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Missing the Boat: The Legal and Practical Problems of the Prevention of Maritime Terrorism

Justin S.C. Mellor

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MISSING THE BOAT: THE LEGAL AND PRACTICAL PROBLEMS OF THE PREVENTION OF MARITIME TERRORISM

JUSTIN S.C. MELLOR*

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INTRODUCTION

The terrorist attacks of September 11, 2001, raise important issues concerning the vulnerability of Western states to attack by sea as well as by air.¹ Each year in the United States alone eight thousand

* B.A. (HONS.), Memorial University of Newfoundland; M.A., Royal Military College of Canada; LL.B., LL.M., Dalhousie University. The author is a practicing member of the Law Society of Newfoundland and is employed as a solicitor with the Government of Newfoundland and Labrador- Department of Justice. All opinions expressed in this paper are strictly the personal opinions of the author and not those of his employer. I would like to thank C. Reccord for providing comments and assistance with this paper. The author may be contacted at jmellor@mail.gov.nf.ca.

ships make fifty-one thousand port calls and deliver approximately seven and a half million overseas containers.² Of those seven and a half million containers,³ only two percent are actually inspected⁴ and

1. See *Canadian Security and Military Preparedness Fifth Report to the Canadian Standing S. Comm. on Nat'l Security and Defence*, (2002) [hereinafter *Canadian Senate Report*] (discussing the vulnerabilities of ports and shipping to terrorist attack), available at <http://www.parl.gc.ca/37/1/parlbus/commbus/senate/com-E/defe-e/rep-e/rep05feb02-e.htm> (last visited Oct. 14, 2002); *Weak Links: Assessing the Vulnerability of U.S. Ports and Whether the Government is Adequately Structured to Safeguard Them: Hearing Before the Senate Comm. on Governmental Affairs*, 106th Cong. (2001) [hereinafter *U.S. Senate Hearing*] (investigating the vulnerabilities of seaports as matter of national security), available at http://www.senate.gov/~gov_affairs/120601witness.htm (last visited Oct. 14, 2002); see also Tom Blackwell, *Ottawa To Study Ports' Vulnerability to Terrorists*, NAT'L POST, Aug. 24, 2002, at A3 (discussing recent efforts of both governments regarding port security).

2. See Adm. James M. Loy & Capt. Robert G. Ross, U.S. Coast Guard, *Global Trade: America's Achilles Heel*, J. HOMELAND SECURITY, Feb. 18, 2002 (discussing maritime traffic in the United States), at <http://www.homelandsecurity.org/journal/articles/displayArticle.asp?article=33> (last visited Oct. 19, 2002); see also *By the Numbers*, COUNTER TERRORISM & SECURITY REP., (Sept./Oct. 2001) (demonstrating that there is some variation in maritime traffic statistics depending on the source).

3. There are two sizes of standardized container: 20x8x8, which are referred to as TEU's or Twenty-foot Equivalent Units, and 40x8x8, which are referred to as Forty-foot Equivalent Units or FEU's. See Loy & Ross, *supra* note 2 (discussing container sizing and standards). In the logistics industry, most measurements are given in relation to twenty-foot equivalent units and unless otherwise indicated, references in this paper to "container" will mean TEU.

4. See Allison Dunfield, *Billions More Urged For the Military*, GLOBE & MAIL, Mar. 1, 2002 (explaining that this rate of inspection is not abnormal in comparison to other Western countries and that Canada inspects approximately three percent of its containers). U.S. Customs Commissioner Robert C. Bonner takes issue with the criticism of the two percent inspection rate and he maintains that the two percent screening is more effective than critics suggest because it is based on a "multi-layered strategy of risk management" that targets high-risk containers. See Robert C. Bonner, *Speech Before the Center for Strategic and International Studies* 6 (Jan. 17, 2002) [hereinafter *CSIS Speech*], available at <http://www.customs.gov/about/speeches/speech0117-02.htm> (last visited Oct. 19, 2002). He notes that,

Much has been made recently of the fact that U.S. Customs manages to inspect only about 2 percent of the total volume of trade entering the country each year[;] [t]aken alone, this statistic sounds alarmingly low. But Customs inspections are not based on random selection—say, one out of fifty is based upon a sophisticated targeting process.

each inspection takes an average of three hours per container.⁵ This inability to verify the contents of containers and the general lack of inspection suggests that containers could be used by terrorist organizations as an effective means to transport weapons of mass destruction into Western ports or even as a means for terrorists themselves to circumvent immigration control.⁶ This lack of verifiable information about cargo carried by foreign ships is compounded by a complete absence of information on the backgrounds of crewmembers operating vessels and whether the ships themselves have implemented appropriate security measures.

In terms of legal regimes, the international community has never seriously attempted to address the issue of the prevention of maritime terrorism.⁷ The focus in the past has been on the exertion of jurisdiction once an attack has occurred.⁸ The 1985 hijacking of the

Id.

5. See Stephen E. Flynn, *Beyond Border Control*, FOREIGN AFF. Nov./Dec. 2000, at 57, 59 (explaining that the three-hour inspection time is based on the five-man team conducting a thorough physical examination of a forty foot container).

6. See Susan Kelleher, *Big Hole in Nation's Defenses: Our Ports*, SEATTLE TIMES, Oct. 28, 2001, at A1 (highlighting a situation in October 2001 when Italian inspectors discovered a suspected al Qaeda member hiding in a container, destined for Toronto, fitted with a bed and makeshift toilet), available at <http://archives.seattletimes.nwsource.com/cgi-bin/texis.cgi/web/vortex/display?slug=seaport28m0&date=20011028&query=susan+kelleher> (last visited Oct. 19, 2002).

7. The absence of an effective international legal regime to prevent terrorism is not limited only to maritime matters. Frequently, attempts to address terrorism in international law have become mired in political debates over the underlying causes of terrorism and the legitimacy of wars of national liberation. See Abraham D. Sofaer, *Terrorism and the Law*, FOREIGN AFF., Summer 1986, at 901, 901-04 (providing an example of political debate surrounding international proposals to address terrorism). Developing states are often critical of Western definitions of terrorism. One of the most notable examples of this type of debate occurred in 1972 when U.N. Secretary General Kurt Waldheim sought to include an item on the U.N. agenda that dealt with the prevention of terrorism. See *id.* (noting the objections raised to Waldheim's proposals and the difficulties associated with addressing terrorism). Some states objected on the basis that such discussion might serve to undermine the General Assembly's principles concerning the legitimacy of the struggle by colonial and dependent people who were seeking independence. *Id.* at 901-05.

8. See *id.* at 901-05 (discussing diplomatic and military efforts in response to terrorist activity).

*Achille Lauro*⁹ drew worldwide attention to the issue and prompted the International Maritime Organization¹⁰ ("IMO") to respond with the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation.¹¹ The Convention seeks to ensure that states will either prosecute or extradite those responsible for terrorist acts that occur at sea.¹² In many respects, achieving

9. On October 7, 1985, a group of Palestinians from the Popular Liberation Front seized the *Achille Lauro*, an Italian registered cruise ship, in Egypt's territorial waters, and asked for the release of Palestinian prisoners from Israeli jails. In response to Israel's refusal, the terrorists murdered an elderly Jewish U.S. citizen, Leon Klinghoffer. Egypt negotiated the release of the hostages and took the terrorists into custody, but did not actually arrest them. Subsequently, the hijackers boarded an Egypt Air flight to Tunisia. Under U.S. pressure, Tunisia did not allow the aircraft to land. U.S. Navy fighters eventually forced the aircraft down at a NATO airfield in Italy where a standoff occurred between U.S. and Italian authorities over which government had jurisdiction. The Italian government denied the U.S. requests for extradition and tried the hijackers in Italy. The leader of the operation, Abu Abbas, was eventually allowed to leave Italy through Yugoslavia. See, e.g., John Tagliabue, *Ship Carrying 400 Seized; Hijackers Demand Release of 50 Palestinians In Israel*, N.Y. TIMES, Oct. 8, 1985, at A1 (describing the hijacking incident); Judith Miller, *Hijackers Yield Ship in Egypt; Passenger Slain, 400 Are Safe; U.S. Assails Deal With Captors*, N.Y. TIMES, Oct. 10, 1985, at A1 (discussing U.S. objections to a negotiated deal); Bernard Gwertzman, *U.S. Intercepts Jet Carrying Hijackers; Fighters Divert it to NATO Base in Italy; Gunmen Face Trial in Slaying of Hostage*, N.Y. TIMES, Oct. 11, 1985, at A10 (addressing the U.S. actions to stop flight from landing in Tunisia).

10. See *Basic Facts About the IMO*, in FOCUS ON THE IMO 1, 1-3, (Mar. 2000) (discussing the structure and functioning of the IMO), available at http://www.imo.org/includes/blastDataOnly.asp/data_id%3D710/Basics.pdf (last visited Nov. 1, 2002). The IMO is a specialized agency of the United Nations and was the first international body dedicated to maritime matters. Established pursuant to the 1948 Convention on the Inter-Governmental Maritime Consultative Organization, the IMO was inaugurated in 1959. It is principally concerned with technical matters in relation to ship source pollution and safety. The Organization consists of an Assembly and a Council along with four main Committees: the Maritime Safety Committee, the Marine Environment Protection Committee, the Legal Committee, and the Technical Co-operation Committee.

11. See Convention and Protocol from the International Conference on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, IMO Doc. SUA/CON/15 (1988), reprinted in 27 I.L.M. 668 (1988) [hereinafter SUA] (The Convention was concluded simultaneously with the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, which was designed to protect oil platforms and incorporates the SUA).

12. See *id.* art. 6(3) (establishing jurisdiction for specific crimes committed at sea).

consensus on the prosecution of terrorists is easier than establishing a prevention regime that may engage issues such as state responsibility for the prevention of terrorism, Flags of Convenience,¹³ jurisdictional issues, and port state control.

This paper examines some of the legal issues surrounding the prevention of maritime terrorism and argues that states have a positive duty to prevent maritime terrorism. However, at present, many practical and legal problems persist regarding the fulfillment of this duty. Section II of this paper seeks to define the security problems and highlights some of the practical problems associated with attempting to increase security in international multimodal¹⁴ systems.¹⁵ At present, the greatest threats to security emanate from the cargo, the crew, and the actual vessel itself. Section III addresses whether customary international law imposes a duty on states to prevent maritime terrorism, and if so, the scope or limit of the duty.¹⁶

13. See United Nations Convention on the Law of the Sea, arts. 91-92, U.N. Doc. A/CONF. 62/122 (1982) [hereinafter UNCLOS] (explaining that ships possess the nationality of the state in which they are registered and are subsequently subject to the laws of that jurisdiction), available at http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm (last visited Oct. 23, 2002). Flags of Convenience refer to states that allow the registration of vessels with minimal regulatory requirements with respect to labor, safety, and ownership regulations. See RT. HON. THE VISCOUNT ROCHDALE, COMMITTEE OF INQUIRY INTO SHIPPING: REPORT 172 (1970) (defining Flags of Convenience and providing the primary source for defining Flags of Convenience); see also H. Edwin Anderson, *The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives*, 21 TUL. MAR. L.J. 139, 156-58 (1996); *Brassed off - Flags of Convenience Under Threat*, ECONOMIST, May 18, 2002, at 65 (recognizing that although such open ship registries have long raised safety and labor concerns, they are now also identified as security risks), available at 2002 WL 7246214.

14. Multimodality or intermodalism involves the integration of different modes of transportation such as rail, road, and sea, by means of a single shipping container. Multimodal systems charge a single through-rate to the shipper and employ a single set of shipping documents regardless of the number of modes or the number of shippers involved. See Richard W. Palmer & Frank P. DeGuilio, *Terminal Operations and Multimodal Carriage: History and Prognosis*, 64 TUL. L. REV. 281, 283-84 (1989) (addressing the use of multimodal carriage and its advantages and future in shipping).

15. See *infra* notes 20-127 and accompanying text (describing weaknesses of the current infrastructure and system, and the ensuing obstacles to improvement).

16. See *infra* notes 128-175 and accompanying text (examining the responsibility and duty of states to take action to prevent terrorist attacks).

Section IV closely examines the inadequacy of existing international law on maritime terrorism, including the shortcomings of the 1982 United Nations Convention on Law of the Sea¹⁷ ("UNCLOS") and the Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation.¹⁸ This paper argues that it is necessary to move beyond the piracy analogies of the past, toward a more comprehensive prevention-oriented regime. Section V discusses the possibility for the creation of such a regime.¹⁹

I. DEFINING THE SECURITY PROBLEM

This section discusses three distinct, yet related, security problems in the area of international maritime shipping. The first, and possibly the most difficult to deal with, is the risk presented by containerized shipping.²⁰ The shift over the last forty years to containerization in the transportation of general cargo has reduced transparency in the shipping industry and has greatly enhanced the potential risk of terrorist attack.²¹ The second threat comes from the lack of knowledge about seafarers.²² Port authorities have virtually no knowledge about the background of the foreign crewmembers who operate vessels within their ports.²³ The third and most obvious threat is related to the lack of security onboard the vessels themselves.²⁴

17. UNCLOS, *supra* note 13.

18. *See infra* notes 176-215 and accompanying text (discussing the shortcomings of current international legal regimes pertaining to maritime terrorism, through an analysis of the UNCLOS and SUA).

19. *See infra* notes 216-249 and accompanying text (making recommendations for a new regime to respond to the current threats of maritime terrorism).

20. *See infra* notes 25-99 and accompanying text (discussing the evolution of containerization and its vulnerability).

21. *See* Michael Grey, *Security-Abandon Secrecy in Global Fight Against Terror Says Register*, LLOYD'S LIST INT'L, Jan. 31, 2002, at 3 (suggesting that a "love of secrecy" exists within the industry that leads to national governments' attempts to increase transparency), *available at* 2002 WL 8245570.

22. *See infra* notes 100-111 and accompanying text (noting the lack of information about the identity of seafarers).

23. CSIS Speech, *supra* note 4, at 5-6.

24. *See infra* notes 112-127 and accompanying text (discussing the lack of adequate ship security).

This paper examines these issues largely in an American context and focuses mainly on the threat stemming from containerization.

A. CONTAINERIZATION

Over the centuries, many attempts have been made to simplify and improve the handling of marine cargo. Success was achieved with bulk commodities by replacing casks and barrels with vessels specifically designed to transport oil, coal, and grain.²⁵ However, for many years very little progress occurred in the area of “general cargo.”²⁶ Until the mid-1950s, general cargo was handled “break-bulk” style.²⁷ Packages were loaded on to trucks or rail cars at the factory and then transported to a port and unloaded.²⁸ Each parcel was then hoisted onboard a vessel and braced for an ocean crossing. Once the ship arrived at its destination, the entire process would occur again in reverse. This system was highly inefficient, created multiple opportunities for theft, and often resulted in the cargo arriving damaged or destroyed.

After World War II, economic necessity dictated a need for a more efficient handling of general cargo.²⁹ Research indicated that the existing systems needed vast improvement.³⁰ The real revolution did not occur until the mid-1950s when Malcolm McLean,³¹ owner of a

25. See MARK L. CHADWIN ET AL., OCEAN CONTAINER TRANSPORTATION 1 (1990) (noting the shift to specifically designed vessels).

26. See Palmer & DeGiulio, *supra* note 14, at 285-86 (discussing developments in general cargo). Despite the lack of progress in improving general cargo handling, considerable thought was given to the matter long before the revolutionizing of the industry in 1950s. *Id.* Englishman James Anderson articulated the first plan for containerization in 1801. *Id.* Anderson was subsequently granted a patent for containerization in Great Britain in 1845, but apparently did not implement the system. *See id.*

27. See CHADWIN ET AL., *supra* note 25 (explaining break-bulk style cargo handling).

28. *See id.* (discussing traditional transport methodology).

29. See HERMAN D. TABAK, CARGO CONTAINERS 1 (1970) (discussing the shipping changes after World War II).

30. *Id.*

31. See Barry Rascovar, *Shipping Pioneer Largely Ignored*, BALT. SUN, June 14, 2001, at 23A (noting McLean's accomplishments), available at 2001 WL 6162184.

North Carolina trucking firm, purchased a small shipping line and implemented a system of "containerization."³² McLean believed that by moving the entire trailer instead of individual packages, the goods would only have to be handled twice; once at the factory door and then again at the door of the recipient.³³ The implementation of this new system of containerization created positive economic benefits for both shippers and ship owners. Using the old break-bulk method, ships often took days to unload, but by utilizing a containerized system, a ship could be unloaded and reloaded in a matter of hours.³⁴ This fast turn-around time reduced port fees and allowed ships to make faster circuits, thereby reducing the number of ships required to service ports.³⁵

It is the very efficiency of containerized systems that today makes them a potential security threat. The lack of transparency in modern multimodal systems helps immunize cargo from theft,³⁶ but at the same time, it creates an enhanced security risk. The emphasis on speed means that cargo is rarely inspected and the only parties with true knowledge of the contents of the container are the shipper and

32. See CHADWIN ET AL., *supra* note 25, at 1-2 (discussing the innovations of McLean). Though McLean came up with his idea for containerization in 1937, he did not implement it until the 1950s when he purchased the Pan-Atlantic Steamship Company. *Id.* In 1956, McLean converted a World War II tanker named *Ideal X* to carry freight by rigging fifty-eight containers to the ship's deck. *Id.* The new system proved successful and he subsequently changed the name of the company to Sea-Land Service Inc. *Id.* The company developed into one of the world's largest container shipping lines and was eventually sold to R.J. Reynolds in 1969. See Wolfgang Saxon, *Malcom McLean Container-Shipping Pioneer*, SAN DIEGO UNION-TRIBUNE, May 19, 2001, at B7 (remembering highlights of the life of Malcom McLean), available at 2001 WL 6463326; see also *All Things Considered: Interview with Paul Richardson* (NPR radio broadcast, May 29, 2001) (discussing the life and career of Malcom McLean), available at 2001 WL 9434939.

33. See CHADWIN ET AL., *supra* note 25, at 1 (discussing McLean's innovations).

34. *Id.* at 3.

35. *Id.*

36. See *When Trade and Security Clash*, ECONOMIST, Apr. 6, 2002, at 59, 60 (recognizing that while containerization initially reduced petty theft, it appears to have increased by a considerable amount the value of those thefts that do occur), available at 2002 WL 7245753. In other words, containerization has promoted criminal efficiency. *Id.* at 60.

the recipient. It may be argued that speed and security correlate in a type of inversely proportional relationship whereby increasing one variable decreases the other.³⁷

In reality, there is no knowledge of what ships bring into a country or what exactly is sitting on quays at major seaports for the purposes of import or export. The former Commissioner of the Interagency Commission on Crime and Security in U.S. Seaports confirmed this at a Senate hearing when she spoke about a supposed “fire truck” destined for China.³⁸ She stated that to her Department’s surprise, when the container was opened, “[t]he vehicle resembled a tank and had a turret for spraying pepper gas” and because it was “exported in a container . . . no one knew at the time of export what was inside.”³⁹

This lack of transparency and the emphasis on speed over security suggests that shipping and seaports are very vulnerable to terrorist attack. Commander Stephen Flynn of the U.S. Coast Guard recently posited a hypothetical situation in which a terrorist organization wanting to deliver a weapon of mass destruction by container could purchase an overseas exporter with an established trade record with the United States and use the shipper as a front.⁴⁰ He notes:

The container could have a global positioning system (GPS) device so it could be tracked as it moved through Singapore or Hong Kong to mingle with the more than half a million containers handled by each of these ports every month. It could arrive in the United States via Long Beach or Los Angeles and be loaded directly on a railcar for the transcontinental trip. Current regulations do not require an importer to file a cargo manifest with the U.S. Customs Service until the cargo reaches its “entry” port—in this case, Newark, 2,800 miles of U.S. territory away from where

37. See *Speed Versus Security*, LLOYD’S LIST INT’L, Mar. 4, 2002, at 7 (suggesting that the task of increasing both speed and security simultaneously in the shipping industry may in fact be impossible), available at 2002 WL 8246696.

38. *U.S. Senate Hearing*, *supra* note 1 (statement of F. Amanda DeBusk).

39. *Id.*

40. See Stephen E. Flynn, *Homeland Security is a Coast Guard Mission*, U.S. NAVAL INSTITUTE PROCEEDING, Oct. 2001, at 72, 73 (explaining the Coast Guard’s ability to defend the United States against attacks at vulnerable ports), available at 2002 WL 8246696; see also Gil Klein, *U.S. Urges Closer Checks on Cargo Containers*, RICHMOND TIMES-DISPATCH, Jan. 19, 2002, at A9 (recognizing that politicians and those in the media frequently refer to this type of scenario as the “nuke-in-a-box” or “bomb-in-a-box”).

it first entered the country—and the importer is permitted 30 days' transit time to make the trip to the East Coast.⁴¹

Flynn points out that the container could then be detonated at a major rail hub, such as Chicago, producing a continent-wide disruption of transportation that would have devastating economic results.⁴²

Flynn's hypothetical scenario is even more troubling when put in the context of the trend in recent years towards the use of larger vessels and the creation of what are known as "megaports."⁴³ These two factors have heightened the vulnerability of the maritime transportation system to terrorist attack. The new super or post-Panamax vessels⁴⁴ now carry upwards of six thousand individual

41. Flynn, *supra* note 40, at 73.

42. *Id.*; see *International Convention for the Suppression of Terrorist Bombings*, U.N. Doc.A/RES/52/164, art. 2(1)(b) (2001). The Convention specifically criminalizes a bombing action designed to produce economic loss:

Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility . . .

(b) With the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.

Id.; see also Samuel M. Witten, *The International Convention for the Suppression of Terrorist Bombings* 92 AM. J. INT'L. L. 774 (discussing the various provisions of the Convention).

43. See John G. Fox, *Sea Change in Shipping*, U.S. NAVAL INSTITUTE PROCEEDINGS, May 2001, at 62, 65 (defining megaports by their ability to efficiently handle large vessels and volumes of containers, and suggesting that they have the following characteristics: (1) container berths of at least fifteen meters deep at all tides; (2) a minimum quay length of 330 meters; and (3) a crane outreach of at least forty-eight meters); *The Economic Impact of Port Regionalization and Expansion*, TEX. S. INTERIM COMM. ON NATURAL RES. REP., 77th Leg., at 35-36 (2000) [hereinafter *Texas Senate Report*] (stating that megaports also require an on dock or adjacent intermodal rail yard, three or more heavy lift cranes for offloading per berth, and a minimum of seventy-five acres of space for each megaship berth).

44. See *Texas Senate Report*, *supra* note 43, at 29. These vessels are referred to as post-Panamax because they are too large to fit through the Panama Canal. *Id.* There are currently three different categories of container vessels in operation:

containers⁴⁵ and require ports that can accommodate ships with a draft of forty-five feet.⁴⁶ This means that traditional ports such as Hong Kong and Oakland are unable to handle the new vessels, and that in the future, shipping will become concentrated in a small number of “megaports” that will serve as hubs in a hub and spoke feeder system.⁴⁷ As one analyst has recently suggested, the disruption of business at a megaport would have greater implications for trade than the blocking of a major maritime choke-point such as the Suez Canal.⁴⁸ He points out that “[s]hips can circumnavigate a choke-point, but there may be no alternative megaport through which to divert a cargo” as they are distributed unevenly throughout the world.⁴⁹ Megaports could be rendered unusable not only by the use of a nuclear, biological, or chemical weapon, but simply by the claim that a container holds a weapon of mass destruction.⁵⁰ A simple threat of this nature could result in the closure of a port for days while authorities conducted a thorough search.⁵¹ This would have

Feeder vessels that typically have less than 1000 TEU capacity, Panamax and Sub-Panamax which have a 1000-4000 TEU capacity and are able to utilize the Panama Canal and Post-Panamax which have a capacity of greater than 4000 TEU and are unable to pass through the Canal. *Id.* The trend in the industry is toward fewer ships carrying larger numbers of containers. At present, there are vessels in development that are designed to carry up to 15,000 containers. *See also U.S. Senate Hearing, supra* note 1 (statement of Robert Quartel), available at http://www.senate.gov/~gov_affairs/120601quartel.htm (last visited Oct. 19, 2002); Terence Smythe, *Heavy Weight Boxing*, BALTIC WORLD PORTS (discussing the size and capacity of post-Panamax ships, specifying that the newer super-post-Panamax ships is on average twenty to twenty-two containers wide), available at <http://www.thebaltic.com/supplements/World%20Ports/index.htm> (last visited Oct. 17, 2002).

45. Fox, *supra* note 43, at 63.

46. CHADWIN ET AL., *supra* note 25, at 116.

47. *See* Fox, *supra* note 43, at 63 (discussing a system of shipping with megaports).

48. John G. Fox, *Sea Change: Strategic Consequences of the Transformation of World Shipping* 4 (2000) (unpublished thesis, National Defense University) (on file with author).

49. Fox, *supra* note 43, at 63-64.

50. *Id.* at 64 (explaining why megaports are more vulnerable to attack).

51. *See* Aviva Freudmann, *Global Traffic Tops 200 Million TEUs, but Revenue Lags*, J. OF COM., May 11, 2000, at 1 (recognizing that the importance of these ports cannot be overstated). Approximately two hundred million containers are

grave economic repercussions for manufacturers, shipping lines, and for the smaller feeder ports that rely on a centralized “hub.”⁵² The mere threat of an attack could produce a poisoned global shipping network.

Just as an attack on a major port or rail hub would have a devastating economic impact on the North American economy, so too would the implementation of a security regime that slowed the flow of foreign goods to the manufacturing sector. As logistical and manufacturing processes have become more efficient, manufacturers have reduced capital expenditures by decreasing their inventories and relying on just-in-time delivery of parts and supplies.⁵³ This system of “in-transit inventory” has been one of the major factors in productivity growth in the last ten years.⁵⁴ However, it adds an element of economic fragility to any disruption of the transportation system.⁵⁵ Though not as reliant on sea transportation, this type of

moved between ports annually. *Id.* Any disruption, even a minor one, would have significant economic ramifications. *Id.*

52. See Nancy Cleeland & Louis Sahagun, *West Coast Ports Brace for a Storm of Labor Negotiations*, L.A. TIMES, May 5, 2002, at C1, available at 2002 WL 2473333 (noting that it is difficult to determine the economic costs of a closure of all U.S. ports, but that recent labor trouble at West coast ports provides some indication of the magnitude of the economic costs associated with even limited port closures). The White House estimated that the labour disruption at West Coast ports in October 2002 cost the U.S. economy one billion dollars a day. While the president of the Federal Reserve Bank of San Francisco estimated the cost to be two billion dollars per day. See Wendy Stueck, *U.S. Port Dispute Causing Delays in Vancouver*, GLOBE & MAIL, Oct. 8, 2002, at B2.

53. See *When Trade and Security Clash*, *supra* note 37, at 60 (explaining that improvements in logistical systems have caused the ratio of inventory to GDP in the United States to fall from twenty-five percent to fifteen percent).

54. See Loy & Ross, *supra* note 2 (noting that productivity improvements were due to warehoused inventory being replaced by in-transit inventory).

55. See Peter Brieger, *Just-in-time Deliveries the Japanese Way: Honda to Fly in Steel*, NAT'L POST, June 29, 2002, at FP1 (stating that as a result of the sudden imposition of steel tariffs by the United States in June 2002, one Japanese automaker contemplated the costly solution of flying steel from Japan to Canada in order to keep Canadian production lines operating), available at 2002 WL 22468223. The reduction of inventories and the shift to “in-transit inventories” has resulted in small economic or logistical changes being potentially disastrous for industries. *Id.*; see also Clare Ansberry, *Just-in-time Deliveries Slow Down U.S. Recovery: Orders From Manufacturers are Smaller, More Rushed as Economic Anxiety Lingers*, GLOBE & MAIL, June 25, 2002, at B13 (noting that just-in-time deliveries are disrupting supply chains).

fragility is most apparent in the auto sector, where manufacturers now have as little as a six hour lead time between when the order is placed and when the purchaser expects it to be delivered.⁵⁶ After the terrorist attacks of September 11, 2001, the wait to cross the Canada-U.S. border was approximately eleven hours, resulting in the closure of six auto plants on the Detroit side of the border.⁵⁷ The cost of a single idle assembly plant may run a manufacturer as much as a million dollars per hour.⁵⁸ Similar economic costs from a disruption of the maritime supply chain were clearly evident in the recent ten-day labour dispute at U.S. west coast ports.⁵⁹

This new vulnerability in the maritime sector is in many respects a product of the success of free trade and liberalized economic policies that allow for the free movement of goods across international boundaries.⁶⁰ It is a vulnerability that owes its genesis to economic success. As Stephen Flynn points out, efforts to increase regulatory enforcement at ports and borders “may result in a cure that is worse than the disease.”⁶¹ The unilateral increase in inspection procedures in one country may result in overseas purchasers avoiding particular ports for fear that goods will arrive damaged or spoiled.⁶² Flynn suggests that if U.S. authorities find themselves having to “turn off the maritime container spigot,” the United States will have engaged in a self-imposed blockade of its own economy.⁶³

56. See, e.g., Peter Brieger, *U.S. Port Dispute Halts Honda Again*, NAT'L POST, Oct. 21, 2002, at FP4 (noting in October 2002, a labour dispute at U.S. ports twice halted car assembly lines because of a lack of parts).

57. See Loy & Ross, *supra* note 2 (stating the consequence of long delays on production at automobile manufacturing plants on the Detroit side of the port).

58. See Flynn, *supra* note 5, at 59 (noting the costs incurred if manufacturing is stalled because parts are delayed in inspection).

59. See Gabriel Kahn Trish Saywell & Queena Sook, *Backlogged Ports Spell Big Trouble for Toyland: Shutdown Offers Dramatic Illustration of Fragility of Modern Global Supply Chain*, GLOBE & MAIL, Oct. 21, 2002, at B8 (noting that even modest disruptions in the supply chain can have dramatic and prolonged economic costs)

60. See *id.* at 62 (explaining that security measures that hinder trade are seen as a nuisance).

61. *Id.* at 58.

62. See *id.* (noting that buyers will avoid ports with known delays).

63. See *U.S. Senate Hearing, supra* note 1 (statement of Stephen E. Flynn) (noting the importance of container shipping to the U.S. economy), *available at*

There are few easy solutions to the threats posed by containers to maritime security. The most obvious solution is to intercept the threat offshore, thereby limiting any potential damage.⁶⁴ As Commander Flynn points out:

[a] busy waterfront pier in Los Angeles or Seattle is hardly an optimal place to find and defuse a bomb. A better approach would be to intercept the vessel carrying the weapon offshore. If a shore side solution is required, the vessel could be escorted to a less vulnerable locale.⁶⁵

There are several problems with this solution. The first is that searching a container vessel at sea is not possible. Many of the post-Panamax ships now carry in excess of six thousand containers.⁶⁶ Each container is “from 20-48 feet in length, 8 wide and high, and can weigh 20 tons or more and be stacked 9 deep in the hold of a container ship.”⁶⁷ The unloading of a container vessel requires highly specialized cranes that can lift between thirty and fifty tons and, in the case of post-Panamax ships, the cranes must be able to extend beyond sixteen rows of containers.⁶⁸ Further, Flynn’s suggestion that a ship could be diverted to a less vulnerable locale for inspection⁶⁹ is also not realistic in light of the fact that post-Panamax ships require ports that accommodate vessels with a draft of up to forty-five feet.⁷⁰ The only real solution is to turn the ship back to the point of

http://www.senate.gov/~gov_affairs/120601flynn.htm (last visited October 19, 2002).

64. See Flynn, *supra* note 40, at 74 (explaining the difficulty and danger of waiting to detect a vessel until it is in a busy port).

65. *Id.*

66. See *U.S. Senate Hearing, supra* note 1 (statement of Robert Quartel) (informing that some ships now carry more than 6500 containers).

67. *Id.*

68. See CHADWIN ET AL., *supra* note 25, at 23 (explaining the capacity of a typical ship-to-shore crane).

69. See Flynn, *supra* note 5, at 59 (stating that if inspection is not feasible in a busy port, then the ship should be diverted to a different port).

70. See *id.* at 59 (suggesting that after the Panamax hurdle was crossed, post-Panamax vessels would have drafts of forty-five feet or more).

departure.⁷¹ In any new maritime security regime, secure control of the ship and cargo prior to departure will be a key aspect.

The favored solution in the United States is the concept of pushing U.S. borders outward.⁷² Robert Bonner, the U.S. Customs Commissioner, has indicated that his goal is to “push our sphere of activities outward, from points of entry in the United States to points of origin abroad.”⁷³ He suggests that “[w]e must expand our perimeter of security away from our national boundaries and towards foreign points of departure. We can no longer think of ‘the border’ merely as a physical line separating one nation from another.”⁷⁴ In other words, any inspection of maritime cargo would occur in other countries before the cargo is loaded on board a vessel bound for the United States. Robert Quartel, an industry representative testifying before the U.S. Senate, has indicated that “[c]argoes that are identified as suspicious should be detained . . . prior to loading on a ship for transport into or through the United States - rather than in the U.S. port itself.”⁷⁵

Suggestions such as these have resulted in the U.S. Customs Service announcing that it would implement the Container Security Initiative (“CSI”).⁷⁶ The program has four key elements: (1) establishment of criteria for the identification of high risk containers

71. See *U.S. Senate Hearing, supra* note 1 (statement of Stephen E. Flynn) (explaining that point-of-origin controls are imperative to security).

72. See *U.S. Senate Hearing, supra* note 1 (statement of Robert Quartel) (urging that suspicious cargos should be detained before they reach a U.S. port); see also Jan Cienski, *U.S. Wants Agents in Canadian Ports: Fears ‘Nuke in a Box:’ Critics See Erosion of Sovereignty*, NAT’L POST, Jan. 18, 2002 (noting that the United States is considering placing Customs agents in Canadian ports), available at 2002 WL 4163398. See generally *U.S. Senate Hearing, supra* note 1 (noting Stephen E. Flynn’s statement about the importance of point-of-source controls outside U.S. jurisdiction).

73. Cienski, *supra* note 72.

74. *Port and Maritime Security Act Implementation: Hearing on Security at U.S. Seaports Before the U.S. Senate Comm. on Commerce, Science, and Transp.*, 107th Cong. (2002) [hereinafter Bonner Statement] (statement of Commissioner Robert C. Bonner, U.S. Customs Service) (stating that Customs needs to implement security outside of the U.S. border), available at 2002 WL 2010946.

75. *U.S. Senate Hearing, supra* note 1 (statement of Robert Quartel).

76. See CSIS Speech, *supra* note 4 (proposing the new Container Security Initiative which was then referred to as the “Container Security Strategy”).

“based on advance information and risk targeting;” (2) pre-screening of containers before they arrive in the United States; (3) the full utilization of “technology to prescreen high risk containers;” and (4) the “use of smart and secure containers.”⁷⁷ Due to the emphasis on pre-screening, a program of this type requires cooperation on the part of other states. Initially, the Customs Service is seeking to involve those foreign ports with the largest volume of container traffic destined for the United States.⁷⁸ However, the ultimate goal of the program is to have some level of pre-screening at all ports of departure regardless of size and traffic volume.

The CSI obviously requires having U.S. inspectors in foreign ports applying U.S. customs regulations. The United States has already posted customs inspectors in Canada to open and inspect containers in the ports of Halifax and Vancouver⁷⁹ and it has begun to expand CSI to include European ports.⁸⁰ Though this may appear to be a solution, it raises the important issue of state sovereignty among American allies.⁸¹ Furthermore, it would appear to be totally

77. See Commissioner Robert C. Bonner, U.S. Customs Service, Remarks at the American Association of Port Authorities (Mar. 19, 2002), available at <http://www.customs.gov/about/speeches/speech0319-00.htm> (last visited Oct. 20, 2002).

78. See *Container Security Initiative to Safeguard U.S. Global Economy*, U.S. CUSTOMS TODAY, Mar. 2002 (stating that the top ten ports of departure for goods destined to the United States are: Hong Kong, China; Shanghai, China; Kaohsiung, Taiwan; Rotterdam, Netherlands; Pusan, South Korea; Bremerhaven, Germany; Tokyo, Japan; Genoa, Italy; and Yantian, China), available at <http://www.customs.gov/custoday/mar2002/csi.htm> (last visited Oct. 20, 2002).

79. See Cienski, *supra* note 72 (discussing customs Commissioner Bonner's comment that “the placement of Customs inspectors in Canada is a first step in . . . our efforts to ‘push the border outwards’”).

80. See Marlise Simons, *American Antiterror Inspections Will Begin At 3 European Ports*, N.Y. TIMES, June 30, 2002, at A12 (stating that the United States received permission to place customs officials in the ports of Rotterdam, Antwerp, and Le Havre, and is seeking agreements with Spain, Italy, and Germany), available at 2002 WL-NYT 0218100017.

81. See Cienski, *supra* note 72 (explaining that the issue of state sovereignty has not gone unnoticed). The Council of Canadians has been highly critical of the idea of allowing U.S. Customs Service inspectors to conduct inspections in Canada and has indicated that “[w]e think that this is the thin edge of the wedge It's maybe only a few agents now but how long before they're calling the shots in Canadian ports?” *Id.* See Daniel Leblanc, *Canada and U.S. Near Troop Deal: Soldiers Would be Able to Cross Border if Terrorist Struck, McCallum Says*,

unworkable in the developing world and in the case of less friendly exporting nations such as China.⁸² It is those countries that are not members of the Organization for Economic Cooperation and Development (“OECD”) that would in reality pose the greatest risk. The imposition of a security screening process would be of little value unless it was a multilateral comprehensive program with uniform standards.⁸³ A partial implementation of the CSI would

GLOBE & MAIL, Aug. 28, 2002, at A1 (revealing that this “thin edge” argument is not completely unfounded); John McLaughlin, *Greece Snubs US Plea to Inspect Ships*, LLOYD’S LIST INT’L, May 4, 2002, at 1 (commenting that the Greek government has publicly opposed new U.S. anti terrorism initiatives and has flatly rejected U.S. requests that it be allowed to inspect ships in Greek waters due to reasons of national sovereignty and constitutional law), available at 2002 WL 21045378. *But see* Jane Porter, *Security Customs Checks Face U.S. Revolution*, LLOYD’S LIST INT’L, June 27, 2002, at 3 (noting that Customs Commissioner Robert Bonner has indicated that there has been no opposition to U.S. initiatives and that “[q]uite the contrary, we have seen a high degree of receptivity”), available at 2002 WL 21046535.

82. *See* Julijana Mojsilovic, *Nato Bombs Chinese Embassy*, GLOBE & MAIL, May 8, 1999, at A1 (indicating that U.S.-Sino relations have been characterized by a number of unfortunate incidents such as the bombing of the Chinese Embassy in Belgrade, the forced landing of a U.S. reconnaissance plane, U.S. arms sales to Taiwan, and the Bush administration’s proposed National Missile Defense Plan); *see also* Miro Cernetig, *China Warns of New Global Arms Race: U.S. Missile-Defence Plan Threatens World Peace*, *News Agency Says*, GLOBE & MAIL, May 3, 2001, at A12 (explaining that the U.S. missile defense plan further harmed U.S.-Sino relations); Paul Koring, *Bush Blasts China after Spy Crew Released: President’s Blunt Words Signal What May be Tough New Approach to Sino-U.S. Relations*, GLOBE & MAIL, Apr. 13, 2001, at A10 (stating the negative impact that Chinese detention of U.S. spy plane crew members had on U.S.-Sino relations); Paul Koring, *China-U.S. Divide Increasing: Bush Calls Defence of Taiwan an Obligation as Beijing Demands Arms Deal be Cancelled*, GLOBE & MAIL, Apr. 26, 2001, at A14 (stating Beijing’s anger at the U.S. plans to defend Taiwan); Greg Siegle, *U.S. Response I: Asia, Europe Lukewarm to U.S. Cargo Inspection Plan*, GLOBAL SECURITY NEWSWIRE, Jan. 31, 2002 (indicating that many security analysts question the CSI’s success in relation to China, and suggest that even if it succeeds, the United States will likely have to bear the expense of such a program), available at http://www.nti.org/d_newswire/issues/2002/1/31/1s.html (last visited October 20, 2002). *But see* Porter, *supra* note 81 (stating that U.S. Customs Commissioner Richard Bonner has attempted to engage China in the CSI program and has stated publicly that he is “cautiously optimistic” about such involvement). However, it is difficult to conceive that the Chinese government would become fully engaged in such a program in light of diplomatic tensions between the two states in recent years.

83. *See* Simons, *supra* note 80 (noting that the eventual goal of the United States is to expand the CSI to twenty ports that would “jointly account for 70

result in secure and non-secure cargo beginning to mix at transshipment points throughout the world.

U.S. government officials have attempted to portray the creation of offshore security perimeters as simply a matter of mutual benefit. As Admiral Loy of the U.S. Coast Guard has suggested, “[t]his goal is not a question of violating the sovereignty of America’s trading partners. Rather, the idea is to create mutually beneficial layered defenses”⁸⁴ However, if we accept the assertion that sovereignty involves the right to “exercise . . . to the exclusion of any other State, the functions of a State,”⁸⁵ then the application of U.S. customs regulations at overseas ports would constitute a *prima facie* violation of the sovereignty of other states.

Further, legislation presently before the U.S. Congress would authorize the Secretary of Transportation to conduct assessments of foreign ports, identify those that are not up to U.S. standards and impose sanctions.⁸⁶ The sanctions can include prohibiting “a United States or foreign vessel from providing transportation between the United States and any other foreign port that is served by vessels navigating to or from a port found not to maintain and carry out effective security measures.”⁸⁷ This legislation punishes third party ports and in many senses seeks to impose U.S. maritime security regulations throughout the world. This may represent an indirect intrusion into the internal affairs of other states and is contrary to the U.N. General Assembly resolution on friendly relations, which states that “[n]o State. . . has the right to intervene, directly or indirectly, for any reasons whatever, in the internal or external affairs of any other State. . . .”⁸⁸

percent of the 5.7 million containers shipped by sea to the United States”). Even if the program achieves compliance from the top twenty ports, CSI would still exclude 1.8 million containers from the screening process. *Id.*

84. Loy & Ross, *supra* note 2.

85. *Island of Palmas Case (Neth. v. U.S.)*, 2 R.I.A.A. 829 (1928).

86. *See* Port and Maritime Security Act 2001, S. 1214, 107th Cong., § 108 (2002).

87. *Id.* § 108-2503 (a)(3).

88. *General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625 (XXV) (1970).

Many of the other solutions posited to the container problem have focused on the use of technological advances to reduce the security risk. One possible solution is the use of x-ray equipment to scan each container, an application of airport type screening procedures to the marine sector.⁸⁹ A recent Canadian Senate Committee Report endorsed the use of x-ray equipment, stating that the port of Vancouver now has technology that allows an entire container to be scanned in approximately one minute.⁹⁰ However, in practical terms, even accepting the premise that a container could be scanned in one minute, the inspection of the six thousand plus containers on a single super-Panamax vessel could add over a hundred hours to the loading process.⁹¹ Even using multiple x-ray machines and targeting as little as ten percent of the cargo on board would produce unacceptable delays for both shippers and ship owners. Further, the utilization of screening devices would have to be uniform at all major international ports.⁹²

89. See Marc Caputo, *Bomb Detector Confuses Sweets With Explosives: Built For U.S. Airports: New-Style Scan Detected Explosives in Test Runs*, NAT'L POST, June 29, 2002, at A16 (stating that technology-based solutions to security have not proven overwhelmingly successful in the aviation sector, which raises concerns about their application in the maritime context). New airport x-ray equipment based on CT scans have produced a false alarm rate of twenty to thirty percent. *Id.* Indications are that this new type of technology has difficulty distinguishing between explosives and ordinary foodstuffs. *Id.*

90. See *Canadian Senate Report*, *supra* note 1, Part I (13)(B).

91. This calculation assumes that a ship carries 6500 containers and uses one scanning machine in the inspection process.

92. See Bonner Statement, *supra* note 74.

The use of such detection technology at our seaports is not enough. The great international seaports - Rotterdam, Singapore, Hong Kong, among other places - must also use this equipment to screen for weapons of mass destruction before they leave those ports. The very survival of the global shipping economy depends upon this.

Id.; see also *The Minister of National Revenue has Announced that the Port of Halifax Will Receive Three Point Six Million Dollars to Improve its Security*, BROADCAST NEWS, May 15, 2002 (explaining that the Port of Halifax has only recently sought the technology), available at 2002 WL 21065431; Tom Peters, *Port has Gamma Rays in its Sights*, CHRONICLE-HERALD, Mar. 7, 2002, at A5 (revealing that the Port of Vancouver has already spent two million dollars on gamma ray equipment). The result is different security screening levels on two different coasts.

In addition to using scanning equipment, another technology-dependent solution is the creation of a system of "Maritime Domain Awareness" ("MDA"), which was originally conceived by the U.S. Coast Guard.⁹³ MDA utilizes information technology to help generate timely information on vessels, crews, and cargos.⁹⁴ Admiral Loy suggests that the incorporation of commercial information from manufacturers and shippers could greatly enhance this concept.⁹⁵ This expanded information network would allow smart decisions about targeting specific cargo vessels for inspection. He suggests,

Easy access to accurate data on container contents, shippers, consignees, and even near-real-time container location is what makes just-in-time systems possible The shipping community and supply chain/value chain managers from commercial sector giants, such as Ford, Walmart, and General Motors, should be enlisted to keep national and international distribution networks functioning.⁹⁶

This seemingly attractive solution, is premised on a series of dubious assumptions. The first is that the information shippers and commercial parties would provide is accurate and that its veracity could be checked. Second, it assumes that, in the absence of domestic regulations imposing such a requirement (in their own countries), foreign companies would willingly provide valuable and detailed commercial information to U.S. government authorities. Third, MDA does not appear to take into account transshipment issues. A manufacturer in Southeast Asia wanting to ship a product to Central America via a U.S. transshipment port such as Long Beach may decide that the cost/risk of disclosing commercial information⁹⁷ would not be outweighed by the increased cost of using

93. UNITED STATES COAST GUARD, STRATEGIC PLAN 1999, 14 (explaining that the Maritime Domain Awareness system allows the Coast Guard to more thoroughly oversee real time vessels), *available at* <http://www.uscg.mil/overview/strategic.pdf> (last visited Oct. 20, 2002).

94. *See id.* (asserting that the Maritime Domain Awareness strategy will use technology to achieve mission requirements).

95. *See Loy & Ross, supra* note 2 (stating that information that is produced for commercial purposes could be used to maximize security).

96. *Id.*

97. *See Grey, supra* note 21, at 3 (explaining that the shipping industry is characterized by extremely high levels of confidentiality).

an alternate and more expensive non-U.S. port.⁹⁸ Finally, information awareness may in itself prove insufficient. Knowing about a possible problem and solving it are very distinct issues. MDA would not solve many of the practical problems discussed earlier such as the inspection of post-Panamax ships or the potential jurisdictional and sovereignty issues that may be involved in pre-departure inspections. Again this solution is not politically or economically realistic because it requires the imposition of U.S. regulations on other countries.

As Section V of this paper discusses, any successful maritime security regime will have to involve international consensus, as well as take into account issues of commercial secrecy and the sovereignty of other states. Many of the initial suggestions to solve maritime security problems have been premised on the imposition of U.S. regulations abroad or the use of economic coercion to insure compliance.⁹⁹

B. SEAFARERS

Though not as difficult a security problem as the container threat, seafarers also represent a real security risk.¹⁰⁰ Each year approximately two hundred thousand foreign mariners arrive in U.S.

98. See *U.S. Senate Hearing, supra* note 1 (statement of Stephen E. Flynn) (expressing concern that people in the international business will begin to “port shop” if they deem U.S. ports to be uncompetitive).

99. See *U.S. Senate Hearing, supra* note 1 (statement of Robert Quartel) (arguing that compliance should be “voluntary - not mandatory”). Quartel concedes that this suggests that “[w]e can’t make foreign suppliers abide by all of the rules, but we can certainly tell their U.S. customers that they may face delays unless they know their sources and can validate cargo process integrity.” *Id.* The implication seems to be that none of the participants in U.S. inspection initiatives will be severely disadvantaged. Delay as a means of insuring compliance suggests that such a scheme would not be voluntary. Further, the use of delay may in some cases be more detrimental to the U.S. economy than to foreign economies and suppliers.

100. See *Port and Maritime Security Strategy: Hearing Before the Subcomm. on the Coast Guard and Maritime Transportation of the House Comm. On Transportation and Infrastructure, 109th Cong. (2001)* (statement of Adm. James M. Loy, Commandant of the U.S. Coast Guard) (discussing increased security measures since the Sept. 11, 2001 attacks), available at http://www.uscg.mil/overview/article_statementloy.htm (last visited Feb. 11, 2002).

ports onboard commercial vessels.¹⁰¹ Just as there is very little knowledge about the contents of containers, there is equally little known about the men who operate these vessels.¹⁰² Any background checks prior to employment on board a vessel are the legal responsibility of the flag state of the vessel.¹⁰³ One of the great attractions of “open registries” or “Flags of Convenience” is that they allow vessel owners to crew the ships with foreign nationals as a means to control costs.¹⁰⁴ The employment of large numbers of foreign nationals makes the implementation of enhanced reliability checks nearly impossible.¹⁰⁵ Thereby, terrorists could operate a vessel in U.S. waters by obtaining employment with an overseas shipping company that utilizes Flags of Convenience.¹⁰⁶

The United States has petitioned the IMO to create a verifiable seafarer identification system to insure that crewmembers “pose no threat to national security or to the safety and security of maritime commerce.”¹⁰⁷ The proposed system aims to employ biometric technology such as retinal scans or fingerprints in order to verify the

101. *See id.* (indicating that movement of unknown persons around U.S. ports creates a potential security risk).

102. *See id.* (finding that the differentiation between the movements of lawful and unlawful persons is imperative in protecting ports).

103. *See UNCLOS, supra* note 13, art. 94(1) (imposing the obligation that “[e]very State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag”). This potentially includes manning requirements and background checks for crewmembers).

104. RODNEY CARLISLE, *SOVEREIGNTY FOR SALE: THE ORIGINS AND EVOLUTION OF THE PANAMANIAN AND LIBERIAN FLAGS OF CONVENIENCE* 11 (1981); *see also* Anderson, *supra* note 13, at 158-59 (finding that the use of foreign labor as a means to control costs goes back to the mid 1900s and is a key reason for the proliferation of Flags of Convenience).

105. *See* Anderson, *supra* note 13, at 163-65 (noting the “ten reasons why the observance of safety standards is less stringent amongst open registry states”).

106. *See id.* (discussing safety standards and Flags of Convenience).

107. *Prevention and Suppression of Acts of Terrorism Against Shipping: Measures to Improve Maritime Security*, U.N. Marit. Safety Comm., 75th Sess., Agenda Item 17, at 5, U.N. Doc. MSC/75/17/xx (2002) [hereinafter *U.S. Submission to IMO*].

identities of the crewmembers.¹⁰⁸ Specifically, the United States is seeking an amendment to Chapter XI of the Safety of Life at Sea Convention (SOLAS) to ensure that crew members have not committed a “serious criminal offence,” including “murder, assault with intent to murder, espionage, sedition, treason, rape, kidnapping, armed robbery, trafficking of drugs or similar offences.”¹⁰⁹ An effective system of reliability checks must involve a similar system of background checks for port employees who have access to the same cargo and facilities as those on the vessels. This may be problematic in the case of some Western countries such as Canada, where a large number of port employees have past criminal convictions.¹¹⁰ In the United States, the union representing longshoremen has gone on record as publicly opposing background checks for port workers.¹¹¹

108. *See id.* at 5-6 (stating that these security devices would help to secure sensitive areas of U.S. ports).

109. *Id.* at 6.

110. *See Canadian Senate Report, supra* note 1, Part II(B)(1)(C) (stating that a recent Canadian Senate Committee report on national security found an alarmingly high rate of personnel with past criminal records). The Committee found that:

At the Port of Montreal . . . roughly 15 percent of longshoremen and 36 percent of checkers have serious criminal records. At the Port of Halifax, police told the Committee that 187 of 500 employees (39 percent) whose records the police checked had serious criminal records. At the Port of Charlottetown, it was 28 of 51 (54 percent). The Committee is certainly concerned with the sizable percentage of employees with criminal records. But it also believes that criminal elements are unlikely to have a zealous interest in countering terrorist activities, and may knowingly or unknowingly engage in acts that assist terrorists. Even their relentless efforts to prevent Port Authorities from exercising control over activities at a port, so that they can go about their illegal activities, plays into the hands of any would-be terrorists who might be deterred by a more effective level of supervision.

Id.

111. *See* John McLaughlin, *U.S. Port Unions Plead Don't Demonize Dockers*, LLOYD'S LIST INT'L, Feb.18, 2002, at 5 (suggesting that legislative attempts to tighten port security put unwarranted suspicion on U.S. longshoremen while inadequately dealing with foreign ships and crewmembers), available at 2002 WL 8246069.

C. SHIP SECURITY

The most obvious security risk comes from the lack of measures taken to protect the ships themselves.¹¹² The attack by a small mooring boat on the destroyer *U.S.S. Cole*, while docked in the port of Aden, is evidence of this inability to protect ships.¹¹³ The incident occurred despite the presence of an anti-terrorism force aboard the ship and demonstrates the vulnerability of even military vessels.¹¹⁴ Unlike the areas of safety and labor, no security framework forces ships to comply with an international code in order for ships to be seaworthy.¹¹⁵ This means that ship security measures may vary from vessel to vessel, and that ships may represent vulnerable targets for terrorists.¹¹⁶

At present, there is no requirement that ships have a means to surreptitiously alert authorities or other vessels that terrorists have hijacked or attacked the vessel.¹¹⁷ The United States has petitioned to have the IMO's Safety of Navigation ("NAV") and Radio-Communications and Search and Rescue ("COMSAR") subcommittees study and make recommendations on this matter.¹¹⁸ International regulations do not mandate that a ship have even the most basic security equipment such as a closed circuit television

112. See *U.S. Submission to IMO*, *supra* note 107, at 9 (finding that security enhancement equipment would help crews' awareness of security threats).

113. See Roberto Suro & Alan Sipress, *Navy Revises Initial Account of Bombing; Cole was Moored, Refueling Before Attack, Officials Say*, WASH. POST, Oct. 21, 2000, at A1 (discussing the attack on the *U.S.S. Cole* and conflicting reports of whether the attack could have been prevented).

114. See Michael Fabey, *Attack Waiting to Happen*, TRAFFIC WORLD, Oct. 23, 2000, at 40 (maintaining that lax port security played a role in the attack).

115. See *U.S. Submission to IMO*, *supra* note 107, at 9 (discussing potential changes to security measures to increase port and ship safety).

116. See *id.* at 10 (recommending that standard security measures be implemented on all ships).

117. See *id.* at 9 (extolling the benefits of an alarm system to notify authorities and other vessels in the event of a terrorist attack or hijacking).

118. See *id.* (suggesting alarm systems and tracking devices be used on maritime vessels).

system to alert the crew of possible hijacking attempts.¹¹⁹ Further, despite emerging security threats, many ship owners oppose the IMO requirements for the mandatory installation of an Automatic Identification System (“AIS”) on all ships by 2008.¹²⁰

The United States claims that the need to ensure ship security through the use of either security equipment or the appointment of a security officer is a safety issue and falls within the domain of the SOLAS.¹²¹ In a recent submission to the IMO, the United States recommended amendments to Chapter XI of SOLAS pertaining to “Special Measures to Enhance Maritime Security.”¹²² However, not all IMO members support this approach, and Japan and the United States have disagreed as to whether the International Safety Management Code (“ISM Code”) or SOLAS should incorporate new requirements for ship security.¹²³ Japan and several other states have argued that the ISM Code is more flexible and suited to the purpose, whereas the United States has pushed for a more stringent approach under the SOLAS provisions.¹²⁴

Although, undoubtedly, counter-terrorism measures can be brought under the safety ambit, this strategy is arguably

119. See *id.* (finding that the “[i]nallation of this basic security equipment on board ships would help the crew quickly become aware of security threats while the ship is in port”).

120. See *Burden Sharing*, LLOYD’S LIST INT’L, June 19, 2002, at 7 (stating that, despite the ship owners’ argument for a greater focus on training in respect to AIS and that the land based infrastructure to receive the signals has not been established, the United States has sought an early implementation of the system), available at 2002 WL 21046222.

121. See *U.S. Submission to IMO*, *supra* note 107, at 4 (suggesting that “a new Regulation 7 be added to Chapter XI of SOLAS”).

122. See *id.* at 3 (advocating the development of a proper ship security plan to enable crews to respond appropriately to an attempted terrorist action).

123. See *IMO Rift Looms Over U.S. Security Proposals*, LLOYDS LIST INT’L, May 15, 2002, at 2 (outlining the competing arguments for placement of new security measures), available at 2002 WL21044767.

124. See *IMO: What it is, What it Does and How it Works*, July 20, 2002 (indicating that codes are recommendations adopted by the IMO Assembly and are not binding on governments, while conventions are binding on state parties), at http://www.imo.org/About/mainframe.asp?topic_id=325. State parties have discretion regarding whether or not to incorporate codes in their domestic legislation. *Id.*

misguided.¹²⁵ It produces a piecemeal approach in which certain aspects of maritime terrorism are dealt with by the World Customs Organization, some by the IMO under SOLAS or the ISM Code, and still others by means of bilateral arrangements under the CSI.¹²⁶ The implementation of a new comprehensive maritime security convention would avoid such problems.¹²⁷

II. STATE RESPONSIBILITY FOR PREVENTION

In many respects the security problems identified in this paper are beyond the capacity of a single state to deal with effectively.¹²⁸ An effective system of maritime counter-terrorism requires a comprehensive multilateral approach.¹²⁹ This type of approach necessitates not only the involvement of OECD countries, but also cooperation from exporting countries in the developing world along with the assistance of states that operate Flags of Convenience.¹³⁰ This need for international cooperation raises the questions of whether states have an international legal obligation to prevent maritime terrorism and if so, how far that duty extends.¹³¹

125. See *id.* (discussing the difficulty in creating binding international amendments under SOLAS).

126. See *id.* (noting that security measures involving navigation safety, carriage of dangerous goods, and nuclear ships are all covered by SOLAS).

127. See *supra* notes 78-85 and accompanying text (illustrating the bilateral, piecemeal approach that the United States is using with regard to the CSI program, and noting that the United States so far favors this approach).

128. See CSIS Speech, *supra* note 4 (stating that “the United States must work in partnership with the governments of the countries . . . to build a new international security standard for sea containers”); see also Flynn, *supra* note 5, at 68 (indicating that a consensus exists amongst both analysts and decision-makers with respect to the need for international cooperation in combating maritime terrorism).

129. See Flynn, *supra* note 5, at 58 (positing that curbing terrorism requires the collective efforts of the private sector, states, and international bodies).

130. See Anderson, *supra* note 13, at 164-65 (discussing the lack of stringent safety standards in developing nations and the difficulty in identifying crew members).

131. See *Report of the Int'l Law Comm.*, U.N. GAOR, 56th Sess., Supp. No. 10, at 43, U.N. Doc. A/56/10 (2001) [hereinafter *Draft Articles*] (stating that under international law, an omission by a state may also be considered a wrongful act). The International Law Commission's Draft Articles on Responsibility for

Customary international law has recognized a duty to prevent terrorism. In 1934, the League of Nations, in response to possible Hungarian negligence surrounding the assassination of King Alexander of Yugoslavia,¹³² passed a resolution stating that it was “the duty of every state neither to encourage nor tolerate on its own territory any terrorist activity with a political purpose.”¹³³ The Resolution indicated that states owed each other a duty of assistance and that “every State must do all in its power to prevent and repress acts of this nature and must for this purpose lend its assistance to governments which request it.”¹³⁴

More recently, both the U.N. General Assembly and the Security Council have consistently emphasized the existence of a positive duty to prevent terrorism.¹³⁵ Past General Assembly resolutions have called on States “to take appropriate practical measures to ensure that their respective territories are not used for terrorist installations or training camps, or for the preparation or organization of acts intended to be committed against other States or their citizens.”¹³⁶ In the wake of the September 11th attacks on the United States, the U.N. Security Council passed Resolution 1373, which reaffirmed

Internationally Wrongful Acts stipulate that an omission by a state attracts liability under international law by maintaining that:

[t]here is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) Is attributable to the State under the international law; and (b) Constitutes a breach of an international obligation of the State.

Id.

132. See JOHN FLOURNOY ALEXANDER, HUNGARY – THE UNWILLING SATELLITE (1947) (discussing the League of Nation’s response to the October 9, 1934, assassinations of King Alexander and French Foreign Minister Jean-Louis Barthou while on a visit to France), *available at* <http://www.hungary.com/corvinus/lib/montgo/montgo06.htm> (last visited Nov. 9, 2002). The assassin was a Macedonian revolutionary with links to Croatian terrorists in Hungary. *Id.* The assassination threatened war between Yugoslavia and Hungary, but the League of Nations was successful in diffusing the conflict. *Id.*

133. See 12 LEAGUE OF NATIONS O.J. 1759 (1934).

134. *Id.*

135. See Measures to Eliminate International Terrorism, G.A. Res. 210, U.N. GAOR, 51st Sess., § I(3), U.N. Doc. A/Res/51/210 (1997) (calling on states to adopt measures to prevent terrorism).

136. Measures to Eliminate International Terrorism, G.A. Res. 60, U.N. GAOR, 49th Sess., sec. I (5)(a), U.N. Doc. A/Res/49/60 (1994).

that each state has a duty to “[c]ooperate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks, and take action against perpetrators of such acts.”¹³⁷ Resolution 1373 specifically requires that states “[t]ake the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information.”¹³⁸

Arguably, a duty to prevent maritime terrorism is also found in the International Law Commission’s *Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities* (“Draft Articles”).¹³⁹ The Draft Articles are generally thought of in the context of transboundary environmental pollution.¹⁴⁰ However, the scope of the Draft Articles is extremely broad and applies to all “activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences.”¹⁴¹ International law clearly does not prohibit establishing a large container transshipment facility.¹⁴² However, the operation of such a facility without appropriate security provisions could be viewed as being a hazardous activity with the potential to cause transboundary harm.¹⁴³ In many respects, it is analogous to a state developing a heavy industry without imposing sufficient environmental controls.¹⁴⁴ The shipping of containers that may potentially hold nuclear, chemical, or biological weapons, without prior inspection, would obviously constitute a form of transboundary

137. SCOR Res. 1373, U.N. SCOR, 4385th Sess., U.N. Doc. S/Res/1373 (2001).

138. *Id.*

139. See *Draft Articles*, *supra* note 131, at 371 (discussing state liability for failing to prevent unlawful acts).

140. See, e.g., Justin Mellor, *The Negative Effects of Chernobyl on International Environmental Law: The Creation of the Polluter Gets Paid Principle*, 17 WIS. INT'L L.J. 65, 75-76 (1999).

141. *Draft Articles*, *supra* note 131, at 371.

142. See *id.* (discussing the risk of transboundary harm from activities not prohibited by international law).

143. See *id.* (defining the term “risk of causing significant transboundary harm”).

144. See *id.* at 372 (noting that each state must “take all appropriate measures to prevent significant transboundary harm”).

harm for the receiving state.¹⁴⁵ The Draft Articles do not require states to share a common border for “transboundary harm” to occur.¹⁴⁶ Additionally, the Articles define the term “transboundary harm” broadly, as harm “caused in the territory . . . of a State other than a State of origin,” which would appear to encompass harm other than mere environmental pollution.¹⁴⁷

The Draft Articles clearly establish a duty of prevention in that they obligate the state from which the threat emanates to “take all appropriate measures to prevent significant transboundary harm.”¹⁴⁸ The Articles state that this duty includes an obligation to take legislative action, “including the establishment of suitable monitoring mechanisms to implement the provisions.”¹⁴⁹ The Draft Articles further stipulate that there are obligations to consult with other states in establishing preventative measures,¹⁵⁰ exchange information on hazards to minimize risk,¹⁵¹ and provide notification in the case of an emergency.¹⁵² Applied in the maritime terrorism context, these provisions imply a duty on the part of states to establish appropriate regulations for maritime security, as well as to share intelligence pertaining to any vessels or shipments that they may deem to be high risks.¹⁵³

145. *See id.* (discussing appropriate measures for preventing transboundary harm).

146. *See id.* (defining the term “transboundary harm”).

147. *Draft Articles, supra* note 131, at 371.

148. *Id.* at 372.

149. *Id.*

150. *Id.* at 373 (stating the requirements for consultations on preventative measures).

151. *Id.* at 375 (requiring that states exchange relevant information in a timely manner).

152. *See id.* at 376 (maintaining that the state of origin must notify any affected state expeditiously).

153. *See Draft Articles, supra* note 131, at 375 (noting that states have the right to withhold information “vital to national security,” but requiring a state to provide as much information as possible under the circumstances). The Draft Articles contemplate sharing sensitive information, and this provision implies that states should share intelligence information pertaining to possible transboundary harm as a matter of course, unless the state of origin specifically deems it “vital to national security.” *Id.*

Several cases in the field of international law point to the fact that states owe a duty to ensure the safety of foreign nationals and property.¹⁵⁴ It is possible to argue that the reasoning behind these cases may be extrapolated to a general duty to prevent terrorism. One of the most famous of these cases was the *Chapman Case*, in which Mexican officials were provided with numerous warnings that members of the U.S. consulate were in physical jeopardy. Mexican authorities omitted to take any action with the result that, Chapman a consulate member, was attacked and shot.¹⁵⁵ The General Claims Commission (United States and Mexico) awarded Chapman compensation for the injury and found that:

A warning of imminent danger was communicated to Mexican authorities in the instant case. One official evidently took note of the warning and issued suitable instructions to meet the situation. These instructions were not carried out In light of the facts revealed by the record and in accordance with the applicable principles of law, the Commission is constrained to sustain the charge of a lack of protection made by the United States in this case.¹⁵⁶

Though states are not liable for the actions of individual citizens, a court can hold a state liable for the failure of government officials to act.¹⁵⁷ In *British Property in Spanish Morocco*, arbitrator Huber,

154. See Richard B. Lillich & John M. Paxman, *State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities*, 26 AM. U.L. REV. 217, 232-35 (1977) (discussing the *Jania* and *Worowski* incidents); see also *Youmans v. United Mexican States*, (U.S. v. Mex.) 4 R.I.A.A. 110 (1926) (recognizing the general principle that states have obligations to prevent harm to other states). The U.S. Supreme Court has observed that, “[t]he law of nations requires every national government to use ‘due diligence’ to prevent a wrong being done within its own dominion to another nation with which it is at peace or to the people thereof” *United States v. Arjona*, 120 U.S. 479, 484 (1888).

155. See *Chapman v. United Mexican States*, (U.S. v. Mex.) 4 R.I.A.A. 632 (1930) (discussing the duty of states to protect aliens and consuls).

156. *Id.* at 639.

157. See *Case Concerning United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1980 I.C.J. 3 (May 24) (holding that while Iran was not responsible for the initial acts of Islamic militants in seizing the U.S. embassy in Tehran, it was responsible for failing to take action to ensure the security of the U.S. embassy and its staff).

distinguished between the responsibilities of government officials and those of individual citizens.¹⁵⁸ He observed that:

[A State] may nevertheless be responsible for what the authorities do or fail to do in order, as far as possible, to avert the consequences of such acts. Responsibility for the action or inaction of the public authorities is quite different from responsibility for acts imputable to individuals outside the influence of or openly hostile to the authorities . . . [Despite this, the] State is obliged to exercise a certain vigilance. . .¹⁵⁹

Though this case deals with foreign property within the jurisdiction of a state, its principles may extend to issues surrounding the prevention of transnational terrorism. Applying its principles to the container scenario discussed earlier in this paper, one may suggest that when a State possesses intelligence information or knowledge of a threat to maritime shipping emanating from its own territory or even on the high seas, it may be obliged under international law to take preventative action¹⁶⁰

The *Corfu Channel* case directly supports this analysis. This case involved a claim by the United Kingdom against Albania for damage done to British warships by mines within Albania's territorial sea.¹⁶¹ The International Court of Justice held that:

The obligations incumbent upon Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based . . . on certain general and well recognized principles namely, even more exacting in peace than in war; the principle of freedom of maritime communication; and every State's

158. See *British Property in Spanish Morocco* (Spain v. U.K.), 2 R.I.A.A. 615 (1925) (observing that, under international law, a state may be held responsible for the actions or omissions of state authorities).

159. See *id.* at 642.

160. See *supra* notes 41-52 and accompanying text (discussing scenarios involving destructive devices placed in shipping containers).

161. See *Corfu Channel Case* (U.K. v. Alb.), 1949 I.C.J. 4 (1949) (holding that Albania had a duty to warn foreign ships of the danger of mines in the North Corfu Strait).

obligation not to allow [knowingly] its territory to be used for acts contrary to the rights of other states.¹⁶²

The reasoning of *Corfu Channel* suggests that states with major hub ports have an obligation not only to maintain security at the port facility itself, but also to take reasonable steps to ensure the security of the contents of the containers that are loaded onboard departing vessels.

While the incidents discussed earlier deal with local terrorism, states also have a customary duty to prevent the use of their territories for the preparation of acts of transnational terrorism.¹⁶³ The 1871 *Alabama Claims* arbitration is one of the older and more significant rulings in this area. In this case, the United States alleged that Britain violated the principles of neutrality by allowing the construction and fitting out of the Confederate ships *Alabama* and *Florida* during the U.S. Civil War.¹⁶⁴ When the United States learned that the vessels were part of the Confederate fleet and informed British authorities, the authorities made only perfunctory and ineffective attempts to arrest the vessels.¹⁶⁵ The *Alabama* escaped, and British vessels eventually fitted out the ship at sea.¹⁶⁶ British authorities also made a similar unsuccessful attempt to detain the *Florida*.¹⁶⁷ Throughout the Civil War, the *Alabama* successfully sunk

162. *Id.* at 51; see also *Trail Smelter Case* (U.S. v. Can.), 3 R.I.A.A. 1911 (1941) (holding that, under the principles of international law, no state has the right to use its territory in a manner that would cause injury to another state). Albania was obliged to notify approaching vessels of the imminent danger of the minefield. *Id.* This obligation is based on the principles of freedom of maritime communication and every State's duty not to allow its territory to be used to act contrary to the rights of other states. *Id.*

163. See Eric C. Bruggink, *The "Alabama" Claims*, 57 ALA. LAW. 339, 342 (1996) (discussing the establishment of the principle that a country must exercise "due diligence" to prevent hostile expeditions from its territory).

164. See *id.* at 342 (noting that by allowing the construction and fitting out of Confederate ships during the U.S. Civil War, Britain allegedly violated the principals of neutrality).

165. See *id.* at 340-41 (claiming that British Customs authorities failed to respond to the U.S. ambassador's complaints regarding the British construction of Confederate ships).

166. *Id.* at 341.

167. *Id.*

a significant number of Union ships, causing the United States to seek reparations through arbitration at the wars end.¹⁶⁸

The arbitration was based on what became known as the “Three Rules of Washington,” which for the purposes of the arbitration acted as a standard for the lawfulness of a state’s behaviour.¹⁶⁹ The tribunal found in favour of the United States and held that the British government had “failed to use due diligence in the performance of its neutral obligations” pursuant to international law and that the preventative measures to stop the ships from departing were insufficient and “so imperfect as to lead to no result.”¹⁷⁰ In the context of transnational terrorism, the *Alabama Claims* arbitration stands for the proposition that “once a government has notice, either from its own observations or from the complaints it receives from other states, that its territory is being used for the preparation of hostile acts, perfunctory efforts to stop these activities will not be sufficient to meet its duty under international law.”¹⁷¹

It is clear from customary law that States do owe a duty to each other to prevent terrorist acts, but this duty extends only as far as a state’s means practically allow. This is an important issue in the case of “container terrorism,” where the cost of purchasing scanning

168. *See id.* (noting that the United States gave immediate notice to the United Kingdom of its intention to demand reparations). Interestingly, the *CSS Alabama* was commanded by a lawyer from Mobile named Raphael Semmes and after the eventual sinking of the vessel, Semmes was promoted to Rear Admiral. Following the war he returned to Mobile and resumed the practice of law. *Id.* at 341, 343.

169. *See Bruggink, supra* note 163, at 342 (noting the establishment of the principle that a country cannot excuse its failure to meet international obligations through the imposition of its own domestic laws).

A neutral government is bound to use due diligence: (1) to prevent the fitting out, arming, or equipping within its jurisdiction of any vessel, which it has reasonable grounds to believe is intended . . . to carry on war against a power with which it is at peace; (2) not to permit either belligerent to make use of its ports or waters as the base of naval operations or for the purpose of augmenting military supplies or recruiting men; and, (3) to prevent violation of the foregoing duties.

Id.

170. Lillich & Paxman, *supra* note 154, at 256-57.

171. *Id.* at 257.

equipment and other preventative technology is high.¹⁷² Even within OECD countries, the use of such technology is financially prohibitive and, as a result, ports do not employ it uniformly. For example, in Canada, the Pacific Coast port of Vancouver obtained scanning equipment long before the East Coast port of Halifax obtained funding.¹⁷³

The duty owed by states in respect to the prevention of terrorism is not an absolute duty but is one that is defined by the exercise of "due diligence."¹⁷⁴ Limitations on liability may be dictated by things such as the inability to prevent the attack because of an absence of manpower in areas of geographical remoteness or by a lack of information concerning an impending attack. Applied in the maritime context, where cargo inspection is extremely difficult and costly, these limitations on state responsibility appear to create a wide exemption.

A possible solution to the restriction of state responsibility is to establish uniform international standards for maritime security. However, as Section V of this paper points out, the creation and implementation of specific standards for security measures on an international scale would be very difficult. As aviation security indicates, past attempts to achieve consensus on international security standards to prevent terrorism have proven largely unsuccessful.¹⁷⁵

172. See Peters, *supra* note 92, at A5 (noting the two million dollar price tag for a gamma ray machine purchased by the port of Vancouver).

173. *Id.*; compare *id.* with *The Minister of National Revenue has Announced that the Port of Halifax will Receive Three Point Six Million Dollars*, BROADCAST NEWS, May 15, 2002 (showing the significant cost of specialized equipment and the time it takes certain ports to acquire it), available at 2002 WL 21065431.

174. See Lillich & Paxman, *supra* note 154, at 258 (stating that the *Alabama Claims*' due diligence analysis can serve as a starting point for state responsibility vis-à-vis matters of terrorism).

175. See Sharon A. Williams, *International Law and Terrorism: Age-Old Problems, Different Targets*, 16 CAN. Y.B. INT'L L. 87, 99-100 (1988) (noting the difficulty of achieving consensus on international security standards to prevent terrorism). The difficulty was apparent in the drafting of the 1988 Convention for the Suppression of Unlawful Acts of Violence at Airports Serving Civil Aviation. See Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Jan. 26, 1973, 974 U.N.T.S. 178 [hereinafter Montreal Convention]. Article 10(1) of the Convention called upon parties to take all practicable measures

III. EXISTING INTERNATIONAL LAW

As Section II discusses, the movement of vessels, cargo, and crews poses a considerable security risk.¹⁷⁶ Arriving at practical solutions that do not impede the flow of goods and restrict international economic growth is extremely difficult. In addition to the practical problems associated with preventing maritime terrorism there are legal difficulties, due in part to the inadequacy of existing international instruments.

Over the past forty years, regional and international conventions that seek to suppress or prevent terrorism have proliferated.¹⁷⁷

to prevent aviation crimes. During the negotiations, the USSR suggested that a requirement be added for trained inspectors and the establishment of a prohibition of unauthorized access in controlled zones within airports. However, difficulties associated with defining "controlled zones" led to the rejection of this suggestion. Williams, *supra*, at 99-100.

176. See *supra* notes 20-24 and accompanying text (outlining the various sources of vulnerability).

177. See, e.g., Convention on Offences and Certain Other Acts Committed On Board Aircraft, Dec. 4, 1969, 704 U.N.T.S. 219; Convention for the Suppression of Unlawful Seizure of Aircraft, Oct. 14, 1971, 860 U.N.T.S. 105; Montreal Convention, *supra* note 175; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving Civil Aviation, Feb. 23, 1988, S. TREATY DOC. NO. 100-19, *reprinted in* 27 I.L.M. 627; International Convention Against the Taking of Hostages, June 3, 1983, 1316 U.N.T.S. 205; International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 37 I.L.M. 251; International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 109, U.N. GAOR, 54th Sess., Supp. No. 49, at 408, U.N. Doc. A/54/109 (1999); Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, Feb. 2, 1971, 27 U.S.T. 3949, 1986 U.N.T.S. 195, *available at* <http://www.oas.org/juridico/english/Treaties/a-49.html> (last visited Nov. 4, 2002); European Convention on the Suppression of Terrorism, Jan. 27, 1977, 1979 U.N.T.S. 94, *available at* <http://conventions.coe.int/Treaty/EN/Treaties/Html/090.htm> (last visited Nov. 4, 2002); South Asian Association for Regional Cooperation Convention on Suppression of Terrorism, U.N. GAOR, 44th Sess., U.N. Doc. A/51/136 (1989) *available at* <http://untreaty.un.org/English/Terrorism/Conv18.pdf> (last visited Nov. 4, 2002); Convention on the Organization of the Islamic Conference on Combating International Terrorism, *available at* <http://www.oic-un.org/26icfm/c.html> (last visited Nov. 4, 2002). At present, no comprehensive international convention on terrorism exists. The United States has consistently opposed a comprehensive approach because the piecemeal approach allows it to draw on a wide range of disparate legal norms. However, one commentator has suggested that the U.S. opposition to such a move stems from the fact that "an effective multilateral

Several international law conventions could play an important role in the prevention of terrorism at sea, including the 1958 Convention on the High Seas, UNCLOS, and the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation.¹⁷⁸ However, these instruments are largely inadequate with respect to prevention because they have either attempted to fit terrorism within the historical ambit of piracy or they have focused on the issue of exertion of jurisdiction following an attack.

A. THE 1958 GENEVA CONVENTION AND UNCLOS

Considerable debate exists amongst commentators as to whether maritime terrorism falls within the meaning of “piracy” under existing international conventions and customary law.¹⁷⁹ Piracy, like war crimes and slave trafficking, is an area of universal jurisdiction, which means that all nations have the right to prosecute the offense regardless of where it takes place.¹⁸⁰ Though it is highly debatable

scheme . . . would presumably restrict its unfettered political power to act unilaterally.” M. Cherif Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Assessment*, 43 HARV. INT'L L.J. 83, 92 (2002).

178. See Convention on the High Seas, Apr. 29, 1958, 450 U.N.T.S. 11 [hereinafter 1958 Geneva Convention] available at <http://www.un.org/law/ilc/texts/hseas.htm> (last visited Nov. 4, 2002); UNCLOS, *supra* note 13, art. 101; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, March 10, 1988, available at http://www.undcp.org/odccp/terrorism_convention_maritime_navigation.html (last visited Nov. 4, 2002).

179. See Gregory V. Gooding, *Fighting Terrorism in the 1980's: The Interception of the Achille Lauro Hijackers*, 12 YALE J. INT'L L. 158, 159 (1987) (debating whether the 1985 hijacking of the *Achille Lauro* falls into the definition of piracy, as defined by the 1958 Geneva Convention); see also George R. Constantinople, *Towards a New Definition of Piracy: The Achille Lauro Incident*, 26 VA. J. INT'L L. 723, 748 (1986) (discussing the drafting of a more contemporary definition of piracy); Samuel Pyeatt Menefee, *The New “Jamaica Discipline:” Problems with Piracy, Maritime Terrorism and the 1982 Convention on the Law of the Sea*, 6 CONN. J. INT'L L. 127, 141-47 (1990) (commenting on the “private ends” controversy and the “one ship/two ship” controversy stemming from the definition of piracy in UNCLOS).

180. See Jeffrey Allan McCredie, *Contemporary Uses of Force Against Terrorism: The United States Response to Achille Lauro—Questions of Jurisdiction and its Exercise*, 16 GA. J. INT'L & COMP. L. 435, 439 (1986) (listing crimes subject to jurisdiction under the universality principle); see also TERRORISM AND INTERNATIONAL LAW 24 (Roselyn Higgins & Maurice Flory eds., 1997) (stating

whether terrorism constitutes a crime of universal jurisdiction, the tendency is to include it within the ambit of piracy for legal purposes.¹⁸¹ Despite the dramatic rise in terrorism throughout the 1960s and 1970s, UNCLOS made no special provision for terrorism; instead the state parties chose to adopt the definitions of piracy contained in the 1958 Geneva Convention.¹⁸²

Maritime terrorism does not fall comfortably within the legal meaning of piracy. As the technology available to terrorists and patterns of maritime commerce evolve, it is increasingly inappropriate to refer to maritime terrorism as a form of piracy. In 1958, at the conclusion of the Geneva Convention, it was not possible to conceive of multimodal systems, post-Panamax ships, or the general increase in global trade. As time progresses, the nature of threats change. As a result, to continue to define terrorism as piracy is to create a new legal fiction.

An examination of the inadequacies of the definition of piracy contained in Article 15 of the 1958 Convention on the High Seas (Article 101 of UNCLOS) confirms this analysis. The article establishes four basic criteria for an act to be considered piratical. These include an illegal act of violence, detention or depredation committed by the crew or passengers for private ends committed on the high seas against another vessel.¹⁸³ The 1958 Convention on the

that states may exert universal jurisdiction over *erga omnes* offenses, i.e., offenses harming both the person to whom they are directed and the general international community). Higgins goes on to note that though the category of universal jurisdiction generally includes piracy, it does not include terrorism. *Id.*

181. *See id.* at 28 (observing that while some terrorist acts, including “certain major offenses against persons protected by the 1949 Geneva Conventions” give rise to universal jurisdiction, the hijacking of aircraft does not).

182. *See* 1958 Geneva Convention, *supra* note 178, art. 15; UNCLOS, *supra* note 13, art. 101. Articles 14-21 of the 1958 Geneva Convention are nearly identical to articles 100-07 of UNCLOS. In particular, the definition of piracy contained in article 15 of the 1958 Geneva Convention became article 101 in UNCLOS. Menefee argues that the piracy articles in UNCLOS “perpetuate defects in response to maritime violence.” Menefee, *supra* note 179, at 128. *See id.* at 141 (suggesting that UNCLOS, like the 1958 Geneva Convention, has several thematic shortcomings, including the definition of piracy).

183. *See* 1958 Geneva Convention, *supra* note 178, art. 15. Article 15 of 1958 Geneva Convention states:

Piracy consists at any of the following acts:

High Seas adopted the definition of piracy from the International Law Commission's ("ILC") report to the U.N. General Assembly.¹⁸⁴ The ILC specifically excluded acts committed on board a vessel by the crew or passengers and directed against the vessel itself, or against the persons or property on the vessel.¹⁸⁵ The requirements that an offence involve two vessels and that an act must be for private ends excludes a large number of modern terrorist acts. The hypothetical situation posited in Section I of this paper, involving the shipping of a container holding a nuclear, biological, or chemical device for the purposes of destroying or disrupting a major international port likely falls outside its meaning; neither the private ends requirement nor the two ship requirement would be met.

The "private ends" issue is also a source of considerable debate amongst commentators in that it appears to exclude acts committed by political insurgents.¹⁸⁶ The ILC rapporteur to the General Assembly in 1955 took a narrow view of the definition of piracy, stating:

(1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or passengers of a private ship or a private aircraft, and directed:

(a) On the high seas, against another ship or aircraft, or against person or property on board such a ship or aircraft;

(b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(3) Any act of inciting or of intentionally facilitating an act described in sub-paragraph 1 or sub-paragraph 2 of this article.

Id. art 15.

184. *Report of the International Law Commission: Regime of the High Seas and of the Territorial Sea*, 2 Y.B. INT'L L. COMM'N 20 (1955).

185. *Id.* at 65.

186. See Malvina Hallberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 AM. J. INT'L L. 269, 277-79 (1988) (explaining that commentators cannot unequivocally determine the meaning of the term "private ends" as used in the 1958 Convention); see also Menefee, *supra* note 179, at 142-43 (discussing whether the piracy, as confined to "private ends," excludes all political seizures). Menefee notes that an act may have both private and political ends; additionally, though a perpetrator may deem an act to be political, it is not necessarily so. *Id.* at 143.

Although States at times have claimed the right to treat as pirates unrecognized insurgents against a foreign government who have pretended to exercise belligerent rights on the sea against neutral commerce, or privateers whose commissions violated the announced policy of the captor, and although there is authority for subjecting some cases of these types to the common jurisdiction of all States, it seems best to confine the common jurisdiction to offenders acting for private ends only.¹⁸⁷

However, this private ends requirement did not stop the United States from characterising the Palestinian terrorists' seizure of the *Achille Lauro* as a form of piracy.¹⁸⁸

The one ship-two ship debate has been as equally controversial among commentators.¹⁸⁹ The 1958 High Seas Convention and the 1982 UNCLOS do not appear applicable to a situation where the crew or passengers seize control of the ship.¹⁹⁰ This would exclude a potential maritime version of the September 11, 2001, aviation attacks, where terrorists already on board a vessel seize control of a ship and attempt to use the ship itself as weapon against other ships at sea or against port facilities. However, the 1958 Convention does apply if the internal seizure of a vessel involves a government ship.¹⁹¹ Article 16 specifically states that "acts of piracy... committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are

187. See *Summary Records of the 290th Meeting* [1955], 1 Y.B. INT'L L. COMM'N 37, 41, U.N. Doc. No. A/CN.4/79.

188. See *Documents Concerning the Achille Lauro Affair and Cooperation in Combating International Terrorism*, 24 I.L.M. 1509, 1554-57 (1985) (demonstrating that the U.S. Justice Department obtained warrants for the arrest of the *Achille Lauro* terrorists for "piracy on the high seas").

189. Menefee, *supra* note 179, at 144-47 (discussing the one ship-two ship controversy and related jurisdictional issues).

190. See 1958 Geneva Convention, *supra* note 178, art. 15 (defining piracy as "any illegal acts of violence... committed... by the crew or the passengers of a private ship... and directed... against another ship or aircraft"); UNCLOS, *supra* note 13, art. 101 (stating that piracy consists of an act of violence or detention by the crew or passengers of a private ship or private aircraft directed against another ship or aircraft).

191. See UNCLOS, *supra* note 13, art. 102 (declaring that acts of piracy committed by a government ship or aircraft are assimilated to acts committed by a private ship or aircraft).

assimilated to acts committed by a private ship.”¹⁹² As one critic has pointed out, this distinction suggests that internal seizures of non-government vessels for political ends are non-piratical, whereas the seizure of government vessels by crew or passengers in contrast would qualify as a form of piracy.¹⁹³

Samuel Menefee has argued that if the 1982 UNCLOS is read closely there is in fact no “two ship requirement.”¹⁹⁴ He argues,

Article 101(a)(ii) states that the crime be against ‘a ship, aircraft, persons or property’ (there is no mention of “another”) if the location is ‘outside the jurisdiction of any State.’ The high seas is unarguably such a place. Therefore, the requirement of the presence of two vessels for a piracy to occur is unnecessary.¹⁹⁵

Though this argument has some merit, it forces international law to fit the changed reality of maritime commerce and international terrorism.

There is very little in the way of provisions in either Convention that would assist in preventing a maritime terrorist attack. However, the 1958 and 1982 Conventions do contain provisions that create a “right of visit” for foreign warships that encounter a vessel on the high seas if the warship has reasonable grounds to suspect that it may be engaged in piracy.¹⁹⁶ Provided that maritime terrorism falls within

192. See 1958 Geneva Convention, *supra* note 177, art 16.

193. See McCredie, *supra* note 180, at 448-49 (explaining the different responses that states may make to seizure of a vessel depending on whether a vessel is taken internally or externally). Under the 1958 Geneva Convention, only the seized ship’s flag state can pursue a vessel if it is taken internally. *Id.* at 448. However, all nations may pursue a ship that is captured by another ship. *Id.*

194. See Samuel Menefee, *Anti-Piracy law in the Year of the Ocean: Problems and Opportunity*, 5 ILSA J. INT’L & COMP. L. 309, 312-13 (1999) (countering the generally accepted reading of UNCLOS as to exclude from the concept of piracy crew seizures or passenger takeovers).

195. *Id.* at 312 (noting that though Article 101 of UNCLOS states that a piracy crime must be against a ship, the article does not explicitly state that the crime be against “another” ship).

196. See UNCLOS, *supra* note 13, art. 110 (1). Art. 101 (1) reads:

Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:

the ambit of piracy, this provision would allow countries such as the United States to conduct searches of suspect vessels at sea before they enter U.S. territorial waters. However, the “reasonable grounds” requirement appears to rule out the conducting of random inspections or engaging in a type of comprehensive maritime security screening process prior to entry into U.S. waters. Further, Article 110(3) of UNCLOS provides that “[i]f the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.”¹⁹⁷ This provision makes wrongful inspections a very costly procedure for the country invoking the “right of visit.” The compensation is payable to the owner of the vessel and not to the state, which seems to rule out the possibility that bilateral agreements between states could contract out of the compensation requirements.

The 1958 Convention and UNCLOS neither envision the need for the type of comprehensive structure or multilateral approach to control maritime terrorism required in the aftermath of September 11, 2001, nor facilitate preventive measures. The only reference that indicates or even hints at a multilateral approach to the problem is Article 14 of the Geneva Convention.¹⁹⁸ It obligates states to “cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.”¹⁹⁹ This provision is inadequate with respect to cooperation because it does not account for the fact that a terrorist act may involve multiple perpetrators, both on the high seas and within several national jurisdictions. Both the 1958 Geneva Convention and

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- (a) the ship is engaged in piracy;
 - (b) the ship is engaged in the slave trade;
 - (c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109;
 - (d) the ship is without nationality; or
 - (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

Id.

197. *Id.* art. 110 (3).

198. See 1958 Geneva Convention, *supra* note 178, art. 14.

199. *Id.*

UNCLOS approach the topic in a manner that evokes historical conceptions of piracy.²⁰⁰ This serves merely to obfuscate the modern reality of violence at sea.²⁰¹

B. CONVENTION ON THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF MARITIME NAVIGATION

As the previous section of this paper has shown, existing international law on maritime terrorism is conceptually outdated and lacking in several key aspects.²⁰² In 1986, in response to the hijacking of the *Achille Lauro* cruise ship, and partly in response to existing legal inadequacies, Egypt, Austria, and Italy proposed the creation of a new convention to specifically deal with the issue of maritime terrorism.²⁰³ As a result of this initiative, in June 1987, the Council of the IMO at its fifty-eighth session “decided to convene a conference on the suppression of maritime terrorism, using as the basis of its work a draft text prepared by an earlier *Ad Hoc* Preparatory Committee.”²⁰⁴ The final result of these negotiations was the creation of the 1988 IMO Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation.

200. See Menefee, *supra* note 194, at 315 (emphasizing that historical notions of piracy obscure attempts to address modern-day piratical crimes). Menefee points out that,

The marine criminal researcher is often put in a ‘Catch-22’ situation ‘playing up’ the skull-and-bones, Blackbeard, walking-the-plank aspect of the problem appears the only way to attract attention, but the media then inexplicably concentrates on this to the exclusion of anything else. By overemphasizing history, focus is lost, and the problem of contemporary piracy is by and large ignored.

. *Id.*

201. *Id.*

202. See *supra* notes 179-201 and accompanying text (discussing current maritime law addressing piracy and other outdated concepts).

203. I.M.O., INTERNATIONAL CONFERENCE ON THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF MARITIME NAVIGATION iii (1988).

204. See Phillip E. Fried, *International Agreements—Convention and Protocol from the International Conference on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 30 HARV. INT'L L.J. 226, 227 (1989) (discussing the creation of the Convention for the Suppression of Unlawful Acts the Safety of Maritime Navigation and discussing its ambiguities).

This new Convention represented a great improvement over existing international law in the sense that it moved away from some of the problems associated with piracy, such as the “private ends” and the “one ship-two ship” debates. The Convention simplified many of the issues surrounding both offenses and jurisdiction. Article 3(1) of the Convention clearly articulates six different types of offences that are covered, including the placing “or causing to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of the ship.”²⁰⁵ This provision clearly makes it an offence to use a container in the manner described in section two of this paper.

In addition to defining offenses, the SUA Convention also focuses on the exertion of jurisdiction after the fact. The Convention establishes three grounds for mandatory jurisdiction and three for permissive jurisdiction over an offender.²⁰⁶ Ultimately, states have a positive obligation to either prosecute terrorists or extradite them for violations of the Convention.²⁰⁷ In many respects, the Convention

205. SUA, *supra* note 11, art. 1(d).

206. *Id.* art. 6(1)-(2). Art. 6 reads:

Each State Party shall take measures as may be necessary to establish its jurisdiction over the offences set forth in article 3 when the offence is committed:

(a) against or on board a ship flying the flag of the State at the time the offence is

committed; or

(b) in the territory of that State, including its territorial sea; or

(c) by a national of that State.

A State Party may also establish its jurisdiction over any such offence when:

(a) it is committed by a stateless person whose habitual residence is in that State; or (b) during its commission a national of that State is seized, threatened, injured or killed; or (c) it is committed in an attempt to compel that State to do or abstain from doing any act.

Id.

207. *Id.* art. 10. Article 10 reads:

The State Party in the territory of which the offender or the alleged offender is found shall, in cases to which article 6 applies, if it does not extradite him be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without delay to its competent authorities for the purpose of prosecution, through proceedings in accordance

constituted a response to the shrinking universal jurisdiction brought about by UNCLOS. This shrinking of the high seas increased opportunities for terrorists to conduct activities within the jurisdiction of states sympathetic to their causes.

The Convention is problematic in that it is reactive, as opposed to preventative, in nature. It offers little guidance for the creation of a regime to prevent terrorism on the high seas or within the territorial waters of states. The Convention largely relegates prevention issues to the preamble; the preamble calls on the IMO to develop measures "to prevent unlawful acts which threaten the safety of ships" and it affirms "the desirability of monitoring rules and standards relating to the prevention and control of unlawful acts against ships and persons on board ships, with a view to updating them as necessary."²⁰⁸ However, in the years since the signing of the Convention, there has been no significant action relating to ship security; rather, the IMO has focused more on its traditional role of promoting safety at sea and preventing maritime pollution.

Even those substantive provisions in the SUA Convention aimed at prevention, such as those dealing with cooperation and communication of relevant information to other state parties, are vague and highly permissive. Article 13 establishes a general duty of states to prevent the use of their territories as bases for possible attacks and requires states to exchange information.²⁰⁹ Article 14 defines the information requirements. It states that a party that has:

with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

Id.

208. *Id.* prmb1.

209. *Id.* art. 13. Article 13 reads:

(1) States Parties shall co-operate in the prevention of the offences set forth in article 3, particularly by:

(a) taking all practicable measures to prevent preparations in their respective territories for the commission of those offences within or outside their territories;

(b) exchanging information in accordance with their national law, and co-ordinating administrative and other measures taken as appropriate to prevent the commission of offences set forth in article 3.

reason to believe that an offense set forth in article 3 will be committed shall, in accordance with its national law, furnish as promptly as possible any relevant information in its possession to those States which it believes would be the States having established jurisdiction in accordance with article 6.²¹⁰

These provisions pose several problems. First, they restrict the flow of information about possible attacks to only those states that may exert jurisdiction, despite the fact that any act involving maritime shipping would likely have implications for a multitude of third-party states. Second, Article 15 requires reporting to the Secretary General any action taken pursuant to the Convention, such as a prosecution; the Secretary General then transmits it to all other states parties.²¹¹ Unless the Secretary General establishes an efficient information clearinghouse with proper procedures, this requirement may slow down the transmission of valuable information by creating an unnecessary intermediary.

(2) When, due to the commission of an offence set forth in article 3, the passage of a ship has been delayed or interrupted, any State Party in whose territory the ship or passengers or crew are present shall be bound to exercise all possible efforts to avoid a ship, its passengers, crew or cargo being unduly detained or delayed.

Id.

210. SUA, *supra* note 11, art. 14.

211. *Id.* art. 15. Article 15 reads:

(1) Each State Party shall, in accordance with its national law, provide to the Secretary-General as promptly as possible, any relevant information in its possession concerning:

(a) the circumstances of the offence;

(b) the action taken pursuant to article 13, paragraph 2;

(c) the measures taken in relation to the offender or the alleged offender, and, in particular, the results of any extradition proceedings or other legal proceedings.

(2) The State Party where the alleged offender is prosecuted shall, in accordance with its national law, communicate the final outcome of the proceedings to the Secretary-General.

(3) The information transmitted in accordance with paragraphs 1 and 2 shall be communicated by the Secretary-General to all States Parties, to members of the International Maritime Organization . . . to the other States concerned, and to the appropriate international inter-governmental organizations.

Id.

The third problem is that the passing of information must follow the national law of the state who possesses the information.²¹² Given the classified nature of information on terrorism and the existence of onerous official secrets acts,²¹³ information might not always be timely and forthcoming. The final problem with the Convention is that it only requires the transmission of information when there is suspicion of a likely attack, not as a matter of regular course.²¹⁴ The U.S. Coast Guard's concept of Maritime Domain Awareness, described in section II of this paper, involves the sharing of commercial and military intelligence on shipping that goes far beyond what the Convention conceives of as information sharing.

The Convention is largely inadequate when dealing with the threat posed by container vessels in the post September 11 security environment. As one commentator suggested after the Convention was opened for signature, "though the Convention represents a commitment to the prevention of unlawful acts, it is ultimately up to the signatory states themselves to make the treaty work, and it remains to be seen how states will apply the Convention in the absence of an enforcement mechanism."²¹⁵ In the years since the Convention's conclusion, states have accomplished very little in this area, suggesting the need for a new multilateral mechanism aimed squarely at prevention.

IV. TOWARD A NEW MARITIME SECURITY REGIME

As the previous section discussed, there are severe inadequacies in existing international law dealing with maritime terrorism. The

212. *Id.* art. 13(1)(b) (stating that States must cooperate by "exchanging information in accordance with the [states parties] national law, and co-ordinating administrative and other measures taken as appropriate to prevent the commission of the offenses set forth in article 3").

213. *See, e.g., Official Secrets Act*, R.S.C. 1985 c. O-5, s.3(4) (illustrating that most states have some form of official secrets act that criminalizes the passing of information to a foreign power, except where it is explicitly approved).

214. SUA, *supra* note 11, art. 14 (explaining that a state party is only required to transmit when it has "reason to believe that an offense set forth in article 3 will be committed").

215. Fried, *supra* note 204, at 235.

problem is complex and involves a wide range of parties such as port, flag, and coastal states along with shippers and manufacturers. The complexity of the problem dictates that any new approach would require international cooperation. This section examines some possible options for dealing with the problem.

One of the most obvious solutions to the problem of maritime terrorism is the establishment of regional anti-terrorism conventions.²¹⁶ This could entail creating uniform standards for inspection of ships and cargo, the sharing of intelligence information among port states, and reciprocal enforcement and inspection rights in one another's maritime zones. However, a proposal of this nature would undoubtedly involve states derogating a certain amount of national sovereignty and could contravene some sections of UNCLOS.²¹⁷ Despite this, UNCLOS may in fact permit this type of agreement between states. Article 311(3) allows for "[t]wo or more State Parties [to] conclude agreements modifying or suspending the

216. See Samuel Pyeatt Menefee, *Maritime Terror in Europe and the Mediterranean*, 12 MARINE POLICY 143, 151 (1988) (advocating a regional approach to terrorism and piracy based on case studies involving Europe and the Mediterranean); see also Menefee, *supra* note 179, at 149 (suggesting that regional organizations could coordinate efforts to fight maritime crime). Regional approaches to terrorism so far have been of a very general nature and have set down the principles of law rather than creating an operational mechanism for counter terrorist initiatives; see, e.g., OAS Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that Are of International Significance, 2 Feb. 1971, 27 U.S.T. 3949, 1986 U.N.T.S. 195, available at <http://www.oas.org/juridico/english/Treaties/a-49.html> (last visited Nov. 21, 2002). SAARC Regional Convention on Suppression of Terrorism, U.N. GAOR, 44th Sess., U.N. Doc. A/51/136 (1989), available at <http://untreaty.org/Terrorism/Conv18.pdf>.

217. See UNCLOS, *supra* note 13, art. 2 (establishing that the coastal state has sovereignty over the adjacent territorial sea to the exclusion of all other states). A regional solution may compromise this to some extent. Article 2 of UNCLOS states:

- (1) The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.
- (2) This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.
- (3) The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.

Id.

operation of provisions of this Convention, applicable solely to the relations between them.”²¹⁸ The state parties, in making such an agreement, cannot derogate from the basic principles of the Convention. While Article 311(3) may suggest that side bar agreements to UNCLOS must be limited, one commentator has suggested that “there is an alternative argument that it opens the way for interested parties to rectify the flaws found in the treaty’s treatment of piracy.”²¹⁹

The regional approach to controlling terrorism would be similar to the attempts by the United States and Caribbean states to control drug trafficking. In the past fifteen years, the United States has entered into “ship rider agreements” with several states.²²⁰ These agreements give the U.S. Coast Guard extensive rights to conduct interdiction operations including boarding and searching vessels within other states’ territorial waters, provided that a member of that coastal state’s defense force is onboard the U.S. vessel. The most far reaching of these agreements allows for the U.S. Coast Guard to “board foreign flag vessels, and place the people on board another country’s ships; pursue suspect vessels into another country’s territorial sea; and detain suspect vessels other than those bearing a signatory’s flag and order suspect planes to land there.”²²¹

There are several problems with this type of regional approach. The first is that for political reasons not all states are comfortable with a derogation of even limited aspects of their sovereignty within their own territorial waters, or for that matter allowing another state

218. *Id.* art. 311(3).

219. Menefee, *supra* note 179, at 149.

220. See Laleta Davis-Mattis, *International Drug Trafficking and the Law of the Sea: Outstanding Issues and Bilateral Responses with Emphasis on U.S.-Caribbean Agreements*, in 15 OCEAN Y.B. 360, 280-85 (Elisabeth Mann Borgese, et al. eds., 2000) (discussing “ship rider agreements” concluded between the United States and Caribbean states that cover counter drug operations against private and commercial vessels other than those of the parties to the agreements).

221. Davis-Mattis, *supra* note 220, at 381-382. See generally Kathy-Ann Brown, *The Ship Rider Model: An Analysis of the U.S. Proposed Agreement Concerning Maritime Counter Drug Operations in Its Wider Legal Context*, in CONTEMPORARY CARIBBEAN LEGAL ISSUES (Andrew Burgess ed., 1997) (analyzing the U.S. proposed ship-rider agreement by examining other cooperative agreements between states to stop the flow of illicit drug traffic on the seas).

to exert jurisdiction on the high seas over ships flying their flag. Arguably, the ship rider agreements are successful in part because U.S. relations with many Caribbean states tends to be of a patron-client nature, which makes the derogation of sovereignty less of an issue than with some other nations. The second problem is that undertaking a regional approach to maritime terrorism may in fact prove an inadequate response to the problem. As section II of this paper demonstrates,²²² modern security threats are global and not just regional in nature. Due to large transshipment facilities, threats may emerge from any corner of the globe, which implies that a new regime must not limit itself to a single geographical area. The scope of today's threat extends beyond that comprehended by commentators writing as recently as ten years ago. Samuel Menefee suggested in 1990 that "[r]egional Conventions could . . . be established, corresponding with the discrete crime clusters which exist in contemporary piracy and maritime terrorism. Involved coastal states and affected flag states could agree on a finely tuned approach to each problem, taking into account local conditions."²²³ Menefee's solution invokes a narrow conception of the problem and would be of limited value in today's security environment.

A better solution to dealing with the new threats associated with maritime terrorism may lie in the creation of a new multilateral mechanism applying a type of the port state control approach. Port state control arose in response to a series of bad maritime accidents such as the Torrey Canyon disaster in 1967²²⁴ and from a growing concern over the proliferation of unsafe shipping that utilized Flags of Convenience or open registries.²²⁵ States in the 1950s and 1960s perceived Flags of Convenience as nothing other than "unethical

222. See *supra* notes 47-52 and accompanying text (explaining the concept of "megaports" and noting the impact of an attack on trade).

223. Menefee, *supra* note 179, at 149.

224. See CRISPIN GILL ET AL., *THE WRECK OF THE TORREY CANYON XX* (1967) (providing a detailed account of the large tanker accident involving the Torrey Canyon, which ran aground off the coast of the United Kingdom, spilling 120,000 tons of oil into the English Channel, and which served as a catalyst for the 1973 International Convention for the Prevention of Pollution from Ships).

225. See John Hare, *Port State Control: Strong Medicine To Cure A Sick Industry*, 26 GA. J. INT'L & COMP. L. 571, 575 (1997) (describing the role of international organizations in developing port state control measures).

legal fictions designed to escape the safety controls, social legislation, taxation, and maritime policies required by other nations."²²⁶ The creation of port state control regimes granted national maritime authorities the power under either an international convention or under domestic legislation to board, inspect, and possibly detain merchant ships that fly a foreign flag.²²⁷ The goal of port state control programmes is to drive sub-standard shipping out of the commercial marketplace through costly detentions for not complying with international regulations.

Just as existing port state control focuses upon safety and environmental concerns, a similar regime aimed strictly at ensuring maritime security could also be created. The system could require that vessels meet certain international standards for security of crew, goods, and vessels. These security standards would have to be first set out in a maritime security convention that would then be enforced using Memorandums of Understanding (MOU)s similar to the Paris and Tokyo MOUs for port state control. A failure of a vessel to comply with security regulations would result in the vessel not being allowed to depart and, in some cases, future access to the port could even be denied. Any refusal by a vessel to provide information on cargo being carried or the employment of crewmembers that have not undergone an enhanced reliability check could result in the detention of the ship

Recent proposals that deal with the issue of maritime terrorism have principally focused on the role of the IMO in setting standards for prevention. In November 2001, the IMO agreed to convene a December 2002 Conference on Maritime Security in order to adopt

226. Carlisle, *supra* note 104, at 152.

227. See Hare, *supra* note 225, at 571 (explaining that the purpose of port state control is to ensure that ships comply with applicable international and domestic safety requirements). There are presently several different port state control regimes. These are established pursuant to a series of regional MOU's such as the Paris, Tokyo, and Vin del Mar MOUs. *Id.* at 577-583; see also Memorandum of Understanding on Port State Control in Implementing Agreements on Maritime Safety and Protection of the Marine Environment, Jan. 26, 1982, *reprinted in* 21 I.L.M. 1 (coordinating the port state control mechanisms of the maritime authorities of Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Netherlands, Norway, Portugal, Spain, Sweden, the United Kingdom, Northern Ireland, and the Russian Federation (since 1996) and cooperating authorities such as the U.S. Coast Guard).

new or amended regulations with respect to maritime security.²²⁸ Though certain aspects of a new security regime may fit within existing safety, security, and port state mechanisms administered by the IMO, it would be beneficial to create a new regime with a significant non-maritime component. Historically, the IMO has principally focused on maritime safety and pollution, as opposed to security matters.²²⁹ A new security regime may involve not just existing national maritime authorities, but also security and customs organizations and could be organized in conjunction with the World Customs Organization.²³⁰ In this sense, a new regime would extend beyond simply focusing on the maritime aspects of terrorism. To a limited degree, the United States has recognized this requirement in its submissions to the IMO, stating that the responsibility for maritime security “extends beyond IMO’s purview of the maritime world into land-based sources. To properly address this issue, other

228. See International Maritime Organization, Newsroom, *Maritime Security* (explaining that the purpose of the Conference on Maritime Security in December 2002 is to adopt new regulations to enhance ship and port security, as well as to prevent the shipping trade from becoming a target of international terrorism), at http://www.imo.org/Newsroom/mainframe.asp?topic_id=582&doc_id=1821 (last visited Oct. 16, 2002).

229. See International Maritime Organization, *Objectives of the Organization in the 2000s*, Resolution A.900 (21) (explaining that the central focus of the IMO has been the implementation of safety and pollution instruments such as the SOLAS and the International Convention for the Prevention of Pollution from Ships as modified by the Protocol of 1978 (MARPOL 73/78), and that it has only recently turned its attention toward terrorism), available at http://www.imo.org/About/mainframe.asp?topic_id=311 (last visited Oct. 16, 2002); see also Convention on the Intergovernmental Maritime Consultative Organization, Mar. 6, 1948, 289 U.N.T.S. 48, art. 1 (setting forth the purposes of the organization).

230. See World Customs Organization, Convention Establishing a Customs Co-operation Council, Dec. 15, 1950, Preamble (noting that the purpose of the Customs Co-operation Council created by the convention was to secure “the highest degree of harmony and uniformity in their Customs systems”), available at <http://www.wcoomd.org/ie/En/Conventions/convccc.pdf> (last visited Nov. 4, 2002). It is logical that the World Customs Organization play a lead role in the establishment of a new international security system for maritime trade, as it is the only intergovernmental organization that has competence in customs matters. The U.S. C.S.I initiative is premised on the principle of customs cooperation and, to prove successful, it would require a comprehensive and global approach.

stakeholders need to be appropriately engaged to develop effective overall security measures.”²³¹

A new security regime for combating terrorism that blacklists or bans ships considered a security risk from ports raises important issues concerning flag discrimination and the legal right of states to close their ports to foreign vessels. The 1923 Geneva Convention and International Regime of Maritime Ports²³² points to a principle of free access to ports.²³³ However, this Convention has a limited number of signatories²³⁴ and in all likelihood is not representative of existing customary law. A 1975 study by UNCTAD dismissed the Convention’s value in this respect. The report stated:

It would appear that the 1923 Ports Convention does not state unequivocally (i) that a right of access exists for all merchant ships that come to a port with a lawful purpose, regardless of their nationality or ownership and prior or subsequent port of call; (ii) the type of ports for which access is granted; (iii) the type of vessels for which access is

231. *U.S. Submission to IMO, supra* note 107, at 8; *see also* Convention on the Intergovernmental Maritime Consultative Organization, *supra* note 231, art. 1(b) (stating that one of the organization’s purposes is “to encourage the removal of discriminatory action and unnecessary restrictions by Governments affecting shipping engaged in international trade so as to promote the availability of shipping services to the commerce of the world without discrimination”). The IMO may also be an inappropriate body to implement a new security scheme because any new initiative will inevitably involve some level of targeting or discrimination against shipping originating from particular states.

232. Convention and Statute on the International Regime of Maritime Ports, Dec. 9, 1923, 58 U.N.T.S. 285 [hereinafter Ports Convention].

233. *See id.* art. 2. Article 2 states:

[E]very Contracting State undertakes to grant the vessels of every other Contracting State equality of treatment with its own vessels, or those of any other State whatsoever, in the maritime ports situated under its sovereignty or authority, as regards freedom of access to the port, the use of the port, and the full enjoyment of the benefits as regards navigation and commercial operations which it affords to vessels, their cargoes and passengers.

Id.

234. *See id.* at 289 (listing parties to the Convention and indicating that neither the United States or Russia signed the Convention, and many of the important maritime states have ignored it).

granted; (iv) the circumstances in which access can be denied; and (v) the procedures governing access.²³⁵

The 1923 Ports Convention also contains a security exemption to the “equality of treatment” provisions that may allow discriminatory port practices if they are based on national security concerns. Article 17 of the annexed statute allows each contracting state “to take the necessary precautionary measures in respect of the transport of dangerous goods or goods of a similar character, as well as general police measures, including the control of emigrants entering or leaving its territory”²³⁶ provided they do not result in discrimination contrary to the principles of the statute.

In addition to the somewhat limited support for free access contained in the 1923 Ports Convention, the principle is also supported by obiter from the arbitration decision in *Saudi Arabia v. Aramco*.²³⁷ In this case, the arbitrator commented that “[a]ccording to a great principle of public international law, the ports of every State must be open to foreign merchant vessels and can only be closed when the vital interests of the State so require.”²³⁸ However, in respect to the arbitration, it can certainly be argued that the “vital interests of a State” would comprise the need to keep its territory free of the threat of terrorist attack.²³⁹

The legal evidence supporting a right of access to another state’s ports is tentative at best.²⁴⁰ The right to close one’s ports to foreign vessels is a natural corollary to the principle of state sovereignty. As

235. UNCTAD, Economic Co-operation in Merchant Shipping, Treatment of Foreign Merchant Vessels in Ports, UN Doc. TD/Bc.4/136 (1975).

236. Ports Convention, *supra* note 232, art. 17.

237. *Saudi Arabia v. Arabian American Oil Co.*, 27 I.L.R. 117 (Arb. Trib. 1958).

238. *Id.* at 212.

239. *See* 50 U.S.C. § 191 (1950) (illustrating that in times of national emergency, U.S. domestic legislation allows the President to make an Executive Order that regulates the anchorage and movement of vessels).

240. *See, e.g.,* *Khedival Line, S.A.E. v. Seafarer’s Int’l Union*, 278 F.2d 49 (2d Cir. 1960) (showing U.S. courts’ rejection of the right of access to ports principle). *See generally* Louise de La Fayette, *Access to Ports in International Law*, 11 INT’L J. MARINE & COASTAL L. 1, 7 (1996) (discussing the U.S. view that “it has complete authority to grant or to deny access to its ports”).

one commentator has observed, "limitations to sovereignty cannot be presumed and there is no evidence of any limitations in state practice in relation to sovereignty over ports."²⁴¹ The International Court of Justice recognized this when it noted in the *Nicaragua* decision that it is "by virtue of its sovereignty that the coastal State may regulate access to its ports."²⁴² Further, UNCLOS recognizes a right to restrict port access under article 211(3). This provision allows states to deny a ship entry into a port for the purposes of preventing and controlling marine pollution.²⁴³

The only international legal provision that may represent a significant impediment to the introduction of a new security regime appears in the General Agreement on Tariffs and Trade ("GATT").²⁴⁴ Article 5(2) provides for "Freedom of Transit" and states:

There shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties. No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport.²⁴⁵

This suggests that engaging in container profiling and selective targeting of transshipment cargo from certain states may in fact contravene the GATT agreement. In the U.S. context, it is clear that ships carrying containers originating from Iraq or Afghanistan would be subject to special scrutiny by government authorities. There are

241. De La Fayette, *supra* note 240, at 1.

242. Case Concerning Military and Paramilitary Activities In and Against Nicaragua (*Nicar. v. U.S.*), 1986 I.C.J. 14, 111 (June 27).

243. See UNCLOS, *supra* note 13, art. 211(3) (asserting that "[s]tates which establish particular requirements for the prevention, reduction and control of pollution of the marine environment as a condition for the entry of foreign vessels into their ports or internal waters or for a call at their off-shore terminals shall give due publicity to such requirements and shall communicate them to the competent international organization"). The possibility of a nuclear, biological, or chemical weapon onboard a ship arguably could qualify as an environmental threat and would allow for a denial of access under UNCLOS.

244. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 188. GATT 1994 annexes article 5 provisions and the rest of the original 1947 GATT agreement.

245. *Id.* art. 5(2).

security exceptions within the GATT agreement, but these appear somewhat limited. Article 21(b) permits a state to override the agreement in cases involving the trafficking of nuclear material, guns, or during a general time of emergency.²⁴⁶ Further, GATT allows any party to take action that violates the agreement if it is “in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.”²⁴⁷ Whilst this provision seems to suggest that security concerns may in some cases be permitted to override other sections of the agreement, a new security regime targeting certain vessels and cargo as a regular matter of course might constitute a violation of the agreement.

One commentator has suggested that prohibitions against the restriction of port access under World Trade Organization agreements is “limited to those situations where the port state is using port access as a means to deny entry of the good being carried by the vessel and not in those situations where the port state’s concern is solely with the sub-standard condition of the vessel.”²⁴⁸ In the case of a new maritime security regime, the concern relates to both the goods and the vessel. In many respects, the ship and the

246. *See id.* art. 21(b) (setting forth the security exceptions). The security provisions in Article 21 of the GATT read as follows:

Nothing in this Agreement shall be construed

(a) to require any contracting party to furnish any information the disclosure of which it considers

contrary to its essential security interests; or

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

Id.

247. *Id.* art. 21(c).

248. Ted McDorman, *Regional Port State Control Agreements: Some Issues in International Law*, 5 OCEAN & COASTAL L.J. 207, 222 (2000).

cargo that it carries are inseparable in terms of security risk, and a new security regime will inevitably result in some form of trade discrimination.²⁴⁹ This suggests the need for international coordination that takes into account international trade and commerce law when creating a solution.

CONCLUSIONS

Over the past forty years, the shift to containerization and the use of larger ships has reduced costs and produced greater efficiencies within the shipping industry.²⁵⁰ However, this shift to multimodal systems and the use of “megaports” has simultaneously increased the vulnerability of the shipping industry to maritime terrorism.²⁵¹ This new vulnerability is very different from threats of the past in that it cuts across national jurisdictions and involves a wide range of parties, including ship owners, crews, manufacturers, and shipping companies. The problem is complex and the maritime component is simply one facet of a larger problem.

As this paper demonstrates, international maritime law has not adapted to the changing nature of terrorist threats.²⁵² The 1982 United Nations Convention on the Law of the Sea failed to deal with maritime terrorism as an independent issue and, as a result, forced terrorism at sea under the rubric of piracy. The 1982 Convention simply adopted the historical conceptions of piracy contained in the 1958 Convention on the High Seas, along with all of its definitional problems. The 1988 Convention for the Suppression of Unlawful

249. See Hare, *supra* note 225, at 579 (explaining that the U.S. Coast Guard already targets ships for inspection based on some of the above criteria). In many respects, a new maritime security regime would differ significantly from the existing port state control in terms of singling out ships of particular flags. As Hare stated, “port state control has matured to the stage where it now recognizes the need to accept the stark reality that some ships pose more of a problem than others. Most MOUs now allow (indeed require) discrimination upon the basis of flag, age, type of vessel, loan owner, operator, or even classification society.” *Id.*

250. See *supra* notes 255-35 and accompanying text (describing the history of containerization).

251. See *supra* notes 36-63 and accompanying text (explaining the repercussions of the vulnerability of the maritime sector)

252. See *supra* notes 176-215 and accompanying text (analyzing the inadequacies of existing international law relating to maritime terrorism).

Acts against the Safety of Maritime Navigation moved away from equating terrorism with the historical notions of piracy; however, it focused strictly on the issues of jurisdiction and extradition. Customary international law clearly indicates that states have a legal obligation to prevent terrorist acts including acts that attempt to cause a disruption to shipping.²⁵³ At present, there is a pressing need for a new comprehensive multilateral instrument that focuses on the prevention of maritime terrorism.²⁵⁴ Due to the multi-modal nature of modern freight services, a convention on prevention must involve not just maritime stakeholders, but also manufacturers, rail companies, and national customs authorities. In many respects, a new convention is beyond the traditional scope of the IMO and may warrant the establishment of a new international authority that can engage both the maritime and the terrestrial elements of the problem.

253. *See supra* notes 128-175 and accompanying text (examining the responsibility and duty of states to take action that would prevent terrorist attacks)

254. *See supra* notes 216-249 and accompanying text (making recommendations for a new regime to respond to the current threats of maritime terrorism).