The PVA and Personification: *Tobar v. United States*

I. OVERVIEW

On patrol in international waters, the United States Coast Guard suspected an Ecuadorian commercial fishing vessel of illicit activities related to the nearby transport of narcotics.[1] The Coast Guard requested and received authorization from Ecuadorian officials to board, search, and subsequently tow the vessel to Ecuador for further investigation.[2] This authorization contained a condition: "If there are no drugs on board, and there are damages or losses sustained by the vessel, in accordance to the U.S. laws and in a manner complying with international laws, the owner of the vessel will be compensated . . . ."[3] The Ecuadorian fishermen plaintiffs alleged that their persons as well as their property suffered various damages arising from the Coast Guard's conduct and

1. Tobar v. United States (*Tobar II*), 731 F.3d 938, 940-41 (9th Cir. 2013).
2. *Id.*
3. *Id.* at 946 (internal quotation marks omitted).

brought suit against the United States under the Suits in Admiralty Act (SAA), Public Vessels Act (PVA), and Federal Tort Claims Act (FTCA).[4]

The United States District Court for the Southern District of California, Judge Hayes presiding, initially dismissed the plaintiffs' complaint for a lack of subject matter jurisdiction, holding the government had not waived its sovereign immunity.[5] On first appeal, the United States Court of Appeals for the Ninth Circuit affirmed in part, vacated in part, and remanded the case for the district court to accept further evidence on the issue of reciprocity with Ecuador.[6] After considering affidavits offered by the parties' experts in Ecuadoran law, Judge Hayes again dismissed the case holding that reciprocity with Ecuador did not exist and, in the alternative, that under the "discretionary function" exception, the government had not waived its sovereign immunity.[7] The plaintiffs appealed, and the United States Court of Appeals for the Ninth Circuit *held* that (1) reciprocity with Ecuador existed, (2) the discretionary function exception did not discharge the government of its nondiscretionary duty to pay damages, (3) the motion to dismiss phase of trial was an inappropriate forum to determine whether the fisherman had exhausted their administrative remedies, and (4) the discretionary function exception barred claims not related to the nondiscretionary duty of the government to pay damages. *Tobar v. United States* (*Tobar II*), 731 F.3d 938 (9th Cir. 2013).

II. BACKGROUND

An effective waiver of sovereign immunity is required to establish jurisdiction for a U.S. court to hear claims by foreign nationals against the U.S. government.[8] The FTCA generally waives the United States' sovereign immunity for tort actions.[9] However, because the FTCA excepts claims for which a remedy is provided by the PVA or SAA, these statutes become controlling on the issue of waiver.[10] In general, the SAA allows claims where a civil action would otherwise be allowed if the

4. *Id.* at 940.

5. *Id.* at 940-41.

6. *Id.* at 940-42. On the issue of reciprocity, the plaintiffs "originally submitted evidence only that Ecuador has an 'open court' system and that foreigners have equal access to the courts." *Id.* at 942.

7. *Id.* at 941.

8. *See* United States v. Mitchell, 445 U.S. 535, 538 (1980) ("It is elementary that '[t]he United States, as sovereign, is immune from suit save as it consents to be sued . . . .'" (quoting United States v. Sherwood, 312 U.S. 584, 586 (1941))).

9. *See* 28 U.S.C. §§ 2674, 2680 (2012) (listing all exceptions).

10. *See id.* § 2680(d). The PVA and SAA also allow contract claims. *See* 46 U.S.C. §§ 30903, 31102 (2006).

United States were not a party,[11] and the PVA allows claims for "damages caused by a public vessel of the United States."[12] The federal courts are constitutionally and statutorily granted exclusive jurisdiction to hear these claims in admiralty.[13] In order to establish admiralty jurisdiction, the pleadings or their contents must satisfy both the locality requirement of a tort occurring on navigable waters and the nexus requirement of a substantial relationship to maritime activity.[14]

A. Development of the PVA and SAA

Whether an admiralty tort claim could be brought under either the SAA or PVA initially turned on distinguishing whether a vessel was a merchant vessel or a public vessel.[15] But in 1960, an amendment to the SAA broadened its scope and eliminated the prior "merchant vessel" requirement.[16] This amendment made it plausible that claims brought under the SAA could also legitimately be brought under the PVA.[17] Recognizing the overlap between the PVA and SAA, in *United States v. United Continental Tuna Corp.*, the United States Supreme Court held that claims falling within the purview of the PVA must be analyzed under its provisions, even after the amendment to the SAA.[18] As a result, when the PVA applies, its comparatively strict requirements control the outcome of cases that also fall within the scope of the SAA.[19]

As a result of the Supreme Court's ruling in *United Continental Tuna Corp.*, when admiralty tort claims fall under the SAA and the PVA, the latter controls the threshold the plaintiffs must satisfy to demonstrate the government's waiver of sovereign immunity.[20] However, disagree-

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11. *See* 46 U.S.C. § 30903.

12. *Id.* § 31102(a)(1). The PVA also allows claims for towage and salvage services provided to a public vessel. *Id.* § 31102(a)(2).

13. *See* U.S. CONST. art. III, § 2, cl. 1; 28 U.S.C. § 1331.

14. In general, the tort must occur on or over navigable waters and must bear a "substantial relationship to traditional maritime activity" in order to satisfy the locality and nexus requirements respectively. *See* Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 534 (1995) (internal quotation marks omitted). The nexus requirement also considers whether the circumstances at issue have the potential to disrupt maritime commerce. *Id.*

15. *See* 46 U.S.C. § 31102 (1958) (public vessel); *id.* § 742 (merchant vessel).

16. *See* Act of Sept. 13, 1960, Pub. L. No. 86-770, § 3, 74 Stat. 912 (amending 46 U.S.C. § 742 (1958)).

17. *See* Peter Child Nosek, *Unifying Maritime Claims Against the United States: A Proposal To Repeal the Suits in Admiralty Act and the Public Vessels Act*, 30 J. MAR. L. & COM. 41, 49 (1999).

18. 425 U.S. 164, 181 (1976).

19. *See* 46 U.S.C. § 31103 (2006) (resolving inconsistencies in favor of the PVA); Nosek, *supra* note 17, at 50.

20. Nosek, *supra* note 17, at 50.

ment over whether the Supreme Court favors a broad or narrow interpretation of the "damages caused by a public vessel" provision (damages provision) has given rise to a circuit split.[21] Thus, the application of a broad or narrow interpretation in order to properly trigger the PVA in a given jurisdiction can both determine what provisional requirements a plaintiff must satisfy and potentially affect the outcome of the case.[22]

B. The PVA Damages Provision

Supreme Court jurisprudence does not clearly state what claims fall within the scope of the PVA damages provision, and after its decisions in *Canadian Aviator, Ltd. v. United States* and *American Stevedores, Inc. v. Porello*, the Court has specifically refused to clarify this issue.[23] In *American Stevedores*, the Court extended the damages provision to cover personal injuries sustained by a longshoreman working aboard a public vessel.[24] Following an in-depth consideration of the FTCA, PVA, and SAA, the Court concluded that these statutes demonstrated the intent of Congress to shed the United States' "sovereign armor in cases where federal employees have tortiously caused personal injury or property damage."[25] In *Canadian Aviator*, the Court held the PVA applicable when a vessel entering the Delaware bay struck a submerged wreck as a result of negligent course directions provided by a U.S. naval ship.[26] The Court explained that the PVA "extends to cases where the negligence of the personnel of a public vessel in the operation of the vessel causes damage

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21. *See* Tobar v. United States (*Tobar I*), 639 F.3d 1191, 1199 n.3 (9th Cir. 2011) ("[The Ninth Circuit] recognize[s] that the Eleventh Circuit has disagreed with our broad reading of the PVA."). *Compare* Marine Coatings of Ala. v. United States, 71 F.3d 1558, 1562-64 (11th Cir. 1996) (holding that unpaid compensation for repairs performed on three Navy vessels did not qualify as damage caused by a public vessel), *with* Thomason v. United States, 184 F.2d 105, 107-08 (9th Cir. 1950) (holding that unpaid compensation for seaman's services aboard a tugboat qualified as damage caused by a public vessel).

22. *See Tobar I*, 639 F.3d at 1199 n.3; *Marine Coatings of Ala.*, 71 F.3d at 1562-64; *Thomason*, 184 F.2d at 107-08.

23. *See* Calmar S.S. Corp. v. United States, 345 U.S. 446, 456 n.8 (1953) ("It is not to be assumed that all claims sounding in contract can form the basis of a suit under the Public Vessels Act. The Act expressly authorizes towage and salvage claims. We intimate no opinion as to other claims, and do not suggest that all or any of the causes of action in this very suit would or would not qualify under the Public Vessels Act. There are cases [such as *Thomason*] in which jurisdiction over contract claims other than towage or salvage has been assumed."); *United Cont'l Tuna Corp.*, 425 U.S. at 181 n.21 ("It is not to be assumed that contract claims other than those expressly authorized by the Public Vessels Act were necessarily beyond the scope of the Act. As in [*Calmar S.S. Corp.*] we intimate no view on the subject.").

24. Am. Stevedores, Inc. v. Porello, 330 U.S. 446, 453-54 (1947).

25. *Id.* at 453.

26. 324 U.S. 215, 228-29 (1945).

to other ships, their cargoes, and personnel, regardless of physical contact between the two ships, and where principles of admiralty law impose liability on private parties."[27] In other words, the PVA is triggered by negligence of personnel "in the operation of the [public] vessel" when general maritime law would impose liability on private parties.[28] Under general maritime law, the Court ultimately employed the doctrine of vessel personification to treat the ship as a "juristic person whose acts and omissions, although brought about by her personnel, are personal acts of the ship for which . . . she is legally responsible."[29] Thus, the Court indicated that the restrictions on application of the PVA were only those supplied by general maritime law and the doctrine of personification.[30]

C. The Doctrine of Personification

There exists a strong doctrine of personification in U.S. maritime law.[31] Although the idiosyncrasies of vessel personification seem to attract ongoing criticism, this classically vulnerable doctrine is nevertheless dutifully defended.[32] A vessel may serve as plaintiff[33] or

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27. *Id.* at 224-25 (footnote omitted).

28. *Id.* at 224, 228.

29. *See id.* at 224 ("Such personification [sic] of the vessel, treating it as a juristic person . . . , has long been recognized by this Court.").

30. *Compare Tobar I*, 639 F.3d 1191, 1199 n.3 (9th Cir. 2011) (holding that the negligent acts of the Coast Guard aboard a private vessel were damages caused by a public vessel), *with* Kenneth P. Raley III, Comment, *The Public Vessels Act and Maritime Injustice: Proving Redress to Deserving Foreign Admiralty Tort Victims*, 10 LOY. MAR. L.J. 429, 434 n.24 (2012) ("[G]eneral maritime law principles require that the phrase 'caused by a public vessel' treat the vessel as a 'juristic person' and personify its negligent actions and omissions. The vessel's negligent acts and omissions must include the negligent operation of a public vessel but certainly should not extend to the negligent acts of public vessel crewmembers while aboard a private vessel." (citation omitted)).

31. *See* Ralli v. Troop, 157 U.S. 386, 402-03 (1895) ("[Personification represents] a distinct principle of the maritime law, namely, that the vessel, in whosesoever hands she lawfully is, is herself considered as the wrongdoer, liable for the tort, and subject to a maritime lien for the damages.").

32. *See* Martin Davies, *In Defense of Unpopular Virtues: Personification and Ratification*, 75 TUL. L. REV. 337, 410 (2000). The doctrine has survived perpetual assault from prominent legal thinkers including, among others, Supreme Court Justice Oliver Wendell Holmes Jr., United States Court of Appeals for the Second Circuit Judge Learned Hand, and scholars Gilmore and Black. *See* O.W. HOLMES, JR., THE COMMON LAW 35 (Little, Brown & Co. 1881) ("The result of following [precedents supporting personification] must often be failure and confusion from the merely logical point of view."); The Eugene F. Moran, 212 U.S. 466, 474 (1909) ("[The doctrine] is not a satisfactory ground for taking one man's property to satisfy another man's wrong, and it should not be extended."); GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 616 (2d ed. 1975) (suggesting personification has become irrelevant); The R. Lenahan, Jr., 48 F.2d 110, 112 (2d Cir. 1931) ("[Personification is] an animistic survival from remote times."). *But see* Davies, *supra*, at 348-49 ("[T]he doctrine of

defendant in a civil action and may itself be liable as a result of an action in rem even when its owner would not have been liable in personam.[34] This aspect of vessel personification may seem illogical and has drawn a considerable amount of criticism, but legal scholars have identified analogous principles and justifications for the more conceptually accessible fiction of corporate personification.[35] Like a corporate personality, a ship is afforded rights and assumes obligations separate and distinct from those of the owner.[36] Further, because corporate personification assigns these rights and obligations to a "metaphysical identity" as opposed to a tangible object—a ship—the fiction of vessel personification may be comparatively less artificial.[37]

While many situations also allow parties to pursue maritime claims in personam against master or owner,[38] recovery following a successful action in rem is limited to the value of the vessel regardless of the damages alleged.[39] Federal courts in admiralty generally treat a personified vessel's in rem liability as both conceptually and legally independent from any related in personam liability.[40]

D. Ninth Circuit Personification and the PVA

The broad reading of the PVA by the Ninth Circuit has elicited criticism from commentators.[41] In *Thomason v. United States*, the Ninth Circuit introduced the doctrine of personification into its broad

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personification is not an animistic anachronism, but a useful means of providing a focus for rights and obligations that would otherwise have to be allocated among a very diffuse group of interested parties." (footnote omitted)).

33. *See* N.V. Stoomvaart Mattschaippij Nederland v. United States, 18 F. Supp. 567, 567 (N.D. Cal. 1937) (naming the vessel as the plaintiff in the action).

34. *See* The China, 74 U.S. (7 Wall.) 53, 61 (1868) (explaining that although a vessel owner who charterers a vessel cannot be liable in personam, the vessel itself can be liable in rem for damages arising from a collision).

35. *See* Davies, *supra* note 32, at 338-39.

36. *Id.* at 338.

37. *See id.* at 340.

38. *See* The Belfast, 74 U.S. (7 Wall.) 624, 642 (1868) ("Wherever a maritime lien arises the injured party may pursue his remedy, whether for a breach of a maritime contract or for a marine tort, by a suit *in rem*, or by a suit *in personam*, at his election."); FED. R. CIV. P. C(1) ("Except as otherwise provided by law a party who may proceed in rem may also, or in the alternative, proceed in personam against any person who may be liable.").

39. Douglas Lind, *Pragmatism and Anthropomorphism: Reconceiving the Doctrine of the Personality of the Ship*, 22 U.S.F. MAR. L.J. 39, 52 (2009-10).

40. *Id.* at 51.

41. *See* Raley, *supra* note 30, at 456 ("[T]his comment focuses on the adverse effects of the Ninth Circuit's precedent resulting in its decision in *Tobar* . . . ."); Jefferson A. Holt, Comment, *Salvaging a Capsized Statute: Putting the Public Vessels Act Back on Course*, 29 GA. ST. U. L. REV. 493, 537 (2013) (calling for strict interpretation of the PVA and a nationwide resolution of the circuit split).

interpretation of the damages provision.[42] In *Thomason*, the court cited *Canadian Aviator* and reasoned that damages within the PVA "include[] damages arising from those acts for which a private ship is held legally responsible as a juristic person under the customary legal terminology of the admiralty law."[43] Commentators have discussed the reasoning in support of a broad reading and suggested its dire consequences,[44] but the Ninth Circuit's interpretation of the PVA has nonetheless remained broad.[45]

E. The PVA Reciprocity Requirement

Once a court determines that the PVA applies to the suit at hand, it must then consider the alleged waiver of sovereign immunity by inquiring whether reciprocity exists with the claimant's country of citizenship.[46] While some scholars criticize this requirement,[47] the PVA permits civil actions against the United States by foreign nationals provided "the government of that country, in similar circumstances, allows nationals of the United States to sue in its courts."[48] To decide reciprocity, a court can analyze any relevant treaty,[49] statements by officials of the applicable foreign government,[50] or opinions of legal experts or practitioners of the foreign law,[51] and otherwise has the option

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42. *See* 184 F.2d 105, 107 (9th Cir. 1950); *see also* Holt, *supra* note 41, at 516 ("In *Thomason*, the Ninth Circuit suggested that the personification of a vessel makes her a sort of unknowing co-conspirator, and that all claims merely involving her trigger the PVA.").

43. *Thomason*, 184 F.2d at 107-08 (citing Canadian Aviator, Ltd. v. United States, 324 U.S. 215, 224 (1945)).

44. *See* Holt, *supra* note 41, at 528 (citing 46 U.S.C. §§ 30906(a), 31104 (2006)) ("Because foreign plaintiffs may bring suit where the offending vessel is found under the SAA (compared to any district court under the PVA), a broad reading of the PVA incorporating contract claims and torts merely involving public vessels frustrates specific policy judgments of Congress as to venue allocation and invites forum shopping."); Raley, *supra* note 30, at 459-60 ("[T]he Ninth Circuit's broad application of the PVA appears to subvert Congress's attempts to make the United States more susceptible to suit for injuries caused to admiralty tort plaintiffs [and] unjustly reduced the chance that foreign admiralty tort plaintiffs may recover . . . .").

45. *See Tobar I*, 639 F.3d 1191, 1198 (9th Cir. 2011).

46. *See* 46 U.S.C. § 31111 (2006).

47. *See* Nosek, *supra* note 17, at 55.

48. 46 U.S.C. § 31111.

49. *See* Blanco v. United States, 775 F.2d 53, 60 (2d Cir. 1985) (considering a treaty with Honduras).

50. *See* Westfal-Larsen & Co. v. United States, 41 F.2d 550, 551 (N.D. Cal. 1930) (holding that communication between the Norwegian Department of Justice and Ministry of Foreign Affairs established reciprocity).

51. *See* N.V. Stoomvaart Mattschaippij Nederland v. United States, 18 F. Supp. 567, 567 (N.D. Cal. 1937) (holding that the authoritative statement by a Dutch barrister established reciprocity).

to perform its own inquiries into the substance of foreign law.[52] Although the burden to prove reciprocity apparently lies with the plaintiff, the ability of a court to furnish its own proof under Federal Rule of Civil Procedure 44.1 "whether or not submitted by a party or admissible under the Federal Rules of Evidence" may affect this allocation.[53]

F. Exceptions to the Government's Waiver

Determination by the court that the government has waived its sovereign immunity does not end the jurisdictional analysis because although the FTCA broadly waives the government's sovereign immunity, it includes fourteen exceptions, some of which have been judicially incorporated into the PVA and SAA.[54] While some potentially applicable exceptions in maritime tort actions have given rise to a split of authority,[55] there has been widespread and uniform incorporation of the discretionary function exception into both statutes.[56] This exception functions to shield the authorized conduct of government employees from serving as the basis for liability under circumstances that might otherwise raise actionable maritime tort claims.[57] The supplied reasoning

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52. *See* FED. R. CIV. P. 44.1 ("In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law."); Nicholas E. Vernicos Shipping Co. v. United States, 349 F.2d 465, 468-69 (2d Cir. 1965) (conducting an inquiry into the substance of Greek law in order to determine reciprocity).

53. *See* FED. R. CIV. P. 44.1. *Compare Tobar I*, 639 F.3d 1191, 1200 (9th Cir. 2011) ("We are uncertain whether a plaintiff bears the burden of [demonstrating] reciprocity."), *with* Nejad v. United States, 724 F. Supp. 753, 756 (C.D. Cal. 1989) (citing United States v. United Cont'l Tuna Corp., 425 U.S. 164, 181 (1976)) ("[P]laintiffs have the burden of demonstrating that reciprocity is available because it is a condition to the government's waiver of its sovereign immunity.").

54. *See* 28 U.S.C. § 2680 (2012).

55. *Compare* B&F Trawlers, Inc. v. United States, 841 F.2d 626, 628 (5th Cir. 1988) (holding that the law enforcement exception is not incorporated into the PVA and SAA), *with* Green v. United States, 658 F. Supp. 749, 751 (S.D. Fla. 1987) (holding that the law enforcement exception is incorporated into the PVA and SAA).

56. *See* Thames Shipyard & Repair Co. v. United States, 350 F.3d 247, 254 (1st Cir. 2003) (PVA); Tew v. United States, 86 F.3d 1003, 1005 (10th Cir. 1996) (SAA); Earles v. United States, 935 F.2d 1028, 1032 (9th Cir. 1991) (SAA); Sea-Land Serv., Inc. v. United States, 919 F.2d 888, 891 (3d Cir. 1990) (SAA); *In re* Joint E. & S. Dists. Asbestos Litig., 891 F.2d 31, 35 (2d Cir. 1989) (SAA); *B&F Trawlers*, 841 F.2d at 630 (PVA); Wiggins v. United States, 799 F.2d 962, 966, (5th Cir. 1986) (SAA); U.S. Fire Ins. Co. v. United States, 806 F.2d 1529, 1534–35 (11th Cir. 1986) (PVA), *abrogated by* United States v. Gaubert, 499 U.S. 315 (1991); Gemp v. United States, 684 F.2d 404, 408 (6th Cir. 1982) (SAA); Bearce v. United States, 614 F.2d 556, 558-60 (7th Cir. 1980) (SAA); Canadian Transp. Co. v. United States, 663 F.2d 1081, 1086 (D.C. Cir. 1980) (SAA); Gercey v. United States, 540 F.2d 536, 539 (1st Cir. 1976) (SAA).

57. *See* 28 U.S.C. § 2680(a) ("Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to

varies by jurisdiction,[58] but incorporation of the discretionary function exception nevertheless enjoys overwhelming support.[59]

G. Supreme Court Jurisprudence Addressing the Discretionary Function Exception

Although the Supreme Court had previously distinguished between planning and operational activities when analyzing the discretionary function exception, *Berkovitz v. United States* and *United States v. Gaubert* stand for the modern analysis. The Court in *Berkovitz* did not inquire whether the activities were planning or operational activities when considering the licensing and subsequent releasing of polio vaccines by the government.[60] In holding that the petitioner's allegations survived the government's motion to dismiss, the Court stated that on remand petitioners might prove that the challenged conduct "did not involve the permissible exercise of policy discretion."[61] *Berkovitz* also established the two-step test used by the Court to analyze the discretionary function exception.[62] First, a government actor must have been given discretion in relation to the challenged conduct.[63] The exception will not apply if a "statute, regulation, or policy specifically prescribes a course of action for an employee to follow."[64] If the first step is satisfied, the exercise of discretion must be based upon considerations of social, economic, and political policy.[65]

In its most recent decision discussing the discretionary function exception, *Gaubert*, the Supreme Court eliminated planning or operational considerations from the discretionary function analysis since "decisions made at an operational level could not also be based on

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exercise or perform a discretionary function . . . whether or not the discretion involved be abused.").

58. *See* Allyson Cook, Comment, *The Suits in Admiralty Act and the Federal Tort Claims Act: Bridging the Gap Between Congressional Intent and Judicial Interpretation*, 16 U.S.F. MAR. L.J. 119, 131-32 (2003-04) (identifying reasoning based on public policy and separation of powers).

59. *See Gercey*, 540 F.2d at 539. *But see* Cook, *supra* note 58, at 142 (calling for congressional action to incorporate FTCA exceptions into the SAA).

60. *See* Berkovitz v. United States, 486 U.S. 531, 536 (1988).

61. *Id.* at 547-48.

62. *Id.* at 536-39.

63. *Id.* at 536 ("[C]onduct cannot be discretionary unless it involves an element of judgment or choice.").

64. *Id.*

65. *Id.* at 536-37; *see also* United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 814 (1984) ("Congress wished to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy . . . .").

policy."[66] The Court held that the government's alleged negligence in selection of officers and overall management of a financial agency did not expose them to liability.[67] *Gaubert* added to the two-step test from *Berkovitz* a presumption in favor of a decision's basis in public policy when a regulation grants a government actor discretion and they engage in permissible conduct within this discretion.[68] However, the Court emphasized that "[t]he focus of the inquiry is not on the agent's subjective intent" in exercising the authorized discretion "but on the nature of the actions taken and on whether they are susceptible to policy analysis."[69] Thus, any government employee acting within the scope of their discretion triggers the exception.[70]

H. Maritime Law Enforcement: Tort Claims and the Discretionary Function Exception

Analysis of the discretionary function exception frequently occurs in the context of tort claims arising from maritime law enforcement activities.[71] In *B & F Trawlers, Inc. v. United States*, the United States Court of Appeals for the Fifth Circuit held that the exception barred claims arising from a fire allegedly caused by the Coast Guard's negligent conduct following apprehension of a stolen vessel.[72] The rightful owner had sought to recover damages from the Coast Guard who deliberately sank the vessel during tow as a result of an onboard fire of undetermined origin.[73] Citing the societal benefits of narcotics enforcement on the high seas, the court reasoned that policy considerations underlie this conduct triggering the exception.[74] Similarly,

66. United States v. Gaubert, 499 U.S. 315, 326 (1991).

67. *Id.* at 334, 339.

68. *Id.* at 324 ("[I]f a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations.").

69. *Id.* at 325.

70. *See id.* at 324-25. *But see id.* at 325 n.7 ("There are obviously discretionary acts performed by a Government agent that are within the scope of his employment but not within the discretionary function exception because these acts cannot be said to be based on the purposes that the regulatory regime seeks to accomplish. If one of the officials involved in this case drove an automobile on a mission connected with his official duties and negligently collided with another car, the exception would not apply. Although driving requires the constant exercise of discretion, the official's decisions in exercising that discretion can hardly be said to be grounded in regulatory policy.").

71. *See* Mid-South Holding Co. v. United States, 225 F.3d 1201 (11th Cir. 2000); B&F Trawlers, Inc. v. United States, 841 F.2d 626 (5th Cir. 1988); Harrington v. United States, 748 F. Supp. 919 (D.P.R. 1990).

72. 841 F.2d at 627, 632.

73. *Id.* at 627.

74. *Id.* at 631-32.

in *Mid-South Holding Co. v. United States*, the United States Court of Appeals for the Eleventh Circuit held that the exception applied to actions of the United States Customs Service in searching a vessel that later sank.[75] Quoting the language of the Fifth Circuit in *Mid-South*, the court explained that because "no statute or corresponding regulation prescribes the methodology for boarding or searching a vessel," the boarding officer must balance competing public policy considerations before making that decision.[76]

For maritime torts, when a claim involves the police activities of the Coast Guard, the government can raise the discretionary function exception as immunizing the challenged conduct.[77] The boarding authority for maritime law enforcement operations states that the Coast Guard "may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the . . . suppression of violations of laws of the United States."[78] If the circumstances indicate a past, present, or future violation of U.S. law, the Coast Guard "may at any time go on board of any vessel" to perform a search.[79] Further, in execution of its boarding operations, the Coast Guard may also "use all necessary force to compel compliance."[80] Because this statute is not limited to domestic vessels, its authorizations also extend to conduct related to foreign flag vessels.[81] International comity is further preserved by the customary practice of requesting authorization from the flag nation before boarding.[82] In claims against the U.S. government, however, ordinary foreign citizens, unlike foreign nations, lack standing to allege violations of international law by the Coast Guard.[83]

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75. 225 F.3d at 1206-07.
76. *Id.*
77. *See* Harrington v. United States, 748 F. Supp. 919, 930 (D.P.R. 1990).
78. 14 U.S.C. § 89(a) (2012).
79. *Id.*
80. *Id.*
81. United States v. May May, 470 F. Supp. 384, 396-97 (S.D. Tex. 1979).
82. *See* United States v. Rubies, 612 F.2d 397, 402-03 (9th Cir. 1979) ("If another nation should wish to board a foreign flag vessel, the other nation would generally seek authorization to do so from the nation whose flag the vessel flies.").
83. *See* United States v. Pringle, 751 F.2d 419, 425 (1st Cir. 1984) ("[T]he rule of international law in the case at bar is a rule designed to secure peace among nations, not to protect the privacy of individuals." (internal quotation marks omitted)). Foreign citizens in such cases also may not invoke the protections afforded by the Fourth Amendment to the U.S. Constitution. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 267 (1990) ("There is . . . no indication that the Fourth Amendment was understood by contemporaries of the Framers to apply to activities of the United States directed against aliens in foreign territory or in international waters.").

Boarding foreign flag vessels necessarily invokes a United States Coast Guard Maritime Law Enforcement Manual (MLEM) regulation, which prohibits the boarding officer from exceeding the terms of any authorization supplied by the flag state.[84] Although these circumstances do not result in a formal legal commitment under international law, the MLEM regulation clearly intends to create a binding political commitment.[85] Consequently, a violation of these terms could produce legal consequences.[86] However, the scope of each authorization may differ depending on the attendant circumstances as well as the intent of the authorizing official and requires a case-by-case analysis.[87]

III. THE COURT'S DECISION

In the noted case, the Ninth Circuit strictly interpreted the statutory language of the PVA to decide the issue of reciprocity with Ecuador and considered application of the discretionary function exception to the government's waiver of sovereign immunity under the Supreme Court's two-step analysis.[88] The Ninth Circuit disagreed with the district court's interpretation of the parties' expert affidavits and concluded that this evidence satisfied the reciprocity requirement of the PVA.[89] The court then considered the discretionary function exception and agreed with the district court that it generally applied under the facts of the noted case.[90] However, the court held that this exception barred only those claims not arising under the government's nondiscretionary obligation to pay damages.[91] Finally, the court held that the issue of whether the plaintiffs had exhausted their administrative remedies was not yet ripe for determination at this phase of the trial.[92]

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84. *Tobar II*, 731 F.3d 938, 946 (9th Cir. 2013) ("When acting pursuant to flag State authorization, the boarding State may not exceed the terms of the authorization. Such authorization may be contained in a pre-existing written agreement or may be provided on an ad hoc basis." (quoting U.S. COAST GUARD, MARITIME LAW ENFORCEMENT MANUAL (MLEM), COMDTINST, M16247.1C (2003) (internal quotation marks omitted)).

85. *See* RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 301 (1987); 13 OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 96 (1991).

86. *See* 13 SCHACHTER, *supra* note 85, at 96.

87. *Tobar II*, 731 F.3d at 946.

88. *See id.* at 941; *see also supra* notes 23-29, 50-59 and accompanying text.

89. *Tobar II*, 731 F.3d at 941.

90. *Id.*

91. *Id.* at 948.

92. *Id.* at 947.

A. Reciprocity

On remand, the plaintiffs' experts on Ecuadorian law introduced two new points, both of which were initially rejected by the district court but later accepted by the Ninth Circuit in the noted case.[93] First, the plaintiffs' experts stated that the common law understanding of sovereign immunity does not exist in the civil law structure of the Ecuadorian legal system.[94] Second, the plaintiffs' experts maintained that, as a result, there existed no legal obstacle to a citizen filing suit against the Ecuadorian government under similar circumstances.[95] Without much discussion,[96] the Ninth Circuit found reciprocity with Ecuador and proceeded to address each of the U.S. government's opposing arguments.[97]

On the first point, the court rejected the U.S. government's argument that the plaintiffs' experts provided unsupported conclusions[98] and noted that the government's expert provided only one unpersuasive statement regarding sovereign immunity in Ecuadorian law.[99] Interpreting the U.S. government's expert as declining to contest the alleged nonexistence of sovereign immunity in Ecuadorian law, the Ninth Circuit reasoned that the government's expert affidavit, read broadly, "implicitly [conceded] that Plaintiffs' experts are correct."[100] The U.S. government had also cited cases in which Ecuador waived its foreign sovereign immunity in U.S. courts, but the Ninth Circuit found this evidence irrelevant and emphasized the proper inquiry as "whether Ecuador applies the concept of sovereign immunity *in its own court system*."[101]

Describing the government's response to the plaintiffs' experts' second point as "rest[ed] on a misunderstanding of the relevant inquiry," the Ninth Circuit explained that the government's expert improperly "focuses only on whether, *as a practical matter*, litigation in Ecuadorian courts would succeed."[102] Although the government's expert stressed the

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93. *See id.* at 942.
94. *Id.*
95. *Id.*
96. *See id.* ("[Plaintiffs' expert] affidavits establish that, in similar circumstances, a United States citizen would be able to sue Ecuador in Ecuadorian courts. Accordingly, reciprocity exists.").
97. *Id.* at 942-44.
98. *Id.* at 942 ("[T]he affidavits themselves *are* support—they are sworn statements by legal experts on Ecuadorian law.").
99. *Id.*
100. *Id.* ("If, as the government asserts, sovereign immunity exists in Ecuadorian law, we would expect its expert simply to say so.").
101. *Id.* at 943.
102. *Id.*

virtual impossibility of success in a similar suit,[103] the Ninth Circuit reemphasized that "the relevant legal inquiry here [is] whether a citizen of the United States would be *allowed to sue*."[104] Finally, the Ninth Circuit summarily rejected the government's arguments that the plaintiffs' experts did not properly consider the military aspect of this case and that reciprocity is not absolutely guaranteed by the Ecuadorian Constitution.[105]

B. The Discretionary Function Exception

As a preliminary matter, the Ninth Circuit explained that its reasoning for reading the discretionary function exception into the SAA applied to the noted case.[106] As a result, the court joined the other three circuit courts that have considered this issue in holding that the discretionary function exception applies to claims brought under the PVA.[107] Turning to the application of the discretionary function exception to the facts of the noted case, the Ninth Circuit proceeded under the two-step analysis established by the Supreme Court.

Considering the first step, the court quoted the language of 14 U.S.C. § 89(a) as authorizing the Coast Guard's actions but directing no specific action.[108] However, the plaintiffs did not argue that 14 U.S.C. § 89(a) prescribed a mandatory course of action and instead asserted that the government "violated its own *regulations and policies*."[109] Focusing on the MLEM regulation, the court found "[t]hat policy does not afford any discretion: the boarding State *may not exceed* the terms of the authorization."[110] The court also determined that the condition of authorization provided by the Ecuadorian government was "specific and mandatory: The owner '*will be* compensated,' so long as the specified conditions are met."[111] As a result, the Ninth Circuit held that if the plaintiffs can demonstrate that the conditions in the authorization have

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103. *Id.* The court noted that the government's expert did not explain the underlying practical considerations. *See id.* at 943 n.3 ("For example: Are the filing deadlines strict? Is discovery against Ecuador limited? Are suits against the government disfavored? Are the filing fees expensive? Would the government seek to resolve the dispute through political channels? Is there a presumption in favor of the government?").

104. *Id.* at 943-44.

105. *See id.* at 944.

106. *Id.*

107. *Id.* at 945.

108. *Id.* at 945-60.

109. *See id.* at 946 & n.5.

110. *Id.* at 946 (internal quotation marks omitted).

111. *Id.*

been satisfied, as alleged in the complaint, the discretionary function exception will not bar their claims.[112]

Because the authorizing condition dictated compensation in accordance to the U.S. laws, the Ninth Circuit held that the plaintiffs must demonstrate compliance with the administrative procedures required by federal law.[113] The court explained that this demonstration is essential to prove that the government violated its nondiscretionary obligation to compensate the owner for damages.[114]

However, the Ninth Circuit included two important caveats to its preceding discussion. First, the government's nondiscretionary duty to pay damages applies only to the owner of the vessel.[115] Second, the government's nondiscretionary duty to compensate the owners encompasses only damages or losses sustained by the vessel.[116] The court noted that the plaintiffs' complaint alleged a wide variety of injuries but expressed no view on which of these might be included in the government's nondiscretionary obligation to pay damages.[117]

In the second step of the analysis, the Ninth Circuit considered the plaintiffs' argument that the discretionary function exception does not apply to the noted case "because any discretionary judgments were not 'based on considerations of public policy.'"[118] The court rejected this argument, explaining that under *Gaubert*, a regulation that authorizes discretionary actions "creates a *strong presumption*" that these discretionary actions "involve[d] consideration of the same policies which led to the promulgation of the regulations."[119] Analogizing the reasoning of the Fifth Circuit in *B&F Trawlers* and the Eleventh Circuit in *Mid-South Holding Co.*, the Ninth Circuit held that the boarding, searching, and eventual towing of the ship qualified as a decision based on considerations of public policy.[120] The court reasoned that these included the general enforcement of domestic narcotics laws, maintaining of foreign relations, "minimization of intrusion on the privacy and property interests of searched parties," and "weighing the costs of [boarding and searching the ship] against the likelihood of an

112. *See id.* ("Because the district court dismissed this action on the pleadings, we take as true the allegations in the complaint.").
113. *Id.* at 947.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* (quoting United States v. Gaubert, 499 U.S. 315, 324 (1991)).
120. *Id.* at 948.

enforcement success."[121] As a result, the court held that all claims falling outside the government's nondiscretionary duty to pay damages were barred by the discretionary function exception.[122]

IV. ANALYSIS

While application of the PVA presents additional obstacles for foreign plaintiffs, commentators may somewhat overstate the impact of a broad reading on maritime tort claims since other barriers, such as the discretionary function exception, may prove substantially more difficult to overcome than the reciprocity requirement.[123] Nonetheless, the noted case presents a difficult state of affairs to award damages and may test the limits of the PVA as well as the doctrine of personification.[124]

A. The Ecuadorian Authorization and Personification

The Ninth Circuit made clear that the scope of the Ecuadorian authorization will ultimately control the plaintiffs' recovery, if any.[125] Because the authorization requires that any compensation for "damages or losses sustained by the vessel" must be in accordance with U.S. law, adherence to the doctrine of personification provides the proper framework for determining which of plaintiffs' alleged injuries the court will consider.

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121. *Id.* (quoting Mid-South Holding Co. v. United States, 225 F.3d 1201, 1206-07 (11th Cir. 2000) (internal quotation marks omitted)).

122. *Id.*

123. *See supra* text accompanying notes 41-45. For example, one commentator suggested that if the Ninth Circuit had held the PVA inapplicable, the plaintiffs in the noted case "might have brought a successful suit against the United States under either the SIAA or the FTCA." Raley, *supra* note 30, at 435. However, it is unclear whether a vessel would be similarly personified under the SAA, and although the PVA may have initially obstructed the plaintiffs' claims, it might ultimately allow recovery for a wider range of damages sustained by a personified vessel. As a procedural matter, if the court applied the SAA or the FTCA and not the PVA, it would still have analyzed the Ecuadorian authorization terms and the discretionary function exception to arrive at substantially the same result.

124. This Recent Development expresses no opinion on the merits of either a broad or narrow interpretation of the PVA. However, the proper, if not necessary, application of the doctrine of personification in order to determine which of the plaintiffs' alleged damages were those "sustained by the vessel" will require the court to address complex considerations in light of its interpretation of damages caused by a public vessel.

125. *Tobar II*, 731 F.3d at 947. This analysis assumes that the plaintiffs have exhausted or will eventually exhaust their administrative remedies. *See id.* at 946-47. Here, the plaintiffs exhausted all available remedies when they submitted damages to the proper authorities and received no reply within six months "tantamount to denial of claim." *Id.* Even if the court holds that this requirement has not been satisfied, the government will likely object to the nature and amount of the plaintiffs' submitted damages resulting in litigation. *See id.* at 947.

First, the authorization did not include any mention of compensation for damages or losses sustained by the owner, nor did it limit compensation to strictly physical damages sustained by the vessel.[126] This language specifically designated the owner as recipient of any resulting compensation and the ship itself as determining the amount of compensation due for damages or losses it sustained. These allocations fit squarely within the doctrine of personification by divorcing the rights of the owner and those of the vessel. Finally, inclusion of the word "losses" implies that the authorization contemplated compensation for damages extending to some indeterminate distance beyond physical damage to the ship.

Notwithstanding the authorization, the Ninth Circuit in *Thomason* clearly stated that personification is used to determine what damages are caused by a public vessel.[127] Consequently, when the incident giving rise to these damages involves a private vessel, that vessel should be personified. Because the Ninth Circuit elects to personify the public vessel, these types of cases fall under the PVA and are analyzed under its requirements.[128] This personified public vessel can cause damages that a nonpersonified private vessel could never sustain. As a result, failure to personify a private vessel when analyzing a PVA claim would raise questions of procedural consistency.

B. Complicated Considerations

The proper, if not necessary, application of the doctrine of personification in the noted case raises complex and interrelated considerations that will affect the court's determination of damages. For example, in the plaintiffs' joint complaint, they allege $500,000 for loss of catch and attribute this loss to the owners.[129] These damages are recoverable under U.S. law.[130] The complaint claims no damages for wages owed to or compensation anticipated by the fisherman, but since the parties have not yet briefed the issue of damages, it is unclear whether any such claim was included as part of loss of catch. A claim for unpaid wages or other compensation due to crew members provides an example of the complicated considerations involved in determining which damages will be recoverable in the noted case.

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126. *See id.* at 947.
127. Thomason v. United States, 184 F.2d 105, 107 (9th Cir. 1950).
128. *Id.* at 108.
129. Plaintiffs' First Amended Complaint, *Tobar II*, 731 F.3d 938 (No. 12-56298).
130. *See* The Menominee, 125 F. 530, 530-31 (E.D.N.Y. 1903).

The owner of a fishing vessel can recover damages "on behalf of the crew members" who sustain losses as a result of a third party's conduct.[131] Lost wages, or a similar claim, generally does not provide crew members the ability to sue the tortfeasor directly, but does provide for a cause of action against the fishing vessel in rem or shipowner when the owner has committed a contractual violation such as failure to pay compensation.[132] However, the crew members in the noted case may have been working for shares of an anticipated catch, a common practice among commercial fishermen.[133] In the Ninth Circuit, commercial fishermen are provided with a direct cause of action against the tortfeasor when seeking to recover their anticipated share of a lost catch.[134] It is uncertain in the noted case whether a claim such as anticipated shares, otherwise directly enforceable by the crew member against a tortfeasor, then provides the shipowner with a cause of action on the crew member's behalf. These crew members remain parties in the ongoing litigation, and it is possible that their direct and indirect causes of action will survive their inability to recover damages.[135]

Wages or other compensation owed to crew members is an injury recognized by the PVA that causes damages capable of being sustained by a personified public vessel.[136] While the government may point out that they are a third party to any contract for wages unlike in *Thomason* and should not therefore be liable, the analogous action for percentage of

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131. *See* Carbone v. Ursich, 209 F.2d 178, 180 (9th Cir. 1953) ("[T]he [tortfeasor] on its part was liable for amounts thus lost by the [fishing] crew and must respond in damages accordingly. Under those cases, whatever the procedural rule may have been, as to who may bring the suit . . . the liability for those damages was clear.").

132. *See* Doyle v. Huntress, Inc., 301 F. Supp. 2d 135, 144-45 (D.R.I. 2004); 46 U.S.C. § 10601 (2006) (requiring that fishing contracts be in writing and include terms regarding wages or other compensation); *id.* § 10602 (allowing cause of action against ship in rem when owner fails to pay wages or shares of the proceeds from sale of the catch within a specified time). Although 46 U.S.C. § 10601 is limited to fishing voyages from a U.S. port, the Ecuadorian authorization requires that the alleged damages, like loss of catch, be analyzed in accordance with relevant U.S. law. *See Tobar II*, 731 F.3d at 946 (Ecuadorian authorization).

133. *See* 46 U.S.C. § 10601.

134. *See Carbone*, 209 F.2d at 183 ("[F]ailure to [grant a cause of action against the tortfeasor] would mean a withholding from fishermen of all redress for tortious interference with the progress of the voyages which are their livelihood.").

135. The court did not eliminate the nonowner plaintiffs from the action and instead stated, "[T]he only Plaintiffs who can [recover damages] are the owners." *Tobar II*, 731 F.3d at 947.

136. *See* Thomason v. United States, 184 F.2d 105, 107 (9th Cir. 1950) ("[T]he scope of the Act [is not limited] to actions in tort and excludes actions in contract. This contention overlooks the common usage of the word 'damages' as meaning compensation in money for any loss or injury.").

anticipated share arises from a statutorily required contractual provision and creates liability for a third party.[137]

The court may be reluctant, and understandably so, to award damages to the owner for injuries to other plaintiffs. When acting on behalf of crew members "owners . . . are charged with a trust for the payment of the claims of the . . . crew," but the international aspect of this case raises questions of enforcement.[138] A U.S. court would not have jurisdiction to hear a subsequent claim related to an owner's failure to pay.[139] This would force the crew members to attempt to recover their wages, which were already awarded to the owner, in an Ecuadorian court far-removed from the original U.S. action.[140] Ultimately, there is no guarantee that this money would reach its intended beneficiaries, victims of tortious conduct.

V. CONCLUSION

As a general matter, if the owner of the vessel in the noted case can demonstrate damages or losses attributable to other parties but sustained by the personified ship, the doctrine of personification would find these losses recoverable. Accordingly, the court might attempt to maintain consistency with the terms of the authorization while simultaneously creating tension with U.S. law.

However, should the court determine that lost wages or any other claim that would independently trigger the PVA are not recoverable in the noted case, it will have arrived at the seemingly impossible result that some damages caused by a public vessel cannot then be sustained by a private vessel. It is against public policy for the same maritime tort claim that triggers application of the PVA to then ultimately be deemed outside its scope of recovery.

Because all damages in this case must be determined in accordance with U.S. law and paid to the owner, the court must entertain competing considerations and runs the risk of granting relief to an underserving party. Parties in the noted case have yet to submit a detailed brief on the issue of damages, but if plaintiffs can raise these or analogous issues, the court will be placed in an analytically difficult situation with no readily

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137. *See supra* note 132 and accompanying text.

138. *See Carbone*, 209 F.2d at 180.

139. *See* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1667-69 (2013).

140. *See supra* note 135 and accompanying text. The Ecuadorian court might also examine crew members' contracts with the owner under Ecuadorian law, an issue the U.S. courts would not consider.

identifiable solution. The resulting analysis may influence the future development of the PVA in the Ninth Circuit.

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