2025), <https://www.spglobal.com/commodity-insights/en/news-research/latest-news/shipping/012125-ship-cargo-insurers-reluctant-to-cover-red-sea-transit-until-ground-level-threat-near-zero>.
- 44 Christopher M. Douse, *Combating Risk on the High Sea: An Analysis of the Effects of Modern Piratical Acts on the Marine Insurance Industry*, 36 Tul. Mar. L. J. 267, 278 (2010).
- 45 MICHAEL D. MILLER, *supra* note 6, at 341-44 (3rd ed. 2005).
- 46 See *id.*; see also Marine Insurance Act 1906 §55(1) (UK), <https://www.legislation.gov.uk/ukpga/Edw7/6/41>.
- 47 Interview with Tom Bomford, *supra* note 10.
- 48 HODGES, *supra* note 6, at 560 (citing *Incorporated General Insurances Ltd v AR Shooter T/A Shooter's Fisheries, 'Morning Star'* (1987) 1 Lloyd's Rep 401, SA CA).
- 49 *Incorporated General Insurances Ltd v AR Shooter T/A Shooter's Fisheries, 'Morning Star'* (1987) 1 Lloyd's Rep 401, SA CA.
- 50 HODGES, *supra* note 6, at 569 (citing *Cory v Burr* (1883) 8 App Cas 393, HL).
- 51 *Id.* at 573.



- 52 Interview with Tom Bomford, *supra* note 10.
- 53 Kathryn Armstrong, *Iran seizes oil tanker St Nikolas near Oman*, BBC (Jan. 11, 2024), <https://www.bbc.com/news/world-middle-east-67948119>.
- 54 Jan De Nul Group contests detention of dredging vessel Zheng He in Mexico, Jan De Nul, (Aug. 21, 2024), <https://www.jandenul.com/news/jan-de-nul-group-contests-detention-dredging-vessel-zheng-he-mexico>; see also Samuel Casey, *Marine war market fears claim over detained \$130mn dredger*, INSURANCE INSIDER, Sept. 18, 2024, [https://www.insuranceinsider.com/article/2ds0vjhwu5284h92voge8/london-market/marine-war-market-fears-claim-over-detained-130mn-dredger?zeph\\_sso\\_ott=EU22tt](https://www.insuranceinsider.com/article/2ds0vjhwu5284h92voge8/london-market/marine-war-market-fears-claim-over-detained-130mn-dredger?zeph_sso_ott=EU22tt).
- 55 Professor Baris Soyer, *Detention Resulting in Constructive Total Loss (CTL) under the War and Strike Risks Policy- Allegation of "Unfair Presentation of the Risk" and Several More Futile Defenses*, THE INSTITUTE OF INTERNATIONAL SHIPPING & TRADE LAW (IISTL) BLOG (Apr. 20, 2024), <https://iistl.blog/2024/04/20/detention-causing-a-constructive-total-loss-under-war-and-strike-risks-policies-allegation-of-unfair-presentation-of-the-risk-and-several-more-futile-defences/> (citing *Delos Shipholding SA & Ors v. Allianz Global Corporate and Specialty SE & Ors* [2024] EWHC 719).
- 56 Benjamin Coffey, *MT ZOUZOU: detention, constructive total loss and mortgagee's interest insurance - Commercial Court clarifies scope of indemnity*, HELLENIC SHIPPING NEWS (June 6, 2022), <https://www.hellenicshippingnews.com/mt-zouzou-detention-constructive-total-loss-and-mortgagees-interest-insurance-commercial-court-clarifies-scope-of-indemnity/> (citing *Piraeus Bank v Antares Underwriting Limited and others* [2022] EWHC 1169 (COMM).)
- 57 Edward Low, *The ZouZou- Banks and their coverage (or lack thereof) under MII policies*, Norton Rose Fulbright (June 2022) <https://www.nortonrosefulbright.com/en/knowledge/publications/fd0d81dc/legalseas>.
- 58 Jimenez-Sanchez, *supra* note 16.
- 59 Soumyajit Dasgupta, *Marine Insurance for Piracy Attacks: Necessities and Benefits*, MARINE INSIGHT (Jan. 5, 2019), <https://www.marineinsight.com/marine-piracy-marine/marine-insurance-for-piracy-attacks-necessities-and-benefits/>.
- 60 Longley, *supra* note 1.
- 61 See Leena Mody, *Piracy- General Average & Insurance*, INMARCO- 2010, <https://www.leenamody.com/documents/INMARCO-2010.pdf> (hereinafter "Mody").
- 62 HODGES, *supra* note 6, at 581 (Roy Carlile, 1999).
- 63 Soumyajit Dasgupta, *Marine Insurance for Piracy Attacks: Necessities and Benefits*, MARINE INSIGHT (Jan. 5, 2019), <https://www.marineinsight.com/marine-piracy-marine/marine-insurance-for-piracy-attacks-necessities-and-benefits/>.
- 64 See Mody, *supra* note 61.
- 65 *Lekas & Drivas, Inc. v. Goulandris*, 306 F.2d 426 (2d Cir. 1962).
- 66 Mike Ingram, Angus Blayney & Matt Hodges, *Marine War Bulletin*, GALLAGHER (Feb. 29, 2024) <https://specialty.ajg.com/marine-cargo/marine-war-bulletin-february-2024>.
- 67 *War Risks Clause for Time Chartering 2025 (CONWARTIME 2025)*, BIMCO, [https://www.bimco.org/contractual-affairs/bimco-clauses/current-clauses/war\\_risks\\_clause\\_for\\_time\\_charters\\_2025/](https://www.bimco.org/contractual-affairs/bimco-clauses/current-clauses/war_risks_clause_for_time_charters_2025/) (last visited Apr. 22, 2025).
- 68 *Herculito Maritime Ltd v. Gunvor International BV (The Polar)* [2024] UKSC 2.
- 69 ROBERT FORCE, *ADMIRALTY AND MARITIME LAW (Green Bible)* 197 (2nd ed. 2013).
- 70 Mike Phillips & Archit Dhir, *Supreme Court Guidance on War Risk Provisions in Charterparties*, WATSON FARLEY & WILLIAMS (Feb. 6, 2024) <https://www.wfw.com/articles/supreme-court-guidance-on-war-risk-provisions-in-charterparties/>.
- 71 Rebecca Crookenden & Phoebe Love, *CIF Weekly – issue 63 THE POLAR Herculito Maritime Ltd and others v Gunvor International BV and others*, STEPHENSON HARWOOD (Jan. 2024) [https://www.stephensonharwood.com/docs/default-source/news-insights-documents/2024/cif-weekly-63.pdf?sfvrsn=bbabc85b\\_0](https://www.stephensonharwood.com/docs/default-source/news-insights-documents/2024/cif-weekly-63.pdf?sfvrsn=bbabc85b_0).
- 72 Membership, BIMCO, <https://www.bimco.org/membership/>.
- 73 *BIMCO Approve Revisions to War Risk Clauses*, MARINE LINK (Apr. 9, 2025), <https://www.marinelink.com/news/bimco-approves-revisions-war-risk-clauses-524518>.
- 74 *Id.*
- 75 *Id.*
- 76 Ioannis Avgoustis, *War Risks Cover: Frequently Asked Questions*, STEAMSHIP MUTUAL P&I CLUB (Mar. 4, 2024), <https://www.steamshipmutual.com/war-risks-cover-frequently-asked-questions>.
- 77 Longley, *supra* note 1 (During the Ukrainian war, P&I clubs excluded cover for Ukraine and Russia; these exclusions made it difficult for charterers to find insurance, and industry experts warned this would cause ships to sail uninsured. While all vessels are required to have a "blue card" proving that they can compensate for limitation of liability under the CLC Convention, Wreck Removal Convention, and Bunker Convention, this is accomplished by being properly insured under P&I insurance.)



*Islands... Continued from page 7*

the area established under UNCLOS. Beneath the surface of what could seem like simple territorial disputes lies a deeper legal dilemma: how evolving interpretations of maritime zones and the militarization of artificial islands reveal significant shortcomings in the global maritime legal framework and how that framework is enforced. Here, one main theme will be considered and analyzed: territorial and navigational sovereignty within the broader geopolitical context of the South China Sea. The paper will ultimately argue that despite landmark arbitral decisions in 2016, the inability to enforce international norms and legal framework may erode confidence in the rule of law. This, in turn, will also affect the enforceability of international law, and also push the region, and ultimately the world, closer to open conflict.<sup>7</sup>

## II. II. Legal Frameworks: Territorial Rights and Entitlements

### A. Artificial Islands and Maritime Entitlements under UNCLOS

One of the key issues surrounding the South China Sea is whether China's extensive land reclamation projects can lawfully generate maritime zones under international law, which would allow it to lawfully exploit the resources mentioned above. The distinction between different types of maritime features is codified in Article 121 of UNCLOS, which provides a legal taxonomy of maritime formations.

According to UNCLOS Article 121(1), "an island is a naturally formed area of land, surrounded by water, which is above water at high tide."<sup>8</sup> The same article is also clear in distinguishing, however, that not all islands enjoy full maritime entitlements. Under Article 121(3), features that "cannot sustain human habitation or economic life of their own" should be classified merely as "rocks" and cannot generate an exclusive economic zone (EEZ) or continental shelf.<sup>9</sup> They are instead entitled only to the designation of a 12-nautical mile territorial sea. This clause is at the heart of this issue because its application and enforcement, or lack thereof, have significant consequences for many of the features claimed by China in the Spratly Islands, which are either naturally uninhabitable or submerged at high tide. If this were to be enforced, it could significantly reduce the legal avenues through which China can claim an EEZ, either forcing it to pursue other avenues of enforcement or modify these formations to adapt to the article's language, which could also have devastating environmental consequences.

Article 60(8) of UNCLOS is even more problematic for China's legal position and development of these reefs into islands; that article explicitly lays out that "...artificial islands, installations, and structures... do not possess the status of islands" and "have no territorial sea of their own."<sup>10</sup> A strict interpretation of the article's language would mean that China's transformation of maritime features, such as using sand



dredgers and concrete to create “islands” with runways, housing, radar towers, and ports, ultimately cannot serve as a legal basis for expanding maritime claims.

One example of these significant transformations in the South China Sea that China has undertaken is Mischief Reef; as its name implies, this is a reef defined as a naturally submerged feature that China has built into one of its most heavily developed outposts.<sup>11</sup> The 2016 South China Sea Arbitration specifically discussed Mischief Reef and its status; it held that the reef was a low-tide elevation and therefore per UNCLOS, incapable of appropriation under international law.<sup>12</sup> It could not serve as the basis for territorial sovereignty or maritime entitlements.<sup>13</sup> The arbitration ruling also held that features like Fiery Cross Reef and Subi Reef were also deemed incapable of generating EEZs, regardless of the scale of infrastructure China decided to build atop them.<sup>14</sup> The problem, however, lies in the fact that this ruling means nothing if there is no mechanism to enforce the UNCLOS article and the arbitration ruling; China has continued and will continue to develop these reefs as long as there is no system to stop that from happening. Even beyond the ability to develop these reefs is that the absence of enforcement means China can use these developments to assert dominance in the area by using the reefs as control points in the South China Sea. The issue here is not the development itself of the islands, however destructive that might be, but rather what their development could be used to achieve.

Despite the legal parameters set out quite clearly by UNCLOS and the 2016 Arbitration, China continues to assert rights over both the large maritime zones in this area and the features within them. It continues to draw EEZ-like boundaries and warns foreign ships and aircraft to stay out of these areas and the features themselves, creating further tension and a higher chance of naval conflict. Based on these actions, it seems rather clear that China’s claims to territorial rights in this area do to rest not on legal entitlement or the following of carefully crafted legal decisions and conventions China is part of and ratified. Rather, its claims appear to be based on de facto strategies of occupation and coercive administration; this approach to regional tension as opposed to one of diplomacy is creating dangerous precedent. China’s taking such an approach ultimately erodes the credibility of UNCLOS, arbitration rulings, and any avenues the international community would pursue. This approach risks creating destructive practices that, over time considering the country’s military size and power compared to other regional actors, may simply be met with acquiescence by those weaker states that also hoped to claim part of the South China Sea and its features.

Legal scholars who have observed and studied China’s artificial island strategy believe that this strategy represents a tactic where geography is physically altered



in order to create new facts on the ground that can be weaponized, literally or figuratively; some of these scholars have called this strategy “lawfare”.<sup>15</sup> International law was designed to be resistant to the manipulation that China is currently exerting its power with; the issue, however, is that no matter how well-drafted, the lack of binding enforcement mechanisms to apply these laws allows military-heavy states to challenge its core tenets with little immediate consequence, especially in areas such as the South China Sea where the power imbalance between China and other regional actors is so large. Therefore, it creates a fascinating paradox: China’s constructions are technically legally meaningless, but strategically effective.

### ***B. The Militarization of Maritime Features and Its Impact on Freedom of Navigation***

A bedrock principle of the law of the sea is freedom of navigation; in this scenario, that is also a potential area of the law affected by China’s island-building activities. Article 87 of UNCLOS guarantees that the high seas shall be open to all states, and that freedoms of navigation, overflight, and the laying of submarine cables and pipelines shall be exercised with due regard to the interests of other states.<sup>16</sup> While the concept of “freedom of the seas” is well-established, its application in EEZs is somewhat more nuanced; here, it is also important to note that this is key because EEZs can extend up to 200 nautical miles from a state’s baselines. Under Article 58, all states enjoy the freedoms of navigation and overflight in EEZs, but must respect the sovereign rights of the coastal state over natural resources and environmental protection.<sup>17</sup> UNCLOS also does not prohibit military activities in another state’s EEZ; this is notable because it is a position consistently maintained by the United States and other naval powers that continue running military exercises and patrolling in the area.<sup>18</sup> While these exercises certainly heighten the tension in the area and globalize the conflict by introducing non-regional powers, they have also acted as a sort of checks-and-balance system on the Chinese government, a system that regional powers would most likely not be able to implement on their own.

These military exercises have not gone without controversy. China, in line with its opinion that UNCLOS does not control here, has taken a more restrictive view than that expressed in Art. 87; China argues that foreign military operations within its alleged EEZs require prior notification or consent.<sup>19</sup> This position is not supported by the majority of states in UNCLOS in practice and is considered inconsistent with the Convention, which China was one of the first to sign onto in 1982 and then ratify in 1996. Still, China has crafted and applied this interpretation to justify harassing foreign vessels; dangerously so, this harassment has included harassing of U.S. Navy ships conducting Freedom of Navigation Operations (FONOPs).<sup>20</sup> Operations like FONOPs were explicitly designed by the United States to challenge excessive maritime claims and reinforce the global norm of open navigation in a way that



could also assist underpowered allies in maintaining their territorial sovereignty. Therefore, China's threats to the ability of the United States to conduct these operations also threatens the order of the region. An escalation by either side could lead to devastating conflict but a choice by the United States not to engage in the area if provoked by China to prevent global conflict would cede China almost final control over it.

China's militarization of its artificial islands as discussed above comes into play here too. Since 2014, China has built runways and facilities akin to military bases that seem capable of hosting military aircraft, surface-to-air missile systems, and naval installations across multiple Spratly features.<sup>21</sup> The transformation of features like Fiery Cross Reef into full-fledged military outposts raises legitimate concerns about whether freedom of navigation is being effectively suppressed, or at least chilled, through the credible threat of force. Beyond this, however, it also raises the concern that even if that freedom of navigation might not be suppressed now, the infrastructure these islands are being made to host would eventually certainly suppress it. From a legal standpoint, this raises questions about whether militarization, or preparations for imminent militarization, violates UNCLOS's principles of peaceful use of the seas. UNCLOS does not explicitly prohibit military installations on islands (artificial or otherwise), but it does discuss a state's general obligations to promote peaceful use of the seas, maintaining peace and security, while also working to preserve the marine environment.<sup>22</sup>

Scholars such as Douglas Guilfoyle and James Kraska have argued that China's militarization is inconsistent with all these objectives, including the marine environment aspect, which will be discussed below.<sup>23</sup> If these scholars' opinions are accurate as to the inconsistency between the Convention and China's actions, this may amount to an abuse of rights under UNCLOS Article 300, which prohibits the use of rights in a manner that contravenes the purposes of the Convention.<sup>24</sup> Beyond this possible Art. 300 violation, China's position and the U.S.'s Navy's FONOPs show there is an increasing risk of miscalculation or confrontation due to close-range military maneuvers and aggressive approaches to the threat of foreign vessels. This suggests that legal norms are being replaced by a security dilemma, creating an incredibly dangerous dichotomy. States like the Philippines, Vietnam, and even the United States as an ally and through its FONOPs are navigating and conducting operations in these areas using a very thin tight rope; they are relying on international law they believe to be binding and applicable here to assert their rights and justify their actions, while also hedging against the risk that law alone will not be enough and that there seems to be no backbone to the legal frameworks on which they rely.



### *C. UNCLOS at a Crossroads: Legal Authority vs. Geopolitical Power*

At a glance, the debate over territorial and navigational rights in the South China Sea could seem like one strictly about international and maritime law. It goes beyond this, however, and how the tensions and assertions in the area unfold will be a test of international law's ability to stand against political will and ambition. China has ratified UNCLOS and consistently uses legal rhetoric to justify its actions, but it seems to do so only when convenient for its government's goals and objectives. This reflects a selective and, as seen here often, a contradictory interpretation of the Convention's provisions and international law. So far, however, nothing has stopped China from taking and applying this selective approach strategy.

The South China Sea dispute reveals a broader issue within maritime and international law: a concerning tension between formal long-established legal authority and practical effective enforcement power. While arbitral tribunals like that which decided the 2016 case can clarify the law and dictate in accordance with it in a perfectly legitimate way, they have no mechanism to compel compliance. In the absence of meaningful enforcement or sanctions, states face no real consequence to their choice to comply with or ignore international law and international rulings. Under this kind of tension, states such as China, with sufficient military and economic leverage either regionally or globally, can practice "lawfare" and act in ways that ignore the legal framework while avoiding outright war, at least for the time being. This not only creates a dangerous precedent, but also exposes a fundamental limitation of international law: the lack of an overarching enforcement mechanism. If UNCLOS, and arbitrators or other mechanisms that review it, cannot enforce very basic principles of maritime laws such as non-expansion through non-recognized methods, freedom of navigation, and encouraging peace in the seas, the legitimacy of the law and its mechanisms will be increasingly questioned. China's actions and the lack of sanctions for them is also ultimately being observed by other states. States such as Russia, with growing maritime ambitions, may see China's actions as a blueprint rather than a breach.

### **III. Broader Implications and the Future of Maritime Governance**

The South China Sea dispute is more than a regional conflict. This dispute reveals and reflects the larger crisis confronting the international legal order at sea. UNCLOS was intended to provide a comprehensive, clear, reviewable and predictable framework for maritime and international law. In reality, though, its enforcement and use have been far from that; rising nationalism, and states' desires for geopolitical control are increasingly testing the framework's capacity to govern behavior in contested waters. As of now, nowhere is this more visible than in the South China



Sea, but it is only a matter of time before it is tested elsewhere and how the situation has unfolded in the South China Sea is creating a dangerous precedent.

The arbitration ruling, for example, demonstrated that legal clarity does not always translate to geopolitical stability if there are no methods to enforce the legal clarity. The South China Sea remains a highly volatile region where the risk of miscalculation or open confrontation is rising. Naval standoffs, “gray zone” operations, and airspace incursions have all increased in frequency as the legal status quo rests on a fragile foundation of states avoiding war, rather than resting on a foundation strictly based on the law. In the worst-case scenario, the inability to resolve these disputes through legal or diplomatic means could lead to escalation, especially if China decides to act on its view that U.S. FONOPs are direct threats to its maritime strategy and ultimately, its sovereignty.

One of the most dangerous long-term consequences of the South China Sea standoff is the normalization of blatant noncompliance, especially by member states of these conventions and international organizations that are key to global peace. When powerful states disregard international rulings without consequence, it encourages others to follow suit. Over time, this erodes confidence in the rule of law and reverses the tide to a global landscape where states stop seeking peaceful resolution mechanisms as Plan A, or as a plan at all. As alluded to earlier, China’s behavior is a perfect example of a rising tactic some scholars are referring to as “lawfare”: the strategic manipulation of legal language and forums to advance national interests while simultaneously ignoring unfavorable outcomes.<sup>25</sup> By ratifying UNCLOS but ignoring its language or subsequent rulings that stem from it, China is leveraging the legitimacy of international law when useful, and casts it aside when inconvenient. If this dual approach to law spreads, and it is likely that it will, international maritime law could become a rhetorical tool and one quoted in speeches only rather than a binding framework for states to follow, weakening cooperation and increasing the risk of conflict.<sup>26</sup> This will be especially true in resource-rich areas, such as the Arctic, where conflict over maritime entitlements is bound to increase as global warming increases, melting the ice in the region which will open up more trade routes.

The upside of these challenges is that the South China Sea dispute has prompted renewed interest in reinvigorating international maritime governance hopefully to avoid repetition of the situation the international community faces today. There have been calls for the establishment of a standing UNCLOS compliance body, greater transparency in state maritime claims, and stronger regional frameworks to manage disputes.<sup>27</sup> For example, ASEAN member states have intermittently advanced proposals for a Code of Conduct in the South China Sea.<sup>28</sup> While this progress so far has been slow and often hampered by internal divisions and Chinese pressure, it is a promising sign that the international community recognizes something needs to be done.



### IV. Conclusion

The South China Sea is not simply a body of water. Over the last few years, it has become a legal, environmental, and geopolitical fault line. Through the lens of territorial claims, navigational freedoms, and ecological damage, this paper has examined how China's island-building and expansive maritime assertions challenge the international legal order established by UNCLOS, and challenge world peace. The destruction of coral reefs, the transformation of submerged features into militarized outposts, and the rejection of binding arbitration all point to a troubling erosion of the norms that govern the seas. The seas once governed how and where warfare was conducted, and the situation in the South China Sea inches the world closer to reverting back to that modus operandi.

Despite clear legal standards, such as those articulated in UNCLOS Articles 60, 121, 87, and 194, the South China Sea dispute reveals how law can be outpaced by political ambition. The current rise of nationalism around the world, including the United States, is only going to fuel political ambition. China's refusal to comply with the 2016 arbitral award and its continued militarization of artificial islands raise the specter of a world in which maritime claims are shaped less by treaty obligations and more by coercive power; a world where once again, navies matter more than diplomats. This conflict has also illuminated the growing importance of environmental law in maritime governance. The irreversible damage to reefs and biodiversity caused by dredging and reclamation activities has prompted renewed interest in holding states accountable under environmental obligations like Articles 192 and 235 of UNCLOS and should be an issue of primary concern of all governments and international organizations. As things stand today, however, legal tools available remain incomplete, and most importantly remain unenforced.

The tension in the South China Sea stands as a warning and a test. It warns of a future in which the rule of law is subordinated to great power competition and strongmen governments, where artificial islands can manufacture and manipulate maritime rights. These kinds of conflicts will test whether the international community is willing to defend the legal order it has spent decades building: defending it either through diplomacy, legal pressure, or continued assertion of navigational and environmental norms. Whether that order holds may depend not only on treaties and tribunals to continue to quote these treaties in their rulings, but also on whether states, especially those with military and economic might, continue to believe that law, rather than force, should govern the sea. Otherwise, the rule of law is headed for a head-on collision with sovereignty, and the only solution at that point might be war. ➤



## Endnotes

- 1 U.N. Conference on Trade & Dev., Review of Maritime Transport 2023, at xvii, U.N. Doc. UNCTAD/RMT/2023, <https://unctad.org/publication/review-maritime-transport-2023>.
- 2 U.S. Energy Info. Admin., South China Sea, [https://www.eia.gov/international/analysis/regions-of-interest/South\\_China\\_Sea](https://www.eia.gov/international/analysis/regions-of-interest/South_China_Sea) (last updated Oct. 14, 2013).
- 3 Jianming Shen, China's Sovereignty over the South China Sea Islands: A Historical Perspective, 1 Chinese J. Int'l L. 94, 95–110 (2002).
- 4 Asia Maritime Transparency Initiative, Island Tracker, CSIS, <https://amti.csis.org/island-tracker/> (last visited Apr. 14, 2025).
- 5 United Nations Convention on the Law of the Sea arts. 60, 87, 121, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].
- 6 Robert Beckman, The South China Sea Disputes: The Legal Framework, 107 AJIL Unbound 171, 172–75 (2013).
- 7 In the Matter of the South China Sea Arbitration (Philippines v. China), PCA Case No. 2013-19, Award (Perm. Ct. Arb. July 12, 2016), <https://pca-cpa.org/en/cases/7/> [hereinafter South China Sea Arb. Award].
- 8 UNCLOS art. 121(1), Dec. 10, 1982, 1833 U.N.T.S. 397.
- 9 *Id.* art. 121(3).
- 10 *Id.* art. 60(8).
- 11 Asia Maritime Transparency Initiative, Island Tracker, <https://amti.csis.org/island-tracker/> (last visited Apr. 14, 2025).
- 12 South China Sea Arb. Award, ¶¶ 645–650.
- 13 *Id.*
- 14 *Id.* at ¶¶ 475–485.
- 15 Douglas Guilfoyle, The Rule of Law and Maritime Security: Understanding Lawfare in the South China Sea, 95 Int'l Aff. 999, 1000–05 (2019).
- 16 UNCLOS art. 87.
- 17 *Id.* art. 58.
- 18 Raul Pedrozo, Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China's EEZ, 9 Chinese J. Int'l L. 9, 12–14 (2010).
- 19 Peter Dutton, Military Activities in the EEZ: A U.S.-China Dialogue on Security and International Law in the Maritime Commons, 39 Ocean Dev. & Int'l L. 1, 4–8 (2008).
- 20 U.S. Dep't of Def., Annual Freedom of Navigation Report to Congress for Fiscal Year 2023 (2024), <https://policy.defense.gov>.
- 21 Michael Green et al., Counter-Coercion Series: China's Island Building in the South China Sea, CSIS (2017), <https://www.csis.org/analysis/counter-coercion-series-chinas-island-building-south-china-sea>.
- 22 UNCLOS arts. 74, 88, 301.
- 23 James Kraska, Maritime Power and the Law of the Sea 242–44 (Oxford Univ. Press 2011).
- 24 UNCLOS art. 300.
- 25 James Kraska, Lawfare in the South China Sea, in Maritime Power and the Law of the Sea 257–272 (Oxford Univ. Press 2011).
- 26 Julian Ku, China and the Failure of Lawfare in the South China Sea, Lawfare (July 13, 2016), <https://www.lawfareblog.com/china-and-failure-lawfare-south-china-sea>.
- 27 Robert McLaughlin, Reimagining Maritime Enforcement: From Sovereignty to Shared Stewardship, 47 Ocean Dev. & Int'l L. 271 (2016).
- 28 ASEAN, Declaration on the Conduct of Parties in the South China Sea (2002); Code of Conduct negotiations updates available via ASEAN official documents.



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### *Granting... Continued from page 8*

64% of the sea.<sup>9</sup> A large portion of the ocean lacks a centralized regulator, which results in overfishing.<sup>10</sup> UNCLOS manages and promotes communication between the RFMOS, but fails to provide oversight of the high seas as a whole. Improving oversight is one of the issues the BBNJ is proposed to solve.<sup>11</sup> For example, some RFMOs jurisdictions overlap, where other parts of the high seas are not managed by an RFMO.<sup>12</sup> When implementing enforcement, some areas have strict regulations while others lack consistency. All of these irregularities are complicated by climate change shifting the boundaries and locations of fish stocks.<sup>13</sup>

This section will explore the background of the BBNJ, CITES, and the Fish Stock Agreement,<sup>14</sup> to better illustrate how enforcement may be improved. First the possible implementation of the BBNJ will be examined. Next the high seas fish stocks and UNCLOS will be analyzed. Third, the enactment of CITES with the BBNJ will be discussed. If the strengths of each treaty are combined, it may overcome their weaknesses.

#### **A. Background on the BBNJ**

The BBNJ was introduced in 2023 after decades of negotiations under the UNCLOS.<sup>15</sup> The ratification process to implement the BBNJ has begun.<sup>16</sup> Sixty ratifications are required for the BBNJ to enter into force. Twenty-one States have ratified the treaty, and 112 States have signed. Article five provides that “[t]his Agreement shall be interpreted and applied in a manner that does not undermine relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies and that promotes coherence and coordination with those instruments, frameworks and bodies.”<sup>17</sup> There were several purposes of implementing the BBNJ; the first was to create cohesion of all the international treaties and the Fish Stock Agreement.<sup>18</sup> Another purpose of the treaty was to combat ocean biological diversity loss, prevent degradation of ocean ecosystems, while also mitigating the effects of ocean warming and deoxygenation. The BBNJ covers areas beyond national jurisdiction of nations’ EEZ’s.<sup>19</sup>

The BBNJ has several enforcement mechanisms, but these mechanisms are weaker than other treaties. The primary enforcement of the BBNJ relies on countries to implement domestic legislation and self-enforce BBNJ provisions.<sup>20</sup> Though there is an Implementation and Compliance Committee whose primary responsibility is to assist States in compliance, the mechanisms used for enforcement are to be non-adversarial, transparent, and non-punitive in nature.<sup>21</sup> The Committee is tasked with considering issues ranging from small conflicts to systemic level concerns, and then to publish reports about their findings. The lack of strong enforcement is fortified by Article 53’s reading that the Committee “may draw on appropriate information from bodies established under this Agreement, as well as relevant legal instruments and



frameworks and relevant global, regional, subregional and sectoral bodies, as may be required.”<sup>22</sup> This lack of enforcement may result in miniscule biodiversity gains, such as the case with the CBD, unless this provision is leveraged to create legally binding obligations.

### ***B. Using the Enforcement of UNCLOS***

UNCLOS is the most substantive treaty that regulates the ocean, it entered into force in 1994, and is currently ratified by 154 States.<sup>23</sup> UNCLOS solidifies the exclusive economic zone of States, sets up ship’s ability to navigate these areas, and establishes authorities to regulate certain aspects of the treaty. UNCLOS has improved the governance of the high seas through conserving natural resources and promoting conflict resolution, though it has been less successful at maintaining marine biodiversity. The BBNJ was specifically designed under UNCLOS to keep the treaties in harmony.<sup>24</sup> Under Article 5 of the BBNJ the treaty states that “[t]his Agreement shall be interpreted and applied in the context of and in a manner consistent with the Convention.”<sup>25</sup> The BBNJ coming into force would greatly improve high seas governance.

There are three major enforcement mechanisms under UNCLOS that may be applied or improved on by the BBNJ. The first enforcement mechanism is international cooperation facilitated by the CoP of UNCLOS.<sup>26</sup> The second enforcement mechanism is the domestic laws promulgated to implement the treaty. Article 5 may leave gaps if a State feels that a regulation falls under UNCLOS instead of the BBNJ resulting in inconsistent implementation. Having varied implementation of the same regulation may result in additional disputes because the treaty protects a purely global resource.

Finally, the BBNJ has access to the International Tribunal for the Law of the Sea, which is a dispute resolution mechanism that focuses on the application and interpretation of the Convention.<sup>27</sup> The Tribunal may issue legally binding opinions or advisory opinions depending on the circumstances.<sup>28</sup> The judicial body is only able to issue opinions if other “global, regional, subregional or sectoral bodies” are not parties to the dispute.<sup>29</sup> This narrowing of the Tribunal’s jurisdiction can leave it unable to resolve conflicts between the BBNJ and RFMO disputes; undermining the treaty’s ability to traverse the gaps it was created to bridge.

### ***C. Current Regulation of the High Seas Including the Fish Stocks Agreement***

The United Nations Agreement for the Implementation of the Provisions, also referred to as the United Nations Fish Stocks Agreement (UNFSA), was negotiated under UNCLOS in 1982 to promote the Conservation and Management of Straddling



Fish Stocks and Highly Migratory Fish Stocks. UNFSA entered into force in 2001, and authorizes the use of the best scientific data available to set out standards for regulating fish stocks while utilizing the precautionary principle.<sup>30</sup> The Agreement further sets out the duties and regulations of flagged States.<sup>31</sup> The overfishing of the high seas shows that better management needs to be implemented and personhood and quasi-state status of the BBNJ maybe the answer.<sup>32</sup>

There are multiple ways that the UNFSA directs parties to manage fish stocks depending on where the fish stocks are located and their migratory patterns.<sup>33</sup> UNCLOS outlines that States whose EEZ contain fish stocks that enter and exit their EEZ, as well as other States that want to be granted access to fish for these species on the high seas, must coordinate an agreement on their catch; often this is accomplished as a bilateral treaty.<sup>34</sup>

The implementation of these bilateral treaties is accomplished by requiring “anyone fishing in a particular area ... to join or cooperate with the Regional Fisheries Management Organizations (RFMOs).”<sup>35</sup> The number of RFMOs coupled with a lack of coordination has left over half of fish stocks exploited. If the BBNJ fails to be given an overview of fish stock agreements then the grant of quasi-state status to the high seas could allow it to join RFMOs and have a voice in these decisions.<sup>36</sup> The BBNJ may be able to boost coordination and enforcement of this patchwork of regulations.

There are several strong enforcement measures for RFMO’s including auditing and documentation requirements.<sup>37</sup> The first part of enforcement of RFMO’s under the UNFSA is that every vessel must carry proper documentation, including permits, flag status, and relevant fishing information. The RFMO’s are permitted to inspect vessels for compliance for conservation and management measures. When vessels fail to comply with the RFMOs then there are two major consequences. The first enforcement measure is the blacklisting of vessels, which prohibits them from fishing in areas where they were found to be engaged in Illegal, Unreported, and Unregulated fishing (IUU).<sup>38</sup> The second measure is sanctions which is a trade related measure that prohibits the sale of the IUU caught fish or products.<sup>39</sup> These measures could be combined to prohibit the take of species listed in the CITES Appendix.

#### ***D. CITES and the Listing of Marine Species***

CITES was ratified in 1973, and currently there are 183 Parties to the treaty. All decisions are made at the Conference of the Parties (CoP) requiring a two thirds vote; these decisions can include changing or adding Appendix listed species.<sup>40</sup> The treaty’s purpose is to promote international cooperation to protect “certain species



of wild fauna and flora against over-exploitation through international trade.<sup>41</sup> More marine species are added to the list each year, though their protections are limited.<sup>42</sup>

## 1. Appendix Listed Species Under CITES

CITES has three appendices starting at the most restrictive Appendix I to the least restrictive Appendix III.<sup>43</sup> Each form of trade of listed species has specific requirements including for the import, export, re-export, or introduction from the sea. Appendix I, the most restricted Appendix, “include[s] all species threatened with extinction which are or may be affected by trade.”<sup>44</sup> Once a species is listed, all commercial trade of the species is prohibited, with limited exceptions.<sup>45</sup> For example, the United States allows for the import of endangered species for exhibition such as at zoos under the scientific research exception.<sup>46</sup> Any nonparty that wishes to trade an Appendix listed species with a Party of CITES has a prerequisite to provide paperwork that is equivalent to what CITES Parties submit when trading listed species.<sup>47</sup> For example, trading in Appendix I listed species requires an export and import permit.

The second category of protected species is Appendix II listed species, including “all species which although not necessarily now threatened with extinction may become so” or other wildlife that require regulating to protect species that may become threatened with extinction.<sup>48</sup> The third and least protected category is the Appendix III listed species, which “includes all species which any Party identifies as being subject to regulation within its jurisdiction for the purpose of preventing or restricting exploitation, and as needing the cooperation of other Parties in the control of trade.”<sup>49</sup> Appendix III listed species are unilaterally added to the Appendix and require an export permit from the State that listed the wildlife.

## 2. Requirements for Introduction from the Sea Under CITES

One of the most complicated provisions of the treaty is “introduction from the sea,” which is defined as a specimen of any species being transported into a State from the high seas.<sup>50</sup> Originally, the regulations for introduction from the sea were outlined in the different articles relating to each Appendix listing. Resolution Conf. 14.6 added clarification.<sup>51</sup> The Resolution also specified that introduction from the sea includes bycatch.<sup>52</sup>

There are two levels of enforcement for the violation of CITES.<sup>53</sup> The first is at the local level, where the State implements laws to uphold the provisions of CITES. Examples of local enforcement may include confiscation, monetary penalties, and criminal penalties, such as how the Fish and Wildlife Service implements CITES through the Endangered Species Act (ESA).<sup>54</sup> The second method of enforcement is



sanctions when a State fails to adequately follow CITES, such as not implementing appropriate laws.<sup>55</sup> Granting the high seas personhood and quasi status would improve enforcement leading to positive outcomes for the environment.

The goal for implementing the three treaties is for them to improve enforcement instead of weakening it. There are three mechanisms used to accomplish this, and each would be improved by allowing the high seas quasi-state personhood. The first is by implementing the BBNJ in a way that boosts the coordination of treaties that protect the ocean and wildlife. The second is by ensuring that the management of fish stocks is implemented in a way to improve enforcement. And the final mechanism is by working with CITES species listing and introduction from the sea, instead of allowing the weaker standards from one treaty to become the standard for all the treaties. If deference for other treaties is followed, then each Nation could default to complying with the treaty with the laxest standards. There are similarities in implementation that could result in increased enforcement to protect wildlife for all three treaties.

### III. Suggestion for Improving Enforcement of the BBNJ By Giving the High Seas Personhood and Making It a Quasi-State

Given that the BBNJ is written in a way that might undermine its enforcement, it is important to find mechanisms that could improve the protection of marine wildlife. A mechanism that might improve enforcement would be granting the high seas personhood. If the high seas gained legal personhood, then it could result in it being granted a quasi-state status. A quasi-state status could provide the ability for the high seas to participate in the governance of treaties and could improve implementation and enforcement.

#### A. *Legal Personhood Under Rights of Nature*

There are two theories of rights of nature. The first derives from some Indigenous Peoples' perspective on rights of nature.<sup>56</sup> As Minnie Degawan states, "Indigenous Peoples do not have a single word for biodiversity simply because we do not separate nature from us."<sup>57</sup> The second arises from the legal framework of environmental law and is often codified in constitutions. Rights of nature are granted in two ways depending on their scope. The first codification is a person's right to a healthy environment, which is provided by 122 States.<sup>58</sup> In 2022, the United Nations General Assembly declared a universal right to a healthy environment. Though this concept is anthropocentric, it may be used to protect animals for the sake of humans.<sup>59</sup>

Granting the high seas rights under rights of nature would desirably result in the high seas gaining personhood. Legal personhood is defined as "the recognition



of nonhuman actors as legal persons with subjective rights.”<sup>60</sup> Though rights of nature’s personhood is a new legal concept, giving non-human entities rights is a long standing tradition.<sup>61</sup> For example, organizations and corporations are granted legal personhood. Legal personhood grants an entity the right to have standing or the ability to bring a case on one’s own behalf in a court system.<sup>62</sup> For example, in Ecuador, the court granted the Vilcabamba River legal personhood under rights of nature.<sup>63</sup> Some of the rights it gained besides being able to file a case on its own behalf includes its right to exist in its natural state, the right to flow freely in its natural flow patterns, the right to regenerate and maintain its cycles, and the right to be free from pollution.

If the high seas were given personhood, then it could be granted several rights. Some of the rights that might be granted to the high seas are similar to the rights granted to the Vilcabamba River, such as the right to be free from pollution, regenerate and maintain its cycles specifically pertaining to marine wildlife which maintain these cycles, and the right to exist in its natural state. There are some rights that may be granted beyond these rights, for example the right to become a quasi-state and to represent itself. When implementing the BBNJ, a mechanism could be provided for the high seas to bring legally enforceable cases at the International Tribunal for the Law of the Seas (ITLOS). For example, the high seas would be able to bring a case in ITLOS to prevent plastic pollution both from ghost nets and dumping from States.

If the high seas or a river are not able to speak, how would they be able to assert their rights and bring a case to court? Often when personhood is granted to a nonhuman actor there are representatives placed to speak on their behalf.<sup>64</sup> For example, when a company has personhood, its president or board of directors is its representative. In the case of the Vilcabamba River, the Manitoba (a group of Indigenous Peoples that own part of the land the river runs through) are able to act on its behalf when its rights are violated.<sup>65</sup> So, if the government attempts to permit a project that diverts the flow of the river, the Manitoba are able to sue the government to let the river flow freely. The high seas could also gain the right to thrive in its natural state and be granted mechanisms that its representatives could use to defend these rights.

Who would be able to take on the role of representing a place that has zero population and under no jurisdiction? A coalition of two main sources are suggested here. The first would be the Scientific and Technical Body (STB), which will be implemented under the BBNJ if it passes.<sup>66</sup> A scientific body is defined “as groups of experts who are tasked to provide advice, recommendations, and/or information to decision-makers are a common feature in multilateral environmental agreements.”<sup>67</sup> Having a body that focuses on the scientific aspect of representing the high seas is imperative to provide decisions that take a balanced approach in protecting the ocean. The



STB is the best option because it will already be charged with managing the data from the high seas.<sup>68</sup> Further, the STB has to use both the best-available scientific data as well as taking into account relevant traditional knowledge of Indigenous Peoples and local communities. The STB would be the ideal body to co-lead the representation of the high seas quasi-state because it already has a framework to account for Indigenous Peoples' voices.

Indigenous Peoples are the second proposed group to act on behalf of the high seas quasi-state, though their voices should be equal to the STB. One of the resulting provisions of the Indigenous Peoples policy brief for the implementation of the BBNJ reads that “[t]heir self-determined governance and legal standing must be explicitly recognized and reflected in the BBNJ governance to prevent dilution or misinterpretation of their rights.”<sup>69</sup> The selection of the Indigenous Peoples to represent the high seas would be determined by the council and could be based on their interaction with the ocean and their interest in protecting the high seas. For example, if a highly migratory species interacts with Indigenous Peoples in their homeland, it may qualify them to represent the high seas. This representation would allow decisions made by the high seas to be scientifically based on its own interest but also allow for cultural practices to be represented as well.

### ***B. Providing the High-Seas Quasi-State Status***

The high seas' personhood might improve the likelihood of it becoming a quasi-state. A definition of “quasi-state” is an “entity that is not universally considered to be a state, [...] but which operates autonomously or semi-autonomously.”<sup>70</sup> A quasi-state refers to a political entity that has most but not all characteristics of a State. A State has four aspects including a territory, a government, sovereignty (with international recognition), and a population.<sup>71</sup> In this case, the high seas, if the BBNJ is enacted, has a designated area, which is the area beyond nations' exclusive economic zones (“EEZs”).<sup>72</sup> There is a government consisting of the Scientific Committee and other representatives or the CoP of the BBNJ.<sup>73</sup> A more challenging aspect of statehood would be gaining recognition of sovereignty by other States because it may not be in their economic interest.<sup>74</sup> Just as every other nation declares its own sovereignty so should a quasi-state that would cover over 40% of the world's surface. The final element is a population, and if the high seas were granted personhood, then there would be a population of one.<sup>75</sup> If marine life were granted personhood, then the high seas would have a high population, but that topic is beyond the scope of this paper. Therefore, there are enough elements to grant the high seas quasi-statehood to better implement the enforcement of treaties.

The purpose of the high seas receiving quasi-statehood would be to gain rights and representation, although quasi-states are not universally recognized as independent



States and as having rights.<sup>76</sup> For example, not all States recognize Taiwan as a State, providing it some rights and privileges but not all of them.<sup>77</sup> Taiwan still participates in international governance, but fails to gain access to all international economic institutions.<sup>78</sup> However, as Kathleen Claussen states “No international instrument expressly disallows quasi-states from participating in international law or lawmaking.”<sup>79</sup> Quasi-states have the ability to join the negotiations of treaties, but historically have not been invited to negotiate the forming of bilateral agreements.<sup>80</sup> However, once an agreement is formed, they have often been allowed to join. When multilateral treaties are formed they may provide a mechanism for anyone to join or might be by invitation only; leaving the ability to join the treaty up to the current participants. Every quasi-state has a unique story of how it achieved its status; the high seas could be the next.

Quasi-states have historically participated in international organizations.<sup>81</sup> The International Law Commission defines an international organization as an “organization established by a treaty or other instrument governed by international law and possessing its own international legal personality.”<sup>82</sup> Giving the high seas access to these organizations could promote recognition of the high seas as well as improve its ability to govern areas beyond the EEZ. Some examples of international organizations include the United Nations, the International Maritime Organization (IMO), and the International Chamber of Shipping.<sup>83</sup> The IMO is “the United Nations specialized agency with responsibility for the safety and security of shipping and the prevention of marine and atmospheric pollution by ships.”<sup>84</sup> Access to the decision-making process of the IMO could reduce the pollution of the high seas.

There are some international organizations that the high seas quasi state may be unable to join. For example, the International Court of Justice permits membership but currently fails to have a single quasi-state member.<sup>85</sup> Another entity that would be helpful to join is the World Trade Organization (WTO).<sup>86</sup> However, to join the WTO a State must have a “government . . . or a government acting on behalf of a separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement.”<sup>87</sup> The above requirement may prevent the high seas quasi-state from joining the WTO because most of the decisions made about commercial relations fall under the RFMOs, which means that it would not have complete autonomy of its commercial relations.

Though no quasi-states are currently Parties to CITES, this may be overcome in the high seas case. A State has to be internationally recognized to join CITES, and to establish this requirement United Nations (UN) membership is required.<sup>88</sup> Here most States that are not a party to the UN either are abstaining by choice or are being blocked by another State.<sup>89</sup> There may be a similar situation that a State



would want to block the high seas quasi-states membership, but it may also be a possibility that it gains membership to the UN. At least right now, there is no active conflict to their joining the UN. If the high seas were able to gain membership to the UN, it would then be able to be an active member of CITES, including gaining voting rights and being able to list species. It may also be possible that the quasi-state could receive partial membership that allows them to participate in UN activities without being a voting member. At the moment, only the Holy See and the State of Palestine operate in this partial status. However, partial status would not allow the admittance to CITES.<sup>90</sup> There are fewer obstacles to quasi-states joining RFMOs. It is common for quasi-states to join RFMO's; for example, Taiwan is a member of several.

Quasi-states have had a high level of participation in international adjudication, though they are not always permitted to be a party to a dispute.<sup>91</sup> Quasi-states have attributed writings to many disputes and have also been Parties. Some of these proceedings are arbitrations, for example Germany incited an international arbitration against Kosovo, but the International Centre for Settlement of Investment Disputes tribunal ruled that it failed to have jurisdiction and gave attorney's fees of two million dollars to Kosovo.<sup>92</sup> In 2019 Transnistria was held liable for \$12.4 million under a decision from an International Chamber of Commerce tribunal.<sup>93</sup> A notable case under UNCLOS occurred when the Philippines took action against China for its destruction in the China Sea, and the International Tribunal of the Sea refused to let Taiwan join as a party despite having nearly identical grievances.<sup>94</sup> These findings show that the application of when a quasi-state is or is not able to join or be held accountable for an action changes from case to case.

Implementing the high seas as a quasi-state is achievable because there are no legal instruments that expressly prohibit the participation of quasi-states in international governance.<sup>95</sup> Though quasi-states sometimes act as States they are not given all the rights and privileges afforded to States. The high seas may not require all of the privileges of full statehood. The treatment of quasi-states differs depending on their situation, and there is a power imbalance between full States and quasi-states.<sup>96</sup> There are several instances where non States participate in international law making; for example non-governmental organizations. Though there is more flexibility for quasi-states to join treaties, they are not given the ability to negotiate bilateral treaties.<sup>97</sup> Making the high seas a quasi-state would allow it to send a representative to participate in international organizations, which could greatly improve the cohesive implementation of the BBNJ. Below are some examples of how the high seas becoming a quasi-state could improve the protection of marine life.



### ***C. Suggestions for How CITES and the BBNJ May Be Combined to Further Protect Ocean Wildlife***

The implementation of “introduction from the sea” is changing due to decisions by the Standing Committee of CITES.<sup>98</sup> Specifically, CITES is considering whether resolutions are binding, and in consequence if the paperwork requirements for “introduction from the sea” are still binding.<sup>99</sup> Implementing the high seas as a quasi-state would grant the high seas voting rights for which species would be listed.<sup>100</sup> If the high seas were a quasi-state, it could then require that in order to take any species from the high seas, countries would first have to be issued an export and import permit for any removal and incidental take.<sup>101</sup> Further, and even more powerful, the high seas could list species under Appendix III including prohibiting any take of listed species from marine protected areas.

Allowing for personhood and the quasi-state status of the high seas could increase enforcement. First, the implementation and dispute resolution provisions could be used under UNCLOS. Second, any violation of CITES could also result in the use of CITES mechanisms, for example the sanctioning of countries that violate the treaty.<sup>102</sup> RFMOs could be used to enforce the decisions listing made by the high seas including auditing catch and documentation.<sup>103</sup> The RFMOs will already be performing this work, so they would just have a wider range of species to consider. If vessels fail to comply with these requirements, the RFMOs could blacklist or sanction those vessels.<sup>104</sup> Giving the high seas personhood and making it a quasi-state would not only increase the ways that marine wildlife could be protected but improve BBNJ enforcement.

## **IV. Conclusion**

The current regulations of the high seas and the BBNJ agreement provide several opportunities to improve its implementation – specifically concerning the provision stating that it would not impede on the implementation of other treaties such as UNCLOS, UNFSA, and CITES. There is an opportunity to improve the implementation of the BBNJ by granting the high seas personhood through rights of nature and declaring it a quasi-state. A mechanism could be created to allow for cases on behalf of the high seas to be initiated at ITLOS. The high seas as a quasi-state could then be represented by Indigenous Peoples and the Scientific and Technical Body on the international stage and improve enforcement. Although the high seas would not be able to participate in every aspect of being a State if it was a quasi-state, the participation it was permitted could improve outcomes for marine life. This implementation may include becoming a representative at CITES and being able to list species. Granting the high seas personhood and quasi-state status would improve representation of Indigenous Peoples, provide an overarching view of implementing regulations, and result in better protections for marine life. ➤



## Endnotes

- 1 Life below water, The World Bank, <https://datatopics.worldbank.org/sdgdAtlas/archive/2017/SDG-14-life-below-water.html>.
- 2 United Nations Convention on the Law of the Seas, pt. V, art. 55, 57, Dec. 10, 1982, 21 I.L.M. 1261, 1280 [hereinafter UNCLOS].
- 3 Intergovernmental Conference on an International Legally Binding Instrument under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction, Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction, UN Doc. A/CONF.232/2023/4 (June 19, 2023) [hereinafter BBNJ].
- 4 Rakhyun Kim, *The Likely Impact of the BBNJ Agreement on the Architecture of Ocean Governance*, 165 MARINE POLICY 106190, <https://doi.org/10.1016/j.marpol.2024.106190>.
- 5 BBNJ, *supra* note 3, Art. 5.
- 6 Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 6, 1973, 27 UST 1087, TIAS No. 8249, 993 UNTS 243, Art. XXII [hereinafter CITES]; Haoyu Tian, Jianping Guo, The potential interactions between the BBNJ Agreement and RFMOs in the establishment of ABMTs: Implications for RFMOs, 171 Marine Policy 106477 (Jan. 2025), <https://doi.org/10.1016/j.marpol.2024.106477>.
- 7 *Id.*
- 8 The BBNJ has not yet entered into force.
- 9 Liz Karan, *What Do You Know About the High Seas?*, PEW TRUST (Sep. 4<sup>th</sup>, 2018), <https://www.pewtrusts.org/en/research-and-analysis/articles/2018/09/04/what-do-you-know-about-the-high-seas>.
- 10 Pablo Paniagua & Veeshan Rayamajhee, *Governing the Global Fisheries Commons*, 165 MARINE POLICY 106182, 106191 (July 2024), <https://doi.org/10.1016/j.marpol.2017.06.017>;
- 11 The High Seas, an Undisclosed World, Oceans Connects, <https://oceansconnects.org/en/the-high-seas-an-undisclosed-world>.  
BBNJ, *supra* note 3, Preamble.
- 12 Paniagua & Rayamajhee, *supra* note 10.
- 13 Anastasia Telesetsky, *Cross Regime UNCLOS and UNFCCC Cooperation to Address Loss and Damage From Climate-Shifted Transboundary Fisheries*, 148 MARINE POLICY 105426 (Feb. 2023), <https://doi.org/10.1016/j.marpol.2022.105426>.
- 14 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Aug. 4, 1995, 2167 UNTS 3, 34 ILM 1542 (1995) [hereinafter UNFSA].
- 15 BBNJ, UN, <https://www.un.org/bbnjagreement/en/bbnj-agreement/history>.
- 16 High Seas Treaty Ratification Tracker, High Seas Alliance, <https://highseasalliance.org/treaty-ratification/>.
- 17 BBNJ, *supra* note 3, Art. 5.
- 18 BBNJ, *supra* note 3, Preamble.
- 19 UNCLOS, *supra* note 2, Art. 56.
- 20 *Id.* Art. 5.
- 21 *Id.* Art. 55.
- 22 *Id.* Art. 53.
- 23 Tullio Treves, *United Nations Convention on the Law of the Sea*, UN (Dec. 10<sup>th</sup>, 1982), <https://legal.un.org/avl/ha/uncls/uncls.html>.
- 24 UNCLOS, *supra* note 2, Art. 5.
- 25 *Id.* Art. 5.
- 26 *Id.*
- 27 BBNJ, *supra* note 3, Art. 47 (7).  
Jurisdiction, ITLS, <https://www.itls.org/en/main/jurisdiction/>.
- 28 UNCLOS, *supra* note 2, Art. 5.
- 29 *Id.*
- 30 *Id.* at Art. 2.
- 31 *Id.* at Art. 14.
- 32 Life below water, The World Bank, <https://datatopics.worldbank.org/sdgdAtlas/archive/2017/SDG-14-life-below-water.html>.
- 33 UNFSA, *supra* note 14, Art. 3.
- 34 UNCLOS, *supra* note 2, Article 63.
- 35 *Id.*
- 36 James MacDonald, *Governing Fisheries in the High Seas*, JSTORE (Oct. 5<sup>th</sup> 2018), <https://daily.jstor.org/governing-fisheries-in-the-high-seas/>
- 37 Jamie Gibbon, *How Regional Fisheries Management Organizations Can Strengthen Compliance Processes*, PEW (Sep. 22<sup>nd</sup>, 2023), <https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2023/05/how-regional-fisheries-management-organizations-can-strengthen-compliance-processes>.
- 38 Regional Fisheries Management Organizations' Illegal, Unreported and Unregulated (IUU) Vessel Lists, NPAFC, <https://www.npafc.org/iuu-vessel-lists/>.
- 39 *Id.*



- 40 *Id.* CITES, *supra* note 6, Art. XI.
- 41 CITES, *supra* note 6, Purpose.
- 42 Importance of CITES for Marine Species, NOAA (May 28<sup>th</sup>, 2024), <https://www.fisheries.noaa.gov/national/international-affairs/convention-international-trade-endangered-species-wild-fauna-and>.
- 43 CITES, *supra* note 6.
- 44 *Id.* at Art. I.
- 45 *Id.*
- 46 *Id.*
- 47 *Id.*
- 48 *Id.* at Art. II.
- 49 *Id.* at Art. III.
- 50 *Id.* at Art. I.
- 51 CITES Resolution Conf. 14.6 (Rev. CoP16).
- 52 *Id.*
- 53 Enforcement Matters, CITES, <https://cites.org/eng/prog/imp/enf/introduction>.
- 54 Endangered Species Act, FWS, <https://www.fws.gov/laws/endangered-species-act/section-11>.
- 55 CITES, *supra* note 6, Arts. XIV & XVIII.
- 56 Kristen Stilt, *Rights of Nature, Rights of Animals*, 134 *Harv. L. Rev. F.* 276, 278 (2021).
- 57 Minnie Degawan, *Subtle Ways of Excluding Indigenous Voices*, IUCN (Oct. 11<sup>th</sup> 2020), <https://iucn.org/news/commission-environmental-economic-and-social-policy/202010/subtle-ways-excluding-indigenous-voices-0>.
- 58 In historic move, UN declares healthy environment a human right, UNEP (July 28<sup>th</sup>, 2022), <https://www.unep.org/news-and-stories/story/historic-move-un-declares-healthy-environment-human-right>.
- 59 Kristen Stilt, *Rights of Nature, Rights of Animals*, 134 *Harv. L. Rev. F.* 276, 278 (2021).
- 60 Jens Kersten, *Who Needs Rights of Nature?*, 6 *LEGAL AND POLITICAL INSIGHTS* 9, (2017), <https://www.jstor.org/stable/26268370>.
- 61 Aissa Dearing, *Legal Personhood: Extending Rights to Nature?*, JSTORE (July 11<sup>th</sup>, 2024), <https://daily.jstor.org/legal-personhood-extending-rights-to-nature/>.
- 62 Standing, Cornell, <https://www.law.cornell.edu/wex/standing>.
- 63 Wheeler et al. v. Director de la Procuraduria General del Estado en Loja, Corte Provincial de Justicia de Loja, 31 marzo 2011, Judgment 11121-2011-0010.
- 64 *Id.*
- 65 *Id.*
- 66 BBNJ, *supra* note 3, Art. 49.
- 67 Christine Gaebel, *Institutionalising Science and Knowledge Under the Agreement for the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction (BBNJ): Stakeholder Perspectives on a Fit-For-Purpose Scientific and Technical Body*, 161 *MARINE POLICY* 105998 (2024), <https://doi.org/10.1016/j.marpol.2023.105998>.
- 68 BBNJ, *supra* note 3, Art. 49.
- 69 Andrea Carmen, *The BBNJ + Indigenous Peoples: From Consultation to Co-Creation*, INT'L INDIAN TREATY COUNCIL (April 2025).
- 70 Kathleen Claussen, *Chapter 1 Sovereignty's Accommodations: Quasi-States as International Lawmakers, Changing Actors in International Law*, BRILL 27 (2020), [https://doi.org/10.1163/9789004424159\\_003](https://doi.org/10.1163/9789004424159_003) (hereinafter "Claussen").
- 71 *Id.*
- 72 UNCLOS, *supra* note 2, Section 2.
- 73 BBNJ, *supra* note 3, Part III.
- 74 See Claussen, *supra* note 70, at 1.
- 75 *Id.* at 2.
- 76 *Id.*
- 77 *Id.* at 1.
- 78 *Id.* at 6.
- 79 *Id.* at 2.
- 80 *Id.* at 3.
- 81 *Id.* at 9.
- 82 International Organizations, Peace Palace Library, <https://peacepalacelibrary.nl/research-guide/international-organizations>.
- 83 Claussen, *supra* note 70, at 9.
- 84 Introduction to IMO, IMO, <https://www.imo.org/en/About/Pages/Default.aspx>.



- 85 Claussen, *supra* note 70, at 9.
- 86 WTO, WTO, <https://www.wto.org/>.
- 87 General Agreement on Tariffs and Trade, adopted 30 October 1947, entered into force 1 January 1948, 55 UNTS 194, Art XXXII.
- 88 International Participation, Nature Conservation, <https://conservation.forest.gov.tw/EN/0001638>.
- 89 Countries Not in the United Nations 2025, WPR (2025), <https://worldpopulationreview.com/country-rankings/countries-not-in-the-un>.
- 90 List of Parties to the Convention, CITES, <https://cites.org/eng/disc/parties/index.php>.
- 91 Claussen, *supra* note 70, at 27. [https://doi.org/10.1163/9789004424159\\_003](https://doi.org/10.1163/9789004424159_003).
- 92 Kyriaki Karadelis, 'Kosovo faces first ICSID claim' 8 June 2015, GLOBAL ARBITRATION (2015), <https://globalarbitrationreview.com/article/1034517/kosovo-faces-first-icsid-claim>.
- 93 Sebastian Perry, 'Transnistria faces bid to enforce ICC award' 9 July 2019, GLOBAL ARBITRATION (2019), <https://globalarbitrationreview.com/article/1194946/transnistria-faces-bid-to-enforce-icc-award>.
- 94 Shannon Tiezzi, 'Taiwan: South China Sea Ruling 'Completely Unacceptable'', THE DIPLOMAT (July 13<sup>th</sup> 2016), <https://thediplomat.com/2016/07/taiwan-south-china-sea-ruling-completely-unacceptable/>.
- 95 *Id.*
- 96 *Id.* at 29.
- 97 *Id.* at 30.
- 98 Seventy-eighth Meeting of the Standing Committee, CITES (Feb. 2025) <https://cites.org/eng/sc/78/agenda-documents>.
- 99 CITES Resolution Conf. 14.6 (Rev. CoP16).
- 100 CITES, *supra* note 6, Art. XI.
- 101 CITES Resolution Conf. 14.6 (Rev. CoP16).
- 102 CITES, *supra* note 6, Art. XVIII.
- 103 UNFSA, *supra* note 14, Art. 9.
- 104 Regional Fisheries Management Organizations' Illegal, Unreported and Unregulated (IUU) Vessel Lists, NPAFC, <https://www.npafc.org/iuu-vessel-lists/>.

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### *Predicting... Continued from page 9*

of the FMC to recover the disputed amount.<sup>11</sup> Claimant alleged that “Respondents’ [Evergreen’s] practice of charging per diem for weekends, holidays and temporary port closures, such as closures due to Covid-19, when Claimant has no ability to return empty containers to the port . . . [is] no motivating factor for increasing cargo fluidity, [and] is not in harmony with the intent of the Shipping Act and serves only to financially benefit the Respondent.”<sup>12</sup>

Evergreen argued that the free time had already expired before the weekend closure, that Claimant was contractually obligated to pay the per diem costs, and that Claimant failed to meet its burden in showing that Respondent’s actions rose to the level of “unjust” and “unreasonable.”<sup>13</sup>

The Small Claims Officer (SCO) concluded that “[TCW] demonstrate[d] that Respondents’ imposition of the per diem charges when it was impossible for [TCW] to return the equipment at issue was unjust and unreasonable” and ordered Evergreen to pay the claim.<sup>14</sup> On sua sponte review, the FMC affirmed the SCO’s decision, holding that “[Evergreen] could not have incentivized cargo movement given that the port was closed on those days, making it impossible for Claimant to return the equipment,” and reasoning that “no amount of detention can incentivize the return of a container when the terminal cannot accept the container.”<sup>15</sup> The FMC also dismissed Evergreen’s “extenuating circumstances” arguments that the “Claimant could have returned the container prior to the May 23–25, 2020 closure and that the container was already in per diem when the closures took place.”<sup>16</sup> The FMC “conclude[d] that the [detention] . . . during the May 23-25, 2020 closure when it was not possible to return the container was unjust and unreasonable under § 41102(c).”<sup>17</sup> But the FMC did not adopt a bright-line “once-in-demurrage, always-in-demurrage” principle; instead they held that such charges were not *always* reasonable and must remain subject to the case-specific analysis required by the Interpretive Rule (described below).<sup>18</sup>

Notably, Commissioner Benzel “disagree[d] with the SCO’s finding that Evergreen’s conduct was unjust or unreasonable under § 41102(c).”<sup>19</sup> He reasoned that the “incentive principle” should not replace the Shipping Act’s core overall requirement of “reasonableness.”<sup>20</sup> He also warned that the FMC was “overstating the manufactured principle at the peril of usurping reasonableness,” and that the majority was “overly concerned with the methodology . . . rather than focusing on whether . . . [the detention] reasonably achieved the objective of providing fluidity of movement of cargo.”<sup>21</sup> In his view, because the closures were publicly announced and the shippers had “adequate notification” of the closure but nonetheless “failed to timely re-deliver [the cargo] before the stipulated time,” Evergreen’s detention charges were consistent with the Act’s goal of promoting freight fluidity.<sup>22</sup>



Evergreen appealed the decision to the U.S. Court of Appeals for the D.C. Circuit. In *Evergreen Shipping Agency (Am.) Corp. v. FMC*, 106 F.4th 1113 (D.C. Cir. 2024) (*Evergreen I*), the Court of Appeals correctly found the FMC’s decision to be “arbitrary and capricious” because it “commit[ted] to making a circumstantial, fact-bound inquiry” into the rule and then “jettison[ed] all but its favorite factor” in its application.<sup>23</sup> The FMC improved its reasoning on remand, but it still may not have done enough. By leaning on the modifying clause—“to promote freight fluidity”—and downplaying whether the charges were actually reasonable, and by crediting a single, threadbare assertion to conclude that earlier return was impossible, the agency has risked repeating the same error in a new vocabulary.<sup>24</sup>

Part II of this note lays out the Shipping Act, the Interpretive Rule, and the APA standard of review. Part III first recaps the D.C. Circuit’s rejection of the FMC’s Affirmation of the Initial Decision and then reviews the FMC’s decision on remand. Part IV predicts that the D.C. Circuit’s decision in *Evergreen II* will disagree with the Remand Order. This is because concerns for freight fluidity do not trump the “reasonableness” analysis—and even if they did—the evidence does not support that the charges were unavoidable and unreasonable. Part V concludes with challenges facing the FMC and practical stakes for carriers and American shippers.

## II. Background

### A. The Shipping Act

The Shipping Act of 1984 provides that ocean carriers must “establish, observe, and enforce *just and reasonable regulations and practices* relating to or connected with receiving, handling, storing, or delivering property.”<sup>25</sup> The FMC is tasked with determining which practices violate this statute.<sup>26</sup> On December 17, 2018, the FMC issued a final rule, “Interpretation of Shipping Act of 1984—Unjust and unreasonable practices,” which states that “46 U.S.C. 41102(c) is interpreted to require the following elements in order to establish a successful claim for reparations . . . . [T]he practice or regulation is unjust or unreasonable . . . .”<sup>27</sup> Thereafter, industry participants petitioned the FMC to promulgate a specific rule “to clarify what constitutes ‘just and reasonable rules and practices’ [specifically] *with respect to the assessment of demurrage, detention, and per diem charges* . . . when ports are congested or otherwise inaccessible.”<sup>28</sup> The FMC then collected comments, published a report, and adopted the Interpretive Rule in 2020.<sup>29</sup>

The Interpretive Rule created the “incentive principle” at issue in this dispute, which holds that “[i]n assessing the reasonableness of demurrage and detention practices and regulations, the FMC will consider the extent to which demurrage and detention are serving their *intended primary purposes as financial incentives to promote freight*



*fluidity*.”<sup>30</sup> The rule permits the FMC to consider factors such as “cargo availability,” and “notice of cargo availability,” in addition to other “factors, arguments, and evidence” not explicitly provided for in the rule.<sup>31</sup> The Interpretive Rule also specifies that “[a]bsent extenuating circumstances, practices and regulations that provide for imposition of detention when it does not serve its incentivizing purposes, such as when empty containers cannot be returned, are likely to be found unreasonable.”<sup>32</sup> However, the FMC has specifically cautioned that the Interpretive Rule did not create any brightline.<sup>33</sup>

### ***B. Administrative Procedure Act***

While the standard of judicial review of agency decisions is “deferential,” it still requires agencies to articulate “a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”<sup>34</sup> Furthermore, this standard is unmet if an agency “entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency.”<sup>35</sup> The Shipping Act also provides that “[i]n all cases governed by the requirements of the Administrative Procedure Act (APA), 5 U.S.C. 556(d), the burden of proof is on the proponent of the motion or the order.”<sup>36</sup> In this case, Evergreen bears the burden to show that the FMC’s Affirmation of the Initial Decision was “arbitrary and capricious” under the APA.<sup>37</sup>

## **III. Court of Appeals Decision and Remand**

### ***A. D.C. Circuit Opinion***

In the noted case, the D.C. Circuit held that detention charges for closed port days could have had incentivizing effects, because such charges could encourage timely returns before closures.<sup>38</sup> The Court of Appeals held that the FMC’s Affirmation of the Initial Decision was “arbitrary and capricious,” and instructed the Agency to provide a more “logical explanation” for the result, because it had failed to consider important aspects of the problem, gave no reasoned explanation for several parts of its decision, and applied the incentive principle “in defiance of common sense to reach an illogical result.”<sup>39</sup> The Court reviewed the FMC’s order under the Administrative Procedure Act’s “arbitrary and capricious” standard, which, as noted above, requires the agency to “articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”<sup>40</sup>

Specifically, the Court of Appeals found that the FMC did not meaningfully account for several “critical facts and extenuating circumstances”—namely, Evergreen’s allotment of twenty-one days of free time; TCW’s contractual obligation to pay detention after free time expired; the Port of Savannah’s advance notice of closure;



and the fact that free time had already lapsed before the May 23–25 closure.<sup>41</sup> Although acknowledged in passing, the FMC failed to explain why these factors were irrelevant or outweighed. The Court emphasized that it was “arbitrary and capricious for the FMC to commit to making a circumstantial, fact-bound inquiry in the interpretive rule and then, when it came time to apply the rule, to jettison all but its favorite factor.”<sup>42</sup> The Court continued that the FMC not only “entirely failed to consider an important aspect of the problem,” but also “offered an explanation for its decision that r[an] counter to the evidence before the agency,” echoing the reasoning of Commissioner Bentzel’s dissent that the incentive principle should not displace the reasonableness standard.<sup>43</sup>

The D.C. Circuit also faulted the FMC’s “illogical application of the incentive principle.”<sup>44</sup> While the FMC claimed that the application of detention fees for days when a port is closed necessarily lacks incentivizing effect, the Court rejected that reasoning: “[o]n the contrary, being charged for detention during a port closing announced before the carrier picks up the equipment heightens the incentive to return equipment on time.”<sup>45</sup> The Court noted the FMC’s own argument about possible “logjams” illustrated this contradiction: if charges created no incentive, there would be no reason to expect a rush.<sup>46</sup> Concluding, the Court held: “[u]nder the APA, the [FMC] cannot rest upon a bare assertion that a detention charge assessed for a day when a port is closed has no incentivizing effect. It must, at a minimum, provide a logical explanation for its view.”<sup>47</sup> The order was vacated and remanded.<sup>48</sup>

### ***B FMC Order on Remand***

The FMC issued its final order on remand on February 13, 2025.<sup>49</sup> The FMC stated that it would assess reasonableness by “balancing how a particular charge fits within the incentive principle to further the primary purpose of promoting freight fluidity alongside other arguments and extenuating circumstances raised by the parties.”<sup>50</sup> While the FMC conceded that Evergreen’s detention charges “clearly created an incentive to return the equipment before the three-day closure”, it ultimately held that “the results of that incentive are not reasonably likely to promote freight fluidity overall.”<sup>51</sup>

The FMC reasoned that congestion caused by mass returns before a holiday weekend, and TCW’s inability to act earlier due to Yamaha’s plant closure meant that detention charges could not have promoted overall system efficiency.<sup>52</sup> It further evaluated Evergreen’s proffered “extenuating circumstances,” and while acknowledging that twenty-one days of free time “weigh[ed] in favor of a finding of reasonableness” the FMC found that, although “generous,” it was not reasonable to impose charges after expiration during a scheduled closure.<sup>53</sup> Similarly, the FMC acknowledged that advance notice of port closures “can weigh in favor of the



reasonableness of assessing detention charges,” but in this case TCW’s inability to act on that knowledge meant the notice did not make charges reasonable.<sup>54</sup>

The FMC continued with public policy arguments that the rule “penalize[d] shippers and truckers unreasonably.”<sup>55</sup> The FMC also rejected Evergreen’s reliance on contractual obligations, citing longstanding skepticism toward enforcing such clauses in the face of the Shipping Act’s reasonableness standard.<sup>56</sup> Ultimately, the FMC concluded that the detention charges for May 23–25, 2020 were “unjust and unreasonable” under § 41102(c).<sup>57</sup> Evergreen appealed the FMC Decision on Remand to the D.C. Circuit on July 9, 2025.<sup>58</sup>

#### IV. Prediction: *Evergreen II* will Reject the Remand Order as Inconsistent with *Evergreen I*

##### A. *Freight Fluidity is Not the Sole Element in the Reasonableness Analysis.*

The D.C. Circuit is likely to issue a ruling in *Evergreen II* in favor of the carrier because the FMC, contrary to the Court’s instructions to “provide a logical explanation” for stating that the incentive principle was not satisfied in these circumstances, adopted the same flawed reasoning as in its initial decision, by “making a circumstantial, fact-bound inquiry in the interpretive rule and then, when it came time to apply the rule, to jettison[ing] all but its favorite factor.”<sup>59</sup> In attempting to provide a justification for its decision, the FMC actually took a narrower approach to the incentive principle by focusing in the “freight fluidity” element to achieve the result that the weekend detention was unjust and unreasonable.<sup>60</sup>

The key is that the incentive principle reads “*financial incentive to promote freight fluidity*,” whereas promoting freight fluidity operates as a dependent clause attached to the financial incentives, such that they must be considered together.<sup>61</sup> The FMC conceded on remand that Evergreen’s charges from May 23–25 “clearly created an incentive to return the equipment before the three-day closure.”<sup>62</sup> The inquiry should end there. However, the FMC began to dig into the “freight fluidity” principle to ultimately conclude that a Friday afternoon gate rush would not have a “positive impact” on freight fluidity, and served more to “penalize shippers and truckers unreasonably.”<sup>63</sup> It argued that these incentives “flow in one direction,” as they currently place “all financial risk on the shippers . . . during scheduled port closures,” discouraging carriers to be “creative or innovative” about how they could promote freight fluidity.<sup>64</sup> This argument ignores a key dynamic of the reason for the charges in the first place: carriers have no control over the domestic leg of shipping containers.



Whether it is bad weather, a traffic jam, lost or stolen containers, or a government shutdown, the only way the carrier can “reach in” to the domestic supply chain is to put a ticking clock on how long the container can leave the yard before charges accrue. The domestic carriers are well aware of this clock: it is published in the carrier’s tariff and is agreed to in the bill of lading to transport the goods.<sup>65</sup> Shippers are also well aware of the “once-in-demurrage, always-in-demurrage” rule, and it is therefore their responsibility to encourage cargo handlers and players further down the supply chain to act efficiently.

Ultimately, in this case, like many others, the increased cost was simply passed down to the U.S. consumer: Yamama was invoiced and paid a 20% markup for the detention, and it is likely that models sold that year were in fact more expensive due to the ever unpopular “supply chain concerns.” Although TCW is the claimant, it could have been any trucking provider at any port during the 18 months of supply chain chaos, many of whom passed that ultimate cost to the American consumer. Perhaps this is really what the FMC is arguing about—unfairness to U.S. consumers through no fault of their own. However, this line of reasoning must fail. The FMC should be limited to the facts in this dispute. Despite its efforts to carve out a pro-consumer holding, the facts in this dispute do not support such a result. If anything, the FMC should have further developed the incentive principle during the OSRA22 rulemaking to avoid such issues. The present case does not present an opportunity for the FMC to *rewrite* the incentive principle, but only to *apply* it, and in its attempt to do the former, it failed to properly do the latter.

***B. The Evidence is Insufficient to Show that TCW Could Not Have Returned the Container in a Timely Manner.***

In the Remand Order, the FMC relied on two arguments to dismiss the “extenuating circumstances” challenge to unreasonableness brought by Evergreen.<sup>66</sup> First, the FMC reasoned that “[m]erely because a container is already in a state of detention does not mean that charges are reasonable and can continue to accrue regardless of circumstance.”<sup>67</sup> Second, it concluded that, “[a]lthough Claimant had advance notice of the Port’s closure,” the charges were unreasonable because “Claimant was unable to act on this knowledge to return the equipment earlier when the Port was open.”<sup>68</sup> If the FMC is to take the position that—if there was nothing the cargo owner can do to move the container, the charge is *per se* unreasonable—it must also require said party to prove it. Otherwise, the FMC is asking the carrier to shoulder *all* the burden of showing why the cargo could not be moved with *none* of the information. In this case, the FMC accepted TCW’s “best attempts” to move the container, despite the limited evidence of a single email from Yamama to TCW stating that the plant was closed until May 21.<sup>69</sup> The FMC held that this evidence,



in light of the fact that Evergreen failed to rebut it, was sufficient to show that TCW “ensure[d] that the cargo and equipment ha[d] moved as fluidly as possible,” and greatly supported the finding that the detention charges were unreasonable.<sup>70</sup> More than a single email is needed to show that there was truly nothing TCW could have done to move the container.

For example, if there had been a hurricane, TCW simply could not have acted on its advance knowledge to pick up the containers, but here, the records show that the Yamaha warehouse was in fact *open* before the planned weekend closure. While it may be true that the container was buried at the bottom of the pile, the choice not to empty it and send it back to the port on Thursday—the first day when the warehouse opened—was a business decision, not an impossibility. If Yamama chose not to move a container with the knowledge that it was already on detention, then it should be their burden to pay those fees.<sup>71</sup> A reasonable business decision would be to move the container before the closure—a *prima facie* “financial incentive”—and yet, the FMC simply accepted the “sworn statement” that there was nothing more TCW could do.<sup>72</sup> Consequently, the FMC’s decision on remand—finding that it was impossible for TCW to return the container, that the port closure could have no incentivizing effect, and that freight fluidity was not achieved—was wrong.

### V. Conclusion

The legal fallout from the extreme volatility of shipping during the Covid pandemic has arrived, and it has left the FMC stranded in a difficult place. With a new charge from Congress to enforce OSRA on the heels of the pandemic’s turmoil on the supply chain, and a set of interpretive rules to apply to the disputes, the FMC is tasked with controlling the incentives that keep containers, chassis, and cargo moving for the benefit of Americans. However, it must do so in a way that avoids the appearance that it has reached a conclusion before constructing a framework to get there. If the FMC’s Order on Remand is upheld, American shippers will be off the hook for detention charges which are “out of their control” without having any significant burden to prove it. But if the Order is dismissed, carriers will continue billing practices that resulted in higher costs to American consumers during the Covid pandemic and would appear to frustrate the purpose of OSRA.

Because the dispute hinges on a reasonableness standard, the FMC should be able to make its case for fairness to American shippers. But in its quest to make sure that ocean shipping works for the American public, it must not run afoul of the very rules it created to protect them. Ultimately, in a post *Chevron* world, the D.C. Circuit will be called upon to ensure that the FMC follows its own rules, even if in this instance, it may have a negative economic impact on American consumers. ➤



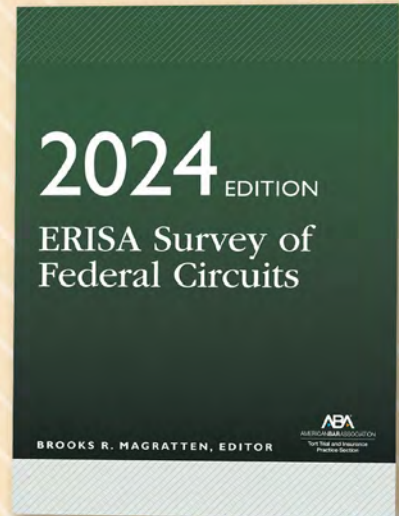
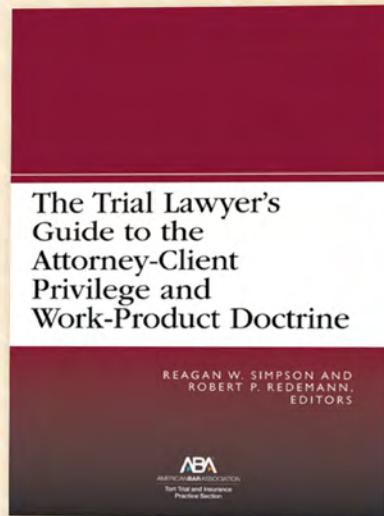
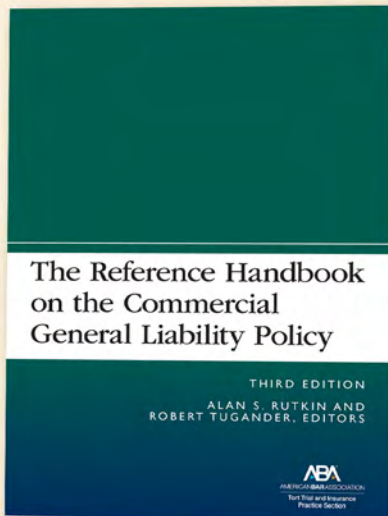
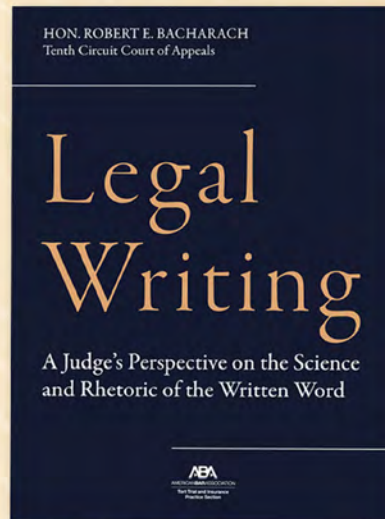
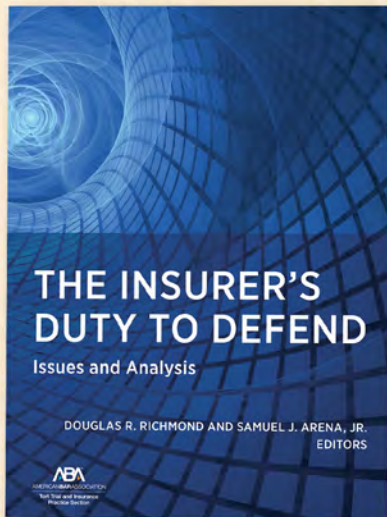
## Endnotes

- 1 The “supply chain crisis” of 2021 was widely publicized. See e.g. Dani Anguiano, *A record number of cargo ships are stuck outside LA. What’s happening?*, THE GUARDIAN (Sept 23, 2021), <https://www.theguardian.com/us-news/2021/sep/22/cargo-ships-traffic-jam-los-angeles-california> (“[W]e can’t absorb all this cargo into the domestic supply chain.”).
- 2 See e.g. Lazaro Gamio and Peter S. Goodman, *How the Supply Chain Crisis Unfolded*, N.Y. TIMES (Dec 5, 2021), <https://www.nytimes.com/interactive/2021/12/05/business/economy/supply-chain.html> (depicting a tangled web of factors leading to shortages).
- 3 FED. MAR. COMM’N, REPORT: RULES, RATES, AND PRACTICES RELATING TO DETENTION, DEMURRAGE, AND FREE TIME FOR CONTAINERIZED IMPORTS AND EXPORTS MOVING THROUGH SELECTED UNITED STATES PORTS, at 12, n. 8; at 19-21 (2015); see Martin Crusinger, *Fed survey finds supply-chain shortages boosting inflation*, A.P. NEWS (Dec. 1, 2021) (<https://apnews.com/article/business-economy-prices-inflation-542f50c1fc779ae75d9574b9703fb4fa>) (citing supply chain bottlenecks for 3 decade high inflation).
- 4 See *Shipping company Maersk sees record profit as demand surges*, A.P. NEWS (Feb 9, 2022), <https://apnews.com/article/coronavirus-pandemic-business-health-economy-cyahagen-50354c5839adfe37186054cdf5d998ac> (explaining that “exceptional market conditions led to record-high growth and profitability”).
- 5 Fed. Mar. Comm’n, *About*, <https://www.fmc.gov/about/> (last visited Nov. 17, 2025) (emphasis added).
- 6 106 F.4th 1113 (D.C. Cir. 2024) (Evergreen I); see also 46 U.S.C. § 41102(c) (requiring just and reasonable practices for ocean transportation).
- 7 Recently, the FMC has been the subject of additional challenges to the interpretive rule on detention and demurrage. In *World Shipping Council v. Fed. Mar. Comm’n*, the Court of Appeals vacated 46 C.F.R. § 541.4, because the “Commission acknowledged—even embraced—the existence of the evident inconsistency but gave no reasonable justification for it,” ultimately finding the regulation “arbitrary and capricious.” No. 24-1088, 2025 WL 2698837, at \*1, \*4, \*6 (D.C. Cir. Sep. 23, 2025).
- 8 *TCW, Inc. v. Evergreen Shipping Agency (Am.) Corp.*, No. 1966(l), at \*1, \*8, ¶¶ 9-10 (F.M.C. Feb. 19, 2021) (Initial Decision), *aff’d*, *TCW, Inc. v. Evergreen Shipping Agency (Am.) Corp.*, No. 1966(l), 2022 WL 18068977 (F.M.C. Dec. 29, 2022) (Affirming Order).
- 9 *Initial Decision*, at 9-10, ¶¶ 22-38. An email was attached to the amended complaint from Yamaha to TCW, which stated that the plant was operating on May 21 but the container wouldn’t be ready until May 23. The FMC accepted this email as a “sworn statement.”
- 10 The per diem fee for the container was \$150 for the container and \$20 for the chassis. TCW picked up both on April 28, 2020, but did not return them both until May 26, 2020. Although Evergreen provided 21 days of “free time,” for the container and 7 days for the chassis, these expired on May 4 and May 19, respectively. Accordingly, TCW paid \$1490 in total in detention charges, invoiced the cargo owner for \$1780, a 20% mark up, and disputed the charges only from May 23-25 with the FMC.
- 11 *Initial Decision*, at 3.
- 12 *Initial Decision*, at 6 (quoting Amended Cl. Pg. 2 at III(a)).
- 13 *Initial Decision*, at 7.
- 14 *Initial Decision*, at 28, 33.
- 15 *Affirming Order*, at 10-11 (quoting the *Initial Decision*, at 26); *TCW, Inc. v. Evergreen Shipping Agency (Am.) Corp.*, No. 1966(l), Order for Supplemental Briefing, at \*1, \*3 (F.M.C. Apr. 26, 2021) (noting that the FMC was “particularly interested in arguments regarding application of the interpretive rule on demurrage and detention”).
- 16 *Affirming Order*, at 11; see Doc. 4 at 5-7; Doc. 6 at 9-11; Doc. 7 at 10 (“[I]f the party responsible for returning the equipment on time (i.e., either the shipper or trucker) can avoid the charge by taking some action prior to the expiration of allotted free time, the charge will be considered reasonable.”); see 46 C.F.R. § 545.5(f).
- 17 *Affirming Order*, at 11.
- 18 See 85 Fed. Reg. at 29652-53 (disagreeing that it is “always a reasonable practice to charge detention . . . after free time regardless of cargo availability or the ability to return equipment.”).
- 19 *Affirming Order*, at 20 (Comm. Benzel, Dissenting).
- 20 *Id.* at 17 (Comm. Benzel, Dissenting).
- 21 *Id.* at 17, 19 (Comm. Benzel, Dissenting).
- 22 *Id.* at 20; *id.* at 18.
- 23 *Evergreen 1*, 106 F.4th at 1118.
- 24 See generally *TCW, Inc. v. Evergreen Shipping Agency (Am.) Corp.*, No. 1966(l), at 9-13, 2025 WL 516256 (Feb. 13, 2025) (Remand Order).
- 25 46 U.S.C. § 41102(c) (emphasis added).
- 26 46 U.S.C. § 41102(c); 46 C.F.R. § 545.4.
- 27 83 FR 64478 (Dec. 17, 2018); see generally 46 C.F.R. § 545.4; § 545.4(d) (emphasis added).
- 28 *Petition of the Coalition for Fair Port Practices for Rulemaking: Notice of Filing and Request for Comments*, 81 Fed. Reg. 95612, 95612 (emphasis added).
- 29 See 85 Fed. Reg. 29638, 29665-66 (publishing 46 C.F.R. § 545.5—Interpretation of Shipping Act of 1984—Unjust and unreasonable practices with respect to . . . detention).
- 30 46 C.F.R. § 545.5(c)(1) (emphasis added).
- 31 46 C.F.R. § 545.5(c)(2)(i); (iii); 545.5(f).
- 32 46 C.F.R. § 545.5(c)(2)(ii).
- 33 See 85 Fed. Reg. at 29642, 29654 (acknowledging that the rule, being interpretative, did not create any new “requirements,” or “mandates,” and specifically rejecting requests for a “bright line rule”).
- 34 *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).
- 35 *Id.*
- 36 46 C.F.R. § 502.203—Burden of proof.



- 37 5 U.S.C. § 706(2)(A). Just one week before the noted case was decided, the Supreme Court held in *Loper Bright Enter. v. Raimondo*, 603 U.S. 369, 413—414 (2024), that “Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires,” overturning decades of precedent under the previous *Chevron* doctrine, which had allowed for judicial deference to agency interpretations of ambiguous statutes. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865—66 (1984).
- 38 *Evergreen 1*, 106 F.4th at 1117-18.
- 39 *Id.*
- 40 *State Farm*, 463 U.S. at 43.
- 41 *Evergreen I*, 106 F.4th at 1117.
- 42 *Id.* at 1118.
- 43 *Evergreen I*, 106 F.4th at 1117; *State Farm*, 463 U.S. at 43.
- 44 *Id.*
- 45 *Id.*
- 46 *See id.* (“[I]f the result reached is illogical on its own terms, the [agency’s] order is arbitrary and capricious.”) (citation omitted).
- 47 *Id.*
- 48 *Id.*
- 49 *Remand Order*, at 1, 20.
- 50 *Id.* at 8.
- 51 *Id.*
- 52 *Id.* at 9-11.
- 53 *Id.* at 13-14.
- 54 *Id.* at 15.
- 55 *See id.* at 10—11 (reasoning that the charges only “flow in one direction,” as they currently place “all financial risk on the shippers . . . during scheduled port closures”).
- 56 *Id.* at 14-15.
- 57 *Id.* at 18.
- 58 *Evergreen Shipping Agency (Am.) Corp. v. Fed. Mar. Comm’n*, No. 25-1104 (D.C. Cir. filed July 9, 2025) (appeal from Fed. Mar. Comm’n); Oral Argument (D.C. Cir. argued Nov. 20, 2025), audio available at <https://media.cadc.uscourts.gov/recordings/docs/2025/11/25-1104.mp3>.
- 59 *Evergreen I*, 106 F.4th at 1117-1118.
- 60 *Remand Order*, at 9—13 (emphasis added).
- 61 46 U.S.C. § 41102(c).
- 62 *Remand Order*, at 8.
- 63 *Id.* at 10. *Evergreen* later challenged this assumption on the grounds that the Savannah terminal was not very busy during the time in dispute.
- 64 *Id.* at 11.
- 65 *See Initial Decision*, at 2.
- 66 46 C.F.R. § 545.5(f).
- 67 *Remand Order*, at 17.
- 68 *Id.* at 12, 16.
- 69 *Initial Decision*, at 10, ¶25, citing Claimant’s Am. Cl. Pgs. 3—4; Brief at 1; *Remand Order*, at 12, citing Claimant’s Complaint at 3, Ex. D.
- 70 *Remand Order*, at 12.
- 71 And that is just what they did.
- 72 *Remand Order*, at 12; 46 C.F.R. § 545.5(c)(1).

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