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Panel Discussion: The Red and Green Lights of Homeland Security

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THE RED AND GREEN LIGHTS OF HOMELAND SECURITY*

MODERATOR: JIMMIE V. REYNA, ESQ.**

PANELISTS: COMMANDER STEVEN POULIN &
ROBERT B. "CHIP" BIRTHISEL, ESQ.

JIMMIE V. REYNA: In the area of customs, green and red are two colors that are used quite a bit. In the express industry, for example, some bags have a green band on them, and some bags have a red band. And when you come to Mexico, you have that little traffic light. You push the button, and if it is green it says "*pasa*" and you go ahead. If it is red, they send you to that little table over there. Stop and go. Now, with homeland security, we have these lights, which we will call navigational lights because our two panelists are associated with the Coast Guard—the navigational lights of trade and commerce with respect to homeland security.

After the September 11 terrorist attacks, a number of new initiatives were immediately put into place, some of which are still being developed. A lot of those new initiatives now come under the common term "homeland security." The following discussion by two outstanding panelists will assist us as attorneys to spot issues and identify areas that will impede commerce and trade, and it will also be very good background for all the initiatives the United States is implementing in the homeland security area.

I want to first introduce Chip Birthisel. He is a partner with a law firm in Norfolk, Virginia. Norfolk is one of the country's largest ports, and a lot of U.S. trade goes through that port. Chip is an admiralty and maritime attorney, so he deals in things involving ships: ships out in the water, collisions on the water, container loads that slide off the container ships and disappear beneath the waves, casualties, wrongful death, items involving machinery, bunker—for any of these emergencies, they call in Chip. He is an outstanding lawyer who is very well known in the maritime industry. He got his juris doctor from the University of Miami, a master's degree at John Hopkins in Baltimore, and his Bachelor of Science at the University of San Francisco.

ROBERT B. "CHIP" BIRTHISEL: In addition to what I do in the admiralty arena, I am also a general transportation lawyer. Because maritime law involves moving things, passengers, and cargo, the laws in the aviation community are very similar to the laws in the train community, the rail community, and any other mode of transportation. The reason we felt homeland security was important to discuss today is that this is the ground level of what is happening in the United States, and actually throughout the world right now, with regard to moving goods and people.

Probably the most significant focus is the movement of goods. Therefore, this presentation primarily concerns the homeland security measures of the Maritime and Transportation Security Act of 2002 (MTSA),¹ particularly the maritime aspects, because the MTSA is probably the most comprehensive regulatory scheme out there today, and you can expect that what is happening now in ports throughout

* A summary of the background of the moderator and panelists appears on the last page of this article.

** The views expressed here are the individuals' own, and should not be taken to represent those of their employers or other organizations with whom they may be affiliated.

1. The Maritime Transportation and Security Act of 2002, Pub. L. No. 107-295, 116 Stat. 2064, which clarifies government agency responsibilities and enhances security preparedness, was passed by Congress on November 15, 2002 and signed into law by President Bush on November 25, 2002.

the United States and around the world is also going to trickle down into the terminals, the border crossings, things moving by truck, things moving by air, and essentially into every mode of transportation out there. We will first discuss the regulations, then offer some practical advice as to how they will affect your trade, how they will affect the people you represent, what you can do, and some of the pitfalls to avoid.

You could not hear about the MTSA from a better source on the planet than Steve Poulin. Steve has an impressive array of degrees and experiences. He is a Washington guy extraordinaire and has been the Coast Guard's guy on the Hill. He left that assignment after 9/11 and was brought into the Marine Security Area in Coast Guard Headquarters. He is an attorney, but was asked to come into the actual functioning part of Coast Guard Headquarters to deal with port security issues.

Steve attended the International Maritime Organization meetings in London during his time with the Coast Guard and Port Security, and is personally responsible for overseeing and writing all the regulations that just hit the streets this July with regard to the Maritime Transportation Act of 2002 and its application to the maritime world.

Without further ado, I'd like to introduce Commander Steve Poulin. He has left the port security arena and is now with the State Department. I expect to see him running for President before too long. I would like to point out that not only does Steve now deal with issues of homeland security for the United States, he is also personally responsible for the liaison efforts with the State Department in international trade.

COMMANDER STEVE POULIN: This is a great opportunity for the Coast Guard to explain these new and emerging maritime security requirements. It is a pleasure to brief you on the new maritime security requirements that were adopted by over one hundred countries at a diplomatic conference at the International Maritime Organization in London in December 2002.² These international requirements were concurrently enacted through the Maritime Transportation Security Act that was signed by President Bush in November 2002, so what we had was sort of a convergence of international requirements and domestic requirements.

My hope is that you will get a better appreciation from this discussion as to how these new maritime security requirements will impact U.S.-Mexico maritime trade. I will start with an overview of the Coast Guard's homeland security strategy, discuss our security philosophy, then move into some of the specific requirements you will see, both in our regulations and the international standards, and finally wrap up with a brief discussion about the Coast Guard's move to the new Department of Homeland Security.³

2. This diplomatic conference was held at IMO's headquarters in London on December 9-13, 2002 for the purpose of developing security measures applicable to ships and port facilities.

3. On February 25, 2003, the U.S. Coast Guard came under the jurisdiction of the newly created Department of Homeland Security, part of a unification process representing the largest government reorganization since the Truman administration. The Coast Guard is one of 22 governmental departments under the auspices of Homeland Security, a merger that was fully completed on March 1, 2003. Homeland Security Secretary Tom Ridge is now in charge of 175,000 employees. *Coast Guard Joins Homeland Security Department*, CNN.COM/INSIDE POLITICS at <http://www.cnn.com/2003/ALLPOLITICS/02/25/homeland.security/> (February 25, 2003).

As one might expect, maritime homeland security is the highest priority for the U.S. Coast Guard right now. It is one priority among many, but nonetheless the highest. The Coast Guard has several guiding principles in implementing the President's maritime homeland security program. The first is that the Coast Guard is the lead federal agency for maritime homeland security, with the Department of Defense acting primarily as a supporting agency to the Coast Guard for maritime homeland security. The second is that the Department of Defense acts as the lead federal agency for maritime homeland defense. Now, the distinction between maritime homeland security and maritime homeland defense is not always evident. Many times these two areas overlap and merge, and that is a challenge that we in the Department of Homeland Security and our colleagues in the Department of Defense are working to better define.

Another part of the strategy for homeland security requires the sharing of responsibilities among many different agencies. One agency, one organization, cannot do it all. We need to take a multilateral approach to homeland security, not only internationally but domestically as well. It requires an unprecedented level of information-sharing between agencies, which is a major emphasis of the Department of Homeland Security.

We also have to structure our maritime homeland strategy to focus on threats. We need to get our biggest bang for the buck, if you will. We need to be able to assess risks and target our resources; moreover, we need to be smart about how we target those resources. The best way to do that is to establish threat-based requirements and allocate our resources based on risk assessments.

The last part of implementing this strategy is to leverage the Coast Guard's multi-mission character. Those familiar with the Coast Guard know that we have a range of missions. One third of the Coast Guard focuses on "justice," if you will – fisheries enforcement, drug enforcement, etc. Another third of the Coast Guard's mission is search-and-rescue and maritime safety, sort of health and safety if you will. And then another third of the Coast Guard's mission is defense, that is, military operations. We are in fact a military organization. Our cutters, when they are underway, have to be prepared at all times to respond to all those different mission portfolios. In short, we have to be smart about how we prioritize homeland security within the mix of that mission profile.

However, homeland security is not a new mission for the Coast Guard. Port and maritime security has been a mission for the Coast Guard since 1917, with the establishment of the Espionage Act,⁴ followed by the Magnuson Act.⁵ It has received different emphasis over the years, but security is not a new mission for the Coast Guard, although current threats, whether counter-drug, maritime safety, or oil

4. "[W]hoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation, ... shall be punished by a fine of not more than \$10,000, or by imprisonment for not more than two years, or both." Espionage Act, ch. 30, H.R. 291 (1918).

5. The Magnuson Act, 50 U.S.C § 191 (2000), was passed during the early days of the Cold War to protect our nation's ports and waterways from subversive acts and sabotage. The threat of the day was communism, and the Magnuson Act gave the Coast Guard broad powers to secure our ports and waterways against that threat. *Passenger Vessel/Facility Security*, PASSENGER VESSEL INDUSTRY NEWSLETTER FOR CONNECTICUT AND LONG ISLAND (Spring 2003), available at <http://www.uscg.mil/d1/units/grumsolis/Prevention/2003Newsletter/Page2final.htm>.

pollution prevention, have caused us to refocus our priorities over the years. That is one of our challenges as we implement this strategy.

The first element of our homeland security strategy is increased maritime domain awareness. I think it is fair to say that we have only a limited picture of what is going on, not only in the deep ocean environment but even in the coastal environment. We have got to be a lot smarter about what is going on in the off-shore area. Secondly, we need to be able to conduct enhanced maritime security operations at the same time we are conducting all our other missions. This goes back to something I just mentioned—we need to be smart about identifying port security gaps. Our ports are very porous. Ports around the world are porous. This is a result of the long tradition of facilitating maritime trade, so we need to identify and assess where those gaps are as we put new requirements in place.

We need to build critical security capabilities and competencies. In other words, we need to train ourselves to be able to respond to this new threat environment. Yes, maritime homeland security has been a responsibility of the Coast Guard for years, but the threat is different now. We live in a much different world after 9/11, and we need to train and equip our people to deal with new and emerging threats.⁶

We need to leverage partnerships with other nations, as do other federal agencies. We also need to leverage partnerships with industry. Lastly, we need to make sure we can transition seamlessly from security to defense. If the United States were to come under attack again, we need to be able to make that transition, because the approaches to security and defense will certainly be different.

One of our biggest challenges in enhancing maritime security is balancing the need for preservation of fundamental liberties and free trade with the need to shore up our borders. We need more information in order to make these risk assessments and judgments. I think we have done a good job achieving this balance and, hopefully, as I get into more of the regulatory requirements, you will see that we have tried to be very attuned to this important balance as we put the new requirements in place.

The first key action the U.S. Coast Guard took after 9/11 was to extend the 24-hour-notice requirement in place prior to 9/11 to 96 hours.⁷ Essentially, any vessel

6. See U.S. Conference of Mayors, *Cities Face Increased Security Costs Following September 11 Attack*, at http://www.usmayors.org/uscm/news/press_releases/documents/surveyresults_102201.asp (Oct. 22, 2001), (“Tightening security in the aftermath of the September 11 attack is costing the nation’s cities a lot of money. In a survey conducted by the U.S. Conference of Mayors, 93 mostly small and medium-sized cities reported that they will spend \$122.5 million in the year after September 11, 2001 in order to maintain heightened security.”); The European Union, *EU Actions: Air Transport Security*, at <http://europa.eu.int/news/110901/airtrans.htm> (last visited Apr. 7, 2004) (“Since the terrorist attacks of the 11 September, the issue of transport security - and in particular, increased air transport security - has moved to the top of the agenda.”); *Security Measures at Borders Begin on September 11, 2002*, GT IMMIGRATION OBSERVER, at <http://www.gtlaw.com/practices/immigration/newsletter/archives/009/item04.htm> (last visited Apr. 7, 2004) (“The Department of Justice announced the implementation of the first phase of the National Security Entry-Exit Registration System to begin on the one year anniversary of the September 11, 2001 attacks. INS was charged with beginning the program at selected ports of entry on September 11, 2002.”).

7. Most ships entering U.S. ports will have to provide 96-hour advance notice of arrival (NOA) to the U.S. Coast Guard along with crew, passenger, and cargo information, under new rules that go into effect tomorrow. A 24-hour advance notice has long been required for ships calling at U.S. ports. In the wake of the September 11th terrorist attacks, ships have been directed by U.S. Coast Guard order to provide advance notice plus detailed information about crews, passengers, and cargoes. *New Reporting Requirements for Ships Entering, Leaving United States*, U.S. COAST GUARD NEWS MEDIA ADVISORY (October 3, 2001), at <http://www.uscg.mil/d11/sandiego/mso/PRAdv011003.pdf>.

that is bound for a U.S. port has to provide 96 hours' notice of its intended entry. The ship has to notify us of its intended ports of call in the United States and give a general description of its cargo. It also has to provide us a list of crew members and their positions on board, a list of their names, passport numbers, and so forth. That information allows us to screen each vessel in order to make a judgment on what action, if any, needs to be taken when that vessel comes into port – whether we need to ban the vessel from coming into port because it poses an unacceptable risk, whether we need to escort the vessel, whether we need to board the vessel, or whether the vessel poses such a low risk that there is no problem letting it come in, subject to our traditional dockside compliance boardings. Thus, the 96-hour notice of arrival requirement is a very important measure which was put in place shortly after 9/11.

The other thing we did was to establish many security zones around the country.⁸ These are primarily waterside zones around critical infrastructure which ships have to avoid—they have to stay out of those areas, or they can only go into those areas with permission of the Coast Guard. Nuclear power plants would be one example; oil terminals may be another.

We also established a Sea Marshal program.⁹ You have heard of Air Marshals on the aviation side, well, we have a parallel program on the Coast Guard side. The Sea Marshals are armed Coast Guard officials who board high-risk vessels as they come into port to make sure that the vessels are not overtaken by terrorists and do not pose an unacceptable threat. Our screening of the information received from the 96-hour notice of arrival can only do so much. We have to take the extra precaution, many times, of putting Sea Marshals on board ships entering the U.S.

The last thing we did was to implement what we call Maritime Safety and Security Teams.¹⁰ This is a little bit different than the Sea Marshals. The Maritime Safety and Security Teams are deployable units of highly trained, highly specialized Coast Guard personnel that act within the United States. If, for example, there is a threat on the West Coast, we can take Maritime Safety and Security Teams from the East Coast and transport them out to the West Coast for what we call surge capability. They have their own boats and their own equipment, and they are deployable within the continental United States.

8. See, e.g., *Coast Guard to Enforce Fleet Week Security Zones*, COAST GUARD NEWS (Oct. 9, 2002) at <http://www.uscg.mil/pacarea/news/newsreleases/2002/oct/3302.htm>; *Safety and Security Zones*, 66 Fed. Reg. 49,106 (Sept. 26, 2001) (to be codified at 33 C.F.R. pt. 165).

9. Armed Coast Guard Sea Marshals board and inspect ships offshore to make sure they are safe to enter port. The Sea Marshal program began in San Francisco shortly after the terrorist attacks of Sept. 11 as a way to control the movement of ships arriving at U.S. ports. The Sea Marshals provide a visible, credible deterrent to ship board terrorism while maintaining positive control of a ship's wheelhouse. They also provide security for the Bar Pilots and provide immediate response if a problem occurs. United States Coast Guard Auxiliary, *Marine Safety and Security*, at http://www.uscgaux.org/~opr/marine_safety.htm (last modified June 11, 2004).

10. "Today, we live in a world where terrorists have demonstrated unfathomed anger and a global reach. This new threat requires that we rethink the way we look at security in our transportation systems, including our seaports, where 95 percent of our overseas trade occurs.... The Maritime Safety and Security Teams are one of several steps being taken to protect our seaports, waterways, and citizens. Our plan takes a multi-layered approach that includes these new, special tactics teams to help us push our maritime borders outward in order to sooner detect, deter, and disrupt terrorist threats. These new teams, like the one just commissioned here today, will be a nimble, elite force that can quickly react to terrorist threats anywhere our nation's seaports and waterways are threatened." Remarks by Norman Y. Mineta, Secretary of Transportation (Sept. 8, 2002), at http://www.uscg.mil/pacarea/msst91103/commissioning_day.htm.

Let me talk a little bit about the Sea Marshal program. One of the high-interest vessels that Sea Marshals routinely escort, both in and out of port, is cruise ships, because they are such an attractive target for somebody who wants to commit a terrorist act, as well as being a very high-consequence target. I know Mexico has a lot of ports and terminals receiving cruise ships. I do not know if the Mexican government has an escort program like the United States. Certainly I would encourage the implementation of something like this because, according to our threat assessment, cruise ships are probably one of the most high-value targets operating in the marine environment right now.

One of our underlying principles is that the marine transportation system, or the MTS as we call it, is worth protecting. Another principle is that we want to avoid economic imbalances that can come from regulating one port or one segment of the industry more than another segment of the industry. So another challenge is to develop uniform and predictable guidelines and standards for industry to adopt. We want to take a risk-based approach. We do not want to just regulate for regulation's sake, we want to take a risk-based approach so that we are putting meaningful security measures in place.

The last principle is something I have alluded to before, that maritime security requires an all-hands evolution. What that means is that the Coast Guard is trying to change the security culture within the maritime industry not just with ship owners, but also with shippers, terminal operators, and port authorities. This requires what we call a sea change in culture within the maritime industry.

If the *USS Cole* and *Limburg* incidents¹¹ taught us anything, it is that the marine transportation system is inherently vulnerable. And frankly, certain segments of the maritime industry have not been closely regulated. Our goal, ultimately, is to prevent a transportation security incident. Our domestic law, the Maritime Transportation Security Act,¹² defines a "transportation security incident" as one that "results in a significant loss of life, environmental damage, transportation system disruption, or economic disruption to a particular area."¹³ So when we set about to regulate our ships and our domestic industry, we were guided by these principles.

The first type of defined incident is one that results in loss of life. You can see how this relates to the cruise industry. These cruise ships are basically floating cities, so we needed to include them in the regulatory framework. We also needed to create a threshold for ships below cruise ship size (for example, smaller passenger vessels), and we established that cutoff at about 150 passengers. We figured that a vessel with less than 150 passengers is not really at a significantly high risk, but once you reach that 150 or more level, it becomes an attractive target and increased measures need to be put in place.

The second type of incident is one that results in environmental damage. Of course, oil tankers, such as the *Limburg*, are an attractive target for terrorists

11. The *Limburg* was a French tanker carrying more than 397,000 barrels of crude oil that was blown up by a small boat, much in the way the *Cole* was damaged, on October 6, 2002 near Yemen. *Yemen Probes French Tanker Blast*, CNN.COM/WORLD (Oct. 6, 2002), at <http://www.cnn.com/2002/WORLD/meast/10/06/yemen.ship/>.

12. *Supra* note 1.

13. Maritime Transportation Security Act of 2002, Pub. L. No. 107-295, § 70101(6), 116 Stat. 2064, 2068 (2002).

because of the opportunity for an incident aboard to foul the water and create environmental damage, as well as serious economic disruption.

Next, the MTSA lists incidents that result in transportation system disruption. We all heard about the West Coast slow-down about a year or so ago and the purported billions of dollars that incident cost the U.S. economy.¹⁴ That is something we are trying to avoid as well. If there were a maritime transportation security incident that affected U.S. ports, what happened on the West Coast would be nothing compared to what you would see as a result of a terrorist incident. We have to be extremely cautious in this regard. We have to be practical, but at the same time we have to be guided by these factors that our domestic law prescribes.

Lastly, there are incidents that result in economic disruption to a particular area. I'll be frank with you, if a transportation incident happens in a large port, it is unlikely that the effects will be geographically limited. A ripple effect would most certainly occur. Nonetheless, economic disruption to a particular area is one of the things Congress directed us to consider.

With all this background, we need to also understand that maritime commerce is an inherently global venture, so any solution, in my view, must have international resolution and international commitment. After 9/11, the United States initiated a set of robust maritime security requirements through the United Nations' International Maritime Organization (IMO),¹⁵ and enlisted the support and help of our trade partners, Mexico being one of them, to help move these security requirements through the IMO in an unprecedented short amount of time. We moved these requirements through IMO in about a year. Those of you who know how international negotiations take place know that a year is probably the shortest amount of time you could ever hope for in an international negotiation, and I think this shows the international community's commitment to enhancing maritime security.

After moving these regulations through the IMO in about a year, we wanted them to come into force as soon as possible. The best way to effect that was to amend an existing international instrument or convention. We chose to amend the International Safety of Life at Sea Convention, or SOLAS.¹⁶ It was one of the first

14. The Pacific Maritime Association, representing major shipping lines and port terminal operators, locked out dockworkers indefinitely at 29 West Coast ports. See *Port lockout continues as sides dig in*, CNN/MONEY (Oct. 1, 2002) at <http://money.cnn.com/2002/09/30/news/economy/ports/>.

15. The IMO is a specialized agency within the United Nations framework. Since shipping is perhaps the most international of all the world's industries and one of the most dangerous, it has always been recognized that the best way of improving safety at sea is to develop international regulations followed by all shipping nations. In 1948, after establishment of the United Nations, an international conference in Geneva adopted a convention formally establishing the IMO. The purposes of the Organization are "to provide machinery for cooperation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade; to encourage and facilitate the general adoption of the highest practicable standards in matters concerning maritime safety, efficiency of navigation and prevention and control of marine pollution from ships." International Maritime Organization, *About IMO*, at <http://www.imo.org/home.asp> (last visited Apr. 7, 2004).

16. The SOLAS Convention in its successive forms is generally regarded as the most important of all international treaties concerning the safety of merchant ships. The first version was adopted in 1914 in response to the Titanic disaster, the second in 1929, the third in 1948, and the fourth in 1960. The 1960 Convention was the first major task for IMO after the Organization's creation and represented a considerable step forward in modernizing regulations and keeping pace with technical developments in the shipping industry. A completely new Convention was adopted in 1974 which included not only the amendments agreed on up until that date, but

maritime conventions that came out of the *Titanic* disaster, and has of course been modified and revised many times since then. It is probably the most ratified international maritime convention in the world. A total of 147 nations are party to it, representing over 98% of world shipping tonnage. Mexico, the United States, and all the maritime trading nations are a party to this convention.

We amended SOLAS by taking advantage of the tacit amendment process, which is a process for amending a convention that automatically brings the amendment into force for parties to that convention without having to go through the advice and consent, ratification, or accession processes. We did that successfully, and these new requirements are going to come into force on July 1, 2004.

At the same time we were negotiating these international requirements, Congress passed the Maritime Transportation Security Act of 2002.¹⁷ We have taken the approach in the Administration that the MTSA should be aligned with the new international requirements. In fact, Congress specifically found that it was in the United States' best interest to adopt the international requirements in our domestic legislation. Our domestic regulations very closely parallel the international standards. We committed to the international community, as part of our push to get these requirements adopted through IMO, that we would proceed multilaterally with the other nations, so it was a key victory for the Coast Guard when Congress recognized this by saying that it is in the United States' best interest to adopt the international standards in the domestically implemented legislation.

As part of the need for uniformity, we wanted to maintain a competitive balance between our ports. We also did not want to be overly prescriptive. For example, we did not want to say that everybody needed an eight-foot-high fence at a port terminal; we instead wanted to say that a facility needed access control adequate to deter somebody from coming onboard that facility. We have a saying, "When you've seen one port, you've seen a port." Not all ports are alike; they are completely different, so it was impractical to direct construction of an eight-foot-high fence at every port. Our regulations were crafted so that they established performance standards, and it is up to industry to tell us how they are going to implement those performance standards. How are they going to achieve this? What measures are they going to put in place? The exact same approach was taken through the International Ship and Port Facility Security (ISPS) Code that was adopted through IMO.¹⁸

a new amendment procedure—the tacit acceptance procedure—designed to ensure that changes could be made within a specified (and acceptably short) period of time. The tacit acceptance procedure provides that an amendment shall enter into force on a specified date unless, before that date, objections to the amendment are received from an agreed number of Parties. As a result, the 1974 Convention has been updated and amended on numerous occasions. International Maritime Organization, *International Convention for the Safety of Life at Sea (SOLAS), 1974*, at http://www.imo.org/Conventions/contents.asp?topic_id=257&doc_id=647#1 (last visited Apr. 7, 2004).

17. *Supra* note 1.

18. The Conference of Contracting Governments to the International Convention for the Safety of Life at Sea (SOLAS), held December 9-13, 2002, adopted a number of amendments to SOLAS, the most far-reaching of which enshrines the new International Ship and Port Facility Security (ISPS) Code. The Code contains detailed security-related requirements for Governments, port authorities, and shipping companies in a mandatory section, together with a series of guidelines about how to meet these requirements in a non-mandatory section. The Conference also adopted a series of resolutions designed to add weight to the amendments, encourage the application of the measures to ships and port facilities not covered by the Code, and pave the way for future work

According to our economic analysis, the first-year cost for implementing our security regulations is U.S. \$1.6 billion. In the first ten years, the cost will be U.S. \$6-8 billion. This is a cost to be borne primarily by the maritime industry and the terminals themselves. The U.S. has a very limited grant program for port security. There is a grant program, but I can tell you, it does not cover six to eight billion dollars.

But this must be taken in perspective. Over 95% of the goods coming into the United States are carried in maritime commerce. The U.S. gross domestic product for 2002 was about U.S. \$10.5 trillion. The economists may disagree with me on this, so take the number for only its magnitude and not its exactness. Maritime commerce contributed about U.S. \$1 trillion, and that is just for one year. What we are asking industry to do is invest just a very small percentage of that. This goes back to the principle that the maritime transportation system is worth protecting, so when you talk about U.S. \$1.6 billion in investment the first year, as compared to U.S. \$1 trillion in benefit, you are really not talking about orders of magnitude or significant cost.

We have tried to balance these measures, again proceeding multilaterally. Everybody who is a party to SOLAS will have to implement similar measures to what the United States is doing. What the U.S. ports and terminals are doing, Mexican ports and terminals will have to do, and ports and terminals in Europe will have to do. Ships that are registered in Mexico, ships that are registered in the United States, and ships that are registered in Europe will have to implement the same standards. So we have tried to avoid the economic imbalances that can come from over-regulating U.S. industry as compared to the rest of the international community.

We are going to do this through a family of plans. Our fundamental approach will be to establish a national transportation security plan that provides an overarching strategy for the United States. But within that, we are going to have port security plans. Within the Coast Guard structure, there are about 45 Captains of the Port who are responsible for defined geographic areas all along the United States coast, including Alaska and Hawaii. Each one of those Captains of the Port will be responsible for developing a port security plan that will cover all activity within that port.

Underneath the port security plan will be individual facility security plans and individual vessel security plans. The vessel owners and facility owners will be responsible for establishing and developing these individual security plans. Each one of these plans—the port plan, the vessel plan, and the facility plan – will have to be based on a thorough security assessment done through a process of introspection, *i.e.*, looking at your vulnerabilities, assessing your current security capabilities, and then devising a plan to address those vulnerabilities.

Each plan will have to establish specific measures that will be put in place at three escalating security levels. We call them “maritime securities levels” or MARSEC levels, specifically MARSEC 1, MARSEC 2, and MARSEC 3.¹⁹

on the subject. International Maritime Organization, *IMO adopts comprehensive maritime security measures*, at http://www.imo.org/Newsroom/mainframe.asp?topic_id=583&doc_id=2689 (last visited Apr. 7, 2004).

19. Experts in maritime security from around the world met in September 2002 in preparation for the

MARSEC 1 is what we call the “new normalcy.” It is how we are going to operate from here on out. So at a minimum, everybody will have to be operating at MARSEC Level 1. MARSEC Level 2 will be set when there is an increased risk of a transportation security incident, and MARSEC Level 3 will be set when there is an imminent threat of a transportation security incident. Security plans will have to detail how the facility, the port, and the vessel can seamlessly transition from Level 1 to Level 2 to Level 3, depending on what the threat is.

If there is an increased risk and we ratchet up to Security Level 2, industry is going to have to be able to go to MARSEC 2 and implement those measures in their plan for that level. In addition, the Coast Guard will have authority to issue maritime security directives. The FAA and the Transportation Security Administration have had authority to issue security directives to the aviation industry for a number of years.²⁰ We have mapped that over into the maritime mode so that if there is a particular threat or a particular need, the Coast Guard can issue a directive to industry across the board, or to segments of industry or regionally, to require that additional measures be put into place above what is in the plan. Furthermore, our Coast Guard Captains of the Port have existing regulatory and statutory authority to take whatever other actions they deem appropriate under the circumstances. The standard for whether it is a proper exercise of that authority is simply an arbitrary and capricious standard that you would find under the Administrative Procedure Act.²¹

The first approach is to perform a port security assessment, which includes identifying the risks, the threats, and the consequences of an incident at the port. Most of these assessments will be done with a stakeholder group put together by the Captain of the Port. The stakeholder group will include other federal, state, and local agencies; maritime stakeholders; port authorities – a whole range of what we call interested and affected persons that will meet regularly with the Captains of the Port to establish and construct this port assessment.

Diplomatic Conference in December 2002. The December conference adopted a completely new regulatory regime to prevent ships and their cargoes from becoming targets of terrorist activities, and the working group on maritime security of the IMO's Maritime Safety Committee met at IMO headquarters in September 2002 to refine a raft of measures to be put before the Conference in December. The new measures are centered around a proposed International Ship and Port Facility Security Code, which seeks to establish the guiding philosophy that will underpin the whole approach to maritime security. The essence of this philosophy is that, because each ship and each port facility present different risks, the Contracting Government should determine and set the appropriate security level. Security levels 1, 2 and 3 (in the U.S., MARSEC 1, 2, and 3) will correspond to normal, medium, and high threat situations, respectively. The security level creates a link between the ship and the port facility, since it triggers the implementation of appropriate security measures for the ship and for the port facility. The Code will provide a methodology for security assessments to be made so that plans and procedures to react to changing security levels can be established. International Maritime Organization, *Maritime security measures take shape at IMO*, at http://www.imo.org/Newsroom/mainframe.asp?topic_id=583&doc_id=2435 (last visited Apr. 7, 2004).

20. The Transportation Security Administration issues and administers Transportation Security Regulations (TSRs), codified in Title 49 of the Code of Federal Regulations, Chapter XII, parts 1500 through 1699. Many TSRs are former rules of the Federal Aviation Administration (FAA) that were transferred to TSA when TSA assumed FAA's civil aviation security function on February 17, 2002. Immediately following the attacks of September 11, 2001, the FAA, and subsequently the TSA, markedly increased the number and scope of security directives issued as a means of notifying specific segments of the air carrier industry of the current threat to U.S. civil aviation. For more information, see the Transportation Security Administration website at <http://www.tsa.gov/public/> (last visited June 14, 2004) and the Federal Aviation Administration website at <http://www.faa.gov/> (last visited June 14, 2004).

21. See Administrative Procedure Act, 5 U.S.C. §§ 500-596 (2000).

The port security plan is then put together based on the port security assessment. Part of the plan will coordinate incident response. Each agency, whether it's federal, state, or local, has certain capabilities in responding to a terrorist incident or a security incident. A "security incident" does not necessarily have to rise to the level of what we would call a terrorist incident, but it is nonetheless a breach of security. The plan itself will coordinate some of those efforts, and the facility and vessel security plans will be critical elements that support the port security plan.

Much like the port security plan, the vessel and facility security plans will also have to be based on security assessments done by the owner/operator or by a contractor. The assessment has to identify critical activities and operations, evaluate threats to key operations and access points that people could exploit, and the adequacy of existing measures. Some segments of our industry already have existing security protocols. For example, ports that handle hazardous chemicals, those that handle oil, and even cruise ship terminals did a pretty good job, even before 9/11, of putting certain security measures in place. Nevertheless, they are now going to have to assess those measures against our new standards, and they are going to have to assess whether the old plans are adequate, and if not, they have to build new plans around our new standards. Lastly, the assessment itself is part of the security plan, and both the plan and the assessment will be submitted to the Coast Guard for review and approval.

For each maritime security level, the vessel and facility security plans have to address access control. Again, we have not prescribed that you have to have an ID card reader at the gate. What we have said is you have to have a means of identifying individuals coming into the facility and validating their reason for being there. How you do that is up to you.

Secondly, you have to identify restricted areas on your facility. That would likely be communication centers and key loading sections within the terminal. You have to restrict access to those sensitive areas to only those people who have a reason for being there. This is a lot of common sense.

There have to be procedures for handling cargo. Here we do not want to duplicate what Customs is doing through its Customs Trade Partnership Against Terrorism²² or its Container Security Initiative. Nevertheless, we do want ports to check cargo that is coming on and off the facility, and match the cargo against the manifest or the bill of lading. We do not necessarily mandate that containers be opened up and inspected—we understand that is commercially impractical—but there has got to be some means of ensuring that the facility and the vessel are receiving only cargo that is properly manifested for that voyage.

22. U.S. Customs Service Commissioner Robert C. Bonner announced on April 16, 2002 the launch of a new initiative in America's fight against terrorism - the Customs-Trade Partnership Against Terrorism, or CTPAT. CTPAT is a joint initiative between government and business designed to protect the security of cargo entering the United States while improving the flow of trade. CTPAT requires importers to take steps to assess, evolve, and communicate new practices that ensure tighter security of cargo and enhanced security throughout the entire supply chain. In return, their goods and conveyances will receive expedited processing into the United States. "The message should be clear - if a business takes steps to secure its cargo against terrorism, we will give it the 'fast lane' through the border," said Bonner. "CTPAT is a program through which businesses win, governments win, and most importantly, the American people win." *U.S. Customs Services Launches Customs-Trade Partnership Against Terrorism*, ITS AMERICA NEWS (April 16, 2002), at <http://www.itsa.org/ITSNEWS.NSF/0/75a670bbf07a2f3e85256ba000623ac9?OpenDocument>.

The port security plan will have to detail the security duties of those on board. Each vessel and facility must have a designated security officer, the one individual who is responsible for security on that vessel and on that facility. The designated security officers must have certain core competencies, and they are responsible for implementation of the plan. Other people involved in security-type functions also have to receive required training. That would be security guards, for example, and those who may conduct screening at the gate or prior to an individual boarding the vessel. They have to be adequately trained.

Lastly, the plan has to identify what measures are being put in place to control the delivery of stores and supplies, not only on the facility but on the vessel. For example, many facilities and vessels may want to go with a trusted supplier, somebody they know, somebody they have done business with, somebody who has already vetted their employees and has good security in place, rather than just going with somebody who is an unknown. So, one of the ways to control delivery of supplies would be to go with these trusted-agent-type arrangements.

Everything I have described so far parallels what is going to be required internationally. Therefore, I would expect that Mexico is already proceeding down this same road for its vessels and terminals.

Another international requirement is that every vessel has to have a ship security alert system. This is essentially a silent alarm that can be pressed in the event of a terrorist attack against the ship or somebody seeking to take over the ship. Many in industry already have this type of system. It is called a piracy alarm, and the standard for the piracy alarm may in fact meet the standard for the ship security alert system. Vessels that have to comply with SOLAS will have to have a ship security alert system.

Further, each ship will have to have its official number painted on the side of its hull for easy identification. We did wrestle with this requirement because anybody with a paintbrush can change the number, but nonetheless, everybody is going to have to have their official number painted on the side, much like aircraft do right now. The only difference is we allow the cruise industry, for aesthetic reasons, to paint the number horizontally on the top deck, so an aircraft flying overhead can identify the vessel in the event of a breach of security or a terrorist act.

The next thing is the automated identification system, or AIS. This is a short-range transponder which every vessel over 300 gross tons is required to have by international standard. It is basically only good in the coastal environment, up to about 20 nautical miles offshore, but it will send out a signal that can be received by other vessels and on shore, giving the name of the ship, its course, and its speed. You can literally program any kind of digital information into this system that you want. The IMO²³ is working on a uniform standard, but every ship is going to have to have an automated identification system. The deadline for this is a little more extended than for the security plan requirement – every ship will have to have it by December 31, 2004. The United States has gone beyond the international requirements by essentially requiring the transponder on most vessels over 100 gross tons. We want to capture some of the smaller vessels that are coming up

23. *Supra* note 15.

through Caribbean and Latin American trade that are below SOLAS convention size but nevertheless pose some risk and threat to security.

Finally, each SOLAS vessel now has to have a continuous synopsis record. That is a long name for what is essentially the diary of the ship. One of the things we have wrestled with over the years is transparency of ownership of a vessel. Who is the beneficial owner of a vessel? With international joint ventures and international financing, it is so hard to tell who the actual owner is. Who gets the benefit of this vessel? We decided to focus on the actual operator, the one telling the ship to go from Point A to Point B, whether it is a charterer or an actual owner. The continuous synopsis record will have to be a record of operation of the ship and any charter agreements and so forth, and it will stay with the ship when it is sold, so it will almost be like part of the ship's equipment and will be open to inspection by any port official trying to make a further assessment of what risks that ship presents to the port.

We do have some additional domestic security requirements beyond the AIS that are going to have to be put in place. The first is a biometric transportation security card. Many of you have heard that the Transportation Security Administration is working on a TWIC, or Transportation Worker Identification Card, that will cut across the different modes of transportation. We are not quite there yet. The only thing I can tell you is that it will be a biometric card. How it applies and to whom it applies, I cannot tell you right now. We are moving in that direction, but that's really a TSA function.

The second additional requirement is seafarer identification. We are trying to move towards some kind of biometric identification for seafarers. The relationship between the transportation security card and a seafarer identification is a point of discussion right now within the Department of Homeland Security. We are not sure how it is going to turn out. Right now, all we are requiring is that each mariner who comes into the United States have an adequate identification issued by a proper authority with a current photo and the individual's full name. Then, of course, we will compare that against the 96-hour notice of arrival information.

There are also requirements for long-range ship tracking. AIS is a short-range system, but we are also moving to long-range tracking, and trying to improve offshore maritime domain awareness through improved maritime intelligence.

So how is this going to affect maritime industry? The Coast Guard will take a very stringent approach to these requirements. It is called a Port-State Control Program.²⁴ Any vessel that is not compliant with international standards can expect

24. The United States has become primarily a port State, with an average of 7,500 foreign ships calling on its ports each year. These foreign ships account for 95% of the passenger ships and 75% of the cargo ships operating in U.S. waters. As a result, the greatest potential threat to U.S. ports and waterways now comes from foreign ships. Beginning in the 1970's, the U.S. Coast Guard increased its emphasis on Port State Control through examination of foreign vessels, primarily driven by requirements to ensure compliance with the then-new pollution prevention and navigation safety regulations. Boarding officers also exercised Port State authority when instances of non-compliance with SOLAS and MARPOL were noted. Over time, the international safety and environmental protection standards, implemented under conventions such as SOLAS and MARPOL, have become more strict, with increased enforcement authority for port States. In 1994, the U.S. introduced risk-management methodologies into our Port State Control program to allocate limited inspection resources where they could do the most good by identifying those ships, ship owners, classification societies, and flag Administrations that were most often found lacking in meeting their international Convention responsibilities. U.S. Coast Guard, *Origins of the Port State Control Program*, at <http://www.uscg.mil/hq/g-m/pscweb/origins.htm> (last updated May 6, 2004).

to be detained, if not banned from entry into the United States altogether. We are taking a very serious approach to this, almost a zero tolerance approach, if you will. So for those vessels that are flagged in Mexico and entering U.S. ports, the U.S. Coast Guard is going to expect to see that they have an approved security plan meeting all the international standards, and that they have AIS equipment. If they do not, I can tell you they probably will not be allowed into the United States, and that is probably going to affect some existing contracts with terminal operators. It is going to interrupt the carriage of those goods that are so vital to making the marine transportation system work. So the stakes are high for non-compliance.

Secondly, we do have the right of self-defense and the right to preserve national security. This right of self-defense extends beyond just this international convention that we have constructed. If there is a serious threat to national security, we are not even going to look to SOLAS. We will take whatever action is deemed appropriate to protect our sovereignty.

We have a very aggressive timeline. These regulations come into force July 1, 2004. Interim regulations published on July 1, 2003 are already on the street. We finalize those regulations at the end of October 2003, and all U.S. ship owners and U.S. terminal operators are required to submit plans to the Coast Guard on or before December 31, 2003. Any industry that has not met this deadline is behind the power curve, and I would submit to you that those Mexican interests that are required to comply with these international requirements and have not already done so are well behind the power curve right now. So this is something very important that industry needs to pay attention to in the short term.

In closing, I want to mention that the Coast Guard transitioned in February 2003 to the new and larger Department of Homeland Security. One of the Department's major goals is to provide better coordination and consolidation of federal security activities.

BIRTHISEL: Every time something like the Oil Pollution Act of 1990²⁵ happens, any kind of SOLAS amendment creates an incredible amount of activity on the waterfront. As Steve mentioned, the ramifications for not complying with these new international standards is essentially that vessels will not be able to come into the United States. I have been representing protection and indemnity insurers²⁶ around the world and a variety of shipping clients for years. If my clients do not meet the requirements, the Coast Guard, Customs, whoever, ties them up and they go nowhere.

25. In 1990, Congress passed the Oil Pollution Act of 1990, 33 U.S.C. §§2701-2761 (2000), to help address a wide range of issues associated with preventing, responding to, and paying for oil pollution. Title I of OPA established oil spill liability and compensation requirements, including the Oil Spill Liability Trust Fund (OSLTF), to help facilitate cleanup activities and compensate for damages from oil spills. In 1991, the United States Coast Guard created the National Pollution Funds Center (NPFC) to implement Title I of OPA, administer the OSLTF, and ensure effective response and recovery. U.S. Coast Guard, *National Pollution Funds Center Laws and Regulations*, at http://www.uscg.mil/hq/npfc/laws_and_regulations.htm (last updated Dec. 2, 2003).

26. Protection and indemnity insurers (P & I Clubs) cover their ship-owner/charterer members for about 30 different risks related to ship operation, to a theoretically unlimited ceiling. This system is supported through a complex arrangement of reinsurance and through the International Group of P & I Clubs, which has access to reserves in excess of U.S. \$2 billion. Edgar Gold, *Liability and Compensation for Ship-Source Marine Pollution: The International System*, in YEARBOOK OF INTERNATIONAL CO-OPERATION ON ENVIRONMENT AND DEVELOPMENT 1999/2000 31-7 (H.O. Bergesen, G. Parmann, & Ø.B. Thommessen eds., 1999).

I cannot emphasize enough the *huge* amount of money that is lost in those endeavors in terms of dockage, wharfage, and crew wages. Ship operations for a single day is an extraordinary cost, and that affects every single client who is moving goods by water. It is important to stress the notion that if your clients are moving goods in any way, shape, or form, they need to be looking at these regulations now, because this is not just a maritime thing, it is going to apply to trucks, aircraft, and trains. It is going to apply to your clients who manufacture goods. It is going to apply to your clients who are moving pork. It is going to apply to your clients who are moving produce. Under the old systems of transportation before September 11, it was not likely that your goods would get tied up or that you would face any demurrage claims as a result of delay. But the ramifications of noncompliance are going to greatly increase. If your clients have perishable cargo, that is certainly something to consider in terms of compliance.

The U.S. Government has created a brand-new agency here, and a lot of these new homeland security rules and regulations, like the IMO regulations, will not be subject to challenge through administrative procedures. Congress has specifically waived the Administrative Procedure Act²⁷ and Title V ability to challenge a lot of these regulations before they hit the streets. It is a very significant change in the way we have made administrative law in the United States for the past 30 years. The Homeland Security agencies will hold town meetings, opportunities to be heard if you will, but in many regards, the agency will do what it needs to do with regard to some of these Acts. It tells you what it is going to do, and on the date that it is supposed to happen, it will happen.

SOLAS, ISPS, the Patriot Act, and the Maritime Transportation Security Act of 2002 are all examples of things that have been modified or come into existence in just the past couple of years. Every agency out there has a finger in the pie somewhere. The Maritime Administration²⁸ and Federal Maritime Commission²⁹

27. *Supra* note 21.

28. The Maritime Administration's mission is to strengthen the U.S. maritime transportation system - including infrastructure, industry and labor - to meet the economic and security needs of the Nation. Maritime Administration programs promote the development and maintenance of an adequate, well-balanced United States merchant marine, sufficient to carry the Nation's domestic waterborne commerce and a substantial portion of its waterborne foreign commerce, and capable of service as a naval and military auxiliary in time of war or national emergency. The Maritime Administration also seeks to ensure that the United States maintains adequate shipbuilding and repair services, efficient ports, effective intermodal water and land transportation systems, and reserve shipping capacity for use in time of national emergency. Department of Transportation Maritime Administration, *MARAD Mission, Goals, and Vision*, at <http://www.marad.dot.gov/mission.html> (last visited Apr. 7, 2004).

29. The Federal Maritime Commission (FMC) was established in 1961 as an independent government agency responsible for the regulation of shipping in the foreign trades of the United States. The FMC protects shippers, carriers, and others engaged in foreign commerce from restrictive rules and regulations of foreign governments and from practices of foreign-flag carriers that have an adverse effect on shipping in U.S. trades. It also investigates discriminatory, unfair, or unreasonable practices of foreign ocean common carriers, terminal operators, and freight forwarders operating in the U.S.; receives agreements among ocean common carriers or marine terminal operators and monitors them to assure they are not substantially anticompetitive; reviews tariff publications under the standards of the Shipping Act of 1984; regulates rates, charges, classifications, rules, and regulations contained in tariffs of carriers controlled by foreign governments and operating in U.S. trades to ensure they are just and reasonable; licenses U.S.-based international ocean transportation intermediaries; requires bonds of U.S. and foreign-based OTT's; and issues passenger vessel certificates showing evidence of financial responsibility of vessel owners or charterers to pay judgments for personal injury or death or to repay fares for the nonperformance of a voyage or cruise. The FMC has no jurisdiction over vessel operations, navigation, construction, documentation, or inspection, nor does it have jurisdiction over licensing of seafaring personnel,

are just a couple, as are the EPA and INS. This new seafarer documentation issue alone is a huge issue with which industries must cope.

Seafarers have always had the right, if you will, to go ashore in the thousands of years they have been sailing. In other words, a ship pulls into a port, and seafarers have the ability to go ashore and take a little rest and relaxation if the ship is in port long enough. We have always allowed people into our country if they have the proper crew visas to go ashore. We offered immigration officials a significant amount of discretion before September 11 to waive the inspection, to waive certain requirements and allow people to come into the country and go on liberty, or to go from the vessel to an airplane and take a plane home. In other words, we allowed people to put their feet on American soil. That has been very seriously curtailed in recent times.

One of the ways the maritime world has done business for years with regard to the cruise industry is to let the cruise vessel come in and present what is known as a crew list, pursuant to the 96-hour rule.³⁰ INS looks at this crew list, runs a basic check on these people, and says, "Yeah, these guys can go ashore." As of summer 2004, that will no longer happen. Each one of these people will have to have an individual visa to allow them to go ashore when they come into this country. That is a significant cutback on the way things have been over the years.

These regulations in the immigration aspect were passed in 2002, after those four Pakistanis jumped ship in Norfolk, Virginia.³¹ That certainly caused a little bit of a problem. And then within months of that, an Al Qaeda guy was found in a container on a trip from Italy to Toronto. He was in a 40-foot container with a bed, a toilet, practically everything in there but HBO! The Al Qaeda guy was on that ship and nobody knew he was in there. Well, they found him in there, and that basically told us, "Houston, we've got a problem."

Those kinds of things are getting the attention of people like our Attorney General,³² and it is making them crazy. So what they are doing is turning to this legislation they have in place that enables them to put severe restrictions on trade and commerce and immigration, and they are doing it.

I would like to talk about Customs. Six million containers a year come into the United States. Two percent are inspected by Customs. There are two primary Customs initiatives out there right now to protect the United States and commerce from the threat of terrorism. One of them is the Customs Trade Partnership Against Terrorism Agreement, or CTPAT.³³ Basically, it applies to all commercial air, rail, and sea transportation. It will ultimately cover port authorities, terminal operators, warehousemen, manufacturers—just about anybody who is in any way, shape, or

maintenance of navigational aids, or dredging. The principal shipping statutes administered by the FMC are the Shipping Act of 1984, 46 U.S.C. App. §§ 1710a-1719 (2000); the Foreign Shipping Practices Act of 1988, 46 U.S.C. App. §§ 1701-1710 (2000); and Section 19 of the Merchant Marine Act of 1920, 46 U.S.C. App. § 876 (2000). See The Federal Maritime Commission, at <http://www.fmc.gov/Quick%20Guide.htm> (last visited Apr. 7, 2004).

30. *Supra* note 7.

31. See *Four Pakistanis Missing After INS Wrongly Let Them Enter U.S.*, FOX NEWS CHANNEL POLITICS (Mar. 23, 2002), at <http://www.foxnews.com/story/0,2933,48581,00.html>.

32. John Ashcroft, nominated by President Bush on December 22, 2000. United States Department of Justice, *Office of the Attorney General*, at <http://www.usdoj.gov/ag/ashcroftbio.html> (last updated Oct. 25, 2002).

33. *Supra* note 22.

form involved in the chain of commerce. Part of the container security initiative is that U.S. Customs inspectors are being placed in foreign ports for the first time in U.S. history. Before there were teams that could go out and do things in certain problem areas. I believe there will now be ports in Mexico that will have U.S. Customs people attached to help them assess threats.

The Container Security Initiative is a primary example of another thing that has been implemented by Customs to try as Customs Commissioner Bonner³⁴ put it, to “trip up the terrorism,” because obviously, you cannot search every container. You cannot search every person. You just cannot do it. But the Container Security Initiative requires people shipping goods into the United States to report 24 hours *before* loading a container into a foreign port what is in that container. That has created some very significant problems worldwide in shipping. The aviation side is struggling right now with what they can do with this new initiative because, obviously, when you move something by air, it is usually because you want to get it there in a hurry, and this 24-hour rule does not help anyone in the aviation community. So Customs is trying to find a balance right now between keeping the 24-hour initiative in place and keeping container security alive, while still allowing people to move goods rapidly.

I would like to discuss what this boils down to in terms of the things that hit people in the pocketbook and the things you need to be concerned about. First, attorneys need to advise their clients that there are criminal penalties involved with all of this legislation. Probably the first step in that direction was the Oil Pollution Act of 1990.³⁵ OPA was one of the first bits of legislation that started putting criminal penalties out there for non-compliance.³⁶ Attorneys need to be aware of those penalties in various statutes and advise their clients so that they do not step into that web.

Additionally, civil penalties, fines, and forfeitures have increased extraordinarily from what they used to be. A liquidated damages claim for violating a Customs rule is very severe, and can put a shipper out of business if that shipper is not careful. These are serious, serious issues.

Terminal security is also huge now, and your clients are going to have to screen the people they hire much more carefully. No longer can people just go to Honduras and pick anybody who is a licensed crew member and put them on a boat and let them sail. It just cannot happen any more. The background checks are extraordinary.

When I was attending the homeland security meetings in Washington back in 2002 when all this legislation was first really starting to hit the street, one of the

34. *See id.*

35. *Supra* note 25.

36. Under the Clean Water Act, as amended by the Oil Pollution Act of 1990, EPA has greater authority to pursue administrative, judicial, and criminal penalties for violations of the regulations and for discharges of oil and hazardous substances. Under the new penalty system, three different courses of action are available to EPA in the event of a spill: (1) EPA may assess an administrative penalty against the facility; (2) EPA may seek a judicial penalty against the facility in the federal court system; or (3) EPA may seek a criminal action against the facility in the federal court system. Such criminal actions are brought against facility owners or operators who fail to notify the appropriate Federal Agency of a discharge of oil. Under the Clean Water Act, the federal government can impose a penalty up to a maximum of \$250,000 for an individual or \$500,000 for a corporation, and a maximum prison sentence of five years. U.S. Environmental Protection Agency, *Penalties for Oil Discharges*, at <http://www.epa.gov/oilspill/penalty.htm> (last updated Apr. 7, 2004).

things they were talking about was having every truck driver who drives a truck into a port go through a background check, and if that truck driver has a felony conviction, he would not be allowed to bring goods into a port. Do you have any idea how many people with felony convictions are driving trucks in the United States? That actually happens to be an occupation of choice for felons! So they changed it to a felony conviction within the past eight years, but the same problem still ensues.

The danger of carrying stowaways on board ships under these rules and regulations has increased substantially, particularly for certain ship owners. It used to be you faced a \$3,000 fine for bringing in somebody illegally. A fine like that is no big deal; you just put the stowaway on a plane and send them home. These days, stowaways are being thrown over the side of the boat, and I am not kidding about that. You are out there in the middle of the ocean; who is looking? You have a guy stowed away in the towing hawser locker on the vessel and he pops his head out, and you say, "Oh man, you are not supposed to be here. You are going to cost us a lot of money and get us tied up." The guy gets thrown over the side. It is frightening to think about, but that is how serious these fines and penalties can be.

The important thing is not to frighten you about these regulations and say, "Gosh, the United States has gone nuts!" The important thing is for you to just understand that the United States is struggling with some very serious security issues, as is everyone around the world in the shipping industry. I represent a lot of marine insurers in the London market, the Lloyd's underwriters, as well as a number of other P&I³⁷ clubs over there. Insurance has gone up 40% on shipping alone. Insurance for vessels is not cheap anyway, and there has been a 40% rise in just the last two years. The United States had to pass an anti-terrorism insurance act last year so they could get terrorism covered.

The point is, the new regulations are being worked on, and you need to monitor the pulse of that process throughout the course of advising your clients, and be aware of what can happen if compliance is not in place. Compliance is not going to be that difficult. However, neither Customs nor the U.S. Coast Guard will tell you exactly how to do things; they will instead give you guidelines. So it will be up to your clients to figure out how they are going to comply with the new regulations and, unfortunately, with that type of scheme, you have got to hope you guess right, because otherwise it can cost a lot of money.

Fortunately, on that note, there are a variety of maritime organizations out there that are able to assist as consultants, and a whole variety of people to help you come up to speed on some of these issues. Indeed, the agencies themselves are terrific about answering questions. The Coast Guard is a very approachable organization. Thank you very much. We are open for questions.

JORGE MOLINA: My name is Jorge Molina and I am from Mexico City. After listening to all of these plans and programs the U.S. government is putting in place, I had to start thinking about what was going on in the socialist regimes in terms of background checking and keeping track of people. It just seems odd that the United States, which has always waved the flag of human rights, seems to be going now

37. See *supra* note 26.

into this other trend. How are personal guarantees being respected under this new regime, which to me looks like it could be easily abused?

POULIN: The easy answer for me is that the Coast Guard itself is not requiring any background checks, so I have the luxury of not having to deal with those issues, but let me come back to that later. Let me mention that the Coast Guard has wrestled with human rights and privacy issues because part of our regulations requires individuals to be screened prior to coming on a facility or boarding a vessel.³⁸ This screening is to be done at a specified percentage, 10%, 15%, whatever it ends up being. We have gotten a lot of comments and complaints through our rulemaking that this violates the inherent right to privacy of certain individuals.

What we are very mindful of is that any time the federal government directs industry to conduct screening, case law is pretty clear that Constitutional principles attach, and our case law in the United States is pretty clear about what constitutes an unreasonable search and what does not.³⁹ In this context, we have to understand that we are preserving the vital national interests of security, and I think the courts would give great deference to that. On the other hand, our screening is supposed to be as least intrusive as possible. For example, we are not requiring people to disrobe or do some of those things.

The cruise lines have metal detectors much like the airports do. Some screening that terminals may do may simply be an undercarriage screening with a mirror and asking questions and some other things. I think that in the maritime context, since there really has not been screening to this point, we are going to draw a lot from the Constitutional principles that have been in place regarding unreasonable searches and seizures,⁴⁰ and we are also going to draw from lessons learned from the aviation industry over a number of years.⁴¹ So that is what we have been wrestling with, and I think we have a pretty good solution to that.

With regard to background checks, it will be a challenge, in part because of the civil liberty and privacy issues to which you alluded. The parameters for

38. See 33 C.F.R. § 104.265(e)(1) (2003), for all vessels; 33 C.F.R. § 104.295(a)(1) (2003), for cruise ships; 33 C.F.R. § 105.255(e)(1) (2003), for all facilities; and 33 C.F.R. § 105.290(a) (2003), for cruise ship terminals.

39. "In determining whether a particular governmental action violates the Fourth Amendment, [the U.S. Supreme Court] inquires first whether the action was regarded as an unlawful search or seizure under common law when the Amendment was framed, see, e.g., *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995). Where that inquiry yields no answer, the Court must evaluate the search or seizure under traditional reasonableness standards by balancing an individual's privacy interests against legitimate governmental interests, see, e.g., *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 652-3 (1995)." *Wyoming v. Houghton*, 526 U.S. 295, 296 (1999).

40. See *id.*

41. FAA officials note that some of the screening practices of other countries reflect cultural and other differences between these countries and the United States. In their view, such practices would not be acceptable in this country. They point in particular to the routine and frequent patting down of passengers, which they believe the American public would not tolerate. The FAA officials say that protecting an individual's civil liberties and taking into account the American public's low tolerance for what may be perceived as invasions of privacy are high priorities when considering checkpoint procedures and equipment. FAA officials say that the draft report did not provide their perspective on the role of cultural and other concerns in countries' screening practices and the public's acceptance of these practices. [The General Accounting Office] revised the draft report to include their views. *Aviation Security: Long-Standing Problems Impair Airport Screeners' Performance*, United States General Accounting Office Report to Congressional Requestors (June 2000), at <http://www.gao.gov/archive/2000/rc00075.pdf>.

background checks are currently under discussion within the Department of Homeland Security.

BIRTHISEL: In the United States, the government is being watched rather carefully by a ton of different people and lawyers, and it is going to have to melt down to a point where it's manageable and they get a handle on it. When I first attended the homeland security meetings in Washington, one of the people who spoke was a fellow who had been in the basement of the White House for months putting together homeland security. He had been one of Secretary Tom Ridge's primary advisors when he was governor, and then when Ridge moved into the homeland security mode,⁴² this guy hunkered down in the White House and helped them come up with this homeland security notion. One of the stories he tells is how President Bush went up to the border in Canada and there were basically seven people from seven different agencies looking at the same container, all wearing different uniforms and on different agency payrolls. He said, "This is crazy!" That was part of the genesis of why a lot of these agencies got poured into one agency so they could get their act together and figure out how to have a real, organized front to protect security.

There is also the story about Mayor Giuliani of New York City and how, after the planes hit on September 11, he could not talk to the White House in a secure mode because he did not have a clearance or a secure means of communication. So, the story goes, he is calling concerned about these two planes that just crashed into his city and thousands of dead people and saying "What the hell am I going to do here and can you get troops here? And by the way, I need medical supplies and all this other stuff!" And when he calls the White House, they allegedly hung up on him because he did not have a security clearance and was calling on an unsecure line. That is a pretty extreme example of lack of communication between different levels of government. So, as these issues get worked out, I feel there will be some swings to the right and some swings to the left, but I feel confident that it is going to get back to the middle.

CHRIS BAUMAN: Chris Bauman, Albuquerque, New Mexico. You mentioned that one of the impositions on people who are using shippers was this 24-hour notice that you have to give Customs of what is going in your container. My question is, are there any other obligations being placed on people using the shipping services, and are there any potential risks in terms of penalties for failure to comply?

BIRTHISEL: That is a good question, and the answer to whether there are there other requirements is yes. Shippers have had to become much more specific about

42. On October 8, 2001, Tom Ridge was sworn in as the first Office of Homeland Security Advisor in the history of the United States. He was chosen for the job due to his strength, experience, personal commitment, and authority to accomplish this critical mission. The Office of Homeland Security and the Homeland Security Council were established following the tragic events of September 11. The new director of homeland defense was to develop and coordinate a comprehensive national strategy to strengthen protections against terrorist threats or attacks in the United States. Ridge was twice elected Governor of Pennsylvania, serving from 1995 to 2001. The White House, *Biography of Secretary Tom Ridge*, at <http://www.whitehouse.gov/homeland/ridgebio.html> (last visited Apr. 7, 2004).

what they put on their bills of lading and their manifests. It used to be people could put "Box o' burgers" on a box and that would be fine. Now they have to say "Box with 15 cartons with 16 hamburgers each." You know, it has to be very specific as to what is in the containers. It has changed the industry not only from a carrier's perspective, but also from the perspective of manufacturers and people in the retail end of things. For instance, one of my clients imports all kinds of stuff from China, like little whistles, beads, chains, rabbits' feet, trinkets, all this crazy stuff, and the container is full of it. One of the things they face is "How are we going to list all these things on the manifest?" So that's a tremendous challenge.

In terms of fines and penalties, probably the most serious consequence these days to not complying with those particular initiatives still in their infancy is that your stuff just does not go. If you cannot accurately list what is in a container, it does not come off the ship or it does not go on the ship in the first place, and that, of course, is a tremendous cost to the shipper. It does not hurt the carrier because the carrier gets paid for freight. It hurts the shipper.

POULIN: Let me just mention something about the 24-hour rule. One of the things we have been wrestling with in the Department of Homeland Security is how to harmonize these different reporting requirements, and a work group has been established among the different affected agencies to deal with this. For example, you have the 24-hour requirement to report to Customs,⁴³ but then you have the 96-hour Notice of Arrival requirement to report to the Coast Guard.⁴⁴ Both require the reporting of cargo information, and then you have a separate requirement to report personnel information to what we call the Automated Personnel Information System.⁴⁵ The Homeland Security Department understands the need for improved coordination and consolidation of information between agencies, and one of our highest priorities is to try to provide this one-stop shopping that I mentioned, where there would only be one reporting requirement, and each agency would be able to tap into that common data base to extract the information they need. Now that is not as easy as it sounds, because each agency needs different data fields to conduct its mission. So it is not only a practical issue, but a technical issue as well, but we are going to get there.

MIKE OWEN: Mike Owen from Paul Hastings in Los Angeles. Question for Commander Poulin: While you are having to spend all this time dealing with these new laws that have been passed and rationalizing the new laws, do you have any time to look at long-standing laws and what their impact is on your mission? The reason I am asking is, my mom is about to take a cruise from Los Angeles to Hawaii, and I am being told that her ship, by regulation, has to stop in Mexico, and

43. Effective December 2, 2002, carriers and/or automated non-vessel operating common carriers must submit a cargo declaration 24 hours before cargo is laden aboard the vessel at a foreign port. U.S. Department of Homeland Security, *U.S. Customs and Border Protection*, at http://www.customs.gov/xp/cgov/import/carriers/24hour_rule/ (last visited Apr. 7, 2004).

44. *Supra* note 7.

45. The Army, Navy, Air Force, National Guard, Coast Guard, and Marine Corps all share personnel information through submission of magnetic tape files. See Army Reg. 680-52, *U.S. Army Reserve Components Personnel Information Reporting System* (Feb. 15, 1981), available at http://www.army.mil/usapa/epubs/pdf/r680_52.pdf.

it just seems insane to me that a ship going from one U.S. port to another U.S. port and back has to stop in a port in a foreign country.

POULIN: That is not really a Coast Guard law, that is a cabotage or coastwise trade law. Generally, only U.S. vessels can engage in coastwise trade within the United States. Therefore, by law, a foreign-flagged cruise vessel en route from L.A. to Hawaii, for example, may be required to make an intermediate stop in a foreign country, otherwise it could be considered coastwise trade, which would be impermissible for a foreign-flagged vessel. Now, I also have the luxury of saying that is a Customs rule, not a Coast Guard rule.

OWEN: But from a security standpoint, that is insane. You have a vessel going from one U.S. port to another U.S. port and back. Why do you permit a law that says “Well, okay, now, in the meantime, you have to go to a foreign port”? It seems to me that would increase the security risk.

POULIN: You raise a good point; it probably does increase the security risk. I guess that is why it is so important that the vessel itself have a robust security plan, so that when it goes to Mexico or to Hawaii, it is implementing the appropriate measures to ensure that the ship is not tainted in any way.

REYNA: We are fortunate to have a director of one of the Mexican Customs offices with us, Nashielly Escobedo. She is going to give her views on what has been said here.

NASHEILLY ESCOBEDO: I just wanted to tell you what we have been working on in Mexican Customs. Of course, we have been facing a very big problem in our seaports and terminals. We have also been working on automated transmission of information with the shipping companies and the airlines, talking about passengers and cargo. So we are trying to move in the same direction that you are, although sometimes we have some problems. Also, as to what you said about information declared on the bill of lading, it is a very big challenge to get shipping companies to understand what we need at Mexican Customs. So I just wanted to comment on that and, of course, add that we need an exchange of information.

BIOGRAPHICAL SUMMARIES

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