Awakened to the inherent vulnerability of ships and seaports to the twenty-first century brand of terrorism, the global seafaring community is largely putting aside regional, political, and ideological differences to devise a new international legal framework to safeguard world shipping interests, protect coastal populations from the threat of surreptitious seaborne attack, and to assure trading partners of ship and cargo security. The first iteration of the world-wide effort to regulate port security is codified in a document authorized by amendment to the 1974 United Nations Convention on Safety of Life at Sea (“SOLAS”), called the International Ship and Port Facility Security (“ISPS”) Code. Originally adopted to promote mariners’ welfare, SOLAS set forth rules for the construction and navigation of ships engaged in international
Pursuant to a 2002 amendment, SOLAS signatories were required to implement the provisions of the Code and self-certify compliance by July 1, 2004. Since then, as participating nations recognize opportunities to improve upon ISPS Code’s basic tenets, they continue to refine the regulations in their own bodies of laws. Participating governments have established programs to coordinate the international application of ISPS regulations. Using a wide array of legislative devices such as treaties, statutes, regulations, rules, executive orders, and royal decrees, the world’s maritime nations have spontaneously created an entire field of international maritime law—where none existed before.

This article considers the conditions giving rise to international port security law and the subsequent and future legislative and regulatory evolution of international port security law. This article weighs the regulatory influence of the ISPS Code from the United States’ perspective and will consider five main issues of port security law. First, to what degree is global port security constrained by self-imposed regulatory gaps in the ISPS Code? Second, how have SOLAS signatory nations addressed and corrected regulatory deficiencies arising from these gaps? Third, how has the United States addressed the jurisdictional challenges resulting from the ISPS Code and from maritime law in general? Fourth, to what extent have ISPS Code regulation protocols given rise to unforeseen legal uncertainties involving jurisdictional infringement, trade agreement adherence, evidentiary procedures, criminal prosecutions, contractual obligations, and tort litigation? Finally, how can maritime nations continue to improve and strengthen the international port security legal regime?

In order to enhance the international port security legal regime, this article then proposes that the United Nation’s International Maritime Organization (“IMO”) develop an advanced international port security regulatory model. This advanced port security regulatory model will promote international cooperation, facilitate information sharing, and elevate the global port security regulatory discussion above and

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3 SOLAS, supra note 2, preamble.
4 Id.
beyond the existing ISPS Code minimum standard. This, in turn, will improve global security.

I. BACKGROUND

Marine insurance giant Lloyd’s of London estimates that approximately 112,000 merchant vessels comprising the contemporary maritime shipping industry link the world’s 11,892 international port facilities in 155 coastal nations, dependent territories, and island states. Roughly half a billion containers are dispatched to the seas each year and one in nine of these containers are bound for the United States. Annually, U.S. ports handle in excess of 50,000 international vessel arrivals, receiving almost ten million containers by sea transport, along with hundreds of millions of tons of liquid and bulk cargo. Due to the sheer size and complexity of maritime transit based commerce, the U.S. Transportation Security Administration and Federal Bureau of Investigation have identified the global shipping network as the most viable and logistically feasible conduit to move a terrorist organization’s weapons and operatives to the United States.

The overwhelming flow of container cargo entering the United States by sea makes unilateral security oversight virtually impossible. Security checks of marine imports at U.S. points of entry are negligible

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5 Peter Chalk, Maritime Terrorism: The Threat to Container Ships, Cruise Liners, and Passenger Ferries, in LLOYD’S MIU HANDBOOK OF MARITIME SECURITY 117, 118 (Rupert Herbert-Burnes et al., eds., 2009).


and only about ten percent of containers and bulk cargos are subject to scrutiny.\textsuperscript{9} Even then, a security “screening” may consist only of the computer reconciliation of cargo manifests and bills of lading. Further compounding the issue, the supply chain is frighteningly porous. Stretching from manufacturer to consumer, the supply chain winds through a frequently unvetted shipper, then exporter, importer, freight forwarder, customs broker, excise inspector, an uncleared dock worker, and a truck driver, a harbor feeder craft, an ocean carrier, and finally, it reaches the consumer. This long chain presents a myriad of opportunities for exploitation by terrorist groups. For example, terrorist groups are adept at defeating the rudimentary container locks and seals in current use by the shipping industry—and access to these containers are made easier by the porous nature of the chain.\textsuperscript{10}

A. New Threats to International Maritime Security

The world is a different place than it was when the nineteenth century naval historian Alfred Thayer Mahan theorized that “(a)s a nation . . . launches forth from its own shores, the need is soon felt of points upon which the ships can rely for peaceful trading, for refuge and supplies. In the present day friendly, though foreign, ports are to be found all over the world; and their shelter is enough while peace prevails.”\textsuperscript{11} With the dawn of the twenty-first century, many maritime nations find this friendly shelter threatened by terrorists.

Evidence of the security challenges inherent to the modern shipping industry is plentiful. In October 2001, dockworkers in the southern Italian port of Gioia Tauro investigated unusual noises coming from a Canadian-bound container and found Rizik Amid Farid (“Farid”) inside a well-appointed box. Farid, an Egyptian national and suspected al Qaeda member, was bearing communications devices, computers, maps, and an airline mechanic’s certificate. The airline mechanic’s certificate was valid for New York’s JFK, Newark, Los Angeles

\textsuperscript{10} Joshua Ho, Managing Port and Ship Security in Singapore, in LLOYD’S MIU HANDBOOK OF MARITIME SECURITY 307, 307-09 (Rupert Herbert-Burnes et al., eds., 2009).
\textsuperscript{11} ALFRED THAYER MAHAN, THE INFLUENCE OF SEA POWER UPON HISTORY 27 (Dover Publications 1987) (1890).
International, and O’Hare Airports. After his arraignment and release on bond, the stowaway disappeared. Soon after the September 11th attacks, Abdul Qadeer Khan (“Khan”), the founder of Pakistan’s nuclear development program, stepped up covert nuclear assistance to known state sponsors of terrorism. Having previously provided clandestine technical assistance to Iran, Libya, and North Korea, Khan secretly arranged for the transport of nuclear production components by container ship to those countries from 2002 to 2003. When one of the ships was intercepted, Khan confessed his involvement, but the extent of the illicit container shipments remains unknown. In December 2002, covert North Korean ballistic missile shipments were intercepted en route to Yemen. In April 2005, Chinese human traffickers set up a fraudulent import/export company and outfitted a container with food, water, blankets, sleeping bags, circulation fans, and pre-cut egress holes. Twenty-nine people boarded the container and transited to the Port of Los Angeles, remaining undetected until they attempted to exit the port facility.

Even when not specifically targeted, the global maritime supply chain can be profoundly impacted by terrorism. This was illustrated in the days following the September 11th attacks when the U.S. Customs Service ratcheted the standing port security posture to such a level that all ports of entry were effectively closed. This halted import/export operations, severely impacted time sensitive manufacturing operations,

13 Michael Laufer, A.Q. Khan Nuclear Chronology, 8 CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE 1, 7-8 (2005).
substantially hindered output in the heavy industrial sector, and disrupted a wide range of international commerce.\textsuperscript{17}

Mirroring the U.S.’s reaction to September 11th, the international community immediately took action. The IMO’s responsive development and imposition of maritime security requirements was conducted at a pace described as “mind-boggling.”\textsuperscript{18} In November 2001, the IMO scrambled to close the gaps in ship-to-port security made painfully obvious by the previous month’s terrorist attacks. Seizing upon the malleable and already widely accepted SOLAS\textsuperscript{19} as the speediest device to improve security, the IMO chose it as a means to standardize and give effect to a uniform list of ship and port facility security measures.\textsuperscript{20} The twenty-seven year old SOLAS Convention was amended on December 12, 2002 to incorporate the ISPS Code, a newly minted set of maritime transportation security standards that could respond better to the threats posed by international terrorism.\textsuperscript{21}

The stated objective of the ISPS Code was to “establish the new international framework of measures to enhance maritime security and through which ships and port facilities can co-operate to detect and deter acts which threaten security in the maritime transport sector.”\textsuperscript{22} The ISPS Code imposes basic security obligations upon international port

\textsuperscript{17} Joseph L. Parks, \textit{The United States-Canada Smart Border Action Plan: Life in the FAST Lane}, L. & BUS. REV. AM. 395, 399 (2004); \textit{State of Maritime Security Hearing, supra note 9} (“[A] terrorist incident against our marine transportation system would have a devastating and long-lasting impact on global shipping, international trade, and the world economy. Based on a recent unscheduled port security closure incident, a maritime terrorist act was estimated to cost up to $2 billion per day in economic loss to the United States.”).


\textsuperscript{19} The United Nations Convention for the Suppression of Unlawful Acts Against Maritime Navigation also afforded means to address this issue. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, arts. 3-4, Mar. 10, 1988, 1678 U.N.T.S. 221 (defining a panoply of offenses pertaining to the terroristic use of ships either international transit, or ships in port and scheduled to be in international transit).

\textsuperscript{20} ISPS Code, \textit{supra} note 3, preamble, para 5.

\textsuperscript{21} ISPS Code, \textit{supra} note 3, foreword, p. iii.

\textsuperscript{22} ISPS Code, \textit{supra} note 3, part B, 1.1.
facilities and shipping interests of contracting governments and supplements those obligations with optional implementation guidance. Addressing the security responsibilities of the shipper and the port facility, the ISPS Code mandates: (1) security threat assessment; (2) the establishment of ship-to-port communications; (3) physical access restriction; (4) weapons and explosives interdiction; (5) security threat notification; (6) ship and port facility security assessment and planning; and (7) the performance of security training, drills, and exercises. 23 Complementing the mandatory provisions, the ISPS Code envisions more specific measures and arrangements needed to achieve and maintain compliance with the mandatory requirements, 24 particularly with respect to the protection of ships berthed within port facilities (i.e., the ship-to-port interface). 25

B. ISPS Code Limitations

Though conceptually ambitious, the ISPS Code suffers from a number of built-in limitations 26 that undermine its ultimate effectiveness. First, as noted above, the ISPS Code is only partially mandatory. The mandatory portion constitutes only about a third of the Code, rendering it more of a port security primer lacking the application of meaningful port security measures. ISPS Code’s optional portion delves into greater detail on the mechanics of security, but its implementation cannot be compelled. Second, even the mandatory security measures are restricted to ship-to-port interface. 27 Beyond the immediate boundaries of regulated wharves and piers, the international community makes no

23 ISPS Code, supra note 3, part A, 1.3.
24 ISPS Code, supra note 3, part B, 1.2, 1.4-1.5.
25 ISPS Code, supra note 3, part B, 1.4 (“There could, however, be situations when a ship may pose a threat to the port facility, e.g. because, once within the port facility, it could be used as a base from which to launch an attack.”).
26 ISPS Code, supra note 3, preamble para. 5 (“[I]t was ... agreed that the provisions relating to port facilities should relate solely to the ship/port interface. The wider issue of security of port areas will be the subject of further joint work between the International Maritime Organization and the International Labour Organization. It was also agreed that the provisions should not extend to the actual response to attacks or to any necessary clean-up activities after such an attack.”).
27 Id.
demands. Supra port facilities remain unregulated. Furthermore, the IMO specifically declined to address incident response procedures in the ISPS Code, which is of little help to developing nations and, by design, also completely fails to provide enforcement guidance. Standing alone, the ISPS Code is limited in scope because it is mostly suggestive, lacks meaningful security guidance, and is, as a practical matter, unenforceable.

C. SOLAS 74: International Responses

Enforceability issues aside, the philosophy behind the ISPS Code’s universal port security scheme is based on twin precepts: to be effective, security measures must be initiated at the beginning of the supply chain (the production/loading phase) and it is easier to prevent a terrorist device from entering the supply chain than to detect it once it is there. This modern cargo security methodology employs a chain-of-custody approach similar to the start-to-finish control of evidence in a criminal investigation. In order to have the chain-of-custody approach within the global maritime trade, previously unheard of levels of international cooperation fostering heightened maritime security awareness are required. To this end, SOLAS’s 2002 amendment pertaining to port security required all of the Convention’s one hundred and fifty-five signatories to promulgate the individually applicable laws, decrees, orders, and regulations necessary to fully implement the fledgling ISPS Code in their jurisdiction by July 1, 2004. Although this initiative is meeting varying degrees of success, it promotes a compelling common objective, coupled with significant commercial incentives, and most maritime states have complied to the best of their respective abilities.

28 Id.
29 Id.
31 Id. at 137.
32 SOLAS, supra note 2, art. I(b).
33 ISPS Code, supra note 3.
The global family of water-bordering states is as diverse as its constituents. Illustrating this, the maritime community employs a wide array of legislative tools to implement the ISPS Code. The most basic form of compliance is implementation by citation. By this method, some SOLAS signatories opt to adopt the entire ISPS Code as written, without expansion. Other signatories restate the ISPS Code language in full or in part in their own legislative traditions. While technically sufficient to comply with standing international obligations, these methods of implementation automatically adopt the ISPS Code’s built-in shortcomings, rendering the subject government powerless to respond to security incidents or to enforce security standards in the absence of supplemental legislation. Though nations may rise to independently address this challenge, the potential impact upon the effectiveness of port security in developing nations may be significant. Worse, some SOLAS signatories rely upon aging general port regulations that fail to address security altogether and others neglect to report any effort at compliance.

Anticipating the challenges to developing nations, the Convention, by resolution, strongly urged signatories and member states to “provide, in co-operation with the organization, assistance to those..."
States which have difficulty in implementing or meeting the requirements of the adopted amendments or the ISPS Code....40 To further this, the IMO initiated the Global Program on Maritime and Port Security in 2002 to assist developing countries in improving SOLAS and ISPS Code compliance.41

D. The United States’ Approach to Port Security

The United States was motivated to significantly contribute to the development of the international port security infrastructure to counter the most spectacular terrorist attentions in modern history. U.S. port security legislation took a truly innovative turn in the international realm post-9/11. Taking what is arguably the most vigorous approach to port security, the United States’ domestic port security implementation strategy relies on U.S. Coast Guard officers appointed as port captains42 who have authority to establish security zones,43 command incident response efforts,44 and to otherwise enforce port security laws and regulations.45 By late 2002, the U.S. stood ready to proactively implement its own port security legislation and adopt regulations with verbiage remarkably similar to the international effort.46 Not content to rely upon the efficacy of the fledgling ISPS international maritime security scheme for the protection of the American seaports, Congress took unprecedented measures to push the boundaries of the U.S. maritime transportation system all the way to the ports of origin around the world. Signed into law almost a month before the ISPS Code’s

40 ISPS Code, supra note 3.
43 33 C.F.R. §1.05-1(f) (2012).
46 Maritime Transportation Security Act of 2002, Pub. L. No. 107-295, 116 Stat. 2067 (2002) (“It is in the best interests of the United States... to have a free flow of interstate and foreign commerce and to ensure the efficient movement of cargo ... . The International Maritime Organization and other similar international organizations are currently developing a new maritime security system that contains the essential elements for enhancing global maritime security. Therefore, it is in the best interests of the United States to implement new international instruments that establish such a system.”).
adoption, the U.S. Maritime Transportation Security Act47 ("MTSA") granted the U.S. Coast Guard48 sweeping powers to regulate domestic and international shipping within U.S. ports and territorial waters.

Similar in theme but far more specific than the ISPS Code, MTSA established detailed new regulatory authority in maritime governance,49 shipping,50 port facility51 and outer continental shelf security.52 Given the United States’ influence as a global economic power, MTSA effectively codified maritime transportation security protocols not only for the U.S., but also for every seafaring nation seeking to trade along her shores because the party must comply with the MSTA.53

In 2004, the U.S. Coast Guard established the International Port Security ("IPS") Program to meet MTSA’s foreign port assessment mandates.54 IPS Program representatives, who are primarily junior officers below the rank of Commander, are dispatched around the world to meet with key government and port authorities to verify compliance with international security standards and assess the effectiveness of anti-terrorism measures in facilities that service U.S.-bound vessels.55

47 Id.
51 33 C.F.R. § 105 (2011). In concept, “ports” are much more expansive than “port facilities,” which are generally limited to the ship-to-port interface. Accordingly, depending on the geography and nature of commerce in a coastal area, a single port may contain several separate and distinct port facilities, each with its own owner/operator and cargo specialty (i.e. petroleum, container, bulk, passenger, etc.).
53 Similarly influential, Australia, Canada, and the European Community soon followed with similar maritime security legislation that further solidified international ship and port facility security standards.
55 US COAST GUARD, Navigation & Vessel Inspection Circular No. 06-03 (2007); Lundquist, supra note 55, at 136, 137 (quoting Commander Tanya Schneider).
The IPS Program prefers to take a cooperative, bi-lateral approach, inviting foreign maritime trading partners to the United States to observe how the U.S. Coast Guard implements port security on a reciprocal basis.56 Since its inception, the IPS Program finds the policy of reciprocity sufficient to overcome most jurisdictional hurdles. The U.S. Coast Guard has visited the port facilities of more than 150 maritime trading partners, and more than half of the world’s coastal nations have accepted the invitation to view U.S. port facilities in return.57

In addition to defining domestic port security obligations and establishing a policy of reciprocity, the MTSA requires the U.S. Coast Guard to evaluate the effectiveness of anti-terrorism measures in the ports of foreign trading partners,58 notify those governments of noted lapses,59 provide technical assistance to correct security deficiencies which could potentially affect U.S. port security, and to prescribe conditions of entry for any vessel arriving from a foreign port that does not maintain effective anti-terrorism measures.60

In the event of an adverse determination, the U.S. Coast Guard, in cooperation with the U.S. Department of State, must issue a formal demarche to the trading partner outlining the noted deficiencies and recommending steps for improvement.61 A foreign government has

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56 Lundquist, supra note 55, at 137 (quoting Commander Tanya Schneider). Private port owners in the United States are under no statutory or regulatory obligation to cooperate with the Coast Guard to allow foreign port security delegations access their facilities. While the Coast Guard enjoys domestic port facility access by virtue of its numerous law enforcement and regulatory authorities, that power does not extend to authorizing access to third parties and foreign powers. See 33 C.F.R. §§ 101-106 (2011). Should the Coast Guard ever seek to force the issue, a reluctant port owner could potentially object on the ground that the U.S. sponsored inspection of a facility by a foreign power constitutes a violation of the Fourth Amendment prohibition against unreasonable searches and seizures. U.S. CONST. amend. IV. Furthermore, such an involuntary inspection would violate regulatory prohibitions on divulging the proprietary information and trade secrets of U.S. entities. 49 C.F.R. § 1520.7 (2011).


61 46 U.S.C. § 70109(a) (2006) (stating that unless the Secretary “[f]inds that a port in a foreign country does not maintain effective antiterrorism measures, the Secretary shall
ninety days from the date of notification to remedy major security deficiencies within its port facilities.\(^{62}\) After the ninety days, if the trading partner remains unresponsive, the U.S. Coast Guard must notify the public of the insufficiency of security measures within the ports of that country.\(^{63}\) This notice, known as a Port Security Advisory (“PSA”), is published in the Federal Register and alerts U.S. Coast Guard units and the maritime industry at large to the security deficiencies and the control measures prescribed for ships coming from non-compliant ports.\(^{64}\) Vessels arriving in the U.S. that have visited any country on the PSA list during their five most recent port calls are normally boarded or examined by the U.S. Coast Guard to ensure the vessel implemented sufficient security measures while in those ports.\(^{65}\) If the Captain of the Port is not satisfied with the vessel’s security posture, the Captain may impose conditions of entry\(^{66}\) and then deny entry if the vessel does not meet those conditions.\(^{67}\) If the government of a foreign trading partner refuses to cooperate or otherwise obstructs the assessment process, the U.S. Coast Guard is empowered by statute to formally conclude non-compliance with international port security standards by virtue of its inability to complete the assessment due to the lack of cooperation.\(^{68}\)
In theory, if foreign port security measures are similar to U.S. MTSA standards, the respective trading partners could enter into cooperative agreements recognizing this to satisfy mutual assessment requirements. The obvious benefits of such an arrangement include freeing personnel to concentrate assessment efforts in areas of genuine need, reduced costs to all parties, and an enhanced atmosphere of cooperation and partnership between signatories. However, such an agreement will require an adjustment to existing U.S. law, which currently imposes a positive obligation on the U.S. Coast Guard Commandant to reassess the effectiveness of antiterrorism measures in foreign ports not less than once every three years. To allow for bilateral security agreements in this context, the statute must first be amended to allow the U.S. Coast Guard to rely upon PSAs performed by approved third parties. While under discussion, this idea has not advanced legislatively.

II. PORT SECURITY LAW

To date, there are no legal challenges against the United States’ policy and procedure for assessing anti-terrorism measures in foreign ports and imposing conditions on ships arriving from foreign ports. However, the rapid domestic and international progression of the body of port security regulation gives rise to the potential for repercussions in other areas of public and private law. In the absence of extant case or controversy, the student of international port security law is not afforded the benefit of authoritative deliberation and guidance. Nevertheless, certain avenues for legal debate are obvious in the areas of jurisdictional authority, trade obligations, contracts, torts, criminal law, evidence and international convention.


A. Public Law

To the extent that port security law frequently invokes intergovernmental interaction, the body of public law is perhaps most sensitive to the emanations of these regulations. Political, ideological, or nationalistic differences may spark criticism of America’s unrepentant regulatory focus on port security even though global maritime trade arguably benefits from the increased security environment promoted by U.S. law and foreign policy. In some quarters, the United States is derided as the self-assumed guardian of the world order writ large, especially by countries with more complex hostilities hard wired into the national, tribal, or religious psyche.

1. State Sovereignty

Addressing Congress in 2004, Admiral Thomas Fargo, the former commander of U.S. Forces in the Pacific, suggested the deployment of special operations forces in high-speed vessels to protect U.S. shipping against the threat of terrorism in the Strait of Malacca and approaches to the Port of Singapore. Malaysia rejected the proposal out of hand, noting that they could look after their own area and that “the use of forces in Southeast Asia to fight terrorism will only serve to fuel Islamic Fundamentalism.” Likewise, the Indonesian Foreign Ministry balked at U.S. participation in the region on the ground, stating “[i]t is the sovereign responsibility and right of the coastal states of Indonesia and Malaysia to maintain safety and security of navigation in the Malacca Strait.”

74 Indonesia Joins Malaysia in Shunning U.S. help in Malacca Straits, ASSOCIATED PRESS, Apr. 12, 2004 (quoting Foreign Ministry spokesman, Marty Natalegawa); Ramachandran, supra note 75.
The precept of state sovereignty is enshrined by the United Nations Charter and embraced by international courts. Pursuant to the United Nations Convention on the Law of the Sea this sovereignty is also applicable to the territorial seas, harbors within, and roadsteads beyond. In the United States, the commitment to the sanctity of national sovereignty is perhaps most evident with regard to the protection of her shores. The U.S. Supreme Court has long held that territorial waters 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.” Thus, Congress has “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.” In application, the Third Restatement of the Foreign Relations Law of the United States notes that “in general, maritime ports are open to foreign ships on condition of reciprocity, . . .

75 U.N. Charter art. 2.
78 UNCLOS, supra note 78, art. 2 (“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.”).
79 UNCLOS, supra note 78, art. 11 (“For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system are regarded as forming part of the coast.”).
80 UNCLOS, supra note 78, art. 12 (“Roadsteads which are normally used for the loading, unloading and anchoring of ships, and which would otherwise be situated wholly or partly outside the outer limit of the territorial sea, are included in the territorial sea.”).
81 The United States is, by history and geography, a maritime nation and its national security is inextricably linked with seaport security and the control of territorial waters and its approaches. Haig v. Agee, 453 U.S. 280, 307 (“It is ‘obvious and unarguable’ that no governmental interest is more compelling than the security of the Nation.”) (quoting Aptheker v. Secretary of State, 378 U.S. 500, 509 (1964)).
83 Lauritzen v. Larsen, 345 U.S. 571, 592-93 (1953). This authority derives from the enumerated powers of Congress under the U.S. Constitution. See U.S. Const. art. I, § 8 (“The Congress shall have power … [t]o regulate Commerce with foreign Nations ….”).
but the coastal State may temporarily suspend access in exceptional cases for imperative reasons . . . ”

In 1986, the International Court of Justice echoed U.S. jurisprudence and set a precedent more specifically applicable to the discussion of ISPS Code implementation and enforcement in light of public law state sovereignty. In an attempt to deter Nicaragua from launching guerilla attacks against its Central American neighbors in the early 1980’s, the U.S. imposed sanctions against the regime of Manuel Noriega, closing American ports to vessels of Nicaraguan registry. The sanctions were challenged in the International Court of Justice by the Nicaragua Mining Company. Supporting U.S. policy, the court held that internal waters are subject to the sovereignty of the particular port state and that it is "by virtue of its sovereignty that the coastal State may regulate access to its ports.” Considerations of state sovereignty naturally lead to jurisdictional discussions.

2. U.S. Jurisdiction Over International Waters

This paper will not delve into the intricacies of jurisdiction, except to note the exceptional circumstances under which U.S. courts occasionally adjudicate on extraterritorial matters with no traditional jurisdiction.

86 As an aside on the general issue of Sovereignty, ISPS Code Part B, section 4.3 allows contracting governments to authorize a Recognized Security Organization (RSO) to undertake certain security related activities, including: (1) approval of Ship Security Plans, or amendments thereto, on behalf of the Administration; (2) verification and certification of compliance of ships with the requirements of chapter XI-2 and part A of this Code on behalf of the Administration; and (3) conducting Port Facility Security Assessments required by the Contracting Government. Although it is incumbent upon each SOLAS signatory to identify and qualify its own RSOs, there are many companies which provide international RSO services. Where such services are rendered, the RSOs are arguably exercising regulatory authority over that country’s shipping and port infrastructure, thus suggesting that the contracting governments have ceded certain of their sovereign powers to the foreign companies.
87 The general concept of “jurisdiction” encompasses not only the traditional exercise of adjudicative and regulatory power by courts and law enforcement agencies, but also describes the constitutional powers of Congress to exert extraterritorial authority to promote the interests of U.S. foreign policy in the form of legislative jurisdiction.
jurisdictional nexus. One such avenue for jurisdiction is territorial, which arises from the location of an offense.88 If no territorial connection exists, a nation may still create that nexus on the high seas or in foreign territorial waters through bi-lateral enforcement agreements or by obtaining the consent of any other affected states.89 Long employed by the U.S. Coast Guard to greatly extend the bounds of general maritime law enforcement authority, bi-lateral and consent agreements are supported by U.S. courts, which have held that nothing prevents two nations from agreeing that the domestic laws of one nation shall be extended onto the high seas or into the territorial waters of the other.90

3. Congressional Authority

By contrast, the extraterritorial reach of Congress in matters of foreign policy has nothing to do with the jurisdiction of the courts. The Constitution grants Congress broad powers to “regulate Commerce with foreign Nations,”91 and the Supreme Court upholds the Congressional power to “make laws applicable to persons or activities beyond our territorial boundaries where United States interests are affected.”92 Congress is generally presumed not to have exceeded the limits of customary international law.93 94 However, that is not to say that Congress is absolutely bound by international law.95 Although acts of Congress do not normally have extraterritorial application, that presumption may be overcome if such intent is clearly manifested, particularly with regard to the application of treaties and circumstances

88 United States v. Smith, 680 F.2d 255, 257 (1st Cir. 1982).
89 United States v. Cardales, 168 F.3d 548, 553 (1st Cir. 1999).
90 United States v. Gonzales, 776 F.2d 931, 938 (11th Cir. 1985).
91 U.S. CONST. art. I, § 8, cl. 3.
93 See Hartford Fire Ins. Co., 509 U.S. at 814 (stating that under one of the fundamental tenets of statutory construction, “an act of congress ought never to be construed to violate the law of nations if any other possible construction remains.”) (quoting Murray v. Schooner Charming Heart, 6 U.S. 64, 81 (1804)).
that involve foreign and military affairs. Accordingly, if it chooses to do so, Congress may legislate with respect to conduct outside the United States in excess of the limits imposed by international law. Where the presumption against extraterritoriality is overcome or is otherwise inapplicable, Congress is deemed to have asserted its “legislative jurisdiction” or “jurisdiction to prescribe.” Establishing adjudicative or legislative jurisdiction to govern port security on a public law state sovereignty basis is only the first step towards affecting enhanced international port security protocols.

4. Enforcement

Whether implemented by international agreement or through unilateral assertion of legislative jurisdiction, the efficacy of port security standards abroad ultimately rests on the enforcing nation’s power to punish non-compliance, typically through the influence or manipulation of market forces. In fact, the U.N.’s IMO takes the general position that while it has no direct power to enforce the ISPS Code, it anticipates that market forces and economic factors will either drive compliance or quickly force non-cooperative shippers and facilities out of the market. In U.S. ports, conditions of entry designed to safeguard against terrorist attacks also tend to subject non-compliant vessels to increased scrutiny, delay, and additional costs. PSAs serve to deter passenger traffic to non-compliant countries. Given the commercial strength of the United States, the issuance of conditions of entry and public security warnings ultimately has the potential to affect shipping rates, increase insurance premiums, deter tourism, and cause the diversion of cargo to

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98 Id. at 813; RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 60 (1934); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 401, 403 (1987).
100 Brown, supra note 63, at 48.
more security-conscious countries. In theory, the threat of such business losses should be incentive to promote port security measures sufficient to the higher standards of more security-conscious nations. The willingness of most maritime states to cooperate with the U.S. Coast Guard in ensuring the efficacy of those measures seems to bear out this theory.\footnote{Brown, \textit{supra} note 63, at 48; Lundquist, \textit{supra} note 66, at 137.}

5. Trade Agreements

From the perspective of government liability, international trade agreement prohibitions could also be a consideration in the application of trans-national security related regulatory requirements. Adopted by the international community in increments,\footnote{With the most recent iteration finalized in 1994 at the Uruguay round of talks. Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994).} the General Agreement on Tariffs and Trade ("GATT")\footnote{General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]; Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement].} sets international trade guidelines and dispute resolution procedures. It also guarantees freedom of maritime transit and forbids member states from discriminating against vessels because of the vessel's flag, origin, or destination.\footnote{GATT, \textit{supra} note 105, art. V.} To that end, GATT encourages member states to reduce the complexity of import formalities and documentation requirements, so as to avoid unnecessary administrative delay.\footnote{GATT, \textit{supra} note 105, art. VIII.} However, GATT also recognizes that it is the maritime state’s sovereign right to take any measures necessary to ensure the national security.\footnote{GATT, \textit{supra} note 105, art. XXI(b) ("Nothing in this Agreement shall be construed ... (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests (i) relating to fissionable materials or the materials from which they are derived; (ii) relating to the traffic in arms, ammunitions and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; (iii) taken in time of war or other emergency in international relations.").}

The convergence of obligation and authority observed in treaties, GATT, U.S. domestic law, and public law is illustrated in the general provisions of SOLAS which empower contracting governments to subject arriving ships to control measures, but grants those ships an entitlement to compensation for damages incurred as a result of undue detention or delay.\(^\text{108}\) If a port authority has clear grounds to suspect that an arriving vessel or its port of origin are not security compliant, the authority may impose control measures,\(^\text{109}\) including the requirement of additional security-related information, inspection of the ship, delaying the ship, detention of the ship, restriction of operations and movement within the port or expulsion of the ship from port.\(^\text{110}\) However, SOLAS tempers this clause, warning that denial of entry or expulsion from a port is only appropriate where a ship poses an *immediate* security threat.\(^\text{111}\) Thus, under the terms of the Convention, port authorities must make every effort to avoid undue delay or detention, or face civil liability for any loss or damage suffered.\(^\text{112}\)

7. U.S. Liability Arising From Distinctions Between MTSA and ISPS Code

The U.S. is in a unique situation because the vigorous port security standards prescribed by MTSA\(^\text{113}\) far exceed ISPS Code minimums. Accordingly, an inconvenienced shipper whose voyage originated in the port of a PSA country, that is, a country found by the U.S. Government to have ineffective anti-terrorism measures, may be able to mount challenges after MTSA’s application. If the country has self-certified ISPS Code compliance as required by SOLAS, it could arguably maintain that a non-contemporaneous sampling by the U.S. Coast Guard does not constitute “clear grounds” or indicate an

\(^{108}\) SOLAS, *supra* note 2.


\(^{111}\) SOLAS, *supra* note 2, ch. XI-2, reg. 9, 3.3.

\(^{112}\) SOLAS, *supra* note 2, ch. XI-2, reg. 9, 3.5.

“immediate security threat”. If the claimant can convince the court that the port authority subjected the vessel to undue detention or delay, the U.S. Government may be indebted to the shipper and other affected parties for commercial loss and cargo damage arising from the port authority’s actions.

Such an assertion is not without comparative precedent, as seen in Canadian Transport Co. v. United States. In Canadian Transport, a foreign company based out of a foreign port filed a lawsuit due to the U.S. government’s attempts to administer domestic port regulations. In April 1974, the Canadian-chartered coal carrier M/V TROPWAVE attempted to enter the port of Norfolk, Virginia. The Coast Guard denied entry on the ground that the ship’s master and several of its officers were Polish nationals and so the ship diverted to Baltimore, disembarked the Communist Bloc personnel and returned to Norfolk. It was alleged by Canadian Transport Co. that the detour caused the company to suffer $93,000 in damages. The company filed a claim against the U.S. Government alleging intentional interference with contract rights under the Suits in Admiralty Act, violation of U.S. treaty obligations, and deprivation of property without due process of law in violation of the Fifth Amendment. On motion for summary judgment, the U.S. argued that the U.S. Coast Guard was engaged in the performance of a “discretionary function,” thereby rendering the U.S. immune from suit in that case. The district court agreed and the case was dismissed in its entirety.

Upon review, the Appellate Court supported most of the district court’s rationale, but noted that the record reflected that several other Communist Bloc ships and crews were admitted to the Port of Norfolk within the same timeframe, creating an inference that the Coast Guard’s

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114 Canadian Transport Co. v. United States, 663 F.2d 1081 (D.C. Cir. 1980).
115 Id. at 1083
116 Id. at 1084.
118 Canadian Transport Co., 663 F.2d at 1083.
119 Id. at 1085.
actions were arbitrary.\textsuperscript{121} The Appellate Court concluded that the Coast Guard’s practice of admitting some Communist Bloc vessels while excluding others created a genuine issue of material fact as to whether it was truly performing a discretionary function.\textsuperscript{122} Thus, the Appellate Court reversed the judgment of the District Court and the case remanded for further proceedings.\textsuperscript{123} \textit{Canadian Transport Co.} demonstrates that similar challenges may arise where MTSA regulations are employed to restrict entry of foreign shipping into U.S. ports.

8. Unique Challenges to Adjudicatory Process in International Port Security Law

In theory, the rapid expansion of international port security law could go so far as influencing adjudicative processes by affecting the application of procedural and evidentiary rules. For example, if a terrorist tucks himself away on a ship with a foreign-approved security plan and then wreaks havoc in the destination port, the terror victims could conceivably seek redress against the ship’s operator for failing to implement all requisite security measures to prevent the attack. Plaintiff’s counsel will naturally seek the ship’s security plan with an eye toward building the case, but they may not get it.

Under the ISPS Code, a ship’s security plans must be protected from “unauthorized access or disclosure.”\textsuperscript{124} U.S. law is in accord with this precept and goes even further to designate such documents as “sensitive security information.”\textsuperscript{125} In the United States, foreign and domestic vessel owners, operators, and charterers are charged with safeguarding sensitive security information\textsuperscript{126} and are forbidden to release such documents except to persons with a “need to know.”\textsuperscript{127} Violation could subject the vessel operator to civil penalties and “other enforcement or corrective action” by the U.S. Department of Homeland Security.

\textsuperscript{121} \textit{Canadian Transport Co. v. United States}, 663 F.2d 1081, 1088 (D.C. Cir. 1980).

\textsuperscript{122} See id. at 1089 (noting that the Suits in Admiralty Act’s discretionary function exemption is limited to the exercise of discretion in formulating governmental policy).

\textsuperscript{123} Id. at 1093.

\textsuperscript{124} ISPS Code, \textit{supra} note 3, part A, 9.7.

\textsuperscript{125} 33 C.F.R. § 104.400(c) (2011); 49 C.F.R § 1520.5(b) (2006).

\textsuperscript{126} 49 C.F.R. § 1520.7 (2011).

\textsuperscript{127} 49 C.F.R. § 1520.9 (2011).
Unfortunately for our hypothetical litigants, such information is not releasable under the Freedom of Information Act (“FOIA”). Access to the sensitive information is specifically granted to attorneys only for the purpose of providing legal advice to the vessel operator or representing the vessel operator in judicial or administrative proceedings regarding those requirements. This exception lies in the allowance that the U.S. Coast Guard may authorize the release of sensitive security information, provided that the requestor can demonstrate the “need to know.”

As a rule, the U.S. Coast Guard itself avoids receipt of foreign ship security plans and discourages the international transfer of such documents. The U.S. Coast Guard cites lack of resources as the primary reason for not demanding receipt of global shipping’s estimated 40,000 ship security plans. It is worth noting that, as a practical matter, U.S. Coast Guard review of foreign ship security plans could open U.S. ship owners to undesirable reciprocal demands by the U.S.’s maritime trading partners. Due to this consideration, any request for U.S. Coast Guard authority to release vessel security plans will likely be evaluated through the lens of the foregoing regulations and procedure, thus inevitably requiring judicial intervention and substantially protracting the discovery process and litigation in general.

9. Criminal Law

Meaningful analysis of the international avalanche of criminal regulations defining port security-related offenses and penalties is far

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133 Coast Guard Vessel Security, 68 Fed. Reg. 60,483, 60,488 ("Foreign flag vessels need not submit their Vessel Security Assessments or Vessel Security Plans to the Coast Guard for review or approval. . . . [O]wners and operators of foreign flag vessels that meet the applicable requirements of SOLAS Chapter XI will not have to submit their assessments or plans to the Coast Guard for review or approval.").
beyond the scope of this paper. However, it is worth noting that, as with any untried body of law, it is conceivable that circumstances may arise when the implementation of one rule causes the responsible party to violate another. Take, for instance, the time-honored precept of the Master’s discretion. As set forth in the ISPS Code, the Master’s discretion allows the Master to abrogate any law which conflicts with the Master’s belief of what is necessary to maintain ship safety. Simultaneously, international law as reflected in the ISPS Code requires ships in port to comply with the security requirements stated by that particular port authority. In some countries, non-compliance of such directives may constitute a criminal offense, which gives rise to conflicts between international standards and local implementation of port security.

To illustrate this point, consider that a passenger ship may frequent a heavily regulated port where the authority limits pier-side access to a single point of entry for security reasons. Violation of such a requirement could constitute a criminal offense under the laws of the port state. If a fire breaks out in the engine room, threatening passengers and crew, the captain may disregard this security requirement and open all access points to allow for emergency response. By opening additional entry points the captain is also potentially permitting unauthorized access to the ship from criminal elements. In such circumstances, the conflict between safety and security could give rise to criminal charges. In the alternative, where the captain neglects safety in favor of enforcing ship and port security measures, injured parties could pursue damages in tort. Although such a result may seem improbable, the burgeoning, but untested, body of international port security legislation could be rife with such conflicts.

135 See SOLAS, supra note 2, ch. XI-2, reg. 8 (“The master shall not be constrained by the Company, the charterer or any other person from taking or executing any decisions which, in the professional judgment of the master, is necessary to maintain the safety and security of the ship. . . . If, in the professional judgment of the master, a conflict between any safety and security requirements applicable to the ship arises during its operations, the master shall give effect to those requirements necessary to maintain the safety of the ship.”).

136 SOLAS, supra note 2, ch. XI-2, reg. 4, 3.

137 See, e.g., Cambodia, Annex A, supra note 35.
B. Private Liability

Private law defines, regulates, enforces, and administers relationships among individuals, associations, and corporations.\(^{138}\) In the maritime context, such dispute could materialize along the well-traveled paths of contract and tort litigation, but as in the public realm, the impact of international port security law development on private disputes is likely to be wide reaching. While it is difficult to assess exactly how evolving international port security law will impact private law, the body of existing jurisprudence in other areas of transportation law may hint at the trajectories that resulting litigation may follow.

1. Marine Insurance

Marine insurance is arguably one of the most prevalent issues in private maritime law, touching at least tangentially on almost every aspect of the practice. As noted above, when a country which fails to effectively implement anti-terrorism measures in its port facilities, it may be publically identified, named in a PSA in the federal register, and have its vessels subjected to conditions of entry to U.S. ports. Marine insurers will note the adverse action and will likely increase premiums or terminate coverage. This compounds the negative implications arising from the country’s failure to implement effective anti-terrorism measures. When policies are issued and claims arising from security incidents come to fruition, the legal scholar should expect to see significant legal debate concerning the precise meaning of “war risks” and other insured or excluded perils.\(^{139}\)

\(^{138}\) BLACK’S LAW DICTIONARY 830 (6th ed. 1995).

\(^{139}\) “War risks” are generally defined as hostile acts or warlike operations. See Standard Oil Co. v. United States, 340 U.S. 54 (1950). The U.S. Supreme Court has found that, within the marine insurance context, the term “war risks” includes adventures and perils involving “restraints and detainments of all kings, princes, and people”. 345 U.S. 427 (1953) (citation omitted). In contrast, lower courts have expanded the concept of “war risks” to include the use of offensive weapons such as mines, torpedoes, and bombs. North Branch Resources, L.L.C. v. M/V MSC CALI, 132 F. Supp. 2d 293 (S.D.N.Y. 2001). A hostile act need not necessarily involve the overt use of a weapon, but may include operations such as the extinguishment of a navigational light or the outfitting of a ship, if
2. Contractual Liability for Violating Port Security Measures

The exercise of port state control measures by a maritime trading nation can conceivably give rise to contractual disputes over liability for lost time and extra expenses incurred by shipping companies trying to comply with conditions of entry. Marine shipping contracts or “charter parties” typically define the terms of the shipping obligation and penalties for non-performance. Such charter parties allow for a specified period of time to load or discharge cargo, known as laytime. After agreed laytimes expire, the charterer may become liable for a specified rate of liquidated damages, known as demurrage.\textsuperscript{140} Thus, to interpret the effect of charter parties, one must determine if laytime commenced. The answer to this hinges upon a factual determination as to whether the voyage was completed or, in maritime parlance, whether the vessel in question is an “arrived ship.”\textsuperscript{141} Theoretically, if a ship is detained at the end of a voyage for enhanced security consideration by the port state, a dispute may arise between the parties as to whether the vessel was an arrived ship, which would commence laytime and expose the charterer to liability for demurrage charges.\textsuperscript{142}

Separate contractual liability related to port security implementation may also be found under the general maritime law warranty of seaworthiness. Stated simply, the warranty of seaworthiness requires that the ship be “reasonably fit for the use intended.”\textsuperscript{143} Under maritime law, this warranty is implied in all contracts.\textsuperscript{144} It is arguable

\textsuperscript{140} Trans-Asiatic Oil Ltd., S.A. v. Apex Oil Co., 804 F.2d 773, 775 (1st Cir. 1986); Gloria Steamship Co. v. India Supply Mission, 288 F. Supp. 674, 675 (S.D.N.Y 1968).

\textsuperscript{141} Fukaya Trading Co., S.A. v. E. Marine Corp., 322 F. Supp. 278, 283 (E.D. La. 1971); see also St. Ioannes Shipping Corp. v. Zidell Explorations, Inc., 336 F.2d 194, 196 (9th Cir. 1964) (“It is concededly the law that under a charter such as the one here, where the lay time is calculable beforehand, delays in the securing of the berth for a discharge of cargo, once the ship has arrived at port, are chargeable to the charterer.”).


\textsuperscript{143} Amerada Hess Corp. v. S/T Mobil Apex, 602 F.2d 1095, 1097 (2d Cir. 1979).

\textsuperscript{144} Aaby v. States Marine Corp., 181 F.2d 383, 385 (2d Cir. 1950).
that the warranty of seaworthiness includes an assurance that the ship is administratively prepared to enter the destination port and deliver the cargo as intended by the parties.\textsuperscript{145} A shipping company’s failure to implement personnel, security plan, and documentation requirements required by the ISPS Code\textsuperscript{146} could render those ships unseaworthy under general maritime law, enabling parties to sue for contract violations under the warranty of seaworthiness.

3. Tort Liability

Shipping companies could conceivably incur tort liability for failure to properly implement ISPS Code and MTSA security measures. Absent specific precedent, tort claims arising from port security incidents will likely reflect the line of jurisprudence occurring in aviation security claims. After the September 11th attacks, a class action claim was filed against the involved airlines and airport operators.\textsuperscript{147} The class included injured claimants, survivors, and entities suffering property damage.\textsuperscript{148} The suit alleged that the defendants failed to fulfill their assigned security responsibilities.\textsuperscript{149} The district court rejected a Motion to Dismiss, holding that while an intervening intentional or criminal act generally severs the liability of the original tort-feasor,\textsuperscript{150} the requirement for causation “has no application when the intentional or criminal intervention of a third party or parties is reasonably foreseeable.”\textsuperscript{151} The court reasoned that the airlines and airport operators were uniquely positioned to protect the plaintiffs from harm and were aware of the history of terrorist suicide missions and hijackings.\textsuperscript{152} Due to this, an

\textsuperscript{145} See In re Complaint of Delphinus Maritima, S.A., 523 F. Supp. 583, 595 (S.D.N.Y. 1981) (holding, inter alia, that a ship owner’s failure to check crew credentials, furnish proper navigational charts, and other administrative failures rendered the ship unseaworthy).

\textsuperscript{146} See, generally, mandatory provisions of ISPS Code, Part A, Section 9 (ship security plans), Section 10 (ship security records), Section 12 (ship security personnel) and Section 19 (International Ship Security Certificates).

\textsuperscript{147} In re Sept. 11 Litig., 280 F. Supp. 2d, 279, 287 (S.D.N.Y. 2003).

\textsuperscript{148} Id.

\textsuperscript{149} Id.

\textsuperscript{150} Id. at 302 (citation omitted).

\textsuperscript{151} Id.

\textsuperscript{152} In re Sept. 11 Litig., 280 F. Supp. 2d, 279 at 294-95 (S.D.N.Y. 2003).
obligation existed to take reasonable aviation security measures that would deter terrorist attacks.\textsuperscript{153} Similarly, the duty to take reasonable security measures is well codified in maritime law.\textsuperscript{154}

If terrorists attack a U.S. port or deliver weapons and operatives using security regulated vessels that are later used in an attack, claims against the ship owner will likely mirror those against the airlines. The plaintiffs can argue that any ISPS Code or MTSA requirement is a reasonable security measure and that the failure to follow it automatically demonstrates a breach of duty, exposing ship owners to the liability seen in aviation security cases.\textsuperscript{155}

III. \textbf{THE FUTURE OF INTERNATIONAL PORT SECURITY}

While many port security-related legal dilemmas remain untried, significant diplomatic, political, and regulatory developments are already reducing much of the jurisdictional uncertainty surrounding the implementation of the MTSA. Through the U.S. Coast Guard, the United States is promoting an aggressive program of bi-lateral security development and international consensus building aimed to satisfy MTSA mandates and improve the overall integrity of the global maritime system, notably through the IPS Program.

\textsuperscript{153} Id. at 307.
\textsuperscript{155} Id., Art. III, Rule 1

Although the ship owner could file for limitation of liability protections, such a defense would only be effective if the ship was compliant with all applicable laws and regulations. See 46 U.S.C. App. §§ 181-188 (2006) (discussing that a vessel owner may limit tort liability to the amount of interest the owner holds in the vessel and freight pending, provided that the loss is incurred without their privity or knowledge). The discovery needed to determine compliance will hinge on the ship’s records, including the security plans, which is problematic because U.S. policy prevents the easy disclosure of security plans. This also puts the ship owner in a difficult spot because the failure to keep complete administrative records or to follow training requirements will limit the ship owner’s ability to demonstrate sufficient duty to establish a limited liability defense. See generally ISPS Code, supra note 3.
The effectiveness of the U.S. approach to regulatory coordination reflects the cooperative global sentiment that has given rise to the rapid expansion of international port security law. Naturally, this coordination is only successful if maritime nations share unified interest in safeguarding their combined port infrastructure. Some countries are inevitably less advanced in the field of port security than others, regardless of their sincerity. While the United States, the European Union, Canada, and Australia were politically and professionally situated following the September 11th attacks to fully regulate their port security processes, many coastal countries lacked the governmental capacity or political will to address port security beyond a cursory recognition of the fundamental international obligations of the SOLAS Convention.\textsuperscript{156} Since the ISPS Code avoids critical elements such as incident response, enforcement, or application beyond the limited scope of the ship to port interface, countries which adopt the regime verbatim or by reference also adopt its built-in limitations.\textsuperscript{157}

The challenge for the community of maritime nations is to find a way to elevate the global port security regulatory discussion above the ISPS Code’s minimum standards. Unfortunately, the MTSA and its Canadian and European counterparts are useless in this context because they are crafted to address specific, complex port security issues that result in unduly convoluted marine security policies in comparison to the port security regimes commonplace in many African, South American, and Asian maritime nations. Since the particularized Western security approach does not translate easily into a general system, a uniform template or guideline does not yet exist to develop improved international port security regulations.

\textsuperscript{156} SOLAS, \textit{supra} note 2, resolution 5 (“[I]n some cases, there may be limited infrastructure, facilities and training programmes for obtaining the experience required for the purpose of preventing acts which threaten the security of ships and of port facilities . . . .”).

\textsuperscript{157} The international community is aware of the built-in limitations and tries to address them in cooperative resolutions. See SOLAS, \textit{supra} note 2, resolution 5 (strongly urging contracting governments and member states to “provide, in co-operation with the Organization, assistance to those States which have difficulty in implementing or meeting the requirements of the adopted amendments or the ISPS Code . . . .”).
A. Developing a New International Port Security Code

The need for further development of more specific port security standards was reiterated in the 2002 amendment to the SOLAS Convention and its associated resolutions. More than a decade later, no further progress has been made to achieve this. In the absence of such detailed guidance, many developing nations are left directionless in their quest to achieve the port security standards enjoyed by the world’s more advanced nations. Considering this, the IMO should commence development of an advanced SOLAS port security regulatory model to assist developing countries, promote international cooperation, facilitate information sharing, and elevate the global port security regulatory discussion, emphasizing that the standard must be above and beyond the current ISPS Code minimums.

A review of international port security law reveals that the substance of such a template is emerging. In the years following the September 11th attacks, many countries recognize the value of enhanced port security regulatory standards and seek them out. Nations that transcend the ISPS Code do so by addressing meaningful enforcement, incident response, and conducting compliance evaluation. Although unavoidably piecemeal in nature, the efforts of individual nations to improve on respective legislative and regulatory schemes reflect genuinely innovative port security implementation developments and trend toward bridging ISPS Code gaps, particularly with regard to facility administration, prohibitions, procedures, personnel duties, and adjudication. This suggests a common benchmark for maritime nations to coordinate their port security expectations may be identified.

How can one identify the common benchmark, coalescing these independent regulatory advances into a viable port security regulatory model? For comparative analysis, it is useful to rethink the concept of port security regulation, exchanging the ISPS Code’s multi-layered, cross-referenced approach for simplicity. Though disparate in form and legal tradition, international port security regulations tend to group

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158 See SOLAS, supra note 2, resolution 2; ISPS Code, supra note 3, preamble para. 5.
159 See Annex A, supra note 35.
around three common themes: (1) the controlling authority,\textsuperscript{160} (2) the primary port security objectives,\textsuperscript{161} and (3) the means utilized by the controlling authority to enforce the regulatory objectives.\textsuperscript{162} Compiling the essence of these into a collection of legislative best practices will create a tool to allow maritime nations to share their innovations and learn from their trading partners. This compilation will serve as a comprehensive international model port security code, creating a new uniform standard.

B. *International Model Port Security Code*

Developing a code that is internationally comprehensible is a challenge. By design, such a model must be concise and straightforward enough to be widely accessible. The model code must be thorough enough in scope to serve capacity building and developmental assistance applications. Since nations of disparate legal tradition and governance wish to coordinate port security measures, it should be sufficiently detailed for use as an analytical checklist. Meanwhile, the model should avoid terms of art and cross-references and permit universal consideration as an à la carte menu of stand-alone port security regulatory options.

At minimum, a model code should define the duties and powers of port and shipping authorities and the general, physical, and operational security requirements for both ships and ports. The model code should explain the role of enforcement, prosecutorial, and judicial elements in the implementation of the requirements. The model code should incorporate a broad survey of existing laws and regulations defining offenses and penalties. Lastly, it should remain flexible to address the changing doctrines of port security law as the field continues to evolve in response to the persistent threat of international terrorism. To create this model code, the international maritime community should take steps to supplement existing port security guidance under SOLAS

\textsuperscript{160} 33 C.F.R. § 103 (2011).
\textsuperscript{161} 33 C.F.R. § 104 (2011).
with a Model Port Security Code that will provide developmental assistance beyond the current limited standard of the ISPS Code.\textsuperscript{163}

IV. CONCLUSION

Prompted by the early twenty-first century surge in international terrorism, the international community recognizes the need to safeguard the global shipping industry by regulating and coordinating international ship and port security. The world’s coastal nations demonstrated unprecedented levels of cooperation to craft the field of international law that is embodied in the ISPS Code. Although the ISPS Code serves as the current standard for international port security discussions, it was intentionally limited by its drafters, rendering it effectively unenforceable as a stand-alone document. Several nations have enacted measures to bridge these gaps, but the United States has taken its regulatory approach a step further, conceptually pushing the boundaries of port security back to the shores of the nation’s foreign trading partners. The need for a uniform international port security code to enhance and protect international security is unmistakable.

From its inception, the efficacy of port security law has drawn from the unity of purpose of coastal states in promoting the integrity of the global shipping system. Recognizing this dynamic, the IMO entrusts the evolution of port security law to the international community itself, tasking SOLAS signatory states with mutual assistance in the development of effective port security laws and regulations.\textsuperscript{164} As maritime and port security law continues to develop and mature, maritime trading partners find it increasingly important to continue to improve the port security infrastructure, elevating the port security discussion beyond ISPS Code minimum standards and establishing legislative means for effective response and enforcement.

To support this pursuit, the community of maritime nations should create an advanced port security regulatory model. Such a model will serve as both an analytical and capacity building tool, and will enable

\textsuperscript{163} The author proposes the following Model Port Security Code substance and structure included in Annex B.

\textsuperscript{164} SOLAS, supra note 2, resolution 5.
developing nations to consider and discuss the legislative and regulatory means by which their trading partners define governmental duties and authorities. Critically, a model international port security code will specify ship and port security requirements and empower law enforcement officers, prosecutors, and judges to protect their respective sectors of the international maritime trade. A model port security code will add much needed support to achieving the international community’s goal of safe and secure ports.
ANNEX A: COMPREHENSIVE LIST OF LEGISLATION FOR ISPS CODE IMPLEMENTATION

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<th>Legislation</th>
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<td>Executive Decree re: Matters of ship and port installation security; Executive Decree inscribing the designation of qualified authorities.</td>
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<tr>
<td><strong>Angola</strong></td>
<td>Decreto No. 48/05 Diario Da Republica August 8, 2005.</td>
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<td><strong>Angola</strong></td>
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<td>Presidential Decree 1241/03 (Regimen de la Navegacion Maritima, Fluvial Y Lacustre, Decreto 1241/2003, No. 138.536/03 del registro del Ministerio de Justicia, Seguridad Y Derechos Humanos, 12/12/2003.</td>
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<td>AB 1993 No. GT 18, 17 August 2007; AB 2004 no. 40, 09 May 2007; Ministeriele Regeling 2009 no. 81, 16 September, 2009; Schepenbesluit 2004 Decree on Shipping 2004-B.</td>
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<td>230th Regulation of the Minister of Transport, Innovation and Technology a national program to increase the security of Austrian ships, No. 387/1996, 21 June 2006.</td>
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<td><strong>Bahrain</strong></td>
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<td>Country</td>
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<td>Sub-Decree on Ship and Port Facility Securities, no. 40 SD/PK, 9 May 2006.</td>
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<td>Decretos No. 31845-MOPT, Alcance No. 27 a La Gaceta No. 119, 18 June 2004.</td>
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<td>Resolucion No. 251/05, Gaceta Oficial, 1 March 2006, p. 179.</td>
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<td>Country</td>
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<td><strong>Dominica</strong></td>
<td>Marine Safety Circular, MSC 01-04.</td>
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