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ASSURING THE FLOW: MARITIME SECURITY CHALLENGES AND TRADE BETWEEN THE U.S. AND CHINA

Joshua A. Lindenbaum

I. INTRODUCTION

Perhaps no economic issue looms larger on the agenda of world governments and business leaders than the emergence of China and its economy. In 2005, China's economy, expressed in terms of Gross Domestic Product (GDP), was estimated to be \$8.158 trillion.¹ This ranks third among world economies, behind only the United States and the European Union.² Though the implications of China's ascendance impact the entire world, the effect on the U.S. and its evolving economic relationship with China is particularly acute, as U.S. businesses seek new opportunities for economic development there at an increasing pace.³ The magnitude of the economic relationship between China and the U.S. manifests itself in several ways, most notably in the amount of trade between the countries, estimated in 2004 to be some \$231.4 billion.⁴

The economic relationship between the two countries is characterized by significant, ever-increasing U.S. dependence on Chinese imports.⁵ This rise in imports is attributable to increased production of consumer goods by Chinese companies, the outsource of manufacturing by U.S. companies to China, and the subsequent shipping of finished product back to the U.S.⁶ Given the massive scale of these activities, the shipping industry plays a particularly crucial role in facilitating U.S.-Sino trade: moving goods and materials safely and efficiently between the two countries.

¹ CIA World Factbook, "Purchasing Power Parity" chart, at <http://www.cia.gov/cia/publications/factbook/rankorder/2001rank.html> (last visited Feb. 15, 2006).

² *Id.*

³ See e.g., Seminar, *Sino-U.S. Relations in the 21st Century*, 6 J. INT'L L. & PRAC. 229 (1997).

⁴ See Foreign Trade Statistics- Trade in Goods (Imports, Exports, and Trade Balance) with China, U.S. Census Bureau, available at <http://www.census.gov/foreign-trade/balance/c5700.html>.

⁵ ODED SHENKAR, *THE CHINESE CENTURY: THE RISING CHINESE ECONOMY AND ITS IMPACT ON THE GLOBAL ECONOMY, THE BALANCE OF POWER, AND YOUR JOB* (Wharton School Publishing 1st. ed. 2005).

⁶ See John S. McClenahan, *U.S.-China Trade: A Different View*, INDUSTRYWEEK.COM, May 24, 2005, available at <http://www.industryweek.com/ReadArticle.aspx?ArticleID=10322> (last visited Feb. 15, 2006).

Among the myriad factors affecting the global shipping industry, two events of the early twenty-first century stand out as the most significant: the terrorist attacks on September 11, 2001,⁷ and exactly three months later, the entry of China into the World Trade Organization.⁸ What is particularly remarkable about these events is their synergy in creating challenges for the world's shipping industry, governments, and businesses. The 9/11 attacks exposed shortcomings in virtually every facet of U.S. homeland security. The methods used by the terrorists responsible for the 9/11 attacks initially directed attention toward the aviation industry. Soon after, focus broadened to include the vulnerabilities of the shipping industry, American seaports, and, thereby, those of any country that transports goods to or from the U.S.⁹ These vulnerabilities, combined with the rapid growth of China's foreign trade,¹⁰—attributable in part to its recent WTO membership and the resulting increase in the volume of goods being shipped,—made increasing worldwide port security imperative.¹¹

Achieving the maritime security necessary to assure sustained growth in trade between the U.S. and China presents a unique set of challenges. This article addresses some of these challenges and assesses the costs to the governments and businesses that seek to overcome them. Part II begins with an overview of maritime security measures and policies implemented by the U.S. government in the wake of the 9/11 attacks and specifically examines the Container Security Initiative (CSI), a proactive security program implemented by the United States Customs Service. Part III of the article examines international efforts to secure maritime transport, the cooperation these policies require, and attendant legal issues. Part IV concludes

⁷ See e.g., Symposium, *Admiralty Law Institute Symposium, Confused Seas: Admiralty Law in the Wake of Terrorism*, Thomas J. Schoenbaum & Jessica C. Langston, *An All Hands Evolution: Port Security in the Wake of September 11th*, 77 TUL. L. REV. 1333 (2003).

⁸ See e.g., Jin Cheng, Kevin Cullinane, Kevin X. Li, and Hong Yan, *Maritime Policy in China After WTO: Impacts and Implications for Foreign Investment*, 36 J. MAR. L. & COM. 77 (2005); see also, *UNDERSTANDING THE WTO: THE ORGANIZATION, Members and Observers*, at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last updated Dec. 11, 2005) (China was officially admitted into the World Trade Organization on December 11, 2001).

⁹ See e.g., Sung Y. Lee, *The Container Security Initiative: Balancing U.S. Security Interests with the European Union's Legal and Economic Concerns*, 13 MINN. J. GLOBAL TRADE 123 (2004).

¹⁰ See Richard N. Haass, Speech to the National Committee on U.S.-China Relations, New York, N.Y., (December 5, 2002) (transcript available at http://www.ncusr.org/articlesandspeeches/haass_speech.htm) (last visited Feb. 15, 2006).

¹¹ See e.g., Owen Bishop, A "Secure" Package? *Maritime Cargo Container Security After 9/11*, 29 TRANSP. L. J. 313 (2002).

with an exploration of the burdens and opportunities these issues create for businesses and the governments of the United States and China, in the context of today's realities.

II. SECURING UNITED STATES PORTS AND MARITIME CARGO: POLICY AND TECHNOLOGY

Both the legislative and executive branches of the U.S. government have responded to the issue of port security. This response has manifested in a variety of legislation, government programs and adjustments in the deployment of various military and security assets.

In the wake of the 9/11 terrorist attacks, the Bush Administration and the United States Congress recognized a need to better coordinate the numerous entities involved in providing domestic security. President Bush created an Executive Office of Homeland Security, charging it with managing resources and implementing programs to protect the U.S. against future terrorist threats.¹² Shortly thereafter, having identified the nation's ports as a likely target of attack,¹³ Congress passed the Maritime Transportation Security Act of 2002 (MTSA), as an amendment to the Merchant Marine Act of 1936.¹⁴ The MTSA supplies agencies beneath the umbrella of the Office of Homeland Security with the authority to provide security for the nation's ports and cargo containers.¹⁵

The MTSA marked the first time the U.S. Congress passed new maritime legislation addressing port security in some sixteen years.¹⁶ Though it ostensibly addressed port security, the International Maritime and Port Security Act, passed in 1986 as a reaction to the *Achille Lauro* incident, was primarily concerned with security on cruise ships and other passenger vessels.¹⁷ The MTSA focused on cargo, and placed much of the responsibility for port security on the United States

¹² *Id.*

¹³ See Maritime Transportation Security Act of 2002, Pub. L. No. 107-295, 116 Stat. 2064, 2067 (2002) (amending Title 46 of the United States Code to incorporate port security initiatives).

¹⁴ *Id.* at 2064.

¹⁵ See Terence F. Hoverter, Comment: *Containing Marine Terrorism: Federal Initiatives Post 9/11*, 16 U.S.F. MAR. L. J. 353, 357 (2004).

¹⁶ Symposium, *Admiralty Law Institute Symposium, Confused Seas: Admiralty Law in the Wake of Terrorism*, Robert G. Clyne, *Terrorism and Port/Cargo Security: Developments and Implications for Marine Cargo Recoveries*, 77 TUL. L. REV. 1183, 1189 (2003) (stating that although President Clinton created the Inter-agency Commission on Crime and Security in United States Ports via Executive Order in 1999, the last maritime security legislation passed by the U.S Congress was the International Maritime and Port Security Act of 1986).

¹⁷ *Id.*

Coast Guard, increasing its budget and authority.¹⁸ The Coast Guard now serves a unique role in the nation's military-security complex; not only it is one of the five branches of the military during times of war, but it is also a prominent agency within the Department of Homeland Security.¹⁹ The formidability of the Coast Guard's task is borne out by the numbers: 26,000 seagoing cargo containers arrive in the ports of the U.S. each day; in 2004 this totaled an estimated 9.6 million containers.²⁰ These cargo containers are unloaded in 361 different U.S. ports.²¹ Moreover, the cargo arrives on some 46,000 ships operating among the world's 3,000 ports.²²

Each cargo container can be said to represent a terrorist threat within itself, as a bomb concealed among cargo is a likely means of carrying out an attack on a commercial seaport. The results of the successful execution of such an attack are difficult to calculate. But in attempting to do so, one must look beyond immediate, local effects; i.e., loss of life, destruction of property, and physical damage to the structure and facilities of the targeted port. Following a successful terrorist attack on a single American port, it is likely that all U.S. ports would effectively shut down for an indefinite period of time. Such a shut down would have a ripple effect around the globe. It follows logically that the negative impact on world trade would be severe, with losses easily reaching into the billions of dollars.²³

Given the scale and scope of the task of securing U.S. ports, government security officials and shipping industry leaders recognized the need for new technology and increased international cooperation. The international community followed the United States' lead in re-vamping its maritime security policies. In December 2002, the International Maritime Organization (IMO) passed amendments to the International Convention for the Safety of Life at Sea, (SOLAS) addressing the need for enhanced ports and cargo ship security.²⁴ At the

¹⁸ See Frank A. LoBiondo, *Improved Port Security Technology: Vital for Safe and Secure Waterways*, 1/1/05 SEA TECH., at 39, available at 2005 WLNR 1575471.

¹⁹ E.g., Symposium, *Combating Terrorism in the Environmental Trenches: Responding to Terrorism*, James Corbett & Jeremy Firestone, *Maritime Transportation: A Third Way for Port and Environmental Security*, 9 WIDENER L. SYMP. J. 419, 423 (2003).

²⁰ *Port Security Issues Before the Senate Comm. on Commerce, Science and Transportation*, May 17, 2005 (statement of Robert Jacksta, Executive Director, Department of Homeland Security), available at 2005 WLNR 7787128.

²¹ See LoBiondo *supra* note 18, at 39.

²² Tim Weiner, *U.S. Law Puts World Ports on Notice*, N.Y. TIMES, March 24, 2004, at A6.

²³ *Id.*

²⁴ Sean D. Murphy, *Establishment of U.S. Antiterrorism Maritime Transportation System*, 98 AM. J. INT'L L. 588, 589 (2004).

same time, the Coast Guard and the Customs and Border Protection agency (CBP) looked to the international community, creating a pivotal role for foreign governments. One such program is the Container Security Initiative (CSI), predicated on the idea that the U.S. should expand its security measures outward in an effort to make American borders the absolute last line of defense.²⁵ The CSI has four main facets: (1) the use of intelligence and technology to identify and evaluate risk of terrorism in individual shipments, (2) the pre-screening of cargo containers in their originating ports, (3) the use of technology to do this screening expediently, and (4) a move toward the use of cargo containers that are less-susceptible to tampering than those commonly in use at present.²⁶

To accomplish the primary objective of the CSI, the pre-screening of containers, U.S. Customs has entered into bilateral agreements with foreign governments that grant Customs agents access to foreign ports. While U.S. agents are precluded from conducting security operations themselves, they actively coordinate efforts with local security officials to screen containers.²⁷ The CSI initially focused on the top twenty so-called "megaports." These are foreign ports responsible for the greatest percentage of exports to the United States. Phase II of the CSI is currently expanding the program to ports beyond the top twenty megaports.²⁸ Thus far, the U.S. has implemented the CSI in thirty-three ports in nineteen countries,²⁹ including China-controlled Hong Kong and Shanghai, which rank as the first and second largest foreign ports, respectively, in terms of exports to the U.S.³⁰

Since the 9/11 attacks, China has generally been supportive toward U.S. efforts to combat terrorism, and Chinese involvement in the CSI is a notable example given the level of cooperation it requires. But this cooperation serves China's interests as well; it advances Chinese efforts to further ingratiate itself to the international community. Moreover, it supports growth of their economy, which depends upon

²⁵ *E.g.*, United States Customs and Border Protection, *CSI in Brief*, available at http://www.customs.gov/xp/cgov/border_security/international_activities/csi/csi_in_brief.xml (2005)(last visited Feb. 15, 2006).

²⁶ *Id.*

²⁷ *See, e.g.*, Lee *supra* note 9, at 123.

²⁸ United States Consulate, Hong Kong, *U.S. Works on Container Security in Foreign Ports, Fact Sheet: Container Security Initiative Guards America, Global Commerce From Terrorist Threat*, available at <http://hongkong.usconsulate.gov/ushk/others/2003/031201.htm> (Mar. 12, 2003)(last visited Feb. 15, 2006).

²⁹ *See* United States Customs and Border Protection, *Ports in CSI- Currently Operational Ports*, available at http://www.customs.gov/xp/cgov/border_security/international_activities/csi/ports_in_csi.xml.

³⁰ United States Consulate, Hong Kong *supra* note 28, at 2.

the ability to ship Chinese goods throughout the world. Port security is an essential element of this ability.³¹

While the intelligence and manpower necessary for the implementation of the CSI are supplied by the U.S. and cooperative foreign governments, it is technology that actually detects threats within shipping containers. In evaluating terrorist threats, a primary area of concern is a bomb attack on a port, especially one carried out with a nuclear device or radiological bomb.³² As such, non-intrusive inspection equipment with the capability to detect radiation is required to effectively screen the standard shipping container. The acquisition of such equipment is one of the requirements for a port to be eligible for participation in the CSI.³³ Technology is also crucial to the administrative and communication components of port security operations.³⁴ Prior to 9/11, ports were the frontline of the War on Drugs, not the War on Terrorism. As a result, much of the security technology used by ports and the Coast Guard focused on the detection of illegal drugs.³⁵ Technology companies and the military industrial complex rapidly expanded and tailored their research and development efforts, advancing existing research with computers and satellites to develop applications for port security.³⁶ The military-industrial complex's history of rapid response to the security needs of the U.S. indicates that effective technologies to secure the world's ships and ports will be developed. The question is: who will bear the substantial costs of developing, purchasing and deploying this equipment and the security regimes it will support?³⁷ This query is among the most pressing for port executives and security officials, politicians, and business leaders.³⁸

Evaluating the costs of obtaining security technology equipment for ports only scratches the surface of the overall financial commitment required to implement the CSI around the world. Ports would not exist without ships coming into them to load and unload materials; similarly, individual vessels play a vital role in port security.³⁹ Ports

³¹ See, e.g., Natalia Rigol, *A Game of Giants: The Future of Sino-U.S. Relations*, HARV. INT'L REV., 2005 at 2, 4, available at 2005 WLNR 5166525.

³² E.g., Hoverter *supra* note 15, at 364.

³³ *Id.*

³⁴ E.g., Weiner *supra* note 22, at A6.

³⁵ Ted McKenna, *Standing Watch: Maritime nations turn to surveillance technology to cope with terrorism, illegal fishing, and more*, J. Elec. Def., May 1, 2004 at 3,5,7,9, available at 2004 WLNR 11656615.

³⁶ *Id.*

³⁷ Symposium, *The Red and Green Lights of Homeland Security*, 12 U.S.-MEX. L.J. 89, 97-102 (2004).

³⁸ See, e.g., Angela Greiling Keane, *Receiving Mixed Signals*, TRAFFIC WORLD, Jan. 31, 2005, at 2-4, available at 2004 WLNR 1321310.

³⁹ *Id.*

are paid by the shipping companies that unload freight in their facilities, and they will likely pass many security costs along to their customers. Higher port fees come at a bad time for shipping concerns that already face mounting legal, logistical and personnel costs in addressing the administrative aspects of security. For example, companies are now required to perform extensive background checks on all of their multinational crews, acquire data systems to manage detailed logistical information and tracking schemes for cargo, and comply with more intensive customs procedures.⁴⁰ In addition, it is suggested that the shipping industry move toward replacing its existing shipping containers with new "smart containers," which are constructed with integrated security sensors to prevent tampering and ease tracking. Though these new containers cost little more than current models, replacing of the entire inventory in circulation, estimated to be as many as fifteen million,⁴¹ constitutes a significant expense.⁴²

It should be noted that these security enhancement efforts have the potential of carrying over to improving the shipping industry's general operations, given the obvious commercial benefits of modernized processes and increased efficiencies.⁴³ But in some ways, these innovations and technologies, and substantial outlays of capital, are being forced on an industry that is known to operate on thin profit margins.⁴⁴ In light of the highly-publicized federal funding provided for other sectors like the aviation industry, which will receive approximately 90% of the Transportation Security Administration's \$53 billion budget in 2005,⁴⁵ U.S. ports and the American shipping industry are looking to the federal government for similar financial support.⁴⁶

The United States Coast Guard has estimated the initial cost of port security at \$1.1 billion,⁴⁷ and costs for the next ten years somewhere between six and eight billion dollars.⁴⁸ At this point, much of this financial burden has been placed on the ports. In February 2004,

⁴⁰ *Id.*

⁴¹ Michael Richardson, *The Coming Sea Change in Port Security*, SOUTH CHINA MORNING POST, Mar. 19, 2004, at 1, available at 2004 WLNR 5988334.

⁴² TechwebNews, *GE Tests 'Wired' Shipping Containers to Combat Terrorism Threat* (January 12, 2005), available at 2005 WLNR 448698.

⁴³ *E.g.*, R.G. Edmonson, *What Cost Security?*, TRAFFIC WORLD, Sept. 13, 2004, at 1, available at 2004 WLNR 12111386.

⁴⁴ *Id.*

⁴⁵ James Verini, *Two if By Sea*, AMERICAN PROSPECT, April 1, 2005, at 2, available at 2005 WLNR 5166628.

⁴⁶ *Id.*

⁴⁷ Angela Greiling Keane, *Maritime's Security Deficit*, TRAFFIC WORLD, Apr. 19, 2004, at 2, available at 2004 WLNR 12108095.

⁴⁸ Symposium, *The Red and Green Lights of Homeland Security*, *supra* note 37, at 97.

President Bush released a budget for 2005 that provided \$46 million for port security, a tenth of what maritime industry lobbying groups, like the American Association of Port Authorities (AAPA), feels is necessary.⁴⁹ The debate over the federal government's financial responsibility for port security bears similarities to the larger debate over the allocation of Department of Homeland Security funds between the states. Coastal states where ports are located feel they deserve higher allocations of federal funding for security, while interior states object to any inequality in federal security grants to the states. Caught in the middle are industries like shipping and oil refining. The nature of these businesses leave them inextricably linked to their coastal geographical locations. Therefore, they are exposed to the inherent security vulnerabilities of these locations' size, demographics, and strategic value.⁵⁰ Port executives balk at bearing the cost for providing security that is as crucial to businesses that use ports as it is to the ports themselves. In its defense, the federal government touts the efficiency upside and potential for higher future profits, and reasons that it is asking ports and shipping concerns to invest only a small percentage of the overall costs.⁵¹

Under the umbrella of the CSI, the U.S. Customs Border Patrol (CBP) agency formally engaged the international trade community in preventing terrorist attacks via the Customs-Trade Partnership Against Terrorism (C-TPAT). The program was initiated in November 2001 and sought to combat terrorist threats by better securing the international these improvements certified by CBP.⁵² In return, companies with the certification are less likely to have their cargo containers inspected.⁵³ The program elicited an enthusiastic response from the transportation services industry; by May 2005 some 9,234 companies applied to join C-TPAT. However, of that number, only 564 companies have thus far completed the certification process.⁵⁴ The back-up in processing applications is due to the stringent validation process, conducted exclusively by CBP personnel. Particularly time-consuming is

⁴⁹ Keane, *Maritime's Security Deficit*, *supra* note 47, at 2.

⁵⁰ *See Id.*

⁵¹ Symposium, *The Red and Green Lights of Homeland Security*, *supra* note 36, at 97.

⁵² Matthew T. McGrath, Cortney O'Toole Morgan, *International Legal Developments in Review: 2002: Business Regulation, Customs Law*, 37 INT'L L. 245, 247 (2002).

⁵³ *Port Security Issues Hearing Before the Senate Comm. on Commerce, Science and Transportation*, May 17, 2005 (statement of Margaret Wrightson, Director, United States Government Accountability Office), available at 2005 WLNR 7788931.

⁵⁴ R.G. Edmonson, *C-TPAT Raises COAC Issues*, J. OF COMM. ONLINE, May 5, 2005, at 1, available at 2005 WLNR 7463436.

verifying a company's security measures in multiple foreign locations, as CBP refuses to use third parties to do so.⁵⁵ Unless this policy is reconsidered, the viability of the C-TPAT program depends on the CBP's ability to expand its certification personnel assets. Given the demands inherent in the scale and scope of the CBP's operations, particularly the strain placed on the CBP by the task of securing the U.S.-Mexico border (a burden enhanced by the issue's significant political components), it seems unlikely these assets will be expanded in the near term.

The international business community has initiated its own efforts to encourage companies to improve their supply chain security. The International Organization for Standardization (ISO), based in Geneva, Switzerland, is an industry group that certifies factories and other businesses based on quality standards.⁵⁶ ISO's "ISO 9000" certification has become an "almost universal seal of quality," given its widespread adoption and record of consistency.⁵⁷ The organization proposes to add a security component to its standardization package, similar to the scheme used by C-TPAT. ISO contends that by establishing one common world standard, countries could not lower their security standards in an effort to undercut competitors and attract business, thereby compromising the larger goal of securing all of the world's ports.⁵⁸

Port security is a challenge that will only be overcome with international cooperation. United States leadership is responsible for many of the global initiatives to improve maritime security. But projecting the costs of U.S. port security onto the world at large has strained the resources of small foreign ports. Both the CSI and some of its subordinate programs have the potential effect of blacklisting foreign ports from handling goods bound for the U.S. if those ports don't meet the standards for port security. One of the greatest challenges in the continued formulation of U.S. policy will be balancing the conflicts between providing for national security and assuring smooth operations and continued growth of global trade.⁵⁹

As the two countries with perhaps the most at stake in the struggle to attain global maritime security, China and the U.S. find themselves with increasingly common interests. But relations be-

⁵⁵ *Id.* at 2.

⁵⁶ International Organization for Standardization homepage, at <http://www.iso.org/iso/en/ISOOnline.frontpage> (last visited on Feb. 19th, 2006).

⁵⁷ R.G. Edmonson, *Crossing the Line?*, J. OF COMMERCE, May 9, 2005, at 1 (explaining that in the international manufacturing community, ISO 9000 certification assures businesses that products produced under this banner will consistently meet expectations for quality), available at 2005 WLNR 7463807.

⁵⁸ *Id.*

⁵⁹ *E.g.*, Weiner *supra* note 22, at A6.

tween the countries are hampered by broader foreign policy and geopolitical issues. As China's economy grows, so grows its political and military power. Differences in Chinese and American stances on issues like the war in Iraq and Taiwan are endemic of growing political tension between the world's singular hyper-power and a rising super-power.⁶⁰

III. THE LAW BEHIND MARITIME SECURITY INITIATIVES: RECONCILING AMERICAN POLICY WITH CHINESE AND MULTILATERAL INITIATIVES

Whereas section II of this paper focused on joint government-business programs and legislation promulgated by the U.S. in the wake of the 9/11 attacks, section III will examine maritime law and policy in China and the international community, and specifically how it interacts with U.S. law.

A. Maritime Law and the Trade Relationship Between the U.S. and the People's Republic of China

At the end of the 1990's, maritime relations between the U.S. and China were governed by a bilateral accord, which expired in 1998.⁶¹ Signed in 1988, the Agreement on Maritime Transport Between the Government of the United States of America and the Government of the People's Republic of China (Agreement on Maritime Transport) predated China's ascension to membership in the World Trade Organization.⁶² Though the agreement did facilitate trade between the U.S. and China during a period of growth, it reflected the closed nature of the Chinese maritime industry and the disparities in the opportunities offered by the two governments to the businesses of the other.⁶³ The American shipping industry alleged that the Chinese government gave preferential treatment to Chinese nationals in maritime business matters, and imposed restrictions and limitations that were not reciprocated by the U.S. on Chinese companies doing business in U.S. ports.⁶⁴ The Agreement on Maritime Transport expired in 1998, but was extended while a new agreement was drafted. During

⁶⁰ *E.g.*, Rigol *supra* note 31, at 4.

⁶¹ Agreement on Maritime Transport Between the Government of the United States of America and the Government of the People's Republic of China, Dec. 15, 1988, U.S.-P.R.C. art. XI, State Dept. No. 89-20, *available at* 1988 WL 404672. [hereinafter Agreement on Maritime Transport].

⁶² *Id.*

⁶³ See generally 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, 167-69 (2002).

⁶⁴ *Id.*

these years, China attempted to further restrict shipping contracts for goods leaving its ports, causing the U.S. government, via the Federal Maritime Commission, to threaten sanctions limiting Chinese access to American ports.⁶⁵ A Federal Maritime Commission Report, issued in June 1999, concluded that, "Chinese laws and regulations discriminate against and disadvantage U.S. carriers and other non-Chinese shipping lines."⁶⁶

But as China moved toward membership in the World Trade Organization, it began to show significant progress in maritime policy and opening its ports to the international community. In addition, it further liberalized its policies on foreign investment in the maritime services industry within China. By the end of 2001, the People's Republic of China had passed laws allowing foreign-owned businesses to establish equity joint ventures to engage in a number of port and maritime services, as well as navigation of Chinese interior waterways.⁶⁷ As a result, some 140 Chinese ports were opened to vessels under foreign flags.⁶⁸ Foreign-invested shipping enterprises also enjoyed the benefits of friendly tax policy, sometimes paying less in taxes on revenues generated in China than their Chinese counterparts.⁶⁹

Differences in Chinese and American maritime law are largely a function of the vastly different histories of the two nations.⁷⁰ While American maritime law can be traced back to the early 19th century, the People's Republic of China is itself less than sixty years old, and its maritime law even younger.⁷¹ Much of the PRC Maritime Code was adapted from international maritime treaties and agreements like the 1924 Brussels Convention.⁷² The international origins of its maritime policy served China well as it prepared for entry into the WTO, where it was required to meet WTO standards on port access, foreign investment and other maritime trade issues.⁷³

⁶⁵ *Id.*

⁶⁶ Federal Maritime Commission, *Shipping Restrictions, Requirements and Practices of the People's Republic of China*, Docket No. 98-14, (Apr. 21, 2005), at <http://canberra.usembassy.gov/hyper/WF990625/epf504.htm>.

⁶⁷ See Cheng et al., *supra* note 8, at 79.

⁶⁸ *Id.* at 80.

⁶⁹ *Id.* at 82-83.

⁷⁰ See Donglai Yang, *A Comparative Analysis of Maritime Lien Priority Under United States and Chinese Maritime Law*, 23 TUL. MAR. L.J. 465, 471 (2005).

⁷¹ *Id.*

⁷² *Id.* at 471.

⁷³ Larry M. Wortzel, *Research: Asia and the Pacific: Seeking Reciprocity in Maritime Trade with China*, The Heritage Foundation Executive Memorandum No. 731, (Mar. 19, 2001), at <http://www.heritage.org/Research/AsiaandthePacific/EM731.cfm>.

Maritime relations between the U.S. and China are currently governed by a five-year bilateral agreement signed by the two countries in December 2003.⁷⁴ The agreement sought to resolve many of the issues that arose in the years since the expiration of the 1998 agreement, as well as to address the needs of the growth in trade between China and the U.S. The agreement also opened the door for American companies to greatly expand their business operations in China in the logistics and shipping industries.⁷⁵

Generally speaking, claims related to maritime commerce in China are litigated in the Chinese civil courts system, which is governed by the People's Republic of China Civil Procedure Law.⁷⁶ This PRC Civil Procedure Law came into effect in 1991, with China's Supreme Court designated as its ultimate interpretive authority.⁷⁷ From its inception, the Chinese code looked outward. It was instituted with provisions for handling cases in semi-foreign countries, like Hong Kong, Taiwan and Macau, and was declared subject to international treaties entered into by China.⁷⁸ Chinese courts are structured somewhat like the federal court system in the United States: there are four levels of courts (District People's Courts, Intermediate People's Courts, High People's Courts, and the Supreme People's Court), divided among administrative regions of the country. Within the system, there are specialized courts to deal with specific areas of law, including a maritime court.⁷⁹

The closed nature of the Chinese system and its Communist rulers made foreign businesses uncomfortable using the People's Courts in the past. As a result, most dispute resolution was handled by arbitration.⁸⁰ The China International Economic and Trade Arbitration Commission (CIETAC) was established in 1956. Based in Beijing, with sub-commissions in Shanghai and Shenzhen, it is "among one of the most widely used arbitral bodies in the world."⁸¹ Comparing CIETAC to other busy international arbitral bodies also reveals the extent of its growth and popularity: in 1997, CIETAC heard more arbi-

⁷⁴ *Supra*, note 61.

⁷⁵ Hon. Steven R. Blust, Chairman, Federal Maritime Commission, Statement Before the Committee on transportation and Infrastructure (Mar. 4, 2004), <http://usinfo.state.gov/eap/Archive/2004/Jun/30-480104.html>.

⁷⁶ Johnson Tan, *Coming to the Table: Arbitration and Civil Litigation In The People's Republic of China, The Legal System*, MONDAQ BUS. BRIEFING (Nov. 8, 2004), available at 2004 WLNR 12284138.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Johnson Tan et al., *Dispute Resolution in Greater China*, MONDAQ BUS. BRIEFING (Oct. 25, 2004), available at 2004 WLNR 12284007.

⁸¹ *Id.*

tration cases than any other arbitration entity in the world.⁸² There also exists the China Maritime Arbitration Commission (CMAC), which specializes in sea transport issues and sees substantial traffic as a result of its proximity to the ports of Hong Kong and Shanghai, the two busiest in the world.⁸³

Decisions rendered in Chinese arbitrations are final and binding, with no appeal option. China's civil law system lends itself to faster arbitrations than countries with common law jurisdictions.⁸⁴ When polled, U.S.-owned businesses with experience in Chinese arbitration reported that compared to arbitrations in other international centers, those in China were often less expensive, more efficient, and had no apparent discrepancies in fairness.⁸⁵ Though arbitration remains the primary means for dispute resolution by foreign entities doing business in China, the escalation in trade has resulted in increasing numbers of foreigners in Chinese courts.⁸⁶ Greater transparency and confidence in the Chinese court system are symptomatic of China's entry into the WTO, and the opening of a previously closed society that it required.

B. The Role of International Law in Maritime Security Issues

In terms of maritime security initiatives, this paper has focused primarily on unilateral programs created by the United States in the wake of the 9/11 attacks. Though these programs involve international cooperation, such efforts have been voluntary, inasmuch as they have been embarked upon out of a mutual interest in maintaining the flow of global trade. As the U.S. promulgated legislation in an effort to better protect itself against terrorist attacks, so too have the organizational bodies of the international community. Shortly after the 9/11 attacks, the United Nations passed a general resolution stating that countries bear a responsibility to prevent against terrorist attacks and prosecute terrorists, particularly via bilateral and multilateral agreements.⁸⁷ In July 2004, the International Port Security Code (ISPS) took effect. An amendment to the 1992 Convention for the Suppression of Unlawful Acts Against the Safety of

⁸² Fredrick Brown and Catherine A. Rogers, *The Role of Arbitration in Resolving Transnational Disputes: A Survey of Trends in The People's Republic of China*, 15 BERKELEY J. INT'L. L. 329, 339 (1997).

⁸³ See United States Consulate, Hong Kong *supra* note 28.

⁸⁴ Tan, *supra* note 76.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

Maritime Navigation (the "SUA Convention"),⁸⁸ the ISPCS was passed to bolster security for global trade via measures to prevent acts of terrorism against ports and ships.⁸⁹ Failure to implement the security requirements of the ISPS by a deadline put nations at risk of huge economic losses.⁹⁰

Though adopted under the auspices of these international organizations, the net effect of failure to meet the terms of these agreements related to foreign port security often results in penalties being leveled by the United States government that limit access to U.S. ports.⁹¹ As discussed earlier in this article, the primary obstacle in implementing heightened security measures at ports is cost. While the U.S. pays for the technological equipment used in scanning cargo, foreign ports are expected to bear the cost of operating it.⁹² Moreover, some critics of the new security requirements question whether the United States is overstepping its boundaries in dictating security policy on foreign soil.⁹³ And in spite of signed international agreements on maritime security, questions remain as to the legal obligation signatory countries bear in preventing terrorism, and how this obligation is quantified.⁹⁴ Such details are important, because international legal precedent holds that a state can be held responsible for actions or a failure to act on the part of its authorities.⁹⁵

It is unlikely that countries with substantial interests in trade with the U.S. would jeopardize that trade by refusing to comply with new security regulations.⁹⁶ However, smaller nations unwilling or unable to meet new standards could present security risks beyond terrorist threats. In describing reaction to the new U.S. maritime security regimes, Stephen E. Flynn, a retired Coast Guard official and maritime expert at the Council on Foreign Relations stated, "The developing world is saying that the wealthiest, most powerful nation in the world is exporting the cost of protecting itself onto some of the world's

⁸⁸ Forrest Booth & Larry Altenbrun, *Maritime and Port Security, Piracy, and Stowaways: Renewed Concerns Over Old Problems*, 15 U.S.F. MAR. L.J. 1, 38 (2003).

⁸⁹ Heda Byron, *Shipping Industry Working to Meet New UN Security Measures*, Voice Am. Press Releases & Documents (Apr. 29, 2004), available at 2004 WLNR 2570121.

⁹⁰ *Id.*

⁹¹ Angela Greiling Keane, *Megaports a Megaflop?*, TRAFFIC WORLD, May 16, 2005, at 1, available at 2005 WLNR 7723891.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ See Justin S.C. Mellor, *Missing the Boat: The Legal and Practical Problems of the Prevention of Maritime Terrorism*, 18 AM. U. INT'L. L. REV. 341, 366 (2002).

⁹⁵ *Id.* at 370.

⁹⁶ See Keane, *supra* note 91.

poorest countries.⁹⁷ If a country were to have sanctions leveled against it preventing its cargo from reaching U.S. ports, the financial implications could result in political instability in that country.⁹⁸

United States intervention on worldwide maritime security transcends concern with cargo coming into U.S. ports. Various key sea lanes used by the worldwide shipping industry have also been identified as potential terrorist targets.⁹⁹ One frequently cited is the Straits of Malacca, situated between Malaysia and Indonesia in Southeast Asia.¹⁰⁰ Fifty thousand vessels pass through those Straits each year, and carry with them 50 percent of the world's oil and 66 percent of the world's liquefied natural gas.¹⁰¹ The United States has promoted a regional initiative to enhance maritime security in the straits via intelligence sharing and multi-national coordination of patrols in the area. The governments of Malaysia and Indonesia, however, view such proposals as an infringing on their national sovereignty, given the fact the straits are within their territorial waters.¹⁰² The situation is yet another example of the challenges the United States, China, and other major economic powers face as they struggle to achieve the global maritime security necessary to guarantee the flow of commerce.¹⁰³

C. FOOD FOR ADDITIONAL THOUGHT: PRACTICAL RAMIFICATIONS OF NEW INTERNATIONAL MARITIME SECURITY REGIMES

This paper has focused on a few major representative issues in examining the challenges facing the United States, China, and the rest of the world in the quest for maritime security. But a high-altitude examination of an issue such as this can belie the almost incalculable complexity of it. It is hoped that a brief look at a minor practical issue can demonstrate by example the innumerable conflicts that arise as the world attempts, multilaterally, to secure its ports, ships and waterways. Such minor issues have the potential to negatively impact

⁹⁷ Weiner *supra* note 22.

⁹⁸ Keane, *supra* note 91.

⁹⁹ See, e.g., Ted McKenna, *Standing Watch*, JOURNAL OF ELECTRONIC DEFENSE, May 1, 2004, at 2, available at 2004 WLNR 11656615.

¹⁰⁰ John Burton, *INTERNATIONAL ECONOMY: A terrorist attack in Asia's busiest shipping lane could wreak havoc on the region's energy supplies: A strip of water crucial to the swift transportation of the area's oil and gas remains a high-profile target*, FIN. TIMES UK, May 18, 2004, at 1-3, available at 2004 WLNR 9732265.

¹⁰¹ *Id.*

¹⁰² *Id.* at 3.

¹⁰³ See generally Evans J.R. Revere, Principal Deputy Assistant of State for East Asian and Pacific Affairs, Remarks to the Baltimore Council on Foreign Affairs (May 3, 2005), available at 2005 WLNR 7144417.

the level of cooperation offered by both countries and individuals, particularly toward the United States and its security regimes.

As previously explained, programs like the CSI and C-TPAT depend on cooperation by both foreign nations and multi-national businesses. Compliance by businesses requires not just leadership from company executives, but actual implementation by lower-level employees. This is particularly true of shipping companies, where largely autonomous ships' crews are responsible for following directives from "headquarters."

The notion of the sailor on shore leave is woven into the rich, centuries-old history of water navigation. Indeed, the tradition of crews on seagoing merchant vessels being free to go ashore in foreign ports is as old as seafaring itself, though the right to do so is not absolute.¹⁰⁴ In spite of the negative connotations of the stereotyped ideal of the sailor going ashore in search of hedonistic debauchery, after weeks or months of being confined to a ship at sea, shore leave is crucial to ships' crew members' health and sanity. Moreover, shore leave is often the sole opportunity crew members have to purchase necessary goods and services, communicate with family, and seek advanced health care.¹⁰⁵

But in the wake of post-9/11 immigration and port security policies, foreign mariners now find it considerably more difficult, if not impossible, to go ashore in United States' ports, given its stringent visa requirements.¹⁰⁶ In a discussion of the complex political, financial, and logistical facets of maritime security, the notion of a ship crew's morale could be dismissed as trivial. But when considered in light of the crucial role ships' crews play in implementing and executing new security measures, their morale is a minor issue considerably more difficult to dismiss.

IV. CONCLUSION

The determination and ingenuity of terrorists in the 21st century require sophisticated, proactive security regimes to protect against attacks. Perhaps no potential terrorist target is larger or more fragmented than the whole of the world's ports, commercial shipping vessels, and key shipping lanes. This creates an enormously far-flung and complex problem in securing maritime transport, and the fate of the world economy rests on its solution. Assuring the free flow of goods and materials is of vital importance to all nations, but arguably to none more than the United States and China. The continued growth of

¹⁰⁴ See e.g., Douglas B. Stevenson, *The Burden That 9/11 Imposed on Seafarers*, 77 TUL. L. REV. 1407, 1408 (2003).

¹⁰⁵ *Id.* at 1409.

¹⁰⁶ *Id.* at 1411-12.

both countries' economies is contingent not just upon the ability to safely transport cargo to each other's ports, but confidence in the global marketplace in their ability to do so.

The United States has, thus far, led the way in passing legislation and creating programs to enhance maritime security at both its own ports and those around the world where it trades cargo. International bodies like the United Nations and the International Maritime Organization have followed suit, but ultimately monetary and access penalties threatened by the United States that compel countries to adopt U.S. security regimes.

In the United States, the government loudly proclaims the need for enhanced maritime security and promulgates legislation requiring it. But the federal government fails to provide ports with funding equal to that it has appropriated for other transportation industries, like commercial aviation. The majority of the financial burden for the substantial capital outlays required to equip, staff and administer security has fallen on the shipping industry. Though this appears logical in some respects, on the whole it is not. The shipping industry exists only to serve the businesses for which it moves cargo, in the end, these security costs must be passed on to those businesses. Businesses should prepare for increased transportation costs, and accept them as a price of moving their manufacturing operations abroad.

It is likely that some of the improved technology and logistical organization inherent in adhering to programs like the Container Security Initiative will ultimately be of commercial benefit to the maritime services industry. But this windfall is speculative. And for it to be realized, maritime terrorist attacks, and the havoc even a single incident can wreak on global trade, will have to be completely prevented. The federal government must find ways to ease the financial burden on ports and maritime concerns with greater subsidies, or the industry developing tax or fee schemes to spread the costs among all of those businesses who require and benefit from this security.

The costs, financial and political, of deploying U.S.-dictated security policy abroad must also be considered. All nations that participate in global trade owe some measure of contribution to achieve maritime security, but those with the highest vested interest should pay an appropriately scaled share. Though China has been cooperative in assisting the U.S. in efforts to solve the security crisis, it should demonstrate greater interest and assume a more significant leadership position in maritime security, in both its own region and the world. It owes much of its ascendancy as a global power to the ability to ship its manufactured goods around the globe. If China seeks the influence and power commensurate with its super-power status, it should be prepared to assume some of the responsibilities that accompany it.

The level of international cooperation sought by the United States will be more easily attained if it examines and re-evaluates some of its own policies. Unilateral action and decision-making on major issues that affect the entire world- in an era that calls for an unprecedented level of multilateralism- will ultimately impede efforts to build the necessary consensus and marshal sufficient resources. Achieving maritime security, and assuring the smooth flow of global trade is plausible only if countries like China and the U.S. capitalize on their shared strengths, and exploit synergies in securing the world's oceans and ports.