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### Conditions on Entry of Foreign-Flag Vessels into US Ports to Promote Maritime Security

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*Executive Summary*

One of the most important engines driving global economic development and progress in recent years is the freedom to engage in seaborne trade throughout the world. Relatively unhindered access to the world's ports is a vitally important component of the recent story of global economic success. At the same time, the grave threats that international terrorists and rogue States pose to global order give rise to overriding maritime security concerns among port States, factors which argue strongly against a maritime open-door policy. Other vital concerns, including illegal immigration, drug trafficking, unsafe oil tankers, illegal fishing and other threats to the marine environment, and violation of customs and trade laws, are also prompting port States to take actions that impose conditions on port entry, to exercise greater jurisdiction in port and even to restrict traditional freedoms of navigation in coastal waters.

As a general rule, international law presumes that the ports of every State should be open to all commercial vessels. However, if a State considers that one or more important interests require closure, necessitate imposing conditions on entry or exit, or dictate the exercise of greater jurisdiction over foreign vessels in port,

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international law generally permits the port State to do so. A port State may restrict the port entry of all foreign vessels, subject only to any rights of entry clearly granted under an applicable treaty and those vessels in distress due to *force majeure*. At the same time, international law presumes that the port State will restrict access to foreign commercial vessels or impose sanctions upon those that enter port, even those designed to promote important maritime goals, which are reasonably related to ensuring the safe, secure and appropriate entry or departure of the vessel on the occasion in question.

As a fundamental policy goal, all States must cooperate to develop and implement efficient and effective conditions on port entry to ensure the security of the port State and the international commercial system. Unreasonably restrictive conditions would have a deleterious effect on global trade and the world's economy. Ineffective conditions on entry, such as faulty procedures to screen ships and their cargoes, could result in a security breakdown and a devastating terrorist attack on a port city. Such a disaster would render virtually inconsequential the debate over restrictions on port entry to achieve political, environmental, navigational safety, law enforcement or other worthwhile goals. Even so, international lawyers and policy-makers in the United States and elsewhere must seek to ensure that access to the ports of the world is fundamentally free, and restricted only on conditions directly, effectively and reasonably related to the significant interests of the port State and the world community at large.

This article discusses general principles of international and domestic law governing the condition of port entry as a basis for regulating foreign vessels entering ports, with an emphasis on maritime security. It also considers the policy consequences of imposing legally permissible restrictions or requirements that could have the practical effect of infringing unreasonably on maritime commerce, or which would lead to concerns in the international community and which might result in diplomatic protests and political objections. The goal of the article is to develop an analytical structure that would encourage a rational review of any proposed conditions on entry to ports to help ensure that any such requirements are legal, acceptable, reasonable and wise. In a post-9/11 world that remains dependent on international trade for economic prosperity, achieving an effective, balanced, legal and workable port-entry regime is a vitally important goal.

### *I. Introduction and Competing Policy Interests*

As a general rule, international law presumes that the ports of every State should be open to all commercial vessels seeking to call on them. As Professors McDougal and Burke observed forty-five years ago: "The chief function of ports for the coastal

state is in provision of cheap and easy access to the oceans and to the rest of the world . . . . [T]he availability of good harbors . . . remains a priceless national asset.”<sup>1</sup> Every modern State has a general obligation to engage in commercial intercourse with other States and, absent an important reason, none should deny foreign commercial vessels reciprocal access to its ports.<sup>2</sup>

In a much-quoted (yet often-criticized) statement, an arbitral tribunal observed in the *Aramco* case in 1958, “According 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.”<sup>3</sup> In his widely respected treatise, Dr. C.J. Colombos wrote that “in time of peace, commercial ports must be left open to international traffic,” and that the “liberty of access to ports granted to foreign vessels implies their right to load and unload their cargoes; embark and disembark their passengers.”<sup>4</sup> The *Third Restatement of the Foreign Relations Law of the United States* summarizes the legal principle as follows: “In general, maritime ports are open to foreign ships on condition of reciprocity, . . . but the coastal State may temporarily suspend access in exceptional cases for imperative reasons . . . .”<sup>5</sup>

At the same time, each port State has the sovereign right to deny entry and to establish reasonable conditions related to access to its internal waters, harbors, roadsteads and ports.<sup>6</sup> Indeed, apart from certain pronouncements, there is little actual support for the broad statement that ports can only be closed for “vital interests” or “imperative reasons” as a fundamental principle of customary international law.<sup>7</sup> The 1982 United Nations Convention on the Law of the Sea (1982 LOS Convention)<sup>8</sup> “contains no restriction on the right of a state to establish port entry requirements . . . .”<sup>9</sup> Article 25, entitled “Rights of protection of the coastal State,” provides: “In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State . . . has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject.”<sup>10</sup> While the United States signed the “Part XI Agreement,” which incorporates almost all of the 1982 LOS Conventions in 1994, the United States Senate has not yet ratified or acceded to it. Even so, the United States has long considered the navigation-related principles contained in the 1982 LOS Convention to reflect customary international law, binding on all States.<sup>11</sup>

After carefully examining the relevant authorities cited in support of such a right-of-port-entry principle in the *Aramco* case, Professor A.V. Lowe concluded that international law does not so severely restrict the authority of a port State to close a port or impose conditions on entry.<sup>12</sup> He convincingly distinguished between a *right* of entry and a *presumption* of entry, concluding that “the ports of a State which are designated for international trade are, in the absence of express provisions to the contrary made by a port State, presumed to be open to the

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merchant ships of all States . . . . [S]uch ports should not be closed to foreign merchant ships except when the peace, good order, or security of the coastal State necessitates closure.”<sup>13</sup> Another knowledgeable observer went even further: “There is a presumption that all ports used for international trade are open to all merchant vessels, but this is practice only, based upon convenience and commercial interest; it is *not* a legal obligation . . . . Pursuant to [their sovereignty over their internal waters], states have absolute control over access to their ports.”<sup>14</sup> The United States Supreme Court observed that the internal waters and territorial sea are “subject to the complete sovereignty of the nation, as much as if they were a part of its land territory, and the coastal nation has the privilege even to exclude foreign vessels altogether.”<sup>15</sup> In another case, the Supreme Court concluded that Congress had “the power . . . to condition access to our ports by foreign-owned vessels upon submission to any liabilities it may consider good American policy to exact.”<sup>16</sup>

Whether States view port entry as an international obligation or one granted based on international comity and domestic self-interest, they typically do not undertake to deny entry to their ports without good cause. Before restricting entry to its ports, a State must have good policy reasons to do so. “Vital interests,” “imperative reasons” or what factors may “necessitat[e] closure” or constitute “good policy” include such obvious ones as national security or public health. However, acceptable State practice includes closing a port to enforce an embargo, to sanction hostile behavior by another State, to impose a political reprisal<sup>17</sup> or to promote other significant interests as the port State may determine to be appropriate and necessary.<sup>18</sup>

There is a good deal of foreign State practice supporting the imposition of a broad spectrum of conditions governing port entry and the exercise of jurisdiction in port.<sup>19</sup> Today, there is general agreement “that the coastal state has full authority over access to ports and is competent to exercise it, virtually at will, to exclude entry by foreign vessels.”<sup>20</sup> Among appropriate entry conditions are complying with pilotage requirements, obeying traffic separation schemes and paying customs duties. Port States have even greater rights to limit or control entry with respect to certain categories of vessels, such as warships, nuclear-powered vessels, fishing boats and recreational craft. Absent agreement between the States concerned, foreign warships have no general expectation of being permitted entry<sup>21</sup> and must request permission to make a port call in each case.<sup>22</sup> International law also permits port States to deny or condition entry as they see fit to foreign-flag fishing boats<sup>23</sup> and private recreational craft.<sup>24</sup> Some port States may consider that the domestic political costs of approving nuclear-powered or -armed vessels entry to their waters are too high,<sup>25</sup> while granting port entry to warships, fishing vessels and private recreational craft does not promote the overriding interests of the port State in international trade that foreign-flag commercial vessels directly serve.

Just as there is a presumption that a port State may not properly bar a foreign commercial vessel from entry into its ports absent adequate justification, the affected flag State and the international community would view with concern the imposition of unreasonable, arbitrary or discriminatory requirements for access.<sup>26</sup> “It is . . . possible that closures or conditions of entry which are patently unreasonable or discriminatory might be held to amount to an *abus de droit*, for which the coastal State might be internationally responsible even if there was no right of entry to the port.”<sup>27</sup> However, both conventional and customary international law permit a State to impose reasonable restrictions on port entry.<sup>28</sup> The possible conditions on entry run from those historically designed to ensure that vessel and crew are free from infectious diseases, and that customs duties have or will be paid, to provisions ensuring that promises to use the services of a pilot when entering or exiting port, and to moor or anchor as directed, are kept. These also include those security-related concerns so important in a post-9/11 world, such as submission of passenger and crew lists and cargo manifests, and a willingness to wait beyond the limits of the territorial sea until an inspection of the vessel with radiation monitoring equipment can be completed.<sup>29</sup>

Of course, under the fundamental international legal principle of *pacta sunt servanda*, nation-States must comply with international agreements to which they are party. Hundreds of bilateral friendship, commerce and navigation (FCN) treaties govern the circumstances under which those party to the agreements permit port entry to the other.<sup>30</sup> Such FCN treaties confirm the general presumption that ports will be open and unrestricted by unreasonable conditions. Whether these bilateral FCN or “most-favored-nation” treaties concerning commerce and navigation reflect customary international law or may have helped established a rule of customary law, there is a general expectancy that, when entered into, commercial vessels of either party will be able to trade with any foreign port, and will need to comply only with standard and necessary port entry conditions and expectations.<sup>31</sup> Here again, international practice is to exclude warships and fishing vessels from the general presumption of entry.<sup>32</sup> Whether at sea or in port, warships and other sovereign immune vessels are subject only to the enforcement jurisdiction of the flag State.<sup>33</sup> If a sovereign immune vessel engages in an activity in violation of the law of the port State, local authorities may direct that the vessel leave immediately and may seek damages through diplomatic channels resulting from the actions of foreign sovereign immune vessels.<sup>34</sup>

Although a port State has a right to condition entry to its ports based on a broad spectrum of concerns, any such restrictions entail costs. The costs include those directly involved in administering the conditions, from processing the paperwork to conducting any ship inspections that may be necessary. Such direct costs may be

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fully or partially offset with appropriate port-entry, pilotage, mooring or anchorage fees. But the most significant burden entails the economic, political and other costs involved in slowing, complicating or otherwise interfering with the smooth and efficient flow of international trade. Whether a nation's port-entry scheme requires a merchant vessel to wait outside port until it receives clearance, embarks a pilot or agrees to submit to a search, or imposes such an extensive planning, inspection or reporting system on shipping companies or ship masters that it is no longer attractive to do business with a certain nation or port, any such conditions on port entry make international trade more time-consuming, difficult and costly. The 1965 Convention on Facilitation of International Maritime Traffic, modeled on earlier international efforts to improve international air traffic, emphasizes the importance of simplifying and reducing to a minimum the administrative burdens imposed on international shipping "to facilitate and expedite international maritime traffic . . ."<sup>35</sup> International legal principles also expect that port States will extend "equality of treatment" to prohibit discrimination in all rules governing port entry and conditions and procedures applied to foreign commercial vessels.<sup>36</sup>

Given the crucial importance of international trade in today's global economy, the cumulative impact of incremental costs, short delays or minor disruptions can have a profoundly adverse impact. In this regard, harmonizing and coordinating conditions on port entry throughout the world community, with similar expectations, requirements, forms and procedures, can achieve the desired goals without imposing as much of an administrative burden. Wisely balancing the benefits to be achieved from imposing conditions on port entry, such as intelligently devised security requirements, against the costs and burdens associated with each is essential. As one commentator observed, with respect to the broader efforts to protect the nation's security against potential terrorist attacks, "Ultimately, getting homeland security right is not about constructing barricades to fend off terrorists. It is, or should be, about identifying and taking the steps necessary to allow the United States to remain an open, prosperous, free, and globally engaged society."<sup>37</sup> Promoting relatively unrestricted oceangoing trade is essential to the continued economic vitality of the world. As Dr. James Carafano, senior fellow for National Security and Homeland Security at the Heritage Foundation, observed: "Global commerce is the single greatest engine in economic growth and it's the single most important thing that raises the standard of living for every human being on the planet."<sup>38</sup> The goal of policymakers and the attorneys and other subject-matter experts who advise them must be to find an appropriate balance that fosters effective and workable limitations on port entry directly related to promoting the important goals to be achieved, while avoiding unnecessarily burdensome restrictions and procedures that merely hamper free international navigation and trade.

## *II. Historical Background, Contemporary Context and Analytical Structure*

### **A. Historical Background**

Seaborne commerce has been a vitally important part of the world's economy ever since mankind began to engage in substantial trade with his neighbor. Portuguese, Chinese, Arabian, Indian, Italian, Dutch, Spanish and English ships competed with each other over the centuries to dominate key trade routes and control the supply of commodities and other valuable goods. Global maritime trade has been a vital component in stimulating international relationships and economic growth. Indeed, perhaps the most impressive structural development in the history of world growth and development has been oceangoing trade. Particularly for goods carried in quantity or bulk, water transportation has long been cheaper and more efficient and—until the advent of railways, modern highways and trucks, and airplanes—usually a good deal faster than the alternative transportation modalities.

At the same time, history has demonstrated the risks associated with maritime activities. Too often, the crews of seagoing vessels were engaged in activities less benign than mutually beneficial, arm's-length trading. Pirates and privateers wreaked havoc on ships engaged in peaceful trade. Coastal raiders, such as the Hittites in the twelfth century BC, and Vikings around the tenth century AD, ravaged shipping, ports and peoples. Vicious oceangoing criminals have preyed on those weaker than themselves along the coasts of Africa and Southeast Asia for thousands of years. Powerful maritime States engaged in the conquest of foreign lands and monopolization of vital shipping lanes and key trading ports and nations. From seaborne attacks against ports in the Mediterranean to the surprise attack on Pearl Harbor, States have sought to exploit coastal waters to wage aggressive warfare. History has demonstrated that the tremendous benefits of international ocean commerce must be balanced against the potential risks. Even so, while the history of international ocean trade no doubt has demonstrated the potential for adverse activities and consequences, including imperialism, colonization, conflict, piracy and maritime terrorism, seaborne commerce has long been a vital component in promoting global economic growth and improving living conditions worldwide.<sup>39</sup>

### **B. Contemporary Context**

Nothing in history rivals the scale on which the world community trades by sea today. Moreover, world trade has been growing at 6–10 percent each year.<sup>40</sup> Ocean commerce will no doubt become increasingly vital in years to come. Some 95 percent of the world's trade today is dependent on maritime commerce. If it were not for ocean transport of key commodities, such as oil and natural gas, cereal grains, such as wheat and rice, and construction materials, many of the world's peoples

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would not have power for their transportation and electrical systems, food for their tables or homes for their families. Increasingly, international trade has focused on high-value items, such as automobiles, televisions, furniture and expensive entertainment systems. Specially constructed roll-on, roll-off vehicle carriers and container ships carrying thousands of interchangeable sealed containers transport cargoes worth hundreds of millions of dollars. Often, the value of the cargo far exceeds the value of the ship. The nations of Asia, in particular Japan, South Korea, Thailand, Singapore, India and, increasingly, China (via modern port facilities in Hong Kong and, increasingly, on the mainland), dominate high-value ocean trade.<sup>41</sup> These States use a good portion of the profits from this trade to purchase oil and natural gas from the energy-rich Middle East, Indonesian archipelago, and parts of western Africa. Supertankers transport huge amounts of oil and liquefied natural gas (LNG) tankers carry tremendous volumes of natural gas through restricted waters of southeastern Asia to the vibrant, but energy-dependent, economies of North and South America, Europe, and South and East Asia.

Despite the tremendous worldwide economic growth exemplified by China, India, Brazil and several other developing States, the American economy remains, by far, the largest and most dynamic in the world. It would be difficult to exaggerate the importance of the maritime transportation component to this nation's economy. When measured by volume, more than 95 percent of international trade that enters or leaves this country does so through the nation's ports and inland waterways.<sup>42</sup> In 2004, US ports handled almost twenty million multimodal shipping containers.<sup>43</sup> Container ships, which account for only eleven percent of the annual tonnage of waterborne overseas trade, account for two-thirds of the value of that trade. Several of the 326 or so seagoing ports in the United States, including Los Angeles/Long Beach, New York, Houston, San Francisco and Baltimore, are among the busiest in the world in one or more categories.<sup>44</sup> In excess of two billion tons of domestic and international commerce now are carried on the water, creating more than thirteen million jobs and contributing more than \$742 billion to the gross national product.<sup>45</sup> Multimodal freight transportation accounts for nearly 15 percent of services the United States trades internationally. Each year, some 7,500 vessels flying foreign flags make 51,000 calls in US ports.<sup>46</sup>

Energy is also a critical and growing import into the United States. Large American owned and/or operated tankers carry oil from Valdez, Alaska to terminals and refineries on the West Coast. But a much larger volume of oil is imported into ports on the Gulf Coast from Mexico, Venezuela, Nigeria and the Middle East.<sup>47</sup> Increasingly, huge liquefied natural gas tankers call on US terminals to meet the tremendous and increasing American appetite for natural gas.<sup>48</sup> Presently, there are only six LNG terminals in the United States, but there are plans under way to



build dozens more.<sup>49</sup> Because the volume of international trade is expected to double by 2020, and because the maritime transportation system is the nation's best means of accommodating that growth, experts expect that the importance of seaports in the US economy will continue to grow dramatically over the coming years.<sup>50</sup>

While trade has grown dramatically, the potential national security risks are also far greater and more complex today than they have ever been in the past. To illustrate, in December, 1941, the Empire of Japan assembled a fleet consisting of six aircraft carriers, thousands of men, hundreds of aircraft and scores of supporting vessels (including submarines and mini-sub) to attack the US Navy and Army infrastructure at Pearl Harbor, Hawaii. This surprise attack killed some 2,403 service members and sixty-eight civilians, seriously damaged or destroyed twelve warships and 188 aircraft, caused hundreds of millions of dollars in damages to infrastructure, and plunged the United States into the Second World War.<sup>51</sup> Nearly sixty years later, a mere fifteen Al-Qaeda terrorists hijacked four civilian airliners and caused the death of nearly three thousand innocent civilians and wreaked incalculable financial costs by intentionally crashing three of the aircraft into the World Trade Center towers and Pentagon. As a result, the United States is now engaged in a "global war on terrorism" (GWOT), with hundreds of thousands of casualties and hundreds of billions of dollars in costs.<sup>52</sup>

Even this level of death and destruction would pale compared to the potential numbers of casualties, and the hundreds of billions of dollars in potential destruction and disruption of global trade, were a nuclear device, "dirty bomb" or other weapon of mass destruction to explode in a major port city, such as Long Beach or Baltimore.<sup>53</sup> Experts fear that terrorists could hide such a device in one of the many thousands of ubiquitous shipping containers imported into the United States every day.<sup>54</sup> Other scenarios, such as the possibility that terrorists would hijack an LNG carrier and detonate the cargo in a populated or industrial area, could also result in devastating destruction.<sup>55</sup> Assuming a rational and effective connection between restrictions on port entry and efforts to prevent such a disaster, a port State could condition port entry on compliance with virtually any set of maritime security measures consistent with international law. Likewise, port States could exert jurisdiction over foreign-flag vessels voluntarily in port, other than sovereign immune vessels, to carry out virtually any rational and effective security measure.

On the other hand, policy experts would argue that handcuffing international trade with irrational, excessive and ineffective restrictions would be counterproductive—enormously disruptive, hugely expensive and fundamentally unwise.<sup>56</sup> Moreover, if the United States were to adopt a policy to conduct wide-ranging, intrusive security raids on board foreign-flag vessels voluntarily present in US ports, such heavy-handed tactics would likely prompt international censure and, to some

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extent, discourage trade. For national concerns of somewhat lesser magnitude, such as to prevent customs violations or the importation of illegal drugs, the imposition of intrusive pre-entry requirements, while legal, should also be directly and reasonably related to the goals to be accomplished.

#### **C. Analytical Structure**

In evaluating the legal principles governing the right of port States to impose conditions on port entry to promote maritime security, this article will consider various factors. It will analyze the nature of the underlying activity, beginning with the most long-standing ones that are directly related to the vessel's visit to the particular port, and proceeding through those which have only recently been considered as conditions for restricting port entry, such as requiring other flag States to cooperate in the global war on terrorism. The more traditional, commonly required and obvious the condition on port entry, the more likely it will meet standards of international law, and also the more likely it will be widely regarded as prudent and necessary.

After analyzing the question of jurisdiction and the various types of underlying activities, we will next consider the nature of the conditions to be imposed, from something as unobtrusive as requiring the vessel to notify port authorities of its arrival, to a requirement to provide a list of the names and nationalities of all passengers and crew members, to submitting to an offshore inspection, to outright denial of entry to the port. The conditions may extend beyond the immediate visit of the vessel to the port State and include activities of the vessel on other occasions, of other ships of that shipping company or even of other vessels of that flag State.

Finally, we will consider a list of relevant questions that a port State and the international community should ask with respect to any proposed condition regulating entry into a port to ensure that it is reasonable and necessary. The questions deal with a variety of factors, ranging from the importance of the goal the regulatory scheme is designed to achieve, to the geographical and temporal nexus between the vessel and the port State, to the effectiveness of the proposed regulation, to the impact of the regulation on freedom of navigation and existing treaty obligations. The goal of this article is to develop and consider objective criteria to evaluate the legality and wisdom of conditions on port entry.

### *III. Conditions on Entry Directly Related to the Vessel's Port Visit*

#### **A. Port Security**

Historically, as well as presently, the most vital single concern that a port State has had with respect to one or more foreign vessels entering its ports and internal waters involves its own security. As the United States Supreme Court has expressed it,

“[I]t is ‘obvious and unarguable’ that no governmental interest is more compelling than the security of the Nation.”<sup>57</sup> As the English, Irish and French lookouts and private citizens stared awestruck out to sea in the years around the turn of the first millennium, they did not wonder whether the dozen or so longboats manned by Viking warriors they observed rowing into their ports or up their rivers were coming to engage in peaceful and productive trade. Instead, they were convinced, based on dreadful experience, that these Vikings were hell-bent on raiding their port villages, pillaging their riches, and abusing and murdering the inhabitants. In short, the security of their homeland was in peril.

For what good it might do, a port or nation obviously has always had the right to prohibit the entry of any vessel determined to inflict death and destruction upon it. In like manner, the port State could mandate a requirement that the pirate ship or foreign-flag raider disarm itself before entering, or sign a promise that no member of the crew would engage in any violent or illegal activities while in port. The problem was that, when faced with marauding Chinese pirates, Phoenician raiders or Vikings, the denizens of the beleaguered coastal port usually did not have the resources to insist on anything of the sort. Instead, the security forces and inhabitants could only run deep into the forest, row or sail further up the river, or climb the nearest mountainside, hoping that the raiders would not find the treasure hidden in the well or overtake and murder them as they fled.

Of course, pirates and other maritime raiders no longer represent a direct threat to Los Angeles, Lisbon or Sydney. Nonetheless, in the wake of 9/11, national security concerns remain paramount throughout the world. Experts conclude that the greatest single security risk to America and its allies today is a surreptitious terrorist attack on, or by way of, port cities using nuclear weapons.<sup>58</sup> To prevent the massive number of innocent deaths, physical destruction and financial disruption that this would entail,<sup>59</sup> a port State may legally do almost anything reasonably necessary to protect against such a threat. This article will discuss in detail the various possibilities of how far a port State may go to ensure port security during times of war or to protect against actual or potential threats to national security, such as from possible terrorist attacks.<sup>60</sup> Before doing so, however, we will first analyze the traditional requirements for port entry properly demanded of *bona fide* commercial vessels to comply with domestic laws to ensure good order and to protect the legitimate interests of the port State.

#### **B. Fiscal, Immigration, Sanitation and Customs Laws and Regulations**

Beyond seeking to ensure the security of the port State, the most long-standing, traditional requirements attendant to a commercial vessel entering a foreign port facility are those that pertain to compliance with port State laws involving fiscal,

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immigration, sanitation and customs (FISC) matters. From the time that the city fathers of Venice imposed import taxes on the foreign merchants seeking entry to trade their spices or other exotic wares, or the authorities of Tokyo required foreign ships to comply with domestic laws related to sanitation, health and immigration, coastal States have exacted financial requirements and imposed requirements to ensure that their citizens benefited from seaborne trade, rather than suffered adverse consequences.

All States today agree with the basic principle that a port State may condition a foreign ship's entry to port upon compliance with laws and regulations governing "the conduct of the business of the port . . . provided that these measures comply with the principle of equality of treatment" among foreign-flag vessels.<sup>61</sup> In the United States, Congress has provided for a regulatory scheme related to each FISC-related requirement, including port clearance and entry procedures,<sup>62</sup> payment of tonnage and customs duties,<sup>63</sup> restrictions on immigration,<sup>64</sup> and sanitation and health regulations.<sup>65</sup> No one doubts the legal authority for, indeed the necessity of, denying entry of a foreign ship to a port if passengers or members of the crew on board carry a serious infectious disease, such as tuberculosis or the plague.<sup>66</sup> Likewise, a port State may take necessary and effective steps, such as requiring that a local public health official first visit the vessel to confirm that the crew and passengers are all free of infectious disease, before granting port entry.<sup>67</sup> International law grants to port States the right to take necessary and appropriate actions to prevent the entry into the port of stowaways, absconders, deserters or other illegal immigrants.<sup>68</sup> Among those is the right to inquire as to nationality, demand to see each passport or other identifying document and determine the status and intentions of crew members and passengers.

For many years, each port State established its own paperwork and procedural requirements for foreign vessels to complete and submit. As international trade became more universal and essential, the hundreds of different procedural requirements and forms became burdensome, particularly where the failure to complete a particular document in a particular way caused the responsible bureaucrat to deny or delay port entry, or to delay departure. In some ports, a customs official would "overlook" a missing document or "assist" a master in filling out the required forms properly in exchange for an under-the-table payment. Even where no bribes or other chicanery was involved, the cost, confusion and delay inherent in complying with varying local laws and completing a plethora of different documents were considerable.

To help ameliorate the problem of burdensome forms and differing port-entry requirements, the 1965 London Convention on the Facilitation of International Maritime Traffic (FAL) established standard practices with respect to documents

and procedures that a port State may require a foreign vessel to submit prior to or upon port entrance.<sup>69</sup> Because it makes so much practical sense, the international community has embraced the Convention.<sup>70</sup> In implementing the FAL Convention to promote maritime efficiency, the International Maritime Organization (IMO) has developed recommended practices and prepared several standardized documents for port States to use.<sup>71</sup> Near universal agreement with what a port State could impose with respect to fiscal, immigration, sanitation and customs requirements, and standard forms and procedures, has greatly improved compliance and promoted international trade. While a port State not party to the FAL Convention could legally deviate from the IMO FISC-related standards as a condition for port entry, to do so would be self-defeating. No State wants to discourage international seaborne trade or, without good reason, increase the costs and delays associated with it. As a result, virtually all port States, whether or not party to the FAL Convention, use the standardized forms and follow the prescribed procedures.

### **C. Navigation, Pilotage and Mooring and Anchorage Requirements**

Port States have also traditionally imposed on visiting vessels the obligation to comply with requirements designed to ensure safe navigation within their internal waters and the operational efficiency of their ports. As Professors Myres McDougal and William Burke observed:<sup>72</sup>

Once vessels enter internal waters and are within state territory, states claim sole competence to prescribe for activities relating to the use of the waters. In the port, for example, coastal states claim authority to regulate the myriad activities connected with port operation such as the movement and anchorage of vessels . . . , assignments of berths, and numerous other events directly affecting the use of the area.

Applicable requirements range from rules mandating use of a pilot—often depending on the size of the vessel, its cargo, horsepower of its plant, and conditions of weather or tide—to manning and equipment expectations, to requirements as to where the vessel must anchor or moor. To have access to ports, all merchant vessels must follow the rules.

As a foreign vessel, particularly any large and unwieldy vessel, approaches the busy and restricted internal waters of a port, authorities of the port State usually require that a pilot boat meet it several miles from restricted waters. From the pilot boat emerges an expert mariner, with an intimate knowledge and familiarity about the waters, currents, shoals, winds and other peculiarities of the port, and who is comfortable in handling a wide range of merchant vessels in any kind of weather, tide, traffic, current and light conditions. The United States is one of many port

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States that condition a foreign vessel's right of entry to its ports upon compliance with non-discriminatory pilotage laws and regulations.<sup>73</sup> In a federal law that traces its origins to 1789, pilots and the laws concerning the use of pilots to enter US ports are generally governed by applicable state laws, rather than any federally mandated requirements.<sup>74</sup> The purpose of pilotage laws is to better ensure that a vessel can enter and operate within a port safely. The practice of requiring pilots in the world's major ports and restricted waterways to ensure the safe entry and departure of larger commercial vessels is increasingly common worldwide. For example, among other requirements, the People's Republic of China now requires the use of licensed pilots for all foreign commercial vessels calling on any of its ports.<sup>75</sup>

Proper port management also requires that port State authorities designate when, where, how and under what circumstances a vessel can navigate in inland ports and waterways.<sup>76</sup> Anyone who has passed through the Panama Canal can attest to the scores of merchant ships "waiting their turn" anchored at either the Atlantic or Pacific side until such time as the local authorities and a qualified pilot are ready to take them.<sup>77</sup> Managing vessel traffic in the busy, fifty-six-mile-long Houston Ship Channel is nearly as hectic.<sup>78</sup> Without some degree of coordination and control over vessel operations, the complicated ballet of ships navigating the channel, anchoring or mooring at the appropriate places, and on-loading and off-loading cargoes could not be done safely or efficiently. An obvious permissible condition on port entry is a vessel's willingness to use (and pay for) a qualified pilot and to follow the rules of the port and directions from the harbor master and other authorities as to when, where and how to proceed. Failure to comply with these requirements means that the vessel would not be permitted to enter port or, once there, would be subject to enforcement jurisdiction.

#### **D. Ability of the Vessel to Operate Safely**

Another significant goal of the port State is to ensure, as a condition of entry, that vessels entering a port will be able to navigate and operate safely.<sup>79</sup> Unsafe vessels and poorly trained crews present a major threat to the proper operation of a port facility and the coastal waters nearby. Those include vessels that are unseaworthy because they were not designed or constructed correctly or do not have proper equipment; are inadequately maintained; or have an improperly trained, manned or certified crew. The Transportation Safety Act includes special precautions that a port State may impose with respect to vessels carrying particularly hazardous materials, such as a cargo of explosives, radioactive materials or liquefied natural gas.<sup>80</sup> Unless the port authorities are convinced that a vessel transporting oil or other hazardous materials has the ability to enter port, conduct business there and depart the area safely, they are under no obligation to grant access to their internal waters

or ports.<sup>81</sup> Moreover, a port State has a right to insist, as a condition of entry, that the vessel and its crew have demonstrated that they are capable of operating safely and have no track record of maritime accidents.<sup>82</sup> The 1982 LOS Convention imposes a “duty to detain” on port States which have determined that a foreign-flag vessel within one of their ports is in violation of applicable international rules and standards relating to seaworthiness of vessels and thereby threatens damage to the marine environment.<sup>83</sup> Finally, a port State may require, as a condition of entry, that the vessel is equipped with the latest IMO-approved safety technology to avoid collisions and groundings.<sup>84</sup>

International commerce would come to a virtual halt if the authorities in each port took it upon themselves to impose unique requirements as to how a ship should be constructed, equipped, manned, trained and operated. As a result, the international community has established detailed rules for most aspects of the construction, equipping, operations, manning and training of merchant vessels above a certain size. Of all the conventions dealing with maritime safety, the most important is the 1974 International Convention for the Safety of Life at Sea (SOLAS), as amended.<sup>85</sup> The original version was adopted in 1914 in response to the sinking of the luxury passenger liner *RMS Titanic*, and the resulting loss of more than fifteen hundred lives.<sup>86</sup> The latest version of SOLAS was adopted in 1974 and has been amended periodically since then. Under SOLAS, classification societies carefully survey (inspect) vessels during and immediately after construction to ensure compliance with international standards for strength, stability, damage control, safety and equipment. Defects must be corrected prior to satisfactorily completing the survey. Only then does the classification society issue a certificate documenting the conditions under which the vessel may safely operate. Although flag States have the primary responsibility to ensure ships flying their flag are properly documented, port States party to the SOLAS Convention have a duty to “intervene” to prevent a vessel from sailing until the owners and crew correct any unsafe conditions.<sup>87</sup>

Another multilateral treaty, the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 (STCW Convention),<sup>88</sup> seeks to ensure that the vessel’s crew members, particularly the master and the vessel’s other officers, complete rigorous training on engineering, watch standing, ship handling, maintenance, rules of the nautical road, firefighting and damage control, and other emergency procedures. Only after he or she satisfactorily completes all aspects of training and demonstrates adequate experience and confidence under instruction is a crew member certified as qualified to serve. A major revision of the STCW Convention that the IMO completed in 1995 provides an even greater level of precision and standardization. The 1995 Amendments also

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enhanced port State control, providing a specific right of intervention and detention in the case of a collision, grounding or other casualty, or evidence of erratic ship handling.<sup>89</sup>

These STCW requirements provide qualification standards and expectations for seafarers. Ideally, a French master in charge of a supertanker sailing from the Persian Gulf to Europe and back will have the same high level of qualifications as a South Korean master on a massive container ship sailing to and from Singapore and Southern California. Each should be able to safely navigate any vessel in his charge through any weather or casualty that might arise. The STCW Convention covers many other matters related to maritime safety, including mandatory crew rest and periodic recertification. Under US law, no vessel may enter or operate in the navigable waters of the United States unless such vessel complies with all applicable laws and regulations designed to promote maritime safety.<sup>90</sup>

From the perspective of the port State, the local authorities have the right to inquire whether the vessel's SOLAS certification and documentation are in order, and if all the crew have their required and up-to-date STCW certificates, prior to allowing the vessel to enter port.<sup>91</sup> Ensuring that a port visit will be completed safely is an essential port State function, and any requirement reasonably related to this goal is permissible as a condition on port entry.<sup>92</sup> If port State authorities consider it to be essential or helpful to accomplish this purpose, they may direct that the visiting vessel submit to a boarding to verify the accuracy of the information provided and, in cases of doubt, to physically check the seaworthiness of the vessel and qualifications of its crew. Where a pilot is required to be on board, he or she may not proceed into port unless the appropriate authorities are confident that the vessel is shipshape in every respect.

The United States Congress recently imposed a safety-related requirement, which the Coast Guard has begun to implement, that virtually all commercial vessels operating in US navigable waters carry a properly functioning Automatic Identification System (AIS).<sup>93</sup> "AIS-equipped vessels will transmit and receive navigation information such as vessel identification, position, dimensions, type, course, speed, navigational status, draft, cargo type, and destination in near real time."<sup>94</sup> AIS can prove essential to avoid collisions and groundings, monitor vessel traffic flow, and, as discussed below, help identify and track vessels of interest for security purposes as part of Maritime Domain Awareness (MDA).<sup>95</sup> "Once a potential threat has been identified, a port or coastal State must have the capability to detect, intercept and interdict it using patrol boats or maritime patrol aircraft. Such action could disrupt planned criminal acts and prevent the eventuality of a catastrophe before it threatens the port."<sup>96</sup> Other safety-related technology that the United States requires of most commercial and certain other vessels calling on US



ports includes IMO-approved electronic position-fixing devices,<sup>97</sup> automatic radar plotting aids<sup>98</sup> and emergency communications systems.<sup>99</sup>

#### **E. Voyage Information**

Another area of inquiry that port States usually make of vessels calling on their ports is that relating to voyage information. One common condition of port entry is providing a vessel's Notice of Arrival (NOA), including advance information as to the date and time it expects to reach port. Under current US Coast Guard regulations, modified following 9/11, visiting ships must generally provide NOA information ninety-six hours prior to arrival.<sup>100</sup> The information required in an NOA is extensive, including the name of the vessel, flag State, registered owner, operator, charterer and classification society.<sup>101</sup> Other voyage information required is the names of the last five ports or places visited, dates of arrival and departure, ports and places in the United States to be visited, the current location of the vessel, telephone contact information, detailed information on the crew and others on board, operational condition of the essential equipment, cargo declaration and the additional information required under the International Ship and Port Facility Code (ISPS Code).<sup>102</sup>

The vessel must make an additional notice whenever there is a hazardous condition, either on board the vessel or caused by the vessel.<sup>103</sup> Failure to do so means that the vessel will be denied entry and will have to wait outside of the port until the Coast Guard and other port authorities are satisfied that they can safely clear the ship.<sup>104</sup> Many of the NOA requirements are related to port security concerns. The ninety-six-hour reporting requirement permits Coast Guard and other authorities time to run the vessel through the appropriate automated databases to try to identify terrorist threats, suspected involvement in drug trafficking or trafficking in illegal immigrants, suspicious or hazardous cargo, and any other special vulnerabilities. By identifying the current flag State, port State authorities can determine whether the flag State is party to international procedures to reduce the risk of a terrorist attack, whether the vessel in question has been prescreened at its previous port of call and whether there is an applicable agreement permitting at-sea searches. The NOA regime also provides adequate time to arrange for pilotage and tug escorts and plan for the optimal use of limited port resources. International law clearly permits port States to require foreign merchant vessels to provide such information directly related to the voyage as a condition of entry, particularly where the IMO has made such requirements mandatory for all vessels.<sup>105</sup>

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### *IV. Conditions on Entry Related to National Defense, Homeland Security, Counterterrorism and Law Enforcement Concerns*

#### **A. Vessels from Enemy, Hostile, Unfriendly or Rogue States**

A port State has an absolute right to deny entry to its ports to foreign warships and certain other categories of ships it considers threatening.<sup>106</sup> Although their sovereign status gives warships special immunities from enforcement jurisdiction, a port State is within its rights to require prior authorization, deny entry for any cause or no cause at all, or condition access, such as limiting the number of warships that may be in port at any one time, or requiring that the vessel enter and leave port only during daylight hours.<sup>107</sup> Even where there is an FCN treaty granting to each party reciprocal rights to enter each other's ports, the provisions usually exclude routine entry rights for "vessels of war."<sup>108</sup> Article 13 of the Statute on the International Régime of Maritime Ports specifically excludes its application to warships.<sup>109</sup> The recognition that international law gives to port State discretion with respect to providing entry to warships is due to the special sovereign immune character of warships, the potential threat that they might represent to the security of the port State and the lack of reciprocal benefits that accrue to the port State when a merchant vessel engages in trade.<sup>110</sup> As a general rule, therefore, warships must make special arrangements and obtain prior permission before entering a foreign port.<sup>111</sup>

The power to deny entry to enemy or potentially hostile vessels is an obvious security precaution that States have followed for centuries. However, warships are not the only vessels to which a port State may deny entry for security reasons. In October 2006, the Japanese government barred all ships from North Korea, including commercial vessels and scheduled passenger ferries, from entering any of its ports due to the "gravest danger" represented by the underground nuclear-weapons test in that rogue State.<sup>112</sup> Australia followed suit, banning all North Korean ships from entering its ports except in dire emergencies.<sup>113</sup> The United States has taken even broader action against rogue States. In its most recent Maritime Operational Threat Response Plan, which is published as part of the National Strategy for Maritime Security, the US government listed six States as non-entrant countries. The six presently on the list are Cuba, Iran, Libya, North Korea, Sudan and Syria.<sup>114</sup> The Secretary of Homeland Security is charged with denying entry to all such vessels "to the internal waters and ports of the United States and, when appropriate, to the territorial seas of the United States."<sup>115</sup>

The right to deny port entry in times of actual or perceived threats to national security is well established in international law. In the early 1900s, Venezuela closed its ports to the vessels of a single US shipping company during a period of revolutionary activity in that nation. The steamship company filed suit before an

international arbitral tribunal complaining that the denial of access to Venezuelan ports was arbitrary and discriminatory, particularly since those same ports remained open to vessels from other companies.<sup>116</sup> Venezuela claimed that it had denied port entry to that company's vessels to prevent rebel forces from receiving support and supplies, and that the steamship company in question was the only one friendly to the rebels. The umpire found that the prohibition was permissible, opining that "the right to open and close, as a sovereign on its own territory, certain harbors, ports or rivers in order to prevent the trespassing of fiscal laws is not and could not be denied to the Venezuelan Government, much less this right can be denied when used . . . in defense of the existence of the Government."<sup>117</sup>

At the same time, US government officials may not act arbitrarily in denying port entry, even when based on security concerns. In 1950, President Truman, acting under the authority of the Magnuson Act, 50 US Code sec. 191, issued Executive Order 10,173, granting to cognizant officials of the US Coast Guard the authority to deny entry to US ports of foreign-flag vessels, or direct their anchorage and movement in US waters, as may be "necessary . . . to prevent damage or injury to any vessel or waterfront facility or waters of the United States . . ."<sup>118</sup> In *Canadian Transport Co. v. United States*, a Canadian corporation brought action against the United States for damages for the Coast Guard's refusal to permit a merchant vessel having a Polish master and officers entry to harbor in Norfolk, Virginia, on the basis that the presence of Communist bloc officers in that sensitive port might pose a risk to national security.<sup>119</sup> The District Court had entered summary judgment against plaintiff for failure to state a claim.<sup>120</sup> On appeal, however, the D.C. Circuit held that "if the Coast Guard officers acted arbitrarily and in violation of regulations in diverting [the foreign merchant vessel], the United States is not immune from a damage action . . ."<sup>121</sup> The Court returned the case to the District Court for a factual hearing on that single issue.

#### **B. Denial of or Restrictions on Entry Related to Terrorism Concerns**

In recent years, international terrorism has replaced the Cold War and revolutionary zeal as the focus of greatest global security concern. Three trends—economic globalization, diffusion of nuclear weapons technology and well-funded and fanatical terrorism—present an unprecedented security threat to the United States, its trading partners and the whole world.<sup>122</sup> Given these trends, port States must do all they can to keep foreign merchant ships out of their coastal waters if they represent any kind of security risk; the stakes are simply too high.<sup>123</sup> According to Dr. Stephen Flynn, the current Jeane J. Kirkpatrick Senior Fellow in National Security Studies at the Council on Foreign Relations and an expert on the risk terrorists pose to international trade, the essence of the terrorist strategy is global economic

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havoc: “There is a public safety imperative and a powerful economic case for advancing international trade security.”<sup>124</sup> Terrorism experts, and the terrorist organizations themselves, consider seaports to be particularly susceptible to attack.<sup>125</sup>

Moreover, the proliferation of nuclear weapons and other weapons of mass destruction, and the means to deliver them, dramatically increase the threat. Osama bin Laden is reported to have described the acquisition of nuclear weapons by Al-Qaeda as a “religious duty.”<sup>126</sup> An improvised nuclear weapon or “dirty bomb” hidden in a shipping container, secreted into a port city and then detonated there or after it has been loaded on a train or truck and in the transportation network could cause hundreds of thousands of deaths, hundreds of billions of dollars in destruction and incalculable damage to the world’s confidence in the global trading system. To prevent a terrorist attack by means of a weapon of mass destruction is a top priority, within both the United States and the international community.<sup>127</sup> Moreover, traditional containment and deterrence strategies that worked during the Cold War are no longer likely to succeed against fanatical terrorist groups.<sup>128</sup> Appropriate measures to reduce the risk of such an attack include any conditions on port entry, or outright denial of such entry, designed to detect and deter terrorists; nuclear weapons and other instrumentalities of mass destruction; and other weapons, supplies and materials used by terrorists from entering a port State.

While an attack with a nuclear weapon secreted on a container ship or otherwise introduced into the transportation system poses the gravest danger to a port State, a terrorist group could cause catastrophic damage using weapons widely available to it, such as conventional explosives and rockets. Before 9/11, for example, few would have guessed that a small group of committed, suicidal terrorists could have caused so much death and destruction by commandeering civilian jetliners and crashing them into the World Trade Center and Pentagon.<sup>129</sup> Various terrorist cells are no doubt speculating even now on vulnerabilities in existing port security plans and developing stratagems to try to exploit them.

A port State has the right to deny entry or impose conditions on entry to its ports when it determines such action to be necessary to protect the port or coastal State and the security of the population against terrorist or other attacks. Indeed, under the “vital interests” analysis discussed above, this fundamental principle is self-evident. Nothing could be more “vital” than defending the homeland against a massive terrorist attack. Following the terrorist attacks on 9/11, the US Congress appropriated funds and passed laws, the Department of Homeland Security and other cognizant agencies implemented new policies and procedures, and airport, border, coastal, and port security has been strengthened considerably. Even so, experts agree that much more work needs to be done to make our nation’s ports and borders truly secure and prepared.<sup>130</sup>

There is an additional international legal basis for taking action against potential terrorist attacks—the fundamental right of self-defense. Article 51 of the United Nations Charter provides: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations . . . .” While the United Nations originally visualized this provision as applying to defending against armed attacks initiated by other nation-States, such as Nazi Germany’s attack on Poland on September 1, 1939 or the invasion of South Korea by Communist North Korea in June, 1950, it seems perfectly appropriate to extend the right of self-defense to deter attacks by subnational terrorist groups, such as Al-Qaeda, in the GWOT. In the United States today, the emphasis has changed from enforcing the law and responding to attacks, to anticipating and preventing such attacks.<sup>131</sup> International law limits what a nation-State may do to protect itself against an armed attack by shooting first<sup>132</sup> or taking preemptive military measures beyond its own territory.<sup>133</sup> However, that paradigm may be changing with respect to preemptive action in anticipation of a terrorist attack. As the White House has argued:

We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries. Rogue states and terrorists . . . rely on acts of terror and, potentially, the use of weapons of mass destruction . . . . To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.<sup>134</sup>

In order to better protect the homeland against a terrorist attack, individual States and the international community must have adequate means to identify and track weapons, vessels, cargo, passengers and crew, and to take appropriate action against those that represent a threat. Some of the new programs designed to improve coastal and port security against potential terrorist attacks include the (1) Proliferation Security Initiative (PSI), (2) Container Security Initiative (CSI), (3) Automated Identification System (AIS), (4) Long-Range Identification and Tracking (LRIT) of Ships, (5) International Port Security Program, and (6) other initiatives to identify personnel and vessels that pose a security threat to the United States and its trading partners and to devise and improve processes to detect and deter them.<sup>135</sup>

One key reason for advancing the requirement of foreign vessels to provide a Notice of Arrival at least ninety-six hours before they plan to enter a US port is to ensure adequate time to check the accuracy and veracity of the details the vessel has provided.<sup>136</sup> In the United States, watch standers at the National Vessel Movement Center (NVMC) monitor the data and evaluate and promulgate possible threats.<sup>137</sup> However, the decision to approve or disapprove port entry is left to the discretion

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of the Coast Guard Captain of the Port (COTP).<sup>138</sup> Implementing and improving processes to identify and track vessels and their cargoes, and to ensure the reliability of their crews, will continue to be a key factor in ensuring the security of the global transportation network in the United States and around the world.<sup>139</sup> This article will now briefly consider several of these initiatives and programs.

#### *(1) Proliferation Security Initiative*

For many years, the United States and its allies were justifiably concerned about the prospect of certain categories of weapons and delivery systems falling into the hands of terrorists and rogue States. Various initiatives, including the Nuclear Non-Proliferation Treaty, specifically addressed the concern of proliferation of nuclear weapons and their delivery systems. The concern that outlaw States or international terrorists could get their hands on weapons of mass destruction intensified following the 9/11 terrorist attacks on the World Trade Center and the Pentagon. President Bush announced the PSI on May 31, 2003, as a “new effort to fight proliferation” through international agreements “to search . . . ships carrying suspect cargo to seize illegal weapons or missile technologies.”<sup>140</sup> The PSI was designed to help fill in the gap in international law to ban the secretive and dangerous trade in nuclear weapons, ballistic missiles, other weapons of mass destruction and their delivery systems, and component materials.<sup>141</sup>

The impetus to develop the PSI concept was largely due to the circumstances surrounding the interdiction of the North Korean freighter *So San* some six hundred miles off the Yemeni coast, which demonstrated the lack of international legal tools then available.<sup>142</sup> American satellites and Navy ships had tracked the *So San* following its departure from North Korea in mid-November 2002. Since the vessel was not flying a flag and there was intelligence information available that it was carrying ballistic missile components to Aden, Spanish naval vessels, in coordination with the United States, stopped and boarded the *So San* on the high seas.<sup>143</sup> The crew of the *So San* contended that the vessel was carrying a legal cargo of concrete to Yemen and showed papers demonstrating that it was validly registered in North Korea. Nonetheless, the search proceeded and uncovered Scud ballistic missile components and chemicals necessary to fuel the missiles hidden beneath the concrete. After Yemen demonstrated that the cargo was perfectly legal under a standard sales and shipping contract, Spanish and American authorities eventually had to acquiesce in the vessel continuing on to its destination.<sup>144</sup>

There was a general consensus within the Bush Administration, particularly within the Department of Defense, that this was an unacceptable result and that something had to be done to change existing law and operational procedures to permit the interdiction of such shipments.<sup>145</sup> In consultation with other concerned

States, President Bush developed and announced the *Statement of Interdiction Principles* that States participating in PSI are “committed” to undertake.<sup>146</sup> Among those steps the *Statement* lists as appropriate is that the States will stop and search suspected vessels, and “enforce conditions on vessels entering or leaving their ports, internal waters, or territorial seas that are reasonably suspected of carrying [prohibited] cargoes, such as requiring that such vessels be subject to boarding, search, and seizure of such cargoes prior to entry.”<sup>147</sup> Although the *Statement* specifically provides that any actions taken under the PSI will be “consistent with national legal authorities and relevant international law and frameworks, including the United Nations Security Council,” some governments and observers are concerned that aspects of the PSI interdiction efforts beyond the limits of national jurisdiction may violate international law.<sup>148</sup> However, if done with the cooperation of the flag State and in compliance with the *Statement*, interdiction activities should not raise any legal problems. Moreover, the United States and its allies could use failure of the flag State to cooperate in the PSI as the basis for denying or restricting port entry to vessels registered in that State.

(2) *Container Security Initiative*

Another recent initiative to combat the risk of international terrorist attacks on US ports is the CSI.<sup>149</sup> The CSI allows US customs agents, in coordination with foreign governments, to prescreen high-risk cargo containers at the port of departure.<sup>150</sup> Today the CSI process results in the preclearance of some 90 percent of the containers that enter US seaports and is in place in at least fifty major international seaports around the world.<sup>151</sup> The CSI process consists of four key elements: (1) using automated information to identify and target high-risk containers; (2) prescreening those containers identified as high risk before they leave foreign ports; (3) using up-to-date detection technology to quickly and efficiently prescreen high-risk containers; and (4) developing and using “smarter,” more secure tamper-proof containers.<sup>152</sup>

American citizens and allied nations expect that the United States will adopt port entry requirements that are reasonably related to the real threat, effectively designed to respond properly to it, and no more costly or intrusive than reasonably necessary. For example, a requirement that every vessel bringing containers into a US port must wait at a point 200 nautical miles from our shores until the US Coast Guard boards the vessel and opens and inspects every container on board would not violate international law.<sup>153</sup> However, given the millions of containers in transit, the practical impossibility of searching them while on board a vessel under way, and the costs and delays that any such effort would entail, this would be an unworkable and unwise policy.<sup>154</sup> The CSI, on the other hand, focuses on a relatively

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small number of containers that security experts have determined to be “high risk.” Trained screening personnel, using the latest high-technology equipment, prescreen these “high risk” containers while they are readily accessible, before they are loaded on the vessel en route to the next port of call. Among other things, the recently enacted Security and Accountability for Every Port Act (SAFE Act) codifies the Customs-Trade Partnership Against Terrorism, a public-private sector initiative that offers international shipping companies benefits such as expedited clearance through US ports in exchange for improvements in their internal security measures.<sup>155</sup> Giving preferential access to vessels from CSI ports is an efficient, effective, legal and relatively inexpensive way to lower the threat of international terrorism.

The fourth key element of the CSI process is to use technology to develop and employ more secure containers. Perhaps the most promising option is to use the latest sensor and computer technology to continually monitor the location, status and cargo of each container. A requirement that every container entering the United States carry a fully functional, self-contained tamper-resistant embedded controller (TREC) would also be a reasonable condition of port entry, particularly if industry were to agree to participate voluntarily or if it were part of an IMO vessel security initiative.<sup>156</sup> TREC technology is rapidly being refined and becoming widely available.<sup>157</sup> Various companies are developing and deploying TRECs that use sophisticated operating systems and act as intelligent, real-time tracking devices. These devices are capable of detecting radiation, reporting tampering of the container and, when coordinated with shipping plans entered into a computer, identifying voyage routing and other anomalies.<sup>158</sup>

A pilot program is under way to permanently install such controllers on a large number of containers. Each unit uses the latest generation of satellite tracking devices and an advanced technology network for use by manufacturers, retailers, logistics providers, carriers and governments to share real-time cargo information. In addition to detecting unauthorized access to the container and providing a constant information stream as to location and status, the TREC controllers have the potential to constantly monitor each container’s contents to detect the presence of radioactive materials and chemical and biological weapons. Any anomaly could lead to a denial of port entry until such time as appropriate authorities could test the container offshore or at a safe location.

Moreover, by enabling them to know exactly where each container is in the world at all times, those depending on the shipments and efficient use of the containers would benefit enormously. For example, imagine that the BMW automobile plant located in Spartanburg, South Carolina is expecting a shipment of necessary component parts from Germany to arrive on August 1. Because of a



severe Atlantic hurricane, however, the container ship must delay its arrival by several days. In a just-in-time supply chain, such a delay could cause an expensive halt in the assembly line. Knowing of the disruption and to avoid that production delay, the factory might order an interim shipment of essential parts to be shipped by air. All of this could be done automatically, saving millions of dollars in production delay and unnecessary warehousing. Another key business advantage, particularly to the company that owns the shipping container, is that, as soon as the cargo is off-loaded, it would become immediately available to pick up another shipment. Except for the most efficient companies, no one currently keeps track of millions of such containers throughout the world. Detecting a weapon of mass destruction thousands of miles from the United States, while an absolutely priceless security benefit, would be “frosting on the cake” to the everyday value of a far more efficient global supply system.

A similar tamper-resistant device could be developed to be permanently affixed to each vessel in the world, no matter how small. Ideally, such devices could detect the presence of dangerous materials on board or keep track of, and report on, routing anomalies. If US policymakers were to determine that such devices on containers or vessels would contribute meaningfully to our maritime security, they could require that every vessel entering a US port be equipped with fully functional units as a condition of port entry. Global cooperation to develop the best possible technology, and an international agreement to require the use of such technology on all vessels, would be the best approach to the effective implementation of such requirements worldwide.

Even though the total cost to install a TREC on every container would be significant, unit costs would no doubt come down as mass production of the device was begun and makers competed for their portion of the market to equip millions of containers. Although the international community must expect growing pains as the CSI becomes fully operational, initiatives to prevent the “bomb in a box” or “bomb on board” scenario are important tools to protect homeland security and the international transportation network against the threat of paralyzing and expensive terrorist attacks.

### *(3) Automated Identification System*

Modern detection, information and communications technologies provide the potential capability to accomplish much of what needs to be done to enhance the security of the global maritime transportation system. Although initially introduced as a collision avoidance and maritime safety tool, the IMO has recently promoted AIS “as a mandatory prescription to the shipping industry’s fear of terrorism.”<sup>159</sup> Although there were growing pains as the technology was developed, AIS has

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proven to be very helpful, both to mariners and flag and port State authorities. Even before the emphasis shifted to combating terrorism, maritime experts had identified satellite-based vessel monitoring systems as an invaluable tool for managing fisheries and for promoting maritime safety.<sup>160</sup> The Department of Homeland Security has statutory authority to implement regulations to fully implement AIS in the United States.<sup>161</sup> The Coast Guard also recognizes the need for such AIS information to improve Maritime Domain Awareness by monitoring vessels approaching the US coastline and, ultimately, to develop the intelligence necessary to help deter terrorist attacks on US ports.<sup>162</sup>

The Maritime Transportation Security Act of 2002<sup>163</sup> and the Coast Guard and Maritime Safety Act of 2004<sup>164</sup> required the Coast Guard to develop and implement a comprehensive vessel identification system. This system will enhance the Coast Guard's capabilities to monitor vessels that could pose a threat to the United States.<sup>165</sup> AIS is a relatively mature technology, having been a key component of IMO's marine safety system for years. All vessels using the Vessel Traffic Service while entering or leaving major ports in the United States must now employ AIS. Consistent with internationally agreed vessel equipment standards, AIS is compulsory on all large commercial vessels worldwide. Moreover, US law and regulations require that it be operational on larger vessels entering US waters.<sup>166</sup> The United States and its trading partners may further exploit AIS to keep track of vessels, with satellite AIS tracking on the near-term horizon.<sup>167</sup>

#### *(4) Long-Range Identification and Tracking of Ships*

The Long Range Identification and Tracking of Ships system is another IMO initiative under SOLAS.<sup>168</sup> When it becomes fully operational in January 2009, LRIT will require ships to which the requirement applies (passenger ships, cargo ships over 300 gross tons, including high-speed craft, and mobile offshore drilling units on international voyages) to transmit their identities, locations, and dates and times of their positions.<sup>169</sup> That information may be accessed upon payment of the costs thereof by port States for those ships that intend to enter ports of that State. Most significantly, coastal States may obtain access to the information when the ship is a designated distance off that State's coast, not to exceed one thousand nautical miles.<sup>170</sup> As it is presently planned, there will be no interface between LRIT and AIS. One of the more important distinctions between LRIT and AIS, apart from the obvious one of range, is that, whereas AIS is a broadcast system available to all within range, data derived through LRIT will be available only to the SOLAS contracting-government recipients who are entitled to receive such information. As a result, the LRIT regulatory provisions have built-in safeguards to ensure the confidentiality of the data and prevent unauthorized disclosure or access. LRIT will be another

tool to keep track of vessels that might represent a security threat. Traditional freedom of navigation principles prevent a coastal State from requiring AIS or LRIT information on foreign-flag vessels merely navigating on the high seas or within the exclusive economic zone, or engaged in innocent or transit passage through the territorial sea. However, by adopting the AIS and LRIT amendments to SOLAS, contracting governments may obtain available AIS and LRIT information from other contracting States. Vessels from States that choose not to participate may be subject to extra scrutiny and delay, additional port access screening or reporting requirements, or even outright denial of entry to ports.

*(5) International Port Security Program*

In December 2002, the IMO adopted a new set of rules for all States and international shipping companies.<sup>171</sup> These rules included changes to the Safety of Life at Sea Convention through adoption of the ISPS Code. These came into effect on July 1, 2004. The ISPS Code requires States to assess the security risks at all port facilities and to ensure that port operators prepare and implement security plans. Shipping companies have to evaluate risks to their vessels and develop prevention and response plans. Moreover, ISPS requires that ships install AIS, develop ship security alert systems, create a permanent display of their vessel identification numbers and carry a valid International Ship Security Certificate. Assuming that vessels comply with the ISPS requirements, port States may not take enforcement action against the vessel, including denial of port entry, unless there are “clear grounds” for concluding that a vessel represents a security threat to the port State. Even then, international procedures encourage the port State to provide an opportunity for the vessel to rectify the non-compliance.

Under US law, the Coast Guard is responsible for determining whether foreign ports are maintaining effective anti-terrorism measures.<sup>172</sup> To do this, the Coast Guard created the International Port Security Program. It generally uses a State’s implementation of the ISPS Code as the key indicator as to whether it has effective anti-terrorism measures in place.<sup>173</sup> When the Coast Guard determines that a foreign port is not maintaining effective anti-terrorism measures (normally by its failure to fully implement the ISPS Code), the Coast Guard imposes conditions of entry on vessels arriving in the United States from a port of that State. These conditions of entry usually require that the vessel take additional security measures, both while in the foreign port and in the United States, to rectify the apparent non-compliance. In addition, the Coast Guard will issue a port security advisory concerning that port and publishes a notice in the Federal Register to provide public notice of its determination. Should a vessel not meet those conditions or

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should there be additional “clear grounds” for concern, the vessel may be denied entry into the United States.

Before allowing it to enter its first US port of call, the Coast Guard must board and inspect each high-interest vessel before it enters the territorial sea or, depending on local conditions, shortly thereafter. Before the Captain of the Port will permit the vessel to enter the US port, the inspection team must first determine that the vessel has complied with special security conditions in the foreign port(s), conduct an inspection using radiation-monitoring equipment and impose certain additional security requirements.<sup>174</sup> If the vessel is unwilling to subject itself to any of these conditions or the inspection fails to resolve any security concerns, the COTP has the authority to impose various “control and compliance measures,” including denial of entry to the port.<sup>175</sup> Presently, the Coast Guard requires that foreign-flag vessels list the five previous foreign ports on which they have called.<sup>176</sup> Since any such measures would be designed to effectively reduce the risk of a terrorist attack on a US port, imposing such non-discriminatory conditions on port entry comports with international law. Vessels that meet the requirements of the ISPS Code and have called upon ports that are in compliance with the ISPS Code generally will not be considered to be of “high interest” and will not typically be required to undergo inspections beyond the US territorial sea.

The effect of the ISPS Code and efforts to implement it around the world means that today the IMO, the United States and the rest of the international shipping community has a much better handle than ever before on where all commercial vessels are at any one time, the nature of the potential security threat, how to avoid a terrorist incident and how best to respond to various other emergency situations.

#### *(6) Other Programs Designed to Improve Vessel and Port Security*

At the IMO, within the US government, and in various international fora, responsible policy experts are engaged in an ongoing effort to review and improve programs designed to enhance the security of commercial vessels and ports. Time and space does not permit a comprehensive review of all the various proposals. Suffice it to note here that whatever international agreements the international community develops to improve security against potential terrorist attacks must include appropriate legal and policy bases on which to impose conditions on entry into port.

#### **C. Denial of or Restrictions on Entry Related to Suspected Criminal Activity**

States have a right to require that vessels seeking to call on their ports will comply with relevant criminal laws and regulations designed to protect the peace and security of the port State. Port State authorities may deny entry to, or impose extensive

controls on, commercial vessels seeking access to their ports as they may deem necessary to ensure that any such vessels are not promoting criminal activities.

There is a vast array of potential criminal activities that can be promoted through port entry, ranging from the importation of illegal drugs, trafficking in women and children for various criminal purposes, maritime terrorism, illegal immigration, and other violations of customs and immigration laws and regulations. To combat such illegal activities, States may require vessels visiting their ports to submit to law enforcement boardings and investigatory screenings. Moreover, if flag States, particularly “open registry” or “flags of convenience” States, are unwilling to take appropriate action to ensure that vessels that they have registered are not engaged in criminal enterprises, a port State could appropriately deny entry to vessels from such States.<sup>177</sup> All States naturally see effective crime prevention as a vital State interest that justifies appropriate investigation and exercise of the sovereign right to close or protect access to their ports.

If a State is aware that a particular vessel, the vessels of a particular company, or the vessels operating under the flag of a particular State are engaged or likely to be engaged in criminal activity, that State’s port authorities may deny entry to that vessel or that group of vessels.<sup>178</sup> Likewise, these authorities may require that those vessels submit to a records review, a thorough search, and/or other personnel or cargo screening as a precondition for entry. To increase security in the transportation industry, the US Congress established a requirement that all “crewmembers on vessels calling at United States ports . . . carry and present on demand any identification that the Secretary decides is necessary.”<sup>179</sup> This has evolved into the Department of Homeland Security’s initiative to establish a transportation workers identification credential (TWIC) for workers in the maritime industry.<sup>180</sup> In the SAFE Port Act of 2006, Congress directed that persons convicted of certain crimes could not obtain a TWIC, and that the TWIC process be in place at the ten most vulnerable US ports by July 1, 2007, and that the process be in place for the forty most vulnerable ports by July 1, 2008.<sup>181</sup> The benefits of requiring and screening lists of crew and passengers in an NOA include the opportunity to detect those with criminal records. All of these conditions on entry are well established in traditional State practice.<sup>182</sup>

#### **D. Balancing the Right of Port Entry in Emergency Cases of *Force Majeure* or Distress with the Protection of the Vital Interest of the Port**

There is one set of circumstances where customary international law generally recognizes a vessel’s right to enter any port—where the ship is in distress due to *force majeure*.<sup>183</sup> Historically, a vessel in distress due to bad weather conditions, dangerous sea state, involvement in a collision, fire or other emergency condition threatening the loss of the vessel and the lives of those on board enjoyed a right to seek

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refuge in a foreign port, bay or other protected internal waters of a foreign coastal State.<sup>184</sup> The 1982 LOS Convention recognizes the principles of *force majeure* and distress as permitting a ship to stop and anchor when in innocent or transit passage.<sup>185</sup> Moreover, both coastal States and individual mariners have an obligation to take affirmative action to render assistance to vessels and persons “in danger of being lost at sea.”<sup>186</sup>

As a general rule, vessels in distress have a right of entry into the internal waters of a port State to seek shelter without first obtaining permission from that State, especially when there is the real risk that the vessel might be lost, thus putting the lives of those on board at genuine risk.<sup>187</sup> Moreover, the sovereign authority of the port State does not generally apply to vessels forced to seek refuge in a port by *force majeure* or other necessity, except as may be necessary to ensure the safe and efficient operation of the port.<sup>188</sup> Under long-standing principles of customary international law, therefore, when a vessel is in extremis and must take shelter in a safe harbor, the port State may not exclude the vessel from its internal waters and may “not take advantage of the ship’s necessity” in any way.<sup>189</sup>

On the other hand, port States have a right to protect themselves and their citizens under the principle of self-preservation. This basic principle gives such States the right, indeed the fundamental responsibility, to keep dangerous instrumentalities and conditions away.<sup>190</sup> As Professors McDougal and Burke expressed it: “[I]f the entry of the vessel in distress would threaten the health and safety . . . of the port and its populace, exclusion may still be permissible.”<sup>191</sup> The Netherlands Judicial Division of the Council of State recently considered the conditions under which a badly damaged Chinese vessel had a right to enter Dutch waters for the purpose of effecting repairs in a shipyard:<sup>192</sup>

[U]nder international law [a State] may not go so far as to prevent a ship which is in distress and requires repairs from entering territorial and coastal waters and seeking safety in a port or elsewhere along the coast. In such case, the seriousness of the situation in which the ship finds itself should be weighed against the threat which the ship poses to the coastal State.

Thus, the right to seek refuge does not extend to situations in which greater damage or loss of life may result were the vessel to enter. The port State must balance the emergency on the vessel with the threat to its own people and nation. Given the national security sensitivities in the world today, it seems unlikely that any vessel in distress today can demand entry to any port at any time. Instead, port State authorities may well conclude, based on all the relevant factors, that permitting a vessel entry into its port or internal waters represents an unacceptable threat to vital port

State interests, and take all necessary action to bar entry. However, the doctrine of *force majeure* continues to represent a viable basis for requesting such access and, in most cases, fully expecting to find safe refuge. Moreover, if port State authorities deny or condition entry, they should be able to articulate a defensible basis for doing so. Finally, if the port State denies entry, that State's authorities, and the masters of any vessels in a position to assist, must provide appropriate aid to preserve the lives of any mariners or other persons in distress.<sup>193</sup>

#### ***V. Domestic Authority and Practical Procedures for Denying Port Entry***

Even if a port State has the international legal right to deny entry to its ports to a particular vessel in the interests of maritime security, the cognizant officials must usually have explicit domestic authority to do so. While a country's head of State or legislative body could formally advise another State that vessels flying its flag are not welcome within its ports (such as Japan and Australia have recently done with respect to vessels flying the North Korean flag and the international community is doing to enforce UN sanctions against Iran), most decisions are made by lower-level functionaries seeking to apply domestic law designed to promote the interests of the State. Since there is a general presumption of entry for foreign-flag commercial vessels, an official who determines that a vessel may not enter under certain circumstances must generally have the domestic legal authority to do so. Otherwise, that official and his agency may experience legal and political complications for engaging in an *ultra vires* act or failing to follow mandated procedures. This might even result in a lawsuit and/or political or diplomatic pressures if the responsible official has taken unauthorized or illegal action to the detriment of the foreign-flag shipping company and the domestic interests using that vessel to engage in international trade. In other words, even if a State has the international legal right to prevent entry, the exercise of that right must be carried out in accordance with domestic legal authority and following established procedures.

In the handful of reported decisions that have focused on the denial of port entry in the United States, the aggrieved party has generally taken the position that the officials who have made the decision to do so have acted contrary to domestic law and policy. In *Canadian Transport Co. v. United States*, for example, a Canadian corporation brought an action for damages for the Coast Guard's refusal to permit a vessel employing a Polish master and several Polish officers entry to the harbor in Norfolk, Virginia.<sup>194</sup> The appellate court observed that "if the Coast Guard officers acted arbitrarily and in violation of regulations in diverting [the foreign merchant vessel], the United States is not immune from a damage action . . . ."<sup>195</sup>

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In a more recent case, *Humane Society of the United States v. Clinton*,<sup>196</sup> plaintiffs successfully sued President Clinton and the Secretary of Commerce because of the federal government's failure to take timely action to sanction Italian driftnet fishing vessels when these government officials had, or should have had, reasonable cause to believe that such vessels persisted in employing excessively long driftnets in violation of an international treaty and the implementing statute.<sup>197</sup> The US Court of International Trade concluded that "nine confirmed sightings [of illegal driftnet fishing by Italian vessels] combined with the numerous allegations make the Secretary's refusal to identify Italy a second time arbitrary, capricious and not in accordance with the Driftnet Act."<sup>198</sup>

Existing federal statutes and regulations give the Coast Guard rather broad power to deny port entry and control operations within US waters of foreign-flag vessels found to be in violation of laws, regulations or treaties to which the United States is a party. The Ports and Waterways Safety Act of 1972, as amended,<sup>199</sup> specifically authorizes the Secretary of Homeland Security (delegated to the cognizant Coast Guard District Commander and COTP) to deny port entry to any US port or navigable waters if "he has reasonable cause to believe such vessel does not comply with any regulation issued under this chapter or any other applicable law or treaty."<sup>200</sup> Implementing regulations provide that "[e]ach District Commander or Captain of the Port . . . may deny entry into the navigable waters of the United States . . . to any vessel not in compliance with the provisions of the [Act] or the regulations issued thereunder."<sup>201</sup> Later in that regulation, the District Commander or COTP is given authority to order a vessel to operate in a particular manner whenever he "has reasonable cause to believe that the vessel is not in compliance with any regulation, law or treaty . . ."<sup>202</sup>

When a port State has good cause to deny port entry to a foreign-flag vessel and decides to do so, it has an obligation to notify the vessel's master, its flag State and its owner(s) in as timely a manner as is reasonable under the circumstances. The President, Secretary of State, appropriate US ambassador or other authorized State Department official could communicate to the appropriate flag State that a particular vessel may not call upon ports in the United States because of its violation of an international convention or domestic law. However, under existing US procedures, appropriate Coast Guard officials normally carry out the process of denying port entry to a foreign-flag vessel where US laws and regulations require or authorize it. The cognizant District Commander or COTP normally issues an order to the vessel denying port entry. Such an order should include a summary of the factual situation, the basis for denying port entry, the legal authority for taking such action, the circumstances under which the order would be rescinded, the potential penalties for violating the order, the process for appealing the order and the office



which the recipient of the order could call for any questions. Such an order should be communicated not only to the vessel in question, but also to its owners, agents and flag State.

Anytime that the United States seeks to deny port entry to a foreign-flag vessel, even to a foreign warship, fishing vessel or merchant vessel that is in clear violation of a law, regulation or treaty obligation, it must find the authority for denying such entry and comply with basic due process requirements of notice and an opportunity to be heard. Particularly involving issues related to homeland security, the Coast Guard and other cognizant agencies employ the Maritime Operational Threat Response (MOTR) coordination process to effectively align and integrate “responses to real or potential terrorist incidents across all stakeholders” in the federal government.<sup>203</sup> If Congress and cognizant agencies consider that denial of port entry to certain foreign-flag vessels under particular circumstances promotes key interests of the United States, there should be laws, regulations and procedures in place to carry out such a policy. Otherwise there are likely to be legal, political and practical consequences for the denial.

## ***VI. Evaluation and Development of an Analytical Matrix***

One of the key purposes of this paper is to develop a methodology to evaluate proposed and actual conditions that the United States and other port States seek to impose on foreign-flag vessels to promote maritime security. This section will evaluate both the legal and policy factors that affect the imposition of such conditions and then propose an analytical methodology in determining whether a particular condition on port entry is an appropriate way to promote a particular policy goal. The final part of this section will emphasize the need and importance of harmonizing port State regulations with international expectations and procedures.

### **A. Evaluating Legality and Policy for Imposing Port Entry Conditions**

As discussed in detail above, international law permits port States to impose reasonable conditions on the entry of foreign vessels into ports. Promoting maritime security is clearly a reasonable, if not essential, policy goal. However, the international community presumes that, as a general rule, commercial vessels will have access to the ports into which they need to enter to engage in global trade. To be consistent with international law, any conditions on port entry must be based on important national goals, must be directly and effectively related to accomplishing one or more of these goals and must be objectively prudent and necessary under all the circumstances. Any effort to impose conditions on port entry of a foreign-flag vessel involves a claim of jurisdiction over the vessel for certain

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purposes. A port State may not deny entry or exercise jurisdiction with respect to a foreign-flag vessel or its activity when the exercise of such jurisdiction would be arbitrary, discriminatory, unreasonable, in violation of treaty obligations or otherwise improper.<sup>204</sup>

**B. Determination of “Reasonableness”**

Although individual States, the international community and legal commentators may often differ as to when the imposition of conditions or the exercise of jurisdiction is reasonable under various circumstances, it is important to make an effort to determine whether the imposition of such restrictions would be reasonable. In determining whether the exercise of jurisdiction over a vessel or its activity as a condition of port entry is appropriate or not involves consideration of a number of relevant factors. Questions that a port State and the international community might appropriately ask in determining the reasonableness of a law or regulation conditioning port entry or imposing jurisdiction upon a vessel’s arrival in port include:

- (1) Is the policy interest(s) that the law or regulation is designed to address one of significant importance to the port State?
- (2) Does the harm(s) to be avoided, or the benefit(s) to be achieved, have a direct connection to the foreign vessel’s presence while operating in the coastal waters of the port State?
- (3) Does the regulated activity have a close geographical and temporal nexus to the entry of the vessel into the waters of the port State?
- (4) Will the law or regulation be effective in accomplishing the policy goal(s) for which it was implemented?
- (5) Would the exercise of jurisdiction under the circumstances violate an applicable bilateral or multilateral convention or the relevant provisions of customary international law?
- (6) Will the law or regulation have the practical effect of denying or impeding freedom of navigation in international waters, or the exercise of the rights of innocent passage, transit passage and archipelagic sea lanes passage, as provided in the 1982 LOS Convention?
- (7) Is there domestic legal authority for denying port entry, and have the appropriate authorities complied with the procedural requirements to

notify the vessel of the denial and included an opportunity to be heard on the matter?

- (8) Is there a less intrusive, disruptive, expensive, complicated or objectionable way to accomplish the same policy goal(s)?

Each of these questions is relevant in determining the reasonableness of the law or regulation under consideration. States considering whether or not to enact such laws or impose such regulations should evaluate them to ensure they are objectively reasonable.

### **C. Harmonizing Regulations with International Law and Expectations**

Even where the port State can demonstrate that the proposed regulation is important and that, under the factors discussed above, it is objectively reasonable, it is important to harmonize the proposed regulation with relevant international standards and expectations. The best way to accomplish this is to obtain the approval of the “competent international organization” charged with regulating the particular activity. If a port State wanted to establish a traffic separation scheme for vessels engaged in innocent passage through its territorial sea on the way into internal waters, international law requires that it take into account “the recommendations of the competent international organization.”<sup>205</sup> Before establishing such schemes within international straits used for international navigation, the 1982 LOS Convention requires that the “States bordering the straits shall refer proposals to the competent international organization with a view to their adoption.”<sup>206</sup> Within the exclusive economic zone, a coastal State may “adopt laws and regulations for the prevention, reduction and control of pollution from vessels conforming to and giving effect to generally accepted international rules and standards . . .”<sup>207</sup> Based on comity and efficiency, all States should seek to harmonize their national expectations, standards and procedures with those of the international community.

The 1982 LOS Convention provides for coordinating proposals that affect international shipping, particularly with respect to navigational safety and the protection of the marine environment, within the IMO process. The IMO has proven particularly adept at reaching consensus, and then harmonizing national and international standards and expectations for a wide variety of issues ranging from vessel construction through bilge-water-discharge standards. The 1965 Convention on Facilitation of International Maritime Traffic, which the IMO has updated regularly, emphasizes the importance of simplifying and reducing to a minimum the administrative burdens imposed on international shipping “to facilitate and expedite international maritime traffic . . .”<sup>208</sup>

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Any measures designed to protect port State interest must also be instituted in such a way so as to avoid the practical effect of denying or impeding freedom of navigation as provided in the 1982 LOS Convention. Those interested in the law of the sea must be concerned about the potential impact that restrictions on port entry might have on vessels merely engaged in transit passage, innocent passage or high seas navigation in the exclusive economic zone of another State. Some of the restrictions on port entry under consideration by some port States, such as Australia's recent decision to require pilots on most vessels transiting the Torres Strait, threaten traditional navigational freedoms and undermine long-standing principles of the law of the sea.<sup>209</sup> Others are less objectionable, because they bind only State parties. These include a provision of the recently adopted Wreck Removal Convention, which imposes a requirement that each State party shall ensure that any ship entering or leaving a port or offshore terminal provide evidence of financial security.<sup>210</sup> Another trend in multilateral treaties is to require that States party bar entry to their ports for fishing vessels determined to have been engaged in illegal, unregulated and unreported fishing activities. Another issue that requires consideration is the possible impact of conditions on entry with trade agreements. Since World War II, multilateral efforts have sought to reduce barriers to international trade, while ensuring a level playing field. These efforts first resulted in the General Agreement on Tariffs and Trade (GATT). During the 1990s, negotiations led to the establishment of the World Trade Organization (WTO), which took over most of the functions of GATT. Although the WTO/GATT process is silent on the specific issue of vessel access to ports, the denial of a right of port entry could well be seen as a trade barrier inconsistent with a nation's responsibility under its provisions. Moreover, if a port State were to treat vessels flying various foreign flags differently, the WTO/GATT rules may apply to prevent discrimination or favorable treatment being given to vessels from member States.<sup>211</sup> However, in practice, there is little real danger of a successful challenge when the port State is seeking to promote legitimate concerns, such as environmental protection, vessel safety and homeland security. As Professor Ted Dorman put it,

While the international trade agreements administered by the W.T.O. may affect the ability of a port state to deny access to foreign vessels or to impose burdensome conditions on foreign vessels entering port, the effect is limited to those situations where the port state is using port access as a means to deny entry of the goods being carried by the vessel . . . .<sup>212</sup>

As discussed earlier in this article, any regulations designed to restrict entry to US ports must also be consistent with our international obligations under any bilateral FCN treaties to which the US is party.

### ***VII. Recommendations and Conclusion***

For the good of the entire world community, policymakers must seek to ensure that ocean trade continues to flourish and grow. This requires promoting access to key ports with minimal restrictions and conditions. Toward this end, international law presumes that the ports of every port State should be open to all foreign commercial vessels, and a port may be closed or a vessel denied entry to the port only when important interests of the port State justify the closure.

At the same time, the world community must be sensitive to the legitimate concerns of port States to protect important national interests, particularly maritime safety and security. To promote and protect these and other important interests, port States have a right to close their ports or to impose conditions on port entry and exit with respect to a broad range of important interests directly related to the vessel's visit. A port State may restrict entry to all foreign vessels, subject only to any rights of entry clearly granted under an applicable treaty and those vessels in distress due to *force majeure*.

To avoid using international trade as a heavy-handed and ineffective diplomatic tool designed to reward or punish foreign States, however, a port State should not impose port entry or exit requirements on foreign merchant vessels—or exercise jurisdiction on foreign-flag vessels in port—even those designed to promote important goals, that are not reasonably related to the visit of the vessel in question on the specific occasion. Toward this end, absent specific, identifiable concerns with respect to the vessel or State in question, a port State should treat all foreign-flag vessels equally, and not discriminate in the prescription and enforcement of its laws.

The application of the law of the port State should not have the practical effect of denying or impairing the traditional rights of the sea, including freedom of navigation in international waters, or the exercise of the rights of innocent passage, transit passage and archipelagic sea lanes passage, in coastal waters. Moreover, denial of port entry, or imposing unreasonable conditions on port entry, has an adverse impact on the port State's ability to engage in international trade. As a result, such restrictions harm the economy of both the port State and, to a less direct extent, the world community at large.

Given the crucial importance of international trade in today's global economy, incremental costs, short delays or minor disruptions can have a profoundly adverse impact. In this regard, harmonizing and coordinating conditions on port entry

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throughout the world community, with similar expectations, requirements, forms and procedures, can achieve the goals without imposing as much of an administrative burden. Wisely balancing the benefits to be achieved from imposing conditions on port entry, such as intelligently devised security requirements, against the costs and burdens associated with each, is essential. International lawyers and policymakers must strive to ensure that access to the world's ports is as free as reasonably possible, and that conditions on entry and exit are directly and effectively related to the important interests of the port State and the world community at large. The goal of all States should be to promote and ensure safe, secure, efficient and environmentally sound international ocean trade.

#### *Notes*

1. MYRES S. MCDUGAL & WILLIAM T. BURKE, *THE PUBLIC ORDER OF THE OCEANS* 90 (1962).
2. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 512 rep. n. 3 (1987) [hereinafter RESTATEMENT]. See PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 175 (7th rev. ed. 1997) ("Although a coastal state has the right to forbid foreign merchant ships to enter its ports, most states are keen to support trade, and therefore welcome foreign ships to their ports."); MCDUGAL & BURKE, *supra* note 1, at 99–100.
3. *Saudi Arabia v. Arabian American Oil Company (Aramco)*, Award of Aug. 23, 1958, 27 I.L.R. 117, 212 (dictum). This statement represents commercial policy and comity and, according to one expert, has no "substantive basis" in international law. A.V. Lowe, *The Right of Entry into Maritime Ports in International Law*, 14 *SAN DIEGO LAW REVIEW* 597, 621 (1977).
4. C. JOHN COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA* §§ 181, 176 (6th ed. 1967). "The entry of foreign merchant ships may thus be reasonably regulated provided no hindrance is put in the way of international trade and no discrimination made between States so as to favour some at the expense of others." *Id.* at § 177.
5. RESTATEMENT, *supra* note 2, § 512 cmt. c (1987).
6. "Coastal states have a sovereign right to grant or to deny access to their ports to any foreign vessel." Louise de La Fayette, *Access to Ports in International Law*, 11 *INTERNATIONAL JOURNAL OF MARINE & COASTAL LAW* 1, 2 (1996).
7. Professors Churchill and Lowe have commented that the "dictum [in the *Aramco* case] is not supported by the authorities cited by the tribunal, and there is almost no other support for the proposition." R.R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* 62 (3d ed. 1999).
8. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3 (entered into force Nov. 16, 1994), available at [http://www.un.org/Dept/los/convention\\_agreements/text/unclos/clos.index.htm](http://www.un.org/Dept/los/convention_agreements/text/unclos/clos.index.htm) [hereinafter 1982 LOS Convention].
9. Bernard H. Oxman, *The Territorial Temptation: A Siren Song at Sea*, 100 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 830, 844 (2006) (footnote referring to 1982 LOS Convention, arts. 25(2) and 211(3), omitted).
10. 1982 LOS Convention, *supra* note 8, art. 25(2). The United States has not yet acceded to the Convention. However, this same principle is codified in Article 16(2) of the 1958 Convention on the Territorial Sea and Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205, to which the United States is a party.

11. See President Ronald Reagan, Statement on United States Ocean Policy, Mar. 10, 1983, 22 INTERNATIONAL LEGAL MATERIALS 464 (1983), *reprinted in* 77 AMERICAN JOURNAL OF INTERNATIONAL LAW 619 (1983); see also ARND BERNAERTS, BERNAERTS' GUIDE TO THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 14–15 (2006).

12. See Lowe, *supra* note 3, at 597–625. See also GEORGE C. KASOULIDES, PORT STATE CONTROL AND JURISDICTION: EVOLUTION OF THE PORT STATE REGIME 1–22 (1993).

13. Lowe, *supra* note 3, at 622 (footnote omitted).

14. La Fayette, *supra* note 6, at 1 (emphasis in original).

15. United States v. Louisiana, 394 U.S. 11, 22 (1969).

16. Lauritzen v. Larsen, 345 U.S. 571, 592–93 (1953).

17. An embargo is one of the tools available to the international community, or a nation-State, to seek to change the behavior of another nation-State. UN Charter art. 41. So are economic reprisals. In 1984 the United States closed its ports to vessels flying the Nicaraguan flag as part of an economic sanctions package in retaliation for the guerrilla war that the government of Nicaragua was waging against its neighbors. Dan Morgan, *Why the Nicaragua Embargo?*, WASHINGTON POST, May 5, 1985, at C5.

18. According to one federal appeals court, US cases contain no precedents that “the law of nations accords an unrestricted right of access to harbors by vessels of all nations.” *Khedivial Line, S.A.E. v. Seafarers' Int'l Union*, 278 F.2d 49, 52 (2d Cir. 1960). “In any event, the law of nations would not require more than comity to the ships of a foreign nation” and in the specific context the Court addressed it noted that American vessels were harassed in the ports of the United Arab Republic. *Id.*

19. For a good example of one State's approach, see the 1995 Norwegian Regulations Governing Pilotage and Entry to Norwegian Waters (June 20, 1995), *available at* <http://www.state.gov/www/global/oes/oceans/ntrvo113.html>.

20. CHURCHILL & LOWE, *supra* note 7, at 107 (footnote omitted).

21. “In the case of warships, the assertion of comprehensive authority to exclude most frequently takes the form of establishing limiting conditions for entry, with particular emphasis upon the necessity for giving notice of intended visits.” MCDOUGAL & BURKE, *supra* note 1, at 94. See also *id.* at 114–15.

22. “[T]he right [of port States] to exclude foreign warships is undoubted.” CHURCHILL & LOWE, *supra* note 7, at 61. See also LOUIS B. SOHN & JOHN E. NOYES, CASES AND MATERIALS ON THE LAW OF THE SEA 377–78 (2004) (treaties of friendship, commerce and navigation usually do not provide for warship access).

23. See, e.g., Straddling and Highly Migratory Fish Stocks Agreement art. 23, Dec. 4, 1995, 34 INTERNATIONAL LEGAL MATERIALS 1542, 1567 (1995) (“Measures taken by a port State”).

24. The general practice of the free access of merchant ships of almost all nations to almost all commercial ports is based upon convenience and economic interest, and in the absence of treaty provisions, it is not based upon any sense of legal obligation . . . [A] coastal state can impose special regulations with regard to fishing boats and privately owned pleasure and racing yachts and boats. For this reason, they form separate categories.

V.D. Degan, *Internal Waters*, 17 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 3 (1986).

25. For example, in 1985 New Zealand announced that it would not permit nuclear-capable US warships to enter its ports absent an official statement confirming that no such weapons were on board. See STUART MCMILLAN, NEITHER CONFIRM NOR DENY: THE NUCLEAR SHIPS DISPUTE BETWEEN NEW ZEALAND AND THE UNITED STATES (1987).

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26. “There is a presumption that ports traditionally designated for foreign trade are open to all ships and that the arbitrary closure of a port gives rise to a right of protest and, under certain circumstances, liability for damages.” Ademuni-Odeke, *Port State Control and UK Law*, 28 JOURNAL OF MARITIME LAW AND COMMERCE 657, 660 (1997) (footnote omitted).

27. CHURCHILL & LOWE, *supra* note 7, at 63.

28. “A coastal state can condition the entry of foreign ships into its ports on compliance with [its] laws and regulations.” RESTATEMENT, *supra* note 2, § 512 rep. n. 3.

29. See International Convention for the Safety of Life at Sea, Nov. 1, 1974, 32 U.S.T. 47, 1184 U.N.T.S. 276, XI-2, Reg. 9/2.1.6 [hereinafter SOLAS Convention]; International Ship and Port Facility Security (ISPS) Code, Part B 4.39. For details on the current status of the SOLAS Convention and its amendments, see [http://www.imo.org/Conventions/contents.asp?topic\\_id=257&doc\\_id=647](http://www.imo.org/Conventions/contents.asp?topic_id=257&doc_id=647). See also Ports and Waterways Safety Act of 1978, Pub. L. No. 95-474, § 2, 92 Stat. 1472 (codified at 33 US Code § 1223(a)(5) and implemented by 33 C.F.R. § 160.201 *et seq.*).

30. An FCN treaty usually provides guarantees for the access of foreign vessels to ports and their subsequent departures. See, e.g., Treaty of Friendship, Commerce, and Navigation, US-Italy, arts. XIX(3) and XX(1), Feb. 2, 1948, 63 Stat. 2256, 2284. Even then, however, FCN treaties do not preclude a port State from denying access to vessels flying the flag of the other State party to protect essential interests. MCDUGAL & BURKE, *supra* note 1, at 109. The provisions of most FCN treaties provide for restricting access when “necessary for the protection of the essential interests . . . in time of national emergency.” Treaty of Friendship, Commerce and Navigation, US-Japan, art. XXI, Apr. 2, 1953, 4 U.S.T. 2063.

31. Professors Churchill and Lowe opined that the power to condition access could be limited. CHURCHILL & LOWE, *supra* note 7, at 63. See also Ademuni-Odeke, *supra* note 26, at 660 (“[T]he arbitrary closure of a port gives rise to a right of protest and, under certain circumstances, liability for damages.”).

32. The normal practice in these FCN agreements is to exclude fishing vessels and warships from the port access provisions, except in cases of distress. MCDUGAL & BURKE, *supra* note 1, at 109–10 & n.59.

33. CHURCHILL & LOWE, *supra* note 7, at 65, 98–99. See *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 147 (1812) (“[A] public armed ship, in the service of a foreign sovereign, . . . should be exempt from the jurisdiction of the country.”). See also 1982 LOS Convention, *supra* note 8, arts. 30–33, 95–96.

34. See RESTATEMENT, *supra* note 2, § 457, rep. n. 7, and § 512, rep. n. 6; CHURCHILL & LOWE, *supra* note 7, at 99 (“[T]he flag State is responsible for loss to the coastal State . . .”). See also 1982 LOS Convention, *supra* note 8, arts. 30–33 and 42(5).

35. London Convention on the Facilitation of International Maritime Traffic art. 1, Apr. 9, 1965, 18 U.S.T. 411, 591 U.N.T.S. 265 [hereinafter FAL Convention]. See Jochen Erler, *The New Convention on Facilitation of International Maritime Traffic*, 13 MCGILL LAW JOURNAL 323, 323–28 (1967). Cf. 1982 LOS Convention, *supra* note 8, art. 255 (“States shall adopt reasonable rules, regulations and procedures to promote and facilitate marine scientific research [including], subject to the provisions of their laws and regulations, access to their harbours . . .”).

36. See FAL Convention, *supra* note 35, art. 16. See also COLOMBOS, *supra* note 4, § 181, at 177. “The entry of foreign merchant ships may thus be reasonably regulated provided no hindrance is put in the way of international trade and no discrimination made between States so as to favour some at the expense of others.” *Id.* Interestingly, the 1982 LOS Convention does not specifically provide for an equal-treatment port-access regime, except in the limited circumstances of land-locked States. “Ships flying the flag of land-locked States shall enjoy treatment



equal to that accorded to other foreign ships in maritime ports.” 1982 LOS Convention, *supra* note 8, art. 131.

37. Stephen E. Flynn, *America the Vulnerable*, 81 FOREIGN AFFAIRS, Jan.–Feb. 2002, at 60, 66.

38. Quoted in April Terreri, *International Trade is Less Secure Than You Think*, WORLD TRADE MAGAZINE, Sept. 4, 2006, available at [http://www.worldtrademag.com/CDA/Articles/Feature\\_Article/d37c5947e0c7d010VgnVCM100000f932a8c0](http://www.worldtrademag.com/CDA/Articles/Feature_Article/d37c5947e0c7d010VgnVCM100000f932a8c0).

39. See J.M. ROBERTS, HISTORY OF THE WORLD 73–99, 333–34, 441–505 (1993). See also A Century of Free Trade, BBC NEWS, Feb. 12, 2003, <http://news.bbc.co.uk/1/hi/business/533716.sm>.

40. International Trade, ENCYCLOPEDIA BRITANNICA ONLINE (2007), <http://www.britannica.com/eb/article-9106321/international-trade>.

41. Andrew Marshall, *Waterway to the World*, TIME ASIA MAGAZINE, July 25, 2006, available at <http://www.time.com/time/asia/2006/journey/strait.html>.

42. US DEPARTMENT OF HOMELAND SECURITY, SECURE SEAS, OPEN PORTS: KEEPING OUR WATERS SAFE, SECURE, AND OPEN FOR BUSINESS 3 (2004), available at [http://www.piersystem.com/posted/586/DHSPortSecurityFactSheet\\_062104.41841.pdf](http://www.piersystem.com/posted/586/DHSPortSecurityFactSheet_062104.41841.pdf).

43. John D. Haveman, Howard J. Shatz & Ernesto A. Vilchis, *U.S. Port Security Policy after 9/11: Overview and Evaluation*, 2 JOURNAL OF HOMELAND SECURITY & EMERGENCY MANAGEMENT 1 (2005), available at <http://www.bepress.com/jhsem/vol2/iss4/1>. “Multimodal” means the ability to transfer shipping containers quickly to and from ocean vessels and other transportation modalities, such as rail cars, trucks, barges and airplanes.

44. OFFICE OF STATISTICAL & ECONOMIC ANALYSIS, MARITIME ADMINISTRATION, US DEPARTMENT OF TRANSPORTATION, VESSEL CALLS AT U.S. PORTS (2004), ix–x, 16–20 (July 2005), available at [http://www.marad.dot.gov/Marad\\_Statistics/vcalls2004.pdf](http://www.marad.dot.gov/Marad_Statistics/vcalls2004.pdf) [hereinafter MARAD].

45. K. Lamar Walters III, *Industry on Alert: Legal and Economic Ramifications of the Homeland Security Act on Maritime Commerce*, 30 TULANE MARITIME LAW JOURNAL 311, 323–24 (2006).

46. *Id.* at 323. See also Jeremy Firestone & James Corbett, *Maritime Transportation: A Third Way for Port and Environmental Security*, 9 WIDENER LAW SYMPOSIUM JOURNAL 419, 422 (2002–03).

47. Energy Information Administration, US Department of Energy, Crude Oil and Total Petroleum Imports Top 15 Countries, Jan. 17, 2007, [http://www.eia.doe.gov/pub/oil\\_gas/petroleum/data\\_publications/company\\_level\\_imports/current/import.html](http://www.eia.doe.gov/pub/oil_gas/petroleum/data_publications/company_level_imports/current/import.html). Canada is the single nation providing the largest source of foreign oil to the American market. *Id.*

48. US LNG imports have been growing dramatically in recent years. The primary sources of LNG for consumption in the United States include Trinidad and Tobago, Algeria and Nigeria. Energy Information Administration, US Department of Energy, U.S. Natural Gas Imports by Country, last updated Jan. 18, 2007, [http://tonto.eia.doe.gov/dnav/ng/ng\\_move\\_imp\\_c\\_s1\\_m.htm](http://tonto.eia.doe.gov/dnav/ng/ng_move_imp_c_s1_m.htm).

49. U.S. COAST GUARD, THE U.S. COAST GUARD STRATEGY FOR MARITIME SAFETY, SECURITY, AND STEWARDSHIP 18 (2007), available at <http://www.uscg.mil/comdt/speeches/docs/CGS-Final.pdf>. See also Natural Gas Intelligence, North American LNG Import Terminals, Nov. 6, 2006, <http://intelligencepress.com/features/lng/>.

50. MARAD, *supra* note 44. See also Firestone & Corbett, *supra* note 46, at 422.

51. See Pearl Harbor Attack, ENCYCLOPEDIA BRITANNICA ONLINE (2007), <http://www.britannica.com/eb/article-9058877/Pearl-Harbor-attack>.

52. See Michael N. Schmitt, *U.S. Security Strategies: A Legal Assessment*, 27 HARVARD JOURNAL OF LAW & PUBLIC POLICY 737, 738–40 (2003–04); Steven M. Kosiak, The Cost and Funding

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of the Global War on Terror (GWOT), Jan. 18, 2007, <http://www.comw.org/pda/fulltext/0701kosiak.pdf> (testimony before Congress).

53. See MICHAEL E. O'HANLON, PROTECTING THE AMERICAN HOMELAND: A PRELIMINARY ANALYSIS 7 (2002) (explaining that not only would such a port-security disaster cause mass casualties and destruction, it would require shutting down the US maritime import and export systems, causing maritime gridlock, the economic collapse of many businesses and possible economic losses totaling \$1 trillion).

54. "It is feared that terrorists could use the ubiquitous, anonymous, and largely innocuous steel boxes and their transport system to devastating effect." MICHAEL D. GREENBERG ET AL., MARITIME TERRORISM: RISK AND LIABILITY 111–14 (2006) (footnote omitted). See Justin Mellor, *Missing the Boat: The Legal and Practical Problems of the Prevention of Maritime Terrorism*, 18 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 341, 348–51 (2002–03); Stephen E. Flynn, *Homeland Security Is a Coast Guard Mission*, US NAVAL INSTITUTE PROCEEDINGS, Oct. 2001, at 72, 72–73.

55. Eben Kaplan, *Liquefied Natural Gas: A Potential Terrorist Target?*, Feb. 27, 2006, <http://www.cfr.org/publication/9810/>. See also August Gribbin, *Seaports Seen as Terrorism Target: U.S. Will Secure Harbors, but Actions Likely to Hurt Trade*, WASHINGTON TIMES, Jan. 22, 2002, at A1. There have been disturbing reports of terrorists hijacking supertankers, practicing handling them and then stealing manuals on vessel operations before leaving the ship. See Gal Luft & Anne Korin, *Terrorism Goes to Sea*, FOREIGN AFFAIRS, Nov.–Dec. 2004, at 61, 68–70.

56. Mellor, *supra* note 54. See also Paul W. Parformak, *Liquefied Natural Gas (LNG) Infrastructure Security: Issues for Congress*, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, 25–26 (2005), available at <http://ncseonline.org/nle/crsreports/05mar/RL32073.pdf>.

57. *Haig v. Agee*, 453 U.S. 280, 307 (1981) (quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 509 (1964)).

58. Jonathan Medalia, *Terrorist Nuclear Attacks on Seaports: Threat and Response*, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS 1, 1–2 (2005); Mellor, *supra* note 54, at 346–47 (focusing on the problem of weapons shipped into the United States in a cargo container); see Flynn, *supra* note 37, at 72–73 (the United States has a pressing need to defend against terrorist attacks at vulnerable seaports).

59. According to one study, a ten-kiloton weapon detonated in a major seaport would kill as many as one million people and inflict as much as \$1.7 trillion dollars in property damage, trade disruption and indirect costs. CLARK C. ABT, EXECUTIVE SUMMARY: THE ECONOMIC IMPACT OF NUCLEAR TERRORIST ATTACKS ON FREIGHT TRANSPORT SYSTEMS IN AN AGE OF SEAPORT VULNERABILITY 3 (2003), available at [http://www.abtassociates.com/reports/ES-Economic\\_Impact\\_of\\_Nuclear\\_Terrorist\\_Attacks.pdf](http://www.abtassociates.com/reports/ES-Economic_Impact_of_Nuclear_Terrorist_Attacks.pdf).

60. See Section IV *infra* ("Conditions on Entry Related to National Defense, Homeland Security, Counterterrorism and Law Enforcement Concerns").

61. Convention and Statute on the International Régime of Maritime Ports art. 3, annexed to the Convention on the International Régime of Maritime Ports, Dec. 9, 1923, 28 L.N.T.S. 115. The United States is not party to either the Statute or the Convention on the International Régime of Maritime Ports. "[A]lthough ratified by only a small number of states, [the 1923 Convention] reflects largely customary rules of international law." BERNAERTS, *supra* note 11, at 111.

62. See, e.g., 46 App. US Code § 91; 46 US Code §§ 42107 and 52305 (2006) ("Refusal of clearance and entry").

63. 46 App. US Code §§ 121–35. Note that tonnage duty is to be paid based on the displacement of the vessel, while the tariff or customs duty is a separate levy based on the value of the imported merchandise.

64. See, e.g., 8 US Code §§ 1181 (“Admission of immigrants into the U.S.”), 1281–87 (“Alien crewmen”).

65. See, e.g., 42 US Code §§ 264–72; and 9 C.F.R. § 93.106 (“Quarantine requirements” for animals and plants being imported into the United States).

66. Congress has provided statutory authority for controlling infectious diseases, including the quarantining of suspect vessels and their crews and passengers. 42 US Code §§ 264–72. The President regularly updates the list of communicable diseases subject to quarantine. Exec. Order No. 13,295, Apr. 4, 2003, 68 Fed. Reg. 17,255 (Apr. 9, 2003), *reprinted in* 42 US Code § 264, as amended by Exec. Order No. 13,375, Apr. 1, 2005, 70 Fed. Reg. 17299 (Apr. 5, 2005). He has also delegated to the Secretary of Health and Human Services his authority to carry out duties under the statute. *Id.* See also 42 C.F.R. pts. 71 & 72.

67. See 42 US Code § 267(a): “[The Surgeon General] shall from time to time select suitable sites for and establish such additional . . . anchorages in the States and possessions of the United States as in his judgment are necessary to prevent the introduction of communicable diseases into the States and possessions of the United States.” “It shall be the duty of the customs officers and of Coast Guard officers to aid in the enforcement of quarantine rules and regulations . . .” 42 US Code § 268(b).

68. “The exclusion of aliens is a fundamental act of sovereignty.” *Knauff v. Shaughnessy*, 338 U.S. 537, 542–43 (1950). In 1981, President Reagan ordered the Coast Guard to interdict vessels on the high seas where there was reason to believe the vessel was engaged in the transportation of illegal immigrants. Exec. Order No. 12,324, 46 Fed. Reg. 48,107, 48,109 (Sept. 29, 1981). President Bush issued similar guidance in 1992. Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (1992). This policy remains in effect today. See Gary W. Palmer, *Guarding the Coast: Alien Migrant Interdiction Operations at Sea*, 29 CONNECTICUT LAW REVIEW 1565, 1569–72 (1997).

69. FAL Convention, *supra* note 35. The purpose of the FAL Convention is “to facilitate maritime traffic by simplifying and reducing to a minimum the formalities, documentary requirements and procedures on the arrival, stay and departure of ships engaged in international voyages.” *Id.* (Preamble).

70. See Rosalie Balkin, *The International Maritime Organization and Maritime Security*, 30 TULANE MARITIME LAW JOURNAL 1, 14 (2006) (noting that the 2002 amendments to the FAL Convention entered into force on May 1, 2003).

71. Information concerning IMO-recommended practices and forms for the FAL Convention is available at [http://www.imo.org/Conventions/contents.asp?topic\\_id=259&doc\\_id=684#4](http://www.imo.org/Conventions/contents.asp?topic_id=259&doc_id=684#4).

72. MCDUGAL & BURKE, *supra* note 1, at 96 (footnote omitted). See also HAIJIANG YANG, JURISDICTION OF THE COASTAL STATE OVER FOREIGN MERCHANT SHIPS IN INTERNAL WATERS AND THE TERRITORIAL SEA 208–20 (2006).

73. 46 US Code §§ 8501–503. Compulsory pilotage requirements in internal waters are among the accepted rights of a port State. Glen Plant, *International Legal Aspects of Vessel Traffic Services*, 14 MARINE POLICY 71, 73 (1990).

74. “Except as otherwise provided in this subtitle, pilots in the bays, rivers, harbors, and ports of the United States shall be regulated only in conformity with the laws of the States” 46 US Code § 8501(a). Although the Constitution clearly gives Congress the power to regulate commerce with foreign nations, including regulating pilotage, Congress continues to let the individual States regulate most pilotage matters. See *Ray v. Atlantic Richfield Co.*, 535 U.S. 151, 159–60 (1978) (States may not impose pilotage requirements on “enrolled vessels” covered by federal laws, but “it is equally clear that they are free to impose pilotage requirements on registered vessels entering and leaving their ports . . .”). *But see* 46 US Code §§ 9301–308 (a federal regulatory scheme governs

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pilotage on the Great Lakes), and 46 US Code § 8502 (requiring federally licensed pilots for vessels designated therein).

75. JEANETTE GREENFIELD, CHINA'S PRACTICES IN THE LAW OF THE SEA 32–33 (1992). Since 1979, the People's Republic of China has established an extensive set of regulations on port access both for security purposes and to foster international trade. Mark A. Hamilton, *Negotiating Port Access: The Sino-U.S. Opportunity for Leadership in the Maritime Transport Services Industry*, 3 ASIAN-PACIFIC LAW & POLICY JOURNAL 153, 155–56 (2002). For example, a vessel must request permission at least one week before the visit, must comply with a host of conditions on port access, must use the services of a pilot and must pay various port fees for services and customs. Failure to do so can result in denial of access, fines or even detention. GREENFIELD, *supra* at 31–34.

76. In the United States, the Ports and Waterways Safety Act provides authority for the Secretary of Homeland Security to establish a comprehensive program for vessel traffic services in US ports. 33 US Code §§ 1221–32. This includes provision for civil and criminal penalties, and authorizes the Captain of the Port to deny entry or withhold clearance to depart for vessels that fail to comply. *Id.* at § 1232. *See also* 33 C.F.R. § 160.1–160.111.

77. A total of some fourteen thousand vessels transit the Panama Canal each year, carrying over 203 million tons in cargo. *See* Panama Canal, ENCYCLOPEDIA BRITANNICA ONLINE (2007), <http://www.britannica.com/eb/article-9110730/Panama-Canal>.

78. *See* Houston Ship Channel, WIKIPEDIA, [http://en.wikipedia.org/wiki/Houston\\_Ship\\_Channel](http://en.wikipedia.org/wiki/Houston_Ship_Channel) (last visited Dec. 28, 2007).

79. *See* 33 US Code § 1223 (“Vessel operating requirements”); 33 C.F.R. §§ 164.11 (“Navigation underway: general”), 164.13 (“Navigation underway: tankers”).

80. The Transportation Safety Act of 1974 is the statutory framework for such regulations. 49 US Code §§ 5101–27. *See* 49 C.F.R. pt. 176 (“This part prescribes requirements . . . to be observed with respect to the transportation of hazardous materials by vessel.”)

81. *See* 33 US Code § 1228 (“Conditions for entry to ports in the United States”). *See also* RESTATEMENT *supra* note 2, § 512 cmt. c, rep. n. 4.

82. *See* 33 US Code § 1228(a)(1).

83. 1982 LOS Convention, *supra* note 8, art. 219 (the vessel will proceed for repairs before being permitted to leave).

84. *See* Sean Poltrack, *Maritime Industry and the Environment: The Delicate Balance of Economic and Environmental Concerns*, 8 UNIVERSITY OF BALTIMORE JOURNAL OF ENVIRONMENTAL LAW 51, 74–75 (2001–02) (“Vessel Safety Management”).

85. SOLAS Convention, *supra* note 29.

86. Titanic, ENCYCLOPEDIA BRITANNICA ONLINE (2007), <http://www.britannica.com/eb/article-9072642/Titanic>.

87. SOLAS Convention, *supra* note 29, ch. I, reg. 19(c) & ch. XI, reg. 4.

88. International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, with Annex (STCW), July 7, 1978, S. Exec. Doc. EE 96-1, C.T.I.A. No. 7624, 1361 U.N.T.S. 190.

89. *See* [http://www.imo.org/Conventions/contents.asp?doc\\_id=651&topic\\_id=257](http://www.imo.org/Conventions/contents.asp?doc_id=651&topic_id=257) (providing details on the current status of the STCW Convention).

90. *See* 33 US Code § 1228 (“Conditions for entry to ports in the United States”).

91. 33 C.F.R. pt. 164 (“Navigational safety regulations”). *See, e.g.,* the proposal by the European Union to bar entry to its ports to ships that fail to comply with the SOLAS International Safety Management Code, which has since been incorporated into Chapter IX of SOLAS.

92. *See* COLOMBOS, *supra* note 4, § 181, at 177:

[E]ach State has the right to enact laws controlling navigation within its national waters. The entry of foreign merchant ships may thus be reasonably regulated provided no hindrance is put in the way of international trade and no discrimination made between States so as to favour some at the expense of others.

*Id.*

93. 46 US Code § 70114; 33 C.F.R. § 164.46 (“Automatic identification system”). AIS is defined as

a maritime navigation safety communications system standardized by the International Telecommunication Union (ITU) and adopted by the International Maritime Organization (IMO) that provides vessel information, including the vessel’s identity, type, position, course, speed, navigational status and other safety-related information automatically to appropriately equipped shore stations, other ships, and aircraft; receives automatically such information from similarly fitted ships; monitors and tracks ships; and exchanges data with shore-based facilities.

47 C.F.R. § 80.5.

94. J.M. Sollosi, *The Automated Identification System & Port Security*, PROCEEDINGS OF THE MARINE SAFETY COUNCIL, Apr.–May 2003, at 36, available at [http://www.uscg.mil/hq/g-m/nmc/pubs/proceed/newpromagpage2005/q2\\_03.pdf](http://www.uscg.mil/hq/g-m/nmc/pubs/proceed/newpromagpage2005/q2_03.pdf).

95. Brian Tetreault, *Automated Identification System: The Use of AIS in Support of Maritime Domain Awareness*, US COAST GUARD PROCEEDINGS, Fall 2006, at 27, 28–30.

96. Sollosi, *supra* note 94, at 38. “The AIS would contribute to this [Maritime Domain Awareness] mission by enabling the shore authority to track certain suspect vessels.” See also Alexandra Marks, *America’s Ship-Tracking Challenge*, CHRISTIAN SCIENCE MONITOR, Jan. 31, 2007, at 3, available at <http://www.csmonitor.com/2007/0131/p03s03-usgn.html>.

97. 33 C.F.R. § 164.41 (“Electronic position fixing devices”). The widespread availability of inexpensive and highly accurate Global Positioning System receivers, computers and communications systems linked to these devices should help make collisions and groundings a thing of the past.

98. 33 C.F.R. § 164.38 (“Automatic radar plotting aids (ARPA)”; see *id.*, app. B.

99. 46 C.F.R. § 184.502 (vessels required to comply with Federal Communications Commission requirements).

100. 33 C.F.R. § 160.212. After 9/11, the Coast Guard immediately acted to increase the advance NOA requirement from twenty-four to ninety-six hours. Temporary Requirements for Notification of Arrival in U.S. Ports, 66 Fed. Reg. 50,565, 50,566–68 (Oct. 4, 2001) (Chart I—Time for Submission) (codified at 33 C.F.R. pt. 160).

101. 33 C.F.R. at § 160.206 (Table 160.206). See J. Ashley Roach, *Container and Port Security: A Bilateral Perspective*, 18 INTERNATIONAL JOURNAL OF MARINE & COASTAL LAW 341, 355–57 (2003) (“Advance Notice of Arrival”).

102. 33 C.F.R. § 160.206 (Table 160.206). The ISPS Code is a comprehensive set of measures that the IMO adopted in response to the threats to ships and port facilities in the wake of the 9/11 attacks on the United States. The ISPS Code requires ships and ports to develop and implement an approved security plan to prevent, among other things, terrorists hiring on as crew members and smuggling weapons, explosives and other such contraband into target ports. MTSA-ISPS Information Site, <http://www.uscg.mil/hq/g-m/mp/mtsa.shtml>.

103. 33 C.F.R. § 160.215. See also 46 C.F.R. subpt. 4-05 (notice requirement in case of a marine casualty).

104. See 33 US Code § 1228 (“Conditions for entry to ports in the United States”); 33 C.F.R. § 160.107 (“Denial of entry”).

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105. See Hartmut G. Hesse, *Maritime Security in a Multilateral Context: IMO Activities to Enhance Maritime Security*, 18 INTERNATIONAL JOURNAL OF MARINE & COASTAL LAW 327, 332–33 (2003).

106. MCDUGAL & BURKE, *supra* note 1, at 94, 100–101, 114.

107. *Id.* at 102–103. See also Access to, or Anchorage in, the Port of Danzig, of Polish War Vessels, 1931 P.C.I.J. (ser. A) No. 43, available at [http://www.worldcourts.com/pcij/eng/decisions/1931.12.11\\_danzig/](http://www.worldcourts.com/pcij/eng/decisions/1931.12.11_danzig/).

108. See, e.g., Treaty of Friendship, Commerce, and Navigation, US-Japan, art. XIX(7), *supra* note 30.

109. 1923 Convention and Statute on the International Régime of Maritime Ports, *supra* note 61, art. 13.

110. MCDUGAL & BURKE, *supra* note 1, at 100–103. “The coastal state ought to be accorded relatively complete discretion in deciding upon the permissibility of the entry of [warships into port].” *Id.* at 100.

111. “Before a warship enters a foreign port, it is generally required that her State or the naval officer in command should notify in advance the territorial State of her proposed visit. The number of warships belonging to the same Power which may remain at the same time in a foreign port and also the period of their stay is usually regulated by the territorial State.” COLOMBOS, *supra* note 4, § 274, at 262.

112. Japan Sets Sanctions on N. Korea to “Protect the Peace,” Associated Press, Oct. 11, 2006, <http://www.cnn.com/2006/WORLD/asiapcf/10/11/korea.nuclear.japan.ap/index.html/>. Indeed, it has been reported that “the Japanese delegation also proposed that North Korea’s ships . . . be turned away from [all] international ports.” Betsy Pisik, *China Hints Agreement on North Korea*, WASHINGTON TIMES, Oct. 11, 2006, at A01, available at <http://www.washingtontimes.com/world/20061011-120355-5512r.htm>.

113. Australia to Ban N. Korean Ships, BBC NEWS (ASIA-PACIFIC), Oct. 16, 2006, <http://news.bbc.co.uk/2/hi/asia-pacific/6054186.stm>.

114. NATIONAL STRATEGY FOR MARITIME SECURITY: MARITIME OPERATIONAL THREAT RESPONSE PLAN, App. B to Annex I (2006).

115. *Id.*, Annex I, at 2.

116. Orinoco Steamship Co. Case (US v. Venezuela), Venezuelan Arbitrations of 1903, at 72 (1904), 9 R.I.A.A. 180 (1904).

117. *Id.* at 95–96, 9 R.I.A.A. 203.

118. Exec. Order No. 10,173, §§ 6.04–5 and 6.04–8, 3 C.F.R. pts. 356, 357 (Oct. 18, 1950).

119. Canadian Transport Co. v. United States, 663 F.2d 1081, 1083–84 (D.C. Cir. 1980).

120. Canadian Transport Co. v. United States, 430 F. Supp. 1168, 1171 (D.D.C. 1977).

121. Canadian Transport Co., 663 F.2d at 1091.

122. ABT, *supra* note 59, at 2. See also William H. Parrish, *International Cooperation in Combating Terrorism*, 6 JOURNAL OF THE INSTITUTE OF JUSTICE & INTERNATIONAL STUDIES 51, 52–54 (2006) (reprint of Mr. Parrish’s presentation).

123. See Flynn, *supra* note 37, at 70–74.

124. Quoted in Terreri, *supra* note 38.

125. Al-Qaida Training Manual Shows Seaports Top Target, WORLD NET DAILY, Oct. 30, 2003, [http://www.worldnetdaily.com/news/article.asp?ARTICLE\\_ID=35327](http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=35327) (Osama bin Laden’s terrorist network has focused on seaports as top-level targets for several years).

126. *A World Wide Web of Nuclear Danger*, ECONOMIST, Feb. 28, 2004, at 25.

127. In April 2004, the UN Security Council agreed on a resolution declaring that all member States were under an obligation to adopt and enforce laws making it illegal for non-State actors

to “manufacture, acquire, possess, develop, transfer, transport, or use nuclear, chemical, biological weapons and their means of delivery, in particular for terrorist purposes.” S.C. Res. 1540, UN Doc. S/Res/1540 (Apr. 28, 2004).

128. “Containment and traditional deterrence . . . are clearly no longer adequate to deal with the new world of terrorists armed with weapons of mass destruction.” *Binding the Colossus*, ECONOMIST, Nov. 22, 2003, at 25, available at <http://www.globalpolicy.org/empire/un/2003/1120colossus.htm>.

129. Note, however, the similar plot twist in Tom Clancy’s novel *Debt of Honor*, where the pilot of a Japan Airlines 747 intentionally crashes his aircraft into the Capitol building during a joint session of Congress, killing nearly everyone in the government except the newly named vice president, Jack Ryan.

130. Haveman et al., *supra* note 43, at 15–21. See also Flynn, *supra* note 37, at 60–74; STEPHEN E. FLYNN, *THE EDGE OF DISASTER: REBUILDING A RESILIENT NATION* (2007).

131. “The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security . . . [I]n an age where the enemies of civilization openly and actively seek the world’s most destructive technologies, the United States cannot remain idle while dangers gather.” THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (2002), available at <http://www.whitehouse.gov/nsc/nss.pdf> [hereinafter NATIONAL SECURITY STRATEGY].

132. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 701–702 (6th ed. 2003) (use of forces under the doctrine of preventive self-defense is problematic). See generally, Michael Byers, *Preemptive Self-Defense: Hegemony, Equality, and Strategies of Legal Change*, 11 JOURNAL OF POLITICAL PHILOSOPHY 171 (2003).

133. See Sean D. Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILLANOVA LAW REVIEW 699, 706–16 (2005) (discussion of four different schools of thought on the issue).

134. NATIONAL SECURITY STRATEGY, *supra* note 131, at 15.

135. See Firestone & Corbett, *supra* note 46, at 431–33; Haveman et al., *supra* note 43, at 15–21.

136. See 33 C.F.R. § 160.212.

137. See 33 C.F.R. § 160.210. Vessels may submit NOAs electronically on the NVMC website, available at <http://www.nvmc.uscg.gov/>.

138. 33 C.F.R. pt. 160. In addition, COTPs have broad authority under the Magnuson Act, 50 US Code §§ 191–98, and the Ports and Waterways Safety Act, 33 US Code §§ 1221–36, to issue orders and take actions to protect the security and safety of vessels and facilities within their areas of responsibility.

139. For a comprehensive analysis of various port security initiatives involving the Coast Guard, see Rachael B. Bralliar, *Protecting U.S. Ports with Layered Security Measures for Container Ships*, 185 MILITARY LAW REVIEW 1, 1–68 (2005).

140. President George W. Bush, Remarks by the President to the People of Poland, Wawel Royal Castle, Krakow, Poland (May 31, 2003), <http://www.whitehouse.gov/news/releases/2003/05/20030531-3.html>. The PSI concept envisions the interdiction of illicit cargoes in air and land-transportation modalities, but its greatest focus has been at sea. Michael A. Becker, *The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea*, 46 HARVARD INTERNATIONAL LAW JOURNAL 131, 134 (2005).

141. Michael Byers, *Policing the High Seas: The Proliferation Security Initiative*, 98 AMERICAN JOURNAL OF INTERNATIONAL LAW 526, 527–28 (2004).

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142. Daniel H. Joyner, *The Proliferation Security Initiative: Nonproliferation, Counterproliferation, and International Law*, 30 YALE JOURNAL OF INTERNATIONAL LAW 507, 508–09 (2005).

143. See Thomas Ricks & Peter Slevin, *Spain and U.S. Seize N. Korean Missiles*, WASHINGTON POST, Dec. 11, 2002, at A1.

144. Joyner, *supra* note 142, at 509.

145. Byers, *supra* note 141, at 527–28.

146. Press Release, Office of the Press Secretary, White House, Fact Sheet: Proliferation Security Initiative, Statement of Interdiction Principles (Sept. 4, 2003), <http://www.whitehouse.gov/news/releases/2003/09/print/20030904-11.html>.

147. *Id.* See also Ted L. McDorman, *An Information Note on the Proliferation Security Initiative (PSI)*, 36 OCEAN DEVELOPMENT & INTERNATIONAL LAW, Oct.–Dec. 2005, at 381, 381–86.

148. See Timothy C. Perry, *Blurring the Ocean Zones: The Effect of the Proliferation Security Initiative on the Customary International Law of the Sea*, 37 OCEAN DEVELOPMENT & INTERNATIONAL LAW, Jan.–Mar. 2006, at 33, 33–53; Joyner, *supra* note 142, at 509. See also Michael Evans, *US Plans to Seize Suspects at Will*, TIMES (London), July 11, 2003, at 23.

149. US Customs and Border Protection, *New CSI Port Becomes Operational*, U.S. CUSTOMS AND BORDER PROTECTION TODAY, May 2006, [http://www.cbp.gov/xp/CustomsToday/2006/may/new\\_csi\\_port.xml](http://www.cbp.gov/xp/CustomsToday/2006/may/new_csi_port.xml).

150. Press Release, Office of the Press Secretary, White House, *Protecting America's Seaports and Security Cargo Shipments* (Feb. 5, 2004), <http://www.whitehouse.gov/news/releases/2004/02/20040205-4.html> (CSI “allows [DHS] to prescreen cargo” before it reaches the United States). See also Jessica Romero, *Prevention of Maritime Terrorism: The Container Security Initiative*, 4 CHICAGO JOURNAL OF INTERNATIONAL LAW 597, 597–605 (2003).

151. US Customs and Border Protection, *Fact Sheet: Container Security Initiative*, (Sept. 30, 2006), [http://www.cbp.gov/xp/cgov/border\\_security/international\\_activities/csi/csi\\_in\\_brief.xml](http://www.cbp.gov/xp/cgov/border_security/international_activities/csi/csi_in_brief.xml).

152. *Id.* See Roach, *supra* note 101, at 343.

153. No such US legal authority currently exists, and there are no serious proponents to adopt any such proposal. However, if Congress chose to impose such a requirement as a condition of port entry based on a reasoned national security justification, it would meet the requirements of international law.

154. *When Trade and Security Clash—Container Trade*, ECONOMIST, Apr. 6, 2002, at 69. (There are over 15 million containers in shipment at any one moment. Cargo shipped by container constitutes 90 percent of international trade by value).

155. See 6 US Code §§ 961–68. See also H. Lamar Walters III, *Industry on Alert: Legal and Economic Ramifications of the Homeland Security Act on Maritime Commerce*, 30 TULANE MARITIME LAW JOURNAL 311, 318–19 (2006) (“Customs-Trade Partnership Against Terrorism”).

156. “The core technology is called a tamper-resistant embedded controller (TREC). It is attached to the cargo door of the container and can be programmed, unlike passive or active radio frequency identification tags. It can detect the opening of the container and can control a host of sensors located inside . . . . All this transforms each container into an intelligent and mobile warehouse.” Robert Malone, *The Container That Could*, FORBES.COM, Aug. 8, 2006, [http://www.forbes.com/2006/08/06/smart-shipping-containers-cx\\_rm\\_0808ship.html?partner=yahootix](http://www.forbes.com/2006/08/06/smart-shipping-containers-cx_rm_0808ship.html?partner=yahootix).

157. Larry Greenemeier, *IBM Launches Wireless Shipping Security*, INFORMATION WEEK, Sept. 20, 2005, <http://www.informationweek.com/showArticle.jhtml?articleID=171000325>. Of course, the early prototypes represent just the first generation of such devices. As more firms enter



the competition to develop such hardware and supporting software, improvements are sure to be forthcoming.

158. Lloyd's List, Freedom and Security: The Dilemma of Vessel Tracking, SECURITYWATCH.COM, Apr. 28, 2006, <http://www.securityinfowatch.com/article/article.jsp?id=7983&siteSection-386>.

159. *Id.*

160. See Erik Jaap Molenaar & Martin Tsamenyi, *Satellite-Based Vessel Monitoring Systems for Fisheries Management: International Legal Aspects*, 15 INTERNATIONAL JOURNAL OF MARITIME & COASTAL LAW 65, 67 (2000).

161. See 46 US Code § 2101; 33 C.F.R. § 164.46.

162. "Intelligence . . . is the first line of defense against terrorists . . . [and such] information becomes the basis for building MDA." US COAST GUARD, MARITIME STRATEGY FOR HOMELAND SECURITY 18 (2002).

163. Pub. L. No. 107-295, § 102(a), 116 Stat. 2082 (2002) (codified at 46 US Code § 70114).

164. Pub. L. No. 108-293, § 803(b), 118 Stat. 1080 (2004) (codified at 46 US Code § 70115).

165. Joe Pappalardo, *Federal Agencies Tackle Maritime Security, Ports First*, NATIONAL DEFENSE, June 2005, at 35, available at [http://www.nationaldefensemagazine.org/issues/2005/June/federal\\_agencies.htm](http://www.nationaldefensemagazine.org/issues/2005/June/federal_agencies.htm).

166. 46 US Code § 70114 ("Automated identification systems"); 46 US Code § 70115 ("Long-range vessel tracking system").

167. Aliya Sternstein, Coast Guard gets satellite help, FEDERAL COMPUTER WEEK.COM, Nov. 7, 2004, <http://www.fcw.com/article84497-11-07-04-Print>.

168. Res. MSC.202(81) and Res. MSC.210(81). See International Maritime Organization, Long range identification and tracking (LRIT), [http://www.imo.org/Safety/mainframe.asp?topic\\_id=905](http://www.imo.org/Safety/mainframe.asp?topic_id=905) (last visited Dec. 28, 2007).

169. Congress authorized the development and implementation of an LRIT system in 46 US Code § 70115, to be fully effective to provide "the capability of receiving information on vessel positions at interval positions appropriate to deter transportation security incidents" by April 1, 2007.

170. As an example, Australia's zone extends one thousand miles from its coast and involves the identification of vessels seeking to enter port, as well as vessels merely transiting Australia's EEZ. See Natalie Klein, *Legal Implications of Australia's Maritime Identification Zone*, 55 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 337, 337-68 (2006).

171. IMO Adopts Comprehensive Security Measures, IMO.org, [http://www.imo.org/About/mainframe.asp?topic\\_id=583&doc\\_id=2689](http://www.imo.org/About/mainframe.asp?topic_id=583&doc_id=2689) (last visited Dec. 28, 2007). See also Maritime Security, IMO.org, [http://www.imo.org/Safety/mainframe.asp?topic\\_id=55](http://www.imo.org/Safety/mainframe.asp?topic_id=55) (last visited Dec. 28, 2007).

172. Maritime Transportation Security Act of 2002, Pub. L. No. 107-295, § 102(a), Nov. 25, 2002, 116 Stat. 2079 (2002), as amended by Pub. L. No. 109-347, 120 Stat. 1918 (2006) (codified at 46 US Code § 70108) ("Foreign port assessment").

173. 46 US Code § 70110(a). The Secretary of the Department of Homeland Security (Coast Guard) is also charged with notifying the foreign country about security deficiencies it has observed at the port. *Id.* at § 70109(a).

174. 33 C.F.R. pt. 101 ("Maritime Security").

175. 33 C.F.R. § 101.410(b)(5) ("Denial of port entry").

176. 33 C.F.R. § 160.206 ("Information required in an NOA").

177. Michael Richardson, *Crimes Under Flags of Convenience: In a Depressed Shipping Market, Poor Nations Sell Flags for Criminal Ventures*, 127 MARITIME STUDIES, Nov.-Dec. 2002, at 22, 22-24.

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178. See 33 US Code § 1228(a)(2) (“Conditions for entry to ports in the United States”); 33 US Code § 1232(e) (“Denial of entry”).

179. 46 US Code § 70111(a) (“Enhanced crewmember identification”).

180. Transportation Worker Identification Credential (TWIC) Implementation in the Maritime Sector, Proposed Rules, 71 Fed. Reg. 29,395 (May 22, 2006) (to be codified at 33 C.F.R. pts. 1, 20; 46 C.F.R. pts. 10, 12, 15; and 49 C.F.R. pts. 1515, 1570, 1572).

181. SAFE Port Act of 2006, Pub. L. No. 109-347, §§ 104, 106, 120 Stat. 1884, 1888–91 (2006) (codified at 46 US Code § 70105).

182. See 8 US Code § 1182 (“Inadmissible aliens” include persons with criminal records and/or terrorist affiliations).

183. Literally, the French phrase *force majeure* translates as a “greater or superior force.” It implies that the consequences were unanticipated and irresistible, such as an “Act of God.” BLACK’S LAW DICTIONARY 645 (6th ed. 1990). Although commonly applied in contract law, *id.*, the principle is well established in the law of the sea. “If a ship needs to enter a port or internal waters to shelter in order to preserve human life, international law gives it a right of entry.” CHURCHILL & LOWE, *supra* note 7, at 63. See also YANG, *supra* note 72, at 64–67.

184. According to one recent authority, “all writers agree” that vessels have a right to enter foreign ports in *bona fide* cases of *force majeure* and distress. La Fayette, *supra* note 6, at 11. A general right of access even extends to warships, where one is “obliged to take refuge in a foreign port by reason of stress of weather or other circumstances of *force majeure*.” COLOMBOS, *supra* note 4, § 274, at 262–63.

185. See 1982 LOS Convention, *supra* note 8, arts. 18 and 39.

186. *Id.*, art. 98 (“Duty to render assistance”). See also SOLAS Convention, *supra* note 29, Annex, ch. 5, regs. 10 & 15a; International Convention on Maritime Search and Rescue, Annex, ch. 2, ¶¶ 2.1.1, 2.1.4, 2.1.10, Apr. 27, 1979, T.I.A.S. No. 11,093, 1405 U.N.T.S. 97. See also 14 US Code § 88 (“Saving life and property” at sea is a statutory mission of the US Coast Guard).

187. COLOMBOS, *supra* note 4, § 353, at 329–30. See also MALANCZUK, *supra* note 2, at 175 (citing as examples ships seeking refuge from a storm or which are severely damaged).

188. See *Kate A. Hoff (United States) v. Mexico*, 4 R.I.A.A. 444 (1929).

189. PHILLIP C. JESSUP, THE LAWS OF TERRITORIAL WATERS AND MARITIME JURISDICTION 194 (1927). See also A.F. de Zayas, *Ships in Distress*, in 11 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 287–89 (Rudolf Bernhardt ed., 1989).

190. MCDUGAL & BURKE, *supra* note 1, at 110. See Christopher F. Murray, *Any Port in a Storm? The Right of Entry for Reasons of Force Majeure or Distress in the Wake of the Erika and the Castor*, 63 OHIO STATE LAW JOURNAL 1465, 1490–91 & n.159 (2002).

191. MCDUGAL & BURKE, *supra* note 1, at 110.

192. *Guangzhou Ocean Shipping Co. v. Minister of Transport, Public Works, and Water Management*, 27 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 354, 357 (1996).

193. See 1982 LOS Convention, *supra* note 8, art. 98 (“Duty to render assistance”); 46 US Code § 2304(a). See generally, Arthur A. Severance, *The Duty to Render Assistance in the Satellite Age*, 16 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 377, 378–93 (2005–06) (discussing the duty of masters, vessels and coastal States to render assistance to vessels and mariners in danger of being lost at sea).

194. *Canadian Transport Co. v. United States*, 663 F.2d 1081, 1083–84 (D.C. Cir. 1980).

195. *Id.* at 1091.

196. *Humane Society of the United States v. Clinton*, 44 F.Supp.2d 260 (Ct. Int’l Trade 1999).

197. High Seas Driftnet Fisheries Enforcement Act of 1992, Pub. L. No. 102-582, § 101, 106 Stat. 4900 (1992), (codified as amended at 16 US Code § 1826(a)).

198. Humane Society, 44 F.Supp.2d at 277–78 (to rule against the government, “the Court must find that [the Secretary of Commerce] acted arbitrarily, capriciously and not in accordance with law”).

199. Ports and Waterways Safety Act of 1972, Pub. L. No. 92-340 (1972) (codified at 33 US Code §§ 1221–36).

200. 33 US Code § 1223(b)(1).

201. 33 C.F.R. § 160.107 (“Denial of entry”).

202. 33 C.F.R. § 160.111 (“Special orders apply to vessel operations”).

203. Admiral Thad Allen, Commandant, US Coast Guard, *The Water Is Different*, Address at the US Naval Institute Port Security Conference (June 7, 2006). “Significant progress has been made in the continuing maturation of the [MOTR] coordination process . . . .” A copy of the Commandant’s entire address is available at [http://www.uscg.mil/comdt/speeches/docs/USNI\\_NY\\_06\\_2006.pdf](http://www.uscg.mil/comdt/speeches/docs/USNI_NY_06_2006.pdf).

204. See RESTATEMENT, *supra* note 2, § 403(1).

205. 1982 LOS Convention, *supra* note 8, art. 22(3)(a).

206. *Id.*, art. 41(3). Moreover, any such proposals “shall conform to generally accepted international regulations.” *Id.*, art. 41(2).

207. *Id.*, art. 211(5). See also *id.*, art. 211(6).

208. FAL Convention, *supra* note 35, art. 1. See FAL Convention, 2002 Amendments, Jan. 10, 2002, 18 U.S.T. 411, 591 U.N.T.S. 265 (entered into force May 1, 2003).

209. For background on the proposal to regulate navigation in the Torres Strait and the legal issues involved, see Julian Roberts, *Compulsory Pilotage in International Straits: The Torres Strait PSSA Proposal*, 37 OCEAN DEVELOPMENT & INTERNATIONAL LAW 93, 94–104 (2006). Several maritime States objected to various aspects of this proposal. The United States, for example, filed a diplomatic protest that the Australian regulations violated international law to the extent that it impeded transit passage to vessels not bound directly for an Australian port. SECSTATE WASH DC message 091524Z Feb 07 (“Torres Strait Compulsory Pilotage: Third Demarche”). Noting that “the IMO has not approved a compulsory pilotage scheme for the Torres Strait . . . ,” the U.S. demarche contended that “there is no basis in international law” to impose such a mandatory scheme on “foreign flag ships exercising the right of transit passage.” *Id.*, ¶ 5.

210. Nairobi Convention on the Removal of Wrecks (May 18, 2007), IMO.org., [http://www.imo.org/Conventions/mainframe.asp?topic\\_id=1604](http://www.imo.org/Conventions/mainframe.asp?topic_id=1604).

211. Ted L. McDorman, *Regional Port State Control Agreements: Some Issues of International Law*, 5 OCEAN & COASTAL LAW JOURNAL 207, 219–22 (2000) (“Access to Ports—Effect of International Trade Laws”).

212. *Id.* at 222.