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LEGAL AND POLICY FACTORS GOVERNING THE IMPOSITION OF CONDITIONS ON ACCESS TO AND JURISDICTION OVER FOREIGN-FLAG VESSELS IN U.S. PORTS

*John T. Oliver**

I. 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 global economic success story. At the same time, the grave threats that international terrorism and rogue states pose to global order give rise to overriding national security concerns among port states, which argue against an unfettered 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, also prompt port states to take actions that impose conditions on port access, leave to exercise greater jurisdiction in port, and even leave to restrict traditional freedoms of

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navigation in coastal waters. Recent examples include proposed speed restrictions on vessels operating off the eastern seaboard of the United States to protect the endangered North Atlantic right whale from deadly "ship strikes" and Australia's mandatory pilotage requirements in the ecologically fragile Torres Strait.

In addition to providing a thorough background discussion on the general topic area, this paper seeks to answer three complex questions: (1) What principles of international law govern the restrictions that a port state may impose on those foreign-flag vessels that desire to enter port? (2) Does international law permit a port state to exercise jurisdiction over the actions of a foreign-flag vessel committed outside of its waters based on the subsequent presence of the vessel in one of its ports? and, (3) If so, what are the limits international law imposes on the exercise of such jurisdiction?

As a general rule, international law presumes that the ports of every state should be open to all commercial vessels. However, international law generally permits an exception if the port state considers that one or more important interests require closure, necessitate imposing conditions on access or exit, or dictate the exercise of greater jurisdiction over foreign vessels in port. A port state may restrict the port access 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 not restrict access to foreign commercial vessels or impose sanctions upon those that enter port, even those designed to promote important societal goals, which are not reasonably related to ensuring the safe, secure, and appropriate entry or departure of the vessel on the occasion in question. Moreover, any effort by the port state to exercise jurisdiction over foreign-flag vessels present within its waters must be consistent with well established, fundamental principles of international law. To do otherwise would be an unreasonable and arbitrary exercise of state sovereignty over foreign-flag vessels that would give rise to various sources of redress, including diplomatic protests, retaliatory restrictions, dispute settlement procedures, and, under some circumstances, liability for damages.

As a key policy goal, all states must cooperate to develop and implement efficient and effective conditions on port access to ensure the security of the port state and the international commercial system. Overly restrictive conditions would have a deleterious effect on global trade and the world's economy. However, overly permissive conditions on entry, such as faulty cargo screening, could result in a security breakdown and a devastating terrorist attack on a port city.

Such a disaster renders virtually inconsequential the debate over restrictions on port access to achieve political, environmental, safety, law enforcement, or other goals. Even so, international lawyers and policy makers must seek to ensure that access to the ports of the world is fundamentally free and only restricted by on conditions directly, effectively, and reasonably related to the significant interests of the port state and the world community at large.

II. INTRODUCTION AND COMPETING POLICY INTERESTS

This paper discusses general principles of international and domestic law governing the condition of port entry as a basis for regulating foreign vessels entering ports in the United States and other select countries as examples of state practice. Additionally, the paper addresses the bases under which a port state may exercise jurisdiction over foreign-flag vessels, their operators, and their activities. It also addresses the policy consequences of imposing legally permissible restrictions or requirements that could have the practical effect of infringing unreasonably on maritime commerce or would lead to concerns in the international community and might result in diplomatic protests and political concerns. The goal of the paper is to develop an analytical structure that encourages a rational review of any proposed conditions on entry to ports to help ensure any such requirements are legal, acceptable, reasonable, and wise. In addition, this paper attempts to answer three difficult legal and policy questions: (1) What legal principles govern the restrictions that a port state may impose on those foreign-flag vessels that desire to enter port? (2) Does international law permit a port state to exercise jurisdiction over the actions of a foreign-flag vessel committed outside of its waters based on the subsequent presence of the vessel in one of its ports? (3) If so, what are the limits international law imposes on the exercise of such jurisdiction? 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.

As a general rule, international law presumes that the ports of every state should be open to all commercial vessels calling on them. As Professors McDougal and Burke observed 45 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.”¹ At the same time, each port state has the sovereign right to deny access and to establish reasonable conditions related to access to its internal waters, harbors, roadsteads, and ports.² For example, a port state may restrict access of warships, fishing vessels, or private recreational craft on any basis it chooses, whether reasonably or not.³

The 1982 United Nations Convention on the Law of the Sea (UNCLOS)⁴ “contains no restriction on the right of a state to establish port entry requirements”⁵ Indeed, 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.”⁶ The port state’s authority

¹ MYRES S. MCDUGAL & WILLIAM T. BURKE, *THE PUBLIC ORDER OF THE OCEANS* 90 (1962) (footnote omitted). As used in international and domestic law, the term “port” has a broad definition. Under 47 U.S.C. § 153(19), “port” means “any place to which ships may resort for shelter or to load or unload passengers or goods, or to obtain fuel, water, or supplies.” This includes harbor facilities, whether natural or manmade. But the term also includes internal waters into which a foreign vessel may enter, anchor, or take shelter, as well as roadsteads or other offshore facilities over which the United States exercises jurisdiction. See *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 122 (1923): “It now is settled in the United States and recognized elsewhere that the territory subject to its jurisdiction includes the land areas under its dominion and control, the ports, harbors, bays and other enclosed arms of the sea along its coast and a marginal belt of the sea extending from the coast line outward [to the outer limit of the territorial sea].”

² “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 INT’L J. MARINE & COASTAL L. 1, 2 (1996).

³ *Id.* at 1, 12, 22. A.V. Lowe, *The Right of Entry into Maritime Ports in International Law*, 14 SAN DIEGO L. REV. 597, 606-07 (1977). Moreover, a port State has the sovereign right of “port nomination” and may designate a port as the only one or one of several ports open to foreign vessels. *Id.* at 607.

⁴ United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3, art. 25(2), available at http://www.un.org/Dept/los/convention_agreements/texts/unclos/clos,index.htm (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

⁵ Bernard H. Oxman, *The Territorial Temptation: A Siren Song at Sea*, 100 AM. J. INT’L L. 830, 844 (2006) (footnote referring to UNCLOS, arts. 25(2) and 211(3), omitted).

⁶ UNCLOS, *supra* note 4, art. 25(2). The United States has not yet ratified UNCLOS. However, this same principle is codified in art. 16(2) of the

has long included conditioning access to a port or departure from the port on compliance with laws and regulations governing "the proper conduct of the business of the port."⁷ While the United States signed the "Part XI Agreement" that incorporated almost all of UNCLOS in 1994, the U.S. Senate has not yet ratified or acceded to it. Nor has it even signed the 1923 Convention and Statute on the International Régime of Maritime Ports. Even so, the United States has long considered the navigation-related principles contained in UNCLOS to reflect customary international law, which is binding on all states.⁸

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.⁹ 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."¹⁰ In his widely respected treatise, Dr. C.J. Colombos wrote that "in time of peace, commercial

1958 Convention on the Territorial Sea and Contiguous Zone, 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.

⁷ Statute on the International Régime of Maritime Ports, art. 3, annexed to the Convention on the International Régime of Maritime Ports, Geneva, 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." ARND BERNAERTS, BERNAERTS' GUIDE TO THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 111 (2006).

⁸ See President Ronald Reagan, Statement on United States Ocean Policy, Mar. 10, 1983, 22 I.L.M. 464 (1983), reprinted in 77 AM. J. INT'L L. 619 (1983); see also BERNAERTS, *supra* note 7, at 14-15.

⁹ THE AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 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, the therefore welcome foreign ships to their ports."); McDUGAL & BURKE, *supra* note 1, at 99-100.

¹⁰ *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. Lowe, *supra* note 3, at 621.

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."¹¹ The Third Restatement of the Foreign Relations Law of the United States summarized 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"¹²

Apart from these pronouncements, however, there is little actual support, as a fundamental principal of customary international law, for the broad statement that ports can only be closed for "vital interests" or "imperative reasons" as a fundamental principle of customary international law.¹³ After carefully examining the relevant authorities cited in support of such a 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.¹⁴ He convincingly distinguished between a *right* of access and a *presumption* of access, 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 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.¹⁵

Another knowledgeable observer went even further: "There is a presumption that all ports used for international trade are open to all

¹¹ 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.

¹² RESTATEMENT, *supra* note 9, § 512, cmt. c (1987).

¹³ 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).

¹⁴ 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).

¹⁵ Lowe, *supra* note 3, at 622 (footnote omitted).

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.”¹⁶ The U.S. 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.”¹⁷ 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.”¹⁸

Whether states view port access as an international obligation or one granted based on international comity and domestic self-interest, they typically do not undertake to deny access to their ports without good cause. States must have good policy reasons before restricting access to their ports. “Vital interests,” “imperative reasons,” or factors that may “necessitate closure” or constitute “good policy” include national security and 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,¹⁹ or to promote other significant interests as the port state may determine appropriate and necessary.²⁰ Protection of the coastal state’s maritime environment is a policy goal of particular importance today, particularly in the

¹⁶ La Fayette, *supra* note 2, at 1 (emphasis in original).

¹⁷ *United States v. Louisiana*, 394 U.S. 11, 22 (1969).

¹⁸ *Lauritzen v. Larsen*, 345 U.S. 571, 592-93 (1953).

¹⁹ An embargo is one of the tools available to the international community, or a nation state, to seek to change the behavior of another. U.N. Charter, art. 41. So is a reprisal. In 1984 the U.S. closed its ports to vessels flying the Nicaraguan flag as part of a rather ineffectual economics sanctions package in retaliation for the guerilla war that the Government of Nicaragua was waging against its neighbors. Dan Morgan, *Why the Nicaragua Embargo?*, WASH. POST, May 5, 1985, at C5.

²⁰ According to one Federal appeals court, U.S. 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 U.A.R. *Id.*

United States.²¹ It boils down to what the concerned state considers to be sufficiently important to close off or burden international trade, so as to subject itself to increased costs, or, in the event the port closure or restriction is considered unjustified, to diplomatic protests, retaliation in the form of economic sanctions or reciprocal restrictions on port access, and, perhaps, damages following a hearing before a domestic or international tribunal.

In the United States, Congress may condition access to ports on such condition as it deems most appropriate. In 1903, the U.S. Supreme Court stated that "the implied consent to permit [foreign vessels] to enter our harbors may be withdrawn, and if this implied consent may be wholly withdrawn, it may be extended upon such terms and conditions as the government sees fit to impose."²² The Third Restatement summarized this legal principle as follows:

[The port State] may condition entry of a foreign ship into its internal waters or ports on compliance with its laws and regulations. [It] may also exercise jurisdiction to enforce international standards with respect to some activities that occurred prior to entry into its ports or internal waters (for example, illegal discharge of pollutants).²³

Many federal statutes and regulations put this principle into practice and govern issues ranging from national security to pollution control to enforcing customs laws to ensuring navigational and operational safety.²⁴

There is also a good deal of foreign state practice supporting the imposition of a broad spectrum of conditions governing port access and exercise jurisdiction in port.²⁵ Today, there is general agreement "that

²¹ "In the case of the United States . . . such control [through port entry requirements to protect the marine environment] now effectively applies to the overwhelming majority of ships operating off its coast." Oxman, *supra* note 5, at 844.

²² Paterson v. Bark Eudora, 190 U.S. 169, 178 (1903).

²³ RESTATEMENT, *supra* note 9, at § 512, cmt. c (1987) (citing UNCLOS, *supra* note 4, art. 218).

²⁴ Examples include the Magnuson Act of 1950 (codified at 50 U.S.C. § 191), and the Ports and Waterways Safety Act of 1972 (codified at 33 U.S.C. §§ 1221-1236), and regulations established under their authority.

²⁵ For a good example of one state's approach, see the 1995 Norwegian Regulations Governing Pilotage and Entry to Norwegian Waters, *available at* <http://www.state.gov/www/global/oes/oceans/ntrvol113.html>.

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.”²⁶ Among appropriate access conditions are complying with pilotage requirements, obeying traffic separation schemes, and paying customs fees. Moreover, this position is fully consistent with the approach taken in international tribunals. In its *Nicaragua Mining* decision, the International Court of Justice noted that internal waters are subject to the sovereignty of the port State and that it is “by virtue of its sovereignty that the coastal State may regulate access to its ports.”²⁷

Port states have even greater rights to limit or control access with respect to certain categories of vessels, such as warships, nuclear-powered vessels, fishing boats, and recreational craft. Absent an agreement between the states concerned, foreign warships have no general expectation of access²⁸ and must request permission to make a port call in each case.²⁹ In 1985, suspecting that certain U.S. military vessels might be carrying nuclear weapons and concerned about the potential dangers of nuclear power, and in the absence of an official U.S. denial that the vessels carried nuclear weapons, New Zealand announced that it would refuse entrance to nuclear-powered warships

²⁶ CHURCHILL & LOWE, *supra* note 13, at 107 (footnote omitted). See *Anglo-Norwegian Fisheries Case* (U.K. v. Norway), 1951 I.C.J. Rep. 116, 125 (international law does not grant a right of access to internal waters for the purpose of passage, even those previously used by foreign vessels for navigation).

²⁷ *Case Concerning Military and Paramilitary Activities (Nicar. V. U.S.)*, 1986 I.C.J. 14, 111 (June 27). Although the case was rather controversial, particularly in the United States, there was no criticism for this point of law. In 1984, the U.S. closed its ports to vessels flying the Nicaraguan flag as part of a rather ineffectual economics sanctions package in retaliation for the guerilla war that the Government of Nicaragua was waging against its neighbors. Dan Morgan, *Why the Nicaragua Embargo*, WASH. POST, May 5, 1985, at C5.

²⁸ “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.” MCDUGAL & BURKE, *supra* note 1, at 94, 114-115.

²⁹ “[T]he right [of port States] to exclude foreign warships is undoubted.” CHURCHILL & LOWE, *supra* note 13, at 61. See also LOUIS B. SOHN & JOHN E. NOYES, *CASES & MATERIALS ON THE LAW OF THE SEA 377-78* (2004) (noting that treaties of friendship, commerce, and navigation usually do not provide access for warships).

into its ports.³⁰ Although disconcerting to the United States and detrimental to the bilateral and multilateral relations with its ANZUS and SEATO allies, New Zealand had the sovereign right to take this action.

International law also permits a port state to impose special restrictions on nuclear-powered ships or vessels carrying particularly dangerous cargoes.³¹ In this regard, the Convention on the Liability of Operators of Nuclear-Powered Ships provides that "nothing in this Convention shall affect any right which a contracting state may have under international law to deny access to its waters and harbours to nuclear ships licensed by another contracting state, even when it has formally complied with all the provisions of this Convention."³² International law also permits port states to deny or condition access as they see fit to foreign-flag fishing boats³³ and private recreational craft.³⁴ Some port states may consider that the domestic political costs of approving nuclear-powered vessels access to their waters to be too high, while granting port access 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 serve.

³⁰ SOHN & NOYES, *supra* note 29 at 365-66; see 21 WEEKLY COMP. PRES. DOC. 146-147 (Feb. 6, 1985); see also *ANZUS Pact*, ENCYCLOPEDIA BRITANNICA ONLINE (2007), available at <http://www.britannica.com/eb/article-9007952/ANZUS-Pact> (discussing the effect of New Zealand's policy of banning port access to nuclear-armed vessels on military ties between the two countries); STUART MCMILLAN, NEITHER CONFIRM NOR DENY: THE NUCLEAR SHIPS DISPUTE BETWEEN NEW ZEALAND AND THE UNITED STATES (1987).

³¹ UNCLOS, *supra* note 4, arts. 22(2), 23.

³² Convention on the Liability of Operators of Nuclear-Powered Ships, Belgium, art. XVII, May 25, 1962, 57 AM. J. INT'L L. 268, 275 (1963).

³³ See, e.g., Straddling and Highly Migratory Fish Stocks Agreement, art. 23, Dec. 4, 1995, 34 I.L.M. 1542, 1567 (1995) ("Measures taken by a port State").

³⁴ Foreign-flag recreation vessels do not engage in international trade or other activities of significant benefit to the port state. At the same time, they represent a threat to import illegal aliens, illicit drugs, and terrorist and weapons. Moreover, it is far more difficult to keep track of them. La Fayette, *supra* note 3, at 12. See V.D. Degan, *Internal Waters*, 17 NETHERLANDS Y.B. INT'L L. 3 (1986). "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." *Id.*

Just as there is a presumption that a port state may not properly bar a foreign commercial vessel from access to its ports absent adequate justification, the affected flag state and the international community would view with concern the imposition of unreasonable, arbitrary, discriminatory, or prohibitive requirements for access.³⁵ "It is . . . possible that closures or conditions of access 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."³⁶ However, both conventional and customary international law permit a state to impose reasonable restrictions on access.³⁷ The possible conditions on entry range from those historically justified to those essential to the orderly operation of a busy port, such as assurances that the vessel and crew are free from infectious diseases, customs duties have or will be paid, and promises to use the services of a pilot when entering or exiting port, and moor or anchor as directed. 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.³⁸

Under the fundamental international legal principle of *pacta sunt servanda*, 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

³⁵ "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 J. MAR. L. & COM. 657, 660 (1997) (footnote omitted).

³⁶ CHURCHILL & LOWE, *supra* note 13, at 63. See also Ademuni-Odeke, *supra* note 35, at 660.

³⁷ "A coastal state can condition the entry of foreign ships into its ports on compliance with [its] laws and regulations." RESTATEMENT, *supra* note 9, § 512 rep. n. 3.

³⁸ 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. See also Ports and Waterways Safety Act of 1978, Pub. L. No. 95-474, § 2, 92 Stat. 1472 (codified at 33 U.S.C. § 1223(a)(5) and implemented by 33 C.F.R. §§ 160.201 *et seq.*)

parties to the agreements provide port access to the other.³⁹ Such FCN treaties support the general presumption that ports will be open and unrestricted by unreasonable conditions. For example, the FCN treaty between the United States and Belgium provides:

Vessels of either Contracting Party shall have liberty, on equal terms with vessels of the other Party and on equal terms with vessels of any third country, to come with their cargoes to all ports, places and waters of such other Party open to foreign commerce and navigation. Such vessels and cargoes shall in the ports, places and waters of such other Party be accorded in all respects national treatment and most-favored-nation treatment.⁴⁰

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 access conditions and expectations.⁴¹ Here again, international practice is to exclude warships and fishing vessels from the general presumption of access.⁴² Whether at sea or in port, warships and other sovereign immune vessels are

³⁹ 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, U.S.-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. 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, Establishment and Navigation, U.S.-Japan, art. XXI, Apr. 2, 1953, 4 U.S.T. 2063.

⁴⁰ Treaty of Friendship, Establishment and Navigation, U.S.-Belgium, art. 13(1), Feb. 21, 1961, 14 U.S.T. 1284, *available at* http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_002781.asp.

⁴¹ Professors Churchill and Lowe opined that the power to condition access could be limited. CHURCHILL & LOWE, *supra* note 13, at 63. *See also* Ademuni-Odeke, *supra* note 35, at 660 (“[T]he arbitrary closure of a port gives rise to a right of protest and, under certain circumstances, liability for damages.”).

⁴² The normal practice in these bilateral agreements is to exclude fishing vessels and warships from the provisions on port access, except for distress. MCDUGAL & BURKE, *supra* note 1, at 109-10 & n.59.

subject only to the enforcement jurisdiction of the flag state.⁴³ 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 to leave immediately and may seek damages through diplomatic channels resulting from the actions of foreign sovereign-immune vessels.⁴⁴

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 fully or partially offset with appropriate port-entry, pilotage, mooring, or anchorage fees. But the most significant burden involves the economic, political, and other costs involved in slowing, complicating, or otherwise interfering with the smooth and efficient flow of international trade. A nation's port-access scheme may require a merchant vessel to wait outside port until it receives clearance, embarks a pilot, or agrees to submit to a search, or it may impose such an extensive planning, inspection, or reporting system on shipping companies or ship masters making it no longer attractive to do business with a certain nation or port. Any such conditions on port access make international trade more time-consuming, difficult, and costly. The 1965 Convention on Facilitation of International Maritime Traffic (FAL Convention), following earlier international efforts to facilitate 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"⁴⁵ International legal principles also expect that port states

⁴³ CHURCHILL & LOWE, *supra* note 13, 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 UNCLOS, *supra* note 4, arts. 30-33, 95-96.

⁴⁴ See RESTATEMENT, *supra* note 9, § 457, rep. n. 7, and § 512, rep. n. 6; CHURCHILL & LOWE, *supra* note 13, at 99 ("[T]he flag State is responsible for loss to the coastal State") See also UNCLOS, *supra* note 4, arts. 30-33 and 42(5).

⁴⁵ 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 L. J. 323, 323-328 (1967). Cf. UNCLOS, *supra* note 4, art. 255 ("States shall adopt reasonable rules,

will extend "equality of treatment" and prohibit discrimination in all rules governing port access and conditions and procedures applied to foreign commercial vessels.⁴⁶

Given the crucial importance to international trade in today's global economy, the cumulative impact of incremental costs, short delays, or minor disruptions can have a profoundly adverse impact. 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. The benefits achieved from imposing conditions on port entry, such as intelligently devised security requirements, must be balanced against the costs and burdens associated with each. 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."⁴⁷ 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. If there is one thing that

regulations and procedures to promote and facilitate marine scientific research [including], subject to the provisions of their laws and regulations, access to their harbours . . .").

⁴⁶ See FAL Convention, *supra* note 45, art. 16. See also COLOMBOS, *supra* note 11, § 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, UNCLOS 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." UNCLOS, *supra* note 4, art. 131.

⁴⁷ Stephen E. Flynn, *America the Vulnerable*, 81 FOREIGN AFF. 60, 66 (Jan.-Feb. 2002).

you are going to protect in this world, it's the ability to conduct global commerce.⁴⁸

Policy makers and the attorneys and other subject-matter experts who advise them must strive for effective and workable limitations on port access 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.

III. 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 man 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. 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, was usually much faster than the alternative transportation modalities.

At the same time, history has demonstrated the risks associated with maritime activities. Too often seagoing vessels were engaged in less benign activities 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 12th Century B.C., and Vikings around the 10th Century A.D., 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

⁴⁸ April Terreri, *Int'l Trade is Less Secure Than You Think*, WORLD TRADE MAG., Sep. 4, 2006, at www.worldtrademag.com/CDA/Articles/Feature_Article/d37c5947e0c7d010VgnVCM100000f932a8c0.

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. Although history has no doubt demonstrated the potential for adverse activities and consequences, including imperialism, colonization, conflict, piracy, and maritime terrorism, international ocean trade has long been a vital component in promoting global economic growth and improving living conditions worldwide.⁴⁹

B. Contemporary Context. No period of history can rival the scale on which the world community trades by sea today. Moreover, world trade is growing 7-10 % each year. Ocean commerce will no doubt become increasingly vital in years to come. Some 95 % 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 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,⁵⁰ 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

⁴⁹ See J. M. ROBERTS, *HISTORY OF THE WORLD* 73-99, 333-34, 441-505 (1993). See also BBC News, *A Century of Free Trade*, Feb. 12, 2003, available at <http://news.bbc.co.uk/1/hi/business/533716.stm>; *International Trade*, ENCYCLOPEDIA BRITANNICA ONLINE (2007), available at <http://www.britannica.com/eb/article-9106321/international-trade>.

⁵⁰ There are four standard lengths: 20, 40, 45, and 48 feet in length. GlobalSecurity.Org, *Container Ships*, available at <http://www.globalsecurity.org/military/systems/ship/container.htm> Container capacity is measured in *twenty-foot equivalent units (TEU)*. Thus a forty-foot container is two TEU's. Some ships in service today can carry over 11,000 TEU. On such ship, the *Emma Marsh*, launched in 2006, is 1,300 feet long. *Containerization*, WIKIPEDIA, available at <http://en.wikipedia.org/wiki/Containerization>; see also MARK LEVINSON, *THE BOX: HOW THE SHIPPING CONTAINER MADE THE WORLD SMALLER AND THE WORLD ECONOMY BIGGER* (2006); Alexander Jung, *The Box That Makes the World Go Round*, SPIEGEL ONLINE INTERNATIONAL, Nov. 25, 2005, available at <http://www.spiegel.de/international/spiegel/0,1518,386799,00.html>.

ocean trade.⁵¹ 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 southern and eastern 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 % of international trade that enters or leaves this country does so through the nation's ports and inland waterways. In 2004, America's ports handled almost 20 million multimodal shipping containers.⁵² Container ships, which account for only eleven percent of the annual tonnage of waterborne overseas trade, account for 2/3 of the value of that trade. Several of the 326 or so seagoing ports in the United States, including LA/Long Beach, New York, Houston, San Francisco, and Baltimore, are among the busiest in the world in one or more categories.⁵³ In excess of 2 billion tons of domestic and international commerce now are carried on the water, creating more than 13 million jobs and contributing more than \$742 billion to the gross national product.⁵⁴ Multimodal freight

⁵¹ Andrew Marshall, *Waterway to the World*, TIME ASIA MAG., Jul. 25, 2006, available at <http://www.time.com/time/asia/magazine/printout/0,13675,501060807-1218608,00.html>.

⁵² John D. Haveman, Howard J. Shatz, & Ernesto A. Vilchis, *U.S. Port Security Policy after 9/11: Overview and Evaluation*, 2 J. HOMELAND SEC. & EMERGENCY MGMT. 1 (2005), available at <http://www.bepress.com/jhsem/vol2/iss2/1>. "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.

⁵³ OFF. OF STAT. & ECON. ANAL., U.S. MARITIME ADMIN., VESSEL CALLS AT U.S. PORTS, 2004 ix-x, 16-20 (Jul. 2005), available at http://www.marad.dot.gov/Marad_Statistics/vcalls2004.pdf.

⁵⁴ U.S. MARITIME ADMINISTRATION (MARAD), AN ASSESSMENT OF THE U.S. MARINE TRANSPORTATION SYSTEM (1999), available at <http://www.marad.dot.gov/publications/MTSreport/mtsfinal.pdf>. See also U.S. MARITIME ADMINISTRATION, STRATEGIC PLAN FOR 2003-2008 (2003), available at http://www.marad.dot.gov/publications/docs/MARAD_2003_2008_strategy_plan.pdf.

transportation accounts for nearly 15% of services the United States trades internationally. Each year, some 7,500 vessels flying foreign flags make 51,000 calls in U.S. ports.⁵⁵

Energy is also a critical and growing import into the United States. Large tankers that are American owned, operated, or both 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.⁵⁶ Increasingly, huge LNG tankers call on U.S. terminals to meet the tremendous and increasing American appetite for natural gas.⁵⁷ Presently, only six LNG terminals in the United States, but plans are underway to build dozens more.⁵⁸ 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 U.S. economy will continue to grow dramatically over the coming years.⁵⁹

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 U.S. Navy and Army infrastructure at Pearl Harbor, Hawaii. This surprise attack

⁵⁵ THE WHITE HOUSE, SECURING AMERICA'S BORDERS FACT SHEET: BORDER SECURITY 1 (Jan. 25, 2002), available at <http://www.whitehouse.gov/news/releases/2002/01/print/20020125.html>.

⁵⁶ EIA, *Crude Oil and Total Petroleum Imports Top 15 Countries*, released January 17, 2007, available at 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.*

⁵⁷ U.S. LNG imports have been growing dramatically in recent years. The primary sources of the LNG for consumption in the United States include Trinidad and Tobago, Algeria, and Nigeria. Energy Information Administration, *U.S. Natural Gas Imports by Country*, last updated Jan. 18, 2007, available at http://tonto.eia.doe.gov/dnav/ng/ng_move_imp_c_s1_m.htm.

⁵⁸ U.S. COAST GUARD, THE U.S. COAST GUARD STRATEGY FOR MARITIME SAFETY, SECURITY, AND STEWARDSHIP 18 (2007). See Natural Gas Intelligence, *North American LNG Terminals*, Nov. 7, 2006, available at <http://intelligencepress.com/features/lng/>.

⁵⁹ MARAD, *supra* note 54. See also Jeremy Firestone & James Corbett, *Maritime Transportation: A Third Way for Port and Environmental Security*, 9 WIDENER L. SYMP. J. 419, 422 (2002-2003).

killed some 2403 service members and 68 civilians, seriously damaged or destroyed 12 warships and 188 aircraft caused hundreds of millions of dollars in damages to infrastructure, and plunged the United States into the Second World War.⁶⁰ Nearly 60 years later, a mere 15 Al-Qaeda terrorists hijacked four civilian airliners, caused the death of nearly 3000 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 on both sides and hundreds of billions of dollars in costs.⁶¹

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 (WMD) to explode in a major port city such as Long Beach or Baltimore.⁶² 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.⁶³ Other scenarios, such as the possibility that terrorists would hijack an LNG carrier and detonate the cargo in a

⁶⁰ *Pearl Harbor Attack*, ENCYCLOPEDIA BRITANNICA ONLINE (2007), available at <http://www.britannica.com/eb/article-9058877/Pearl-Harbor-attack>.

⁶¹ See Michael N. Schmitt, *U.S. Security Strategies: A Legal Assessment*, 27 HARV. J. L. & PUB. POL’Y 737, 738-40 (2003-2004); Steven M. Kosiak, *The Cost and Funding of the Global War on Terror (GWOT)*, Jan. 18, 2007, available at <http://www.comw.org/pda/fulltext/0701kosiak.pdf> (testimony before Congress).

⁶² 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 U.S. maritime import and export systems, causing maritime gridlock, the economic collapse of many businesses, and possible economic losses totaling \$1 trillion).

⁶³ “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 111-114 (2006) (footnote omitted). See Justin Mellor, *Missing the Boat: The Legal and Practical Problems of the Prevention of Maritime Terrorism*, 18 AM. U. INT’L L. REV. 341, 348-51 (2002-2003); Stephen E. Flynn, *Homeland Security is a Coast Guard Mission*, U.S. NAVAL INSTITUTE PROCEEDINGS, Oct. 2001, at 72, 72-73.

populated or industrial area, could also result in devastating destruction.⁶⁴ Assuming a rational and effective connection between restrictions on port access and efforts to prevent such a disaster, a port state could condition port access on compliance with virtually any set of 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.⁶⁵ Moreover, if the U.S. were to adopt a policy to conduct wide-ranging, intrusive security raids onboard foreign-flag vessels voluntarily present in U.S. ports, such heavy-handed tactics would likely prompt international censure and, to some 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-access 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 legal right of port states to impose conditions on port entry, this paper will consider the fundamental questions of jurisdiction of the port state to prescribe laws governing the activities of vessels entering its ports. The paper will analyze each principle of jurisdiction, ranging from territoriality to universality. It will then analyze the nature of the underlying activities, 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

⁶⁴ Council on Foreign Relations, *Liquefied Natural Gas: A Potential Terrorist Target?*, Feb. 27, 2006, available at <http://www.cfr.org/publication/9810/>. See also August Grimmins, *Seaports Seen as Terrorist Target; U.S. Will Secure Harbors, but Actions Likely to Hurt Trade*, WASH. 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 and Anne Korin, *Terrorism Goes to Sea*, FOR. AFF., Nov.-Dec. 2004, at 61, 68-70.

⁶⁵ See Mellor, *supra* note 63, at 348-51. See also Paul W. Parformak, *Liquefied Natural Gas (LNG) Infrastructure Security: Issues for Congress*, CRS REPORT FOR CONGRESS, 25-26, Mar. 16, 2005, available at <http://ncseonline.org/nle/crsreports/05mar/RL32073.pdf>.

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, this paper 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 outright denial of access 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 the shipping company, or even to that of other vessels of the flag state.

Finally, the paper will consider a list of sixteen relevant questions that a port state and the international community should ask with respect to any proposed condition regulating entry into its ports 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 acceptance of similar regulations by the competent international organization and the international community. The paper will then analyze each of these sixteen questions with respect to the mandatory pilotage scheme that Australia is imposing on all larger commercial vessels and tankers transiting the Torres Strait as an example of how far coastal states are willing to go to promote domestic policy goals that they deem important. This paper's goal is to develop and consider objective criteria to evaluate the legality and wisdom of conditions on port entry.

IV. BASES FOR EXERCISING JURISDICTION OVER COMMERCIAL VESSELS

Before seeking to prescribe or enforce laws and regulations, international law requires that a state have jurisdiction, or the legal right and power to impose its national will on another person or entity

under various circumstances.⁶⁶ For seagoing commercial vessels plying the world's oceans, often far removed from the territory of the flag state, this basic question becomes one of particular importance. This portion of the paper will analyze the various bases for exercising jurisdiction over vessels engaged in international commerce.

A. Territoriality Principle. Territoriality is the jurisdictional principle that virtually everyone understands. The New York cop on the beat has jurisdiction – the physical power combined with the legal right – to arrest and take into custody a malefactor who violates a law in his or her “territory,” such as Manhattan or Queens. The nationality principle, “law of the flag,” gives the flag state jurisdiction over most aspects of the vessel wherever it may be.⁶⁷ At the same time, the primary jurisdictional basis for prescribing and applying criminal laws and domestic regulations to seagoing vessels voluntarily within the port or internal waters of another state is the territoriality principle.⁶⁸ International law does not extend the territoriality principle to permit the exercise of enforcement jurisdiction over warships and government ships operated for non-commercial purposes “because of the immunity that they enjoy under customary international law.”⁶⁹ With respect to foreign-flag commercial vessels voluntarily, if only temporarily, present in U.S. internal waters, the exercise of jurisdiction over matters of vital importance to the port state based on the territoriality principle is not controversial. As the U.S. Supreme Court observed in 1923:

A merchant ship of one country voluntarily entering another subjects herself to the jurisdiction of the latter. . . . Of course, the local sovereign may out of considerations of public policy choose to forego the exertion of its jurisdiction or to exert the same in only

⁶⁶ RESTATEMENT, *supra* note 9, at 230-32, 235-37, 304-05, 320-21 (discussion of the principles of jurisdiction to prescribe, adjudicate, and enforce).

⁶⁷ See *United States v. Flores*, 289 U.S. 137, 154-55 (1933) (under the nationality principle, the law of the flag a ship is entitled to fly governs all crimes committed on board).

⁶⁸ RESTATEMENT, *supra* note 9, § 402, cmt. c. But see *Lauritzen*, 345 U.S. at 584 (territorial principle “usually is modified by the more constant law of the flag.”).

⁶⁹ CHURCHILL & LOWE, *supra* note 13, at 99 (citation to UNCLOS, art. 32, omitted).

a limited way, but that is a matter resting solely in its discretion.⁷⁰

For example, if the master of a foreign-flag merchant vessel violates a criminal law or regulation of a port state while it is at anchor or alongside the pier, the port state has jurisdiction because the offense was committed within its territory. This territoriality principle, in which the coastal state exercises sovereignty, extends at least to the outer limit of the territorial sea, which usually extends to 12-nautical miles (nm) from the coastline.⁷¹ For certain offenses, such as illegal fishing, sovereign rights to prescribe and enforce to protect resources extend out to the outer limit of the coastal state's EEZ, usually 200-nm from the coastline.⁷² While port states generally decline to exercise jurisdiction when the crime committed on the vessel only affects the "internal discipline" of a vessel,⁷³ certain crimes, such as murder, are so infamous as to fall under the jurisdictional cognizance of the port state, even over the objections of the vessel's master and diplomatic representatives of the vessel's flag state. This is because such offenses disturb the "peace and tranquility of the country to which the vessel has been brought."⁷⁴

⁷⁰ *Cunnard S.S. Co.*, 262 U.S. 100, 124 (1923). See *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 142 (1957) ("It is beyond question that a ship voluntarily entering the territorial limits of another country subjects itself to the laws and jurisdiction of that country."). See also *MCDUGAL & BURKE*, *supra* note 1, at 156 ("It is universally acknowledged that once a ship voluntarily enters a port it becomes fully subject to the law and regulations prescribed by the officials of that territory.")

⁷¹ *Id.* at 122. UNCLOS, *supra* note 4, art. 2(1) ("The sovereignty of a coastal State extends, beyond its land territory and internal waters . . . to an adjacent belt of sea, described as the territorial sea.") See also *United States v. Williams*, 617 F.2d 1063, 1073 & n.6 (5th Cir. 1980).

⁷² UNCLOS, *supra* note 4, art. 56 ("sovereign rights" and "jurisdiction" within the EEZ).

⁷³ "[I]t would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship, and the general regulation of the rights and duties of the officers and crew towards the vessel, or among themselves." *Mali v. Keeper of the Common Jail (Wildenhuis' Case)*, 120 U.S. 1, 12 (1887).

⁷⁴ *Id.* (U.S. domestic law applied to a murder committed on board a foreign ship while it was present in an American port over the objections of the vessel's master and the flag State). See *CHURCHILL & LOWE*, *supra* note 13, at

Most of the issues that involve imposing conditions on port entry, such as complying with customs requirements, equipping and manning the vessel properly so as to ensure navigational safety, not trafficking in drugs or illegal immigrants, and not importing illegally taken fish clearly take place within the territory of the port state and potentially affect the state's vital interests. Although international law limits the enforcement jurisdiction of the port state over vessels simply engaged in passage through its territorial sea, contiguous zone, or archipelagic waters, the port state reasonably would have jurisdiction if the foreign-flag vessel were to enter port after having committed an offense within waters subject to its jurisdiction. For example, a commercial vessel that discharged oily water into the territorial sea while entering San Francisco Bay in violation of the Clean Water Act, as amended by the Oil Pollution Act of 1990 (OPA), and failed to report it as the Act and implementing regulations require would be subject to the jurisdiction of U.S. laws and administrative sanctions under the territoriality principle.⁷⁵ Indeed, the most common violation of vessel pollution laws may be the failure to maintain an accurate Oil Record Book. Although the illegal discharge may have occurred on the high seas, it is an offense subject to U.S. jurisdiction to enter port with an inaccurate Oil Record Book that the vessel presents to Coast Guard inspectors as accurate.⁷⁶ On the other hand, states are reluctant to impose rules and regulations with respect to vessel construction, manning, safety, and pollution control which diverge markedly from international standards, even when the vessel is present within its territory.⁷⁷ Although the United States in the past has chosen to impose

66-67 (citing cases for the proposition that "local jurisdiction will be asserted when the offense affects the peace or good order of the port either literally . . . or in some constructive sense.")

⁷⁵ The Federal Water Pollution Control of 1977 (FWPCA), as amended by the Oil Pollution Act of 1990 (OPA), 33 U.S.C. §§ 1301-1330, as well as the Act to Prevent Pollution from Ships (APPS), 33 U.S.C. §§ 1901-15 apply, *inter alia*, to foreign vessels operating in U.S. navigable waters or while at a port or terminal within U.S. jurisdiction. See *United States v. Hyundai Merchant Marine Co., Ltd.*, 172 F.3d 1187, 1191 (9th Cir. 1999). See generally 33 C.F.R. pts. 151 & 153.

⁷⁶ 33 U.S.C. §§ 1907(a), 1908(a) (violations and criminal penalties); 33 C.F.R. §§ 151.09, 151.25. See *United States v. Abrogar*, 459 F.3d 430, 437 (3d Cir. 2006) (noting in dicta that the "'offense of conviction' – taking into account the text of the relevant provisions of the APPS and accompanying regulations – was the 'failure to maintain an accurate oil record book while in U.S. waters or in a U.S. port.'")

⁷⁷ See UNCLOS, *supra* note 4, art. 21(2) (laws and regulations adopted by the coastal State "shall not apply to the design, construction, manning or

certain more stringent construction standards and equipment requirements for vessels engaged in trading in the lucrative American market, the international norm is to require conformity only with the minimum standards that the International Maritime Organization has established. Finally, even though territorial jurisdiction may exist, U.S. and international law requires that states not regulate activities on board affecting only the "internal affairs" or "internal economy" of the vessel, such as those related to labor, wages, shipboard discipline, or other personnel matters.⁷⁸

B. Extraterritorial Application of Domestic Law. As a general rule, "the coastal State has no jurisdiction over vessels for acts which took place during navigation on the high seas."⁷⁹ Under certain circumstances, however, international law permits extraterritorial application of domestic penal laws and administrative regulations. In the United States, federal courts have repeatedly held that such extraterritorial jurisdiction can be constitutional.⁸⁰ Indeed, federal courts have held that, if it chooses to do so, Congress may legislate with respect to conduct outside the United States beyond the limits imposed by international law.⁸¹ However, because there is a

equipment of foreign ships unless they are giving effect to generally accepted international rules or standards."); *see also id.*, art. 211 ("Pollution from vessels").

⁷⁸ *Lauritzen*, 345 U.S. at 593. *See* Jason M. Schupp, *The Clay Bill: Testing the Limits of Port State Sovereignty*, 18 MD. J. INT'L L. & TRADE 199, 211 (1994) ("The United States . . . has adopted the internal economy doctrine as an obligation imposed by international law.") (footnote omitted). *See also id.* at 221-226 (discussing cases in which Federal law was not applied to labor and personnel matters).

⁷⁹ Degan, *supra* note 34, at 26. Dr. Kasoulides notes that normally the port State's "customary competence is not extended to incidents preceding the entry of the vessel into any state's jurisdictional zones, [but that] a sequence of drastic changes in law and practice has contributed in fact to an enhancement of the port regime even in this respect." KASOULIDES, *supra* note 14, at 183.

⁸⁰ The Supreme Court has held that extraterritorial jurisdiction exists over aliens when a conspiracy had for its object crime in the United States and overt acts were committed in the United States by co-conspirators. *Ford v. United States*, 273 U.S. 593, 624 (1927). *See also* *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1204 (9th Cir. 1991); *United States v. Pinto-Mejia*, 720 F.2d 248, 261 (2d Cir. 1983).

⁸¹ *United States v. Howard-Arias*, 679 F.2d 363, 371-72 (4th Cir.), *cert. denied*, 459 U.S. 874 (1982) (the U.S. Congress "may violate international law

presumption against extraterritorial jurisdiction, U.S. courts will not construe that congressional statutes have extraterritorial application unless the Congress has clearly manifested its intent to do so in the statutory language itself.⁸²

In analyzing whether extraterritorial jurisdiction is appropriate in a particular case, U.S. courts undertake a two-part inquiry: (1) Is it clear from the text of the statute that Congress intended to apply it outside the territory of the United States? (2) Would the extraterritorial application of the statute on the facts presented be consistent with relevant principles of international law?⁸³ The first of these questions requires that the law make congressional intent to impose extraterritorial application sufficiently clear to overcome the presumption that laws generally apply only to the territory of the country in which they were enacted. For example, in 14 U.S.C. § 89(a), Congress specifically authorizes the Coast Guard to search vessels and make arrests on the high seas for violations of certain offenses.⁸⁴ Likewise, the "special maritime and territorial jurisdiction of the United States" includes the high seas for a limited set of criminal offenses.⁸⁵

The second question ensures that the application does not violate fundamental principles of international law, particularly those involving due process. At least as applied in the United States, international law recognizes that states have jurisdiction to prescribe laws and sanction conduct committed outside the territory of the forum state on five separate principles. These "five well-recognized bases of

principles to effectively carry out this nation's policies."); *see also* *United States v. Gaitlin*, 216 F.3d 207, 211-212 (2d Cir. 2000).

⁸² *See* *Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 188 (1993). "That presumption has special force when we are construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility." *Id.* *See also* *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949). The Supreme Court recently called this the "clear statement" requirement. *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 129 (2005).

⁸³ *United States v. Neil*, 312 F.3d. 419, 421 (9th Cir. 2002); *see also* *United States v. Bowman*, 260 U.S. 94, 97-99 (1922).

⁸⁴ For an interesting discussion of whether the exercise of such Coast Guard jurisdiction is consistent with the U.S. Constitution, *see* Megan Jaye Kight, *Constitutional Barriers to Smooth Sailing: 14 U.S.C. § 89(a) and the Fourth Amendment*, 72 IND. L.J. 571 (1997).

⁸⁵ 18 U.S.C. § 7; *see also* 18 U.S.C. § 2244(a) ("Abusive sexual contact").

criminal jurisdiction”⁸⁶ include: (1) the objective territorial principle (the “effects principle”); (2) the nationality principle; (3) the protective principle; (4) the passive personality principle; and (5) the universality principle.⁸⁷ Unless one or more of these jurisdictional bases exist in a particular factual situation before it, a U.S. federal court would likely find a violation of the Due Process Clause of the Fifth Amendment in convicting a defendant for an action that took place outside the territory of the United States.⁸⁸ This paper will now consider each briefly as it relates to extraterritorial jurisdiction over foreign vessels.

(1) Objective Territorial Principle. Jurisdiction with respect to the activity of a vessel that takes place outside the port state, but that has (or could have) substantial effects within the state’s territory, falls under the objective territorial principle.⁸⁹ This is also known as the “effects principle.”⁹⁰ For example, if a foreign-flag vessel knowingly discharges oil on the high seas or within a coastal state’s 200-nm EEZ in violation of MARPOL, and the discharged oil subsequently pollutes the coastline or substantially damages the natural resources of the coastal state, international law grants the coastal state jurisdiction to prescribe sanctions.⁹¹ If the vessel is voluntarily in port or at an off-shore terminal, the port state may “institute proceedings in respect of

⁸⁶ *United States v. Yousef*, 327 F.3d 56, 91 n.24 (2d Cir. 2003); *see also* RESTATEMENT, *supra* note 9, § 402 and cmts. a-g.

⁸⁷ In 1935, an influential article first suggested these five bases for jurisdiction over extraterritorial crimes. Draft Convention on Research in International Law of the Harvard Law School, *Jurisdiction with Respect to Crime*, 29 AM. J. INT’L L. 435, 467 (Supp. 1935).

⁸⁸ *Pinto-Mejia*, 720 F.2d at 259. *See generally* Christopher L. Blakesley, *Extraterritorial Jurisdiction*, in INTERNATIONAL CRIMINAL LAW 50-81 (2d ed.1999).

⁸⁹ *See United States v. Baker*, 609 F.2d 134, 138 (5th Cir. 1980) (extraterritorial application of statute appropriate under the objective territorial principle).

⁹⁰ RESTATEMENT, *supra* note 9, § 402, cmt. d. *See United States v. MacAllister*, 160 F.3d 1304, 1308 (11th Cir. 1998) (“objective territorial” or “effects” principle provided jurisdiction over a conspiracy by Canadian citizen to import cocaine into the United States).

⁹¹ *See* 33 U.S.C. § 1321 (“Oil and hazardous substance liability”). *See generally* Jim Rubin & Shata Stuky, *Fighting Black Markets and Oily Water: The Department of Justice’s National Initiatives to Combat Transnational Environmental Crimes*, 4 SUSTAINABLE DEV. L. & POL’Y 21, 25-26 (2004) (“Vessel Pollution Initiative”).

any violation of its laws and regulations adopted . . . for the prevention, reduction and control of pollution from vessels when the violation has occurred within the territorial sea or the exclusive economic zone of that state.”⁹² Moreover, for those serious pollution incidents, “[w]here there is clear objective evidence that a vessel navigating in the exclusive economic zone or the territorial sea” has committed a violation causing or threatening “major damage to the coastline or related interests of the coastal state,” the coastal state may “institute proceedings, including detention of the vessel, in accordance with its laws.”⁹³ Any such coastal laws, however, must be implementing, or at least consistent with, “applicable international rules and standards.”⁹⁴

The coastal state also may take such additional extraordinary measures as may be necessary beyond its territorial sea “proportionate to the actual or threatened damage to protect their coastline or related interests, including fishing, from pollution or threat of pollution following upon a maritime casualty . . . which may reasonably be expected to result in major harmful consequences.”⁹⁵ This extraordinary power of the coastal state gives rise to a jurisdictional principle that both customary and conventional law recognize. The principle stems from international approval of the British actions to protect its coastline from the massive oil spill following the *Torrey Canyon* incident in 1967, when British authorities bombed the commercial tanker to set fire to its hazardous cargo.⁹⁶ The perceived need to respond in similar incidents led the international community to adopt the Convention Related to Intervention on the High Seas in Cases of Pollution Casualties in 1969.⁹⁷ Although many foreign states object, U.S. courts have also held that the objective territorial principle permits the coastal state to exercise jurisdiction over economic activities intended to have a substantial effect within the territory of

⁹² UNCLOS, *supra* note 4, art. 220(1). See generally Tatjana Keselj, *Port State Jurisdiction in Respect of Pollution from Ships: The United Nations Convention on the Law of the Sea and the Memorandum of Understanding*, 30 OCEAN DEV. & INT’L L. 207, 216-27 (2000).

⁹³ UNCLOS, *supra* note 4, art. 220(6).

⁹⁴ *Id.*, arts. 219, 220(3). See Emeka Duruigbo, *Reforming the International Law and Policy on Marine Oil Pollution*, 31 J. MAR. L. & COM. 65, 76-77 (2000).

⁹⁵ UNCLOS, *supra* note 4, art. 221(1).

⁹⁶ CHURCHILL & LOWE, *supra* note 13, at 216.

⁹⁷ Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, Brussels, Nov. 29, 1969, 26 U.S.T. 765, 970 U.N.T.S. 211.

that state, such as a conspiracy among foreign shipping companies to monopolize trade in a particular commodity in the forum state.⁹⁸

(2) Nationality Principle. The nationality principle provides for jurisdiction over the extraterritorial acts committed by a state's own citizens outside the boundaries of the forum state.⁹⁹ Although normally applied to individuals, that principle extends as well to juridical persons, such as a corporation or a registered vessel flying the flag of that state.¹⁰⁰ Under the law of the sea, the flag state has the near exclusive right to exercise legislative and enforcement jurisdiction on the high seas over those vessels to which it has granted the right to sail under its flag.¹⁰¹ Moreover, the jurisdiction of the flag state extends wherever vessels flying its flag happen to find themselves. Even in a foreign port, the flag state governs crimes and regulatory violations that affect the "internal affairs" of the ship, and concurrent jurisdiction over crimes over which the port state may insist on the exercise of jurisdiction.¹⁰² The flag state has an international legal obligation to impose requirements on its flag vessels with respect to international conventions to which it is a party. Although port state control is increasingly effective, it is incumbent upon the state of registry to adopt

⁹⁸ See *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1292 (3d. Cir. 1979). However, several States, notably the United Kingdom, have objected to application of the effects principle of jurisdiction to economic offenses, such as shipping legislation, that do not constitute a crime in the other country. See A.V. Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75 AM. J. INT'L L. 257, 260 (1981) (British opponents contended that the U.S. was violating international law, and not just principles of comity, in extending jurisdiction over shipping).

⁹⁹ RESTATEMENT, *supra* note 9, § 402, cmt. e.

¹⁰⁰ *Id.* See *Cunard S.S. Co.*, 262 U.S. 100, 124 (1923) (observing that a flag State's jurisdiction over a vessel "partakes more of the characteristics of personal than of territorial sovereignty.") But see HAIJANG YANG, JURISDICTION OF THE COASTAL STATE OVER FOREIGN MERCHANTS SHIPS IN INTERNAL WATERS AND THE TERRITORIAL SEA 26 (2006) (noting "some debate as to the nature of flag State jurisdiction" and concluding that it "should be considered a jurisdiction *sui generis*." *Id.*).

¹⁰¹ UNCLOS, *supra* note 4, art. 92(1). See also CHURCHILL & LOWE, *supra* note 13, at 208-09.

¹⁰² See *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-21 (1963). See also YANG, *supra* note 100, at 83, 92 ("the unpleasant truth is that restraint in coastal State jurisdiction appears to have diminished, if not totally evaporated." *Id.* at 83.).

national laws and regulations governing vessels flying its flag to ensure efficient and safe transport of passengers and cargo, monitoring and enforcing compliance with a variety of obligations to ensure safe ships, manned by qualified officers and competent crews.¹⁰³

The nationality principle is particularly important in today's world because it permits the flag state to authorize other states to exercise jurisdiction.¹⁰⁴ The United States takes full advantage of such authorization to pursue maritime drug traffickers on foreign-flag vessels with which it has an agreement with the flag state. The United States Code provides: "For purposes of this section [governing narcotic offenses on vessels], a vessel subject to the jurisdiction of the United States includes— . . . (C) a vessel registered in a foreign nation where the flag nation has consented or waived objection to the enforcement of United States law by the United States."¹⁰⁵ While this extension of the nationality principle is currently commonly used in combating maritime trafficking in illegal drugs and illegal fishing activities,¹⁰⁶ it has the potential to be used in other important contexts in which international cooperation is vital, including countering maritime terrorism and in efforts to locate weapons of mass destruction carried on foreign-flag vessels engaged in international trade.¹⁰⁷

An interesting application of the nationality principle applies in cases of vessels operating on the high seas without nationality. According to international and domestic law, all vessels must have a nationality. As Professors Churchill and Lowe have observed, "Ships without nationality are in a curious position."¹⁰⁸ Whether the basis is a borrowed nationality or an application of universal jurisdiction, a

¹⁰³ UNCLOS, *supra* note 4, art. 94(3). SOHN & NOYES, *supra* note 29, at 149-50.

¹⁰⁴ See *United States v. Perez-Oviedo*, 281 F.3d 400, 402-03 (3d Cir.), *cert. denied*, 536 U.S. 969 (2002) (Panama authorized U.S. Coast Guard authorities to detain, search, and seize Panamanian-flag vessel carrying cocaine bound for Canada. The court concluded that there was no due process violation, nothing fundamentally arbitrary or unfair, in exercising jurisdiction with the express permission of the flag State.)

¹⁰⁵ 46 App. U.S.C. § 1903(c)(1). On Oct. 6, 2006, Congress recodified, without substantive change, 46 App. U.S.C. § 1903 and many other sections of existing law. Pub. L. 109-304, 120 Stat. 1485.

¹⁰⁶ See 16 U.S.C. § 1802(44).

¹⁰⁷ See generally Stephen J. Adler, *Fighting Terrorism in the New Age: A Call for Extraterritorial Jurisdiction Over Terrorists*, 18 UNIV. SAN FRANCISCO MARITIME L.J. 171-199 (2005-06).

¹⁰⁸ CHURCHILL & LOWE, *supra* note 13, at 214.

stateless ship is not entitled to the protection of any state, and may be subject to the jurisdiction of any state that has an interest in prosecuting an offense it has committed.¹⁰⁹ Similarly, a ship that sails under the flag of two or more states, using them according to convenience, is not entitled to the protection of either state, "and may be assimilated to a ship without nationality."¹¹⁰ In various types of legislation, Executive Orders, and regulations, the United States exerts jurisdiction over stateless vessels. For example, the High Seas Fishing Compliance Act of 1995 gives the United States the ability to prosecute vessels without nationality found on the high seas violating any international conservation and management measure the United States recognizes.¹¹¹

(3) Protective Principle. Under the protective, or security, principle, international law recognizes the right of a state to exercise jurisdiction to punish a limited class of offenses committed outside its territory by persons who are not its nationals.¹¹² The protective principle "permits a nation to assert jurisdiction over a person whose conduct outside the nation's territory threatens the nation's security or could potentially interfere with the operation of its governmental functions."¹¹³ An additional requirement for the proper application of

¹⁰⁹ *Id.* See H. Edwin Anderson III, *The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives*, 21 MAR. LAW. 139, 141-43 (1996).

¹¹⁰ UNCLOS, *supra* note 4, art. 92(2).

¹¹¹ High Seas Fishing Compliance Act of 1995 §§ 103, 106, and 107, Pub. L. No. 104-43, 109 Stat. 367 (codified as amended at 16 U.S.C. §§ 5502(10), 5505, and 5506). The Maritime Drug Law Enforcement Act of 1980 (MDLEA) § 4, Pub. L. No. 96-350, 94 Stat. 1160 (codified as amended at 46 App. U.S.C. § 1903(c)), included similar provisions to define and provide jurisdiction over vessels without nationality. See *United States v. Martiniez-Hidalgo*, 993 F.2d 1052, 1054-55 (3d Cir. 1993), *cert. denied*, 510 U.S. 1048 (1994).

¹¹² RESTATEMENT, *supra* note 9, § 402, cmt. f. See *Chua Han Mow v. United States*, 730 F.2d 1308, 1312 (9th Cir. 1984) (United States had jurisdiction to prosecute alien defendant even though all unlawful acts were committed in Malaysia, both because the effects of the crime would be felt in the U.S., and the need to protect U.S. interests against illegal drugs).

¹¹³ *United States v. Gonzalez*, 776 F.2d 931, 938 (11th Cir. 1985) (finding extraterritorial application of the MDLEA constitutional, particularly given the High Seas Clause of the U.S. Constitution. U.S. CONST. art. I, § 8, cl. 10. The protective principle permits a State to assert jurisdiction over aliens for any crime committed outside its territory impinging upon the security,

the protective principle is that the conduct prosecuted must be "generally recognized as a crime under the laws of states that have reasonably developed legal systems."¹¹⁴ In defining the "Special maritime and territorial jurisdiction of the United States" for certain criminal offenses, Congress included "[a]ny place outside the jurisdiction of any nation with respect to an offense . . . against a national of the United States."¹¹⁵ Examples of such offenses are those directed against the security of the state, or other offenses threatening the integrity of governmental functions that developed legal systems recognize as crimes, such as counterfeiting currency or forging passports.¹¹⁶

U.S. federal courts have held that the "protective principle" of jurisdiction in international law justified the exercise of jurisdiction over foreign ships on the high seas to enforce narcotics legislation "to such an extent and to so great a distance as is reasonable and necessary to protect itself and its citizens from injury"¹¹⁷ Federal jurisdiction is proper under the protective principle "if the activity threatens the security or governmental functions of the United States. Drug trafficking presents the sort of threat to our nation's ability to function that merits application of the protective principle of jurisdiction."¹¹⁸ However, other federal courts have held that the U.S. Constitution requires the Government to demonstrate an adequate nexus between the prohibited activity and the United States.¹¹⁹

territorial integrity, or political independence.); *United States v. Marino-Garcia*, 679 F.2d 1373, 1381 (11th Cir. 1982), *cert. denied*, 459 U.S. 1114 (1983).

¹¹⁴ *United States v. Pizzarusso*, 388 F.2d 8, 10 (2d Cir.), *cert. denied*, 392 U.S. 936 (1968) (quoting RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 33 (1965)).

¹¹⁵ 18 U.S.C. § 7(7) ("Special maritime and territorial jurisdiction of the United States defined").

¹¹⁶ *United States v. Birch*, 470 F.2d 808, 811-12 (4th Cir. 1972) ("The protective principle . . . provides an appropriate jurisdictional base for prosecuting a person who, acting beyond the territorial boundaries of the United States, falsifies its official documents.").

¹¹⁷ *Gonzalez*, 776 F.2d at 939 (quoting *United States v. Romero-Galue*, 757 F.2d 1147, 1154 n.2 (11th Cir. 1985)).

¹¹⁸ *United States v. Peterson*, 812 F.2d 486, 494 (9th Cir. 1987) (citations omitted).

¹¹⁹ *United States v. Perlaza*, 493 F.3d 1149, 1162 (9th Cir. 2006); *see also United States v. Robinson*, 843 F.2d 1, 3 (1st Cir. 1988) (questioning the reasonableness of a overly broad reading of the "protective principle" because

As the world community increasingly views international terrorism as a serious threat to global peace and security, it is likely to recognize exercises of jurisdiction to interdict the means, methods, and personnel designed to accomplish a terrorist attack as prudent and necessary.¹²⁰ Likewise, the protective principle of jurisdiction would be used as a jurisdictional basis to interdict the transportation of weapons of mass destruction or missile technology on the high seas, even in cases of vessels flying flags from states that are not party to the Proliferation Security Initiative (PSI) or other relevant international agreement. If the protective principle applies in cases of drug conspiracies on the high seas, it would certainly apply when the potential threat involves weapons of mass destruction being transported on the high seas for use by international terrorists. Even so, coordination with the flag State in such circumstances would be consistent with international expectations.

(4) Passive Personality Principle. Under the passive personality principle, a state may assert jurisdiction over criminal activity committed outside its territory by non-nationals where the victim of the crime is one of its citizens.¹²¹ Although not generally applied to ordinary crimes and tortious conduct,¹²² this principle is increasingly accepted as applied to terrorist and other organized attacks on a state's citizens by reason of their nationality, or at least where the

such a reading would allow the United States to police any international conduct "against [any] important state interests").

¹²⁰ See *Yousef*, 327 F.3d 56, 110 (2d Cir. 2003) (upholding jurisdiction over a terrorist conspiracy made in the Philippines to blow up foreign-flag aircraft outside the United States under the protective principle). See also *id.*, at 86. "Moreover, the presumption against extraterritorial application does not apply to those 'criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction.'" (quoting *Bowman*, 260 U.S. 94, 98 (1922)).

¹²¹ *United States v. Rezaq*, 134 F.3d 1121, 1133 (D.C. Cir. 1998) (applying the passive personality principle where the victim in an air hijacking was targeted because he was an American citizen).

¹²² See, e.g., *United States v. Vasquez-Velasco*, 15 F.3d 833, 841 (9th Cir. 1994) (holding that the passive personality principle applied in the case of a murder in Mexico of two members of the Drug Enforcement Agency, but observing, "[i]f the evidence at trial only suggested that two tourists were randomly murdered, extraterritorial [jurisdiction] would be inappropriate.")

state has a particularly strong interest in preventing the crime.¹²³ In an effort to combat terrorism outside the territory of the United States, the Congress relied upon the passive personality principle in enacting the Antiterrorism and Effective Death Penalty Act of 1996,¹²⁴ and the Omnibus Diplomatic Security and Antiterrorism Act of 1986.¹²⁵ In the international context, the 1984 Convention Against Torture authorizes a state to exercise extraterritorial jurisdiction "when the victim is a national of that State if that State considers it appropriate."¹²⁶ Congress has extended the passive personality principle to permit the exercise of extraterritorial jurisdiction over the crime of sexual contact with a minor on a foreign-flag cruise ship; in 2002, the 9th Circuit upheld this exercise of extraterritorial jurisdiction, at least in a case where the victim was an American citizen and the cruise was scheduled to begin and end at a U.S. port.¹²⁷

(5) Universality Principle. The "universality principle" provides for jurisdiction over extraterritorial acts that are so heinous as to be universally condemned by all civilized nations.¹²⁸ These include piracy,¹²⁹ genocide,¹³⁰ engaging in the slave trade and *apartheid*-like

¹²³ RESTATEMENT, *supra* note 9, § 402, cmt. g; *United States v. Benitez*, 741 F.2d 1312, 1216 (11th Cir. 1984), *cert. denied*, 471 U.S. 1137 (1985) (court invoked passive-personality principle in prosecution of Colombian citizen convicted of killing U.S. agents in Colombia).

¹²⁴ *See, e.g.*, The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, § 722 (codified at 18 U.S.C. § 2280(b)).

¹²⁵ 18 U.S.C. §§ 2331-2332b. *See* Patrick L. Donnelly, *Extraterritorial Jurisdiction Over Acts of Terrorism Committed Abroad: Omnibus Diplomatic Security and Antiterrorism Act of 1986*, 72 CORNELL L. REV. 599 (1987). "The statute bases jurisdiction on the passive personality principle . . . rather than concepts of territoriality or nationality." *Id.* at 599 (footnotes omitted).

¹²⁶ Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment, art. 5(1)(c), Dec. 10, 1984, 1465 U.N.T.S. 85.

¹²⁷ 18 U.S.C. § 7(8); *United States v. Neil*, 312 F.3d 419, 422 (9th Cir. 2002).

¹²⁸ RESTATEMENT, *supra* note 9, § 404 & cmt. a.

¹²⁹ All States have a duty to cooperate in the suppression of piracy. UNCLOS, *supra* note 4, art. 100. Punishment of piracy is the responsibility of the State that seizes the pirate(s), a principle recognized in the U.S. since the early days of the Republic. *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 161-62 (1820). *See* CHURCHILL & LOWE, *supra* note 13, at 209-11.

¹³⁰ *See* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277. Although the Convention defines "genocide" and makes violating it a universal crime, states Party to it must

practices, hijacking of and attacks on passenger aircraft in flight, and other universally recognized "crimes against humanity."¹³¹ Some scholars have even found universal jurisdiction evidenced in the text of several international conventions, such as the 1988 Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation.¹³² In many cases, the relevant international agreement requires that party states prosecute or extradite suspects.¹³³ However, largely because of the lack of precise definitions of these crimes,¹³⁴ the universality principle has not yet extended more broadly to include such offenses as drug trafficking, terrorism,¹³⁵ human trafficking,¹³⁶ or the physical or sexual abuse of children.¹³⁷ Moreover, if used

establish an international tribunal to try those accused of it, unless the crime has taken place within the territory of one of the States. *See* art. 6.

¹³¹ M. Cherif Bassiouni, *Universal Jurisdiction of International Crimes: Historic Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 80, 108-124 (2001-2002).

¹³² *Id.* at 126-27. *See* Rome Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, art. 7(4, 5), Mar. 10, 1988, 1678 U.N.T.S. 201, *reprinted in* 27 I.L.M. 668 (1988).

¹³³ *See, e.g.,* Hague Convention for the Suppression of Unlawful Seizure of Aircraft, art. 4(3), Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105. The United States is usually party to such treaties.

¹³⁴ Professor Bassiouni would extend greatly the concept of universal jurisdiction, including these and other *jus cogens* offenses, such as "war crimes" and torture, that the international community has had some difficulty in defining. *See* Bassiouni, *supra* note 131, at 125-28.

¹³⁵ One person's despicable "terrorist" is another's revered "freedom fighter." *See* Abraham D. Sofaer, *Terrorism and the Law*, FOREIGN AFFAIRS, Summer, 1986, at 901-04 (discussing the difficulty in reaching agreement on defining terrorism and outlawing terrorists in the modern age). *See generally* Tina Garmon, *International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11th*, 27 TUL. MAR. L. J. 257, 257-276 (2002).

¹³⁶ *See* Terry Coonan & Robin Thompson, *Ancient Evil, Modern Face: The Fight Against Human Trafficking*, 63 GEORGETOWN J. INT'L AFF. 43, 43-51 (Winter-Spring 2005) (discussing recent international and domestic efforts to implement effective criminal measures against human trafficking, "a shadow slave industry that annually yields an estimated \$9 billion in profits." *Id.* at 45.)

¹³⁷ RESTATEMENT, *supra* note 9, § 404, cmt. a. *See, e.g.,* United States v. Clark, 435 F.3d 1100 (9th Cir. 2006) (In affirming the conviction of an American pedophile who committed his crimes in Cambodia, the court relied on the nationality, rather than universality, principle).

indiscriminately, and/or for political or propaganda reasons, the universality principle of jurisdiction could create considerable friction between states.¹³⁸

C. Limitations on Jurisdiction and the Concept of Reasonableness. The previous section discussed the fundamental bases by which states may exercise jurisdiction, whether within the territory of the state or beyond. In many cases, if not most, port state jurisdiction to prescribe and enforce does not raise a problem. However, there are other limitations on a state's jurisdiction to prescribe and enforce its laws.¹³⁹ Whether the exercise of jurisdiction over a person, vessel, or activity in a particular set of circumstances comports with international law depends on whether such exercise is reasonable and necessary so as to make it fundamentally fair or unfair.¹⁴⁰

Determining whether the exercise of jurisdiction is appropriate or not depends on a variety of relevant factors. These factors include: the nature and extent of the link between the person, vessel, or activity and the state seeking to exercise jurisdiction; the character of the activity to be regulated, including the importance to the regulating state; the importance of the exercise of jurisdiction to the international community; the possibility of conflict with another state's interests; the costs associated with defending in the forum state; and the expectations and traditions of the international legal system.¹⁴¹ Even where there is a clear territorial nexus between the vessel and the regulating state, another affected state may apply the relevant principles of international law and conclude that it would be unreasonable to regulate activities on

¹³⁸ Such potential underlies the concerns of the United States (and certain other States) in signing the International Criminal Court (ICC). See Symposium, *Toward and International Criminal Court? A Debate*, 14 EMORY INT'L L. REV. 159, 160-197 (2000).

¹³⁹ RESTATEMENT, *supra* note 9, § 403 & cmt. a. As the ICJ stated in the *Anglo-Norwegian* case, it is incumbent on the coastal State to conduct its policy "within the bounds of what is moderate and reasonable" *Anglo-Norwegian Fisheries Case* (U.K. v. Norway), 1951 I.C.J. Rep. 116, 142.

¹⁴⁰ *Id.* See *Asahi Metal Industry Co., Ltd. v. Superior Court*, 480 U.S. 102, 114 (1987) (holding that the exercise of jurisdiction by a California court over a Japanese corporation "in this instance would be unreasonable and unfair."); see generally *International Shoe Co. v. Washington*, 326 U.S. 310, 316-17 (1945) (discussion of "reasonableness" and "fairness" in an interstate context).

¹⁴¹ RESTATEMENT, *supra* note 9, § 403(2) (list of relevant factors), cmts. b-g (discussion).

the vessel. Any such attempt to do so could result in international friction. For example, with respect to international safety standards for vessels entering a U.S. port, it is perfectly proper to impose regulations, and penalize any failure to observe them. However, it would be counterproductive and unreasonable to seek to impose domestic law to regulate the entire spectrum of labor relations of a foreign-flag vessel that regularly calls on U.S. ports. In applying and interpreting the law of the respective lands, governmental agents and domestic courts will seek to avoid an expansive jurisdictional mandate unless the Congress has made it manifest that is what should be done.

As Judge Learned Hand phrased it, courts should not assume that Congress intended to “punish all whom [our] courts can catch, for conduct which has no consequences within the United States.”¹⁴² The extent to which a coastal state has jurisdiction to impose conditions on port entry depends upon the reasonableness of the exercise of jurisdiction, taking into account all of the relevant factors. The more vital the interest and the more the exercise of jurisdiction is directly related to protecting or promoting it, the more likely the international community will respect it as appropriate. This paper provides a list of useful questions to analyze the reasonableness of conditions on port entry, and thus the legality, in a later section.¹⁴³ Before doing so, however, it is appropriate to analyze various traditional and emerging areas of state practice, particularly those of the United States, in imposing conditions on entry or on the exercise of jurisdiction over foreign vessels in the waters of the coastal state in various settings.

V. TRADITIONAL 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 coastal state has had with respect to one or more foreign vessels entering its ports and internal waters involves its own security. As the U.S. Supreme Court has expressed it, “it is ‘obvious and unarguable’ that no governmental interest is more

¹⁴² *United States v. Aluminum Co. of America (Alcoa)*, 148 F.2d 416, 443 (2d Cir. 1945). See generally John M. Raymond, *A New Look at the Jurisdiction in Alcoa*, 61 AM. J. INT'L L. 558 (1961) (discussing the criticism of the “effects doctrine” as a basis for jurisdiction in international trade cases).

¹⁴³ See *infra* Section IX.C.

compelling than the security of the Nation.”¹⁴⁴ 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 port or up their river 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 village, pillaging its riches, and abusing and murdering its 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 cave 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.¹⁴⁵ To prevent the massive number of innocent deaths, physical destruction, and financial disruption that this would entail,¹⁴⁶ a coastal state may legally do

¹⁴⁴ Haig v. Agee, 453 U.S. 280, 307 (1981) (quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 509 (1964)).

¹⁴⁵ Jonathan Medalia, *Terrorist Nuclear Attacks on Seaports: Threat and Response*, CONG. RESEARCH SERVICE REPORT FOR CONGRESS 1, 1-2 (Jan. 24, 2005); Mellor, *supra* note 63, at 346-47 (focusing on the problem of weapons shipped into the U.S. in a cargo container); see Flynn, *supra* note 63, at 72-73 (the United States has a pressing need to defend against terrorist attacks at vulnerable seaports).

¹⁴⁶ According to one study, a 10-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. Dr. Clark C. Abt, ABT Associates, *Executive Summary: The Economic Impact of*

almost anything reasonably necessary to protect against such a threat. This paper 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.¹⁴⁷ Before doing so, however, this paper will first analyze the traditional requirements for port access 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 ensure the ships have complied with port state laws designed to ensure compliance with those involving fiscal, immigration, sanitation, and customs (FISC) requirements. From the time that the city fathers of Venice imposed taxes and fees on the foreign merchants seeking entry to trade their wares, or the authorities of Tokyo required foreign ships to comply with domestic laws related to sanitation and immigration, coastal states have exacted financial requirements and imposed requirements to ensure that the port state benefited from seaborne trade rather than suffered adverse consequences.

All states today agree with the basic principle that a coastal state may condition a foreign ship's access 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" provided foreign-flag vessels.¹⁴⁸ In the United States, Congress has provided for a regulatory scheme related to each FISC-related requirement, including: port clearance and entry procedures;¹⁴⁹

Nuclear Terrorist Attacks on Freight Transport Systems in an Age of Seaport Vulnerability, Apr. 30, 2003, p. 3, available at www.abtassociates.com/reports/ES-Economic_Impact_of_Nuclear_Terrorist_Attacks.pdf.

¹⁴⁷ See *infra* Section V. ("Conditions on Entry Related to National Defense, Homeland Security, Counterterrorism, and Law Enforcement Concerns")

¹⁴⁸ Convention and Statute on the International Régime of Maritime Ports, *supra* note 8, art. 3; see also *UNCLOS*, *supra* note 4, art. 25(2).

¹⁴⁹ See, e.g., 46 App. U.S.C. § 91; 46 U.S.C. §§ 42107 and 52305 ("Refusal of clearance and entry").

payment of tonnage and customs duties,¹⁵⁰ several related to restrictions on immigration,¹⁵¹ and sanitation and health regulations.¹⁵² No one doubts the legal authority or, indeed the necessity of, denying access to a foreign ship for entry to a port if passengers or members of the crew on board carry a serious infectious disease, such as tuberculosis or the plague.¹⁵³ Likewise, a port state may take necessary and effective steps to ensure that the vessel is free of such diseases, such as requiring that a local public health official first visit the vessel to confirm that the crew and passengers are free of infectious disease before granting port access.¹⁵⁴ International law grants to coastal states the right to take necessary and appropriate actions to prevent the entry into the port of stowaways, absconders, deserters, or other illegal immigrants.¹⁵⁵ Among those are the rights to inquire as to the

¹⁵⁰ 46 App. U.S.C. §§ 121-135. 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.

¹⁵¹ See, e.g., 8 U.S.C. §§ 1181 ("Admission of immigrants into the U.S."), 1281-1287 ("Alien crewmen").

¹⁵² See, e.g., 42 U.S.C. § 264-272, and 9 C.F.R. § 93.106 ("Quarantine requirements" for animal and plants being imported into the United States.)

¹⁵³ Congress has provided statutory authority for controlling infectious diseases, including quarantining of suspect vessels and their crews and passengers. 42 U.S.C. §§ 264-272. 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 U.S.C. § 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.

¹⁵⁴ See 42 U.S.C. § 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 U.S.C. § 268(b).

¹⁵⁵ "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. Pres. 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 CONN. L. REV. 1565, 1569-72 (1997).

nationality, demand to see each passport or other identify 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 access 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-access requirements, the 1965 FAL Convention 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.¹⁵⁶ Because it makes so much practical sense, the international community has embraced this Convention.¹⁵⁷ In implementing this Convention and promoting efficiency, the International Maritime Organization (IMO) has developed recommended practices and prepared several standardized documents for port states to use.¹⁵⁸ Near universal agreement about 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

¹⁵⁶ FAL Convention, *supra* note 45. 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).

¹⁵⁷ See Rosalie Balkin, *The International Maritime Organization and Maritime Security*, 30 TUL. MAR. L. J. 1, 14 (2006) (noting the 2002 amendments to the FAL Convention entered into force on May 1, 2003).

¹⁵⁸ Information concerning IMO recommended practices and forms for the FAL Convention are available at http://www.imo.org/Conventions/contents.asp?topic_id=259&doc_id=684#4.

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 use the prescribed forms and follow these procedures.

C. Navigation, Pilotage, and Mooring and Anchorage Requirements. Ports 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 the port. As Professors Myres McDougal and William Burke observed:

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.¹⁵⁹

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 direct the movements of the vessel while in port.

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 who has 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 states that condition a foreign vessel's right of access to its ports upon compliance with non-discriminatory pilotage

¹⁵⁹ MCDUGAL & BURKE, *supra* note 1, at 96 (footnote omitted). See YANG, *supra* note 100, at 208-20.

laws and regulations.¹⁶⁰ In a Federal law that traces its origins to 1789, pilots and the laws concerning the use of pilots to enter U.S. ports are generally governed by applicable state laws, rather than any federally-mandated requirements.¹⁶¹ 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 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 pilots for all foreign commercial vessels calling on any of its ports.¹⁶²

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.¹⁶³ Anyone who has passed through the Panama Canal can attest to the scores of merchant ships "waiting their turn" anchored at the Atlantic or Pacific side until such time as the local authorities and a qualified pilot are ready to take

¹⁶⁰ 46 U.S.C. §§ 8501-8503. 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 POL'Y 71, 73 (1990).

¹⁶¹ "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 U.S.C. § 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 most regulate 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 . . ."); *Anderson v. Pacific Coast Steamship Co.*, 225 U.S. 187, 196-202 (1912). But see 46 U.S.C. §§ 9301-9308 (a Federal regulatory scheme governs pilotage on the Great Lakes), and 46 U.S.C. § 8502 (requiring federally licensed pilots for vessels designated therein).

¹⁶² JEANETTE GREENFIELD, *CHINA'S PRACTICES IN THE LAW OF THE SEA* 32-33 (1992).

¹⁶³ 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 U.S. ports. 33 U.S.C. §§ 1221-1232. This includes provisions 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.

them.¹⁶⁴ Managing vessel traffic in the busy, 56-mile-long Houston Ship Channel is nearly as hectic.¹⁶⁵ 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 access 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 port state 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.¹⁶⁶ Unsafe vessels present a major threat to the proper operation of a port facility and the coastal waters nearby. This includes 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. It 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.¹⁶⁷ 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.¹⁶⁸ Moreover, a port state has a right to insist, as a condition of

¹⁶⁴ A total of some 14,000 vessels transit the Panama Canal each year, carrying over 203 million tons in cargo. *Panama Canal*, WIKIPEDIA, available at http://en.wikipedia.org/wiki/Panama_Canal; see also *Panama Canal*, ENCYCLOPEDIA BRITANNICA ONLINE (2007), available at <http://www.britannica.com/eb/article-9110730/Panama-Canal>.

¹⁶⁵ See *Houston Ship Channel*, WIKIPEDIA, at http://en.wikipedia.org/wiki/Houston_Ship_Channel.

¹⁶⁶ See 33 U.S.C. § 1223 ("Vessel operating requirements"); 33 C.F.R. §§ 164.11 ("Navigation underway: general"), 164.13 ("Navigation underway: tankers").

¹⁶⁷ The Transportation Safety Act of 1974 is the statutory framework for such regulations. 49 U.S.C. §§ 5101-5127. See 49 C.F.R. pt. 176 ("This part prescribes requirements . . . to be observed with respect to the transportation of hazardous materials by vessel.")

¹⁶⁸ See 33 U.S.C. § 1228 ("Conditions for entry to ports in the United States"). See also RESTATEMENT, *supra* note 9, § 512, cmt. c, rep. n. 4.

entry, that the vessel and its crew have demonstrated that they are capable of doing so and have no track record of maritime accidents.¹⁶⁹ The 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.¹⁷⁰ 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.¹⁷¹

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.¹⁷² 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 1500 lives.¹⁷³ 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 the flag state has the primary responsibility to ensure ships flying their flags are properly documented, port states party to the SOLAS have a duty to “intervene”

¹⁶⁹ See 33 U.S.C. § 1228(a)(1).

¹⁷⁰ UNCLOS, *supra* note 4, art. 219 (the vessel will proceed for repairs before being permitted to leave).

¹⁷¹ See Sean Poltrack, *The Maritime Industry and Our Environment: The Delicate Balance of Economic and Environmental Concerns*, 8 U. BALT. J. ENVTL. L. 51, 74-75 (2001-2002) (“Vessel Safety Management”).

¹⁷² SOLAS Convention, *supra* note 38. For details on the status of the SOLAS Convention and its amendments, see http://www.imo.org/Conventions/contents.asp?topic_id=257&doc_id=647.

¹⁷³ *Titanic*, ENCYCLOPEDIA BRITANNICA ONLINE (2007), available at <http://www.britannica.com/eb/article-9072642/Titanic>.

to prevent a vessel from sailing until the owners and crew correct any unsafe conditions.¹⁷⁴

Another multilateral treaty, the International Convention on Standards of Training, Certification, and Watchstanding for Seafarers, 1978 (STCW),¹⁷⁵ seeks to ensure that the vessel's crew members, particularly the master and the vessel's other officers, complete rigorous training in engineering, watch standing, ship handling, maintenance, rules of the nautical road, firefighting and damage control, and other emergency procedures. Only after satisfactorily completing all aspects of training and demonstrating 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 sought to provide an even greater level of precision and standardization. The 1995 Amendments also provided for greater 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.¹⁷⁶

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 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 U.S. law, no vessel may enter or operate in the navigable waters of the United States unless the vessel complies with all applicable laws and regulations designed to promote maritime safety.¹⁷⁷

From the perspective of the port state, the local authorities have the right to inquire whether the vessel's SOLAS certification and documentation is in order and if all crew members have their required

¹⁷⁴ SOLAS Convention, *supra* note 38, ch. 1, reg. 19(c) & ch. XI, reg. 4.

¹⁷⁵ International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, with Annex (STCW), Jul. 7, 1978, S. Exec. Doc. EE 96-1, C.T.I.A. No. 7624, 1361 U.N.T.S. 190.

¹⁷⁶ See http://www.imo.org/Conventions/contents.asp?doc_id=651&topic_id=257 (providing details on the current status of the STCW Convention).

¹⁷⁷ See 33 U.S.C. § 1228 ("Conditions for entry to ports in the United States").

and up-to-date STCW certificates prior to allowing the vessel to enter port.¹⁷⁸ 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.¹⁷⁹ 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, the pilot may not proceed into port unless the appropriate authorities are confident that the vessel is shipshape in every respect.

The U.S. Congress recently imposed a safety-related requirement, which the Coast Guard has begun to implement, that virtually all commercial vessels operating in U.S. navigable waters carry a properly functioning Automatic Identification System (AIS).¹⁸⁰ "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

¹⁷⁸ 33 C.F.R. pt. 164 ("Navigational safety regulations.") See, e.g., the proposal by the EU to bar entry to its ports ships that failed to comply with the SOLAS ISM Code, which has since been incorporated into Chapter IX of SOLAS.

¹⁷⁹ See COLOMBOS, *supra* note 11, § 181, at 177. Observing, "each 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.*

¹⁸⁰ 46 U.S.C. § 70114; 33 C.F.R. § 164.46 ("Automatic identification systems"). 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.

time.”¹⁸¹ 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).¹⁸² “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.”¹⁸³ Other safety-related technologies that the United States requires of most commercial and certain other vessels calling on U.S. ports include IMO-approved electronic position fixing devices,¹⁸⁴ automatic radar plotting aids (ARPA),¹⁸⁵ and emergency communications systems.¹⁸⁶

E. Voyage Information. Another area of inquiry that coastal 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 U.S. Coast Guard regulations, visiting ships must generally provide NOA information 96 hours prior to arrival.¹⁸⁷ The information required in an NOA is extensive, including the name of the vessel, flag state,

¹⁸¹ J.M. Sollosi, *The Automated Identification System & Port Security*, PROCEEDINGS 36, 36 (Apr.-May 2003), available at http://www.uscg.mil/hq/g-g/nmc/pubs/proceed/newpromagpage2005/q2_03.pdf.

¹⁸² Brian Tetreault, *Automated Identification System: The Use of AIS in Support of Maritime Domain Awareness*, PROCEEDINGS 27, 28-30 (Fall 2006), available at <http://www.uscg.mil/hq/g-m/nmc/pubs/proceed/newpromagpage2005/fall%2006/FALL%2006/Fall06%20PDFs/AutoID%20System.pdf>.

¹⁸³ Sollosi, *supra* note 181, 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 SCI. MONITOR, Jan. 31, 2007, available at <http://www.csmonitor.com/2007/0131/p03s03-usgn.html>.

¹⁸⁴ 33 C.F.R. § 164.41 (“Electronic position fixing devices”). The wide-spread availability of inexpensive and highly-accurate GPS receivers, computers, and communications systems linked to these devices should help make collisions and groundings a thing of the past.

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

¹⁸⁶ 46 C.F.R. § 184.502 (vessels required to comply with FCC requirements).

¹⁸⁷ 33 C.F.R. § 160.212.

registered owner, operator, charterer, and classification society.¹⁸⁸ Other voyage information required includes 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).¹⁸⁹

The vessel must make an additional notice whenever there is a hazardous condition, either on board the vessel or caused by the vessel.¹⁹⁰ 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.¹⁹¹ Many of the NOA requirements are related to port security concerns. The 96-hour reporting requirement permits Coast Guard and other authorities time to run the vessel through the appropriate automated data bases 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

¹⁸⁸ *Id.* § 160.206 (Table 160.206). See J. Ashley Roach, *Container and Port Security: A Bilateral Perspective*, 18 INT'L J. MARINE & COASTAL L. 341, 355-57 (2003) ("Advance Notice of Arrival").

¹⁸⁹ 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*, at <http://www.uscg.mil/hq/g-m/mp/mtsa.shtml>.

¹⁹⁰ 33 C.F.R. § 160.215; see also 46 C.F.R. subpt. § 4.05-5 (notice requirement in case of a marine casualty).

¹⁹¹ See 33 U.S.C. § 1228 ("Conditions for entry to ports in the United States"); 33 C.F.R. § 160.107 ("Denial of entry").

resources.¹⁹² 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 engaged in international commerce.¹⁹³

VI. 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 access to its ports to foreign warships and certain other categories of ships it considers threatening.¹⁹⁴ Although their sovereign status gives warships special immunities from enforcement jurisdiction, a port state is within its rights to require prior authorization, deny access 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.¹⁹⁵ Even where there is an FCN treaty granting each party reciprocal rights to enter each other's ports, the provisions usually exclude routine access rights for "vessels of war."¹⁹⁶ Article 13 of the Statute on the International Régime of Ports specifically excludes its application to warships.¹⁹⁷ This is due to

¹⁹² Since 1979, the People's Republic of China has established an extensive set of regulations on port access for both security purposes and to foster international trade. Mark S. Hamilton, *Negotiating Port Access: The Sino-U.S. Opportunity for Leadership in the Maritime Transport Services Industry*, 3 ASIAN-PAC. L. & POL'Y J. 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. JEANETTE GREENFIELD, CHINA'S PRACTICE IN THE LAW OF THE SEA 31-34.

¹⁹³ See Hartmut G. Hesse, *Maritime Security in a Multilateral Context: IMO Activities to Enhance Maritime Security*, 18 INT'L J. MARINE & COASTAL L. 327, 332-33 (2003).

¹⁹⁴ MCDUGAL & BURKE, *supra* note 1, at 94, 100-01, 114.

¹⁹⁵ *Id.* at 102-03. See also Access to, or Anchorage in, the Port of Danzig, to 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/.

¹⁹⁶ See, e.g., Treaty of Friendship, Commerce, and Navigation, U.S.-Japan, art. XIX(7), Apr. 2, 1953, 4 U.S.T. 2063.

¹⁹⁷ 1923 Convention and Statute on the International Régime of Maritime Ports, *supra* note 7.

the special sovereign-immune character of warships and the potential threat that they might pose to the security of the port state.¹⁹⁸ As a general rule, therefore, warships must make special arrangements and obtain prior permission before entering a foreign port.¹⁹⁹

The power to deny access 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 access for security reasons. Recently, the Japanese Government barred all vessels from North Korea from entering any of its ports due to the "gravest danger" represented by the underground nuclear-weapons test in that rogue state.²⁰⁰ Australia is reported to have followed suit, "banning [all North Korean] ships from entering its ports, except in dire emergencies."²⁰¹ The United States has taken even broader action. In its most recent Maritime Operational Threat Response Plan, which is published as part of the National Strategy for Maritime Security, the U.S. Government listed six States as non-entrant countries. These are Cuba, Iran, Libya, North Korea, Sudan, and Syria.²⁰² The Secretary of Homeland Security is charged with denying access to all such vessels "to the internal waters and ports of the United

¹⁹⁸ MCDUGAL & BURKE, *supra* note 1, at 100-03. "[T]he coastal state ought to be accorded relatively complete discretion in deciding upon the permissibility of the entry of [warships into port]." *Id.* at 100.

¹⁹⁹ "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 11, § 274, at 262.

²⁰⁰ Associate Press, "Japan Sets Sanctions on N. Korea to 'Protect the Peace,'" Oct. 11, 2006, available at <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*, WASH. TIMES, Oct. 11, 2006, available at <http://www.washingtontimes.com/world/20061011-120355-5512r.htm>.

²⁰¹ Ng Han Guan and Audra Ang, *China Boosts N. Korea Border Inspections*, WASH. POST, Oct. 17, 2006, available at <http://www.washingtonpost.com/wpyn/content/article/2006/10/16/AR2006101600665.html>.

²⁰² NATIONAL STRATEGY FOR MARITIME SECURITY: MARITIME OPERATIONAL THREAT RESPONSE PLAN, App. B to Annex I (Oct. 2006).

States and, when appropriate, to the territorial seas of the United States."²⁰³

The right to deny port access in times where perceived threats to national security arise is well established in international law. In 1904, Venezuela closed its ports to the vessels of a single U.S. shipping company during a period of revolutionary activity in Venezuela. The steamship company filed suit before an 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.²⁰⁴ Venezuela claimed that it had denied port access 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 harbours, ports, and 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 defence of the very existence of the Government."²⁰⁵

At the same time, U.S. Government officials may not act arbitrarily in denying port access, even when based on security concerns. In 1950, President Truman, acting under the authority of the Magnuson Act, 50 U.S.C. § 191, issued Executive Order 10,173, granting to cognizant officials of the U.S. Coast Guard the authority to deny access to U.S. ports of foreign flag vessels, or direct their anchorage and movement in U.S. waters, as may be "necessary . . . to prevent damage or injury to any vessel or waterfront facility or waters of the United States"²⁰⁶ 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 might pose a risk to national security.²⁰⁷ The District Court entered summary

²⁰³ *Id.*, Annex I, at 2.

²⁰⁴ *Orinoco Steamship Co. Case (U.S. v. Venezuela)*, Venezuelan Arbitrations of 1903, at 72 (1904), 9 R.I.A.A. 180 (1903).

²⁰⁵ *Id.* at 95-96, 9 R.I.A.A. at 203.

²⁰⁶ Exec. Order No. 10,173, §§ 6.04-5 & 6.04-8, 3 C.F.R. 356, 357 (Oct. 18, 1950).

²⁰⁷ *Canadian Transport Co. v. United States*, 663 F.2d 1081, 1083-84 (D.C. Cir. 1980).

judgment against plaintiff for failure to state a claim.²⁰⁸ However, on appeal, 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”²⁰⁹ The Court returned the case to the District Court for a factual hearing on the issue of the reasonableness of the Coast Guard’s decision.

B. Denial of or Restrictions on Entry Related to Terrorism Concerns. In recent years, international terrorism has replaced the Cold War 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.²¹⁰ Given these trends, coastal 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.²¹¹ According to Dr. Stephen Flynn, the current Jeanne J. Kirkpatrick Senior Fellow in National Security Studies at the Council of Foreign Relations and an expert on the risk terrorists pose to international trade, the essence of the terrorist strategy is global economic havoc: “There is a public safety imperative and a powerful economic case for advancing international trade security.”²¹² Terrorism experts, and the terrorist organizations themselves, consider seaports to be particularly susceptible to attack.²¹³

²⁰⁸ *Canadian Transport Co. v. United States*, 430 F.Supp. 1168, 1171 (D.D.C. 1977).

²⁰⁹ *Canadian Transport Co.*, 663 F.2d at 1091.

²¹⁰ Dr. Clark C. Abt, ABT Associates, *Executive Summary: The Economic Impact of Nuclear Terrorist Attacks on Freight Transport Systems in an Age of Seaport Vulnerability*, Apr. 30, 2003, p. 2, available at www.abtassociates.com/reports/ES-Economic_Impact_of_Nuclear_Terrorist_Attacks.pdf.

²¹¹ See Flynn, *supra* note 47, at 70-74.

²¹² Quoted in April Terreri, *Int’l Trade is Less Secure Than You Think*, WORLD TRADE MAG., Sep. 4, 2006, at http://www.worldtrademag.com/CDA/Articles/Feature_Article/d37c5947e0c7d010VgnVCM100000f932a8c0.

²¹³ *Al-Qaida Training Manual Shows Seaports Top Target*, WORLD NET DAILY, Oct. 30, 2003, available at 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).

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."²¹⁴ 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 attacking with a weapon of mass destruction is necessarily of top priority, both within the United States and the international community.²¹⁵ Moreover, traditional containment and deterrence strategies that worked during the Cold War are no longer likely to succeed against fanatical terrorist groups.²¹⁶ Appropriate measures to reduce the risk of such an attack include any conditions on port access or outright denial of such access, designed to detect and deter terrorists from entering a port state, nuclear weapons and other instrumentalities of mass destruction, and other weapons, supplies, and materials used by terrorists.

However, 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 incalculable damage using weapons widely available to them, such as conventional explosives and rockets. Before 9/11, for example, who 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?²¹⁷ Although there are increasingly stringent security

²¹⁴ *A World Wide Web of Nuclear Danger*, ECONOMIST, Feb. 29, 2004, at 25.

²¹⁵ On April 28, 2004, the U.N. Security Council agreed on a Resolution declaring all Member States were under an obligation to adopt and enforce laws making it illegal for non-State actors to "manufacture, acquire, possess, develop, transport, transfer, or use nuclear, chemical, biological weapons and their means of delivery, in particular for terrorist purposes." S.C. Res. 1540, U.N. Doc. S/RES/1540 (Apr. 28, 2004).

²¹⁶ "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. 20, 2003, at 25, available at <http://www.globalpolicy.org/empire/un/2003/1120colossus.htm>.

²¹⁷ Note, however, the similar plot in Tom Clancy's novel, *DEBT OF HONOR* (1994), where the pilot of a Japan Airlines 747 intentionally crashed his

measures in place to prevent such a scenario, a small terrorist group could conceivably take control of a liquefied natural gas (LNG) carrier as it approached a U.S. port. If the terrorists placed explosives at critical points and set off the cargo in a highly populated and/or industrialized area the death, destruction, and disruption could be similar to that resulting from a low-yield nuclear weapon.²¹⁸ Various terrorist cells are no doubt speculating even now on vulnerabilities in existing port security plans and developing plans to exploit them.

A port state has the right to deny access, or impose conditions on access, 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 U.S. 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 authorities have strengthened precautionary measures 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.²¹⁹

There is an additional international legal basis for taking action against potential terrorist attacks – the 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

aircraft into the Capital building during a joint session of Congress, killing nearly everyone in the Government except the newly-named vice president, Jack Ryan.

²¹⁸ Mark Reynolds, *Lloyd’s Executive Likens LNG Attack to Nuclear Explosion*, ENERGY BULLETIN, Sep. 20, 2004, available at <http://www.energybulletin.net/2202.html>. See also Eben Kaplan, *Liquefied Natural Gas: A Potential Terrorist Target?*, Feb. 26, 2006, available at <http://www.cfr.org/publication/9810/>.

²¹⁹ Haveman et al., *supra* note 52, at 15-21. See also Flynn, *supra* note 47, at 60-74; STEPHEN E. FLYNN, THE EDGE OF DISASTER: REBUILDING A RESILIENT NATION (2007).

September 1, 1939, or the invasion of South Korea from communist North Korea in June, 1950, it seems proper to extend the right of self-defense to deter attacks by sub-national terrorist groups, such as Al-Qaeda. In the United States today, the emphasis has changed from enacting treaties, enforcing the law, and responding to attacks, to anticipating and preventing such attacks.²²⁰ International law limits what a nation state may do to protect itself against an armed attack by shooting first²²¹ or taking preemptive military measures beyond its own territory.²²² However, that paradigm may be changing with respect to preemptive action in anticipation of a terrorist attack.

“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.”²²³

In order to better protect homeland security 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 pose 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 (IPS) Program; and (6) other initiatives to identify personnel and vessels that pose a security threat to the United States and its

²²⁰ “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 (Sep. 2002), <http://www.whitehouse.gov/nsc/nss.pdf>.

²²¹ See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 701-02 (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 J. POL. PHIL. 171 (2003).

²²² See Sean D. Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILL. L. REV. 699, 706-16 (2005) (discussion of four different schools of thought on the issue).

²²³ THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (Sep. 2002), available at <http://www.whitehouse.gov/nsc/nss.pdf>.

trading partners and to devise and improve processes to detect and deter these agents.²²⁴

One key reason for advancing the requirement of foreign vessels to provide a notice of arrival (NOA) at least 96 hours before they plan to enter a U.S. port is to ensure adequate time to check the accuracy and veracity of the details the vessel has provided. In the United States, watchstanders at the National Vessel Movement Center (NVMC) monitor the data and evaluate and promulgate possible threats.²²⁵ However, the decision to approve or disapprove port entry is left to the discretion of the Coast Guard Captain of the Port (COTP).²²⁶ 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.²²⁷ This paper will now briefly consider several of these initiatives and programs.

(1) Proliferation Security Initiative (PSI). 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 Proliferation Security Initiative (PSI) on May 31, 2003 as a “new effort to fight proliferation” through international agreements “to search . . . ships carrying suspect cargo to

²²⁴ See Firestone & Corbett, *supra* note 59, at 431-33; Haveman et al., *supra* note 52, at 15-21.

²²⁵ See 33 C.F.R. § 160.210. Vessels may submit NOA's electronically on the NVMC web site, available at <http://www.nvmc.uscg.gov/>.

²²⁶ 33 C.F.R. pt. 160. In addition, COTP's have broad authority under the Magnuson Act, 50 U.S.C. §§191-198, and the Ports and Waterways Safety Act, 33 U.S.C. §§ 1221-1236, to issue orders and take actions to protect the security and safety of vessels and facilities within their area of responsibility.

²²⁷ For a comprehensive analysis of port security initiatives involving the Coast Guard, see Rachel B. Bralliar, *Protecting U.S. Ports with Layered Security Measures for Container Ships*, 185 MIL. L. REV. 1, 1-68 (2005).

seize illegal weapons or missile technologies.”²²⁸ The PSI was designed to help fill in the gap in international law by banning the secretive and dangerous trade in nuclear weapons, ballistic missiles, other weapons of mass destruction and their delivery systems, and component materials.²²⁹

The impetus to develop the PSI concept was largely due to the circumstances surrounding the interdiction of the North Korean freighter *So San* some 600 miles off the Yemeni coast, which demonstrated the lack of international legal tools available.²³⁰ American satellites and Navy ships had tracked the *So San* since it left North Korea in mid-November 2002. Since the vessel was not flying a flag and intelligence information revealed 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.²³¹ The crew contended that the vessel was carrying a legal cargo of concrete to Yemen. However, a subsequent search uncovered Scud ballistic missile components hidden beneath the concrete, and chemicals necessary to fuel the missiles. After Yemen contended that the cargo was perfectly legal pursuant to a sales and shipping contract, Spanish and American authorities eventually had to acquiesce in the vessel continuing to its destination.²³²

There was a general consensus within the 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

²²⁸ President George W. Bush, *Remarks by the President to the People of Poland*, Wawel Royal Castle, Krakow, Poland, available at <http://www.whitehouse.gov/news/releases/2003/05/20030531-3.html> (May 31, 2003). 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 HARV. INT'L L. J. 131, 134 (2005).

²²⁹ Michael Byers, *Policing the High Seas: The Proliferation Security Initiative*, 98 AM. J. INT'L L. 526, 527-28 (2004).

²³⁰ Daniel H. Joyner, *The Proliferation Security Initiative: Nonproliferation, Counterproliferation, and International Law*, 30 YALE J. INT'L L. 507, 508-09 (2005).

²³¹ See Thomas E. Ricks & Peter Slevin, *Spain and U.S. Seize N. Korean Missiles: Scuds Were on Ship Bound for Yemen*, WASH. POST., Dec. 11, 2002, at A1.

²³² Daniel H. Joyner, *The Proliferation Security Initiative: Nonproliferation, Counterproliferation, and International Law*, 30 YALE J. INT'L L. 507, 509 (2005).

such shipments.²³³ 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.²³⁴ 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.”²³⁵ 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.²³⁶ However, if done with the cooperation of the flag state, there would not be any legal problem. 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 access to vessels registered in that state.

(2) Container Security Initiative (CSI). Another recent initiative to combat the risk of international terrorist attacks on U.S. ports is the Container Security Initiative (CSI).²³⁷ The CSI allows U.S. customs agents, in coordination with foreign governments, to prescreen

²³³ Michael Byers, *Policing the High Seas: The Proliferation Security Initiative*, 98 AM. J. INT’L L. 526, 527-28 (2004).

²³⁴ White House, Office of the Press Secretary, *Fact Sheet: Proliferation Security Initiative, Statement of Interdiction Principles*, available at <http://www.whitehouse.gov/news/releases/2003/09/print/20030904-11.html> (Sept. 4, 2003).

²³⁵ *Id.* See also Ted L. McDorman, *An Information Note on the Proliferation Security Initiative (PSI)*, 36 OCEAN DEV. & INT’L L. 381-86 (Oct.-Dec. 2005).

²³⁶ 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 DEV. & INT’L L. 33, 33-53 (Jan.-Mar. 2006); Daniel H. Joyner, *The Proliferation Security Initiative: Nonproliferation, Counterproliferation, and International Law*, 30 YALE J. INT’L L. 507, 509 (2005); see also Michael Evans, *US Plans to Seize Suspects at Will*, TIMES (LONDON), Jul 11, 2003, at 23.

²³⁷ U.S. Customs and Border Protection, *New CSI Port Becomes Operational*, U.S. CUSTOMS & BORDER PROTECTION TODAY, May 2006, http://www.cbp.gov/xp/CustomsToday/2006/may/new_csi_port.xml.

high-risk cargo containers at the port of departure.²³⁸ Today, the CSI process results in the preclearance of some 90 percent of the containers that enter U.S. seaports and is in place in at least 50 major international seaports around the world.²³⁹ The CSI process consists of four key elements: (1) using automated information to identify and target high-risk containers; (2) pre-screening those containers identified as high risk before they leave foreign ports; (3) using up-to-date detection technology to quickly and efficiently pre-screen high-risk containers; and (4) developing and using "smarter," more secure, tamper-proof containers.²⁴⁰

American citizens and allied nations expect that the United States will adopt port access 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 U.S. port must wait at a point 200 nm from our shores until the U.S. Coast Guard boards the vessel and opens and inspects every container on board, would not violate international law.²⁴¹ However, given the millions of containers in transit, the practical impossibility of searching them while on board a vessel underway, and the costs and delays that any such effort would entail, this would be an unworkable and unwise policy.²⁴²

²³⁸ White House, Office of the Press Secretary, *Press Release: Protecting America's Seaports and Securing Cargo Shipments*, available at <http://www.whitehouse.gov/news/releases/2004/02/20040205-4.html> (Feb. 5, 2004) (CSI "allows DHS to prescreen cargo" before it reaches U.S.). See also Jessica Romero, *Prevention of Maritime Terrorism: The Container Security Initiative*, 4 CHI. J. INT'L L. 597, 597-605 (2003).

²³⁹ U.S. Customs and Border Protection, *Fact Sheet: Container Security Initiative*, available at http://www.cbp.gov/xp/cgov/border_security/international_activities/csi/csi_in_brief.xml (Sep. 30, 2006).

²⁴⁰ *Id.* See Roach, *supra* note 188, at 343.

²⁴¹ No such 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.

²⁴² *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).

²⁴² Larry Greenemeier, *IBM Launches Wireless Shipping Security*, INFORMATIONWEEK, Sep. 20, 2005, available at <http://www.informationweek.com/showArticle.jhtml?articleID=171000325>. Of course, IBM's prototype represents just the first generation of such devices. Improvements are sure to be coming soon.

The CSI, on the other hand, focuses on a relatively 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 (C-TPAT), a public-private sector initiative that offers international shipping companies benefits such as expedited clearance through U.S. ports in exchange for improvements in their internal security measures.²⁴³ Giving preferential access to vessels from CSI ports is an efficient, effective, legal, and relatively inexpensive way to lower the threat of international terrorism.

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) in each container would also be a reasonable condition of port entry, particularly if the industry were to agree to participate voluntarily or if it were part of an IMO vessel security initiative. The technology is rapidly being refined and becoming available. IBM recently developed a TREC that operates a Linux operating system and acts as an intelligent, real-time tracking device. These devices are capable of detecting radiation, reporting tampering of the container, and, when coordinated with shipping plans entered into a computer, of identifying other anomalies.²⁴⁴ Even though the cost to install a TREC on every container would be significant, competition and mass-production would likely bring the prices down dramatically. In addition, the resulting enhanced level of security would be worth the costs. Moreover, the expected benefits would transcend security. If a comprehensive system were implemented universally, shippers, vessel operators, port

²⁴³ See 6 U.S.C. §§ 961-968. See also K. Lamar Walters, III, *Industry on Alert: Legal and Economic Ramifications of the Homeland Security Act on Maritime Commerce*, 30 TUL. MAR. L.J. 311, 318-19 (2006) (“Customs-Trade Partnership Against Terrorism”).

²⁴⁴ 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>.

administrators, and customers would be able to keep track of every container, pallet, and box within, wherever it is located in the world.²⁴⁵ Although the international community must expect growing pains as CSI becomes fully operational, initiatives to prevent the "bomb in a box" scenario from becoming a reality are important tools to protect homeland security and the international transportation network against the threat of such terrorist attacks.

(3) Automated Identification System (AIS). 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."²⁴⁶ Although growing pains existed as the technology was developed, AIS has proven to be very helpful, both to mariners and flag and port state authorities. Even before the emphasis shifted to combating terrorism, maritime experts identified satellite-based vessel monitoring systems (VMS's) as an invaluable tool for managing fisheries and for promoting maritime safety.²⁴⁷ The Department of Homeland Security has statutory authority to implement regulations to fully implement AIS in the United States.²⁴⁸ The Coast Guard also recognizes the need for such AIS information to improve Maritime Domain Awareness (MDA) by monitoring vessels approaching the U.S. coastline and, ultimately, to

²⁴⁵ "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, Aug. 8, 2006, available at http://www.forbes.com/2006/08/06/smart-shipping-containers-cx_rm_0808ship.html?partner=yahootix.

²⁴⁶ Lloyd's List, *Freedom and Security: The Dilemma of Vessel Tracking*, SECURITYINFOWATCH.COM, Apr. 28, 2006, <http://www.securityinfowatch.com/article/article.jsp?id=7983&siteSection=386>.

²⁴⁷ See Erik Jaap Molenaar & Martin Tsamenyi, *Satellite-Based Vessel Monitoring Systems for Fisheries Management: International Legal Aspects*, 15 INT'L J. MARINE. & COASTAL L. 65, 67 (2000).

²⁴⁸ See 46 U.S.C. § 2101; 33 C.F.R. § 164.46.

develop the intelligence necessary to help deter terrorist attacks on U.S. ports.²⁴⁹

The Maritime Transportation Security Act of 2002²⁵⁰ and the Coast Guard and Maritime Safety Act of 2004²⁵¹ 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.²⁵² AIS is a relatively mature technology, and was a key component of IMO's marine safety system for years. All vessels using the Vessel Traffic Service (VTS) 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, U.S. law and regulations require that it be operational on larger vessels entering U.S. waters.²⁵³ 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.²⁵⁴

(4) Long-Range Identification and Tracking (LRIT) of Ships.

The Long Range Identification and Tracking (LRIT) of Ships system is another IMO initiative under SOLAS.²⁵⁵ LRIT requires certain ships

²⁴⁹ "Intelligence . . . is the first line of defense against terrorists . . . [and such] information becomes the basis for building MDA." U.S. COAST GUARD, MARITIME STRATEGY FOR HOMELAND SECURITY 18 (2002).

²⁵⁰ Maritime Transportation Act of 2002, Pub. L. No. 107-295, 116 Stat. 2082 (2002).

²⁵¹ Maritime Transportation Act of 2002, Pub. L. No. 108-293, 118 Stat. 1080 (2004).

²⁵² See Joe Pappalardo, *Federal Agencies Tackle Maritime Security, Ports First*, NAT'L DEF., June, 2005, available at http://www.nationaldefense.magazine.org/issues/2005/Jun/federal_agencies.htm.

²⁵³ 46 U.S.C. § 70114 (Supp. 2002) ("Automated identification systems"); 46 U.S.C.A. § 70115 (West 2007) ("Long-range vessel tracking system").

²⁵⁴ Aliya Sternstein, *Coast Guard Gets Satellite Help*, FED. COMPUTER WK., Nov. 8, 2004, available at <http://www.fcw.com/article84497-11-07-04-Print>.

²⁵⁵ Adoption of Amendments to the International Convention for the Safety of Life at Sea, Res. MSC.202(81) (May 19, 2006); Imo, Revised Performance Standards and Functional Requirements for the Long-Range Identification and Tracking of Ships, Res. MSC.Z63 (84) (May 16, 2008). *Long*

(passenger ships, cargo ships over 300 gross tons, including high speed craft, and mobile offshore drilling units on international voyages) to transmit their identity, location, and date and time of the position.²⁵⁶ That information may be accessed upon payment of the costs thereof by port states for those that evidence an intent 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 1000 nautical miles.²⁵⁷ As 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 EEZ, 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 additional scrutiny and delay, port access requirements, or even outright denial of port access.

(5) International Port Security (IPS) Program. In December 2002, the IMO adopted a new set of rules for all States and

Range Identification and Tracking (LRIT), available at http://www.imo.org/Safety/mainframe.asp?topic_id=905.

²⁵⁶ Congress authorized the development and implementation of an LRIT system in 46 U.S.C. § 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 Apr. 1, 2007.

²⁵⁷ As an example, Australia's zone extends 1000 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 system*, 55 INT'L & COMP. L. Q. 337, 337-368 (2006).

international shipping companies.²⁵⁸ These rules included changes to the Safety of Life at Sea Convention (SOLAS) through adoption of the International Ship and Port Facility Security Code (ISPS Code). These went 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 (ISSC). Assuming that vessels comply with the ISPS requirements, port states may not take enforcement action against the vessel, including denial of port access, 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 require the vessel to rectify the non-compliance.

Under U.S. law, the Coast Guard is responsible for determining whether foreign ports are maintaining effective anti-terrorism measures.²⁵⁹ To do this, the Coast Guard created the International Port Security (IPS) 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.²⁶⁰ 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 issues a Port Security Advisory (PSA) 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 there are additional “clear grounds” for concern, the vessel may be denied entry into the United States.

²⁵⁸ *IMO Adopts Comprehensive Security Measures*, http://www.imo.org/About/mainframe.asp?topic_id=583&doc_id=2689. See also *Maritime Security*, http://www.imo.org/Safety/mainframe.asp?topic_id=55.

²⁵⁹ Maritime Transportation Security Act of 2002, 46 U.S.C.A. § 70108 (West 2007) (“Foreign port assessment”).

²⁶⁰ 46 U.S.C.A. § 70110(a) (West 2007). The Secretary of DHS (Coast Guard) is also charged with notifying the foreign country about security deficiencies it has observed at the port. *Id.* § 70109(a).

Before entering the first U.S. 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 (COTP) will permit the vessel to enter the U.S. 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.²⁶¹ 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 access to the port.²⁶² Presently, the Coast Guard requires that foreign-flag vessels list the five previous foreign ports on which they have called.²⁶³ Since these measures are designed to effectively reduce the risk of a terrorist attack on a U.S. port, imposing such non-discriminatory conditions on port access 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 U.S. 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 have 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 U.S. 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 do not permit a comprehensive review of all the various proposals. Suffice it to say 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 or the exercise of jurisdiction over foreign-flag vessels.

²⁶¹ 33 C.F.R. §§101.400-101.410 ("Maritime Security").

²⁶² 33 C.F.R. §101.410(b)(5) (2008).

²⁶³ 33 C.F.R. § 160.206 (2008).

C. Denial of or Restrictions on Entry Related to Suspected Criminal Activity. Coastal 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 access to, or impose extensive controls on, commercial vessels seeking port access as they may deem necessary to ensure that any such vessels are not promoting criminal activities.

There are 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 laws and regulations. To combat such illegal activities, coastal 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 vessels that they have registered are not engaged in criminal enterprises, a port state could appropriately deny access to vessels from such States.²⁶⁴ 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 its ports.

If a coastal 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, the authorities of the port state may deny entry to that vessel or that group of vessels.²⁶⁵ Likewise, these authorities may require that those vessels submit to a records review, or to a thorough search, personnel or cargo screening, as a precondition for entry. To increase security in the transportation industry, the U.S. 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.”²⁶⁶ This has evolved into the Department of

²⁶⁴ Michael Richardson, *Crimes Under Flags of Convenience: In a Depressed Shipping Market, Poor Nations Sell Flags for Criminal Ventures*, YALE GLOBAL, May 19, 2003, <http://yaleglobal.yale.edu/display.article?id=1633>.

²⁶⁵ See 33 U.S.C. § 1228(a)(2) (2006) (“Conditions for entry to ports in the United States”); 33 U.S.C. § 1232(e) (2006) (“Denial of entry”).

²⁶⁶ 46 U.S.C.A. § 70111(a) (West 2007).

Homeland Security's initiative to establish a transportation workers identification credential (TWIC) for workers in the maritime industry.²⁶⁷ 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 10 most vulnerable U.S. ports by July 1, 2007, and that the process be in place for the 40 most vulnerable ports by July 1, 2008.²⁶⁸ The benefits of requiring and screening lists of crew and passengers in an NOA include the opportunity to detect those individuals with criminal records. All of these conditions on entry are well established in traditional state practice.²⁶⁹

VII. CONDITIONS ON ENTRY TO PROTECT THE MARINE ENVIRONMENT

A. Denial of or Restrictions on the Entry of Vessels Representing a Pollution Risk. Protecting the marine environment of the internal or coastal waters of a state is often cited as another of the vital interests that can legally support coastal state jurisdiction over ocean space, including restrictions on port access.²⁷⁰ Except for the unusual case of *force majeure*, a vessel has no right to enter a state's internal waters, particularly where it presents a real pollution threat. In 1971, various European ports denied access to the Dutch freighter *Stella Maris* because it was carrying a load of toxic vinyl chloride waste for dumping at sea.²⁷¹ As a general rule, therefore, a coastal state may deny access or impose any regulations it deems appropriate consistent with its rights and obligations under international law.²⁷² For instances of pollution beyond the coastal state's territorial waters that have no effect within its jurisdictional zones, customary international

²⁶⁷ 33 C.F.R §§ 101.105, 101.514, 101.515 (2008).

²⁶⁸ SAFE Port Act of 2006, 6 U.S.C.A § 901. 46 U.S.C.A. § 70105 (West 2007).

²⁶⁹ See, e.g., 8 U.S.C. § 1182 ("Inadmissible aliens" includes persons with criminal records and/or terrorist affiliations).

²⁷⁰ See Ted L. McDorman, *Regional Port State Control Agreements: Some Issues of International Law*, 5 OCEAN & COASTAL L. J. 207, 208-09 (2000).

²⁷¹ KASOULIDES, *supra* note 14, at 22 n.125; SEBASTIAN A. GERLACH, MARINE POLLUTION 56 (SPRINGER-VERLAG 1981) (1976).

²⁷² UNCLOS, *supra* note 4, arts. 211(3) and 220. See Craig H. Allen, *Federalism in the Era of International Standards: Federal and State Government Regulation of Merchant Vessels in the United States (Part II)*, 29 J. MAR. L. & COM. 565, 567 (1998); A.W. Anderson, *National and International Efforts to Prevent Traumatic Vessel Source Oil Pollution*, 30 U. MIAMI L. REV. 985, 1001 (1976).

law does not give the coastal state a basis to exert jurisdiction over the vessel involved, even when it enters into the internal waters of that state. As one scholar observed, "[T]he traditional principles of state jurisdiction do not support such an application of jurisdiction" in such a case.²⁷³

At least for States party to UNCLOS, Article 218, "Enforcement by port states," creates a potential enforcement authority for a port state in situations where a foreign-flag vessel discharges a pollutant on the high seas or in a foreign state's EEZ in contravention of existing international standards, even where the port state has suffered no direct harm from the discharge.²⁷⁴ But, since it exceeds the traditional principles of jurisdiction discussed above, "[i]t is highly questionable whether Article 218 . . . has emerged as part of customary international law."²⁷⁵ It is probably only a matter of time, however, before port states seek to exercise jurisdiction over vessels voluntarily present in one of their ports to protect the "global commons."²⁷⁶ At least among States Party to UNCLOS, Article 218 provides international authority to do so. In any case, the port state could certainly deny access to any foreign-flag vessel that it determines has polluted, failed to take adequate steps to prevent pollution, even with respect to an incident beyond its EEZ.

²⁷³ KASOULIDES, *supra* note 14, at 34. "However, where an *activity* of a foreign vessel, such as a pollution discharge, *takes place on the high seas* or in the waters of a third state, and the activity does not affect the port state, customary international law does not permit a host state to enforce its laws regarding that activity against a visiting foreign vessel in its ports." McDorman, *supra* note 271, at 216.

²⁷⁴ UNCLOS, *supra* note 4, art. 218 ("Enforcement by port States"). See Ted L. McDorman, *Port State Enforcement: A Comment on Article 218 of the 1982 Law of the Sea Convention*, 28 J. MAR. L. & COMM. 305, 314-15 (1997).

²⁷⁵ McDorman, *supra* note 270, at 216-17. "Moreover, few countries have extended their law to embrace a port state enforcement power of this type" *Id.*

²⁷⁶ See David S. Ardia, *Does the Emperor Have No Clothes? Enforcement of International Laws Protecting the Marine Environment*, 19 MICH. J. INT'L L. 497, 534, 555-57 (1997-1998); Mary Ellen O'Connell, *Enforcement and the Success of International Environmental Law*, 3 IND. J. GLOBAL LEG. STUD. 47, 57 (1995) ("The idea of expanding the use of domestic courts for international environmental law enforcement against citizens and governments of other countries is a more recent and interesting concept.")

For most coastal States, including the United States, the MARPOL Convention and its Annexes provide for international vessel construction standards and operational requirements designed to minimize the risk of pollution.²⁷⁷ States party to MARPOL must adopt domestic laws and regulations to implement these requirements. In the United States, several statutes and regulations, including the Act to Prevent Pollution from Ships of 1980 (APPS),²⁷⁸ implement MARPOL. APPS requires that United States flag vessels operating anywhere and foreign-flag vessels operating in the navigable waters of the United States comply with the requirements of Annexes I and II of MARPOL. There are several other statutes designed to protect the marine environment from pollution, whether created by catastrophic incidents, minor spills, or other practices that, combined together, jeopardize the port or coastline. These statutes include the Ports and Waterways Safety Act of 1972,²⁷⁹ Federal Water Pollution Control Act of 1972, (commonly called the Clean Water Act),²⁸⁰ the Port and Tanker Safety Act of 1978,²⁸¹ and the Federal Oil Pollution Control Act of 1990.²⁸²

Following the *Exxon Valdez* disaster in Prince William Sound in March 1989 and several other disasters, Congress passed the Oil Pollution Act of 1990 (OPA-90).²⁸³ Among other things, this law established a phase-out schedule by which most tank vessels entering the ports of the United States must have double hulls.²⁸⁴ While the IMO, through amendments to MARPOL 72/78, subsequently established double-hull requirements to be phased in, the regulations implementing the U.S. law remain stricter in some respects than the international standards.

²⁷⁷ See Rubin & Stucky, *supra* note 91, at 21.

²⁷⁸ Act to Prevent Pollution from Ships of 1980, 33 U.S.C. §§ 1901-1905 (2006), amended by Maritime Pollution Prevention Act of 2008. Pub. L. No. 110-280, 122 Stat. 2611 (2008). For a good discussion of this and other marine pollution prevention statutes, see Allen, *supra* note 272, at 575-613.

²⁷⁹ Ports and Waterways Safety Act of 1972, 33 U.S.C. §§ 1221-1236 (2006) (implementing regulations can be found at 33 C.F.R. §§ 160.101-.215 (2008)).

²⁸⁰ Federal Water Pollution Control Act of 1972, 33 U.S.C. §§ 1251-1387 (2006).

²⁸¹ Port and Tanker Safety Act of 1978, 33 U.S.C. §§ 1222-1232 (2006).

²⁸² Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-2761 (2006).

²⁸³ Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (1990).

²⁸⁴ 46 U.S.C.A. § 3703(a) (West 2007).

“While the [stricter standards] are in accordance with the jurisdiction of port states under both customary law and the Law of the Sea Convention, it may be questioned how far it is in accordance with the spirit of the Convention, which is to discourage unilateral design and construction standards for ships.”²⁸⁵ Since owners of oil and product tankers would like the option of engaging in trade by entering ports in the United States, the effect of the stricter American regulation is to make it the *de facto* international standard.

In addition to prohibiting the discharge of oil, the requirement to report any such discharges, no matter how small, and an obligation to maintain an accurate Oil Record Book, MARPOL 73/78 and Federal law require that most commercial vessels prepare and carry shipboard oil pollution emergency plans (SOPEP's) as a condition of port entry.²⁸⁶ The Federal Water Pollution Control Act, as amended by the Oil Pollution Act of 1990,²⁸⁷ directs the establishment of a regulatory scheme to mitigate and respond to maritime accidents that threaten the maritime environment. This is the primary statute under which the Coast Guard promulgated the oil pollution prevention regulations for vessels, including foreign-flag vessels, operating in U.S. waters. Those regulations detail equipment, manning, procedures, recordkeeping, and other operational requirements consistent with the provisions of the relevant international agreements.²⁸⁸ Subpart D of 33 C.F.R. part 155 sets out the rules that require tankers to develop tailored vessel response plans (VRPs) and conduct exercises in carrying them out.²⁸⁹ These plans are considerably more detailed than a standard MARPOL SOPEP. However, if foreign-flag vessels are in U.S. navigable waters while engaged only in innocent passage (or transit passage), the more demanding U.S. provisions do not apply to them.²⁹⁰

²⁸⁵ CHURCHILL & LOWE, *supra* note 13, at 353.

²⁸⁶ MARPOL, Regulation 26 requires oil tankers of greater than 150 tons, and other commercial vessels of greater than 400 gross tons, to carry a SOPEP. Shipboard Marine Pollution Emergency Plans, APPS implemented MARPOL, including Regulation 26, for vessels operating in the navigable waters of the U.S. See 33 U.S.C. § 1902(a)(2); 33 C.F.R. § 151.25 (“Oil Record Book”) (2008).

²⁸⁷ Federal Water Pollution Act of 1972, 33 U.S.C. § 1321 (2006).

²⁸⁸ 33 C.F.R. pts. 151, 155 (2008).

²⁸⁹ 33 C.F.R. §§ 155.1015(a), 155.1035 (2008).

²⁹⁰ 33 C.F.R. § 155.1015(c)(7) (2008).

An interesting question is how to balance the application of these provisions to vessels that are engaged in innocent or transit passage through one part of U.S. territorial waters, but that subsequently enter a U.S. port. For example, imagine a Russian flag vessel sailing from eastern Siberia bound for Houston with a load of crude oil. Following the Great Circle Route through the Bering Sea, the vessel would normally sail through Unimak Pass about halfway up the Aleutian Island chain in Alaska. Unimak Pass, the major shipping route between the Bering Sea and the North Pacific Ocean, narrows to a little over 10 nautical miles.²⁹¹ Several thousand vessels use the Unimak Pass each year, mostly fishing vessels passing from the Bering Sea to the Gulf of Alaska, but increasingly container ships and other commercial vessels utilizing the Great Circle Route from East Asia to the West Coast of the United States. The Unimak Pass is an international strait overlapped by the 12-nm territorial sea of the United States and used for international navigation. Under basic principles of customary international law to which the United States subscribes, the regime of transit passage applies to such straits.²⁹²

Once it clears the Gulf of Alaska, the vessel would then normally sail through Canada's EEZ, pass through the EEZ off the Western Coast of the United States, continue through Mexico's EEZ and the EEZ's and territorial seas of Central American states on the way to the Panama Canal. After passing through the Panama Canal, such a tanker would normally proceed through the Caribbean Sea and Gulf of Mexico on the way to Houston. Once in a U.S. port, Coast Guard officials are likely to ask the vessel's master to show the VRP, not only for the Gulf Coast of Texas, but also for Alaska and the other U.S. zones through which it passed. Although the Coast Guard regulations recognize the right of innocent and transit passage for foreign-flag

²⁹¹ *Unimak Pass Vessel Analysis*, Sept. 1984, available at www.mms.gov/eppd/soecon/techsum/ak/TR-108.DOC (last visited Apr. 3, 2009). The Unimak Pass is one of "[t]he main navigational lanes through the [Aleutian Island] chain" *Aleutian Islands*, ENCYCLOPEDIA BRITANNICA ONLINE (2007), available at <http://www.britannica.com/eb/article-9005580/Aleutian-Islands>.

²⁹² UNCLOS, *supra* note 4, arts. 37-38. When President Reagan extended the U.S. territorial sea to 12 nautical miles, he preserved the inclusive navigational rights through international straits. See Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988) ("In accordance with international law, as reflected in the applicable provisions of the 1982 United Nations Convention on the Law of the Sea, within the territorial sea of the United States, the ships of all countries enjoy the right of innocent passage and the ships and aircraft of all countries enjoy the right of transit passage through international straits.")

vessels that voluntarily enter U.S. internal waters, there is an obligation to comply with U.S. laws imposing conditions on port entry, including having a VRP appendix for each geographical COTP zone of the United States through which the vessels may operate.²⁹³ The fact that a vessel sailed outside of U.S. waters, and may even have made a port call in another country does not insulate it from having to comply with U.S. law as a condition of port entry.

Indeed, imagine that a foreign-flag tanker vessel bound for a U.S. port passing through Unimak Pass during one of the frequent violent storms in the area loses power and is subsequently blown onto the rocks, causing a major environmental disaster on Alaska's shores. If the vessel failed to have the equipment mandated by U.S. law, or had no VRP for that coastal area of the United States and any such failure caused or aggravated the disaster, one can imagine the deafening public outcry. Although requiring each oil tanker planning a voyage to the United States to be properly equipped and have prepared a VRP for each coastal region of the United States through which it plans to pass would add somewhat to the expense of the voyage, this would merely be part of the cost of doing business. In this regard, most large foreign tankers doing business in the United States must ensure that they have double hulls that meet the more strict requirements of the OPA, even though they may be more stringent than MARPOL may require. So long as they take into account international standards, the coastal state is well within its rights to insist on such stringent equipment and construction requirements and comprehensive planning as a condition of port entry and to take necessary action to enforce the regulations once the vessel arrives in port.

The discharge of ballast-water is another issue that coastal States could control as a condition of entry. The Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990,²⁹⁴ recognized the problem of ballast water from ships engaged in international trade introducing alien species, such as the zebra mussel, invading U.S. waters. The Coast Guard has promulgated a regulatory scheme to

²⁹³ 33 C.F.R. § 155.1030(a) (2008) ("The [VRP] must cover all geographic areas of the United States in which the vessel intends to handle, store, or transport oil, including port areas and offshore transit areas.")

²⁹⁴ Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990, Pub. L. No. 101-646, 104 Stat. 4761 (1990) (current version at 16 U.S.C.A. §§ 4701-4751 (West 2007)).

implement that Act.²⁹⁵ A complete flushing of the ballast water tanks at sea is one method to limit introduction of invasive species. Researchers are considering other proposals, including on board ballast-water treatment, ozone treatment, and routing tank gasses through ballast water tanks underway, to kill any aquatic organisms. Once a practical solution is found to the problem, concerned coastal States may certainly require that the vessel comply with any implementing regulations as a condition of port entry. Of course, the fact that a port state may have the legal right to implement stringent port entry requirements does not answer the question of whether such requirements make the best policy sense.

B. State and Local Requirements to Impose Conditions on Port Entry to Prevent Water and Air Pollution. Particularly when state and local officials view the Federal government as acting too slowly or cautiously to protect the marine environment effectively, some individual states and localities have sought to protect the environment by requiring that visiting vessels comply with local laws designed to protect the marine environment along their coastlines and within their internal waters. However, "state and local governments within the United States are limited in the extent to which they may impede a foreign vessel's access to United States ports where the federal government has permitted such access by international agreement or other federal law."²⁹⁶ The U.S. Supreme Court has consistently determined that federal supremacy principles mandate preemption of efforts of state and local governments to impose conditions on port entry that federal laws already cover. In *United States v. Locke*,²⁹⁷ for example, the Supreme Court overturned the decisions of the lower courts that the state of Washington could require vessels entering Puget Sound to comply with local requirements for ship construction, manning, casualty reporting, and crew training and certification. Failure to comply with the state rules could have resulted in "sanctions includ[ing] statutory penalties, restrictions on the vessel's operations in state waters, and a denial of entry into state waters."²⁹⁸ Relying upon its earlier holding in a similar case, *Ray v. Atlantic*

²⁹⁵ See 33 C.F.R. §§ 151.2041-151.2045 (2008). ("Ballast Water Management for Control of Nonindigenous Species in Waters of the United States"). This requires arriving vessels to report ballast water history and status.

²⁹⁶ Allen, *supra* note 272, at 577.

²⁹⁷ 529 U.S. 89, 110-117 (2000).

²⁹⁸ *Id.* at 97.

Richfield Co.,²⁹⁹ the *Locke* Court held that “only the federal Government may regulate the design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of tankers.”³⁰⁰

On the other hand, federal law preserves state authority to regulate with respect to “the peculiarities of local waters, if there is no conflict with Federal regulatory determinations.”³⁰¹ For example, as discussed above, since the early history of the nation, Congress has left conditions like requiring pilots and certifying them to the cognizance of state authorities.³⁰² Likewise, nothing in federal law preempted or barred a state or local requirement requiring that large tanker vessels be accompanied by tugboats while navigating within restricted waters.³⁰³ This is because the question of bringing a vessel safely into port is so intimately connected with the peculiarities of the local waters and navigational conditions as to make it susceptible to state regulation.

On the other hand, questions of design, construction, equipping, and manning standards fall directly within the purview of the federal government, particularly when the implementation of international agreements is involved. In the *Locke* case, over a dozen foreign

²⁹⁹ 435 U.S. 151 (1978). “[T]he Supremacy Clause dictates that the federal judgment that a vessel is safe to navigate United States waters prevail over the contrary state judgment.” *Id.* at 165.

³⁰⁰ *United States v. Locke*, 529 U.S. 89, 91 (2000). A Federal Court in Massachusetts most recently re-affirmed this principle in *United States v. Massachusetts*, 440 F.Supp.2d 24, 38 (D. Mass. 2006), involving regulations governing oil tanker vessels in the approaches to Buzzard’s Bay (Boston).

³⁰¹ *Locke*, 529 U.S. at 91. *See also* *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 171-72, 178 (1978).

³⁰² Except as otherwise provided in this subtitle, pilots in the bays, inlets, rivers, harbors, and ports of the United States shall be regulated only in conformity with the laws of the States.” 46 U.S.C. § 8501(a)(2000). Although the Constitution clearly gives Congress the power to legislate on all aspects of commerce with foreign nations, including pilotage, Congress permits the individual States to regulate most pilotage matters. *Anderson v. Pacific Coast Steamship Co.*, 225 U.S. 187, 204-05 (1912). *But see* 46 U.S.C. §§ 9301-9308 (2000) (a Federal regulatory scheme governs pilotage on the Great Lakes).

³⁰³ “The relevant inquiry . . . with respect to the State’s power to impose a tug-escort rule is thus whether the Secretary has either promulgated his own tug requirement for Puget Sound tanker navigation or has decided that no such requirement should be imposed at all. It does not appear to us that he has yet taken either course.” *Atlantic Richfield*, 435 U.S. at 171-72.

governments and several shipping industry representatives filed amicus briefs to convince the Court that, if Washington state regulations were given full effect, the adverse consequences on international commerce by sea would be substantial.³⁰⁴

One recent development in the issue of state regulation is an effort by California to impose stringent air quality standards as a condition of entry for all vessels seeking to call on its ports. Two ports in particular, Oakland and Los Angeles/Long Beach, are among the busiest and most important in the world. Because both ports are in highly populated areas where air pollution is already a serious problem and because they were dissatisfied with Federal efforts to combat it, California authorities decided to enact regulations to enhance air quality. In December, 2005, the Air Resources Board of California's Environmental Protection Agency approved statewide regulations designed to reduce emissions from cargo handling equipment and auxiliary diesel engines on ocean-going vessels. To comply, vessels must use cleaner fuel and auxiliary equipment that pollutes less.

Insofar as California's requirements are more strict or otherwise inconsistent with Federal or international standards, the California rules could have an adverse impact on international trade. Whether these state-wide rules will survive a preemption challenge under the analysis contained in *Ray* and *Locke* is problematic. To the extent that they deal with cargo handling equipment powered by diesel engines that are used on the pier, the state regulations are likely to prevail. On the other hand, to the extent that they set standards for equipment on board foreign merchant vessels, any conflicting federal law is likely to take precedence.

Programs need not be mandatory to be effective, however, and some ports are introducing incentive initiatives. For example, the Port of Long Beach, working in cooperation with federal and state EPA's, has implemented voluntary programs to educate and reward ocean-going merchant vessels that comply with speed restrictions and other efforts to reduce emissions while entering or leaving port or while engaged in cargo-handling activities.³⁰⁵ Such voluntary incentive programs will likely pass constitutional muster. Moreover, insofar as

³⁰⁴ See, e.g., Brief Amicus Curiae of the Gov'n't of Can. in Support of Petitioners, *United States v. Locke*, 529 U.S. 89 (2000), (Nos. 98-1701, 98-1706); Brief of the Pacific Merchant Shipping Ass'n in Support of Petitioners, *United States v. Locke*, 529 U.S. 89 (2000), (Nos. 98-1701, 98-1706).

³⁰⁵ *Air Quality*, http://polb.com/environment/air_quality/default.asp (last visited Apr. 3, 2009).

they are administered in a non-discriminatory manner and available to all, they are unlikely to conflict with customary international law or the relevant provisions of trade agreements and FCN treaties.

C. Jurisdiction to Sanction Violation of Environmental Protection Laws in the Territorial Sea and Exclusive Economic Zone (EEZ). Increasingly, port states are using their jurisdiction over vessels calling on their ports to exercise jurisdiction, including criminal and civil sanctions, to protect the marine environment in their territorial sea and EEZ. This trend extends, in some cases, to vessels exercising their right of innocent passage through the territorial sea or transit passage through an international strait. The UNCLOS provides for the right of coastal states to enact laws and regulations to protect the environment of their coastal waters from pollution.³⁰⁶ Moreover, other international conventions negotiated and administered under the auspices of the International Maritime Organization, such as MARPOL 73/78, provide the coastal state with additional legal authority and responsibility to act.

For example, the UNCLOS and customary international law impose on the flag state the obligation to comply with legal obligations on the high seas, including “the prevention, reduction, and control of marine pollution”³⁰⁷ Moreover, for serious pollution incidents, and “[w]here there is clear objective evidence that a vessel navigating in the exclusive economic zone or the territorial sea” has committed a violation causing or threatening “major damage to the coastline or related interests of the coastal State,” the coastal state may “institute proceedings, including detention of the vessel, in accordance with its laws.”³⁰⁸ Any such coastal laws, however, must be implementing, or at least consistent with, “applicable international rules and standards.”³⁰⁹

The coastal state also has the right to identify a “clearly defined area of its respective exclusive economic zones” where the adoption of

³⁰⁶ See UNCLOS, *supra* note 4, arts. 21, 42, 54, 94, 211, 220. Pursuant to Article 211(3) of UNCLOS, port states may establish particular requirements for the prevention and control of pollution as a condition for the entry of foreign vessels into their ports. See generally ERIK J. MOLENAAR, COASTAL STATE JURISDICTION OVER VESSEL-SOURCE POLLUTION 103-104 (David Freestone & Danieal Bodansky eds., Kluwer Law International 1998); CHURCHILL & LOWE, *supra* note 13, at 353-55.

³⁰⁷ UNCLOS, *supra* note 4, art. 94(4)(c).

³⁰⁸ *Id.* art. 220(6).

³⁰⁹ *Id.* arts. 219, 220(3).

special protective measures is necessary for "oceanographical and ecological" reasons; in such areas, after consultations with the IMO, the coastal state may adopt laws and regulations specially designed to protect those fragile areas.³¹⁰ The IMO has established several Particularly Sensitive Sea Areas (PSSA), of which there are eleven or so in existence today, including the Florida Keys in the United States.³¹¹

Standing alone, the PSSA concept has no enforcement teeth. The IMO may approve what it calls "associated protective measures" (APM's), such as areas to be avoided and other routing measures," which the flag state, coastal state, and port state are to enforce. Because of the coercive effect that these measures may have on international shipping, an APM must have a valid legal basis.³¹² The 1982 Convention specifies that, "[w]hen a vessel is voluntarily within a port or an off-shore terminal of a State, that State may . . . institute proceedings in respect of any violation of its laws and regulations . . . when the violation has occurred within the territorial sea or the exclusive economic zone of that State."³¹³

One recent example of coastal States seeking to properly apply these principles is the requirement that commercial vessels transiting the Torres Strait make use of an Australian pilot.³¹⁴ The Torres Strait is located between Papua New Guinea and the north end of Cape York Peninsula, Australia.³¹⁵ The area of the Torres Strait is at the northern end of the Great Barrier Reef Marine Park.³¹⁶ Although there has been

³¹⁰ *Id.* art. 211(6)(a) ("Pollution from vessels").

³¹¹ Particularly sensitive sea areas http://www.imo.org/Environment/mainframe.asp?topic_id=1357#list ("Particularly sensitive sea areas")

³¹² Roberts et al., *The Western European PSSA: a "politically sensitive sea area,"* 29 MARINE POL'Y 431, 432 (2005).

³¹³ UNCLOS, *supra* note 4, art. 220(1) ("Enforcement by coastal States").

³¹⁴ See generally Julian Roberts, *Compulsory Pilotage in International Straits: The Torres Strait PSSA Proposal*, 37 OCEAN DEV. & INT'L L. 93, 94-104 (2006); Stuart B. Kaye, *Jurisdictional Patchwork: Law of the Sea and Native Title Issues in the Torres Strait*, 2 MELB. J. INT'L L. 381, 400-02 (2001).

³¹⁵ Although some 80 nautical miles wide, the Torres Strait is largely composed of reefs, shoals, and uninhabited islands. The navigational channel passes through Australian territorial waters. STUART B. KAYE, *THE TORRES STRAIT* 84 (1997).

³¹⁶ Ottesen, et al., *Shipping Threats and Protection of the Great Barrier Reef Marine Park- The Role of the Particularly Sensitive Sea Area Concept*, 9 INT'L J. MARINE & COASTAL L. 507, 507-514 (1994). The IMO

only one major oil spill in the region, when the *Oceanic Grandeur* ran aground in the Torres Strait in 1970 spilling a few thousand tons of crude oil, the volume of oil and other hazardous shipments is increasing every year, risking ecological disaster.³¹⁷ In 1987 the IMO had adopted a resolution establishing a PSSA for the Torres Strait and recommending that States “recognize the need for effective protection of the Great Barrier Reef and Torres Strait region and inform ships flying their flag that they should act in accordance with Australia’s system of pilotage...”³¹⁸

At the 49th session of the Marine Environment Protection Committee (MEPC) of the IMO in April 2003, Australia and New Guinea submitted a proposal to include the Torres Strait as an extension of the Great Barrier Reef PSSA.³¹⁹ While there was general consensus that the Torres Strait was an ecologically sensitive area and that modification of the sea lane system in the area was appropriate, the mandatory pilotage proposal that Australia and Papua New Guinea put forward “proved to be controversial” and failed to garner adequate support among the member States.³²⁰ This was because of concerns of other key maritime nations, including Singapore, Japan, Iran, Russia, and the United States, that such a scheme would unduly constrain the right of transit passage through an international strait. Australia and Papua New Guinea tried again in 2005. The Resolution adopted in July

designated the Great Barrier Reef as the world’s first “particularly sensitive sea area” in 1990. *Id.* at 507.

³¹⁷ *Id.* at 511 (the grounding resulted in spilling between 1400 and 4100 tons of crude oil). A strange disease decimated the area’s pearl industry in the 18 months following the spill, causing some to speculate that there was a causal link between the oil spill and the industry’s collapse. Kaye, *supra* note 315, at 122.

³¹⁸ IMO, *Use of Pilotage Services in the Torres Strait and Great Barrier Reef Area*, Res. A619(15) (Nov. 19, 1987). Robert Beckman, *IMO Didn’t Approve Australia’s Move*, STRAIT TIMES FORUM, Dec. 23, 2006, available at http://law.nus.edu.sg/news/archive/2006/ST_Forum_Dec_23_2006.pdf.

³¹⁹ IMO, *Extension of existing Great Barrier Reef PSSA to include the Torres Strait Region*, submitted by Australia and Papua New Guinea MEPC 49/8.

³²⁰ Roberts, *supra* note 314, at 94, 103-04. See Robert Beckman visiting Senior Fellow, Institute of Defence and Strategic Studies, *Australia’s Pilotage System in the Torres Strait: A threat to transit passage?*, IDSS Commentaries 125/2006, Dec. 7, 2006 available at www.ntu.edu.sg/rsis/publications/Perspective/IDSS1252006.pdf.

22 only recommended that member States "recognize the need for effective protection of the Great Barrier Reef and Torres Strait region and inform ships flying their flag that they should act in accordance with Australia's system of pilotage"³²¹

Australia subsequently adopted a law implementing the requirement that pilotage through the Torres Strait is a "condition of entry into an Australian port."³²² The marine notice continued: "[F]ailure to carry a pilot as prescribed may result in a prosecution under Australian law."³²³ To transit the Torres Strait following the traffic routing scheme that the IMO approved, a vessel passes through Australia's territorial sea. Under UNCLOS, coastal States may not hamper, impair, deny, or suspend transit passage in international straits, even for violations of the laws and regulations of the States through whose territorial waters they pass.³²⁴ The Australian Government recognizes that the transit passage regime applies in the Torres Strait but insists that their rules comport with international law. Indeed, the Marine Notice emphasized that "[t]he carriage of an Australian pilot will have the effect of *enhancing transit passage*, with the ability to maximise tidal window opportunities for transit and ensuring adequate margins for safety and environmental protection."³²⁵ Even so, the

³²¹ IMO, *Designation of the Torres Strait as an Extension of the Great Barrier Reef Particular Sensitive Sea Area*, Res. MEPC.133 (53) (July 22, 2005). See generally Roberts, *supra* note 314, at 104.

³²² Clive Davison, Chief Executive Officer, Australian Mar. Safety Auth., Marine Notice 16/2006: Further Information on Revised Pilotage Requirements for Torres Strait. While Australia and Papua New Guinea made a joint application at the MEPC, the Torres Strait falls predominantly within the Australian territorial sea and, therefore, Australia has the primary responsibility to enforce the navigational regime. See Roberts, *supra* note 314, at 9, 107 n.9.

³²³ Davison, *supra* note 322. "Relevant authorities such as the vessel's flag state administration and the IMO will also be advised of the failure to embark a pilot." *Id.*

³²⁴ UNCLOS, *supra* note 4, arts. 42(2) ("Such laws and regulations shall not . . . have the practical effect of denying, hampering, or impairing the right of transit passage as defined in this section.") and 44 ("States bordering straits shall not hamper transit passage . . ."). As one Australian scholar observed: "As the coastal State through whose territorial sea and internal waters transiting ships must pass when using the Torres Strait, Australia has limited legislative competence at international law to deal with non-Australian flagged vessels using the strait." Kaye, *supra* note 314, at 402 (footnote omitted).

³²⁵ Davison, *supra* note 322 (emphasis added). Moreover, the notice asserted: "Australian authorities will not suspend, deny, hamper or impair

notice makes clear that “the owner, master and/or operator of the ship may be prosecuted on the next entry into an Australian port, for [failing to use a pilot on] both ships on voyages to Australian ports and ships transiting the Torres Strait en route to other destinations.”³²⁶

Australia’s mandatory scheme, which requires that a vessel slow or stop and pick up a pilot at one end of the strait, pay the pilot several thousand dollars for the work of piloting the vessel through the strait, and then slow or stop and drop off the pilot after clearing the restricted water, will have the practical effect of hampering continuous and expeditious transit passage, at least to some degree. Indeed, there is always a possibility that a pilot and/or pilot boat will not be immediately available, which means that vessels must delay their transit while waiting at or near the pilot transfer point. Some States, the United States and Singapore in particular, expressed concern about the adverse impact the Torres Strait regime will have on transit passage.³²⁷ The U.S. Embassy in Canberra recently delivered yet another diplomatic note to appropriate Australian government officials protesting the mandatory pilotage scheme. Noting that “the IMO has not approved a compulsory pilotage scheme for the Torres Strait . . . ,” the diplomatic note 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.”³²⁸

Another major legal concern is the apparently unlimited temporal reach of a “bench warrant” filed against the master of a vessel that proceeds through the Torres Strait without a pilot while en route to another port. Australia apparently intends to prosecute the master on the next occasion in which that vessel voluntarily enters an Australian

transit passage and will not stop, arrest or board ships that do not take on a pilot while transiting the Strait.” *Id.*

³²⁶ *Id.* The only exceptions are for “sovereign immune vessels” and where a pilot could not be carried because of “stress of weather, saving life at sea or other unavoidable cause.” *Id.*

³²⁷ Other States that agreed with the United States that such a pilotage scheme was not consistent with transit passage were Japan, Bahamas, Singapore, Iran, the People’s Republic of China, the Russian Federation, and the Republic of Korea. “[T]he Resolution is recommendatory and provides no international legal basis for mandatory pilotage for ships in transit in this or any other strait used for international navigation.” <http://www.uscg.mil/hq/cg5/imo/mepc/docs/mepc53-report.pdf>.

³²⁸ SECSTATE WASH DC message 091524Z Feb 07 (“Torres Strait Compulsory Pilotage: Third Demarche”), ¶ 5.

port.³²⁹ In its most recent demarche, though the United States acknowledged that "Australia could impose such a requirement on foreign flag ships bound directly for Australian ports as a condition of entry into its ports," it rejected the broad exercise of coastal-state jurisdiction over foreign-flag vessels engaged in transit passage.³³⁰ Australia's efforts to unilaterally impose a compulsory pilotage regime on vessels transiting an international strait sets an adverse precedent that other strait States may rely on to require a variety of other restrictions on transit passage, archipelagic sealanes passage, and innocent passage. This paper will undertake a more detailed analysis of whether such a condition on port entry is reasonable in Section XI.C.³³¹

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 grants a vessel a right of entry to port — where the ship is in distress due to *force majeure*.³³² 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, had a right to seek refuge in a foreign port, bay, or other protected internal waters of a foreign coastal state.³³³ The UNCLOS recognizes the

³²⁹ "[T]here appears to be no other international legal mechanism that would enable Australia to regulate pilotage in the Torres Strait for vessels not entering an Australian port." Roberts, *supra* note 314, at 105.

³³⁰ SECSTATE WASHDC message 091524Z Feb 07 ("Torres Strait Compulsory Pilotage: Third Demarche"), ¶ 5. The demarche conclude that "the United States cannot accept application of this scheme of compulsory pilotage to ships flying its flag exercising their right of transit passage through the Torres Strait and not directly bound for an Australian port, or the assertion of the right to prosecute owners or masters not taking a pilot upon any subsequent entry into an Australian port, and reserves its rights and those of its nationals, owners, masters and other persons on board ships flying its flag." *Id.*

³³¹ See *infra* section XI.C. ("Applying These Factors for Determining Reasonableness in a Particular Case: Mandatory Pilotage Requirements in the Torres Strait").

³³² Literally, the French phrase *force majeure* translates as a "superior force." It implies that the consequences were unanticipated and irresistible, such as an "Act of God." BLACK'S LAW DICTIONARY 6673-74 (7th ed. 1999). 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 13, at 63. See also YANG, *supra* note 100, at 64-67.

³³³ 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

principles of *force majeure* and distress as permitting a ship to stop and anchor when engaged in innocent or transit passage.³³⁴ 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."³³⁵

The international community respects this principle in a wide variety of additional contexts. For example, one Conservation Measure adopted under the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR)³³⁶ provides that Contracting Parties shall deny port access to their ports to vessels listed as engaged in or supporting illegal, unregulated, or unreported (IUU) fishing in violation of the Convention, "unless for the purpose of enforcement action or for reasons of *force majeure* or for rendering assistance to vessels, or persons on those vessels, in danger or distress."³³⁷ U.S. statutes³³⁸ and regulations³³⁹ also recognize the need to make special allowances for the access of vessels into port in cases of *force majeure*.

distress. La Fayette, *supra* note 2, 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 11, § 274, at 262-63.

³³⁴ See UNCLOS, *supra* note 4, arts. 18 and 39.

³³⁵ *Id.*, art. 98 ("Duty to render assistance"). See also SOLAS Convention, *supra* note 38, 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 [hereinafter SAR Convention]. See also 14 U.S.C. § 88 ("Saving life and property" at sea is a statutory mission of the U.S. Coast Guard).

³³⁶ Convention on the Conservation of Antarctic Marine Living Resources, Canberra, May 20, 1980, 19 I.L.M. 841-859 (1980), available at www.ccamlr.org. See generally Erik Jaap Molenaar, *CCAMLR and Southern Ocean Fisheries*, 16 INT'L J. MARINE & COASTAL L. 465, 466-71 (2001).

³³⁷ Schedule of Conservation Measures in Force, 2006-2007 Season, Conservation Measures 10-06, ¶ 18(iv); 10-07, ¶ 22(iii) (2006).

³³⁸ See, e.g., 33 U.S.C. § 1518(c)(2); 33 U.S.C. 1905(e)(1). See also 22 U.S.C. § 454(b) (prohibiting entry into U.S. ports for 3 months for any foreign-registered vessel illegally flying the flag of the United States or otherwise holding itself out to be an American vessel, "except in case of *force majeure*").

³³⁹ See 33 C.F.R. §§ 151.08(a), 158.130(e), and 160.203(b)(3). The following language is typical: "Except for a foreign vessel entering U.S. waters under force majeure, no vessel shall enter any port or terminal of the U.S. without a safety management system . . ." 33 C.F.R. § 96.390(a).

As a general rule, vessels in distress have a right of entry into the internal waters of a coastal state to seek shelter without first obtaining permission from the coastal state, especially when there is a real risk that the vessel might be lost, thus putting the lives of those on board at genuine risk.³⁴⁰ Moreover, the sovereign authority of the coastal 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.³⁴¹ Under long-standing principles of customary international law, therefore, when a vessel is in extremis and must take shelter in a safe harbor, the coastal state may not exclude the vessel from its internal waters and may "not take advantage of the ship's necessity" in any way.³⁴² For example, if a foreign-flag vessel en route from Cuba to Canada with a cargo of hand-rolled cigars and cane sugar was forced to enter the Chesapeake Bay to seek shelter from a violent, life-threatening hurricane, the United States could not impose sanctions against the vessel for engaging in trade with Cuba in violation of the U.S. law embargoing all such trade.³⁴³

On the other hand, coastal 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.³⁴⁴ 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."³⁴⁵ The Netherlands Judicial Division of the Council of State recently considered the conditions under which a badly damaged Chinese vessel

³⁴⁰ COLOMBOS, *supra* note 11, § 353, at 329-30. See MALANCZUK, *supra* note 9, at 175 (citing as examples ships seeking refuge from a storm or which are severely damaged).

³⁴¹ See *Kate A. Hoff (United States) v. Mexico*, 4 R. Intl'l Arb. Awards 444 (1929).

³⁴² PHILLIP C. JESSUP, *THE LAWS OF TERRITORIAL WATERS AND MARITIME JURISDICTION* 194 (1927). See A.M. de Zayas, *Ships in Distress*, in 11 *ENCYCLOPEDIA PUB. INT'L L.* 287-89 (1989). See also *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 122 (1812) ("[This vessel] had been sent on a distant mission with a military cargo. . . . There was no implied waiver of the peculiar immunities of a public vessel.") (dicta).

³⁴³ See 22 U.S.C. § 2370(a) ("Cuba; embargo on all trade").

³⁴⁴ 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 ST. L. J. 1465, 1490-91 & n.159 (2002).

³⁴⁵ MCDUGAL & BURKE, *supra* note 1, at 110.

had a right to enter Dutch waters for the purpose of effecting repairs in a shipyard:

[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.³⁴⁶

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 coastal state must balance the emergency on the vessel with the threat to its own people and nation. For example, if a Venezuelan-flagged, liquefied natural gas (LNG) tanker was on fire off the coast of Texas and requested permission to enter the protected waters of Galveston Bay to put out the fire and save the lives of the crew, it would be legally proper for U.S. authorities to deny entry to such a dangerous instrumentality. In such a situation, an attempted entry into port might well result in a destructive and deadly catastrophe far out of proportion to the disaster had the ship remained at sea. Even so, under the obligation to go to the assistance of mariners in distress, the United States would be expected to use Coast Guard or other maritime life-saving assets to rescue the crew and render fire-fighting assistance to the vessel.³⁴⁷ All concerned would also be under an obligation to minimize the potential environmental consequences of the disaster.

Recent state practice has revolved around avoiding polluting the port and sensitive coastal areas that vessels in distress might represent. The cases of the *Erika* and *Castor* were separate incidents involving two tankers seeking refuge in European and North African ports from the hazards of the sea.³⁴⁸ According to reports, the French government refused to permit the *Erika* to seek shelter when it was in danger of

³⁴⁶ *Guangzhou Ocean Shipping Co. v. Minister of Transport, Public Works, and Water Management*, 27 NETH. Y.B. INT'L L. 354, 357 (1996).

³⁴⁷ UNCLOS, *supra* note 4, art. 98 ("Duty to render assistance"). "Every coastal State shall [establish] an adequate and effective search and rescue service regarding safety on and over the sea" *Id.*, art. 98(2). See also 14 U.S.C. § 88 ("Saving life and property" at sea is a statutory mission of the U.S. Coast Guard.).

³⁴⁸ See Murray, *supra* note 344, at 1469-72.

breaking up due to heavy weather in the North Atlantic in late 1999. Although British Navy helicopters were able to rescue the 26-man crew, the vessel was lost, causing what one newspaper article called the "worst oil disaster in European history" and the death of more than 200,000 sea birds.³⁴⁹

The *Castor's* saga was more protracted. Encountering severe weather in late December 2000, it began to break apart in the Mediterranean Sea, threatening to spill the 29,500 tons of refined gasoline it carried on board.³⁵⁰ The governments of nine different coastal States refused its master's passionate requests for refuge over a 40-day period, through several severe winter storms,³⁵¹ until the vessel was able to offload its cargo to smaller vessels while at sea just south of the island of Malta.³⁵²

These two incidents, along with the November 2002 loss of the tanker *Prestige* in heavy weather off the northwest coast of Spain, and the resulting discharge of 20 million gallons of heavy fuel oil, helped motivate the IMO General Assembly in 2003 to adopt a non-binding resolution, "Guidelines on Places of Refuge for Ships in Need of Assistance."³⁵³ In cases in which persons on board the ship find themselves in distress, the rules applicable to rescue operations under the SAR Convention and other protocols take "priority."³⁵⁴ Among other things, this Resolution "invites Governments to take these Guidelines into account when . . . responding to requests for places of refuge for ships in need of assistance."³⁵⁵ These include criteria and

³⁴⁹ See Clare Garner, *Diesel Oil Tanker Snaps in Two Off French Coast*, INDEPENDENT (London), Dec. 13, 1999, at 9; Tim Finan & Stephen Bevan, *Oil Death Toll May Rise to 300,000 Birds*, SUNDAY TIMES (LONDON), Jan. 9, 2000, at 28. See also *The Erika Oil Spill: Environmental Contamination and Effects in the Bay of Biscay*, 17 AQUATIC LIVING RESOURCES (Special Issue) 235, 235-394 (2004).

³⁵⁰ Murray, *supra* note 344, at 1471-72; see Donald Urquhart, *Stricken Vessel Off Europe Denied Refuge*, BUS. TIMES (Singapore), Jan. 12, 2001, at 1.

³⁵¹ Donald Urquhart, *Outcast Castor's 40-Day Ordeal Comes to an End*, BUS. TIMES (Singapore), Feb. 20, 2001, at 1.

³⁵² Brian Reyes, *Salvage: Salvage Chief Warns that "Leper" Ship Will Sink*, LLOYD'S LIST (London), Jan. 29, 2001, at 3.

³⁵³ Int'l Maritime Org. [IMO], *Guidelines on Places of Refuge for Ships in Need of Assistance*, IMO Assemb. Res. A. 949 (23) (Dec. 5, 2003), available at http://www.imo.org/home.asp?topic_id=746. See also Veronica Frank, *Consequences of the Prestige Sinking for European and International Law*, 20 INT'L J. OF MARINE & COASTAL L. 1, 36-37 (2005).

³⁵⁴ Annex ¶ 1.14.

³⁵⁵ *Id.*, Res. A. 949, ¶ 2.

factors for evaluating and balancing the risks of refusing or providing refuge under various circumstances.³⁵⁶

A more complex incident in January 2007 involved the M/V *Tong Cheng*, a 485-foot Chinese-flag commercial cargo vessel en route from South Korea to the Panama Canal. The vessel's cargo reportedly included plywood, steel, and a limited amount of military equipment and munitions bound for Cuba.³⁵⁷ During a period of heavy weather in the North Pacific, the M/V *Tong Cheng* suffered a large crack in its hull below the waterline causing dangerous flooding and placing the vessel and the lives of those on board at some risk. On January 17, 2007, the ship's master requested permission for an unscheduled entry into a Hawaiian port to undertake essential repairs.³⁵⁸ After Navy divers made emergency repairs to the cracked hull, the Coast Guard removed much of the flooding water, and authorities completed a careful review of the vessel's structural integrity while still at sea, the Captain of the Port at Kalaeloa Barber's Point decided to authorize port access to effect repairs.³⁵⁹ Moreover, the United States agreed not to subject the vessel, cargo, or persons on board to any inspections, duties, or fees arising from entry into port except as may be necessary to ensure the safety, security, and health of the port. Prior to departing Hawaii, the Coast Guard conducted a safety inspection to ensure that the vessel was fully seaworthy.³⁶⁰

³⁵⁶ See *id.*, Annex and App. 2. See also Comité Maritime Int'l, *Work in Progress – Places of Refuge*, available at http://comitemaritime.org/worip/pdf/Places_RefugeWP.pdf. Included among the factors relevant in deciding whether to grant port access to a vessel in distress is "[t]he advent of the helicopter, which makes it possible to rescue the crew of a vessel [in distress] quickly and relatively safely."

³⁵⁷ Audrey McAvoy, *Coast Guard Pumps Water from Chinese Ship*, NAVY TIMES, Jan. 26, 2007, available at <http://www.navytimes.com/news/2007/01/apcgdistress070126/>.

³⁵⁸ U.S. Coast Guard Public Affairs Hawaii, *M/V Tong Chen 19 Jan 2007*, available at <http://www.uscgohawaii.com/go/doc/800/142557/>.

³⁵⁹ Security Zone: Waters Surrounding M/V *Tong Cheng*, 72 Fed. Reg. 4639 (Feb. 1, 2007) (temporary final rule); U.S. Coast Guard, *Damaged Chinese Cargo Vessel Makes Unanticipated Stop in Honolulu*, Coast Guard News, Jan. 22, 2007, available at <http://coastguardnews.com/2007/01/22/>.

³⁶⁰ David Waite, *Damaged Ship Carrying Ammo*, HONOLULU ADVERTISER, Jan. 25, 2007, at 1A available at <http://www.honoluluadvertiser.com/apps/pbcs.dll/article?AID=/20070125/NEWS01/701250331/1001/>.

In addition, with the agreement of the Shanghai Ocean Shipping Company, the vessel's owner, the United States required that the vessel not continue on to Cuba, but rather return to China for final repairs. Local officials in Hawaii reportedly discussed the situation with the U.S. State Department, because of the U.S. embargo on trade with Cuba.³⁶¹ The embargo prevents U.S. companies from trading directly with Cuba, and prevents ships under any flag from shipping cargo directly from a U.S. port to Cuba. The argument that the doctrine of *force majeure* does not require the United States to facilitate the transportation of cargo in violation of its national security interests has the potential to adversely impact foreign relations with China. In addition, consideration of such factors could jeopardize the ability of U.S. vessels to take advantage of their right to enter a foreign port in the event of an emergency, at least without having to agree to objectionable conditions.³⁶²

Thus, the current state of the law on the right to enter port under circumstances of *force majeure* and distress is somewhat unclear. There must be a balance of the equities: assessing the damage to the vessel and the risk to its passengers and crew against the risks to the coastal state, including environmental and security concerns, and the foreseeable consequences of granting port access. Given the national security and environmental protection sensitivities in the world today, it seems unlikely that any vessel in distress today can demand access to any port at any time. Instead, coastal state authorities may well conclude, based on all the relevant factors, that permitting a vessel

³⁶¹ David Waite & Mike Gordon, *Chinese Ship Repair Protested*, HONOLULU ADVERTISER, Jan. 26, 2007, at 26B available at <http://www.honoluluadvertiser.com/apps/pbcs.dll/article?AID=/20070126/NEWS01/70120361/1001/>.

³⁶² Although the situations differ markedly for a number of reasons, recall how China protested the emergency landing of a Navy EP-3E Aries II electronic "spy plane" at a military airfield on Hainan Island, China, following a mid-air collision with a Chinese F-8 interceptor jet fighter over the South China Sea on Apr. 1, 2001. The United States recovered the crew, and the dismantled aircraft, only after "apologizing" for the death of the Chinese pilot and its "unauthorized" landing at the airfield, even though objective accounts agree that the Chinese pilot was at fault and, in the event of an in-flight emergency threatening the lives of those on board, any aircraft, whether military or civilian, has a legal right to declare an emergency and land at the nearest available airfield. Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 95 AM. J. INT'L L. 626, 630-32 (2001) ("Aerial incident off the coast of China"). See also Erik Eckholm, *Collision with China: The Reaction – Angry Beijing Denounces Washington's Reports That Its Pilot Caused the Collision*, N.Y. TIMES, Apr. 15, 2001, at A10.

entry into its port or internal waters represents an unacceptable threat to vital coastal state interests, and may take all necessary action to bar access. 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 state port authorities deny or condition access, they should be able to articulate a defensible basis for doing so. Finally, if the port state denies access, the authorities of any nearby coastal States, 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 and to help protect the marine environment.³⁶³

VIII. CONDITIONS ON ENTRY DESIGNED TO PROMOTE ECONOMIC INTERESTS

All coastal states are interested in taking effective measures to promote the economic interests of their citizens and businesses. The classic example of those economic interests that seek exclusive access to resources in coastal waters are domestic fishermen and fisheries. Such demands can conflict with inclusive uses by fishermen from foreign States and have often lead to “cod wars” or other actual or threatened conflicts over living resources.³⁶⁴ With the end of World War II, domestic demands in the United States to control living and non-living resources offshore resulted in the two 1945 Truman Proclamations.³⁶⁵ Today, coastal States possess the exclusive right to explore and exploit living and non-living resources within a 200-mile Exclusive Economic Zone (EEZ) and to the outer limits of the

³⁶³ See UNCLOS, *supra* note 4, art. 98 (“Duty to render assistance”); 46 U.S.C. § 2304(a). See generally Arthur A. Severance, *The Duty to Render Assistance in the Satellite Age*, 36 CAL. W. INT’L L. J. 377, 378-93 (2005-2006) (discussing the duty of masters, vessels, and coastal States to render assistance at sea).

³⁶⁴ See Jennifer L. Talhelm, *Curbing International Overfishing and the Need for Widespread Ratification of the Convention on the Law of the Sea*, 25 N.C. J. INT’L L. & COMM. REG. 381, 406-07, 417 (1999-2000).

³⁶⁵ Proclamation No. 2667, *Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf*, Sept. 28, 1945, 10 Fed. Reg. 12,303 (Oct. 2, 1945), and Proclamation No. 2668, *Policy of the United States with Respect to Coastal Fisheries in Certain Areas of the High Seas*, Sept. 28, 1945, 10 Fed. Reg. 12, 304 (Oct. 2, 1945).

continental shelf.³⁶⁶ This part of the paper will examine how conditions on port access reinforce exclusive control over these resources. It will also discuss under what circumstances coastal States may impose conditions on port access to protect the state's economic interests.

A. Denial of or Restriction on Entry of Vessels Engaged in Fishing and Other Prohibited Activities within the EEZ and on the Continental Shelf. International law grants to the coastal state complete sovereignty over the exploration and exploitation of economic resources within its EEZ and on its continental shelf. The coastal state also has jurisdiction with regard to "the protection and preservation of the marine environment"³⁶⁷ Other states enjoy various inclusive rights, including freedom of navigation and overflight, the laying of cables and pipelines, "and other internationally lawful uses of the sea related to those freedoms"³⁶⁸ These inclusive rights do not include fishing, marine scientific research, drilling, or otherwise exploring or exploiting the living and non-living resources of the EEZ and continental shelf. To engage in such activities requires the consent of the coastal state.³⁶⁹ To enforce its rights in the EEZ and on the continental shelf, "the coastal state may . . . take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance" with the laws and regulations that it has adopted in conformity with the Convention.³⁷⁰ The U.S. Coast Guard constantly patrols the EEZ off the coast of the United States, and regularly boards, inspects, and arrests foreign fishing vessels found to be in violation of U.S. laws.³⁷¹

³⁶⁶ UNCLOS, *supra* note 4, pts. V (EEZ) and VI (continental shelf). For further discussion, see CHURCHILL & LOWE, *supra* note 13, chs. 8 (continental shelf) and 9 (EEZ).

³⁶⁷ UNCLOS, *supra* note 4, art. 56(1)(b)(iii).

³⁶⁸ *Id.*, art. 58 ("Rights and duties of other States in the [EEZ]"). See also *id.*, art. 78(2) ("The exercise of the rights of the coastal State over the continental shelf must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States . . .").

³⁶⁹ For example, no one may explore or exploit the natural resources of the continental shelf "without the express consent of the coastal State." UNCLOS, *supra* note 4, art. 77(2). But see *id.*, arts. 246 (The coastal State shall, "in normal circumstances," grant consent for marine scientific research) and 252 ("Implied consent").

³⁷⁰ *Id.*, art. 73(1),

³⁷¹ See, e.g., U.S. Coast Guard, *Press Release: U.S. Coast Guard Seizes Foreign Fishing Vessel Illegally Fishing in U.S. Waters*, Sept. 14, 2006, available at http://www.nmfs.noaa.gov/ole/news/news_PID_091406.htm. Jurisdiction is found in the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1882. Potential sanctions include civil

Extending as they do to the use of appropriate force to effect an arrest and detention pursuant to judicial proceedings, these enforcement measures clearly include the less drastic ones of conditioning access to port on the vessel operating in compliance with the laws governing the EEZ and continental shelf.

B. Denial of or Restriction on Entry of Vessels Engaged in Illegal Economic Activities on the High Seas. International law also grants to port states the right to deny or restrict access to vessels based on the illegal activities in which they may have engaged on the high seas, such as fishing and whaling in violation of an international treaty to which they, the vessel's flag state, may be party. For example, the international community has largely agreed that driftnet fishing is one of the most destructive predatory fishing practices. Driftnets can reach as long as 25 miles in length. At the height of their use in the 1970's and early 1980's, thousands of fishing vessels paid out many thousands of miles of nearly invisible nylon driftnets on the high seas in virtually every part of the world. Often the nets would break or drift away. Fish, sea birds, dolphins, sharks, sea turtles, and other marine animals would become entangled in these driftnets, struggle, and die before the fishing vessel would return to harvest the particular species it was targeting, especially tuna (albacore), squid, swordfish, and high-seas salmon. The effect was environmental devastation.³⁷² As one group of marine experts has observed:

Driftnet fishing . . . is sometimes called 'wall of death fishing' because it kills most living things in its path. Whatever they catch, driftnets kill or maim. Marine creatures in search of food and lured by fish already caught in the net, swim or dive into the webbing where they become entangled. If they do not drown or manage to escape they may suffer for several

penalties, up to \$100,000 for each violation, *in rem* forfeiture, loss of fishing permit, and imprisonment of the master. 18 U.S.C. §§ 1858, 1859 ("Criminal offenses"), 1860 ("Civil forfeitures").

³⁷² See generally JAMES CARR & MATTHEW GIANNI, *HIGH SEAS ECOSYSTEMS: LARGE SCALE DRIFTNETS AND THE LAW OF THE SEA* (1991); *Report of the Expert Consultation on Large-scale Driftnet Fishing*, U.N. FAO Fisheries Report No. 434, UN Doc. FIPL/R434 (1990).

months before dying from injury, starvation or both.³⁷³

The international community reacted to outlaw such environmentally destructive practices. The first such response was the Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific (Wellington Convention of 1989).³⁷⁴ The United States ratified the Wellington Convention on February 28, 1992. Among other enforcement measures, the Convention required party states to "restrict port access and port servicing facilities for driftnet fishing vessels" to the extent permitted by international law.³⁷⁵ Among other things, this Convention prohibits driftnets longer than 2.5 kilometers (1.5 miles) in length. In December 1989, the United Nations General Assembly agreed upon a Resolution that proposed a global moratorium on large-scale driftnet fishing on the high seas.³⁷⁶

The U.S. Congress implemented the Convention in the High Seas Driftnet Fisheries Enforcement Act of 1992.³⁷⁷ That Act requires U.S. authorities to deny port access to vessels from any nation that the Secretary of Commerce has determined engages in drift-net fishing on the high seas, except where such activity complies with applicable international agreements, or other illegal, unregulated, or unreported

³⁷³ LAKSHMAN D. GURUSWAMY ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND WORLD ORDER 747 (1994). See Douglas M. Johnston, *The Driftnetting Problem in the Pacific Ocean: Legal Considerations and Diplomatic Options*, 21 OCEAN DEV. & INT'L L. 32 (1990).

³⁷⁴ Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific Nov. 24, 1989, 29 I.L.M. 1449 (1990), available at <http://www.oceanlaw.net/texts/wellington.htm>.

³⁷⁵ *Id.*, art. 3(2)(d). See Grant J. Hewison, *The Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific*, 25 CASE W. RES. J. INT'L L. 449, 507-11 (1993).

³⁷⁶ G.A. Res. 44/225, at 147, U.N. Doc. A/RES/44/225 (Dec. 22, 1989).

³⁷⁷ Pub. L. No. 102-582, 106 Stat. 4901, § 101 (codified as amended at 16 U.S.C. § 1826a), amended by Pub. L. No. 109-479, § 610, 120 Stat. 3575, Jan. 12, 2007.

The European Union did not ban driftnet fishing until 2001. BBC News, *EU Bans Fishing 'Wall of Death'*, June 8, 1998, available at <http://news.bbc.co.uk/1/hi/uk/108747.stm>. Even so, some European fishermen, particularly from Italy, continue to practice driftnet fishing in the Mediterranean Sea. Greenpeace, *Press Release: Greenpeace Rounds Up 'Wall of Death' Fishing Nets*, June 26, 2006, available at <http://www.scoop.co.nz/stories/WO0606/S00533.htm>.

fishing.³⁷⁸ In the subsection entitled “Denial of port privileges,” the applicable statute provides:

The Secretary of the Treasury shall, in accordance with recognized principles of international law--

(A) withhold or revoke the clearance . . . for any large-scale driftnet fishing vessel that is documented under the laws of the United States or of a nation included on a list [of violator nations]; and

(B) deny entry of that vessel to any place in the United States and to the navigable waters of the United States.³⁷⁹

Thus, the denial of access to all U.S. ports extends to a particular category of fishing vessels registered with any nation that the Secretary has determined does not comply with the Convention. No evidence is necessary that the particular vessel in question has violated international law.³⁸⁰ Federal law provides that the denial of port privilege to fishing vessels registered in the listed state continues “until such time as the Secretary of Commerce certifies to the President and the Congress that such nation has terminated large-scale driftnet fishing by its nationals and vessels beyond the exclusive economic zone of any nation.”³⁸¹ That Act also requires the United States to notify the nation against whose fishing vessels it has taken action, and imposes additional sanctions on any nation that fails to take appropriate follow-up action.³⁸²

³⁷⁸ 16 U.S.C. § 1826a. This section was amended in January 2007 to add “illegal, unreported, and unregulated fishing” as another basis for denying port access. Pub. L. No. 109-479, § 610, 120 Stat. 3575, Jan. 12, 2007.

³⁷⁹ 16 U.S.C. § 1826a(a)(2).

³⁸⁰ *Id.* See Jane Kathryn Jenkins, *International Regulation of Driftnet Fishing: The Role of Environmental Activism and Leverage Diplomacy*, 4 IND. INT’L & COMP. L. J. 197, 216-17 (1993).

³⁸¹ 16 U.S.C. § 1826b (“Duration of denial of port privileges and sanctions”). See *Humane Soc. Of U.S v. Clinton*, 44 F.Supp.2d 260, 277-278 (D.D.C. 1999)(continued violations by Italian fishermen required that the Secretary of Commerce place Italy on the list of violator nations).

³⁸² 16 U.S.C. § 1826a(b)(“Sanctions”)(Sanctions include banning the importation of fish products and fishing equipment from the nation whose nationals or registered vessels are in violation of the statute).

Denial of port access or conditioning access to enforce compliance with international treaties related to illegal fishing activities on the high seas is an appropriate unilateral sanction. The same principle applies to nations whose vessels engage in fishing in violation of other international agreements, such as the one designed to protect highly migratory species, including tuna, straddling stocks, dolphins, and sea turtles.³⁸³ Article 23 of the Convention Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks provides:

1. A port state has the right and the duty to take measures, in accordance with international law, to promote the effectiveness of . . . conservation and management measures. When taking such measures a port state shall not discriminate in form or in fact against the vessels of any state.
2. A port state may, *inter alia*, inspect documents, fishing gear and catch on board fishing vessels, when such vessels are voluntarily in its ports or at its offshore terminals.
3. States may adopt regulations empowering the relevant national authorities to prohibit landings and transshipments where it has been established that the catch has been taken in a manner which undermines the effectiveness of subregional, regional or global conservation and management measures on the high seas.

³⁸³ In addition to the statutory provisions that permit the United States to bar fishing vessels from States that engage in long-net fishing in violation of international conventions, the U.S. Congress permitted the Secretary of Commerce to bar vessels engaged in fishing in the Central Bering Sea in violation of agreement. Central Bering Sea Fisheries Enforcement Act of 1992, Pub. L. No. 102-582, § 303, 16 U.S.C. § 1823. For an interesting analysis of the possibility that the dispute resolution provisions of the Law of the Sea Convention may have on unilateral approaches to promote U.S. interests in these areas, see Richard J. McLaughlin, *UNCLOS and the Demise of the United States' Use of Trade Sanctions to Protect Dolphins, Sea Turtles, Whales, and Other International Marine Living Resources*, 21 *ECOLOGY L.Q.* 1, 72-6 (1994).

4. Nothing in this article affects the exercise by States of their sovereignty over ports in their territory in accordance with international law.³⁸⁴

Thus, the coastal state has the authority and responsibility to take appropriate measures, including vessel inspection and denial of port access, to carry out the conservation and management purposes of this Convention.

Of particular popular interest in the United States have been the various international initiatives to protect whales and other marine mammals. The International Convention for the Regulation of Whaling (ICRW) was adopted "to establish a system of international regulation for the whale fisheries to ensure proper and effective conservation and development of whale stocks."³⁸⁵ While the law implementing the ICRW in the United States provides for criminal and civil sanctions, including vessel forfeiture, it does not specifically deny port access to the vessels from foreign States found to be in violation of the Convention. Instead, under the Pelly and Packwood-Magnuson Amendments, once the Secretary of Commerce has "certified" a foreign state as permitting its nationals to engage in whaling operations that undermine the effectiveness of the ICRW, the Secretary of State must impose sanctions.³⁸⁶ Possible punishments include fines, imprisonment, forfeitures of catch, and restrictions on port access.³⁸⁷ Moreover, the Congress has provided for additional sanctions against foreign States that violate international agreements to protect fish stocks and endangered species, including sanctions against imports

³⁸⁴ Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Sept. 8, 1995, 2167 U.N.T.S. 88, *available at* http://www.un.org/Depts/los/convention_agreements/texts/fish_stocks_agreement/CONF164_37.htm.

³⁸⁵ International Convention for the Regulation of Whaling, Preamble, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 361; The Whaling Convention Act of 1949, 16 U.S.C. §§ 916-916k, (implements the ICRW in the United States). *See also* 50 C.F.R. §§ 230.1-230.8.

³⁸⁶ 22 U.S.C. § 1978(a) ("Certification to President") *See* Gene S. Martin, Jr., & James. W. Brennan, *Enforcing the International Convention for the Regulation of Whaling: The Pelly and Packwood-Magnuson Amendments*, 17 DENV. J. INT'L L. & POL'Y 293, 294-97 (1989).

³⁸⁷ 16 U.S.C. § 916f ("Violations; fines and penalties"). *See also* 19 C.F.R. § 12.30 (2009).

from those States certified to be in violation.³⁸⁸ The United States has taken action to impose trade sanctions against such whaling States as Japan, Peru, Iceland, and Norway under the applicable statutory provisions.³⁸⁹ The economic impact of such sanctions appears to have had greater persuasive force than the moral, diplomatic, or political arguments against whaling activities undertaken in violation of international norms.³⁹⁰

C. Conditions on Entry to Protect the U.S. Maritime Industry. International law also permits coastal States to impose certain conditions on port entry to protect the domestic maritime industry. Cabotage laws, or coastwise trade laws, have become commonplace among maritime States. Such laws generally require that vessels documented in a particular state support virtually all of the trade between ports of that state.³⁹¹ "The right of a nation to exclude foreign vessels from its domestic maritime trade is accepted without question in the international community; and most coastal nations, including the United States, have adopted cabotage laws to enforce that right."³⁹² The primary purpose is to promote the continued viability of the domestic merchant marine industry.³⁹³

³⁸⁸ 22 U.S.C. § 1978 ("Restriction on importation of fishery or wildlife products from countries which violate international fishery or endangered or threatened species programs").

³⁸⁹ Maria Clara Maffei, *The International Convention for the Regulation of Whaling*, 12 INT'L J. MAR. & COASTAL L. 287, 298-99 (1999).

³⁹⁰ See Ronald B. Mitchell, *Discourse and Sovereignty: Interests, Science, and Morality in the Regulation of Whaling*, 4 GLOBAL GOVERNANCE 275, 282-85 (1998).

³⁹¹ "Cabotage," also known as coast-wise trade, denotes the reservation of a nation's coastwise trade exclusively for that nation's own vessels. See BLACK'S LAW DICTIONARY 202 (6th ed. 1990). "Coastwise trade includes the transportation of passengers or merchandise between points embraced within the coastwise laws of the United States." 46 C.F.R. § 67.3 (2009).

³⁹² Robert L. McGeorge, *United States' Coastwise Trading Restrictions*, 11 NW. J. INT'L L. & BUS. 62, 62-63 (1990-91)(footnote omitted).

³⁹³ "The requirement that U.S.-flag vessels be U.S.-built, U.S.-crewed and U.S. citizen-owned ensures the continuation of a domestic merchant marine and shipbuilding industry -- important goals of the United States and MARAD." Clyde J. Hart, Jr., Administrator of U.S. Maritime Administration, Department of Transp., Statement before the House Subcommittee on Coast Guard and Mar. Trans. (Sept. 24, 1998), available at <http://www.marad.dot.gov/headlines/testimony/testim1.htm>.

In the United States, the law governing cabotage, or the coastwise trade, has long been the Jones Act.³⁹⁴ That Act, and its predecessors and successors, generally require that such vessels are “built in the United States” and are “wholly owned” by American citizens.³⁹⁵ Proof of eligibility to engage in such coastwise trade requires a Certificate of Documentation, proving compliance with all applicable laws and conditions.³⁹⁶ Other countries share these policy goals and have enacted similar laws.³⁹⁷ For example, China has well established cabotage laws, established for security as well as to encourage the growth of the domestic shipping industry.³⁹⁸ Worldwide, there are approximately fifty nations that have enacted cabotage laws to protect the domestic maritime industry. However, the recent trend, particularly in the European community, is to liberalize the requirements of cabotage laws to encourage greater trade efficiencies and reduce maritime transportation costs.³⁹⁹

D. Conditions on Entry to Protect Other Economic Interests.

Within reasonable limits, coastal States may also impose conditions on port entry to protect other economic interests. Some such laws are only tangentially related to the vessel’s operations, such as imposition of requirements under the Fair Labor Standards Act and the National Labor Relations Act to certain foreign-flag vessels. Although the

³⁹⁴ As used here, the “Jones Act” refers to the provisions of section 27 of the Merchant Marine Act of 1920, 41 Stat. 999 (codified at 46 App. U.S.C. § 883), repealed by Pub. L. No. 109-304, Oct. 6, 2006, 120 Stat. 1710-1712 (codified at 46 U.S.C. chs. 121 and 551).

³⁹⁵ 46 U.S.C. §§ 12116, 55102 (2009); 46 C.F.R. § 67.30 (“Requirement for citizen owner”).

³⁹⁶ The Director, National Vessel Documentation Center, issues a Certificate of Documentation, or CG-1270, with appropriate endorsement, once all requirements have been met. 46 C.F.R. § 67.15.

³⁹⁷ “Cabotage . . . is common among the maritime nations of the world.” Clyde J. Hart, Jr., Administrator of U.S. Maritime Administration, Department of Transp., Statement before the House Subcommittee on Coast Guard and Mar. Trans. (Sept. 28, 1998), *available at* <http://www.marad.dot.gov/headlines/testimony/testim1.htm>.

³⁹⁸ Mark A. Hamilton, *Negotiating Port Access: The Sino-U.S. Opportunity for Leadership in the Maritime Transport Services Industry*, 3 ASIAN-PAC. L. & POL’Y J. 153, 158 (2002). *See also* JEANETTE GREENFIELD, CHINA’S PRACTICES IN THE LAW OF THE SEA 81-83 (1992).

³⁹⁹ *See* Malgorzata Nesterowicz, *Freedom to Provide Maritime Transport Services in European Community Law*, 34 J. MAR. L. & COM. 629, 640-45 (2003).

Supreme Court recognizes the “well-established rule of international law” that the law of the flag state ordinarily governs the “internal affairs of a ship.”⁴⁰⁰ The U.S. Congress has seen fit on several occasions to impose certain expectations on foreign-flag vessels engaged in trade with the United States. As a general rule, the United States will not interfere with the internal affairs of a foreign vessel as a condition of port entry unless the absence of port state regulation would place a direct burden on the United States or where the United States has a special duty to safeguard the welfare of the class of persons protected by the statute.⁴⁰¹ The U.S. Supreme Court has concluded that U.S. obligations under international law would not permit it to impose on the owners of foreign-flag vessels the requirements of federal law merely to make U.S. merchant shipping more competitive or to create additional rights for foreign seamen.⁴⁰² The United States, as a member of the seafaring community of nations, has accepted the “internal affairs” rule as a binding obligation of international law.⁴⁰³ Given the likelihood of diplomatic protests from affected flag States, this doctrine assumes that Congress will take special care in the exercise of its powers to enact laws that seek to regulate the internal conduct of visiting ships.⁴⁰⁴ On the other hand, courts may reasonably assume that Congress intends for “its statutes to apply to entities in United States territory that serve, employ, or otherwise affect American citizens, or that affect the peace and tranquility of the United States, even if those entities happen to be foreign-flag ships.”⁴⁰⁵

⁴⁰⁰ *McCulloch*, 372 U.S. at 21. See RESTATEMENT, *supra* note 9, § 402, cmt. h, § 502 cmt. d., § 512 rep. n. 5.

⁴⁰¹ Jason M. Schupp, *The Clay Bill: Testing the Limits of Port State Sovereignty*, 18 MD. J. INT'L L. & TRADE 199, 226 (1994).

⁴⁰² *Lauritzen*, 345 U.S. 571, 593 (1953).

⁴⁰³ *McCulloch*, 372 U.S. at 19-21. While the Congress may have the constitutional power to apply the provisions of the National Labor Relations Act to give a union the right to hold elections on a Honduran-flag vessel while in U.S. ports, this would violate “the well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship.” *Id.* at 21.

⁴⁰⁴ *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 146-47 (1957) (In *Benz*, the Court held that it was inappropriate for it “to run interference in such a delicate field of international relations [as labor-management relations]” without “the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain.” *Id.* at 147.)

⁴⁰⁵ *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 132 (2005).

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 1990's, 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 access 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.⁴⁰⁶ 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 vessel⁴⁰⁷

E. Enforcing Other Domestic Laws Designed to Protect U.S. Citizens. As this paper has repeatedly emphasized, the Supreme Court considers it appropriate to apply domestic laws to foreign vessels in U.S. ports only where Congress has made clear that it intended such laws to apply. Moreover, Congress is likely to do so only when the absence of U.S. regulation would place a direct burden on American resources or nationals. A recent example of this balancing process involved a statute Congress enacted to apply to "places of public accommodations" and "public conveyances" under the Americans with Disabilities Act (ADA).⁴⁰⁸ In *Spector v. Norwegian Cruise Line Ltd.*, the Supreme Court determined that the ADA imposed requirements on

⁴⁰⁶ McDorman, *supra* note 270, at 219-22 ("Access to Ports – Effect of International Trade Laws").

⁴⁰⁷ *Id.* at 222.

⁴⁰⁸ Americans with Disabilities Act of 1990, §§ 301(7), (10), 302(a), 304(a)(codified at 42 U.S.C. §§ 12181(7), (10), 12182(a), 12184(a)).

foreign-flag cruise liners operating out of U.S. ports.⁴⁰⁹ After discussing the “internal affairs” rule as developed in a series of earlier cases, the Supreme Court determined that Congress intended the ADA to apply to foreign-flag cruise vessels to the extent practicable even though the statutory language and history did not contain a “clear statement” mandating coverage for such vessels, because the purpose and intent of the ADA was to protect disabled Americans on all means of public conveyance.⁴¹⁰

In considering whether the ADA required removal of physical barriers, when such a requirement would implicate vessel design and construction standards and which “would bring a vessel into noncompliance with the International Convention for the Safety of Life at Sea . . . or any other international legal obligation,” the Court observed that such a requirement could not qualify as one that was “readily achievable” within the language of the ADA.⁴¹¹ However, to the extent that other practices of the foreign-flag cruise line violated the ADA, did not merely affect the internal affairs of the ship, and could be remedied by measures that were “readily achievable,” the Court held that the foreign cruise line had to comply with the Act’s provisions when operating out of U.S. ports.⁴¹²

If Congress chose to do so, it could impose a wide range of laws applicable to foreign-flag vessels in U.S. ports beyond those it has already enacted. All it needs do to pass muster with the Supreme Court is: (1) make a “clear statement” of its intention to do so on the face of the statute; and (2) comply with the requirements of the U.S. Constitution.⁴¹³ If these two requirements are met, the Supreme Court has held that there is no additional need to comply with international law.⁴¹⁴ Despite its broad authority, Congress is unlikely to act unreasonably because of the dictates of international comity and

⁴⁰⁹ *Spector*, 545 U.S. at 129 (in overruling the contrary conclusion of the lower court, the Supreme Court held that “there can be no serious doubt” that the ADA applies to the foreign cruise ships). For a concise discussion of the significance of this rather complex plurality decision, see David W. Robertson & Michael F. Sturley, *Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits*, 30 TUL. MAR. L.J. 195, 209-13 (2006).

⁴¹⁰ *Spector*, 545 U.S. at 129-135.

⁴¹¹ *Id.* at 135-36.

⁴¹² *Id.* at 136.

⁴¹³ *Id.* at 140.

⁴¹⁴ See, e.g., *Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 174-77, 188 (1993); *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949).

economic realities. As a policy matter, excessive exercise of jurisdiction over foreign-flag vessels would undoubtedly have adverse consequences, including diplomatic protests, other retaliative actions, possible court-ordered damage judgments resulting from the breach of bilateral and multilateral trade agreements, and, perhaps most importantly, a chilling economic effect on the burgeoning global ocean trade with the United States.

The United States has also enacted laws to protect U.S. citizens against other threats. For example, the Department of Agriculture has long maintained a comprehensive program for inspecting potentially contaminated or otherwise harmful agricultural products brought into the United States from overseas.⁴¹⁵ These and other laws are appropriate exercises of jurisdiction to control port access to protect economic and other interests of the American public.

IX. CONDITIONS ON PORT ENTRY AND EXERCISE OF JURISDICTION TO PROMOTE OTHER INTERESTS NOT DIRECTLY RELATED TO THE PORT VISIT IN QUESTION

In some instances, States include in their international agreements and/or domestic legislation or regulations restrictions or conditions on port entry (or even passage through territorial waters) that are not directly or even tangentially related to the visit itself. These run the gamut from a desire to show displeasure with the domestic or international policies of the flag state to a need to punish a state which allows its fishermen to engage in practices in violation of international fishing agreements. There are too many variations of the possible applications of this principle to cover all of the possibilities here. Instead, this paper will simply deal with two recent examples, Protection of the North Atlantic Right Whale and Protection of Underwater Cultural Heritage.

A. Protection of the North Atlantic Right Whale. The North Atlantic right whale is one of the most endangered species of marine mammals. Although the Endangered Species Act protects all types of

⁴¹⁵ See, e.g., 7 U.S.C. § 8303a (2004) ("Restriction on importation of entry . . . necessary to prevent the introduction into or dissemination within the United States of any pest or disease of livestock . . ."); See *Pacific Merchant Shipping Assn. v. Voss*, 12 Cal. 4th 503, 907 P.2d 430 (Cal. 1995).

right whales,⁴¹⁶ the North Atlantic right whale is perhaps the species at greatest risk.⁴¹⁷ The best available estimates put the current population of the North Atlantic right whale at approximately 300-400 individuals.⁴¹⁸ Low reproductive rates and high mortality make recovery a slow and uncertain process, with the real possibility that the species could become extinct.⁴¹⁹

One of the major reasons for high whale mortality is the occurrence of "ship strikes" along the East Coast of the United States where the whales are particularly vulnerable as they feed, mate, and loiter on or near the surface of the ocean.⁴²⁰ After consultations with officials at the National Marine Fisheries Service (NMFS) in the mid-1990's, both the U.S. Navy and Coast Guard instituted measures to protect against strikes caused by their ships. These measures included

⁴¹⁶ 16 U.S.C. §§ 1362-62, 1531-44 (2004). See also 50 C.F.R. 224.101(b).

⁴¹⁷ "[T]he North Atlantic right whale [is] one of the most endangered whales" *Endangered North Atlantic Right Whale Study Says Population in Crisis*, SCIENCE DAILY, Jul. 27, 2005, available at <http://www.sciencedaily.com/releases/2005/07/050726075715.htm> (based on a study by the Woods Hole Oceanographic Institution). See also Michael Moore, Whither the North Atlantic Right Whale?, 43 OCEANUS No. 2, 1 (2004), available at <http://oceanusmag.whoi.edu/v43n2/moore.html> ("[U]nless this dire population trend is reversed, the species is headed quickly toward extinction."); John Garofolo, *Protecting America's Fisheries*, Jan. 1999, available at http://www.uscg.mil/history/h_fisheries.html. ("The right whale is the world's most endangered species of whale.")

⁴¹⁸ *Id.* (estimated population of 350 individuals). See also NOAA, *Fact Sheet: Proposal to Address Ship Strikes of the North Atlantic Right Whale*, June 23, 2006, available at http://www.nmfs.noaa.gov/pr/pdfs/shipstrike/proposed_rule_fact_sheet.pdf. See also Alexander Gillespie, *Wasting the Oceans: Searching for Principles to Control Bycatch in International Law*, 17 INT'L J. MARINE & COASTAL L. 161, 168 (2002) (the latest figures put the population of the North Atlantic right whale at around 300, "due to a combination of ship strikes and entanglements.") (footnote omitted); *Right whale*, Wikipedia, available at http://en.wikipedia.org/wiki/Right_whale (estimating 400); *Right whale*, ENCYCLOPEDIA BRITANNICA ONLINE (2007), available at <http://www.britannica.com/eb/article-9063681/right-whale> ("numbering only in the hundreds.").

⁴¹⁹ A recent computer model "predicts that, under current conditions, the population will be extinct in less than 200 years." NOAA Fisheries, Office of Protected Resources, *Right Whale (Eubalaena glacialis)*, available at <http://www.nmfs.noaa.gov/pr/species/mammals/cetaceans/rightwhale/>.

⁴²⁰ *Id.*

operating at slower speeds and posting specially-trained lookouts.⁴²¹ The Coast Guard has acted significantly to protect against strikes caused by vessels in general, including passing initiatives to educate the public, participating in studies, assisting in whale monitoring efforts, and issuing precise and up-to-date notices to mariners. Upon the request of the United States and consistent with the provisions of the UN Convention on the Law of the Sea and other applicable international agreements,⁴²² in December 1998 the IMO established a mandatory ship reporting system for vessels passing through two of the whale's critical habitats and imposed restrictions on fishing gear used by vessels within these areas.⁴²³ Exercising statutory authority specifically enacted for that purpose,⁴²⁴ the Coast Guard has issued regulations to implement this mandatory reporting system.⁴²⁵

To further lower the risk of such deadly ship strikes, the National Oceanographic and Atmosphere Administration (NOAA) proposed in 2006 that the United States impose and enforce seasonal speed-limits on vessels 65-foot in length or greater, subject to the jurisdiction of the United States, as well as those entering or departing a port of place under the jurisdiction of the United States.⁴²⁶ The geographical areas affected would include specified Atlantic coast whale breeding and feeding areas, including arcs extending out to 30 nautical miles from major U.S. East Coast ports and 15-day "dynamic management areas" that may be designated at any point within the U.S. EEZ in the Atlantic

⁴²¹ Bob Nelson, Navy News Service, *Press Release: Navy continues to protect marine life off East Coast*, available at http://findarticles.com/p/articles/mi_pnav/is_200101/ai_906909234/print.

⁴²² UNCLOS, *supra* note 4, art. 194(5); International Convention for Safety of Life at Sea, Nov. 1, 1974, 32 U.S.T. 47, ch. V, reg. 8-1.

⁴²³ IMO Maritime Safety Committee, *Report of the Maritime Safety Committee on its Seventieth Session*, 70th Sess., Agenda Item 23, par. 11.41, IMO Doc. MSC 70/23 (1998). See generally Jeffrey P. Luster, *The International Maritime Organization's New Mandatory Ship Reporting System for the Northern Right Whale's Critical Habitat: A Legitimate Approach to Strengthening the Endangered Species Act?*, 46 NAVAL L. REV. 153, 153-54 (1999).

⁴²⁴ 33 U.S.C. § 1230(d) ("International Agreements -- Ship reporting systems").

⁴²⁵ 33 C.F.R. §§ 169.100-169.140 ("Establishment of Two Mandatory Ship Reporting Systems for the Protection of Northern Right Whales").

⁴²⁶ NOAA Fisheries, Office of Protected Resources, *Strategy to Reduce Ship Strikes to North Atlantic Right Whales*, available at <http://www.nmfs.noaa.gov/pr/shipstrike/>.

Ocean.⁴²⁷ The compliance and enforcement concept currently under consideration by NOAA and the Coast Guard potentially includes using AIS data on the position, heading, and speed of vessels in the area to notify those vessels located in the areas of concern that they are exceeding the speed limit.⁴²⁸

If a particular vessel fails to slow down, NOAA or the Coast Guard may issue the master a citation which will be enforced once the vessel enters port. Should the violation occur while a foreign-flag vessel is outbound from the U.S. port, enforcement action against the vessel, its owner-operator, and/or the master would not take place until a subsequent port call, perhaps even several years later, raising due process concerns.⁴²⁹ Some proponents have even proposed enforcing the speed restrictions on vessels that are engaging in innocent passage through the territorial sea or exercising their freedom of navigation in international waters when and if the vessel next visits a U.S. port.⁴³⁰

⁴²⁷ NOAA, Office of Endangered Fish and Wildlife; Proposed Rule to Implement Speed Restrictions to Reduce the Threat of Ship Collisions with North Atlantic Right Whales, 71 Fed. Reg. 36299, 36299-36310 (June 26, 2006)(to be codified at 50 C.F.R. § 224.105). See generally NOAA, *Ship Strike Reduction*, Aug. 16, 2006, available at <http://www.nero.noaa.gov/shipstrike/>.

⁴²⁸ See Brian Tetreault, *Automated Identification System: The Use of AIS in Support of Maritime Domain Awareness*, PROCEEDINGS 27, 30 (Fall 2006) (“[T]he Coast Guard is working with [NOAA] to use the automatic identification system in support of protection of endangered living marine resources.”)

⁴²⁹ See NOAA, Office of Law Enforcement, *Press Release: NOAA Penalizes Vessel Operators for Violating Various Federal Marine Mammal Protection Laws*, Jul. 14, 2005, available at http://www.nmfs.noaa.gov/ole/news/news_NED_071405.htm (announcing fines of up to \$3500 to operators whose vessels failed to comply with laws and regulations to protect right whales).

⁴³⁰ See, e.g., Int’l Fund for Animal Welfare, *Recommended Measures to Reduce Ship Strikes of North Atlantic Right Whales*, Aug. 23, 2001, available at http://www.ifaw.org/ifaw/dfiles/file_159.pdf; *North Atlantic right whale found dead on an East Coast beach*, May 20, 2005, available at <http://www.ens-newswire.com/ens/may2005/2005-05-20-02.asp>. “It is critical for the right whale population that NMFS enact these measures immediately until meaningful and permanent regulations are put in place,” the coalition said. . . . With a combined membership of more than 11 million people, the coalition to protect the North Atlantic right whale species includes - Defenders of Wildlife, The Humane Society of the United States, International Fund for Animal Welfare, International Wildlife Coalition, National Environmental Trust, Natural Resources Defense Council, Oceana, The Ocean Conservancy, and the Whale and Dolphin Conservation Society.” *Id.*

Domestic opponents argue that such restrictions adversely affect international shipping. Any such extension of jurisdiction over foreign-flag vessels would go against the position that the United States has taken on similar issues that other States have proposed and could have significant international repercussions.

B. Protection of Underwater Cultural Heritage. A second example of how far restrictions on port access can depart from those directly related to the vessel's visit is the adoption of laws designed to protect underwater cultural heritage. At least in the opinion of a zealous group of international advocates, the world community is increasingly interested in protecting such interests. The 1982 UN Convention on the Law of the Sea established a "duty to protect objects of an archaeological and historical nature found at sea."⁴³¹ In order to restrict the trafficking of cultural artifacts, Article 303 expands the jurisdiction of the coastal state to presume that removal from the seabed in the contiguous zone "without its approval would result in an infringement within its territory or territorial sea"⁴³²

One of the most important underwater cultural heritage sites is the portion of the North Atlantic where the *RMS Titanic* sank, causing the loss of approximately 1500 lives, after striking an iceberg in April, 1912. Seventy-three years later, technological breakthroughs enabled a joint U.S.-French expedition to locate the shipwreck in 12,500 feet of water. Later expeditions began to recover treasure and other artifacts from the wreck site. To protect against destruction of this historic site and uncontrolled pilferage of the cultural heritage, in 1986 Congress directed that the Administrator of the National Oceanographic and Atmospheric Administration, in discussion with the Secretary of State, "to enter into consultations with the United Kingdom, France, Canada, and other interested nations to develop international guidelines for research on, exploration of, and if appropriate, salvage of the R.M.S. Titanic"⁴³³ Congress instructed NOAA to negotiate with

⁴³¹ UNCLOS, *supra* note 4, art. 303(1) ("Archaeological and historical objects found at sea").

⁴³² *Id.*, art. 303(2).

⁴³³ R.M.S. Titanic Maritime Memorial Act of 1986, Pub. L. No. 99-513, Oct. 21, 1986, 100 Stat. 2083, (codified at 16 U.S.C. §§ 450rr-1 – 450rr-6).

concerned States to have the site declared to be an international maritime memorial.⁴³⁴

In 2001, NOAA issued Guidelines for Research, Exploration and Salvage of RMS Titanic.⁴³⁵ Subsequent diplomatic negotiations resulted in the 2004 Agreement Concerning the Shipwrecked Vessel RMS Titanic.⁴³⁶ The United Kingdom, France, Canada, and the United States have all signed the Agreement. Among other expectations, such as following the best practices for developing an underwater archaeological site, this 2004 Agreement requires all parties to "take appropriate actions to prohibit activities in its territory including its maritime ports . . . that are inconsistent with this Agreement."⁴³⁷

The Agreement is subject to acceptance following the enactment of implementing legislation. After working within the interagency process to develop an appropriate legislative package, the State Department submitted a draft to Congress in June 2006.⁴³⁸ Once enacted and signed into law, the United States will deposit its acceptance and the Agreement will become effective for the U.S.⁴³⁹ The draft legislation includes various administrative and criminal sanctions against any person determined to have violated the legislation implementing the Agreement, including fines of \$250,000 per day of violation, imprisonment for not more than five years, or both.⁴⁴⁰ Current sanctions do not include barring access to U.S. ports of foreign-vessels determined to be in violation of the Agreement. Although denial of port access could certainly constitute an appropriate sanction,

⁴³⁴ 16 U.S.C. § 450rr-4 (international agreement to designate site "as an international maritime memorial").

⁴³⁵ National Oceanographic and Atmospheric Administration, Guidelines for Research, Exploration and Salvage of RMS Titanic, 66 Fed. Reg. 18905, 18908-09 (Apr. 12, 2001).

⁴³⁶ Agreement Concerning the Shipwrecked Vessel RMS Titanic, June 18, 2004, available at <http://www.state.gov/g/oes/rls/or/2004/33709.htm>.

⁴³⁷ *Id.*, art. 4(5).

⁴³⁸ Letters from Jeffrey T. Bergner, Assistant Secretary, Legislative Affairs, Department of State, to Vice President Richard B. Cheney, President of the Senate, and the Honorable J. Dennis Hastert, Speaker of the House (June 9, 2006).

⁴³⁹ State Department, Office of the Spokesman, *Media Note: Administration Transmits Proposed Legislation to Implement Agreement to Protect RMS Titanic Wreck Site*, June 9, 2006, available at <http://www.state.gov/r/pa/prs/ps/2006/67769.htm>.

⁴⁴⁰ State Department Draft Legislation, *R.M.S. Titanic Maritime Memorial Act of 2006* § 10 (as submitted to Congress on June 9, 2006).

those responsible for enforcing the treaty obligations apparently view obtaining jurisdiction over and prosecuting the violator as more likely to deter criminal conduct than simply denying port access to the vessel.

X. DOMESTIC AUTHORITY AND PRACTICAL PROCEDURES FOR DENYING PORT ENTRY

Even if a port state has the international legal right to deny access to its ports to a particular vessel, the cognizant officials usually must 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 U.N. sanctions against Iran), most decisions made by lower-level functionaries seek to apply domestic law designed to promote the interests of the state. Since there is a general presumption of access for foreign-flag commercial vessels, an official who determines that a vessel may not have access 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 interested in using that vessel to engage in international trade. In other words, even if a state has the international legal right to do prevent access, 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 access 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 harbor in Norfolk, Virginia.⁴⁴¹ While the general

⁴⁴¹ *Canadian Transport Co. v. United States*, 663 F.2d 1081, 1083-84 (D.C.Cir. 1980).

rationale for that denial, that the presence of Communist-bloc officers might pose a risk to national security in that particularly sensitive port, was sufficient to satisfy the requirements of international law, the plaintiffs argued that the Coast Guard officials had acted capriciously and contrary to existing regulations and procedures in reaching and carrying out the decision to deny access. The Appellate Court 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"⁴⁴² The Court returned the case to the district court for a factual hearing on that issue.

In the *Humane Society of the United States v. Clinton*,⁴⁴³ plaintiffs successfully sued President Clinton and the Secretary of Commerce because the Federal Government failed to take timely action to sanction Italian drift-net 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.⁴⁴⁴ The U.S. 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."⁴⁴⁵

In recent decades some international institutions have also directed their attention to combat illegal, unregulated, and unreported (IUU) fishing and the threat such fishing poses to in the global commons. Of particular concern are highly migratory species, such as albacore tuna, and various types of fish that spend significant amounts of their adult lives in the high seas or seas outside of the EEZ or in more than one EEZ (straddling stocks), such as the Patagonian toothfish in the waters of the Southern Ocean.⁴⁴⁶ To provide some measure of protection and management of threatened fish stocks, the

⁴⁴² *Id.* at 1091.

⁴⁴³ *Humane Society of the United States v. Clinton*, 44 F.Supp.2d 260 (Ct. Int'l Trade 1999).

⁴⁴⁴ High Seas Driftnet Fisheries Enforcement Act of 1992, Pub. L. No. 102-582, 106 Stat. 4900, § 101 (codified as amended at 16 U.S.C. § 1826a).

⁴⁴⁵ *Humane Society*, 44 F.Supp.2d at 277. To rule against the Government, "the Court must find that [the Secretary of Commerce] acted arbitrarily, capriciously and not in accordance with law." *Id.* at 278.

⁴⁴⁶ See *Patagonian toothfish*, Wikipedia, available at http://en.wikipedia.org/wiki/Patagonian_toothfish.

Law of the Sea Convention encourages concerned States to work together or within international and regional organizations “to agree upon the measures necessary for the conservation of those stocks”⁴⁴⁷ Toward this end, the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks met in the early 1990’s to develop a comprehensive strategy for handling such management issues.⁴⁴⁸ Moreover, for decades concerned States have formed Regional Fisheries Management Organizations (RFMO’s) in various parts of the world. Among several such RFMO’s, the Northwest Atlantic Fisheries Organization (NAFO), established in 1979, pursues aggressive policies to manage and conserve fishery stocks in the once highly productive waters of the northwest Atlantic.⁴⁴⁹

Conservation measures that NAFO have adopted include fishing bans on certain threatened fish stocks and requirements to mark fishing gear, to submit to vessel monitoring and inspection, and to maintain catch and transshipment records. After appropriate investigation, the NAFO General Council may place vessels found to have violated conservation measures on an IUU List.⁴⁵⁰ “Contracting parties shall take all necessary measures to the extent possible in accordance with their applicable legislation with regard to vessels on the IUU List, including . . . prohibiting the entry into their ports of such vessels, except in case of *force majeure*”⁴⁵¹ Most enforcement provisions, including denial of port entry, extend to fishing vessels of both contracting parties and non-contracting parties alike. By its terms,

⁴⁴⁷ UNCLOS, *supra* note 4, art. 63(2); *id.*, art. 64 (“Highly migratory species”), and art. 197 (“Cooperation on a global or regional basis . . . for the protection and preservation of the marine environment”).

⁴⁴⁸ United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, Sep. 8, 1995, U.N. Doc. A/CONF. 164/37, *reprinted in* 34 I.L.M. 1542-1580 (1995).

⁴⁴⁹ Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, available at <http://www.nafo.int/about/frames/about.html>. A similar international agreement involving an RFMO is the Convention on the Conservation of Antarctic Marine Living Resources, May 20, 1980, 19 I.L.M. 840 (CCAMLR). Chapter 44A of Title 16, United States Code, 16 U.S.C. §§ 2431-2444, implements the CCAMLR in the United States. As a normal rule, statutes implementing these Conventions apply directly only to vessels or actions subject to the jurisdiction of the United States.

⁴⁵⁰ NAFO Conservation and Enforcement Measures, NAFO FC Doc. 07/1 Ser. No. N5335, art. 49 (“Establishment of the IUU List”).

⁴⁵¹ *Id.*, art. 58.

however, those enforcement provisions are not self-executing. Just because a vessel may appear on the IUU list, the port state must still have taken legislative and administrative action to ensure that appropriate laws and regulations result in the sanctions specified.

In the United States, Congress implemented the Northwest Atlantic Fisheries Convention through Title II of the Fisheries Act of 1995.⁴⁵² As a general rule, the primary enforcement mechanisms under that Act, and the many international conventions and domestic statutes established to protect and manage fish stocks, are administrative sanctions, such as civil fines and the seizure of illegally obtained fish. However, except for the rather involved process for listing nations whose fishing vessels are found to engage in illegal fishing activities using long driftnets,⁴⁵³ sanctions in current U.S. law and regulation do not extend to barring vessels listed as having engaged in IUU fishing in violation of international conventions. Indeed, nothing in the implementing statute or regulations specifically refers to the denial of port entry for vessels on any of the several IUU lists that RFMO may promulgate. To justify enforcing a port-entry ban against a foreign-flag fishing vessel, the cognizant Coast Guard officer must look to authority found elsewhere.

Existing Federal statutes and regulations give the Coast Guard rather broad power to deny port entry and control operations within U.S. 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 1978 (PWSA), as amended,⁴⁵⁴ specifically authorizes the Secretary of Homeland Security (delegated to the cognizant Coast Guard District Commander and Captain of the Port) to deny port entry to any U.S. port or navigable waters if "he has reasonable cause to believe such vessel does not comply with any regulation issued under this act or any other applicable law or treaty."⁴⁵⁵

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

⁴⁵² Fisheries Act of 1995, Pub. L. No. 104-43, Tit. II (codified at 16 U.S.C. §§ 5601-5612).

⁴⁵³ See 16 U.S.C. § 1826(a)(2).

⁴⁵⁴ Ports and Waterways Safety Act of 1978 (PWSA), Pub. L. No. 92-340 (codified at 33 U.S.C. §§ 1221-1236).

⁴⁵⁵ 33 U.S.C. § 1223(b)(1).

thereunder.”⁴⁵⁶ 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”⁴⁵⁷ While the PWSA and the regulations issued under it normally apply to international vessel safety, manning, equipment, and construction standards, nothing limits them to such laws or treaties. If the cognizant international commission or implementing body determined that a particular vessel had violated conservation measures designed to combat IUU fishing, this finding would seem to provide “reasonable cause” for denying access to port. Because the National Oceanographic and Atmospheric Administration is the lead Federal Agency responsible for interpreting and enforcing international and domestic fishery regulations, the Coast Guard would normally wait until NOAA has made a determination that the vessel in question was in violation of U.S. laws. If the violation of law, regulation, or treaty concerned a vessel equipment standard, or a threat of serious pollution, the Coast Guard would not require the determination of another Federal Agency to take action, since it would be the appropriate subject-matter expert. If the violation related to a homeland security matter, the coast guard would presumably act based on information received from the appropriate Agency in DOD or DHS. If it related to an immigration matter, the subject-matter expert would likely be CBP or ICE. Of course, before the Coast Guard would take action to deny port access, it would have to independently determine that it had authority and valid and appropriate rationale under all the circumstances.

When a port state has good cause to deny port access 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 or owners in a timely and reasonable manner under the circumstances. The President, Secretary of State, appropriate U.S. 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 international convention or domestic law. However, under existing U.S. procedures, appropriate Coast Guard officials normally carry out the process of denying port access to foreign-flag vessel where U.S. law and regulations require or authorize it. The cognizant District Commander or Captain of the Port (COTP)

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

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

normally issues an order to the vessel denying port access. Such an order should include a summary of the factual situation, the basis for denying port access, 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.

Any time that the United States seeks to deny port access 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 access 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.⁴⁵⁸ If the Congress and cognizant agencies consider that denial of port entry to certain foreign-flag vessels under particular circumstances promote 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. The next section discusses some of these possible adverse consequences in detail.

XI. IMPOSSIBLE LEGAL, DIPLOMATIC, AND PRACTICAL CONSEQUENCES FOR IMPOSING EXCESSIVE RESTRICTIONS ON PORT ACCESS OR EXERCISING OVERLY BROAD JURISDICTION OVER FOREIGN VESSELS IN PORT

Black letter law provides that "a State that violates an international obligation is responsible for the wrongful act towards the injured State"⁴⁵⁹ To avoid adverse consequences, port states

⁴⁵⁸ Admiral Thad Allen, Commandant, U.S. Coast Guard, *The Water Is Different*, Address at the U.S. Naval Institute Port Security Conference (Jun. 7, 2006) ("Significant progress has been made in the continuing maturation of the [MOTR] coordination process"), available at http://www.uscg.mil/comdt/speeches/docs/USNI_NY_06_2006.pdf.

⁴⁵⁹ MALANCZUK, *supra* note 9, at 3. See also *The Corfu Channel Case (Merits)* (U.K. v. Alb.), 1986 I.C.J. 4, 27-30 (Apr. 9); *Trail Smelter Arbitration (U.S. v. Can.)*, 3 U.N.R.I.A.A. 1901, 1905, 35 AM. J. INT'L L. 684, 685 (Mar.

should be careful not to impose conditions on port access over foreign merchant vessels not rationally and effectively related to the voyage in question or otherwise violate norms of international law. Likewise, port states should only exercise jurisdiction over foreign vessels in their ports consistent with well established, fundamental principles of international law. Otherwise, the port state may be exposed to various consequences to any other state, individual, or entity harmed as a result. Under international law, a port state that has violated a legal obligation to another state or individual may be required both to stop violating that obligation and to make restitution for any loss suffered.⁴⁶⁰ Such consequences may be the result of legal action or responses from foreign States or shipping companies, diplomatic intervention, international sanctions, unilateral remedies, or the practical consequence of making seaborne trade so onerous or expensive as to discourage companies from making port calls in the state in question. This section will briefly consider the range of possible legal, diplomatic, and practical consequences for violating international law related to port access.

A. Legal Consequences. If the state imposes a condition on port access that violates its obligations under a treaty or customary international law, the flag state, or even the affected individual, may attempt to seek a legal remedy. As Professors Churchill and Lowe wrote: “[Port] closures or conditions of access 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 . . .”⁴⁶¹ Likewise, if the port state attempts to assert jurisdiction over a foreign-flag vessel in its ports or waters in violation of international law, the aggrieved party may seek a legal remedy, either through the courts of the port state or in some other legal forum.

For example, if a port state imposed a condition on access, such as an excessive or discriminatory fee for port services, that violated the terms of an applicable FCN treaty between the port and flag state, relief

11, 1941); IAN BROWNLIE, *SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY* (PART I) 1, 49-52 (1983).

⁴⁶⁰ RESTATEMENT, *supra* note 9, at § 901. “[I]t is a principle of international law . . . that any breach of an engagement involves an obligation to make reparation.” BROWNLIE, *supra* note 221, at 17 (quoting the Court’s opinion in the *Chorzów Factory Case* (Merits), 1928 P.C.I.J. (ser. A), No. 17, at 29).

⁴⁶¹ CHURCHILL & LOWE, *supra* note 13, at 63.

could be sought in the courts of the port state, through a mediation or arbitration panel, through compulsory settlement procedures under the LOS Convention, or other agreed-upon forum. Likewise, if the domestic courts of the port state brought the vessel's master before it for a criminal or administrative matter solely related to the internal economy of the vessel, any defense counsel would first seek to protect his client's interest by seeking to have the charge dismissed or, if this were not possible, mount a zealous defense to the charge in court. In the United States, Federal courts occasionally review criminal or civil charges against foreign persons or shipping interests on the basis that the exercise of U.S. jurisdiction may be inconsistent with international law.⁴⁶²

The LOS Convention established safeguards for foreign-flag vessels that the port state has subjected to abusive or excessive investigative or enforcement actions.⁴⁶³ "Coastal States that violate the Convention's safeguards may be liable for any resulting damages or losses suffered by the vessel."⁴⁶⁴ If both the coastal and flag state sign on to the LOS Convention, the compulsory dispute settlement provisions may come into effect.⁴⁶⁵ In certain cases, international fora are also available to consider providing relief to aggrieved States or, in a few cases, individuals. These range from arbitration panels that bilateral or multilateral treaties between the effected States call for, regional international courts, trade courts, or even the International Court of Justice (ICJ). For states party to UNCLOS and with respect to certain issues, the International Tribunal on the Law of the Sea (ITLOS) would be available to resolve issues affecting port access, detention of vessels, or the exercise of jurisdiction over vessels and crews by port states.⁴⁶⁶ Decisions of such international courts and tribunals could not only result in a determination that the particular law or administrative practice violates international law, but that the violator state was under an obligation to pay restitution for the damages

⁴⁶² See, e.g., *United States v. Perez-Oviedo*, 281 F.3d 400, 402-03 (3d Cir. 2002), *cert. denied*, 536 U.S. 969 (2002); *United States v. Hyundai Merchant Marine Co., Ltd.*, 172 F.3d 1187, 1191 (9th Cir. 1999).

⁴⁶³ UNCLOS, *supra* note 4, arts. 223-231.

⁴⁶⁴ Allen, *supra* note 272, at 575 (citing UNCLOS, art. 232).

⁴⁶⁵ *Id.* (citing UNCLOS, art. 292). Interestingly, the first case that the International Tribunal on the Law of the Sea decided arose under article 292. See *M/V SAIGA (Saint Vincent and the Grenadines v. Guinea)*, 37 I.L.M. 360 (1997).

⁴⁶⁶ UNCLOS, *supra* note 4, art. 287 and Annex VI. See Jillaine Seymour, *International Tribunal for the Law of the Sea: A Great Mistake?*, 13 IND. J. GLOBAL LEGAL STUD. 1, 3-9 (2006); Roberts, *supra* note 314, at 107.

it has caused. States determined to have violated international norms must usually pay the litigation costs associated with any court or administrative hearings as well.

B. Diplomatic Consequences and International Sanctions.

Even if the aggrieved state or private party is unable or unwilling to seek legal redress for what it perceives to be excessive conditions on access or the excessive exercise of jurisdiction in a foreign port, one or more concerned States might decide to issue diplomatic protests to the port state that violated international law. For example, if the United States denied access to a French-flag commercial vessel based on criteria that France considered unjustified, or which violated a bilateral treaty between France and the United States, the French government could issue a formal demarche concerning the incident, to which the United States would normally have to reply. It is through such claims and counterclaims that customary international law forms and develops over time. This is what the United States recently did to protest Australia's efforts to impose a compulsory pilotage scheme in the Torres Strait.

The aggrieved state may also take the matter outside of the bilateral relationship to the United Nations, International Maritime Organization (IMO), World Trade Organization (WTO), or other appropriate regional or specialized organization. The purpose of such an action would be to bring international diplomatic and political scrutiny to bear on the excessive application of jurisdiction. Particularly if an international consensus can develop that a particular action is unreasonable and excessive, the use of such diplomatic and political tools can have a significant impact on modifying state behavior. If the violation of international law is sufficiently serious, the cognizant international organization may even decide to impose appropriate sanctions against the violator state.

C. Unilateral Remedies and Practical Consequences. Perhaps the most effective response to the violation of international law by a port state is through the unilateral remedies that other States might impose and the practical consequence that shipping companies might adopt. For example, consistent with the international principle of reciprocity, the aggrieved state might impose equally burdensome conditions on port access to vessels from the state it considers to be acting in violation of international law as a unilateral sanction. Such a countermeasure would be appropriate if necessary to end the violation. Moreover, excessive conditions on port access or jurisdiction over

foreign vessels in port would discourage international trade with ports of that state. This effect would be particularly telling if the foreign state or shipping company were to communicate the reasons it had decided to no longer call on a particular port. The loss of business would likely cause the local industry, civil, and business associations to seek relief through the elimination or modification of the excessive and unreasonable exercise of port state jurisdiction. If the denial of access to a port amounted to a trade barrier or an example of discriminatory treatment inconsistent with GATT or an international agreement under the World Trade Organization, the aggrieved state might have access to the WTO dispute settlement process and, ultimately, the imposition of trade sanctions against the offending state.

XII. 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. This section will evaluate both the legal and policy factors that affect the imposition of such conditions and then propose an analytical methodology for determining whether a particular condition on port entry is an appropriate way to promote a particular policy goal. The paper will then apply these analytical factors to a current real-life issue, Australia's recent requirement that foreign-flag vessels employ an Australian pilot while transiting the Torres Strait. The final part of this paper 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. 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 restrictions 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 purposes. While a foreign vessel can likely avoid the exercise of jurisdiction by refusing to engage in trade with the port state or, if notified as it approaches, refusing to enter the waters of the port state, imposing conditions on

port entry presupposes some appropriate enforcement mechanism. That is, if a foreign vessel enters a port in violation of conditions of entry, or reports that it has complied, when it has not in fact complied with any such conditions, the port state has the right to enforce its conditions by taking appropriate administrative, civil, or possibly criminal sanctions against the owner and/or operators of the foreign vessel.⁴⁶⁷ However, a state may not exercise jurisdiction with respect to a foreign-flag vessel or its activity when the exercise of such jurisdiction would be arbitrary, discriminatory, or unreasonable.⁴⁶⁸

B. Determination of “Reasonableness.” Although various States, the international community, and legal commentators will 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 do so. Determination whether the exercise of jurisdiction over a vessel or its activity as a condition of port entry is appropriate 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 on foreign merchant vessels upon arrival in port include the following:

- (1) Are the policy interests that the law or regulation is designed to address of 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 nexus to the entry of the vessel into the waters of the port state?
- (4) Does the regulated activity have a close temporal nexus to the planned entry of the vessel into the waters of the port state?

⁴⁶⁷ See 33 U.S.C. § 1232 (“Enforcement provisions,” including civil, criminal, in rem, injunctions, and denial of entry or exit).

⁴⁶⁸ See RESTATEMENT, *supra* note 9, § 403(1).

(5) Will the law or regulation be effective in accomplishing the policy goal(s) for which it was implemented?

(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 LOS Convention?

(7) Would the exercise of jurisdiction under the circumstances violate an applicable bilateral or multi-lateral convention or the relevant provisions of customary international law?

(8) Are the criminal or administrative sanctions to be imposed for violation of the law or regulation consistent with the applicable principles of international law?

(9) How important to the international community are the political, economic, social, or environmental goals to be achieved?

(10) To what extent have other States imposed similar conditions on port entry or exercises of jurisdiction over foreign vessels in their ports with at least the tacit approval of other States?

(11) Has the relevant competent international organization approved similar laws or regulations that one or more other States may have proposed or adopted?

(12) To what extent does another state with a greater claim to jurisdiction over the vessel have an interest in regulating the activity to promote the policy goals?

(13) What is the likelihood of a conflict between the port state and another state with an interest in regulating the activity?

(14) Is there domestic legal authority for denying access, 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?

(15) Will the consequences of enforcing the regulation have any adverse consequences, such as increasing navigational risks for vessels underway, complicating or delaying the port visit, or otherwise discouraging or increasing the costs of seaborne commerce?

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

Each of these relevant questions determines the reasonableness of the domestic law, regulation, or policy under consideration.

C. Applying These Factors for Determining Reasonableness in a Particular Case: Mandatory Pilotage Requirements in the Torres Strait. To illustrate how these sixteen factors could be used effectively to determine the objective reasonableness of a proposed condition on port entry, consider the recent initiative of Australia and Papua New Guinea to require a qualified local pilot to board and pilot all commercial vessels of a certain size and all tanker vessels passing through the Torres Strait between northern Australia and southern Papua New Guinea. Failure to employ such a pilot could result in substantial financial sanctions to be imposed on the vessel on its next visit to an Australian port. As discussed above,⁴⁶⁹ this proposed mandatory pilotage requirement has generated a good deal of international discussion. This paper will consider each of the factors listed above to evaluate reasonableness.

First, the law or regulation was implemented to address a matter of significant and long-term concern to both Australia and Papua New Guinea.⁴⁷⁰ The Torres Strait, located just beyond the northern end of the Great Barrier Reef, is an environmentally sensitive area and home to indigenous peoples who have lived and worked in the pristine waters there for many generations. A collision in those restricted waters, or a

⁴⁶⁹ See *supra* Section VI.C, discussing Australia and Papua New Guinea's mandatory pilotage proposal for the Torres Strait, and Australia's implementing regulations.

⁴⁷⁰ Ottesen *et al.*, *supra* note 316, at 507-511, 519; Roberts, *supra* note 314, at 93-94, 99-101.

grounding on any of the thousands of rocks, reefs, and islets would likely cause an ecological disaster, impacting adversely on those living and working there. Moreover, depending on the size of the vessels and where the incident occurs, it could have the effect of blocking the Torres Strait for international navigation for some time. Preventing pollution of the marine environment of the area and keeping the Torres Strait open for international navigation are two vital and nationally important goals.

Second, the harm has a direct connection to the foreign vessel's presence while navigating through the coastal waters of the port state. The physical presence of these large commercial vessels and tankers, plying the waters of the Torres Strait, is of direct concern. If these vessels never enter the Torres Strait, the regulation would have no impact on their free navigation rights. Once they enter the Torres Strait, the purpose of the legislation is that they proceed through without incident. Australia and Papua New Guinea have determined that this can best be done by requiring a certified Australian pilot to be in charge of navigating the vessel. At the end of the passage through the strait, the vessels need only pay the pilot for services rendered. Although the ship's operators may be concerned about the cost, the harm to be avoided is directly related to the vessel's presence in the water of the coastal States.

Third, the regulated activity, passage through the Torres Strait, is geographically related to the Australian ports into which many of the vessels are likely bound. The Torres Strait is within a few thousand nautical miles of the major Australian port cities to which many of these vessels will be bound. Considering the vast size of Australia, this is relatively close. While some of the commercial vessels transiting the Torres Strait may be coming from and bound for New Zealand, Chile, India, South Africa, Singapore, or elsewhere, a significant number, if not most, will be on their way to Australian destinations. Of course, there is much international concern with the proposal to impose a mandatory pilotage requirement on vessels merely engaged in transit passage and bound for a port far removed from Australia. However, if the vessel proceeds through the strait and on its way to its foreign destination without incident, such a vessel would avoid any immediate sanctions for not using a pilot.⁴⁷¹ The provision does not provide for immediate enforcement authority for vessels underway.

⁴⁷¹ Of course, if it has a collision, goes aground, or otherwise fails to negotiate the Torres Strait safely, Australia and Papua New Guinea would have other bases for exercising jurisdiction and imposing sanctions. See UNCLOS,

Fourth, at least for vessels proceeding directly to an Australian port, the regulated activity has a close temporal nexus to the planned entry of the vessel into the port state. Any such vessel would be within a few days of arrival at an Australian destination. For vessels traveling to other ports and unlikely to return to Australia anytime in the near future, there would not be a close temporal nexus between the regulated activity and entry into an Australian port. Indeed, Australian authorities could potentially impose punitive sanctions many years later.

Fifth, the regulation will likely be effective in accomplishing the policy goals for which it was designed, particularly with respect to vessels bound directly for Australian ports. Australia has long had a similar law requiring mandatory pilotage on all vessels passing through the Great Barrier Reef on the way to and from an Australian port. After dozens of cases in which the masters of foreign ships had to pay fines for failing to comply with this requirement, the present level of compliance is reported to be quite high, nearing 100%.⁴⁷² Under the current voluntary pilotage regime in the Torres Strait, in contrast, Australian authorities have noted that compliance has declined from 70% in 1995 to 55% in 2001.⁴⁷³ A study commissioned by the Australian government concluded that only "some 45% of vessels take pilots through the Torres Strait . . ."⁴⁷⁴ The study stated "[t]he effect of introducing 100% pilotage is predicted to reduce collision accidents by about 30% and powered grounding accidents by about 32%. . . . The risk benefit should be assessed against the additional cost of

supra note 4, arts. 220 and 221. See generally Michael White, *Marine Pollution from Ships: The Australian Legal Regime*, 9 CURRENTS: INT'L TRADE L.J. 1, 3-11 (2000).

⁴⁷² Ottesen *et al.*, *supra* note 316, at 514-21. See also Michael White, *Liability for Damage to the Marine Environment from Ships*, 26 DALHOUSIE L. J. 231, 260-61 (2003).

⁴⁷³ Roberts, *supra* note 314, at 102 ("This equates to approximately 500 un-piloted transits each year." *Id.*). See also Stuart B. Kaye, *Regulation of Navigation in the Torres Strait: Law of the Sea Issues*, in NAVIGATIONAL RIGHTS AND FREEDOMS AND THE NEW LAW OF THE SEA 119, 124-25 (Donald R. Rothwell & Sam Bateman, eds., 2000).

⁴⁷⁴ AUSTRALIAN MARITIME SAFETY AUTHORITY, ASSESSMENT OF SHIP SAFETY CONTROLS IN THE TORRES STRAIT AND GREAT BARRIER REEF 28, § 5.3.3. (2001) ("Recommended Pilotage"), available at http://www.amsa.gov.au/publications/shipping/assessment_of_ship_safety_controls.pdf.

compulsory pilotage.”⁴⁷⁵ As Australian authorities take appropriate administrative action against vessels that fail to take on a pilot in the Torres Strait and subsequently enter an Australian port, compliance will likely be much higher. On the other hand, vessels that never intend to enter an Australian port and consider the benefits of using a pilot not worth the expense are unlikely to comply, even with the prospect of being cited for violating the regulation and being reported to the cognizant flag state authorities.

The sixth question concerns the impact the regulations will have on international navigational rights. These regulations will directly impact the right of transit passage through the Torres Strait. The regulations require the use of a pilot in passing through the strait; however, they do not deny or significantly impair the right to pass through. The disastrous effect that the grounding of a supertanker in the restricted waters of the Strait could potentially have, closing it off for transit by all vessels renders, the requirement to use a pilot a relatively minor burden. Of course, some substantial financial costs associated with using the services of a pilot exist, particularly since the transit time through the entire strait can require nearly 24 hours. This economic impact will no doubt discourage some marginally-profitable vessels from using the Torres Strait as a route to ports in Australia. However, by exempting sovereign immune vessels and vessels engaged in emergency transits⁴⁷⁶ and applying sanctions only after the vessel enters an Australian port, an objective appraisal must show that there is no serious impairment of the right of transit passage.⁴⁷⁷ On the other hand, the Torres Strait proposal could establish a precedent where strait States elsewhere seek to impose a mandatory pilotage regime on all vessels seeking to engage in transit passage, or where coastal States

⁴⁷⁵ *Id.* at 37, § 6.1.4. Historically, the total number of marine incidents in the Torres Strait from all causes is very low, approximately .60 per year. *Id.* at 26, Fig. 5.2 (“Incident Type across the Study Area”).

⁴⁷⁶ Davison, *supra* note 322 (excepting pilotage requirement for “sovereign immune vessels” and where a pilot could not be carried because of “stress of weather, saving life at sea or other unavoidable cause.”).

⁴⁷⁷ Some maritime States, particularly Singapore, Japan, Russia, the PRC, the Bahamas, South Korea, and the United States, argued that the Australian mandatory pilotage scheme would have the practical effect of seriously impeding the right of transit passage. Indeed, it was the lack of consensus that led the IMO to approve only a PSSA in the Torres Strait and recommend, but not require, the use of pilots while engaged in transit passage through it. Roberts, *supra* note 314, at 103-04. “Such a requirement could only be voluntary.” U.S. Delegation, MEPC 52 Delegation Report, Jul. 18-22, 2003, par. 3.

impose such a regime on all vessels engaged in innocent passage through the territorial sea.⁴⁷⁸ As the Russian legal expert V.D. Bordunov noted, “the sovereignty of the State may not be used as grounds for enlarging legislative power distinct from that granted by the [LOS Convention], nor for appropriating additional powers aimed at enforcing the laws extending to transit passage.”⁴⁷⁹ If this precedent claiming additional legislative power were emulated widely elsewhere or were extended to include enforcement measures against vessels actively engaged in passage, it could have a major adverse impact on freedom of navigation throughout the world.

The seventh relevant question is whether the exercise of jurisdiction under the circumstances would be consistent with Australia’s treaty obligations. If there were an FCN treaty in effect that specifically spoke to the issue, Australia would have to comply or it would be in violation of its obligations. The LOS Convention, to which Australia has been party since October 1994, is the most applicable. Under the LOS Convention, no state may impose a restriction on passage that would have “the practical effect” of impairing or impeding the inclusive right of transit passage.⁴⁸⁰ Several maritime States, including the United States, Singapore, Russia, South Korea, China, and Japan, argue that this mandatory pilotage requirement would have just such an effect.⁴⁸¹ However, UNCLOS and customary international law permit a coastal state to impose prudent and necessary laws and regulations to prevent pollution and promote maritime safety in its territorial sea under the territoriality

⁴⁷⁸ The United States cited the potential adverse precedent as a major concern in its February 2007 demarche to the Australian government: “This action could also serve as an adverse precedent for strait states to burden transit passage in other straits used for international navigation of critical importance.” SECSTATE WASHDC message 091524Z Feb 07, ¶ 5, V.

⁴⁷⁹ Victor D. Bordunov, *The Regime of Transit Passage Under the 1982 Convention*, 12 MARINE POL’Y 219, 225 (1988).

⁴⁸⁰ UNCLOS, *supra* note 4, art. 42(2). See *id.*, art. 44 (“States bordering straits shall not hamper transit passage . . .”)

⁴⁸¹ U.S. Delegation, MEPC 52 Delegation Report, Jul. 18-22, 2003, par. 3. “Some of these delegations forcefully expressed opposition to compulsory pilotage in straits used for international navigation, noting in their view such pilotage could only be voluntary.” *Id.*

principle.⁴⁸² And although no UNCLOS provision refers to pilotage, much less to mandatory pilotage for vessels merely engaged in innocent or transit passage. Under Australia's scheme, the exercise of the enforcement jurisdiction would not take place until the vessel is voluntarily present in port, which would normally be consistent with customary international law.

At the same time, Australia seeks to impose a compulsory pilotage requirement when the IMO has only approved a recommended pilotage scheme. For vessels that do not intend to visit Australia's ports directly after passing through the Torres Strait, therefore, enforcing the provisions would not be consistent with international law, because it would hamper or impair transit passage through an international strait. By its terms, UNCLOS does not authorize a strait state unilaterally to impose restrictions on transit passage designed to protect the environment and safety of navigation, but at the most to "refer [any such] proposals to the competent international organization [the IMO] with a view to their adoption."⁴⁸³ However, UNCLOS is an evolving treaty, and actions within the IMO and by individual States continue to modify its practical application. It may be that the international community will someday consider mandatory pilotage an appropriate requirement for coastal States to impose on vessels transiting straits, particularly in cases where the ecology of the strait is particularly sensitive. The appropriate way for this to happen, however, is on a case-by-case basis and with formal approval by the IMO.

Eighth, the criminal and administrative sanctions that Australia plans to impose for violation of the law or regulation appear to be reasonable and within the constraints of international law. While one might interpret "prosecution" to extend to criminal sanctions including jail sentences, sanctions the severity of which are beyond that permitted in international law, Australia's enforcement scheme for the mandatory pilotage requirement through the Great Barrier Reef Marine Park involves only the potential for a large fine. Additional administrative sanctions, including notification to the flag state and the IMO of those

⁴⁸² See *id.*, arts. 21 ("Laws and regulations of the coastal State relating to innocent passage") and 41 ("Sea lanes and traffic separation schemes in straits used for international navigation").

⁴⁸³ UNCLOS, *supra* note 4, art. 41(4). See also *id.*, art. 42(1)(a).

vessels that fail to employ a pilot, would be fully consistent with Australia's rights and obligations under international law.⁴⁸⁴

Ninth, the goal of protecting this particular PSSA from ecological disaster and maintaining safe and unobstructed transit through the Torres Strait is important not only to Australia but to the entire international community. The U.N. General Assembly and the IMO have recognized the ecological fragility of the Great Barrier Reef, the northern portion of which extends into the Torres Strait.⁴⁸⁵ The IMO has gone so far as to approve a scheme to recommend the use of pilots for vessels transiting through the Torres Strait. Moreover, a collision or grounding in the Strait would have ramifications for the entire international shipping community. Of course flag States could require that their vessels employ pilots while transiting the Torres Strait. Moreover, if a compelling case could be made that protecting this PSSA in this way were vital, the IMO could approve the full extent of the associated protective measures (APM's) Australia and Papua New Guinea has proposed. After careful consideration, the IMO decided not to approve a mandatory pilotage scheme. It is likely that the international community did not consider this APM sufficiently important to justify Australia's unilateral action.

The tenth question is the extent to which Australia's law and regulatory scheme is consistent with state practice. Requiring pilots while passing through restricted, busy, hazardous, or ecologically fragile waters as a condition of port entry is well established in the international community. Singapore, Japan, China, the United States, and other States that object to Australia's mandatory pilotage scheme require pilots as a condition of port entry for large commercial vessels and tankers. The unique wrinkle here, with no parallel state practice, is the requirement that foreign commercial vessels use a pilot even when the vessel is not bound for a destination under Australian jurisdiction. The concern is aggravated by the potential exercise of civil (and possibly criminal) jurisdiction many years later. According to Australia's legislative action, Australia will prosecute the master and/or owner of a vessel that fails to use a pilot while transiting the Torres Strait any subsequent occasion it enters an Australian port. This claim to a continuing exercise of jurisdiction is unique and troublesome.

⁴⁸⁴ See UNCLOS, *supra* note 4, art. 218(4) ("Enforcement by port States").

⁴⁸⁵ See Ottesen, *supra* note 316, at 507-514.

The eleventh question involves whether the competent international organization has approved of the regulation. As Dr. Rothwell observed: "If . . . a coastal state can work within existing international fora to have a regime of compulsory pilotage accepted for certain waters, then it may legitimately seek to enforce such a requirement within its territorial sea."⁴⁸⁶ In this case, however, because of opposition from certain other maritime States and the shipping industry, the relevant competent international organization, the IMO, did not approve the mandatory pilotage scheme that Australia had proposed. The IMO only approved a voluntary pilotage scheme for passage through the strait and recommended that flag States require vessels to employ pilots consistent with Australia's scheme. While the international community has consistently approved port state regulations that require the use of pilots as a condition of port entry, until the IMO approves a mandatory requirement scheme for the Torres Strait as an APM for this PSSA, exercise of jurisdiction over vessels merely engaged in transit passage to a non-Australian port on the voyage in question is inconsistent with international law.⁴⁸⁷

The twelfth question involves whether another state has a greater interest in regulating the activity. As a general rule, the flag state has the priority claim to exercise jurisdiction over its vessel. Obviously, the vessel's flag state could require that all of its vessels use Australian pilots when passing through the Torres Strait. This is what the IMO recommended, and the flag state may have an interest in doing so to better ensure the safe navigation of its vessels through the Strait. However, most open registry or flag of convenience States are unwilling to impose a requirement that will increase, even marginally, the costs of doing business, unless the requirement is a universal standard. To do otherwise would place their ships at an economic disadvantage.

Thirteenth, there is little likelihood of a serious conflict between Australia and any other state with an interest in regulating this particular activity. Australia and Papua New Guinea appear to be of one accord on this issue and, while Papua New Guinea has not announced any implementing regulations similar to Australia, nothing would prohibit that nation's authorities from doing so. If Australia imposes a fine on the master and/or operator of a foreign-flag vessel,

⁴⁸⁶ Donald R. Rothwell, *Navigational Rights and Freedoms in the Asia Pacific Following Entry Into Force of the Law of the Sea Convention*, 35 VA. J. INT'L L. 587, 605 (1994-1995).

⁴⁸⁷ *Id.* at 604-05 ("Compulsory pilotage").

that vessel's flag state may file a diplomatic protest against Australia's exercise of jurisdiction. However, any such conflict would likely be resolved through diplomatic, political, or legal channels. Moreover, as a matter of international comity, even a flag state is likely to complain only if it perceives that Australia has discriminated or otherwise treated one of its flag vessels unfairly.

As one of the foreign-flag States whose vessels would be most affected by Australia's new regulations, however, Singapore has objected strenuously to the mandatory pilotage scheme for vessels merely engaged in transit passage. Likewise, the United States has sent several notes to the Australian government protesting this action, reserving the rights of U.S. nationals and ships flying its flag using the Torres Strait and not directly bound for an Australian port.⁴⁸⁸ Given the purposes Australia has given for this scheme, to protect the environmentally fragile Torres Strait and the indigenous peoples who live and work there, however, no other state has a greater interest.

Fourteenth, Australia and Papua New Guinea sought IMO approval for its mandatory pilotage scheme. Moreover, Australia has notified the international community of this law and the consequences of not complying with it. The scheme does not deny port access, but rather imposes a fine upon vessels that fail to comply with the scheme and then enter an Australian port. Presumably, the legal procedures give the foreign-flag vessel an opportunity for a legal hearing to demonstrate that the imposition of the fine under the circumstances is unfair or inconsistent with international law.

Fifteenth, there will be few adverse practical consequences as a result of enforcing this mandatory pilotage scheme. During busy transit periods, vessels may begin to back up on either end of the strait while they wait for pilots to become available. Vessel operators will have to pay a pilotage fee that they previously did not have to pay. Some masters will likely argue that paying for a pilot is insufficiently beneficial to be worthwhile. At the margins, this view might result in some commercial vessels avoiding the Torres Strait and, potentially, trade with Australian ports that require passage through the Torres Strait. In the long run, however, enhancing navigational safety through the Torres Strait and avoiding an ecological disaster will likely save money. Australia is too large a market to avoid merely because of a

⁴⁸⁸ SECSTATE WASH DC message 091524Z Feb 07 ("Torres Strait Compulsory Pilotage: Third Demarche"), ¶ 5, VII.

pilotage fee. In any case, shippers will merely pass the cost of any such fee along to consumers for products being shipped through the Torres Strait. In other words, Australian consumers and those engaged in the international shipping trade to and from Australia will pay the costs.

Finally, the only other possible way to achieve the goal of having qualified pilots on commercial ships while they are engaged in transiting the Torres Strait is for the international community to approve, or for all flag States to impose, a mandatory pilotage requirement. So far, member States of the IMO have been unwilling to go that far. Until another ecological disaster in the Torres Strait or other restricted international waterway mobilizes the international community to act, either possibility is unlikely. While there are significant costs associated with a mandatory pilotage scheme, the purpose is not merely a full-employment bill for Australian pilots. If having a qualified pilot on board to assist safe navigation prevents the massive ecological damage and cleanup costs associated with a single disastrous collision or grounding in the waters of the Torres Strait, these regulations would be worthwhile.

While the shipping industry, representatives of flag of convenience States, and proponents of unrestricted freedom of navigation might well object to Australia's legislation, these regulations, as they relate to vessels engaged in a voyage to or from an Australian port, seem objectively reasonable. On the other hand, with respect to vessels simply engaged in transit passage through the Torres Strait, on a voyage to or from ports outside of Australia, the restrictions are unjustified. It will be interesting to see how Australian courts, and the international community, particularly international shipping companies, react to the first cases in which Australian authorities seek to impose a large fine on a vessel's new owners for something that the vessel had done in years past. A legal challenge by the flag state of the vessel, perhaps in the International Tribunal of the Law of the Sea, is likely to occur at some point. "Ultimately this may well be the only way to resolve the divergent views over the legal basis of compulsory pilotage measures in a strait used for international navigation."⁴⁸⁹

D. Harmonizing National and International Standards and Expectations. Even where the port state can demonstrate that the proposed regulation is important and, under the factors discussed above, 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

⁴⁸⁹ Roberts, *supra* note 314, at 107.

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.”⁴⁹⁰ Before establishing such schemes within international straits used for international navigation, the LOS Convention requires that the “States bordering the straits shall refer proposals to the competent international organization with a view to their adoption.”⁴⁹¹ 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”⁴⁹² Based on comity and efficiency, all States should seek to harmonize their national expectations, standards, and procedures with those of the international community.

UNCLOS provides for coordinating proposals that effect 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”⁴⁹³

XIII. RECOMMENDATIONS AND CONCLUSION

For the continuation and expansion of world trade by sea, policy makers must seek to ensure that ocean trade continues to flourish and grow. This requires promoting access to key ports with minimal

⁴⁹⁰ UNCLOS, *supra* note 4, art. 22(3)(a).

⁴⁹¹ *Id.*, art. 41(3). Moreover, any such proposals “shall conform to generally accepted international regulations.” *Id.*, art. 41(2).

⁴⁹² *Id.*, art. 211(5). *See also id.*, art. 211(6)

⁴⁹³ FAL Convention, *supra* note 45, 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).

restrictions and conditions. Toward this end, international law presumes that the ports of every coastal state should be open to all foreign commercial vessels, and a port may be closed or a vessel denied access to the port only when important interests of the coastal 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, including homeland security, their laws related to fiscal, immigration, sanitation, and customs matters, combating the scourge of illegal drugs, protecting the coastal environment, and other matters directly related to the port visit of a vessel. To promote and protect these and other important interests, port states have a right to close their ports or to impose conditions on port access and exit with respect to a broad range of important interests directly related to the vessel's visit, including national security, navigation, safety, health, immigration, and customs, and to prevent degradation of the marine environment. A port state may restrict access 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 access or exit requirements on foreign merchant vessels, or exercise jurisdiction on foreign-flag vessels in port, even those designed to promote important goals, 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, port states 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, and the exercise of the rights of innocent passage, transit passage, and archipelagic sea lanes passage in coastal waters. Moreover, denial of port access or imposing unreasonable conditions on port access 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 to 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 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 policy makers 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.

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FUNDAMENTAL PRINCIPLES AND CONCLUSIONS

1. International law presumes that the major ports of every coastal state will remain accessible to all foreign commercial vessels and that a port may be closed or entry conditioned only when important interests of the coastal state justify such action.
2. Port states have a right to close their ports or to impose conditions on port access and exit with respect to a broad range of important interests directly related to the vessel's visit, including national security, navigation, safety, environmental protection, health, immigration, and customs.
3. Port states may not impose port access or exit requirements on foreign merchant vessels, even those designed to promote important goals, not reasonably and directly related to the specific voyage of the vessel in question.
4. Port states may not unreasonably discriminate among foreign-flag vessels in the application of laws governing port access or in the exercise of jurisdiction in port.
5. Port states may close their ports to foreign warships, fishing vessels, and private recreational craft for any or no reason, or may impose any precondition on entry or departure that the state deems appropriate.
6. In an emergency distress situation constituting *force majeure* due to hazardous weather conditions or other danger representing a risk to life or loss of the vessel, a foreign-flag commercial vessel should be allowed to take shelter in any convenient coastal water or port until such time as the emergency condition ends. During such emergency visits, the

port state should refrain from exercising any jurisdiction over the vessel other than to verify its claim of *force majeure*.

7. However, even in cases of *force majeure*, a port state may prevent or condition entry when the vital interests of the state so require it. In such cases, coastal States in the area have an obligation to render assistance to save the lives of mariners in distress at sea and attempt to mitigate marine pollution.
8. The United States must generally comply with its obligations under international law, and courts will assume that Congress intended to do so, limiting the apparent jurisdictional scope of the statutes. However, nothing prevents Congress from disregarding such international legal obligations, and U.S. courts will enforce the language of any such statute, so long as congressional intent to do so is clearly manifested in the statute.
9. Applicable bilateral and multilateral treaties may provide for unrestricted port access to the merchant vessels of certain States under specified conditions. Denial of access, except for failure to comply with applicable laws and regulations directly related to the visit, would be a violation of such a treaty.
10. Under customary international law, a port state may generally enforce laws that relate to activities of a foreign vessel that take place while the vessel is in port, or that took place in the waters of the port state prior to the vessel's entry into port or as the vessel leaves port, except those related solely to the "internal affairs" of the vessel. Such "internal affairs" are the legal responsibility of the flag state.
11. A port state may only impose charges and fees on foreign-flag commercial vessels calling on a port related to services actually rendered, as well as for non-discriminatory customs fees and other taxes.
12. The application of the law of the port state should not have the practical effect of denying or impairing freedom of navigation in international waters or the exercise of the rights of foreign-flag vessels to engage in innocent passage, transit passage, and archipelagic sea lanes passage through coastal waters.

13. Denial of port access or imposing unreasonable conditions on port access 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, less directly, the world community at large.
14. International lawyers and policy makers must strive to ensure that access to the world's ports is as free as reasonably possible and that conditions on entry and exit of foreign-flag commercial vessels are directly and effectively related to the important interests of the port state and the world community at large.
15. Any imposition of conditions on port access or exercise of jurisdiction over foreign-flag commercial vessels in port in violation of international law gives rise to a right to seek redress through legal, diplomatic, or other appropriate means.
16. Even if international law permits a coastal state to deny or restrict access to foreign-flag vessels, the coastal state must have domestic authority and must follow prescribed procedures when doing so. To the extent practicable, the denial decision must be communicated to the vessel in a timely manner, and the vessel should have the due process right to appeal the decision.
17. To the extent practicable, the conditions foreign-flag commercial vessels must meet to obtain port access and the requirements and administrative procedures for complying with them, including required data and administrative forms, should be as simple as possible and consistent worldwide.

